EYEWITNESS MISIDENTIFICATION:
A MISTAKE THAT BLINDS
INVESTIGATIONS, SWAYS JURIES,
AND LOCKS INNOCENT PEOPLE
BEHIND BARS

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“God help us, if ever in this great country we turn our heads while people who have not had fair trials are executed.”

I. INTRODUCTION

The very first exoneration in the United States took place on August 14, 1989. On that day, DNA evidence freed Gary Dotson from his wrongful rape conviction. Since then, exonerations have become somewhat common in the United States. Today, the leading cause of wrongful convictions is eyewitness misidentification. In over seventy percent of DNA-based exonerations, eyewitness misidentification helped seal the innocent person’s conviction.

Eyewitness misidentification is most likely to occur when a stranger commits a crime toward another. The two most common types of crimes committed by a stranger are robbery and rape. In 2005, eighty-eight percent of the defendants convicted of rape and later exonerated had been wrongfully convicted based on a faulty identification by the victim of the crime. In most of these exonerations, DNA evidence cleared the defendant’s name. Due to a lack of DNA evidence in robberies, many misidentified defendants may still be in

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4. Id.
5. Id. at 542.
7. Gross et al., supra note 2, at 530.
8. Id. Robbery related misidentifications likely outnumber rape related misidentifications because there are more arrests for robberies than rapes. Id.
9. Id.
10. Id.
prison. Unfortunately, this means that eyewitness misidentification has likely sent many unaccounted for innocent people to prison. This Article will explore the measures our justice system and communities can take to avoid such wrongful convictions.

First, this Article will discuss three examples of wrongful rape convictions caused by eyewitness misidentification. These cases will display that eyewitness identification can have negative consequences, even when the witness feels that she had done everything in her power to make the correct identification. Then, this Article will explain how an eyewitness’s memory functions and why memory plays a role in eyewitness misidentification. Thereafter, this Article will examine current safeguards courts have taken to prevent convictions based on eyewitness misidentification. Thereafter, this Article will examine research on the best methods for identifying a perpetrator. Finally, this Article will conclude with ideas on reforms regarding eyewitness misidentification.

II. EXAMPLES OF EXONERATION CASES: EXACTLY HOW DOES EYEWITNESS MISIDENTIFICATION SEND AN INNOCENT PERSON TO PRISON?

Eyewitness misidentification occurred in seventy percent of over 300 exoneration cases where innocence was proven by DNA evidence. This Article will discuss three of these cases, all of which involved a rape. In the cases that follow, the eyewitnesses were sure that they had selected the correct person as their perpetrator. One of these individuals was so sure of her selection that even after DNA evidence proved the defendant was innocent, she had a difficult time believing the truth.

11. Id. at 531.
12. See id. at 530-31 (discussing eyewitness misidentifications that have led to undetectable false convictions).
13. See infra notes 23-81 and accompanying text.
15. See infra notes 82-89 and accompanying text.
16. See infra notes 90-93 and accompanying text.
17. See infra notes 97-152 and accompanying text.
18. See infra notes 153-169 and accompanying text.
21. Collins, supra note 14, at 10; Marvin Anderson, supra note 20; Tegoseak, 221 P.3d at 352.
22. Tegoseak, 221 P.3d at 354.
A. **Ronald Cotton: A Witness Can be Completely Sure on Identifying the Perpetrator and Still be Incorrect**

In 1984, a man forcefully entered Jennifer Thompson’s apartment, attacked, and raped her, while holding a knife to her throat.\(^23\) During her attack, she paid special attention to her attacker’s features in order to identify him later in court.\(^24\) She paid close attention to his voice, accent, and physical characteristics.\(^25\) After she was attacked for about a half an hour, she convinced the rapist to let her get him a drink and managed to escape out her back door.\(^26\)

While she was recovering in the hospital, a police detective interviewed her and drew a composite sketch of her attacker.\(^27\) This sketch was broadcast to the public and the police began receiving tips about the crime, one of which was about Ronald Cotton.\(^28\) Unfortunately for Cotton, he worked at a restaurant located by Thompson’s apartment, he had a previous breaking and entering conviction, and he had a sexual assault charge in his juvenile record.\(^29\) Just three days after the rape had occurred, the detective put together a photo lineup that included Cotton’s picture.\(^30\) After five minutes of examining the photographs, Thompson selected Cotton’s photo as depicting the man who raped her.\(^31\) Later on, Thompson picked Cotton from a live line up and was told that she chose the same man from the photo lineup.\(^32\) After hearing this news, she thought, “Bingo! I did it right; I did it right.”\(^33\) She once again identified Cotton during his trial; thereafter, Cotton was convicted and sentenced to “life in prison plus fifty years.”\(^34\)

