
EYEWITNESS IDENTIFICATIONS: RECOMMENDATIONS TO THE THIRD CIRCUIT

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INTRODUCTION

Just before two o'clock in the afternoon on October 22, 1991, two high school students, Chedell Williams and Zahra Howard, ascended the steps of the Fern Rock train station in North Philadelphia, planning to take a train back to their homes.¹ Seemingly out of nowhere, two men appeared, blocked the girls' way up to the station, and demanded Chedell's earrings. Terrified, the girls bolted in opposite directions. The two men followed Chedell. They soon caught her and tore out her earrings. Then "[o]ne of the men grabbed her, held a silver handgun to her neck, and shot her."² The perpetrators fled. Chedell was pronounced dead within the hour.³

Police soon focused their investigation on James Dennis, who lived relatively close to the train station in the Abbotsford Homes projects. Detectives would later explain that they heard rumors that Dennis was involved in the shooting, though they were at that time "unable to identify the source of the rumors."⁴ The detectives obtained preliminary descriptions of the perpetrators from three eyewitnesses.⁵ These initial descriptions did not align well with Dennis's actual appearance. Nonetheless, a few eyewitnesses identified Dennis during subsequent photo lineups, live lineups, and the trial.⁶ In presenting the government's case, the prosecution relied heavily on these eyewitness identifications.⁷ Dennis was found guilty of "first-degree murder, robbery, carrying a firearm without a license, criminal conspiracy, and possession of an instrument of a crime."⁸ He was sentenced to death.

Then, after spending twenty-four years challenging his conviction, Dennis was granted a conditional writ of habeas corpus.⁹ In *Dennis v. Secretary, Pennsylvania Department of Corrections*, the Third Circuit Court of Appeals found that prosecutors had improperly withheld evidence that bolstered Dennis's alibi and implicated another man in Chedell's death.¹⁰

Dennis is most notable not for unearthing aberrant prosecutorial misconduct, but for Chief Judge Theodore McKee's lengthy concurrence,

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1. *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 269 (3d Cir. 2016).
 2. *Id.*
 3. *Id.*
 4. *Id.*
 5. *Id.* at 270.
 6. *Id.* at 270–71.
 7. *Id.*
 8. *Id.* at 275.
 9. *Id.* at 269.
 10. *Id.* at 275, 287.

which illuminated endemic failures by courts and police departments to understand and mitigate the unreliability of eyewitness identification evidence.¹¹ Shortly after issuing its decision in *Dennis*, the Third Circuit formed a task force instructed to “make recommendations regarding jury instructions, use of expert testimony, and other procedures and policies intended to promote reliable practices for eyewitness identification and to effectively deter unnecessarily suggestive identification procedures, which raise the risk of a wrongful conviction.”¹² The Task Force will rely on scientific research and is co-chaired by Chief Judge McKee.¹³ By establishing this Task Force, the Third Circuit recognized that not only is there a problem with the way the criminal justice system deals with eyewitness identification evidence, but also that unreliable identifications correspond to false convictions. Chief Judge McKee’s concurrence in *Dennis* and the commissioning of the Task Force demonstrate that the legal system is opening up to implementing scientifically proven methods to lessen the problem of false identifications and convictions.¹⁴

This Note will concentrate on how system variables impact the reliability of eyewitness identifications.¹⁵ “System variables are the procedures and practices law enforcement use to elicit eyewitness identifications.”¹⁶ Because system variables are generally within the exclusive control of law enforcement, they present the most straightforward method through which the criminal justice system can make eyewitness identifications reliable, thus decreasing the risk of false convictions. This Note will focus on how the criminal justice system can improve the eyewitness identification process. In particular, this Note evaluates suggested reforms for photo arrays, live lineups, and jury instructions.

This Note will present simple, scientifically proven approaches to reform that will lead to a more just system and more accurate identifications and convictions. The Third Circuit Task Force should adopt recommended methods found in the volumes of psychological research written on eyewitness identification and analyzed in detail in this Note. Through a combination of legislative and judicial action, the system can be dramatically improved with minimal cost and inconvenience. Part I of this Note will

11. See generally *id.* at 313–44 (McKee, C.J., concurring).

12. Order Establishing Third Circuit Task Force on Eyewitness Identifications (Sept. 9, 2016), http://www.ca3.uscourts.gov/sites/ca3/files/TFEyewitnessIdOrder_11042016.pdf.

13. *Id.*

14. See *Dennis*, 834 F.3d at 313 (McKee, C.J., concurring); Order, *supra* note 12.

15. While there are other factors that contribute to unreliable eyewitness identification evidence, this Note will only focus on system variables.

16. *Dennis*, 834 F.3d at 321 (McKee, C.J., concurring).

examine *Dennis* in-depth and demonstrate how failures on the part of the criminal justice system led to false identifications and Dennis's conviction. Part II will analyze the scientific research concerning system variables as well as the intersection of science and the criminal justice system. Part III will discuss current procedures for photo arrays, live lineups, and jury instructions, and their deficiencies. Part IV will discuss how different states have tried to solve these problems. Part V will make recommendations to the Third Circuit Task Force.

I. *DENNIS V. SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS*

As Chief Judge McKee examined the data and scientific research on eyewitness identifications, he came to the conclusion that cases like *Dennis* are not mere anomalies; instead, they are serious miscarriages of justice that occur too frequently and should be rectified by the judiciary.¹⁷ Even when multiple eyewitnesses identify a person, those identifications can be unreliable and “[a]lmost without exception, eyewitnesses who identify the wrong person express complete confidence that they chose the real perpetrators.”¹⁸ Even though three people identified the defendant as the perpetrator in *Dennis*, the way those identifications were obtained raised “serious questions about the accuracy of those identifications.”¹⁹ Perhaps most troubling, the jury had no way of knowing the unreliable nature of the identifications, and as a result, an innocent man spent more than twenty years on death row.²⁰

On the day Chedell Williams was murdered, the police obtained initial reports from eyewitnesses to the crime.²¹ Five eyewitnesses claimed they could identify the shooter.²² These five eyewitnesses were at varying distances from the shooter when the crime took place. The eyewitnesses said the shooter wore a red sweat suit and wielded either a dull silver gun or a shiny, chrome-plated gun. One of the key eyewitnesses told police that he “would be able to identify the shooter if he saw him again,” as he was only “about six feet from the perpetrators” and looked directly at the shooter as the shooter ran away.²³

17. *Id.* at 313–16.

18. *Id.* at 315.

19. *Id.*

20. *Id.* at 316.

21. *Id.* at 317.

