

**CHALLENGING EYEWITNESS
IDENTIFICATION EVIDENCE**

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CHALLENGING EYEWITNESS IDENTIFICATION EVIDENCE¹

by J. Craig Jett and William S. Harris

I. INTRODUCTION

Almost any defense lawyer has tried a case in which his or her client protests his innocence despite confession to the crime, an eyewitness identification, or testimony from a witness' memory that make the client's innocence, improbable if not impossible. Sometimes the truth is the client is lying to his attorney and is guilty. But, what do you do about those other cases; the ones that haunt you at night or whenever you think about the cases you have tried; the cases where, against all "reason", you suspect you represented or represent an innocent. How do you effectively represent those clients in the face of seemingly overwhelming evidence, where the prosecutors and judges scoff and suggest that you are three bricks short of a full load if you think your client's profession of innocence is truth. You can start with the realization that you are in good company with your concern over what some view as evidence that is surely convincing beyond a reasonable doubt. Studies have estimated that wrongful conviction for serious crimes range from 7500 to 150,000 cases every year in the United States. Cindy J. O'Hagen, When Seeing Is Believing: The Case for Eyewitness Testimony, 81 Geo. L. J. 741, 752 (1993). It appears that the major source of these wrongful convictions is mistaken eyewitness identification. Andrew R. Tillman, Expert Testimony on Eyewitness Identification: The Constitution Says, "Let the Experts Speak." 56 Tenn. L. Rev. 735, 736 (1989); Gary L. Wells and Eric P. Seelau, Eyewitness Identification: Psychological Research and Legal Policy on Lineups, Psychology, Public Policy and the Law, 1995, Vol 1, No. 4, 765, 791.

II. CONSTITUTIONAL STANDARDS

In *United States vs. Wade*, 388 U.S. 218, 228-30, 87 S.Ct. 1926, 1933-34, 18 L.Ed.2d 1149 (1967),² the

¹This paper updates and expands a paper entitled "Admitting Scientific Evidence Relating to Eyewitness Identification" by the same authors that was previously published in the Voice for the Defense, Vol. 32, No. 1, January/February, 2003.

²Respondent Wade's counsel was Weldon Holcomb, of Tyler, Texas, former elected District Attorney of Smith County and Past President of the Texas Criminal Defense Lawyers Association.

Supreme Court of the United States recognized the uncertainties of eyewitness identification.

The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: 'What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient criminal procedure.' *The Case of Sacco and Vanzetti* 30 (1927). A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. A commentator has observed that '(t)he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined.' Wall, *Eye-Witness Identification in Criminal Cases* 26. Suggestion can be created intentionally or unintentionally in many subtle ways. And the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest.

Moreover, '(i)t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial.'

The pretrial confrontation for purpose of identification may take the form of a lineup, also known as an 'identification parade' or 'showup,' as in the present case, or presentation of the suspect alone to the witness, as in *Stovall v. Denno*, supra. It is

obvious that risks of suggestion attend either form of confrontation and increase the dangers inhering in eyewitness identification. But as is the case with secret interrogations, there is serious difficulty in depicting what transpires at lineups and other forms of identification confrontations. 'Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on ***.' *Miranda v. State of Arizona*, supra 384 U.S. at 448, 86 S.Ct. at 1614. For the same reasons, the defense can seldom reconstruct the manner and mode of lineup identification for judge or jury at trial. Those participating in a lineup with the accused may often be police officers; in any event, the participants' names are rarely recorded or divulged at trial. The impediments to an objective observation are increased when the victim is the witness. Lineups are prevalent in rape and robbery prosecutions and present a particular hazard that a victim's understandable outrage may excite vengeful or spiteful motives. In any event, neither witnesses nor lineup participants are apt to be alert for conditions prejudicial to the suspect. And if they were, it would likely be of scant benefit to the suspect since neither witnesses nor lineup participants are likely to be schooled in the detection of suggestive influences. Improper influences may go undetected by a suspect, guilty or not, who experiences the emotional tension which we might expect in one being confronted with potential accusers. Even when he does observe abuse, if he has a criminal record he may be reluctant to take the stand and open up the admission of prior convictions. Moreover any protestations by the suspect of the fairness of the lineup made at trial are likely to be in vain; the jury's choice is between the accused's unsupported version and that of the police officers present. In short, the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification."

(Footnotes and citations omitted).³ The Supreme Court held that if an accused's conviction rests on a courtroom identification that is the fruit of a suspect pretrial identification, the accused is deprived of the right of cross-examination and confrontation of the witnesses against him. *Id.*, 388 U.S. at 235, 87 S.Ct. at 1936, citing *Pointer vs. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923. Such testimony is per se inadmissible. *Gilbert vs. California*, 388 U.S. 263, 273, 87 S.Ct. 1951, 1957, 18 L.Ed.2d 1178 (1967); *Moore vs. Illinois*, 434 U.S. 220, 231, 98 S.Ct. 458, 466, 54 L.Ed.2d 424 (1977).

In *Stovall vs. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), decided the same day as *United States vs. Wade* and *Gilbert vs. California*, the Supreme Court held that considering "'the totality of the circumstances,' the conduct of identification procedures may be 'so unnecessarily suggestive and conducive to irreparable mistaken identification' as to be a denial of due process of law". *Foster vs. California*, 394 U.S. 440, 442, 89 S.Ct. 1127, 1128, 22 L.Ed.2d 402 (1969), quoting *Stovall vs. Denno*, 388 U.S. at 302, 87 S.Ct. at 1972; *Barley vs. State*, 906 S.W.2d 17, 32-33 (Tex. Crim. App. 1995); Dix and Dawson, *Texas Practice*, Vol. 41, § 14.31, p. 244. In subsequent cases the Supreme Court confirmed and elaborated upon the holding in *Stovall vs. Denno*. The Constitutional standard for determining the admission of identification testimony "is that of fairness as required by the Due Process Clause of the Fourteenth Amendment." *Manson vs. Brathwaite*, 432 U.S. 98, 113, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140 (1977). The Supreme Court held "that each case must be considered on its own facts and that convictions based on eye-witness identification at trial following a pre trial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons vs. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247 (1968). The standard applies to testimony regarding in-court and out of court identification. *Neil vs. Biggers*, 409 U.S. 188, 197, 93 S.Ct. 375, 381 34 L.Ed.2d 401 (1972). "[R]eliability is the linchpin in determining the admissibility of identification testimony". *Manson vs. Brathwaite*, 432 U.S. at 114, 97 S.Ct. at 2253. A due process challenge

³See footnotes 6 through 17 for citations of scholarly publications and case citations relating to eyewitness identification.

