Beyond a Reasonable Doubt?: Reconsidering Uncorroborated Eyewitness Identification Testimony

by Sandra Guerra Thompson*

“In the life of justice, trains are wrecked and ships are colliding too often, simply because the law does not care to examine the mental colour blindness of the witness’s memory.”

--HUGO MÜNSTERBERG, ON THE WITNESS STAND at 68-69 (1908).

Introduction

Human perception and memory are highly fallible, and social and cognitive psychologists have universally accepted this fact for many decades. Experiments long ago conclusively established that people lack the ability accurately to remember what a stranger looked like with whom they had only a brief interaction. For decades, the criminal justice systems throughout the United States and other countries have ignored the scientific findings. Indeed, some courts still recognize a presumption of reliability for eyewitness testimony. Such a presumption accords with the lay person’s common

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beliefs about the reliability of a witness who confidently proclaims to have seen the alleged culprit “with her own eyes.”

The scientific findings of high rates of eyewitness memory failure have serious implications for the reliability of criminal cases that rest on eyewitness identifications. We know, for example, that eyewitnesses identify a known wrong person (a “filler” or “foil”) in approximately 20 percent of all real criminal lineups. This alone is a staggering figure, as it means that one-in-five of the eyewitnesses in real cases who are willing to give sworn testimony that would put a person behind bars for a long time—or even put a person to death—are undeniably wrong. Fortunately, in those cases, police investigators know that the chosen foil is not the true culprit, so the error does not lead to a wrongful conviction. However, we also know that the police sometimes erroneously arrest a person who fits the general description, but who is not the perpetrator, and that eyewitnesses sometimes incorrectly select that innocent person from a lineup or photo spread. The many wrongful convictions uncovered by the work of innocence projects around the country have brought into stark relief the fact that eyewitness often get it wrong.

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2 See Cutler & Penrod, infra note ___ at 207-208 (summarizing survey studies, prediction studies, and mock juror studies and concluding that “jurors are generally insensitive to factors that influence eyewitness identification accuracy, often rely on factors (such as recall of peripheral details) that are not diagnostic of witness accuracy, and rely heavily on one factor, eyewitness confidence, that possesses only modest value as an indicator of witness accuracy”).

3 See Gary L. Wells & Elizabeth A. Olson, Eyewitness Testimony, 54 ANNU. REV. PSYCHOL. 277, 291 (2003) (noting reports from two studies of actual cases of filler identification rates of 20 percent and 24 percent and observing that these rates may be underestimated because police often do not distinguish between witnesses who choose a filler and those who make no choice); see also Tim Valentine, Alan Pickering & Stephen Darling, Characteristics of Eyewitness Identification that Predict the Outcome of Real Lineups, 17 APPL. COGNIT. PSYCH. 969, 973 (2003) (reporting 20 percent rate); Amy Klobuchar, Nancy K. Mehrkens Steblay & Hillary Lindell Caliguiri, Improving Eyewitness Identifications: Hennepin County’s Blind Sequential Lineup Pilot Project, ___ CARDOZO PUB. L., POL’Y & ETHICS J. 381, 396 (2006) (same).

4 See http://www.innocenceproject.org/causes/ (last visited November 17, 2006). The total number of case profiles on the Innocence Project’s website is 187. Another study of exonerations examined 328 exonerations since 1989 and found that 90 percent of those cases involved misidentification by witnesses,
Studies of wrongful conviction cases have concluded that erroneous eyewitness identifications are by far the leading cause of convicting the innocent. For example, the Innocence Project of Cardozo School of Law reports that of the first 130 exonerations, 101 (or 77.8 percent) involved mistaken identifications. But exactly how often eyewitnesses make tragic mistakes that lead to the punishment of innocent persons is unknown and probably unknowable. Were it not for the development of DNA evidence technology, the victims’ erroneous identification in the numerous cases in which innocent people have been recently freed would not have been discovered.

Logic suggests that untold numbers of additional innocent people have been punished for crimes they did not commit. In virtually every recent case in which individuals have been exonerated, DNA matter from the crime scene was available for testing, and these tests have proved that the convicted person is innocent. Every single

very often across races. See Adam Liptak, Study Suspects Thousands of False Confessions, N.Y. TIMES (April 19, 2004). Today, the announcement of wrongfully convicted persons being exonerated has become a regular feature of newspaper reports. See, e.g., Dallas County clearing man convicted of rape, HOUSTON CHRON. (Jan. 17, 2007) at B4 (noting that James Waller was the twelfth person exonerated by DNA in Dallas County alone).