While Cotton was serving his time in prison, he met a man that looked very similar to himself, Bobby Poole.\(^35\) Another inmate told Cotton that Poole had actually confessed to raping Thompson and, because of this information, Cotton was given a new trial.\(^36\) During this new trial, Thompson was asked to identify Poole; however, she failed

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24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 352-53.
32. *Id.* at 353.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
to recognize him. At this point, Thompson was very angry with Cotton and his attorneys for questioning her previous identification because she felt that she would never be able to forget her rapist’s face. At the conclusion of this trial, Cotton was again convicted of the rape, but this time received two life sentences.

After seven years, Cotton learned about DNA evidence by watching the O.J. Simpson trial. At that point, he convinced his lawyer to look into the possibility of viable DNA evidence. Although this was ten years after the initial rape, the police department still had Thompson’s rape kit, which contained testable sperm. The results of the DNA test proved that Poole was the actual rapist and that Cotton was innocent.

Even after hearing of this news, Thompson had trouble believing it and even remembered the event in the same way she had before, by visualizing Cotton as her attacker. She would even have dreams about the rape and see Cotton’s face. This case shows that a witness can accurately describe his or her perpetrator prior to a lineup, select another person from a photo lineup and, as a result, be incorrect about the identity of his or her perpetrator. To determine that a pre-lineup description is accurate, based only on the fact that the witness described her attacker with similar physical characteristics to the defendant on trial, is assuming to be true what actually needs to be proven.

B. MARVIN ANDERSON: EYEWITNESS MISIDENTIFICATION ALONE PUTS AN INNOCENT MAN BEHIND BARS

In 1982, a young female was raped by an African-American male that she did not know. While the woman was being raped, the perpetrator told her that he had a “white girl.” Unfortunately for Mar-

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37. Id. During this trial, Jennifer never experienced any uncertainty as to who had raped her. Id. at 354.
38. Id. at 353. She remembers thinking: “How dare you question me? How dare you [suggest that I] could possibly have forgotten what my rapist looked like? . . . The one person [I] would never forget?” Id.
39. Id.
40. Id.
41. Id.
42. Id.
43. Id. Jennifer reacted to this news by thinking, “No, that can’t be true; it’s not possible . . . . I know Ronald Cotton raped me. There’s no question in my mind.” Id. at 354.
44. Id.
45. Id.
46. Id. at 357.
47. Id.
49. Id.
vin Anderson, he was the only black man who resided with a white woman that the investigating officer could identify; thus, Anderson became a suspect.\textsuperscript{50} The officer obtained a color photo of Anderson from Anderson's employer and used the photo in a lineup with only black and white photos.\textsuperscript{51} An hour after choosing Anderson's photo from the lineup, the victim was presented with a live lineup and chose Anderson again; Anderson was the only person who was included in both lineups.\textsuperscript{52}

In the meantime, people in the community had become aware that another man, John Otis Lincoln, most likely committed the crime.\textsuperscript{53} A stolen bicycle was widely believed to be used by whoever committed the crime.\textsuperscript{54} The owner of that bicycle identified Lincoln as the person who stole the bicycle just a half an hour before the rape took place.\textsuperscript{55} Even though Anderson asked his attorneys to call Lincoln and the bicycle owner as witnesses, his attorneys declined.\textsuperscript{56}

During the trial, the victim identified Anderson once again as her rapist.\textsuperscript{57} Even with an alibi, the eyewitness misidentification was sufficient to convict Anderson of abduction, rape, robbery, and sodomy by an all-white jury.\textsuperscript{58} Consequently, Anderson was sentenced to prison for 210 years.\textsuperscript{59}

