AVOIDING MISIDENTIFICATION: IMPROVING BEST PRACTICES CAN REDUCE INCIDENTS OF WRONGFUL CONVICTION

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Abstract: In May 2021, newly tested DNA evidence appeared to exonerate Ledell Lee, who had spent almost thirty years in prison for a murder he did not commit. Although this new evidence should have been a great relief to Mr. Lee and his family, it was not. The State of Arkansas had executed Mr. Lee almost four years earlier. Mr. Lee's wrongful conviction was, in part, based on an unreliable eyewitness identification. Unfortunately, mistaken eyewitness identification is the most common factor in wrongful convictions. The manner in which eyewitness evidence is collected can have a significant impact on its reliability. This paper explores eyewitness identification collection procedures and examines best practices adopted by different states. Learning from recent developments in New Jersey and Massachusetts, this paper suggests two best practices for collecting eyewitness evidence which states can adopt to decrease the likelihood of misidentification and wrongful conviction.

INTRODUCTION

In a criminal trial, eyewitness identification is often a crucial factor in convincing the jury to convict the defendant. Emotional testimony by a sympathetic victim or an innocent bystander—with no ulterior motive other than the pursuit of justice—can be the evidence the jury needs to leave no reasonable doubt of the defendant's guilt. Eyewitness identification, however, is far from infallible. Juries have place significant trust in eyewitnesses' identifications, despite scientific studies showing high rates of unreliability.[2] Eyewitness identification relies on the witness's memory

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being a correct recitation of the events in question. But human memory is an imperfect storage system with a wide array of variables affecting an individual's memory, and these variables can lead a witness to inadvertently add or omit details. And because juries place a high degree of trust in identifications—even when they may incorrect—misidentifications lead juries to convict innocent people.

Unfortunately, this event is all too common. Even considering that it many convictions of innocent people due to eyewitness misidentifications likely go uncounted, eyewitness misidentification is recognized as the most common factor in wrongful convictions.[3] Many of these mistaken identifications only come to light with the discovery of new evidence, such as previously untested DNA.[4] Without this DNA evidence, many individuals spend years in prison for crimes they did not commit. Given that eyewitness identification is such a powerful tool at trial, it is important that eyewitness evidence is collected reliably.

Law enforcement can improve the reliability of memory evidence—making it more like trace evidence[5]—by improving best practices.[6] When collected carefully and with proper procedures in place, memory evidence can be a useful tool in the legal system to prove the truth. But unlike physical trace evidence, the legal system has historically subjected eyewitness testimony to less strenuous scrutiny.[7] Many believe, despite scientific evidence pointed to the contrary, that judging the accuracy of memory is a

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[2] Innocence Staff, *How Eyewitness Misidentification Can Send Innocent People to Prison*, INNOCENCE PROJECT (Apr. 15, 2020), https://innocenceproject.org/how-eyewitness-misidentification-can-send-innocent-people-to-prison/.

[3] *Eyewitness Identification Reform*, INNOCENCE PROJECT, https://innocenceproject.org/eyewitness-identification-reform/ (last visited Jan. 17, 2023).

[4] *Id.* (Approximately sixty-nine percent of DNA exonerations nationally have involved mistaken eyewitness identification).

[5] Common forms of trace evidence include bloodstains, hair, cloth fibers, paint, fingerprints, scratch marks, and glass fragments.

[6] *See* Gary L. Wells and Elizabeth F. Loftus, *Eyewitness Memory for People and Events*, *in* 11 HANDBOOK OF PSYCHOLOGY, FORENSIC PSYCHOLOGY 617 (Alan M. Goldstein & Irving B. Weiner eds., 2013) (comparing the safeguards the legal system has implemented to ensure the reliability of trace evidence to the lack of protections for the collection of eyewitness identification).

[7] *Id.* (noting that the legal system has not embraced the scientific data for improving eyewitness identifications).

commonsense endeavor.[8] Unfortunately, too often judges and attorneys hold these beliefs as well.[9] Thus, judges fail to exclude eyewitness identifications that should have raised red flags and are accepted as fact, misleading juries.

There are several factors that contribute to the level of reliability for witness identification. Some of these factors are part and parcel to memory evidence, and thus, cannot be made more reliable.[10] But outside of problems inherent to human memory, there are cognizable steps law enforcement can take to improve the collection and use of eyewitness identification. For example, the processes police use can have a major impact on the outcome of an investigation, as fair and unbiased eyewitness identification procedures improve the probability that the police have identified the correct person. Conversely, unduly prejudicial practices can help law enforcement get a conviction; it just may not be the right person. By relying on prejudicial eyewitness identification procedures, the defendant and the justice system suffer.

When faced with the decision of whether to catch the right person or any person, the states have generally decided to try to catch the right person.[11] Over the past couple of decades, states throughout the country have served as laboratories of democracy, testing best practices to improve eyewitness identification procedures, generally with much success.[12] As states have found ways to improve the collection of eyewitness

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[8] *See* Jennifer L. Devenport, Steven D. Penrod, & Brian L. Cutler, *Eyewitness Identification Evidence: Evaluating Commonsense Evaluations*, 3 PSYCH. PUB. POL'Y & L. 338, 344 (1997) (examining how many of the safeguards in the legal system are developed based on judges' intuition).
[9] *Id.*
[10] *See, e.g.*, CHRISTOPHER CHABRIS AND DANIEL SIMONS, THE INVISIBLE GORILLA (2010). For example, if someone is focused on a certain event, they may miss important details that were not the center of their attention. A famous example is from a video which asks viewers to count the number of times a team passes a ball back and forth. *Id.* While counting, the viewers fail to notice a person dressed up as a gorilla walk into the middle of the screen, stare at the camera and then walk off. *Id.*
[11] *See e.g.*, 12 R.I. GEN. LAWS § 12-1-16 (2010) (creating a task force to improve the collection of eyewitness identification through the development of best practices statewide).
[12] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (arguing that federalism enables the states to play the vital role of laboratories to democracy, trying novel experiments that can be exported).

identification, others have followed, enabling the country to efficiently improve its procedures across the board. Now, most states require best practices for the collection of eyewitness identification, which aims to improve the reliability of the evidence and combat the grave consequences of mistaken eyewitness identification.[13]

This Article will first look at the history of eyewitness identification in the United States and the constitutional rights afforded to defendants. Next, the Article will explore the evolution of scientific understanding regarding memory evidence and how mistaken identifications can have serious ramifications, both on the individual level as well as society at large.[14] This Article will then look at the ways local and state governments have improved their eyewitness identification procedures and which best practices have become near-uniformly accepted nationwide.[15] Finally, this Article highlights two states' best practices and explains why these best practices should adopted broadly.[16]

I. HISTORY OF EYEWITNESS IDENTIFICATION IN CRIMINAL PROCEEDINGS

The Constitution preserves several rights for criminal defendants. With respect to eyewitness identification, there are two distinct but interconnected constitutional provisions at issue: (i) due process and (ii) the

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[13] *See* Nicholas A. Kahn-Fogel, *The Promises and Pitfalls of State Eyewitness Identification Reforms*, 104 KY. L.J. 99, 121, 138, 146, 150 (2016) (highlighting approaches taken by numerous states); 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, 113 (2011) (discussing the standards various state courts have adopted to admit expert testimony concerning the reliability of eyewitness identification).
[14] *See generally* U.S. DEP'T OF JUST., EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT-RESEARCH REPORT (1999) https://www.ojp.gov/pdffiles1/nij/178240.pdf.
[15] *See, e.g.*, 12 R.I. GEN. LAWS §12-1-16 (2010) (implementing a taskforce's recommendations for best practices regarding eyewitness identification); Eyewitness Identification Reform Act, N.C. GEN. STAT. §15A-284.52 (2007); Minimum Requirements for Live Lineup or Photo Lineup Procedures, OHIO REV. CODE ANN. § 2933.83 (West 2009).
[16] *See* N.J. CT. R. 3:11 (requiring all eyewitness identification procedures to be recorded); 725 ILL. COMP. STAT. ANN. 5/107A-2(f)(10) (West 2015) (requiring an audio or video recording of all lineup procedures when practicable); Eyewitness Identification Reform Act, N.C. GEN. STAT. 15A-284.52(b)(14) (2007) (requiring a video record or, if not practical, an audio record of live identification procedures); Commonwealth v. Crayton, 470 Mass. 228 (Mass. 2014).

right to counsel.[17] These two constitutional rights provide defendants with protections against abusive eyewitness identification in the criminal justice system. Law enforcement's identification methods can have significant impacts on either right.

i. Due Process

The Fifth and Fourteenth Amendments of the Constitution guarantee criminal defendants due process of law.[18] With respect to eyewitness identification, the Supreme Court has interpreted these amendments to prohibit identification procedures that are "so unnecessarily suggestive and conducive to irreparable mistaken identification."[19] When eyewitness testimony is based upon such prejudicial procedures that it creates a significant likelihood of mistaken identification, it denies defendants their due process rights.[20]

