

# THAT’S THE ONE!: AN ANALYSIS OF EYEWITNESS IDENTIFICATIONS IN MISSOURI AND THEIR IMPACT ON CROSS-RACIAL IDENTIFICATION

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## INTRODUCTION

On August 9, 2014, Michael Brown, Jr., an African American man, was shot by Darren Wilson, a police officer, in Ferguson, Missouri.<sup>1</sup> Ferguson is located within St. Louis County.<sup>2</sup> A grand jury was called to determine if Officer Wilson should be indicted.<sup>3</sup> Robert McCulloch, then the St. Louis County Prosecutor, provided the grand jury with evidence that included multiple eyewitness accounts.<sup>4</sup> The eyewitnesses’ accounts of the shooting were inconsistent, and at least one was motivated by racial biases.<sup>5</sup> For example, Sandra McElroy testified that Michael Brown beat Darren Wilson before the officer shot him.<sup>6</sup> But testimony later revealed that McElroy may

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1. John Eligon, *Michael Brown Spent Last Weeks Grappling with Problems and Promise*, N.Y. TIMES (Aug. 24, 2014), <https://www.nytimes.com/2014/08/25/us/michael-brown-spent-last-weeks-grappling-with-lifes-mysteries.html> [<https://perma.cc/R6E6-9XLG>].

2. *Id.*

3. Conor Friedersdorf, *Witness Saw Michael Brown Attacking—and Others Saw Him Giving Up*, ATLANTIC (Nov. 25, 2014), <https://www.theatlantic.com/national/archive/2014/11/major-contradictions-in-eyewitness-accounts-of-michael-browns-death/383157/> [<https://perma.cc/F7WW-HRGQ>].

4. *Id.*; see Holbrook Mohr, David A. Lieb & Phillip Lucas, *Some Ferguson Eyewitnesses Clearly Made Up Their Statements*, BUS. INSIDER (Nov. 27, 2014, 1:17 PM), <https://www.businessinsider.com/these-eye-witness-accounts-of-michael-browns-shooting-were-wildly-inconsistent-2014-11> [<https://perma.cc/F97V-P8JC>].

5. See Josh Levs, *One Challenge for Ferguson Grand Jury: Some Witnesses’ Credibility*, CNN (Dec. 14, 2014, 3:53 PM), <http://www.cnn.com/2014/12/14/justice/ferguson-witnesses-credibility/index.html> [<https://perma.cc/V8MV-HY99>].

6. Lindsay Toler, *The Upsetting Truth About Sandra McElroy, Witness 40 in the Ferguson Grand Jury*, RIVERFRONT TIMES (Dec. 17, 2014, 7:00 AM),

not have been at the shooting and that she was biased against African Americans.<sup>7</sup> Overall, the eyewitnesses were not credible, and some even admitted that their stories were false.<sup>8</sup> In November 2014, the grand jury declined to indict Officer Wilson.<sup>9</sup>

After Officer Wilson shot Michael Brown, activists began using the slogan “#BlackLivesMatter” to advocate against a police officer shooting an unarmed black teen.<sup>10</sup> The term “#BlackLivesMatter” was used to protest police brutality and was expanded to include protesting the unjust treatment of African Americans in the criminal justice system.<sup>11</sup> A report by the United States Department of Justice released shortly after Michael Brown’s death supported that African Americans were being treated unfairly.<sup>12</sup> The report showed how Ferguson’s police department and municipal courts disproportionately discriminated against African Americans.<sup>13</sup>

Eyewitness misidentifications can lead to wrongful convictions. Part I of this note discusses the history of eyewitness identifications using Johnny Briscoe as a case study. It also explains the unreliability of eyewitness identifications. Eyewitness misidentifications can be attributed to many intentional and unintentional factors. This note focuses on the unintentional factors, including cross-racial bias, eyewitness errors, and suggestive police investigations. Furthermore, Part I discusses the impact of wrongful convictions on African Americans and reforms in eyewitness identification procedures. Part II discusses Missouri’s dire need for reforms in eyewitness identification procedures. Lastly, Part III of the note suggests reforms that Missouri’s enforcement agencies should adopt, which include creating a set

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<https://www.riverfronttimes.com/newsblog/2014/12/17/the-upsetting-truth-about-sandra-mcelroy-witness-40-in-the-ferguson-grand-jury> [<https://perma.cc/X8XE-REV5>].

7. *Id.*; see Levs, *supra* note 5.

