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Ankle Monitors for Everyone: The Plight of Eyewitness Identifications in Louisiana

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I. INTRODUCTION

Steven Avery captured America's attention when *Making a Murderer* premiered on Netflix on December 18, 2015.¹ The country watched in awe as he was finally exonerated by DNA evidence, after serving eighteen years in prison for a crime he did not commit.² The most troubling part: Avery presented sixteen strong alibi witnesses at his trial, and yet was still convicted of rape, almost solely on the bases of a physical description and a photo array.³ Unfortunately, what happened to Avery is not uncommon. Eyewitness misidentifications are the leading cause of false convictions in the United States.⁴ In the courtroom, eyewitness identifications are compelling pieces of evidence.⁵ Eyewitness misidentifications have played a role in more than sixty per cent of convictions that were subsequently overturned on the basis of DNA evidence.⁶

The statistics in Louisiana are just as dire. Yet remarkably, Louisiana has a per se ban on expert testimony about the problems with eyewitness identification.⁷ As of this writing, forty-seven individuals convicted of crimes in Louisiana have been exonerated

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1. MAKING A MURDERER (Netflix 2015). The series was filmed over a ten-year period and follows Steven Avery as he is exonerated in a rape case only to then be convicted in a murder case. *See Over 10 Years, 2 Filmmakers Documented the 'Making' of a Murderer*, NPR (Jan. 5, 2016, 4:38 AM), <http://www.npr.org/2016/01/05/461908092/over-10-years-two-filmmakers-documented-the-making-a-murderer>; Daniel Victor, *Steven Avery, of 'Making a Murderer,' Eyes Freedom After Co-Defendant's Conviction Is Overturned*, N.Y. TIMES (Aug. 18, 2016), <https://nyti.ms/2blmV37>.
 2. *Steven Avery*, INNOCENCE PROJECT, <http://www.innocenceproject.org/cases/steven-avery> (last visited Apr. 6, 2017). Steven Avery was exonerated from the rape conviction after hairs recovered from the crime scene were tested using the FBI DNA database and identified as belonging to Gregory Allen, not Steven Avery. *Id.* The charges against Avery were subsequently dropped, the case was dismissed, and he was released from prison. *Id.*
 3. *Id.*
 4. *See* George Vallas, *A Survey of Federal and State Standards for the Admission of Expert Testimony on the Reliability of Eyewitnesses*, 39 AM. J. CRIM. L. 97, 98, 100 (2011); Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 WIS. L. REV. 615, 615; Richard A. Wise et al., *An Examination of the Causes and Solutions to Eyewitness Error*, FRONTIERS PSYCHIATRY, Aug. 2014, at 1, 1.
 5. POLICE EXEC. RESEARCH FORUM, A NATIONAL SURVEY OF EYEWITNESS IDENTIFICATION PROCEDURES IN LAW ENFORCEMENT AGENCIES, at iii (2013).
 6. *See The National Registry of Exonerations*, UNIV. MICH. L. SCH., <http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx> (follow "DNA" hyperlink in "DNA" dropdown list; then follow "MWID" hyperlink in "MWID" dropdown list) (last visited Apr. 6, 2017). The statistics from the National Registry of Exonerations account for the period in which DNA evidence has been used to exonerate convicted persons, with the earliest cases occurring in 1989. *See generally id.* (follow "Reset All Filters" hyperlink).
 7. Louisiana is one of only two states to have this ban; the other state is Nebraska. *Petition for Writ of Certiorari at 11, Henry v. Louisiana*, 136 S. Ct. 402 (2015) (mem.) (No. 15-50), 2015 WL 4267855, at *11. Additionally, the Eleventh Circuit is the only circuit court to have a per se ban. *Id.*; Lauren Tallent, Note, *Through the Lens of Federal Evidence Rule 403: An Examination of Eyewitness Identification Expert Testimony Admissibility in the Federal Circuit Courts*, 68 WASH. & LEE L. REV. 765, 792 (2011).

since 1989.⁸ Twenty-three of those cases involved a mistaken identification.⁹ Additionally, Louisiana has not yet implemented any legislation or policies ensuring that best police practices are used during eyewitness identification procedures.¹⁰

A recent Louisiana case involving Jerry Harris demonstrates the substantial power of eyewitness identifications, even when the eyewitness is mistaken. Harris, a seventeen-year-old, was nearly arrested and prosecuted because an eyewitness identified him in a six-person lineup.¹¹ Fortunately, Harris was wearing an ankle monitor at the time of the crime, the data from which proved he could not possibly have committed the crime.¹² The arrest warrant was subsequently dropped.¹³ Had Harris not been wearing the ankle monitor, he would most likely have been: arrested, tried, unable to present an eyewitness testimony expert, and wrongly convicted, solely because of the eyewitness's misidentification. This begs the question: "Given the reluctance of law enforcement agencies and courts in Louisiana to make common-sense changes in light of what we know to be very risky and fallible evidence, [should we] all get ankle monitors[?] Just in case[?]"¹⁴

Measures must be put in place to reduce the potential for wrongful convictions resulting from misidentifications. The harm from a wrongful conviction extends beyond the innocent person who was convicted; it also affects mistaken witnesses, who must now live knowing that their error cost another person her freedom, and it harms society as a whole.¹⁵ This note focuses on Louisiana's failure, in the courtroom and by its legislature, to acknowledge the extensive literature on the unreliability of

8. *The National Registry of Exonerations*, *supra* note 6 (follow "Reset All Filters" hyperlink; then follow "LA" hyperlink in "ST" dropdown list).

9. *Id.* (follow "Reset All Filters" hyperlink; follow "LA" hyperlink in "ST" dropdown list; then follow "MWID" hyperlink in "MWID" dropdown list).

10. See *Eyewitness Identification Reform*, INNOCENCE PROJECT, <http://www.innocenceproject.org/eyewitness-identification-reform> (last visited Apr. 6, 2017) (listing the states that "have implemented evidence-based practices as standard procedure"); see also *Eyewitness Identification Procedure Reforms*, INNOCENCE PROJECT NEW ORLEANS, <http://ip-no.org/eyewitness-identification-procedure-reforms> (last visited Apr. 6, 2017) ("[Innocence Project New Orleans] advocates the adoption of all of these procedures in law enforcement agencies . . .").