When evaluating whether eyewitness identification has violated the defendants due process rights, courts must look at the totality of the circumstances surrounding the identification.[21] Certain procedures may so unfairly prejudice the eyewitness against a defendant that the reliability of the identification cannot be determined.[22] For example, police may employ a "showup," which is "[a] procedure in which a suspect is shown singly to a witness for identification, rather than as part of a lineup."[23] In a showup, the witness is asked whether a detained suspect is the perpetrator. The perpetrator may be with officers and handcuffed or may have just been removed from a police vehicle. Law enforcement also indicates to the

[17] Stovall v. Denno, 388 U.S. 293, 294–95 (1967); Gilbert v. California, 388 U.S. 263, 271 (1967); United States v. Wade, 388 U.S. 218, 221 (1967). Due process rights stem from the Fifth and Fourteenth Amendments to the Constitution, while the right to counsel is found in the Sixth Amendment. U.S. CONST. amends. V & XIV (Due Process Clauses); U.S. CONST. amend. VI (right to counsel).
[18] U.S. CONST. amends. V & XIV.
[19] *Stovall*, 388 U.S. at 301–02.
[20] *Id.*
[21] *Id.* at 302 ("[A] claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it, and the record in the present case reveals that the showing of Stovall to Mrs. Behrendt in an immediate hospital confrontation was imperative.").
[22] *Id.*
[23] *Showup*, BLACK'S LAW DICTIONARY (11th ed. 2019).

eyewitness that the person before them is the suspected perpetrator.[24] Courts balance the unreliable factors of a showup against reliable ones and consider the state's interest or need in conducting the prejudicial process.[25] After conducting this totality-of-the-circumstances analysis, courts decide whether the eyewitness identification is reliable, and thus, permissible for the jury to hear.

The Supreme Court's 1967 case *Stovall v. Denno* originated the eyewitness identification totality-of-the-circumstances analysis described above.[26] In *Stovall*, an instant eyewitness identification procedure forced the Court to determine if the need for urgent identification offset the prejudicial circumstances surrounding it.[27] The case involved Mr. and Mrs. Berheldt, who lived in the town of Garden City, Long Island.[28] One evening, an assailant entered their home, stabbing both of the residents, killing Mr. Berheldt, and severely injuring Mrs. Berheldt.[29] Police linked evidence from the scene to defendant Mr. Stovall, arresting him later that day.[30] Meanwhile, the local hospital was preparing Mrs. Berheldt for emergency surgery following the attack.[31] Unsure whether Mrs. Berheldt would survive the surgery, law enforcement brought the suspect, Mr. Stovall, to Mrs. Berheldt's hospital room so that she could positively or negatively identify him as the attacker.[32] At that time, Mr. Stovall was handcuffed to one of the

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[24] *Id.*
[25] *Stovall,* 388 U.S. at 294.
[26] *Id.* The case also was used to help determine whether to retroactively apply the rules announced in *Wade* and *Gilbert* regarding "the exclusion of identification evidence which is tainted by exhibiting the accused to identifying witnesses before trial in the absence of his counsel." *Id.* The court decided not to apply *Wade* and *Gilbert* retroactively. *Id.* at 297. This portion of the decision was eventually overruled in *Griffith v. Kentucky. See* Griffith v. Kentucky, 479 U.S. 314 (1987).
[27] *Stovall,* 388 U.S. at 294.
[28] *Id.* at 295.
[29] *Id.*
[30] *Id.*
[31] *Id.* At the time, it was unclear whether Mrs. Berheldt would survive the surgery. *Id.* Because of the urgency of the situation, the police brought Mr. Stovall to the hospital room before he had time to retain counsel. *Id.*
[32] *Id.*

police officers and was the only African-American in the room.[33] Under these circumstances, Mrs. Berheldt identified Mr. Stovall as her attacker, and he was subsequently convicted.[34]

On appeal before the Supreme Court, the defendant argued that this eyewitness identification procedure denied him of his right to the due process of law.[35] Stovall suggested that bringing him into her hospital room as the only suspect in a showup, rather than as a part of a lineup, was unnecessarily suggestive and conducive to irreparable mistaken identification. While the Court had largely condemned the practice of showups, it held that due to the urgency surrounding Mrs. Berheldt's health, the totality of the circumstances permitted the practice in this instance.[36]

Under this totality-of-the-circumstances standard, the Court in *Stovall* required judges to conduct a two-part test for admission of eyewitness testimony under the due process clause. First, the judge must determine whether the process was unnecessarily suggestive.[37] If it was, the judge then must determine whether the eyewitness's identification was reliable.[38] Unfortunately, following the *Stovall* decision, lower courts

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[33] *Id.* ("Petitioner was handcuffed to one of five police officers who, with two members of the staff of the District Attorney, brought him to the hospital room. Petitioner was the only Negro in the room. Mrs. Behrendt identified him from her hospital bed . . . .").
[34] *Id.* Stovall was sentenced to death and the New York Court of Appeals affirmed the conviction without an opinion. *See* People v. Stovall, 196 N.E.2d 65 (N.Y. 1963).
[35] *Id.* at 301–02.
[36] *Id.* at 302. ("Here was the only person in the world who could possibly exonerate Stovall. Her words, and only her words, 'He is not the man' could have resulted in freedom for Stovall. The hospital was not far distant from the courthouse and jail. No one knew how long Mrs. Behrendt might live. Faced with the responsibility of identifying the attacker, with the need for immediate action and with the knowledge that Mrs. Behrendt could not visit the jail, the police followed the only feasible procedure and took Stovall to the hospital room. Under these circumstances, the usual police station line-up, which Stovall now argues he should have had, was out of the question.").
[37] *See id.*
[38] *See id.* However, as will be discussed below, placing this responsibility on Judges may be unwise. The reliability of memory is not as simple nor straightforward as a layperson may initially believe. *See* Richard A. Wise & Martin A. Safer, *A Survey of Judges' Knowledge and Beliefs About Eyewitness Testimony*, 40 CT. REV. J. AM. JUDGES ASS'N 6 (2003) (highlighting the ways in which judges err in their thinking regarding eyewitness testimony and memory in general); Devenport et al., *supra* note 7, at 345 (explaining how judges were found to have commonsense knowledge of issues with eyewitness

struggled to consistently determine whether an eyewitness identification was "reliable."[39] In attempt to address this issue, the Supreme Court in *Neil v. Biggers* laid out factors for courts to consider to further standardize reliability determinations.[40]

In *Biggers*, the petitioner had been convicted of rape, largely based on eyewitness identification by the victim.[41] The victim stated that her assailant, wielding a butcher's knife, grabbed her in her kitchen, walked her outside, and raped her.[42] The victim described the assailant as "between 16 and 18 years old and between five feet ten inches and six feet tall, as weighing between 180 and 200 pounds, and as having a dark brown complexion."[43] The police, trying to find the suspect, showed the victim several photograph lineups, but she was not able to positively identify any of the images.[44] Seven months after the rape had occurred, police detained the petitioner on other charges and asked the victim to come to the station to determine if the petitioner was her assailant.[45] The police walked the petitioner past the victim, and the victim identified the petitioner as her attacker.[46]

The petitioner challenged this eyewitness identification procedure, claiming it violated his due process rights because the procedure was unnecessarily suggestive, and thus, unreliable.[47] The Court recognized that showups like the petitioner's showup in *Biggers* were suggestive but held that a court may uphold a showup by if it was weighed against a five factor totality-of-the-circumstances test used to evaluate overall reliability of an identification.[48] These factors are (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention,

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identification but lacked scientific knowledge regarding specific factors and indicators of reliability).

39 *See, e.g.*, Neil v. Biggers, 409 U.S. 188, 199–200 (1972).

40 *Id.*

41 *Id.* at 193.

42 *Id.* at 195.

43 *Id.*

44 *Id.* at 194–95.

45 *Id.* at 195.

46 *Id.*

47 *Id.* at 199.

48 *Id.*

(3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation.[49] The Court evaluated the showup under these factors, determined that the identification was reliable, and upheld the conviction.[50]

By providing the five totality-of-the-circumstances test factors, *Biggers* changed the test for admission of eyewitness identification evidence from focusing on the suggestiveness of the identification procedure to focusing on the identification procedure's reliability.[51] As a result, the Supreme Court instructed the lower courts to focus on the totality of the circumstances surrounding the identification and admit the identification if "the identification was reliable even though the confrontation procedure was suggestive."[52] Later, the Supreme Court reaffirmed this due process focus on the indicia of reliability in *Manson v. Brathwaite* in 1977.[53]

ii. Right to Counsel

The Sixth Amendment provides that during a criminal prosecution, the accused shall have the assistance of counsel for their defense.[54] Originally, this amendment only applied to defense at trail, but as the

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[49] *Id.* The Court in *Biggers* balanced the inherent suggestiveness of the police showup against these competing reliability factors. *Id.* at 200. The factors were derived from the Court's prior cases, building upon their commonsense understanding of eyewitness testimony and the reliability of memory. *Id.*; *see also* Suzannah B. Gambell, *The Need to Revisit the Neil v. Biggers Factors: Suppressing Unreliable Eyewitness Identification*, 6 WYO. L. REV. 189, 206 (2006).