8. Levs, *supra* note 5.

9. Jeremy Kohler, *Statement of St. Louis Prosecuting Attorney Robert P. McCulloch*, ST. LOUIS POST-DISPATCH (Nov. 24, 2014), [https://www.stltoday.com/news/local/crime-and-courts/statement-of-st-louis-prosecuting-attorney-robert-p-mcculloch/article\\_2becfef3-9b4b-5e1e-9043-f586f389ef91.html](https://www.stltoday.com/news/local/crime-and-courts/statement-of-st-louis-prosecuting-attorney-robert-p-mcculloch/article_2becfef3-9b4b-5e1e-9043-f586f389ef91.html).

10. DUCHESS HARRIS, BLACK LIVES MATTER 10 (Marie Pearson ed., 2017).

11. *Id.*

12. *Id.* at 8.

13. See U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 62 (2015) (noting that the disproportionate harms towards Ferguson’s African American residents were motivated by racial bias from Ferguson’s law enforcement and were in violation of federal law); THE SHOOTING DEATH OF MICHAEL BROWN AND THE FERGUSON POLICE DEPARTMENT: DOJ INVESTIGATIONS 80 (Keith H. Gonzales ed., Nova Science Pub., 2015).

of procedures for using double-blind administrations, providing instructions to eyewitnesses, using non-suspect fillers that are similar to the suspect's description, collecting confidence statements from eyewitnesses, and recording identifications.

## I. HISTORY

Eyewitness identifications, like the eyewitness testimonies in the grand jury proceedings of Officer Wilson, are generally unreliable.<sup>14</sup> Thus, an innocent person can be convicted when an eyewitness, tasked with identifying a suspect, makes a false identification.<sup>15</sup> African Americans are unduly affected by eyewitness misidentifications due to the disproportionate number of times African Americans have been wrongly convicted.<sup>16</sup> The misidentification of African Americans occurs most often when the eyewitness is of a different race.<sup>17</sup> This theory is known as cross-racial misidentification.<sup>18</sup>

### A. Johnny Briscoe Case Study

Johnny Briscoe, a Missouri resident, was convicted based on cross-racial misidentification but was later exonerated by DNA evidence.<sup>19</sup> In 1983, Briscoe, an African American male, was convicted for committing a rape and robbery in St. Louis, Missouri.<sup>20</sup> The criminal robbed a woman at

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14. NAT'L RESEARCH COUNCIL, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 9 (Susanna Carey ed., 2014) (emphasizing caution when relying on eyewitness identifications).

15. See *Eyewitness Misidentification*, MIDWEST INNOCENCE PROJECT, <http://themip.org/issues/eyewitness-misidentification/> [https://perma.cc/7AHU-PH78].

16. See NAT'L REGISTRY OF EXONERATIONS, THE FIRST 1,600 EXONERATIONS 2 (2015), [http://www.law.umich.edu/special/exoneration/Documents/1600\\_Exonerations.pdf](http://www.law.umich.edu/special/exoneration/Documents/1600_Exonerations.pdf) [https://perma.cc/VK3Z-V3FQ] (finding that from January 1989 to May 18, 2015, African Americans accounted for forty-seven percent of the sixteen hundred individuals exonerated).

17. James M. Doyle, *Discounting the Error Costs: Cross-Racial False Alarms in the Culture of Contemporary Criminal Justice*, 7 PSYCHOL. PUB. POL'Y & L. 253, 253–62 (2001).

18. *Id.* at 259.

19. *Johnny Briscoe*, CENTURION, <https://centurion.org/cases/johnny-briscoe/> [https://perma.cc/E92J-XDGZ] (showing Briscoe's wrongful conviction was in part due to cross-racial identification).

20. *Johnny Briscoe*, LIBR. CONG. (Sept. 4, 2013, 10:58 PM), [http://webarchive.loc.gov/all/20130904225846/http://www.innocenceproject.org/Content/Johnny\\_Briscoe.php](http://webarchive.loc.gov/all/20130904225846/http://www.innocenceproject.org/Content/Johnny_Briscoe.php) [https://perma.cc/R8WT-8ZU7].