11. Chris Grillot, *NOPD Rescinds Arrest Warrant in French Quarter Shooting*, TIMES-PICAYUNE (May 30, 2015, 9:37 PM), http://www.nola.com/crime/index.ssf/2015/05/nopd_rescinds_arrest_warrant_f.html; Emily Maw, *Mistaken Eyewitness Identification Could Have Sent Another Innocent Person to Prison*, TIMES-PICAYUNE (June 3, 2015, 10:58 AM), http://www.nola.com/opinions/index.ssf/2015/06/bad_eyewitness_identification.html.

12. Grillot, *supra* note 11; Maw, *supra* note 11.

13. Grillot, *supra* note 11; Maw, *supra* note 11.

14. Maw, *supra* note 11.

15. Shirley K. Duffy, *Using an Expert to Evaluate Eyewitness Identification Evidence*, N.Y. ST. B. ASS'N J., June 2011, at 41, 42.

[T]here are many adverse consequences stemming from faulty eyewitness identifications of an individual, including on a societal level. Of course, the most obvious result is that defendants are convicted and sentenced for crimes they did not commit. The impact, of course, is devastating in death penalty cases. Moreover, there is an adverse effect on the

eyewitness identifications. Most states are heeding the scientific evidence that eyewitness identifications are unreliable. In 2010, however, Louisiana issued a per se ban on expert testimony about the inherent weaknesses of eyewitness identifications, at the very time when other state courts were preparing to *overturn* their own per se bans. This note argues that Louisiana must accept the scientific evidence about the unreliability of eyewitness identifications and make substantial reforms both in the courtroom and in its legislature.

Part II of this note provides background on the science and psychology of eyewitness identifications, specifically focusing on the factors that decrease the reliability of such identifications. Part III explores scientifically proven ways to reduce the risk of wrongful convictions resulting from eyewitness misidentifications. Part IV discusses problems with the current case law and legislation in Louisiana in light of the extensive literature on eyewitness identifications. Part V proposes three potential solutions to these problems.

II. THE UNRELIABILITY OF EYEWITNESS IDENTIFICATIONS

The potential dangers of wrongful convictions stemming from eyewitness misidentifications are well documented, and were recognized specifically in a string of U.S. Supreme Court cases in 1967. In *United States v. Wade*, the Court acknowledged that the “vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.”¹⁶ The Court again acknowledged the unreliability of eyewitness identifications in *Gilbert v. California*¹⁷ and *Stovall v. Denno*.¹⁸ Five years later, in *Neil v. Biggers*, the Court established five factors to be weighed when determining the reliability of an eyewitness’s identification¹⁹: (1) the eyewitness’s opportunity to view the alleged perpetrator; (2) the eyewitness’s degree of attention during the crime; (3) the accuracy of the eyewitness’s previous description of the perpetrator; (4) the eyewitness’s level of certainty; and (5) the amount of time that

mistaken witness, who may experience profound distress over playing a role in a miscarriage of justice.

. . . Society is not served by wrongful convictions because the objectives of the criminal justice system (retribution, deterrence and incapacitation) are not realized. The only “winner” when someone is falsely convicted is the real perpetrator of the crime.

Id. (footnotes omitted).

16. 388 U.S. 218, 228 (1967) (holding that criminal defendants have the right to counsel during a lineup identification procedure).
17. 388 U.S. 263, 271–74 (1967) (holding that the admission of in-court identifications, without determining whether they were tainted by an illegal lineup, was constitutional error).
18. 388 U.S. 293, 297–301 (1967) (holding that rules requiring exclusion of tainted identification evidence did not apply retroactively), *abrogation recognized by* *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86 (1993). *Wade*, *Gilbert*, and *Stovall* were all decided on the same day and “[t]he driving force behind [them] . . . was the Court’s concern with the problems of eyewitness identification.” *Manson v. Brathwaite*, 432 U.S. 98, 111–12 (1977).
19. 409 U.S. 188, 199–200 (1972).

has passed between the crime and the identification.²⁰ Then, in *Manson v. Brathwaite*, the Court established a two-pronged test for evaluating eyewitness identifications, which uses the five factors from *Biggers*.²¹

The *Manson* Court acknowledged that factors that affect the reliability of eyewitness identifications exist and are important, but found the five *Biggers* factors to be outdated and incomplete. When a crime is being committed, there are significantly more variables at play than those outlined in *Biggers* that can affect a witness's identification, especially when the witness is the victim. These additional variables can be separated into two general categories: system and estimator.²² "System variables" are factors over which the criminal justice system has control,²³ while "estimator variables" are factors relating to the eyewitness's perception and memory, and are out of the control of the criminal justice system.²⁴ Examining these variables is key to understanding the complexities of eyewitness identifications.

A. System Variables

System variables are those factors affecting the reliability of eyewitness identifications that the criminal justice system, especially police officers, can control.²⁵ These variables include the type of identification procedure that is used, the composition and administration of that identification procedure, and any communication with the witness before or after the identification procedure.²⁶ System variables are especially important because, unlike estimator variables, they can be controlled in *every* case involving an eyewitness.²⁷ Consequently, the way a police officer conducts an identification procedure can have a material effect on the reliability of an eyewitness's identification.²⁸

There are three main types of identification procedures that police officers use with eyewitnesses: photo arrays, live lineups, and showups. The use of photo arrays

20. *Id.*

21. *Manson*, 432 U.S. at 107, 114, 116. The first prong examines whether the police used unnecessarily suggestive procedures when conducting the eyewitness identification. *Id.* at 107–09. The second prong then weighs the "corrupting effect of the suggestive identification," *id.* at 114, against the five factors outlined in *Biggers* to determine whether the improper conduct created a "substantial likelihood of misidentification," *id.* at 106. This test was upheld in *Perry v. New Hampshire*, 565 U.S. 228, 238–39 (2012).