[50] *Biggers*, 409 U.S. at 200–01.

[51] *See* Gambell, *supra* note 49, at 206. (arguing that *Biggers* deviated from *Stovall* and *Wade* by primarily focusing on whether the identification was reliable instead of whether the identification was unduly suggestive).

[52] *Biggers*, 409 U.S. at 199.

[53] Manson v. Brathwaite, 432 U.S. 98, 106 (1977) ("The admission of testimony concerning a suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability."). In *Brathwaite*, the Court laid out the underlying policy concerns for this totality-of-the-circumstances standard: (1) providing the jury as much relevant and reliable evidence as practical, (2) creating some deterrence against bad police conduct, and (3) administration of justice by preventing the guilty from going free. *Id.* at 111–12; *see also* Gambell, *supra* note 49, at 206.

[54] U.S. CONST. amend. VI (right to counsel).

criminal justice system evolved, the Supreme Court expanded the scope of the Amendment to require assistance throughout all critical stages of the prosecution.[55] In justifying this expansion, the Court likened delaying defendants of the right to counsel until trial to a "cynical prosecutor saying: 'Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at the trial.'"[56] Rather than permit the trial to be merely an appeal from the investigation, the Court wanted the defendants to receive meaningful representation through all the important stages of a trial.

In 1967, the Supreme Court directly addressed the constitutional right to assistance as it relates to eyewitness identification. In *United States v. Wade* and *Gilbert v. California*, the Court analyzed whether the defendant should be afforded counsel during identification procedures.[57] In *Wade*, a man entered a bank with strips of tape obscuring his face, pointed a pistol at a cashier, and forced her to fill a pillowcase with money.[58] Roughly six months later, the police indicted the defendant and charged him with for robbing the bank.[59] The defendant had counsel appointed, but without notifying the defendant's attorney, an FBI agent arranged for two of the bank's employees to observe the defendant in a lineup.[60] Without counsel to observe nor object to suggestive lineup procedures, the two eyewitnesses positively identified the defendant.[61]

The Supreme Court held that this violated the Sixth Amendment, which guarantees counsel's assistance whenever that assistance is necessary

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[55] *See* Gideon v. Wainwright, 372 U.S. 335, 343 (1963) (requiring both federal and state defendants to be provided the assistance of counsel); Escobedo v. Illinois, 378 U.S. 478, 490–91 (1964) (holding that if defendants did not have access to counsel before the trial, a trail would merely be an appeal from the interrogation and the right to counsel would mean little).

[56] *Escobedo*, 378 U.S. at 488 (quoting *Ex parte Sullivan*, 107 F.Supp. 514, 517-518 (D. Utah 1952)).

[57] Gilbert v. California, 388 U.S. 263, 264 (1967); United States v. Wade, 388 U.S. 218, 219–20 (1967). These cases, alongside *Stovall*, would later become known as the *Wade* trilogy of cases.

[58] 388 U.S. at 220.

[59] *Id.*

[60] *Id.*

[61] *Id.*

to ensure the defendant receives a *meaningful* defense.[62] The Court acknowledged that the period of time between arraignment and trail was possibly the most crucial period for the accused to receive assistance of counsel, recognizing that the defendant has a significant interest in ensuring the procedures are fair during a pretrial witness identification.[63] Therefore, the court held that counsel is necessary during pretrial identification in order to provide the defendant with a meaningful defense.

The *Wade* Court also acknowledged that it is at best impractical and at worse impossible for a criminal defendant to accurately and effectively recreate the circumstances and methods used during a pretrial lineup to demonstrate bias to the jury later at trial.[64] The presence of the defendant's counsel at the identification is better suited to prevent prejudice or suggestive procedures from seeping their way into an identification than trying to identify and raise those issues later for a jury.[65] As a result, the Court held that the Sixth Amendment requires the defendant have counsel at the post-arraignment identifications.[66]

In *Wade*'s sister case, *Gilbert v. California*, the Supreme Court again held that an eyewitness identification was in violation of the defendant's Sixth Amendment rights.[67] Like *Wade*, authorities in *Gilbert* failed to notify the defendant's counsel of the defendant's identification.[68] Furthermore, the Court noted that the record inadequately described the identification procedures.[69] The Supreme Court noted that while there was an overview of the identification procedure, the record was silent as to the specific details.[70] Without knowledge of what occurred at the lineup, the defense is unable to adequately challenge the reliability at a suppression

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[62] *Id.* at 225.
[63] *Id.* (citing *Powell v. Alabama*, 287 U.S. 45, 60–65 (1932) (reversing the Scottsboro Boys' convictions for rape as they did not receive adequate legal counsel)).
[64] *Id.* at 230.
[65] *Id.* at 230–31 ("Improper influences may go undetected by a suspect, guilty or not, who experiences the emotional tension which we might expect in one being confronted with potential accusers").
[66] *Id.* at 232.
[67] *Gilbert*, 388 U.S. at 270.
[68] *Id.* at 269.
[69] *Id.*
[70] *Id.*

hearing or raise doubt as to the suggestiveness of the proceedings to a jury, thus depriving the defendant of a meaningful defense.[71] As it did in *Wade*, the Court held that the out of court eyewitness identification violated the defendant's right to have assistance of counsel as guaranteed by the Sixth Amendment.[72]

II. GROWING CONCERN ABOUT THE RELIABILITY OF EYEWITNESS IDENTIFICATION POST-*BIGGERS*

After the *Biggers* and *Brathwaite* decisions, both State and Federal courts began to adopt the due process and right to counsel analyses for eyewitness identifications.[73] Using these seemingly objective factors, judges were confident that they could adequately determine which forms of eyewitness evidence were reliable and which must be excluded.[74] However, despite this standardized approach to evaluating the reliability of eyewitness identification, experts and advocates raised questions regarding the connection between the *Biggers* factors and reliability of eyewitness identifications.

At the time of these Supreme Court decisions, several psychologists and researchers studying human memory began discovering and publishing results contrary to what commonsense would dictate. For example, Dr. Elizabeth Loftus, a notable psychologist, raised significant concerns about the malleability of memories in her text *Reconstructing memory: The Incredible Eyewitness*.[75] Published between the *Biggers* and *Brathwaite* decisions, Dr. Loftus detailed the ways memory can change drastically between the observation and the time the memory is recounted.[76]

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[71] *See id.* at 272–74.
[72] *Id.* at 272 (remanding the in-court identifications for evidence that they were based on an independent source and not tainted by the out of court identifications).
[73] *See generally* Gambell, *supra* note 49, at 207–14.
[74] *E.g.*, State v. Delahunt, 401 A.2d 1261, 1266 (R.I. 1979) (adopting the *Biggers* factors in Rhode Island state courts).
[75] Throughout her research, Dr. Loftus showed that not only could individuals forget details, interactions subsequent to the observation could alter or add details to the individual's memory of the event. *See generally* ELIZABETH LOFTUS, EYEWITNESS TESTIMONY (Harv. U. Press 1979).
[76] Elizabeth Loftus, *Reconstructing memory: The Incredible Eyewitness*, 15 JURIMETRICS J. 188, 188, 193 (1974).

The Supreme Court's decision in *Biggers* reoriented reviewing eyewitness identification procedures, choosing to focus on the reliability of the identification rather than the prejudicial nature of the procedure. However, in implementing this method, the Court ignored the scientific discoveries on human memory discussed above and instead used an amalgamation of prior caselaw, commonsense, intuition, and personal experience to delineate the factors that judges should consider when evaluating reliability of the eyewitness identification.[77] The resulting procedure directly contradicted the science, which determined that these judicially mandated factors are not accurate indicators for the reliability of eyewitness identifications.[78]

As a result, although the *Biggers* factors were intended to minimize misidentifications, the factors fail to prove such protection.[79] By placing such a significant importance on reliability for admission of eyewitness identification, *Biggers* thereby requires judges and attorneys to essentially act as human factors experts. However, much like jurors, lawyers and judges tend to overrate their innate ability to spot unreliable testimony.[80] By placing the focus of admissibility on reliability, courts have inadvertently left important admission decisions to random chance.

