CRIMINAL DEFENDANTS HAVE A DUE PROCESS RIGHT TO AN EXPERT ON EYEWITNESS RELIABILITY: WHY THE COURT WAS WRONG IN *PERRY V. NEW HAMPSHIRE* (2012)

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I. INTRODUCTION: SUPREME COURT'S 5-FACTOR RELIABILITY ALGORITHM IN EYEWITNESSES IDENTIFICATION CASES: CREATED, APPLIED, LIMITED

In *United States v. Wade*,[1] *Gilbert v. California,*[2] and *Stovall v. Denno*,[3] the Supreme Court cited psychological science reported in books, law review articles, and court cases to support its creation of a totality of circumstances algorithm for judges to use to evaluate the reliability of eyewitness identifications.

In *Wade*, an early case addressing the need for counsel at pretrial lineups, the Court determined that although Wade's lineup, absent counsel, could not be used in court, the subsequent in-court identifications may be admitted if they could be shown through an analysis of the circumstances of the original witnessing of the crime that the witness' conditions for observation were good, the description given fitting, the time lapse between crime and identification short, and that there were no prior false identifications of others or failures to identify the defendant.[4] Thus, the in-court identifications could be shown to have had an independent basis apart from the inadmissible pretrial lineup.[5] In *Gilbert*, where a similar counsel-absent pretrial lineup was held and possibly tainted in-court identifications were admitted, the Court remanded the case to California's highest court to determine whether the in-court identifications had an independent source sufficiently reliable that admission of the evidence was warranted.[6] In

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1 *United States v. Wade*, 388 U.S. 218 (1967).
2 *Gilbert v. California*, 388 U.S. 263 (1967).
3 *Stovall v. Denno,* 388 U.S. 293 (1967).
4 *United States v. Wade*, 388 U.S. 218 (1967).
5 *Id.*
6 *Gilbert v. California*, 388 U.S. 263 (1967).

Stovall, the Court moved to the more general issue of the overall fairness of pretrial identifications, noting that "it remains open to all persons to allege and prove . . . that the confrontation resulted in such unfairness that it infringed his right to due process of law."[7] *Stovall* also injected exigency into its determination of admissibility, stating that the suggestive conditions of Stovall's identification were imperative given the likely imminence of the witness' death.[8]

In a subsequent series of eyewitness cases—*Simmons v. United States*,[9] *Foster v. California*,[10] *Coleman v. Alabama*,[11] *Neil v. Biggers*,[12] and *Manson v. Brathwaite*[13]—the Court further spelled out and illustrated the reliability algorithm to assess the admissibility of eyewitness identifications. In all of these cases, it was up to a judge to evaluate the independence or reliability of the in-court identifications through a totality of the circumstances analysis applying the algorithm.

Such judicial inquiry came to an abrupt halt in *Perry v. New Hampshire*[14] where the Court held that such a hearing was necessary *only* when the police had deliberately arranged the circumstances of the identification. Otherwise, the due process rights of the defendant can be protected by vigorous cross-examination and careful jury instructions. *Perry* claimed eyewitness evidence is no different from any other evidence presented to a jury.[15]

This paper will argue that the Supreme Court was wrong in its estimation of the ability of judges to accurately assess the reliability of eyewitness identifications, and the *Perry* Court was wrong to augment the error by its reliance on cross-examination and jury instructions to adequately educate jurors. We will show that forensic psychological science reveals the Supreme Court's own reliability analyses of the circumstances of witnessing crimes are deeply flawed and have likely affirmed wrongful convictions. Further, the science exposes profound inadequacies of cross-examination and jury instructions to correct the errors.

To protect the due process rights of criminal defendants, expert scientific knowledge of the factors affecting the perceptions, memories, and identifications of eyewitnesses is clearly needed for the triers of fact to adequately assess eyewitness testimony. Due process requires that qualified psychological experts be provided to defendants in eyewitness cases.

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7 *Stovall,* 388 U.S. at 299 (referencing *Palmer v. Peyton*, 359 F.2d 199, 202 (4th Cir. 1966) for the proposition that a highly suggestive identification procedure can infringe on the right to due process of law).

8 *Id.*

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

10 *Foster v. California*, 394 U.S. 440 (1969).

11 *Coleman v. Alabama*, 399 U.S. 1 (1970).

12 *Neil v. Biggers*, 409 U.S. 188 (1972).

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

14 *Perry v. New Hampshire,* 132 S. Ct .716 (2012).

15 *Id*. at 719-720.

Part I of this Article will undertake a factor-by-factor review of the psychological findings about the effects on witness perception, memory, and identifications of circumstances surrounding eyewitness observation of crimes, summarizing each factor to facilitate direct application to individual eyewitness cases.

Part II will apply the findings of psychological science to the Supreme Court's own cases and juxtapose the results to the conclusions reached by the justices using its own algorithm. The analysis will make it clear that in nearly every case, the science is at odds with the Court's own conclusions.

Part III will review the Court's new direction in the *Perry* case and argue that it violates Supreme Court jurisprudence that has established the absence of fairness as the essence of the denial of Due Process. *Perry's* reliance on the demonstrated inadequacies of cross-examination and jury instructions is fundamentally unfair and cannot help but lead to false convictions.[16]

II. PART I: PSYCHOLOGICAL SCIENCE RELIABILITY ANALYSIS OF MULTIPLE FACTORS IN THE CIRCUMSTANCES OF EYEWITNESS IDENTIFICATIONS

Even under optimal conditions of observation, eyewitnesses are wrong in their identifications of previously observed perpetrators of crimes about 50 percent of the time, and when crimes are committed by multiple perpetrators, witnesses are wrong about three-quarters of the time.[17] One of the earlier modern studies found that for a staged crime, 34 percent of the witnesses made no identification from a six-person photo spread, 31 percent made accurate identifications, and 35 percent identified an innocent person.[18]

A. RELIABILITY FACTORS IDENTIFIED BY FORENSIC PSYCHOLOGY

Many factors have been identified as significantly affecting witnesses' perceptions, memories, and identifications of the perpetrators and details of the crime they witnessed. In this review the focus is on the totality of the particular circumstances confronting an observer viewing a crime and identifying the perpetrator independently of the actions of law enforcement in effecting that identification.

16 THE INNOCENCE PROJECT, http://www.innocenceproject.org/causes/eyewitness-misidentification/ (last visited Aug. 28, 2016) (citing mistaken eyewitness identifications as cause of more than 70 percent of known wrongful convictions).

17 Evan Brown, Kenneth Deffenbacher & William Sturgill, *Memory for Faces and Circumstances of Encounter*, 62 J. OF APPLIED PSYCHOL. 311, 316 (1978).

18 Michael R. Leippe, Gary L. Wells & Thomas M. Ostrom, *Crime Seriousness as a Determinant of Accuracy in Eyewitness Identification*, 64 J. OF APPLIED PSYCHOL. 345, 347-49 (1978).

1. Observation Conditions at the Time of the Crime

a. Scene Illumination

There is no psychological research on the amount of light needed for a witness to clearly perceive a perpetrator of a crime because too many factors operate simultaneously for a general rule to be formulated. State insurance agencies publish guidelines for different industries and working environments, but few would attempt to make the case that perceiving an actor's critical characteristics and facial features is not possible under less than optimal illumination.[19]

b. Duration Of The Crime, Exposure Time

For at least forty years, we have known that the longer the exposure to an event, the more accurate the recall of its specific features. Less time to observe leads to fewer correct identifications and more incorrect ones. A meta-analysis [20] by Shapiro and Penrod of eight studies with 990 participants showed that longer exposure times lead to more correct identifications in facial recognition tasks.[21] A component analysis within the same meta-analysis by Shapiro and Penrod of eight studies with 1,389 participants showed that shorter exposure times lead to more mistaken facial identifications.[22]

The same effect for slides of faces was shown by Laughery, Alexander, and Lane: the longer the exposure, the more accurate the recall.[23]

These results are hardly surprising since it is clear that having more time for observation would likely increase the number and detail of items observed. Many crimes, of course, are of very short duration so eyewitnesses may have very little time to take in the details of the action and the actors.

2. Attention to the Perpetrator

a. Perceived Significance Of Observed Event

The perceived significance of the observed event affects what is perceived and remembered because, presumably, it directs the viewer's attention to different aspects of the scene. Many witnesses do not understand what they hear or see at the beginning of a crime.

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19 *See Lighting for Office and Industry*, Industrial Hygiene (Dec. 2011), http://www.saif.com/_files/SafetyHealthGuides/ss-405.pdf.

20 "Meta-analysis:" A statistical technique for combining the results from more than one study on a single topic to identify common findings despite variations in methodology and sample size. From: http://medical-dictionary.thefreedictionary.com/meta-analysis.

21 Peter N. Shapiro & Steven Penrod, *Meta-analysis of Facial Identification Studies*, 100 PSYCHOL. BULL. 139, 142-44 (1995).

22 *Id*. at 142-43.

23 Kenneth R. Laughery, et al., *Recognition of Human Faces: Effects of Target Exposure Time, Target Position, Pose Position, and Type of Photograph*, 55 J. OF APPLIED PSYCHOL. 477, 479 (1971).

Baron and Byron interviewed University of Texas students who were present in 1966 when Charles Whitman began shooting from a high tower on campus.[24] Many reported that they thought the shootings were a fraternity prank.[25] In the recent wave of shootings at high schools around the country, many students reported the same reaction. They simply assumed that what they saw and heard was innocuous–some sort of joke or stunt–and they did not pay much attention.[26] More than forty years ago, Darley and Latane reported the same effect in trying to explain why so many bystanders to terrible events seem to be so apathetic about them.[27] They found that many bystanders simply did not understand what was going on around them.[28]

Even when witnesses do understand that they are witnessing a crime, the event may not seem serious to them and this may affect their perceptions. Leippe, Wells, and Ostorm found exactly this effect when they staged a theft in front of college students and then had the witnesses try to identify the thief from a six-picture photo lineup.[29] Fifty-six percent of the students who witnessed the theft of a $50.00 calculator (serious because it was a lot of money at the time) identified the thief, but only nineteen percent of students who witnessed the theft of a pack of cigarettes could do so.[30] Marshall, Marquis, and Oskamp found a similar focus of witness attention on details perceived to be important or salient.[31] They staged a two-minute film of an automobile striking a pedestrian in a parking lot followed by an altercation and rank-ordered the details in terms of salience.[32] They found that the actual salience of details co-varied linearly with the likelihood of being reported—the most salient details were more likely to be reported—but the accuracy of the reported details varied from seventy percent to ninety percent across viewers regardless of the salience of the details.[33] They also found that in most conditions of inquiry, legally relevant items were mentioned with slightly less accuracy than legally irrelevant items.[34]

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24 ROBERT A. BARON & DONN BYRNE, SOCIAL PSYCHOLOGY: UNDERSTANDING HUMAN INTERACTION (4th ed. 1977).

25 *Id.*

26 Helen Kennedy, *Columbine shootings leave 39 dead or injured in 1999*, NEW YORK DAILY NEWS (Apr. 21, 1999), http://www.nydailynews.com/news/national/high-school-bloodbathgun-toting-teens-kill-25-article-1.822951 ("at first, we just thought they were firecrackers until we saw the guns come out of the trench cots…We didn't think it was real, and then we saw the blood.").

27 John M. Darley & Bibb Latané, *Bystander intervention in emergencies: Diffusion of responsibility*, 8 J. OF PERS. AND SOC. PSYCHOL. 377 (1968).

28 *Id.*

29 Leippe, *supra* note 18.

30 *Id.*

31 James Marshall, Kent H. Marquis & Stuart Oskamp, *Effects of Kind of Question and Atmosphere of Interrogation on Accuracy and Completeness of Testimony*, 84 HARV. L. REV. 1620 (1971).

32 *Id.*

33 *Id.*

34 *Id.*

b. Disguises or Obscuring of Features

While there is no systematic work on which features of a disguise would most effectively mask the identifying characteristics of an actor, it is known that even a minimal disguise such as wearing a hat drops identification accuracy down to about twenty-five percent.

In 1987, researchers found that the perpetrator wearing a hat that fully covered the hair, cut the accuracy of identification in a lineup from about fifty percent to about twenty-five percent. Interestingly, the decrease in identification accuracy occurred without any corresponding decrease in witness confidence in his or her identification.[35] A much later review of six studies with over 1,300 witnesses again showed that identification accuracy was significantly reduced when perpetrators wore hats that masked the hair and the hairline.[36] Mansour also found that for witnesses who viewed mock-crime videos and then viewed lineups, the criminal wearing a hat decreased correct identifications from eighty-seven percent to seventy-eight percent and that wearing sunglasses decreased it even more to sixty-nine percent.[37] The combination of the two was even worse, reducing correct identifications to only fifty-five percent.[38] The researchers also found in a second study that wearing a stocking mask that occluded either the whole head or the head from top to mouth also obscuring all the features but the mouth and chin had equally deleterious effects on number of correct identifications.[39] Surprisingly, the criminal disguises and the decrease in correct identifications were not consistently correlated with the confidence witnesses felt in their identifications, even though their tasks were manifestly more difficult.[40]

c. Distinctive "Perpetrator" Characteristics

Some research has looked at distinctive characteristics of the perpetrator like hair and accents that can affect—for good or bad—the witness' observation, memory, and ability to identify.

i. Hair of Perpetrator

Wright and Sladden found that both men and women were better at identifying pictures of faces with hair visible than without.[41] Men were better able to recognize male faces and women better able to identify female faces.[42]

35 Brian L. Cutler and Steven D. Penrod, Improving the reliability of eyewitness identifications: Lineup construction and presentation,. 73 J. OF APPLIED PSYCHOL. 281, 284 (1988).

36 Jamal K. Mansour, et al., *Impact of Disguise on Identification Decisions and Confidence With Simultaneous and Sequential Lineups*, 36 LAW & HUM. BEHAV. 513, 518 (2012).

37 *Id.* at 518-19.

38 *Id.*

39 *Id.*

40 *Id.*

41 Daniel B. Wright & Benjamin Sladden, *An own gender bias and the importance of hair in face recognition*, 114 ACTA PSYCHOLOGICA 101 (2003).

42 *Id.*

ii. Accented Speech

Pickel and Staller examined the effect of accented speech on a witness' ability to recall details of a criminal's appearance and message.[43] Witnesses watched a video of a carjacking filmed from the point of view of the hijacked driver where the perpetrator had either an Irish accent or a Midwestern one like the participants in the study.[44] Witnesses who heard the carjacker speak with an Irish accent were significantly less likely to recall details about the perpetrator's appearance accurately than witnesses who heard him speak with a familiar Midwestern accent.[45] Witnesses who heard the Midwestern speaker were also able to identify correctly more of the details of the carjacker's message and reported slightly fewer incorrect details.[46]

3. Attention to the Weapon

In crimes involving weapons, the most salient aspect of the crime for the witness is likely to be the weapon itself. The visual presence of a weapon tends to attract the attention of the witness. This phenomenon, known as "weapon focus," has been studied by forensic psychologists for decades. As long ago as 1959, Easterbrook observed that highly anxious people narrow their attention to the most threatening or most relevant aspects of the event under observation, particularly when the observed event is complex.[47] Maass and Kohnken, in 1989, seeking to verify weapon focus physiologically, measured observers' eye fixations, and found that observers did indeed fixate on the weapon when there was a weapon present.[48]

In one of the first attempts to characterize the consequences of the weapon focus phenomenon, in 1976, Johnson and Scott studied students' reactions following their hearing—off-stage—either a discussion about equipment or a violent altercation. Subsequently, they were exposed for four seconds to a man with either greasy hands holding a pen or bloody hands holding a letter opener that strongly resembled a knife. When asked later to identify the person they saw and what he was holding, nearly every observer who had seen the man holding the "knife" accurately described the weapon, but very few observers who had seen the man holding the pen could describe what he was holding. Moreover, observers who had seen the

43 Kerri L. Pickel & Joshua B. Staller, *A Perpetrator's Accent Impairs Witnesses' Memory for Physical Appearance*, 16 LAW & HUM. BEHAV. 140 (2012).

44 *Id.*

45 *Id.*

46 *Id.*

47 James A. Easterbrook, *The effect of emotion on cue utilization and the organization of behavior*, 66 PSYCHOL. REV. 181 (1959).

48 Anne Maass & Günther Köhnken, *Eyewitness Identification: Simulating the "Weapon Affect."* 13 LAW & HUM. BEHAV. 397 (1989).

weapon rather than the pen were less likely to be able to pick the holder of the "knife" out of a set of fifty photographs.[49]

Loftus found a similar result in her study of a mock crime where the only difference between two groups of observers was the presence of a weapon.[50] Observers viewed a series of slides of a customer in a fast food line who was either pointing a gun or handing a check to the cashier and in return receiving money.[51] Observers who saw the gun were less accurate when asked to give details of the appearance of the perpetrator and only fifteen percent could identify the perpetrator from a set of twelve photographs.[52] Observers who had seen the customer handing the clerk a check were able to identify the perpetrator from the photoarray thirty-five percent of the time.[53] In a less threatening but still frightening situation, subjects in a study by Maass and Kohnken were approached by a researcher with a syringe or a pen and threatened—or not—with an injection. [54] Participants who saw the assailant with the syringe subsequently made more false identifications out of a seven-person, target-absent, photo lineup, but were able to recall more details about the hand area (color, length, and diameter of the pen or syringe).[55] There were no differences between the two groups across conditions in free recall of facial details (color, length and style of hair, and shape of face).[56]

Similarly, Kramer, Buckout, and Eugenio showed observers slides of a mock crime in which a weapon was highly visible or mostly concealed.[57] They found that viewers of the highly visible weapon were less accurate when picking out the criminal than were viewers of the mostly hidden weapon. [58] Also, the longer the weapon was in view, the greater the decrement in identification accuracy, even when the perpetrator's face was also in view for the longer periods of time.[59]

a. Weapon Focus in Realistic Crime Settings

When the scene viewed is a more realistic representation of a true crime, the weapon focus effect is more pronounced. In 1987, Cutler, Penrod, and Martens studied eyewitness perceptions of videotaped crimes in two settings under various conditions involving weapons and disguises

49 Craig L. Johnson, The Effects of Arousal, Sex of Witness and Scheduling of Interrogation on Eyewitness Testimony (May 1, 1977) (unpublished Ph.D. dissertation, Oklahoma State University) (on file at Oklahoma State University).

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

51 *Id.*

52 *Id.*

53 *Id.*

54 Maass & Köhnken, *supra* note 48.

55 *Id.*

56 *Id.*

57 Thomas H. Kramer, Robert Buckhout & Paul Eugenio, *Weapon Focus, Arousal and Eyewitness Memory*, 14 LAW & HUM. BEHAV. 167 (1990).

58 *Id.*

59 *Id.*

as well as other factors.[60] They found that the visibility of a gun decreased the percentage of correct identification of the perpetrator from forty-six percent to twenty-six percent.[61] There was no corresponding decrease in confidence.[62]

Steblay also found that the effect was most pronounced in highly realistic simulations.[63] Moreover, increasing the delay between observation of the crime and observation of the lineup increases the effect.[64] Similarly, Tooley, Brigham, Maass, and Bothwell showed "witnesses" a realistic film of a crime and found, as expected, that they focused more on the weapon than on the weapon holder.[65]

The gist of the weapon focus research is summed up in a large meta-analysis by Steblay of nineteen separate studies with over 2,000 witnesses.[66] The weapon focus effect was small but reliable, and the effect was larger in studies that were more like the experience of actual crimes, i.e. where a crime simulation produced a higher level of stress.[67]

3. Description of Perpetrator: Accuracy and Consistency

1. Accuracy

a. Description of Perpetrator Poorly Related to Characteristics of Person Identified

The accuracy of descriptions of suspects was examined by Piggott and Brigham. They studied the relationship between the quality of a witness's perpetrator description and the actual physical characteristics of the perpetrator or the person wrongly chosen from a photographic lineup and found no statistically significant relationship.[68] One hundred twenty college-aged students were shown a target person for about fifteen seconds.[69] The person entered the room, stood about fifteen feet away and then turned around and left.[70] Observers were then asked to describe his physical characteristics using a checklist that contained twenty-two items of appearance.[71] Later, they were asked to identify the target person from a fair photograph lineup in which he was or was not present and to rate their

60 Brian L. Cutler, Steven D. Penrod, & Todd K. Martens, *Improving the realiability of eyewitness identification: Putting context into context*, 72(4) J. OF APPLIED SOC. PSYCHOL. 629 (1987).
61 *Id.*
62 *Id.*
63 *Id.*
64 Nancy M. Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 LAW & HUM. BEHAV. 413 (1992).
65 Vaughn Tooley, John C. Brigham, Anne Maass & Robert K. Bothwell, *Facial Recognition: Weapon Effect and Attentional Focus*, 17 J. OF APPLIED SOC. PSYCHOL. 845 (1987).
66 Steblay, *supra* note 64.
67 *Id.*
68 Melissa Piggott & John C. Brigham, *Relationship Between Accuracy of Prior Description and Facial Recognition*, 70 J. OF APPLIED PSYCHOL. 547 (1985).
69 *Id.*
70 *Id.*
71 *Id.*

confidence in their decisions.[72] Results showed that there was no relationship between a subject's description of the perpetrator (as indicated on the item checklist) and the characteristics of the person identified (rightly or wrongly) from the lineup.[73]

i. Accuracy of Description Does Not Lead to Accuracy of Identification

There is also no empirically demonstrable relationship between the accuracy of the verbal description of the perpetrator and the accuracy of the identification by the witness. In the Piggott and Brigham study above, there was also no relationship between the accuracy of the checklist description and the accuracy of the subsequent photographic identification.[74] As earlier researchers had observed, "[t]he accuracy of verbal description has little or nothing to do with lineup recognition memory performance."[75]

It seems fair to conclude that the ability to describe well and the ability to make correct identifications involve different skills. Thus, it cannot be assumed that persons who are accurate in describing another person will also be accurate in recognizing that person from a photographic lineup. Good describers are not necessarily the same as good identifiers. Despite years of cases assuming the contrary, the two processes may simply be unrelated.

Interestingly, there were two "stand-out" target persons in the Piggott and Brigham study, one of whom was identified ninety percent of the time and one only fifty percent of the time. This raises the issue of the distinguishability of the faces of perpetrators of crimes as a critical factor in eyewitness identification. Facial distinguishability has been the focus of some research.

b. Distinctiveness of Criminal Faces—Accuracy of Description and Identification

Research has determined that both accurate descriptions and accurate identifications are a function of the distinctiveness of the crimnal's face and not of the perceptive or descriptive powers of the eyewitness—highly distinctive faces are both better described and more frequently identified correctly.

More than forty years ago, Shepherd and Ellis found that (female) faces rated as very high or very low in attractiveness were more easily recalled than faces rated as medium.[76] Although the effect is robust, the reason for it

72 *Id.*
73 *Id.*
74 *Id*. at 551.
75 Alvin G. Goldstein, Karen S. Johnson & June Chance, *Face recognition and verbal descriptions of faces from memory*. Paper presented at the Annual Meeting of the Psychonomic Society, Wash. D. C., Nov. 1977; Alvin G. Goldstein, Karen S. Johnson & June Chance, *Does Fluency of Face Description Imply Superior Face Recognition?* 13 BULL. OF THE PSYCHONOMIC SOC'Y 15 (1979).
76 J.W. Shepherd & H.D. Ellis, *The Effect of Attractiveness on Recognition Memory for Faces*, 86 AM. J. OF PSYCHOL. 627 (1973).

is unclear. Their finding has not been replicated recently. The next year, Going and Read found, along the same lines, that "highly unique" faces of college students were recognized far more easily than "low-unique" faces as rated by undergraduates.[77] Light, Kayra-Stuart, and Hollander found support for the atypicality hypothesis in a series of studies they performed some years later.[78] Using young, white, male adults as both sources of target faces and as persons performing ratings of typicality and making identifications, these authors found in four studies that faces that were rated as unusual in appearance were more easily recognized than faces rated as more "typical."[79] The reason atypical faces are more easily recognized is unclear. It may simply be that the atypical is more interesting and arrests the attention of viewers.