22. *Id.*

23. *Id.*

After the police heard rumors that the shooter was Dennis, they arranged for several eyewitnesses to see if they could identify Dennis as the shooter by placing his picture in a photo array.²⁴ The police “compiled three arrays of eight photographs each.”²⁵ The first array was used to identify the shooter, the second to identify the accomplice, and the third to give the eyewitnesses an opportunity to identify a suspect. Police composed the photo arrays with pictures of seven innocent fillers and a recently taken photo of Dennis. They then individually showed the photo arrays to each eyewitness and instructed each witness to “[s]ee if you recognize anyone.”²⁶ Four of the nine eyewitnesses stated that Dennis looked familiar, but no eyewitness expressed a high degree of confidence in their identification at the time of the photo array.²⁷ Following at least two of these uncertain identifications, the photo array administrator asked the eyewitnesses if they were confident in their identifications; when responding to this question, two eyewitnesses reported greater confidence in their identifications.²⁸ The remaining five eyewitnesses were not able to identify the shooter with any degree of certainty.²⁹

Around a month and a half later, police conducted a live lineup, which included six persons: Dennis and five fillers.³⁰ Only the four eyewitnesses that identified Dennis in the prior photo arrays were present at this live lineup, and “[t]he police had those four witnesses view the lineup at the same time, in the same room.”³¹ The police gave instructions to each eyewitness to carefully look at all of the lineup participants to see if they recognized any one of them as the suspect, and they also instructed that none of the eyewitnesses had to make an identification if they could not recognize the suspect in the lineup.³² Two of the eyewitnesses somewhat confidently pointed out Dennis, one eyewitness was less sure, and one—the eyewitness who initially claimed that he was so close to the perpetrator that he could easily make an identification—identified a filler.³³ Later at the trial, the prosecution put three eyewitnesses on the stand, all of whom confidently

24. *Id.* at 318. Police never clarified where the rumors originated or why the detectives decided to further investigate the rumors. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 319.

30. *Id.*

31. *Id.*

32. *Id.* at 320.

33. *Id.*

pointed at Dennis, “even though all three had expressed doubt in their earlier identifications.”³⁴

II. HISTORY OF THE SCIENTIFIC AND JUDICIAL ANALYSIS OF EYEWITNESS IDENTIFICATION EVIDENCE

The debate about what role science should play in eyewitness identification evidence is not new. In 1908, Hugo Münsterberg, a pioneering psychologist, published *On the Witness Stand*.³⁵ In it, Münsterberg profiles different judicial and police practices and analyzes them to see how the judicial system could improve with respect to eyewitness testimony.³⁶ To illustrate the need to incorporate science into the criminal justice system, he detailed an experience that occurred after his family home was burglarized.³⁷ As an eyewitness at the burglary trial, he recounted various details about the robbery.³⁸ But after comparing his testimony to the crime-scene evidence, Münsterberg realized there were significant errors in his testimony and that, despite his best intentions, some of his memories were distorted.³⁹ He emphasized that human memory is inherently faulty and that perhaps the greatest impediment to justice is not intentional lies on the part of the eyewitness but the unintentional failings of memory.⁴⁰ Finally, he spoke to the issue of how the judicial system has failed to put into practice the scientific research of the time.⁴¹

Münsterberg was repudiated by John Wigmore for what Wigmore viewed as an uncouth attack on the legal profession, an attack that was not justified by the scientific research Münsterberg touted.⁴² Wigmore viewed Münsterberg as a popular scientist—someone more interested in fame than properly integrating science and the law.⁴³ While Wigmore criticized Münsterberg, he himself was a strong proponent of the use of psychology in the legal profession.⁴⁴ This debate, which took place over a century ago, demonstrates that even among those who believe science should play a

34. *Id.*

35. HUGO MÜNSTERBERG, *ON THE WITNESS STAND: ESSAYS ON PSYCHOLOGY AND CRIME* (1908).

36. *See generally id.*

37. *Id.* at 39–44.

38. *Id.* at 39.

39. *Id.* at 39–40.

40. *See id.* at 40, 67–68.

41. *See generally id.*

42. *See* James M. Doyle, *Ready for the Psychologists: Learning from Eyewitness Errors*, 48 CT. REV. 4, 4–5 (2012).

43. *See id.* at 4.

44. *Id.*

greater role in evidence, it is difficult to achieve a consensus on the specifics.

Today, there are some in the legal profession who believe few or no reforms are necessary to bring science and evidence together. For example, Justice Antonin Scalia, in his concurrence in *Kansas v. Marsh*, rejected the idea that the way the justice system handles eyewitness identifications is deeply flawed.⁴⁵ He wrote his *Marsh* concurrence primarily as a response to Justice Souter's dissent, in which Souter acknowledged the primary risk of capital punishment: that the defendant is innocent.⁴⁶ Scalia claimed that because Souter did not list an instance when an innocent person was put to death, this risk is overstated.⁴⁷ Scalia went further, claiming that DNA evidence has confirmed guilt more often than it has proved the innocence of convicted persons.⁴⁸ He also claimed that the recent reversals of false convictions are not the result of "the operation of some outside force to correct the mistakes of our legal system, rather than *as a consequence of the functioning of our legal system*."⁴⁹ Scalia stated that capital cases are actually given heightened judicial scrutiny, which leads to better and more accurate results, as the appeals process can be very lengthy in these cases.⁵⁰ Scalia echoed the claims of many who say that while the system may be imperfect, it still functions at a high rate of accuracy and needs minimal reform, if any.⁵¹

Scalia's assessment contrasted with that of Chief Judge McKee in *Dennis*, in which McKee tied together the best psychological research on eyewitness identifications and recognized that the criminal justice system must improve in order to be more accurate.⁵² McKee began by quoting Justice Brennan, who had stated over three decades prior that juries are likely to believe eyewitness testimony over other types of evidence, especially when the eyewitness is confident.⁵³ "James Dennis was sentenced to death because three eyewitnesses appeared at trial and confidently pointed their fingers at him when asked if they saw Chedell Williams' killer in the courtroom."⁵⁴ Because the jury was not properly instructed as to how to handle eyewitness identifications by the court and the police department was

45. See *Kansas v. Marsh*, 548 U.S. 163, 182–99 (2006) (Scalia, J., concurring).

46. *Id.* at 185–86.

47. *Id.* at 188.

48. *Id.*

49. *Id.* at 193.

50. *Id.* at 198.

51. *Id.*

52. See generally *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 313–44 (3d Cir. 2016) (McKee, C.J., concurring).

53. *Id.* at 313.