The next most frequent cause of wrongful convictions is false confessions which were admitted in 27% of the cases. See http://www.innocenceproject.org/causes/ (last visited November 17, 2006). False statements by informants were involved in 16%. Faulty and false forensic evidence accounted for a significant number of erroneous convictions as well, although the frequency of occurrence is not provided by the study. Id. (citing numerous analyses over several decades that have consistently proved that mistaken eyewitness identification is the single largest source of wrongful convictions).

See supra note ___.

Wells & Seelau, supra note ___ at 765.

Today innocent people are also frequently being spared the horror of wrongful prosecution by being excluded as a suspect through DNA testing before trial. By one account, “[o]f the first eighteen thousand results at the FBI and other crime laboratories, at least five thousand prime suspects were excluded before their cases were tried.” See BARRY SCHECK, PETER NEUFELD, AND JIM DWYER, ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT at xx (2001).

All of the case files posted by the Innocence Project involve sexual assaults, even if the individual was not charged with a sexual assault. Id. For example, David Vasquez was wrongly convicted of burglary in Virginia, but the underlying offense actually included a rape and murder. http://www.innocenceproject.org/case/display_profile.php?id=11 (last visited October 12, 2006). This author reviewed the case profiles of the first 184 exonerations posted on the Innocence Project’s website. See http://www.innocenceproject.org/case/display_cases.php?sort=year_exoneration (last visited October 12, 2006).
case in which DNA evidence has been available for testing involved a sexual assault, even if the charged offense did not include a sexual assault. Regardless of whether the charge is burglary, assault with a deadly weapon, robbery, murder, or anything else, the only reason that individuals have been exonerated by DNA evidence is that there was also evidence of rape. Thus, only wrongly convicted “rapists” have enjoyed the benefits of DNA evidence, and then only those innocent “rapists” for whom there was DNA evidence available to test (and with the wherewithal to get it tested) have been exonerated.

For other violent felonies, such as robberies that do not involve a sexual assault, there has yet to be a case in which DNA evidence was available for testing. Robbery cases pose grave risks of wrongful conviction because of the frequency of the use of lineups in these cases. In a large study of twentieth century wrongful convictions—a study conducted before the advent of DNA testing—robberies accounted for fifty-three percent (73/136) of all wrongful convictions. The Supreme Court acknowledged the dangers of misidentifications in robbery cases as early as 1967. In fact, five of its major decisions on police lineups—United States v. Wade (and its companion case, Gilbert v. California), Simmons v. United States, Kirby v. Illinois, and United States v. Ash—

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10 Id.
11 Fortunately, more and more crimes are being solved in the first instance by means of DNA evidence, including non-violent crimes such as thefts. See Richard Willing, Thefts solved by DNA analysis, USA TODAY, Oct. 20-22, 2006 at 1A. The use of DNA evidence as an investigative tool can be expected decrease the numbers of wrongly convicted persons in the future. See supra note ___ (on Scheck).
13 United States v. Wade, 388 U.S. 218, 230 (1967) (“Lineups are prevalent in rape and robbery prosecutions and present a particular hazard that a victim’s understandable outrage may excite vengeful or spiteful motives.”).
14 388 U.S. at 219.
involved robbery cases.\textsuperscript{19} Two others involved crimes other than sexual assault,\textsuperscript{20} and only one involved a rape.\textsuperscript{21} Since robbers almost always perpetrate their crimes against strangers, there is normally going to be an eyewitness victim who is asked to identify a suspect, and, thus, the likelihood of an identification procedure such as a lineup, photo array, or show-up.

The circumstances under which a victim views an armed robbery suspect typically present many of the classic variables that reduce the accuracy of an eyewitness’s identification—presence of a weapon, no prior familiarity with the robber, dark lighting conditions, hats or disguises, and a short time frame in which to view the robber. Race also plays a major factor in exacerbating the problem of erroneous identifications. The phenomenon of unreliable cross-racial identifications is universally accepted as fact by psychologists. Thus, the practice of relying on eyewitness testimony to obtain convictions often involves an element of racial injustice.\textsuperscript{22}

Yet it is not uncommon for armed robbers to be convicted based solely on an eyewitness’s identification. How many innocent people have been falsely condemned as armed robbers and unfairly punished? The numbers would likely dismay us; by one estimate they would be in the thousands.\textsuperscript{23} There are over four times the numbers of