In a study published a few years later, Wells, using eighty-eight different target faces of college students viewed by other college students, found a significant relationship between the accuracy of description and accuracy of identification, not because good describers are good identifiers, but because faces that are better described are better identified.[80] Wells opined that "this is due to variance in faces along dimensions of uniqueness or typicality."[81] Some faces are easier to describe than others regardless of who is doing the describing.[82]

In their meta-analysis of 128 eyewitness identification studies involving 16,950 participants, Shapiro and Penrod found that overall, when target distinctiveness was High, the mean number of Hits was seventy percent versus sixty percent for Low distinctiveness, and the False Alarm rate was only seventeen percent for High distinctiveness versus twenty-nine percent for low.[83] The authors concluded simply that distinctive targets are easier to recognize than ordinary looking targets. They suggested that distinctive faces carry more information and may elicit more extreme judgments, but it is hard to operationalize how one face would carry more or less information than another.

Although "distinctiveness," "typicality," "attractiveness," and "uniqueness" all label faces that are more easily described and/or recognized, it is not possible to generalize any specific parameters across diverse populations of faces. Each group of these associated criteria is dependent on the set of faces being studied.[84]

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77 Merideth Going & J.D. Read, *Effects of Uniqueness, Sex of Subject, and Sex of Photograph on Facial Recognition*, 39 PERCEPTUAL & MOTOR SKILLS 109 (1974).

78 Leah L. Light, Fortune Kayra-Stuart & Steven Hollander, *Recognition Memory for Typical and Unusual Faces*, 5 J. OF EXPERIMENTAL PSYCHOL. 212 (1979).

79 *Id.*

80 Gary L. Wells, *Verbal Descriptions of Faces from Memory: Are They Diagnostic of Identification Accuracy?*, 70 J. OF APPLIED PSYCHOL. 619, 625 (1985).

81 *Id.*

82 *Id.*

83 Shapiro & Penrod, *supra* note 21, at 142-44.

84 M. Goldman & Margaret A. Hagen, *The forms of caricature: Physiognomy and political bias*, 5 STUDIES IN THE ANTHROPOLOGY OF VISUAL COMM. 30, 30-36 (1978).

2. Consistency

a. Consistency of Descriptions is Only Weakly Related Either to Accuracy

The relations between the *consistency* of witnesses' *descriptions* of perpetrators and the *accuracy* of their *descriptions,* as well as of their subsequent *identifications* of the perpetrators are either weakly positively related or not related at all.

Fisher and Cutler, in their extensive review of the extant literature, baldly stated, "[d]espite the legal community's general belief in the maxim that inconsistency of testimony is diagnostic of inaccuracy, we have been unable to find any empirical research to support (or refute) the claim."[85] These authors then conducted their own experiment to examine the relationship between *consistency* of *description*/*reporting* and *accuracy* of *description/reporting* as well as the relationship between *accuracy* of *reporting* and *accuracy* of *identification* in lineups.

Witnesses viewed a staged interruption of a university class during which one or more intruder(s) stole an object of value (wallet, watch, or video equipment) from the teacher's desk.[86] The event lasted from thirty to 150 seconds.[87] Within the next few hours or days, witnesses gave descriptions of the intruder(s) using either a questionnaire or during an interview.[88] Several days after the initial descriptions, the witnesses were asked to describe the intruder(s) a second time.[89] Immediately following the second description, witnesses were shown videos of lineups or photoarrays and attempted to identify the perpetrator(s).[90] For half of the witnesses, at least one intruder was present in the lineup, for half, not.[91] For the witnesses who were interviewed, half experienced a standard, hurried, police-style, interview and half an extensive, detailed, "cognitive" interview.[92] For each witness, the researchers calculated the *accuracy* by the proportion of correct *description* statements, the proportion of *consistent*/*inconsistent* statements, and the *accuracy* of the *identification*.[93] The results showed a very low relationship between *accuracy* and *consistency* of *description* statements; in half of the cases, the relationship was nonexistent.[94] Moreover, in seventy-five percent of the different conditions, there was no relationship at all between either the *accuracy* of the *description* or the *consistency* of the *description* and the *accuracy* of the

85 Ronald P. Fisher & Brian L. Cutler, *The Relation Between Consistency and Accuracy of Eyewitness Testimony*, *in* PSYCHOLOGY, LAW, & CRIMINAL JUSTICE 21, 21 (G.M. Davies et al., eds. 1995).
86 *Id.*
87 *Id.*
88 *Id.*
89 *Id.*
90 *Id.*
91 *Id.*
92 *Id.*
93 *Id.*
94 *Id.*

subsequent *identification*. In the two conditions showing a positive relationship, it was very small.[95]

The authors concluded that "the overriding theme is that inconsistency of description is not highly predictive of inaccuracy of recollection. Inconsistency of description was neither strongly related to the accuracy of the description nor to the accuracy of the identification."[96]

In their most recent study of consistency and accuracy of witness reports, the Fisher research group studied witnesses' recollections of videotaped crimes—a robbery and a homicide—over two different interrogation sessions.[97] When witnesses were interviewed twice about what they observed during the crime, 98 percent recalled new items on the second interview, just as in the previous research. When the questioning technique was changed from the first interview to the second, witnesses came up with almost twice as many new details as when the same technique was used twice.[98] Depending on the recall techniques used, newly recalled details varied in accuracy from sixty-six percent to eighty-seven percent.[99] Consistent details, on the other hand, were about ninety-five percent accurate.

The number of details newly recalled by a witness in the second interview was not reliably associated with his or her overall accuracy.[100] Moreover, witnesses who made many contradictory statements were not much less accurate overall when their entire testimony was evaluated than were witnesses who made only a few contradictory statements.[101]

4. Speed

a. Choices Made "Instantly" Tend to be Correct

Speed of identification is positively related to accuracy of identification, but only when the witness makes the identification "right away" or "instantly." Instant recognition takes much longer than the process of one-by-one elimination of possible suspects. When witnesses fail to identify the face right away, they then search for the face that is the best match to the face they remember. Of course, the best match may not be the perpetrator at all.

95 *Id.*
96 *Id.* at 26.
97 Ronald P. Fisher et al., *The Relation Between Consistency and Accuracy of Eyewitness Testimony: Legal versus Cognitive Explanations*, *in* HANDBOOK OF PSYCHOLOGY OF INVESTIGATIVE INTERVIEWING: CURRENT DEVELOPMENTS AND FUTURE DIRECTIONS 121 (T. Williamson et al., eds., 2009).
98 *Id.*
99 *Id.*
100 *Id.*
101 *Id.* at 129-30.

i. Correct Choices Tend to be Faster than Incorrect Choices

While a correct choice certainly need not be instantaneous, Sporer found that, with simultaneous photographic lineups, it takes witnesses who make a correct choice in a target-present lineup only about one-third the time it takes witnesses to correctly reject all the choices in a target-absent lineup (3.49 seconds versus 9.43).[102]

When the choices made are *incorrect*, the decision times are much closer together (5.28 versus 7.23).[103] But, this is only true for simultaneous lineups. With sequential lineups, the time it takes to choose the correct target is about 80 percent of the time it takes to correctly reject them all (3.74 versus 4.73).[104] When the target choices are incorrect, the time it takes to incorrectly choose one incorrect target is about four times as long as the time it takes to incorrectly reject all the choices (13.33 versus 3.68).[105] "In the sequential lineup, witnesses who had a strong memory trace of the perpetrator apparently knew immediately that 'this is the person.' They arrived quickly at a decision and were quite confident about this particular choice."[106]

Dunning and Stern also found with observers who viewed a video of a crime and were then asked to make an identification of the criminal from a set of photographs that speed of choice was strongly related to witnesses' descriptions of their identification processes.[107] Subjects were presented with eight responses and told they could endorse as many as they wished.[108] About twenty-five percent of the Accurate witnesses claimed when asked, "[h]ow would [they] describe your decision process," that "I just recognized him, I cannot explain why" versus eleven percent of the Inaccurate witnesses; and thirty-eight percent of the Accurate witnesses claimed "[h]is face just 'popped' out at me" versus forteen percent of the Inaccurate witnesses.[109] In contrast, only forty-six percent of the Accurate witnesses acknowledged that they engaged in a process of elimination comparing and eliminating photographs or that "[h]e was the closest person to what I remember, but not exact" versus seventy percent of the Inaccurate witnesses.[110]

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102 Siegfried L. Sporer, *Eyewitness Identification Accuracy, Confidence and Decision Times in Simultaneous and Sequential Lineups*, 78 J. OF APPLIED PSYCHOL. 22 (1993).

103 *Id.*

104 *Id.*

105 *Id.* at 29.

106 *Id*. at 31.

107 David Dunning & Lisa B. Stern, *Distinguishing Accurate from Inaccurate Eyewitness Identifications via Inquiries about Decision Processes*, 67 J. OF PERSONALITY AND SOCIAL PSYCHOL. 818, 822 (1994).

108 *Id.*

109 *Id.*

110 *Id.* at 825.

5. Confidence/Certainty

a. Little to No Relationship Between Confidence In Identification And Accuracy

Psychological research going back more than three decades has consistently shown that there is little or no relationship between a witness's confidence in his or her identification and a witness's accuracy. Clifford and Scott in 1978 exposed witnesses to videos of either a violent or nonviolent confrontation among two police officers and a third person, and then analyzed which individual and situational factors influenced the accuracy of eyewitness reports of the event.[111] They found no relationship between the accuracy of a witness' report and the witness' confidence in it. [112] Clifford and Hollin similarly found the confidence-accuracy relationship to be weak or nonexistent in their studies: no relationship was found for witnesses to a violent event, but a small yet significant relationship was found for viewers of a nonviolent event.[113]

A classic example of this kind of research is the 1981 study by Lindsay, Wells, and Rumpel where observers who viewed an act of theft were subsequently asked to pick the thief from a six-picture photoarray.[114] They found that the accuracy of the identifications was unrelated to the witnesses' confidence whether the confidence was judged by the witnesses themselves or by mock jurors viewing cross-examinations of the witnesses. [115] Cutler and Penrod emphasized the weak or nonexistent relationship between confidence and accuracy in their 1995 book on mistaken identification.[116]

Deffenbacher claimed, in his review of the confidence-accuracy research, that confidence and accuracy will be correlated only under "optimal conditions" of observation. [117] Optimal conditions included witnesses' being warned about the nature of their task, having a high level of vigilance, having ample opportunity to observe, having high familiarity with the target (e.g. faces of celebrities), having a short time between observation and identification, having similar conditions during initial observation and identification, having additional consistent information presented after observation but before the choice is made (e.g. during interviews), a forced-choice test of memory with unbiased instructions, and low similarity between the target and the wrong choices, amongst others.

111 Brian R. Clifford & Jane Scott*, Individual and Situational Factors in Eyewitness Testimony*, 63 J. OF APPLIED PSYCHOL. 352 (1978).

112 *Id.*

113 Brian R. Clifford & Clive R. Hollin, *Effects of The Type of Incident and The Number of Perpetrators on Eyewitness Memory*, 66 J. OF APPLIED PSYCHOL. 364 (1981).

114 R.C. Lindsay, Gary L. Wells & Carolyn M. Rumpel, *Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?*, 66 J. OF APPLIED PSYCHOL. 79 (1981).

115 *Id.*

116 Brian L. Cutler & Steven D. Penrod, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW 94-96 (1995).

117 Kenneth A. Deffenbacher, *Eyewitness Accuracy and Confidence: Can We Infer Anything About Their Relationship?,* 4 LAW & HUM. BEHAV. 243 (1980).

Most of these "optimal" conditions for maximizing the relationship between accuracy and confidence are also those likely to produce high accuracy in identifying a target seen during a witnessed event, as Deffenbacher acknowledged.[118]

In fact, Leippe, that same year, argued that Deffenbacher's "optimal" conditions of observation affected only *accuracy* of the witness' *memory* but *not* the *confidence* of the witness.[119] In addition to Deffenbacher's accuracy factors, Leippe added labeling of the remembered face and stereotypes about criminals.[120] Factors Leippe proposed as altering *confidence*, but *not* necessarily *memory* are: recognition tests that do not require a forced choice, biased testing instructions, interrogation about details, instructions to "think about" their memories of the person observed, and beliefs that memory for faces is generally good.[121] Lastly, Leippe noted that high similarity between the suspect and the foils as well as dissimilar presentation of the suspect at the time of observation and at the time of the choice can affect either memory *accuracy* or *confidence*.[122]

Several meta-analyses have found the relationship between measured confidence in the identification and measured accuracy of the identification to range from essentially zero to about sixteen percent of the variance—a very weak degree of predictability. Of course, the experimental conditions and types of measurements employed varied greatly from study to study. Cutler and Penrod conducted a meta-analysis of the correlations between confidence measured both before and after an identification and the accuracy of the identifications made.[123] Pre-identification confidence correlated with accuracy from study to study from 0.00 to 0.14 (very weak) and post-identifications confidence correlated with accuracy from 0.12 to 0.45 (weak to moderate).[124] The authors conclude that "a witness's confidence in his or her ability to make an identification should not be given much weight in determining whether or not to have the witness attempt an identification."[125] Wells and Murray, in their review of thirty-one studies, reported an average r=.07 (negligible).[126] In an exhaustive review, Bothwell, Deffenbacher, and Brigham meta-analyzed thirty-five studies involving staged incidents that yielded an average correlation of r=.25 (with a 95 percent confidence interval of .08 to .42) between post-

118 *Deffenbacher* at 257.

119 Michael R. Leippe, *Effects of Integrative Memorial and Cognitive Processes on The Correspondence of Accuracy and Confidence*, 4 LAW AND HUM. BEHAV. 261 (1980).

120 *Id.*

121 *Id.*

122 *Id.*

123 Brian L. Cutler and Steven D. Penrod (1989) *Forensically relevant moderators of the relation between eyewitness identification accuracy and confidence*. JOURNAL OF APPLIED PSYCHOLOGY, 74 (4), 650-652.

124 *Id.*

125 *Id.*

126 Gary L. Wells & D.M. Murray, *Eyewitness Confidence*, *in* EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 155-70 (Gary L. Wells & E.F. Loftus eds., 1984).

identification confidence and identification accuracy.[127] "This finding suggests that witnesses who are highly confident in their identifications are only somewhat more likely to be correct as compared to witnesses who display little confidence."[128]

In their own meta-analysis of thirty studies of staged events followed by lineups, Sporer, Penrod, Read, and Cutler also found a modest relationship between confidence and accuracy.[129] There was no relationship between the confidence and accuracy witnesses who rejected everyone in the lineup.[130] Witnesses who *did* make a positive identification from a lineup were slightly more likely to be confident when they are accurate (or vice versa) than when they were not.[131] The relationship is modest (r=.41, sixteen percent of the variance, approximately) but statistically significant.[132]

6. Extraneous Confidence Inflation

a. Authorities Influencing Witness Confidence

i. Direct Confirmation: "Good! You Identified The Suspect!" Increases Confidence

Wells and Bradfield (1998) showed 352 people a security video that included a clip of a man who later shot and killed a security guard.[133] They were asked to identify the gunman from a photo-spread which did not contain the gunman's picture.[134] After the choice was made, one-third of the witnesses, randomly selected, were told, "Good. You identified the actual suspect in the case."[135] (Confirming.) One-third were told they had identified the wrong suspect and that the true suspect was a different person pictured.[136] (Disconfirming.) One-third were given no feedback.[137] Witnesses who received confirming feedback—of their wrong choices—reported greater certainty in their identifications, a better view of the culprit, a greater ability to make out details of the face, greater attention to the event, a stronger basis for making the identification, greater ease of making the identification, less time taken to make the identification, greater

127 Robert K. Bothwell, Kenneth A. Deffenbacher & John C. Brigham, *Correlation of Eyewitness Accuracy and Confidence: Optimality Hypothesis Revisited*, 72 J. OF APPLIED PSYCHOL. 691 (1987).

128 Steven D. Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 PSYCHOL., PUB. POL'Y & LAW 817, 823 (1995).

129 Ludwig S. Siegfried, Steven Penrod, Don Read & Brian Cutler, *Choosing, Confidence and Accuracy: A Meta-analysis of The Confidence-accuracy Relationship in Eyewitness Identification Studies*, 118 PSYCHOL. BULL. 315 (1995).

130 *Id.*

131 *Id.* at 320.

132 *Id.* at 323.

133 Gary L. Wells & Amy L. Bradfield, *"Good, You Identified The Suspect:" Feedback to Eyewitnesses Distorting Their Reports of Their Witnessing Experience*, 83 J. OF APPLIED PSYCHOL. 360 (1998).

134 *Id.*

135 *Id.*

136 *Id.*

137 *Id.*

willingness to testify, more trust in an identification made under these conditions, and more details provided in the description.[138] Disconfirmation affected only attention to the event, basis for the identification, ease of identification, and willingness to testify, dropping each to a lower level.[139]

In their meta-analysis of twenty tests on the post-identification feedback effect employing 2,400 participants, Douglass and Steblay (2006) found that participants receiving confirming feedback ("Good. You identified the suspect.") expressed significantly more confidence in their observations and identifications than those who received no feedback, reported enhanced evaluations of their conditions of view and degree of attention during their observations of the crimes, consistently claimed that they possessed a significantly better basis for making the identification, had greater clarity of the perpetrator's image in mind, had greater ease of identification, and needed less time to make their identifications.[140] These witnesses also reported a greater memory for strangers' faces and greater trust in the memory of another witness with a similar experience.[141] They were also more willing to testify about their identifications.[142]

The authors concluded that, "[t]his meta-analysis demonstrates the reliability and robustness of the post-identification feedback effect. It reinforces recommendations for double-blind testing, recording of eyewitness reports immediately after an identification is made, and reconsideration by court systems of variables currently recommended for consideration in eyewitness evaluations."[143]

ii. Praise: "You Have Been a Really Great Witness" Increases Confidence

Witness confidence in a false identification is inflated even when the lineup administrator remarks only, "Thank you. You have been a really great witness."[144] According to findings by Dysart, Lawson, and Raney, not only are witnesses' confidence in their lineup choices inflated, but other aspects of their eyewitness-relevant experience as well, like how good their view of the perpetrator was, how confident they were about the description they had given, the clarity of the mental image of the perpetrator, the clarity of the look at the perpetrator during the crime, the quality of view of the perpetrator, and the amount of attention they had paid to the perpetrator's face.[145] When the eyewitnesses were led to believe that the administrator in fact knew the identity of the perpetrator, their ratings of all of these factors

138 *Id.* at 365.
139 *Id.* at 360.
140 Amy B. Douglass & Nancy Steblay, *Memory Distortion In Eyewitnesses: A Meta-analysis of The Post-identification Feedback Effect*, 20 APPLIED COGNITIVE PSYCHOL. 859 (2006).
141 *Id.*
142 *Id.* at 863.
143 *Id.* at 859.
144 Jennifer E. Dysart, Victoria Z. Lawson & Anna Rainey, *Blind Lineup Administration as a Prophylactic Against the Postidentification Feedback Effect*, 36 LAW & HUM. BEHAV. 312, 316 (2012).
145 *Id.* at 312.

except quality of view of the perpetrator were elevated.[146] There was no such elevation for witnesses who had not been led to believe the lineup administrator knew the identity of the perpetrator. Moreover, the inflation took place only for witnesses who had made an *incorrect* choice, not for those who had identified the *correct* man from the lineup.[147] The authors suggest that blind administration of lineups would help prevent the inflation effect that results from post-identification confirmatory feedback to the witness.

iii. Warning Re Cross-Examination Increases Confidence in Incorrect Choice

Wells, Ferguson, and Lindsay (1981) found that a similar inflation of confidence in the identification in witnesses who have made an *incorrect* choice can be induced simply by having a "prosecutor" suggest to the witness before the trial that the defense attorney will question the witness about details of the perpetrator's appearance and any inconsistencies in the witness' statements, and that the witness should rehearse the answers to these questions.[148] For witnesses who identified the *correct* person in a photo lineup, there was no reliable increase in the confidence felt by the witness in the accuracy of the identification following the prosecutor's briefing.[149]

b. Co-Witnesses Influencing Witnesses

i. Co-witness Identifications Affect Confidence in Witness Choice

Similarly, Luus and Wells found that confidence in an incorrect choice from a target-absent photoarray was *increased* when the witness was told that another witness made the *same* choice, and *decreased* when told another witness picked a *different* person or no one, for witnesses who viewed a staged theft and then were asked to pick the thief from a target-absent photoarray.[150] Mock jurors who viewed videotapes of these witnesses' testimony judged the more confident witnesses to be more credible.[151]

The influence of co-witness identifications was also shown by Semmler, Brewer and Wells (2004).[152] When witnesses were told that eighty-four out of eighty-seven of the other witnesses who picked out a thief from a photoarray that contained no picture of the thief had made the

146 *Id.* 317-18.

147 *Id.*

148 Gary L. Wells, Tamara J. Ferguson & R.C. Lindsay, *The Tractability of Eyewitness Confidence and Its Implications For Triers of Fact*, 66 J. OF APPLIED PSYCHOL. 683, 688 (1981).

149 *Id.*

150 Elizabeth Luus & Gary L. Wells, *The Malleability of Eyewitness Confidence: Co-witness and Perseverance Effects*, 79 J. OF APPLIED PSYCHOL. 714 (1994).

151 *Id*. at 720.