requires a two step analysis. First it is necessary to determine whether the pretrial identification was impermissibly suggestive. If that was the case, then it is necessary to proceed to the second step which is whether the proffered identification testimony creates a substantial likelihood of misidentification. *Manson vs. Brathwaite*, 432 U.S. at 106, 97 S.Ct. at 2249; *United States vs. Sanchez*, 24 F.3d 1259, 1261-62 (10th Cir. 1994); *Loserth vs. State*, 963 S.W.2d 770, 771 (Tex. Crim. App. 1998); Dix and Dawson, Texas Practice, Vol. 41, § 14.31, p. 244. “[T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.” *Neil vs. Biggers*, 409 U.S. at 199-200, 93 S.Ct. at 382; *Manson vs. Brathwaite*, 432 U.S. at 114, 97 S.Ct. at 2253. Where there is not a substantial likelihood of irreparable misidentification, the Supreme Court is “content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.” *Id.* 432 U.S. at 116. 97 S.Ct. at 2254.

A defendant challenging the admissibility of identification testimony on due process suggestiveness grounds in Texas has the burden of showing by clear and convincing evidence that a witness’ in court identification was tainted by an impermissibly suggestive pretrial procedure. *Barley vs. State*, 906 S.W.2d 27, 34 (Tex. Crim. App. 1995); *Delk vs. State*, 855 S.W.2d 700, 706 (Tex. Crim. App. 1993). While this burden appears to be well established in Texas law, it is of dubious authority. This burden of proof “was first articulated in a single judge’s opinion in *Jackson vs. State* [628 S.W.2d 446, 448 (Tex. Crim. App. 1982)], but has since been uncritically accepted as governing law. It apparently has no basis in Supreme Court case law and the Texas courts have never undertaken to justify it in terms of federal constitutional doctrine.” Dix and Dawson, Texas Practice, Vol. 41. § 14.33, p. 245. Where there has been a finding that courtroom identification has been tainted by a Sixth Amendment violation the government should be given the opportunity to establish by clear and convincing evidence that the in court identification was based upon observations of the

suspect other than the lineup identification. *United States vs. Wade*, 388 U.S. at 240, 87 S.Ct. at 1939.

III. SCIENTIFIC RESEARCH

There is a vast body of psychological research on eyewitness memory, most of which has occurred in the last thirty years. This research is based on the scientific method, “meets the highest standards for psychological research and is a well established subdiscipline of cognitive and social psychology”. Brian L. Cutler, Eyewitness Testimony: Challenging Your Opponent’s Witness, pp. 6-8, copyright 2002 National Institute for Trial Advocacy. The research has generated “hundreds of books, chapters, and research articles on the psychology of eyewitness memory that addresses such issues as the accuracy of eyewitness memory, improvement of eyewitness memory, and how eyewitness testimony is evaluated by lawyers, judges and juries.” *Id.* See Brian L. Cutler and Steven Penrod, Mistaken Identification: The Eyewitness, Psychology, and the Law (Cambridge University Press 1995), for a review of the research literature, and Elizabeth Loftus and James M. Doyle, Eyewitness Testimony: Civil and Criminal (3rd Ed. Lexis Law Publishing 1997).

It is generally accepted theory that when an individual experiences an important event it is not simply recorded in memory like a videotape. The memory process is considered to be divided into three stages. The first is the acquisition stage which is when the individual perceives the event and the perception is entered into the memory system. The second stage is the retention stage, where time elapses before a witness tries to remember an event. Third is the retrieval stage where the witness tries to recall the event. The accuracy of eyewitness memory can be compromised at any of the three stages. Research psychologists attempt to identify and study the important factors in each to determine what influences eyewitness memory. Loftus and Doyle, Eyewitness Testimony: Civil and Criminal.

In accessing the accuracy of eyewitness testimony Cutler has identified five categories of factors. For each category the research has identified factors that affect the accuracy of eyewitness testimony and factors that do not. The first factor is witnessing, that is, whether some people are better eyewitnesses than others. The only witness factors that seem to make a difference are age and intoxication. Young children are more susceptible to suggestive influences when interviewed and perform more poorly at recognizing strangers than do older children and adults. Elderly

witnesses are more disadvantaged when recalling information than when recognizing persons or things. Intoxicated eyewitnesses encode less information from the event and the quality of retrieved information is lower. The second factor relates to the perpetrator, that is, whether some people are more easily recognized than others. Neither men nor women, nor any racial or ethnic group, are more easily recognized. People with distinctive appearances are more easily recognized. The third factor relates to the event, that is, whether eyewitnesses are better able to remember details about some events than other events. The quality of eyewitness memory tends to be reduced by high stress levels. Eyewitnesses are less accurate at describing other people, things, or events when there is a weapon visible at the scene of the crime. No particular race or ethnic group is more easily recognized than another but people recognize members of their own race more accurately than members of other races or ethnic groups. There is no “own-gender” bias in face recognition. Fourth is the post-event factor, or whether an eyewitness’ memory can be influenced after the event in question. Although memory performance declines over time, the greatest decline occurs early after an event, but levels off with time. When an eyewitness commits to an identification of a suspect from a photograph, the witness is more likely to identify that suspect in a subsequent photo array or line-up test whether or not the suspect is the perpetrator. Where an eyewitness is familiar with a suspect from another event other than the crime, but does not recall why he knows the suspect, the witness may assume that he knows the suspect because he is the perpetrator. The fifth factor is eyewitness testimony, that is, whether the quality of an eyewitness’ recall predicts the accuracy of the eyewitness’ identification. The research shows that the accuracy of an eyewitness’ description of a perpetrator is only weakly associated with the accuracy of the identifications of the perpetrator. The relationship between an eyewitness’ confidence and the accuracy of his or her testimony or identification is modest. Confidence in identification can be affected by investigating officers or other eyewitnesses. Cutler, Eyewitness Testimony: Challenging Your Opponent’s Witness, Chap. 2, pp. 13-26. More than one of these factors may be present in any eyewitness case.