knifepoint and then raped her.<sup>21</sup> After the woman was raped, the perpetrator remained in the room for an hour while the two of them smoked cigarettes together.<sup>22</sup> During that time, the perpetrator identified himself as Johnny Briscoe.<sup>23</sup> The woman called the police after the perpetrator left.<sup>24</sup> The perpetrator called the woman twice while the police were at the scene.<sup>25</sup> Later, the woman participated in both a photo lineup and a live lineup where the real Johnny Briscoe was the only suspect wearing an orange jumpsuit.<sup>26</sup> Even though the woman had sat with the perpetrator for an hour, she incorrectly chose Briscoe.<sup>27</sup> The true perpetrator was Larry Smith.<sup>28</sup> At trial, prosecutors also used other evidence against Briscoe, including an analysis of hairs found at the crime scene.<sup>29</sup> The strongest evidence against Briscoe, however, was the witness's identification.<sup>30</sup> Briscoe provided an alibi, claiming that he had been at the World Series game.<sup>31</sup> Nevertheless, Briscoe was sentenced to forty-five years in prison because of a cross-racial eyewitness identification and a hair analysis; both were highly unreliable.<sup>32</sup> In 2006, DNA on the cigarette butts at the crime scene was analyzed and matched Larry Smith.<sup>33</sup> Briscoe was exonerated after serving twenty-three years for a crime that he did not commit. Unfortunately, this is just one of the many examples of a case in which an innocent person in Missouri was sent to prison on the basis of an erroneous eyewitness identification.<sup>34</sup>

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21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Johnny Briscoe*, *supra* note 19.

29. *Johnny Briscoe*, *supra* note 20.

30. *Id.*

31. *Johnny Briscoe*, *supra* note 19.

32. *Id.*

33. *Id.*

34. See NAT'L REGISTRY OF EXONERATIONS, *supra* note 16, at 14 (placing Missouri, with thirty-four exonerations, amongst the top ten states with the largest exonerations per capita); NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2015, at 5 (2016) (finding that Missouri exonerated two people in 2015), [http://www.law.umich.edu/special/exoneration/Documents/Exonerations\\_in\\_2015.pdf](http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2015.pdf) [<https://perma.cc/AB7J-DQT8>]; NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2016, at 5 (2017) (finding that Missouri exonerated two people in 2016), [http://www.law.umich.edu/special/exoneration/Documents/Exonerations\\_in\\_2016.pdf](http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2016.pdf) [<https://perma.cc/CZ6D-P56D>]; NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2017, at 4

*B. Eyewitnesses Unreliability*

In the United States, criminal defendants are presumed innocent until proven guilty.<sup>35</sup> In a criminal trial, the prosecution must meet the difficult standard of proving the defendant's guilt beyond a reasonable doubt.<sup>36</sup> Eyewitness testimony often plays a major role in criminal trials because it can provide evidence of what occurred during the crime.<sup>37</sup> While there are many ways to identify perpetrators, "eyewitnesses identify 77,000 criminal suspects in the United States every year."<sup>38</sup> Eyewitnesses can provide environmental conditions, the time of the event, the description of the acts, and specific details about the crime.<sup>39</sup>

As in the case of Johnny Briscoe, faulty eyewitness accounts can significantly contribute to wrongful convictions.<sup>40</sup> Eyewitness misidentifications can lead to mistaken in-court testimony when eyewitnesses erroneously tell the jury that their identification was correct.<sup>41</sup>

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(2018) (finding that Missouri exonerated one person in 2017), <http://www.law.umich.edu/special/exoneration/Documents/ExonerationsIn2017.pdf> [<https://perma.cc/8YEG-Y4PY>].

35. BARBARA J. SHAPIRO, "BEYOND REASONABLE DOUBT" AND "PROBABLE CAUSE": HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE 30 (1991).

36. *Id.* at 24–25. Shapiro defines "reasonable doubt" as not merely possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the mind of the jurors in that condition that they cannot say they feel an abiding conviction of moral certainty, of the truth of the charge . . . the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgement.

*Id.* (quoting *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 320 (1850)).

37. Amina Memon, *Eyewitness Research: Theory and Practice*, in *PSYCHOLOGY AND LAW: BRIDGING THE GAP* 51, 51 (David Canter & Rita Žukauskiene eds., 2008).

38. Andrew E. Taslitz, "Curing" Own Race Bias: *What Cognitive Science and the Henderson Case Teach About Improving Jurors' Ability to Identify Race-Tainted Eyewitness Error*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 1049, 1052 (2013).

39. DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 51 (2012).

40. See Taslitz, *supra* note 38, at 1051.

41. Harvey Gee, *Cross-Racial Eyewitness Identification, Jury Instructions, and Justice*, 11 RUTGERS RACE & L. REV. 70, 103 (2009).

