

From a Federal Perspective:
Eyewitness Memory Issues & Suppression of Pretrial Identification
(Part II)

This is the second and final segment of a two part article on memory issues and the potential suppression of pretrial identifications. As you may recall, the first part of the article explored a variety of current psychological studies and widely accepted memory phenomena that are relevant to consideration of an eyewitness's reliability in the identification process.

Many courts have recognized how problematic eyewitness testimony is and how equally problematic it is that juries tend to convict when such testimony is part of the government's proof against our clients. In fact, in a recent Sixth Circuit dissenting opinion, Judge Clay noted that erroneous eyewitness testimony is the leading, single cause of wrongful convictions in the United States.¹ Consequently, suppression of those identifications is of paramount importance in cases that will ultimately be tried.

To suppress a pretrial identification, we must show the district court that our client's due process rights were violated. In essence, a pretrial identification, and a subsequent in-court identification, is suppressed only if the "identification procedure is so impermissibly suggestive as to give rise to the very substantial likelihood of misidentification."²

To determine whether a violation of due process occurred, district courts are to apply a two (2) prong test: (1) whether the identification procedure was impermissibly suggestive, and (2) if so, whether it created a very substantial likelihood of irreparable misidentification.³

The defendant bears the burden of proving suggestiveness.⁴ However, if the defendant fails at the first step and cannot show that the identification procedure was impermissibly suggestive, "no further inquiry by the court is required, and '[t]he reliability of properly admitted eyewitness identification, like the credibility of the other parts of the prosecution's case is a matter for the jury.'"⁵

On the issue of suggestiveness, the Supreme Court has found that "show-ups" are inherently suggestive and are "widely condemned."⁶ Likewise, the Supreme Court has consistently questioned the use of a single photograph for pretrial identification and has encouraged the use of a reasonable photographic display.⁷ On the other hand, there are no adverse presumptions or inferences regarding suggestiveness to be drawn from other identification procedures such as photo arrays or line-ups.

Once the Court finds suggestiveness in the identification procedure, the Court must evaluate the totality of the circumstances to determine whether the identification was nevertheless reliable.⁸ To assess the reliability of the identification, the Supreme Court instructs district courts to consider five (5) factors: (1) the witness's opportunity to view the perpetrator at the time of the offense; (2) the witness's degree of attention at the time of the offense; (3) the accuracy of the witness's prior description; (4) the level of certainty when identifying the defendant as the perpetrator; and, (5) the time elapsed between the crime and the identification.⁹

When the suggestive identification procedure has created a very substantial likelihood of irreparable misidentification, an in-court identification should be prohibited by the Court. *See, Simmons*, 390 U.S. at 384; *Wade, supra*; *Ledbetter*, 35 F.3d at 1070.

It is important to note that psychological studies show that the second factor (degree of attention) and fourth factor (confidence) do not necessarily correlate with the reliability or accuracy of the witness's identification.

Unfortunately, the Supreme Court jurisprudence on identification suppression was developed in the 1960's and 1970's. Meanwhile, the bulk of the scientific and psychological studies regarding the way memory works (and more specifically, documenting the fact that unreliable witness's routinely exhibit false confidence) were published in the 1980's and 1990's.¹⁰ Therefore, the law trails the science in this area. We need to educate the Courts through the use of experts and push the issue of suppression of pretrial identifications back to the Supreme Court for reevaluation.

1. *Moss v. Hofbauer*, 286 F.3d 851, 874 (6th Cir. 2002)(Clay, Dissenting).
2. *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968); *See, Stovall v. Denno*, 388 U.S. 293, 302 (1967); *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); *Ledbetter v. Edwards*, 35 F.3d 1062, 1070 (6th Cir.1994); *United States v. Johnson*, 114 F.3d 435, 441 (4th Cir.1997).
3. *Id.*
4. *Ledbetter*, 35 F.3d at 1070-71.
5. *Raheem v. Kelly*, 257 F.3d 122, 133 (2nd Cir.2001) (citing *Foster v. California*, 394 U.S. 440, 442-43 n. 2 (1969)).
6. *Stovall*, 388 U.S. at 302, 87 S.Ct. at 1972; *Manson v. Brathwaite*, 432 U.S. 98, 116, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); *Foster v. California*, 394 U.S. 440, 443, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969); *Biggers v. Tennessee*, 390 U.S. 404, 407, 88 S.Ct. 979, 19 L.Ed.2d 1267 (1968); Wayne R. LaFave et al., *Criminal Procedure* §§ 7.4(f) (2nd ed.1999).
7. *See, Manson*, 432 U.S. at 117 (stating that "identifications arising from single-photograph displays may be viewed in general with suspicion"); *Simmons*, 390 U.S. at 383, 88 S.Ct. at 970-71(same); *United States v. Johnson*, 114 F.3d 435, 442 (4th Cir.1997) (concluding that the "single photograph display [in that case] was unduly suggestive").
8. *Ledbetter*, 35 F.3d at 1071; *United States v. Thai*, 29 F.3d 785, 808 (2nd Cir.1994); *Manson*, 432 U.S. at 114 (Reliability is the linchpin in determining the admissibility of identification testimony).

9. *Neil v. Biggers*, 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972) ; *Johnson*, 114 F.3d at 441.

10. Bower, G.H., *Mood and Memory*, 36 *American Psychologist* 129-148 (1981); Gayla Swihart, John Yuille, & Stephen Porter, *The Role of State-Dependent Memory in "Red-Outs,"* 22 *Int'l Journal of Law and Psychiatry*, 199-212 (May 1999); John P. Aggleton, & Louise Waskett, *The Ability of Odours To Serve as State-Dependent Cues for Real-World Memories: Can Viking Smells Aid the Recall of Viking Experiences?* 90 *British J. of Psychology* 1-7 (Feb. 1999); *See*, Elizabeth F. Loftus & James M. Doyle, *Eyewitness Testimony Civil and Criminal* § 1-5 (3rd ed. 1997 and Cumulative Supp. 2004).