Six years after Anderson's conviction, Lincoln came forward and confessed that he was the person who had committed the rape.\textsuperscript{60} At a state hearing, Lincoln testified that he was the assailant, but the same judge who sentenced Anderson to prison refused to reverse Anderson's conviction.\textsuperscript{61} Years later, DNA evidence became popular and although the court, police, and prosecutor all told Anderson that the rape kit from the crime had been destroyed, he proceeded to contact the Innocence Project for help in 1994, which he received at that time.\textsuperscript{62}

\textsuperscript{50. Id.}
\textsuperscript{51. Id.}
\textsuperscript{52. Id. The live lineup took place within an hour of the photo lineup. Id.}
\textsuperscript{53. Id.}
\textsuperscript{54. Id.}
\textsuperscript{55. Id.}
\textsuperscript{56. Id. Marvin's attorney had represented Lincoln in prior criminal proceedings and refused to interview or investigate Lincoln. \textit{Panel 2 Q \& A with Marvin Anderson, Juvenile Exoneree}, 18 CARDOZO J.L. \& GENDER 601, 601 (2012).}
\textsuperscript{57. Panel 2 Q \& A with Marvin Anderson, Juvenile Exoneree, supra note 56, at 611.}
\textsuperscript{58. Id. at 601.}
\textsuperscript{59. Id.}
\textsuperscript{60. Marvin Anderson, supra note 20.}
\textsuperscript{61. Id.}
\textsuperscript{62. Id.; Panel 2 Q \& A with Marvin Anderson, Juvenile Exoneree, supra note 56, at 601.}
Seven years later, Dr. Paul Ferrara from the center that tested the evidence for the first trial informed the Innocence Project that DNA evidence had been located in a notebook that the original technologist used when he performed the testing for the trial.63 Luckily for Anderson, the technologist did not follow protocol and failed to return the DNA evidence to the rape kit that was subsequently destroyed.64 After DNA testing was first denied, the Innocence Project continued to pursue the testing and eventually won the right to go forward with it.65 The DNA evidence appeared to match Lincoln and not Anderson.66 After fifteen years in prison and four years on parole, DNA evidence proved that Anderson was innocent and he received a full pardon.67

C. STEVEN AVERY: THE TALE OF TWO WITNESSES

In 1985, Penny Beerntsen was jogging on a beach by Lake Michigan when she was attacked and raped by a man.68 During the attack, Beerntsen took notice of the features of her attacker.69 After her attack, she gave the Manitowoc County Sheriff’s Department a detailed description of her assailant and the sheriff immediately suspected Steven Avery because the sheriff felt that the description matched Steven Avery’s features.70 Within just a few hours, a photo lineup, which included Steven Avery’s photo, was presented to Beerntsen while she was told that “there was a chance that the suspect might be in there.”71 Beerntsen selected Steven Avery from the photo lineup and just three days later, she instantly identified Steven Avery in a live lineup after being told “the man whose photograph she had selected had been arrested.”72

Within days of arresting Steven Avery, the district attorney and sheriff received information connecting Gregory Allen to the rape.73 Gregory Allen was a sex predator with a lengthy record.74 However, the sheriff and district attorney did not seem to even bat an eye at this new information and chose to continue to pursue the charges against

64. Id.
65. Id.
66. Id.
68. Collins, supra note 14, at 10; Griesbach, supra note 20, at 7.
69. Collins, supra note 14, at 10. She remembered thinking, “I have to stay calm and get a good look at this guy.” Id.
70. Id.
71. Id.
72. Id.
73. Griesbach, supra note 20, at 7.
74. Id.
Steven Avery.75 Despite having an alibi witness, Steven Avery was convicted and sentenced to thirty-two years in prison after Beerntsen testified at his trial that there was no question in her mind that Steven Avery was her attacker.76 Eight years after Steven Avery’s conviction, Gregory Allen raped another woman in the woman’s home and was convicted of burglary, kidnapping, and second-degree sexual assault.77 Finally, he was sent to prison for sixty years.78

After attempting to appeal his case for a suggestive photo lineup, Steven Avery attempted a second appeal after learning that DNA testing proved fingernail scrapings from the victim belonged to a third party.79 With the help of the Innocence Project, Steven Avery invoked a two and a half year old law to obtain the DNA testing necessary to free him.80 The DNA evidence proved that Gregory Allen was the perpetrator and, as a result, Steven Avery was freed after having served eighteen years in prison.81