Not only does *Biggers* rely on unreliable, unknowledgeable opinions, but most of the *Biggers* factors—purporting to indicate reliability—actively mislead the court and jury. Because judges are instructed to look at these factors, it can mislead a court to admit unreliable eyewitness testimony. In her book, Eyewitness Testimony, Dr. Loftus suggests that several of the *Biggers* factors, while seemingly reliable, actually have a negative or no correlation to accurate recall of memory.[81] Only two of the five factors, (1)

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[77] *See Biggers*, 409 U.S. at 199.
[78] Gary Wells, Mark Small, Steve Penrod, & Roy S. Malpass, *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 L. & HUM. BEHAV. 603, 608 (1998).
[79] *Id.*
[80] *Id.* at 619. In a survey of 166 defense attorneys and 69 prosecutors, 75% of prosecutors falsely believed that when an eyewitness was more confident, they were more likely to be correct, compared to only 40% of defense attorneys having the same mistaken belief. *Id.*
[81] LOFTUS, *supra* note 75.

duration of exposure to the suspect and (2) length between observation and relaying the information, are correlated with accuracy.[82]

The other three *Biggers* factors, (3) the witness' degree of attention, (4) the accuracy of the witness' prior description of the criminal, and (5) the level of certainty demonstrated by the witness at the confrontation, fail to ensure reliability. For example, intuitively, evaluating the degree of the witness's attention to the identity of the criminal would seem to indicate whether the identification was reliable. But psychological research has shown that other factors, such as stress or cross-racial identification, can substantially interfere with the accuracy of a memory, even if the eyewitness was playing close attention to the physical features of the actor.[83] Contrary to intuition, the stress and anxiety caused by a dangerous encounter tend to distort a memory, rather than enhance its reliability.[84] Focusing on the witness's attention to detail risks telling a juror that the identification is reliable, even when it may not be.

Similarly, *Biggers* instructs courts to consider eyewitness confidence in determining reliability.[85] However, psychological studies have shown that confidence in an identification can be warped because of suggestive identification procedures or repeated identifications.[86] When law enforcement utilizes suggestive procedures, eyewitnesses may have higher degrees of confidence, but their identifications are less reliable. For example, if a police officer shows a witness a photo array and taps their finger over a single picture, the eyewitness may be persuaded to choose that suspect, and that action may instill undue confidence in the eyewitness's identification.[87] This is significant because juries believe more confident

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[82] Steven D. Penrod and Brian L. Cutler, *Eyewitness Expert Testimony and Jury Decision Making*, 52 L. & CONTEMP. PROBS. 43, 50–51 (1989).
[83] *Id.* at 52.
[84] A. DANIEL YARMEY, THE PSYCHOLOGY OF EYEWITNESS TESTIMONY, 20 (The Free Press 1979).
[85] *Biggers*, 409 U.S. at 199.
[86] Wells *et al.*, *supra* note 78, at 620.
[87] *Id.* at 631. The suggestive procedures help to convince the eyewitness that they are correct in their identification, despite the fact that the police may be investigating the wrong person. Without the presence of strict procedure guidelines or an informed counselor, some of these suggestive procedures may go unnoticed and unduly prejudice a defendant. *See id.*

eyewitnesses.[88] By instructing courts to consider confidence that has been artificially inflated by suggestive identification procedures, the judge or jury likely to convict a defendant based on unreliable factors. If the wrong person is accused, the conviction may not be the perpetrator.

Without confronting the flawed *Biggers* factors, the Court not only reinforces common mistaken beliefs regarding memory but provides an unreliable eyewitness identification with a façade of reliability. Because most of the *Biggers* standardized factors showed no or negative relation to eyewitness identification reliability, the law enforcement community, the legal system, and outside advocates are justified in encouraging widespread reforms to the eyewitness identification procedures to ensure that a witness correctly identifies an individual and the court properly prosecutes that individual.

III. EVOLUTION OF THE STANDARDS FOR EYEWITNESS IDENTIFICATION PROCEDURES

In the decades after the Supreme Court issued their last statement on evaluation of eyewitness identification reliability in *Biggers*, the legal profession began to more closely examine the processes of how memory evidence is collected, and the science on human memory continued to develop.[89] While these developments showed that there were several ways law enforcement can take tangible steps to reduce incidents of wrongful convictions. Recognizing room for improvement, advocates began pushing for reforms. Several high-profile DNA exonerations helped to build public support for reforms.[90] States have followed this call for improvement and

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[88] *Id.*

[89] *See* LOFTUS, *supra* note 75; Gary Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 L. & HUM. BEHAV. 603, 620 (1998); Jennifer Devenport et al., *Eyewitness Identification Evidence: Evaluating Commonsense Evaluations*, 3 PSYCH. PUB. POL. & L. 338, 344 (1997).

[90] *See, e.g.*, *Nick Hopkins Raphael Rowe Was Freed as One of the M25 Three. But His Fight for Justice Goes On,* THE GUARDIAN (Jul. 22, 2000, 12:08 PM) https://www.theguardian.com/uk/2000/jul/22/race.world; *see generally DNA Exoneration in the United States*, INNOCENCE PROJECT, https://innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited Jan. 17, 2023).

reformed their eyewitness identification techniques.[91] Despite these improvements, there are still several ways states can further improve eyewitness identification.[92]

i. The Measurable and Unmeasurable Impacts of Misidentification

Initially, despite the fervent support of scientific psychologists and other advocates, public support for reforms to eyewitness identification procedures initially showed little progress. However, after the *Biggers* and *Brathwaite* decisions, public support slowly began to grow.[93] By 1989, a scientific breakthrough in criminal investigation sparked a new wave of eyewitness identification reform.

1989 marked the first DNA exoneration.[94] Stemming from a fabricated rape claim, a court relied primarily on eyewitness identification evidence to convict Gary Dotson.[95] The eyewitness, the supposed victim, was pressured by police to pick out Dotson, a man who resembled the description she had given to police officers.[96] After Dotson spent eight years in prison, state officials tested a semen sample found on a dress tied to the alleged victim's rape allegation for DNA.[97] The results of the test led to Dotson's release from prison, resulting in the United States' first DNA exoneration.[98]

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[91] *See* Eyewitness Identification Reform Act, N.C. GEN. STAT §15A-284 (2007); Eyewitness Identification Procedures in Lineups, OHIO REV. CODE ANN. § 2933.83 (2022); R.I. GEN. LAWS §12-1-16 (2022).

[92] *See, e.g.*, N.J. Court R. 3:11 (requiring all eyewitness identification procedures to be recorded); 725 Ill. Comp. Stat. Ann. 5/107A-2(f)(10) (same); *Commonwealth v. Crayton*, 470 Mass. 228 (Ma. 2014) (prohibiting in-court identifications without prior identification without good reason).

[93] *Brathwaite*, 432 U.S. at 106; *Biggers*, 409 U.S. at 199.

[94] *DNA Exonerations in the United States*, INNOCENCE PROJECT, https://innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited November 13, 2022)

[95] Dolores Kennedy, *Gary Dotson*, THE NATIONAL REGISTRY OF EXONERATIONS (June 2012) https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3186.

[96] *Id.*

[97] *Id.*

[98] Associated Press, *Released Prisoner gets big welcome*, SPOKANE CHRONICLE, April 5, 1985, at 6. The alleged victim, Cathleen Crowell Webb had made up the whole story as she came from a religious family and did not want her family to believe she got pregnant

To date, there have been 374 more DNA exonerees since Dotson's exoneration.[99] While his story is unique, the underlying factors contributing to his wrongful incarceration are not. In addition to Dotson's exoneration, there have been numerous highly publicized, wrongfully convicted individuals released after lengthy prison sentences.[100] Of the 375 DNA exonerations, sixty-nine percent involved eyewitness misidentification.[101] Of those exonerated by DNA, sixty percent were African American.[102] Moreover, these numbers only include the number of exonerees freed due to liberating evidence. The overall number of wrongful convictions caused by mistaken identification is unknown, and many falsely accused individuals are not fortunate enough to have untested DNA to clear their names.

More evidence continues to be uncovered with life changing effects.[103] In May 2021, newly tested DNA evidence exonerated Ledell Lee, who had been convicted of murdering a woman in Arkansas in 1993.[104] Mr. Lee was convicted in part due to ineffective (drunk) counsel and unreliable eyewitness testimony.[105] Although this newfound evidence should have been cause for joy, it came too late; the State of Arkansas had executed Mr. Lee

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with her then-boyfriend. The DNA was eventually tested because after getting married, Webb was riddled with guilt and recanted her testimony. *See* Kennedy, *supra* note 95.

[99] *DNA Exonerations in the United States*, INNOCENCE PROJECT, https://innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited Dec. 22, 2022).

[100] For example, the wrongful conviction of Kenneth Waters, a Rhode Island resident, was the inspiration for the 2010 film Conviction. Robin Pogrebin, *From Waitress to Brother's Savior, Then Hollywood Hero*, N.Y. TIMES, Oct. 13, 2010, at C1.

[101] 34% of these misidentification cases involved an in-person lineup, 52% involved a misidentification from a photo array, 16% involved a misidentification from a showup procedure, 5% involved a misidentification from a one-on-one photo procedure, 42% involved a cross-racial misidentification, and 54% involved an in-court misidentification. *Id.*

[102] *Id.*

[103] *See, e.g.*, Heather Murphy, *4 Years After an Execution, a Different Man's DNA Is Found on the Murder Weapon*, N.Y. TIMES (May 7, 2021) https://www.nytimes.com/2021/05/07/us/ledell-lee-dna-testing-arkansas.html.

