

2015

Mistaken Eyewitness Identifications in Maryland

David Aaronson

American University Washington College of Law, daarons@wcl.american.edu

Julia Fox

American University Washington College of Law

Follow this and additional works at: http://digitalcommons.wcl.american.edu/facsch_lawrev



Part of the [Criminal Law Commons](#)

Recommended Citation

Aaronson, David and Fox, Julia, "Mistaken Eyewitness Identifications in Maryland" (2015). *Articles in Law Reviews & Other Academic Journals*. Paper 305.

http://digitalcommons.wcl.american.edu/facsch_lawrev/305

This Article is brought to you for free and open access by the Scholarship & Research at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Articles in Law Reviews & Other Academic Journals by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

THE MARYLAND BAR

JOURNAL

Volume XLVIII • Number 4

July/August 2015



Criminal Law

MISTAKEN EYEWITNESS IDENTIFICATIONS



IN MARYLAND



**By David E. Aaronson
and Julia M. Fox**

Mistaken eyewitness identifications played the primary role in 236 of the 329 (72 percent) post-conviction DNA exonerations in the United States, according to Innocence Project statistics, making it the number one cause of wrongful convictions. The real perpetrators were apprehended in 159 of these cases. http://www.innocenceproject.org/cases-false-imprisonment/front-page#c10=published&b_start=0&c4=Exonerated+by+DNA (last visited Mar. 22, 2015). Since only a fraction of criminal cases involve biological evidence that can be subject to DNA testing, most wrongfully convicted persons have little chance of proving their innocence. Wrongful convictions based on mistaken eyewitness identifications are especially serious for racial minorities, who make up approximately 70 percent of the wrongfully convicted. Elizabeth F. Loftus, *The Dangers of Eyewitnesses for the Innocent: Learning from the Past and Projecting into the Age of Social Media*, 46 New Eng. L. Rev. 769, 770 (2012).

Maryland is not exempt from eyewitness misidentification. In this state, Kirk Bloodsworth became the first man to be exonerated after being sentenced to death. At the age of 22, Bloodsworth was arrested after an anonymous call suggested that he was responsible for the rape and murder of a young girl. Although no physical evidence tied Bloodsworth to the murder, witnesses testified that they had seen him with the victim. Bloodsworth spent nine years in prison before he was released based on DNA evidence. *Kirk Bloodsworth*, Innocence Project, <http://www.innocenceproject.org/cases-false-imprisonment/kirk-bloodsworth> (last visited Mar. 8, 2015).

Other examples of wrongful convictions based on eyewitness identifications in Maryland include Larry Lane Hugee, who was arrested for the robbery of a Dollar Tree. Hugee, who had prior convictions for theft and possession of a weapon, had been questioned by police in the strip mall where Dollar Tree was located about a week prior to the robbery. Police put Hugee's photograph into a photographic lineup, and although the robber's face was covered with a ski mask during the commission of the crime, witnesses identified Hugee as the robber. *Larry Lane Hugee*, the National Registry of Exonerations, <http://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=4172> (last visited Mar. 8, 2015).

Jerry Jenkins was another Maryland victim of witness misidentification who was falsely imprisoned for rape. Jenkins, who was being held in Charles County Jail following his arrest for an unrelated crime, was interviewed in relation to the rape. Despite having taken

a photo during their interview of Jenkins, police put a five-year-old photograph of him into a photographic array, resulting in the victim saying he "looked like" the attacker. Although at trial, the victim said she could not positively identify Jenkins, he was convicted and spent approximately 26 years in prison. *Jerry Lee Jenkins*, the National Registry of Exonerations, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4191> (last visited Mar. 8, 2015).

These stories and others demonstrate the need to re-evaluate current eyewitness identification procedures in Maryland to help reduce wrongful convictions.