III. EYEWITNESS MEMORY: NOT AS RELIABLE AS ONE WOULD HOPE

One might ask, what causes eyewitness misidentification to occur? Eyewitness misidentification occurs because the eyewitness’s memory is dynamic and prone to error.82 When a person remembers something, he or she does so unconsciously.83 This process occurs in three stages: (1) encoding or acquisition; (2) retention; and (3) retrieval or recall.84 At each one of these stages, many psychological and physical elements can influence whether a person will accurately remember an event.85 However, these are not the only elements that can influence memory; suggestive identification procedures can also play a role in incorrectly remembering an event.86

These elements can further be divided into two types of factors: estimator and system variables.87 An estimator variable “is a factor that is not under the control of the government, such as lighting condi-

75. Id.
77. Griesbach, supra note 20, at 7.
78. Id.
79. Collins, supra note 14, at 10; Avery, 570 N.W.2d at 575.
81. Id.; Griesbach, supra note 20, at 7.
83. Id.
84. Id.
85. Id.
86. Id. at 30-31.
87. Id. at 31.
tions at the time of the witnessed event or the race of the witness and the suspect.”88 A system variable “is a factor affecting the reliability of an identification that is or could be within the control of the criminal justice system,” and such factors include witness instructions prior to the lineup, the structure of the lineup presentation, and the fillers chosen for the lineup.89 This Article will focus on estimator variables that can aid eyewitness misidentification.

IV. EYEWITNESS IDENTIFICATION AND COURTS: COURTS HAVE ALREADY ACKNOWLEDGED EYEWITNESS MISIDENTIFICATION AND HAVE TAKEN SAFEGUARDS TO PREVENT RESULTING WRONGFUL CONVICTIONS

With the many factors that can affect eyewitness identification, courts have acknowledged that eyewitness misidentification exists and certain factors play a role in such misidentification.90 These factors include:

(1) a weak correlation between a witness’s confidence in his or her identification and its accuracy;

(2) the reliability of an identification can be diminished by a witness’s focus on a weapon;

(3) high stress at the time of observation may render a witness less able to retain an accurate perception and memory of the observed events;

(4) cross-racial identifications are considerably less accurate than same-race identifications;

(5) a person’s memory diminishes rapidly over a period of hours rather than days or weeks;

(6) identifications are likely to be less reliable in the absence of a double-blind, sequential identification procedure;

(7) witnesses are prone to develop unwarranted confidence in their identifications if they are privy to postevent or postidentification information about the event or the identification; and

(8) the accuracy of an eyewitness identification may be undermined by unconscious transference, which occurs when a person seen in one context is confused with a person seen in another.91

After accepting the existence of eyewitness misidentification, courts put safeguards into place to protect against such misidentifica-

88. See id.
89. Id.
90. Savage & Devendorf, supra note 82, at 30; State v. Guilbert, 49 A.3d 705, 721-23 (Conn. 2012).
91. Guilbert, 49 A.3d at 721-23.
These safeguards include: excluding the results of impermissibly suggestive identifications, jury instructions regarding identification evidence, and allowing expert testimony regarding the reliability of eyewitness identification. Although these safeguards are currently in place, it is not enough to prevent eyewitness misidentification. This Article will next discuss the elements that aid in eyewitness misidentification and what further measures the court system should take.

V. IDENTIFYING A PERPETRATOR: STUDIES SHOW THAT FACIAL FEATURES, DISTANCE, LENGTH OF TIME VIEWED, AGE, AND REHEARSAL CAN HAVE A POSITIVE IMPACT ON MEMORY AND IDENTIFICATION

Several experiments have been done in the field of eyewitness identification. These experiments exposed factors that prevent witnesses from making accurate identifications. These experiments also revealed the factors that contribute to making positive eyewitness identifications. This Article will next explore several different factors that contribute to making an accurate identification. These factors include: facial features, distance, the length of time the perpetrator was viewed, the age of the witness, and whether the witness rehearsed after viewing the event. Finally, the studies showed that the level of confidence the witness displays after making his or her very first identification is a good indication that he or she actually made an accurate identification.