Consequently, juries may falsely convict innocent people due to the value they place on an eyewitness's testimony.<sup>42</sup>

### *1. Cross-Racial Bias*

Cross-racial identification is when an eyewitness identifies a suspect of a different race.<sup>43</sup> When an eyewitness has cross-racial bias, it is difficult for the eyewitness to identify the perpetrator because faces of different races are harder for them to identify than faces of the same race as the eyewitness.<sup>44</sup> For example, white people may less accurately identify African Americans than they identify other white people.<sup>45</sup> Therefore, cross-racial bias can lead to misidentification when the eyewitness and the perpetrator are of a different race.<sup>46</sup>

Many experimental studies have researched misidentification due to cross-racial bias.<sup>47</sup> In these studies, scientists have created many social-processing theories to explain the introduction of cross-racial bias in identification proceedings. In one article, researchers theorized that having less contact with members of another race decreases a person's ability to correctly identify a member of another race's face.<sup>48</sup> The researchers also theorized that individuals pay attention to the distinguishing features of ingroup members rather than the distinguishing features of outgroup members during an identification.<sup>49</sup> Another theory contemplated by the researchers was that members of a race pay less attention to those of the outgroup by cognitively disregarding them and categorizing them at a superficial level, as opposed to categorizing members of the ingroup at an

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42. Cindy Laub & Brian H. Bornstein, *Juries and Eyewitnesses*, in *ENCYCLOPEDIA OF PSYCHOLOGY AND LAW* 390, 390 (Brian L. Cutler ed., 2008) (finding that jurors place the most emphasis on eyewitness testimony).

43. Taslitz, *supra* note 38, at 1052.

44. SIMON, *supra* note 39.

45. Doyle, *supra* note 17.

46. *See* Taslitz, *supra* note 38, at 1052.

47. John C. Brigham, L. Brooke Bennett, Christian A. Meissner & Tara L. Mitchell, *The Influence of Race on Eyewitness Memory*, in *HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR PEOPLE* 257, 258–59 (Rod C. L. Lindsay, David F. Ross, J. Don Read & Michael P. Toglia eds., 2007).

48. *Id.*

49. *See id.* (speculating that misidentification “might be due to the ‘majority’ race status of White participants who had participated in the studies”).

individual level.<sup>50</sup> Furthermore, the researchers attributed cross-racial bias to mental states, such as using a different and shallower cognitive process when identifying individuals of another race or using an encoding system optimized for identifying same-race faces.<sup>51</sup> While there are many experimental studies to prove that misidentification occurs, there are no available statistics regarding misidentification in the real-world and research on how to eliminate cross-race misidentification is extremely limited.<sup>52</sup> Hence, there is no way of knowing whether a suspect is guilty in real-world situations based on eyewitness testimony alone.<sup>53</sup>

## 2. *Eyewitness Identification Errors*

Eyewitness evidence is unreliable because a witness's memory can transform over time.<sup>54</sup> Thus, an eyewitness's memory of a suspect should be carefully gathered during an identification procedure that is close in time to the incident, or else it could be inaccurate.<sup>55</sup> Eyewitnesses participate in various forms of identifications, including live lineups (putting several people in a row), photo lineups (putting pictures of similar people next to each other), and live show-ups (showing a single suspect while they are in their own environment).<sup>56</sup> An eyewitness's misidentification can be the result of system variables or estimator variables.<sup>57</sup> System variables are factors that can be controlled by our criminal justice system, such as the methods investigators use to collect information.<sup>58</sup> Estimator variables are factors that cannot be controlled by our system, such as weapon focus, stress and fear, the duration of the exposure, and retention intervals.<sup>59</sup>

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50. *Id.* at 266.

51. *Id.*

52. Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 832 (2010).

53. Taslitz, *supra* note 38.

54. MIDWEST INNOCENCE PROJECT, *supra* note 15.

55. *Id.*

56. *See id.*

57. *Id.*

58. *Id.*

59. NAT'L RESEARCH COUNCIL, *supra* note 14, at 35.

Weapon focus is the idea that witnesses pay more attention to the weapon during a criminal act than to the assailant.<sup>60</sup> As a result, eyewitnesses are less likely to identify the suspect. Stress and fear also decrease the likelihood of a correct identification because a witness who is scared or stressed by the criminal act will pay less attention to the perpetrator.<sup>61</sup> Duration of exposure also affects the reliability of eyewitness identification because witnesses who see the perpetrator for a short time during the crime will be less likely to correctly identify the perpetrator.<sup>62</sup> Because witnesses more accurately remember things that are temporally closer (a concept known as “retention intervals”), they are more likely to misidentify a suspect if there is a long period of time between the eyewitness’s initial observation of a criminal action and their identification of a suspect for that action.<sup>63</sup> But even when an eyewitness (1) did not focus on the perpetrator’s weapon, (2) was impacted minimally by the event, (3) viewed the perpetrator for a long time while the event occurred, and (4) identifies the perpetrator shortly after the initial observation of the crime, cross-racial bias can still cause problems during the identification.

