

COMMENT

WHY AND HOW NEW YORK SHOULD ENACT MANDATORY STATEWIDE EYEWITNESS IDENTIFICATION PROCEDURES

*Andrew D. Rikard**

I. INTRODUCTION

Since 1989, the use of DNA evidence to exonerate wrongfully convicted individuals¹ has illuminated certain flaws inherent in the structure and procedures of our criminal justice system. One commentator's analogy is particularly appropriate: "Just as the current economic recession revealed bad practices in the financing system and Ponzi schemes, the recent DNA exonerations have exposed the bad eyewitness identification procedures that lead to wrongful convictions."² With the spotlight cast on these imperfections, two important, but seemingly basic, questions are raised: (1) how just, effective, and accurate is our criminal justice system; and (2) what can be done to improve it?

In answering the former question, one could not logically argue that the system is, or even could be, completely just, effective, and accurate. Any system involving human decisionmaking will inevitably produce some degree of error. However, an ever-increasing majority of legal and other scholars aver that the system may be even less just, effective, and accurate than previously believed. This belief is grounded in the argument that certain steps, although readily available and scientifically proven to mitigate the abovementioned human error, are not being taken.

* J.D. Candidate, Albany Law School, Class of 2011.

¹ *Innocence Project Case Profiles*, INNOCENCE PROJECT, <http://www.innocenceproject.org/know> (last visited Jan. 24, 2011).

² Margery Malkin Koosed, *Reforming Eyewitness Identification Law and Practices to Protect the Innocent*, 42 CREIGHTON L. REV. 595, 609 (2009).

Based upon this argument, many groups, agencies, scholars, and task forces are proponents of various evidentiary reforms, which address the latter question above. While there seems to be a general consensus on the specific types of reform required, the suggested application and implementation of these reforms varies from group to group.

Of the various changes to evidentiary law widely recommended by researchers and practitioners,³ the reform of eyewitness identification procedures may produce the most striking improvement in the efficacy, accuracy, and fairness of the criminal justice system. This is because eyewitness misidentification is by far the most prevalent of all the factors cited as regularly causing wrongful convictions; of the 239 wrongful convictions hitherto overturned through DNA evidence in the United States, seventy-five percent involved witness misidentification.⁴

While the underlying scientific reasoning is too complex for full explication here, the near consensus of the scientific community is that eyewitness identifications are inherently unreliable as clearly and widely expressed within the pages of the scholarly literature.⁵

³ For a discussion of the entire “package” of generally recommended reforms, see generally James R. Acker & Catherine L. Bonventre, *Protecting the Innocent in New York: Moving Beyond Changing Only Their Names*, 73 ALB. L. REV. 1245 (2010) (examining and discussing the *Final Report of the New York State Bar Association’s Task Force on Wrongful Convictions* and suggesting the enactment of reactive reforms); INNOCENCE PROJECT, LESSONS NOT LEARNED (2009), available at http://www.innocenceproject.org/docs/NY_innocence_report.pdf [hereinafter LESSONS NOT LEARNED] (discussing the causes of wrongful convictions and legislative remedies aimed to repair New York’s justice system); JUSTICE PROJECT, EYEWITNESS IDENTIFICATION: A POLICY REVIEW, <http://www.thejusticeproject.org/national/solution/improving-eyewitness-id/> [hereinafter JUSTICE PROJECT POLICY REVIEW] (setting forth a model policy following a review of psychological factors, the science behind wrongful convictions, and benefits and costs); *Priority Issues*, INNOCENCE PROJECT, <http://www.innocenceproject.org/fix/Priority-Issues.php> (last visited Jan. 24, 2011) (identifying seven policy issues that can be addressed to reduce wrongful convictions, including eyewitness identification); *The Solution: Agenda for Reform*, JUSTICE PROJECT, <http://www.thejusticeproject.org/national/solution/> (last visited Jan. 24, 2011) (noting that eyewitness identification procedures is among the Justice Project’s agenda items for reform).

⁴ *Understand the Causes: Eyewitness Misidentification*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited Jan. 24, 2011).

⁵ See, e.g., NAT’L INST. OF JUST., U.S. DEP’T OF JUST., NCJ 178240, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999) [hereinafter DOJ GUIDE] (stating, diplomatically, that such identifications are “not infallible,” although this reserved characterization is reasonably expectable in materials created by or for law enforcement); Acker & Bonventre, *supra* note 3; Roy S. Malpass, Colin G. Tredoux & Dawn McQuinston-Surrett, *Lineup Construction and Lineup Fairness*, in 2 HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR PEOPLE 155 (R. Lindsay, D. Ross, J. D. Read & M. P. Toglia eds., 2007); Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 WIS. L. REV. 615 (2006) [hereinafter Wells,

As such, the procedures utilized in obtaining these identifications must be as minimally suggestive as possible in order to prevent further degradation of such foundationally fragile and questionable, although highly important, evidence. Procedures must be designed to winnow away the chaff of unreliable identifications, while not wasting the precious wheat of reliable eyewitness identification evidence. Fortunately, reform of eyewitness identification procedures is seemingly quite feasible, as legislation to that effect can be grounded in the voluminous research and scholarly literature on this topic, including various empirical studies,⁶ “best practices” guidelines or proposed solutions,⁷ and model legislation.⁸

Unfortunately, despite widespread scientific and scholarly support for such reforms, New York State has failed to enact any type of statewide eyewitness identification procedure,⁹ and continues to rely upon the demonstrably flawed approach¹⁰ of a

Systemic Reforms]; Gary L. Wells, Amina Memon & Steven D. Penrod, *Eyewitness Evidence: Improving its Probative Value*, 7 PSYCHOL. SCI. IN THE PUB. INT. 45 (2006); INNOCENCE PROJECT, REEVALUATING LINEUPS: WHY WITNESSES MAKE MISTAKES AND HOW TO REDUCE THE CHANCE OF A MISIDENTIFICATION, available at http://www.innocenceproject.org/docs/Eyewitness_ID_Report.pdf [hereinafter REEVALUATING LINEUPS]; JUSTICE PROJECT POLICY REVIEW, *supra* note 3.

⁶ See, e.g., Richard A. Leo & Jon B. Gould, *Studying Wrongful Convictions: Learning from Social Science*, 7 OHIO ST. J. CRIM. L. 7 (2009); Gary L. Wells, Elizabeth A. Olson & Steve D. Charman, *Distorted Retrospective Eyewitness Reports as Functions of Feedback and Delay*, 9 J. EXPERIMENTAL PSYCHOL.: APPLIED 42 (2003).

⁷ See, e.g., DOJ GUIDE, *supra* note 5; Bennett L. Gershman, *The Eyewitness Conundrum: How Courts, Police and Attorneys Can Reduce Mistakes by Eyewitnesses*, 81 N.Y. ST. B. J. 24 (Jan. 2009); Koosed, *supra* note 2, at 601; John Turtle, R.C.L. Lindsay & Gary L. Wells, *Best Practice Recommendations for Eyewitness Evidence Procedures: New Ideas for the Oldest Way to Solve a Case*, 1 CAN. J. POLICE & SEC. SERVS. 5 (Mar. 2003); Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603 (1998); Richard A. Wise, Kirsten A. Dauphinais & Martin A. Safer, *A Tripartite Solution to Eyewitness Error*, 97 J. CRIM. L. & CRIMINOLOGY 807 (2007); Wells, *Systemic Reforms*, *supra* note 5; TASK FORCE ON WRONGFUL CONVICTIONS, N.Y. ST. B. ASS'N, FINAL REPORT OF THE NEW YORK STATE BAR ASSOCIATION'S TASK FORCE ON WRONGFUL CONVICTIONS (2009) [hereinafter NYSBA REPORT]; Gary L. Wells, Elizabeth A. Olson & Steve D. Charman, *The Confidence of Eyewitnesses in Their Identifications from Lineups*, 11 CURRENT DIRECTIONS IN PSYCHOL. SCI. 151 (2002).

⁸ See, e.g., INNOCENCE PROJECT, MODEL LEGISLATION, 2010 LEGISLATIVE SESSIONS: AN ACT REGARDING WRITTEN EYEWITNESS IDENTIFICATION ADMINISTRATION PROCEDURES (2009), http://www.innocenceproject.org/docs/2010/Eyewitness_ID_Written_Policies_Bill_2010.pdf; INNOCENCE PROJECT, MODEL LEGISLATION, 2009 STATE LEGISLATIVE SESSIONS: AN ACT TO IMPROVE THE ACCURACY OF EYEWITNESS IDENTIFICATIONS (2008), http://www.innocenceproject.org/docs/09_model_legislation/Eyewitness_ID_Prescriptive_Mode_l_Bill_2009.pdf.

⁹ LESSONS NOT LEARNED, *supra* note 3, at 5.