A. FACIAL FEATURES: FACIAL AREA, TIMING, AND UNUSUAL FEATURES CAN MAKE ALL THE DIFFERENCE

J. Kirkland Reynolds and Kathy Pezdek conducted two different experiments to determine whether two separate witnesses would remember two perpetrators’ faces differently if one of the perpetrators covered his chin, nose, and mouth with a bandana while the other perpetrator wore a hat and dark glasses. The first experiment tested whether the duration of time the participant viewed the perpetrator aided memory and the second experiment tested whether giving certain instructions to participants aided memory; the results of both experiments indicated that eyewitnesses did in fact find more success

92. Savage & Devendorf, supra note 82, at 30.
93. Id.; Guilbert, 49 A.3d at 730.
94. See infra notes 97-141 and accompanying text.
95. See infra notes 97-141 and accompanying text.
96. Wixted et al., supra note 19, at 524.
recognizing certain features over others. In both of these experiments, the people who participated viewed slides that contained faces and were later tested on their ability to recognize the faces in the slides. Each time the same face was shown in a different slide, a feature of the face was modified, such as the mouth, chin, eyes, nose, and hair. The results of the first experiment revealed that it was easier for the participant to identify upper-facial features, such as eyes and hair, as opposed to lower-facial features, such as the mouth, chin, and nose.

In the second experiment, the participants were given either one of two sets of instructions before the slides were presented to them. One of the sets of instructions stated, “Look at each face carefully and judge the AGE of the person in the slide by using whatever criteria you want. For those people judged older than 30, circle older below, and for those judged younger than 30, circle younger below.” (”Age Instructions”). The other set of given instructions stated:

As you look at each face, look at all of the features (chin, eyes, mouth, nose, and hair) and decide if this set of features includes relatively typical features or relatively unusual features compared to people you see every day. After scanning the features of each face, check on the response sheet in front of you either “typical” or “unusual” corresponding to your judgment for that face. (“Feature Instructions”).

The results of the second experiment showed that when the Feature Instructions were given the participant was able to remember the faces considerably better than a participant who was given the Age Instructions.

These experiments revealed that a witness should focus on the perpetrator’s upper facial features, but also look for unusual features. It is difficult to say whether Jennifer Thompson focused on Bobby Poole’s upper or lower facial features while he attacked her; however, science tells us that we have the best chance of remembering a face when we focus on the upper features as opposed to the lower features.

98. Id. at 279, 283, 287.
99. Id. at 279.
100. Id.
101. Id. at 287.
102. Id.
103. Id. at 287-88. (emphasis in the original).
104. Id. at 288.
105. Id. at 279.
106. Id.
107. Id.
B. **DURATION: THE LONGER A WITNESS SEES A PERPETRATOR THE BETTER**

In the United Kingdom, police officers are required to record several key factors they are taking a statement from a witness ("United Kingdom Study"). These factors include distance, prior familiarity with the perpetrator, and exposure duration. The statements are taken very shortly after someone has reported a crime, but before a line up is presented. The results of this information showed that the length of time a witness viewed a perpetrator correlated with the likelihood of the witness accurately identifying the perpetrator. Accordingly, when a witness viewed a perpetrator for a long period of time, there was a higher likelihood that the witness would accurately identify the perpetrator as opposed to a witness who had viewed the perpetrator for a shorter period of time. Further, when the witness saw the perpetrator for less than sixty seconds, there was a high likelihood that the witness was not able to identify the perpetrator. Thus, the longer the witness was exposed to the perpetrator the stronger the witness’s memory of the perpetrator’s face became.

The first experiment conducted by J. Kirkland Reynolds and Kathy Pezdek, discussed above, supports this theory. During one session of the experiment where faces were modified in each slide, a person was exposed to a face within a slide for twenty seconds; while in another session, a person was exposed to a face within a slide for three seconds. When the results of these two experiments were studied, it was discovered that the person was able to identify all five features of a face considerably better when he or she was exposed to the face for twenty seconds as opposed to three seconds, thus showing that a few seconds can make a tremendous difference in whether an eyewitness will be able to accurately identify a perpetrator. Not surprisingly, the eyewitness should try to look at the perpetrator’s face for at least twenty seconds in order to have a greater chance of accurately remembering the perpetrator’s face.