22. Gary L. Wells, *Applied Eyewitness-Testimony Research: System Variables and Estimator Variables*, 36 J. PERSONALITY & SOC. PSYCHOL. 1546, 1548 (1978).

23. *Id.* They are "termed *system variables* because of their relevance for application to change in the criminal justice system." *Id.*

24. *Id.* They are "termed *estimator variables* because, in actual crimes, one can at best only *estimate* the role of such factors." *Id.*

25. *Id.*

26. *See id.* at 1553–54.

27. Gary L. Wells et al., *Eyewitness Evidence: Improving Its Probative Value*, 7 PSYCHOL. SCI. PUB. INT. 45, 48 (2006).

28. M. Dyan McGuire et al., *Eyewitness Identification for Prudent Police*, 38 POLICING 598, 599 (2015).

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is the most common.²⁹ A photo array can be presented to eyewitnesses either sequentially or simultaneously.³⁰ In a sequential photo array, eyewitnesses are shown one photograph at a time and asked whether they recognize the person in the photograph.³¹ In a simultaneous photo array, eyewitnesses are presented with all the photographs at once.³² The purpose of using the sequential photo array is to prevent eyewitnesses from choosing an individual on the basis of relative judgments.³³ A relative judgment occurs when eyewitnesses select an individual in the array merely because that individual looks most like their memory of the perpetrator as compared to the other individuals in the lineup.³⁴

A live lineup usually contains the suspect and at least five fillers,³⁵ although the exact number of fillers varies by police department.³⁶ In a properly conducted lineup, the fillers should be similar in physical features to the suspect and unknown to the eyewitness.³⁷ The final type of identification procedure, the showup, occurs when eyewitnesses are shown only one individual and asked if they recognize that person.³⁸ This type of procedure has been recognized by courts as inherently suggestive, and therefore must only be used shortly after the commission of the crime and in proximity to the crime scene.³⁹

Who administers the identification procedure is another systemic variable that can be controlled.⁴⁰ The case investigator generally performs this task, and will know who in the live lineup is the suspect and who are the fillers.⁴¹ Another approach is the double-blind procedure, in which the police officer administering the identification procedure does not know the suspect's identity, or the suspect's location

29. POLICE EXEC. RESEARCH FORUM, *supra* note 5, at 48.

30. COMM. ON SCI. APPROACHES TO UNDERSTANDING & MAXIMIZING THE VALIDITY & RELIABILITY OF EYEWITNESS IDENTIFICATION IN LAW ENF'T & THE COURTS, NAT'L RESEARCH COUNCIL, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 23 (2014) [hereinafter IDENTIFYING THE CULPRIT].

31. *Id.*; POLICE EXEC. RESEARCH FORUM, *supra* note 5, at 6.

32. IDENTIFYING THE CULPRIT, *supra* note 30, at 23; POLICE EXEC. RESEARCH FORUM, *supra* note 5, at 6.

33. Wells et al., *supra* note 27, at 63.

34. *Id.*; Wells, *supra* note 4, at 618.

35. IDENTIFYING THE CULPRIT, *supra* note 30, at 25; Wells, *supra* note 4, at 617.

36. See POLICE EXEC. RESEARCH FORUM, *supra* note 5, at x.

37. IDENTIFYING THE CULPRIT, *supra* note 30, at 25.

38. *Id.* at 27.

39. *Id.* at 27–28. For background on the law concerning showup identifications, see generally Michael D. Cicchini & Joseph G. Easton, *Reforming the Law on Show-Up Identifications*, 100 J. CRIM. L. & CRIMINOLOGY 381 (2010). Showup evidence is only admitted if “(1) exigent circumstances prevented the use of a lineup or photo array; or (2) the police lacked probable cause to arrest the suspect and, therefore, could not have legally detained him long enough to conduct a lineup or photo array.” *Id.* at 382.

40. POLICE EXEC. RESEARCH FORUM, *supra* note 5, at 7.

41. *Id.*

in a lineup or photo array.⁴² The police officer can also conduct a “blinded” procedure, in which the officer knows the identity of the suspect, but only the eyewitness can see the suspect and the fillers.⁴³

Any communication with eyewitnesses before or after an identification procedure can influence them. Before the procedure, the police officer may give eyewitnesses instructions, including a statement that the perpetrator may or may not be in the lineup or photo array.⁴⁴ Post-identification feedback from police officers can affect eyewitnesses’ confidence.⁴⁵ Negative post-identification feedback occurs when the police officer suggests that the eyewitness did not choose the right person, but instead chose one of the fillers.⁴⁶ This causes eyewitnesses to become less certain of their identification.⁴⁷ Positive post-identification feedback occurs when a police officer gives a confirmatory statement, indicating that the eyewitness correctly picked the suspect.⁴⁸ Positive feedback may lead to wrongful convictions because it augments eyewitnesses’ confidence in their identification.⁴⁹ Eyewitnesses then feel more certain while testifying in the courtroom, which in turn causes jurors to afford more weight to their identification. This is problematic because an eyewitness’s level of certainty has been shown to be a poor predictor of accuracy.⁵⁰

B. Estimator Variables

Estimator variables affect the reliability of eyewitness identifications, but unlike system variables, individuals in the criminal justice system cannot control them.⁵¹ These variables relate to eyewitnesses’ memory or perception.⁵² Some of the most common estimator variables include cross-race bias, weapon focus, stress, and memory.⁵³ Estimator variables demonstrate the fallibility of memory and that

42. Wells et al., *supra* note 27, at 63.

43. IDENTIFYING THE CULPRIT, *supra* note 30, at 27.

44. NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, PUB. NO. NCJ 178240, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 31–32 (1999).

45. See Lorraine Hope, *Eyewitness Testimony*, in FORENSIC PSYCHOLOGY 160, 167 (Graham J. Towl & David A. Crighton eds., 2010).