### 3. Police Investigations

In 1999, the U.S. Department of Justice created *Eyewitness Evidence: A Guide for Law Enforcement (Guide)* to combat the various problems regarding eyewitness identifications.<sup>64</sup> The *Guide* gives detailed descriptions of how to interact with eyewitnesses, beginning with the initial report and ending with the identification.<sup>65</sup> Even with the *Guide* in place, police officers play a role in the disproportionate number of African Americans being erroneously convicted.<sup>66</sup> Certain police procedures—like

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60. Jesse Singal, *Eyewitness Accounts in Ferguson—and Everywhere Else—Are Very Flawed*, CUT (Aug. 20, 2014), <https://www.thecut.com/2014/08/eyewitnesses-wont-solve-the-michael-brown-case.html> [<https://perma.cc/U6Q3-S7MB>].

61. See NAT’L RESEARCH COUNCIL, *supra* note 14, at 35.

62. *Id.* at 96.

63. *Id.* at 98.

64. U.S. DEP’T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 1 (1999) [hereinafter *GUIDE*], <https://www.ncjrs.gov/pdffiles1/nij/178240.pdf> [<https://perma.cc/EBQ5-45A9>]; see Laura Connelly, *Cross-Racial Identifications: Solutions to the “They All Look Alike” Effect*, 21 MICH. J. RACE & L. 125, 137 (2015).

65. See *GUIDE*, *supra* note 64, at 11.

66. See Connelly, *supra* note 64, at 139–40.



the use of suggestive instructions, the use of simultaneous line-up techniques, and when the eyewitness knows who the suspect is in the lineup—increase the chances of cross-racial misidentification.<sup>67</sup> Since the police set the groundwork for eyewitness investigational procedures, their suggestive techniques can increase cross-racial bias.<sup>68</sup>

Before showing a lineup to the eyewitness, police officers give the eyewitness instructions.<sup>69</sup> Problems arise when these instructions are suggestive.<sup>70</sup> Some instructions by the police give the impression that the perpetrator is in the lineup.<sup>71</sup> This could occur if police officers make a comment that the suspect is in the lineup or if they do not mention that there is a possibility that the suspect is not in the lineup.<sup>72</sup> Although the *Guide* instructs officers to let eyewitnesses know that suspects may or may not be in the lineup, many officers lack training on lineup techniques.<sup>73</sup>

When an officer gives a suggestive instruction, eyewitnesses are more likely to make an identification during the lineup procedure.<sup>74</sup> While research has also shown that eyewitnesses are more likely to choose the suspect when given suggestive instructions; this is problematic when the actual perpetrator is not present in the lineup.<sup>75</sup> When the perpetrator is not in the lineup, eyewitnesses make misidentifications instead of saying that the perpetrator is not present in the lineup.<sup>76</sup> Accordingly, an eyewitness may choose someone who is not the perpetrator during an identification because they lack understanding that the perpetrator may not be in the lineup.<sup>77</sup>

As mentioned previously, police officers can choose from a variety of lineup types, including simultaneous and sequential lineup procedures.<sup>78</sup>

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67. *Id.*

68. *See Doyle, supra note 17, at 260.*

69. BRIAN L. CUTLER & STEVEN D. PENROD, *MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW* 115 (1995).

70. *Id.*

71. *Id.*

72. *Id.*; *see Gary L. Wells et al., From the Lab to the Police Station: A Successful Application of Eyewitness Research*, 55 *AM. PSYCHOLOGIST* 581, 585 (2000) (noting that eyewitnesses must be instructed that the suspect may not be in the lineup).

73. *See Connelly, supra note 64, at 139.*

74. CUTLER & PENROD, *supra note 69, at 115.*

75. *Id.*

76. *Id.*

77. Wells et al., *supra note 73, at 585.*

78. Taslitz, *supra note 38.*

While the *Guide* instructs officers to use either sequential or simultaneous lineups,<sup>79</sup> police officers are more likely to employ the simultaneous technique because it is a more traditional standard.<sup>80</sup> The type of lineup used, however, could have negative implications for how eyewitnesses choose a suspect.