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

same choice they had made, the witnesses' confidence in the choice made was reliably increased.[153] When the photoarray did contain a picture of the thief, feedback about other witnesses' choices also increased confidence for correct and mistaken array identifications and rejections.[154] The effect of the feedback was not large, but it was consistent and statistically reliable in both culprit-absent and culprit -present situations.[155]

7. Time Between Observation And Identification

a. Loss of Memory for Details Over Time

Time as a factor in eyewitness research also has a long history. Lipton (1977) showed observers a short, color film of a peaceful scene in a Los Angeles park in which, suddenly, a man is shot and robbed.[156] All the witnesses were led to believe that the film was of an actual crime and had been made by an amateur photographer who happened to be filming at the scene when the incident occurred and that the film was on loan from the district attorney's office for research purposes.[157] The film was scored for 144 separate items.[158] Witnesses were questioned about what they had seen either immediately after viewing the film or a week later, and were scored for both quantity of items recalled and accuracy.[159] After the one-week delay, the quantity of items recalled was eighteen percent less than immediately after the film. The accuracy was 4.3 percent less.[160] The researchers do not give us the mean number of items recalled either immediately or later, so it is difficult to know whether memory in general for this very realistic filmed "crime" was good or poor.[161] Neither do we know whether decay would have continued in an Ebbinghous function or otherwise had the researchers continued to test with increasing time delays.[162]

Turtle and Yuille (1994) found that details recalled from viewing a videotape of a mock crime dropped from about twenty-seven items out of fifty-nine (forty-six percent) forensically relevant details recalled immediately after down to about twenty-two (thirty-seven percent) elicited three weeks after the tape was viewed.[163] Immediate recall witnesses were also more confident.[164] The tape showed a breaking and entering by two men that led to an eventual shooting of another man and a woman during

153 *Id.* at 338.
154 *Id.* at 342.
155 *Id.*
156 Jack P. Lipton, *On The Psychology of Eyewitness Testimony*, 62 J. OF APPLIED PSYCHOL. 92-93 (1977).
157 *Id.*
158 *Id.*
159 *Id.*
160 *Id.*
161 *Id.*
162 *Id.*
163 John W. Turtle & John C. Yuille, *Lost But Not Forgotten Details: Repeated Eyewitness Recall Leads to Reminiscence But Not Hypermnesia*, 79 J. OF APPLIED PSYCHOL. 260, 265 (1994).
164 *Id.* at 266.

an attempted robbery of money and drugs—all in four and a half minutes.[165]

In their 2006 review of the literature on retention interval and forgetting, Odinot and Wolters reported that they found only two studies addressing repeated—or even delayed—recall of complex, natural events, and only the Turtle and Yuille study above examined delayed recall without any intervening immediate recall. In their own study, these researchers showed witnesses a twenty-one-minute long videotape depicting two "storylines"—one of a man with a car who is helping a neighbor get some things from a shop and the other of a young man who recently received a motor-bike for his birthday.[166] The two storylines converge in an accident between the car and the motorbike at the end of the video.[167] Viewers were asked to recall and write down everything they could remember and were asked to clarify ambiguous responses.[168] Witnesses who were first asked to recall details five weeks after viewing the tape recalled significantly fewer details than those asked for recollections just one week after viewing the tape.[169] The proportion of details recalled incorrectly was twice as great at five weeks (twenty-nine percent) than at one week (forteen percent) and the proportion of correctly recalled details decreased to seventy-one percent at five weeks from eighty-six percent at one week.[170] "The main findings were that longer intervals before first questioning resulted in more 'do not know' answers, fewer correct units of information recalled, and lower confidence ratings." (Repeated questioning did not affect any of these measures.)[171]

b. Loss of Memory for Faces Over Time

One of the most critical roles for the eyewitness in the prosecution of crimes is the identification of the perpetrator. Much of the research on the effect of delay on memory in this area has dealt with memory for faces. It should be noted, however, that in nearly all cases, memory for "faces" has been tested with photographs of faces, not with the faces themselves. There is no clear reason to believe the two faculties are the same.

Shapiro and Penrod conducted a meta-analysis of facial recognition studies, eighteen looking at positive hit rates and fourteen at false alarms.[172] Twenty percent of the studies involved the identification of a perpetrator after the witnessing of a crime.[173] In these, it was found that as the time between the observation and the recall grows greater, the number of accurate hits declines in a linear fashion, but the number of false alarms

165 *Id.* at 260.
166 Geralda Odinot & Gezinus Wolters, *Repeated Recall, Retention Interval and The Accuracy-confidence Relation in Eyewitness Memory*, 20 APPLIED COGNITIVE PSYCHOL. 973, 973-76 (2006).
167 *Id.*
168 *Id.*
169 *Id.* at 979.
170 *Id.*
171 *Id.* at 983.
172 Shapiro & Penrod, *supra* note 21, at 140.
173 *Id.*

does not.[174] (Generally, across all the studies in the meta-analysis that examined the frequency of false alarms, in target-present lineups the false alarm rate ran about twenty-five percent, while with target-absent lineups it averaged about fifty-two percent.)[175] Because these studies each used different amounts of delay between witnessing the crime and trying to identify the face of the perpetrator while the meta-analysis simply dichotomized the delays into "long" and "short," it is not possible to reach any conclusions about the amount or type of decay in accuracy of facial memory with time.[176] It should be noted, however, that most of these studies used pictures and situations considerably different from those encountered in police work.[177]

In a recent meta-analysis of loss of memory for faces over time, Deffenbacher et al. (2008), analyzed fifty-three independent tests of the hypothesis that longer retention intervals decrease the ability of "witnesses" to identify a once-seen face in studies involving 5,405 participants.[178] Retention intervals ranged from ten seconds to 343 days.[179] The researchers found a reliable correlation between the length of the delay before recall and the ability to recall faces.[180] When examining delays of the length common in police work, studies found that memory decays over that interval.[181]

8. Stress

More than a century ago, Yerkes and Dodson formulated the effect of stress on learning, i.e. perceiving and remembering, as a U-shaped function wherein very low and very high levels of stress diminish the amount learned—and remembered—while moderate levels of stress enhance learning.[182] A thirty-year-old review of the stress literature by Loftus claimed that the bulk of the subsequent research supported the Yerkes-Dodson Law—although admittedly, there is no objective definition of the optimum level of stress to facilitate learning and subsequent retention of information or of the minimum level needed to impair perception and memory.[183]

Modern-era research has made some strides toward grounding the stress literature in more realistic-seeming crime scenarios, making the research more readily relevant to actual conditions experienced by

174 *Id.* at 144.
175 *Id.* at 146.
176 *Id.*
177 *Id.*
178 Kenneth A. Deffenbacher et al., *Forgetting The Once-seen Face: Estimating The Strength of an Eyewitness's Memory Representation*, 14 J. OF EXPERIMENTAL PSYCHOL. APPLIED 139, 140-41 (2008) (citing Kenneth A. Deffenbacher, On the Memorability of the Human Face (1986)).
179 *Id.*
180 *Id.*
181 *Id.* at 140-42.
182 Robert M. Yerkes & John D. Dodson, *The Relation Of Strength Of Stimulus To Rapidity Of Habit-Formation*, 18 J. OF COMPARATIVE NEUROLOGY & PSYCHOL. 459 (1908).
183 Elizabeth F. Loftus, *Ten Years in The Life of an Expert Witness*, 10 LAW & HUM. BEHAV. 241 (1986).

eyewitnesses to real crimes. About thirty years ago, Clifford and Scott determined that witnesses who viewed violent videotaped events gave less accurate and less complete accounts of the witnessed events than did witnesses who witnessed nonviolent encounters.[184] Their scenario showed a police officer who finds a suspect, searches him, and during the course of the encounter, either hits him or does not.[185] Female witnesses who observed the officer striking the suspect were even less accurate than their male counterparts.[186] In a follow up study, Clifford and Hollin added multiple perpetrators to the scene as well and found a further decrease in accuracy: almost three-quarters of the observers in the multiple perpetrators-high violence condition were wrong in their identifications of the perpetrators.[187] In this later study, however, there were no sex differences in accuracy.[188]

A more recent set of studies by Houston, Clifford, Phillips, and Memon (2012) made a finer breakdown of categories of items impacted for good or ill by stress. Their witnesses viewed either a crime scenario (a mugging) or an ordinary conversation.[189] They measured the ability of witnesses to describe the perpetrator, the critical incident, the victim, and the environmental details.[190] They found that observers who witnessed the crime, and were presumably under stress from the negative emotion, overall gave *less complete* accounts of the *witnessed event* and its *players*, but their recall was *not less accurate* than the witnesses to the conversation.[191] However, mugging viewers provided a more complete description of the *perpetrator* than did the witnesses to the conversation while they were less able to describe what the perpetrator did to the victim—the elements of the crime itself.[192] In a follow-up study, these researchers tested the abilities of the witnesses to the two types of events (violent and nonviolent) to identify the perpetrator from a photographic lineup and found that violent event witnesses were less able than their neutral counterparts to recognize the perpetrator.[193]

The results of a 2004 meta-analysis by Deffenbacher et al. of the effects of stress in twenty seven separate tests involving over 1700 participant/witnesses also clearly showed that high stress had a high negative impact on identification and recall of detail accuracy, but with a

184 Brian R. Clifford & Jane Scott, *Individual and Situational Factors in Eyewitness Testimony*, 63 J. OF APPLIED PSYCHOL. 352, 354-55 (1978).
185 *Id.*
186 *Id.* at 352.
187 *Id.* at 368.
188 Brian R. Clifford & Clive R. Hollin, *Effects of The Type of Incident and The Number of Perpetrators on Eyewitness Memory,* 66 J. OF APPLIED PSYCHOL. 365 (1981).
189 Kate A. Houston et al., *The Emotional Eyewitness: The Effects of Emotion on the Specific Aspects of Eyewitness Recall and Recognition Performance*, 13 EMOTION 118, 119-22 (2013).
190 *Id.*
191 *Id.*
192 *Id.*
193 *Id*.

much more nuanced analysis of the extensive research on the subject.[194] Deffenbacher et al. argued that the sometimes conflicting findings of the stress research can be explained by the degree to which the study materials simply arrest the attention of the witnesses rather than produce a defensive response to a threat to bodily integrity or self-esteem of the observer.[195] With attention-grabbing but nonthreatening events, the witness gets excited and focuses intently on the main objects and actions of the event, but as the perceived danger and emotional voltage rises, the witness gets scared and can no longer attend to anything but his own safety.[196] Generally, most laboratory studies are not dangerous or frightening." [197] In the six ecologically valid studies where stress was manipulated in the context of a staged crime, the mean percent correctly identified was thirty-three percent under high stress and fifty percent under low stress.[198]

These researchers concluded that from their analysis of studies employing methods that simulate actual eyewitness identification and recall under conditions that stimulate not just the observer's attention but also a defensive response to fear or threat, they have "adduced considerable support for the hypothesis that high levels of stress negatively impact both accuracy of eyewitness identification as well as accuracy of recall of crime-related details."[199]

9. Cross-Racial

In 1969, Malpass and Kravitz found that, generally, cross-racial identifications were more difficult than within-race identifications, but the results were not identical for different races.[200] Using twenty black and twenty white students as witnesses, the researchers showed twenty pictures, half of black and half of white "suspects," then asked all the volunteers to pick out of a set of eighty pictures the twenty they had already seen.[201] White witnesses were better at identifying the previously seen white faces than the black faces, but black witnesses were equally good at picking out previously seen targets from both.[202] Cross, Cross, and Daly (1971) found that white volunteer witnesses could pick out white targets forty-five percent of the time but could identify black targets only twenty-seven percent of the time.[203] Black volunteer witnesses could pick out, on

194 Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 LAW & HUM. BEHAV. 687, 690 (2004).
195 *Id.*
196 *Id.* at 688.
197 *Id.* at 691.
198 *Id.* at 697.
199 *Id.* at 700.
200 Roy S. Malpass & Jerome Kravitz, *Recognition for Faces of Own and Other Race*, 13 J. OF PERSONALITY & SOC. PSYCHOL. 330 (1969).
201 *Id.* at 331-32.
202 *Id.* at 330.
203 *Id.*

average, forty percent of the previously seen black targets and an almost identical number of white targets—thirty-nine percent.[204]

In a series of studies, Brigham and colleagues in a series of studies likewise found that white witnesses were less accurate at identifying black targets than white ones. Brigham and Barkowitz (1978) had eighty-six black and seventy-six white undergraduates attempt to identify which of a series of facial photographs they had seen earlier.[205] They found that both blacks and whites were significantly more accurate at identifying faces of their own races.[206] In a later study, these two researchers, Barkowitz and Brigham (1982),[207] again had both black and white undergraduates try to identify previously seen faces and found a significant degree of own-race bias, but only among white students.[208] Lindsay et al. (1991) found essentially the same results using very short presentations of the initial photographs of faces.[209]

Bothwell, Brigham, and Malpass (1989) conducted a meta-analysis of fourteen samples that revealed that the magnitude of the own-race bias was similar for both black and white subjects despite the results of the previous studies with relatively small numbers of participants. The own-race bias was consistent across studies, showing that memory for own-race faces is superior to memory for other-race faces, but there was considerable variability from study to study.[210]

> This meta-analysis persuades us to disagree with those who have argued that the data from facial-recognition studies of own-race bias are equivocal and inconsistent. The data indicate that the own-race bias effect is quite consistent, in that it occurs for both Black and White subjects in 79% of the samples considered. The effect occurs with equal magnitude among both Black and White subjects, accounting for 11% of the variance in recognition ability of Black subjects and 10% of the variance in recognition ability of White subjects.[211]

The researchers speculated that the variability might be due largely to variations in the number or distinctiveness of the faces employed from study to study.[212]

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204 John F. Cross, Jane Cross & James Daly, *Sex, Race, and Beauty as Factors in Recognition of Faces*, 10 PERCEPTION AND PSYCHOPHYSICS 393 (1971).

205 John C. Brigham & Paul Barkowitz, *Do "They all look alike?" The Effect of Race, Sex, Experience, and Attitudes on The Ability to Recognize Faces*, 8 J. OF APPLIED SOC. PSYCHOL. 255, 311 (1978).

206 *Id.*

207 Paul Barkowitz & John C. Brigham, *Recognition of Faces: Own-race Bias, Initiative, and Time Delay*, 12 J. OF APPLIED SOC. PSYCHOL. 255 (1982).

208 *Id.*

209 D. Stephen Lindsay, Philip C. Jack, Jr., & Marcus A. Christian, *Other Race Face Perception*, 76 J. OF APPLIED PSYCHOL. 587, 587-89 (1991).

210 Robert K. Bothwell, John C. Brigham & Roy S. Malpass, *Cross-racial Identification*, 15 PERSONALITY & SOC. PSYCHOL. BULL. 19, 20-21 (1989).

211 *Id.* at 23.

212 *Id.*

There is considerably less literature addressing the cross-racial effect in groups other than whites and African-Americans and very few field studies as opposed to laboratory research. MacLin et al. (2001) found the own-race recognition superiority with Hispanic male undergraduates viewing both black and Hispanic faces.[213] When participants were asked to distinguish past seen faces from novel faces, Hispanic faces were more accurately recognized by Hispanics than black faces.[214] Moreover, as has been found repeatedly, faces observed for a longer period of time—five seconds—were more likely to be recognized than faces viewed for only one-half a second.[215]

In a real world example that comes closer to simulating the situation that is often encountered by eyewitnesses to crimes, Brigham, Maas, Snyder, and Spaulding (1982) studied clerks working alone in convenience stores in a small city, asking them to identify from photographs two male customers—one white and one black—who had been in their stores two hours earlier.[216] The "customers" had engaged in unusual activities in an attempt to engage the clerks' attention—they counted out the price of the item in pennies and then asked for directions to a nearby location.[217] The seventy-three clerks could make correct identifications only about one-third of the time. These researchers found very little evidence of own-race bias but their sample had a very small number of black clerks (nine) compared to white (sixty-four).[218] In an interesting side note, the researchers write that, "Black clerks working in stores where robberies had been attempted showed a recognition accuracy rate of one hundred percent versus twenty-five percent for black clerks in stores where robberies had not been attempted."[219] No similar results were obtained for white clerks.[220]

A few years later, Platz and Hosch (1988), using the same methodology as Brigham et al. (1982), asked eighty-six convenience store clerks in El Paso, Texas—a racially/ethnically diverse town—to identify three customers—one white, one black, one hispanic—who had visited the store two hours earlier.[221] Forty-seven clerks were anglo, eleven were black, and twenty-eight were Mexican-American.[222] They found that clerks in each racial group were better at identifying the customers who shared their own racial group or ethnicity than either other.[223] Anglo clerks correctly

213 Otto H. MacLin, Kimberly MacLin & Roy Malpass, *Race, Arousal, Attention, Exposure, and Delay: An Examination of Factors Moderating Face Recognition*, 7 PSYCHOL., PUB. POL'Y., & LAW 134 (2001).

214 *Id.* at 140.

215 *Id.* at 134.

216 John C. Brigham, Anne Maass, Larry D. Snyder & Kenneth Paulding, *Accuracy of Eyewitness Identifications in a Field Setting*, 42 J. Of PERSONALITY & SOC. PSYCHOL. 673, 673-81 (1982).

217 *Id.* at 675-76.

218 *Id.*

219 *Id*. at 677.

220 *Id.*

221 Stephanie Platz & Harmon Hosch, *Cross-racial/ethnic eyewitnesses identification: A field study*, 18 J. OF APPLIED SOC. PSYCHOL. 972 (1988).

222 *Id.*

223 *Id.*

identified the anglo customer fifty-three percent of the time, black customers forty percent of the time and Mexican-American thirty-four percent of the time.[224] The corresponding percentages of correct identifications for black clerks were fifty-five percent for anglo customers, sixty-four percent for black customers and forty-five percent for Mexican-American customers.[225] For Mexican-American clerks, the numbers were thirty-six percent correct for anglo customers, twenty-five percent for black customers, and fifty-four percent for Mexican-American customers.[226]

Echoing the findings of decades of research, a recent meta-analysis by Meissner and Brigham (2001) of thirty-nine research articles reporting ninety-one tests of the accuracy of identifications involving nearly 5,000 participants found that eyewitnesses were consistently less accurate when identifying members of races/ethnicities other than their own.[227] Overall, results indicated a "mirror effect" pattern in which own-race faces yielded a higher proportion of hits and a lower proportion of false alarms compared with other-race faces.[228] Participants were 1.4 times more likely to *correctly* identify previously seen own-race faces than other-race faces and were 1.56 times more likely to *falsely* identify a novel other-race face than own-race face.[229] Moreover, the analysis provided no support for the hypothesis that negative racial attitudes decreased ability to recognize other-race faces.[230] A weak but reliable relationship was found between the amount of self-reported inter-racial contact and ability to correctly recognize other-race faces; the authors suggested that further research on the relationship using more objective measures than self-report is warranted.[231] The authors noted that the own-race bias effect has decreased from the 1970's to the end of the 1990's—except for the false alarm rate—and suggested that this might be attributed to increasing inter-racial contact.[232]

10. Source Confusion

a. Transferring Mugshots to Lineups

More than twenty-five years of research has shown that a significant number of people who witness crimes and then view mugshots of possible suspects mistakenly identify as the perpetrator in a physical lineup an innocent person whose mugshot was seen.

Brown, Deffenbacher, & Sturgill (1977) showed that with a one-week interval, twenty percent of people who had been shown a photograph wrongly picked out that innocent person as a perpetrator from a physical

224 *Id.*
225 *Id.*
226 *Id.*
227 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. & LAW 3 (2001).
228 *Id*. at 15.
229 *Id*. at 15.
230 *Id.* at 17.
231 *Id.*
232 *Id*. at 21.

lineup.[233] In two experiments (sixty-four and 146 subjects), participants were first exposed to "criminals" and then shown mugshots.[234] Subjects in the one experiment were aware they would need to remember the subjects' faces; in the other, they were not.[235] One and one-half hours after viewing the "criminals," subjects were shown mugshots.[236] One week later they were shown physical lineups.[237] For the group cautioned that they would need to remember the criminals, sixty-five percent of "criminals" whose mugshots had been seen were correctly identified, as were fifty-one percent of "criminals" whose mugshots had not been seen.[238] For the group not so cautioned, forty-five percent of "criminals" whose mugshots had been seen were correctly identified, as were twenty-four percent of "criminals" whose mugshots had not been seen.[239] More importantly, the cautioned group *misidentified* twenty percent of the noncriminals in the lineup whose mugshots had been seen and the not-cautioned group misidentified twnety-nine percent of the noncriminals.[240] Accuracy did not correlate with confidence.[241]

Recently, Deffenbacher, Bornstein and Penrod (2006) undertook comprehensive meta-analyses of all of the research on transference from mugshots to lineups to summarize the findings statistically.[242] Two separate meta-analyses—one for positive hit rates and one for false alarms—were conducted on thirty-two independent tests of the hypothesis that prior exposure to mugshots decreases witness accuracy at a subsequent physical lineup.[243] Mugshot exposure both significantly decreased the proportion of correctly identified targets and significantly increased the number of innocents wrongly identified. The effect was greater for wrongful identifications, indicating the influence of either source confusion (transference) or commitment.

b. Transferring Mugshots to Mugshots

The phenomenon of mistaking a prior mugshot choice for the perpetrator of a witnessed crime also occurs when the subsequent identification is made from a photographic lineup—mugshot—as well as with a physical one. Brigham and Cairns (2006) found that viewing mugshots after witnessing a crime could decrease the ability of the witness to accurately identify the perpetrator in later mugshot sets—only one-third of mugshot viewers could pick the criminal out of a later seen mugshot set

233 Brown, *supra* note 17.
234 Brown, Deffenbacher & Sturgill at 313.
235 *Id.*
236 *Id.*
237 *Id.*
238 *Id.*
239 *Id.*
240 *Id.*
241 *Id.* at 314.
242 Kenneth A. Deffenbacher, Brian H. Bornstein & Steven D. Penrod, *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference*, 30 LAW & HUM. BEHAV. 287 (2006).
243 *Id.* at 314, 316.

versus nearly two-thirds of those who had not attempted prior mugshot identifications.[244] These researchers showed 164 study participants a video of a staged assault.[245] Some of the viewers were asked to identify the assailant from a set of eighteen photographs while another group rated the same set for attractiveness.[246] The pictures were similar to mug shots.[247] The photograph of the target assailant was *not* in the set.[248] Half of the mugshot viewers made their choice—if any—in private and half in public.[249] A third group did not view any pictures at all.[250] Two days later, all the observers were asked to pick the assailant out of a photo spread of six photographs that included the assailant as well as the mug shot that had been selected previously when such a choice had been made.[251] Sixty-nine percent of the group that had seen *no* intervening photographs accurately identified the target in the photo spread as did sixty-four percent of the observers who had only rated the photographs for attractiveness.[252] However, only thirty-three percent of the "mugshot" group was able to accurately pick the target out of the six-picture photo spread.[253] Moreover, seventy-eight percent of the group who had made the original choice *publicly* remained committed to it while only forty-five percent of the group that had made a *private* choice did so. (The authors note that the difference, though large, did not reach statistical significance.)[254] Witness confidence was not significantly related to accuracy.[255]

These findings replicate those in earlier work on mugshot bias by Gorenstein & Ellsworth,[256] and by Brown et al. attributing the misidentifications to source confusion with Brown commenting, "These results clearly support the notion that persons are better able to recognize faces than they are able to remember where they saw them."[257]

In a recent test of the effect of intervening mugshot viewing on the ability of witnesses to identify perpetrators of a crime, Dysart, Lindsay, Hammond and Dupuis (2001) also found an increase in the frequency of falsely identifying an innocent person from the photoarray.[258] These researchers had participants view a sixty second staged crime and then

244 John C. Brigham & Donna L. Cairns, *The Effect of Mugshot Inspections on Eyewitness Identification Accuracy*, 18 J. OF APPLIED SOC. PSYCHOL. 1394-1410 (2006).
245 *Id.* at 1399-1403.
246 *Id.*
247 *Id.*
248 *Id*
249 *Id.*
250 *Id.*
251 *Id.*
252 *Id.*
253 *Id.*
254 *Id.*
255 John C. Brigham & Donna L. Cairns, *The Effect of Mugshot Inspections on Eyewitness Identification Accuracy*, 18 J. OF APPLIED SOC. PSYCHOL. 1394-1410 (2006).
256 Gabriel W. Gorenstein & Phoebe Ellsworth, *Effect of Choosing an Incorrect Photograph on a Later Identification By an Eyewitness*, 65 J. OF APPLIED PSYCHOL. 616 (1980).
257 Brown, *supra* note 17, at 313.
258 Jennifer E. Dysart et al., *Mug Shot Exposure Prior to Lineup Identification: Interference, Transference, and Commitment Effects*, 86 J. OF APPLIED PSYCHOL. 1280 (2001).

view some 600 or so mugshots.[259] A second witness group saw no mugshots.[260] The next day, the mugshot group was asked to pick the perpetrator of the crime out of a set of six pictures containing his mugshot.[261] About sixty-nine percent could do so—the same percent as those who had not seen any mugshots.[262] However, when the six-photo array had *no* mugshot of the perpetrator, only about fifty-seven percent of the mugshot participants correctly rejected all six pictures in the array versus sixty-five percent of participants who had not seen mugshots.[263] Viewing many mugshots did not interfere with later identification of a perpetrator from another small array of mugshots, but it did increase the chance of an innocent mugshot subject being chosen as the perpetrator of a witnessed crime.[264] In a subsequent experiment using the same materials, the researchers found that when a mugshot that had been picked out previously was included in the six-picture, perpetrator absent array, sixty-one percent of participants chose the familiar picture as that of the perpetrator.[265] Only nine percent of the mugshot viewers who saw no familiar photo picked anyone from the six-picture array and only twenty percent of the viewers who had seen no mugshots did so.[266]

c. Transferring Bystanders into Perpetrators

Research over the last fifty years has shown that a witness will frequently mistake an innocent bystander or even someone seen at a completely different place or different time for the perpetrator of a witnessed crime.

