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# Showing Up: Eyewitness-Identification Requirements in Bosnia and Herzegovina: A Comparative Case Study

Carrie Leonetti\*

## ABSTRACT

Almost all jurisdictions in the United States, at least under some circumstances, permit the highly suggestive procedure of a “showup”—in essence, a one-person lineup containing only the suspect. In Bosnia and Herzegovina, on the other hand, identifications resulting from showups are categorically prohibited, even though requiring full lineups in all cases inevitably causes relative delays in police investigations. This case study explores that crucial difference between the two systems and attempts to assess what, if anything, the United States could learn from the Bosnian requirement that eyewitnesses always be shown fillers, in addition to the suspect, when being asked to make identifications.

This Article contains a summary of interviews with key domestic and international judges, prosecutors, criminal-defense attorneys, and law-enforcement officers in Bosnia and Herzegovina, as well as

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\*Associate Professor, Faculty Leader, Criminal Justice Initiative, University of Oregon School of Law. Visiting Professor, University of Sarajevo Faculty of Criminalistics, Criminology, and Security Studies, 2011-12. The author wishes to extend her heartfelt gratitude to Professors Almir Maljevic, Sakib Softic, and Interior Minister Muhamed Budimlic of the University of Sarajevo Faculty of Criminalistics, Criminology, and Security Studies, and the staffs of the Crime Investigation Division of the Sarajevo Canton Ministry of Internal Affairs Police Department (“MUPS”), the Sarajevo Cantonal Prosecutor’s Office, the Crime Investigation Unit of the Bosnian State Investigation and Protection Agency (“SIPA”), the judges of the Sarajevo Municipal Court, the Sarajevo Cantonal Court, and the Court of Bosnia and Herzegovina (“Sud BiH”), who assisted in creating the author’s interview schedule, were willing to participate in open and frank discussions about the BiH judicial system, and provided additional material to assess with this evaluation. She also wishes to thank the staff of the American Embassy in Sarajavo and particularly Sunshine Ison and Elizabeta Delalic. Without their hospitality, guidance, support, generosity with their time and effort, and commitment to this project, this Article would never have happened. She was impressed with all of the interview subjects at every level of the BiH judicial system who sincerely want the best for their country’s rule of law and hopes that these conversations have expanded and strengthened the network of international experts working on eyewitness-identification issues.

participant comments, as part of a case study of the Bosnian rules governing eyewitness identification. It also contains the author's reflections and recommendations that resulted from these interviews. The recommendations are designed to ensure that the United States does a better job of protecting the innocent by rethinking its approach to eyewitness identifications, the consequences of suggestive and unreliable practices, and the relationship between exclusionary rules and deterrence.

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## INTRODUCTION

When a police investigation yields evidence against a criminal accused that is both inculpatory and potentially unreliable, it creates a dilemma for criminal-justice systems because evidence can be categorically unreliable (i.e., come from a category of evidence that is concerning in the aggregate) but nonetheless individually probative of the guilt or innocence of a particular accused. The dilemma, therefore, is whether to exclude such evidence from the jury’s consideration and risk that the jury will make an inaccurate decision to acquit (a “false negative”) or to include it and risk that the jury will make an inaccurate decision to convict (a “false positive”). In the United States, the rules of evidence and criminal procedure categorically exclude certain classes of evidence—coerced confessions, polygraph examinations, hypnotically induced testimony—no matter how probative they may be, because their questionable reliability in the aggregate outweighs their probative value in any given case.

Eyewitness identification exemplifies the dilemma. An eyewitness identifies a suspect, previously unknown to the witness, as the perpetrator. The suspect becomes the defendant, and the police stop investigating other possible suspects. The eyewitness is certain of the identification, but it is well known that such identifications are not very reliable.<sup>1</sup> Presumably, there is no way to know, at least in most cases, if this, or any, particular identification is actually correct.

If there were a way to determine accuracy, the identification itself would no longer be important to the prosecution’s case. If the system excludes the identification because of its valid reliability concerns, the jury will never know that the victim identified the suspect, resulting in a potentially serious loss for a system that seeks the truth as one of its goals. If the system includes the identification because of its probative value, the jury may not understand that the identification may have a significant chance of being incorrect, potentially resulting in an innocent person being convicted. Different systems address this dilemma differently.

In the United States, this dilemma, at least as regards eyewitness identification, is largely resolved in favor of including the evidence and

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1. See *infra* Part I.

letting the jury decide whether to credit it, rather than throwing out the proverbial baby with its bath water.<sup>2</sup> One example of this preference for “letting the jury sort it out” occurs in the context of “showup” identifications. Although lay people tend to picture a six-person lineup (or photographic array) when thinking about eyewitness identifications, in many American jurisdictions, eyewitness identifications are often done by showups—a highly suggestive procedure of a one-person lineup containing only the suspect (i.e., “Is this the guy who robbed you?”).

In Bosnia and Herzegovina,<sup>3</sup> on the other hand, identifications resulting from showups are categorically prohibited, even though requiring full lineups in all cases inevitably causes some delays in police investigations relative to those in which showups are used.<sup>4</sup> This case study explores that crucial difference between the two systems and attempts to assess what, if anything, the United States could learn from the Bosnian requirement that eyewitnesses be shown fillers, in addition to the suspect, when being asked to make identifications.

This study involved: (1) a review of the provisions of the Bosnian-Herzegovinan Criminal Procedure Code (“BiH CPC”) relating to the admissibility of eyewitness identifications at criminal trials,<sup>5</sup> as well as the published scientific and legal literature regarding the reliability and admissibility of eyewitness identification; (2) interviews with key domestic and international judges, prosecutors, criminal-defense attorneys, and law-enforcement officers in Bosnia and Herzegovina; and (3) collection and review of key data, information, and reports on Bosnia’s eyewitness-identification procedures, including information from the BiH Ministry of Internal Affairs Police Department and the Court of BiH. The author, in collaboration with the University of Sarajevo Faculty of Criminalistics, Criminology, and Security Studies and pursuant to a Fulbright Scholar grant from the U.S. Department of State, met with Bosnian criminal-justice leaders, including prosecutors, judges, academicians, and police officers. In total, she conducted approximately six days of interviews and met with approximately 15 judges, lawyers, and law-enforcement officers working in the justice

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2. See *infra* Part II.

3. This Article often refers to the country of Bosnia and Herzegovina only as Bosnia or “BiH” for brevity. BiH consists of two entities, the Federation of Bosnia and Herzegovina (“FBiH”) and the Republika Srpska (“RS”).

4. See *infra* Part III.

5. The BiH CPC sets forth the rules of criminal procedure that govern the criminal proceedings of the Court of Bosnia and Herzegovina, the Chief Prosecutor of Bosnia and Herzegovina, and other participants in criminal proceedings. See Criminal Procedure Code of Bosnia and Herzegovina, 2003, c. 1, art. 1.

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systems of BiH.<sup>6</sup> During the meetings, the author asked the participants to assess the successes and failures of Bosnia's eyewitness-identification rules and to identify best practices for eyewitness identification. Specifically, participants were asked to describe: how Bosnia's rules of criminal procedure governing eyewitness identification came into existence; the purposes behind their adoption and implementation; practice for conducting and admitting eyewitness identifications; the rate of compliance with the rules governing eyewitness identification and the consequences for the failure to comply, if any; the reasons for noncompliance, if any; how exclusion of inadmissible identifications occurs in practice; and how the eyewitness-identification rules fit into the law of criminal procedure in BiH generally. They were also asked to opine about whether Bosnia's eyewitness-identification rules have worked well and why and whether Bosnia's rules governing eyewitness identifications are beneficial for seeking the truth in criminal trials.

Part I of this Article summarizes the concerns outlined in the social-science research about the accuracy of eyewitness identification of strangers and the suggestiveness that often occurs in traditional eyewitness-identification procedures in the United States, particularly in light of the recent DNA exonerations of defendants convicted largely on the basis of eyewitness-identification evidence. In particular, Part I focuses on the relationship between the quantity of fillers in an identification procedure (or lack thereof, as is the case with showup identifications), interpersonal expectancy, and cognitive biases.

Part II describes the legal requirements for the admission of eyewitness-identification evidence in the United States, focusing on the federal constitutional procedures for assessing lineups that result from suggestive identification procedures, as well as the more stringent procedures adopted recently by a handful of state supreme courts. It also analyzes the effectiveness of jury instructions and cross-examination to minimize wrongful convictions from mistaken identifications and the state of eyewitness-identification "reform."

Part III contains a summary of the BiH rules of criminal procedure governing eyewitness identifications, as well as the results of interviews and participant comments obtained during the case study of the BiH rules. In particular, it reviews the provisions of the BiH CPC that govern eyewitness identifications, the use of identification testimony at trial, and the effect of noncompliance with the code requirements.

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6. During some of the interviews, the subject(s) invited an additional person or persons into the meeting, so the total number of interview subjects may have exceeded 15.

Part IV discusses the relationship between relatively strict rules of exclusion for potentially unreliable eyewitness identification and the resulting identifications in light of the deterrence role that a stricter rule can play in changing pretrial investigation procedures in the first instance. Part V contains reflections and recommendations resulting from the Bosnian case study in comparison to the American system of rules. The recommendations are designed to ensure that the United States does a better job of protecting the innocent by rethinking its approach to eyewitness identifications, the consequences of suggestive and unreliable practices, and the relationship between exclusionary rules and deterrence. It recommends that the United States rethink its eyewitness-identification procedures, particularly its use of showup identifications, in light of the consequences of using suggestive or unreliable procedures and argues that the Bosnian eyewitness-identification rules do a better job of protecting the innocent from wrongful convictions. Part V also argues that the deterrence benefit of a stricter exclusionary rule prohibiting eyewitness testimony derived from suggestive showups would offset the potential loss of probative evidence of perpetrator guilt by incentivizing the use of more reliable identification procedures in the first instance.

## I. TRUTHINESS: THE PROBLEM WITH EYEWITNESS IDENTIFICATION

### A. *Background*

“Eyewitness testimony is the crack cocaine of the criminal justice system. Law officers know the potential risks but are addicted to its power to convict.”<sup>7</sup>

Eyewitness identification is notoriously unreliable.<sup>8</sup> Decades of social-science, criminal-justice, and behavioral-health research has proven this overwhelmingly.<sup>9</sup> Whether due to faulty memories or subtle police coercion, eyewitnesses often misidentify the suspect as the perpetrator.<sup>10</sup>

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7. Steve McGonigle & Jennifer Emily, *18 Dallas County Cases Overturned by DNA Relied Heavily on Eyewitness Testimony*, DALLAS MORNING NEWS (Oct. 12, 2008), <http://truthinjustice.org/dallas-eyewitness.htm>.

8. For an overview on the inaccuracy of eyewitness testimony generally, see Kathryn Segovia, Jeremy Bailenson & Carrie Leonetti, *Virtual Lineups*, in CRANIOFACIAL IDENTIFICATION 101, 101–18 (Caroline Wilkinson & Christopher Rynn eds., Cambridge Univ. Press 2012).

9. *See id.*

10. *See id.*

The general idea behind eyewitness identification is that a witness to a crime, whether a victim or bystander, can later accurately establish the perpetrator's identity. The assumption is that if the witness had a good view of the crime and was paying attention to the physical characteristics of the perpetrator, then the witness's memory will be a valid indicator of identity, particularly if the witness is certain about his or her identification.

Psychological research suggests, however, that this trust in eyewitness testimony is misplaced.<sup>11</sup> Instead, witness memory is like any other evidence at a crime scene; it must be preserved carefully and retrieved methodically, or it can be contaminated.<sup>12</sup>

### *B. Traditional Eyewitness-Identification Procedures*

Traditionally, in the United States, the police have relied upon one of three initial identification procedures: lineups, photo arrays, and showups. A lineup is a procedure in which a criminal suspect, or a photograph of the suspect, is placed among other people ("live lineup") or photographs ("photo array"), referred to as fillers or foils,<sup>13</sup> and a witness is asked whether he or she recognizes anyone present.<sup>14</sup> Live lineups and photo arrays typically contain at least six individuals or photographs, comprising the suspect and at least five fillers. The individuals or photographs are then presented to an eyewitness, either sequentially or simultaneously, for identification. Sometimes, however, particularly when a live lineup or photo array is not practical due to time or logistical constraints, the police in the United States will instead resort to a "showup," the presentation of a single person to the witness, who is then asked whether the individual is the perpetrator of the crime.<sup>15</sup>

Although eyewitness identification is one of the most compelling types of evidence to which a jury or judge is exposed, experimental research<sup>16</sup> and cases of DNA exoneration<sup>17</sup> have prompted scholars and

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11. See *id.* at 101.

12. See *id.*

13. See Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANN. REV. PSYCHOL. 277, 279 (2003).

14. For practical reasons, photo spreads have become more widely used in the United States than live lineups. See David A. Fahrenthold, *Lack of Suspect Look-a-Likes Helps Lineup Demise*, WASH. POST, Apr. 19, 2004, at A01.

15. See *State v. Dubose*, 699 N.W.2d 582, 584 n.1 (Wis. 2005).

16. See generally Gary L. Wells, *What Do We Know about Eyewitness Identification?*, 48 AM. PSYCHOL. 553 (1993).

17. See generally Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 L. & HUM. BEHAV. 1 (2009).

practitioners to question the accuracy, confidence levels, and procedures surrounding eyewitness-identification evidence.<sup>18</sup> While the Academy has produced a large body of literature criticizing the legal responses to developing scientific evidence and DNA exonerations,<sup>19</sup> this Article will focus primarily on two of the well-established system variables: the number of fillers and the retention interval between the eyewitness event and subsequent identification. These are the two variables around which there is the greatest divergence between the American and Bosnian rules for admissibility.