[104] *Id.*

[105] *Id.* ("According to the Innocence Project, no physical evidence was ever produced that connected Mr. Lee to Ms. Reese's murder. In a summary of the case, the group also outlined obstacles that Mr. Lee had faced over the years, including a lawyer who was drunk and unprepared at court hearings, unreliable neighborhood eyewitnesses and conflicts of interest for key players.").

four years earlier.[106] What should have been a fortuitous discovery now serves as a tragic indictment of the flaws in the justice system. Mistaken identification is costing innocent people years, if not the entirety, of their lives.[107]

ii. Law Enforcement Buy-In

With a growing body of science suggesting that the commonsense approach to eyewitness evidence was incongruent with maximizing the reliability of such evidence, the federal government started making significant changes to how it should consider eyewitness identification. In 1999, the Department of Justice (DOJ) convened a working group to study and issue a guide for law enforcement to improve eyewitness evidence procedures.[108] This report suggested procedures, based on scientific data, to maximize the accuracy and reliability of eyewitness evidence.[109]

The DOJ looked for areas in which law enforcement procedures can substantially influence the reliability of eyewitness identifications. They realized that law enforcement can impact the accuracy of the testimony at almost every step of an investigation.[110] Throughout the report, the DOJ suggests best practices for local and state governments to adopt to improve their collection of evidence, including how police dispatchers conduct 9-1-1 emergency calls, how to assemble mug books, interviewing witnesses, managing field identifications, photo lineups, live lineups, and more.[111] Janet Reno, then-Attorney General of the United States, hoped that implementing these improvements would reduce the number of wrongful convictions based on eyewitness misidentification. Law enforcement

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[106] Despite this newfound evidence, statewide elected officials in Arkansas refuse to consider the idea that they have executed an innocent person. *See id.*

[107] On average, exonerees spend 14 years of the lives in person before exoneration and release. *Id.* Of these individuals exonerated by DNA evidence, they have spent a combined total of 5,284 years in person. *Id.*

[108] U.S. DEP'T OF JUST., *supra* note 14, at 4. The DOJ developed procedures that could be adopted throughout the country while leaving flexibility for jurisdictions to respond specifically to the needs of their community. *Id.*

[109] *Id.*

[110] *Id.* at 8–9.

[111] *See generally id.*

eventually implemented these reforms to ensure that they were ultimately arresting and convicting the right person.[112]

According to Duke University School of Law Professor Brandon Garrett, suggestive police practices occurred in nearly 80% of all the misidentification cases.[113] Professor Garrett noted that it is highly unusual to have an eyewitness intentionally provide a misidentification.[114] Rather, as studies have shown, memory is malleable, and witnesses believe that they are accurately reporting what they observed.[115] Prejudicial eyewitness procedures can trick the eyewitnesses into honestly believing something they did not see. The legal system has neither noted nor accounted for this phenomenon. However, it is vital to the integrity of the criminal justice system to embrace reforms that help avoid the terrible ramifications of misidentification.[116] With respect to memory evidence, law enforcement must support reforms which advocate and improve accountability and reliability.

IV. EXPERIMENTS IN RELIABILITY: STATES ADOPT PROCEDURES TO PREVENT MISIDENTIFICATION AND WRONGFUL CONVICTIONS

After the 1999 DOJ report, several states and law enforcement agencies began to adopt the report's recommended best practices as the scientific understanding of memory and human factors cut against the assertions and recommendations made by the Supreme Court in *Biggers* and *Brathwaite*.[117] In their attempts to protect their citizenry against the harms of unreliable eyewitness identification procedures, these states have acted

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[112] *Id.* at iii–iv.
[113] *How Eyewitness Misidentification Can Send Innocent People to Prison*, INNOCENCE PROJECT (Apr. 15, 2020) https://innocenceproject.org/how-eyewitness-misidentification-can-send-innocent-people-to-prison/.
[114] *Id.*
[115] *Id.*
[116] *Id.*; *see also* Heather Murphy, *4 Years After an Execution, a Different Man's DNA Is Found on the Murder Weapon*, N.Y. TIMES (May 7, 2021) https://www.nytimes.com/2021/05/07/us/ledell-lee-dna-testing-arkansas.html.
[117] *See Brathwaite*, 432 U.S. at 106; *Biggers*, 409 U.S. at 199.

as useful laboratories for determining the best practices to improve eyewitness identification.[118]

i. North Carolina and the Eyewitness Identification Reform Act (ERIA)

The North Carolina legislature was the first state legislature in the nation to pass laws mandating (1) pre-lineup instructions and (2) blind and sequential lineup administration.[119] These two practices are crucial to ensure eyewitness identification procedures are not unnecessarily suggestive as they prevent administering officers from hinting at the identity of the suspect and require eyewitnesses to determine whether the image alone was the perpetrator.[120] These practices, developed in conjunction with advocates, have helped improve reliability and prevent wrongful convictions.[121] This law, titled the Eyewitness Identification Reform Act of 2007 (ERIA), stated that the act would "help solve crime, convict the guilty, and exonerate the innocent in criminal proceedings by improving procedures for eyewitness identification of suspects."[122]

Rather than treating eyewitness and human memory evidence as an independently reliable source, North Carolina listened to the science and treated both eyewitness and memory evidence like trace evidence left at a crime scene.[123] The state acknowledged that like trace evidence, the manner in which eyewitness and memory evidence is collected matters, and if done improperly, evidence is susceptible to be contaminated, destroyed, or can

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[118] *See* Eyewitness Identification Reform Act, N.C. GEN. STAT §15A-284 (2007); *see also Liebmann*, 285 U.S. at 311 (Brandeis, J., dissenting).
[119] Eyewitness Identification Reform Act, N.C. GEN. STAT. §15A-284 (2007).
[120] Wells & Loftus, *supra* note 6, at 626 (explaining the concept of relative judgment conceptualization where eyewitnesses tend to identify the person in the lineup that most resembles the perpetrator relative to other members of the lineup).
[121] *See id,*; R.I. GEN. LAWS §12-1-16 (2010) (utilizing a diverse group of stakeholders to create and implement improvements to the eyewitness identification procedures in Rhode Island).
[122] *Id.*
[123] NORTH CAROLINA DEPARTMENT OF JUSTICE CRIMINAL JUSTICE STANDARDS DIVISION, EYEWITNESS IDENTIFICATION REFORM ACT UPDATE MATERIAL 16 (2020); *see* Wells & Loftus, *supra* note 6, at 617.

produce an incorrect reconstruction of events.[124] The ERIA recommended enhanced procedures, such as, but not limited to, blind administration,[125] sequential presentation of individuals or photographs,[126] and improved instructions prior to identification.[127] These methods have been shown to significantly improve reliability of eyewitness identification.[128] While North Carolina is the first state in the nation to adopt these improve procedures, they were far from the last.

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[124] *See* Eyewitness Identification Reform Act, N.C. GEN. STAT. §15A-284.51 (N.C. 2007) (describing the purpose of the statute); Wells & Loftus, *supra* note 6, at 617.
[125] Independent administration recommends having an officer who is not involved in the investigation conduct the lineup. Eyewitness Identification Reform Act, N.C. GEN. STAT §15A-284 (N.C. 2007). These procedures can be blind or double-blind. *Id.* Blind administration means that the officer administering the photo array may know the identity of the suspect but does not know where the suspect's photo is in the array, does not know which photograph the eyewitness is viewing, and is not in a position to leak information to the witness or give feedback to the witness. *Id.* Double-Blind is similar except that the police officer administering the photo or live lineup is also not aware of the identity of the suspect. *Id.*
[126] Sequential, over simultaneous, identification has proven to be a more reliable means of correctly identifying suspects. Wells et al., *supra* note 78, at 613–14. By presenting an eyewitness with multiple individuals to choose from, they tend to pick the person who looks most like the culprit relative to others in the lineup. *Id.* This relative judgement process tends to yield false positive identifications for individuals who look like the culprit. *Id.* This should be contrasted with absolute judgment, where the images of individuals are presented sequentially. *Id.* This requires the eyewitness to compare each image to the image in their head and decide whether this person is the culprit. *Id.*
[127] The instructions given to an eyewitness before the identification takes place can have a significant impact on the reliability of the identification. North Carolina requires before each lineup, the eyewitness shall receive five instructions: (1) the perpetrator might or might not be presented in the lineup, (2) the lineup administrator does not know the suspect's identity, (3) the eyewitness should not feel compelled to make an identification, (4) it is as important to exclude innocent persons as it is to identify the perpetrator, and (5) the investigation will continue whether or not an identification is made. Eyewitness Identification Reform Act, N.C. GEN. STAT §15A-284 (N.C. 2007). These instructions reduce the chance of misidentification as they discourage relative identification and reassure the eyewitness it is acceptable to not make an identification. Wells et al., *supra* note 78, at 615.
[128] *See generally* Cara Laney and Elizabeth Loftus, *Eyewitness Testimony and Memory Biases*, NOBA, https://nobaproject.com/modules/eyewitness-testimony-and-memory-biases (last visited Dec. 23, 2022); Wells et al., *supra* note 78, at 608.