¹⁰ See Timothy P. O'Toole & Giovanna Shay, *Manson v. Brathwaite Revisited: Towards A New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41

thirty-three-year-old United States Supreme Court decision.¹¹ This comment proposes that New York State, through the adoption of mandatory statewide witness identification procedures, fulfill its moral and ethical duty to protect the innocent.¹² As one observer aptly stated,

[t]he time has come for eyewitness researchers and experts to move out of the laboratory and courtroom—and into the police station. The time has come to use all that we know to improve the procedures used to conduct the lineups and photo arrays that too often give rise to mistaken identifications.¹³

The fact that this advice has yet to be followed in the intervening decade, despite clear empirical support, illustrates the pressing need for eyewitness identification reform.

Initially, this comment discusses the United States Supreme Court's position on eyewitness identification procedures. Thereafter, it examines preventative measures aimed at addressing the various causes of witness misidentification. Finally, as stated above, this comment suggests that New York should implement statewide eyewitness identification procedures based upon the research and scientific and scholarly recommendations discussed herein.

II. EYEWITNESS IDENTIFICATION JURISPRUDENCE OF THE UNITED STATES SUPREME COURT

By 1967, as evinced by its decision in *Stovall v. Denno*,¹⁴ the United States Supreme Court had developed a fairly clear position on eyewitness identification procedures.¹⁵ This is not to say that

VAL. U. L. REV. 109 (2006); Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW & HUM. BEHAV. 1 (2009). This is only to say that the test is flawed—as it has been empirically proven ineffective at protecting the innocent and excluding suggestive identifications in the intervening thirty-three years—not that the legal reasoning which begot the test was flawed.

¹¹ *Manson v. Brathwaite*, 432 U.S. 98 (1977).

¹² However, reform of eyewitness identification procedures is only a step in this direction. See Koosed, *supra* note 2.

¹³ Saul M. Kassir, *Eyewitness Identification Procedures: The Fifth Rule*, 22 LAW & HUM. BEHAV. 649, 649 (1998).

¹⁴ *Stovall v. Denno*, 388 U.S. 293 (1967) (later overruled on unrelated grounds).

¹⁵ *Id.* at 301–02; see also *infra* notes 17–19 and accompanying text (discussing the *per se* exclusion rule).

the Court prescribed specific procedures, but rather that it had a standard for exclusion of such identifications in certain cases. In handing down its decision in the *Stovall* case—based upon the jurisprudence of *United States v. Wade*¹⁶ and *Gilbert v. California*¹⁷—the Court solidified what became known as the “*per se* exclusion rule.”¹⁸

Simply put, the “*per se* exclusion rule” held that unduly “suggestive eyewitness identification procedures” rendered the identification inadmissible as evidence at trial.¹⁹ Specifically, the Court held that a defendant may assert that “the confrontation conducted . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law,”²⁰ and furthermore that the suggestiveness of the identification procedure was to be determined in light of “the totality of the circumstances.”²¹ This rule, however, would soon be overtaken by another. The new standard would introduce an additional level of inquiry into the propriety of admitting eyewitness identification, above and beyond the suggestiveness of the identification procedure alone.

In its 1972 decision in *Neil v. Biggers*,²² the Supreme Court abandoned the “*per se* exclusion rule” in favor of a new two-pronged test, sometimes referred to as the “reliability” or “totality” approach.²³ The first prong of this test examines the suggestiveness of the identification procedure.²⁴ If the court determines that the procedure was not unnecessarily suggestive, then the identification is, naturally, admissible.²⁵ If the court determines, however, that the procedure was unnecessarily suggestive, the second prong of the test comes into play.

¹⁶ *United States v. Wade*, 388 U.S. 218 (1967).

¹⁷ *Gilbert v. California*, 388 U.S. 263 (1967).

¹⁸ Wells & Quinlivan, *supra* note 10, at 2.

¹⁹ *See id.*

²⁰ *Stovall*, 388 U.S. at 301–02.

²¹ *Id.* at 302.

²² *Neil v. Biggers*, 409 U.S. 188 (1972).

²³ Wells & Quinlivan, *supra* note 10, at 2. While this approach still aims to determine the propriety of admitting the identification in light of “the totality of the circumstances,” as *Stovall* did with its “*per se* exclusion” rule, it also adds another level of inquiry—reliability—to the equation. As discussed *infra*, this additional level of inquiry has a major impact.

²⁴ *Neil*, 409 U.S. at 198–99.

²⁵ *See id.* at 199. This is not to say that the identification may not be excluded for various other reasons, only that the identification *procedure* will not cause its exclusion.

The second prong of the test examines the reliability of the identification and whether it is so great as to overcome the improperly suggestive nature of the identification procedure.²⁶ In determining the reliability of an otherwise procedurally improper identification, the Court considers five factors:

the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.²⁷

If these five factors militate in favor of the identification's reliability, then the identification is acceptable in light of "the totality of the circumstances,"²⁸ despite the suggestive nature of the identification procedure.²⁹

Although the five criteria discussed above were first set out in *Neil* in 1972, the clearest explication of them came in 1977 with the Supreme Court's decision in *Manson v. Braithwaite*.³⁰ As one prominent commentator put it, "although [the five reliability factors] were first articulated in *Neil v. Biggers*, it was *Manson v. Braithwaite*³¹ that reaffirmed and clarified the Court's two-pronged reliability approach."³² *Manson* is the precedent most closely associated with the reliability approach and, along with its decision in *Wade*,³³ comprises the Supreme Court's substantive position on

²⁶ *Id.*

²⁷ *Id.* at 199–200. For the sake of this discussion, these factors will be referred to as view, attention, description, certainty, and time, respectively.

²⁸ *See supra* notes 21 and 23.

²⁹ *Neil*, 409 U.S. at 199.

³⁰ *Manson v. Braithwaite*, 432 U.S. 98 (1977). I have found two different spellings of the defendant's name: Braithwaite and Braithwaite. Although the latter sounds phonetically correct to me, I am using the former, in deference to the orthographic abilities of the Supreme Court.

³¹ Again, note the divergent spelling of the defendant's name between the Court's decision and this commentator's article.

³² Wells & Quinlivan, *supra* note 10, at 2.

³³ *United States v. Wade*, 388 U.S. 218 (1967). *Wade* recognizes that defendants are entitled to counsel during the identification process, as well as that suggestive identification procedures violate due process and are inadmissible. *See id.* at 240–42. "*Wade* hearings" are pretrial hearings during which a defendant may challenge the nature of the identification procedure as unduly suggestive, and thus inconsistent with their due process rights under the Fifth and Fourteenth Amendments to the United States Constitution. *See id.* at 242. *Wade* explicates the constitutional basis for exclusion of unreliable identifications, *see id.* at 235, while *Manson* provides the specific approach for determining suggestiveness and therefore exclusion. *See Manson*, 432 U.S. at 114–17. Although *Wade* plays an important role in the

the exclusion of eyewitness identifications to this day.³⁴ Interestingly, despite the fact that it has been over thirty years since the Supreme Court solidified its position on suggestive eyewitness identification procedures in *Manson*, the Court has yet to revisit its ruling.³⁵

During that lengthy period, scholars have observed two major problems with the *Manson* reliability approach. First, scientific data shows that the approach does not provide legitimate safeguards against suggestive identification procedures and misidentification.³⁶ This lack of efficacy stems from the fact that three of the “reliability” factors (certainty, view, and attention) involve what psychologists refer to as “retrospective self-reports.”³⁷ This means that the court relies on the witness’ own assessment of these factors, a situation that is questionable according to most scientific literature on this topic.³⁸ According to one group of social scientists, “[b]y their nature, [retrospective self-reports] are subject to the vagaries of memory and information-processing capabilities.”³⁹ Furthermore, the suggestive nature of the identification procedure itself may lead to the distortion of the witness’ retrospective self-reporting, what is known as the “suggestiveness augmentation effect.”⁴⁰ Correspondingly, the reliability approach not only does a poor job of divining reliability, but it also provides little protection against improperly suggestive identification procedures. The second major problem with the *Manson* reliability approach is that, as a practical matter, the

process of admitting or excluding identifications, this comment focuses on procedural reforms at the *investigational level* as the route to increased fairness, as opposed to attacking the issue through a suggested reduction in the burden of proof for the defendant at *Wade* hearings, for example.

³⁴ See Wells & Quinlivan, *supra* note 10, at 1.

³⁵ See *id.*

³⁶ See *id.* at 1; see also Wells et al., *supra* note 7, at 632 (“[C]ertain methods of conducting lineups are particularly likely to promote false identifications of innocent suspects.”); O’Toole & Shay, *supra* note 10, at 109–10 (noting that eyewitness misidentification is the number one cause of wrongful convictions); Wise, Dauphinais & Safer, *supra* note 7, at 815–18 (discussing scientific findings regarding the suggestive and inaccurate nature of eyewitness identification).

³⁷ Wells & Quinlivan, *supra* note 10, at 9.

