

## A Comprehensive Approach to the Problem of Mistaken Identifications:

*The District of Columbia Experience and What it can Mean for You*

By Tim O'Toole



Virtually every day it seems, we read in the newspapers about another DNA exoneration. The great bulk of these involve murder or sexual assault convictions that relied heavily on stranger identifications — that is, they were built on the testimony of someone who did not know the defendant, but nonetheless pointed across the courtroom and told the jury, "I'm certain that's the guy."

The exonerations have proven — irrefutably — many eyewitnesses are wrong. In fact, the most recent experience in Virginia shows the number of wrongful convictions produced by eyewitness identifications may be truly alarming. In 2004, Gov. Mark Warner ordered scientists to conduct DNA testing on a small, randomly selected percentage of sexual assault cases tried between 1973 and 1988 to determine if a more widespread DNA testing of the hundreds of convictions obtained during that time would be warranted. Of the 31 cases reviewed, two exonerations occurred. In other words, 6 percent of the randomly sampled cases tested resulted in exonerations. Predictably, both Virginia exonerations involved convictions that relied heavily on eyewitness testimony.<sup>1</sup>

These results ought to strike fear into the heart of every prosecutor, judge and

criminal defense practitioner, because stranger identification testimony is the bread and butter of the criminal justice system. Stranger identifications have been used to secure thousands of convictions in all sorts of cases, including physical assaults, burglaries, robberies, drug cases, etc. There is no reason to believe that stranger identifications are any more reliable in

these types of cases than in the murder or sexual assault cases where DNA exonerations have occurred. Based on the Virginia results, one can reasonably estimate that six out of every 100 judgments of conviction in these cases are also sending the wrong person to jail. In many of these cases, moreover, we will probably never know which 6 percent of the convictions are mistaken because no physical evidence exists that could be tested for purposes of exoneration. In those cases, there is unlikely ever to be a meaningful remedy for the wrongly convicted.

Because of these sorts of structural barriers to exoneration, all defense counsel must continually ask themselves what more can be done to make sure that none of our clients is among the dreaded 6 percent of those wrongly convicted by mistaken identification. Along these lines, in a November 2004 article in the National Association of Criminal Defense Lawyer's (NACDL) *Champion* "Trying Identification Cases: An Outline for Raising Eyewitness

Issues," attorney Lisa Steele provided a good model for litigating eyewitness cases. As Steele outlined, defense counsel should develop a comprehensive strategy — one that applies the current social science research on memory and eyewitness identification to all stages of the litigation, ranging from pre-trial investigation and discovery, through voir dire and opening statements, continuing with the presentation of experts, the cross-examination of witnesses and closing arguments, through the final instructions to the jury and, if necessary, the appeal.

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In the District of Columbia, we have used the same sort of comprehensive eyewitness litigation method at all stages of the proceedings. We report below on the status of our efforts and what we have learned in the process about why mistaken identifications create such an intractable problem for the criminal justice system. We also discuss some of our efforts to move the battle beyond the courtroom, by building a body of eyewitness defense resources, by raising public awareness of the issue and by attempting to instigate systemic reforms so that the criminal justice system becomes less vulnerable to the serious problems created by mistaken eyewitnesses.

### **A. An Overview: Why Mistaken Eyewitness Testimony Creates so Much Trouble for our Criminal Justice System**

We mentioned in the previous section the importance of incorporating the social science research into all aspects of an eyewitness identification case, but it is worth emphasizing why that research is so critical. Mistaken identifications cause serious problems for the criminal justice system because many people — including jurors, law enforcement officials, judges and lawyers — have a simplistic understanding of how memory works and no meaningful understanding of the complex factors that affect the reliability of a stranger identification.<sup>2</sup> The key to ensuring that our system becomes less vulnerable to mistaken eyewitness testimony, therefore, lies in helping all the relevant participants better understand how to differentiate between reliable and unreliable identifications.