C. *The Social Science of Facial Recognition: Experimental Research, Estimator Variables, and the (In)Accuracy of Eyewitness Identification*

The most important source of information that people use to identify one another is the face.<sup>20</sup> The tricky thing, however, is that human faces are all very similar to one another.<sup>21</sup> “[T]he representations [that people] store in memory that allow [them] to recognize faces are based around an analysis of surface features—patterns of light and dark—in which the interrelationships between different parts of the pattern [are] particularly important.”<sup>22</sup> Furthermore, “although visual memory for faces is remarkable, it is not infallible,” and errors in personal identification are common.<sup>23</sup> Visual identifications of unfamiliar faces are particularly vulnerable to mistakes.<sup>24</sup>

Social scientists have known for decades that eyewitness identifications suffer from profound weaknesses in methodology and reliability. More than 100 years ago, Professor Hugo Münsterberg, chair of Harvard’s psychology laboratory, undertook the herculean task of persuading legal scholars, legal professionals, and the general public that even confident and honest individuals could deliver mistaken eyewitness

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18. See BARRY SCHECK ET AL., ACTUAL INNOCENCE 246 (1st ed. 2000) (discussing the most common factors that led to 62 wrongful convictions).

19. See generally, e.g., Nicholas A. Kahn-Fogel, *Manson and Its Progeny: An Empirical Analysis of American Eyewitness Law*, 3 ALA. C.R. & C.L. L. REV. 177 (2012); Margery Malkin Koosed, *Reforming Eyewitness Identification Law and Practices to Protect the Innocent*, 42 CREIGHTON L. REV. 595 (2009) [hereinafter Koosed, *Reforming*]; Timothy P. O’Toole & Giovanna Shay, *Manson v. Brathwaite Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 VAL. U. L. REV. 109 (2006).

20. See Vicki Bruce, *Remembering Faces*, in THE VISUAL WORLD IN MEMORY 66, 66 (James R. Brockmole ed., 2009).

21. See *id.*

22. See *id.* at 80.

23. See *id.* at 66.

24. See *id.*



identifications.<sup>25</sup> Armed with extensive experience and knowledge in psychological research, Münsterberg pushed psychologists and legal scholars to investigate the reliability and accuracy of eyewitness identification more thoroughly.<sup>26</sup> He challenged the legal system's complacent acceptance of eyewitness testimony, and legal scholars responded harshly with their own counter attacks.<sup>27</sup> Despite Münsterberg's efforts and growing experimental-research evidence, his attempt to inform the field was a "miserable failure."<sup>28</sup>

Since Münsterberg's era, many psychologists have undertaken the now more readily accepted task of studying the reliability of eyewitness identification.<sup>29</sup> Today, hundreds of scientific studies affirm that eyewitness identification is often inaccurate.<sup>30</sup> One classic study asked people to attempt to match high-school graduation photos with pictures of people taken 25 years later, when they were in their early forties.<sup>31</sup> Study subjects who were unfamiliar with any of the people photographed were accurate in their identifications approximately 33 percent of the time.<sup>32</sup> Subjects who were asked to identify their own high-school classmates 25 years later were accurate approximately 49 percent of the time.<sup>33</sup> Although the Bruck study was not concerned with eyewitness testimony in criminal trials, it highlights the general concern with witnesses' ability to identify suspects accurately using their very long-term memory for faces whose appearance has changed through the aging process. This is a particularly important consideration when an eyewitness identification is disputed many years after an alleged crime has been committed.

Research has identified a number of causes for eyewitness misidentifications in criminal cases.<sup>34</sup> Some factors bearing on the

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25. See HUGO MÜNSTERBERG, *ON THE WITNESS STAND: ESSAYS ON PSYCHOLOGY AND CRIME* 39, 49–69 (1908) (describing the early psychological research on the malleability and unreliability of eyewitness memories). See generally JAMES M. DOYLE, *TRUE WITNESS: COPS, COURTS, SCIENCE, AND THE BATTLE AGAINST MISIDENTIFICATION* (2005).

26. See generally DOYLE, *supra* note 25.

27. See generally *id.*

28. *Id.* at 10.

29. See generally Segovia, Bailenson & Leonetti, *supra* note 8.

30. See Wells & Quinlivan, *supra* note 17, at 1.

31. See Maggie Bruck et al., *Fortysomething: Recognizing Faces at One's 25th Reunion*, 19 *MEMORY & COGNITION* 221, 222 (1991).

32. See *id.* at 224.

33. See *id.*

34. See Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 *L. & HUM. BEHAV.* 603, 639 (1998) (studying 40 cases of innocent people who were wrongly convicted of serious crimes and

reliability of eyewitness identification are the subject of common knowledge. For example, as most jurors could likely intuit for themselves, the greater the retention interval (the time between the event and the identification), the greater the likelihood of misidentification is.<sup>35</sup> Unfortunately, cognitive-science research also documents several phenomena that are counterintuitive, or at least contrary, to what most jurors believe about eyewitness reliability.

*D. Suggestiveness in the Lineup Procedure: System Variables and Weapons of Mass Misidentification*

Another set of factors affecting the validity of eyewitness identifications derives from how police lineups are conducted. In some cases, subtle cues by police—whether intentional or not—lead to false identifications. Suggestive witness-identification procedures, including using too few fillers in the lineup and verbal or physical clues from the police, permanently taint eyewitness memory by blending the new suggested memory with the original one or even replacing the original memory altogether.<sup>36</sup>

1. Filler Quantity

Lineup fairness is not inherent, but rather it is a result of the interaction between the lineup fillers and the verbal description of the suspect as provided by the witness.<sup>37</sup> One quality that can profoundly affect lineup fairness is its size.<sup>38</sup> Studies have shown that increasing the number of foils helps to reduce the likelihood of a false identification,<sup>39</sup>

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served time in prison—five on death row—and finding that 90% involved eyewitness-identification evidence in which one or more witnesses falsely identified the suspect).

35. See Peter N. Shapiro & Steven Penrod, *Meta-Analysis of Facial Identification Studies*, 100 PSYCHOL. BULL. 139, 152 (1986).

36. See Segovia, Bailenson & Leonetti, *supra* note 8, at 100–01 & nn.156–75.

37. See *id.*

38. See Steven Penrod, *Eyewitness Identification Evidence: How Well Are Witnesses and Police Performing?*, 18 CRIM. JUST. 36, 45 (2003); see also Roy S. Malpass & R.C.L. Lindsay, *Measuring Line-up Fairness*, 13 APPLIED COGNITIVE PSYCHOL. 1 (1999).

39. Cognitive scientists have roundly condemned the six-person lineup, which is common in the United States, recommending at least a ten-person lineup. See Penrod, *supra* note 38, at 45; Andrew E. Taslitz, *Convicting the Guilty, Acquitting the Innocent: The ABA Takes a Stand*, 19 CRIM. JUST. 18, 21 (2005). The United Kingdom's standard is a nine-person lineup, which the police have been able to achieve relatively seamlessly. See Penrod, *supra* note 38, at 45.

while “target distinctiveness” significantly decreases the accuracy of eyewitness identifications and facial recognition.<sup>40</sup>

## 2. Cognitive Biases and Administrators

The dangers of eyewitness error are magnified when the police employ suggestive techniques in the form of subtle and even unconscious clues.<sup>41</sup> “Cognitive scientists have documented the human tendency for people to interpret evidence through the lens of their existing beliefs.”<sup>42</sup> Once an eyewitness has made an identification, confirmation bias<sup>43</sup> causes the witness to seek information that confirms its accuracy, “tunnel vision”<sup>44</sup> causes him or her to trust information tending to confirm the identification and distrust information undercutting it, and belief perseverance<sup>45</sup> causes him or her to adhere to the identification even when the basis for it is later undermined. Cognitive dissonance<sup>46</sup> can

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40. See Shapiro & Penrod, *supra* note 35, at 145.

41. See Segovia, Bailenson & Leonetti, *supra* note 8, at 100–01.

42. See Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119, 2134 (2010) [hereinafter Burke, *Prosecutors*].

43. Confirmation bias causes people unconsciously to seek confirming information supporting their preexisting beliefs. See Kerala Thie Cowart, *On Responsible Prosecutorial Discretion*, 44 HARV. C.R.-C.L. L. REV. 597, 603 (2009). For example, in studies in which subjects have been assigned a hypothesis and asked to work to investigate its validity by asking questions, they often only ask questions that would yield confirming results. See Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1594–96 (2006) (describing confirmation bias and its possible effects on prosecutorial decision making) [hereinafter Burke, *Decision Making*].

44. Tunnel vision, or selective information processing, causes people to rely more on facts that weigh in favor of their preexisting beliefs than on facts that tend to disprove them. See Burke, *Decision Making*, *supra* note 43, at 1596–99. Tunnel vision results in people tending to accept at face value information that is consistent with their beliefs, while resisting inconsistent information. See Burke, *Prosecutors*, *supra* note 42, at 2134. See generally, e.g., Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979). New pieces of information that confirm a prior belief are likely to be accepted as accurate, while information contradicting a prior belief is scrutinized more closely and is more likely to be dismissed as false. See Burke, *Decision Making*, *supra* note 43, at 1598–99. For example, one study found that women who consumed a lot of caffeine were less likely to believe a study that said that caffeine increased the risk of breast cancer than those who consumed little-to-no caffeine. See Ziva Kunda, *Motivated Inference: Self-Serving Generation and Evaluation of Causal Theories*, 53 J. PERSONALITY & SOC. PSYCHOL. 636, 644, 646 (1987).

45. Belief perseverance is the resistance to changing one's beliefs to account for new information that undercuts them. See Burke, *Decision Making*, *supra* note 43, at 1599.

46. See *id.* at 1601 (stating that cognitive dissonance is the psychological mechanism by which people believe that their behavior conforms to their personal philosophy (and vice versa), even when that belief is unfounded).

play an important role in some eyewitnesses' insistence that people whom they have identified and who are later exonerated by other evidence, were nonetheless the perpetrators because the eyewitnesses cannot bear to believe that they would identify the wrong person. The result of these cognitive biases, in the context of suggestive showup identification procedures, is that once the eyewitness has identified the suspect through a showup procedure, the eyewitness is unlikely ever to revisit or seriously question that identification in another context.

Eyewitness confidence is malleable and susceptible to influence and suggestion,<sup>47</sup> and such influence can be unintended and unrecognized, particularly when the administrator of the identification procedure provides post-identification feedback (confirming or disconfirming).<sup>48</sup> Because witness certainty tends to rise over time, witnesses who make tentative identifications during a showup and who are then told that they selected the "right" person—either explicitly or implicitly through that person's subsequent arrest and prosecution—will be even more confident in their identification at trial.<sup>49</sup> Unfortunately, the level of confidence exhibited by eyewitnesses correlates strongly with juries rendering guilty verdicts.<sup>50</sup>

#### E. DNA Exonerations

Although the results of the aforementioned research have been well known and tested in the scientific community for decades, the criminal-justice community did not begin to heed warnings regarding the inaccuracies of eyewitness identification until the 1990s, when DNA analysis began exonerating innocent prisoners.<sup>51</sup> DNA exonerations have proven that a significant number of past eyewitness identifications were incorrect.<sup>52</sup> Studies have shown that erroneous eyewitness

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47. See *Crawley v. United States*, 320 A.2d 309, 312 (D.C. 1974) ("[I]t is well recognized that the most positive eyewitness is not necessarily the most reliable.").

48. See Amy L. Bradfield et al., *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPLIED PSYCHOL. 112, 112 (2002).

49. See BRIAN CUTLER, EYEWITNESS TESTIMONY: CHALLENGING YOUR OPPONENT'S WITNESSES 24–25 (2002); Penrod, *supra* note 38, at 46.

50. See Michael D. Cicchini & Joseph G. Easton, *Reforming the Law on Show-Up Identifications*, 100 J. CRIM. L. & CRIMINOLOGY 381, 387 (2010).

51. See Sharon Cohen & Deborah Hastings, *Stolen Lives in Prison: DNA Evidence Is Setting Free the Wrongfully Convicted. But What Happens to Them Then?*, CONN. L. TRIB., June 24, 2002, at 1 (describing an Associated Press study of 110 inmates exonerated by postconviction DNA testing); Wells & Olson, *supra* note 13.

52. See Segovia, Bailenson & Leonetti, *supra* note 8, at 100–01; see also *Eyewitness Misidentification*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last

identifications are the single greatest cause of wrongful convictions in the United States.<sup>53</sup> A recent Innocence Project estimate shows that, of the first 321 DNA exonerations, 72 percent included at least one misidentification.<sup>54</sup>

## II. U.S. PROCEDURES: THE AMERICAN SOLUTION

These developments in social-science research and the wakeup call of DNA exoneration cases lead to two inescapable questions: (1) what can be done to minimize the risks of eyewitness misidentifications; and (2) would a “cure” in the form of stricter admissibility rules be worse than the “disease” of unreliable identifications?

Experts have noted that “American courts rely more heavily on eyewitness identifications to convict defendants than in several other nations.”<sup>55</sup> American courts tend to assume that a fair identification procedure can somehow correct an earlier misidentification resulting from a suggestive procedure,<sup>56</sup> even though social-science evidence generally invalidates that assumption.<sup>57</sup>

Showups, which have been used for decades in the United States without serious scrutiny, continue to be common. Despite mounting evidence of the inaccuracy of these traditional eyewitness-identification procedures and the availability of simple measures to reform them, showups, perhaps the most inherently suggestive lineup procedures of all, remain among the most commonly used tools in criminal investigations in the United States.<sup>58</sup>

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visited Mar. 28, 2014). The Innocence Project keeps a running tally of the number of DNA exonerations nationally on its website. *DNA Exonerations Nationwide*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/DNA\\_Exonerations\\_Nationwide.php](http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php) (last visited Oct. 19, 2014).

