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# Recent Appellate Court Decisions on Eyewitness Identification.

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## I. Due Process and Suggestive Identification Procedures

The United States Supreme Court was very concerned in the late 1960s and early 1970s with the threat to due process under the Fifth and Fourteenth Amendments presented by suggestive identification procedures. In the 1967 case of *Stovall v. Denno*, the Supreme Court declared that the Constitution would be violated where the "confrontation . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process of law."[2] The Court limited its more expansive reading of the broad language in its earlier decision in 1972 with the case of *Neil v. Biggers*.[3] In *Neil*, the Court held that even unnecessarily suggestive identification procedures would still not violate due process if "under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive."[4] The Court then listed five factors to consider in assessing the reliability of the witness' identification: (1) opportunity to view the perpetrator during the crime; (2) degree of attention; (3) accuracy of the prior description; (4) the witness's level of certainty when identifying the defendant at the time of the confrontation; and (5) the length of time between the crime and the confrontation.[5] Five years later, doubts concerning the issue of suggestive identification procedures were resolved in *Manson v. Brathwaite*.[6] The Court acknowledged "the corrupting effect" of suggestive identification, but it identified the central due process concern as being something other than grading the identification procedures used by the police.[7] The Court declared, "reliability is the linchpin in determining the admissibility of identification testimony."[8] In the thirty years since *Brathwaite* was decided, the Supreme Court has had little to say of the constitutional restrictions on suggestive identification procedures, in spite of many psychological studies disclosing unreliability in eyewitness testimony.

### A. Unnecessarily Suggestive Identification Procedures in State Courts

The state courts have not been silent, however. In the years following the Supreme Court *Brathwaite* decision, first New York, then Massachusetts rejected the due process approaches taken by the Supreme Court and instead adopted a *per se* rule in interpreting their state constitutions. They held that identifications obtained through the use of unnecessarily suggestive identification procedures must be excluded, regardless of indications that the resulting identifications were reliable.[9]

New York and Massachusetts were recently joined by Wisconsin. Last July, the Supreme Court of Wisconsin decided the case of *State v. Dubose*.[10] Judging the admissibility of an identification based on a one-man showup, the court first reviewed the U.S. Supreme Court's decisions in *Biggers* and *Brathwaite*. The Wisconsin court concluded, "Studies have now shown that approach is unsound . . ."[11] Basing its reasoning on the earlier Supreme Court decision of *Stovall v. Denno*,[12] the Wisconsin court adopted the following rule of state constitutional law:

> We conclude that evidence obtained from an out-of-court showup is inherently suggestive and will not be admissible unless, based on the totality of the circumstances, the procedure was necessary. A showup will not be necessary, however, unless the police lacked probable cause to make an arrest or, as a result of other exigent circumstances, could not have conducted a lineup or photo array.[13]

While the Wisconsin Supreme Court denied that it was adopting a *per se* exclusionary rule, it acknowledged the similarity between its approach to state constitutional due process and the approaches taken in New York and Massachusetts.[14] In these three states, therefore, *unnecessarily suggestive* identification procedures—or at least showup procedures in the case of Wisconsin—will violate the

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state constitution and cannot be saved by showings of likely reliability.

### B. State Constitutions and the "Level of Certainty" Factor

Other states have been unwilling to reject the *Biggers-Brathwaite* test *in toto*, but have rejected the fourth of the five factors listed in *Neil v. Biggers*, the one that would permit reliance on the level of certainty of the identifying witness. Many psychological studies have suggested that the witness' certainty in his identification of the offender is, in fact, not a strong indicator of the reliability of the identification.[15] A recent example of the rejection of this factor is a decision of the Georgia Supreme Court in 2005.[16] Georgia had a pattern jury instruction modeled after the fourth *Biggers* factor, telling jurors that they may consider a witness' level of certainty in his or her identification in assessing the reliability of the identification.[17] In *Brodes v. State*, the Supreme Court of Georgia concluded: "In the 32 years since the decision in *Neil v. Biggers*, the idea that a witness's certainty in his or her identification of a person as a perpetrator reflected the witness's accuracy has been 'flatly contradicted by well-respected and essentially unchallenged empirical studies.'"[18] While it found the instruction harmless error in the case before it, the Georgia Supreme Court directed the state trial courts to discontinue use of the pattern jury instruction.[19] Courts in Kansas, Massachusetts and Utah have taken similar approaches, rejecting the use of "level of certainty" instructions.[20] However, the Connecticut Supreme Court recently decided that their state constitution does not require that this *Biggers* factor be abandoned.[21]

