3.2 Overview of Risks of Misidentification

A. Nature of the Problem

Research and studies. Eyewitness identifications play a major role in the charging and conviction of criminal defendants, providing the basis for criminal charges against approximately 77,000 people each year. Gary L. Wells & Elizabeth A. Olson, *Eyewitness Identification: Information Gain from Incriminating and Exonerating Behaviors*, 8 J. EXPERIMENTAL PSYCHOL.: APPLIED 155 (2002).

Scientific research, academic literature, and overturned convictions, however, have raised concerns about the reliability of eyewitness identifications in general and cross-racial identifications in particular. *See also infra* "State guarantee of due process" in § 3.4A, Due Process (discussing recent cases from the U.S. Court of Appeals for the Fourth Circuit and state supreme courts reviewing research raising concerns about eyewitness identification evidence). The U.S. Supreme Court has observed that "the annals of criminal law are rife with instances of mistaken identification." *United States v. Wade*, 388 U.S. 218, 228 (1967); *see also Perry v. New Hampshire*, 565 U.S. __, 132 S. Ct. 716, 738–39 (2012) (Sotomayor, J., dissenting) ("[A] staggering 76% of the first 250 convictions overturned due to DNA evidence since 1989 involved eyewitness misidentification."). Experts believe that "eyewitness error is the leading contributing factor in wrongful convictions in the United States." *See* ELIZABETH F. LOFTUS ET AL., EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL § 1-2 (5th ed. 2013) [hereinafter EYEWITNESS TESTIMONY]; *see also* EDWARD CONNORS ET AL., NATIONAL INSTITUTE OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996); C. Ronald Huff et al., *Guilty Until Proved Innocent*, 32 CRIME & DELINQUENCY 518 (1986); Innocence Project, Facts on Post-Conviction DNA Exonerations, INNOCENCEPROJECT.ORG (last visited Sept. 25, 2014).

A review of post-conviction DNA exonerations found that at least 40% of cases in which the defendant was exonerated as a result of DNA evidence involved cross-racial eyewitness identifications. Innocence Project, Facts on Post-Conviction DNA Exonerations, INNOCENCEPROJECT.ORG (last visited Sept. 25, 2014). As discussed in greater detail below, researchers have found that White eyewitnesses are more likely than Black eyewitnesses to make erroneous cross-racial identifications and that most cross-racial identification errors made by White eyewitnesses are false positives—that is, the erroneous identification of a person as the perpetrator. Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL'Y & L. 3 (2001); *see infra* § 3.3, Cross-Racial Impairment.

Case study: The role of race in the Shawn Massey case. Below are the reflections of Duke University School of Law John S. Bradway Professor of Law and Wrongful Convictions Clinic Co-Director James E. Coleman on the Shawn Massey case:

Shawn Massey spent twelve years in prison for crimes he did not commit, and the hard truth is that race played a role in this miscarriage of justice. In 1999, a jury wrongfully convicted him of kidnapping, armed robbery, and breaking and entering based on allegations that in May 1998 he forced a woman and her children at gunpoint into their Charlotte apartment and took $60 from them. The adult victim in this case, a White woman, described the perpetrator of the crime as a 5-foot-9, 180-pound African American male who wore his hair "pulled back from his face and four braids on the back of his head." At trial, the victim clarified that she meant to describe cornrows. However, the White police officers and prosecutors handling the case did not understand the cornrow hairstyle, and this misunderstanding caused them to focus on the wrong suspect, create a photo lineup with inappropriate fillers, and prosecute an innocent man. If the police officers investigating the case had been familiar with the cornrow hairstyle or had focused on Mr. Massey's appearance before concluding that he was the assailant, they would have discovered that he was both shorter and slimmer than the perpetrator, did not wear his hair in cornrows, did not have enough hair for that hairstyle, and should have been excluded as a suspect.