Recognition of the fallibility of eyewitness identification led former Attorney General Janet Reno to establish a Technical Working Group for Eyewitness Evidence consisting of police officers, attorneys and research psychologists. The group developed Eyewitness Evidence: A Guide for Law Enforcement,

that was released in 1999. These guidelines include policies and procedures relating to the acquisition and development of eyewitness evidence. They are published by the United States Department of Justice and are available at www.ojp.usdoj.gov/nij. Some of the same psychology professors who participated in the Justice Department’s eyewitness identification working group have since published recommendations for additional law enforcement protocols announcing a preference for sequential lineups, double blind protocols or videotaping. These recommendations are published by the American Psychology/Law Society and Division 41 of the American Psychological Association. G. Wells, M. Small, S. Penrod, R. Malpas, S. Fulero, & C. Brimacombe, Eyewitness Identification Procedures: Recommendations for Lineups and Photo Spreads, available at <http://psych-server.iastate.edu/faculty/gwells>. Also see BNA Criminal Practice Manual and the Criminal Practice Report, October 31, 2000, Vol. 1, No. 10, published by Pike & Fischer, Inc., which discusses the merits of Eyewitness Evidence: A Guide for Law Enforcement, the recommendations of the American Psychology/Law Society and the opinions of legal commentators. The recognition of the complexities, and the advancement of knowledge, of human memory continue to raise issues about the accuracy of eyewitness identification. Each scientific discovery potentially raises a legal issue that should be challenged by the defense lawyers and examined by the justice system. The legal rules should change, and to some degree are changing, to accommodate the expansion of the body of knowledge about eyewitness memory.

IV. CHALLENGING ADMISSIBILITY OF IDENTIFICATION TESTIMONY

A. Federal Court

In order to preserve the right to complain about identification testimony in federal court, a pretrial motion to suppress must be filed. Rule 12(b)(3), Fed. R. Crim. Pro. Failure to file a pretrial motion to suppress constitutes waiver of the right to raise the issue at trial. See Rule 12(f), Fed. R. Crim. Pro.; *United States vs. Chavez-Valencia*, 116 F.3d 127, 129-31 (5th Cir. 1997), *cert. den’d* 522 U.S. 926. While a trial court may grant relief from waivers stemming from failure to file a pretrial motion to suppress, once the right is waived at trial, it may not be resurrected on appeal. *United States vs. Chavez-Valenzia*, *supra* at 129. Motions to suppress may be written or oral, at the discretion of the trial judge. Rule 12(b), Fed. R. Crim. Pro.; *United States vs. Carreon-Palacio*, 267 F.3d 381, 385 (5th Cir.

2001). Certainly it is the preferred practice to file a written motion in order to present and preserve all of one's issues.

A written motion should not only raise legal issues, but may suggest procedural steps that should be taken to insure that the defendant's issues are raised in the most effective way possible. It has been held that a trial court does not have an obligation to stage a line-up, but there is an obligation to ensure that an in court identification procedure does not simply amount to a "show up". *United States vs. Archibald*, 734 F.2d 938, 941 (2nd Cir. 1984) *on rehearing*, 756 F.2d 223. Where a defendant has raised the issue of the reliability of identification testimony, "his remedy is to move for a line-up order to assure that the identification witness will first view the suspect with others of like description rather than in the courtroom sitting alone at the defense table." *United States vs. Brown*, 699 F.2d 585, 594 (2nd Cir. 1983); *United States vs. Archibald*, 734 F.2d at 942. This may be advisable, or even necessary, to avoid having in court procedures that are so suggestive and conducive to irreparable mistaken identification as to be a denial of due process of law. *Foster vs. California*, 394 U.S. 440, 442, 89 S.Ct. 1127, 1128, 22 L.Ed.2d 402 (1969). A sample motion for use in federal court asking for a pretrial identification hearing and seeking to suppress identification evidence is appended to this paper. This motion can be easily adapted for use in state court.

B. State Court

In state court an issue as to the admissibility of evidence may be raised by a pretrial motion to suppress or by objection when the evidence is offered at trial. *Pierce vs. State*, 32 S.W.3d 247, 251 (Tex. Crim. App. 2000); *Roberts vs. State*, 545 S.W.2d 157, 157 (Tex. Crim. App. 1977); *Hanks vs. State*, 2003 WL 1563994 (Tex. App. - El Paso 3/27/03). In state court the primary procedural device for suppression of evidence is Article 38.23(a), C.C.P., which provides that no evidence obtained in violation of any provisions of the constitution or laws of the State of Texas or the constitution or laws of the United States shall be admitted into evidence against the accused upon the trial of a criminal case. Where a trial court has admitted evidence over objection that it was illegally obtained the defendant is entitled to have the jury instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of Article 38.23, then the jury shall disregard such evidence. Article 38.23(b), C.C.P. Thus, not only can a defendant in Texas challenge eyewitness testimony in a pretrial

proceeding, such evidence can also be challenged before the jury, either in an effort to have the jury disregard the evidence, or to convince the jury that the eyewitness testimony was not correct.

V. CHALLENGING EYEWITNESS EVIDENCE WITH EXPERT TESTIMONY

To effectively use existing scientific research to challenge eyewitness testimony employment of an expert may be advisable, if not necessary.⁴ An expert may be used to challenge the government's eyewitness evidence in a pretrial proceeding or before a jury. While in the past expert testimony regarding eyewitness evidence was considered inadmissible before a jury because it invaded the province of the jury, the adoption of the Texas Rules of Evidence and the recognition of the scientific research on eyewitness memory has led to the acceptance of expert testimony on the subject in Texas and federal courts.

A. Rules of Evidence

Rule 702, Tex. R. Ev., is the basic vehicle in state court for introducing scientific evidence to the trier of fact.

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

For years the standard of admissibility in most jurisdictions was the famous "Frye Standard" from a 1923 decision of the D. C. Circuit Court of Appeals. *Frye v. United States*, 54 App. D.C. 46, 47, 293 F. 1013, 1014 (1923). Texas never explicitly adopted the "Frye Standard", but did employ a similar test when reviewing lower court decisions regarding the admission

⁴In *Deason vs. State*, 84 S.W.2d 793 (Tex. App. - Houston [1st Dist.] 2000, *pet. ref'd*), the court held that a trial court did not have to appoint an expert on eyewitness memory to assist defense counsel where the State was not presenting expert testimony on eyewitness identification and the witnesses had ample opportunity to observe, or were personally acquainted with the defendant. The court noted that this was a case of first impression in Texas and that the only federal court to address the issue was the Ninth Circuit which had not required the appointment of such an expert. *Jackson vs. Ylst*, 921 F.2d 882, 886 (9th Cir. 1990).

of scientific evidence. *Kelly v. State*, 824 S.W.2d 568, 572 (Tex. Crim. App. 1992); *Zani v. State*, 758 S.W.2d 233 (Tex. Crim. App. 1988); *Reed v. State*, 644 S.W.2d 479 (Tex. Crim. App. 1983). In 1992 the Court of Criminal Appeals ruled that the Texas Rules of Criminal Evidence supplanted pre-existing rules governing the admission of scientific evidence and set forth the standard that would govern the admission of such evidence. *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App., 1992). The *Kelly* decision preceded the more famous Supreme Court decision in *Daubert V. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). However, both decisions supplant *Frye* and tie the admission of scientific evidence directly to the respective rules of evidence.