When a simultaneous lineup technique is used, eyewitnesses tend to no longer compare each photo to their own mental image of the perpetrator, but rather compare people in the lineup with each other.<sup>81</sup> In a sequential technique, however, the mind holds the only comparison the eyewitness can use against a suspect. This is because in a sequential setup, the eyewitness is only shown one person at a time as opposed to four or more images simultaneously.<sup>82</sup> Accordingly, simultaneous procedures are based off relative judgments where the eyewitness chooses the person in the lineup that most resembles the suspect.<sup>83</sup> Sequential lineups are based off absolute judgments where eyewitnesses are forced to compare images to their memory.<sup>84</sup> As a result, the simultaneous lineup, which officers are most likely to use, more often leads to errors.<sup>85</sup> This result changes when the investigating officer does not know if the suspect is in the lineup. When the investigating officer does not know whether the suspect is in the lineup, research has shown that eyewitnesses in simultaneous lineups make fewer errors during identifications than those in sequential lineups.<sup>86</sup>

Officers can be unconsciously suggestive if they have knowledge of the suspect, or an idea of who the suspect should be.<sup>87</sup> Police officers have been found to remove photos more slowly if eyewitnesses do not choose the suspect, or they may ask the eyewitness to take another look at the lineup if

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79. See Connelly, *supra* note 65, at 138; see also GUIDE, *supra* note 65, at 33–36.

80. Wells et al., *supra* note 73, at 585.

81. Connelly, *supra* note 65, at 140–41; SIMON, *supra* note 39, at 71.

82. SIMON, *supra* note 39, at 74.

83. *Id.*

84. *Id.*

85. Melissa B. Russano, Jason J. Dickinson, Sarah M. Greathouse & Margaret Bull Kovera, “Why Don’t You Take Another Look at Number Three?”: Investigator Knowledge and Its Effects on Eyewitness Confidence and Identification Decisions, 4 CARDOZO PUB. L. POL’Y & ETHICS J. 355, 369 (2006).

86. Mark R. Phillips, Bradley D. McAuliff, Margaret Bull Kovera & Brian L. Cutler, *Double-Blind Photoarray Administration as a Safeguard Against Investigator Bias*, 84 J. APPLIED PSYCHOL. 940, 947 (1999).

87. Wells et al., *supra* note 73, at 594 (showing that police officers inadvertently influence eyewitness identifications when they know the identity of the suspect).

the eyewitness says the suspect is not there.<sup>88</sup> Research has shown that when the identity of the suspect is known by the investigator administering the lineup, eyewitnesses are more likely to choose a suspect.<sup>89</sup>

The suspect's race can also impact the way police handle crimes.<sup>90</sup> In 1999, Amadou Daillo, a West African male in the Bronx, was gunned down for reaching in his pocket for his wallet because officers believed that he was reaching for a gun.<sup>91</sup> The negative stereotype that African Americans are violent caused the police officers to shoot an innocent man.<sup>92</sup> When police believe that someone is a suspect, they may put them in a photo lineup with people of a different race or with extremely different features so that the eyewitness is more likely to identify the suspect the police believes committed the crime.<sup>93</sup> Officers may also put indicators on the photos to show the type of crime someone committed. This makes eyewitnesses more likely to choose the suspect in the lineup who committed the same crime as the perpetrator.<sup>94</sup> For example, a man whose picture was marked with a letter "R"—which is used by the police to show that someone was previously arrested for rape—was later identified as a rapist in a sex crime and was convicted.<sup>95</sup> Similarly, in Johnny Briscoe's lineup, Briscoe was the only individual dressed in an orange prison jumpsuit.<sup>96</sup> Consequently, he was falsely chosen out of the lineup and later convicted of a crime he did not commit.<sup>97</sup>

Though police officers can be unaware of some of their suggestive actions, this can be problematic for the eyewitness process. It can cause an eyewitness to choose the suspect who the police believe to be the perpetrator, rather than who the eyewitness believes to be the perpetrator.<sup>98</sup>

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88. See SIMON, *supra* note 39, at 74.

89. *Id.*

90. See Karen F. Parker, Mari A. Dewees, & Michael L. Radelet, *Racial Bias and the Conviction of the Innocent*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 114, 121 (Saundra D. Westervelt & John A. Humphrey eds., 2001).

91. *Id.*

92. *Id.*

93. See SIMON, *supra* note 39, at 77 (mentioning people who were falsely identified because they were the only Hispanic in the lineup or the only blonde in the lineup).

94. *Id.* at 78.

95. *Id.*

96. *Johnny Briscoe*, *supra* note 20.