53. See Wells et al., *supra* note 34, at 605.

54. *DNA Exonerations Nationwide*, *supra* note 52.

55. Mark Roth, *Looking Across the Racial Divide: How Eyewitness Testimony Can Cause Problems*, Pittsburgh Post Gazette (Dec. 26, 2010, 12:00 AM), <http://www.post-gazette.com/news/science/2010/12/26/Looking-across-the-racial-divide-How-eyewitness-testimony-can-cause-problems/stories/201012260195>.

56. See, e.g., *Van Pelt v. State*, 816 S.W.2d 607, 610 (Ark. 1991) (“Even had the pre-trial identification been impermissibly suggestive, the taint of an improper ‘show-up’ was removed by the clear and convincing evidence that the in-court identification was based upon [the eyewitness’s] independent observations of the suspect.”).

57. See Wells & Quinlivan, *supra* note 17, at 16.

58. See Segovia, Bailenson & Leonetti, *supra* note 8, at 103.

A. *Legal Requirements for Admission of Eyewitness Identification in the United States*

American courts, including the U.S. Supreme Court, have recognized for decades that the inherent inaccuracy of eyewitness identifications can cause grave miscarriages of justice.<sup>59</sup> As the Supreme Court noted 40 years ago: “the vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification.”<sup>60</sup>

1. The Federal Due Process Test

The primary constitutional limitation on pretrial lineups in the United States is the due process limitation on suggestiveness in the lineup procedure.<sup>61</sup> The Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution prohibit the federal and state governments, respectively, from “depriv[ing] any person of life, liberty, or property, without due process of law.” In the United States, a defendant may be able to exclude at trial evidence of a pretrial identification if the lineup procedure “was so unnecessarily suggestive and conducive to mistaken identification that [the defendant] was denied due process of law.”<sup>62</sup>

Over time, this test has evolved into two concrete steps, both of which must be met for an eyewitness identification to be barred from

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59. See *United States v. Wade*, 388 U.S. 218, 228 (1967); *Jackson v. Fogg*, 589 F.2d 108, 112 (2d Cir. 1978) (“[C]onvictions based solely on testimony that identifies a defendant previously unknown to the witness are highly suspect.”); *United States v. Moore*, 786 F.2d 1308, 1312 (5th Cir. 1986) (citation omitted) (“The scientific validity of the studies confirming the many weaknesses of eyewitness identification cannot be seriously questioned at this point.”); *Wehrle v. Brooks*, 269 F. Supp. 785, 792 (W.D.N.C. 1966) (“Positive identification of a person not previously known to the witness is perhaps the most fearful testimony known to the law of evidence.”); *In re As. H.*, 851 A.2d 456, 459–60 (D.C. 2004) (citing cases spanning five decades that cast doubt on the reliability of eyewitness identifications).

60. *Wade*, 388 U.S. at 228 (citation omitted).

61. In *Wade*, the Supreme Court also required, as a precondition of admissibility, that a defendant have the right to counsel at post-charge lineups. See *id.* Although the unreliability of eyewitness identification was a significant part of the Court’s rationale in *Wade*, the *Wade-Gilbert* exclusionary rule stems from a very different constitutional guarantee, the Sixth Amendment right to counsel. See *Kirby v. Illinois*, 406 U.S. 682, 690–91 (1972).

Even the Federal Rules of Evidence exclude pretrial identifications from the operation of the rule excluding hearsay. See FED. R. EVID. 801(d)(1)(C) (dictating that the hearsay rule does not bar prior “identification of a person made after perceiving the person,” even when such identification is offered to prove its truth).

62. *Stovall v. Denno*, 388 U.S. 293, 302 (1967).

evidence at trial: (1) the pretrial identification procedure must have been unduly suggestive; and (2) under the totality of the circumstances of the case, the procedure must have resulted in a significant possibility of a mistaken identification. The focus of most cases involving challenges to an eyewitness identification is the reliability of the identification, rather than the suggestiveness of the procedure, for two reasons. First, most identification procedures are suggestive (even unduly so) in some way. Second, under the Court's two-part test, developed in *Manson v. Brathwaite*,<sup>63</sup> even if a pretrial identification procedure was highly suggestive, the eyewitness will still be permitted to testify to the identification at trial if the trial court can be convinced that the identification resulting from the suggestive pretrial procedure was nonetheless reliable.<sup>64</sup> As a result, many eyewitness identifications fail the first prong of the test (suggestiveness) but pass the second prong (reliability).<sup>65</sup> In other words, the identifications involve police procedures that are unnecessarily suggestive, but which courts nonetheless find to have resulted in sufficiently reliable identifications.

In *Stovall v. Denno*,<sup>66</sup> for example, seven white police officers brought Stovall, a black stabbing suspect, in handcuffs to the hospital room of the white stabbing victim.<sup>67</sup> While Stovall was not only in handcuffs, but also the only black person in the room, the police officers asked the victim if she could identify him as the man who had stabbed her, and she said yes.<sup>68</sup> Despite the suggestiveness of the identification

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63. 432 U.S. 98 (1977). See *infra* notes 83 & 84 and accompanying text.

64. See, e.g., *Sharp v. State*, 692 S.E.2d 325, 330 (Ga. 2010) (explaining that if an out-of-court identification is impermissibly suggestive, a subsequent in-court identification is admissible if it did not depend upon the prior identification); *State v. Auger*, 262 N.W.2d 187, 189 (Neb. 1978) (holding that an in-court identification could properly be received in evidence when it was untainted by the illegal pretrial identification procedure being challenged); *Commonwealth v. McGaghey*, 507 A.2d 357, 309 (Pa. 1986) (explaining that the court must determine whether "the in-court identification resulted from the criminal act and not the suggestive encounter"); *McCary v. Commonwealth*, 321 S.E.2d 637, 645 (Va. 1984) (holding that the complaining witnesses' in-court identifications of McCary were not tainted by a suggestive pretrial identification procedure because the eyewitnesses availed themselves of ample opportunities to observe McCary before and during his alleged crimes).

65. See, e.g., *Allen v. State*, 326 So.2d 419, 420 (Fla. 1975) ("There is nothing in the record that shows the in-court identification was tainted by the prior improper out-of-court identification procedure."); *State v. Skelton*, 795 P.2d 349, 356 (Kan. 1990) (explaining that "an in-court identification is capable of standing on its own even though a pretrial confrontation was deficient").

66. *Stovall v. Denno*, 388 U.S. 293 (1967).

67. See *id.* at 295.

68. See *id.*

procedure,<sup>69</sup> the Supreme Court found that Stovall's right to due process had not been violated because, under the totality of the circumstances, the witness's hospital identification had been the only one reasonably available to the police at the time.<sup>70</sup>

In 1972, in *Neil v. Biggers*,<sup>71</sup> the Supreme Court outlined five factors for trial courts to consider in determining the admissibility of pretrial-identification testimony: (1) the eyewitness's opportunity to view the perpetrator; (2) the eyewitness's degree of attention; (3) the accuracy of the eyewitness's description of the perpetrator; (4) the eyewitness's level of certainty; and (5) the time lapse between the crime and the lineup.<sup>72</sup> Since *Biggers*, the Supreme Court has conferred a great deal of discretion upon trial courts in applying the factors.<sup>73</sup> The facts of the *Biggers* case provide a good example of the high bar set by the Court's current due process test. Biggers became a suspect in a rape investigation.<sup>74</sup> The rape victim had spent considerable time with her assailant and had described him to the police.<sup>75</sup> She identified Biggers as the assailant during a police-station showup.<sup>76</sup> She later testified at Biggers's trial that she had "no doubt" about her identification of Biggers and that there was something about his face that "I don't think I could ever forget."<sup>77</sup> Biggers was convicted of her rape and eventually instituted habeas corpus proceedings in federal court.<sup>78</sup> The habeas court found that the showup procedure had been so suggestive that it violated Biggers's due process rights.<sup>79</sup> The Supreme Court reversed the district court's decision, reinstating Biggers's rape conviction.<sup>80</sup> The Court agreed that the showup procedure had been unnecessarily suggestive, but concluded that there was nonetheless no substantial likelihood that Biggers was misidentified, thus the evidence of the identification did not have to be excluded.<sup>81</sup>

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69. See *United States v. Wade*, 388 U.S. 218, 232 (1967) ("It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed to be guilty by the police [than the presentation to the suspect alone handcuffed to police officers.]").

70. *Stovall*, 388 U.S. at 302.

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

72. See *id.* at 199–200.

73. See generally *Manson v. Brathwaite*, 432 U.S. 98 (1977).

74. See *Biggers*, 409 U.S. at 195.

75. See *id.* at 194.

76. See *id.* at 195.

77. *Id.* at 196.

78. See *id.* at 189.

79. See *Biggers*, 409 U.S. at 189.

80. See *id.* at 201.

81. See *id.* at 199.



In 1977, in *Brathwaite*, the seminal Supreme Court decision regarding the reliability of eyewitness identifications, the Court refined the *Biggers* five factor test by clarifying the two-step inquiry that courts should make in determining whether to exclude an eyewitness identification. The first step is a determination of whether the identification procedure in question was impermissibly suggestive. The second step, which is only applied if the answer to the first question was yes, is whether that impermissibly suggestive procedure resulted in a “very substantial likelihood of irreparable misidentification.”<sup>82</sup> In other words, an eyewitness identification that resulted from an unduly suggestive procedure would still be admissible at trial if it were nonetheless somewhat reliable.<sup>83</sup>

Like those of *Biggers*, the facts of *Brathwaite* exemplify the difficulty that defendants have in excluding eyewitness identifications that result from suggestive procedures. Brathwaite was accused of selling narcotics to an undercover police officer in a face-to-face drug transaction.<sup>84</sup> The undercover officer did not arrest the drug dealer at the time of the transaction, however.<sup>85</sup> Instead, he gave a description of the drug dealer to another police officer who obtained a photograph of Brathwaite—a man who fit the undercover officer’s description—and left it in the undercover officer’s office.<sup>86</sup> After viewing Brathwaite’s picture only, the undercover officer identified him as the drug dealer.<sup>87</sup> At Brathwaite’s trial, the photograph was admitted in evidence, and the undercover officer identified him as both the person in the photograph and the person from whom the officer had purchased drugs.<sup>88</sup> Brathwaite was, unsurprisingly, convicted of narcotics trafficking.<sup>89</sup>

Brathwaite, like *Biggers*, eventually filed a petition for a writ of habeas corpus in federal court.<sup>90</sup> The federal appeals court reversed his conviction on the grounds that the evidence identifying him as the drug dealer was unreliable, and the undercover officer’s identification of him from a single photograph was unnecessary and suggestive.<sup>91</sup> The Supreme Court reversed the appellate court, reinstating Brathwaite’s

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82. *Manson v. Brathwaite*, 432 U.S. 98, 116 (1977) (citing *Simmons v. United States*, 390 U.S. 377, 383 (1968)).

83. *Id.* at 114.

84. *See id.* at 99–101.

85. *See id.*

86. *Id.*

87. *Brathwaite*, 432 U.S. at 101.

88. *Id.* at 102.

89. *See id.* at 102–103.

90. *See id.* at 103.

91. *Id.*

conviction.<sup>92</sup> The Court reiterated that the guarantee of due process did not compel exclusion of the suggestive pretrial identification of Brathwaite, as long as it was nonetheless reliable, and concluded that, under the circumstances, the undercover officer's identification of Brathwaite was sufficiently reliable.<sup>93</sup> The Court based its finding on the *Biggers* factors, noting that the undercover officer had a sufficient opportunity to view the drug dealer and paid attention to identifying him, gave a timely and complete description of the suspect, was certain in his identification of Brathwaite, and identified him a short time after his observation of him during the drug deal.<sup>94</sup>

Research suggests that this “undue suggestiveness + reliability” test is not an effective remedy for unreliable pretrial identification procedures because the five *Biggers* “reliability” factors are not related to eyewitness accuracy.<sup>95</sup> On the contrary, three of the five factors—certainty, view, and attention—are self-reports that are themselves the product of suggestive procedures.<sup>96</sup> Judges also routinely consider descriptions given after the witness has identified a suspect and the confidence statements made long after the identification procedure.<sup>97</sup> Commentators have noted the “paucity of decisions finding a due process suggestiveness violation and excluding the identification evidence”<sup>98</sup> and the resulting lack of deterrence effect that the Court's approach has on police conduct in administering lineups.<sup>99</sup> Nonetheless, almost all of the state supreme courts in the United States continue to follow the *Brathwaite* test under their state constitutions.<sup>100</sup>

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92. *Brathwaite*, 432 U.S. at 117.

93. *See id.* at 105.

94. *See id.* at 108–110.

95. *See* Veronica Stinson et al., *How Effective Is the Motion-to-Suppress Safeguard? Judges' Perceptions of the Suggestiveness and Fairness of Biased Lineup Procedures*, 82 J. APPLIED PSYCHOL. 211, 217 (1997); Calvin TerBeek, *A Call for Precedential Heads: Why the Supreme Court's Eyewitness Identification Jurisprudence is Anachronistic and Out-of-Step with Empirical Reality*, 31 L. & PSYCHOL. REV. 21, 21–22 (2007); Wells & Quinlivan, *supra* note 17, at 17–18.

96. *See* Wells & Quinlivan, *supra* note 17, at 17 (noting that “for deterrence to work, the use of a suggestive procedure must lower the chances that the witness will receive a passing score in the second inquiry of Manson” and pointing out that instead “the test actually raises the score”).