³⁸ *Id.*; see also Wells, Olson & Charman, *supra* note 7, at 151 (specifically discussing the relationship between confidence and accuracy in eyewitness identification); Sandra Metts, Susan Sprecher & William R. Cupach, *Retrospective Self-Reports*, in *STUDYING INTERPERSONAL INTERACTION* 162, 168 (Barbara M. Montgomery & Steve Duck eds., Guilford Press 1991).

³⁹ Metts, Sprecher & Cupach, *supra* note 38, at 168.

⁴⁰ Wells & Quinlivan, *supra* note 10, at 9.

standard for exclusion under *Manson* is so high that the defense's argument for suppression rarely prevails.⁴¹

In addition to the two major flaws discussed above, the reliability approach also fails to provide a proactive proscription against suggestive identification procedures, or a specific set of standard procedures to follow, offering instead a reactionary plan for dealing with the questionable evidence they produce. Therefore, individual jurisdictions are free to adopt and utilize any identification procedures they deem acceptable, as any judicial inquiry is directed at the case-by-case admissibility of the end product, and is not aimed at procedural reform.⁴² As a result of the Supreme Court's failure to provide effective guidance,⁴³ these local procedures are frequently far more suggestive than those recommended by the scientific community.⁴⁴ As such, the responsibility for reforms aimed at providing effective, accurate, and just identification procedures falls upon individual jurisdictions, such as the state of New York.

Putting the logical basis for statewide⁴⁵ eyewitness identification procedures behind us, the following section will discuss the procedural reforms most widely recommended by the legal and scientific communities, as well as the reasoning and data supporting them.

⁴¹ See *id.* at 1 (citing E.F. LOFTUS & J.M. DOYLE, *EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL* (3d ed. 1997)). This is arguably a result of the suggestiveness augmentation effect, according to Wells & Quinlivan, *supra* note 10, at 9.

⁴² Although inquiry into the "suggestiveness" of the procedure is the first step of the *Manson* reliability approach, *Manson v. Brathwaite*, 432 U.S. 98, 114 (1997), once the procedure is determined to be suggestive or not, the issue essentially falls by the wayside. The main inquiry of the approach is aimed specifically at the admissibility of the identification in the immediate case, not whether the procedures used by the relevant jurisdiction should be revised. See Wells & Quinlivan, *supra* note 10, at 2.

⁴³ Again, this is intended to be an indictment of the effectiveness of the *Manson* reliability approach, based upon scientific data gathered over the intervening thirty years, and not of the legal reasoning underlying the decision. See *LESSONS NOT LEARNED*, *supra* note 3, at 18-19.

⁴⁴ See *id.* at 29.

⁴⁵ This is in contrast to a national standard. Any attempt by the United States Supreme Court to provide a new approach, which improves upon the Court's current *Manson*-based jurisprudence, would be a step in the right direction, but until such an opportunity presents itself, New York State should step in to shore up any gaps in evidentiary protection.

III. WIDELY RECOMMENDED REFORMS⁴⁶

Thanks to television, most people today are familiar with the eyewitness identification procedure commonly known as the “lineup.” Nonetheless, a clear description of certain details, however elementary, is necessary for any meaningful discussion of procedural reform. Put simply, a lineup is a procedure wherein an eyewitness to a crime views a group of individuals⁴⁷ and attempts to determine whether any of them is the perpetrator.⁴⁸ There is generally a window or a one-way mirror⁴⁹ between the lineup and the observing eyewitness, with a police officer on either side. The officer with the eyewitness communicates with said eyewitness and with the officer on the other side.⁵⁰ The officer with the lineup gives instructions to the members of the lineup and communicates with the officer on the other side.⁵¹ Typically, one of the individuals in the lineup, known as the “suspect,” is believed by the authorities to be the guilty party.⁵² Several other individuals, known as “fillers,”

⁴⁶ For examples of how different jurisdictions have discussed or implemented the various reforms considered herein, see BUREAU OF TRAINING & STANDARDS FOR CRIM. JUST., WIS. DEP’T OF JUST., MODEL POLICY AND PROCEDURE FOR EYEWITNESS IDENTIFICATION (2010), *available at* <http://www.doj.state.wi.us/dles/tns/eyewitnesspublic.pdf>; DALLAS, TEX. POLICE ACAD., ROLL CALL TRAINING BULLETIN #2008-27: ONE PERSON SHOW-UP (2008) (on file with author); DEP’T OF LAW & PUB. SAFETY, N.J. OFF. OF ATT’Y GEN., ATTORNEY GENERAL GUIDELINES FOR PREPARING AND CONDUCTING PHOTO AND LIVE LINEUP IDENTIFICATION PROCEDURES (2001), *available at* http://www.innocenceproject.org/docs/NJ_eyewitness.pdf; OFF. OF ATT’Y GEN., WIS. DEP’T OF JUSTICE, EYEWITNESS IDENTIFICATION BEST PRACTICES (2005), *available at* http://www.innocenceproject.org/docs/WI_eyewitness.pdf; N.C. ACTUAL INNOCENCE COMM’N, NORTH CAROLINA ACTUAL INNOCENCE COMMISSION RECOMMENDATIONS FOR EYEWITNESS IDENTIFICATION, http://www.innocenceproject.org/docs/NC_eyewitness.pdf (last visited Jan. 24, 2011); NORTHAMPTON, MASS. POLICE DEP’T, ADMINISTRATION & OPERATIONS MANUAL O-408: EYEWITNESS IDENTIFICATION PROCEDURE (2000), *available at* http://www.innocenceproject.org/docs/Northampton_MA_ID_Protocols.pdf; SANTA CLARA CNTY. CAL., SANTA CLARA COUNTY LINE-UP PROTOCOL, http://www.innocenceproject.org/docs/Santa_Clara_eyewitness.pdf (last visited Jan. 24, 2011); TASK FORCE ON EYEWITNESS EVIDENCE, SUFFOLK CNTY. OFF. OF DIST. ATT’Y & BOSTON POLICE DEP’T, REPORT OF THE TASK FORCE ON EYEWITNESS EVIDENCE (2004), *available at* <http://www.mass.gov/dasuffolk/docs/120904.html>.

⁴⁷ The group of individuals being viewed usually stands in a line, hence the term “lineup.” They will be referred to as such hereinafter.

⁴⁸ See DOJ GUIDE, *supra* note 5, at 29–31.

⁴⁹ Although not discussed here, an important consideration in any eyewitness identification procedure is the confidentiality of the eyewitness, ensuring similar cooperation by other eyewitnesses in the future through the publicly-acknowledged and well-established safety of cooperating with law enforcement. See *id.* at 29-30.

⁵⁰ See DOJ GUIDE, *supra* note 5, at 35–36.

⁵¹ See *id.* at 36–37.

⁵² See *id.* at 30.

comprise the balance of the lineup.⁵³

Two other common types of eyewitness identification procedure are the “photo array” and the “show-up” identification. A photo array⁵⁴ is similar to the traditional lineup in that it is comprised of several fillers and a suspect, although it uses photographs instead of live people.⁵⁵ Photo arrays are generally utilized when the authorities have a suspect in mind, but not in custody. The last of the three most widely discussed approaches to eyewitness identification⁵⁶ is the “show-up.”⁵⁷ A show-up identification involves transportation by the authorities of the suspect to the eyewitness, at which point the eyewitness determines if the suspect is the perpetrator.⁵⁸ This procedure typically involves the eyewitness viewing the suspect in the back of a squad car and involves no fillers, making its increased capacity for misidentification fairly apparent.⁵⁹

Of the reforms to eyewitness identification procedure commonly recommended by the scientific and legal communities, those which will be discussed herein—and later suggested for legislative application in New York State—deal generally with one of three issues. The first two of these are composing the lineup and conducting the procedure. The third issue, encompassing expert testimony on eyewitness identifications and jury instructions about eyewitness identifications, respects the balanced use of eyewitness evidence at trial, rather than the procedure through which it was obtained.

⁵³ *Id.*; Malpass, Tredoux & McQuinston-Surrett, *supra* note 5, at 156.

⁵⁴ DOJ GUIDE, *supra* note 5, at 29–30. This is not to be confused with a photo book, also known as a “mug book,” which presents a very large number of unrelated and arbitrarily ordered photos, and is typically used when the police do not have a particular suspect in mind. *See id.* at 17. New York, although the only jurisdiction with such a rule, precludes the jury from receiving evidence of photographic identifications. *See infra* text accompanying notes 115–17.

⁵⁵ *See* DOJ GUIDE, *supra* note 5, at 29–30.

⁵⁶ These three approaches include live lineups, photographic identifications, and “show-up” identifications.

⁵⁷ *See* DOJ GUIDE, *supra* note 5, at 27.

⁵⁸ *See id.* at 27–28.

⁵⁹ *See id.* at 27–28. Not only does this procedure fail to protect the suspect, it also fails to provide confidentiality for the eyewitness. *See supra* note 49.