### C. Corroborating Identifications

The two topics above deal with state courts interpreting state constitutions. Federal courts, of course, interpret only the federal constitution and are bound in this by decisions of the Supreme Court. However, in applying the totality test in deciding whether identification is reliable under the standards of *Biggers-Brathwaite*, federal courts, among others, have

Outside the Wisconsin Supreme Court chambers in Madison. Wisconsin recently joined a handful of other states in declaring unnecessarily suggestive identification procedures unconstitutional.

frequently required that, where the identification procedure is unnecessarily suggestive, the identification must be corroborated in some manner beyond the testimony of the identifying witness.[22] As a Tennessee court put it in *State v. Meeks*, in addition to the five *Biggers* factors, there is a sixth factor not mentioned by the United States Supreme Court.[23] That is "whether an eyewitness identification is supported by corroborating evidence."[24] However, there has been disagreement among the circuits on what the corroboration must go to. The First, Fourth, Seventh and Eighth Circuits hold that there must be corroboration, but that this corroboration satisfies due process requirements if it corroborates the defendant's general guilt.[25] On the other hand, the Second, Third and Fifth Circuits hold that corroboration of general guilt is not enough. There must be corroboration of the accuracy of the identification itself.[26] There seems to be a similar split in state court decisions.[27]

## II. Identification Procedures

Courts have rarely ventured into the task of dictating that particular identification procedures be followed. A noteworthy exception to this is a decision by the Connecticut Supreme Court last year holding, in effect, that whenever there is a risk of misidentification, the administrator of the identification procedure must instruct the witness that the perpetrator may or may

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the relative frequencies of the perpetrator actually being present in the lineup, or not.

Is there a discontinuity between the corpus of laboratory research on simultaneous and sequential lineups and the field studies?

There is no discontinuity. First, it must be understood that the field data cannot be resolved into the categories of laboratory studies (figure 1): All that can be observed in this study are identification rates. The field study findings indicate that sequential lineups are associated with a lower rate of lineup choices (suspect identifications) than are simultaneous lineups (45 percent < 62.7 percent). The Steblay et al. meta-analysis of laboratory studies shows a similar result.[20]

For known perpetrator present lineups, sequential lineups lead to fewer lineup choices (54 percent < 74 percent) and for known perpetrator absent lineups (with designated suspects) sequential lineups also lead to fewer lineup choices (28 percent < 51percent). It is therefore not the case that one can invest ones self in either lab or field studies as the definitive source of truth and reject the other. Their results are very similar for the level of data aggregation at which they can be compared. This consistency is in fact a vindication of the laboratory-based experimental research strategy. We did not know beforehand that we could extrapolate from the corpus of laboratory studies to answer the question posed in the Illinois Pilot Program, but we are on firmer ground given the Illinois results. Most important, however, is the assurance that questions raised in the context of application can be examined in laboratory environments with a high likelihood of relevance for the application environment.

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not be present at the procedure.[28] While the Supreme Court of Connecticut claimed broad inherent supervisory authority over the administration of justice, it did not claim that it could order law enforcement agencies to follow particular identification procedures.[29] Rather, it found its authority in providing guidance concerning jury instructions.[30] It directed that, if the administrator of an identification procedure fails to warn the witness, the jury must be instructed that such a failure "may increase the likelihood that the witness will select one of the individuals in the procedure even when the perpetrator is not present.[31] Thus, such action on the part of the procedure administrator may increase the probability of a misidentification."[32]

The Supreme Court of Wisconsin reached a similar conclusion in *State v. Dubose*.[33] The court there held that showups would violate state due process if "unnecessarily" suggestive.[34] Necessity is to be determined by the "totality of the circumstances," but the court specifically held that "a showup will not be necessary . . . unless the police lacked probable cause to make an arrest or, as a result of other exigent circumstances, could not have conducted a lineup or photo array."[35] Beyond dictating a specific preference for lineups and photo arrays over showups, the Wisconsin Court also urged that for showups police should follow procedures similar to those proposed by the Wisconsin Innocence Project, including warning the witness that the perpetrator may or may not be there.[36] Clearly the court was leaving open the possibility that, under the rubric of assessing whether the procedure as "unnecessarily" suggestive, it might review the specific identification procedures used.[37]

### III. Expert Witness Testimony

Until recently, eyewitness expert testimony was rarely allowed. As one Tennessee court put it, "[W]e are of the opinion that the subject of the reliability of eyewitness identification is within the common understanding of reasonable persons. Therefore, such expert testimony is unnecessary."[38] However, a recent writer has observed "eyewitness expert testimony has become more frequent in recent years. Since 2002, a number of published federal court opinions have allowed or upheld the admission of eyewitness expert

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testimony."[39] A similar change has been occurring in the state courts. The Iowa Supreme Court reviewed this evolution in the use of expert witnesses when it decided *State v. Schutz* in 1998.[40] When that court first addressed the question 19 years earlier, it found "not a single appellate decision in which such expert testimony was held admissible or its exclusion held to be an abuse of discretion."[41] However, in 1984 the California Supreme Court held that it was an abuse of discretion to exclude expert testimony.[42] Similar decisions allowing this testimony followed in several federal circuits and in Arizona, Colorado, Nevada, New York, South Dakota and Wisconsin.[43] The Iowa court chose to join these jurisdictions.