Read et al. (1990) report fairly strong evidence of this bystander effect with a realistic time delay of two weeks before identification. Participants in this study were students in a classroom interrupted by someone who was supposedly a technician who came in to fix the sound system. Half the students were also exposed to a "bystander" who was engaged nearby in another class at another task like making a class announcement or handing out exam material. Two weeks later, everyone was asked to pick the technician out of a photoarray that contained not the technician but the bystander and four unfamiliar foils. When the bystander photograph bore a strong resemblance to the perpetrator photograph, twice as many participants who had seen a bystander incorrectly chose the bystander as the perpetrator than those who had not (twenty-five percent vs. twelve percent). There was no reliable difference when the two photographs were dissimilar.[267]

259 *Id.* at 1281-83.
260 *Id.*
261 *Id.*
262 *Id.*
263 Jennifer E. Dysart et al., *Mug Shot Exposure Prior to Lineup Identification: Interference, Transference, and Commitment Effects*, 86 J. OF APPLIED PSYCHOL. 1280 (2001).
264 *Id.*
265 *Id.*
266 *Id.*
267 *Read & Tollestrup* at 22.

In a well-designed study employing realistic materials, Ross, Ceci, Dunning and Toglia (1994)[268] found that a familiar but innocent person—such as a bystander—is often identified as the perpetrator of a crime. They showed 335 college students a three-minute film of a female preschool teacher interacting with children in various ways, including reading a story aloud, then leaving the classroom to go to a break room where a male steals the money from her wallet while her back is turned. In one version of the film, the story is read aloud by a man unrelated to the subsequent crime—i.e. an innocent bystander.

Participants are then asked to pick the thief out of a photoarray of five persons. Sixty-four percent of the participants who had seen the film where the female teacher read the story and no male bystander was present (Control) picked the true thief out of the five-person photoarray that contained the thief but not the bystander, as did seventy-five percent of the viewers who had seen the bystander read the story. When the array contained *not* the thief but the bystander, only twenty-two percent of the viewers who had never *seen* the "bystander" before reading the story picked the bystander rather than the true thief, while sixty-one percent of viewers who *had seen* the bystander did so. (The bystander photo had been chosen to resemble the thief to a noticeable degree.) When *both* thief and bystander pictures were in the photoarray, only ten percent of the Control "no bystander seen" viewers picked the bystander's picture while seventy-six percent picked the true thief. However, over eighteen percent of the viewers who *had seen* the bystander read the story picked the bystander's photo from the array and only fifty-three percent chose the true thief.[269] These researchers argue that the transference is inadvertent but not completely unconscious. This echoes the claim in Loftus' work that the process of blending old and new memories is one of compromise.[270]

A comprehensive meta-analysis of all of the bystander transference research was undertaken by Deffenbacher, Bornstein and Penrod (2006). They analyzed nineteen independent tests of the hypothesis that failure of witnesses to remember where they had seen a familiar face was the source of the subsequent identification, looking at both "bystander errors" and "mugshot errors" in the subsequent identification. The increase in error rate (smaller number of correctly identified and higher number of wrongly identified targets) was about half the size for "bystander" studies with no subsequent mugshot exposure as for "mugshot studies" when the mugshot exposure was close in time to the identification task.[271]

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268 David R. Ross et al., *Unconscious Transference and Mistaken Identity: When a Witness Misidentifies a Familiar but Innocent Person*, 79 J. OF APPLIED PSYCHOL. 918-930 (1994).

269 *Id*. at 925.

270 Elizabeth F. Loftus, *Unconscious Transference in Eyewitness identification*. 2 LAW AND PSYCHOL. REV. 93, 93-98 (1976).

271 Kenneth A. Deffenbacher, Brian H. Bornstein & Steven D. Penrod, *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference*, 30 LAW & HUM. BEHAV. 287, 314, 316 (2006).

In their recent review of the best practices in forensic psychological assessment, Cutler and Kovera (2010) conclude that modern psychological research has shown that: "A person seen in a context unrelated to a crime will seem familiar and may be falsely identified as the criminal through unconscious transference. For example, a person seen at a subway station may seem familiar and be misidentified as having been present at a nearby crime. The process is thought to be an unconscious error because the witness does not recall that the person is familiar because of having been seen in some context other than the witnessed crime."[272]

d. Transferring Co-Witnesses' Information into Memory

Witnesses can be misled easily into changing their reports of details of an observed, filmed, crime when given erroneous or prejudicial information by co-witnesses.

In group discussions of witnessed events, witnesses can be easily led to adopt misinformation provided by other members of the discussion group as true. Hollin and Clifford (1983)[273] staged a classroom interruption, and two minutes later informed the class members of the manipulation. They were split into two groups to report on what they had seen. One group simply answered a series of sixteen paper and pencil questions without any group discussion. The second group answered these questions, then discussed these sixteen questions with two stooges in the group who deliberately claimed to remember incorrect information, i.e. answers, to eight of the sixteen questions. At the end, all participants answered thirty-two questions, sixteen of them entirely new. On the eight items where they had been misled, all subjects changed their answers on four to eight items. On the items where there had been no misleading discussion, the mean number of changes was fewer than 1.0. It is unknown whether the misleading information provided in the group discussion actually changed memory, or changed criteria for reporting a bit of information, or both. The researchers did not test whether witnesses could distinguish the sources of the details reported at the end.

Hollin and Clifford caution:

> The crucial point in real life is that knowledge of the veracity or otherwise of reporting can never be known . . . we submit that at the present level of knowledge, it is both illogical and empirically unsound to create witness groups deliberately as an evidential tool. After all, we know the old adage about a camel being a horse designed by a committee, do we not?[274]

e. Transferring Misinformation from Neutral Sources into Memory

272 Brian R. Cutler, Brian R. & Margaret B. Kovera, EVALUATING EYEWITNESS TESTIMONY: BEST PRACTICES IN FORENSIC MENTAL HEALTH ASSESSMENT 47 (2010).

273 Clive R. Hollin & Brian R. Clifford, *Eyewitness Testimony: Effects of Discussion on Recall Accuracy and Agreement*, 13 J. OF APPLIED SOC. PSYCHOL. 234 (1983).

274 *Id*. at 243.

Even when witnesses are given information in narrative form following a witnessed event, the verbally provided information is often confused with the information actually perceived in the witnessed crime.

A 1998 study by Allen and Lindsay showed that the transfer of post-event information from another source to the experienced event itself can occur even when the transferred information is not about the event of interest at all.[275] These researchers had "witnesses" read detailed verbal descriptions of a bland event like an interaction between a student and a professor in a classroom or office.[276] When then asked to recall the details of a similar—but different—event they had previously viewed through a short slide demonstration, their accuracy was impaired by the intervening, irrelevant, information.[277] The interference occurred only for viewers who were presented with the misleading narrative two days later, and not for those tested immediately.[278]

Lindsay and colleagues extended this line of research to Web-based "crime scenes" and video testing of the effects of post-observation verbal narratives to show that details from the verbal stories would be reported by the viewers as having been seen in the visually presented crime scenario material.[279] When the verbal story was the same as the visually present crime scenario, the intrusion was much greater than when the verbal story concerned different events.[280]

f. Summary of What the Forensic Psychological Research Tells Us

Almost 140 years of research on the reliability of eyewitnesses makes it clear that people are demonstrably poor at remembering exactly what they actually experienced. They remember what caught their attention. They remember what makes sense to them, what seems logical. They might remember with great clarity words they have never heard and sights they have never seen just because they make sense. Memory is not a mindless videotape of experience; it is active, constructive, and creative. In many ways, memory is very much like thought. What people actually experienced, what they felt at the time, what they already knew, what other people say and imply about an event, along with having gone on record one way or another, all work together to create "memories" that may have little in common with actually witnessed persons and events. We ignore this reality as a presumption in our courtrooms.

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275 Bem P. Allen & D. Stephen Lindsay, *Amalgamations of Memories: Intrusion of Information from One Event into Reports of Another*, 12 APPLIED COGNITIVE PSYCHOL. 277, 284 (1998).

276 *Id.* at 279.

277 *Id.* at 281.

278 *Id.* at 281.

279 D. Stephen Lindsay et al., *Eyewitness Suggestibility and Source Similarity: Intrusions of Details from One Event into Memory Reports of Another Event*, 50 J. MEMORY & LANGUAGE 96, 100-02 (2004).

280 *Id.* at 102.

A short summary of the research reviewed above from the decades of psychological science identifying the factors in the circumstances of eyewitness identifications that affect reliability, improving it or diminishing it, is presented below in short text and in table forms in Appendix A: Checklist of Reliability Factors.

III. PART II: PSYCHOLOGICAL SCIENCE RELIABILITY ANALYSIS VS. SUPREME COURT

A. RELIABILITY ALGORITHM IN EYEWITNESS CASES

In nine separate cases since 1967, the United States Supreme Court itself has considered the admissibility of eyewitness memory. A review of the Court's cases should convince even the most skeptical that eyewitness testimony should not be left up to triers-of-fact to evaluate without the benefit of expert education about the complex and even counterintuitive nature of the many factors that affect eyewitness reliability. The Court's first eyewitness reliability case was *United States. v. Wade* in 1967.[281]

1. Facts and Holding of United States v. Wade (1967)

On September 21, 1964, a bank robber disguised with a "small strip of tape on each side of his face" entered a bank occupied only by a vice president and a teller, pointed a gun at them, and told them to fill a pillowcase with money.[282] "The man then drove away with an accomplice who had been waiting in a stolen car outside the bank."[283]

The following March, an indictment was returned against respondent, Wade, and two others "for conspiring to rob the bank, and against Wade and the accomplice for the robbery itself. Wade was arrested on April 2, and counsel was appointed to represent him on April 26."[284] Fifteen days later, May 11, the FBI arranged for a lineup in a county courthouse courtroom with Wade and five or six other prisoners. This was seven and a half months after the bank robbery. Each man in the lineup said something like, "put the money in the bag."[285] Both the teller and the vice president identified Wade as the robber.[286] Although Wade had engaged counsel at that point, the lineup was conducted without notice to Wade's counsel.[287]

[T]he testimony of the identifying witnesses elicited on cross-examination revealed that those witnesses were taken to the courthouse and seated in the courtroom to await assembly of the lineup. The courtroom faced on a hallway observable to the witnesses through an open door. The cashier testified that she saw Wade "standing in the hall" within sight of an

281 United States v. Wade, 388 U.S. 218 (1967).
282 *Id.* at 220.
283 *Id.*
284 *Id.*
285 *Id.*
286 *Id.*
287 *Id.*

FBI agent. Five or six other prisoners later appeared in the hall. The vice president testified that he saw in the custody of the agent a person in the hall who "resembled the person that we identified as the one that had entered the bank."[288]

The Court followed this account with a footnote quoting *Napley* deriding this pre-lineup exposure practice: "[w]hile many identification parades are conducted by the police with scrupulous regard for fairness, it is not unknown for the identifying witness to be placed in a position where he can see the suspect before the parade forms."[289]

At trial, the same two bank employees identified Wade as the robber and then described having identified him at the earlier lineup.[290] Wade's counsel moved for acquittal or to have the courtroom identifications stricken from the record because the pretrial lineup had been conducted without notifying counsel, violating Wade's Sixth Amendment right to counsel.[291] The motion was denied and Wade was convicted.[292] Wade eventually appealed the case to the Supreme Court.[293]

In its decision in *Wade*, the Court held that, post-arraignment, a defendant has a right to have counsel present at a lineup.[294] Thus, the pretrial lineup identifications could not be presented as evidence in court, leaving only the identifications at trial to support the conviction of Wade as the bank robber.[295]

The Court considered and rejected *per se* exclusion of the courtroom identifications following from the out-of-court, counsel-absent, lineups.[296] The Court sent the case back to the Court of Appeal with instructions to vacate the conviction and remand the case to the District Court for a determination of whether the in-court identifications during Wade's trial had bases sufficiently independent of the pretrial identification lineup tainted by the absence of counsel to be admitted as evidence.[297] If not, the courtroom identification evidence would be excluded as "fruit of the poisonous tree."[298]

For the lower court to consider, the Court listed factors it felt would affect the reliability of any eyewitness identification. These are: the "opportunity to observe the alleged criminal act," degree of attention to the perpetrator, the "existence of any discrepancy between any pre-lineup description and the defendant's actual description," and certainty of identifications (prior identification of another person, prior identification by

288 *Id.* at 233-34.
289 *Id.* at 234.
290 *Id.* at 220.
291 *Id.*
292 *Id.*
293 *Id.* at 221.
294 *Id.*
295 *Id.* at 236, 239-40.
296 *Id*. at 242.
297 *Id*. at 242-43.
298 *See generally Wong Sun v. United States*, 371 U.S. 471, 488-89 (1963) (discussing the test for determining evidence illegality).

picture of the defendant, prior failure to identify the defendant), and the "lapse of time" between the criminal act and the lineup identification.[299] (The Court in some places seems to regard prior identification of a mugshot of a person later seen in a physical lineup as a contaminating factor and in other places as a measure of high certainty.[300]) The Court also considered how well the witness knows the suspect.

Had the Court undertaken its own source/reliability analysis using its factors, it could well have concluded that, given the short duration of the crime, the opportunity to observe the perpetrator was no more than fair, that attention to the robber's features was likely to be poor to fair, that the time between the crime and the lineup was so great that reliability likely would be poor, and that no information was available to consider the witnesses' descriptions or certainty.

2. Totality of Circumstances Analysis of Facts in Wade

Below is a modern, point-by-point, psychological analysis of the totality of circumstances in *Wade*.[301] In the analyses of each of the cases, where a factor is not applicable to a case or not noted therein, it will be omitted. No ultimate opinion about the reliability of any of these factors as reflected in the factual circumstances of the crime is offered.

a. Observation

i. Scene Illumination

The illumination was presumably appropriate for conducting business during banking hours, and, hence, adequate for perception.

ii. Duration of Observation

No estimate of the duration of the crime appeared in the decision, but it seems likely that the time was short, probably less than five minutes.

iii. Familiarity of Perpetrator

Wade was unknown to either witness.

b. Attention

i. Attention to Perpetrator

These witnesses had to respond to the threat of a gun being waved at them and to the command to get the money and place it in the robber's

299 *See Wade*, 388 U.S. at 241 (listing factors to consider when evaluating when identification would be tainted); *see also* Hoffa v. United States, 385 U.S. 293, 309 (1966) (laying out the test for determining the illegality of evidence through various factors).

300 *See Simmons v. United States*, 390 U.S. 377, 385-86 (1968); *see also Wade*, 388 U.S. at 228-29.

301 *See Wade*, 388 U.S. 218.

pillowcase. All of these actions could detract the witnesses' attention from the robber's face.

ii. Disguises

It is not clear exactly how the adhesive tape was applied to the robber's face or how effective it was as a disguise.

iii. Attention to Weapon

The robber was threatening both witnesses with a gun while he demanded and obtained the money.

c. Description: Accuracy and Consistency

No description of the robber was contained in the facts of the case.

d. Speed

The speed of neither witness's identification of Wade in the lineup was noted.

e. Certainty/Confidence

There was no measure of witness confidence given in the case.

f. Extraneous Confidence Inflation

There was no measure of witness confidence given in the case.

g. Time Between Observation and Identification

Identification was more than seven and a half months after the bank robbery.

h. Stress

These witnesses were severely stressed by the gun and violent events.

i. Cross-Racial

Robber and witnesses were of the same racial/ethnic group.

j. Source Confusion

There was no exposure to mugshots or any verbal information.

i. Transferring Bystanders into Perpetrators

If the witnesses had little or no recollection of the features of the robber himself, the observation by the bank teller and vice president of Wade in the hallway in the company of an FBI agent prior to the appearance of the other members of the lineup and, of course, immediately prior to the lineup

itself, could have filled the gap.[302] The sight of Wade in the grip of the FBI agent also provided clear information to the two witnesses about which man was the actual suspect among the lineup members.

Thus, a modern psychological analysis of the identification of *Wade* might well have echoed and augmented an analysis using the Court's reliability algorithm. However, making assumptions about the results of judicial analyses is rash.

3. Facts and Holding of Gilbert v. California (1967)

In *Gilbert*, the second case of the landmark "right to counsel at lineup" trilogy all decided the same day as *Wade*, the Court similarly found that the possibly tainted in-court identifications were suspect until and unless it could be shown that they had a reliable basis independent of the lineup.[303]

Gilbert was convicted of an armed bank robbery in California during which a police officer who entered during the course of the robbery was killed.[304] Shortly after 10:30 a.m., January 3, 1964, Jesse James Gilbert and Edgar Ball Weaver allegedly entered a bank, wearing "hats and sunglasses."[305] Holding an automatic pisotol, Gilbert shouted, "[e]verybody freeze; this is a holdup."[306] Gilbert then "threw a paper shopping bag with the name Alpha Beta on it [at] one of the tellers and told her to fill it with money. Weaver, armed with a revolver, stood by the door and kept [the people in] the bank covered."[307] Gilbert forced a bank employee to open the vault.[308] He "retrieved the shopping bag and began to fill it with money from the tellers' drawers."[309]

At this point, "Alhambra Police Officer, George Davis, who had been alerted to the robbery, entered the bank."[310] Officer Davis was armed with a shotgun and he disarmed Weaver.[311] Gilbert then grabbed a woman teller and pushed her toward the door, pointing his pistol at her head and warning Davis: "Drop that gun and back off or I'll shoot the woman." Davis backed toward the front door, saying, "No you won't; you will never shoot." Officer Billy Edward Nixon then arrived at the bank in [a] police car and saw Officer Davis backing out of the front door with a shotgun. As Gilbert followed Davis out of the bank, he pushed the woman toward Davis and fired, mortally wounding Davis. Weaver picked up his revolver and followed Gilbert out of the bank. As the robbers fled, Officer Nixon shot

302 *Id.* at 234.
303 Gilbert v. California, 388 U.S. 263, 272 (1967). There is no explicit instruction in either *Wade* or *Gilbert* that the lower courts are to employ the five factors listed by the Supreme Court, but the extent of the *dicta* certainly suggests that expectation.
304 *Id.* at 265.
305 People v. Gilbert, 408 P.2d 365, 369 (Cal. 1965).
306 *Id.* at 371
307 *Id.*
308 *Id.*
309 *Id*.
310 *Id.* at 369.
311 *Id*.

and wounded Weaver.[312] Gilbert and Weaver fled in a white automobile, pursued by Officer Nixon. He died later that evening.[313] Gilbert was apprehended through the cooperation of a co-conspirator.[314] Nixon eventually found Weaver in a crashed vehicle, critically wounded.[315][316]

"There were separate guilt and penalty phases of the trial before the same jury."[317] Prior to trial, on March 26, 1964, a lineup was conducted on a stage in an auditorium where some 100 witnesses to various bank robberies allegedly committed by Gilbert were gathered.[318]

> Some ten to thirteen prisoners were placed on a lighted stage. . . . Each man in the lineup was identified by number, but not by name. Each man was required to step forward into a marked circle, to turn, presenting both profiles as well as a face and back view, to walk, to put on and off certain articles of clothing. . . . [H]e was asked certain questions . . . and was also asked to repeat certain phrases that witnesses to the crimes had heard the robbers use.[319]

The witnesses were asked if they wanted to see any of the men on stage again.[320]

Several gave the numbers of men they wanted to see, including Gilbert's. While the other prisoners were no longer present, Gilbert and two or three others were again put through a similar procedure. Some of the witnesses asked that a particular prisoner say a particular phrase, or walk a particular way. After the lineup, the witnesses talked to each other; it is not clear that they did so during the lineup. They did, however, in each other's presence, call out the numbers of men they could identify.[321]

In court, the three eyewitnesses to the instant bank robbery identified Gilbert in the courtroom.[322] The fact that each witness had previously identified Gilbert in the auditorium lineup was elicited by the defense.[323]

Jesse James Gilbert was convicted of the bank robbery.[324] He appealed on several grounds, including that the absence of counsel at the pretrial lineup violated his constitutional rights under the Sixth Amendment.[325] The Court agreed, as in *Wade*, that the pretrial lineup identification violated the Constitution and that the admission of the in-court identifications by these same lineup witnesses, without a prior determination that the illegal, counsel-absent, pretrial identification had not tainted them, was likewise

312 *Id*.
313 *Id.*
314 *Id.*
315 *Id.*
316 *Id.*
317 Gilbert v. California, 388 U.S. 263, 265 (1967).
318 *Id*. at 270
319 *Id.*
320 *Id.*
321 *Id*.
322 *Id*. at 269.
323 *Id.*
324 *Id.* at 265.
325 *Id.* at 271.

constitutional error.[326] The Court vacated Gilbert's conviction and sent the case back to the California Supreme Court to determine how "to afford the State the opportunity to establish that the in-court identifications had an independent source, or that their introduction in evidence was in any event harmless error" beyond a reasonable doubt.[327]

Since *Gilbert* was decided the same day as *Wade*, it is assumed that the Court likely expected the California court also to apply the same five independent source/reliability criteria developed in *dicta* in *Wade*: observation, attention, description, certainty, and time.[328] Although the Court pointed out the possibility of group contamination for the auditorium identifications, it did not instruct the lower court to consider it.[329] As in *Wade*, it is not known what the Supreme Court would have concluded had it applied its own prescriptive algorithm.

4. Totality of Circumstances Analysis of Facts in Gilbert

Regardless of what the lower courts should have or would have concluded about eyewitness reliability in *Gilbert*, it is fairly clear how a forensic psychologist would educate fact finders about the overall circumstances of the eyewitnesses' experiences of the crime.

a. Observation

i. Scene Illumination

Since the robbery took place shortly after 10:30 in the morning in what was presumably a normally illuminated bank, the witnesses should have had adequate light for observation of Gilbert and his accomplice, Weaver.[330]

ii. Duration of Observation

If the robbery took place shortly after 10:30 AM and Gilbert arrived at his apartment at 11:45 AM, and the drive from the bank to the apartment took approximately 45 minutes, then the entire sequence of events at the bank must have taken about 30 minutes.[331]

326 *Id*. at 272.
327 *Id.*
328 This might be an entirely unwarranted assumption, but, since so much of *Wade* is *dicta* covering the scholarly literature on variables that affect the reliability of eyewitness identifications, it is hard to believe that the Court expected no application of its extensive analysis.
329 *See* United States v. Wade, 388 U.S. 218, 234 (1967) (citing Williams & Hammelmann, *Identification Parades* Part I, CRIM. L. REV. 479, 486 (1963)); *see also* HAROLD E. BURTT, APPLIED PSYCHOLOGY 254-55 (2nd ed. 1957). ("A witness may get his ideas, that is, suggestions, from some other witness if he knows how the latter testifies. Sometimes, when it is a question of identifying suspects, several observers come in at once to look at the same suspect. If No. 1 identifies him as the one who did the stick-up, then it's quite natural for No. 2 and No. 3 to follow suit, whereas if they had been observing the suspect separately the suggestion would not be present.")
330 *See Gilbert*, 408 P.2d at 369.
331 *Id.* at 377.

iii. Familiarity of Perpetrator

None.

b. Attention

i. Attention to Perpetrator

Attention was likely impaired by both the disguises and attention to the weapon.

ii. Disguises or Obscured Features

Both robbers who entered the bank were wearing hats and sunglasses during the whole period of the robbery.[332] There were no distinctive perpetrator characteristics.

iii. Attention to Weapon

Thirty minutes is a lot of time for observation, but the number of threats, guns, dangerous actions, and shootings would necessarily have commanded the attention of the witnesses. Indeed, attention likely would have zig-zagged from one attention-compelling event to another, splitting any focus of attention.

c. Description: Accuracy and Consistency

No descriptions were ever given, or if they were, they were not included in the case. Gilbert was apprehended through information given by a confederate.

d. Speed

The group identification procedure with various witnesses calling out numbers and asking to see some suspects again suggests few if any witnesses recognized Gilbert instantly.

e. Certainty/Confidence

No measures of confidence or prior identifications are explicitly given, but, it is really impossible to evaluate because of the group procedure.

f. Extraneous Confidence Inflation

i. Authorities Influencing Witnesses' Confidence

The action of the authorities in winnowing the field down to just Gilbert and two or three others, however, could well have supported witnesses' belief that the suspect was in the smaller field.