\textsuperscript{18} 413 U.S. 300, 302 (1973).
\textsuperscript{19} See also Foster v. California, 394 U.S. 440 (1969) (reversing conviction for armed robbery because eyewitness identification procedure was so suggestive as to violate defendant’s due process rights).
\textsuperscript{22}\textit{See infra} notes ___ and accompanying text (on Cromedy case); see also Andrew E. Taslitz, \textit{Wrongly Accused: Is Race a Factor in Convicting the Innocent?}, 4 Ohio St. J. Crim. L. 121, 124-25 (2007) (noting that cross-racial identification issues can lead to more broad stereotyping and selective inattention at every stage of the investigation and prosecution process).
\textsuperscript{23} A 2004 University of Michigan study supervised by law professor, Samuel R. Gross, estimates that in the past 15 years there were over 28,500 innocent people convicted of non-capital cases. \textit{See Liptak supra} note ___. Interestingly, in 1987, before the large wave of DNA exonerations, Professor Gross had written an article in which he set out to determine why eyewitness misidentifications (and erroneous convictions) are
robberies committed as there are rapes. In 2004, there were 401,326 robberies as compared to 94,635 rapes reported by victims in the United States.\(^{24}\) Were DNA evidence available in robbery cases, we would likely have an additional four times the numbers of individuals who have been exonerated to date and these would only include cases dating back about twenty years.

What has not been determined, however, is how best to prevent erroneous convictions.\(^{25}\) A movement to improve the procedures by which identifications are obtained was put into motion by the Warren Court’s opinions in \textit{United States v. Wade}\(^{26}\) and \textit{Stovall v. Denno},\(^{27}\) among others. Similar efforts to regulate the manner in which the police conduct lineups are proceeding today at a record pace. Most reforms proposed by innocence commissions and other reformers aim to improve the procedures followed by police investigators in obtaining eyewitness identifications.\(^{28}\) These prophylactic remedies include efforts to implement blind and sequential lineups or photo arrays.\(^{29}\) The methods are designed to reduce the tendency of human memory to malfunction and to minimize the possibility of police influencing an eyewitness’s choice. Other remedies


\(^{25}\) For an article arguing that wrongful convictions scholars should focus on the criminal justice system as a single interrelated “system” in searching for the causes of wrongful convictions, see Erik Luna, \textit{System Failure}, 42 AM. CRIM. L. REV. 1201 (2005). Some scholars have also begun to encourage an examination of other aspects of the administration of justice, beyond evidence-related procedures, that may contribute to wrongful convictions. \textit{See e.g.}, Andrew M. Siegel, \textit{Moving Down the Wedge of Injustice: A Proposal for a Third Generation of Wrongful Convictions Scholarship and Advocacy}, 42 AM. CRIM. L. REV. 1219 (2005) (urging scholars to focus on broader questions about the structure and administration of the justice system such as prosecutorial decision making).

\(^{26}\) 388 U.S. 218, 230 (1967) (holding that the Sixth Amendment right to counsel applies to post-indictment pre-trial lineups).

\(^{27}\) 388 U.S. 293 (1967) (holding that the Fourteenth Amendment due process clause requires exclusion of eyewitness identifications that are the product of unnecessarily suggestive procedures).

\(^{28}\) \textit{See infra} notes ___ and accompanying text.

\(^{29}\) \textit{Id.}
are thought to better equip juries in evaluating the reliability of eyewitness testimony. These include the use of expert testimony, as well as special jury instructions, on the dangers of various aspects of eyewitness identifications.

If the Warren Court’s effort to regulate identifications has taught anything, however, it is that regulating the investigative process is a difficult task. It is difficult for two reasons. First, the corporate culture within police departments is such that efforts will typically be made to circumvent mandates imposed from “on high.”30 Second, especially in the area of eyewitness identifications, the courts themselves have shown a profound and understandable reluctance to enforce their own judicially-created rules. On a human level, it is a gut-wrenching task indeed to prohibit a victim or other witness from identifying the alleged culprit in court, no matter how dubious the identification procedure may have been or how unlikely it may seem that the victim/witness could have gotten a sufficient view of the suspect.31