However, although the use of eyewitness experts has increased, "there is no federal authority for the proposition that such testimony must be admitted."[44] Nor will the refusal to allow such testimony be a basis for habeas corpus relief.[45] Beyond this, as the Wisconsin Supreme Court recently concluded, it is a matter for the sound discretion of the trial court.[46] Excluding such testimony does not deprive the defendant of his constitutional right to present a defense.[47]

### IV. Jury Instructions

At least since *United States v. Telfaire* in 1972, courts have been concerned enough with the inherent unreliability of eyewitness identification that they have held that special instructions cautioning the jury of these risks may be advisable.[48] As noted in Section I B above, the Supreme Court of Georgia among others has recently held that it is error to instruct the jury that it may consider the level of certainty of the witness in making the identification. Studies cast doubt on the reliability of this *Biggers-Brathwaite* factor.[49] Taking a different approach, the Supreme Court of Connecticut chose to use its supervisory powers to write a new instruction that must be given to juries, "unless there is no significant risk of misidentification."[50]

In this case, the state has presented evidence that an eyewitness identified the defendant in connection with the crime charged. That identification was the result of an identification procedure in which the individual conducting the procedure either indicated to the witness that a suspect was present in the procedure or failed to warn the witness that the perpetrator may or may not be in the procedure.

Indicating to a witness that a suspect is present in an identification procedure or failing to warn the witness that the perpetrator may or may not be in the procedure may increase the likelihood that the witness will select one of the individuals in the procedure even when the perpetrator is not present. Thus, such action on the part of the procedure administrator may increase the probability of a misidentification.

This information is not intended to direct you to give more or less weight to the eyewitness identification evidence offered by the state. It is your duty to determine what weight to give to that evidence. You may, however; take into account this information, as just explained to you, in making that determination.[51]

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[2] 388 U.S. 293, 301-02 (1967).

[3] 409 U.S. 188 (1972).

[4] *Neil v. Biggers*, 409 U.S. at 199.

[5] *Id.* at 199-200.

[6] 432 U.S. 98 (1977).

[7] *Manson v. Brathwaite*, 432 U.S. at 114.

[8] *Id.*

[9] *See Commonwealth v. Johnson*, 650 N.E.2d 1257 (Mass. 1995); *People v. Adams*, 423 N.E.2d 379 (N.Y. 1981).

[10] 699 N.W.2d 582 (Wisc. 2005).

[11] *State v. Dubose*, 699 N.W.2d at 592.

[12] *Stovall, supra* note 2.

[13] *State v. Dubose*, 699 N.W.2d at 593-94.

[14] *Id.* at 598.

[15] *See, e.g. Brodes v. State*, 614 S.E.2d 766 (Ga. 2005).

[16] *Id.*

[17] *Id.* at 767.

[18] *Id.* at 770, *quoting State v. Long*, 721 P.2d 483 (Utah 1986).

[19] *Id.*

[20] *See State v. Hunt*, 69 P.3d 571 (Kan. 2003); *Commonwealth v. Santoli*, 680 N.E.2d 1116 (Mass. 1997); *State v. Ramirez*, 817 P.2d 774 (Utah 1991).

