

American Criminal Law Review
Fall, 2005**Symposium: Wrongful Convictions and Systemic Reform*****1271 THE ROLE OF THE SOCIAL SCIENCES IN PREVENTING WRONGFUL CONVICTIONS**[Jacqueline McMurtrie \[FNa1\]](#)

Copyright © 2005 by American Criminal Law Review; Jacqueline McMurtrie

The lawyer alone is obdurate. The lawyer and the judge and the jurymen are sure that they do not need the experimental psychologist. They do not wish to see that in this field preeminently applied experimental psychology has made strong strides They go on thinking that their legal instinct and their common sense supplies them with all that is needed and somewhat more The Court would rather listen for whole days to the "science" of the handwriting experts than allow a witness to be examined with regard to his memory and his power of perception, his attention and his association, his volition and his suggestibility, with methods which are in accord with the exact work of experimental psychology.

Hugo Münsterberg, *On the Witness Stand* 10, 46 (1908)

I. INTRODUCTION

The legal profession's reluctance to acknowledge the findings of social scientists, while accepting other "sciences" on little other than blind faith has contributed to the phenomena of erroneous convictions. It is undisputed that people are convicted and sentenced, sometimes to death, [\[FN1\]](#) for crimes they did not commit. [\[FN2\]](#) The advent of deoxyribonucleic (DNA) testing and rapid improvements in DNA technology have resulted in the exoneration of over 163 people in the United States. [\[FN3\]](#) As forensic DNA technology continues to evolve and improve, other forensic sciences, long accepted by courts as scientific proof of identification in ***1272** criminal cases, have come under scrutiny. Individuals convicted on the basis of expert forensic testimony on comparisons of bitemarks, [\[FN4\]](#) hairs, voiceprints, earprints [\[FN5\]](#) and fingerprints, [\[FN6\]](#) were freed after post-conviction DNA tests established their innocence and proved the "scientific" evidence wrong. In one example, prosecutors stated that hairs found at a rape scene were "indistinguishable" from Jimmy Ray Bromgard's. With faulty statistics to bolster this bold statement, Bromgard, at eighteen, was sentenced to forty years in prison. Fifteen years later ***1273** he was exonerated when DNA evidence proved he did not commit the rape. [\[FN7\]](#) In another case, the prosecutor's use of voiceprint analysis to match David Pope's voice with threatening messages left on the rape victim's answering machine following her attack sealed his conviction. Post-conviction DNA tests freed Pope, but only after he spent fifteen years in prison. [\[FN8\]](#)

At the same time, studies of DNA exonerations and other erroneous convictions have validated the research of social scientists, particularly in the areas of mistaken eyewitness identification, false confessions and suggestibility of children. Courts traditionally tended to exclude scientific evidence from expert witnesses in these disciplines, primarily on the basis that the testimony addressed matters within the common understanding of jurors, [\[FN9\]](#) was confusing, [\[FN10\]](#) or that it invaded the province of the jury to make credibility determinations. [\[FN11\]](#) However, with the increased awareness of the role that mistaken identification, false confessions and suggestive interviewing of children play in convicting the innocent, a new trend is developing regarding the admissibility of expert testimony. Courts have more recently ***1274** acknowledged that the research of social scientists in these areas contains findings that are counter-intuitive and therefore expert testimony can assist the trier of fact. [\[FN12\]](#)

(Cite as: 42 Am. Crim. L. Rev. 1271)

Section II of this essay will provide an introduction (the literature is far too extensive to attempt a comprehensive treatment in this article) to the findings of social scientists in the areas of: a) eyewitness identification; b) false confessions; and c) suggestibility of children. In each section, it will also discuss efforts to implement reforms based upon the research of social scientists. Any meaningful reform must take place on two fronts. First, it is essential that "obdurate" lawyers and judges address their preconceptions about the social sciences and educate themselves about the findings of applied psychology. Second, and most importantly, systemic change must occur in the way evidence is collected and preserved during the investigation of a case that involves an eyewitness, a child witness, or an interrogation. [\[FN13\]](#) By incorporating lessons learned from the research of social science, we can improve the administration of justice and guard against conviction of the innocent.

II. THE INTEGRATION OF SOCIAL SCIENCE RESEARCH INTO CRIMINAL JUSTICE REFORM

The legal profession's relationship with the discipline of social sciences is complex and has vacillated between integration and isolation. James Ogloff traces the development of the law and psychology movement over the past century in *Two Steps Forward and One Step Backward: The Law and Psychology Movement(s) in the 20th Century*. [\[FN14\]](#) He discusses the genesis of the movement in the late *1275 19th century and the promising "first step" of integrating social sciences, including psychology, into the law school curriculum. According to Ogloff, the movement took "one step back" in the late 1940s and 1950s, when virtually no articles or books are written on the general topic of law and psychology. The "second step forward" in the movement occurred in the 1960s, with the development of numerous scholarly journals devoted to the field of law and psychology and with the increase in the number of graduate programs in psychology and law. [\[FN15\]](#) Much of the social science research in the areas of eyewitness identification, interrogations, and interviewing of children that provides the foundation for reform in the criminal justice system was developed during the "second step forward" period of the law and psychology movement.

A. Eyewitness Identification

Mistaken eyewitness identification has long been recognized as a leading cause of wrongful convictions. The Supreme Court acknowledged the grave role that misidentifications play in the criminal justice system, indicating that mistaken identification "probably accounts for more miscarriages of justice than any other single factor." [\[FN16\]](#) Statistics bear out this observation, showing that mistaken eyewitness identification is the leading cause of conviction of the innocent--misidentification played a major role in two-thirds of the first 138 DNA exonerations in the United States. [\[FN17\]](#) Even before the development of forensic DNA testing, mistaken eyewitness identification was responsible for the convictions of more innocent persons than any other combination of factors. [\[FN18\]](#)

Although DNA testing is a powerful tool in exonerating individuals convicted on the basis of mistaken identifications, it is not a panacea for eyewitness error in criminal cases. In most crimes involving eyewitnesses, such as murders, robberies, burglaries, and thefts, the perpetrator does not leave biological material at the scene of the crime. [\[FN19\]](#) However, procedures for maximizing accurate identifications *1276 and minimizing erroneous identifications have been extensively and empirically tested by cognitive and social psychologists, peer reviewed, and thoroughly and scientifically studied.

Research over the past thirty years has shown that expert testimony on memory and eyewitness identification is the only legal safeguard that is effective in sensitizing jurors to eyewitness errors. [\[FN20\]](#) A 1984 Massachusetts case provides an interesting example of how expert testimony on eyewitness identification could change the outcome of a trial. In *Commonwealth v. Francis*, the defendant was convicted in the Superior Court of Massachusetts for armed robbery. [\[FN21\]](#) An eyewitness testified before the grand jury, at the probable cause hearing, and at the first trial that the robber was wearing short sleeves, and had no distinctive features. The trial ended in a mistrial when the jury was unable to reach a verdict after the defendant showed that he had tattoos up and down his arms.

