

# EYEWITNESS IDENTIFICATION

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## EYEWITNESS IDENTIFICATION

### I. INTRODUCTION

#### A. Scientific Research on Eyewitness Memory and Identification

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 (3<sup>rd</sup> 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](http://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.

### B. Dangers of Eyewitness Identification

Identification of the defendant as the person who committed the charged crime is always an essential element of the crime which the government must establish beyond a reasonable doubt. Yet, perhaps in no other area of the law do the rights of the public to quick arrest and punishment of the criminal collide so frequently with the rights of the accused as in questions relating to the proper identification of the real culprit. Eyewitness identification has been a fertile ground for misidentification. Justice Frankfurter in the *Case of Sacco and Vanzetti* 30 (1927) stated:

“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 Supreme Court also discussed the dangers inherent in eyewitness testimony. In *U.S. v. Wade*, 388 U.S. 218 (1967) it stated:

The influence of improper suggestion upon the identifying witnesses probably account for more miscarriages of justice than any other single factor – perhaps it is responsible for

more such errors than all other factors combined.

388 U.S. at 229 (*quoting* P. Wall, *Eye-Witness Identification in criminal cases* (1965), at 26).

In *Manson v. Brathwaite*, 432 U.S. 98, 111-112 (1977), the Supreme Court again emphasized the troublesome characteristic of eyewitness testimony:

“The driving force behind *United States v. Wade*, 388 U.S. 218 (1967), *Gilbert v. California*, 388 U.S. 263 (1967) (right to counsel at a post-indictment lineup), and *Stoval*, all decided on the same day, was the Court’s concern with the problems of eyewitness identification. Usually, the witness must testify about an encounter with a total stranger under circumstances of emergency or emotional stress. The witness’ recollection of the stranger can be distorted easily by the circumstances or by later actions of the police.”

The dangers of eyewitness identification can occur not only with civilians but also with police officers. Chief Justice Bazelon of the District of Columbia Circuit noted: “Identifications made by policemen in highly competitive activities, such as undercover narcotics agents, whose chances for promotion may depend upon the number of arrests made because of their sales should be scrutinized with special care.” *U.S. v. Butler*, 636 F.2d. 727, 733 (D.C. Cir. 1980).

### C. Types of Identification Procedures

#### 1. Lineups

A lineup is a standard police procedure that is used to enable an eyewitness to a crime to pick out the person seen at the place of the crime. A lineup usually consists of several individuals standing in a line side by side for the purpose of identification. The manner of conducting the lineup may or may not point unfairly to the accused as the person who committed the crime in issue. The Due process clause of the Fifth and Fourteenth Amendments prohibit a lineup that is unnecessarily suggestive and conducive to irreparable mistaken identification. *Stoval v. Senno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L. Ed. 2d 1199 (1967). The practice of requiring an accused to participate in a pretrial lineup does not deny the accused due process or equal protection of law nor is it a violation of the privilege against self-incrimination. *Ridgney v. Hendrick*, 35 F.2d 710 (3d Cir. 1965).

#### 2. Showups

A showup is the presentation of the suspect alone to the victim or other identifying witness. A showup is

always somewhat suggestive since the victim is given no other choice. The courts reluctantly approve this process under limited circumstances. These circumstances will be discussed below.

### 3. Photo I.D. and Photo Array

Photo identification may be in showup form such as the presentation of a single photograph or in a lineup form where several photos are shown together. When the constitutionality of a photo array is challenged, the Due Process Clause requires a two-pronged inquiry: first, the court must determine whether the photo array was impermissibly suggestive, and if it is found to be so, then the court must decide whether the identifications were nevertheless reliable in view of the totality of the circumstances. *U.S. v. Galati*, 230 F.3d 254, 55 Fed. R. Evid. Serv. 759 (7<sup>th</sup> Cir. 2000).