97. *See id.* at 18.

98. Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to “Do Justice”*, 76 FORDHAM L. REV. 1337, 1386 (2007).

99. *See generally* Steven P. Grossman, *Suggestive Identification: The Supreme Court's Due Process Test Fails to Meet Its Own Criteria*, 11 U. BALT. L. REV. 53 (1981); Randolph N. Jonakait, *Reliable Identification: Could the Supreme Court Tell in Manson v. Brathwaite?*, 52 U. COLO. L. REV. 511 (1981).

100. *See* Cicchini & Easton, *supra* note 50, at 381.

A defendant challenging a pretrial showup in the United States, therefore, would have to show not only that the procedure was suggestive and that the resulting identification was unreliable but also that any subsequent in-court identification would itself be unreliable because it was tainted by the showup procedure—i.e., that there was no basis independent of the suggestive showup from which the court could conclude that a subsequent in-court identification was reliable. The result is that the identifications arising out of showups remain almost universally admissible in the United States—or, at least, universally not *per se* inadmissible.

## 2. A Faint Breeze of Change

The Wisconsin Supreme Court has held, under its state constitution, based on social-science research, that evidence derived from a showup procedure is inadmissible unless the State could show that the showup was necessary because the police could not have conducted a lineup or photo-array procedure.<sup>101</sup> New York and Massachusetts have adopted similar rules.<sup>102</sup>

More recently, in *State v. Henderson*,<sup>103</sup> in a unanimous opinion that methodically evaluated the totality of current cognitive-science evidence, the New Jersey Supreme Court modified the *Biggers/Brathwaite* legal standard for analyzing the reliability of eyewitness identifications in criminal cases, which New Jersey had previously followed.<sup>104</sup> The court found that the New Jersey constitution required major changes in the way that courts evaluate identification evidence at trial and how they should instruct juries. For the first time in an American jurisdiction, the justices of a state supreme court went far beyond the requirements of *Brathwaite* by embracing a social-science framework for evaluating eyewitness identifications in criminal trials, requiring increased scrutiny

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101. See *State v. Dubose*, 699 N.W.2d 582, 584–85 (Wis. 2005) (concluding that courts should grant the admission of the results of showup identifications under the Wisconsin Constitution only when necessary due to exigent circumstances); see also PEG LAUTENSCHLAGER, WIS. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION BEST PRACTICES 2 (June 16, 2005), available at [http://www.innocenceproject.org/docs/WI\\_eyewitness.pdf](http://www.innocenceproject.org/docs/WI_eyewitness.pdf) (recommending, *inter alia*, the use of “non-suspect fillers chosen to minimize any suggestiveness that might point toward the suspect”).

102. See *Commonwealth v. Johnson*, 650 N.E.2d 1257, 1259 (Mass. 1995) (finding showups to be “disfavored” and requiring “exigent circumstances” to justify their use); *State v. Adams*, 423 N.E.2d 379, 382–83 (N.Y. 1981) (characterizing showups as “flawed” identification procedures and requiring a special showing of need to justify their use).

103. *State v. Henderson*, 27 A.3d 872 (N.J. 2011).

104. See *State v. Madison*, 536 A.2d 254, 265 (N.J. 1988).

prior to the identifications' admission in evidence, and calling on trial courts to take new measures to address doubts surrounding the reliability of eyewitness identifications in criminal trials. The justices recognized that eyewitness identification was inherently flawed and concluded that the *Brathwaite* standard for assessing eyewitness-identification evidence needed to be revised because it did not offer an adequate measure for the reliability of eyewitness identifications, did not sufficiently deter inappropriate police conduct, and overstated the jury's ability to evaluate identification evidence.<sup>105</sup> Instead, the New Jersey Supreme Court required that, when defendants show some evidence of suggestiveness, trial courts consider all relevant system variables, like lineup procedures, estimator variables, and lighting conditions, in assessing the reliability of a resulting identification.<sup>106</sup> The court also required, on the basis of the social-science research laid out in the special master's report, that enhanced cautionary jury instructions be given regarding the reliability of eyewitness identification.<sup>107</sup>

The following year, the Oregon Supreme Court followed suit in *State v. Lawson*.<sup>108</sup> In *Lawson*, the court overturned its previous decision to follow the federal *Biggers/Brathwaite* test and revised its state (nonconstitutional) evidentiary rule in light of the developing scientific knowledge regarding the reliability of eyewitness identifications.<sup>109</sup>

It remains to be seen whether showup identifications will survive these new tests. In the meantime, rather than following New Jersey's lead, most American jurisdictions have continued to rely instead on the adversary nature of American jury trials as an antidote to suggestive pretrial identifications, primarily in the form of cautionary jury instructions and the famed "crucible" of cross-examination.

### B. Jury Instructions

The American Bar Association ("ABA") and many scholars encourage courts to consider instructing juries about the teachings of

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105. See *Henderson*, 27 A.3d at 877–88.

106. See *id.* at 878.

107. See *id.*

108. *State v. Lawson*, 291 P.3d 673 (Or. 2012).

109. See *id.* at 690. A few other state supreme courts had previously rejected or modified the *Biggers/Brathwaite* test in some way. See *State v. Hunt*, 69 P.3d 571, 576 (Kan. 2003) (altering the *Biggers* factors to include the witness's capacity to observe the event, including his or her mental acuity, the spontaneity and consistency of the identification, the nature of the event observed as it relates to perception and memory, and the respective races of the witness and the suspect); *State v. Ramirez*, 817 P.2d 774, 781 (Utah 1991) (modifying the *Biggers* factors to address some of their shortcomings).

social science concerning eyewitness inaccuracy in appropriate cases.<sup>110</sup> The New Jersey Supreme Court is not alone among American courts in requiring a cautionary jury instruction, although other courts generally do so in lieu of suppressing identifications of questionable reliability (i.e., without abandoning *Brathwaite*).<sup>111</sup> For example, the Seventh Circuit Pattern Criminal Jury Instructions provide:

You have heard testimony of an identification of a person. Identification testimony is an expression of belief or impression by the witness. You should consider whether, or to what extent, the witness had the ability and the opportunity to observe the person at the time of the offense and to make a reliable identification later. You should also consider the circumstances under which the witness later made the identification. The government has the burden of proving beyond a reasonable doubt that the defendant was the person who committed the crime charge.<sup>112</sup>

North Carolina, by statute, mandates that juries be instructed that they “may consider credible evidence of non-compliance [with statutory

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110. See Cindy J. O’Hagan, *When Seeing Is Not Believing: The Case for Eyewitness Expert Testimony*, 81 GEO. L.J. 741, 754 (promoting jury instructions in addition to expert testimony about eyewitness identification evidence); AM. BAR ASS B, *ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY* 24 (Paul Giannelli & Myrna Raeder eds., 2006) [hereinafter ABA REPORT] (“Whenever . . . identity is a central issue in a case tried before a jury, courts should consider exercising their discretion to use a specific instruction, tailored to the needs of the individual case, explaining the factors to be considered in gauging the accuracy of the identification.”); see, e.g., CUTLER, *supra* note 49, at 159–63; Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating Own-Race Bias in Memory for Faces*, 7 PSYCHOL. PUB. POL’Y & L. 3, 25 (2001).

111. See, e.g., *United States v. Telfaire*, 469 F.2d 552, 558–559 (determining that a cautionary jury instruction regarding eyewitness identification was appropriate in certain cases); *State v. Ledbetter*, 881 A.2d 290, 313–14 (Conn. 2005) (requiring cautionary instructions whenever the police have told an eyewitnesses that the suspect was present in the lineup or failed to warn an eyewitness not to assume that the perpetrator was present). *But see Brodes v. State*, 614 S.E.2d 766, 771 (Ga. 2005) (holding that jurors should not be instructed to consider eyewitness certainty in evaluating identification evidence).

112. COMM. ON FED. CRIMINAL JURY INSTRUCTIONS FOR THE SEVENTH CIRCUIT, *PATTERN CRIMINAL FEDERAL JURY INSTRUCTIONS FOR THE SEVENTH CIRCUIT* § 3.08 (1998), available at [https://www.ca7.uscourts.gov/Pattern\\_Jury\\_Instr/pjury.pdf](https://www.ca7.uscourts.gov/Pattern_Jury_Instr/pjury.pdf). Other courts have refused such an instruction. For example, in *Evans v. United States*, 484 F.2d 1178 (2d Cir. 1973), the United States Court of Appeals for the Second Circuit refused to find error in the trial court’s refusal to give Evans’s requested specific charge to the jury regarding the dangers of eyewitness identification, holding that such a charge is “at most . . . a matter of discretion.” *Evans*, 484 F.2d at 1188; accord *United States v. Barber*, 442 F.2d 517, 526 (3d Cir. 1971) (“[I]t is necessary neither to instruct the jury that they should receive certain identification testimony with caution, nor to suggest to them the inherent unreliability of certain eyewitness identification.”).

eyewitness-identification procedures] in determining the reliability of the eyewitness identification.”<sup>113</sup>

What value do these curative instructions really have? Other commentators have noted the insufficiency of cautionary jury instructions to prevent mistaken identification.<sup>114</sup> Research demonstrates that jurors fail to understand the jury instructions that they receive<sup>115</sup> and find it extremely hard to disregard powerful evidence, despite instructions to the contrary.<sup>116</sup> These findings have been confirmed in a variety of contexts in which jurors have misused evidence in violation of the court’s explicit instructions, including using evidence of a defendant’s prior convictions as evidence of the likelihood of the defendant’s guilt after being instructed not to<sup>117</sup> and using evidence offered for impeachment purposes to determine the issue of liability after being instructed not to.<sup>118</sup> Similarly, research shows that curative instructions do not effectively counter the prejudicial effects on juries of negative pretrial publicity.<sup>119</sup>

Because jurors have a tendency to accord greater weight to eyewitness testimony than is often warranted, especially when a witness exudes confidence in an identification,<sup>120</sup> judicial reliance on a jury instruction to balance the detrimental effect of a suggestive identification procedure is likely misplaced. Research has provided little evidence that jurors can understand and appreciate the influence of suggestive

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113. See N.C. GEN. STAT. § 15A-284.52(d)(3) (2007).

114. See generally Michael H. Hoffheimer, *Requiring Jury Instructions on Eyewitness Identification Evidence at Federal Criminal Trials*, 80 J. CRIM. & CRIMINOLOGY 585 (1989); Koosed, *Reforming*, *supra* note 19.

115. See, e.g., Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1307 (1979) (“[P]resent[ing] the results of the first empirical, objective linguistic study of the comprehensibility of . . . standard jury instructions” and “demonstrat[ing] that jury instructions are inadequately understood”); Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL. PUB. POL’Y & L. 589, 589 (1997) (examining “the social science research relevant to evaluating the effectiveness of judicial instructions”).

116. See Dale W. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 754 (1959); Thomas R. Carretta & Richard L. Moreland, *The Direct and Indirect Effects of Inadmissible Evidence*, 13 J. APPLIED SOC. PSYCHOL. 291, 305–08 (1983).

117. See Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 L. & HUM. BEHAV. 37, 43–47 (1985).

118. See Sarah Tanford & Michele Cox, *Decision Processes in Civil Cases: The Impact of Impeachment Evidence on Liability and Credibility Judgments*, 2 SOC. BEHAV. 165, 177–81 (1987).

119. See Christina A. Studebaker & Steven D. Penrod, *Pretrial Publicity: The Media, the Law, and Common Sense*, 3 PSYCHOL. PUB. POL’Y & L. 428, 442–43 (1997).

120. See *supra* note 49 and accompanying text.

identification procedures like showups or their hidden nature (such as contextual clues and nonverbal suggestions to the witness).<sup>121</sup>

### C. *Cross-Examination*

The American system of criminal justice relies extensively on the power of good cross-examination to weed out weaknesses in the prosecution's case. In the end, however, even a skilled cross-examination may fail to convince the jury to disregard the powerful impact of an eyewitness's identification of the defendant as the perpetrator of a crime.<sup>122</sup> The infamous wrongful-conviction case of *Arizona v. Youngblood*<sup>123</sup> speaks not only to the fallibility of eyewitness identification but also to the limits of cross-examination as a tool for guaranteeing that a mistaken identification will be effectively exposed at trial, especially in a case involving a particularly horrific crime with a surviving victim making a positive identification.<sup>124</sup> In *Youngblood*, the defense attorney showed significant inconsistencies between the victim's description of his assailant and Youngblood and between the victim's description of his attacker's car and Youngblood's car.<sup>125</sup> In the end, however, despite the inconsistencies in the victim's testimony and the alibi evidence proffered by the defense, the victim's mistaken identification prevailed.<sup>126</sup> On appeal to the Supreme Court, even Justice Stevens concluded that the jury's verdict demonstrated that the evidence against Youngblood was overwhelming.<sup>127</sup> Subsequent DNA testing revealed, however, that Youngblood, who had served seven years in prison, was not the perpetrator.<sup>128</sup> *Youngblood* and other DNA-exoneration cases involving eyewitness misidentification are a powerful indictment of the unwarranted confidence in the ability of the

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121. See Wells et al., *supra* note 34 at 21–22; Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL'Y & L. 765, 768–69 (1995).

122. See O'Toole & Shay, *supra* note 19, at 135 (“Finally, because the use of suggestive procedures and unreliable identifications almost always occur with eyewitnesses who honestly believe their own mistaken identifications, cross-examination is nearly useless.”); Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 WIS. L. REV. 739, 788.