(Cite as: 42 Am. Crim. L. Rev. 1271)

At the second trial, after the eyewitness (who had been sequestered during the first trial) learned about the defendant's tattoos, she changed her testimony, suddenly remembering that the robber wore a long-sleeved jacket which concealed his weapon. [FN22] At this point, the defendant moved to allow expert testimony regarding eyewitness identification. The expert for the defense testified that high levels of stress and the presence of a weapon reduce the ability of an eyewitness to correctly identify a suspect. The expert also testified that when an eyewitness learns of inconsistent post-event information, she will often unconsciously alter her memory to resolve the conflict, incorporating this post-event information into her memory. [FN23]

The trial judge refused to admit the expert testimony, stating that "the proposed testimony is not beyond the ordinary experience and knowledge of the average juror, and would not aid jurors in their deliberations." [FN24] The defendant, despite an alibi and the presence of the tattoos, was convicted. However, the undecided jury at the first trial, and the cross examination of the witness at the second trial, revealing her prior inconsistent statements, suggests that had the expert testimony *1277 been admitted, the defendant may well have been acquitted.

In light of the research exposing the weaknesses of eyewitness identification, the Francis and other courts' traditional reliance on cross-examination and closing argument [FN25] and on the common sense of jurors to understand the flaws of eyewitness identification is misguided. Although cross-examination is a powerful tool for exposing lies, it is not particularly effective when used against eyewitnesses who believe they are telling the truth. [FN26] Further, reliance upon a fact-finder's common sense is misplaced when social science research concludes that many of the findings in the area of eyewitness identification are counter-intuitive.

For example, extensive scientific research establishes that high confidence on the part of an eyewitness does not directly correlate with high accuracy. [FN27] Yet, the confidence that an eyewitness expresses in his or her identification is the most powerful determinant of whether or not a fact-finder believes that the witness has made an accurate identification. [FN28] The presence of other factors known to genuinely influence accuracy--such as disguises worn by the perpetrator, stress experienced by the victim, instructions that encourage a witness to make a selection, bias in the composition of the photo array or lineup, and the victim's focus upon a weapon during an incident--are not relied upon by jurors as much as eyewitness confidence. [FN29]

*1278 The great weight that a fact-finder places upon eyewitness confidence is particularly troubling because research establishes that eyewitness confidence is highly malleable. The confidence of an eyewitness can be influenced and strengthened by repeat questioning [FN30] or by information that the witness receives during, or after, the identification process. [FN31] Eyewitnesses who are given confirming feedback about their identifications express more confidence in their identification and the details of their identification. In a recent study, researchers obtained 352 false identifications in an experiment and randomly assigned these eyewitnesses to receive feedback about their identification decisions. Some received confirming feedback ("good, you identified the suspect"), some received disconfirming feedback ("actually the suspect is number 4") and some received no feedback. Later, the eyewitnesses were asked how certain they were at the time of the identification that they had identified the actual culprit. The eyewitnesses who received confirming feedback were much more confident than the witnesses with no feedback and the witnesses with disconfirming feedback. In addition, the confirming feedback witnesses distorted their reports of their witnessing conditions by exaggerating how good their view was of the culprit and how much attention they paid to the culprit's face while observing the event. [FN32]

To protect against the contamination of eyewitness testimony by subtle or express confirming feedback, Gary L. Wells and other scholars in scientific psychology recommend the use of a double-blind identification procedure. [FN33] In a double-blind procedure, neither the eyewitness nor the officer conducting the identification procedure are aware of who the

(Cite as: 42 Am. Crim. L. Rev. 1271)

suspect is within the photo array or lineup. This straightforward procedure protects against witnesses looking towards the administrator of the photo array or lineup for cues as to which person to choose, or for confirmation of their selection. It also prevents against the administrator giving unintended or express reinforcement of the witnesses' selection.

***1279** Another leading recommendation of scholars in the field of eyewitness identification is to conduct a sequential, rather than simultaneous, identification procedure to guard against what social scientists identify as the "relative judgment process." [\[FN34\]](#) Witnesses who view a simultaneous photo array or lineup tend to select the individual who most resembles their memory of the perpetrator, relative to the other members of the photo array or lineup. If the perpetrator is actually in the photo array or lineup, there is less danger that the eyewitness will select the wrong individual during the identification procedure. However, if the perpetrator is not present there is a substantial risk that the eyewitness will select the individual who most resembles the perpetrator through the process of elimination. In a sequential identification procedure, the eyewitness views one photo or lineup member at a time and makes a decision on each subject before viewing the next subject. Thus, the opportunity for exercising relative judgment during the selection is eliminated. A meta-study analysis on the simultaneous versus sequential experiments found that mistaken witness identifications were greatly diminished by the sequential lineup compared to the simultaneous lineup. [\[FN35\]](#)

The simple procedures of using double-blind methods and sequential, rather than simultaneous, lineups can greatly reduce the number of erroneous eyewitness identifications without significantly affecting the number of accurate identifications. [\[FN36\]](#) In New Jersey, the Attorney General, who has jurisdiction over all law enforcement agencies in the state, issued a directive recommending the use of the double-blind sequential procedure. [\[FN37\]](#) Other law enforcement agencies in Suffolk County and Boston, Massachusetts have adopted the double-blind, sequential identification procedure on a voluntary basis. [\[FN38\]](#) Many state legislatures are considering eyewitness identification reform bills in a commitment towards increasing the accuracy of eyewitness identification. [\[FN39\]](#)

***1280 B. False Confessions**

The idea that an individual would confess to a crime, particularly a horrific crime such as murder or rape, without being subject to physical torture, runs counter to the intuition of most people. Accordingly, a confession is given tremendous weight by a jury, resulting in defendants being convicted on the basis of a confession even in the absence of evidence corroborating the confession. [\[FN40\]](#) The commonly held belief that innocent people will not confess to a crime is countered by evidence establishing that police-induced false confessions are a substantial cause of erroneous convictions. [\[FN41\]](#) In case studies of erroneous convictions, a false confession is identified as the cause of miscarriages of justice in numbers ranging from 14% to 25% of the cases studied. [\[FN42\]](#)

Dr. Gisli H. Gudjonsson, a Professor of Forensic Psychology at the Institute of Psychiatry in London was the first to compile case studies, survey the international theories on coerced confessions and develop a theory of false confessions. [\[FN43\]](#) Between the publication of his first book in 1992 and a 2003 addition to the series, *THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK*, several other prominent researchers have joined in the field and contributed to a body of literature discussing case studies and theories of false confessions. [\[FN44\]](#) The literature ***1281** regarding modern interrogation methods establishes that although the police no longer rely upon physical torture to obtain confessions, they are instead trained to employ a number of methods of psychological persuasion that are intended to compel a suspect to confess. [\[FN45\]](#) It is important to note that the officer conducting the interrogation is not embarking upon an objective fact-gathering mission. Rather, the officer's sole purpose is to obtain a confession, or at minimum incriminating statements and admissions, from a suspect in order to bolster the prosecution's case. [\[FN46\]](#)

Social scientists have endeavored to explain how and why the strategies of psychological interrogation sometimes lead

innocent persons to confess. Richard Ofshe and Richard Leo are social psychologists who have extensively researched and studied the decision-making process of false confessors. [FN47] They break the interrogation process into two-steps. [FN48] The first step of an interrogation is meant to remove the suspect's confidence that he or she will survive the interrogation without being arrested. The interrogator will forcefully insist that the suspect has been caught "red-handed" and that incontrovertible evidence establishes that the suspect is guilty. [FN49] In the second step of interrogation, the interrogator seeks to obtain a confession by persuading the suspect that it is in his or her self-interest to admit to some version of involvement in the offense. The inducements to confess range from low-end (appeals to morality, self-respect, or cathartic relief) to systemic (better treatment by the system if the suspect confesses) to high-end *1282 inducements (implicit or explicit promises of lesser punishment or other reward). [FN50] Modern interrogation techniques are effective when used with guilty suspects; however the psychological persuasiveness of the techniques is such that they convince some innocent suspects that their only rational choice is to confess. [FN51]