On the surface, this task seems manageable. As the National Institute of Justice itself has recognized,<sup>3</sup> social scientists have now definitively identified a variety of factors that affect people's ability to recognize the faces of strangers. Unfortunately, many of those factors are obscure or even counter-intuitive. The most powerful (and common) counter-intuitive example is the confidence/accuracy relationship. Most jurors, judges and lawyers think, as a matter of common sense, a certain witness is a more accurate one.<sup>4</sup> Indeed, 30 years ago, before virtually any of the social science on this topic was developed, the U.S. Supreme Court identified witness confidence as an important factor in determining witness accuracy.<sup>5</sup> But social scientists have shown that a certain trial witness is no more accurate than an uncertain one: by the time of trial, an eyewitness' certainty has inevitably been influenced by so many variables — beyond the accuracy of the original identification — that there is no meaningful relationship between a witness' confidence in their identification at trial and the underlying reliability of that identification.<sup>6</sup>

To properly represent a client in a stranger identification case, defense counsel must become familiar with principles like these. A comprehensive discussion of the social science is beyond the scope of this article, but fortunately there are many good, easily digestible materials available on the subject. Perhaps the best is Professor Gary Wells' article in the April 2005 NACDL *Champion*, "Eyewitness Identification Evidence: Science and Reform." That article and many others like it explore how different factors influence the reliability of eyewitness testimony and counsel should review those principles immediately upon assuming representation in a case based on eyewitness identification evidence. Of course, such basic materials are just the beginning. Once counsel has determined which particular factors may be relevant to the client's case, counsel will need to become familiar with the specific social science research that pertains to those factors. This social science can then help guide counsel through the investigation and trial of the case by

highlighting which facts should be fully developed. The social science will also serve as a guide at trial for educating the other relevant players in the system — jurors, law enforcement officials and judges — about how to evaluate the reliability of identification testimony. Finally, the social science can serve as a critical resource outside the courtroom when seeking systemic reforms.

### **B. The District of Columbia Experience**

At the Public Defender Service for the District of Columbia (PDS), we have tried to put these lessons into practice. We have trained PDS lawyers and those of the private District of Columbia defense bar about the social science related to memory and eyewitness identification. We have held brainstorming meetings with PDS trial lawyers to explore incorporating the social science into defense case theories and we have collected a searchable database of social science materials to make the literature available to our lawyers at a moment's notice. We have formulated model discovery materials, suppression motions, voir dire materials, jury instructions and eyewitness expert materials — all with the aim of making it easy to include the social science in the litigation of our trial cases. We have modified those materials as our thinking and the research has evolved over time. We have also trained our investigators about the social science pertaining to eyewitness identification, thus enhancing their ability to uncover facts relevant to eyewitness reliability. We have worked with organizations like the National Legal Aid & Defender Association (NLADA) and NACDL to help create an eyewitness identification resource library within the NLADA/NACDL Forensics Library, which PDS and private attorneys alike can readily access.<sup>7</sup> We are also currently working with NLADA, NACDL and the Innocence Project to create an eyewitness e-mail list serve so that our lawyers can more easily consult with lawyers and experts nationally about commonly recurring issues.

The results of these efforts have already been encouraging. The training and model pleadings have led to increased factual development about the police procedures used generally in the District of Columbia to secure identifications, as well as the specific procedures used in individual cases (often the two are not the same). This training has also prompted additional factual development in PDS cases concerning the basis and evolution of witness confidence statements, the role a weapon may have played in causing the witness to look somewhere other than the culprit's face, the confirming feedback provided to the witness after any identification and other specific factors with a proven correlation to eyewitness reliability. Indeed, in one of the first cases in which this strategy was attempted, the investigation, expert consultation and pre-trial motions proceeding generated so much information about the unreliability of the identification evidence, the government agreed not to use its star eyewitness at trial. The pre-trial motions hearing in that same case also produced additional factual information that severely undermined the remainder of the prosecution case, which was then incorporated into the voir dire, the cross-examination and the arguments. Although the prosecutor nonetheless continued forward to trial, the client was quickly acquitted by the jury on all charges, including the first-degree murder charge. We have had similar results — complete acquittals or dismissals prior to trial — in a number of other cases in which we have pursued this litigation approach.

We have also attempted to move this battle beyond litigation. For example, we provided advice and encouragement for our local legislature, the District of Columbia City Council, when it explored eyewitness reform legislation. That legislation, the Eyewitness Identification Procedures Act of 2004 (EIPA), would have required police to implement a number of best practices, supported by the social science and by police departments around the county, in conducting eyewitness identification procedures. The EIPA also would have excluded identification evidence not handled in the statutorily directed fashion, unless the government could demonstrate the eyewitness testimony was nonetheless reliable.

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Apart from legislation, we have also tried to raise local awareness about the serious risks to the criminal justice system posed by mistaken eyewitness testimony. For example, we have begun a methodical review of past convictions in the District of Columbia to determine whether there are other cases in which mistaken identification testimony has led to wrongful convictions. We have already made contact with a number of potential clients and begun a search for biological evidence; that search is on-going, with a number of identified cases moving toward the stage in which DNA testing will soon be conducted.

