

Eyewitness Evidence:  
Experts,  
Legal Developments,  
and "Reliability"

Professor Jules Epstein  
PBI, 2012

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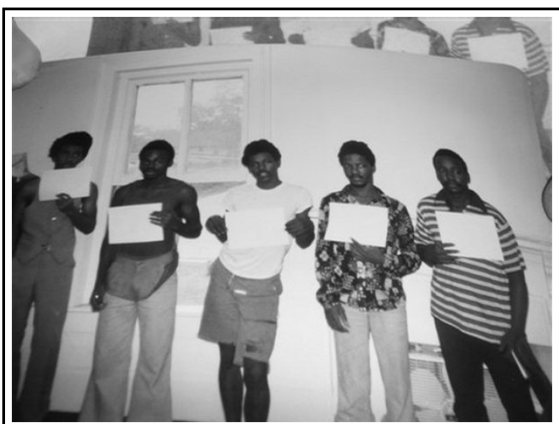
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System Concerns



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### Expert Testimony



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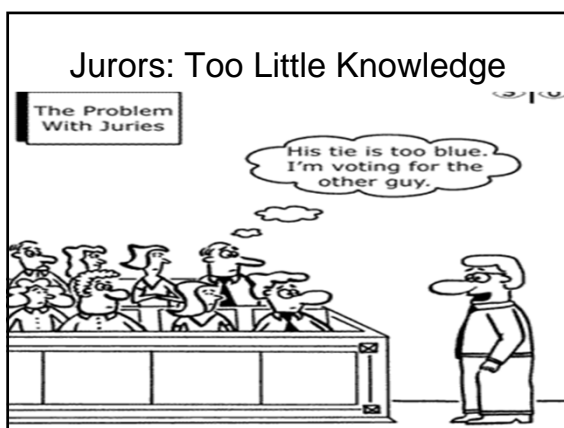
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### Jurors: Too Little Knowledge



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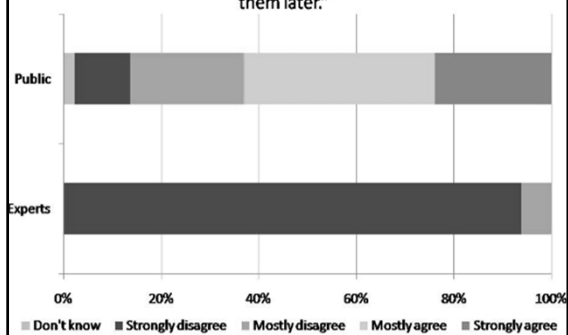
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"Human memory works like a video camera, accurately recording the events we see and hear so that we can review and inspect them later."



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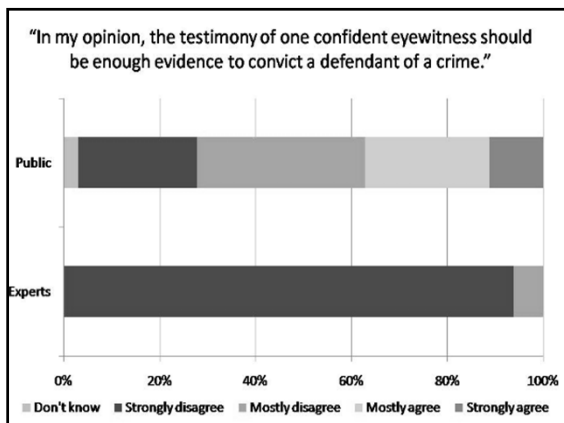
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### National Response

- ◆ The great majority of states, and federal courts, allow expert testimony.
- ◆ Both *Frye* and *Daubert*

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### Expert Testimony

- ◆ New York: *People v. Santiago*, October 20, 2011
- ◆ Texas: *Tillman v. State*, 2011 Tex. Crim. App. LEXIS 1343, Oct. 5, 2011

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### Pennsylvania



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### The *Allocatur* Grant

- ◆ Should not the trial court have had the discretion to permit Petitioner to present the testimony of a nationally recognized expert in the field of human memory, perception and recall

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### The *Allocatur* Grant

- ◆ Question 2:
- ◆ Should not the court permit expert scientific testimony, whether it be for the defense or prosecution, on how the mind works

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*Amici Curiae*

- ◆ PACDL
- ◆ The National Innocence Network/ Pa Innocence Project
- ◆ American Psychological Association

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Protocols

Follow the protocol



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### Massachusetts: Protocols

- ◆ before a photographic array..., mak[e] clear to the eyewitness:
- ◆ the alleged wrongdoer may or may not be in the...array;
- ◆ it is just as important to clear a person from suspicion as to identify a person as the wrongdoer;

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### Why a Protocol

- ◆ Reduce the risk of a misidentification
- ◆ [P]ermit the officer...to testify more accurately and with greater precision as to what the witness was told prior to the identification.