332 *Id*. at 369.

ii. Co-Witnesses Influencing Witnesses' Confidence

Approximately 100 eyewitnesses were in the auditorium, calling out numbers of men they could identify, no doubt affecting others' confidence. After—and perhaps during—the lineup, the witnesses talked to each other.

g. Time Between Observation and ID

Almost three months passed between the robbery on January 3, 1964, and the identifications on March 26, 1964. Memory for faces decays badly over three months.

h. Stress

Witnesses in Gilbert's case were threatened with multiple guns, dangerous actions, and the shooting of a police officer who came on the scene and disarmed one of the robbers. In addition, one of the female witnesses was taken hostage and used as a shield, and then thrust into the direction of that officer as one of the robbers shot past her and killed the officer.

i. Cross-Racial

All participants are assumed to be of the same racial/ethnic background.

j. Source Confusion

i. Prior Mugshots Subjects Identified as Perpetrators

Witnesses here were shown photographs of Gilbert—and only Gilbert—seized from his apartment very soon after the robbery of the instant bank. No other member of the lineup had been presented by photograph to any of the witnesses.

ii. Co-witnesses' Identifications Influencing Witnesses' Identifications

It seems highly likely that the one hundred eyewitnesses calling out numbers of men they could identify influenced each others' identifications.

Even in the absence of an ultimate opinion given by an expert, it seems an educated jury would be confronted essentially with weighing the disrupted attention of witnesses, the extremely high stress of the situation, the long delay before the identifications of two well-disguised criminals, and the rather startling contamination of neutrality by the exposure of witnesses to identifications made by other witnesses at the same lineup, along with the reduction in lineup size to just perhaps three men.

5. Facts and Holding of Stovall v. Denno (1967)

In *Stovall v. Denno*, the Court considered not just the issue of the absence of counsel at the pretrial confrontation, but also whether the confrontation itself "was so unnecessarily suggestive and conducive to

irreparable mistaken identification that the defendant was denied due process of law."[333]

In August, 1961, on Long Island, a husband and wife—both doctors—were attacked at about midnight in their home.[334] "Dr. Paul Behrendt was stabbed to death in the kitchen."[335] His wife "had followed her husband to the kitchen and jumped at the assailant. He knocked her to the floor and stabbed her 11 times."[336] The assailant's shirt with keys in the pocket was left on the floor after the fight.[337] The defendant, Stovall, was traced by these items and arrested the next day.[338] The surviving Dr. Behrendt was hospitalized and underwent surgery to save her life.[339]

The next day, while Dr. Behrendt's condition was still precarious, Stovall was brought to her hospital room in the company of five police officers—to one of whom he was handcuffed—and two members of the District Attorney's staff.[340] He was the only African-American in the room.[341]

Mrs. Behrendt identified him from her hospital bed after being asked by an officer whether he "was the man" and after petitioner repeated at the direction of an officer a "few words for voice identification." None of the witnesses could recall the words that were used. Mrs. Behrendt and the officers testified at the trial to her identification of the petitioner in the hospital room, and she also made an in-court identification of [Stovall] in the courtroom. [Stovall] was convicted and sentenced to death.[342]

In his *habeas corpus* petition in the District Court for the Southern District of New York, Stovall claimed, among other things, that the identification took place "under circumstances which unfairly focused the witness' attention on him as the man believed by the police to be the guilty person."[343] In response, the Court said, "We have outlined in *Wade* the dangers and unfairness inherent in confrontations for identification,"[344] and noted that "it remains open to all persons to allege and prove, as Stovall attempts to do in this case, that the confrontation resulted in such unfairness that it infringed his right to due process of law."[345] How, exactly, the defendant is to do that is not specified.

In fact, the Court omitted any actual analysis and abruptly concluded that the degree of suggestiveness in Stovall's identification was excessive.

333 Stovall v. Denno, 388 U.S. 293, 294, 302 (1967).
334 *Id.* at 295.
335 *Id*.
336 *Id.*
337 *Id.*
338 *Id.*
339 *Id.*
340 *Id.*
341 *Id.*
342 *Id.*
343 *Id*. at 296.
344 *Id*. at 298.
345 *Id*. at 299.

"The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned."[346]

[T]he vice of suggestion created by the identification in *Stovall* . . . was the presentation to the witness of the suspect alone handcuffed to police officers. *It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police*.[347]

Nevertheless, the Court deemed the hospital identification admissible because it was not *unnecessarily* suggestive; indeed, it was "imperative."[348] The Court, quoting the Court of Appeals,,stated, without any apparent sense of irony,

Here was the only person in the world who could possibly exonerate Stovall. Her words, and only her words, "He is not the man" could have resulted in freedom for Stovall. The hospital was not far distant from the courthouse and jail. No one knew how long Dr. Behrendt might live. Faced with the responsibility of identifying the attacker, with the need for immediate action and with the knowledge that Dr. Behrendt could not visit the jail, the police followed the only feasible procedure and took Stovall to her hospital room. Under these circumstances, the usual police station line-up, which Stovall now argues he should have had, was out of the question.[349]

Thusly, the Court introduced the so-called "totality of circumstances" scheme for analyzing whether confrontation evidence was admissible.[350] Where *Wade* and *Gilbert* had laid out suggested guidelines for assessing independent source/reliability of in-court identifications based on the circumstances under which the witness experienced the crime and then identified the suspect, the Court in *Stovall* simply conceded that the circumstances of the showup confrontation were conducive to misidentification but added an orthogonal domain—the need of law enforcement to apprehend the criminal—to the analysis.[351] In its eyewitness jurisprudence since then, the Court has veered from one tack to the other. In one case, the circumstances of the observation of the crime prevail—as adjudicated on an *ad hoc* basis,[352] in the next, the demands occasioned by the need to capture the criminal prevail.[353] This was exactly the consequence foretold by Justice Black in his dissents to these cases.[354]

346 *Id.* at 302.
347 *Wade*, 388 U.S. at 234 (emphasis added).
348 *Stovall*, 388 U.S. at 302.
349 *Id*.
350 *Id.*
351 *See id.*
352 *See, e.g*., Neil v. Biggers, 409 U.S. 188, 200-01 (1972) (stating victim was with assailant for considerable amount of time and faced him many times indicating there was no likelihood of identification).
353 *See, e.g.,* Simmons v. United States, 390 U.S. 377, 384-85 (1968) (recognizing a criminal was still at large and there was a need to make identifications by photographs).
354 *See* Manson v. Brathwaite, 432 U.S. 98 (1977); *supra* note 13*., e.g., id.* at 395 (Black, J., dissenting).

The Court, although noting the horrendous facts of the crime, was more forcibly struck by the almost overwhelming suggestiveness of the hospital identification than by anything else in the case. One never knows what particular conclusion judges will reach about eyewitness factors that affect reliability. In a later case, the Supreme Court claimed that the extreme stress occasioned by imminent threat of grievous bodily harm would focus the attention of the victim on the perpetrator's face.[355]

It is, however, possible to undertake a psychological analysis of the circumstances surrounding Mrs. Behrendt's experience of the crime, determinedly disregarding the circumstances under which the identification was conducted.

6. Totality of Circumstances Analysis of Facts in Stovall

a. Observation

i. Scene Illumination

There is no evidence regarding the amount of light in the kitchen where the attacks took place on August 23, 1961, when the moon was in the third quarter.

ii. Duration of Observation

Mrs. Behrendt saw her husband being attacked, jumped on the assailant, was knocked to the ground and was stabbed eleven times. It seems very unlikely that she could have had more than a second or two to observe the facial features of the attacker.

b. Attention

i. Attention to Perpetrator

Mrs. Behrendt's observation of the assailant was accompanied by a rapid sequence of terrifying events. It seems very unlikely that much of her attention was focused on the facial features or physical characteristics of the attacker other than those most general.

ii. Disguises and Distinctive Perpetrator Characteristics

In this case, the distinctiveness of the perpetrator's characteristics is confounded with the difficulty commonly experienced when trying to identify members of a different race from one's own.

355 *See Biggers*, 409 U.S. at 200-01 (discussing victim spent notable amount of time with assailant in a personal crime giving serious weight to her credibility with identification).

iii. Attention to Weapon

Ordinarily, a witness in the presence of a threatening weapon would likely be focusing attention on that weapon, but this is not the case when the weapon is a knife being used to stab the observer eleven times.

c. Description: Accuracy and Consistency

Little in the Court's decision gives one reason to believe that Mrs. Behrendt had provided much of a description of the assailant to the police, except that the police arrested a black man rather than a white man, and a male rather than a female. The police might have identified Stovall from the shirt and keys left at the scene. The record is unclear.

d. Speed

Stovall was brought into Mrs. Behrendt's hospital room handcuffed to law enforcement officers, required to say a few words, and then Mrs. Behrendt, in response to the question, "Is this the man?" said "Yes."

e. Certainty/Confidence

Nothing in the record indicates any measure of the degree of certainty.

f. Extraneous Confidence Inflation

i. Authorities Influencing Witnesses' Confidence

Nothing indicates that the authorities remarked on Mrs. Behrendt's identification in the hospital room.

g. Time Between Observation and ID

Time was short here, just two days between the crime.

h. Stress

The stress of physical assault on a loved one and then on oneself, especially when both are in deadly danger, is so extreme it is highly likely to impair the ability of a witness in such circumstances to identify the assailant. Moreover, when she made the hospital room identification, Dr. Behrendt had been hospitalized for major surgery to repair her eleven stab wounds.

i. Cross-Racial

Dr. Behrendt was white; Stovall was African-American, the only one in the room.

There is no note in the case about the percentage of the population of Long Island, NY where the attacks took place who were black in 1967.

j. Source Confusion

i. Law Enforcement Belief Re: Target

Police officers and members of the District Attorney's office certainly provided unmistakable information to Mrs. Behrendt about who they believed committed the crime, most likely influencing her identification.

There is little reason in the psychological analysis of the circumstances of the crime for anyone to conclude that Mrs. Behrendt's identification of Stovall was based on her observations of her assailant at the time of the crime; everything militates against that. She most likely identified Stovall because he was the only black man brought to her for identification—under the exigent circumstance of her probable imminent death.

7. Facts and Holding of Simmons v. United States (1968)

The Court followed the next year with the consideration of exigent circumstances in *Simmons v. United States*. In *Simmons*, the Court assessed a new claim that the circumstances of an identification procedure were so unduly prejudicial as to fatally taint the defendant's conviction.[356] The appellant claimed that the pretrial *photographic* lineups shown to witnesses were unduly prejudicial; there were no physical lineups held in *Simmons*.

Simmons was convicted, along with two codefendants, one of whom was Andrews, of robbing a Chicago savings and loan association. Two men had entered the bank and one ordered a teller to place money in a sack. After about five minutes, they left, getting into an automobile that was viewed by one of the five witnesses in the bank. It was by means of the vehicle that Simmons was first identified as a suspect. One of the bank employees ran to the window and observed the getaway car—a distinctive white Thunderbird—leaving. Within the hour, the police found the car abandoned in the vicinity and traced the registration to Andrews.

The next day, FBI agents obtained from Andrews's sister at least six photographs containing images of Simmons and Andrews. "Apparently, these consisted primarily[357] of group-photographs, with Simmons and Andrews each appearing several times in the series."[358] These pictures were shown separately to the five bank employees who had witnessed the robbery and each identified Simmons as one of the robbers. At least six photographs were viewed by each witness. In how many pictures Simmons was identified by each witness is not specified. Later on, some of these witnesses were again shown an indeterminate number of pictures, and, again, all identified Simmons—in how many pictures again is not specified.[359]

356 *See* Simmons v. United States, 390 U.S. 377, 381-82 (1968) (analyzing identification in the context of showing photographs to witnesses).

357 *Id.* at 385 (it is not stated whether there were also photographs showing only Simmons and Andrews separately or together).

358 *Id.*

359 *Id.*

During the trial, each of these witnesses again identified Simmons in person.[360] No witness displayed any doubt about his or her courtroom identification of Simmons, even under cross-examination.[361]

Simmons was convicted and appealed, claiming that the photographic pretrial identification procedure was "so unnecessarily suggestive and conducive to misidentification as to deny him due process and should at least require reversal of his conviction."[362] However, in order to examine this claim, the Court in *Simmons* did not actually analyze the relevant photographs for suggestiveness because they had been unavailable at trial and the judge had not ordered their production despite a defense request during trial.

Instead, the Court undertook, for the first time, its own detailed analysis of the circumstances under which the witnesses experienced the crime, employing the general algorithm sketched in the *Wade* trilogy, to determine whether the identifications of Simmons had been reliable, whatever the exact character of the photographic presentations might have been.[363] The Court noted that the conditions of observation for the witnesses were optimal: The robbery took place in the afternoon—with plenty of light—in a bank that was itself well-lit. The robbers wore no masks. The Court noted, too, that all of the five eyewitnesses had been able to view Simmons during the holdup for periods "ranging up to five minutes."[364] Additionally, since the group-photographs of Simmons, Andrews, and others were presented to the witnesses only a day after the robbery, their memories were still fresh. Furthermore, "[t]here [was] no evidence to indicate . . . that the FBI agents in any other way suggested which persons in the pictures were under suspicion."[365] Thus, the Court concluded, "[t]here was in the circumstances of this case little chance that the procedure[366] utilized led to misidentification of Simmons."[367]

However, the Supreme Court did agree with Simmons that the photographic identification procedure was less than optimal. The Court even quoted extensively from Wall, the legal scholar relied on so heavily in *Wade*, in acknowledging the danger of misidentification through improperly conducted photographic identifications:

> "It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals . . . . This danger will be increased if the police display to the witness . . . the pictures of several persons among which the photograph of a single such individual

360 *Id.*
361 *Id.*
362 *Id.* at 381.
363 *Id.* at 385.
364 *Id.*
365 *Id.* (The Court is ignoring the probable lack of similarity in appearance among the men in the photographs).
366 Note that in the section that follows, the Court described the circumstances of the witnesses' observation of the crime, not of the photographic identification procedure.
367 *Id.*

> recurs or is in some way emphasized . . . . [T]he witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen . . . ."[368]

Nevertheless, the Court observed approvingly that the initial photographic identifications of Simmons were "confirmed" [369] in subsequent viewings of the same and other photographs and in person at trial.[370] It is difficult to follow the Court's reasoning.

Perhaps as important as the circumstances under which the eyewitnesses observed the bank robbery was the other prong of the *Stovall* totality of circumstances analysis—the overriding necessity for law enforcement to apprehend dangerous criminals before they do more harm.[371] "In the first place, it is not suggested that it was unnecessary for the FBI to resort to photographic identification in this instance. A serious felony had been committed. The perpetrators were still at large. The inconclusive clues which law enforcement officials possessed led to Andrews and Simmons . . . . The justification for this method of procedure was hardly less compelling than that which we found to justify the 'one-man lineup' in *Stovall v. Denno."*[372]

In *Simmons*, the Court concluded that the identifications were likely reliable, given the circumstances, and also necessary. Neither in *Stovall* nor in *Simmons* does the Court make any attempt to reconcile, balance, or otherwise weigh the relative importance of an identification "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" with the need of law enforcement to apprehend dangerous criminals.

Below is a forensic psychologist's likely analysis of circumstances of the robbery and the witnesses' observation of the perpetrators looking both at the factors that impressed the Court and factors not considered.

8. Totality of Circumstances Analysis of Facts in Simmons

a. Observation

i. Scene Illumination

The bank robbery took place around 1:45 in the afternoon on Feb. 27, 1964—with plenty of light—in a bank in Chicago that was itself well-lit.

ii. Duration of Observation

The duration of the robbery was about five minutes. However, during that time, one teller was told to fill one sack with whatever money was in

368 *Id.* at 386, citing P. Wall, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES. 74-82, 83 (1965); Williams, *Identification Parades*, Crim. L. Rev. 525, 530, 531 (1955).
369 *Id*. at 385.
370 *Id.*
371 Stovall v. Denno, 388 U.S. 293, 302 (1967); *Simmons*, 390 U.S. at 384.
372 *Simmons*, 390 U.S. at 384-85.

her till at the time; another bank employee was made to open the vault. A robber emptied the tills.

iii. Familiarity of Perpetrator

Neither robber was familiar to any of the five witnesses in the bank.

b. Attention

i. Attention to Perpetrator

It is unlikely that the robbers would have been observed carefully by any witness. Indeed, at trial, two of the five witnesses testified that they did not get a good look at the second robber.

ii. Disguises

Neither robber wore a mask or any disguise.

iii. Distinctive Perpetrator Characteristics

No distinguishing characteristics are noted in the case.

iv. Attention to Weapon

Witnesses were threatened by guns in the hands of two men issuing commands.

c. Description: Accuracy and Consistency

No witness provided any description at all of either of the two bank robbers.

d. Speed

There is no mention in the case of the time it took the witnesses to identify Simmons from one, much less the six or more photographs shown them.

e. Certainty/Confidence

The Court thought it notable that no witness displayed any doubt about his or her identification but there is no indication that any witness was ever asked about degree of certainty.

f. Extraneous Confidence Inflation

Not applicable.

g. Time Between Observation and ID

The time between the commission of the crime and the showing of at least six group-photographs featuring Simmons included was short—only two days.

h. Stress

Being robbed at gunpoint is a high stress situation.

i. Cross-Racial

Criminal perpetrators and witnesses were all of the same ethnic background.

j. Source Confusion

i. Transferring Mugshots to Mugshots

"These initial identifications were confirmed by all five witnesses in subsequent viewings of the photographs and at trial, where each witness identified Simmons in person."[373]

ii. Transferring Co-witnesses' Information into Memory

It is not clear whether co-witnesses viewed the photographs together and communicated their impressions to each other.

The Court's focus on the well-lit bank and ample time to observe the unmasked robbers led it to judge the identifications of Simmons reliable. The tainted nature of the photographic identification procedure was acknowledged and dismissed. It is likely that a modern psychologist would put far more emphasis on the importance of the inevitable mugshot bias as well as on the extreme stress of the robbery itself.

The next year, in *Foster v. California,*[374] the Court chose to look in far greater detail than they had in *Stovall* at the issue of unconstitutional suggestiveness, declaring, "it is the teaching of *Wade, Gilbert*, and *Stovall* . . . that in some cases the procedures leading to an eyewitness identification may be so defective as to make the identification constitutionally inadmissible as a matter of law."[375]

9. Facts and Holding in Foster v. California 394 U.S. 440 (1969)

In *Foster*, the Court illustrated the problem of determining under what circumstances an identification might be unconstitutionally suggestive—yet somehow never managed to go beyond illustration to explicit characterization of suggestiveness.

The Court confined itself to a searching look at the totality of circumstances of the lineup and showup procedures employed to produce the identifications, but not at the totality of circumstances of the witnessing

373 *Id*. at 381 ("On appeal, the Court of Appeals for the Seventh Circuit affirmed as to Simmons and Garrett, but reversed the conviction of Andrews on the ground that there was insufficient evidence to connect him with the robbery.").

374 Foster v. California, 394 U.S. 440 (1969).

375 *Id.* at 443.

of the crimes. As in *Stovall*, the Court seemingly stuck with an "I know it when I see it" approach.

Foster was convicted of the armed robbery of a Western Union office. Just after midnight, two men came into the telegraph company office, wrote a note telling the manager it was a holdup, put it under his face, and demanded money. They "flashed guns,"[376] took $531.00 and fled from the office. One of the robbers wore a leather jacket under overalls. The day after the robbery, one of the robbers, Clay, surrendered to the police and implicated Foster. "Except for the robbers themselves, the only witness to the crime was Joseph David, the late-night manager of the Western Union office."[377]

After Foster had been arrested, David was called to the police station to view a three-man lineup. One man was Foster. Foster was close to six feet in height; the other two men were 5'5" or 5'6". Foster wore a leather jacket that David said was similar to the one worn underneath the robber's coveralls. David could not positively identify Foster as the robber from this lineup. He "thought" Foster was the man, but he was not sure. David then asked to speak to Foster. Foster was brought into an office and sat at a table across from David. Except for prosecuting officials, there was no one else in the room. Even after this one-on-one confrontation, David still was not certain whether Foster was one of the robbers: "[T]ruthfully—I was not sure," he testified at trial.[378] About a week later, the police arranged a second lineup with five men. Foster was the only person in the second lineup who had appeared in the first lineup. Finally, David was "convinced" Foster was the man who had robbed him."[379]

At trial, David testified to his identification of Foster in the lineups, and repeated his identification in the courtroom. There was no other evidence against Foster other than the testimony of the alleged accomplice, Clay. (The absence of counsel at the identification procedures was not relevant because the trial took place before the 1967 *Wade* and *Gilbert* decisions.)

Looking solely at the identification procedures, the Court concluded, "[T]his case presents a compelling example of unfair lineup procedures."[380] The Court summarized its view of the confrontations in *Foster* as follows:

> In the first lineup arranged by the police, petitioner stood out from the other two men by the contrast of his height and by the fact that he was wearing a leather jacket similar to that worn by the robber. When this did not lead to positive identification, the police permitted a one-to-one confrontation between petitioner and the witness . . . . Even after this the witness' identification of petitioner was tentative. So some days later another lineup was arranged. Petitioner was the only person in this lineup who had also

376 *Id.* at 444.
377 *Id.* at 442.
378 *Id.*
379 *Id.* at 441-42.
380 *Id.* at 442.

> participated in the first lineup. This finally produced a definite identification.[381]

The Court concluded:

> The suggestive elements in this identification procedure made it all but inevitable that David would identify petitioner whether or not he was in fact "the man." In effect, the police repeatedly said to the witness, '*This* is the man.' *This procedure so undermined the reliability of the eyewitness identification as to violate due process*.[382]

The judgment was reversed and the case remanded for further proceedings not inconsistent with the opinion. As Justice Black pointed out in his dissent, just how the lower court was to proceed was a puzzle.[383]

In *Stovall*, the Court allowed into trial an identification of such dubious quality and such indubitable suggestiveness that it could stand without modification as a sendup of racist police work. In *Simmons*, the Court admitted a photographic procedure that was apparently unnecessarily suggestive, despite the Court's rhetorical assertion that it was required by the exigency of the situation. Yet, in *Foster*, the Court balked and held that an identification indistinguishable in degree of suggestiveness from those made in *Stovall* and *Simmons* was inadmissible as "unnecessarily suggestive and conducive to irreparable misidentification"—presumably because of the complete absence of any pretext of law enforcement or public safety exigency, even though this was not stated explicitly.[384]

Here follows an analysis—not considered by either the majority or the dissent—of the factors in the totality of the circumstances of the crime and its observation by Joseph David that might well have been be produced by a neutral forensic psychological expert.