A. *Composing the Lineup*

Ostensibly, the purpose of a lineup is to ensure fairness.⁶⁰ As the appearance, arrangement, order, number, and participation of the suspect and fillers can severely exacerbate the suggestive nature of a lineup procedure, the main consideration when composing a lineup must be that neither the suspect nor the fillers stand out.⁶¹ However, the practical implications of this are more interesting than they may seem at first blush. First of all, should the fillers be chosen for their resemblance to the police's suspect, or to the description of the eyewitness? Most commentators suggest the latter,⁶² although a majority of them also provide a pragmatic exception, allowing use of the former approach in certain cases.⁶³ For example, consider a situation wherein the police have a suspect, based upon evidence other than the eyewitness description (e.g., possession of stolen property or a specific weapon), but the suspect does not fit the eyewitness' description. In such a case, the fillers should be chosen for their resemblance to the suspect, *not* the eyewitness' description, in order to prevent the suspect from standing out. This exception may also apply in other cases, such as where the eyewitness has provided an especially limited description.

Second, once the person who the fillers should resemble has been ascertained, the fillers may be selected. As stated above, it is imperative that all participants in the lineup appear fairly similar,

⁶⁰ Malpass, Tredoux & McQuinston-Surrett, *supra* note 5, at 155 (internal citations omitted).

Police lineups come from English criminal law and procedure. According to Devlin, lineups were instituted through a Middlesex magistrate's order in the mid-nineteenth century. They were intended as a fair replacement for the practices of courtroom identification, and showups, which were widely used in nineteenth-century England but widely recognized as potentially unfair to the defendant. Their origin indicates that the notion of fairness is their *raison d'être*. They are intended to secure an identification that can potentially incriminate someone but is fair to those who are subjected to it, particularly those who are innocent of the crime.

Id.

⁶¹ See, e.g., Acker & Bonventre, *supra* note 3, at 1289–90; Wells, Memon & Penrod, *supra* note 5, at 51; Malpass, Tredoux & McQuinston-Surrett, *supra* note 5, at 156; Wells et al., *supra* note 7, at 630; Wells, *Systemic Reforms*, *supra* note 5, at 624; DOJ GUIDE, *supra* note 5, at 29; JUSTICE PROJECT POLICY REVIEW, *supra* note 3, at 3; NYSBA REPORT, *supra* note 7, at 59.

⁶² See, e.g., JUSTICE PROJECT POLICY REVIEW, *supra* note 3, at 3; NYSBA REPORT, *supra* note 7, at 59; REEVALUATING LINEUPS, *supra* note 5, at 18; Wells et al., *supra* note 7, at 632.

⁶³ Wells et al., *supra* note 7, at 632–33; Turtle, Lindsay & Wells, *supra* note 7, at 9; DOJ GUIDE, *supra* note 5, at 29.

and this includes both significant and unique characteristics.⁶⁴ So, for example, if the individual to be matched by the fillers—either the suspect or the eyewitness’ description—has a “unique” characteristic, such as a tattoo or birthmark, it should be recreated for the fillers.⁶⁵ The fillers should also match that individual’s “significant” characteristics, such as height, weight, race, dress, etc.⁶⁶ Scholars accept, however, that the lineup participants need not be entirely uniform in features and characteristics.⁶⁷

In certain cases, such as when the suspect has unique features that are hard to match⁶⁸ or are not mentioned by the eyewitness,⁶⁹ multiple witnesses who give divergent descriptions,⁷⁰ or a composite sketch results in the selection of the suspect,⁷¹ the task of composing a lineup may be more a matter of art than science. As one commentator observed:

[T]here are appropriate methods for choosing fillers under all of these circumstances. This is one domain where there is a need for police training because of the complex possibilities. . . . [T]he test . . . is whether a nonwitness could pick the suspect out from the lineup by merely knowing the

⁶⁴ See Turtle, Lindsay & Wells, *supra* note 7, at 9; DOJ GUIDE, *supra* note 5, at 29–31; JUSTICE PROJECT POLICY REVIEW, *supra* note 3, at 6; REEVALUATING LINEUPS, *supra* note 5, at 18.

⁶⁵ Turtle, Lindsay & Wells, *supra* note 7, at 9; DOJ GUIDE, *supra* note 5, at 29–31; JUSTICE PROJECT POLICY REVIEW, *supra* note 3, at 6. It has been argued that a lineup may not even be necessary in cases of specific description by an eyewitness:

In such a situation, we question the need to construct a lineup. A lineup is useful to the extent that the eyewitness’s verbal description is vague enough that it leaves doubt as to the identity of the perpetrator. With a vague description, a lineup provides the witness with an opportunity to recognize physical characteristics that he or she had been unable to recall when providing a prelineup description of the culprit. A recognition memory task (i.e., a lineup) seems unnecessary when an eyewitness’ recall is so complete that he or she describes specific idiosyncratic physical features of the culprit. Under such circumstances, we believe the police need only apprehend a suspect who fits the witness’ description.

Wells et al., *supra* note 7, at 634.

⁶⁶ See Turtle, Lindsay & Wells, *supra* note 7, at 9; REEVALUATING LINEUPS, *supra* note 5, at 18.

⁶⁷ Turtle, Lindsay & Wells, *supra* note 7, at 9; DOJ GUIDE, *supra* note 5, at 31; NYSBA REPORT, *supra* note 7, at 58.

⁶⁸ Wells, *Systemic Reforms*, *supra* note 5, at 624; see Wells et al., *supra* note 7, at 634; see also DOJ GUIDE, *supra* note 5, at 29–31 (discussing the treatment of suspects identified as having unique markings, such as tattoos, scars, etc.).

⁶⁹ Wells et al., *supra* note 7, at 633–34; see Malpass, Tredoux & McQuinston-Surrett, *supra* note 5, at 158; Wells, *Systemic Reforms*, *supra* note 5, at 624.

⁷⁰ Wells et al., *supra* note 7, at 634; Wells, *Systemic Reforms*, *supra* note 5, at 624.

⁷¹ See Malpass, Tredoux & McQuinston-Surrett, *supra* note 5, at 160; Wells, *Systemic Reforms*, *supra* note 5, at 624.

description that the eyewitness gave of the offender or by answering the question of who stands out in the lineup.⁷²

Third, fillers should not be reused when introducing a new suspect into the lineup⁷³ and, when using photo arrays, the photos of the suspect should match their appearance at the time of the incident.⁷⁴

Finally, all lineups should contain only a single suspect,⁷⁵ and for live lineups or photo arrays, a minimum of four or five fillers should be used respectively.⁷⁶ It has been asserted, however, that any attempt to choose a specific minimum number of fillers would be “arbitrary.”⁷⁷ Most arbitrarily chosen minimums may be too small in any case, as “the science has shown that the greater the number of fillers, the greater the reliability of the procedure.”⁷⁸ One group of social scientists distilled the abovementioned science down to a single, impeccably logical paragraph:

[T]he probability of false identification is inversely related to the number of lineup members and . . . there is a diminishing return on this probability with the addition of each lineup member. If we assume that the suspect is innocent and the lineup is fairly constructed, the chances that the innocent suspect will more closely resemble the actual culprit more than will the other lineup members is simply $1/N$, where N is the number of lineup members. Hence, the chances that the innocent suspect will stand out by mere chance (as the best choice in a relative judgment process)⁷⁹ is [sic] 1/6 in a 6-person lineup, 1/10 in a 10-person lineup, and so on. Levi has made a convincing argument that real-world

⁷² Wells, *Systemic Reforms*, *supra* note 5, at 624 (citation omitted).

⁷³ DOJ GUIDE, *supra* note 5, at 30; REEVALUATING LINEUPS, *supra* note 5, at 18; Turtle, Lindsay & Wells, *supra* note 7, at 9.

⁷⁴ Or as close to the time of the incident as possible. See Turtle, Lindsay & Wells, *supra* note 7, at 9; DOJ GUIDE, *supra* note 5, at 29; REEVALUATING LINEUPS, *supra* note 5, at 18.

⁷⁵ Wells, *Systemic Reforms*, *supra* note 5, at 623; DOJ GUIDE, *supra* note 5, at 29; JUSTICE PROJECT POLICY REVIEW, *supra* note 3, at 3, 6; NYSBA REPORT, *supra* note 7, at 59; REEVALUATING LINEUPS, *supra* note 5, at 5.

⁷⁶ DOJ GUIDE, *supra* note 5, at 29–30; JUSTICE PROJECT POLICY REVIEW, *supra* note 3, at 3; REEVALUATING LINEUPS, *supra* note 5, at 18. Although stating that “research has shown that the more fillers there are in a lineup or photo array, the less likely a witness is to misidentify an innocent suspect as the perpetrator,” the NYSBA report also contains the seemingly incongruous assertion that five participants “is acceptable, [and] should be standard statewide.” NYSBA REPORT, *supra* note 7, at 59.

⁷⁷ Wells et al., *supra* note 7, at 634.

⁷⁸ JUSTICE PROJECT POLICY REVIEW, *supra* note 3, at 7.