123. See *Arizona v. Youngblood*, 488 U.S. 51 (1988).

124. See Uphoff, *supra* note 122, at 788.

125. See *id.* at 788–89.

126. See *id.* at 790.

127. See *Youngblood*, 488 U.S. at 59–61 (Stevens, J., concurring).

128. See Thomas Stauffer & Jim Erickson, *DNA Test Clears Tucsonan Convicted in Molestation*, ARIZ. DAILY STAR, Aug. 9, 2000, at A1.

adversarialism of the American criminal-justice system to screen out victims of mistaken identification.<sup>129</sup>

*D. Defense Experts*

The American preference for jury determination of the validity of identifications, rather than judicial determination and exclusion of such evidence when unreliable, results in the increasingly common practice of permitting juries to hear expert defense testimony to aid them in assessing reliability.<sup>130</sup> Some American courts have excluded expert testimony on eyewitness reliability because it was deemed to be a matter of common sense—i.e., “not . . . beyond the ken” of the average juror.<sup>131</sup> This is despite the fact that most social-science experts conclude that “jurors, as a matter of common sense, are not fully aware of the factors that influence eyewitness testimony.”<sup>132</sup> Even when courts permit

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129. During the Author’s interviews, one Bosnian appellate judge expressed his skepticism about the helpfulness of confrontation and cross-examination of eyewitnesses in challenging the credibility of identifications. Interview with Hilmo Vucinic, Judge, Second Instance Chamber of the BiH Court, in Sarajevo, BiH (June 12, 2012) [hereinafter Vucinic Interview] (notes on file with Author).

130. See, e.g., *Benn v. United States*, 978 A.2d 1257, 1262, 1280 (D.C. 2009) (holding that the trial court erred in excluding Benn’s proffered expert testimony on the “unreliability [of] stranger-to-stranger eyewitness identifications” and other specific factors that could affect the accuracy of an eyewitness’s identification and recollection); *People v. LeGrand*, 867 N.E.2d 374, 375–76 (N.Y. 2007). The court in *LeGrand* held:

[W]here the case turns on the accuracy of eyewitness identifications and there is little or no corroborating evidence connecting the defendant to the crime, it is an abuse of discretion for a trial court to exclude expert testimony on the reliability of eyewitness identifications if that testimony is (1) relevant to the witness’s identification of [the] defendant, (2) based on principles that are generally accepted within the relevant scientific community, (3) proffered by a qualified expert and (4) on a topic beyond the ken of the average juror.

*Id.*; *State v. Clopten*, 223 P.3d 1103, 1117–18 (Utah 2009) (holding that the trial court abused its discretion when it excluded Clopten’s expert testimony regarding various factors that could affect the accuracy of eyewitness identifications, including cross-racial identification, the impact of violence and stress during an event, the tendency to focus on a weapon rather than an individual’s facial features, and the suggestive nature of certain identification procedures used by police). See generally O’Hagan, *supra* note 110.

131. *Frye v. United States*, 293 F. 1013, 1014 (D.C. 1923); BRIAN L. CUTLER & STEVEN D. PENROD, *MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW* 217 (1995); Kenneth Deffenbacher, *Eyewitness Accuracy and Confidence: Can We Infer Anything About Their Relationship?*, 4 L. & HUM. BEHAV. 243, 258 (1980) (“[T]he apparent majority of American judges, . . . acting within permitted judicial discretion, do not allow expert testimony to be admitted into evidence.”).

132. ELIZABETH F. LOFTUS, JAMES M. DOYLE & JENNIFER E. DYSART, *EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL* (5th ed. 2013) § 6-5; see Keith A. Findley, *Learning From Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W.L. REV. 333, 334 (2002). Findley explains:



defense experts to testify regarding the questionable reliability of eyewitness identifications, there is no empirical evidence that such testimony affects juries any more than cautionary instructions or cross-examination.

*E. The State of “Reform”*

In 1999, the U.S. Attorney General Janet Reno commissioned an investigation into the first 28 cases of persons who were convicted and subsequently exonerated by DNA evidence.<sup>133</sup> The investigation documented the first confirmed cases of wrongful convictions that had been based on erroneous eyewitness identification. The resulting report fueled an expansion in the research into eyewitness reliability, and led the Attorney General to conclude that: “Even the most honest and objective people can make mistakes in recalling and interpreting a witnessed event; it is the nature of human memory.”<sup>134</sup>

Despite the criticisms leveled at the unreliability of eyewitness identifications in light of the social-science data and DNA exonerations, more than a decade after the U.S. Department of Justice issued its *Eyewitness Evidence* report, it still has not produced “any fundamental change in the vast majority of law enforcement agencies” because the police culture in the United States has resisted change and many law-enforcement agents are concerned that the proposed procedures would “result in a loss of valuable evidence.”<sup>135</sup> Only a handful of police departments have adopted new, evidence-based eyewitness-identification procedures.<sup>136</sup> In fact, only a small minority of police departments in the

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[H]ard evidence shows that jurors do not understand the psychological processes at work in an eyewitness identification and tend to rely an unwarranted extent on such identifications . . . . Nonetheless, courts in many jurisdictions routinely continue to exclude expert testimony designed to educate jurors on these matters, often on the ground that such information is within the common knowledge of jurors or would usurp the role of the jury.

*Id.* (footnote omitted).

133. See U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 3 (1999), available at <https://www.ncjrs.gov/pdffiles1/nij/178240.pdf>.

134. *Id.* at iii.

135. Sandra Guerra Thompson, *What Price Justice? The Importance of Costs to Eyewitness Identification Reform*, 41 TEX. TECH. L. REV. 33, 56–57 (2008); see Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin’s New Governance Experiment*, 2006 WIS. L. REV. 645, 687–89.

136. For example, in 2010, the Texas legislature approved several bills aimed at remodeling the state’s criminal-justice system. One of them set up a task force to write new procedures for handling eyewitness identifications. See Bobby Cervantes, *Houston Senator’s Bills Aim to Stop Wrongful Convictions*, HOUSTON CHRONICLE (Feb. 4, 2011),

United States even has a written policy regarding eyewitness-identification procedures.<sup>137</sup>

One reform occasionally proposed during these reform debates involves prohibiting showup identifications and instead requiring a certain minimum number of fillers in pretrial identification procedures.<sup>138</sup> For this reason, the Bosnian rules governing eyewitness identification make a good comparative case study in showup reform.

### III. THE BiH CPC: A CASE STUDY IN RETHINKING EYEWITNESS IDENTIFICATION

The BiH CPC incorporates specific restraints on the investigatory powers of the police *vis-à-vis* eyewitness identification. Article 85 of the CPC provides:

#### **Method of Examination, Confrontation and Identification**

- (1) Witnesses shall be examined individually and in the absence of other witnesses.
- (2) At all times during the proceedings, witnesses may be confronted with other witnesses or with the suspect or accused.
- (3) If necessary to ascertain whether the witness knows the person or object, first the witness shall be required to describe him/her/it or to indicate distinctive signs, and then a line-up of persons shall follow, or the object shall be shown to the witness, if possible among objects of the same type.<sup>139</sup>

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<http://www.chron.com/news/houston-texas/article/Houston-senator-s-bills-aim-to-stop-wrongful-1684022.php>.

137. See, e.g., *id.*; Roma Khanna, *Study: Witness Errors Lead Juries Astray: DNA Undoes the Mistakes on the Stand During Trials*, HOUSTON CHRONICLE (Mar. 25, 2009), <http://www.chron.com/news/houston-texas/article/Study-Witness-errors-lead-Texas-juries-astray-1728585.php>. But see MD. PUB. SAFETY CODE d 3-50 (2013) (requiring police departments to prepare written guidelines that “comply with the United States Department of Justice standards on obtaining accurate eyewitness identification”); EYEWITNESS IDENTIFICATION PROCEDURE, NORTHAMPTON POLICE DEPARTMENT, ADMINISTRATION & OPERATIONS MANUAL, O-408, at 7–9 to 8–9 (on file with Author) (requiring that, when showups are conducted, the police “[d]etermine and document the description of the perpetrator prior to the showup,” “consider using other identification procedures (e.g., lineup, photo array) for remaining witnesses” if one witness makes a positive identification in a showup, “[c]aution the witness that the person he/she is looking at may or may not be the perpetrator,” “[o]btain and document a statement of certainty” if the showup results in an identification, and document “[a]ll identifications and non-identifications”). See generally *State v. Herrera*, 902 A.2d 177 (N.J. 2006), App. A (reprinting the New Jersey Attorney General’s guidelines for eyewitness identifications).

138. See *infra* Part V; see, e.g., Cicchini & Easton, *supra* note 50, at 395.

139. Criminal Procedure Code of Bosnia and Herzegovina, 2003, c. 8, § 5, art. 85.

A. *Requirements of the Code*

The Bosnian CPC attacks the problem of unreliable eyewitness identifications from two sides. On the front end, it attempts to reduce the risk of error at the time when a witness makes an identification. Article 85(3) requires that eyewitness identification of a suspect or an accused be conducted by either live or photo-spread lineup procedure.<sup>140</sup> The line-up procedure takes place in three distinct steps.<sup>141</sup>

First, the witness must give a full statement of the event, describing in detail the suspect and any “distinctive signs.”<sup>142</sup> This description must be concrete, not a general description that could describe a relatively large number of individuals, and the police must promptly record it.<sup>143</sup> The witness signs the statement, including the description, and the statement is entered in evidence in the court file.<sup>144</sup>

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140. See Criminal Procedure Code of Bosnia and Herzegovina, 2003, c. 8, § 5, art. 85(3). A similar requirement is incorporated into the Code of Criminal Procedure for the Federation of Bosnia and Herzegovina (“FBiH CPC”). Criminal Procedure Code of the Federation of Bosnia and Herzegovina, 2003, c. 8, § 5, art. 99. The requirements of Art. 85 trace back to the Criminal Procedure Code of the Socialistic Federative Republic of Yugoslavia (“SFRY”). Vucinic Interview, *supra* note 129.

In 2009, the FBiH CPC was amended to permit the police to use photo arrays in the investigation phase, as long as they are not composed from “mug shots,” although their results may not be used as evidence. As a result, photo arrays are rare and occur only in the early phases of investigation, before the police have a suspect. Interview with Ivica Buzuk, Superintendent, Edin Dzuho, Marinko Meditch & Mehmed Kola, Heads of the Property Crime Unit and Officers of the Canton Sarajevo Ministry of Internal Affairs Crime Investigation Division, in Sarajevo, BiH (June 4, 2012) [hereinafter MUPS Interview] (notes on file with Author). Instead, the police prefer always to use live fillers. *Id.* After the witness flips through the photographs, the police conduct further investigation and then employ a live lineup. *Id.*

One exception to this general preference for live lineups over photo arrays arises in the case of fugitive suspects. In those cases, the police are still required to follow the requirements of the criminal-procedure code. Interview with Mirsad Shehovic, Deputy Chief Prosecutor, Sarajevo Cantonal Prosecutor’s Office, in Sarajevo, BiH (June 4, 2012) [hereinafter Shehovic Interview] (notes on file with Author). In those cases, the passage of time can make an eyewitness’s initial identification of the fugitive suspect or a unique characteristic of the suspect (for example, a tattoo) out of a photo array more valuable than an identification at a live lineup conducted much later. *Id.*

141. MUPS Interview, *supra* note 140; Interview with Senka Sojkic, Officer, Organized Crime Unit, Crime Investigation Div., BiH State Investigation & Protection Agency, in East Sarajevo, BiH (June 6, 2012) [hereinafter SIPA Interview].

142. MUPS Interview, *supra* note 140; Shehovic Interview, *supra* note 140; SIPA Interview, *supra* note 141; Interview with Adisa Zahiragic, President, BiH Judges’ Ass’n, Sarajevo Cantonal Court, in Sarajevo, BiH (June 4, 2012) [hereinafter Zahiragic Interview] (notes on file with Author).

143. MUPS Interview, *supra* note 140; SIPA Interview, *supra* note 141.

144. MUPS Interview, *supra* note 140; see, e.g., *infra* app. A [hereinafter MUPS Witness Record].

Second, only after proper completion of the first step and only if the police have a suspect, the witness must be shown a lineup of at least five to six persons selected for their similarity to the description of the suspect.<sup>145</sup> During that lineup, which may be in either live or photo-spread form, the witness must indicate if the person he or she previously described is present.<sup>146</sup> The Bosnian cantonal police stations have specially built rooms for lineup procedures.<sup>147</sup> The rooms consist of a viewing room and a lineup room, separated by a two-way mirror. All eyewitnesses are held in separate police offices apart from the lineup rooms and escorted in and out of the viewing room one at a time, without having contact with the suspect or one another.<sup>148</sup> If there are multiple eyewitnesses, they never see one another and are never told if or whom the other witnesses identified.<sup>149</sup>

Third, if the eyewitness selects someone from the lineup, he or she must give a “confidence statement,” indicating his or her level of certainty that the identification is accurate.<sup>150</sup> The witness’s responses during the lineup, positive or negative, must be recorded simultaneously.<sup>151</sup> The entirety of the eyewitness’s testimony is included in the official police report, and the fillers and suspects in the photo array or lineup are photographed by a crime-scene photographer.<sup>152</sup>

All lineup procedures, whether in live or photo-spread form, must be conducted with a minimum of five to six unknown persons of similar appearance to the person initially described by the witness.<sup>153</sup> Those other persons, also known as “foils,” must be “of similar appearances and approximately the same constitution, hair color, similarly dressed,

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145. Shehovic Interview, *supra* note 140; SIPA Interview, *supra* note 141; Zahiragic Interview, *supra* note 142.

146. MUPS Interview, *supra* note 140; Vucinic Interview, *supra* note 129.

147. MUPS Interview, *supra* note 140.

148. *Id.*

149. *Id.*

150. *Id.*; SIPA Interview, *supra* note 141; *see, e.g.*, MUPS Witness Record, *supra* note 144.