The Need for Additional Safeguards to Reduce the Likelihood of Wrongful Convictions Based on Mistaken Eyewitness Identification(s)

There is an emerging consensus, including within the U.S. Department of Justice, the National Research Council of the National Academies of Sciences (*Identifying the Culprit: Assessing Eyewitness Identification*, 2014), and the International Association of Chiefs of Police (*National Summit on Wrongful Convictions: Building a Systemic Approach to Prevent Wrongful Convictions*, August 2013), that recognizes the need and importance of additional safeguards to reduce the likelihood of mistaken eyewitness identifications. These reforms need to be initiated through state courts and legislatures, rather than rely on federal intervention.

The U.S. Supreme Court, in an 8-1 decision in *Perry v. New Hampshire*,

565 U.S. ___, 132 S. Ct. 716 (2012), affirmed a defendant's conviction for breaking into a car in a parking lot. Defendant alleged that the circumstances surrounding his identification were suggestive because, among other things, the eyewitness had identified him while he was standing next to a police officer in the parking lot. Resolving a conflict among federal and state courts, the Court held that a trial judge is not required under the Due Process Clause to conduct a preliminary assessment of "the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement." *Id.* at 730.

The Court in *Perry* reaffirmed the holdings of its earlier cases, especially *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375 (1972) and *Manson v. Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243 (1977). Under these cases, the Due Process Clause does not require that an identification infected by improper police influence be automatically excluded. "If the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances," then the pre-trial "identification evidence ordinarily will be admitted and the jury will ultimately determine its worth." *Perry*, at 720. Trial courts often follow a two-step procedure: (1) "whether the police used an unnecessarily suggestive identification procedure"; and (2) "if they did, ... whether [that] procedure so tainted the resulting identification as to render it unreliable and thus inadmissible." *Id.* at 722. Maryland follows this two-step procedure. *See Chambers v. State*, 81 Md. App. 210, 567 A.2d 458 (1989). Even when the pre-trial identification is found to be inadmissible due to its



suggestive nature, if the subsequent in-court identification is not a product of the tainted identification, but is based on an independent source such as a clear view of the suspect at the occurrence of the crime, the in-court identification may be admitted. See, e.g., *Foster v. State* 272 Md. 273, 323 A.2d 419 (1974). In *Manson v. Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243 (1997), the Supreme Court provided a list of “factors to weigh against the corrupting effect of a suggestive identification,” including: opportunity to view, degree of attention, accuracy of the description, witness’s level of certainty, and time between the crime and confrontation. *Id.* at 114-16, 97 S. Ct. at 2253-54.

In Justice Sotomayor’s dissenting opinion in *Perry*, she stated that it is not merely the suggestive act that creates a Due Process concern, but the effect of a suggestive act on the reliability of a resulting identification. *Perry*, at 731. Conduct that is intentionally suggestive or inadvertently suggestive can lead to the same unfair result. Referring to the numerous scientific studies on the topic of reliability of eyewitness identifications, she stated: “Over the past three decades, more than two thousand studies related to eyewitness identification have been published. One state supreme court recently appointed a special master to conduct an exhaustive survey of the current state of

the scientific evidence and concluded that ‘(t)he research...is not only extensive’ but ‘it represents the gold standard in terms of the applicability of social science research to law,’” *Id.* at 738 (citing *State v. Henderson*, 208 N.J. 208, 283, 27 A.3d 872, 916 (2011)).

At least one state court has rejected the holding in *Perry v. New Hampshire*, *supra*, on state evidence grounds, finding that an identification should not be admitted when it arises from “especially suggestive circumstances” other than police procedures. In *Commonwealth v. Crayton*, 470 Mass. 228, 21 N.E.3d 157 (2014), the Supreme Judicial Court of Massachusetts stated: “Our reliance on common-law principles of fairness to sup-

press an identification made under ‘especially suggestive circumstances’ even where the circumstances did not result from improper police activity is also in contrast with the United States Supreme Court jurisprudence.” *Id.* at 235, 21 N.E.3d at 165.