54. *Id.*

not properly trained, an innocent man was sentenced to death.⁵⁵ His purpose in writing his lengthy and thoughtful concurrence was to push the law to catch up with the science and persuade both police departments and juries to reform.⁵⁶ Reform is critical as mistaken identifications “erode public confidence in the criminal justice system as a whole.”⁵⁷

The Supreme Court itself recognized the problems inherent in eyewitness identifications in *United States v. Wade*.⁵⁸ In *Wade*, the Court declared that “the vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.”⁵⁹ The Court cited “the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification” as a major factor contributing to misidentification.⁶⁰ The Court’s opinion recognized the danger that once an eyewitness has identified someone during a lineup, that eyewitness’s confidence in that identification can be artificially inflated. Improper suggestions and poor lineup construction during the lineup process can taint an entire trial.⁶¹

III. PHOTO ARRAYS, LINEUPS, JURY INSTRUCTIONS, AND SYSTEM VARIABLES

In the United States, eyewitnesses identify some 77,000 suspects annually.⁶² Often, juries place great weight on eyewitness identifications and, accordingly, the identifications provide powerful evidence against a defendant.⁶³ Despite the importance of eyewitnesses, their accounts are generally less accurate than most people—including judges, jurors, and attorneys—would assume.⁶⁴

In one study, 590 participants were tested to determine if, after having spoken to a woman for fifteen seconds, they could later identify that same woman.⁶⁵ During a live lineup where the woman was present, only forty-

55. *Id.*

56. *Id.*

57. *Id.* at 316 (quoting COMM. ON SCI. APPROACHES TO UNDERSTANDING AND MAXIMIZING THE VALIDITY AND RELIABILITY OF EYEWITNESS IDENTIFICATION IN LAW ENFORCEMENT AND THE COURTS ET AL., IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 22 (2014)).

58. See generally *United States v. Wade*, 388 U.S. 218 (1967).

59. *Id.* at 228.

60. *Id.*

61. *Id.* at 231–33.

62. DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 50–51 (2012).

63. *Id.*

64. *Id.* at 51, 53.

65. A. Daniel Yarmey, *Eyewitness Recall and Photo Identification: A Field Experiment*, 10 PSYCHOL. CRIME & L. 53, 53 (2004).

nine percent of the participants were able to correctly identify the woman.⁶⁶ While 62% of participants correctly refrained from making an identification when the target was absent from the lineup, the remaining thirty-eight percent of participants made an identification.⁶⁷

Police departments generally use three types of methods to obtain identifications from eyewitnesses: showups, photo arrays, and live lineups.⁶⁸ But how police departments administer these three methods varies greatly and lacks uniformity across jurisdictions.⁶⁹ With thousands of police departments and courts, it is difficult to obtain a clear picture of how different jurisdictions obtain eyewitness identifications.⁷⁰ Many police departments have no standing procedures or policies, and many police officers are not aware of how system variables, which police control, can influence the reliability of this type of evidence.⁷¹

This Section describes how photo arrays, live lineups, and jury instructions function and how these processes often fall short of their objective to obtain reliable identifications. Show-ups, ad hoc procedures where law enforcement officers bring eyewitnesses to a location to show them a suspect, will not be discussed at length.⁷²

A. PHOTO ARRAYS AND LIVE LINEUPS DEFINED

Photo arrays and live lineups constitute important ways in which police can obtain eyewitness identifications.⁷³ Police regularly use both photo arrays and live lineups in their investigative efforts.⁷⁴ Though live lineups are generally considered more accurate than photo arrays, they are conducted less frequently.⁷⁵ In most photo arrays, the eyewitness is presented with a number of photographs and instructed to identify the photo of the person who the eyewitness believes committed the crime.⁷⁶ A defendant does not have the right to have an attorney present during a photo array.

Like photo arrays, live lineups are used by police either to determine or

66. *Id.*

67. *Id.*

68. SIMON, *supra* note 62, at 51.

69. *Id.*

70. *Id.*

71. *Id.* at 76.

72. For an in-depth discussion of show-up procedures, *see id.* at 70–71, 77–78.

73. *Id.* at 51–52.

74. *Id.* at 52.

75. *Id.* at 69.

76. *Id.* at 51–52.

confirm the identity of a suspect.⁷⁷ In a live lineup, an eyewitness is presented with a number of people and asked to identify the person the witness believes to be the suspect.⁷⁸ Live lineups can occur either before or after an indictment.⁷⁹ Most live lineups in the United States contain around five participants.⁸⁰ Eyewitnesses either view the lineup participants sequentially or simultaneously.⁸¹ Sequential lineups compel the eyewitness to make an absolute judgment of identity, while simultaneous lineups allow the eyewitness to make a relative judgment of identity.⁸²

In a sequential lineup the eyewitness views the suspect and fillers one at a time. . . . In the original sequential lineup for each person (i.e., the suspect and fillers) the eyewitness either identifies the person as the culprit or not. If the eyewitness makes an identification the procedure ends. If no identification is made then the next person is shown to the eyewitness.⁸³

In a simultaneous lineup, the eyewitness is presented with all the lineup participants at one time.⁸⁴

B. SYSTEM VARIABLES AND ACCURACY

As Chief Justice McKee stated in *Dennis*, system variables are within the control of law enforcement.⁸⁵ Because police departments control the practices and procedures used to acquire eyewitness identifications, the Third Circuit Task Force (“Task Force”) should examine the scientific research concerning the accuracy of those procedures. Studies have identified simple, cost-effective ways to adjust system variables to improve the reliability of eyewitness identification evidence.

Though photo arrays and live lineups are most accurate when administered blindly—that is, when the person administering the lineup does not know the identity of the suspect—very few police departments conduct blind lineups and arrays.⁸⁶ In an experiment, students were randomly

77. *Id.* at 70.

78. *Id.*

79. *Id.* at 81.

80. *Id.* at 72.

81. *Id.* at 71.

82. *Id.*

83. Daniel B. Wright, *The Impact of Eyewitness Identifications from Simultaneous & Sequential Lineups*, 15 *MEMORY* 746, 748 (2007).

84. SIMON, *supra* note 62, at 71.

85. *Dennis v. Sec’y, Pa. Dep’t of Corr.*, 834 F.3d 263, 321 (3d Cir. 2016) (McKee, C.J., concurring).

86. Steve D. Charman & Vanessa Quiroz, *Blind Sequential Lineup Administration Reduces Both False Identifications and Confidence in Those False Identifications*, 40 *LAW & HUM. BEHAV.* 477, 477, 483–84 (2016).

assigned to play the role of either a lineup administrator or a mock eyewitness.⁸⁷ The mock eyewitnesses were shown a video of a theft in which they were exposed to the perpetrator's face for twenty-five seconds.⁸⁸ One group, who was assigned the role of lineup administrator, was told the identity of the suspect, while the other group was not.⁸⁹ The researchers found that the non-blind administrators often smiled when the mock eyewitness viewed the suspect in the photo array and smiled after the eyewitness identified the suspect.⁹⁰ The non-blind photo arrays resulted in significantly more false identifications than the photo arrays that were administered blind.⁹¹ The researchers also found that the non-blind administrators affected eyewitnesses' confidence in their selections.⁹²

Feedback from a non-blind administrator can manipulate eyewitnesses' confidence in their identifications.⁹³ This is even true when the eyewitness mistakenly identifies the wrong person; feedback confirming an eyewitness's mistaken identification impairs the eyewitness's memory of the original perpetrator.⁹⁴ When an administrator makes statements like "[w]e thought this might be the one," "[t]hat's the one you picked out in the photo," or even more subtle, non-verbal communications, eyewitnesses' confidence can increase and their ability to recognize the actual suspect can decrease.⁹⁵ "Relative to a no feedback condition, witnesses who received good-memory feedback expressed higher post-identification confidence in a subsequent lineup identification, whereas those who received poor-memory feedback evinced lower confidence."⁹⁶

Jurisdictions, as well as experts, disagree as to the advantages of using sequential lineups instead of simultaneous lineups. Some jurisdictions have reformed their procedures in order to have eyewitnesses make absolute judgments of identity, while others have cited evidence that claims relative judgments of identity are more reliable.⁹⁷ A study that purports to go against

87. *Id.* at 477.