These projects have already prodded movement in the right direction. At our local judiciary committee hearing on the Eyewitness Identification Procedures Act, our police force responded to the expert testimony presented by Dr. Gary Wells and by a prosecutor from the New Jersey Attorney General's Office by acknowledging that District of Columbia procedures were behind the times. The police promise of self-reform probably doomed more formal legislative efforts in the short term, but if our police do not institute these practices voluntarily, it is likely that similar legislation will return and will

generate more support the next time. Likewise, while our exoneration project has yet to identify any wrongful convictions, it has prompted a methodical creation of review procedures that, through time, are likely to demonstrate mistaken identifications are occurring in the District of Columbia cases at the same rate they are nationally. This, in turn, will lead to increased awareness among the public and the local bench about the scope of the problem and the need to proceed carefully when dealing with cases based largely on eyewitness identification.

### C. How to use the District of Columbia Experience in Your Jurisdiction

Our experience in District of Columbia has taught us several lessons that may prove helpful in other jurisdictions. First and foremost is the importance of encouraging all defense lawyers to establish a basic familiarity with the social science, which is the key to understanding why some eyewitnesses are more reliable than others. The second fundamental lesson is the importance of a comprehensive approach to eyewitness litigation — using the social science to help in factual development of the case and during all stages of the litigation — from investigation, to case theories, to witness preparation and through final arguments. Third, we have found it very helpful to use technology and training as ways to leverage the knowledge and skill of the

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## *Save the Date*

# Litigating Eyewitness Identification Cases

June 16 -17, 2006 • Washington, DC

The Public Defender Service for the District of Columbia, the National Association of Criminal Defense Lawyers (NACDL), and the National Legal Aid & Defender Association (NLADA) are pleased to host a national conference Litigating Eyewitness Identification Cases, this June 16 and 17.

The conference will bring together eyewitness identification experts and defense attorneys from across the country to discuss innovative litigation and legislative strategies. Over 76 percent of the exonerations to date involve eyewitness misidentifications and now-established social science research overwhelmingly supports reform of police procedures in this area. Conference sessions will address how to combine these timely developments with sound defense strategies at all stages of a case, including:

- Discovery & Investigation
- Motions Practice (Suppression, Expert Admission)
- Preparing and Using Experts
- Trial Issues (Voir Dire, Cross, Closing, Jury Instructions)

Come hear leading defense counsel give practical advice on how to litigate these cases and learn about the current state of research from reknowned scientists in the field.

**Location:** Marriott Crystal City at Reagan National Airport

**Registration:** Online registration will be available soon on the NACDL Web site.

**Costs:** A \$100 conference registration fee will be charged. A limited number of hotel rooms at the Marriott Crystal City are available at a cost of \$119 per night with the reservation code given at registration.

Please SAVE THE DATE now! Further details will be available shortly at [www.pdsdc.org/SpecialLitigation](http://www.pdsdc.org/SpecialLitigation). Please contact Richard Schmechel at [rschmechel@pdsdc.org](mailto:rschmechel@pdsdc.org) for information.

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entire defense community; sharing access to materials and collaborating on a regular basis with other lawyers and offices improves the materials we use and helps our collective thinking evolve. Fourth, good defense advocacy does not stop in the courtroom. Many jurisdictions are already using the social science along with the reality of wrongful convictions to generate legislative reforms, which generally focus on improving the procedures police use to handle eyewitness evidence. Those reforms in turn should encourage policy makers in your jurisdiction to help lower the risk of mistaken identification and wrongful conviction by adopting similar measures. Finally, we have learned, as we have in many other contexts, the importance of persistence and creativity.

Mistaken identifications and wrongful convictions have been around for years and we will not eliminate them overnight. But through hard work, dogged advocacy and shared resources, we can move the ball forward a long way. Of course, some defender offices are so stripped of resources and have such high caseloads as to make the proper litigation of these issues virtually impossible. In such jurisdictions, part of the solution is beyond our control: no matter how doggedly counsel seeks to challenge eyewitness reliability and no matter how many general resources are made available by national organizations, mistakes will inevitably continue to occur until funding is brought to levels to ensure that defense counsel can provide a meaningful defense to their indigent clients.

But in the meantime, we hope our suggestions and shared resources can serve as a stopgap until that day when adequate funding of indigent defense is the rule throughout the country. We hope defense counsel can utilize these resources in the fight to ensure our clients do not fall within the dreaded 6 percent — those who are wrongly condemned by mistaken eyewitness testimony to spend years and decades in prison, or even suffer execution, for crimes they did not commit.