## **D. Evidentiary Hearing to Determine Admissibility of Identification**

Whether or not to conduct a pretrial evidentiary hearing to assess the admissibility of identification is within the discretion of the court. The U.S. Constitution does not contemplate a per se rule as to the admissibility of identification evidence outside the presence of the jury in every case. *Watkins v. Sowders*, 449 U.S. 341 (1981). However the prudence of such a hearing has been emphasized by many decisions in the Courts of Appeals, most of which in various ways admonished trial courts to use that procedure. *Id.*

Two former Supreme Court Justices, Brennan and Marshall, felt that the Due Process Clause mandates such a hearing whenever a defendant has proffered some evidence that pretrial police procedures directed at identification were impermissibly suggestive. *Watkins v. Sowder*, 449 U.S. 341 (1981)(Brennan, J., dissenting).

## **II. RIGHT TO COUNSEL**

### **A. Pre-Indictment Lineups**

The Supreme Court has held that a criminal defendant's Sixth Amendment right to counsel attaches to all critical stages after the initiation of the criminal prosecution. *See gen. United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967). However, the Supreme Court has refused to apply the right to counsel to lineups occurring before an indictment or formal complaint. *Kirby v. Illinois*, 406 U.S. 682, 689, 92 S.Ct. 1877, 32 L. Ed. 2d 411 (1972). The Supreme Court determined that the right to counsel under the Sixth Amendment could only be extended to proceedings occurring after the "initiation of judicial proceedings . . . it is only then that the government has committed itself to prosecution . . ." *Kirby*, 406 U.S. at 689, 92 S. Ct. at 1882, 32 L. Ed. 2d at 423.

Justice Brennan filed a lengthy dissent in *Kirby* stating that the rationale behind the Court's earlier decision, of ensuring that the defendant is afforded the opportunity to reconstruct the lineup in order to attack its credibility, is equally relevant at a lineup conducted before an indictment. Several states have adopted the same or similar reasoning. *See Kirby v. Illinois*, 406 U.S. 682, 704 n.14, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972) (Brennan, J., dissenting). [For other criticisms of the *Kirby* decision see: Note, *The Lineup's Lament-Kirby v. Illinois*, 22 De Paul L. Rev. 660 (1973); Note, *Right to Counsel at Lineups - A Pro Forma Right?* 7 Suffolk U. L. Rev. 587 (1973); Grano, *Kirby, Biggers and Ash: Do any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?* 72 Mich. L. Rev. 717 (1974).]

### **B. Post-Indictment Lineups**

A post-indictment pretrial confrontation for identification purposes is a critical stage of prosecution at which an accused needs the presence of counsel. *Kirby v. Illinois*, 406 U.S. 682, 689, 92 S.Ct. 1877, 32 L. Ed. 2d 411 (1972). Conduct of such an encounter by the police without notice to and in the absence of counsel denies an individual of his Sixth Amendment right to the assistance of counsel. Thus, a post-indictment lineup is a critical stage of the prosecution at which the accused is as much entitled to the aid of counsel as at the trial itself. *U.S. v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967).

A critical stage includes the filing of a formal charge, filing of an indictment, filing of an information, arraignment, or preliminary hearing. *McFarland v. State*, 928 S.W.2d 482, 507 (Tex. Crim. App. 1996) (en banc), *overruled on other grounds by Mosley v. State*, 983 S.W.2d 249, 263 (Tex. Crim. App. 1998) (en banc); *Guzman v. State*, 567 S.W.2d 188, 191 (Tex. Crim. App. [Panel Op.] 1978). Where the accused is not afforded his right to counsel, there must be identification at the trial based upon an independent origin. *U.S. ex rel. Riffert v. Rundel*, 464 F.2d 1348 (3<sup>rd</sup> Cir. 1972).

An arrest does not trigger the right to counsel. *McFarland*, 928 S.W.2d at 507; *Wyatt v. State*, 566 S.W.2d 597, 600 (Tex. Crim. App. [Panel Op.] 1978). There is also no right to counsel when eyewitnesses are viewing photographic displays for the purpose of identifying the culpable person. *U.S. v. Figueroa-Paz*, 468 F.2d 1055 (9<sup>th</sup> Cir. 1972).