The public does not thoroughly understand how methods of psychological interrogation lead innocent people to falsely confess. [FN52] After completing a study of 125 recent cases of proven interrogation-induced false confessions, Steven A. Drizin and Richard A. Leo conclude that neither do the police. [FN53] They urge greater education and training of police about the causes, indicia and consequences of false confessions, with specialized training in how to interrogate persons with developmental disabilities and juveniles, who appear to be particularly susceptible to falsely confessing in response to the psychological methods of persuasion used in interrogations. [FN54]

The leading recommendation from scholars and practitioners is to videotape the entire custodial interrogation. [FN55] The taping requirement ensures that there is an objective, thorough and reviewable record of what took place in the interrogation room. It diminishes the potential for a future swearing contest between the police and the suspect regarding what took place in the interrogation room. And taping deters police from engaging in misconduct during the interrogation, and allows supervisors the opportunity to monitor and improve interrogation methods. [FN56] At present four states require the police to electronically record interrogations. [FN57] Other police departments, recognizing that recording custodial interrogations *1283 benefits law enforcement, have implemented videotaping on a voluntary basis. [FN58]

C. Child Suggestibility

Erroneous convictions in the area of child sex abuse are often impossible to prove with the scientific certainty of DNA exonerations. [FN59] Recent events make it clear that improper interviewing techniques and other suggestive influences lead to false accusations and convictions of the innocent. High profile cases in Los Angeles, California, [FN60] New Jersey, [FN61] Wenatchee, Washington, [FN62] and Kern County, California [FN63] demonstrate the power of the state's claim that a child's statements about sexual activity "indicate precocious sexual knowledge that ... could have *1284 [been] learned only as the result of being abused." [FN64] Wrongful convictions in child abuse cases differ from cases of misidentification and false confession, because exonerations are often based upon evidence that the crime did not occur. However, the cases of erroneous convictions in each area show that memory is fallible and that it can be shaped and influenced through suggestion.

A body of research has developed in the areas of children's memory and suggestibility demonstrating the complex dynamic that exists when a child is interviewed to gather forensic evidence in a sex abuse case. [FN65] There is a consensus among researchers that young children are more susceptible to suggestion. [FN66] Although jurors may generally accept the notion that children are suggestible, studies indicate that they are reluctant to accept that fact in cases of child sex abuse. [FN67] Several studies focusing on the credibility of different-aged victims/witnesses alleging sexual assault found that jurors in mock trials viewed younger victims as unable to fabricate sexual allegations. [FN68] This is likely because jurors *1285 believe that a young child will not invent details about sexual activity, even when an interviewer suggests that something sexual occurred. However, this commonly held belief needs re-examination. Researchers have found that the

(Cite as: 42 Am. Crim. L. Rev. 1271)

younger the child, the more susceptible the child is to suggestion from adults, including well-meaning interviewers, about bodily contact and bodily touching. [FN69]

Even accepting that jurors are aware that children are suggestible, average jurors are not aware of the effects of interview techniques or other suggestive influences on false memories. For example, most lay people would not know how to identify a leading question; the effect of leading questions on a suggestible child; [FN70] the effect of interviewer bias; [FN71] the pressure on a child to please the interviewer; [FN72] the effect of "stereotype-induction" (when an adult tells a child how others characterize the suspect); [FN73] the necessity of beginning an interview by asking open-ended questions; [FN74] and the necessity of an appropriate rapport building introduction. [FN75] Expert witnesses are able to educate the jury about these areas of concern, allowing the jury to better assess the credibility of the testimony of the complainants and the capability of interviewers who present hearsay renditions of the children's prior disclosures.

Scholars, empiricists and psychologists have consistently recommended that the initial interview of a child victim be conducted by a professional who is trained to avoid the types of questions and scenarios that lead to the risk of influencing *1286 answers. [FN76] In order for training to be effective, it has to be extensive and include practice, individual feedback and follow-up. [FN77] Improved training is critical since research has consistently indicated that interviewers continue to ask leading and suggestive questions even after extensive training in how to conduct interviews with children. [FN78] Moreover, child interviewers doing self-assessments are more likely to rate their own interviewing skills more positively than does an objective observer. [FN79]

Many scholars and practitioners agree that the best way to determine whether interviewers are using proper interviewing techniques is to document the interview so that other professionals can independently evaluate the interview. [FN80] As in the area of interrogation and false confessions, videotaping a child interview ensures that there is an accurate and complete record of the exchange between the interviewer and child. It also provides for better monitoring, supervision and training of interviewers. And it has the added benefit of minimizing the number of times that a child is subject to interviewing. If a qualified professional conducts a videotaped interview, police, prosecutors, and defense attorneys are less likely to request additional interviews of the child. Although at least thirty-nine states authorize some use of videotaped interviews, no state mandates videotaping interviews of child victims. [FN81]

*1287 III. CONCLUSION

It is evident ... that a discussion of the relation of the several social sciences to law ... is timely and significant.

Roscoe Pound, foreword to Huntington Cairns, *Law and the Social Sciences*, xi, xiv (1935).

The magnitude of error in our criminal justice system can no longer be ignored. Nor can the legal profession continue to turn its back towards the field of social sciences. This essay cannot pay tribute to the wealth of research of social sciences that can inform the criminal justice system how to implement reforms that will decrease the rate of error in our system. Instead it is meant to entice the reader to seek out further information in a search to improve the truth-seeking mission of our legal system. We owe it to those who have served years in prison, or have been sentenced to death for crimes they did not commit, to enact reforms that will help prevent further miscarriages of justice.

[FN1]. Assistant Professor of Law, Director: Innocence Project Northwest Clinic--University of Washington School of Law, J.D., University of Michigan Law School, B.G.S., University of Michigan.

[FN1]. See Death Penalty Information Center, for a current list of death penalty exonerees, <http://www.deathpenaltyinfo.org/article.php?did=412&scid=6>, (last visited Sept. 9, 2005); see also MICHAEL L.

(Cite as: 42 Am. Crim. L. Rev. 1271)

RADALET, HUGO A. BEDEAU & CONNIE PUTMAN, *IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES* (Northeastern University Press 1992) (identifying 416 cases of erroneous conviction in capital or potentially capital cases between 1900 and 1991).

[FN2]. See Samuel R. Gross et al., *Exonerations in the United States: 1989 through 2003*, 95 J.L. & CRIM 524 (2005) (identifying 340 exonerations between 1989 and 2003, 144 of which were exonerations based on post-conviction DNA testing, and 196 cases where individuals were freed through other types of evidence); RADALET ET AL., *supra* note 1 at 17; Arye Rattner, *Convicted But Innocent*, 12 LAW & HUM. BEHAV. 283, 287 (1988) (identifying 205 wrongful convictions); C. Ronald Huff, *Wrongful Conviction: Societal Tolerance of Injustice*, 4 RES. SOC. PROBS. & PUB. POL'Y. 99 (1987) (examining 500 wrongful convictions); JEROME FRANK & BARBARA FRANK, *NOT GUILTY* (Doubleday & Company, Inc. 1957) (discussing thirty-six cases of erroneous conviction); EDWIN M. BORCHARD, *CONVICTING THE INNOCENT* (Garden City Publishing Company 1932) (discussing sixty-five cases of wrongful conviction).

[FN3]. See The Innocence Project, <http://www.innocenceproject.org> (last visited Oct. 14, 2005), for a current list of DNA exonerations.