46. McGuire et al., *supra* note 28, at 600.

47. Hope, *supra* note 45, at 167.

48. McGuire et al., *supra* note 28, at 600.

49. *Id.* at 600–01.

50. *Id.* at 601; Wells, *supra* note 4, at 620 (“Controlled experiments . . . show that eyewitnesses can be both highly confident (even ‘positive’) and yet totally mistaken in an eyewitness identification.”).

51. Wells et al., *supra* note 27, at 45.

52. See IDENTIFYING THE CULPRIT, *supra* note 30, at 72.

53. *Eyewitness Identification*, FORENSIC RESOURCES, <http://www.ncids.com/forensic/eyewitness/eyewitness.shtml> (last visited Apr. 6, 2017).

eyewitnesses are inherently vulnerable to making errors, even when they have the best intentions.⁵⁴

Cross-race bias occurs when eyewitnesses make an identification of someone who is not of their own race.⁵⁵ The chance of a mistaken identification is 1.56 times greater in this situation.⁵⁶ Unsurprisingly, research has consistently found that cross-race eyewitness identifications are “notoriously unreliable.”⁵⁷

Another highly studied factor is weapon focus. Weapon focus refers to the premise that when a weapon is present during the commission of a crime, it will distract eyewitnesses and negatively affect the reliability of any subsequent identification those eyewitnesses make.⁵⁸ The presence of a weapon results in poor recall and recognition of the perpetrator.⁵⁹

The level of stress eyewitnesses are under when witnessing a crime is another significant factor to consider when examining the reliability of identifications.⁶⁰ Stress diminishes eyewitnesses’ ability to accurately recall events.⁶¹ Humans’ natural response to threats is to either fight the threat or immediately flee; these reactions are “geared toward enhancing prospects of survival, not memory.”⁶² Therefore, eyewitnesses in highly stressful situations will have a harder time making an accurate identification.

Finally, the fallibility of memory always plays a role in eyewitness identification.⁶³ Contrary to popular belief, memory does not operate like a video that can be played back.⁶⁴ An eyewitness’s memory

54. See CURT R. BARTOL & ANNE M. BARTOL, *PSYCHOLOGY AND LAW: RESEARCH AND PRACTICE* 143 (2015).

55. For more information on this topic, see generally John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 AM. J. CRIM. L. 207 (2001), discussing how people are unconsciously influenced by race and the problems associated with cross-race identifications.

56. McGuire et al., *supra* note 28, at 602; Wells et al., *supra* note 27, at 52.

57. Douglas Balko, Note, *Justice Delayed Is Justice Denied: Wrongful Convictions, Eyewitness-Expert Testimony, and Recent Developments*, 46 SUFFOLK U. L. REV. 1087, 1094 (2013).

58. Wells et al., *supra* note 27, at 53.

59. Jonathan M. Fawcett et al., *Of Guns and Geese: A Meta-Analytic Review of the ‘Weapon Focus’ Literature*, 19 PSYCHOL. CRIME & L. 35, 36 (2013).

60. For a comprehensive review of this subject, see Kenneth A. Deffenbacher, *Estimating the Impact of Estimator Variables on Eyewitness Identification: A Fruitful Marriage of Practical Problem Solving and Psychological Theorizing*, 22 APPLIED COGNITIVE PSYCHOL. 815, 819–22 (2008).

61. McGuire et al., *supra* note 28, at 602.

62. Nancy K. Steblay, *Scientific Advances in Eyewitness Identification Evidence*, 41 WM. MITCHELL L. REV. 1090, 1105 (2015).

63. For more information concerning the fallibility of memory, see generally Mark L. Howe & Lauren M. Knott, *The Fallibility of Memory in Judicial Processes: Lessons from the Past and Their Modern Consequences*, 23 MEMORY 633 (2015), discussing the reliability of one’s memory and memory’s role in the judicial system.

64. Steblay, *supra* note 62, at 1107.

often us[es] current knowledge to understand the past event or to fill in a gap in the story

. . . . An eyewitness may replace (or confuse) a perpetrator's face with another image—of an innocent lineup member, a police composite, or a face seen in a mug-shot or other post-event context.⁶⁵

Events and people shape one's memory, proving that memory is not infallible.

III. REDUCING THE RISKS

A. Best Police Practices

Policies and legislation mandating police officers to use methods that have been proven to reduce the potential for misidentifications are geared toward reducing errors resulting from system variables. States must work toward preventing eyewitness identification errors, which is far easier than “detect[ing] them once they have occurred.”⁶⁶ There are several reports, dating as far back as 1999, that highlight identification procedure methods that all police departments should strive to adopt.⁶⁷ Some states have made eyewitness identification reforms a priority by passing legislation that sets forth statewide requirements.⁶⁸ However, despite overturning their per se bans on expert testimony about eyewitness identification reliability, many states have not made eyewitness identification reforms a priority, and most police agencies still do not have any written policies regarding eyewitness identification procedures.⁶⁹ The National Academy of Sciences found that even when there are policies in place, the policies are not uniform across police agencies and are generally insufficient.⁷⁰

Policies and legislation should reflect the enormous body of research on eyewitness identifications, and should mandate that states adopt best police practices. Lineups should contain only one suspect,⁷¹ and the fillers should resemble the description of the perpetrator so that the suspected perpetrator does not stand out.⁷² The fillers should so closely resemble the suspected perpetrator that a nonwitness

65. *Id.* at 1108.

66. Wise et al., *supra* note 4, at 5.

67. See IDENTIFYING THE CULPRIT, *supra* note 30, at 23. See generally NAT'L INST. OF JUSTICE, *supra* note 44 (examining the effectiveness of various procedures within the criminal justice system that are used to collect and preserve evidence); POLICE EXEC. RESEARCH FORUM, *supra* note 5 (examining the effect different procedures have on the reliability of evidence). Psychologists have been making these recommendations for decades. See generally Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 1 (1998) (comparing various eyewitness identification procedures to help determine which procedure is most effective).