### **C. Courtroom Showups**

The right to counsel attaches to courtroom showups. In *People v. Best* 665 P.2d 644 (Colo. Ct. App. 1983) a Colorado prosecuting attorney asked a robbery victim to enter the courtroom during voir dire proceedings to determine if he could recognize "the fellow that robbed"

him. Defense counsel was not notified that an identification would be taking place. This tactic violated the defendant's Sixth Amendment right to counsel, so that a new trial was required. In *State v. Smith*, 36 Wash. App. 133, 672 P.2d 759 (Div. 1 1983) a Washington prosecutor brought a witness into the courtroom before the commencement of the fifth day of trial, at which time the witness identified the defendant who was sitting alone at counsel table. This identification conducted in the absence of defense counsel also violated the defendant's right to counsel. *State v. Smith*, 36 Wash. App. 133, 672 P.2d 759 (Div. 1 1983) (there was no reversible error, however, since the formal identification had an independent source.) In *Martin v. Donnelly*, the court held that the right to counsel was violated where witnesses identified defendants during their arraignment, and neither defendants nor their counsel were aware that witnesses were engaged in identification at the request of the police. *Martin v. Donnelly*, 391 F. Supp. 1241 (D. Mass. 1974); accord, *Com. v. Donovan*, 392 Mass. 647, 467 N.E.2d 198 (1984); see gen. *Mason v. United States*, 414 F.2d 1176 (D.C. Cir. 1969); *U.S. v. Luck*, 447 F.2d 1333 (6<sup>th</sup> Cir. 1971). Thus, where the state or government arranges for witnesses to identify the defendant during the course of a courtroom proceeding and defense counsel was either not present or not aware that an identification was occurring, the Sixth Amendment right to counsel is violated.

#### D. Remedy for Violation of the Right to Counsel

The Supreme Court has held that evidence of an identification that violated the defendant's right to counsel is per se inadmissible at trial. *U.S. v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). However, a subsequent in-court identification is admissible if the prosecution can prove that it is not tainted by the un-counseled pretrial lineup, but rather is of "independent origin." *Id.* at 242. Moreover, unlike the per se reversible error rule found with some other right to counsel violations, if eyewitness identification is improperly admitted into evidence, an appellate court must conduct a "harmless error" analysis. *Id.*

The courts consider several factors in determining if an improper in-court identification has an independent origin. Those factors include:

- (1) the prior opportunity to observe the alleged criminal act
- (2) the existence of any discrepancy between any pre-lineup description and the defendant's actual description;
- (3) any identification prior to the lineup of another person;
- (4) the identification by picture of the defendant prior to the lineup; and

- (5) failure to identify the defendant on a prior occasion.

*U.S. v. Wade*, 388 U.S. 218, 241, 87 S.Ct. 1926, 1940, 18 L.Ed.2d 1149, 1165 (1967). If the court determines that the identification does not have an independent origin then the identification will be suppressed.

### III. DUE PROCESS

#### A. The Reliability Test

In *Brathwaite*, the Supreme Court stated that "reliability is the linchpin in determining the admissibility of identification testimony" over a due process challenge. *Mason v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L. Ed. 2d 140 (1977). Hence, in determining whether identification procedures based upon lineup, showup or photo array are so unreliable as to violate due process, the court must first decide whether the original identification procedure was unduly suggestive and, if so, whether suggestive procedure, given the totality of the circumstances, created a substantial risk of irreparable misidentification at trial.

#### B. Factors Used for Determining Reliability

Courts are to consider several factors in determining the reliability of eyewitness identification. These factors are: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of his prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (4) the time between the crime and the confrontation. See *Mason v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L. Ed. 2d 140 (1977).

#### C. General Application of Due Process

In general, there are four situations to which the due process test applies:

- (1) To all showups and lineups occurring prior to June 12, 1967.
- (2) To all showups and lineups at which counsel was present but which, it is contended, because of makeup or conduct were prejudicially suggestive.
- (3) To those showups and lineups held after June 12, 1967 which are "exempt" from *Wade's* requirement of counsel, i.e. prompt-on-the-scene showups, accidental or unarranged showups, and all prearraignment showups and lineups.
- (4) To all photo identification procedures irrespective of the date when such procedures were employed.