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109. *Id.*
110. *Id.*
111. *Id.* at 102.
112. *Id.*
113. *Id.* at 103.
114. *Id.* at 102-03.
115. Reynolds & Pezdek, *supra* note 97, at 279. Interestingly, the amount of time the participant was able to examine the perpetrator did not have an effect on the mental process the participant took to examine the perpetrator’s face. *Id.* at 287.
116. *Id.* at 279.
117. *Id.*
C. Timing and Rehearsal: Surprisingly the Best Practice is to Wait Rather Than Immediately Attempt to Recall a Perpetrator’s Appearance

J. Don Read asked the question, “[I]f an eyewitness rehearses the people and details observed in a brief event, would such rehearsal have benefits upon identification of those people and recall of the event’s details?”118 Therefore, he conducted two experiments: one of the experiments involved a staged classroom event while the other involved a video scenario.119 The experiments’ outcomes proved that when a person rehearsed directly after an event he or she was more likely to correctly identify a facial target than a person who did not rehearse directly after the event.120 However, this increase only occurred when the facial target never changed its appearance as opposed to when the facial target even slightly changed its appearance during the identification procedures.121

When he conducted an experiment where the person was asked not to rehearse for ten minutes after the event, the person’s ability to accurately identify the facial target actually improved, even when the facial target changed its appearance.122 These experiments actually proved that when a person immediately rehearses after an event, the person’s ability to accurately identify a perpetrator is reduced.123 Thus, it is best to wait at least ten minutes before attempting to recall a perpetrator’s appearance.124

D. Distance: The Five Meter Rule

When a witness observes criminal activity there is a chance that the witness is standing a great distance from the actual event.125 A witness is best able to identify a perpetrator while using his or her low and high spatial frequency bands.126 When a witness is a great distance away from a perpetrator, the size of the retina’s visual image decreases.127 When the size of the retina’s visual image decreases, this causes the witness to mostly rely on his or her lower spatial fre-

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119. Id.
120. Id.
121. Id.
122. Id. “Immediate rehearsal, in contract, led to a reduction in identification performance.” Id.
123. Id.
124. Id.
126. Id.
127. Id.
James Michael Lampinen conducted an experiment to study the effect distance has on a person’s ability to recognize the face of a perpetrator. In his experiment, a person was asked to view eight other people. Each of the eight people viewed in the experiment were placed outdoors at one of six distances, which ranged from five to forty yards. The person was then asked to match the eight people he or she viewed to an array of photographs. The photograph array included sixteen photos, eight of which were the actual targets while the other eight were fillers. The results of the experiment showed that the further away the perpetrator was from the witness, the less likely the witness was able to identify the perpetrator.

Further findings that back up this conclusion were found in the United Kingdom Study discussed above. In the United Kingdom Study, the results showed the effect distance had on eyewitness identification. The likelihood of a witness correctly identifying a perpetrator was reduced when the witness saw the perpetrator at a greater distance than five meters as opposed to when the witness saw the perpetrators at a distance of less than five meters or when the witness was face-to-face with the perpetrator. Thus, a witness is in the best position to remember his or her perpetrator’s face when he or she sees the perpetrator at a distance of less than five meters.

E. Age: Children Have a Lower Reliability Rate than Young Adults

The United Kingdom Study was helpful for more than just two categories. The study also revealed information related to the age of the witness. According to the results, people sixteen- to twenty-years-old were more likely to correctly identify a suspect than a child witness. However, the author

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128. Id.
129. Id. at 1490.
130. Id.
131. Id.
132. Id. at 1491.
133. Id.
134. Id.
135. Horry et al., supra note 108, at 102-03.
136. Id. at 103.
137. Id.
138. Id.
139. Id.
140. Id. For purposes of this experiment, a child witness is a person under the age of 16. Id.
concluded that age did not play a significant role with nonidentifications and suspect identifications.141

F. EYEWITNESS CONFIDENCE LEVEL: THE WITNESS’S LEVEL OF CONFIDENCE AT THE TIME OF THE INITIAL IDENTIFICATION HOLDS THE MOST VALUE

Studies show that there is a poor relationship between an eyewitness’s identification accuracy and an eyewitness’s level of confidence, unless the eyewitness reveals his or her level of confidence early on in the investigation.142 Confidence levels taken during the initial eyewitness identification are indicative of whether the witness made an accurate identification; however, because people are capable of being misled into remembering events contrary to the actual circumstances, any confidence statement taken thereafter may be contaminated, and thus, not indicative of whether the witness has made an accurate identification.143 Jennifer Thompson’s comment after her second misidentification of Ronald Cotton, “Bingo! I did it right; I did it right,” and her contaminated dreams of Ronald Cotton attacking her, even after she was told he was not her attacker, further support this contention.144