⁷⁹ See discussion *infra* Part III.B.

identification rates for eyewitnesses viewing culprit-absent lineups is [sic] around 60%. This means that the chances of an innocent suspect being identified in a 6-person lineup, even when it is constructed and conducted [appropriately], are 10% (i.e., 1/6 of 60%), far higher than what would seem acceptable to the justice system.⁸⁰

Thus, the referenced scholarly literature points towards an unspecified, although apparently large, increase in the number of lineup participants.⁸¹ Seemingly—when it comes to lineup participants—the more the merrier.

B. *Conducting the Lineup*

Like the recommendations outlined above, the reforms regarding the manner in which eyewitness identifications are conducted aim to ensure procedural fairness. For instance, before the lineup is conducted or even composed, the task of documenting the identification procedure should have already begun. A majority of scholarly literature on the topic recommends that the entire identification procedure—including the eyewitness' initial description, the selection and arrangement of fillers, any documents or photographs used during or in preparation for the procedure, any identification or nonidentification, and a post-lineup certainty or confidence statement wherein the eyewitness explains, in her own words, how confident she is in her identification—be documented.⁸² This should be accomplished by the most effective means available, and electronic recording, specifically video and audio, is preferable.⁸³ By recording the various circumstances of the procedure, the ability of a jury to give proper weight to an identification is preserved. Instead of relying on the two

⁸⁰ Wells et al., *supra* note 7, at 635 (citations omitted).

⁸¹ One group has advocated for lineups composed of up to twelve people. See Turtle, Lindsay & Wells, *supra* note 7, at 10. Also, according to another group, “[m]ore systematic research is needed before it will be possible to conclude that lineup sizes can easily be raised to 20 or more persons without harming accurate identification rates, but there appears to be great promise in the simple idea of increasing the nominal size of lineups.” Wells, Memon & Penrod, *supra* note 5, at 63.

⁸² See Wells et al., *supra* note 7, at 635; Wells, *Systemic Reforms*, *supra* note 5, at 631; Turtle, Lindsay & Wells, *supra* note 7, at 15–16; DOJ GUIDE, *supra* note 5, at 33–38; JUSTICE PROJECT POLICY REVIEW, *supra* note 3, at 3, 7; NYSBA REPORT, *supra* note 7, at 60–61; REEVALUATING LINEUPS, *supra* note 5, at 20–21.

⁸³ See NYSBA REPORT, *supra* note 7, at 60–61; REEVALUATING LINEUPS, *supra* note 5, at 20–21.

characterizations of the procedure provided by counsel, and their antipodal biases, the record of the procedure allows jurors to make individual assessments of propriety.

Further illustrating the overarching theme of procedural fairness, most scholars recommend that, before the procedure even begins, certain “cautionary instructions” be given to the eyewitness in order to further limit the negative impact of relative judgment processes on the identification procedure.⁸⁴ Commonly suggested instructions include, among others, stating that the suspect may or may not be present in the lineup,⁸⁵ the suspect’s appearance may have changed since the incident,⁸⁶ and the police will continue to investigate the crime whether the eyewitness selects someone or not.⁸⁷ These instructions take some of the pressure to choose off of the eyewitness by making it clear that they are not compelled to make a choice, especially one based on a relative judgment, that failing to choose will not terminate the investigation, and that protecting the innocent is as important as prosecuting the guilty. By issuing these cautionary instructions, the administrator enlists the eyewitness’ help in ensuring the procedure’s propriety.

Another common and straightforward recommendation is that identification procedures utilize “double blind” administration.⁸⁸

⁸⁴ See Wise, Dauphinais & Safer, *supra* note 7, at 863; Wells et al., *supra* note 7, at 615; Wells, *Systemic Reforms*, *supra* note 5, at 625; Turtle, Lindsay & Wells, *supra* note 7, at 11–12; DOJ GUIDE, *supra* note 5, at 31–33; JUSTICE PROJECT POLICY REVIEW, *supra* note 3, at 3, 5–6; NYSBA REPORT, *supra* note 7, at 58–59; REEVALUATING LINEUPS, *supra* note 5, at 19–20.

⁸⁵ See, e.g., Wells et al., *supra* note 7, at 615; JUSTICE PROJECT POLICY REVIEW, *supra* note 3, at 6; REEVALUATING LINEUPS, *supra* note 5, at 19. In at least one study, this instruction reduced misidentifications when the perpetrator was not in the lineup by fifty-six percent, while maintaining an eighty-five percent accuracy rate for identifications when the perpetrator was present. See Roy S. Malpass & Patricia G. Devine, *Eyewitness Identification: Lineup Instructions and the Absence of the Offender*, 66 J. APPLIED PSYCHOL. 482, 485 (1981).

⁸⁶ See, e.g., Turtle, Lindsay & Wells, *supra* note 7, at 11; DOJ GUIDE, *supra* note 5, at 32. At least one study, however, has found that this instruction may have a *negative* effect on identification accuracy. See Steve D. Charman & Gary L. Wells, *Eyewitness Lineups: Is the Appearance-Change Instruction a Good Idea?*, 31 LAW & HUM. BEHAV. 3 (2007).

⁸⁷ See, e.g., Turtle, Lindsay & Wells, *supra* note 7, at 11; REEVALUATING LINEUPS, *supra* note 5, at 19.

⁸⁸ See, e.g., Wells, Memon & Penrod, *supra* note 5, at 63; Gershman, *supra* note 7, at 28; Wells et al., *supra* note 7, at 627–30; Wells, *Systemic Reforms*, *supra* note 5, at 629–30; Wise, Dauphinais & Safer, *supra* note 7, at 862; JUSTICE PROJECT POLICY REVIEW, *supra* note 3, at 3, 7–8; NYSBA REPORT, *supra* note 7, at 58; REEVALUATING LINEUPS, *supra* note 5, at 18; Amy L. Bradfield, Gary L. Wells & Elizabeth A. Olson, *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPLIED PSYCHOL. 112, 118 (2002). Although the DOJ Guide states that officers should “[a]void saying anything to the witness that may influence the witness,” and that “[i]f an identification is made, avoid reporting to the witness any information regarding the

The term “double blind” is commonly associated with pharmaceutical trials and experiments, wherein there are two groups, known respectively as the control and experimental groups.⁸⁹ The control group is given a placebo, which is chemically neutral, and the experimental group is given the experimental drug.⁹⁰ However, neither the administrators nor the participants are aware of who received the drug.⁹¹ The reasoning behind this experimental approach rests on the widely confirmed hypothesis that study participants, when the administrators know who got which, are better able to guess whether they had received the drug or placebo.⁹² Either consciously or subconsciously, the administrators impart information, known as “feedback,”⁹³ to the participants,⁹⁴ damaging the experiment’s objectivity. To counter this effect and maintain objectivity, the double blind approach to administration was created.

Unlike a pharmaceutical study, where a participant may be able to guess whether he is receiving the placebo as a result of feedback, feedback during eyewitness identification may either suggest a specific choice to the eyewitness, or confirm the one being made. However, if double blind administration procedure is utilized, the officer administering the procedure is unaware of who the suspect is and, therefore, cannot give any direct or indirect cues—feedback—to the eyewitness.

The concept of feedback has been widely studied and the scientific community seems to agree that the phenomenon exists, that it has an extremely detrimental effect on eyewitness identification procedures,⁹⁵ and that its effect can be easily mitigated through the implementation of double blind administration.⁹⁶ Accordingly, in

individual he/she has selected,” it does not specifically discuss double-blind administration. DOJ GUIDE, *supra* note 5, at 33.

⁸⁹ See JUSTICE PROJECT POLICY REVIEW, *supra* note 3, at 7.

⁹⁰ See *id.*

⁹¹ See *id.*

⁹² See Bradfield, Wells & Olson, *supra* note 88, at 118; Wells et al., *supra* note 7, at 627–29; Wells, *Systemic Reforms*, *supra* note 5, at 629–30.

⁹³ See Bradfield, Wells & Olson, *supra* note 88, at 117–18; Wells, Olson & Charman, *supra* note 6, at 49–51.

⁹⁴ Technically, for an accurate analogy to a lineup, the participants in a pharmaceutical trial would need to be involved in guessing whether they were on the placebo, during which the administrator’s feedback would come into play.

⁹⁵ See Wells et al., *supra* note 7, at 628–29; Wells, *Systemic Reforms*, *supra* note 5, at 629–30; Bradfield, Wells & Olson, *supra* note 88, at 118; Wells, Olson & Charman, *supra* note 6, at 50.

⁹⁶ See Wells, Memon & Penrod, *supra* note 5, at 63; Gershman, *supra* note 7, at 28; Wells

light of the general goal of procedural fairness, the double blind approach to administration should be utilized when conducting eyewitness identifications.