97. *Id.*

98. SIMON, *supra* note 39, at 74.

These suggestive actions can also cause eyewitnesses to be more prone to making an error in cross-racial identifications.<sup>99</sup>

### *C. Impact of Eyewitness Misidentification on African Americans*

Eyewitness misidentification disproportionately impacts African Americans.<sup>100</sup> Wrongful convictions due to misidentifications can destroy relationships. For example, Rubin Carter was falsely imprisoned for nineteen years due to an eyewitness misidentification.<sup>101</sup> Since his release from prison, Rubin has not spoken with his family.<sup>102</sup> Furthermore, PBS's airing of *Burden of Innocence* showed that wrongly convicted African American males were often unable to maintain relationships once they were released from prison.<sup>103</sup> Wrongful convictions also cause psychological problems. In *Burden of Innocence*, exonerees had problems with drug abuse and associating with society because they were afraid and were in a burdensome environment for so long.<sup>104</sup> Johnny Briscoe does not travel far from his home because he is scared to be falsely accused again.<sup>105</sup> He organizes his room like a jail cell where everything is within arm's reach.<sup>106</sup> Other exonerees have post-traumatic stress disorder, abuse drugs and alcohol, and are depressed.<sup>107</sup> Exonerees also encounter economic problems

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99. Connelly, *supra* note 64, at 141–42.

100. See *supra* note 64 and accompanying text.

101. Steven Pearlstein, *But the Fighter Still Remains*, WASH. POST (Jan. 6, 2000), <http://www.washingtonpost.com/wp-srv/WPcap/2000-01/06/020r-010600-idx.html> [<https://perma.cc/HNE6-6LPM>].

102. *Id.*

103. *Frontline: Burden of Innocence* (PBS television broadcast May 1, 2003) (discussing that many of the wrongly accused African American males who got married got divorced a couple of years later).

104. *Id.*; see Kevin Johnson, *Cleared by DNA Tests, but Still Struggling to be Free: Stigma of Conviction Is Difficult to Overcome*, USA TODAY (Jan. 28, 2009), <https://www.pressreader.com/usa/usa-today-international-edition/20090115/281496452162667>.

105. Johnson, *supra* note 104.

106. *Id.*

107. *Id.*; see also Benjamin Weiser, *Kalief Browder's Suicide Brought Changes to Rikers. Now It Has Led to a \$3 Million Settlement*, N.Y. TIMES (Jan. 24, 2019), <https://www.nytimes.com/2019/01/24/nyregion/kalief-browder-settlement-lawsuit.html>

[<https://perma.cc/4QQH-E7X8>] (showing that Kalief Browder, who was falsely accused of stealing a backpack, committed suicide after his release from New York's notorious Rikers Island jail, where he was physically abused for three years).

because many of them cannot find a job once they are released and cannot continue the career they had before their imprisonment.<sup>108</sup> For example, Rubin Carter no longer pursued his career as a middleweight boxing champion once he was released from prison.<sup>109</sup> In addition to familial, psychological, and economic problems associated with wrongful convictions, there are also the restrictions that society places on convicted individuals. Moreover, wrongful convictions of African Americans decrease their confidence in the legal system.<sup>110</sup>

#### *D. Reform Efforts and Innovations*

Missouri lawmakers have seen firsthand that eyewitnesses are unreliable through the eyewitness testimonies in officer Darren Wilson's grand jury proceedings.<sup>111</sup> Nevertheless, Missouri lawmakers have failed to make efforts to improve eyewitness identifications. Missouri lawmakers have failed to pass bills proposed by both the House of Representatives and the Senate that recommended changes in processing eyewitness identifications.<sup>112</sup>

Innovations in DNA testing have also proven the unreliability of eyewitness identifications. Since the 1980s, DNA profiling has proven to be a reliable method because it establishes the likelihood that a particular individual committed a crime.<sup>113</sup> For example, in Johnny Briscoe's case, DNA evidence showed that he was not the perpetrator in the rape and robbery crime.<sup>114</sup>

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108. Johnson, *supra* note 104.

109. Pearlstein, *supra* note 101 (stating Rubin Carter is "sparring now with words instead of his fists").

110. See NAT'L RESEARCH COUNCIL, *supra* note 14, at 22 (showing that eyewitness misidentifications decrease public confidence in our judicial system).

111. See Levs, *supra* note 5.

112. House Bill 575 was introduced in the House of Representatives in 2013 but failed. H.R. 575, 97th Gen. Assemb., Reg. Sess. (Mo. 2013). Likewise, Senate Bills 303 in 2014 and 842 in 2016, which recommended changes in collecting eyewitness identifications, also failed. S. 842, 98th Gen. Assemb., Reg. Sess. (Mo. 2016); S. 303, 98th Gen. Assemb., Reg. Sess. (Mo. 2015).

113. See Corey Harbison, *ABO Blood Type Identification and Forensic Science (1900-1960)*, EMBRYO PROJECT ENCYCLOPEDIA (June 2, 2016), <https://embryo.asu.edu/pages/abo-blood-type-identification-and-forensic-science-1900-1960> [https://perma.cc/T82A-9UN6].