Consequently, when an eyewitness gives a confidence statement during a trial, which is generally a very long time after the first identification event, that confidence statement should be at least discounted if not completely disregarded.145 Stephen Avery is a perfect example of a person who fell victim to a confidence statement given by a witness during a trial, as he was convicted after the eyewitness told the jury that she had no question in her mind that he was her attacker.146

To support the idea of disregarding confidence statements during a trial, John Wixted completed research to determine whether witnesses who gave confidence statements during the first lineup identification experienced memory contamination.147 The results of his research showed that during the initial identification, the witness’s confidence level was highly indicative of whether the witness made an

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141. Id. at 102.
142. Wixted et al., supra note 19, at 515.
143. Id. A confidence statement is a statement given by an eyewitness that expresses how confident he or she is about his or her identification. Id.
145. Wixted et al., supra note 19, at 515-16. Unfortunately, “[d]espite the unreliability of eyewitness memory, research has shown that jurors find high-confidence eyewitness IDs to be particularly compelling evidence of guilt.” Id.
147. Wixted et al., supra note 19, at 515.
Thus, the witness’s confidence level is most reliable during the initial identification and this confidence level will set a standard to detect whether the witness has lost or gained any confidence over time.149 So, if during the initial identification the witness displays a low level of confidence, then there is a high likelihood that the witness did not identify the perpetrator accurately.150 On the other hand, if the witness displays a high level of confidence during the initial identification, then there is a high likelihood that the witness accurately identified the perpetrator.151 Wixted stressed that expressions of confidence, as well as statements of confidence, should be included when assessing the confidence level of the witness.152

VI. CONCLUSION

Eyewitness misidentification is a large problem within the court system. Eyewitness identification has been presented at a trial as the only piece of evidence supporting the contention that the defendant actually committed the crime, and that single piece of evidence has put a defendant in prison for many years, even when the defendant has an alibi, such as the cases of Marvin Anderson and Steven Avery.153 Thus, there is no doubt that such eyewitness identification plays a major role for a jury during discussions and deliberations regarding the fate of the defendant.

Yet, whether jury instructions regarding the reliability of an eyewitness’s identification are given or whether the jury will even hear factors that affect the accuracy of eyewitness identification depends on the jurisdiction of the court.154 Some courts will only allow eyewitness identification instruction if there is reason to doubt the witness.155 Worse, some courts will not allow any jury instructions specific to eyewitness identification.156 However, research shows that there are certain factors that a jury should take into consideration

148. Id. at 524-25.
149. Id. at 523-24.
150. Id. at 524-25.
151. Id.
152. Id. at 525.
155. Id.
156. Id.
when determining the validity of an eyewitness’s identification. As a result, when an eyewitness gives testimony about the identity of a perpetrator, the court should give jury instructions regarding factors that affect the reliability of eyewitness identification.

Further, an expert witness should always testify about the reliability of an eyewitness’s identification. Undoubtedly, jurors take eyewitness identifications seriously during deliberations. If a juror only views eyewitness identification testimony without hearing from an expert rebutting such testimony and without hearing jury instructions regarding factors that affect the credibility of such eyewitness testimony, it is highly likely that the eyewitness’s testimony will play a large part in the jurors’ decision to convict the defendant. Therefore, it is important that an expert rebut an eyewitness’s testimony identifying the defendant as the perpetrator.

The issues that the jury instructions and experts should address are the certain factors that affect the reliability of eyewitness identification. The following factors can affect whether an eyewitness will accurately identify a perpetrator: facial features, distance, the length of time the perpetrator was viewed, the age of the witness, and whether the witness rehearsed after viewing the event. Regarding the amount of time the witness saw the perpetrator, there is a higher likelihood that a witness will make a correct identification if he or she saw the perpetrator for longer than sixty seconds as opposed to if the witness saw the perpetrator for less than sixty seconds. If the witness saw the perpetrator at a distance of less than five meters, there is a higher likelihood that the witness’s identification is correct than if the witness saw the perpetrator at a distance farther than five meters.