68. POLICE EXEC. RESEARCH FORUM, *supra* note 5, at 23.

69. IDENTIFYING THE CULPRIT, *supra* note 30, at 23; POLICE EXEC. RESEARCH FORUM, *supra* note 5, at vii.

70. IDENTIFYING THE CULPRIT, *supra* note 30, at 103–04.

71. Wells et al., *supra* note 27, at 60. This is true even when there are multiple suspects. *Id.* Each suspect should be placed in her own separate lineup. *Id.*

72. NAT'L INST. OF JUSTICE, *supra* note 44, at 29; see Wells, *supra* note 4, at 624.

would be unable to identify which individual is the suspect.⁷³ Before the administration of the identification procedure, there should be standardized instructions, which should include a statement that the perpetrator may or may not be present in the lineup or photo array.⁷⁴ These instructions also should inform eyewitnesses that if they are unable to pick an individual, the investigation will continue, and that eyewitnesses are “not ‘failing’ if they do not choose someone; after all, the correct answer might be ‘none of the above.’”⁷⁵

Although there is some debate about the use of sequential lineup procedures over simultaneous lineup procedures,⁷⁶ many researchers have found that use of sequential procedures reduces the likelihood that eyewitnesses will use relative judgment when making their identifications.⁷⁷ Even if the lineup is not done sequentially, most researchers agree that the lineup should be a double-blind administration.⁷⁸ This guarantees that the administrator does not influence eyewitnesses through nonverbal cues or through post-identification feedback.⁷⁹ Additionally, double-blind procedures safeguard against influencing eyewitnesses’ confidence and certainty during their selection.⁸⁰ Influencing eyewitnesses’ confidence will alter their confidence statement,⁸¹ which the police officer should take and record verbatim after the identification

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73. See Wells, *supra* note 4, at 624. This prevents the eyewitness from using a “simple process of elimination to arrive at the suspect.” Steblay, *supra* note 62, at 1114.
74. Steblay, *supra* note 62, at 1116. “It has long been known that asking witnesses to make identifications without explicitly warning them that the perpetrator may be absent from the lineup or photo array increases the odds of misidentification.” McGuire et al., *supra* note 28, at 601 (citation omitted).
75. Wells, *supra* note 4, at 625; accord IDENTIFYING THE CULPRIT, *supra* note 30, at 107; NAT’L INST. OF JUSTICE, *supra* note 44, at 31–32.
76. McGuire et al., *supra* note 28, at 599 (“While the bulk of the literature strongly suggests that sequential identification procedures are more diagnostic of guilt, it should be noted that there are a couple of studies challenging the superiority of the sequential identification effect.”).
77. Wells, *supra* note 4, at 625–28 (“[U]sing the sequential lineup procedure produces fewer mistaken identifications.” *Id.* at 626).
78. *Id.* at 629. For a brief discussion on the double-blind lineup, see Wells et al., *supra* note 27, at 63.
79. See McGuire et al., *supra* note 28, at 600. For a study on the effects of post-identification feedback, see generally Laura Smalarz & Gary L. Wells, *Post-Identification Feedback to Eyewitnesses Impairs Evaluators’ Abilities to Discriminate Between Accurate and Mistaken Testimony*, 38 LAW & HUM. BEHAV. 194 (2014), examining whether feedback given to eyewitnesses influences evaluators’ abilities to assess the credibility of eyewitnesses’ testimony.
80. IDENTIFYING THE CULPRIT, *supra* note 30, at 106; Wells, *supra* note 4, at 630. Eyewitnesses may also inflate the amount of time they spent witnessing the crime and their degree of attention, which are important “factors . . . to both judges’ admissibility decisions and juries’ determinations of persuasiveness.” McGuire et al., *supra* note 28, at 601.
81. A confidence statement refers to the statement the eyewitness gives after making the identification. See *Eyewitness Misidentification*, INNOCENCE PROJECT, <https://www.innocenceproject.org/causes/eyewitness-misidentification> (last visited Apr. 6, 2017). It measures their level of “confidence (e.g., ‘I am not sure’ or ‘I’m totally positive.’)” C. A. Elizabeth Luus & Gary L. Wells, *The Malleability of Eyewitness Confidence: Co-Witness and Perseverance Effects*, 79 J. APPLIED PSYCHOL. 714, 714 (1994).

procedure.⁸² As an alternative to the double-blind administration, if the identification procedure is a photo array, a laptop may be used to administer the array, further reducing any influence from the police officer.⁸³

B. *Expert Testimony*

Research consistently shows that the use of an expert in eyewitness identification is one of the most effective ways to educate the jury on the factors that alter the reliability of eyewitness identifications.⁸⁴ An expert in eyewitness identification provides the jury with the tools to make an informed decision as to the credibility of an eyewitness by explaining how memory works and how it is shaped by the circumstances surrounding the observation of the perpetrator.⁸⁵ A successful expert will increase jurors' skepticism, while also heightening their sensitivity to the system and estimator variables that contribute to misidentifications.⁸⁶

While it is true that a layperson may understand common-sense factors such as lighting conditions, length of time between the crime and the identification, and presence of a disguise, many of the factors that lead to misidentifications are not common sense, and are actually counterintuitive.⁸⁷ Research shows that jurors are not aware of the many factors that can influence eyewitness identifications.⁸⁸ Additionally, eyewitness testimony is so compelling that "[j]urors have been known to accept eyewitness testimony pointing to guilt even when it is *far* outweighed by evidence of innocence."⁸⁹ Experts are needed to counteract the significant weight that is placed on eyewitness identifications by both judges and jurors.

C. *Voir Dire and Jury Instructions*

Other methods for reducing wrongful convictions include the use of voir dire and jury instructions. In voir dire,⁹⁰ attorneys can ask "specific, targeted questions" as well

82. IDENTIFYING THE CULPRIT, *supra* note 30, at 108; Wells, *supra* note 4, at 631; see NAT'L INST. OF JUSTICE, *supra* note 44, at 38.