State v. Henderson, the landmark case decided by the Supreme Court of New Jersey and cited by Justice Sotomayor in *Perry v. New Hampshire*, revised the framework for admission of eyewitness identifications by “allowing judges to consider all relevant factors that affect reliability in deciding whether an identification is admissible” and departing from a rule that is heavily weighted by factors that can be affected by suggestiveness. 208 N.J. 208, 288, 27 A.3d 872, 919 (2011). The new test allows all relevant variables to be explored at pretrial hearings when there is evidence of suggestiveness, and calls for courts to develop and use enhanced jury instructions so that jurors can evaluate eyewitness identification evidence properly. *Id.*

The Oregon Supreme Court, in *State v. Lawson*, went further by requiring Oregon courts to consider all factors that can affect an eyewitness identification and employ remedies, such as limiting the eyewitness’s testimony and permitting expert testimony to explain the science behind identifications. 352 Or. 724, 761-62, 291 P.3d 673, 697 (2012). It also instructed trial courts to impose remedies if the defendant establishes that he/she would be unfairly prejudiced by the evidence. *Id.*

Building on that momentum, the Supreme Court of Connecticut, in *State v. Guilbert*, held that the reliability of eyewitness identifications is often not a matter that the average juror is familiar with, and the admis-

sion of an expert witness on that issue “does not invade the providence of the jury to determine what weight to give evidence.” 306 Conn. 218, 251-52, 49 A.3d 705, 731 (2012). The Court held that the trial court abused its discretion by concluding that an expert witness’s testimony about the reliability of eyewitness identification concerned matters of common knowledge. *Id.* at 259, 49 A.3d at 735.

Pre-trial and Trial Safeguards to Reduce the Likelihood of Wrongful Convictions Based on Mistaken Eyewitness Identification(s)

According to Deborah Davis and Elizabeth Loftus, eyewitness identifications are very rarely suppressed. Deborah Davis & Elizabeth F. Loftus, *The Dangers of Eyewitnesses for the Innocent: Learning from the Past and Projecting into the Age of Social Media*, 46 New Eng. L. Rev. 769, 775-76 (2012). In *New Jersey v. Henderson*, *supra*, the Report of the Special Master, No. A-8-08 (June 18, 2010) found only one New Jersey appellate decision, unreported, that applied the U.S. Supreme Court’s *Manson v. Brathwaite*, *supra*, test to suppress an eyewitness identification. The Report concluded: “Because the test allows...a finding of reliability notwithstanding impermissible suggestiveness, it appears to be of little value in weeding out unreliable identifications.” *Id.* at 78.

There are two viable avenues to reduce the likelihood and impact of mistaken eyewitness identifications: (1) improve pre-trial police procedures to reduce the likelihood that mistaken identifications will occur; and (2) in appropriate cases, trial judges should consider allowing

expert witness testimony and providing eyewitness specific jury instructions to help jurors better understand the circumstances that may affect the accuracy of eyewitness identification evidence.

A third avenue, to modify existing standards and procedures so that trial judges will be more likely to suppress unduly suggestive and unreliable eyewitness identifications, is unlikely to happen in Maryland in light of the Court of Appeals recent decision in *Smiley v. State*, No. 37 SEPT. TERM 2014, 2015 WL 1000055 (Md. Mar. 9, 2015). In a unanimous decision, the Court of Appeals affirmed its nearly 30-year-old standard that photo identifications be admitted unless the police procedure was so impermissibly suggestive as to make the identification unreliable.

A. Improving Pre-trial Police Procedures

The Innocence Project notes that ten states have implemented the 1999 reforms published by the U.S. Department of Justice (DOJ), *Eyewitness Evidence: A Guide for Law Enforcement* (1999) (available at <https://www.ncjrs.gov/pdffiles1/nij/178240.pdf>), a set of voluntary guidelines for eyewitness investigations by law enforcement. According to the Innocence Project, these procedures have been shown to significantly decrease misidentifications. *The Causes of Wrongful Conviction*, Innocence Project, <http://www.innocenceproject.org/causes-wrongful-conviction> (last visited Mar. 8, 2015).