In addition to double blind administration procedures, using sequential presentation of lineup participants is widely recommended within the scholarly literature.⁹⁷ This simply means that the identification procedure participants—in both photo arrays and live lineups—are presented to the eyewitness one at a time, rather than simultaneously. This type of presentation aims to reduce the impact of “relative judgment processes” on the identification procedure.⁹⁸ Relative judgments involve a comparison of how the participants appear relative to one another, and “can be contrasted with absolute judgments in which the eyewitness compares each lineup member to his or her memory of the culprit, and uses some type of criterion threshold to decide whether or not the person is the actual culprit.”⁹⁹ During simultaneous lineups, relative judgment processes frequently lead the eyewitness to select the participant *most like* the person they saw, instead of only making a selection if the person they saw is an actual participant, which leads to misidentification.¹⁰⁰ In order to protect against the effects of relative judgment processes, and the resultant bias of simultaneous presentations, lineups must employ sequential presentation procedures.

Finally, due to their inherently suggestive nature, the use of show-up identification procedures should be restricted to cases in

et al., *supra* note 7, at 627–29; Wells, *Systemic Reforms*, *supra* note 5, at 629; JUSTICE PROJECT POLICY REVIEW, *supra* note 3, at 7–8; NYSBA REPORT, *supra* note 7, at 58; REEVALUATING LINEUPS, *supra* note 5, at 18–19; Bradfield, Wells & Olson, *supra* note 88, at 118; Wells, Olson & Charman, *supra* note 6, at 44.

⁹⁷ See Wells, Memon & Penrod, *supra* note 5, at 63; Gershman, *supra* note 7, at 28; Wells et al., *supra* note 7, at 639–40; Wells, *Systemic Reforms*, *supra* note 5, at 625–28; Wise, Dauphinais & Safer, *supra* note 7, at 860; DOJ GUIDE, *supra* note 5, at 34–35; JUSTICE PROJECT POLICY REVIEW, *supra* note 3, at 3, 8; NYSBA REPORT, *supra* note 7, at 61–64; REEVALUATING LINEUPS, *supra* note 5, at 21. The *DOJ Guide* (impliedly) and *Reevaluating Lineups* (expressly) rank this reform as optional.

⁹⁸ See Wells et al., *supra* note 7, at 614.

⁹⁹ *Id.*

¹⁰⁰ Wells, Memon & Penrod, *supra* note 5, at 61; Gershman, *supra* note 7, at 28; Wells et al., *supra* note 7, at 613–14; Wells, *Systemic Reforms*, *supra* note 5, at 618–20; Wise, Dauphinais & Safer, *supra* note 7, at 852; NYSBA REPORT, *supra* note 7, at 52; JUSTICE PROJECT POLICY REVIEW, *supra* note 3, at 4; REEVALUATING LINEUPS, *supra* note 5, at 21; Turtle, Lindsay & Wells, *supra* note 7, at 12–13. This is an extreme simplification of the underlying science, but it does establish a foundation for discussion of the basic reasoning behind sequential presentation.

which there is no other available or reasonably feasible alternative.¹⁰¹ Naturally, in the few cases where they are necessary, all procedural safeguards possible—given the suggestive nature of a show-up procedure—should be afforded; including giving the eyewitness cautionary instructions, and documenting every part of the procedure. Even with these safeguards in place, scholars have expressed “grave concerns about the use of show-ups.”¹⁰²

C. *At Trial*

Certain recommended reforms deal with the subsequent use of an identification at trial, rather than the procedure which elicited it.

First, expert testimony on the reliability of eyewitness identifications should be permitted.¹⁰³ However, prosecutors may oppose this approach for one of several reasons. One team of social scientists summarized the usual grounds of opposition as follows:

Prosecutors generally use four arguments against the admission of expert testimony on eyewitness issues. One argument is that the eyewitness literature is not sufficiently mature or precise to be considered scientific. Today, this argument almost never prevails. However, the three other arguments continue to prevent expert testimony on eyewitness issues in many jurisdictions. One is that such testimony invades the province of the jury, because it is the jury that must decide the credibility of witnesses. Another argument is that the findings are merely a matter of common sense and that juries already know these things from their everyday experience. Yet another argument is that the prejudicial value of expert testimony regarding eyewitnesses outweighs its probative value. This argument assumes that eyewitness experts can make juries more

¹⁰¹ Wise, Dauphinais & Safer, *supra* note 7, at 859–60. See Gershman, *supra* note 7, at 28; Wells et al., *supra* note 7, at 630–31; Wells, *Systemic Reforms*, *supra* note 5, at 628; DOJ GUIDE, *supra* note 5, at 27.

¹⁰² Wells et al., *supra* note 7, at 630–31.

¹⁰³ Gershman, *supra* note 7, at 25; Wise, Dauphinais & Safer, *supra* note 7, at 823–26; NYSBA REPORT, *supra* note 7, at 64–65. Whether this recommendation should be implemented through a universal right to expert testimony about eyewitness identifications in every case involving them is unclear. It is an issue too broad to cover in this brief comment. It is clear, however, that expert testimony should be allowed—at the very least—in cases where eyewitness identification is the principle evidence against the accused. For a discussion of New York’s evolving position on admitting expert testimony, which may follow this approach, see *infra* Part IV.

dubious of the eyewitness than they ought to be.¹⁰⁴

While prosecutors may not agree, most scholars approve of and recommend the admission of expert testimony on eyewitness identifications.¹⁰⁵ Like documenting the identification procedure, allowing expert testimony allows jurors to make an individual determination regarding the identification's reliability, and to assign weight to the evidence accordingly.

Second, juries should be given specific instructions regarding the unreliability of eyewitness identifications if expert testimony is not permitted.¹⁰⁶ This is already the practice in at least one circuit of the United States Court of Appeals. With its decision in *United States v. Telfaire*, the District of Columbia Circuit provided special jury instructions for use in future cases where a single eyewitness' identification is the only evidence offered against a defendant.¹⁰⁷ Across the United States, such instructions,¹⁰⁸ or ones derived from them, are used more frequently than any other jury instruction regarding eyewitness identification.¹⁰⁹ However, the scholarly preference for expert testimony is demonstrated by one commentator's succinct observation that "*Telfaire* is not a reliable alternative to eyewitness expert testimony."¹¹⁰

IV. CURRENT SITUATION IN NEW YORK STATE

Despite the fact that it ranks third among the United States in its number of wrongful convictions,¹¹¹ New York continues to fall far short of the recommended standards of procedural fairness advanced by experts.¹¹² Since 1991, twenty-three prisoners in state custody have been exonerated based on DNA evidence.¹¹³ These

¹⁰⁴ Wells, Memon & Penrod, *supra* note 5, at 48.

¹⁰⁵ See *supra* note 103.

¹⁰⁶ See Gershman, *supra* note 7, at 25; Wise, Dauphinais & Safer, *supra* note 7, at 830–33; NYSBA REPORT, *supra* note 7, at 65–71.

¹⁰⁷ *United States v. Telfaire*, 469 F.2d 552, 558–59 (D.C. Cir. 1972).

¹⁰⁸ The instructions were provided by the court as an appendix to *Telfaire*. *Id.*

¹⁰⁹ See Wise, Dauphinais & Safer, *supra* note 7, at 830–33 (citation omitted).

¹¹⁰ Gabriella Ramirez, Dennis Zemba & R. Edward Geiselman, *Judges' Cautionary Instructions on Eyewitness Testimony*, 14 AM. J. FORENSIC PSYCHOL. 31, 45 (1996); see also NYSBA REPORT, *supra* note 7, at 66 (noting the clear preference for expert testimony).

¹¹¹ See LESSONS NOT LEARNED, *supra* note 3, at 3.

¹¹² See generally *id.* at 5 (discussing changes made by other states that New York has not yet adopted); NYSBA REPORT, *supra* note 7 (discussing proposed changes to New York's criminal justice system). For the recommended standards of fairness, see *supra* Part III.

¹¹³ See LESSONS NOT LEARNED, *supra* note 3, at 3.

circumstances, especially in light of the fact that these innocent people served a combined total of 260 years in prison,¹¹⁴ should elicit a popular demand for a thorough examination of the State's criminal justice processes.