88. *Id.* at 480.

89. *Id.* at 477.

90. *Id.*

91. *Id.*

92. *Id.* at 484.

93. Laura Smalarz & Gary L. Wells, *Confirming Feedback Following a Mistaken Identification Impairs Memory for the Culprit*, 38 *LAW & HUM. BEHAV.* 283, 283 (2014).

94. *Id.*

95. *Id.*

96. Michael R. Leippe, Donna Eisenstadt & Shannon M. Rauch, *Cueing Confidence in Eyewitness Identifications: Influence of Biased Lineup Instructions and Pre-Identification Memory Feedback Under Varying Lineup Conditions*, 33 *LAW & HUM. BEHAV.* 194, 197 (2009).

97. See *infra* Part IV (discussing how various jurisdictions have either adopted or rejected this

the grain of recent evidence—in that it supports simultaneous lineups—found that eyewitness identifications based on relative judgments are less reliable than those based on absolute judgments.⁹⁸ “[A] witness using an absolute judgment makes an identification of a lineup member if the match between that lineup member and the witness’s memory of the perpetrator is sufficiently high,” while a relative judgment can be made when the match is relatively better than any other member of the lineup.⁹⁹ The study also found that “witnesses’ reliance on relative judgments undermines the reliability of the identification evidence, and increases the relative risk of a false identification that can ultimately lead to a wrongful conviction.”¹⁰⁰ Despite this recent study, the scientific community is still somewhat divided on this issue, with some studies claiming that there is little difference in reliability between the two approaches.¹⁰¹

Lineup instructions given to eyewitnesses before they make identifications impact the reliability of any identification that follows.¹⁰² Biased instructions occur when “the lineup administrator fails to explicitly instruct the eyewitness that the perpetrator may not be present in the lineup and that it is permissible to identify no one.”¹⁰³ In some instances, biased instructions “compel[] witnesses to adopt a lower criterion for accepting their sense of recognition of the most familiar-looking lineup member as correct . . . and thereby enhances their confidence in making a positive identification of that lineup member,” and can also artificially increase eyewitnesses’ confidence in their identifications because they may assume the suspect is in the lineup.¹⁰⁴ In one study, participants viewed a video of a mock theft and were instructed to identify a suspect from both a thief-present and thief-absent live lineup.¹⁰⁵ One group was given biased instructions before they attempted to make an identification, while the other group was not. The mock eyewitnesses’ confidence was then measured. The results found that “[b]iased instructions and positive feedback increased confidence

reform).

98. Steven E. Clark, Michael A. Erickson & Jesse Breneman, *Probative Value of Absolute and Relative Judgments in Eyewitness Identification*, 35 *LAW & HUM. BEHAV.* 364, 364 (2011).

99. *Id.*

100. *Id.* at 377.

101. *See, e.g.*, COMM. ON SCI. APPROACHES TO UNDERSTANDING & MAXIMIZING THE VALIDITY & RELIABILITY OF EYEWITNESS IDENTIFICATION IN LAW ENF’T & THE COURTS ET AL., IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 104 (2015) [hereinafter COMM. ON SCI.].

102. Leippe, *supra* note 96, at 196, 204.

103. *Id.* at 196.

104. *Id.*

105. *Id.* at 194.

and ratings of eyewitnessing conditions.”¹⁰⁶ The study also found that eyewitnesses’ confidence in their identifications only modestly relates to the accuracy of those identifications.¹⁰⁷

C. JURY INSTRUCTIONS

Jury instructions that provide the jury with information on how to use eyewitness identifications could improve a jury’s evaluation of eyewitness evidence, thus improving the deliberation process. Instructions can inform the jury how memory works, how an identification was obtained, and dismiss the myth of the infallibility of the identification process.¹⁰⁸ Jury instructions regarding eyewitness identifications and their use in trials typically contain some qualifications about their accuracy, but these instructions are often generic and do not properly convey scientific realities.¹⁰⁹ Some experts claim that most current jury instructions do not increase a jury’s sensitivity to possible errors in eyewitness testimony.¹¹⁰ This is because jurors weigh eyewitness evidence too heavily and because they are “often uncritical of the reliability of the testimony.”¹¹¹

For example, the instructions received by the jury in *Dennis* were “plain vanilla” and unhelpful.¹¹² The instructions were long, confusing, and did not include any “explanation of the relevant system or estimator variables that so crucially impact the reliability of witness identifications.”¹¹³ Jurors are often not aware, or at least do not receive instructions from the court, of possible inaccuracies of eyewitness testimony generally and of eyewitness identifications specifically.¹¹⁴ Studies have shown that jurors do not understand how memory functions or how memory can be influenced and manipulated.¹¹⁵ Juries have limited knowledge about memory and rely on eyewitness confidence, an eyewitness’s memory for minor details, and the consistency of an eyewitness’s testimony, while ignoring the impact system variables have on the reliability of eyewitness identifications.¹¹⁶ The myth

106. *Id.*

107. *Id.*

108. *See Dennis v. Sec’y, Pa. Dep’t of Corr.*, 834 F.3d 263, 341–44 (3d Cir. 2016) (McKee, C.J., concurring).

109. *Id.* at 342.

110. *See, e.g.*, Richard A. Wise et al., *An Examination of the Causes and Solutions to Eyewitness Error*, FRONTIERS PSYCHIATRY, Aug. 14, 2014, at 1, 4.

111. Wright, *supra* note 83, at 747.

112. *Dennis*, 834 F.3d at 342 (McKee, C.J., concurring).

113. *Id.*

114. *Id.*

115. *See generally* Wise, *supra* note 110.

116. *Id.* at 1–2.

that people can never forget a face or that an encounter with an armed suspect increases or enhances one's ability to identify a suspect can lead to a jury overvaluing an identification during its deliberations.¹¹⁷

IV. DIFFERING JURISDICTIONAL APPROACHES

In the past decade, a few jurisdictions have reformed procedures with the goal of improving the reliability of eyewitness identification evidence. This Section will discuss three states in particular: New Jersey, Oregon, and North Carolina. These jurisdictions used scientific research to improve how police departments obtain identifications and to ensure that courts only admit into evidence eyewitness identifications that have indicia of truth and reliability. New Jersey and Oregon addressed eyewitness identification procedures through their respective Supreme Courts.¹¹⁸ North Carolina's legislature instituted reforms statutorily.¹¹⁹ In addition to analyzing the reforms adopted by these states, this Section will evaluate proposals from experts in the fields of law and psychology who have proposed procedures and practices to increase the reliability of eyewitness identification evidence.