10. Totality of Circumstances Analysis of Facts in Foster

a. Observation

i. Scene Illumination

Illumination was presumably whatever would be usual for a Western Union office at midnight—presumably fairly bright lighting to deter robbers.

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381 *Id.* at 442-43.

382 *Id.* at 443; *see* Biggers v. Tennessee, 390 U.S. 404, 407 (1968) (emphasis added) (discussing issues and biases with identifying suspects).

383 *Foster*, 394 U.S. at 446 (Black, J. dissenting) ("I am compelled to say that if I were the trial judge in this case I would not know how to proceed or how to decide whether the 'error' in this case was harmless….For the Court has in effect decided here that the officers of the law have so 'arranged' lineups that the eyewitness to the robbery has been led to make an 'irreparable mistaken identification.' In other words, no one now or hereafter can believe his identification of Foster as the robber. Since he and the accomplice are the only eyewitnesses, and since, in order to convict, California law requires evidence of an accomplice to be corroborated, the Court's direction means, I suppose, that the trial judge here should dismiss the case.").

384 *Id.* at 446-47.

ii. Duration of Observation

It is reasonable to conclude that the whole event transpired in a minute or two.

b. Attention

i. Attention to Perpetrator

The time was short but packed with action: two armed men entered with guns out, shoved a note under the face of the night manager informing him that he was being held up, demanded money, took the money and ran from the office.

ii. Attention to Weapon

The manager's attention, to the extent that it was focused on anything at all other than survival and compliance with the robbers' demands, might have been focused on the weapons threatening him rather than on the faces of the robbers.

c. Description: Accuracy and Consistency

There is no description of Foster given by witness David.

d. Speed

The speed was slow, requiring three separate confrontations, including a one-on-one, sit down, and conversation.

e. Certainty/Confidence

The witness did not identify Foster with any degree of confidence even after a one-on-one tableside chat.

i. Prior Failure to Identify Defendant

Eyewitness David failed to identify Foster, 6 inches or so taller than the other two men in a three-man and dressed like the robber, and was not at all certain even after a one-on-one sit down conversation with him. It was only in the second lineup where Foster was the only member who made a reappearance from the first lineup, that David made a positive identification.

f. Extraneous Confidence Inflation

No confidence to inflate.

g. Time Between Observation and ID

If an identification is to be assumed, it was made after about two weeks and three exposures to the suspect, Foster.

h. Stress

Being threatened at gunpoint, while alone at midnight, by men angrily demanding money could be assumed to be extremely stressful.

i. Cross-Racial

This was not noted as an element in this case.

j. Source Confusion

Not applicable.

As the Court's eyewitness jurisprudence stands after *Foster*, where exigent circumstances are present, highly suggestive identification procedures are warranted, and especially so if the circumstances of the crime suggest the reliability of identifications; where exigent factors are *not* present, then the suggestiveness of the confrontation itself warrants exclusion of the identification regardless of the possible reliability resulting from the circumstances of the crime. In its next eyewitness case, the Court analyzed the circumstances of the crime, the conduct of the lineup and consequent identification, and the question whether a preliminary hearing was a critical stage of the proceedings against the defendant requiring presence of counsel.

11. Facts and Holding in Coleman v. Alabama, 399 U.S. 1 (1970)

In *Coleman v. Alabama*,[385] the Court undertook yet another analysis of an eyewitness identification in a station-house lineup to determine whether it was "so unduly prejudicial and conducive to irreparable misidentification as fatally to taint"[386] the eyewitness' in-court identifications of the defendants at the trial, but did so primarily for the purpose of determining whether a defendant has a right to have counsel present at a pretrial hearing on the issue.

Coleman and a codefendant, Stephens, were convicted in an Alabama Circuit Court of assault with intent to murder in the shooting of Casey Frank Reynolds after he and his wife parked their car by the side of an Alabama highway to change a flat tire.

At the trial Reynolds testified that at about 11:30 p.m. on July 24, 1966, he was engaged in changing a tire when three men approached from across the highway. One of them shot him from a short distance away. The three then ran up to within three or four feet. Reynolds arose from his stooped position and held on to his wife, who had left the car to watch him as he worked. One of the men put his hand on Mrs. Reynolds' shoulder. Reynolds testified that this was Coleman. Within a few seconds a car with

385 Coleman v. Alabama, 399 U.S. 1 (1970).

386 *Id.* at 3. Presumably, "unduly" was used as a synonym for "unnecessarily," but "unnecessarily" refers to the needs of law enforcement regardingre the apprehension of dangerous criminals while "unduly" references what the defendant was due or deserved. Neither tack was taken by the Court which confined itself to the strength of the identification regardless of its circumstances.

its lights on approached, and the three men turned and "ran across the road. . . ." As they turned to go, Reynolds was shot a second time. He identified petitioner Stephens as the gunman, stating that he saw him "in the car lights" while "looking straight at him." Reynolds repeated on cross-examination his testimony on direct. He said he also saw Coleman "face to face;" "I looked into his face;" and "got a real good look at him."[387]

The police spoke briefly to Reynolds at the hospital two days after the assault and again about two weeks later. On neither occasion was Reynolds able to provide much information about his assailants. At the initial interview at the hospital he gave the vague description that the attackers were "young, black males, close to the same age and height."[388] Both Coleman and Stephens were African American men, but they were not the same age and height. Coleman was twenty-eight years old and very short; Stephens was eighteen years old and very tall. The police testified that at the hospital interview when Reynolds gave the vague descriptions, he was in considerable pain.

Coleman and Stephens were taken into custody and a lineup of six men was arranged containing both suspects. At the lineup, the male victim, Reynolds, immediately identified Stephens and, shortly thereafter, Coleman. Both men were convicted and appealed.

On appeal, Coleman and Stephens argued, *inter alia*, that they were subjected to a station-house lineup in circumstances "so unduly prejudicial as fatally to taint Reynolds' in-court identifications of them."[389] This is a claim that must be determined on the totality of the surrounding circumstances.[390] Sometimes, the Court applies the terminology "totality of circumstances" to the circumstances under which the identification was made, sometimes to the circumstances of the witness' experiencing of the crime—e.g. when examining whether in-court identifications could have been derived from a source independent of a tainted pretrial procedure—and sometimes to both.[391] In *Coleman*, the Court's emphasis switched back and forth.

In analyzing the lineup procedures, the Court began with these facts: The lineup was conducted on October 1, 1966, about two months after the assault and seven months before petitioners' trial.[392] Six men were brought up onto a stage with the very tall Stephens in first place.[393] Before he got into lineup position, Stephens was identified by Reynolds as one of his

387 *Id.* at 4.
388 *Id.*
389 *Id.* at 3.
390 *Id.* at 3-4; *see Foster*, 394 U.S. at 447-48 (stating holding is based on totality of circumstances); *Simmons v. United States*, 390 U.S. 377, 382-83 (1968) (analyzing totality of circumstances); *Stovall*, 388 U.S. at 301-02 (mentioning totality of circumstances).
391 *See United States v. Wade*, 388 U.S. 218, 241 (1967); *Gilbert*, 388 U.S. at, 272 (analyzing and directing analysis of the totality of circumstances related to circumstances of the crimes); *Coleman*, 399 U.S. at 4 (analyzing totality of circumstances related to lineup and in-court identification).
392 *Coleman, 399 U.S.* at 3.
393 *Id.* at 4. (Stephens was 18 years old and 6' 2" tall, and Coleman was 28 years old and 5' 4 ½" tall).

assailants. Reynolds testified, "As soon as he stepped inside the door—I hadn't seen him previous to then until he stepped inside the door, and I recognized him . . . Just as soon as he stepped up on the stage, I said, 'That man, there, is the one; he is the one that shot me.'"[394]

The Court also considered the question of prejudice in the conduct of the lineup itself given the defense's assertions that it was likely that only Coleman was required to repeat words requested by the victim witness, Reynolds. The Court noted that it was not clear when the request was made. Reynolds testified that although he did not inform police of it, he did in fact identify Coleman before any of the men could speak. The Court did not seem greatly troubled that only some of the men—perhaps one, Coleman—were made to quote the words of one of the assailants. The Court remarked, "[t]here is some conflict in the testimony on this point… In any case, the court could find on the evidence that Reynolds identified both petitioners before either said anything, and that therefore any failure to require the other participants to say the same words did not aid or influence his identifications."[395]

The Court also considered whether it was prejudicial to Coleman that he was the only man in the lineup wearing a hat; one of the attackers wore a hat. (There are no details given about either hat.) In any case, the Court was not greatly troubled by the hat. "Although the record demonstrates that Coleman did in fact wear a hat at the lineup, nothing in the record shows that he was required to do so. Moreover, it does not appear that Reynolds' identification of Coleman at the lineup was based on the fact that he remembered that Coleman had worn a hat at the time of the assault. On the contrary, the court could conclude from his testimony that Reynolds "asked them to make John Henry Coleman to take his hat off, or move it back," because he wanted to see Coleman's face more clearly."[396]

Lastly, the Court also dismissed as irrelevant Reynolds' testimony that "when the police asked him to go to the city jail he "took [it] for granted" that the police had caught his assailants"[397] . . . "[b]ecause . . . the record is utterly devoid of evidence that anything the police said or did prompted Reynolds' virtually spontaneous identification of petitioners among the lineup participants as the proceeding got under way."[398]

In its analysis of the totality of circumstances in which the crime took place, the Court was more impressed by the testimony of Reynolds than the facts of the circumstances. The Court first considered the meager and inaccurate descriptions given by Reynolds of his attackers, and, then, dismissed their inadequacy. "At the initial interview at the hospital he gave a vague description—that the attackers were 'young, black males, close to the same age and height.'"[399] The Court noted that both petitioners were

394 *Id.* at 5.
395 *Id.* at 6.
396 *Id.*
397 *Id.*
398 *Id.*
399 *Id.* at 4-5.

black, but Stephens was eighteen years old and 6'2" tall, and Coleman, was twenty-eight years old and 5'4 ½" tall.[400] The Court did not mention further the discrepancies between the descriptions given and the actual appearances of the men despite one man being nearly a foot taller and ten years older than the other. The Court observed that at the time Reynolds gave his descriptions he was in considerable pain, and that consequently the questioning was very brief.[401] The inference seems to be that at a later time and with more extensive interviewing, Reynolds could have given more precise descriptions. But, there is no mention in the case of his ever having done so.

Nor did the Court take more than a glancing look at the fact that the assailants were African-American and the victim witness was White. Also, there is no mention made of why Mrs. Reynolds did not—or could not—make an identification although she was standing beside her husband during the whole episode. The Court noted approvingly that Reynolds made his identifications of Stephens and Coleman almost immediately, although the facts are actually muddled with respect to Coleman. The Court took note of the fact that police could not corroborate Reynolds' claim that he identified Coleman before he spoke, but did not seem to give it much weight.[402]

The Court paid no heed at all to the likely debilitating effects on perception and memory of the truly horrific circumstances of the actual assault and shootings in a dark and isolated location with the only illumination the headlights of a passing vehicle or of the terrifying experience of its victims, Mr. and Mrs. Reynolds, despite carefully detailing them in its statement of the facts of the case. This was so despite the Court's emphasis in its earlier eyewitness cases on the importance of the witness' opportunity to observe and attend to the perpetrators of a crime in evaluating the source and reliability of an identification.

The Court concluded its analysis of the totality of circumstances of the crime and the lineup in Coleman's and Stephens' case thusly: "Indeed, the court could find on the evidence…that Reynolds' identifications were entirely based upon observations at the time of the assault and not at all induced by the conduct of the lineup."[403] The witness' certainty, his claim that, despite all the evidence to the contrary, he got "a real good look" at his assailants on a highway near midnight by the lights of a passing car,[404] and the claimed spontaneity of his lineup identification of Stephens—and, perhaps, of Coleman—so impressed the Court that all of the other factors that would have cast serious doubt on the reliability of the identification were cast aside. (The decision was nevertheless reversed and remanded because the defendants were denied counsel at a preliminary hearing.)

400 *Id.* at 4.
401 *Id.* at 4-5.
402 *Id.* at 5.
403 *Id.*
404 *Id.*

Below is an account of all of those factors that might or might not have cast doubt on the reliability of Mr. Reynolds' identifications of Coleman and Stephens.[405]

12. Totality of Circumstances Analysis of Facts in Coleman

a. Observation

i. Scene Illumination

The crime took place at 11:30 p.m. on a dark road with the moon at the First Quarter. It is unlikely that the suburban highway was lighted at all in 1966, so, other than the pale moonlight, the only illumination available was that from the headlights of the passing car.

ii. Duration of Observation

The maximum duration of exposure would be the length of time it would have taken the three men to cross half the road from the median to the shoulder where Reynolds was working, plus the few seconds noted by Reynolds before they turned and ran away. The width of a roadway lane depends on where and what type it is: freeways average twelve feet in width and rural roadway from nine to twelve feet.[406] How long does it take an adult male to run twenty-four feet? The entire episode cannot have taken more than thirty seconds.

b. Attention

i. Attention to Perpetrator

Reynolds testified that he "looked into (Coleman's) face" and "got a real good look" at him at the same time that Reynolds rose, wounded, to grasp his wife and protect her as Coleman put his hand on her, and, then, as he was shot a second time while the men fled, he saw Stephens "in the car lights" while "looking straight at him."

ii. Disguises

One of the attackers wore a hat. Coleman wore a hat at the lineup—the only participant to do so, although the record indicates that he removed or displaced the hat at the lineup to reveal his face.

iii. Distinctive Perpetrator Characteristics

If it was the case that two of the perpetrators, the one who touched Mrs. Reynolds and the one who fired the second shot striking Reynolds, were of statistically rare heights—one very tall and one very short, and that two of

405 The Court never touches on the self-contradictory, oddly incriminating, testimony of defendant Stephens. *See* Coleman v. State, 211 So. 2d 917, 918 (Ala. Ct. App. 1968).

406 *See* Lane Width, U.S. DEP'T OF TRANSP. FED. HIGHWAY ADMIN, http://safety.fhwa.dot.gov/geometric/pubs/mitigationstrategies/chapter3/3_lanewidth.htm.cfm (last modified Oct. 15, 2014).

the men in the lineup were of similar heights, then the identifications might have been made on the basis of the single distinctive characteristic of unusual heights.[407]

iv. Attention to Weapon

At least two—possibly three—of the assailants were not only armed with guns but were shooting Reynolds with them, possibly drawing his attention to his injuries along with the weapons used to shoot him.

c. Description: Accuracy and Consistency

i. Accuracy of Description

Reynolds described his assailants as "young, black males, close to the same age and height." Research has shown a lack of correlation between accuracy of description and identification, but here, the descriptions were about as vague as they could be. The absence of any details and the very large errors in claims about the ages and heights strongly suggest that the witness did not actually get a good enough look at his assailants to perceive and remember their physical features in any detail.

ii. Distinctiveness of Criminal

Highly distinctive heights are also likely to be noticed and identified correctly. Two of the perpetrators, the one who touched Mrs. Reynolds, and the one who fired the second shot striking Reynolds, might have been of statistically rare heights. The average black American male is 69.5" tall,[408] so Stephens was 4.5" taller than average and Coleman 5.0" shorter. Working on simple probability, there is a sixty-seven percent probability that the other four men in the lineup were between 5' 7" and 5' 11" tall. The statistical probability of an adult man being below 5' 5" tall is less than two percent, like the probability that he would be over 6' 1" tall. Thus, both Stephens and Coleman would stand out from the others by virtue of their height alone and the very tall Stephens was first out on the stage.

d. Speed

i. Speed of ID ≈ Accuracy of ID

Although normally "instantaneous" speed of identification can be taken as indicative of accuracy, where there is an obvious basis for the identifications other than the actual recognition of the assailants, the speed-accuracy relationship might not apply.

e. Certainty/Confidence

407 Dani Arbuckle, *What Is the Average Adult Male Height and Weight*, LIVESTRONG, http://www.livestrong.com/article/289265-what-is-the-average-adult-male-height/ (last updated Oct. 27, 2015).

408 *Id.*

Reynolds was very confident about his identification at the lineup, but research has shown very little relationship between confidence and accuracy.

f. Extraneous Confidence Inflation

There is no evidence on this point.

g. Time Between Observation and ID

About nine weeks passed from the time of the attack to the lineup confrontation. That is a long time for a witness to hold in memory the faces of the perpetrators of a violent crime against him or her.

h. Stress

Reynolds was under considerable stress, not least from having been shot twice during the course of the attack, in addition to the threat to his wife. It is unlikely indeed that his attention, perception and memory were unaffected by such intense stress.

i. Cross-Racial

Reynolds was white; his three assailants were black. It is reasonable to consider that since cross-racial identifications are notoriously difficult that such difficulty would apply in the case of white Reynolds' attempting to identify his black assailants.

j. Source Confusion

i. Summary: Transferring Mugshots to Lineups

Mugshots were shown to witness Reynolds and he failed to identify anyone pictured but the Court notes that there is nothing in the record to say whether either defendant was pictured in the mugshots shown.

ii. Summary: Transferring Co-witnesses' Information into Memory

There is no evidence at all about Mrs. Reynolds' identifications or communications.

That all of these circumstances deleterious to reliability combined weighed less heavily on the Court than the witness' repeatedly stated confidence in his ability to make the identifications is a sobering realization indeed. That other judges—both expert and otherwise—might reach drastically different conclusions given the same facts did not seem to occur to the majority. However, the very next eyewitness case before the Court—its seventh—brings the reality of dueling judicial conclusions to the fore in *Neil v. Biggers,* in 1972.

13. Facts and Holding in Neil v. Biggers, 409 U.S. 188 (1972).

In *Biggers*, the Court considered whether an identification, although resulting from an impermissibly suggestive one-man showup, might nevertheless be reliable—and admissible—when considered in light of the totality of circumstances. "As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include 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."[409]

Employing these factors to determine whether the identification of Biggers was reliable, the Court concluded that it was. "Weighing all the factors, we find no substantial likelihood of misidentification. The evidence was properly allowed to go to the jury."[410]

In *Biggers*, in January, 1965, a youth with a butcher knife grabbed a woman in the doorway to her kitchen. The witness testified that although there was no light in the kitchen, there was light coming in from the bedroom into the hallway. She screamed; her twelve-year-old daughter emerged from her lighted bedroom and began to scream as well. The assailant told the victim to shut her daughter up or he would kill them both. He then forced her to walk at knifepoint about two blocks by a railroad track, took her into the woods there, and then raped her in the light of a full moon. He then left.[411]

The victim described her assailant to the police as "being fat and flabby with smooth skin, bushy hair and a youthful voice." She testified that he was between sixteen and eighteen years old, between five feet ten inches and six feet tall, had a dark complexion and weighed between 180 and 200 pounds.[412]

Over the next seven months, the victim looked at photographs of suspects in her home and at the police station; she looked at men in lineups and in showups; she was shown between thirty and forty photographs. She once told the police that one man in a photograph had features similar to her assailant but she never identified anyone as her assailant from the suspects she viewed.[413]

In August, the victim was called to the station to try to identify another suspect, Biggers, who had been arrested on an unrelated rape charge. The police screened the city jail and called the juvenile home to try to find suitable foils for a lineup with Biggers, but failed to find anyone "fitting respondent's unusual physical description."[414] Hence, they conducted a

409 *Biggers*, 409 U.S. at 199-200.
410 *Id*. at 201.
411 *Id*. at 193-94.
412 *Id*. at 194.
413 *Id*. at 194-95.
414 *Id.* at 195.

one-man showup that consisted of two detectives walking past the victim with the defendant who said, "Shut up or I'll kill you." The victim identified Biggers and said that she had no doubt about her identification.[415]

In evaluating the reliability of this showup identification, the Court assessed the opportunity of the witness to view the criminal and noted that the rape victim here had spent a considerable period of time—as much as half an hour—with the rapist and that she was with him under adequate artificial light and under a full moon outside and had faced him directly and intimately at least twice, once in the house and later in the woods. "In the nature of the crime, there are rarely witnesses to a rape other than the victim, who often has a limited opportunity of observation. The victim here, a practical nurse by profession, had an unusual opportunity to observe and identify her assailant."[416] In assessing her degree of attention to the perpetrator, the Court seems to suggest that as a practical nurse she would have unusually acute powers of observation. "She testified at the habeas corpus hearing that there was something about his face 'I don't think I could ever forget.'" [417] Although the Court in *Wade* had noted that witnesses' perceptions may be rendered less reliable by the understandable reactions they might feel as the victim of a particularly stressful crime, the Court here seemed to believe that a woman, during a half-hour rape that occurred after she was dragged from her home at knifepoint—having been threatened with her own death and the death of her twelve year-old daughter—and pulled into the dark woods, would have an excellent opportunity to observe her assailant.[418]

The Court reviewed the accuracy of her description and observed that "Her description to the police, which included the assailant's approximate age, height, weight, complexion, skin texture, build, and voice, might not have satisfied Proust but was more than ordinarily thorough." [419] In evaluating her level of certainty, the Court noted that she had no doubt that Biggers was her rapist. The Court noted that while the seven month lapse in time between the crime and the showup identification would ordinarily be a negative factor, here the "the testimony is undisputed that the victim made no previous identification at any of the showups, lineups, or photographic showings. Her record for reliability was thus a good one, as she had previously resisted whatever suggestiveness inheres in a showup."[420]

On this *ad hoc* analysis of identification reliability factors the Court concluded, "Weighing all the factors, we find no substantial likelihood of misidentification."[421]

The Court's conclusion as to the reliability of the identification was in direct opposition to the conclusions reached by the District Court and by

415 *Id*.
416 *Id*. at 200.
417 *Id*. at 200-01.
418 *Id*. at 201.
419 *Id.* at 200.
420 *Id*. at 201.
421 *Id*.

the Court of Appeals below which examined the same set of facts. The majority simply remarked, "We find that the District Court's conclusions on the critical facts are unsupported by the record and clearly erroneous."[422] As the dissent by Brennan explains, "Even a cursory examination of the Court's opinion reveals that its concern…extends to an essentially *de novo* inquiry into such "elemental facts" as the nature of the victim's opportunity to observe the assailant and the type of description the victim gave the police at the time of the crime."[423]

The analysis and evaluation of another person's experience as a victim of a crime is clearly fraught with peril and, as is so strongly illustrated in this case, highly subjective—even for distinguished jurists. To illuminate this complexity, below is an analysis of the factors likely to be considered relevant by a forensic psychologist. The psychologist might well have suggested an interpretation of the facts identical to that of the Supreme Court but emphatically not for the main reason cited by the Court—the confidence of the victim witness. The expert would more likely suggest that research has shown the critical factor is likely to have been that the perpetrator was unusually distinctive.

14. Totality of Circumstances Analysis of Facts in Biggers

a. Observation

i. Scene Illumination

The beginning of the episode occurred inside in very dim light and the rape itself occurred in moonlight. The moon in January 1965, was full on January 17, not January 22.[424] Light from the bedroom could not have been light falling directly on the assailant's face. It is unclear that the victim here could have had an unusually optimal opportunity to identify her assailant unless she could see his face and features in close proximity during the rape.

ii. Duration of Observation

The whole incident took between fifteen minutes and half an hour.[425] That is plenty of time to carefully observe someone if there is adequate lighting and nothing distracting like fear, weapons, or sexual assault to distract the attention.