At the time of the offense, Mr. Massey was 26 years-old, working a construction job, and living with his grandmother. He had been charged with petty offenses, but had never been to prison. I became involved with his case through my work in Duke Law School's Wrongful Conviction Clinic. We decided to investigate his claim of innocence because the only evidence in the case was the victim's eyewitness identification of Mr. Massey, and her identification was always conditioned on the assailant having the cornrow hairstyle. Because of the general unreliability of eyewitness identification evidence, we believe that any prosecution based entirely on eyewitness identification evidence merits an innocence investigation.

In this case, the misidentification problem arose when the victim was shown a photo lineup including Mr. Massey and a number of fillers. Neither Mr. Massey nor the fillers wore their hair in cornrows. In the photo shown to the victim, Mr. Massey's hair was very short. Asked if she saw the assailant in the six- photograph lineup, the victim told police that Mr. Massey looked most like the man, except that Mr. Massey did not have braids and the assailant's hair was longer. This kind of relative judgment is typical in cases of misidentification. Because Mr. Massey's hair was not in cornrows, however, the victim stated that she couldn't be sure of her identification unless she saw Mr. Massey in person.

The first time the victim saw Mr. Massey in person was in court. Just before the trial started, she told the prosecutor that she had doubts about her identification, both because the defendant's hair was not in cornrows and because he appeared smaller than her attacker. Mr. Massey's trial attorney was not informed of the victim's eleventh-hour doubts; we uncovered this *Brady* violation during our innocence investigation. The only person who consistently maintained that Mr. Massey was the perpetrator was the investigating officer, a White detective who relied exclusively upon an alleged statement by Mr. Massey's friend that Mr. Massey wore his hair "pulled back and 4 or 5 braids on the back of his head." At trial, however, this friend denied making such a statement, and denied that Mr. Massey wore braids or that his hair was long enough to braid. Mr. Massey's friends and family members uniformly testified that he had never worn his hair in cornrows or long enough to braid, but the statements did not persuade the jury.

While investigating the case, we discovered seven photographs of Mr. Massey in the District Attorney's files, one of which was taken in March 1998, nine weeks before the crime. The seven photographs were taken over a nine-year period. In all of the photos, including the one taken in March 1998, Mr. Massey's hair was very short. We showed these photographs to professional barbers familiar with African American hairstyles, who all agreed that Mr. Massey could not have

grown his hair long enough to wear cornrows by the time of the offense. At the time of Mr. Massey's prosecution, police and prosecutors did not appreciate the significance of these photographs because they were not familiar with the cornrow hairstyle; as a result, they did not disclose the photographs to the defense. Until the victim testified at trial, the police and prosecutor assumed that cornrows were worn only on the back of the head and neck, and therefore concluded that photographs showing only the front of Mr. Massey's head did not exclude him as a suspect.

At the conclusion of our investigation, we sent a letter to the Mecklenburg County District Attorney laying out the evidentiary basis of Mr. Massey's claim of innocence, along with a description of the *Brady* violations we uncovered. We included the photograph of Mr. Massey with short hair taken in March 1998, prior to the offense, along with the opinions of professional barbers familiar with African American hairstyles. In response to this evidence, District Attorney Peter Gilchrist filed an ex parte motion to vacate the conviction and dismiss the charges, which was granted by a superior court judge. Mr. Massey was released in 2010, approximately two years before the expiration of his sentence.

This was a case of cross-racial identification, and race played an important role in the wrongful conviction of Shawn Massey, beginning with the police and prosecutor's misinterpretation of the witness's description of the perpetrator. This misinterpretation illustrates the importance of obtaining an accurate description of the assailant from the very outset and making sure one understands what is being described. Prompt investigation of identification procedures also provides counsel with an opportunity to clarify any confusion or misunderstanding on the part of the police or prosecutor, or to litigate pretrial the admissibility of a questionable identification. If the issue is not raised until trial, jurors likely will see the dispute as one involving only the credibility of witnesses, and, as some studies have shown, the race of a witness may affect jurors' perceptions of whether the witness is telling the truth. In Mr. Massey's case, the jurors chose to believe the White police officers and not the Black witnesses who all testified Mr. Massey did not wear braids and did not have hair long enough to braid.