Beginning with the jurisdiction's most unique procedural shortcoming, New York State is the only jurisdiction in the nation to prohibit juries from receiving evidence of photographic identification.¹¹⁵ This preclusion has a detrimental effect on the jury's ability to thoroughly review the circumstances of the case and to make an independent and individual assessment of whether the prosecution's burden of proof has been met. There is no reason why, *if properly conducted and documented as outlined above*, evidence of photographic identifications should be excluded.¹¹⁶

Although New York has an unusual prohibition regarding the admission of photographic identifications and has no statewide eyewitness identification procedure, the jurisdiction is not entirely bereft of positive characteristics. First, the use of "show-up" identification procedures is strongly disfavored by the state courts.¹¹⁷ Second, it appears that the jurisdiction *may* be making progress in another area slated by experts for reform—allowing

¹¹⁴ *See id.*

¹¹⁵ *People v. Woolcock*, 792 N.Y.S.2d 804, 815 (Sup. Ct. 2005) ("The Court has undertaken an exhaustive review of identification procedures employed nationwide. Every other state, forty-nine in all, as well as the Federal Courts, permit evidentiary use of a prior photographic identification *in a fair array*." (emphasis added); NYSBA REPORT, *supra* note 7, at 71; *see People v. Caserta*, 224 N.E.2d 82, 83 (N.Y. 1966) (explaining the rule's origins—in a statutory construction aimed at preventing jurors from assuming that, since the police had the defendant's picture, he or she must have been a repeat offender or career criminal); *see also People v. Lindsay*, 364 N.E.2d 1302, 1303–04 (N.Y. 1977) ("[I]t is settled that the convenience of the People cannot outweigh the prejudice to the defendant inherent in such proof."); *People v. Pleasant*, 430 N.E.2d 905, 906, n.* (N.Y. 1981) (citing *People v. Lindsay*, 364 N.E.2d 1302 (N.Y. 1977)) (noting that photo identifications are inadmissible); *People v. Perdomo*, 720 N.Y.S.2d 205, 206 (App. Div. 2001) ("In general, a witness may not testify concerning a previous identification of a defendant from photographs.").

¹¹⁶ This view may be gaining support amongst the state courts. *See Woolcock*, 792 N.Y.S.2d at 816 ("The Court now returns to the conundrum created by New York's singular rule of excluding photographic identification. . . . Recognizing that our Court of Appeals has not re-visited the issue of photographic identifications in decades, and given advances in both technology and social science research, this Court respectfully suggests that the time has come to re-evaluate New York's singular exception regarding photographic identification.").

¹¹⁷ Show-ups are strongly disfavored unless there are exigent circumstances requiring immediate identification, or the suspect is detained near the scene of the crime and the witness can make an immediate identification. Even in these cases, the identification may still be inadmissible unless there was a prior effort to provide a less suggestive procedure. Furthermore, police station show-ups are impermissibly suggestive as a matter of law. *See, e.g., People v. Riley*, 517 N.E.2d 520, 523 (N.Y. 1987).

expert testimony on eyewitness identifications.

Currently, in New York State the standard for the admissibility of expert testimony is that found in *Frye v. United States*.¹¹⁸ In applying this standard, New York State courts allow the judge to exercise wide discretion in admitting or excluding expert testimony on eyewitness identifications.¹¹⁹ Although, in the past, the New York courts—including the Court of Appeals, the state’s highest court—have *quite* frequently found that trial judges did not abuse their discretion in denying requests for expert testimony,¹²⁰ a recent Court of Appeals decision may indicate decreasing judicial aversion to admission. In *People v. LeGrand*,¹²¹ the New York Court of Appeals stated,

it is clear that expert testimony regarding the factors that

¹¹⁸ *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923); *see also* *People v. Wesley*, 633 N.E.2d 451, 454 (N.Y. 1994) (adopting the *Frye* standard). However, this is not the standard employed in federal courts because the Supreme Court found the *Frye* standard to be inconsistent with Federal Rule of Evidence 702. *See* *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 588–89 (1993). The *Daubert* approach is the more flexible of the two standards.

¹¹⁹ *See* *People v. Mooney*, 559 N.E.2d 1274, 1274 (N.Y. 1990); *see also* *People v. LeGrand*, 867 N.E.2d 374, 380 (N.Y. 2007) (“[T]he court would still be obliged to exercise its discretion with regard to the relevance and scope of such expert testimony.”); *People v. Lee*, 750 N.E.2d 63, 66–67 (N.Y. 2001) (“[T]he admissibility and limits of expert testimony lie primarily in the sound discretion of the trial court.”); *People v. Young*, 850 N.E.2d 623, 625–26 (N.Y. 2006) (citing *Lee*, 750 N.E.2d 63) (noting that the decision to admit or exclude evidence is a discretionary one).

¹²⁰ *See, e.g.,* *Young*, 850 N.E.2d at 624; *Lee*, 750 N.E.2d at 67; *People v. McCray*, 886 N.Y.S.2d 519, 520 (App. Div. 2009); *People v. Muhammad*, 885 N.Y.S.2d 793, 794 (App. Div. 2009); *People v. Chisolm*, 868 N.Y.S.2d 643, 644 (App. Div. 2008).

¹²¹ In this case, a livery cab driver was stabbed to death. *LeGrand*, 867 N.E.2d at 376. The descriptions of four eyewitnesses were used to create a composite sketch of the assailant. *Id.* Two years later, while arresting Mr. LeGrand for an unrelated burglary, a police officer determined that Mr. LeGrand resembled the composite sketch. *Id.* As the four eyewitnesses could not be found, the homicide case fell apart. *Id.* Five years later, Mr. LeGrand was again arrested for an unrelated burglary and again found to resemble the composite sketch. *Id.* This time, however, the four witnesses were located, and a fifth surfaced as well. *Id.* Mr. LeGrand was charged with second-degree murder. *Id.* There was no forensic or other physical evidence linking Mr. LeGrand to the crime. *Id.* Only one of the witnesses made a positive identification of Mr. LeGrand from a photo array and lineup, although two others stated, respectively, that he was “close” or “similar” to the assailant. *Id.* At trial, three witnesses identified Mr. LeGrand as the assailant, although it was discovered that two of them had viewed photo arrays containing Mr. LeGrand the night before in the district attorney’s office. *Id.* Thus, the only evidence against Mr. LeGrand was a few (questionable) eyewitness identifications. *Id.* Due to a hung jury, the trial ended in a mistrial. *Id.* Prior to his second trial, Mr. LeGrand sought to admit expert testimony about eyewitness identifications. *Id.* After a *Frye* hearing, the court precluded the testimony on the ground that the scientific conclusions therein were not generally accepted by the relevant scientific community. *Id.* at 377. Mr. LeGrand was subsequently found guilty of second-degree murder. *Id.* On appeal, the Court of Appeals held that this preclusion was reversible error, setting the precedent discussed in this section. *Id.*

affect the accuracy of eyewitness identifications, in the appropriate case, may be admissible in the exercise of a court's discretion. Moreover, there are cases in which it would be an abuse of a court's discretion to exclude expert testimony on the reliability of eyewitness identifications.¹²²

Furthermore, the Court specifically stated that "where the case turns on the accuracy of eyewitness identifications and there is little or no corroborating evidence connecting the defendant to the crime, it is an abuse of discretion for a trial court to exclude expert testimony on the reliability of eyewitness identifications."¹²³ Thus, it would seem that New York's highest court intends to lead the way with respect to increased admissibility of expert testimony on eyewitness identifications.¹²⁴

At first, however, two decisions out of New York's Appellate Division appeared to evince a failure of the lower courts to follow the abovementioned lead. In *People v. Abney*,¹²⁵ the Appellate Division's First Department attempted to justify a narrow application of *LeGrand* by citing "sufficient corroborating evidence," which it held rendered expert testimony unnecessary.¹²⁶ With its decision in *People v. Allen*,¹²⁷ the Second Department did likewise nearly two months earlier. As a result of these two decisions, the practical effect of *LeGrand*—especially the scope of the phrase "little or no corroborating evidence"—was unclear for almost a year.

Fortunately, the New York Court of Appeals granted leave to appeal and consolidated the cases in an effort to provide a measure of guidance for those who would apply the *LeGrand* precedent.¹²⁸ Although the adjudication of this consolidated case has not provided exhaustive guidance for application of the multi-faceted *LeGrand*

¹²² *Id.* at 378–79.

¹²³ *Id.* at 375. The *LeGrand* decision also set out four additional criteria, which restrict admission of expert testimony, even where the case turns on eyewitness identification and there is little or no corroborating evidence. In such cases, expert testimony is only permissible "if that testimony is (1) relevant to the witness's identification of defendant, (2) based on principles that are generally accepted within the relevant scientific community, (3) proffered by a qualified expert and (4) on a topic beyond the ken of the average juror." *Id.* at 375–76.

¹²⁴ Among the state's various courts.

¹²⁵ *People v. Abney*, 867 N.Y.S.2d 1 (App. Div. 2008), *rev'd*, 918 N.E.2d 486 (N.Y. 2009).

¹²⁶ *Id.* at 5 (quoting *People v. LeGrand*, 876 N.E.2d 374, 380 (N.Y. 2007)).

¹²⁷ *People v. Allen*, 861 N.Y.S.2d 775, 776–77 (App. Div. 2008), *aff'd*, *Abney*, 918 N.E.2d 486.

¹²⁸ *Abney*, 918 N.E.2d at 487.

decision,¹²⁹ the Court’s differentiation between *Abney* and *Allen*—based on their respective factual circumstances—does provide a basic foundation for understanding the meaning of “little or no corroborating evidence.” In *Abney*, eyewitness identification by the thirteen-year-old victim was the only evidence connecting the defendant to the crime.¹³⁰ The Court of Appeals stated that

it [is] clear that there was no evidence other than [the victim’s] identification to connect defendant to the crime, and she did not describe him as possessing any unusual or distinctive features or physical characteristics.