The Innocence Project reports that Maryland has already taken steps to reduce and remedy wrongful convictions: law enforcement units that regularly use interrogation rooms capable of creating audiovisual

recordings must make reasonable efforts to record custodial interrogations for certain crimes (see Md. Code Ann., Crim. Proc. 2-402); a person convicted of murder, manslaughter, or certain sexual offenses may be eligible for post-conviction DNA testing; biological evidence must be preserved for certain criminal cases; and the Board of Public Works determines compensation packages for pardoned individuals wrongfully convicted (see Md. State Fin. & Proc. 10-501). *Maryland*, Innocence Project, <http://www.innocenceproject.org/how-is-your-state-doing/MD> (last visited Mar. 8, 2015).

In 2014, the Maryland General Assembly took another important step by enacting legislation requiring all law enforcement agencies in the state to adopt and implement policies to improve pre-trial police-conducted eyewitness identification procedures. Each law enforcement agency within the state has until January 1, 2016, to adopt the Police Training Commission's Eyewitness Identification Model Policy or to adopt and implement its own policy that complies with Md. Code Ann., Public Safety § 3-506.1. The Department of State Police will then compile the written policies and allow public inspection. Md. Code Ann., Public Safety § 3-506; Public Safety—Eyewitness Identification—Procedures, 2014 Maryland Laws Ch. 202 (H.B. 1200).

The new legislation has some shortcomings and leaves many questions unanswered, among them: After the Department of State Police compiles the written policies and allows public inspection, which agency, if any, will be tasked with making sure that the policies are implemented, how much time

will be allowed for implementation, and what authority will this agency have?; What penalties, if any, will be imposed for failure(s) to abide by the new legislation?; What resources will be available to local law enforcement agencies to implement the new policies?; What type of and how much training will be required to make sure that the procedures are properly implemented, who will provide the training, and how will the training be conducted?; Will these procedures be applied to serious felonies, all felonies, or all cases?

Also, while sequential line-ups and sequential photo line-ups are discussed in the DOJ Guidelines (see *supra* at 34), they are not addressed in the recently enacted Maryland legislation. According to the Guidelines, "Scientific research indicates that identification procedures such as lineups and photo arrays produce more reliable evidence when the individual lineup members or photographs are shown to the witness sequentially – one at a time – rather than simultaneously." (see Guidelines at 9). Some, but not all, Maryland law enforcement agencies currently use sequential methods of presentation.

B. Trial Safeguards

• Expert Witnesses

Justice Ginsburg, writing for the majority in *Perry v. New Hampshire*, stated that the admission of expert testimony helps jurors evaluate eyewitness identifications and safeguards defendants against misidentification. 565 U.S. ___, 132 S.Ct. 716, 729 (2012). The Court noted that some states allow defendants to present expert testimony on this evidence. *Id.* (citing *State v. Clopten*, 2009 UT 84, A33, 223 P.3d. 1103, 113)("We expect...that in

cases involving eyewitness identification of strangers or near-strangers, trial courts will routinely admit expert testimony [on the dangers of such evidence.]").

Justice Sotomayor, dissenting in *Perry v. New Hampshire*, responded to the majority's reliance on the jury to determine the reliability of eyewitness identification evidence: "...[O]ur cases are rooted in the assumption that eyewitness identifications upend the ordinary expectation that it is 'the province of the jury to weigh the credibility of competing witnesses'.... As noted, jurors find eyewitness evidence unusually powerful and their ability to assess credibility is hindered by a witness' false confidence in the accuracy of his or her identification." 132 S.Ct 716, 737.

Maryland judges have often declined to admit expert testimony on eyewitness identifications. Interestingly, in the Kirk Bloodsworth case in 1986, the Court of Appeals of Maryland held that the trial court did not abuse its discretion in declining to admit expert testimony on the reliability of eyewitness identifications given the discretion of trial judges in the admission of expert testimony. *Bloodsworth v. State*, 307 Md. 164, 186, 512 A.2d 1056, 1067 (1986). The trial judge feared that the evidence would confuse or mislead the jury and that it would be of little value in helping the jury understand the evidence. *Id.* at 178, 512 A.2d at 1063.