When the introduction of a flawed identification can't be avoided, defenders should emphasize not only the problems with cross-racial identification, but also specific contextual factors that may make the witness identification less reliable. For example, in this case, opinions from professional barbers familiar with African American hairstyles could have been introduced as evidence supporting Mr. Massey's claim that his hair could not have been worn in cornrows at the time of the offense. Without such information, jurors are often misled by the common but mistaken belief that a victim never forgets the face of his or her attacker.

Mr. Massey's experience also underscores the recommendation of scholar Elizabeth Loftus, that whenever possible, officers of the same race as the suspect should be involved in identification procedures. If an African American police officer had constructed the lineup in this case or been part of the investigation, he or she probably would have been familiar with the cornrow hairstyle and Mr. Massey might never have been wrongfully convicted. If the White police officers or prosecutor had queried the victim about her description, Mr. Massey also might never have been convicted. These are flaws that can be fixed or, at a minimum, raised early in the case by the defense attorney.

B. Factors Affecting Eyewitness Identifications

Assuming that witnesses for the most part are earnestly trying to construct an accurate account of a past event, why do eyewitness errors occur and why do they lead to

wrongful convictions? This section discusses the causes of eyewitness errors, while subsection C, below, discusses jury perceptions of eyewitness testimony.

Generally. Researchers have concluded that eyewitness mistakes generally result from the "normal and natural processes that occur whenever human beings attempt to acquire, retain, and retrieve information." EYEWITNESS TESTIMONY at § 2-1. Some studies suggest that because of these natural processes eyewitnesses make correct identifications only 50% of the time. BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION 218 (1995) [hereinafter MISTAKEN IDENTIFICATION].

Factors affecting the accuracy of eyewitness identification fall into three broad categories: problems of acquisition, problems of retention, and problems of retrieval. EYEWITNESS TESTIMONY at § 2-2. Familiarity with these factors may assist counsel in assessing the possibility of a misidentification and preparing for discussions with expert witnesses. *See infra* § 3.6D, Expert Testimony.

Acquisition stage. In the acquisition stage, when an eyewitness memory is formed, the accuracy of the witness's perception may be affected by factors such as lighting conditions, the duration of the event at issue, violence, stress, fear, age, sex, race, and expectations. EYEWITNESS TESTIMONY at § 2-2. Research has found that cross-racial eyewitness identifications are particularly susceptible to error at this stage. *See infra* § 3.3, Cross-Racial Impairment.

Retention stage. The retention stage encompasses the time between when the witness's memory was formed and when the witness describes the memory. Memory is malleable. The accuracy of a memory during the retention stage is influenced by the length of the retention interval and post-event experiences. For example, a suggestive pretrial identification procedure, especially one involving cross-racial identification, could distort an eyewitness's memory of the actual event. "An eyewitness who is told that it is very important for her to view a photoarray or lineup immediately is more likely to infer that the investigators have identified the perpetrator than is an eyewitness who is told that she could drop by the station whenever it is convenient for her to do so," and this inference may exert subtle pressure on the witness to provide a positive identification. MISTAKEN IDENTIFICATION at 113–14. Similarly, the memory of an eyewitness who is given positive feedback after participating in an identification procedure may be influenced by such feedback. *Id.* at 186–90. One study concluded that in the trials of offenders exonerated by DNA evidence between 1989 and 2010 that involved eyewitness testimony, 57% of the eyewitnesses were initially uncertain of their eyewitness identifications, an indicator of unreliability at the retention stage. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 64 (2011).

Retrieval stage. In the context of a criminal trial, the retrieval stage refers to the moment when the witness testifies about the identification. When retrieving events from memory, eyewitnesses are susceptible to the manner in which information is solicited. Frequent review of the event, through questioning, identification procedures, and preparation to testify, may artificially increase witness confidence when retrieving the memory at trial.