....

. . . Accordingly, the trial judge in *Abney* abused his discretion when he did not allow [an expert witness] to testify . . .¹³¹

Essentially, the Court held that the First Department had abused its discretion in excluding expert testimony because the case turned on the accuracy of one eyewitness identification and there was no corroborating evidence, placing the case squarely within the situation envisioned by the Court in *LeGrand*.¹³² Conversely, the Court of Appeals held that the Second Department had not abused its discretion in refusing to admit expert testimony on eyewitness identifications in *Allen*.¹³³ In *Allen*, after a barbershop robbery, two victims independently made positive identifications of the defendant almost four months after the incident.¹³⁴ Furthermore, both of the victims personally knew defendant from around the neighborhood, and one even recognized his voice.¹³⁵ The Court stated that, unlike its actions with respect to *Abney*,

[w]e are unwilling to second-guess the trial judge’s exercise of discretion in *Allen* because the case did not depend exclusively on [one victim’s] eyewitness testimony—i.e., *Allen* is not a “case that turns on the accuracy of eyewitness identifications where there is little or no corroborating

¹²⁹ For example, it does not give in-depth treatment to the four factors, laid out in *LeGrand*, which go beyond whether the case turns on eyewitness identification and whether there is little or no corroborating evidence. *See supra* note 123.

¹³⁰ *Abney*, 918 N.E.2d at 489–90.

¹³¹ *Id.* at 495–96.

¹³² *See id.* at 496.

¹³³ *Id.*

¹³⁴ *Id.* at 491–92, 496.

¹³⁵ *Id.* at 491.

evidence connecting the defendant to the crime.”¹³⁶

With its affirmance of *Allen* and reversal of *Abney* in this consolidated decision, the Court of Appeals has provided a modicum of clarification regarding its holding in *LeGrand*.

However, as with any precedent, the Court’s decision may have a few loose ends worth discussing. First, the Court may have inadvertently “boxed itself in.” An overly simple “one witness = expert testimony, two witnesses = no expert testimony” formula—although not applied, or even necessarily implied by the Court—may wind up being the decision’s practical effect. Second, the precedent still provides a large amount of judicial discretion, and therefore has the potential for greatly divergent application across jurisdictions and between judges. Put another way, although limiting a judge’s discretion to *directly* allow or disallow expert testimony on eyewitness identification, this precedent still gives the judge discretion in *construing and applying* the language of *LeGrand*. This “back door” may essentially collapse the *LeGrand* and *Frye* standards, reviving the “over my dead body” approach to expert testimony on eyewitness identifications previously applied by the state’s courts.¹³⁷ The impact and severity of these shortcomings is presently unclear, however, and depends upon future guidance by the Court of Appeals. Over time, the propriety and efficacy of the *LeGrand* standard will become clearer with its application and further interpretation by the state’s courts. Although it is too soon to tell how the case law in this area will develop, the Court of Appeals has—at the very least—demonstrated that *LeGrand* provides a substantive and meaningful standard, deviation from which will be judicially chastened.

Thus, it appears that New York State is taking limited steps in the right direction. This is certainly not to say, however, that immediate reforms, based on the recommendations discussed herein, are unnecessary. Whether characterized as a legal, logical, moral, or practical matter, they cannot wait.

V. RECOMMENDATIONS FOR NEW YORK STATE

In order to guarantee the just, effective, and accurate nature of

¹³⁶ *Id.* at 496 (quoting *People v. LeGrand*, 867 N.E.2d 374, 375 (N.Y. 2007)).

¹³⁶ *Id.* (quoting *LeGrand*, 867 N.E.2d at 375).

¹³⁷ Thanks to Albany Law School Professor Michael J. Hutter for allowing me to use his characterization of the Court’s pre-*LeGrand* approach.

eyewitness identifications in New York—and thereby address one aspect of the wrongful conviction phenomenon—the state legislature should propose and pass mandatory statewide identification procedures based on the recommendations set out above. This legislation should explicitly provide for and require the following:

A. Composing the Lineup

- Neither the suspect nor the fillers shall stand out, and they shall all appear reasonably uniform with respect to both significant and unique characteristics.
- Fillers shall be chosen based on their resemblance to the eyewitness' description, not the police's suspect, unless such an arrangement would cause the suspect to stand out, in which case the opposite approach may be used.
- There shall be only one suspect per lineup.
- Fillers shall not be reused when introducing a new suspect into the lineup.
- If using a photo array, the photos of the suspect shall be from as close to the time of the incident as possible, in an attempt to use a photo in which the suspect's appearance is closest to what it was during the incident.
- There shall be at least ten participants in the lineup.¹³⁸

B. Conducting the Lineup

- The *entire* procedure shall be electronically documented on audio and video—from the witness' initial description through a certainty or confidence statement by the eyewitness after the lineup.
- The eyewitness shall receive cautionary instructions prior to viewing. The experts are not in agreement about which instructions are best, although, at a minimum, the instructions meant to prevent relative judgment processes shall be included: that the suspect may or may not be in the lineup; that protecting the innocent is equally

¹³⁸ Although using even more participants may improve fairness, the science on vastly increased lineup size is not complete. Ten participants, however, is a one hundred percent increase in the number of participants currently used across New York. This means that the risk of a misidentification would be cut in half, which is a good start. *See supra* notes 75–80.

important as finding the guilty; and that the investigation will not be terminated as a result of failure to select a lineup participant.

- The procedure shall utilize “double blind” administration.
- The procedure shall employ sequential presentation.
- Show-up identifications shall be restricted to an extreme degree. They shall be inadmissible unless there are *emergency* circumstances requiring immediate identification.¹³⁹ When they do occur, they shall be conducted in a manner that attempts to mitigate their inherently suggestive nature. They shall be conducted, as much as is possible, in accordance with the recommendations for other lineups found herein, especially providing cautionary instructions to the witness and documenting the procedure.

C. At Trial

- The *LeGrand* standard¹⁴⁰ shall be maintained, although the empirical ramifications of this must be closely monitored, especially judicial construction and application of the language “little or no corroborating evidence,” and of the four criteria.¹⁴¹ If the trial judge excludes expert testimony (i.e., on the basis of “sufficient corroborating evidence”), jury instructions regarding the unreliability of eyewitness identifications shall be provided. Based on the fairness, accuracy, and efficacy of this developing standard, as observed over the next few years, the legislature may need to revisit this topic with the goal of

¹³⁹ Currently in New York, show-ups are not acceptable unless there are: (1) exigent circumstances requiring immediate identification; or (2) the suspect is detained near the scene of the crime and the witness can make an immediate identification. *See supra* note 117. This recommended standard would raise the prosecutor’s burden of proof when arguing for admission in the first case, and completely abolish the admissibility of show-up identifications in the second case. Allowing for the admission of show-ups when the “suspect is detained near the crime scene and the witness [can] view that person immediately” implies that the convenience of police outweighs a suspect’s right to a minimally suggestive identification procedure. *People v. Clark*, No. 528/03, 2003 WL 22250343, at *1 (N.Y. Sup. Ct. Aug. 13, 2003). This is unacceptable, and has been so labeled by at least one court in New York. *See People v. Woolcock*, 792 N.Y.S.2d 804, 810 (Sup. Ct. 2005) (“Convenience is of course an insufficient basis upon which to jeopardize a defendant’s right to a non-suggestive identification procedure.”).

¹⁴⁰ *See supra* note 123 and accompanying text.

¹⁴¹ *People v. LeGrand*, 867 N.E.2d 374, 375–76, 380 (N.Y. 2007).

2010/2011] Statewide Eyewitness Identification Procedures 1551

developing a statutory provision for expert testimony on eyewitness identifications.¹⁴²

- Juries shall not be precluded from receiving evidence of photographic identifications, provided that the procedure through which they were obtained complies with the recommendations herein.

D. Practical Considerations

- This legislation must also include mechanisms and funding for the training of relevant individuals, including defense attorneys, prosecutors, judges, and the police.
- This legislation must also provide a mechanism through which compliance with these procedures is mandatory and noncompliance is punished.

VI. CONCLUSION

Although it will take significant time and financial resources, like most political action, enactment by the New York State Legislature of mandatory statewide identification procedures is surprisingly practical when weighed against the immense positive effect it will have on the fair and equal administration of justice.¹⁴³ By enacting these procedures and providing for the relatively brief and straightforward training of relevant groups (i.e., attorneys, judges, and law enforcement personnel), New York will be moving in the direction demanded by its official state motto—“*Excelsior*.”

¹⁴² Again, whether this should be a universal right is unclear. *See supra* note 91.

¹⁴³ This cost/benefit analysis is especially profound when compared to similar analyses of other state programs. For instance, compare New York’s “ballistic fingerprinting” program with other similar state programs.