See Nathan R. Sobel, *Eyewitness Identification, Legal and Practical Problems*, §3:2 (2002 Ed.)

#### D. Due Process and Lineups

"[A] pre-trial identification procedure may be so suggestive and conducive to mistaken identification that subsequent use of that identification at trial would deny the accused due process of law." *Barley v. State*, 906 S.W.2d 27, 32-33 (Tex. Crim. App. 1995) (en banc). Determining admissibility of in-court identifications requires a two part analysis: first, was the out-of-court identification procedure impermissibly suggestive; second, did the suggestive out-of-court procedure give rise to a substantial likelihood of irreparable misidentification. *Barley*, 906 S.W.2d at 33; *Garcia v. State*, 626 S.W.2d 46, 54 (Tex. Crim. App. 1981) (en banc). Each case is determined by analyzing the totality of the circumstances. *Barley*, 906 S.W.2d at 33, *Garcia*, 626 S.W.2d at 54.

Pre-lineup suggestion can occur by the police pointing out the suspect or the police commenting that the suspect is included in the lineup, or if the suspect is the only participant resembling the witness' description. *Barley*, 906 S.W.2d at 33; *Ibarra v. State*, 11 S.W.3d 189, 196 (Tex. Crim. App. 1999). However, the Court of Criminal Appeals of Texas has held a lineup is not impermissibly suggestive simply because a witness is told the suspect is included in the lineup, because a witness would normally assume the suspect is included in the lineup. *Harris v. State*, 827 S.W.2d 949, 959 (Tex. Crim. App. 1992) (en banc). Witnesses shown a suspect's driver's license prior to a lineup and told that the suspect would look older was held to be unnecessarily suggestive. *Munguia v. State*, 603 S.W.2d 876, 877-878 (Tex. Crim. App. [Panel Op.] 1980).

To meet due process, it is important the composition of the lineup not make the suspect appear conspicuous. *Cooks v. State*, 844 S.W.2d 697, 732 (Tex. Crim. App. 1992) (en banc). In *Cooks*, all the lineup participants were of the same race, all wore similar clothing, and all were close to the same height and within twenty to thirty pounds of the same weight; the fact that the participants did not perfectly match witnesses' previous descriptions did not make the lineup impermissibly suggestive. *Cooks*, 844 S.W.2d at 732. In *Barley*, lineup participants differed in height by several inches, but the witnesses' earlier descriptions differed in height estimates, and the participants had similar builds and features; the lineup was not suggestive. *Barley*, 906 S.W.2d at 34.

Lineup participants should fit the suspect's description, but exactitude is not required for due process. *Buxton v. State*, 699 S.W.2d 212, 216 (Tex. Crim. App. 1985) (en banc). In *Buxton*, the suspect appeared in the lineup wearing a pink shirt and green pants, other participants wore bright shirts, heights of the

participants were within five inches of each other, weights were within thirty-five pounds, but there was variation in participants' skin tones; the lineup did not violate due process. *Buxton*, 699 S.W.2d at 216. A suspect wearing sunglasses and a wig in a lineup was held to be permissible. *Coe v. State*, 683 S.W.2d 431, 435 (Tex. Crim. App. 1984) (en banc). In *Bell v. State* the suspect was the only participant in a six-member lineup wearing bright white pants, suspect was the tallest participant, and the suspect's number was underlined and a triangle mark appeared over the suspect's number. *Bell v. State*, 724 S.W.2d 780, 798-799 (Tex. Crim. App. 1986) (en banc). This lineup procedure did not prevent admission of the witnesses' in-court identifications of the suspect because the witnesses in *Bell* testified the in-court identifications were based on observations during the incident. *Bell*, 724 S.W.2d at 799.