A. NEW JERSEY

Recently, the Supreme Court of New Jersey attempted to improve the reliability of eyewitness identification evidence with its decision in *State v. Henderson*.¹²⁰ The court overhauled its test for the admission of eyewitness identification evidence.¹²¹ The decision called for blind administration of photo arrays and live lineups, new pre-lineup instructions, the creation of rules for lineup construction, and new record keeping procedures.¹²² The court also determined that jury instructions needed to improve in order to better equip juries in their process of deliberation.¹²³

In *Henderson*, an eyewitness to a crime was shown a photo array that included eight photographs—one of the suspect and seven of innocent fillers.¹²⁴ Before the photo array was administered, the eyewitness was given instructions that were standard in New Jersey police departments.¹²⁵ He was

117. *Dennis*, 834 F.3d at 342–43 (McKee, C.J., concurring).

118. *See generally* *State v. Lawson*, 291 P.3d 673 (Or. 2012); *State v. Henderson*, 27 A.3d 872 (N.J. 2011).

119. N.C. GEN. STAT. § 15A-284.50–.53 (2015).

120. *See Henderson*, 27 A.3d at 896–903.

121. *See id.*

122. *Id.* at 896–900.

123. *Id.* at 878.

124. *Id.* at 880–81.

125. *Id.*

informed that an administrator would show him photos sequentially and the perpetrator's photo was not necessarily included in the array.¹²⁶ The eyewitness also was instructed that the suspect could have either gained or lost weight since the incident and that facial hair could easily be altered.¹²⁷ The photos were shown to the eyewitness in an order that was random to the administrator.¹²⁸ During the photo array, the eyewitness narrowed the photos down to two, but he could not make a clear identification.¹²⁹ Police later testified that during this point in the photo array, the eyewitness was excited, so police removed him from the room, calmed him down for one to five minutes, and then showed him the eight photos again.¹³⁰ Police claimed that the eyewitness was then quickly and confidently able to identify the police suspect. The eyewitness later testified that he felt pressured to make an identification and that police pushed him to identify the suspect.¹³¹

The jury instructions provided at trial did not inform the jury about the influence suggestive police behavior can have on the reliability of identifications.¹³² The instructions were long, confusing, and included scientific language most likely unfamiliar to jurors, and to determine whether the identification was reliable, the instructions asked jurors to consider a number of competing and seemingly contradictory factors.¹³³

To improve the reliability of eyewitness identifications, the New Jersey Supreme Court addressed system variables within the control of the criminal justice system that it believed would best improve the reliability of identification evidence.¹³⁴ The court determined that because even subtle, non-intentional suggestions by police during the identification process can influence memory, photo arrays and live lineups should be administered blindly.¹³⁵ Because police departments have limited resources, the court suggested that departments could use the "envelope method" for the administration of photo arrays.¹³⁶ With the envelope method, "an officer who knows the suspect's identity places single lineup photographs into different envelopes, shuffles them, and presents them to the witness. The

126. *Id.*

127. *Id.* at 881.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *See id.* at 882–83.

133. *Id.*

134. *See id.* at 892, 896.

135. *Id.* at 896–97.

136. *Id.* at 897.

officer/administrator then refrains from looking at the envelopes or pictures while the witness makes an identification.”¹³⁷ This method would decrease the likelihood of improper suggestion by the police.¹³⁸

The court ordered that before administering a photo array or a live lineup, New Jersey police must always instruct the eyewitness that the person who committed the crime may or may not be present and that the eyewitness should not feel pressure to make an identification.¹³⁹ In order to decrease the possibility of an eyewitness simply guessing the identity of the suspect, every lineup should be composed of fillers who look similar to the suspect, so the suspect does not stand out.¹⁴⁰ This is so an eyewitness’s confidence is not artificially inflated by a perception that the identification process was “easy.”¹⁴¹ There should be at least five fillers in a live lineup, and lineups should not feature more than one suspect.¹⁴² The court also reminded police departments that all lineups should be recorded and preserved so that courts can later determine if the lineup was properly constructed.¹⁴³

In order to avoid improper feedback from police that could inflate eyewitnesses’ confidence in their identification, the court held that “law enforcement officers should make a full record—written or otherwise—of the witness’ statement of confidence once an identification is made.”¹⁴⁴ Officers should not allow eyewitnesses to view the suspect multiple times, as this can artificially increase confidence in their identification.¹⁴⁵ The New Jersey Supreme Court took no position on whether police departments should favor sequential or simultaneous lineups.¹⁴⁶ The court believed that there was insufficient scientific evidence to show a preference for either and that more studies needed to be conducted before the court could state a preference.¹⁴⁷

To better help jurors understand the eyewitness identification process, the court reformed jury instructions.¹⁴⁸ Lay people, on the whole, do not understand how memory works.¹⁴⁹ The court identified the common

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 897–98.

141. *Id.* at 898.

142. *Id.*

143. *Id.*

144. *Id.* at 900.

145. *Id.* at 900–01.

146. *Id.* at 901–02.

147. *Id.*

148. *Id.* at 910–11.

149. *Id.* at 910.

misconceptions that memory is similar to a video recording and that memory cannot be contaminated or distorted by outside influence.¹⁵⁰ Juries also tend to give disproportionate weight to the confidence of the eyewitness.¹⁵¹ In order to better equip the jury to evaluate eyewitness identifications, jury instructions need to clearly and comprehensively inform the jury about the science of eyewitness identification and the nature of memory.¹⁵² However, jury instructions should not overwhelm the jury and must be helpful to jurors.

B. OREGON

In *State v. Lawson*, the Supreme Court of Oregon overhauled its test for determining the admissibility of eyewitness identifications.¹⁵³ In *Lawson*, the court consolidated two cases, in which the admissibility of eyewitness identification evidence was at issue.¹⁵⁴ Two defendants were separately tried and convicted, at least in part because of eyewitness identifications that “had been subject to an unduly suggestive police procedure in the course of identifying” the defendants.¹⁵⁵

The test used by Oregon courts during the defendants’ trials to evaluate the admissibility of eyewitness identification evidence was fairly permissive, and it failed in its purpose of preventing suggestive and inaccurate identifications from being admitted into evidence.¹⁵⁶ The test was comprised of generic, unhelpful factors that attempted to make sure the time between the event and the identification was minimized, the certainty of the eyewitness was high, and the eyewitness had a chance to clearly see the suspect before the identification was admitted.¹⁵⁷

In one of the cases consolidated in *Lawson*, a victim was shot in the chest and admitted to the hospital, where she was questioned by police as to the identity of her attacker.¹⁵⁸ The victim was shown a black-and-white photo array while heavily medicated, sedated, and restrained in her hospital bed.¹⁵⁹ Moreover, because her injuries necessitated a breathing tube, the victim could only respond to police questioning by nodding or shaking her head. At first, the victim did not identify anyone from the photo array;

150. *Id.* at 894–95.