More recently, the Court of Appeals of Maryland upheld the trial court's refusal to admit expert testimony on (1) the lack of correlation between a witness's confidence and accuracy of that witness's identification on the grounds that it offered nothing of value to the jury, (2) the adverse affect of the passage of time on

a witness's ability to recall memories on the grounds that it is common knowledge, and (3) the adverse affect of stress on one's recollection of memories on the grounds that it would be confusing to the jury. *Bomas v. State*, 412 Md. 398, 421-22, 987 A.3d 98, 115 (2010).

Furthermore, in *Smiley v. State*, No. 37 SEPT. TERM 2014, 2015 WL 1000055 (Md. Mar. 9, 2015), the Court of Appeals affirmed the decision of the Court of Special Appeals, 216 Md. App. 1, 84 A.3d 190 (2014) and upheld the trial court's refusal to allow expert witnesses to testify on scientific knowledge concerning memory. The Court of Appeals declined to adopt the theories and methodologies of the New Jersey Supreme Court in *State v. Henderson, supra*, either as a matter of State constitutional or evidentiary law. *Id.* at *7. However, the court declared that "trial courts should recognize these scientific advances in exercising their discretion whether to admit such expert testimony in a particular case." *Id.* at *13 (quoting *Bomas v. State*, 412 Md. at 416, 987 A.2d at 112 (2010)).

• Eyewitness Specific Jury Instructions

Eyewitness Specific Jury Instructions
The court in *Henderson v. State* stated that expert testimony might be less necessary with the use of focused eyewitness identification jury instructions. 208 N.J. 208, 219, 27 A.3d 872, 878 (2011). An important judicial function is educating the jury through the use of jury instructions. Currently, Maryland cases do not recognize the need to inform jurors of specific factors that may affect the reliability of eyewitness identifications. A judge need not give a requested instruction if he/

she believes the matter is already covered by instructions given. Md. Rule 4-325; see e.g. *Gunning v. State*, 374 Md. 332, 701 A.2d 374 (1997). Maryland judges often choose not to give these jury instructions because they classify certain eyewitness identification issues as "common sense." See e.g. *Smiley v. State*, 216 Md. App. 1, 38, 84 A.3d 190, 211-12 (2014), *aff'd* No. 37 SEPT. TERM 2014, 2015 WL 1000055, n. 11 (Md. Mar. 9, 2015).

Henderson, however, requires trial judges, in appropriate circumstances, to instruct juries on factors that increase the risk of eyewitness misidentifications. *Henderson v. State*, 208 N.J. 208, 27 A.3d 872 (2011). The court appointed a Special Master who submitted a report on her findings on eyewitness identifications that the court used to create its model instructions. See *State v. Henderson*, N.J. Supreme Court, No. A-8-08 (Special Master's Report).

Two years later, the United States Supreme Court in *Perry v. New Hampshire* recognized the importance of these instructions. While refusing to enlarge the domain of Due Process, the Court specifically noted that eyewitness-specific jury instructions, adopted by many courts as safeguards built into the system, prevent juries from putting too much weight on eyewitness testimony. 132 S.Ct. 716, 729 (2012).

In *Commonwealth v. Gomes*, 470 Mass. 352, 22 N.E.3d 897 (2015), the Supreme Judicial Court of Massachusetts affirmed the defendant's conviction, holding that the trial court did not abuse its discretion by failing to give the defendant's proffered eyewitness identification jury instructions. However, with the guidance of the Report and Recommendations of the Supreme

Judicial Court Study Group on Eyewitness Evidence (July 25, 2013) (Study Group Report), available at <http://www.mass.gov/courts/docs/sjc/docs/eyewitness-evidence-report-2013.pdf>, the court concluded "that there are scientific principles regarding eyewitness identification that are 'so generally accepted' that it is appropriate in the future to instruct juries regarding these principles so that they may apply the principles in their evaluation of eyewitness identification evidence." 470 Mass. at 354, 22 N.E.3d at 900. In an unusual turn, the court included as an Appendix to its opinion a provisional jury instruction regarding eyewitness identification evidence. . *Id.* at 354, 22 N.E.3d at 900-01.