The practice of allowing witnesses to jointly view a lineup and make identifications in each other's presence is not to be commended. *Chappell v. State*, 489 S.W.2d 923, 924 (Tex. Crim. App. 1973). In *Chappell*, a lineup where defense counsel should have been present and victims viewed the lineup together was held to not violate due process because the victims' in-court identifications were based on their observations at the time of the crime. *Chappell*, 489 S.W.2d at 924-925. In *Walker v. State*, witnesses were allowed to mingle and talk with each other before the lineup began, but no talking was allowed once the lineup began; each witness was interviewed separately concerning identification; the lineup was not impermissibly suggestive. *Walker v. State*, 588 S.W.2d 920, 925 (Tex. Crim. App. [Panel Op.] 1979).

Prior acquaintance with the suspect appearing in a lineup did not make the procedure impermissibly suggestive. For example, in *Ellsworth v. State*; the suspect and witness had lived in the same boarding house and had been introduced to each other, and had one brief conversation with each other. *Ellsworth v. State*, 447 S.W.2d 170, 171-172 (Tex. Crim. App. 1969). These facts did not prevent the witness' identification of the suspect.

A witness unable to make an identification after first viewing a lineup because attorneys were badgering her was allowed to return to the viewing room and the witness subsequently made an identification; this was held to be permissible. *Buxton*, 699 S.W.2d at 215-216. In *Barley*, witnesses, after viewing a lineup, were mistakenly allowed in the courtroom at a hearing in violation of the rule; this was held to not contribute to any impermissible identification of the suspect. *Barley*, 906 S.W.2d at 32, 34.

#### E. Due Process and Showups

One man showups are not favored, but a claimed violation of due process in the showup procedure depends on an analysis of the totality of the circumstances surrounding the showup. A showup on its own does not violate due process. *Garza v. State*, 633 S.W.2d 508, 512 (Tex. Crim. App. [Panel Op.] 1982); *Jackson v. State*, 657 S.W.2d 123, 127 (Tex. Crim. App. 1983) (en banc) (quoting *Cole v. State*, 474 S.W.2d 696, 698 (Tex. Crim. App. 1972)). Factors to consider in reviewing the totality of the circumstances include the opportunity the witness had to view the suspect, the degree of attention shown by the witness, the accuracy of the witness' description, the witness' level of certainty in the identification, and the time between the showup and the crime. *Garza*, 633 S.W.2d at 513.

Showups have some degree of suggestiveness. However, in some situations showups are permissible. In *Garza*, an in-field showup less than thirty-minutes after a burglary where the witnesses had not seen the suspects' faces was held to not create a substantial likelihood of irreparable misidentification. *Garza*, 633 S.W.2d at 513. In *Hudson v. State*, an in-field showup that occurred less than ten minutes after the witness phoned the police was not unnecessarily suggestive where the witness had ample opportunity to observe the suspect and note his appearance. *Hudson v. State*, 675 S.W.2d 507, 510 (Tex. Crim. App. 1984) (en banc).

Station house showups seem to be an area that has brought mixed decisions. In *Jackson*, witnesses were driven by police to the station house after being told the police had a suspect in custody. At the station house, the witnesses were taken to a room where an officer and the suspect were sitting. The witnesses were then allowed to identify the suspect. This procedure was held to be unnecessarily suggestive; however, the witnesses' in-court identifications were held to be admissible because the in-court identifications were shown to have independent origins apart from the station house showup. *Jackson*, 657 S.W.2d at 125, 126, 130. In *Guzman*, the court noted that a station house showup after the police had arrested two suspects should not have taken place. The court stated the police should have conducted a lineup instead. *Guzman v. State*, 567 S.W.2d 188, 191 (Tex. Crim. App. [Panel Op.] 1978). In *Nichols v. State*, a station house showup where the witness viewed the suspect while suspect was in a jail cell was a procedure the court said should be avoided. *Nichols v. State*, 511 S.W.2d 269, 271 (Tex. Crim. App. 1974).

Showups have occurred in places other than police stations. For example, witnesses who viewed a suspect in another trial before making in-court identifications of the suspect was not held to have been involved in an impermissibly suggestive pre-trial procedure. *Benson v. State*, 487 S.W.2d 117, 118-119 (Tex. Crim. App. 1972). In *Cooks*, a witness in court left the witness stand and

stood in front of the suspect, who was also standing, to get a closer look at the suspect; the court said "[w]e can conceive of no reason to hold that an in-court identification should be invalidated because the witness wanted to 'get a closer look' at the appellant." *Cooks v. State*, 844 S.W.2d 697, 731 n.29, 732 (Tex. Crim. App. 1992) (en banc).