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<sup>1</sup> Michael D. Shear and Jamie Stockwell, DNA Tests Exonerate 2 Former Prisoners, *Washington Post*, December 15, 2005, at A01.

<sup>2</sup> Elizabeth F. Loftus & James M. Doyle, *Eyewitness Testimony: Civil and Criminal*, §1-6 at 6 (3d Ed., 1997) ("Jurors also place enormous faith in eyewitness testimony because they are often unaware of the many factors that influence its accuracy."); Steven Penrod and Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 *Psych. Pub. Pol. & Law* 817, 819 (1995) (reporting mock-jury study finding that "nearly four out of five mistaken identifications are believed."); Gary L. Wells, et al., *Eyewitness Identification Procedures: Recommendations For Lineups and Photospreads*, 22 *Law & Hum. Behav.* 603, 624 (1998) ("jurors appear to overestimate the accuracy of identifications, fail to differentiate accurate from inaccurate eyewitnesses — because they rely so heavily on witness confidence, which is relatively non-diagnostic — and are generally insensitive to other factors that influence identification accuracy.")

<sup>3</sup> United States Department of Justice, National Institute of Justice, *Eyewitness Evidence. A Guide for Law Enforcement*, October 1999

<sup>4</sup> Gary L. Wells, *How Adequate is Human Intuition for Judging Eyewitness Testimony*, in *Eyewitness Testimony: Psychological Perspectives*, 256, 271 (Gary L. Wells, Elizabeth Loftus, eds., 1984) ("there is at least one important aspect of eyewitness testimony that is misunderstood by the trier of fact, namely witness confidence"); Gary L. Wells, et al., *Eyewitness Identification Procedures:*

*Recommendations for Lineups and Photospreads*, 22 *Law & Hum. Behav.* at 624 ("jurors appear to overestimate the accuracy of identifications, fail to differentiate accurate from inaccurate eyewitnesses — because they rely so heavily on witness confidence, which is relatively non-diagnostic — and are generally insensitive to other factors that influence identification accuracy.")

<sup>5</sup> *Manson v. Bratbrite*, 432 U.S. 98, 114 (1977); *Neil v. Biggers*, 409 U.S. 188, 199 (1972).

<sup>6</sup> Although some studies have found some correlation between witness certainty and accuracy, they have done so only by controlling factors that are impossible to control in the real world. See Kenneth Deffenbacher, *Eyewitness Accuracy and Confidence: Can We Infer Anything About Their Relationship?*, 4 *L. & Hum. Behav.* 243, 258 (1980); Steven Penrod & Brian Cutler, *Choosing, Confidence and Accuracy Relation In Eyewitness Identification Studies*, 118 *Psychol. Bulletin* 315 (1995); see also *Brodes v. State*, 614 S.E.2d 766, 771 (Ga. 2005) ("In light of the scientifically-documented lack of correlation between a witness's certainty in his or her identification of someone as the perpetrator of a crime and the accuracy of that identification ... we can no longer endorse an instruction authorizing jurors to consider the witness's certainty in his/her identification as a factor to be used in deciding the reliability of that identification.")

<sup>7</sup> This important resource can be found at [www.nlada.org/forensics/for\\_lib/index/Eyewitness%20ID](http://www.nlada.org/forensics/for_lib/index/Eyewitness%20ID), and it contains model pleadings, information about experts, important social science articles and Web sites, and reform legislation from around the country. For a more complete description of the NLADA/NACDL Forensic Web site, see Richard Schmechel's article on the August 2005 *Champion*, *Defending With (And Against) Forensic Evidence, A Call To Share Resources*.

## Nuts and Bolts is Just Around the Corner April 26-29 • Atlanta, GA

To be a successful manager you need a successful theory of management or supervision. Just as it takes a good theory of defense to win a criminal trial, it takes a good theory of management or supervision to solve problems in your office.

Sponsored by the National Defender Leadership Institute, this conference is designed to assist public defenders as they transition from being trial attorneys to leaders of colleagues and staff. Participants prepare a written management problem in advance of the training, which is utilized in small group workshops to address the wide array of internal managerial challenges one faces in the public defender setting. Participants gain the management skills needed to lead and energize their organizations. We hope you can join us on April 26-29, 2006 at the Ritz Carlton in Atlanta, Ga. Visit [www.nlada.org/Training](http://www.nlada.org/Training) for more information.