B. The Kelly Standard

In *Kelly* the State was seeking to admit DNA evidence while it was still relatively new in forensic circles. The state prevailed at the trial level. On petition for discretionary review Judge Campbell wrote for the majority of the Court of Criminal Appeals. The Court held that under Rule 702,⁵ for scientific evidence to be admissible, it must be both reliable and relevant. To be considered reliable, scientific evidence must, in any particular case, satisfy three criteria:

1. The underlying scientific theory must be valid.
2. The technique applying the theory must be valid.
3. The technique must have been properly applied on the occasion in question.

Kelly, 824 S.W.2d at 573. Judge Campbell also set forth a non-exhaustive list of factors to be considered when determining reliability of proffered scientific evidence.

1. The extent to which the theory is accepted by the relevant scientific community.
2. The expert witness' qualifications.
3. The existence of literature supporting or rejecting the theory or technique.
4. Potential rate of error of the technique.
5. Availability of other experts to test and evaluate the technique.
6. The clarity of the explanation to the Court of the underlying scientific theory and technique.

⁵Rule 702 is unchanged in the consolidated Texas Rules of Evidence.

7. The technique and skill of the person applying the technique on the occasion in question.

Id.

To be considered relevant, the expert's testimony must assist the trier of fact to understand the evidence or to determine a fact in issue and it must be sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute. *Kelly v. State*, *supra*, 572; *Jordan v. State*, 928 S.W.2d 550, 555 (Tex. Crim. App. 1996); *Morales v. State*, 32 S.W.3d 862, 865 (Tex. Crim. App. 2000); *McGann v. State*, 30 S.W.3d 540, 544-45 (Tex. App. - Ft. Worth 2000, *pet. ref'd*). Expert witness testimony should only be admitted when it is helpful to the jury and limited to situations in which the expert's knowledge and experience on a relevant issue are beyond that of the average juror. *McGann v. State*, *supra* at 545; *Gonzalez v. State*, 4 S.W.3d 406, (Tex. App. - Waco 1999, *no pet.*). The Court of Criminal Appeals has, since *Kelly*, described the relevance inquiry as follows:

Relevance is by nature a looser notion than reliability. Whether evidence "will assist the trier of fact" and is sufficiently tied to the facts of the case is a simpler, more straightforward matter to establish than whether the evidence is sufficiently grounded in science to be reliable. This is not to say that the relevancy inquiry will always be satisfied. *See Pierce*, 777 S.W.2d at 414-16 (expert could not say which scientific principles he discussed were applicable to facts in case and he had no knowledge of witnesses' testimony); *Rousseau*, 855 S.W.2d at 668 (expert only referred to "studies" and did not discuss whether any factors he planned to testify to would apply to facts of case); *Williams v. State*, 895 S.W.2d 363, 366 (Tex. Crim. App. 1994) (expert failed to connect "generic testimony" to specific facts of case). The expert must make an effort to tie pertinent facts of the case to the scientific principles which are the subject of his testimony. Establishing this connection is not so much a matter of proof, however, as a matter of application.

Jordan v. State, *supra* at 555.

Even if the scientific evidence is found to be reliable and relevant, a trial judge must "still decide

whether the probative value of the testimony is outweighed by one or more of the factors identified in Rule 403”, Tex. R. Ev. *Kelly v. State, supra*, 572. Finally, *Kelly* holds that the proponent of scientific evidence has the burden of persuading the court of the reliability and relevance of the scientific evidence by clear and convincing evidence, *Id.* at 573.

C. The *Daubert* Standard

Just over a year later the United States Supreme Court addressed the same issue of admissibility of scientific evidence under the Federal Rules of Evidence. Rule 702 of the Federal Rules is identical to Rule 702 of the Texas Rules of Evidence. In *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579, 113 S.C. 2786, 125 L.Ed.2d 469 (1993), the plaintiffs were trying to reverse a summary judgment for the pharmaceutical defendant. The plaintiffs claimed that their birth defects were caused by the defendant’s product. The defendant had F. D. A. studies that showed their product (an anti nausea drug used in early pregnancy) was safe and numerous highly qualified experts concurred. The plaintiff had a list of experts who maintained that the results of the F. D. A. study were flawed and evidence from animal tests that the product did cause birth defects.

Justice Blackmun delivered the opinion of the Court. He held that the Rules of Evidence had superseded the *Frye* doctrine in Federal Court and now governed the admission of scientific evidence in those forums. In order to be called “scientific knowledge”, an inference must be derived by use of scientific method, *Id.*, 509 U.S. at 590. The Court must determine “whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.” *Id.* 509 U.S. at 592. If it has, then the following test should be used to determine if the evidence is admissible:

1. Has the theory or technique been tested? *Id.* at 593.
2. Has the theory or technique been subjected to peer review. *Id.* at 593.
3. The known or potential rate of error for the technique. *Id.* at 594, (emphasis added).
4. Whether the theory and technique have general acceptance in the relevant scientific community. (This question from the *Frye* test still is relevant, just not determinative.) *Id.* at 594.

The approach is not quite as detailed as *Kelly* but the thrust of the test is the same.

D. Subsequent Developments In Texas

Since *Kelly* and *Daubert* were decided they have been subject to interpretation and application in various situations. The state courts have held that the test in *Kelly* is substantially the same as the *Daubert* test, *Jordan v. State*, 928 S.W.2d 550, 554 (Tex. Crim. App.1996), and is to apply to all scientific evidence. *Hartman vs. State*, 946 S.W.2d 60 (Tex. Crim. App. 1997). However, the Court of Criminal Appeals has drawn a distinction between what they call hard science (physics and chemistry) and soft science (psychology and sociology). In the latter areas, the Court proposes a modified test:

The appropriate questions are: (1) whether the field of expertise is a legitimate one, (2) whether the subject matter of the expert’s testimony is within the scope of that field, and (3) whether the expert’s testimony properly relies upon and/or utilizes the principles involved in the field. These questions are merely an appropriately tailored translation of the *Kelly* test to areas outside of hard science.