151. *Id.* at 910–11.

152. *See id.* at 910–11, 924–25.

153. *See State v. Lawson*, 291 P.3d 673, 688 (Or. 2012).

154. *Id.* at 678.

155. *Id.*

156. *Id.* at 683–84, 688–89.

157. *Id.* at 683–84.

158. *Id.* at 678–79.

159. *Id.* at 679.

however, she eventually nodded “yes” to leading questions regarding the suspect’s identity.¹⁶⁰ The victim later had no recollection of this interview.¹⁶¹

Approximately two weeks later, when the victim could speak, she said that she was not able to identify the person who shot her; the following month, she was not able to pick the defendant out of another photo array, but shortly thereafter the police informed her that she had identified someone during her stay in the hospital.¹⁶² After hearing this, the victim said she recognized the man police had identified as a suspect; however, she stated that she was not certain he was the perpetrator.¹⁶³ At a much later date, and after police repeatedly exposed the victim to the suspect’s photo, the victim identified the suspect at a live lineup and even testified at trial that she “always knew it was him.”¹⁶⁴ Based in part on this evidence, the defendant was convicted.¹⁶⁵ On appeal, the Oregon Supreme Court held that the identification should not have been admitted into evidence as it was subject to suggestive police procedure.¹⁶⁶

In the case, the Oregon Supreme Court examined scientific research about system variables that the court believed could prevent false or unreliable identifications from being admitted into evidence.¹⁶⁷ Based on their examination of the science, the court mandated judicial and police department reforms.¹⁶⁸ Additionally, the *Lawson* court shifted the defendant’s burden to prove suggestibility onto the prosecution.¹⁶⁹

In order to improve the reliability of eyewitness identification evidence, the Oregon Supreme Court found that the criminal justice system needed to improve several system variables, which are in the exclusive control of the justice system.¹⁷⁰ The court called for the blind administration of photo arrays to prevent an administrator from improperly influencing an identification.¹⁷¹ When police administer photo arrays or live lineups, the administrator should inform eyewitnesses that they do not have to make an identification, as the perpetrator may not be in the lineup or array.¹⁷² The

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 679–80.

164. *Id.* at 680.

165. *Id.*

166. *Id.* at 698.

167. *Id.* at 685–88.

168. *Id.* at 698.

169. *Id.* at 693–94.

170. *Id.* at 685.

171. *Id.* at 686.

172. *Id.*

court called for live lineups to be constructed using fillers that look physically similar to the suspect so the suspect does not stand out.¹⁷³ Furthermore, live lineups and photo arrays in Oregon must now be conducted sequentially so that the eyewitness makes an absolute judgment of identity instead of a relative judgment.¹⁷⁴

The fact that the victim in *Lawson* viewed the suspect multiple times was a major factor in determining the identification was unreliable.¹⁷⁵ When police continually expose a victim to images of one suspect, the victim tends to become more familiar with the suspect's face; this can result in the victim eventually identifying that suspect with confidence, even if initially the victim was unsure of the perpetrator's identity. Because police continually exposed the victim to images of the suspect, the victim became more familiar with his face, so much so that the victim could eventually identify him with confidence, even though initially the victim was unsure of the perpetrator's identity.¹⁷⁶ For this reason, after *Lawson*, Oregon police are required to avoid multiple viewings when conducting photo arrays and live lineups.¹⁷⁷

The opinion did not elaborate in-depth about how Oregon courts should craft jury instructions on how to evaluate eyewitness identifications, but the court suggested that future jury charges should include reference to system variables that influence reliability.¹⁷⁸ The court cited an Oregon evidence rule that stated identifications must be helpful to the trier of fact.¹⁷⁹ Therefore, identifications, when admitted, should not serve to confuse the jury but should help the jurors with their fact-finding, thus providing another reason to improve the reliability of eyewitness identifications.¹⁸⁰

C. NORTH CAROLINA

While legislatures lack some of the sophisticated legal experience of the courts, passing laws to regulate police conduct can be an effective way to quickly and authoritatively adjust system variables. North Carolina took this approach with the North Carolina Eyewitness Identification Reform Act ("the Act").¹⁸¹ The Act, passed in 2007, attempts to incorporate scientific advances in the field of eyewitness identifications to better assure reliability

173. *Id.*

174. *Id.*

175. *See id.* at 698.

176. *Id.* at 686–87.

177. *Id.*

178. *Id.* at 688.

179. *Id.* at 693–94.

180. *Id.*

181. N.C. GEN. STAT. § 15A-284.50–.53 (2015).

and bolster the truth finding function of the criminal justice system in North Carolina.¹⁸² To further this goal, it provides instructions for police departments on how to administer identifications according to the best available practices.¹⁸³

The Act calls for independent administrators, who are not aware of the suspect's identity, to carry out both photo arrays and live lineups.¹⁸⁴ The independent administrator will give instructions that inform the eyewitness that the perpetrator may or may not be in the lineup or photo array, and will also state that the investigation does not hinge on the eyewitness making an identification, so the eyewitness should not feel undue pressure to make one.¹⁸⁵

Under the Act, both photo arrays and live lineups should contain at least five innocent fillers who resemble the suspect.¹⁸⁶ Lineups and photo arrays with more than one suspect are prohibited, and eyewitnesses are separated from others who are making an identification to prevent them from conferring with one another before or during the live lineup or photo array.¹⁸⁷ Eyewitnesses are not be provided any information about the suspect, and police make a video recording of the process or an audio recording if a video recording is not feasible.¹⁸⁸ The Act also proposes that lineups could be administered by a computer program as an alternative method to keep the administrator from seeing the photo in front of the witness.¹⁸⁹

In order to facilitate these reforms, law enforcement officers are required to go through training programs so that they know how to conduct lineups and photo arrays in compliance with this statute.¹⁹⁰ The Act calls for the creation of materials and classes to facilitate the training of law enforcement officers.¹⁹¹ Two pre-existing North Carolina police-training agencies, the North Carolina Criminal Justice Education and Training Standards Commission and the North Carolina Sheriffs' Education and Training Standards Commission, were made responsible for creating these programs and materials.¹⁹²

182. *See id.* § 15A-284.51-.52.

183. *Id.* § 15A-284.52.

184. *Id.* § 15A-284.52(b).

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* § 15A-284.52(c).

190. *Id.* § 15A-284.53.