83. Wells et al., *supra* note 27, at 63.

84. Steve Newton, *What Happened to Daubert? Eyewitness Identification Expert Testimony in Louisiana After State v. Young*, 3 J. RACE GENDER & POVERTY 105, 106 (2012); Balko, *supra* note 57, at 1087.

85. Vallas, *supra* note 4, at 99. The expert's testimony serves two goals: "it should both inform jurors that eyewitnesses are significantly less reliable than common sense suggests, and also should educate jurors about the nature of human memory and specific variables that affect the accuracy of identifications." *Id.*

86. *Id.* at 132.

87. Newton, *supra* note 84, at 113; see Steblay, *supra* note 62, at 1125.

88. Vallas, *supra* note 4, at 130.

89. ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 9 (1979).

90. Voir dire is "[a] preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury." *Voir dire*, BLACK'S LAW DICTIONARY (10th ed. 2014).

as prepare the jury for issues that will arise in the case.⁹¹ However, voir dire can only be effective as a method of educating the jury if attorneys are given enough time to properly assess jurors' attitudes and beliefs, and if attorneys are capable of making such assessments.⁹² Attorneys have no control over the length of time the judge affords them to conduct voir dire in each case. However, even with an unlimited amount of time, an inexperienced attorney will not fully be able to use voir dire.

Jury instructions on eyewitness testimony are often cited as an alternative to expert testimony. Some have even gone so far as to argue that “[t]hese instructions are theoretically stronger than expert testimony because they reflect the opinion of the court as a matter of law.”⁹³ However, studies have shown that jury instructions only have a minor effect on jurors' knowledge of the factors affecting eyewitness testimony.⁹⁴ For example, in 2012, New Jersey released new pattern jury instructions⁹⁵ “carefully constructed to inform lay jurors of the state-of-the-science on eyewitness memory and how to leverage that knowledge in assessing such testimony.”⁹⁶ A study focused on these instructions found that while the instructions did seem to reduce jurors' reliance on weak identification evidence, they also seemed to reduce the jurors' reliance on strong identification evidence.⁹⁷ As a result, potentially guilty persons were more likely to be acquitted as a result of the new instructions. Although this situation is not ideal, it is certainly more favorable than convicting innocent persons. As Sir William Blackstone astutely observed, “[i]t is better that ten guilty persons escape, than that one innocent suffer.”⁹⁸

IV. EYEWITNESS IDENTIFICATIONS IN LOUISIANA

“Eyewitness identification is the most damning of all evidence that can be used against a defendant.”⁹⁹ Most states have made progress toward protecting innocent

91. Matthew J. Reedy, Note, *Witnessing the Witness: The Case for Exclusion of Eyewitness Expert Testimony*, 86 NOTRE DAME L. REV. 905, 934 (2011).

92. Wise et al., *supra* note 4, at 4.

93. Reedy, *supra* note 91, at 935.

94. Vallas, *supra* note 4, at 131.

95. These instructions were instituted as a result of the ruling in *State v. Henderson*, 27 A.3d 872 (N.J. 2011). Press Release, N.J. Courts, Supreme Court Releases Eyewitness Identification Criteria for Criminal Cases (July 19, 2012), <http://www.judiciary.state.nj.us/pressrel/2012/pr120719a.html>. The jury instructions can be found at http://www.judiciary.state.nj.us/pressrel/2012/jury_instruction.pdf.

96. Athan P. Papailiou et al., *The Novel New Jersey Eyewitness Instruction Induces Skepticism But Not Sensitivity*, PLOS ONE 2 (Dec. 9, 2015), <http://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0142695&ctype=printable>.

97. *Id.* at 8–9.

98. *Words of Justice: Roof Garden Wall—Right Panel*, HARV. L. SCH. LIBR., <http://library.law.harvard.edu/justicequotes/explore-the-room/south-4> (last visited Apr. 6, 2017).

99. ELIZABETH LOFTUS & KATHERINE KETCHAM, WITNESS FOR THE DEFENSE: THE ACCUSED, THE EYEWITNESS, AND THE EXPERT WHO PUTS MEMORY ON TRIAL 13 (1991).

individuals from being convicted because eyewitnesses misidentified them.¹⁰⁰ However, Louisiana has been moving backward and is behind the rest of the nation in terms of courtroom and legislative reforms. Even though researchers for decades have been calling for reforms in police practices when administering identification procedures,¹⁰¹ Louisiana has not yet responded. Louisiana has not provided police agencies with any guidelines to follow, and has not enacted any legislation specifically addressing the issue.¹⁰² Data gathered from known cases of wrongful convictions have shown that eyewitness misidentifications are the leading cause of innocent persons being convicted.¹⁰³ The best way to counteract this is by attacking misidentifications at their source: the identification procedures.

Perhaps even more troubling than Louisiana's lack of identification procedure reform is that Louisiana is one of only two states to have a per se ban on eyewitness identification expert testimony.¹⁰⁴ In *State v. Young*, the Louisiana Supreme Court held that the district court had erred in allowing an expert to testify on the factors that contribute to eyewitness misidentifications.¹⁰⁵ The court found that expert testimony on eyewitness identifications would invade the province of the jury, be more prejudicial than probative, and promote a "battle of experts."¹⁰⁶ Instead of relying on the vast amounts of research indicating the importance of expert testimony on factors affecting the reliability of eyewitness identifications, the court chose to interpret a prior decision as a total bar to the admission of an expert on eyewitness testimony.¹⁰⁷ This interpretation created the per se ban where, arguably, one did not exist.

In *State v. Stucke*, the court concluded that expert testimony on eyewitness identifications presents a "substantial risk that the potential persuasive appearance of the expert witness will have a greater influence on the jury than the other evidence presented during the trial."¹⁰⁸ However, instead of barring this expert testimony, the court acknowledged that the trial court had the discretion to determine the competence of the eyewitness expert, and found that in this case the trial court did not abuse its discretion by not allowing an expert witness to testify.¹⁰⁹ Thus, the court in *Young* should have ruled that the trial court abused its discretion by allowing

100. See POLICE EXEC. RESEARCH FORUM, *supra* note 5, at 23.

101. See *supra* Part III.

102. See *Eyewitness Identification Procedure Reforms*, *supra* note 10; Maw, *supra* note 11.

103. Vallas, *supra* note 4, at 98, 100; Wells, *supra* note 4, at 615; Wise et al., *supra* note 4, at 1.

104. See *supra* note 9 and accompanying text.

105. 35 So. 3d 1042, 1043 (La. 2010), *cert. denied*, 562 U.S. 1044 (2010).