Nenno v. State, 970 S.W.2d 549 (Tex. Crim. App. 1998)⁶. It is important to note that the Court admitted in *Nenno* that the original *Kelly* factors could apply in the “soft sciences” in the proper case, *Id.* at 561, fn 9. Some of the confusion that has lead to the characterization of psychology as a “soft science” is the tendency to admit expert testimony from clinical psychologists who are accorded expert status, but who often do not back up their opinions with scientific research. They are cloaked in the mantle of an expert and thereafter allowed to opine freely without being challenged on the basis of their opinions. As illustrated above, there is a large body of knowledge on eyewitness memory developed by research psychologists that is the result of the same scientific methods used in the hard sciences. Close evaluation of the studies by research psychologists, the methods of analysis used, and the controls placed on the research

⁶*Nenno* was overruled on other grounds in *State v. Terrazas*, 4 S.W.3d 720 (Tex. Crim. App. 1999) . The holding on scientific evidence is still the law. *Weatherred vs. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000).

suggest that the distinction between “hard” and “soft” science may be a creation of the Court that is not justified by the reality of research psychology. It may be helpful for the advocate to be prepared to justify the validity of scientific evidence under both the *Kelly/Hartman* analysis and the *Nenno* analysis.

The Court of Criminal Appeals’ first opportunity after *Kelly* and *Daubert* to rule on the admissibility of scientific evidence challenging the reliability of eyewitness testimony was in *Jordan v. State*, 928 S.W.2d 550 (Tex. Crim. App.,1996) an aggravated robbery case from Mansfield, a suburb of Fort Worth. The defendant was accused of robbing a 7-11 Store. Two men were spotted by police shortly after the robbery occurred. The men, who fit the description of the robbers, were seen near two vehicles that fit the description of vehicles used in the robbery. The men fled on foot and escaped. The defendant’s photo identification card was found in one of the vehicles. The complainant was shown a photo spread containing a photo of the defendant but was unable to identify anyone. About a month later he was shown a second photo spread with a more recent photo of the defendant and this time made a positive identification. At trial the co-defendant testified that he was one of the robbers and his brother, the defendant was not involved. The co-defendant identified another man as the second robber.

The defense offered the testimony of a clinical psychologist, Dr. Ray Finn, who testified to the following outside the presence of the jury:

1. He is a degreed psychologist with emphasis in forensic psychology. His special training and expertise in the area of eyewitness identification comes from self education, reading the works of others in the field, working with crime victims concerning memory, and teaching courses in this area.
2. Dr. Finn was apprized of many of the facts of the case including information about the photo spreads, by the defense prior to forming his opinions.
3. He is of the opinion that there is a significant chance that Officer Sander's identification of appellant is not as reliable as it would have been had a number of factors not been present, including having seen a photo identification card with appellant's photo on it prior to viewing the photo spread.
4. There is a process call[ed] "proactive inhibition" which describes how misidentification has occurred due to seeing a photograph at a time

between an event and a later photo spread. There have been studies that have demonstrated this effect.

5. He is of the opinion that Mr. Briggs' identification of appellant could have been undermined by proactive inhibition caused by the first photo spread. He is of the further opinion that his identification could have been undermined by the fact that appellant was the only subject common to both photo spreads, and the fact that appellant's photo was the only full body position.
6. Research refers to the effect of something called “weapon focus.” Weapon focus and the emotional trauma associated with it can undermine a person's ability to recall or identify someone. Weapon focus can cause a narrowing of perception.
7. There is a state of mind that occurs when people are traumatized called “state dependent learning.” When people perceive an event in a traumatized state, they are less likely to be able to recall when they are asked to do so in a calm state of mind.
8. Research shows that people are generally less able to identify or remember faces from ethnic groups different than their own. This could affect the identifications of appellant by Mr. Briggs and Officer Sanders.
9. There is a term called "memory hardening" which refers to the effect of being asked to recall an event a number of times. This frequent recall has a tendency to alter memories. Consequently, the degree of certainty with which witnesses believe in their identification is not related to accuracy. Someone can be certain, but yet inaccurate. They are not necessarily lying.

Jordan v. State 928 S.W.2d 550, 552 -553.

The trial court ruled that the psychologist’s testimony was inadmissible on the ground that the subject matter of the testimony was not beyond the common knowledge of jurors, that it would supplant the jurors’ role in weighing credibility and that the same information could be brought out with effective cross-examination. The Court of Appeals held the trial court did not abuse its discretion in excluding Dr. Finn’s testimony, citing *Pierce vs. State*, 777 S.W.2d 309 (Tex. Crim. App. 1985), *cert. den’d* 110 S.Ct. 2603, and *Rousseau vs. State*, 855 S.W.2d 666 (Tex. Crim. App. 1993), for the proposition that expert testimony concerning eyewitness reliability is not admissible if it is too general and does not fit the specific facts of the case. The Court of Appeals concluded that certain

facts of the case were not a part of Dr. Finn's opinion. Thus, Dr. Finn's opinion did not sufficiently "fit" the facts of the case and was not relevant.

The Court of Criminal Appeals reviewed the Court of Appeals' opinion to determine whether it erred in finding that Dr. Finn's testimony was not relevant. The Court of Criminal Appeals reversed the Court of Appeals finding that although Dr. Finn's testimony did not address every conceivable factor that might affect the reliability of eyewitness identification, his testimony was sufficiently tied to the facts to meet the requirement that it be helpful to the jury on the issue of eyewitness reliability, and thus was relevant. "The question under Rule 702 is not whether there are *some* facts of the case that the expert failed to take into account, but whether the expert testimony took into account *enough* of the pertinent facts to be of assistance to the trier of fact on a fact in issue. That some facts were not taken into account by the expert is a matter of weight and credibility, not admissibility. In view of the facts that Finn *did* consider, the omissions in his testimony did not so undermine the value of his testimony as to render it unhelpful to the jury." *Jordan vs. State, supra* at 556. The case was remanded to the Court of Appeals to reconsider the admissibility of the evidence.

Unfortunately for Mr. Jordan, although he won the battle in the Court of Criminal Appeals, he lost the war on remand in the Court of Appeals. *Jordan vs. State, 950 S.W.2d 210* (Tex. App. - Ft. Worth 1997, *pet. ref'd*). On remand the Court of Appeals followed the Court of Criminal Appeals' opinion and found that Jordan had established that the testimony of Dr. Finn was relevant to an issue in the case. The Court of Appeals determined that it then had to decide whether the defendant had met his burden of establishing the scientific reliability of Dr. Finn's testimony under the *Kelly* standard. The Court noted that the proponent of the proffered scientific evidence has the burden of proving its scientific reliability by clear and convincing evidence. *Id.* at 212. The Court set about to apply the factors set forth in *Kelly* to determine whether or not the trial court abused its discretion in excluding Dr. Finn's testimony. The Court noted that "if the trial court's decision to exclude the evidence falls within the 'zone of reasonable disagreement,' we will affirm." *Id.*; citing *Montgomery vs. State, 810 S.W.2d 372, 391* (Tex. Crim. App. 1990) (Op. on reh'g).