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### Protocols or Consequences

- ◆ we expect such protocols to be used in the future
- ◆ Commonwealth v. Silva-Santiago, 2009 Mass. LEXIS 77 (Mass. May 15, 2009)

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Delaware:  
A State to Watch



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In-Court Identifications

- ◆ we join the majority of courts in concluding that the two-step Biggers analysis does not apply to in-court identifications that do not come following an impermissibly suggestive pretrial identification.
- ◆ Byrd v. State, 2011 Del LEXIS 412

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Legislation



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### Texas Legislation

- ◆ Every department must adopt eyewitness practices:
- ◆ A state "model" or a similar one
- ◆ Tex. Code Crim. Proc. art. 38.20 (effective 9/2011)

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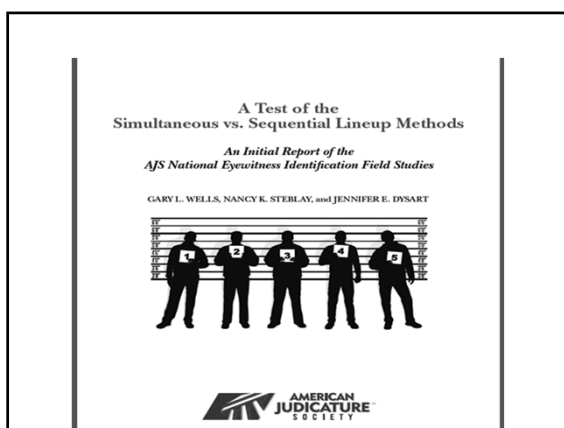
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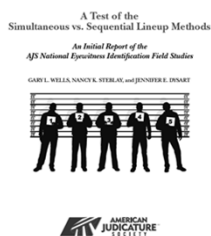
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### 9-19-11 Research



- ◆ Roughly same % of correct IDs.
- ◆ Simultaneous yielded 18.1% identifications of fillers and sequential yielded 12.2% IDs of fillers

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### Police “Get It” [Sometimes]

- ◆ **Some in law enforcement endorse blind, sequential procedures.**
- ◆ **Successful Eyewitness Identification Reform: Ramsey County’s Blind Sequential Lineup Protocol**



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### Pennsylvania – Proposed Legislation



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### Preventing Wrongful Convictions



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What is "Reliability?"



In particular:  
**Suppression  
Motions**

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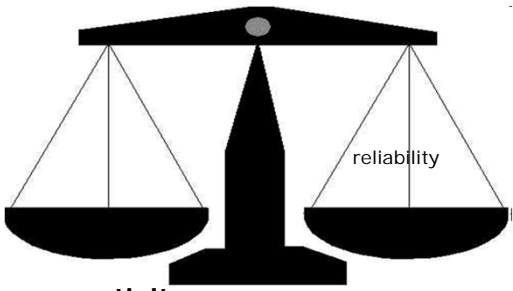
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The Standard



suggestivity      reliability

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State v. Angel Luis Sanchez

- ◆ **Tong's initial description: a young black male possibly with a tattoo on his arm**
- ◆ **the defendant's being forty-two years old, having no tattoo on his arm and Hispanic**

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Holding

- ◆ The phrase "black male" can apply to a wide variety of people and is not necessarily inconsistent with "Hispanic"
- ◆ Even if there was suggestivity, the ID is reliable

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Texas: Eye-dentification



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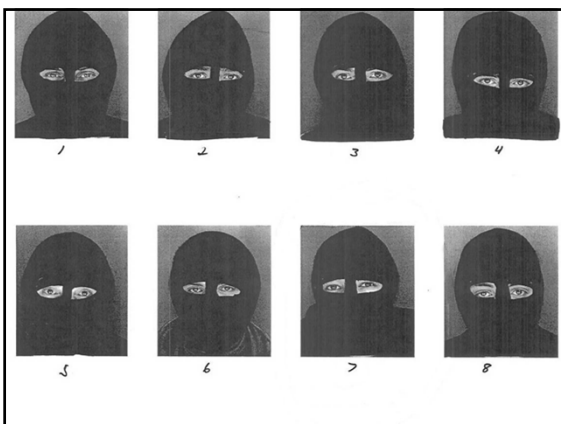
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Concerns Regarding  
Suppression Law

- ◆ **Of the first 200 DNA exonerations, 158 involved eyewitness testimony**
- ◆ **29 raised “suggestive ID” claims**
- ◆ **None received relief**

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The [Incompatible?]  
Legal Standards

- ◆ 6<sup>th</sup> Amendment:
- ◆ No in-court identification unless clear and convincing proof of *actual* independent basis.
- ◆ Due Process:
- ◆ Sufficiently reliable that a juror *might* be able to find that it is correct.
- ◆ A tolerance of “untrustworthiness” in the adversary trial.

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Reliable

- ◆ What is sufficiently reliable to avoid “a likelihood of irreparable misidentification.”
- ◆ What offers the chance of repair?
  - Cross?
  - Experts?
  - Instructions?
- ◆ When those are not available, do we heighten the suppression standard?

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Reliability and Civil Cases

◆Rule 403?

◆Rule 602

◆Taint?

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