106. *Id.* at 1050.

107. *Id.* at 1047–51. The court was interpreting *State v. Stucke*, 419 So. 2d 939 (La. 1982). For a brief discussion of *State v. Stucke*, see *infra* text accompanying notes 108–09.

108. 419 So. 2d at 945.

109. *Id.* at 944–45.

an expert to testify on the factors relating to eyewitness identifications, without issuing a per se ban. This per se ban was recently upheld in *State v. Henry*.¹¹⁰

Louisiana's failure to acknowledge the unreliability of eyewitness identifications has dangerous implications for criminal defendants, eyewitnesses, victims, and society. Changes must be made in both the courtroom and the legislature.

V. PROPOSED SOLUTIONS

A. Mandate Best Police Practices

"[T]he best way to prevent wrongful convictions by inaccurate eyewitness identification evidence is at the source."¹¹¹ Louisiana needs to focus on preventing misidentifications. The state legislature should use the recent reports on best police practices from the National Academy of Sciences¹¹² and the National Institute of Justice¹¹³ to create a set of model guidelines for police agencies.

Additionally, Louisiana should look to other states' statutes that have been passed on this issue. For example, North Carolina recently passed the Eyewitness Identification Reform Act,¹¹⁴ solidifying its commitment to preventing wrongful convictions resulting from misidentifications. Louisiana should do the same, and model North Carolina's legislation.¹¹⁵ Any legislation promulgated by Louisiana should be similar to the Eyewitness Identification Reform Act and outline the best practice police procedures for conducting eyewitness identifications.¹¹⁶ At a minimum, all police agencies in Louisiana should be required to have *some* form of a written eyewitness identification policy, even if it is not fully comprehensive.¹¹⁷

The Louisiana Supreme Court also has the power to keep police officers in check and to make certain that best practice police procedures are being used during eyewitness identifications. New Jersey has made changes to its eyewitness identification procedures after a special master (retired judge) conducted an "exhaustive study of the

110. 147 So. 3d 1143 (La. Ct. App. 2014), *writ denied*, 164 So. 3d 831 (La. 2015), *cert. denied*, 136 S. Ct. 402 (2015).

111. Duffy, *supra* note 15, at 46.

112. IDENTIFYING THE CULPRIT, *supra* note 30; *see also* Radley Balko, *New National Academy of Sciences Study Critical of Eyewitness Testimony*, WASH. POST: WATCH (Oct. 3, 2014), <https://www.washingtonpost.com/news/the-watch/wp/2014/10/03/new-national-academy-of-sciences-study-critical-of-eyewitness-testimony> (discussing the National Academy of Sciences' research focusing on problems with the eyewitness identification procedures and ways to improve them); Josh Sanburn, *Behind the Messy Science of Police Lineups*, TIME (Oct. 3, 2014), <http://time.com/3461043/police-lineups-eyewitness-science> (discussing the National Academy of Sciences' report, which recommended new training guidelines for law enforcement during lineups and the adoption of the double-blind lineups).

113. POLICE EXEC. RESEARCH FORUM, *supra* note 5.

114. N.C. GEN. STAT. §§ 15A-284.50–.53 (2008).

115. *Id.*

116. *Id.*

117. For example, Kansas governor Sam Brownback recently signed a bill requiring police agencies to adopt written policies in relation to eyewitness identifications. *See* KAN. STAT. ANN. § 22-4619 (2016).

scientific research on eyewitness identification”¹¹⁸ The New Jersey Supreme Court’s decision in *State v. Henderson* placed responsibility on judges to examine police identification procedures.¹¹⁹ There is no reason Louisiana cannot follow in New Jersey’s footsteps. Louisiana established a Judicial Council in 1950 as a “research arm for the Supreme Court[, which] acts as a resource center where ideas for . . . correcting shortcomings in the system are studied.”¹²⁰ The Judicial Council has published a couple of task force reports.¹²¹ Thus, a task force should be established to examine best practices for eyewitness identification procedures, and the Judicial Council should publish a final report on the task force’s findings. This would be an enormous step in the right direction for Louisiana.

B. *Eliminate the Per Se Ban on Eyewitness Identification Expert Testimony*

The Louisiana Supreme Court must revisit its decision in *State v. Young*.¹²² The court misinterpreted precedent and in doing so created a problematic per se ban that will continue to contribute to wrongful convictions.¹²³ The idea that *Young*’s per se ban needs to be overturned is not a novel one,¹²⁴ but it is worth repeating and expanding upon.

Recent cases in other jurisdictions provide an abundance of support and guidance. In *State v. Carr*, the Kansas Supreme Court abandoned its previous per se ban on eyewitness experts.¹²⁵ The court acknowledged the various studies in the field and chose to “evolve in a like manner.”¹²⁶ Similarly, in *Commonwealth v. Walker*, the Pennsylvania Supreme Court stated, “in light of the concerns identified by researchers and other courts, we are no longer willing to maintain a preclusive rule based on equating common knowledge among jurors with a developed understanding of the

118. Benjamin Weiser, *In New Jersey, Rules Are Changed on Witness IDs*, N.Y. TIMES (Aug. 24, 2011), <http://www.nytimes.com/2011/08/25/nyregion/in-new-jersey-rules-changed-on-witness-ids.html>. For a comprehensive list of the reforms the New Jersey Supreme Court made, see *New Jersey Supreme Court Issues Landmark Decision Mandating Major Changes in the Way Courts Handle Identification Procedures*, INNOCENCE PROJECT (Aug. 24, 2011), <http://www.innocenceproject.org/new-jersey-supreme-court-issues-landmark-decision-mandating-major-changes-in-the-way-courts-handle-identification-procedures>.