ii. The Rhode Island Task Force

North Carolina's adoption of their eyewitness best practices was a marked step forward. However, as scientific understanding of memory evidence has continued to develop, so has understanding of what constitutes best practices. In Rhode Island, the state legislature authorized a task force to provide a study of the eyewitness identification procedures and a report on suggested best practices.[129] Rhode Island convened a group of advocates, scientists, and law enforcement to create practices that law enforcement could practically implement and administer ("the task force").[130] State law enforcement initially resisted this reform, but their eventual buy-in helped create meaningful improvements throughout the state.[131]

Through this task force, Rhode Island both adopted and expanded on many of North Carolina's best practices. For example, Rhode Island expanded pre-identification instructions to eyewitnesses to better dissuade eyewitnesses from using relative judgement.[132] The task force also recommended more detailed procedures for both live and photo lineups.[133] Additionally, the task force reduced the likelihood of misidentification by mandating that only one suspect appear in each individual lineup, requiring at least five fillers for each lineup, and providing guidance on how to select the fillers to meet the eyewitness descriptions.[134]

Rhode Island's reforms did not stop at adopting North Carolina's practices. The task force also studied the best practices of Georgia, Illinois, New Jersey, Vermont, Wisconsin, Suffolk County of Massachusetts District Attorney's office, the Boston Police Department, Santa Clara County,

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[129] R.I. GEN. LAWS § 12.1.16 (2010) (enacting legislation to create a task force to study and implement improvements to the state's eyewitness identification procedures).
[130] *See generally* TASK FORCE TO IDENTIFY & RECOMMEND POLICIES & PROCEDURES TO IMPROVE THE ACCURACY OF EYEWITNESS IDENTIFICATIONS, FINAL REPORT (2010) [hereinafter TASK FORCE]. The task force held several meetings between psychologists, law enforcement, prosecutors, defense attorneys, and advocates. *Id.* at 2.
[131] *Rhode Island Police Review Eyewitness Identification Procedures*, INNOCENCE PROJECT (May 18, 2010) https://innocenceproject.org/rhode-island-police-review-eyewitness-identification-procedures/.
[132] TASK FORCE, *supra* note 130, at 10–11.
[133] *Id.* at 8–9.
[134] *Id.*

California Police Department, and Northampton Massachusetts Police Department.[135] Rhode Island exemplifies how states can learn from one another and implement tested best practices to improve their procedures. For example, concerned that it may be impractical to require blind administration of lineups for all instances, the task force adopted Wisconsin's solution to when there are insufficient officers available to conduct a blind lineup.[136] The task force determined that when there is not a blind administrator available, they would adopt Wisconsin's "folder shuffle method" for sequential photo lineups by placing each photograph in a separate folder and then randomly shuffling the folders so they no longer know which folder contains the suspect's photo.[137] With this method in place, the witness can then look at each photo without the risk of the administrator biasing the selection.[138] Rather than reinvent the wheel, Rhode Island learned from the experience of others.

iii. Other States' Eyewitness Identification Reforms

Other states have taken different paths to improve their eyewitness identification procedures. Through the crucible of trials and experiments, a consensus has developed throughout the country regarding the unreliability of the *Biggers* factors and how states can better implement procedures to improve eyewitness identification. Now, most states have widely accepted certain scientific facts and best practices. Summed up neatly by the Connecticut Supreme Court in *State v. Guilbert*:[139]

> Courts across the country now accept that (1) there is at best a weak correlation between a witness' confidence in his or her identification and its accuracy, (2) the reliability of an identification can be diminished by a witness' focus on a weapon, (3) high stress at the time of observation may render a witness less able to retain an accurate perception and memory of the observed events, (4) cross-racial identifications are considerably

[135] *Id.* at 4.
[136] *Id.* at 8 n.14.
[137] *Id.*
[138] *Id.*
[139] 49 A.3d 750, 721–23 (Conn. 2012) (citations omitted).

> less accurate than same race identifications, (5) a person's memory diminishes rapidly over a period of hours rather than days or weeks, (6) identifications are likely to be less reliable in the absence of a double-blind, sequential identification procedure, (7) witnesses are prone to develop unwarranted confidence in their identifications if they are privy to post-event or post-identification information about the event or the identification, (8) the accuracy of an eyewitness identification may be undermined by unconscious transference, which occurs when a person seen in one context is confused with a person seen in another. This list is not exhaustive; courts have permitted expert testimony on other factors deemed to affect the accuracy of eyewitness identification testimony. Although these findings are widely accepted by scientists, they are largely unfamiliar to the average person, and, in fact, many of the findings are counterintuitive.[140]

It is becoming more widely accepted throughout the criminal justice system that evaluating the reliability of eyewitness testimony should not be treated as commonsense. Rather, the reliability of the memory of eyewitnesses involves complex and nuanced psychology which the average juror, attorney, or judge may not comprehend without specialized knowledge.[141] As the states become more enlightened on this topic, they have begun to implement judicial safeguards to protect defendants' constitutional rights against faulty eyewitness identification. For example, courts across the country have begun permitting expert testimony on the reliability of eyewitness identification.[142] This testimony helps the jury effectively and accurately evaluate the evidence by helping them understand

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[140] *Id.*

[141] J. McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 AM. CRIM. L. REV. 1271, 1276 (2005).

[142] 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, 114 (2011); *see, e.g. Guilbert*, 49 A.3d at 730 (permitting expert testimony to provide information on eyewitness identification as it is often beyond the common experience of the jury and will help them assess the facts); People v. McDonald, 690 P.2d 709, 721 (Cal. 1984) (same); Benn v. United States, 978 A.2d 1257, 1274 (D.C. 2009) (same).

the science about human memory that may contradict jurors' common sense.[143]

Another area where many states have focused their improvements is pre-identification instructions. These changes have led to significant improvements in preventing wrongful conviction.[144] Studies have shown that improved instructions to jurors reduce the chance of misidentification without reducing the likelihood of accurate identifications.[145] For example, pre-identification instructions may warn eyewitnesses that the perpetrator may not be in the lineup, and thus, they do not have to choose anyone if they do not see a match.[146] Without this warning, eyewitnesses would sometimes chose the person that looked the most like the perpetrator, setting the stage for a wrongful conviction. States have learned from one another and implemented standardized pre-identification warnings.[147]

These changes not only lessen the worries of misidentification, but also reduce constitutional concerns regarding due process and right to counsel. As discussed above,[148] the Supreme Court held that identification procedures that are "so unnecessarily suggestive and conducive to irreparable mistaken identification" violate a defendant's due process rights.[149] Decreasing the

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[143] 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, 129–32 (2011).
[144] *See* R.I. Gen. Laws §12-1-16; Eyewitness Identification Reform Act, N.C. GEN. STAT. §15A-284 (2008); Eyewitness identification procedures in lineups, OHIO REV. CODE ANN. § 2933.83 (2022).
[145] Wells et al., *supra* note 78, at 629. When eyewitnesses are not warned that the culprit may not be in the lineup, 78% of eyewitnesses studied attempting an identification from a culprit-free lineup. *Id.* at 615. The false identification rate dropped to 33% when the eyewitnesses were explicitly warned that the culprit might not be in the lineup. *Id.*
[146] *See, e.g.*, R .I. POLICE CHIEFS ASSOCIATION, LINE-UP AND SHOW-UP PROCEDURES 12, https://rimpa.ri.gov/documents/pchiefs/3_Eyewitness%20Model%20Policy_03-30-12.pdf ("This procedure is designed to clear the innocent as well as to ensure the accurate and reliable identification of the guilty. The perpetrator may or may not be present in this group of photographs. You do not have to identify anyone and regardless of whether or not you make identification, the investigation will continue.").
[147] *See, e.g.*, COMMITTEE ON SCIENTIFIC APPROACHES TO UNDERSTANDING AND MAXIMIZING THE VALIDITY AND RELIABILITY OF EYEWITNESS IDENTIFICATION IN LAW ENFORCEMENT AND THE COURTS, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 18, 34 (2014).
[148] *See infra*, § I(i).
[149] *Stovall*, 388 U.S. at 301–02.

suggestive and unreliable nature of identification procedures by requiring methods like blind administration reduces the likelihood the defendant's due process rights will be violated. Similarly, by decreasing suggestiveness of procedures, Sixth Amendment right to counsel concerns are abated. In *Wade*, the Court interpreted the Sixth Amendment to guarantee counsel's assistance whenever it is necessary to ensure the defendant receives a *meaningful* defense.[150] If a procedure is not unduly prejudicial, the pre-indictment identification may not be as critical of a stage, and the defendant is less likely deprived of Sixth Amendment rights even without counsel present.[151]