[FN4]. Ray Krone was convicted and sentenced to death for the murder of a woman who was stabbed to death and left in the restroom of a bar where she worked. Little physical evidence was found, except for bitemarks left on the neck and the breast of the victim. Investigators heard that Krone helped the victim close the bar on the night of the murder and he was arrested and charged. Styrofoam impressions of Krone's teeth were taken for comparison with the bitemarks on the victim. At trial, an odontologist testified that the bitemarks on the victim matched the impression Krone made on the Styrofoam. Krone, who testified he was at home at the time of the murder, was convicted and sentenced to death. Krone was successful in obtaining a new trial, but was convicted after re-trial and sentenced to life imprisonment. In 2002, DNA testing done on the saliva and blood found on the victim exonerated Krone and implicated a man named Kenneth Phillips, who worked near the scene of the crime, and who was already in prison for another sex offense. Krone spent ten years in prison, including some years on death row, before he was exonerated and released. See [State v. Krone, 897 P.2d 621, 622 \(Ariz. 1995\)](#) (ordering a new trial because Krone had been prejudiced by the state's failure to disclose a crucial piece of evidence in the form of a videotape which "attempted to show match between Krone's teeth" and the victim's wounds); Henry Weinstein, *The Nation's Death Penalty Foes Mark a Milestone Crime: Arizona Convict Freed on DNA Tests is Said to be the 100th Known Condemned U.S. Prisoner to be Exonerated Since Executions Resumed*, LOS ANGELES TIMES, April 10, 2002, at A16 (reporting on the exoneration of Ray Krone); Craig M. Cooley, [Reforming the Forensic Science Community to Avert the Ultimate Injustice](#), 15 STAN. L. & POL'Y REV. 381, 437 (2004) (using Ray Krone's story as an example of the potential fallacies of bite mark identification).

[FN5]. See Bob Woffinden, *Earprint Landed Innocent Man in Jail for Murder: Grotesque Miscarriage of Justice Resolved after Seven Years*, GUARDIAN (LONDON), Jan. 23, 2004, at 13 ("A man who spent seven years in prison after being convicted of murder on the strength of an earprint walked free from the Old Bailey yesterday after the charges against him were formally dropped ... [Mark Dallagher] was convicted primarily on the basis of earprints found on the glass of the window through which the intruder had entered the house. The prosecution expert ... told the court he was "absolutely convinced" that the prints were those of Mr. Dallagher's ears A DNA profile obtained from the earprint [in 2004] proved that it was not Dallagher's.").

[FN6]. Stephan Cowans was convicted of multiple crimes associated with an assault on a police officer. Jurors heard that the assailant shot a police officer after wrestling the gun away from the officer during a physical struggle. The assailant then shot at a resident of the neighborhood, before breaking into a home. The assailant drank from a glass of water in the house and left

behind a baseball cap, the gun and a sweatshirt. Two weeks after the assault, the police officer identified Cowans from a photo array and then picked him out of a lineup. The other victim did not pick Cowans' picture in the photo array, but later selected him from a lineup and identified him at trial. None of the other eyewitnesses, including the residents of the home which was invaded, identified Cowans as the assailant. Two fingerprint technicians testified that a fingerprint lifted from a glass used by the assailant matched Cowans' print. A fingerprint expert hired by the defense confirmed the match. Cowans was convicted and sentenced to thirty to forty-five years in prison. In 2003, the state agreed to release the glass, baseball hat and sweatshirt for DNA testing. Profiles obtained from the glass and the hat matched each other, but did not match Cowans. The state asked to have the sweatshirt tested, and again, the profile matched the profiles from the glass and the hat, but did not match Cowans. In 2004, Cowans was exonerated after serving six years in prison. See Jonathan Saltzman & Mac Daniel, *Man Freed in 1997 Shooting of Officer Judge Gives Ruling After Fingerprint Revelation*, BOSTON GLOBE, Jan. 24, 2004, at A1 (reporting that the prosecutor at Cowans' court hearing stated "I can conclusively and unequivocally state, your honor, that the purported match was a mistake"); see also Sandy L. Zabell, *Fingerprint Evidence*, 13 J.L. & POL'Y 143, 146-47 (2005) (discussing two case studies of fingerprint misidentification).

[FN7]. At trial, the victim said she was 60% to 65% sure that her attacker was Bromgard. To bolster its case, the prosecutor presented testimony from an expert who testified that pubic and head hairs found at the scene could not be distinguished from Bromgard's hair samples. The expert testified that the chances that either set of hairs found at the scene were not those of Bromgard were 1 in 100 for normal hair and rose to 1 in 10,000 for pubic hair. In 2002, DNA tests proved that Bromgard did not commit the rape and he was released after serving fifteen years in prison. See Lise Olsen, *Reopened Rape Case Dogs Crime Lab Worker*, SEATTLE POST-INTELLIGENCER, Oct. 11, 2002, at A1 (quoting the expert as claiming "that the odds of making a mistake in matching both head and pubic hair would be one chance in 10,000."); see also Adam Liptak, *2 States to Review Lab Work Of Expert Who Erred on ID*, NEW YORK TIMES, Dec. 19, 2002, at A24 (where Walter Rowe, a professor of forensic science at George Washington University, who reviewed the case at the request of Bromgard's lawyer, Peter J. Neufeld of the Innocence Project, said of the expert's testimony: "The 1-in-100 estimate was without any scientific basis ... [t]he multiplying of probabilities was totally fallacious.").

[FN8]. See Cecilia M. Vega, *Life in the Free World: After 15 years in a Texas Prison for a Crime He Didn't Commit, David Pope Tries to Rebuild his Life in the North Bay*, THE PRESS DEMOCRAT, Jan. 25, 2004. See also The Innocence Project, http://www.innocenceproject.org/case/display_profile.php?id=82 (last visited Sept. 21, 2005) (providing a short profile of the Pope case and explaining that Pope was exonerated because the DNA profile matched that of another man, who was serving time in a Texas prison).

[FN9]. See, e.g., [People v. Son](#), 93 Cal. Rptr. 2d 871, 883 (2000) (declaring that the lower court acted within its discretion by excluding expert testimony on false confessions on "a matter easily understood by a layperson without expertise"); [State v. Swan](#), 790 P.2d 610, 632 (Wash. 1990) (upholding the exclusion of an expert psychologist's testimony on the suggestibility of children because child suggestibility is within the understanding of the jury and was addressed in cross-examination); [Commonwealth v. Francis](#), 453 N.E.2d 1204, 1210 (Mass. 1983) (holding that juries can understand, without expert assistance, the general factors associated with inaccurate identifications).

[FN10]. See, e.g., [People v. Green](#), 683 N.Y.S.2d 597, 600 (N.Y. App. Div. 1998) (finding that proffered expert testimony concerning defendant's susceptibility to providing a false confession "was not sufficiently relevant to outweigh the confusion it would inject into the trial").

[FN11]. See, e.g., [Callis v. State](#), 684 N.E.2d 233, 239-40 (Ind. Ct. App. 1997) (holding that the trial court properly excluded an expert opinion about the defendant's interrogation, because the aim of the excluded testimony was "to express an opinion

(Cite as: 42 Am. Crim. L. Rev. 1271)

as to which witness was telling the truth" about the interrogation; however "the trial court properly admitted Ofshe's [expert] testimony regarding the phenomenon of coerced confessions"); [State v. Stucke, 419 So. 2d 939, 945 \(La. 1982\)](#) (stating that eyewitness expert testimony "invades the province of the jury and usurps its function").