422 *Id*. at 200.
423 *Id*. at 203-04.
424 Calender-12.com, *Moon Phases 1965*, https://www.calendar-12.com/moon_phases/1965.
425 *Neil v. Biggers*, 409 U.S. at 194.

b. Attention

i. Attention to Perpetrator

During the first time she had a chance to see the perpetrator's face, the victim had just been suddenly attacked in her own home by a man with a knife, her daughter was screaming, and her assailant was threatening to kill both her and her daughter if she could not make her be silent. It seems very unlikely that she would have been able to attend carefully. Generally, rape by a stranger at night at knifepoint is not the kind of occurrence that engenders close examination of the assailant despite the close physical proximity of victim and attacker. However, she testified at the habeas corpus hearing that there was something about his face "I don't think I could ever forget."[426]

ii. Distinctive Perpetrator Characteristics

The rapist was very young and very big, with unusually smooth skin and an unusual voice. The mother of teenage boys, the victim was much struck by the young age along with the unusually large size of her youthful attacker.

The record also states that a search of the jails and juvenile detention facilities did not turn up anyone who resembled the suspect sufficiently to make up a fair lineup. This certainly suggests that Biggers was quite distinctive in appearance.

iii. Attention to Weapon

The victim and her twelve year-old daughter were attacked by a youth who threatened to kill them with a butcher knife he was carrying. The presence of such a weapon would tend to draw the witness' attention to it.

c. Description: Accuracy and Consistency

i. Distinctiveness of Criminal => Accurate Descriptions & Accurate Identifications

The victim described the rapist as "being fat and flabby with smooth skin, bushy hair and a youthful voice"…between sixteen and eighteen years old, between five feet ten inches and six feet tall, weighing between 180 and 200 pounds, and as having a dark brown complexion."[427] Proust aside, as the Court put it,[428] it seems that the victim gave an unusually thorough description of her unusually distinctive assailant to the police.

426 *Id.*
427 *Id.* at 194.
428 *Id*. at 200.

ii. Consistency of Description

Duly recalling that consistency of description is not reliably related to accuracy of either description or identification, the victim never changed her mind about any of the details and her description fit the defendant.

d. Speed

The victim's identification did not take place the instant she saw the defendant—who should have matured somewhat during his sixteenth year—but did follow immediately on his having spoken the words threatening to kill if her daughter did not shut up.

e. Certainty/Confidence

The Court noted that the victim had no doubt that Biggers was her rapist. Although confidence correlates only weakly with accuracy of identification, confidence in an identification almost instantly made is predictive of identification accuracy. However, the research on this question is focused on physical description not voice recognition.

f. Extraneous Confidence Inflation

There is no indication that this ever took place.

g. Time Between Observation and ID

There passed at least seven months between the commission of the crime and the showup identification of Biggers at the courthouse.

h. Stress

Despite the Court's observations that "She was no casual observer, but rather the victim of one of the most personally humiliating of all crimes,"[429] it is reasonable to conclude that the stress of the attack on her person by a large young man wielding a butcher knife might well have had a strong negative impact on the victim's ability to perceive and remember her attacker.

i. Cross-Racial

Both the victim and the rapist were African American.

j. Source Confusion

Not applicable.

The forensic psychologist and the Supreme court would likely have evaluated the facts of this case very differently, yet reached the same conclusion—that the victim's identification of Biggers was probably reliable. The Court's judgment seemed to rely most heavily on the victim's

429 *Id*. at 201.

confidence and on its characterization of the experience of rape at knifepoint. The psychologist' analysis would likely stress the distinctiveness of the perpetrator.

Perhaps as important as the Court's mistaken belief in the value of simple confidence is the inescapable fact that the Supreme Court reached such a drastically different conclusion—on the same set of facts—from that reached by the District Court and by the Court of Appeals below. The same split among judicial reliability analyses is evident in *Manson v. Brathwaite*, (1977), the last of the Court's classic eyewitness cases.

15. Facts and Holding in Manson v. Brathwaite, 1977

In *Brathwaite*, 1977, the Court once again revisited the question of "…whether the *Due Process Clause of the Fourteenth Amendment* compels the exclusion, in a state criminal trial, apart from any consideration of reliability, of pretrial identification evidence obtained by a police procedure that was both suggestive and unnecessary."[430] Here, a single photograph.

On May 5, 1970, at 7:45 p.m., a few minutes before sunset on a cloudy day,[431] Jimmy Glover, a black undercover state police officer, knocked on the third floor door of an apartment to purchase narcotics. The hallway was illuminated only by natural light from the setting sun through a window in the hallway. The door opened twleve to eighteen inches and Officer Glover saw a man standing within with a woman behind him. There was no light visible in the apartment. Glover asked for "two things" of narcotics and handed the man two ten dollar bills. The door closed. Soon, the door opened and the man handed Glover two glassine bags, then closed the door. While the door was open, Glover stood within two feet of the person from whom he purchased the drugs and observed his face. Glover testified that the entire transaction from the door's opening the first time to its closing the second took place within five to seven minutes.[432] The man and woman within the apartment were visible only during the two brief exchanges of query, money, and drugs. There is nothing in the record to indicate that the total time for viewing the occupants was more than a minute.

Glover returned to the street and described the seller to a back-up officer, Officer D'Onofrio. The rather generic description was of "a colored man, approximately five feet eleven inches tall, dark complexion, black

430 Manson v. Braithwaite, 432 U.S. 98, 99 (1977) (mentioning both *Stovall* and *Biggers* are implicated in making such determination).

431 Brathwaite v. Manson, 527 F.2d 363, 364, 371, 399 (1975) ("Trooper Glover of the Connecticut State Police, who had been assigned to the Hartford narcotics squad in an undercover capacity, went with an informant, Henry Brown, around 7:45 p.m. on the evening of May 5, 1970, to an apartment on the third floor of a building at 201 Westland Street . . . [a]lthough Glover testified that the hallway was well lit by sunlight, we can take judicial notice that on May 5, 1970 sunset at Hartford took place at 7:53 p.m."); Manson v. Brathwaite, 432 U.S. 98, 99 (1977) ("On May 5 of that year, about 7:45 p.m., e.d.t., and while there was still daylight, Glover . . . went to an apartment building at 201 Westland . . . .").

432 Manson v. Brathwaite, 432 U.S. at 99. The Dissent by Marshall and Brennan estimates, much more realistically than the 5 to 7 minutes estimate by the Majority, that Glover could have viewed the seller's face for no more that 15-20 seconds during the transaction itself. *Id.* at 129-30.

hair, short Afro style, and having high cheekbones, and of heavy build."[433] He was wearing at the time blue pants and a plaid shirt at the time.[434] D'Onofrio suspected that Brathwaite, whom he knew by sight, might be the seller. He obtained a picture of Brathwaite and left it at Glover's office. When Glover returned to his office on May 7, two days later, he viewed the photograph alone and identified the subject as the seller of the drugs he had purchased at the apartment on May 5. However, no arrest was made, however, until July 27, eighty days later. Brathwaite was arrested at the same apartment. No physical lineup followed.

At the trial in January of the next year, the photograph given by D'Onofrio to Glover was introduced into evidence by the prosecution without objection from the defense. Glover testified that although he had not seen Brathwaite in the eight months since the sale, "there (was) no doubt whatsoever" in his mind that the person shown in the photograph was Brathwaite.[435] Nothing in the record suggests that the defense elicited testimony that Office Glover refreshed his recollection before testifying or addressed the possibility that Glover might have been holding the photograph while seated facing the defendant when he made that statement."[436] Glover also made a positive in-court identification without defense objection.[437]

Brathwaite was found guilty. The verdict was affirmed by the Supreme Court of Connecticut. A little over a year later, Brathwaite filed a *habeas* petition in the United States District Court for the District of Connecticut.[438] The District Court first found that while it was clear in that circuit that the presentation to a witness of a single photograph for identifications was impermissibly suggestive,[439] the court employed the second step of assessing reliability according to the factors enumerated in *Biggers*. The District Court concluded that when considering all of these indicia of the reliability of Glover's identification of Brathwaite, the impermissibly suggestive single photograph confrontation had *not* led to a substantial likelihood of irreparable misidentification.

Brathwaite appealed the District Court's decision to the United States Court of Appeals for the Second Circuit. The Second Circuit reversed, having concluded that a *per se* exclusionary rule for identification evidence resulting from an unnecessarily suggestive photographic showup was needed to deter the use of improper procedures.[440]

433 *Id.* at 98.
434 *Id*. at 101-02.
435 *Id*. at 102 (there is no clarification of the implied relationships among drug seller, photograph, and Defendant Brathwaite).
436 *Id*.
437 *Id.*
438 *Id.* at 103.
439 *Id*. at 107-08.
440 *See id.* at 109 ("No rules less stringent than these can force police administrators and prosecutors to adopt procedures that will give assurance against the awful risks of misidentification.").

The Second Circuit then performed a gratuitous reliability analysis.[441] The court concluded that there was just too great a danger that Brathwaite had been arrested because he was a man whom D'Onofrio had observed previously in the vicinity of the crime, that he was thought to be a likely drug offender; and that he was really arrested just because he was known to be in the relevant apartment at the time, and not because Glover "really remembered him as the seller."[442]

The Supreme Court, noting a split in the circuits,[443] took the case to decide whether a *per se* exclusionary rule was to be preferred over an approach that assessed the totality of circumstances in which the witness observed the crime and its perpetrator.[444] The Court chose the reliability approach, acknowledging that the totality of circumstances approach is *ad hoc* but it "serves to limit the societal costs imposed by a sanction that excludes relevant evidence from consideration and evaluation by the trier of fact."[445] The Court declared that, "The standard, after all, is that of fairness as required by the Due Process Clause of the Fourteenth Amendment," [446] and "reliability is the linchpin in determining the admissibility of identification testimony."[447]

The Court undertook its own—the third—analysis and concluded that the identification was reliable despite the unnecessary suggestiveness of identification through a single photograph.[448] Short of "a very substantial likelihood of irreparable misidentification,"[449] such evidence is for the jury to weigh. "We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature."[450]

The Court took note of the notoriously unreliable character of eyewitness testimony, quoting from a federal appeals case: "It is part of our adversary system that we accept at trial much evidence that has strong elements of untrustworthiness...[w]hile identification testimony is significant evidence, such testimony is still only evidence, and, unlike

441 The Court provides no reason for conducting this reliability analysis in the face of its ruling requiring *per se* exclusion of the identification regardless of reliability; perhaps the conclusion so different from that of the lower court was intended to illustrate the unreliable nature of judges' reliability analyses.

442 *Id*. (quoting *Brathwaite v. Manson*, 527 F.2d 363, 372 (1975)).

443 *Id*. at 109-10 ("The first, or *per se* approach, employed by the Second Circuit in the present case, focuses on the procedures employed and requires exclusion of the out-of-court identification evidence, without regard to reliability, whenever it has been obtained through unnecessarily suggested confrontation procedures. The justifications advanced are the elimination of evidence of uncertain reliability, deterrence of the police and prosecutors, and the stated "fair assurance against the awful risks of misidentification.").

444 *Id.* at 112.

445 *Id.* at 110.

446 *Id.* at 113 (quoting United States v. Lovasco, 431 U.S. 783, 790 (1977)).

447 *Id*. at 114.

448 *Id*. at 115-16.

449 *Id*. at 116 (citing Simmons v. United States, 390 U.S. 377, 384 (1968)).

450 *Id*.

presence of counsel, is not a factor that goes to the very heart—the 'integrity' of the adversary process."[451]

In *Brathwaite*, the Court, for the first time, specifically classified the identification procedures at issue as "police" procedures. However, questions of fairness, reliability and due process in identification do not arise when a crime victim or witness simply afterwards encounters the perpetrator by accident or witnesses a crime committed by someone known to her, and reports that fact to the police. It is not at all clear that the *Brathwaite* Court meant to distinguish "a police procedure" from any other, unspecified, procedure.

Because the differences among the various reliability analyses by the three sets of judges in Brathwaite are so striking, it will be especially instructive in this case to present the facts seen in light of the modern context of established scientific information about the factors that actually do affect a witnesses' reliability.

16. Totality of Circumstances Analysis of Facts in Brathwaite

a. Observation

i. Scene Illumination

The witness viewed the drug seller a few minutes before sunset in the natural light provided by the setting sun coming through a window onto an otherwise unlighted hallway. The seller was standing back inside the unlighted apartment. There was light from a window in the apartment.

ii. Duration of Observation

It seems likely that Glover could have viewed the seller's face for no more that fifteen to twenty seconds during the actual transaction itself since the apartment door was closed the rest of the time.

b. Attention

i. Attention to Perpetrator

Glover observed that the door was opened twelve to eighteen inches, that there was a window in the room behind the door, and that there was a woman standing behind the man. Glover "must have looked away from the seller's face to hand him the money and receive the drugs . . . [t]he observation during the conversation thus may have been as brief as five or ten seconds."[452]

ii. Attention to Weapon

No weapon was employed in the crime.

451 *Id.* at 133 (quoting Clemons v. United States, 408 F.2d 1230, 1251 (D.C. Cir. 1968)).
452 *Id.* at 129-30 (Brennan and Marshall, J., dissenting).

c. Description: Accuracy and Consistency

i. Accuracy of Description

The description given by Glover could have applied to "hundreds of Hartford black males."[453]

ii. Distinctiveness of Criminal

A black man in the USA in 1970 was quite likely to sport an Afro. "High cheekbones" was the only remarkable feature mentioned by the witness. There was no mention of Brathwaite's distinctive West Indian accent.[454]

iii. Consistency of Description

Not applicable.

d. Speed

There is no indication of speed.

e. Certainty/Confidence

Glover testified he had no doubt whatsoever.

f. Extraneous Confidence Inflation

i. Authorities Influencing Witnesses' Confidence

That Brathwaite's photograph was produced by an experienced fellow narcotics officer might have bolstered the weight of suspicion attending the photograph.

ii. Co-Witnesses Influencing Witnesses' Confidence

Here, the co-witness to the drug sale, an informant, Brown, contradicted Glover's identification, testifying that the drug seller was a woman, but his statements were disregarded because of his admitted drug use at the time.

g. Time Between Observation and ID

Glover saw the photograph two days after the drug buy. No arrest took place until 80 days later. There was never any lineup. Moreover, Glover did not identify Brathwaite at trial until 8 months after that.

h. Stress

Not applicable.

i. Cross-Racial

453 *Id*. at 109.
454 *Id*. at 132.

Both Glover and Brathwaite were black. However, Brathwaite was an immigrant from the West Indies who came to America as an adult.

j. Source Confusion

i. Summary: Transferring Mugshots to Lineups

Glover had seen a single photograph of a suspect; he looked at no other photographs. Glover would have had more than one opportunity to view the photograph between the drug buy and the trial eight months later.

ii. Summary: Transferring Bystanders into Perpetrators

Brathwaite might have been a victim of the "bystander effect" where a party seen in the locale of a crime may be attributed a starring role in that crime when in fact he was but a bystander. In this case, the "bystander effect" would be operating on D'Onofrio who provided the critical photograph.

What would a modern jury confronted with both the psychological research conclude about the reliability of Officer Glover's identification of Brathwaite as the drug seller? This is an especially important question in light of the two highly divergent evaluations by the courts in this case. It might well be more skeptical about the circumstances of the initial observation itself, and of the conditions of the production of the single photograph by the other officer, as well as the biasing effects of a witness viewing only a single photograph of a single suspect on subsequent physical identification.

17. Facts and Holding in Perry v. New Hampshire (2012)[455]

In *Perry v. New Hampshire*, the defendant effectively lost the right to judicial review of the reliability of the eyewitness testimony at the trial or appeals level. In *Perry,* the defendant was denied a requested pretrial hearing to assess the reliability and argued on appeal that suggestive circumstances alone suffice to trigger the court's duty to evaluate the reliability of the resulting identification before allowing presentation of the evidence to the jury.[456]

a. Facts in Perry

Around 2:30 a.m. one August morning, Nubia Blandon, looking out the 4th floor kitchen window of her apartment down into a parking lot below, saw a Black male trying to break into cars parked there. Around 3 a.m., her husband called the police and reported this. Soon thereafter, an officer responded to the scene and encountered a black male, Barion Perry, holding two car stereo speakers he said he had found on the ground. Another officer

455 *Perry v. New Hampshire*, 132 S. Ct. 716 (2012).
456 *Id.* at 722-23.

arrived at the scene and Perry was told to remain with that police officer, next to his police vehicle, while the first officer, Clay, went up to the 4th floor apartment to speak to the witness. Clay met Nubia Blandon right outside the open door of her apartment. When asked to describe the man she had seen, the witness said she had seen a tall black man roaming the parking lot and looking into cars.[457] Asked for a more specific description of the man, Ms. Blandon said that the person she had seen was standing in the parking lot next to the police officer, and pointed across the room toward her kitchen window. Perry was the only black man visible in the vicinity.[458] Perry was then arrested.

About a month later, the witness was shown a photographic lineup containing Perry's picture but could not identify him. At the trial, Ms. Blandon, and the first officer on the scene, Clay, both testified that the witness had identified Perry at the crime scene, although, in fact, no actual identification of a picture or person presently visible to Ms. Blandon had taken place: Ms. Blandon could not pick him out of a photoarray; she could not pick him out of a lineup;[459] she did not identify him at trial. Despite the lack of any actual identification of Perry by Blandon, the Court rather breezily asserted, "There is no reason why an identification made by an eyewitness with poor vision, for example, or one who harbors a grudge against the defendant, should be regarded as inherently more reliable, less of a 'threat to the fairness of trial,' than the identification Blandon made in this case."[460] However, in those examples an identification does actually take place. Simply labeling Blandon's indication with a wave of her hand that the perpetrator was in the parking lot with the policeman does not turn that indication into an identification.

Nevertheless, Perry was convicted of theft and criminal mischief.

Before proceeding to the higher courts' analyses of the identification in Perry, it is appropriate to here lay out what a forensic psychologist expressing an expert opinion on the conditions of observation—such as they were or were not—and the reliability of the "identification.

18. Totality of Circumstances Analysis of Facts in Perry

Nubia Blandon's apartment window and the parking lot four stories below.

457 *Id.* at 721.
458 *Id.* at 728.
459 *Id.* at 730.
460 *Id.* at 727.

a. Observation

i. Scene Illumination

Ms. Blandon was looking down at 3:00 a.m. on August 15, 2008 from a 4th floor window at a person in a poorly and variably-lit parking lot filled with a dozen cars and fully-leaved trees in the middle of summer. The view of the car was partially blocked. The moon was full that night but the angle of view was very poor. She observed only a "tall, Black man."

ii. Duration of Observation

Nubia Blandon testified that the observation could have been from a couple of minutes to a half an hour. She did not claim that she never took her eyes off of him from her first glimpse until she saw Perry standing next to a uniformed police officer by two marked vehicles in a relatively poorly-lit section of the parking lot.

b. Attention

i. Attention to Perpetrator

Blandon testified that she was "so scared (she) really didn't pay attention" to what Perry was wearing strongly suggests that she was so scared she could not pay attention to identifying specifics at all.

ii. Distinctive Perpetrator Characteristics

None observed.

c. Description: Accuracy and Consistency

Blandon noted only, "tall, Black man" with a bicycle. She could not describe his facial features, hair or clothing in any way.

d. Speed

When asked if she had been able to point out the person she saw taking something from the car, she responded, "[n]ot point, as I said, thank God the officer arrived in time and found out who the person was."

e. Confidence/Certainty

Blandon certainly had a strong reason to believe that the person in custody below her window—Perry—was, in fact, the perpetrator of the crime she witnessed, but such a supposition is not an identification.

Blandon never made in-court identification of Perry.

f. Extraneous Confidence Inflation

i. Authorities Influencing Witnesses' Confidence

Officer Clay knew that the witness had observed the crime scene from her window on the fourth floor when she placed Perry with the second officer at the crime scene and then went up the apartment stairs to interview the witness. Blandon most likely assumed—as anyone would—that the man with the officer was a suspect who had been apprehended.

g. Time Between Observation and ID

Since no actual pretrial identification was ever made, the question does not arise. Blandon never actually identified Perry formally in the presence of law enforcement at all.

h. Stress

Blandon's admitted fear during her observation of the criminal activity makes it highly likely that she could not perceive and thus could not retain specifics of the criminal's appearance.

i. Cross-Racial

Nubia Blandon, Barion Perry and the thief were all Black.

j. Source Confusion

i. Transferring Bystanders into Perpetrators

Blandon testified that she observed a black man in the parking lot chasing cars. She testified the man who she saw doing that was the man later standing in custody next to a police officer and cruisers. That two tall black men were sequentially present in this parking lot in this neighborhood would not be unusual.

ii. Transferring Law Enforcement Belief Re Target

That the police had Perry standing next to the uniformed police officer next to the police car with its flashing lights suggested that Perry was the suspect in the case.

An expert certainly could have closely tied the facts in this case to the research on factors showing that those facts generally would create very poor conditions for identifying a perpetrator. However, an expert could have nothing useful to add to illuminate the jurors' evaluation of an identification that did not in actuality take place.

IV. PART III: SUPREME COURT LIMITS RELIABILITY REVIEW: DUE PROCESS IN AND AFTER *PERRY V. NEW HAMPSHIRE*

A. PERRY'S MOTION TO SUPPRESS IDENTIFICATION AS VIOLATION OF DUE PROCESS

Before the trial, Perry had moved to suppress Blandon's identification on the ground that admitting it at trial would violate due process. The New Hampshire trial court denied the motion, declining to undertake a reliability analysis on the grounds that the identification procedure had not been arranged by the police, but by chance.[461] The court held, "[t]o determine whether due process prohibits the introduction of an out-of-court identification at trial…[our] decisions instruct a two-step inquiry. First, the trial court must decide whether the *police* used an unnecessarily suggestive identification procedure."[462] If they did, the court must next consider "whether the improper identification procedure so tainted the resulting identification as to render it unreliable and therefore inadmissible."[463]

Perry appealed to the New Hampshire Supreme Court. Ms. Blandon witnessed what amounted to a one-person showup in the parking lot, Perry asserted, which all but guaranteed that she would identify him as the culprit.[464] But the New Hampshire Supreme Court affirmed the conviction, holding that, following *Biggers*, a court is obliged to undertake a reliability analysis only if it first determined that the identification had been arranged by the police. The court decided that the police did not employ any identification procedure at all, that the circumstances of the identification had occurred out of the control of the police or by accident or in some other way that did not in any way implicate procedural actions of law enforcement. Since Perry failed this crucial first step, the trial court had no reason to consider whether the circumstances of the identification of Perry – as he was detained at the side of the police officer and vehicle at the scene of the crime and viewed by a witness near the 4th floor window in the middle of the night – were unnecessarily suggestive or unreliable.

The Supreme Court granted *certiorari* to resolve a division of opinion on this issue—the "question whether the Due Process Clause requires a trial judge to conduct a preliminary assessment of the reliability of an

461 Totality of Circumstances Analysis of Facts in *Perry* is in Appendix B.
462 *Id.* at 722 (citing *Biggers*, 409 U. S. 188 (1972) and Manson v. Brathwaite, 432 U. S. 98 (1977)).
463 *Id.*
464 *Id.*

eyewitness identification made under suggestive circumstances *not* arranged by the police."[465]

The Court stated that "only when evidence is so extremely unfair that its admission violates fundamental conceptions of justice have we imposed a constraint tied to the Due Process Clause,"[466] and such extreme unfairness can only arise, the Court held, when the police are its perpetrators. "The due process check for reliability, *Brathwaite* made plain, comes into play only after the defendant establishes improper police conduct."[467] Therefore, New Hampshire got it right in holding that *unless* the identification was *deliberately* arranged by law enforcement, there were no due process reliability concerns to trigger pretrial judicial review. The Court explained this new rule by asserting that, "[o]ur decisions...turn on the presence of state action and aim to deter police from rigging identification procedures, for example, at a lineup, showup, or photograph array."[468] With no police misconduct to deter, no reliability analysis was necessary.