V. ROOM FOR GROWTH: THE FUTURE OF EYEWITNESS IDENTIFICATION PROCEDURES

While these procedures adopted throughout the country have ensured more reliability in eyewitness identifications, states' desires to uphold constitutional rights and ethical duties have continued to push innovation. After identifying and studying some of the states' best practices, this paper suggests that jurisdictions emulate New Jersey and Massachusetts' practices to improve eyewitness identification reliability and protect the constitutional rights of their citizenry.[152]

i. New Jersey, State v. Delgado*, and Court Rule 3:11*

New Jersey's heightened eyewitness identification standards first developed in the 2006 case *State v. Delgado.*[153] In *Delgado*, the New Jersey Supreme Court considered whether preserving only a photographic array—without including details of law enforcement's identification procedures in a case's record—was sufficient to protect the defendant's due process rights.[154] The Court noted that preserving specific out-of-court identification procedures, such as the conversations between the law enforcement officer

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[150] 388 U.S. at 225.
[151] *See id.*
[152] *See* N.J. Court R. 3:11 (2012) (requiring video recording of eyewitness identifications); *State v. Henderson*, 27 A.3d 872, 913 (N.J. 2011); *Commonwealth v. Crayton*, 21 N.E.3d 157, 169–70 (Mass. 2014) (treating a first-time in-court identification as a showup and only permitting it for "good reason").
[153] 188 N.J.A.2d 888 (N.J. 2005).
[154] *Id.* at 893–94.

administering the array and the eyewitness, may be as important to answering the question of reliability as being able to see the photo array itself.[155] Acknowledging the "frailty of human memory" and the "inherent danger of misidentifications,"[156] the New Jersey Supreme Court held that going forward, law enforcement officers must, as a condition of an out-of-court identification's admissibility, make a written or tape-recorded record detailing the identification procedure whenever practical.[157]

After *Delgado*, New Jersey continued to study the dangers of eyewitness identification and how unreliability permeates the identification process.[158] The New Jersey Supreme Court recognized the difficulties of accurately recreating a lineup, not only with the photographs used in a lineup but also with other influencing factors, such as the suggestive tone of an officer or the identification process's coercive atmosphere.[159] To better protect the rights of the accused, the court instituted Court Rule 3:11.[160]

New Jersey Court Rule 3:11 provides legal remedies for when law enforcement violates the defendant's due process right by requiring a substantial record of every out-of-court identification.[161] This record includes an electronic recording of all out-of-court identifications in video or audio format.[162] If, for some reason, such a recording is not practical, law enforcement shall "contemporaneously record the identification procedure in writing and include a verbatim account of all relevant verbal and non-verbal exchanges between the officer and the witness" and provide

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[155] *Id.* at 897.
[156] *Id.* at 895.
[157] This record would include "the place where the procedure was conducted, the dialogue between the witness and the interlocutor, and the results." *Id.*
[158] *See Henderson*, 27 A.3d at 885–86.
[159] *See id.* at 918.
[160] N.J. Court Rules, R. 3:11.
[161] *Id.*; Gurbir Singh Grewal, *Attorney General Guidelines for Preparing and Conducting Out-of-Court Eyewitness Identifications* (Feb. 9, 2021) https://www.nj.gov/lps/dcj/agguide/Photo-Lineup-ID-Guidelines.pdf.
[162] N.J. Court Rules, R. 3:11(a) & (b). Illinois and North Carolina have also encouraged law enforcement to record identifications as well. N.C. GEN. STAT. § 15A-284.52(b)(14) (2020) (requiring live identification procedures to be recorded); 725 ILL. COMP. STAT. 5/107A-2(e) (recording identifications if practical) (2015).

a written explanation on why an electronic recording was unavailable.[163] These recordings must describe a wide range of factors, such as the location of the procedure, dialogue between the witness and the administrating officers, and copies of the identification materials.[164] If the record is missing important details, courts may find the identification inadmissible or provide jury instructions warning of potential unreliability.[165] This ensures that all eyewitness identification procedures are reviewable, and if not, the state carried a significant burden to admit the evidence. Rule 3:11 also requires eyewitness identifications to be recorded and a copy be provided to the defense.[166] Both practically and constitutionally, this rule improves important procedures within New Jersey's criminal justice system.

Rights are most important when an individual's freedom is threatened. When a right is violated, there must be a remedy for that right to have meaning. However, if the accused does not know if their rights have been violated, it is impossible to correct the injustice, and, as a result, the right lacks meaning. Rule 3:11 is effective because it provides defendants with knowledge of when their rights were violated and how. The Rule gives criminal defendants a powerful tool to observe the procedures as they happened, seek expert evaluation, raise concerns to the judge and the jury

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[163] N.J. Court Rules, R. 3:11(a).

[164] *Id.* The list of factors are: "(1) the place where the procedure was conducted; (2) the dialogue between the witness and the officer(s) who administered the procedure; (3) the results of the identification procedure, including any identifications that the witness made or was unable to make; (4) if a live lineup, then a picture of the lineup; (5) if a photographic array or sequential photo display, then the photos displayed; (6) if a digital database, then any photos the witness selected as the suspect, or as someone who resembled or looked similar to the suspect, along with all other photos on the same screen; (7) if a paper mug book, then any photos the witness selected as the suspect, or as someone who resembled or looked similar to the suspect, along with all other photos on the same page; (8) the identity of persons who were present at the out-of-court identification procedure; (9) a witness' statement of confidence, in the witness' own words, once an identification has been made; and (10) the identity of any individuals with whom the witness has spoken about the identification procedure, at any time before, during, or after the official identification procedure, and a detailed summary of what was said. This includes the identification of both law enforcement officials and private actors who are not associated with law enforcement. *Id.* at 3:11(c)

[165] *Id.* at 3:11(d)

[166] N.J. Court Rules, R. 3:11.

about unreliable identification procedures, and prevent wrongful convictions.[167]

Rule 3:11, therefore, provides increased protection for the constitutional rights to due process and assistance of counsel.[168] As interpreted by the Supreme Court, the due process clause prohibits courts from admitting unreliable eyewitness identification that unnecessarily suggestive police procedures create.[169] When the police fail to record their process, there is no way to know if law enforcement has deprived the defendant of the defendant's due process of law.[170] By requiring that law enforcement records all identifications, Rule 3:11 ensures that impartial parties can evaluate the identification processes and determine whether the defendant has received their due process rights.[171]

In addition to strengthening due process protections, Rule 3:11 strengthens the defense counsel's ability to provide a meaningful defense.[172] Without a video or audio recording of the identification, defense counsel must settle with written descriptions that may omit, intentionally or unintentionally, the most suggestive portions of the process. Additionally, other parts of the identification procedure, such as a conversation between the law enforcement officer and the witness, may be more indicative of an identification's reliability than the photo display itself.[173] Rule 3:11 ensures that records of these other parts of the identification procedure are available to the defendant, enabling a defense counsel to review the events as they transpired and raise objections to suggestive or prejudicial processes.[174] As a result, Rule 3:11 helps defense counsel prevent admission of unreliable

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[167] *See generally id.*
[168] *Id.*; *See* U.S. CONST. amends. V; XIV (due process clauses); U.S. CONST. amend. VI (right to counsel).
[169] *See Brathwaite*, 432 U.S. at 106 (holding that reliability is the key determinant for admissibility of eyewitness identifications)*; Stovall,* 388 U.S. at 294; *see also* Wells et al., *supra* note 78, at 641–42 (noting that errors in eyewitness identification can come from the procedures used to conduct the lineup).
[170] *See Henderson*, 27 A.3d at 885; *see also* State v. Green, 216 A.3d 104, 110 (N.J. 2019).
[171] *See Green*, 216 A.3d at 110; *Henderson*, 27 A.3d at 885; *Delgado,* 902 A.2d at 894.
[172] U.S. CONST. amend. VI (right to counsel); N.J. Court Rules, R. 3:11.
[173] *Delgado,* 902 A.2d at 897.
[174] *Id.* at 894.

eyewitness identifications and strengthens the counsel's ability to provide a meaningful defense, which is essential part of the constitutional right to counsel.[175]

In addition, Rule 3:11 may prevent misidentifications and improperly influential police identification procedures from occurring in the first place. Officers will be less likely to knowingly break the rules if they know someone is watching. Additionally, a visual record of the identification procedures is appealing to the prosecution because it can strengthen the government's case that an identification is, in fact, reliable.[176] As a result, Rule 3:11 encourages and rewards valid identification processes while simultaneously disincentivizing improper identification practices.