[FN12]. See e.g. [United States v. Hall, 974 F. Supp. 1198, 1205-06 \(C.D. Ill. 1997\)](#) (ruling that testimony of expert may assist the trier of fact in overcoming common misperception that "once a person confesses to his guilt, he must be guilty"); [State v. Cheatam, 81 P.3d 830, 840 \(Wash. 2003\)](#) (acknowledging a "shift in thinking" regarding the admissibility of eyewitness expert testimony because research establishes that "certain subjects thought to be commonly understood are actually not as straightforward as thought"); [State v. Gersin, 668 N.E.2d 486, 488 \(Ohio 1996\)](#) (finding that most jurors lack the knowledge of accepted practices in interviewing child victims, and expert testimony on this issue is therefore admissible).

[FN13]. Gary L. Wells and Elizabeth F. Loftus, leading researchers and scholars in the field of eyewitness memory, advocate that the criminal justice system treat memory evidence in the same manner it treats other types of trace evidence admitted at trial to identify the perpetrator of the crime. They state that memory evidence, like fingerprints, fiber or blood, can be contaminated, lost, destroyed or otherwise made to produce results that lead to an incorrect reconstruction of the event in question. And, the method used to gather memory evidence can affect the accuracy of the results, just as it can with fingerprints or blood evidence. Gary L. Wells & Elizabeth F. Loftus, *Eyewitness Memory for People and Events*, in 11 HANDBOOK OF PSYCHOLOGY, FORENSIC PSYCHOLOGY 149-60 (Alan. M. Goldstein ed., 2002).

[FN14]. James R. P. Ogloff, *Two Steps Forward and One Step Backward: The Law and Psychology Movement(s) in the 20th Century*, in TAKING PSYCHOLOGY AND LAW INTO THE TWENTY-FIRST CENTURY 4-11 (James R. P. Ogloff ed., Kluwer Academic / Plenum Publishers 2002). See generally LAW AND SOCIETY: READINGS ON THE SOCIAL STUDY OF LAW (Stewart Macaulay et al. eds., W.W. Norton & Company 1995) (containing various articles analyzing law written from a social science perspective); LAW AND THE SOCIAL SCIENCES 3 (Leon Lipson & Stanton Wheeler eds., Russell Sage Foundation 1986) (describing "the enterprise of law and social science"); THE USE/NONUSE/MISUSE OF APPLIED SOCIAL RESEARCH IN THE COURTS (Michael J. Saks & Charles H. Barton, eds., Abt Books 1978) (analyzing the implementation of social science by the judicial system).

[FN15]. Ogloff, *supra* note 14, at 8-11.

[FN16]. [United States v. Wade, 388 U.S. 218, 229 \(1967\)](#).

[FN17]. The Innocence Project, *Mistaken I.D.*, [http:// www.innocenceproject.org/causes/mistakenid.php](http://www.innocenceproject.org/causes/mistakenid.php) (last visited Sept. 21, 2005). Other studies place the percentage at a higher figure. U.S. DEPT OF JUSTICE, *CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL* 15-17 (1996) (finding that mistaken eyewitness identification was a factor in 85% of the twenty-eight cases studied); BARRY SCHECK, PETER NEUFELD & JIM DWYER, *ACTUAL INNOCENCE* (2000) (reporting that mistaken eyewitness identification was present in 86% of the first sixty DNA exonerations in the United States).

[FN18]. See BORCHARD, *supra* note 2, at xiii (noting that eyewitness error occurred in 45% of sixty-five cases of wrongful conviction); Huff, *supra* note 2, at 99, 101-03 (finding that mistaken eyewitness identification occurred in 60% of the 500 wrongful convictions studied); Rattner, *supra* note 2, at 283, 291 (finding that eyewitness error occurred in 52% percent of the 205 wrongful convictions studied).

[FN19]. See Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 609 (1998) (stating that the number of suspects in the United States who become defendants

on the basis of eyewitness identification has been conservatively estimated at 77,000 suspects per year).

[FN20]. See Steven D. Penrod & Brian L. Cutler, Preventing Mistaken Identification in Eyewitness Identification Trials, *PSYCHOLOGY AND LAW: THE STATE OF THE DISCIPLINE* 89, 114 (Ronald Roesch et al. eds., Kluwer Academic / Plenum Publishers 1999) ("Considered as a whole, the studies of juror knowledge and decision making indicate that expert psychological testimony can serve as a safeguard against mistaken identification."). But see Gary L. Wells, Eyewitness Identification Evidence: Science and Reform, *CHAMPION*, April 2005, at 18-19 (arguing that loosening rules for expert eyewitness identification testimony is a flawed reform proposal, since there are a very limited number of well qualified eyewitness identification scientists--fewer than fifty--and the costs and the arbitrariness with which cases will receive the benefit of expert testimony make the solution ineffective given the magnitude of the problem of eyewitness identification).

[FN21]. [Commonwealth v. Francis, 453 N.E.2d 1204, 1204 \(Mass. 1983\)](#).

[FN22]. [Id. at 1204-05](#).

[FN23]. [Id. at 1206](#).

[FN24]. [Id. at 1207](#).

[FN25]. See, e.g., [State v. Kemp, 507 A.2d 1387, 1390 \(Conn. 1986\)](#) ("The weaknesses of identifications can be explored on cross-examination and during counsel's final arguments to the jury.").

[FN26]. See generally Gary L. Wells et al., Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification, 64 *J. APPLIED PSYCHOL.* 440 (1978) (discussing the relationship between witness confidence and accuracy when tested by cross-examination). See also Gabriella Ramirez et al., Judge's Cautionary Instructions on Eyewitness Testimony, 14 *AM. J. FORENSIC PSYCHOL.* 31 (1996) (concluding that jury instructions do not provide much assistance in educating jurors about the accuracy of eyewitness identification).

[FN27]. See Gary L. Wells et al., Eyewitness Identification Procedures: Recommendations For Lineups and Photospreads, 22 *LAW & HUM. BEHAV.* 603, 619-27 (1998) (concluding the effect a confident eyewitness has upon a jury, and the relationship between confidence and accuracy is one of the most researched questions in all of scientific eyewitness literature).

[FN28]. *Id.*

[FN29]. See Brian L. Cutler et al., Juror Sensitivity to Eyewitness Identification Evidence, 14 *LAW & HUM. BEHAV.* 185, 190 (1990) (concluding that jurors were insensitive to many factors that influence eyewitness memory and give disproportionate weight to the confidence of the witness); Timothy P. O'Toole et al., District of Columbia Public Defender Eyewitness Reliability Survey, *CHAMPION*, April 2005, 28, 28-32 (finding, in a survey of approximately 1,000 potential jurors, that a significant numbers of jurors do not understand the concepts of weapon focus, the effects of violence and stress and the lack of meaningful correlation between witness confidence at trial and the accuracy of eyewitness identification, and that they overestimate the reliability of cross-racial identification and have no understanding of how police procedures can affect the accuracy of an eyewitness identification). See also Wells et al., *supra* note 27, at 619-20 (recounting surveys showing that public defenders, prosecutors, and private defense attorneys indicate that the substantial majority of lawyers also believe that confident eyewitnesses are more likely to be accurate in their identification); Richard A. Wise & Martin A. Safer, A Survey of Judges' Knowledge and Beliefs About Eyewitness Testimony, 40 *COURT REVIEW* 6, 8-14 (2003)

(Cite as: 42 Am. Crim. L. Rev. 1271)

(finding that, while judges generally were familiar with blind lineups, post-event information, weapon focus, mug shot bias, and confidence malleability, they had limited understanding regarding eyewitness accuracy and confidence, were unfamiliar with simultaneous lineups, with the forgetting curve and with studies indicating that half or more of all wrongful felony conviction are due to eyewitness misidentification).