151. *See* MUPS Interview, *supra* note 140. In practice, the police comply with the recording requirement by using a live transcriptionist and a signed witness statement at all identification procedures. *Id.*; SIPA Interview, *supra* note 141; *see, e.g.*, MUPS Witness Record, *supra* note 144.

152. MUPS Interview, *supra* note 140.

153. *See* MUPS Interview, *supra* note 140. In the FBiH, the requirement is to use at least five fillers. *Id.*; Shehovic Interview, *supra* note 140. While the eyewitness-evidence requirements described in this Article are codified at both the national and entity level in Bosnia and Herzegovina, they predate Bosnia’s independence from Yugoslavia. Going back to the SFRY CPC, the police have always used at least five individuals (at least four fillers plus the suspect) in their lineup identification procedures. MUPS interview, *supra* note 140.

etc.,” and the lineup should take place under light conditions similar to those in which the witness first saw the suspect.<sup>154</sup> Both the suspect and the eyewitnesses have a right to have an attorney present at all lineup procedures, irrelevant of whether formal charges have been filed, although attorneys often do not attend the procedures.<sup>155</sup>

*B. Use of Identification Evidence at Trial*

The probative value of any witness identification is determined at trial in the context of other corroborative evidence or lack thereof.<sup>156</sup> Courts employ benchmarks of corroboration to determine the weight and sufficiency of the identification evidence—for example, the time period during which the witness observed the alleged perpetrator, the reasons for the witness’s ability to make an accurate identification (e.g., the suspect’s distinguishing features), the witness’s certainty, and whether there is contemporaneous video evidence of the defendant showing him or her in clothing matching that described by the eyewitness.<sup>157</sup> The probative value also depends upon the type of case. For example, in a robbery or burglary case in which the eyewitness was also the victim, the court is more likely to place heavy weight on the victim’s identification.<sup>158</sup> There are very few criminal cases in which a stranger

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154. MUPS Interview, *supra* note 140. In the practice, the police generally employ civilian or administrative employees of the police department as fillers, but, if fillers of sufficient number and quality are not available, they are also empowered to seize individuals from public places for use in the lineup procedure. *Id.* The Sarajevo police admitted that their lineup fillers often come from the cafes in the neighborhood around the police station. *Id.*

155. *Id.*; SIPA Interview, *supra* note 141; Interview with Hon. Lejla Konjic, Hon. Merima Kurtovic-Bilic & Hon. Emir Neradin, Judges, Sarajevo Mun. Court, in Sarajevo, BiH (June 8, 2012) [hereinafter Mun. Judges Interview] (notes on file with Author). The police are required to notify the prosecutor’s office and the suspect’s attorney prior to conducting the lineup, but it is up to the individual prosecutor and defense attorney to decide whether to attend. MUPS Interview, *supra* note 140; SIPA Interview, *supra* note 141. In practice, the prosecutor and defense attorney attend only post-charge lineups. MUPS Interview, *supra* note 140. Suggestiveness concerns still exist, however, even when defense counsel is present during a lineup. Research shows, for instance, that judges have difficulty detecting suggestive bias. See Stinson et al., *supra* note 95, at 211. Under the criminal procedure codes and in practice, all of these same requirements apply to the identification of objects, as well—for example, when a victim identifies stolen property that the police have recovered from a suspect. See Criminal Procedure Code of Bosnia and Herzegovina, 2003, c. 8, § 5, art. 85(3); MUPS Interview, *supra* note 140; Shehovic Interview, *supra* note 140.

156. Shehovic Interview, *supra* note 140; Zahiragic Interview, *supra* note 142.

157. Mun. Judges Interview, *supra* note 155; Shehovic Interview, *supra* note 140; Zahiragic Interview, *supra* note 142.

158. Shehovic Interview, *supra* note 140; Zahiragic Interview, *supra* note 142.

identification is the only evidence of the defendant's guilt.<sup>159</sup> For most judges, an identification, in the absence of other corroborative evidence, is an insufficient basis to convict.<sup>160</sup>

### C. *Effect of Noncompliance*

At the back end, the Bosnian CPC attacks the problem of unreliable eyewitness identifications with serious sanctions for noncompliance. Failure by the police or prosecutors to abide by any of these procedural requirements constitutes a violation of the CPC, rendering such eyewitness identifications invalid and inadmissible as evidence at trial.<sup>161</sup> If a trial court admitted evidence in "essential violation" of the CPC, such error would require reversal of a trial verdict of guilt.<sup>162</sup> The exclusionary rule for potentially unreliable eyewitness identifications in Bosnia, therefore, is broader than the analogous rule in the United States.<sup>163</sup>

## IV. THE DETERRENCE FACTOR

To some—or maybe to a large—extent, the dichotomy posed in the Introduction to this Article, that the decision whether to admit or exclude eyewitness identifications that are both potentially unreliable and potentially probative, is a false one. It is false because it ignores a third choice: conducting eyewitness identifications in a way that eliminates as much of their unreliability as possible, so that exclusion is unnecessary.

The U.S. Supreme Court has agreed that the preferred solution to the problem of unreliable eyewitness-identification procedures, "where so many variables and pitfalls exist," is not a trial at which the prosecution presents the faulty identification and the defense points out

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159. Mun. Judges Interview, *supra* note 155. Instead, most of the eyewitness-identification cases involve suspects who are known to their identifiers. *Id.*

160. Zahiragic Interview, *supra* note 142.

161. See Criminal Procedure Code of Bosnia and Herzegovina, 2003, c. 1, art. 10(3) (establishing an exclusionary rule for evidence obtained in violation of the code); see also *id.* at c. 1, art. 10(2) ("The Court may not base its decision . . . on evidence obtained through essential violation of this Code."); see generally *id.* at c. 23, § 1, art. 297(1)(i) (providing that it is an essential violation of the CPC "if [a] verdict is based on evidence that may not be used . . . under the provisions of this Code").

162. See Vucinic Interview, *supra* note 129.

163. But see generally Carrie Leonetti, Does a Rose by Any Other Name Still Smell as Sweet? The Nature of the Exclusionary Rule in Bosnia and Herzegovina (forthcoming) (unpublished manuscript) (on file with Author). Of course, the enforcement of the exclusionary rule depends upon the judge. Shehovic Interview, *supra* note 140. Several Bosnian judges expressed, during their interviews, that they nonetheless consider identifications that have been "suppressed." Mun. Judges Interview, *supra* note 155.

its pitfalls to the jury, but rather “the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself.”<sup>164</sup> This is true, at least in part, because the “grave potential for prejudice, intentional or not” in a suggestive pretrial identification procedure “may not be capable of reconstruction at trial.”<sup>165</sup>

Critics of exclusionary rules in general tend to argue that their costs outweigh their benefits—that the relevant and probative evidence lost as a result of their operation is too great a cost to pay in the name of deterrence.<sup>166</sup> But that argument is only true if the deterrent does not work. If police follow strict investigatory procedures and the evidence that they obtain complies with legal requirements, there is nothing to exclude.<sup>167</sup>

## V. REFLECTIONS AND RECOMMENDATIONS

One recent study estimated that three to five percent of convictions in the United States are wrongful ones.<sup>168</sup> When the police end a criminal investigation after the arrest of an innocent person, not only is the accused left to face false charges but the actual perpetrator is also left at large, with impunity, possibly to commit more crimes.<sup>169</sup>

### A. *Eyewitness Identification*

Eyewitness-identification reform would be a good place to start addressing and correcting the causes of wrongful convictions in the United States, but American legislatures, courts, and police departments

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164. *United States v. Wade*, 388 U.S. 218, 235 (1967).

165. *Id.* at 236.

166. *See, e.g., id.* (White, J., dissenting in part and concurring in part); *Miranda v. Arizona*, 384 U.S. 436, 504 *et seq.* (1966) (Harlan, J., dissenting).

167. *Cf.* Peter F. Nardulli, *The Societal Costs of the Exclusionary Rule Revisited*, 1987 U. ILL. L. REV. 223, 226 (summarizing research demonstrating that defense motions to suppress suggestive identifications are rarely granted). *Cf. generally* Albert W. Alschuler, Demisesquicentennial: *Studying the Exclusionary Rule: An Empirical Classic*, 75 U. CHI. L. REV. 1365, 1375 (2008).

168. *See* D. Michael Risinger, *Criminal Law: Innocent Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 780 (2007) (estimating that wrongful convictions occurred at a rate of 3.3 to 5% in capital rape-murder cases in the United States in the 1980s).

169. In its 233 nationwide exoneration cases, the Innocence Project identified 91 of the actual perpetrators and estimated that 49 rapes and 19 murders were committed by those perpetrators after innocent people were convicted of their crimes. *See* Koosed, *Reforming*, *supra* note 19, at 600; Wells & Quinlivan, *supra* note 17, at 23 (noting that there are deficiencies in a cautionary jury instructions regarding the unreliability of eyewitness-identification evidence but that they could aid the jury in some individual cases and deter future suggestive identification practices).

have been slow to respond to the crisis. On the one hand, the DNA exonerations have exposed the unreliability of the eyewitness-identification procedures that lead to wrongful convictions. On the other hand, identifications are valuable evidence and can, in the right context, be reliable means for bringing justice.<sup>170</sup> As Gary Wells admonished years ago: “[M]emory is a form of trace evidence, like blood or semen or hair, except the trace exist in the witness’ head. How you go about collecting that evidence and preserving it and analyzing it is absolutely vital.”<sup>171</sup>

Unlike the analysis of other forms of trace evidence, however, when eyewitness-identification procedures are unreliable, there is generally no way to reconstruct the procedures or rerun the test. The reason for this inability to detect false positives in the context of eyewitness identification is that suggestive eyewitness procedures tend not only to produce inaccurate identifications in the first instance but also to taint the witness’s memory moving forward in the second.<sup>172</sup> In this sense, “the eyewitness’s memory is gone[.]” and there is no opportunity to “retest” it.<sup>173</sup>

Should the United States continue to allow the use of showup identification procedures? Should it continue to depend on jurors to listen to the testimony of eyewitnesses and sort the accurate from the inaccurate, and, in the process, the innocent from the guilty? Are showup procedures simply too unreliable? Or is this merely a case of the perfect being the enemy of the good? Although the U.S. Supreme Court may not revisit the showup any time soon, Bosnia provides a look at the alternate universe in which showup identifications do not exist.

### 1. Rethinking the Showup

Scholars, practitioners, policymakers, and a few American courts have identified steps that can be taken to reduce the risk of eyewitness misidentifications. In 1998, the American Psychology/Law Society (“AP/LS”) released a report recommending four specific eyewitness-identification procedures that “represent[ed] an emerging consensus among eyewitness scientists as to key elements that such a set of

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170. Shehovic Interview, *supra* note 140.

171. D.W. Miller, *Looking Askance at Eyewitness Testimony*, CHRON. HIGHER EDUC. (Feb. 25, 2000), <http://chronicle.com/article/Looking-Askance-at-Eyewitness/8713/>.

172. See, e.g., Gary L. Wells & Amy L. Bradfield, *Distortions in Eyewitnesses’ Recollections: Can the Postidentification-Feedback Effect Be Moderated?*, 10 PSYCHOL. SCI. 138, 138 (1999).

173. See Koosed, *Reforming*, *supra* note 19, at 615–16.



procedures must entail.”<sup>174</sup> One recommendation called for designing the procedure and selecting fillers so that the suspect would not stand out in the lineup or photo array in comparison.<sup>175</sup>

In 2006, the ABA Criminal Justice Section’s Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process, which comprises of scholars, forensic scientists, prosecutors, defense attorneys, and judges, released a report recommending “best practices” for eyewitness-identification procedures.<sup>176</sup> The ABA recommendations included procedures for the selection of fillers, employing “a sufficient number of foils to reasonably reduce the risk of an eyewitness selecting a suspect by guessing rather than by recognition[,]” and comprising lineups of more than six individuals “whenever practicable.”<sup>177</sup> The ABA committee declined to make a general recommendation regarding the retention or elimination of showup identifications.<sup>178</sup>

What both of these prominent American reports, and several other high-profile ones not specifically noted here, have in common is that they all agree that a minimum number of fillers is crucial to more reliable identifications.<sup>179</sup> In this area of general consensus lies one of the most significant differences between the requirements of the BiH CPC and those of the U.S. Constitution.<sup>180</sup> Perhaps one of the most significant comparative aspects of the BiH CPC eyewitness-identification requirements is that they mandate that prospective eyewitnesses participate in *lineups* (in which an eyewitness picks from multiple individuals, one of whom may or may not be the suspected perpetrator)

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174. Wells et al., *supra* note 34, at 609.

175. *See id.* at 627–36. The purpose of this recommended procedure is to prevent the increase in an eyewitness’s confidence between the pretrial and trial identifications from playing a role in the jury’s assessment of the credibility of the identification. *See id.* at 636.

176. *See* ABA REPORT, *supra* note 110, at 24–26.

177. *Id.* at 25–26, 35–36.

178. *See id.* at 38–39. The committee report reflected two potentially competing concerns: the highly suggestive nature of showups and the concern that the alternative might be “a poorly constructed lineup.” *Id.* at 39 (citing Michael J. Saks et al., *Model Prevention and Remedy of Erroneous Convictions Act*, 33 ARIZ. ST. L. REV. 665, 687 (2001)). The committee also noted that “many representatives of law enforcement . . . described show-ups as common and as essential to effective law enforcement.” *Id.*

179. *See* Thompson, *supra* note 135, at 42–55.