The Court of Appeals noted that it had "recently held that Dr. Finn's opinion based on the same theories and offered under a similar predicate failed to meet the admissibility requirements of expert scientific testimony

offered under Rule 702. See *Forte vs. State, 935 S.W.2d 172, 177* (Tex. App. - Ft. Worth 1996, *pet. ref'd*). This court held that the trial court did not abuse its discretion in excluding the proffered testimony because Forte failed to present clear and convincing evidence that the theories underlying Dr. Finn's opinions were valid or that the techniques used to apply those theories were valid." *State vs. Jordan, 950 S.W.2d at 586*. As it did in *Forte*, the Court of Appeals found that Jordan had failed to present sufficient evidence of the validity of the scientific theories underlying Finn's opinion or the validity of the techniques used to apply the theories. The Court, in particular, criticized the proffer of Dr. Finn's testimony as follows:

While Dr. Finn constantly referred to support for the validity of the theories in vague generalities such as "research of others," "some research," "a number of studies," and even "one specific test"; he failed to mention by name any other person who purports to be an expert in the field or produce or name the studies he relied on to research his opinions. Dr. Finn also admitted that he had never been subjected to peer review or conducted scientific research to test the validity of these theories himself. Finally, there is not evidence of the rate of error in applying Dr. Finn's method of reaching his conclusions under the theories he discussed. Based on the record before us, we cannot say that the trial court abused his discretion in excluding his testimony.

State vs. Jordan, 950 S.W.2d at 586.

In *Nations vs. State, 944 S.W.2d 795* (Tex. App. - Austin 1997, *pet. ref'd*), the Third Court of Appeals arrived at a different result. *Nations* was an aggravated sexual assault case where the most highly contested issue was the victims' identification of her assailant. The complainant's initial identification of the accused was through a six photograph lineup. She also identified the defendant in trial. In rebuttal, the defense offered the testimony of Dr. Caren Phelen, a psychologist with a Ph.D. from the University of Maryland and who had done post-doctoral work in neuropsychology on the nature of memory as well as additional training in that area. Dr. Phelen testified that she had done a great deal of research on the nature of memory, in particular the impact of post-traumatic stress on the accuracy of memory and had also trained

with some of the leading experts in the field of memory. Outside the presence of the jury she testified to some of the pitfalls of identification by eyewitnesses and related certain scientific findings to the facts of the case. She concluded that those factors could effect the accuracy of the victim's memory. She further testified that due to her training and study she believed she had more knowledge about the way human memory works and about the reliability of eyewitness identification than the average juror. The State objected to the relevance of her testimony on the ground that it would be of no assistance to the jury. The trial court sustained the objection. Relying on the Court of Criminal Appeals' decision in *Jordan vs. State*, 928 S.W.2d 550 (Tex. Crim. App. 1996), the Third Court of Appeals held that the testimony of Dr. Phelen was relevant and that the trial court's exclusion of the testimony was error.

Although the State had only objected to Dr. Phelen's testimony on the ground that it was not relevant and the Court of Appeals ruled that the State had waived any objection as to the reliability of Dr. Phelen's testimony, the Court of Appeals addressed the reliability issue. The Third Court of Appeals stated that "we are not convinced under the current law in this state interpreting Rule 702 that it is appropriate to conduct a hearing on the reliability of evidence from the field of psychology. Neither the Court of Criminal Appeals nor the Supreme Court has specifically addressed the question of whether a reliability inquiry is applicable to a social science such as psychology." *Nations vs. State*, *supra* at 799-800. The Court recognized that there is a difference in scientific, technical and other specialized knowledge under Rule 702. The Court noted that many commentators would distinguish different types of expert testimony and would subject them to different screening under Rule 702. *Id.* at 800. "Among other problems, the criteria used to evaluate scientific testimony cannot be properly applied to fields of expertise which are not based on the scientific method, the process of retesting scientific hypothesis by duplicating the original experimental conditions....Many commentators have urged courts to restrict *Daubert's* reliability prong to purely scientific knowledge and to assess all other expert testimony only for helpfulness to the trier of fact, without evaluating the underlying theory and the methodology....Other commentators recognize the difficulty of applying *Daubert's* criteria to non-scientific areas like psychology, engineering or accounting and advocate adapting the factors to better fit non-scientific evidence." *Id.* The Court went on to state that psychology, "especially opinions regarding psychological

syndromes and problems with eyewitness identification, may fall more in the category of specialized knowledge, rather than scientific knowledge." *Id.* at 801. Even though it was uncertain that the reliability prong of *Kelly* should be applied to the field of psychology, the Court concluded that "on this record, Dr. Phelen's testimony sufficiently complies with the *Kelly* criteria to be held reliable." The Court held that it would have been an abuse of discretion for the trial judge to have excluded the testimony of Dr. Phelen. In support of its holding, the Court of Appeals pointed to other jurisdictions which had approved the admission of expert testimony on the reliability of eyewitness identification: *United States vs. Moore*, 786 F.2d 1308, 1312 (5th Cir. 1986); *State vs. Chapple*, 660 P.2d 1208, 1218 (Az. 1993); *United States vs. Downing*, 753 F.2d 1224, 1241-42 (3rd Cir. 1985). As the pivotal defensive issue was the victim's misidentification of the defendant as her offender and the proffered testimony challenged the reliability of the victim's identification, the Court was unable to determine beyond a reasonable doubt that the exclusion of Dr. Phelen's testimony made no contribution to the conviction. The trial court's judgment was reversed and the case was remanded for a new trial.

The distinction between the standard of admissibility for "hard" science versus that for "soft" science was revisited by the Court of Criminal Appeals in *Weatherred vs. State*, 15 S.W.3d 540 (Tex. Crim. App. 2000). The issue in *Weatherred* was whether the Court of Appeals erred in holding the trial court's exclusion of expert testimony on the lack of reliability of eyewitness testimony was an abuse of discretion. The Court of Criminal Appeals applied the standard of reliability for "soft" science that was set forth in *Nenno vs. State*, *supra*. The Court held that the reliability of "soft" scientific evidence is established "by showing (1) the field of expertise involved is a legitimate one, (2) the subject matter of the expert testimony is within the scope of that field, and (3) the expert testimony properly relies upon or utilizes the principles involved in that field." *Weatherred vs. State*, *supra* at 542. The Court of Criminal Appeals further noted that it must uphold the trial court's ruling if it was in the zone of reasonable disagreement, citing *Montgomery vs. State*, *supra* and that it must review the trial court's ruling in light of what was before the trial court at the time that ruling was made. *Id.*

Reviewing the expert testimony proffered at the trial court, the Court of Criminal Appeals found that the proffer was lacking. The Court noted that the defendant had offered the expert's testimony, but nothing else. "Furthermore, a close examination of

Deffenbacher's [defendant's expert] testimony reveals that, although he claimed that he and others had carried out extensive research on reliability of eyewitness identification and that he himself had written much on that subject, he failed to produce or even name any of the studies, researchers, or writings in question. The trial court did not state its reasons for excluding Deffenbacher's testimony, but, given what the trial court had before it at the time it ruled, it *could* have reasonably concluded that Appellant failed to carry his burden of showing that the proffered expert testimony was scientifically reliable.", citing *Jordan vs. State*, 950 S.W.2d 210, 212 (Tex. App. - Ft. Worth 1997, *pet. ref'd*). Thus, the Court of Criminal Appeals reversed the Court of Appeals' holding that the trial court had abused its discretion in excluding the expert testimony.