[FN30]. See John S. Shaw, III & Kimberley A. McClure, Repeated Postevent Questioning Can Lead to Elevated Levels of Eyewitness Confidence, 20 LAW & HUM. BEHAV. 629, 644 (1996) (chronicling two experiments showing that witness confidence was increased by repeated post event questioning).

[FN31]. See Amy L. Bradfield et al., The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy, 87 J. APPLIED PSYCHOL 112, 117 (2002) (showing that confirming feedback increases certainty of witnesses in inaccurate recollections).

[FN32]. See Gary L. Wells & A. L. Bradfield, "Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts their Reports of the Witnessing Experience, 83 J. APPLIED PSYCHOL. 360, 366 (1998) (summarizing the results of a study where 352 subjects made a misidentification from a photo array without the suspect and then were given feedback on that misidentification, then questioned on their decision).

[FN33]. See John Turtle, Roderick C. L. Lindsay & Gary L. Wells, Best Practices Recommendations for Eyewitness Evidence Procedures, 1 CAN. J. POLICE & SECURITY SERVICES 5, 12-13 (2003) (stating the "double-blind" procedure models what occurs in scientific experiments or clinical drug trials where "placebos" or "control groups" are used. In such cases, the patient taking the pills and the doctor assessing the patient's health do not know whether the patient is taking the actual drug or a placebo. This is done out of recognition that such knowledge can have an unintentional influence on the results); Wells et al., supra note 27, at 627-29 (1998) (following the line-up as an experiment analogy to its logical conclusion that the person conducting the lineup should not be aware of who the suspect is).

[FN34]. See Roderick C. L. Lindsay & Gary L. Wells, Improving Eyewitness Identification from Lineups: Simultaneous Versus Sequential Lineup Presentations, 70 J. APPLIED PSYCHOL. 556 (1985).

[FN35]. See Nancy M. Steblay et al., Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-analytic Comparison, 25 LAW & HUM. BEHAV. 459, 459 (2001) (showing through a meta-study analysis of 23 papers comparing sequential and simultaneous identification procedures that a sequential procedure diminishes mistaken identifications in comparison to simultaneous identifications).

[FN36]. See id. at 459. For other recommendations for reform in the area of eyewitness identification, see generally Turtle, supra note 33; Wells et al., supra note 27; TECHNICAL WORKING GROUP OF EYEWITNESS EVIDENCE, U.S. DEPT OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999) available at <http://www.ncjrs.org/pdffiles1/nij/178240.pdf> (last visited Sept. 9, 2005).

[FN37]. See State of New Jersey, Department of Law and Public Safety, Office of the Attorney General, Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures, 1, 1-2, (April 18, 2004), available at <http://www.psychology.iastate.edu/faculty/gwells/njguidelines.pdf> (last visited Sept. 9 2005) (following Department of Justice recommendations and also acknowledging numerous studies by adopting double-blind and sequential identification procedures).

[FN38]. See Scott Ehlers, Eyewitness Identification: State Law Reform, CHAMPION, April 2005, at 34.

[\[FN39\]](#). See *id.* at 34-36 (following efforts at state law eyewitness reform in fourteen states in various stages of development).

[\[FN40\]](#). Steven A. Drizin & Richard A. Leo, The Problem of False Confessions in the Post-DNA World, 82 N.C. L. REV. 891, 960 (2004) (stating false confessors, i.e., individuals whose confessions would eventually be proven false, who chose to take their cases to trial stood a more than 80% chance of being convicted).

[\[FN41\]](#). For an in-depth analysis of police induced false confessions and wrongful convictions see generally Richard J. Ofshe & Richard A. Leo, The [Decision to Confess Falsely: Rational Choice and Irrational Action](#), 74 DENV. U. L. REV. 979 (1997); Richard J. Ofshe & Richard A. Leo, The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions, 16 STUD. IN L., POL., & SOC'Y 189 (1997); Richard A. Leo and Richard J. Ofshe, The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998); Steven A. Drizin and Richard A. Leo, The Problem of False Confessions in the Post-DNA World, 82 N.C. L. REV. 891 (2004). For a debate regarding the quantification of false confessions and its impact on policy reform, see Paul G. Cassell, [Balanced Approaches to the False Confession Problem: A Brief Comment on Ofshe, Leo, and Alschuler](#), 74 DENV. U. L. REV. 1123 (1997); Paul G. Cassell, Protecting the Innocent from False Confessions and Lost Confessions--and from Miranda, 88 J. CRIM. L. & CRIMINOLOGY 497 (1998); Paul G. Cassell, The [Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions](#), 22 HARV. J.L. & PUB. POL'Y 523 (1999); Richard A. Leo & Richard J. Ofshe, [Missing the Forest for the Trees: A Response to Paul Cassell's "Balanced Approach" to the False Confession Problem](#), 74 DENV. U. L. REV. 1135 (1997); Richard A. Leo & Richard J. Ofshe, Using the Innocent to Scapegoat Miranda: Another Reply to Paul Cassell, 88 J. CRIM. L. & CRIMINOLOGY 557 (1998); and Steven A. Drizin and Richard A. Leo, The Problem of False Confessions in the Post-DNA World, 82 N.C. L. REV. 891, 920 n.156 (2004).

[\[FN42\]](#). See Drizin & Leo, *supra* note 40, at 901-907 (summarizing studies of wrongful convictions and percentage of false confessions in the studies); Gross et al., *supra* note 2, at 544 (revealing that defendants confessed in 15% of the 340 exonerations identified between 1989 and 2004).

[\[FN43\]](#). GISLI H. GUDIONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY (John Wiley & Sons 1992).

[\[FN44\]](#). See generally Drizin & Leo, *supra* note 40, (analyzing 125 cases of confirmed false confessions produced by interrogation); GISLI H. GUDIONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK (John Wiley & Sons 2003) (utilizing case studies from the U.S. and Britain to study false confessions by comparing their occurrence in two different legal systems); Saul M. Kassin, The Psychology of Confession Evidence, 52 AM. PSYCHOL. 221, 230 (1997) (finding police tactics such as deception and psychological coercion are responsible for many false confessions and that juries do not take these tactics sufficiently into account); Saul M. Kassin & Katherine L. Kiechel, The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation, 7 PSYCHOL. SCI. 125, 125 (1996) (employing a scientific experiment to demonstrate the relationship between false incriminating evidence and erroneous confessions); Richard A. Leo & Richard J. Ofshe, The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998) (pointing out the unjust consequences of false confessions); Richard J. Ofshe & Richard A. Leo, The [Decision to Confess Falsely: Rational Choice and Irrational Action](#), 74 DENV. U. L. REV. 979 (1997) (using field data to explain why interrogation methods lead to false confessions); Richard J. Ofshe & Richard A. Leo, The Social Psychology of Police Interrogation; The Theory and Classification of False Confessions, 16 STUD. L.POL. & SOC'Y 189 (1997) (developing a

model of interrogation influence using case studies).

[FN45]. See GUDIONSSON, *supra* note 44, at 7-21 (discussing modern police methods of interrogation, most notably "The Reid Technique").