180. A small minority of American jurisdictions requires, either by statute, under their state constitution, or under their common law, greater protections against unreliable eyewitness identifications than that which the Due Process Clauses of the United States Constitution require. For example, in 2007, North Carolina became the first state to require, by statute, statewide sequential double-blind lineups and photo arrays, without exception. *See* N.C. GEN. STAT. § 15A-284.52(b)(2) (2007). West Virginia requires that eyewitnesses draft a confidence statement and that the police create a written record of identification procedures. *See* W. VA. CODE ANN. § 62-1E-2 (LexisNexis 2014).

rather than showups (in which an eyewitness is shown a single individual, the suspect, and asked to indicate whether the suspect is the perpetrator),<sup>181</sup> both of which are routinely permitted under the Due Process Clauses of the U.S. Constitution.<sup>182</sup> This requirement is consistent with the AP/LS recommendation precluding the use of showups.<sup>183</sup>

The concerns with showups are probably self-evident.<sup>184</sup> The purpose of fillers in a lineup is to reduce the suggestiveness of the identification procedure and draw errors away from the suspect and toward the fillers.<sup>185</sup> Showups, in contrast, are inherently biased contextually. As Cicchini and Easton explain: “Eyewitnesses often believe that when an officer presents a suspect for identification, the officer has caught the true perpetrator. Few people would think that an officer would show a suspect without truly believing that the suspect was, in fact, the criminal.”<sup>186</sup> If witnesses trust and respect legal authorities and believe that police procedures are generally fair, the pressure to validate a one-person lineup may be difficult to resist.<sup>187</sup> Because the identity of the suspect, regardless of guilt, is obvious, it is difficult to determine whether the witness is making the identification from memory or merely deducing which person the police believe to be the perpetrator.<sup>188</sup> Furthermore, witnesses (and suspects) are unlikely to be aware of the likelihood and dangers of subtle suggestibility influencing an inaccurate identification.<sup>189</sup> This is especially true in showup confrontations that occur in the field during “drive-by”

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181. See Criminal Procedure Code of Bosnia and Herzegovina, 2003, c. 8, § 5, art. 85(3).

182. See, e.g., *United States v. Amaral*, 488 F.2d 1148, 1152 (9th Cir. 1973); *United States v. Hamilton*, 469 F.2d 880, 883–84 (9th Cir. 1972).

183. See Wells, *supra* note 34, at 630–32.

184. See, e.g., *United States v. Funches*, 84 F.3d 249, 254 (7th Cir. 1996). The court reasoned that “[a] show-up is inherently suggestive because the witness is likely to be influenced by the fact that the police appear to believe the person brought in is guilty, since presumably the police would not bring in someone that they did not suspect had committed the crime.” *Id.* (internal citation omitted).

185. See Nancy K. Mehrkens Steblay, *Reforming Eyewitness Identification: Cautionary Lineup Instructions; Weighing the Advantages and Disadvantages of Showups Versus Lineups*, 4 CARDOZO PUB. L. POL’Y & ETHICS J. 341, 349 (2006); see also Wells & Seelau, *supra* note 121, at 766.

186. Cicchini & Easton, *supra* note 50, at 389.

187. See A. Daniel Yarmey et al., *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 L. & HUM. BEHAV. 459, 459 (1996).

188. See *id.* at 459–60.

189. See J.D. Grano, *A Legal Response to the Inherent Dangers of Eyewitness Identification Testimony*, in EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 315, 315–35 (Gary L. Wells & Elizabeth A. Loftus eds., 1984).

identifications.<sup>190</sup> The greatest danger under these circumstances is that false identifications of innocent suspects, who resemble the perpetrator, in contextually biased one-person identification procedures are likely to be very high in contrast to identifications made from many-person lineups.<sup>191</sup>

Studies have confirmed the intuition that showups result in even more false identifications than lineups.<sup>192</sup> One recent large-scale field experiment confirmed the relative inaccuracy of identifications (false “hit scores”) in showups when compared to lineups.<sup>193</sup> Individual witnesses were asked to identify a young woman they had spoken to a few minutes earlier in a natural setting.<sup>194</sup> The study found that the accuracy of identification in six-person simultaneously presented photographic lineups was significantly superior to identification in one-person photographic lineups when choices were corrected for guessing.<sup>195</sup> The diagnosticity index in the study was twice as high in the six-person as in the one-person lineups, suggesting that the probative value of identification decisions from six-persons lineups is greater than from showups.<sup>196</sup>

Another experiment compared one-person and six-person photographic lineup identifications in field situations, immediately, 30 minutes, 2 hours, and 24 hours after a 15-second encounter with a target.<sup>197</sup> The study found that the accuracy of performance was superior in six-person lineups than in showups over time, concluding that the

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190. See Yarmey et al., *supra* note 187, at 460.

191. *See id.*

192. See Richard Gonzalez et al., *Response Biases in Lineups and Showups*, 64 J. PERSONALITY & SOC. PSYCHOL. 525, 527 (1993) (finding that test subjects in experimental showups correctly identified the perpetrator 30% of the time, while test subjects in experimental lineups correctly identified the perpetrator 67% of the time); Wells et al., *supra* note 34, at 630–31 (“[T]here is clear evidence that showups are more likely to yield false identifications than are properly constructed lineups.”); *see also* Amy Luria, *Showup Identifications: A Comprehensive Overview of the Problems and a Discussion of Necessary Changes*, 86 NEB. L. REV. 515, 543–44 (2008); R.C.L. Lindsay et al., *Simultaneous Lineups, Sequential Lineups, and Showups: Eyewitness Identification Decisions of Adults and Children*, 21 L. & HUM. BEHAV. 391, at 391 (1997); Nancy Steblay et al., *Eyewitness Accuracy Rates in Police Showup and Lineup Presentation: A Meta-Analytic Comparison*, 27 L. & HUM. BEHAV. 523, 523 (2003); Yarmey et al., *supra* note 187, at 460.

193. See Yarmey et al., *supra* note 187, at 460.

194. *See id.*

195. *See id.*

196. *See id.*; Gary L. Wells & R.C.L. Lindsay, *On Estimating the Diagnosticity of Eyewitness Nonidentifications*, 88 PSYCHOL. BULL. 776, (1980). Whether the results of this study can be generalized, however, is speculative because testing was conducted within minutes of the encounter. *See also* Yarmey et al., *supra* note 187.

197. See Yarmey et al., *supra* note 187, at 461.

likelihood of a false identification of a lookalike innocent suspect was significantly greater in showups than in six-person lineups, especially when the innocent suspect wore the same clothing as the culprit.<sup>198</sup>

## 2. Defending the Showup

Nonetheless, showups are common in the United States.<sup>199</sup> There are several reasons why American police agencies have been resistant to abolishing showups. Some are suspect; some are legitimate. The most common rationales for permitting showups are that they occur much more quickly than multi-party lineups and that juries can understand their suggestibility concerns and assess their credibility appropriately.<sup>200</sup> While the idea that juries can accurately process the relationship between the suggestibility of the identification procedure and the reliability of the resulting identification has been thoroughly debunked,<sup>201</sup> the concern with speed is a more legitimate one. Generally speaking, the police can conduct a showup much more quickly than a full lineup because they do

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198. See *id.* at 468.

199. See ABA REPORT, *supra* note 110, at 39; Bruce W. Behrman & Sherrie L. Davey, *Eyewitness Identification in Actual Criminal Cases: An Archival Analysis*, 25 L. & HUM. BEHAV. 475, 479 (2001) (documenting the use of 258 field showups in 271 cases that they analyzed); Cicchini & Easton, *supra* note 50, at 388; Gonzalez et al., *supra* note 191, at 535 (“In our sample showup identifications were over three times more common than lineups . . . .”); Sandra Guerra Thompson, *Judicial Blindness to Eyewitness Misidentification*, 93 MARQ. L. REV. 639, 646 (2009) (noting that “show-ups constitute one of the most commonly used identification procedures”).

200. See Gonzalez et al., *supra* note 192, at 525; Steblay, *supra* note 185, at 348–49; Gary L. Wells, *Police Lineups: Data, Theory, & Policy*, 7 PSYCHOL. PUB. POL’Y & L. 791, 795–96 (2001); see, e.g., *People v. Duuvon*, 571 N.E.2d 654, 657 (N.Y. 1991) (permitting a showup identification to be admitted at Duuvon’s trial, despite New York’s general “disfavoring” of them in the absence of exigent circumstances, because of “temporal considerations”); see also *Commonwealth v. Ye*, 756 N.E.2d 640, 645 (Mass. App. Ct. 2001) (permitting the use of a showup because it was conducted within 90 minutes of the crime and justified by special need, over Massachusetts’s general presumption against their admissibility); *Commonwealth v. Martinez*, 857 N.E.2d 1096 (Mass. App. Ct. 2006) (permitting the use of a showup identification because assembling a photo array would have taken additional time). See generally *Manson v. Brathwaite*, 432 U.S. 98, 131 (1977) (Marshall, J., dissenting) (explaining that “the greatest memory loss occurs within hours after an event”).

201. See *supra* Part I & studies discussed therein. Scholarship on the subject reveals that jurors’ “common sense” intuitions about eyewitness identification are the opposite of what cognitive-science studies have demonstrated. For example, jurors tend to believe that the more confident a witness seems, the more accurate that witness’s testimony will be. See Saul M. Kassin & Kimberly A. Bardollar, *The Psychology of Eyewitness Testimony: A Comparison of Experts and Prospective Jurors*, 22 J. APPLIED SOC. PSYCHOL. 1241, 1241 (1992). Research reveals, however, that the correlation between a witness’s expression of certainty in an identification and its accuracy is unwarranted. See *supra* Part I and studies cited therein.

not have to secure fillers prior to administering it, and cognitive science has demonstrated that witnesses' memories fade quickly.<sup>202</sup>

Several American courts have held that showup confrontations that occur within a short time period of an incident contribute to the accuracy of identification.<sup>203</sup> The case of *Simmons v. United States*,<sup>204</sup> in which the Supreme Court declined to adopt a per se rule prohibiting showup identifications, exemplifies American courts' general preference for speedy showups over delayed lineups. Simmons was convicted of armed bank robbery, largely on the basis of eyewitness identifications by bank employees.<sup>205</sup> The day after the bank robbery, FBI agents showed photographs of Simmons to five bank employees who had witnessed the robbery, and each witness identified Simmons from his photographs.<sup>206</sup> During his trial, all five bank employees again identified Simmons as one of the robbers.<sup>207</sup> Rejecting Simmons's claim that his pretrial photographic identification was so unnecessarily suggestive and conducive to misidentification as to deny him due process, the Supreme Court noted that, with the bank robbers still at large, it had been essential for FBI agents to determine swiftly whether they were on the right track in suspecting Simmons.<sup>208</sup> The Court concluded that, "even though the identification procedure employed may have in some respects fallen short of the ideal," there was little chance that the procedure utilized led to Simmons's misidentification, particularly in light of the fact that "none of the witnesses displayed any doubt about their respective identifications of Simmons."<sup>209</sup>

The Bosnian experience suggests that this choice—speed versus fillers—is a false one. Although the Bosnian police concede that finding a sufficient number and quality of fillers is always a challenge, they also

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202. See *supra* Part I.

203. See, e.g., *Singletary v. United States*, 383 A.2d 1064, 1068 (D.C. 1978); *Commonwealth v. Johnson*, 650 N.E.2d 1257, 1259 (Mass. 1995) (permitting showups "in the immediate aftermath of a crime"); *Duuvon*, 571 N.E.2d at 656 (admitting a showup identification in large part because it was conducted "within minutes" of the crime).

204. *Simmons v. United States*, 390 U.S. 377 (1968).

205. See *id.* at 399.

206. See *id.* at 380. While the witnesses were shown multiple photographs of Simmons and other men, the procedure that the police used was not a photographic lineup. Instead, the photographs consisted primarily of group photographs, with Simmons appearing several times in the series. See *id.* at 385.

207. See *id.* at 381.

208. *Id.* at 385.

209. *Simmons*, 390 U.S. at 385.

claim that their efforts to do so do not significantly delay their investigations.<sup>210</sup>

### 3. Consequences of Suggestive or Unreliable Practices

The BiH CPC details an explicit set of procedures that must be followed in pretrial eyewitness identifications and establishes a black-letter exclusionary rule for identifications made under circumstances that do not meet those requirements. Several of the procedures required by the BiH CPC are consistent with the recommendations of the AP/LS and the ABA, including larger lineups of six to nine individuals total. The United States, on the other hand, leaves largely to the lay jury the task of determining when an identification procedure has been so suggestive or unreliable that a subsequent in-court identification should not be believed.

### 4. Bosnian Eyewitness-Identification Requirements and the Innocent

Bosnia has a lot to teach the United States about stricter eyewitness-identification rules. As a general rule, all of the criminal-justice stakeholders in Bosnia seem to think that their eyewitness-identification provisions have worked well and, perhaps more importantly, that, when they have not, the fault is not that of the criminal-procedure code or its lineup-composition requirements. They also seem unanimously to think that their practices are better than that of the United States at getting at the truth and were routinely horrified when confronted with a description of the showup procedure permitted by American courts. As one police officer explained: “A lineup is a better procedure, especially if you want to find the truth and think that you have the right suspect.”<sup>211</sup>

### 5. Photoshop to the Rescue

Of course, one obvious limitation of using the Bosnian experience in support of the claim that lineups—in comparison to showups—do not significantly delay investigations or increase the retention interval

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210. MUPS Interview, *supra* note 140. According to the police, they conduct their lineup procedures “as quickly as possible” to mitigate the effects of delay. *See id.* In order to fill their lineups quickly, the police in Bosnia are empowered to recruit civilians, occasionally combing nearby cafes and shopping malls for passable fillers. *See id.*

211. MUPS Interview, *supra* note 140. Of course, Bosnia’s identification practices are not perfect. For example, the Bosnians do not employ blind administrators during their identification procedures. Nonetheless, the prohibition against the use of showups is a significant improvement over the American rules governing eyewitness identification.

between eyewitnesses' observations and subsequent identification procedures is that Bosnia is almost entirely heterogeneous ethnically. While it may be easy for law-enforcement officers in Bosnia to step into a nearby café or mall and grab five people who are equally similar to the eyewitness's description of the perpetrator as the suspect,<sup>212</sup> such a technique, even if legally authorized, might not bear the same easy fruit in the United States.