119. 27 A.3d 872, 919–20 (N.J. 2011).

120. *The Judicial Council of Louisiana*, LA. SUP. CT., http://www.lasc.org/la_judicial_entities/judicial_council.asp (last visited Apr. 6, 2017).

121. *Id.*; see TASK FORCE ON DELAY REDUCTION & CASE MGMT., JUDICIAL COUNCIL, GUIDELINES FOR BEST PRACTICES IN DELAY REDUCTION AND CASE MANAGEMENT (2004), http://www.lasc.org/la_judicial_entities/Judicial_Council/Delay_Guidelines.pdf; TASK FORCE ON PRO SE LITIG., JUDICIAL COUNCIL, GUIDELINES FOR BEST PRACTICES IN PRO SE ASSISTANCE (2004), http://www.lasc.org/la_judicial_entities/Judicial_Council/Pro_Se_Guidelines.pdf.

122. 35 So. 3d 1042 (La. 2010).

123. See *supra* notes 104–10 and accompanying text.

124. See generally Matthew S. Foster, Comment, *I’ll Believe It When You See It*, 60 LOY. L. REV. 857 (2014) (discussing the shortcomings of *Young*’s holding and the need to correct it).

125. 331 P.3d 544, 689–90 (Kan. 2014), *rev’d on other grounds* by 136 S. Ct. 633 (2016).

126. *Id.*

factors which potentially impact eyewitness testimony.”¹²⁷ Finally, in *State v. Guilbert*, the Connecticut Supreme Court overturned its per se ban, finding its past decisions were “out of step with the widespread judicial recognition that eyewitness identifications are potentially unreliable in a variety of ways unknown to the average juror.”¹²⁸ Louisiana is in a good position to follow these states. And it is hard to imagine a Louisiana court facing any backlash for doing so, since it would have forty-eight other states, and decades of scientific research on its side.

Additionally, Justice Max Tobias’ concurrence in *State v. Henry* indicated that the Louisiana Court of Appeals may be ready to re-examine its per se ban in the near future.¹²⁹ Justice Tobias recognized the inherent danger that is present when the only evidence presented against a defendant is an eyewitness’s identification, as was the case in *Henry*:

In the case at bar, I cannot say that the trial court ruled incorrectly on the issue by following Louisiana Supreme Court jurisprudence, and more specifically *Young*, which excludes an expert’s testimony relating to eyewitness identifications. Nevertheless, here the only evidence against the accused is eyewitness identifications by individuals who were not familiar with the accused and no corroborative or other circumstantial evidence links the accused to the crime. Thus, it seems reasonable in a death penalty case that, out of fairness, the defendant should be allowed to call an expert witness

. . . [Defendants should be able to do this], given that many studies exist that call into question the validity of eyewitness identification.¹³⁰

Justice Tobias raises an interesting point. If the Louisiana Supreme Court insists on maintaining its per se ban on eyewitness identification expert testimony, then exceptions must be made. However, there is no reason to limit expert witness testimony to only death penalty cases. In *any* case where the only piece of evidence against a defendant is an eyewitness’s identification, the defense should be allowed to bring in an expert to testify about eyewitness identifications. The cost of a mistaken identification is just too high.

C. Increase Voir Dire Flexibility and Implement New Jury Instructions

Currently, Louisiana does not have mandatory jury instructions on eyewitness identifications, and it rarely grants defendants’ requests to have special instructions on eyewitness identifications charged to the jury.¹³¹ Instead, the general charge instructions are found to be satisfactory. These instructions merely instruct the jury to:

[C]onsider [the witness’s] ability and opportunity to observe and remember the matter about which he or she testified, his or her manner while testifying,

127. 92 A.3d 766, 789 (Pa. 2014).

128. 49 A.3d 705, 720 (Conn. 2012).

129. 147 So. 3d 1143, 1161–69 (La. Ct. App. 2014) (Tobias, J., concurring).

130. *Id.* at 1168 (citation omitted).

131. See LA. CODE CRIM. PROC. ANN. arts. 802, 807 (2016).

any reason he or she may have for testifying in favor for or against the State or the defendant, and the extent to which the testimony is supported or contradicted by other evidence.¹³²

These instructions lack any specificity relating to the various factors present in an eyewitness's testimony and identification. Again, the Louisiana Supreme Court should learn from New Jersey,¹³³ and adopt mandatory instructions on eyewitness identifications. This is especially important in light of Louisiana's per se ban on expert testimony relating to eyewitness identifications. The only way to educate a jury when the use of an expert is barred is through jury instructions.¹³⁴

Along with mandatory jury instructions on eyewitness identifications, attorneys should be afforded leniency when conducting voir dire. Louisiana courts should allow for longer voir dire so that attorneys can properly evaluate jurors' ability to assess eyewitness identifications. In addition, attorneys should be granted more flexibility when asking questions that touch specifically on system and estimator variables. By making these adjustments to the voir dire process, attorneys may be able to reduce jurors' reliance on eyewitness identifications and avoid convicting innocent people.

VI. CONCLUSION

Eyewitness misidentifications have already led to far too many wrongful convictions in the United States in general, and Louisiana in particular. Louisiana courts and its legislature need to inform themselves about the research conducted on the factors affecting the reliability of eyewitness identifications. Three ways in which Louisiana can, and must, improve are by: implementing legislation mandating police agencies to use best practice police protocols during eyewitness identification procedures, eliminating the per se ban to eyewitness expert testimony, and modifying the state's voir dire rules and standard jury instructions. Until Louisiana makes eyewitness identification reform a priority, it seems ankle monitors for everyone might be the only viable defense against the danger of mistaken eyewitness identifications and wrongful convictions.

132. *State v. Velez*, 588 So. 2d 116, 136 (La. Ct. App. 1991).

133. *See State v. Henderson*, 27 A.3d 872 (N.J. 2011); *see discussion supra* pp. 424–25.

134. *Supra* Part III.C.

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