[FN46]. Drizin & Leo, *supra* note 40, at 911 (2004) (stating that "the singular purpose of American police interrogation is to elicit incriminating statements and admissions--ideally a full confession--in order to assist the State in its prosecution of the defendant").

[FN47]. See generally Richard J. Ofshe & Richard A. Leo, The [Decision to Confess Falsely: Rational Choice and Irrational Action](#), 74 *DENV. U. L. REV.* 979 (1997) (containing a detailed study of why "normal" people make false confessions); Richard J. Ofshe & Richard A. Leo, The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions, 16 *STUD. IN L., POL., & SOC'Y* 189 (1997) (using social psychology to analyze police interrogation in an attempt to explain the phenomenon of false confessions).

[FN48]. Richard J. Ofshe & Richard A. Leo, The [Decision to Confess Falsely: Rational Choice and Irrational Action](#), 74 *DENV. U. L. REV.* 979, 989- 90 (1997) (describing the two-step process).

[FN49]. [Id. at 1004-50.](#)

[FN50]. [Id. at 1050-06.](#)

[FN51]. [Id. at 997-1000.](#)

[FN52]. Richard A. Leo, False Confessions: Causes, Consequences, and Solutions, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE*, 36-37 (Saundra D. Westervelt & John A. Humphrey, eds., Rutgers University Press 2001) (discussing the "myth" that people do not falsely confess to crimes).

[FN53]. Drizin & Leo, *supra* note 40, at 1001 (2004) ("American police are poorly trained to understand the psychology of interrogation, suspect decision-making and, confession; to evaluate the likely unreliability of confession statements; and to recognize and prevent false confessions.").

[FN54]. [Id. at 997-1002.](#)

[FN55]. For a summary of studies recommending the videotaping of custodial interrogation see Drizin & Leo, *supra* note 40, at 993-97; Steven A. Drizin and Mariss J. Reich, [Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions](#), 52 *DRAKE L. REV.* 619 (2004); Daniel Donovan and John Rhodes, The Case for Recording Interrogations, *CHAMPION*, Dec. 2004, at 12.

[FN56]. Drizin & Leo, *supra* note 40, at 997 (explaining that "taping leads to a higher level of scrutiny (by police officials as well as others) that will deter police misconduct during interrogation).

[FN57]. See [Stephan v. State](#), 711 P.2d 1156, 1159 (Alaska 1985) (where the state supreme court held that the recording of custodial interrogations is required); [State v. Scales](#), 518 N.W.2d 587, 592 (Minn. 1994) (holding that a recording requirement exists under the Minnesota Constitution); [In re Jerrell C.J.](#), 699 N.W.2d. 110, 113 (Wisc. 2005) (adopting an electronic recording requirement in all interrogations of juveniles). See also Steve Mills, Law Mandates Taping of Police Interrogations, *CHI. TRIB.*, July 18, 2003, at C1 (reporting on an Illinois statute passed in 2003 that mandates electronic

(Cite as: 42 Am. Crim. L. Rev. 1271)

recording of interrogations in homicide cases).

[FN58]. See Thomas P. Sullivan et al., *The Police Experience: Recording Custodial Interrogations*, CHAMPION, Dec. 2004, at 24 (interviewing over 260 police agencies in forty-one states that record custodial interrogations of suspects in felony cases. Virtually every officer enthusiastically favored the practice, citing benefits such as being able to focus on suspects rather than note-taking, observing inconsistencies in statements and evasive contact upon reviewing the recordings, obtaining more guilty pleas and greater prosecution bargaining power, and the ready acceptance of recordings by judges and juries).

[FN59]. See generally Gross et al., *supra* note 2, 539-40 (2005) (noting the authors did not include in their study of 340 exonerations more than seventy individuals whose convictions were overturned in childcare sex abuse cases. Although the study concludes there is no doubt that most of these individuals in the childcare cases were falsely convicted, the complexity of the cases made it difficult for the authors to officially state that the defendants were exonerated).

[FN60]. In the 1980s and 1990s, more than 350 children claimed to have been molested at a daycare operated by Peggy McMartin Buckey and her son Raymond Buckey. They were found not guilty after Raymond Buckey spent five years in jail and his mother spent two years in jail. The trial proceedings lasted three years and cost taxpayers between \$13 million and \$15 million. NANCY WALKER PERRY & LAWRENCE S. WRIGHTSMAN, *THE CHILD WITNESS: LEGAL ISSUES AND DILEMMAS* 4- 10 (Sage Publications 1991).

[FN61]. In 1988, Margaret Kelly Michaels, a nursery school teacher, was convicted of 115 counts of bizarre acts of sexual abuse against many of the children who attended the daycare. She was sentenced to forty-seven years in prison. The New Jersey Supreme Court overturned the convictions in 1994, holding that: (1) the interviews of the alleged child sex abuse victims were improper; and (2) given the substantial likelihood that the evidence derived from the interviews was unreliable, the state would be required to prove by clear and convincing evidence that the statements and testimony retained a sufficient degree of reliability to warrant admission at a re-trial. [State v. Michaels, 642 A.2d 1372 \(N.J. 1994\)](#); See also John Chadwick *Day-Care Nightmare Haunts Her Still Key Figure In Abuse Case Fights Back*, NEW JERSEY RECORD, Feb. 8, 2001, at A1 (reporting that the prosecutor declined to retry the case against Michaels).

[FN62]. In Wenatchee, Washington, as a result of investigations during 1994 and 1995, forty-three adults were accused of 29,726 charges of child-sex abuse involving over sixty children. Volunteer lawyers and University of Washington law students and faculty members from the Innocence Project handled appeals for many of the accused, who were often poor or developmentally disabled. To date, the majority of those convicted have been freed by higher courts, had their convictions overturned or pleaded guilty to lesser, often unrelated, charges. Mike Barber, *Wenatchee Must Pay Up, Court Rules \$718,000 in Sanctions Over Abuse Case is Confirmed by State Appeals Panel*, SEATTLE POST-INTELLIGENCER, Aug. 4, 2004, at B1.

[FN63]. In the Kern County ritual sex abuse ring prosecutions, authorities charged over fifty people and sent twenty-six of them to prison. At least fifteen of the convicted defendants had their convictions reversed and charges dismissed; many on the basis of prosecutorial misconduct. John Stoll was last to be freed, after serving twenty years in prison, when members of the Northern California Innocence Project agreed to represent him and obtained his release. Jim Boren, *Botched Child Molestation Cases Meted Out Injustice*, FRESNO BEE, May 9, 2004, at B3; Tom Kerscher, *Molestation Hysteria Left Sad Legacy: Painful Lessons Learned in Overzealous Kern County Prosecutions*, FRESNO BEE, Sept. 10, 1995, at A1.

[FN64]. [State v. Swan, 790 P.2d 610, 620 \(Wash. 1990\)](#).