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157. Horry et al., supra note 108, at 102-03; Lampinen et al., supra note 125, at 1491; Read et al., supra note 118, at 295; Reynolds & Pezdek, supra note 97, at 279; Wixted et al., supra 19, at 524-25.

158. See Collins, supra note 14, at 10 (explaining that a jury convicted Eugene Glenn of armed robbery after the victim testified “that she ‘recognized his face immediately.’”); Avery, 570 N.W.2d at 575 (revealing that a jury convicted Steven Avery after Penny Beerntsen identified him as her perpetrator, even though an alibi witness testified on Steven Avery’s behalf); Panel 2 Q & A with Marvin Anderson, Juvenile Exoneree, supra note 56, at 601, 611 (discussing how a jury convicted Marvin Anderson after the victim of the crime identified him).

159. See Panel 2 Q & A with Marvin Anderson, Juvenile Exoneree, supra note 56, at 601 (describing how an all-white jury convicted Marvin Anderson of “forcible sodomy, robbery, rape, and abduction” after the victim of the crimes identified him as her perpetrator); Avery, 570 N.W.2d at 575 (showing that a jury chose to convict Steven Avery even after two witnesses gave conflicting testimony, one identifying him as her attacker and one providing him an alibi).

160. Horry et al., supra note 108, at 102-03; Lampinen et al., supra note 125, at 1491; Read et al., supra note 118, at 295; Reynolds & Pezdek, supra note 97, at 279.

161. Reynolds & Pezdek, supra note 97, at 279; Horry et al., supra note 108, at 102-03.
Finally, research on the age of the witness revealed that a child witness is less reliable than a witness who is sixteen to twenty years old. As these factors are not common knowledge, such factors should be presented to the jury through both an expert witness and jury instructions.

In addition, studies show that after a witness has made his or her first identification, the confidence level of such witness is a strong indication of whether the identification was correct. This represents another issue that a jury might take into consideration: the confidence level of the witness while making his or her identification in the courtroom. Research shows that such a confidence statement at that time actually gives little insight to whether the identification was correct. Jurors should be informed by an expert during the trial and through jury instructions to disregard such a confidence statement and to only focus on the initial confidence statement given by the eyewitness after making his or her first identification. Further, a judge should consider whether to even allow an eyewitness to give a confidence statement during a trial. At that point, considerable time has probably passed since the actual crime, and thus, such a confidence statement is irrelevant. Therefore, a jury should be informed, through both expert testimony and jury instructions, about the reliability of confidence statements taken after each identification.

Additionally, it is important that research regarding factors that affect eyewitness reliability is shared with the public. Research can help people who are put in unfortunate situations, such as a robbery or a rape, find and convict their assailant. I recommend that research be shared with the general public regarding factors that aid in giving accurate identification, possibly through free seminars or even simple brochures. Potential witnesses to a crime should know what to focus on during an attack. Such focus should be on the upper facial features of the attacker, such as the eyes and hair. Additionally, the potential victims should be told to look for odd facial features rather than focusing on the age of the perpetrator. Further, the potential witnesses should be told to rehearse the features of the attacker, but to

162. Lampinen et al., supra note 125, at 1491.
163. Horry et al., supra note 108, at 102.
164. Wixted et al., supra note 19, at 524-25.
165. Id.
166. See id. at 525 (explaining that if testimony had “been focused . . . on confidence in the initial ID, many of the eyewitnesses involved in the DNA exoneration cases may not have persuaded jurors that guilt was established beyond a reasonable doubt . . . . [C]onfidence statements at the time of an initial lineup may be a big part of the solution to false convictions based on eyewitness misidentifications.”).
167. Reynolds & Pezdek, supra note 97, at 279.
168. Id.
wait ten minutes after the attack to do so. If potential victims are given this information, the accuracy of eyewitness identification may be improved to allow a guilty person to go to prison and to prevent an innocent person from going to such a place.

Hopefully with the amount of research that is out there, combined with the new research to come, researchers will be able to create a fool-proof process for accurate eyewitness identification. Currently, courts have recognized the issues with eyewitness identification and have created safeguards to block future wrongful convictions, but more safeguards are needed. While we are waiting on a fool-proof identification process, certain reforms, such as required expert testimony, better jury instructions, and eyewitness training, can help in the quest to remove eyewitness misidentification from our justice system.

169. Read et al., supra note 118, at 295.