MISTAKEN IDENTIFICATION at 186–87. Witness confidence exerts a powerful influence on jurors, but researchers have found that "eyewitness confidence is not a great or consistent indicator of eyewitness accuracy." EYEWITNESS TESTIMONY at § 3-12; *see also* MISTAKEN IDENTIFICATION at 95; Siegfried Ludwig Sporer et al., *Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence/Accuracy Relation in Eyewitness Identification Studies*, 118 PSYCHOL. BULL. 315 (1995); Neil Vidmar et al., *Rethinking Reliance on Eyewitness Confidence*, 94 JUDICATURE 16 (2010).

Illustration: The wrongful conviction of Ronald Cotton illustrates the problems that may arise with the acquisition, retention, and retrieval stages of eyewitness identifications. Ronald Cotton was convicted of the rape of Jennifer Thompson in Burlington, North Carolina and sentenced to life plus 54 years based on Thompson's eyewitness identification. Ronald Cotton served 10.5 years in prison before he was exonerated by DNA evidence. Jennifer Thompson, a White woman, made a cross-racial identification of Ronald Cotton, a Black man. Ms. Thompson later observed that she "studied every single detail on the rapist's face . . . [and] was going to make sure he was put in prison." Jennifer Thompson, *I Was Certain, But I Was Wrong*, N.Y. TIMES, June 18, 2000. In the time between the crime and the trial of Mr. Cotton, Ms. Thompson grew more and more confident in her mistaken identification. She reflected that, when she saw Ronald Cotton in a photo array, she was "completely confident" that he was the assailant; and when she picked him out of a lineup, she was "sure . . . [she] had picked the right guy." *Id.* However, her confidence did not correspond with accuracy. "From description, to creating an Identikit, to reviewing a photo array, to identifying the wrong man in a lineup and in court—each step unconsciously became a process of picking the individual most resembling the prior step, not most resembling the perpetrator." Joseph F. Savage Jr. & James P. Devendorf, *Conviction After Misidentification: Are Jury Instructions a Solution?*, THE CHAMPION, June 2011, at 30, n.7 (discussing factors contributing to Jennifer Thompson's misidentification of Ronald Cotton).

Estimator and system variables. Variables that affect eyewitness identifications can be categorized as either "estimator" or "system" variables. *See* Gary L. Wells, *Applied Eyewitness Testimony Research: System Variables and Estimator Variables*, 36 J. PERSONALITY & SOC. PSYCHOL. 1546 (1978) (using these categories for the first time). Familiarity with these variables may assist counsel in assessing the identification and discussing it with an expert. Additionally, counsel may use these variables to structure cross-examination in order to show how a given variable, such as the presence of a gun, affected the reliability of eyewitness testimony.

Some variables that bear on the accuracy of eyewitness identifications are within the control of the criminal justice system while others are not. Estimator variables occur before the case enters the criminal justice system and include factors such as: the lighting at the time of the event, the duration of the witness's exposure to the perpetrator, and the race of the witness and perpetrator. In contrast, system variables are or may be within the control of the criminal justice system, such as the construction of a lineup, the questioning of the eyewitness, and the method in which the lineup is presented. Examples of system and estimator variables are as follows. (The list is reproduced verbatim from

Joseph F. Savage & James P. Devendorf, *Conviction After Misidentification: Are Jury Instructions a Solution?*, THE CHAMPION, June 2011, at 30, 31, except that examples of variables that have been added are set off in brackets.)

1. *Wording of questions:* The wording of questions posed to an eyewitness can affect the witness's testimony about an event. [For example, if an eyewitness is asked how many minutes she was able to observe the assailant, she may be more likely to estimate that the event took a matter of minutes, rather than seconds.]

2. *Lineup instructions:* The instructions given to the witness at a lineup can affect the witness's willingness to make an identification. [For example, studies have shown that instructions implying that the suspect is in fact in the photo array "increas[e] the likelihood that the eyewitness will make a positive—though not necessarily correct—identification." MISTAKEN IDENTIFICATION at 115–23.]

3. *Confidence malleability:* Factors unrelated to identification accuracy can influence a witness's confidence. [For example, a witness's confidence may rise when she is told that another witness has identified the same person. MISTAKEN IDENTIFICATION at 186–90.]