Ultimately, Rule 3:11 and the *State v. Delgado* decision ensure that law enforcement follows New Jersey's best practices for eyewitness identification without placing major, additional burdens on law enforcement. Rule 3:11 could and should be adopted by other states to avoid misidentification and wrongful convictions. Extensively and accurate recording the interaction and other important moments of the identification process provides a healthy check on law enforcement officers' incentive to encourage prejudicial and suggestive identification practices. Because many states already require that law enforcement record interrogations,[177] requiring law enforcement to also record identifications should not create a substantial drain of police resources. It would be a small price to pay to improve reliability and more effectively protect defendants' constitutional rights.

ii. Massachusetts Says No to In-Court Showups

Like New Jersey, Massachusetts expanded beyond the courtroom to reform their eyewitness identification procedures.[178] In 2011, in

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[175] N.J. Court Rules, R. 3:11.
[176] *See id.*
[177] *See, e.g.* R.I. GEN. LAWS § 12-7-22 (2022) (electronic recording of custodial interrogations).
[178] *Compare Henderson*, 27 A.3d 872 (tracing the evolution of New Jersey's eyewitness identification standards), *with*, Commonwealth v. Walker, 953 N.E.2d 195 (Mass. 2011) (sparking the Supreme Judicial Court to create a study group on Eyewitness evidence);

Commonwealth v. Walker, the Massachusetts Supreme Court (SJC) law enforcement was failing to conform with the court's recommendations to reduce the suggestiveness of eyewitness identification procedures.[179] Hoping to improve police practices, the SJC formed a study group to recommend improvements to the state's practices.[180] The study group issued its report in 2013, comprehensively outlining specific steps Massachusetts could take to provide greater protections for innocent defendants at risk of misidentifications and urging the SJC to act.[181] In 2014, the SJC responded accordingly.

Police typically conduct an out-of-court identification with an eyewitness and subsequently have that eyewitness identify the defendant again at trial. On occassion, however, prosecutors will attempt to have an eyewitness identify a defendant for the first time *in court*. This invokes extreme prejudice; when a prosecutor in court asks an eyewitness to identify the perpetrator, the eyewitness has a pretty good guess who the government thinks did the crime, as the defendant is generally sitting at the counsel's table. In the 2014 SJC decision in *Commonwealth v. Crayton*, the SJC recognized the practice of a first time, in-court identification as essentially an "in-court showup."[182] Traditional showups have been widely accepted to be unnecessarily suggestive, and the SJC recognized that in-court showups may be even more suggestive and less reliable.[183] This is because showups occur in close temporal proximity to the crime when memory is fresh and

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see also SUPREME JUDICIAL COURT STUDY GROUP ON EYEWITNESS EVIDENCE, REPORT AND RECOMMENDATIONS TO THE JUSTICES 13 (July 25, 2013).

[179] *Walker*, 953 N.E.2d at 210.

[180] *See generally id.* at 195; SUPREME JUDICIAL COURT STUDY GROUP ON EYEWITNESS EVIDENCE, REPORT AND RECOMMENDATIONS TO THE JUSTICES 6 (July 25, 2013).

[181] SUPREME JUDICIAL COURT STUDY GROUP ON EYEWITNESS EVIDENCE, REPORT AND RECOMMENDATIONS TO THE JUSTICES (July 25, 2013). The five recommendations were: (1) The SJC should "take judicial notice ... of the modern psychological principles regarding eyewitness memory"; (2) adoption of uniform statewide procedures for conducting identification procedures and comprehensive training on the scientific support; (3) expansion of pretrial judicial inquiry into the reliability of eyewitness evidence; (4) further adoption of science based jury instructions; and (5) creation of a committee to develop training for judges and attorneys as related to the new procedures. *Id.* at 2–5.

[182] *Id.* at 166. Showups are where police officers individually present a suspect to an eyewitness, rather than as a part of a lineup or photo array. Showups have been recognized as a highly suggestive practice dating back to *Stovall*. 388 U.S. at 294.

[183] Commonwealth v. Crayton, 21 N.E.3d 157, 166; *see* Evan J. Mandery, *Due Process Considerations of In-Court Identifications*, 60 ALB. L. REV. 389, 415 (1996).

questions remain about whether law enforcement has the right person in custody.[184] Conversely, at an in-court showup, the eyewitness is well aware that the government has charged the defendant with a crime and undertaken the lengthy and consuming process of conducting a trial.[185]

The SJC held that the practice could be "so unnecessarily suggestive and conducive to irreparable misidentification that its admission would deprive the defendant of his right to due process."[186] As a result, Massachusetts adopted a presumption against admission for in-court showups and no longer permits the practice without "good reason" for its admission (the *Crayton* rule).[187] The SJC placed the burden of showing this "good reason" on the prosecution.[188] With this system in place, the SJC created an effective practice that reduces admission of unreliable eyewitness identification and combats the "greatest source of known wrongful convictions."[189] Like New Jersey's Rule 3:11, the *Crayton* rule protects criminal defendants' constitutional right to due process of law, which is infringed upon when the identification procedures utilized are unreliable and unnecessarily suggestive.[190] By prohibiting in-court showups made without good reason, the SJC provides greater due process protections to criminal defendants.[191]

By relying on the science, Massachusetts' per se rule prohibiting the admission of in-court showups without showing good cause provides important protections against misidentification and wrongful conviction.[192] This practice places a small burden on law enforcement, requiring either a

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[184] Mandery, *supra* note 183, at 415.
[185] *Crayton*, 21 N.E.3d at 166.
[186] *Id.* at 164 (Mass. 2014) (quoting *Commonwealth v. Walker*, 953 N.E.2d 195 (Mass. 2011)).
[187] *Id.* at 170. The court did not make the decision apply retroactively and the holding only applied to eyewitnesses that were present at the scene of the crime. *Id.* at 170–71.
[188] *Id.* at 170. A few examples of acceptable good reasons include when an eyewitness is familiar with the defendant prior to the commission of the crime or where the witness was an arresting officer who also witnessed the commission of the crime. *Id.*
[189] SUPREME JUDICIAL COURT STUDY GROUP ON EYEWITNESS EVIDENCE, REPORT AND RECOMMENDATIONS TO THE JUSTICES 6 (July 25, 2013).
[190] *See* Manson v. Brathwaite, 432 U.S. 98, 106 (1977) (holding eyewitness identification must be determined to be reliable for admission); Stovall v. Denno, 388 U.S. 293, 294 (1967) (discussing the issues with unnecessarily suggestive identification techniques).
[191] Mandery, *supra* note 183, at 423.
[192] *See* SUPREME JUDICIAL COURT STUDY GROUP ON EYEWITNESS EVIDENCE, REPORT AND RECOMMENDATIONS TO THE JUSTICES 6 (July 25, 2013).

pre-trial identification or a good reason, while leaving clear paths to admitting fair and justified identifications. The SJC has been at the forefront of improving judicial treatment of eyewitness identification, serving as a laboratory for best practices.[193] Other states should take notice of this important procedure and adopt similar measures to better uphold their citizenry's right to due process and reduce instances of wrongful conviction.

CONCLUSION

In criminal trials, eyewitness evidence often plays a critical role in the conviction of wrongdoers. However, when an eyewitness is wrong, for whatever reason, misidentification can lead to wrongful convictions, depriving innocent individuals of their liberty. The state and federal criminal justice systems seek to balance the constitutional rights of defendants, namely their right to due process and assistance of counsel, with the need to admit eyewitness identifications.

Since the Supreme Court last weighed in on the admissibility of eyewitness identification, scientific understanding of memory evidence has significantly developed. Based on this scientific consensus, states have experimented with best practices to improve the reliability of eyewitness testimony. Certain best practices have become widely adopted throughout the country as the efficacy and administrability has proven effective. North Carolina, the first state in the nation to legislate best practices for eyewitness identifications, led the way. Other states learned from North Carolina's example, and as a result, eyewitness identifications have become more reliable.

As states develop and effectively implement new best practices, other states should be quick to recognize improvements and to adopt them. Two states have developed important eyewitness identification practices from which other states could learn. New Jersey has required that all eyewitness identifications be recorded whenever possible, creating increased accountability and transparency. Meanwhile, Massachusetts has created a per se rule against in-court showups without good cause, providing

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[193] Eric Pilch, *Massachusetts at Forefront of Reforming Treatment of Eyewitness Identification Evidence in Court*, INNOCENCE PROJECT (Aug. 8, 2013), https://innocenceproject.org/massachusetts-at-forefront-of-reforming-treatment-of-eyewitness-identification-evidence-in-court/.

important limitations on a highly prejudicial identification practice. These developments respect the scientific understanding of memory and defendant's constitutional rights. Additionally, these practices will help their respective states prevent misidentification, and thus, wrongful convictions. Other states should move to adopt these practices as they improve reliability, protect criminal defendants, and uphold the integrity of the criminal justice system itself. The justice system cannot give Ledell Lee or Gary Dotson what was taken from them. But by improving eyewitness identification procedures, states may just prevent the next wrongful conviction from happening.