In light of the recently published *Gomes* opinion and one of the co-authors recently published pre-*Gomes* instructions for Maryland, the authors recommend the following proposed model jury instructions for Maryland trial judges to consider in appropriate cases. These instructions are based on integrating some of the provisional jury instructions in *Gomes* with the co-author's published jury instructions, especially § 2.56, Identification of Defendant by Eyewitnesses. See related jury instructions: § 2.57(A), Identification of Defendant by Single Eyewitness; § 2.61, Photographic Identification; § 2.62, Identification Based on Defendant's "Mug Shots": No inference to be Drawn from Police Possession; § 2.23, Credibility of Witnesses; and § 2.57(B), Cross-Racial Identification of Defendant. David E. Aaronson, *Maryland Criminal Jury Instructions and Commentary* (2014-2015 ed., LexisNexis). See also David E. Aaronson, *Cross-*

Racial Identification of Defendants in Criminal Cases: A Proposed Model Jury Instruction, 23 Crim. Just. 4 (2008).

The bracketed language in the following instruction should be used only when the facts of the case suggest that the additional guidance may be helpful to the jurors.

• **Proposed Model Jury Instruction on Eyewitness Identification of Defendant**

You have heard evidence regarding the identification of the defendant(s) as the person(s) who committed the crime. The burden is on the State to prove beyond a reasonable doubt not only that the offense(s) [was] [were] committed, but also that _____ (*insert name(s) of defendant(s)*) (is)(are) the person(s) who committed (it) (them).

You must determine whether the eyewitness testimony of _____ (*insert name(s) of eyewitness(es)*) (is) (are) both truthful and accurate. You may consider any evidence relating to (his)(her) (their) identification(s), including to what extent any witness's testimony should be believed.

A number of factors may affect the accuracy of an identification of the defendant by an alleged eyewitness. To decide whether the identification testimony is sufficiently reliable evidence, you may consider the following factors: [*Include, if applicable, the following factors:*]

1. The witness's opportunity to observe the criminal act(s) and the person(s) committing it (them) including:
 - a. the length of the encounter;
 - b. the distance between the

- c. various parties;
- c. the witness's eyesight and the lighting conditions at the time;
- d. the witness's state of mind at the time of the offense [including the use of alcohol or drugs by the witness];
- e. the witness's degree of attention to the perpetrator during the commission of the offense;
- f. [whether the perpetrator had a distinctive face or feature];
- g. [any disguises worn by the perpetrator];
- h. the accuracy of any prior description of the person committing the offense given by the witness, including any discrepancies between the prior description and the defendant's actual description; and

- i. whether the witness previously knew or had seen the person committing the offense before the incident or before the identification. [Prior exposure to a person can help a witness recognize that person. But it can also lead to a mistaken identification if the witness confuses people (he)(she) saw at different time(s) or place(s). You should consider how many times the witness had seen the defendant and under what circumstances. It is for you to decide whether the prior contact between the witness and the defendant makes the witness identification more accurate, less accurate, or had no effect.]

2. You heard testimony that



_____ (*insert name(s) of witness(es)*) made a statement at the time (he) (she)(they) identified the defendant about (his) (her)(their)level of certainty that the (person)(person shown in the photograph) is, in fact, the person who committed the crime. In general, a witness's level of confidence may or may not be an indication of the reliability of the identification. It is for you to determine, based on all of the circumstances in evidence, how much weight to give to the witness's level of confidence.

3. Any earlier or later identification by the witness that occurred out of court and the circumstances surrounding that identification, including:

- a. the length of time that elapsed between the crime and the identification;
- b. the witness's state of mind when making the identification;
- c. any suggestive circumstances that may have influenced the witness [and any statements or actions by law enforcement officers concerning the identification

or the identification procedure].

4. [Any failure of a witness to make identification, or a mis-identification by the witness].