4. *Mugshot-induced bias:* Exposure to mugshots of a suspect increases the likelihood that the witness will later choose that suspect in a lineup.

5. *Post-event information:* Testimony of eyewitnesses about an event often reflects not only what they actually saw but information they obtained after the event.

6. *Child witness suggestibility:* Young children are more vulnerable than adults to interviewer suggestion, peer pressures, and other social influences.

7. *Attitudes and expectations:* A witness's perception and memory of an event may be affected by his or her attitudes and expectations. [For example, if a person is attacked in the dark in an area primarily frequented by Latinos, he or she may be more likely to believe that his or her attacker was Latino.]

8. *Hypnotic suggestibility:* Hypnosis increases suggestibility to leading and misleading questions.

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

10. *Cross-race bias:* Eyewitnesses are more accurate when identifying members of their own race than members of other races.

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

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

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

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

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

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

Defense attorneys can attempt to mitigate the influence of system variables by, for example, ensuring that law enforcement officers present individuals or photographs to witnesses sequentially rather than simultaneously. *See infra* § 3.5, Eyewitness Identification Reform Act. Additionally, counsel can educate jurors about the impact of system and estimator variables on the reliability of eyewitness testimony through expert testimony, cross-examination of eyewitnesses, and jury instructions concerning factors influencing eyewitness reliability. *See infra* § 3.6, Procedures for Challenging Eyewitness Identification Evidence.

C. Jurors' Perceptions of Eyewitness Identification

Concerns about eyewitness identification, discussed in the preceding section, are compounded by the weight jurors may give such testimony. Studies have concluded that jurors tend to overestimate the reliability of eyewitness testimony. *See, e.g.*, Tanja Rapus Benton et al., *Eyewitness Memory is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts*, 20 APPLIED COGNITIVE PSYCHOL. 115 (2006); Richard S. Schmechel et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS 177 (2006); *Perry v. New Hampshire*, ___ U.S. ___, ___, 132 S. Ct. 716, 739 (2012) (Sotomayor, J., dissenting) (observing that "jurors routinely overestimate the accuracy of eyewitness identifications"). In 2004, the Public Defender Service for the District of Columbia surveyed nearly 1,000 potential jurors about eyewitness identification. The researchers concluded that the survey members often underestimated the difficulties eyewitnesses experience in making cross-racial identifications, the impact of stress on memory, and the ways in which police procedures may undermine eyewitness accuracy. Timothy P. O'Toole et al., *District of Columbia Public Defender Survey*, THE CHAMPION, Apr. 2005, at 28; *see also*, Richard S. Schmechel et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS 177 (2006); EYEWITNESS TESTIMONY at § 6-6.

One reason that lay people misunderstand the reliability of eyewitness identification is that much of what experts now know about memory and eyewitness testimony is counter-intuitive. For example, even though experts now recognize that eyewitness confidence is not reliably correlated with accuracy, "it would seem logical that a more certain witness would be a more accurate one, [and therefore] it would be surprising if jurors understood the relationship between confidence and accuracy as a matter of common sense." Timothy P. O'Toole et al., *District of Columbia Public Defender Survey*, THE CHAMPION, Apr. 2005, at 28, 29. As one court observed, "while science has firmly established the inherent unreliability of human perception and memory, this reality is outside the jury's common knowledge, and often contradicts jurors' commonsense understandings. To a jury, there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says, 'That's the one!'" *United States v. Brownlee*, 454 F.3d 131, 142 (3d Cir. 2006) (quotations and citations omitted). *See also Phillips v. Allen*, 668 F.3d 912, 916 (7th Cir. 2012) (stating that "nothing is obvious about the psychology of eyewitness identification" and "most people's intuitions on the subject of identification are wrong").

Practice note: Counsel may file a motion in limine requesting the court to preclude the prosecutor from drawing a correlation between witness confidence and witness accuracy. *See* Lisa Steele, *Trying Identification Cases: An Outline For Raising Eyewitness ID Issues*, THE CHAMPION, Nov. 2004, at 8.