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[21] *State v. Ledbetter*, 881 A.2d 290, 313 (Conn. 2005).
[22] Note, *Process v. Outcome: The Proper Role of Corroborative Evidence in Due Process Analysis of Eyewitness Identification Testimony*, 88 CORNELL L. REV. 1097 (2003).
[23] *State v. Meeks*, 1994 Tenn. Crim. App.LEXIS 654 (Tenn. Crim. App. Oct. 6, 1994).
[24] *State v. Meeks*, 1994 Tenn. Crim. App.LEXIS at *24.
[25] *Id.*
[26] Process v. Outcome, *supra* note 22.
[27] Comment, *The Need to Revisit the Neil v. Biggers Factors: Suppressing Unreliable Eyewitness Identifications*, 6 WYO. L. REV. 189, 212-14 (2006).
[28] *State v. Ledbetter*, *supra* note 21, at 317-19.
[29] *Id.* at 318.
[30] *Id.*
[31] *Id.*
[32] *Id.* at 319.
[33] *Dubose*, *supra* note 11 (Three members of the Wisconsin Supreme Court dissented).
[34] *Id.* at 585.
[35] *Id.* at 594.
[36] *Id.*
[37] As this issue was going to press, the Supreme Court of New Jersey decided *State v. Delgado*, mandating police procedures in out-of-court identification meetings with witnesses. 2006 N.J. LEXIS 1148 (July 31, 2006). Specifically, the court stated: "We now exercise our supervisory powers under Article VI, Section 2, Paragraph 3 [of the New Jersey Constitution] to require that, as a condition to the admissibility of an out-of-court identification, law enforcement officers make a written record detailing the out-of-court identification procedure, including the place where the procedure was conducted, the dialogue between the witness and the interlocutor, and the results. Preserving the words exchanged between the witness and the officer conducting the identification procedure may be as important as preserving either a picture of a live lineup or a photographic array. When feasible, a verbatim account of any exchange between the law enforcement officer and witness should be reduced to writing. When not feasible, a detailed summary of the identification should be prepared. In the station house where tape recorders may be available, electronic recordation is advisable, although not mandated." *State v. Delgado*, 2006 N.J. LEXIS at *32.
[38] *State v. Copeland*, 2005 Tenn. Crim. App. LEXIS 916 (Tenn. Crim. App. Aug. 22, 2005).
[39] Note, *Beyond Admissibility: A Practical Look at the Use of Eyewitness Expert Testimony in the Federal Courts*, 80 N.Y.U. L. REV. 1895, 1910 (2005).
[40] 579 N.W.2d 317 (Iowa 1998).
[41] *Id.*, *See also State v. Galloway*, 275 N.W.2d 736 (Iowa 1979)
[42] *People v. McDonald*, 690 P.2d 709 (Cal. 1984).
[43] *Schutz*, *supra* note 40, at 319-20.
[44] *United States v. Langford*, 802 F.2d 1176 (9th Cir. 1986), *aff'd mem., Williams v. Merkle*, 94 Fed. Appx. 562 (9th Cir. 2004).
[45] *Id.*
[46] *State v. Shomberg*, 709 N.W.2d 370, 372, 382 (Wis. 2006)(Three members of the court dissented).
[47] *State v. Shomberg*, 709 N.W.2d at 382.
[48] 469 F.2d 552 (D.C. Cir. 1972); *See also* Note, *No Exigency, No Consent: Protecting Innocent Suspects from the Consequences of Non-Exigent Show-Ups*, 36 COLUM. HUM. RTS. L. REV. 755, 780-82 (2005); Beyond Admissibility, *supra* note 39, at 1907.
[49] *Brodes*, *supra* note 15.
[50] *Ledbetter*, *supra* note 21.
[51] Id. at 318-19.

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[5] Brant Raney Burleson, Terrance L. Albrecht, Daena J. Goldsmith & Irwin G. Sarason, *Introduction* to THE COMMUNICATION OF SOCIAL SUPPORT: MESSAGES, INTERACTIONS, RELATIONSHIPS, AND COMMUNITTY xi-xxx (Raney Burleson, Terrance L. Albrecht & Irwin G. Sarason eds., Sage 1994).
[6] Gail S. Goodman, Bette L. Bottoms, Leslie Rudy & Beth M. Schwartz-Kenney, Children's testimony about a stressful event: Improving children's reports, 1 J. NARRATIVE & LIFE HIST. 69-99 (1991); Cathleen A. Carter, Bette L. Bottoms & Murray Levine, Linguistic and Socioemotional Influences on the Accuracy of Children's Reports, 20 L. & HUM. BEHAV. 335-58 (1996); Suzanne L. Davis & Bette L. Bottoms, Effects of Social Support on Children's Eyewitness Reports: A test of the underlying mechanism, 26 Law & Hum. Behav. 185-215 (2002); and Bette L. Bottoms, Jodi A. Quas & Suzanne L. Davis, The Influence of Interviewer-provided Social Support on Children's Suggestibility, Memory, and Disclosures, in Child Sexual Abuse: Disclosure, Delay and Denial (M.E. Pipe, M. Lamb, Y. Orbach, & A. C. Cedarborg eds., Erlbaum, forthcoming 2006).
[7] Id.
[8] Id.
[9] Id.
[10] Suzanne L. Davis & Bette L. Bottoms, *supra* note 6.
[11] Bette L. Bottoms, Jodi A. Quas & Suzanne L. Davis, *supra* note 6.
[12] Id.