5. [If you determine that _____'s (*insert name of witness(es)*) out-of-court identification(s) is(are) not reliable, you may still consider _____'s (*insert name of witness(es)*) in-court identification if you find that to be reliable. However, unless the identification here in court resulted from _____'s (*insert name of witness(es)*) observation(s) or perception(s) of a perpetrator during the commission of an offense rather than being the product of an impression gained at an out-of-court identification procedure such as a (line-up)(photo lineup), it should be afforded no weight. The ultimate issues of the trustworthiness of both in-court and out-of-court identifications are for you, the jury to decide.]

6. [You heard evidence that a weapon was involved in the commission of the alleged crime(s) of _____ (*insert alleged criminal offense(s)*), namely a _____ (*insert type of weapon alleged to be used*). You must decide whether the witness saw this weapon during the incident and the circumstances surrounding the witness's perception of the weapon. In general, a weapon can distract the witness and take the witness's attention away from the perpetrator's face, particularly if the

weapon is directed at the witness. As a result, if the crime is of short duration, the presence of a visible weapon may reduce the accuracy of identification. In longer events, this distraction may decrease as the witness adapts to the presence of the weapon and focuses on other details. It is solely for you to determine, considering all the facts and circumstances in evidence, whether a weapon did distract the witness and, if so, how much weight to give to this factor.]

7.[Another factor to consider about the accuracy of a witness's perception is stress or fear. Although moderate levels of stress may improve focus in some circumstances, high levels of stress or fear can have a negative effect on a witness's ability to make an accurate identification.]

8. [When the witness and the perpetrator are of a different race, *see* David Aaronson, *Maryland Criminal Jury Instruction and Commentary (2014-2015 ed., LexisNexis)* §2.57(B), Cross-Racial Identification of Defendant.]

9. Any other factors that have been brought to your attention [by (*expert testimony; other*)] and any evidence that you conclude bears upon the accuracy of the witness's in-court or out-of court identification of the defendant.

You may consider any other direct or circumstantial evidence that may be relevant to the identification of the person who committed the offense(s) charged and either supports or does not

support the identification by the witness(es).

[When the evidence raises a question about whether the defendant was the person who committed the alleged crime(s), the identification of the defendant by a single eyewitness, if believed beyond a reasonable doubt, can be sufficient evidence of defendant's identification.]

You must scrutinize the evidence relating to the identification of the defendant with great care. You may consider the credibility or lack of credibility of the identifying witness, all of the circumstances surrounding a witness's identification of the defendant, and any other facts and circumstances that you deem relevant to determine the reliability of the identification. You alone are to decide whether (a)(any) witness[es] [has] [have] adequately identified the defendant as the perpetrator of the offense. The weight and sufficiency to be given to identification testimony is a matter solely for your determination.

While this proposed jury instruction is more detailed than those generally used, it is much easier for a trial judge to modify or delete language from a pattern jury instruction when it is not needed than to draft a more detailed instruction when it is needed.

Conclusion

As a result of 30 years of scientific research and thousands of studies, a scientific consensus exists on many of the factors affecting the reliability of eyewitness identifications.

Courts, legislatures, police departments, prosecutors, the defense bar, and legal scholars are assessing the implications for the criminal justice system. Mistaken eyewitness identifications are the leading cause of wrongful convictions, playing the primary role in nearly three-quarters of post-conviction DNA exonerations in the United States.

Building on legislation enacted in Maryland in 2014, police departments should be encouraged to adopt and implement the best practices when conducting eyewitness pre-trial identification procedures. At trial, judges should consider admitting expert testimony in appropriate cases to better educate jurors on factors that affect the reliability of eyewitness identifications. Also, detailed jury instructions, such as the proposed model jury instructions recommended above, may better educate jurors on the factors affecting the reliability of eyewitness identifications and reduce the need for expert testimony. Taken together, the above steps can reduce wrongful convictions based on mistaken eyewitness identifications in Maryland.

Mr. Aaronson is a Professor of Law at the Washington College of Law, American University, and a past chair of the MSBA Criminal Law and Practice Section, and currently serves as an ex officio member. He may be reached at daarons@wcl.american.edu. Ms. Fox is a graduate (J.D. 2015) of the Washington College of Law, American University. She served as Professor Aaronson's research assistant as a second and third year law student.