A simpler and more effective approach to systemic reform would shift the focus away from what the police do or fail to do in gathering evidence and focus instead on changes to the rules of criminal procedure that govern the sufficiency of evidence for conviction. To give one example, in a number of states convictions cannot be obtained on the sole basis of an accomplice’s testimony.32 The categorical unreliability of accomplice testimony prompted state legislatures to enact a rule simply requiring that other evidence be produced in cases that rely on an accomplice’s testimony; the

30 See JOHN KLEINIG, POLICE ETHICS at 224-29 (Cambridge Univ. Press: 1996); Debra Livingston, Police Reform and the Department of Justice: An Essay on Accountability, 2 Buff. Crim. L. Rev. 815, 848 (1999) (“‘External controls and accountability mechanisms (desirable as they are) cannot be expected to be effective unless police organizations are themselves involved in the process of control.’”) (quoting DAVID DIXON, LAW IN POLICING: LEGAL REGULATION AND POLICE PRACTICES 94-95 (1997)).
31 See infra notes ___ and accompanying text.
32 See infra notes ___ and accompanying text.
accomplice’s testimony is insufficient on its own. Likewise, in the ordinary case, the inherent unreliability of eyewitness identifications justifies a limitation on their use to obtain convictions. I do not propose an outright ban on convictions based solely on identifications as that would go too far. For instance, I would exclude from those cases in which victims and culprits knew each other prior to the date of the crime.

A corroboration requirement has the distinct advantages of being simple to implement and of prompting systemic changes in police investigations without attempting to micromanage police behavior or trying to change police or prosecutorial culture. Perhaps most importantly, such a rule does not require courts to exclude identifications, as do the rules in *Wade* and *Stovall*. Courts have proved themselves highly reluctant to exclude identifications. Besides, victims and witnesses have a right to expect that they will be allowed to identify the person they believe to be the culprit at trial. A corroboration requirement operates at the investigatory stage, making it incumbent on police investigators to continue their investigations even after obtaining a positive identification. Without corroborating evidence, a case is simply not accepted by the prosecutor’s office, and the police must explain to the victim the shortcoming in the available evidence.

The rule thus relieves courts of the difficult choice of allowing convictions based uncorroborated eyewitness identifications on the one hand (a prospect which should be a highly troubling given the high probability of error) and rejecting an eyewitness’s identification testimony as too unreliable to admit into evidence. Such a rule also brings the criminal practice into line with the mandate of *In re Winship*[^33] that criminal convictions can only be obtained on proof beyond a reasonable doubt. Scientific

evidence establishes beyond peradventure that eyewitness identification testimony carries an error rate too high to meet the evidentiary threshold of “beyond a reasonable doubt.”34

Part I of the Article addresses the rich psychology literature documenting the numerous laboratory experiments and studies of actual eyewitness identifications in a police setting. This first part of the paper demonstrates that there are numerous factors relating to the inherently faulty memory capabilities of human beings, especially under the circumstances that crime victims usually make their observations.

In Part II, this Article examines the failure of currently available remedies in protecting the integrity of the trial process as a search for truth. In particular, this part reviews the constitutional protections of the right to counsel at lineups and the due process rule excluding unreliable identifications that are also made under unduly suggestive circumstances. Also reviewed in this part are the corrective remedies of admitting expert testimony on the unreliability of eyewitness identifications under certain circumstances and jury instructions to the same effect. Finally, the paper examines the prophylactic remedies of blind and sequential lineups that are currently in favor by reformers. The Article argues that the new prophylactic measures—while worthwhile in improving the overall accuracy of eyewitness identifications—do nothing to reduce the error rate caused by the inherent fallibility of human memory. Indeed, there is no known remedy for the basic shortcomings of the human mind to recall events accurately. Any such remedy would be the stuff of science fiction today. Thus, while better eyewitness identifications are possible, there is a substantial margin of error that cannot be eliminated.

34 See infra Part I.
The Article concludes with a proposal in Part III to prohibit convictions based solely on eyewitness identification testimony. This part reviews other federal and state laws that similarly prohibit convictions based only on various types of single witness testimony, such as that of confessing suspects, accomplices, and rape victims, as well as the two-witness rule in treason law. In each case, either because of the seriousness of the charge, the ease of wrongly convicting an individual falsely accused, or the motivations of the witness, a determination has been made the government should be put to the task of producing some independent corroborating evidence in order to protect the innocent. The Article concludes with a brief, preliminary discussion about how a corroborating evidence requirement for eyewitness identification cases might operate.