#### F. Due Process and Photo Identification

Showing pictures to a witness before a lineup or trial is not a denial of due process. *Proctor v. State*, 465 S.W.2d 759, 764 (Tex. Crim. App. 1971). Showing pictures of a suspect to witnesses pre-trial is a consideration in determining if an in-court identification is of independent origin. A pre-trial photo identification procedure that is impermissibly suggestive so that the procedure causes a substantial likelihood of irreparable misidentification will prevent admission of an in-court identification. *Proctor*, 465 S.W.2d at 764; *Delk v. State*, 855 S.W.2d 700, 706 (Tex. Crim. App. 1993) (en banc). A fair number of photos should be shown a witness without the police suggesting the suspect's identity. *Proctor*, 465 S.W.2d at 764 n.7.

Displaying a single photo to a witness increases the chance of misidentification. *Proctor*, 465 S.W.2d at 764 n.7; *Delk*, 855 S.W.2d at 706 (showing one photograph held to be impermissibly suggestive); *Harris v. State*, 827 S.W.2d 949, 959-960 (Tex. Crim. App. 1992) (en banc) (displaying single photograph assumed to be impermissibly suggestive). But an investigator who displayed a single photo to a witness during an interview without revealing the identity of the suspect to the witness was held not to be an unduly suggestive procedure. *Rivera v. State*, 808 S.W.2d 80, 95-96 (Tex. Crim. App. 1991) (en banc).

Repeatedly including the suspect's photo in different displays increases the chance for misidentification. *Proctor*, 465 S.W.2d at 764 n.7; *Cantu v. State*, 738 S.W.2d 249, 251-252 (Tex. Crim. App. 1987) (en banc) (holding including suspect's photo in several photo displays was suggestive, but noting that not every case where different photos of a suspect are displayed in different photo displays is suggestive); *See Barley v. State*, 906 S.W.2d 27, 33 (Tex. Crim. App. 1995) (en banc) (stating the court does not encourage using photos of suspect that differ in lighting and background but recognizing different photos may be necessary due changes in suspect's appearance).

Impermissible suggestion in a photo display can occur if the suspect's photo is the only photo that resembles the witness' description. *Barley*, 906 S.W.2d at 33. The photos should depict persons of similar race, in similar poses, similar appearance, and approximately the same age. *Rivera*, 808 S.W.2d at 95; *Conner v. State*, 67 S.W.3d 192, 200 (Tex. Crim. App. 2001)

In *Conner*, the suspect's photo was the only one displaying booking numbers, however some of the other photos displayed other parts of the police booking card and one photo showed a person standing against a height indicator; the display of booking numbers did not necessarily cause impermissible suggestion. *Conner*, 67 S.W.3d at 200.

If the police indicate a suspect is included in a photo display this can cause impermissible suggestiveness. *Ibarra v. State*, 11 S.W.3d 189, 195-196 (Tex. Crim. App. 1999). In *Coleman v. State* the witness was shown two photos of the suspect and the police suggested that the suspect was in custody; this photo display was held to be impermissibly suggestive. *Coleman v. State*, 505 S.W.2d 878, 880 (Tex. Crim. App. 1974). The recommended procedure for displaying photos to witnesses is to have the witnesses view the photos separate and apart from other witnesses. *Powell v. State*, 466 S.W.2d 776, 778 n.1 (Tex. Crim. App. 1971).