Although the Bosnian experience suggests that increased risk of suggestiveness inherent in showups can and should trump the benefit of their speedier administration, increasingly the choice between speed and fillers, even in a multiethnic society like the United States, is a false one anyway. In the United States, the television-show lineup is increasingly being replaced with the photographic array.<sup>213</sup> The combination of photographic lineups, digital photography, and photograph-enhancement software like Photoshop has made the need for high-quality live fillers much less pressing.<sup>214</sup>

#### B. *Exclusionary Rules and Deterrence*

A few American states have used their state constitutions or supervisory powers to modify the federal exclusionary rule for identifications stemming from suggestive procedures.<sup>215</sup> As a general rule, however, even the American jurisdictions with the most stringent requirements for eyewitness-identification evidence do not enforce those rules with an inflexible exclusionary rule. Wisconsin, for example, which has directed the adoption of "best practices" by statute, permits divergent implementation of those practices at the local level.<sup>216</sup>

This has led to a debate among American scholars about whether the United States should adopt a statute like Article 85 of the BiH CPC, with a strict exclusionary rule. As Wells and Quinlivan have explained in critiquing the current *Brathwaite* test: "There is almost no threat of exclusion resulting from the use of suggestive procedures. . . . [T]he inflated certainty, statement of view, and statement of attention resulting from suggestive procedures effectively guards against exclusion, thereby undermining incentives to avoid suggestive procedures."<sup>217</sup> Several

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212. MUPS Interview, *supra* note 140.

213. See Wells & Quinlivan, *supra* note 17, at 16 (noting that a significant percentage of American jurisdictions "use only photographs and never use live lineups").

214. See Fahrenthold, *supra* note 14, at A01.

215. See *supra* Part II and cases discussed therein.

216. See Thompson, *supra* note 135, at 57, 62.

217. Wells & Quinlivan, *supra* note 17, at 17; see also *id.* at 20 (proposing shifting the burden from the defendant to prove the unreliability of an eyewitness identification to

other American legal scholars have agreed that the *Brathwaite* test fails to discourage the use of suggestive procedures, advocating for expanding the exclusionary rule in the United States so that unreliable eyewitness-identification evidence is never admitted at trial, at least in the absence of corroborating evidence.<sup>218</sup> Sandra Guerra Thompson has concluded that the United State should enact a statute regulating eyewitness identification “with few exceptions for practicability concerns and with serious consequences for failures to follow the procedures.”<sup>219</sup> Margery Koosed has argued that more stringent eyewitness-identification procedures and a tighter exclusionary rule are necessary in capital and related cases to avoid executing an innocent person.<sup>220</sup> Amy Luria has advocated making inadmissible any showup identification that was conducted absent exigency, not in close temporal proximity to the witnessing event, or without the presence of counsel.<sup>221</sup> Katherine Kruse has advocated a flexible exclusionary rule, like the one that Wisconsin follows.<sup>222</sup>

Opponents of these proposals, on the other hand, generally emphasize a preference for flexible standards over per se rules and

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the prosecution to prove “that the identification was reliable regardless of whether a suggestive procedure was necessary”).

218. See, e.g., Koosed, *Reforming*, *supra* note 19, at 626 (arguing that the *Brathwaite* approach “not only undermines incentives to avoid suggestive procedures but also provides an incentive to use suggestive procedures”); Benjamin E. Rosenberg, *Rethinking the Right to Due Process in Connection with Pretrial Identification Procedures: An Analysis and a Proposal*, 79 KY. L.J. 259, 304 (1990) (“[I]f a per se rule were enforced, the police would soon stop using unnecessarily suggestive procedures.”).

219. Thompson, *supra* note 135, at 57; see Wells & Quinlivan, *supra* note 17, at 17–18 (contending that lower courts have failed to follow the *Brathwaite* test’s modest constraints and noting that as long as the test “continues to be applied the way it is today, there is no reason to expect the contingencies and incentives themselves to somehow reduce the use of suggestive identification procedures”).

220. See Margery Malkin Koosed, *The Proposed Innocence Protection Act Won’t—Unless It Also Curbs Mistaken Eyewitness Identifications*, 63 OHIO ST. L.J. 263, 310–12 (2002) (advocating a rule permitting an in-court eyewitness identification only if the prosecution could prove by clear and convincing evidence that the prior identification was not conducive to irreparable mistaken identification); see also Koosed, *Reforming*, *supra* note 19, at 624–25 (advocating that American courts return to the per se exclusionary rule that the Supreme Court originally articulated in *Stovall*).

221. See Luria, *supra* note 192, at 543–44; see also O’Toole & Shay, *supra* note 19, at 109; David E. Paseltnier, *Twenty-Years of Diminishing Protection: A Proposal to Return to the Wade Trilogy’s Standards*, 15 HOFSTRA L. REV. 583, 607 (1987) (advocating a per se exclusionary rule for evidence from unnecessarily suggestive identification procedures); Wells & Quinlivan, *supra* note 17, at 5 (arguing that, rather than deterring suggestive procedures, the *Brathwaite* test “has had the unintended consequence of setting up conditions that create a positive incentive for police to use suggestive procedures”).

222. See Kruse, *supra* note 135, at 647–48.



specifically emphasize the evidentiary costs to the system of a strict exclusionary rule for eyewitness identifications resulting from suggestive procedures.<sup>223</sup>

Bosnia's experience with the eyewitness-identification procedures of the CPC provides support for the former view (the existence of a deterrence effect from a stricter exclusionary rule) rather than the latter (the truth-hampering critique thereof). In Bosnia, there are very few defense challenges to eyewitness-identification procedures and even fewer challenges in situations in which there is no other substantial evidence of guilt.<sup>224</sup> In fact, the police in Bosnia claim that there have been no defense challenges to identifications conducted under the procedures of the CPC, particularly because the defendant has an unqualified right to the presence of counsel at all pretrial identification procedures,<sup>225</sup> which suggests that the real cost of a stricter exclusionary rule is the loss of unnecessarily suggestive procedures in the first instance, rather than the loss of the evidence that they produce.

#### CONCLUSION

The Supreme Court of the United States has acknowledged: "The few cases that have surfaced therefore reveal the existence of a [pretrial-identification] process attended with hazards of serious unfairness to the criminal accused and strongly suggest the plight of the more numerous defendants who are unable to ferret out suggestive influences in the secrecy of the confrontation."<sup>226</sup> In fact, "most [DNA] exonerees had no successful [legal] basis for challenging what we now know to be incorrect eyewitness identifications."<sup>227</sup>

The Bosnian experience suggests that one simple and relatively costless approach that the United States could take to decrease the number of wrongful convictions stemming from mistaken identifications is to adopt a per se rule prohibiting identification procedures without a sufficient number of fillers, in other words banning the showup, and enforcing the rule with an exclusionary remedy forbidding the consideration of the results of showup procedures by the jury in

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223. See, e.g., *Perry v. New Hampshire*, 132 S. Ct. 716 (2012); *Manson v. Brathwaite*, 432 U.S. 98, 112–13 (1977).

224. Vucinic Interview, *supra* note 129; cf. Luria, *supra* note 192, at 540 ("[P]olice officers have little incentive to use more reliable methods of identification, such as a lineup, because the showup identification will not be suppressed.").

225. MUPS Interview, *supra* note 140.

226. *United States v. Wade*, 388 U.S. 218, 234–35 (1967).

227. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 188 (2011).

determining guilt or innocence. Contrary to the suggestion of the often false admission/exclusion dichotomy, the Bosnian experience suggests that banning the showup would simply increase the use of more reliable forms of identification procedures, like full lineups and photographic arrays.

APPENDIX A

Crime Investigation Division of the Sarajevo Canton Ministry of Internal Affairs  
Police Department ("MUPS") Eyewitness Form  
[As translated from Bosnian by Carrie Leonetti]

Bosnia and Herzegovina  
Federation of Bosnia and Herzegovina  
XXXXX Canton  
MINISTRY OF INTERNAL AFFAIRS  
POLICE DEPARTMENT

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No. 02/2-2-2-\_\_\_\_\_/12  
Date: xx.xx.2012

RECORD  
of witness proceeding

Transpired on xx.xx.2012 and attended by  
xx, regarding the interview of witness  
xxxxxxx from Sarajevo in relation to the proceeding about  
xxxxxxxxxxxxxxxxxxxxxxxx.

- PRESENT
1. -----, prosecutor, Cantonal Prosecutor's Office  
in Sarajevo (not present – notice),
  2. Assigned duty officer: -----
  3. Witness: -----
  4. Attorney:
  5. Transcriptionist: -----

Witness proceeding initiated on xx.xx.2012 at 00:00 o'clock.

Pursuant to art. 8 & 9 of the Code of Criminal Procedure of the Federation of  
Bosnia and Herzegovina you were notified of the criminal procedures and the  
duty of equal usage of the languages of BiH, Bosnian, Croatian, and Serbian and  
both alphabets – Cyrillic and Latin. Inasmuch as you do not understand a  
language, you are guaranteed translation of your statements, as well as the  
warrant and other demonstrative material.

Do you understand these instructions? Yes

Witness affirmation:

I do not need an interpreter

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(witness signature)

Pursuant to article 100 paragraph 2 of the Code of Criminal Procedure of the Federation of Bosnia and Herzegovina you are admonished that you are obligated to tell the truth. You are not permitted to hold anything back. Be aware that giving a false statement is a felony act prohibited by article 348 of the Criminal Code of the Federation of BiH, which is punishable by a sentence of 6 months to 5 years. Be aware that you are not obligated to answer a question as provided in article 98 paragraph 1 of the CPC of F BiH.

I have understood this warning as certified by my signature.

\_\_\_\_\_  
(witness signature)

The witness in the meaning of article 100 para. 3 of the Federation of BiH Code of Criminal Procedure gives the following data by himself:

Name and surname: \_\_\_\_\_

Father's name and surname: \_\_\_\_\_

Mother's name and maiden name: \_\_\_\_\_, born: \_\_\_\_\_

Birth date: \_\_\_\_\_

Place of birth: \_\_\_\_\_

Place and address of residence: \_\_\_\_\_

PIN: \_\_\_\_\_

Citizenship: \_\_\_\_\_

Occupation: \_\_\_\_\_

Are you and where are you employed: \_\_\_\_\_

Relationship to suspect and injured party: \_\_\_\_\_

Identity determined by the peculiarities of the statement and inspection of the personal identity number \_\_\_\_\_, extraneous costs

Contact telephone: \_\_\_\_\_

\_\_\_\_\_  
(witness signature)

Be aware that you are obliged to inform the Prosecution and Court of your change in address or change in residence.

Pursuant to article 95 paras. 5, 6, and 17 of the Federation of BiH Code of Criminal Procedure you are obligated to answer each notification of the Prosecution and the Court unless you are unable to attend and notify the Prosecution and the Court of the reasons. If you do not comply with this notice you can be punished with a monetary penalty of 5,000 KM, and you will be subjected to mandatory production. You are obligated to testify. If you refuse to testify in Court it could punish you with a monetary penalty of 30,000 KM.

Do you understand this advice?

Witness's reply. Yes

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(witness signature)

Pursuant to article 97 of the Federation of BiH Code of Criminal Procedure be aware that you have the right to decline to testify if you are the suspect's spouse, domestic partner or parent or child, adoptive parent or adoptive child.

Witness's reply: affirmative statement

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(witness signature)

Pursuant to article 98 of Federation of BiH Code of Criminal Procedure you have the right not to respond to questions if a truthful response would expose you to a criminal prosecution, unless you want to respond to the questions and you request immunity. Immunity is given to you by the prosecutor. Unless you are given immunity at that time and you are obligated to testify in response to these questions, you are unable to be criminally prosecuted except if you give a false statement. You have the right to request that the Court appoint you an attorney, unless you have the capacity by yourself to protect your rights as a witness.

Pursuant to article 105 of the Federation of BiH Code of Criminal Procedure you can request that you convene a hearing on the protected properties or endangered witness in accordance with the Law on the Protection of Witnesses under Threat or Endangered Witnesses.

Do you understand these advices? Yes.

Witness's reply: affirmative to all necessary notices.

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(witness signature)

Whence the witness is informed of his given rights next:

STATEMENT

Whence I have been approached in the official rooms of the MPDs of the Sarajevo Canton as well as extraneous police officials familiar with the occasion of my summons, I give the following statement:

I was

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Pursuant to article 168 para. 1 of the Federation of BiH Criminal Procedure Code you have the right to read the record or demand that the same be read to you, as well as to insert an objection about the contents of the record.

Have you read the record or had it read to you?

Read the record

Do you have an objection to the contents of the record? No

Witness proceeding terminated the same day at 00.00 o'clock.

Witness Recording Secretary Prosecutor

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not present

Authorized officials

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I do not have anything else to declare, I have heard aloud the dictation of the record, and in the same has been inserted all that I have declared without objection to the record, and I sign to indicate the same.

Witness proceeding terminated on xx.xx.2012 at 00:00 o'clock.

Witness Recording Secretary Prosecutor

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not present

Authorized officials

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