The State and some judges may interpret *Weatherred* as an overruling of *Jordan vs. State* and contend that it renders expert testimony on reliability of eyewitnesses to be inadmissible. Such a reading would be incorrect because in *Weatherred* the Court of Criminal Appeals cited its prior decision in *Jordan vs. State*, 928 S.W.2d 550 (Tex. Crim. App. 1996), with approval. Instead, *Weatherred* should be read to reaffirm the use of the modified *Kelly* criteria for "soft" sciences; to reiterate the degree of discretion the trial court has in admitting and excluding evidence; and to illustrate that the proponent of scientific evidence must

strictly adhere to the proof required by *Kelly* in order to introduce scientific evidence before the jury.⁷

The foregoing and other cases decided under *Kelly* and *Daubert* provide substantial guidance to the proponent of scientific evidence. Counsel should pay particular attention to the factors set forth in *Kelly*.

⁷A good example of how strictly the proponent of scientific evidence must adhere to the *Kelly* standard is provided in an unpublished opinion from the Dallas Court of Appeals, *Wright-Thomas vs. State*, 2000 WL 1184591 (Tex. App. - Dallas 2000, *no pet.*). Wright-Thomas and his co-defendant were charged with two counts of aggravated assault and two counts of aggravated robbery. The defendants were African-American males and the complainants were white males. The defense sought to introduce the testimony of Roy Malpas, a professor of psychology and Director of the Criminal Justice Department of the University of Texas at El Paso, concerning various factors that could lead to eyewitness misidentification. Dr. Malpas is a nationally known authority on eyewitness identification. After a hearing outside the presence of the jury, the trial court allowed Malpas to testify about cross-racial misidentification and an experiment he conducted using the appellant's photo lineup. The trial excluded "testimony regarding: (1) how the presence of a weapon tends to distract the eyewitness; (2) the negative effect of alcohol consumption on eyewitness identification; (3) the validity of showup procedures; and (4) the relationship between an eyewitness' level of confidence in his identification and the accuracy of that identification." *Id.* at *4. Applying the abuse of discretion standard, the Court of Appeals found that the trial judge's ruling was within the zone of reasonable disagreement. Although the research supports all of Dr. Malpas' testimony, including that which was excluded, the Court of Appeals held that the "trial court could have reasonably determined Malpas' testimony was not relevant because Malpas did not sufficiently relate his testimony to the facts of the case. Malpas did not tie his testimony about eyewitness confidence to any of the facts of this case. Further, Malpas testified that weapon focus and showup procedures may have negatively affected the identification in this case. However, he did not provide any explanation for or details about why that may have been true under the specific facts of the case. Regarding the eyewitness' use of alcohol, Malpas could not say that alcohol affected their identification of appellant. Indeed, he acknowledged the witnesses' blood alcohol content could have been near zero when the offenses occurred. Thus, Malpas' proffered testimony did not tie the specific facts of this case to the scientific principles at issue and was not shown to be relevant to the issues in the case." *Id.* at *5. It does appear that allowing the excluded testimony to be heard by the jury would also not have been an abuse of discretion.

A degree alone is not enough to qualify a purported expert to give an opinion, as the case may be, on every conceivable medical question, legal question, or psychological question. The inquiry must be into the actual qualification. See *Brodgers*, 924 S.W.2d at 153. There must be a "fit" between the subject matter at issue and the expert's familiarity therewith. *Id.* The proponent must establish that the expert has knowledge, skill, experience, training, or education regarding the specific issue before the trial court which would qualify the expert to give an opinion on that particular subject. *Id.*

Roise v. State, 7 S.W.3d 225, 234 (Tex. App. - Austin 1999, *pet. ref'd*), *cert. denied* 531 U.S. 895, 121 S.Ct. 225, 148 L.Ed.2d 160 (2000).⁸ An expert's bald assurance that he knows what he is talking about and that it is scientifically supported is not enough to satisfy the *Daubert* standard. *Minnesota Mining and Manufacturing Company v. Atterbury*, 978 S.W.2d 183, 197 (Tex. App. - Texarkana 1998). It is probably necessary for the expert witness to be able to name and produce copies in court of the studies, researchers and writings upon which the expert relies. The production of such material, along with the testimony of the expert should show that the underlying scientific theory and technique are accepted as valid by the relevant scientific community, establish the existence of literature that supports or rejects the underlying scientific theory and technique, illustrate the potential rate of error of the technique applied and show that there are other experts that have tested and evaluated the technique. In addition, the expert must be able to clearly articulate and explain the underlying scientific theory and technique and state a firm belief that the theory and technique are valid. While it is probably not

necessary that your expert actually conduct research in the area, it is preferable. *Nations vs. State*, *supra* at 798-801; *Jordan vs. State*, 928 S.W.2d at 556, fn. 8.

VI. CONCLUSION

For decades it has been accepted in the scientific community that eyewitness memory is more than simply fallible, that instead it is a complex process that may be adversely affected by many factors. While courts gave lip service to research findings on the subject, until recently judges would not consider, or allow juries to consider, well established scientific evidence relating to eyewitness memory. To the credit of the scientific community, it continued to conduct the research so that lawyers, and finally judges, could not ignore the results. Now at least lawyers have the legal means to challenge eyewitness testimony through presentation of scientific evidence, and judges have some guidance, both legal and scientific, as to what is reliable and relevant for consideration. Now there is no reason not to employ scientific knowledge about eyewitness memory to aid the truth finding process just as other, new, scientific evidence has been accepted and employed.