191. *Id.*

192. *Id.*

D. SCHOLARLY PROPOSALS

Legal scholars have proposed reforms that often go further than the changes made in states like New Jersey, Oregon, and North Carolina. For example, the National Academy of Sciences issued a report addressing the reliability of eyewitness identification evidence.¹⁹³ The academy's goal was to digest the current scientific research on the subject and present it to law enforcement and the legal community, and the academy called for greater cooperation among the law enforcement and scientific communities so that identification procedures can improve across the country.¹⁹⁴ Scholars hope that the training of law enforcement as to how memory works and how law enforcement can unintentionally influence identifications will allow police to see why reform is necessary.¹⁹⁵

The report made recommendations as to how jurisdictions can improve the reliability of eyewitness testimony.¹⁹⁶ It called for blind administration of lineups, uniform and "easily understood instructions" to be provided to the eyewitness prior to an identification, and careful documentation of eyewitnesses' confidence in their identifications.¹⁹⁷ These instructions should inform the eyewitness that "the perpetrator may or may not be in the photo array or lineup and that the criminal investigation will continue regardless of whether the witness selects a suspect."¹⁹⁸ The report suggested that due to a lack of consensus as to the merits of sequential versus simultaneous lineups, neither method should be preferred.¹⁹⁹

The academy acknowledged that some police departments are hesitant to make changes that would require them to stretch their limited resources.²⁰⁰ In response, the committee suggested that "departments consider procedures and new technologies" that would alleviate this concern.²⁰¹ For example, if a non-blind administrator is not available, a department could use either a "computer-automated presentation of lineup photos"²⁰² or the envelope method that is employed in New Jersey.²⁰³ The eyewitness identification process should also be videotaped, even though doing so could increase costs

193. See generally COMM. ON SCI., *supra* note 101.

194. See *id.* at xiii–xiv.

195. *Id.* at 106.

196. *Id.* at 105–12.

197. *Id.* at 104.

198. *Id.* at 107.

199. *Id.* at 104.

200. *Id.* at 106–07.

201. *Id.* at 106.

202. *Id.* at 107.

203. *Id.* See also *State v. Henderson*, 27 A.3d 872, 897–99 (N.J. 2011).

and burden eyewitnesses' privacy interests.²⁰⁴ However, when these concerns arise, departments can videotape the process non-intrusively, and in fact, many departments already have the technology that would allow them to document these procedures.²⁰⁵

The report called for the "use of clear and concise jury instructions" to assist jurors in their fact-finding mission.²⁰⁶ Jury instructions can convey the most important underlying aspects of the identification process in clear language.²⁰⁷ This would allow the jury to properly give weight to eyewitness identification evidence in its deliberations.²⁰⁸ "Appropriate legal organizations, together with law enforcement, prosecutors, defense counsel, and judges, should convene a body to establish model jury instructions regarding eyewitness identifications."²⁰⁹

Going forward, the academy recommended that a national research initiative be established to increase our understanding of the science of eyewitness identifications.²¹⁰ The research initiative would allocate future funds for research, formulate new policy positions, review research, advocate future policy changes, and provide formal assessments of reforms across the country.²¹¹

Separately, Dan Simon, in his book *In Doubt*, proposed a series of reforms that could fix the systematic errors inherent in the identification process.²¹² He proposed a series of reforms that would "provide best-practice protocols" and "are directed at the twofold goal of maximizing the accuracy of identifications and the transparency of the procedures used to elicit them."²¹³ Simon's reforms include:

2. . . . [L]ive and video lineups should be preferred over photographic arrays.
3. Suspects should not be placed in identification procedures absent an appreciable threshold of guilt.
4. Prior to the lineup, witnesses should not be exposed to any identifying information about the suspect from any source.

204. COMM. ON SCI., *supra* note 101, at 109.

205. *See id.*

206. *Id.* at 112.

207. *See id.*

208. *Id.*

209. *Id.*

210. *Id.* at 113–14.

211. *Id.*

212. *See generally* SIMON, *supra* note 62.

213. *Id.* at 82–83.

5. Lineups should be conducted as soon as possible after the witnessed event.
6. Lineups should include only one suspect and five or more fillers whose innocence is beyond doubt.
7. Fillers should match the witness's description of the perpetrator and not be noticeably dissimilar from the suspect.
8. The suspect should be allowed to determine his place in the lineup and to change places between lineups.
9. The witness should be instructed that the perpetrator "may or may not be" in the lineup, and that it is appropriate to respond "perpetrator is not present," and "don't know."
10. Targets should be presented sequentially (rather than simultaneously).
11. All identification procedures should be "double blind": the administrator must be kept unaware of the identity of the suspect; the witness should be informed that the administrator does not know the suspect's identity.
12. The administrator should refrain from any communication or behavior that could be interpreted as suggestive or revealing of the identity of the suspect.
13. The witness should announce his recognition or nonrecognition, followed immediately by a confidence statement. The witness should not be given any feedback before completing the statement.
14. The time it took the witness to announce recognition should be measured and recorded. . . .
16. Witnesses who at any time pick someone other than the suspect should not be allowed to provide any identification testimony about the suspect.
17. Witness [sic] who fail to identify the suspect, make a hesitant decision, or express low confidence at the initial identification should be deemed to have a weak memory of the suspect.
18. The procedure should be recorded in its entirety, preferably on videotape. Recording should include the images used and the instructions given. The witness should be videotaped throughout the procedure.²¹⁴

Simon also suggests that the composition of lineups be computerized to altogether remove the human error element from the equation.²¹⁵

Simon does recognize that the implementation of most of these ideas is uncontroversial, but also that there is an inherent trade off "between the intended objective of reducing false identifications and the unintended effect

214. *Id.* at 83–84.

215. *Id.* at 86–87.

of losing correct identifications.”²¹⁶ Despite this, Simon argues that these proposed reforms would provide a net gain for the judicial system.²¹⁷ Providing a complete record of identification procedures is critical for minimizing “the effects of memory decay, contamination, and any other biases induced by the investigation and pretrial procedures” and providing “fact finders and other decision makers with the best possible information for assessing the reliability of the identifications.”²¹⁸

V. RECOMMENDATIONS FOR THE THIRD CIRCUIT TASK FORCE

The Third Circuit should borrow the best and most practicable reforms undertaken by North Carolina, New Jersey, and Oregon. These states have taken steps toward integrating scientific research into the judicial system, thus making eyewitness identification evidence more reliable. The Task Force has the opportunity to combine the best ideas of these states to lower the risk of wrongful convictions in the Third Circuit. These reforms can further serve as a model for other jurisdictions to reform their policies and procedures. Though live lineups generally produce more reliable evidence than photo arrays, the Task Force should recommend reforms for both photo arrays and live lineups given the impracticality of having a live lineup for every identification. The Task Force should also address jury instructions.

Because the composition of a lineup can greatly influence the reliability of the resulting identification, the Task Force should provide clear guidelines on how and when lineups should be conducted. Lineups and photo arrays should be conducted close in time to when the crime took place, so the eyewitness is more likely to remember the suspect. In many of the cases discussed above, police conducted lineups months or even a year after an event occurred, which led to decays in memory and ultimately false identifications.

The Task Force should adopt a policy similar to that of North Carolina, which requires that live lineups include at least five fillers.²¹⁹ These fillers should be similar in race, height, age, and facial structure to the suspect. Ideally, lineups will be composed by a computer program to ensure similarity among the lineup participants. If the suspect has a unique feature, such as a mole or a tattoo, lineup administrators should select photos of other suspects with the same features or alter the filler photos so that the unique feature is

216. *Id.* at 84.