When *no* improper law enforcement activity is involved, the Court held, "it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt."[469]

B. CROSS-EXAMINATION BY ATTORNEYS TO ADDRESS JURY DEFECTS

As an illustration of the use of vigorous cross-examination to expose flaws in the witness' testimony,"[470] the Court first gave a rather compelling description of the facts of the Perry case, noting that the witness had a very poor opportunity to observe the criminal at 3 o'clock in the morning in a poorly lit parking lot 4 floors below her, that she could not possibly have paid close attention to someone she could hardly see, that she could give no description other than "tall African-American male,"[471] that she was unable to identify Perry in a photograph, or a lineup, or at trial, and that she had never actually seen the face of the perpetrator in the parking lot—or Perry's for that matter—until trial.

The Court followed up that telling statement of facts with a stark description of the cross-examination of the witness: "While cross-examining Blandon…Perry's attorney constantly brought up the weaknesses of Blandon's identification. She highlighted: (1) the significant distance between Blandon's window and the parking lot; (2) the lateness of the hour; (3) the van that partly obstructed Blandon's view; (4) Blandon's

465 *Id.* at 723.
466 *Id.* (citing *Dowling v. United States*, 493 U. S. 342 (1990)).
467 *Id.* at 726.
468 *Id.* at 721.
469 *Id.*
470 *Id.*
471 *Id.* at 721-22.

concession that she was "so scared [she] really didn't pay attention" to what Perry was wearing; (5) Blandon's inability to describe Perry's facial features or other identifying marks; (6) Blandon's failure to pick Perry out of a photo array; and (7) Perry's position next to a uniformed, gun-bearing police officer at the moment Blandon made her identification."[472] And, yet, Perry was convicted.[473]

With its own analysis of this case, the Court has effectively impugned its own claim that vigorous cross-examination suffices to protect the due process right of a defendant faced with a profoundly unreliable eyewitness identification and a gullible jury. To Barion Perry's jury, the cross-examination by the defense attorney likely seemed to be just the efforts of an adversarial advocate for the accused, and the jury seemed not impressed by her futile attempts to point out the factors that made this "eyewitness" identification both suggestive and unreliable.

Acknowledging and dismissing the problem in a single breath, the *Perry* Court insisted that the well-known jury deficiencies with respect to eyewitness evaluation can be overcome by cross-examination. However, many courts have noted the failure of cross-examination to educate juries about the factors affecting the reliability of eyewitnesses. The District Court in Massachusetts recently noted, "[C]ross-examination of the eyewitnesses will have little effect on jurors if they analyze the evidence through their common-sense, often incorrect assumptions. For example, if jurors incorrectly assume that in general, high levels of stress enhance a [witness'] ability to remember a suspect, they will not be persuaded by defense counsel's efforts to establish that the witness was under a high level of stress during an encounter with the suspect."[474]

The *Guilbert* court in Connecticut observed that "cross-examination is far better at exposing lies than at countering sincere but mistaken beliefs…although cross-examination may expose the existence of factors that undermine the accuracy of eyewitness identifications, it cannot effectively educate the jury about the import of these factors."[475] Similarly, the *Clopten* court in Utah explained that "[b]ecause eyewitnesses may express almost absolute certainty about identifications that are inaccurate, research shows the effectiveness of cross-examination is badly hampered."[476] *Copeland* likewise noted that research indicates that cross-examination is insufficient "to educate the jury on the problems with eyewitness identification."[477] *Guilbert* explained that "…because nothing is obvious about the psychology of eyewitness identification and most people's intuitions on the subject of identification are wrong ... some

472 *Id.* at 729-30.
473 *Id.*
474 United States v. Jones, 762 F. Supp. 2d 270, 277 (D.Mass. 2010), aff'd, 689 F.3d 12 (1st Cir. 2012).
475 *State v. Guilbert*, 49 A.3d 705, 725-26 (Conn. 2012).
476 *State v. Clopten*, 223 P.3d 1103, 1110 (Utah 2009).
477 *State v. Copeland*, 226 S.W.3d 287, 300 (Tenn. 2007).

circumstances undoubtedly call for more than mere cross-examination of the eyewitness."[478]

When jurors need education—and there is no doubt that they need education about eyewitness reliability—that information is provided via the expert witness or through judicial instructions to the jury. Indeed, the *Perry* court also opined that instructions by the judge to the jury about factors affecting eyewitness reliability could compensate for the failures of juror knowledge.

C. TRADITIONAL JURY INSTRUCTIONS BY JUDGE TO ADDRESS JURY DEFECTS

Clearly, reliance on judges' instructions to the jurors to guide them to a reliable and just decision depends naturally on the assumption that most or all jurors actually understand those instructions. But, do they? Decades of research show they do *not* understand.

A number of years ago, Laurence Severance and Elizabeth Loftus (1984) examined court records of 405 trials, civil and criminal, in Washington State. They discovered that about one-quarter of those juries requested clarification of the instructions during jury deliberations. Presumably, that one-quarter failed to fully comprehend the judges' instructions.[479] As noted by Kassin, "The courts' reactions were interesting, to say the least. Almost without exception, judges refused to paraphrase or in any way explain the problematic instructions. Instead, they directed their juries to reread them."[480] (This is hardly surprising since allowing every judge to paraphrase the "law" into his/her own words lends itself readily to changes in the meaning of law and opens the avenue to verdicts being overturned on appeal.)

D. EMPIRICAL WORK ON JUROR COMPREHENSION OF INSTRUCTIONS

In empirical work specifically examining jurors' ability to comprehend judges' instructions, Reifman, Gusick, and Ellsworth (1992) reported that, "[s]tudy after study has shown that jurors do not understand the law they are given, often performing at no better than chance level on objective tests of comprehension."[481] Most prior studies used mock jurors as participants, often college students. In this study, the authors surveyed 224 Michigan citizens who actually had been called for jury duty over a two-month period. Citizens who had actually served on juries and had been instructed on the law by judges were compared to citizens who were called for jury

478 *Guilbert*, 49 A.3d at 243-244; Moore v. Keller, United States District Court, Docket No. 5:11–HC–2148–F (E.D.N.C. March 30, 2012).

479 Laurence J. Severance & Elizabeth F. Loftus, *Improving thet Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 LAW AND SOCIETY REVIEW 153-198 (1984).

480 Saul M. Kassin & Lawrence M. Wrightsman, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 148 (1988).

481 Alan Reifman, Spencer M. Gusick & Phoebe C. Ellsworth, *Real Jurors' Understanding of the Law in Real Cases,* 16 LAW AND HUMAN BEHAV. 539, 540 (1992).

duty but did not serve. Also, jurors who served on different kinds of cases (Stolen property, Assault with intent to murder, Assault with intent less than murder, Assault with a dangerous weapon, Armed robbery, Delivery of controlled substances) were compared to one another. The researchers reported that actual jurors understood fewer than half of the instructions given them at trial, with percent correct on various questions regarding substantive criminal law – ranging from seven percent to seventy-five percent. Actual jurors who received judges' instructions performed no better than uninstructed jurors on substantive questions, but significantly better (4.8/10 correct versus 3.8/10) on questions regarding procedural law. It is notable that although the difference is statistically significant, neither 3.8/10 nor 4.8/10 correct answers represents an impressive degree of understanding of the criminal law contained in the judges' instructions. These results replicated those in prior studies using college students as jurors in mock trials.

In a study published in 1997, Lieberman and Sales reviewed all of the published work on jurors' comprehension of pattern instructions over the prior twenty years and concluded that, "[j]urors do not understand a large portion of the judicial instructions delivered to them even when they are pattern instructions," citing ten studies published since 1977.[482] Comprehension rates varied from study to study with thirteen percent in Steele and Thornburg (1988),[483] thirty-nine percent in Charrow & Charrow (1979),[484] forty-one percent in Reifman, Gusick, & Ellsworth (1992),[485] fifty-one percent in Ellsworth (1989),[486] sixty percent in Elwork, Sales, & Alfini (1977),[487] sixty percent in Forston (1975),[488] seventy percent in Severance et al. (1984),[489] seventy percent in Strawn and Buchanan (1976)[490] and seventy-three percent in Buchanan, Pryor, Taylor, and Strawn (1978).[491] The authors concluded that it is common to find over half the instructions misunderstood, and even the most optimistic results indicate that roughly thirty percent of the instructions are not understood."[492] They

482 Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOLOGY, PUBLIC POLICY AND LAW 589, 596 (1997).

483 Walter W. Steele Jr, & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 77-119 (1988).

484 Robert P. Charrow & Veda Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. LAW REVIEW 1306-1374 (1979).

485 Reifman et al., *supra* note 291.

486 Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?,* 52 LAW AND CONTEMPORARY PROBLEMS 205 (1989).

487 Amiram Elwork, Bruce D. Sales & James J. Alfini, *Juridic Decisions: In Ignorance of the Law or in Light of It.* 1 LAW AND HUMAN BEHAV. 163-189 (1977).

488 Robert F. Forston, *Judge's Instructions: A Quantitative Analysis of Jurors' Listening Comprehension*. 18 TODAY'S SPEECH 34-38 (1970).

489 Lawrence T. Severance, Edith Greene & Elizabeth F. Loftus, *Toward Criminal Jury Instructions That Jurors Can Understand*, 75 THE JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 198 (1984).

490 David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice,* 59 JUDICATURE 478 (1976) .

491 Raymond W. Buchanan et al., *Legal Communication: An Investigation of Juror Comprehension of Pattern Instructions*, 26 COMMUNICATION QUARTERLY 31 (1978).

492 Lieberman and Sales, *supra* note 483 at 597.

note, too, that "[i]n some studies, no difference was found in comprehension rates between participants who are presented with instructions, and those who are not presented with any,"[493] as in the Reifman et al. study described above with actual jurors.[494]

Elaborating on the nature of jurors' lack of comprehension, Ellsworth and Reifman explain that, "[a] general characterization of jurors' cognitive performance during trials is that they are good at remembering and understanding the *facts* of a case but are poor at remembering, understanding, and applying the relevant *laws*."[495] They report that correct performance on remembering facts reaches a level of about 75% correct across various studies.[496]

E. RESEARCH FOCUSED ON IMPROVING COMPREHENSION

Some of the research has focused on rewriting instructions so that legal terminology and requirements are clear. Charrow and Charrow (1979) rewrote instructions and managed to improve comprehension to about sixty percent accuracy—again, not a very impressive increase over the fifty percent average accuracy with pattern instructions.[497] However, repeated rewrites by the seminal researchers, Elwork, Sales and Alfini lifted the level of comprehension up to eighty percent.[498] So, clearly, the possibility exists that juror comprehension could be increased by improvements in the language of the instructions, but this is, of course, a massive undertaking requiring the cooperation of judge associations, bar associations, and standards groups.

A tactic that is considerably less difficult to implement is to change the timing[499] of the giving of instructions to the jurors. Some studies have shown some small improvements in comprehension when jurors are instructed *before* the presentation of the evidence. Heuer and Penrod (1989) found that preinstruction improved comprehension from seventy-thre percent to seventy-seven percent.[500] Similarly, the researcher team Elwork et al. managed to raise comprehension from sixty-seven percent to sixty-nine percent through giving of instructions both *before and after* versus only *after* the presentation of evidence. Kassin and Wrightsman (1979) showed mock jurors a one-hour videotaped trial and gave instructions *before*, *after* or *not at all*. Jurors who had received the instructions *before* hearing the evidence were less likely to convict (thirty-seven percent) than

493 *Id*.
494 Reifman et al., *supra* note 291.
495 *Id.* (emphasis added).
496 Those studies being Cruse and Browne (1987); Forster Lee, Horowitz and Bourgeois (1983); Kassin & Wrightsman (1979); and Smith (1991).
497 Charrow & Charrow, *supra* note 485.
498 Amiram Elwork, Bruce D. Sales & James J. Alfini, MAKING JURY INSTRUCTIONS UNDERSTANDABLE (1982).
499 *See Model Eyewitness Idenitfication Instruction*, MASSACHUSETTS SUPREME JUDICIAL COURT (Nov. 2015).
500 Larry Heuer & Steven Penrod, *Instructing Jurors: A Field Experiment with Written and Preliminary Instructions.* 13 LAW AND HUMAN BEHAV. 162 (1989).

those who heard the instructions *after* the evidence (fifty-nine percent) or *not at all* (sixty-three percent).[501] Kassin and Wrightsman believe that jurors instructed before the trial are more likely to wait until the end to reach a verdict than whose who receive the instructions at the end or never. Smith (1991) found that jurors instructed *both before* and *after* the evidence answered law comprehension questions with seventy percent accuracy while those instructed only *after* answered with sixty-eight percent accuracy—a finding that whatever its statistical reliability has no practical significance.[502] Clearly, while there is some promise of improvement in giving instructions before jurors hear evidence, change in timing is hardly a panacea for juror incomprehension.[503]

It is reasonable to conclude that efforts to improve understanding of instructions through changes in wording and timing have not yet reached a level of success that would warrant standardizing form, wording, or timing of instructions. Currently, research on comprehension of pattern instructions has produced the same troublesome findings that research on judicial instructions has shown since the mid-1970's—jurors understand only about half of the instructions on substantive law given to them by the judges in trials.[504] Traditional judicial instructions, even those rewritten for clarity, have been shown to be largely ineffective as a reliable tool for educating jurors about the law.

1. Where Does Ineffectiveness of Cross & Traditional Instructions Leave Due Process?

Perry acknowledged that briefs submitted on behalf of Perry by sources such as the American Psychological Association established that mistaken identifications are the leading cause of false convictions and that as many as one in three eyewitness identifications is inaccurate, but waved away the results of this scientific research by stating, "We have concluded in other contexts, however, that the potential unreliability of a type of evidence does not alone render its introduction at the defendant's trial fundamentally unfair."[505] The other types of potentially unreliable evidence the Court cited were the hearsay testimony of jailhouse snitches,[506] and evidence concerning prior acquittals[507]—neither of which is burdened by the so soundly and repeatedly demonstrated unreliability of eyewitness testimony. Eyewitness evidence is *not* just "potentially unreliable;" it is actually, empirically, demonstrably unreliable. The Court here is indulging

501 Saul M. Kassin & Lawrence S. Wrightsman, *On the Requirements of Proof: The Timing of Judicial Instruction and Mock Juror Verdicts,* 37 JOURNAL OF PERSONALITY AND SOCIAL BEHAV. 1877 (1979).

502 Vicki L. Smith, *Impact of Pretrial Instruction on Jurors' Information Processing and Decision-Making*, 76 JOURNAL OF APPLIED PSYCHOLOGY 220 (1991).

503 *Id* at 224.

504 *Infra* at notes 481-504.

505 *Perry,* 132 S. Ct. at 728 (2012).

506 *Id.* (citing Kansas v. Ventris, 556 U. S. 586, 594 (2009)).

507 *Dowling*, 493 U. S. at 353 (rejecting argument that the introduction of evidence concerning acquitted conduct is fundamentally unfair because such evidence is "inherently unreliable").

in the classic ploy of postulating false equivalence where there is none and then generalizing from that postulation.

Perhaps sensitive to the dramatically differing results of various reliability analyses in its own cases and the courts below it, *Perry* clearly seemed to be not so much oblivious to the overwhelming evidence of the unique unreliability of eyewitness evidence, but, rather, desperate to punt the evaluation of that reliability off the judge's shoulders and back onto those of the jury—where it was prior to the *Wade*, *Gilbert*, *Stovall* trilogy's excursion into judicial review back in 1967. "Our unwillingness to enlarge the domain of due process as Perry and the dissent urge rests, in large part, on our recognition "that the jury, not the judge, traditionally determines the reliability of evidence."[508]

Not only is the punt rather late in the game, it also contravenes the Court's own acknowledgement of the special character of eyewitness evidence going back to *Wade*. It is also contrary to the bedrock principle of Due Process established in *Rochin*[509] in 1952, and reaffirmed in case after case since then, that "convictions cannot be brought about by methods that offend "a sense of justice."'"[510] A conviction based solely on a type of evidence known to be inaccurate in one in three cases[511] and to be the leading cause of wrongful convictions[512] clearly offends "a sense of justice." There is no greater injustice than wrongful conviction: There is nothing more "unfair." However strongly the Court might evoke respect for the traditional province of the jury to weigh the evidence before it, Due Process requires that we look for another way out of the impasse.[513] In the face of massive and manifest injustice, we must seek a route to Due Process that both respects the traditions of the jury and acknowledges the reality informed by modern research.

508 *Perry,* 132 S. Ct. at 728.
509 *Rochin v. California*, 342 U.S. 165 (1952).
510 *Id.* at 173.
511 *Perry,* 132 S. Ct. at 728; *See* Brief for Petitioner 17–22 (citing studies showing that eyewitness misidentifications are the leading cause of wrongful convictions); Brief for American Psychological Association as *Amicus Curiae* 14–17 (describing research indicating that as many as one in three eyewitness identifications is inaccurate).
512 *Id.*
513 *Id.* at 731 (Sotomayor, J., dissenting).

V. APPENDIX A

CHECKLIST OF RELIABILITY FACTORS FROM FORENSIC PSYCHOLOGICAL SCIENCE

* = Counterintuitive

1. Observation =>

a. Scene Illumination

Adequate illumination is a prerequisite to the perception and formation of any memory for an event or a person.

b. Duration of Observation

The longer the exposure, the more accurate the recall.

c. Familiarity of Perpetrator

A familiar perpetrator is an extreme case of long duration of observation

2. Attention

a. Attention to Perpetrator

Witnesses must attend to the perpetrator in order to remember the perpetrator. Witnesses who do not understand the significance of what they hear or see when witnessing a crime might not direct their attention to the perpetrator.

i. Disguises or Obscured Features

Even simple disguises obscuring a perpetrator's distinctive features will drop the percent of correct identifications by 50%.

ii. Distinctive Perpetrator Characteristics

Distinctive characteristics like hair and accents of perpetrators can influence identification of perpetrators.

*b. *Attention to Weapon*

The visual presence of a weapon tends to draw the attention of the witness to the weapon and away from the physical characteristics of the person wielding the weapon.

3. Description

*a. *Accuracy of Description*

*i. *Description ≠ Characteristics of Perpetrator*

There is little relationship between a subject's *description* and the *characteristics* of the person identified (rightly or wrongly) from the lineup

*ii. *Accuracy Of Descriptions ≠> Accuracy Of Identification.*

There is no relationship between accuracy of description and accuracy of identification.

iii. Distinctiveness of Criminal => Accurate Description & Accurate Identifications

Highly distinctive faces are both better described and more frequently identified correctly. Accurate descriptions and accurate identifications are a function of the distinctiveness of the face of the criminal.

b. Consistency of Description

*i. *Consistency ≠ Accuracy of Descriptions*

The consistency of witnesses' descriptions and the accuracy of their descriptions are either weakly positively related or not related at all.

*ii. *Consistency ≠ Accuracy of Identifications*

The *consistency* of witnesses' *descriptions* and the *accuracy* of their subsequent *identifications* are either weakly positively related or not related at all in most studies.

4. Speed Of Identification

*Speed of identification is positively related to accuracy of identification but only when the witness makes the identification "right away" or "instantly."

Correct choices tend to be faster than incorrect choices.

5. Confidence/Certainty

*a. *Confidence ≠ Accuracy Of Identification*

The relationship between a witnesses' confidence in and the accuracy of the identification varies from nonexistent to slight across different studies.

b. Identification of Another Person

No evidence that this is a reliable indicator of subsequent inaccuracy of identification.

c. Prior Failure to Identify Defendant

No evidence that this is a reliable indicator of subsequent inaccuracy of identification.

6. Extraneous Confidence Inflation

a. Authorities Influencing Witnesses' Confidence

Authorities' *direct confirmation* of identification increases confidence and overestimation of observation conditions.

Authorities' *praise* for an identification increases confidence and overestimation of observation conditions.

Authorities' *warnings* about cross-examination decrease confidence.

b. Co-Witnesses Influencing Witnesses' Confidence

Witnesses' confidence in their own identifications can be influenced after the fact by the choices they think other witnesses have made.

7. Time Between Observation And Identification

a. Longer Time => Poorer Memory

The longer the time between the observation of a person or event and the later confrontation, identification, or remembrance, the weaker and less reliable the memory of the person and event observed.

b. Loss of Memory for Details Over Time

With a greater length of time between observation of an event and recall of the details of that event, the fewer details are accurately recalled and more errors are made.

c. Loss of Memory for Faces Over Time

Memory for faces decays badly over the length of time common in police work.

8. Stress

a. Mild Stress: Attention-grabbing

*Extreme Stress: Violence

Stress at high levels diminishes the accuracy of identification of perpetrators of crimes and the recall of the details of events. Witnesses who are stressed into defensive responses by the observation of violent events make fewer identifications of perpetrators and give less accurate and less complete accounts of the witnessed events than do witnesses who witness nonviolent encounters.

b. Moderate Stress: Attention-grabbing

Stress that is mild, attention-grabbing, heightens the accuracy of identification and recall of central details of events.

9. Cross-Racial

*Cross-racial Identification

Witnesses are less accurate when attempting to identify other-race (ethnicity) perpetrators/persons than same-race (ethnicity) perpetrators/persons.

10. Source Confusion

a. Summary: Transferring Mugshots to Lineups

Eyewitness who see crimes and then view mugshots of possible suspects often mistakenly identify as the perpetrator in a physical lineup an innocent person whose mugshot was seen.

b. Summary: Transferring Mugshots to Mugshots

Eyewitnesses who have made a mugshot choice often mistakenly identify that prior mugshot choice as the perpetrator of a witnessed crime in subsequent mugshot identifications.

c. Summary: Transferring Bystanders into Perpetrators

Witnesses will frequently mistake an innocent bystander or even someone seen at a completely different place or different time for the perpetrator of a witnessed crime.

The transference effect for mugshots is twice as great as the effect for bystanders.

d. Summary: Transferring Co-witnesses' Information into Memory

The beliefs of co-witnesses can be incorporated into the witness' own memories.

e. Summary: Transferring Misinformation from Neutral Sources into Memory

Even when information is provided verbally, in narrative, following a witnessed event, the verbally provided information will be confused with the information actually perceived in the witnessed crime.

f. Summary: Transferring Law Enforcement Belief Re Target

Table of Reliability Factors from Forensic Psychological Science

OBSERVATION		
Scene Illumination	Duration of Observation	Familiarity of Perpetrator
Disguises	Distinctive Perpetrator Characteristics	
ATTENTION		
Attention to Perpetrator	Attention to Weapon	
DESCRIPTION		
ACCURACY OF DESCRIPTION		
Description ≠ Characteristics of Perpetrator	Accuracy Of Description ≠ Accuracy Of ID	Distinctiveness of Criminal
CONSISTENCY OF DESCRIPTION		
Consistency ≠ Accuracy of Descriptions	Consistency ≠ Accuracy of Identifications	
SPEED		
Speed of ID ≈ Accuracy of ID		

CERTAINTY/CONFIDENCE		
Confidence ≠ Accuracy Of Identification	Identification of Another Person	Prior Failure to Identify Defendant
CONFIDENCE INFLATION		
AUTHORITIES		
Confirmation increases confidence	Praise increases confidence	Warning decreases confidence
CO-WITNESSES		
Identifications incr. confidence		
TIME BETWEEN OBSERVATION AND ID		
Longer Time => Poorer Memory	Loss of Memory for Details Over Time	Loss of Memory for Faces Over Time
STRESS		
Mild Stress: Attention-grabbing	Extreme Stress/Violent: Impairing	
CROSS-RACIAL		
Cross-racial Identification: Poor		

SOURCE CONFUSION: TRANSFERENCE		
Mugshots to Lineups	Mugshots to Mugshots	Bystanders into Perpetrators
Co-witnesses' Information into Memory	Misinformation from Neutral Sources	Law Enforcement Belief re Target