⁸*Roise* is an interesting case involving "soft science". It is a child pornography case in which the state proffered a psychologist to testify that certain photographs that the defense maintained were art (some were 50 to 100 years old) were in fact kept to illicit a sexual response and would cause the viewer to develop inappropriately with respect to their sexual desires. The expert also testified that the subjects of the photographs were harmed by being photographed although he had absolutely no training to support his opinion. The Court applied the *Nenno* standard for judging the admissibility of "soft science." The Court ultimately, and correctly, concluded that the trial court abused its discretion by admitting the evidence. Of course, it was harmless. *Id.* at 238.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF TEXAS
_____ DIVISION

UNITED STATES OF AMERICA

§
§
§
§
§

VS.

No. _____

MOTION FOR PRETRIAL IDENTIFICATION HEARING
AND TO SUPPRESS IDENTIFICATION EVIDENCE AND
AUTHORITIES IN SUPPORT THEREOF

TO THE HONORABLE _____, JUDGE, UNITED STATES DISTRICT COURT FOR THE
_____ DISTRICT OF TEXAS, _____ DIVISION:

COMES NOW _____, the Defendant in the above styled and numbered cause,
pursuant to Rule 12(b), Fed. R. Crim. Pro., and files this his/her motion and authorities in support thereof, seeking a
pretrial identification hearing and moving the Court to suppress certain identification evidence and for cause would show
the Court as follows:

I.
Motion

1. The Defendant is charged in a ____ count indictment which alleges that he/she
_____. The offenses are
alleged to have taken place on or about _____. The Defendant was not arrested at or near
the time of the alleged _____ or at the locations of the _____. The Defendant
was arrested on _____. 2. Part of the government's burden is to prove beyond a reasonable
doubt that the Defendant is the same person who _____ as alleged in each count
of the indictment. The Defendant requests that a hearing be conducted prior to trial to determine whether the
government's eye-witnesses can identify the Defendant as the _____. As part

of this procedure, the Defendant requests that the Court conduct an identification hearing with the following safeguards:

- a. The Court keep all government witnesses out of the courtroom during any court proceedings, except when the witness is testifying and being asked to identify the Defendant;
- b. That the Court instruct the government and any of its agents that the agent not show to any person who allegedly was a witness to the offense charged any mug shot or photograph or suggest what the Defendant was wearing, where the Defendant is located or provide a description of the Defendant or by any other means suggest to the purported eye-witness who the person is that committed the offense;
- c. That the witness be required to chose the Defendant from a group or line-up rather than being placed at counsel table next to his/her lawyer (the defense would provide others to be in the line-up or group from which the identification is made);
- d. That during the identification proceeding the Defendant not be dressed in jail clothing or not be required to wear any other clothing or indicator that he/she is the accused.

3. The Defense believes that identification of the Defendant by the witness will be cross-racial. In addition, the defense is not aware of any event that occurred at the time of the alleged offense that would have called particular attention toward the Defendant. These circumstances warrant a hearing to determine the reliability of any identification of the Defendant.

4. The government has made defense counsel aware that at least one witness has been shown a photographic line-up in an effort to identify the Defendant. Defense counsel is not aware of the procedures employed by the agent, but requests a pretrial hearing to determine whether any of those procedures were suggestive and therefore tainted any identification of the Defendant. The defense requests that a hearing be conducted in regard to any identification procedures employed by the government and if the Court finds them suggestive, then any resulting identification testimony be suppressed.

II. Brief

A motion to suppress evidence must be made prior to trial. Rule 12, Fed. R. Crim. Pro. It has been held that a trial court does not have an obligation to stage a line-up, but there is an obligation to ensure that an in court identification procedure does not simply amount to a “show up”. *United States vs. Archibald*, 734 F.2d 938, 941 (2nd Cir.). Where a defendant has raised the issue of the reliability of identification testimony, “his remedy is to move for a line-up order to assure that the identification witness will first view the suspect with others of like description rather than in the courtroom sitting alone at the defense table.” *United States vs. Brown*, 699 F.2d 585, 594 (2nd Cir. 1983); *United*

States vs. Archibald, supra at 942. This is so because it is recognized that identification procedures may be so suggestive and conducive to irreparable mistaken identification as to be a denial of due process of law. *Foster vs. California*, 394 U.S. 440, 442, 89 S.Ct. 1127, 1128, 22 L.Ed.2d 402 (1969).

The Supreme Court's conclusion that suggestive identification procedures may constitute a denial of due process of law is based on a recognition that "identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The vagaries of eye-witness identification are well known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: 'What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent--not due to the brutalities of ancient criminal procedure.' The Case of *Sacco and Vanzetti* 30 (1927). A major factor contributing to the high incidents of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to the witness for pretrial identification. A commentator has observed that '[t]he influence of improper suggestions upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor--perhaps it is responsible for more errors than all other factors combined.' Wall, *Eye-Witness Identification in Criminal Cases* 26. Suggestion can be created intentionally or unintentionally in many subtle ways. The dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest. Moreover, '[i]t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial.'" *United States vs. Wade*, 388 U.S. 218, 228-29, 87 S.Ct. 1926, 1933-34, 18 L.Ed.2d 1149 (1967) (citations and footnotes omitted).

Not only has the Supreme Court recognized the lack of reliability in eye-witness identification testimony, it has also "recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him the picture

of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime. Regardless of how the initial identification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than the person actually seen, reducing the trustworthiness of subsequent line-up or courtroom identification.” *Simmons vs. United States*, 390 U.S. 377, 383-84, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247 (1968) (footnotes omitted), citing P. Wall, *Eye-Witness Identification in Criminal Cases* 74-77 (1965). See *Eyewitness Evidence: A Guide for Law enforcement*, published by U.S. Department of Justice and National Institute of Justice, October, 1999 (available at www.ojp.usdoj.gov/nij).

WHEREFORE, the Defendant prays that the Court conduct an identification hearing prior to trial to determine whether the government’s witnesses can fairly identify the Defendant; to determine whether any identification has been tainted by suggestive procedures; and that any identification testimony that is the result of suggestive procedures be suppressed.

Respectfully Submitted,

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Attorney for Defendant

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Motion for Pretrial Identification Hearing and to Suppress Identification Evidence and Authorities in Support Thereof

was hand delivered to _____, Assistant United States Attorney, _____,
_____, Texas _____, on the _____ day of _____, _____.

J. CRAIG JETT

CERTIFICATE OF CONFERENCE

Prior to the filing of this motion, a copy was provided to Assistant United States Attorney

_____.

_____ was contacted in regard to the merits of the motion and stated the following:

- _____ He/She is opposed to the motion.
- _____ He/She is not opposed to the motion.
- _____ He/She will respond to the motion in writing.
- _____ He/She was not available to confer about the merits of the motion.

J. Craig Jett