#### G. Examples of Suggestive Procedures From Other Jurisdictions

The due process test is applicable to showup and lineups. Some suggestive identification procedures from other jurisdictions include:

1. Identification where suspects were being arraigned. *U.S. ex rel Johnson v. Hatrak*, 417 F. Supp. 316 (D.N.J. 1976), aff'd, 564 F.2d 90 (3<sup>rd</sup> Cir. 1977) and aff'd, 564 F.2d 90 (3<sup>rd</sup> Cir. 1977).
2. Identification made after a defendant was paraded in shackles by two witnesses outside the court room. *U.S. v. Emanuele*, 51 F.3d 1123 (3<sup>rd</sup> Cir. 1995).
3. Identification made where the defendant was the only black male in the courtroom. *Boyd v. Henderson*, 555 F.2d 56 (2<sup>nd</sup> Cir. 1977).
4. Defendant was wearing a prison uniform during hearing. *State v. Strickland*, 113 Ariz. 445, 556 P.2d 320 (1976).
5. Defendant was the only Puerto Rican in the room and was seated at counsel table. *People v. Ramos*, 52 A.D.2d 640, 383 N.Y.S.2d 548 (2d Dept. 1976).
6. Suspect appeared in handcuffs. *Bradley v. State*, 148 Ga. App. 722, 252 S.E.2d 648 (1979).
7. Identification took place during parole violation hearing. *People v. Williams*, 83 Mich. App. 642, 269 N.W.2d 251 (1978).
8. Detective brought robbery witnesses to defendant's bond hearing. *People v. Goodman*, 109 Ill. App. 3d 203, 64 Ill. Dec. 793, 440 N.E.2d 345,354 (1<sup>st</sup>. Dist. 1982)(court still

found there was reliable basis for in-court identification.)

9. Parents of teenage kidnaping victims pointed out defendant to their daughters as he was being brought to the courtroom at trial. *State v. Herrera*, 197 Mont. 462, 643 P.2d 588, 590-91 (1982) (admittedly suggestive procedures did not undermine the reliability of the identification.)

While courts have recognized that eyewitness identification at trial is usually suggestive because defendant is seated prominently at the defense table, it is nonetheless admissible if not tainted by a pretrial identification. See *U.S. v. Kaylor*, 491 F.2d 1127 (2d Cir. 1973).

#### 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 a 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 (5<sup>th</sup> 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 (5<sup>th</sup> 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 (2<sup>nd</sup> 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 (2<sup>nd</sup> 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 an 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.<sup>1</sup> 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 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.C. 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

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<sup>1</sup>In *Deason vs. State*, 84 S.W.2d 793 (Tex. App. - Houston [1<sup>st</sup> 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 (9<sup>th</sup> Cir. 1990).

held that under Rule 702,<sup>2</sup> 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.
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 straight-forward

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.Ct. 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

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<sup>2</sup>Rule 702 is unchanged in the consolidated Texas Rules of Evidence.

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)<sup>3</sup>. 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 led 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 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

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<sup>3</sup>*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).

- 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 (5<sup>th</sup> Cir. 1986); *State vs. Chapple*, 660 P.2d 1208, 1218 (Az. 1993); *United States vs. Downing*, 753 F.2d 1224, 1241-42 (3<sup>rd</sup> 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.<sup>4</sup>

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<sup>4</sup>A 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.

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*.

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 *Broders*, 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).<sup>5</sup> An expert's bald

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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.

<sup>5</sup>*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

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

Eyewitness identification involves two separate considerations: (1) the right to counsel and (2) the due process test. The right to counsel attaches at all critical stages of a criminal proceeding. A critical stage includes the filing of a formal charge, filing of an indictment, filing of an information, arraignment, or preliminary hearing. Even if the right to counsel has been provided the eyewitness identification must still pass due process. Reliability is the linchpin in determining the admissibility of identification testimony over a due process challenge. In determining whether identification procedures based upon a lineup, showup or photo array is so unreliable as to violate due process, the court must first decide whether the original identification procedure was unduly suggestive and, if so, whether suggestive procedure, given the totality of the circumstances, created a substantial risk of irreparable misidentification at trial. Because of the dangers of misidentification and the constitutional requirements, eyewitness identification should be carefully analyzed by both the bench and bar. Expert witnesses on identification may enlighten the jury on the inherent problems with identification testimony and thereby lead to more just results.

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evidence. Of course, it was harmless. *Id.* at 238.