[FN65]. See Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal*

(Cite as: 42 Am. Crim. L. Rev. 1271)

[Implications, 86 CORNELL L. REV. 33, 39-71 \(2000\)](#) (reviewing the research on children's suggestibility). See also Amye R. Warren & Dorothy F. Marsil, [Why Children's Suggestibility Remains a Serious Concern, 65 LAW & CONTEMP. PROBS. 127 \(2002\)](#) (identifying six areas in the field of child memory and suggestibility that require further study: (1) suggestibility is not limited to preschool children (2) suggestiveness is not limited to leading questions, (3) suggestibility is not confined to formal interviews, (4) it is difficult to identify particular children most susceptible to suggestion (5) it is difficult to train children to resist potentially suggestive questions or to "gate-out" previously suggested information and (6) it is difficult to train interviewers to avoid suggestive techniques and to use techniques designed to promote accuracy). But see Thomas D. Lyon, The [New Wave in Children's Suggestibility Research: A Critique, 84 CORNELL L. REV. 1004, 1004 \(1999\)](#) (arguing that the "new wave presents a serious challenge to those who have claimed that children are unlikely to allege sexual abuse falsely ... [by assuming] that highly suggestive interviewing techniques are the norm in abuse investigations"; neglecting to take into account that the characteristics of child sex abuse cases are different from other cases, and presenting an "apparent value-free scientific treatment of the suggestibility issue [that] obscures, rather than avoids, value judgments regarding the tradeoff between false allegations and false denials of sexual abuse.").

[FN66]. Ceci & Friedman, *supra* note 65, at 34. See Warren & Marsil, *supra* note 65, at 127-130 (summarizing research on suggestibility of older children and concluding that suggestibility problems continue to exist in older children due to the ability to shape memories through questioning).

[FN67]. John E. B. Myers et al., [Jurors' Perceptions Of Hearsay In Child Sexual Abuse Cases, 5 PSYCHOL. PUB. POL'Y & L. 388, 393 \(1999\)](#) (summarizing studies finding that in bystander and victim/witness cases, adults and older children are likely to be viewed as more credible than young children, but noting several studies focusing on child sexual abuse cases that reveal the opposite pattern). See L. Matthew Duggan, III, et. al., The Credibility of Children as Witnesses in a Simulated Child Sexual Abuse Trial, *PERSPECTIVES ON CHILDREN'S TESTIMONY* 71-99, 82, 88 (Stephen J. Ceci et al., eds., Springer-Verlag 1989) (stating that mock jurors rated a thirteen-year-old victim as less credible than five and nine-year-old victims); Bette L. Bottoms & Gail S. Goodman, Perceptions Of Children's Credibility In Sexual Assault Cases, 24 *J. APPLIED SOCIAL PSYCHOL.* 702, 709-10 (1994) (comparing mock juror perceptions of a school age child (six years-old), an adolescent (fourteen years-old), and a young adult (twenty-two years old) in written trial scenarios of sexual abuse. The six-year-old victim was viewed as more credible than the fourteen and twenty-two-year-old victims. In addition, the defendant was found guilty more often when the six-year-old testified).

[FN68]. See DUGGAN ET AL., *supra* note 67 at 71-99 (mock jurors rated a thirteen-year-old victim as less credible than five and nine-year-old victims); Bette L. Bottoms & Gail S. Goodman, Perceptions Of Children's Credibility In Sexual Assault Cases, 24 *J. APPLIED SOCIAL PSYCHOL.* 702 (1994) (comparing mock juror perceptions of a school age child (six years), an adolescent (fourteen years), and a young adult (twenty-two years) in written trial scenarios of sexual abuse. The six-year-old victim was viewed as more credible than the fourteen and twenty-two-year-old victims. In addition, the defendant was found guilty more often when the six-year-old testified.).

[FN69]. See STEPHEN J. CECI & MAGGIE BRUCK, *JEOPARDY IN THE COURTROOM* 68-74 (American Psychological Association 1995) (discussing experimental studies of child sexual abuse interviews and suggesting that their findings may underestimate the potency of suggestive techniques in actual cases, where aggressive interviewing methods are used, and children are repeatedly interviewed or questioned by anxious parents, therapists, or legal officials).

[FN70]. Ceci & Friedman, *supra* note 65, at 36 (2000) (discussing five studies that focus on repeated questioning which find high rates of error in response to questions about abuse). But see Thomas D. Lyon, [Applying Suggestibility Research to the Real World: The Case of Repeated Questions, 65 LAW & CONTEMP. PROBS. 97 \(2002\)](#) (arguing that the risks of question

repetition have been exaggerated).

[FN71]. See CECI & BRUCK, *supra* note 69, at 87-93 (summarizing studies showing that interviewer bias impacts how interviewer's interpret answers and influences the accuracy of interviewee's answers); Nancy E. Walker, [Forensic Interviews of Children: The Components of Scientific Validity and Legal Admissibility](#), 65 LAW & CONTEMP. PROBS. 149, 167 (2002) (attempting to explain interviewer bias).

[FN72]. See LUCY S. MCGOUGH, CHILD WITNESSES: FRAGILE VOICES IN THE AMERICAN LEGAL SYSTEM 72 (1994) (explaining how children's dependence on adults leads children to rely on adults as being truthful).

[FN73]. See CECI & BRUCK, *supra* note 69, at 127-137 (summarizing studies and cases showing that interviewer's negative characterization of suspects will lead children to erroneously describe the suspects).

[FN74]. Nancy E. Walker, [Forensic Interviews of Children: The Components of Scientific Validity and Legal Admissibility](#), 65 LAW & CONTEMP. PROBS. 149, 167 (2002) (explaining that open-ended questions generally result in more accurate answers).

[FN75]. Walker, *supra* note 74, at 165-66 (2002) (explaining how rapport building initially leads to more information).

[FN76]. Lucy S. McGough, [Good Enough for Government Work: The Constitutional Duty to Preserve Forensic Interview of Child Victims](#), 65 LAW & CONTEMP. PROBS. 179, 181 (2002) (explaining a reform consistently recommended by scholars, empiricists, and psychologists is that the initial interview be conducted by a trained professional).

[FN77]. Warren & Marsil, *supra* note 65, 146-47 (describing encouraging findings when interviewers completed an extensive training program).

[FN78]. *Id.* at 144-47 (discussing national and international studies that document the difficulty and lack of success in training interviewers to avoid suggestive techniques and to use techniques designed to promote accuracy); see also Walker, *supra* note 74, at 176 (explaining that without continued monitoring "interviewers are likely to fall back on old habits"); LUCY BERLINER & ROXANNE LIEB, WASH. STATE INST. FOR PUB. POL'Y, CHILD SEX ABUSE INVESTIGATIONS: TESTING DOCUMENTATION METHODS 10-11 (2001), [http:// www.wsipp.wa.gov/](http://www.wsipp.wa.gov/) (last visited Sept. 9, 2005) (follow "Title" hyperlink under "List Publications by:"; then follow "C" hyperlink to find article) (finding that 20% of the questions asked by professional interviewers were suggestive of abuse and that only about half of the interviews began with open-ended invitations to provide information).

[FN79]. Berliner & Lieb, *supra* note 78, at 11.

[FN80]. See McGough, *supra* note 76, at 180-90; BERLINER & LIEB, *supra* note 78, at ii (endorsing "electronic recording [as] clearly the most efficient and reliable form of documentation [and noting how transcripts can be used] to evaluate whether interviewers are using proper interviewing techniques [and as] an invaluable tool for supervisors to use in assessing performance and giving corrective action" (emphasis in original)). But see Paul Stern, Videotaping Child Interviews: A Detriment to an Accurate Determination of Guilt, 7 J. INTERPERSONAL VIOLENCE 278, 278 (1992) (arguing that routine videotaping of child sexual abuse victims is "inappropriate and dangerous").

[FN81]. McGough, *supra* note 76, at 181-82 ("At least thirty-nine states now explicitly authorize at least some use of videotaped interviews of child victims, although no state as of yet mandates or provides significant incentives for videotaping

forensic interviews.").

END OF DOCUMENT