217. *See id.* at 84–86.

218. *Id.* at 85.

219. N.C. GEN. STAT. § 15A-284.52 (2015).

present in all or most of the photographs.²²⁰ Photos of the suspect should not be more than a year old²²¹ and, whenever possible, should not be photos where the suspect has different facial hair than during the time the incident took place.²²² Lineups should never include more than one suspect.²²³ As in New Jersey, all live lineups and photo arrays should be recorded and preserved, so that if the reliability of the identification is brought into question, a court can use the recording to help determine if the identification was reliable.

Whenever possible, photo arrays and live lineups should be administered in isolation, away from third parties who could influence the evidence. Lineup administrators should select quiet, separate areas of police precincts and ensure that the eyewitness is separated from other police officers and other eyewitnesses. The lineup administrator should ensure that the eyewitness does not have any access to case materials, including “information about the case, [and] the progress of the investigation.”²²⁴ Eyewitnesses should not be allowed to see images of the suspect outside of the lineup administration, including wanted posters of the suspect that may be hanging in the police department where the photo array or live lineup is being administered.²²⁵

The Third Circuit should mandate that police departments administer both photo arrays and live lineups blindly. Blind administration increases the accuracy of eyewitness identifications and lowers the risk of feedback from the lineup administrator.²²⁶ Because police resources are limited, the task force should recommend that even where the photo array administrator is not blind to the suspect’s identity, the police department should follow the envelope method employed in New Jersey. This method will prevent the administrator from seeing the photographs before eyewitnesses make an identification, removing the risk that the administrator could influence the eyewitnesses beforehand.²²⁷ However, because the administrator could provide feedback to the eyewitness post-identification, the envelope method

220. Memorandum from Deputy Att’y Gen. Sally Q. Yates to Heads of Dep’t Law Enf’t Components All Dep’t Prosecutors (Jan. 6, 2017) (on file with author) [hereinafter Yates].

221. Although Yates’s memo recommends against using a photograph that is “several years old,” the routine use of photographs that are no more than one year old would be ideal to increase the probability of accurate identifications. *See id.*

222. *Id.*

223. SIMON, *supra* note 62, at 83.

224. Yates, *supra* note 220.

225. *Id.*

226. Charman, & Quiroz, *supra* note 86, at 484.

227. *See* State v. Henderson, 27 A.3d 872, 897 (N.J. 2011).

should only be used when a fully blind test is impractical.

The Task Force should recommend that police departments change the way they instruct eyewitnesses prior to administering either a photo array or a live lineup. Because biased instructions lead to false identifications and artificially increased confidence in those identifications, it is critical that police departments give uniform, unbiased instructions to eyewitnesses.²²⁸ Lineup administrators should explicitly state that the suspect may or may not be in the photo array or live lineup and that the entire case does not rely on the eyewitness making an identification. Police should try to ensure that eyewitnesses do not feel pressure to make an identification and that they are aware they can say that they do not know if the suspect is in the lineup. These eyewitness instructions are important because an eyewitness should not assume that the suspect is in the lineup. Furthermore, multiple viewings of the suspect by eyewitnesses should not be allowed, so as not to inflate their confidence in the identification.

Once an eyewitness makes an identification, police should immediately record the level of confidence the eyewitness has in that identification. Although juries often overvalue eyewitness confidence, it can serve a role at trial, especially if the confidence is measured immediately after an identification.²²⁹ Eyewitnesses' confidence in their identifications can be used as a factor to determine if the evidence is admissible. When an eyewitness identifies a suspect without hesitation and without prompting by the lineup administrator, that identification is more likely to be reliable. The eyewitness should also confirm in writing the identification. This provides an additional fail-safe to ensure that the eyewitness was not coerced into making an identification and allows for a statement of confidence to be in writing.

Because the scientific community is split on whether sequential or simultaneous viewing of a lineup results in the most reliable identifications, the Task Force should not state a preference for either.

The Task Force should improve existing jury instructions. If a jury were equipped to properly weigh eyewitness evidence and were aware of how and why some identifications are unreliable, police departments could internally strive to improve system variables knowing that a jury may discard improperly obtained identification evidence. Some jurisdictions use expert testimony to inform the jury about eyewitness identifications; however, this

228. Leippe, *supra* note 96, at 197.

229. Yates, *supra* note 220.

method generally appears unsuccessful.²³⁰ Because current instructions do not assist the jury in properly evaluating eyewitness identifications, new, standard instructions should be implemented.

As in *Dennis*, the jury instructions in New Jersey prior to judicial reform were confusing and muddled.²³¹ This led the New Jersey Supreme Court to implement new jury instructions. Because the Third Circuit's jury instructions are similar to those previously used in New Jersey—in that they are too long and do not explain simply how eyewitness identifications can be inaccurate and unreliable—the Task Force should also implement better jury instructions.²³² Proper instructions give juries a tool to compensate for their limited knowledge of how memory functions. Instructions should encourage a jury to examine various factors to determine not only if police procedure leading up to the identification was proper, but also if the eyewitness's memory shows indicia of reliability. As in New Jersey, the Task Force should inform juries that they should refrain from assigning undue weight to eyewitness confidence; however, they should also be wary of overwhelming the jury with scientific information.

Finally, the Third Circuit Task Force should recommend a training program for police departments that will help implement these reforms. When implementing its legislative reforms, North Carolina recognized that training was essential to increase the reliability of eyewitness identification evidence.²³³ Police officers should be instructed that following these procedures will not necessarily result in fewer convictions, but will help ensure that investigations are conducted in a manner most conducive to truth-finding. The Task Force could appoint a team of experts to travel to conferences and individual police departments to train police on how best to implement the proposed reforms. In order to ensure compliance, the Task Force should require periodic reports from both trial courts and police departments as to how the proposals are being implemented and if any modifications to the reforms are necessary in the future. The Task Force should reconvene in five years to reexamine scientific evidence and suggest any further changes.

CONCLUSION

The investigative procedures used in *Dennis* that caused such an unjust

230. Wise, *supra* note 110, at 4–5.

231. *Henderson*, 27 A.3d at 882–84.

232. *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 342 (3d Cir. 2016) (McKee, C.J., concurring).

233. See N.C. GEN. STAT. § 15A-284.50–.53 (2015).

outcome are employed in many jurisdictions across the country. The Third Circuit Task Force on Eyewitness Identifications has been presented with the unique opportunity to examine every facet of the eyewitness identification process and recommend changes that will serve to decrease the risk of false convictions. New Jersey, Oregon, and North Carolina, among others, provide a path forward that the Task Force should follow. Through blindly administrated lineups, correct pre-lineup instructions, proper construction of lineups, helpful jury instructions, and other reforms analyzed above, the Third Circuit can serve as an example of how scientific research can be implemented into the justice system to produce both fair and just results.