114. *Johnny Briscoe*, *supra* note 20.

Before the advent of DNA profiling, a blood-typing technique was used that identified specific blood-type groups, rather than particular people.<sup>115</sup> The blood-typing technique is effective when the accused suspect and the actual perpetrator have different blood types.<sup>116</sup> The problem with this technique is that many people have the same blood type, so it would be difficult to limit suspects.<sup>117</sup> Additionally, the blood-typing technique could not be used to satisfy the “beyond a reasonable doubt” standard, which is necessary for a criminal conviction.<sup>118</sup>

Fingerprinting is another innovation still used today by investigators.<sup>119</sup> Fingerprinting is the process of matching a suspect’s fingerprints with fingerprints at the crime scene.<sup>120</sup> But research has shown that there is a lack of validity during fingerprinting testing and there are inconsistent standards for proving what constitutes a match.<sup>121</sup> Consequently, some courts have ruled that fingerprint identification is not reliable enough to be submitted as evidence.<sup>122</sup> Other common forensic science disciplines include: “forensic chemistry, trace evidence examination (hairs and fibers, paints and polymers, glass, soil, etc.), . . . firearms and toolmarks examination, handwriting analysis, fire and explosives examinations, forensic toxicology, and digital evidence.”<sup>123</sup>

Attorneys Peter Neufeld and Barry Scheck established the Innocence Project in 1992, to use DNA testing to liberate those who were wrongly accused.<sup>124</sup> The Innocence Project assisted in Johnny Briscoe’s exoneration.<sup>125</sup> The Innocence Project has found that eyewitness misidentification has accounted for more than seventy-five percent of

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115. Harbison, *supra* note 113.

116. *Id.*

117. *Id.*

118. *Id.*

119. Gould & Leo, *supra* note 52, at 852.

120. See generally *Fingerprints: An Overview*, NAT’L INST. JUST. (Mar. 27, 2013), <https://www.nij.gov/topics/forensics/evidence/impression/pages/fingerprints.aspx> [<https://perma.cc/AE2Q-WSSP>].

121. Gould & Leo, *supra* note 52, at 852.

122. *Id.*

123. *Forensic Science*, U.S. DEP’T JUST., <https://www.justice.gov/olp/forensic-science> [<https://perma.cc/Q336-6Q4E>].

124. *About*, INNOCENCE PROJECT, <https://www.innocenceproject.org/about/> [<https://perma.cc/3Q2J-DGKQ>] (last visited Feb. 7, 2020).

125. *Johnny Briscoe*, *supra* note 20.

wrongful convictions that have been overturned by DNA testing.<sup>126</sup> Accordingly, eyewitness accounts have been identified as the greatest cause of wrongful convictions nationwide.<sup>127</sup>

Extensive scientific research of eyewitness errors has led several organizations to recommend eyewitness identification reform. In 1998, the American Psychology-Law Society division of the American Psychological Association approved a set of best procedures for lineups.<sup>128</sup> These practices include using double-blind testing, providing instructions that the perpetrator might not be present, using non-suspects that are consistent with the description of the perpetrator, and obtaining the witness's confidence statement at the time of the identification.<sup>129</sup> The National Research Council made similar findings when it published the best practices that police officers should follow to decrease misidentification within their agencies.<sup>130</sup> Moreover, the American Bar Association included the same recommendations when it published its best practices to promote the accuracy of eyewitness procedures in 2004.<sup>131</sup> These reforms were also accepted by the International Association of Chiefs of Police in 2010 and the National Academy of Sciences in 2014.<sup>132</sup>

### *1. States' Reform Efforts*

Several states have agreed with these recommendations.<sup>133</sup> Particularly, Midwestern states have made changes to the way they conduct eyewitness identifications.<sup>134</sup> States like Kansas, Nebraska, and Arkansas have made

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126. *Eyewitness Misidentification*, *supra* note 15.

127. *See id.*

128. *See* Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603 (1998).

129. *Id.*

130. *See generally* NAT'L RESEARCH COUNCIL, *supra* note 14 (providing a set of best practices for law enforcement agencies).

131. *See* RESOLUTION 111C (A.B.A. HOUSE OF DELEGATES 2004) (adopting the Statement of Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures), <https://www.nacdl.org/getattachment/1c882cb8-4624-4c41-bade-4e3c957ff2f2/aba-adopts-statement-of-best-practices-for-promoting-the-accuracy-of-eyewitness-identification-procedures-august-2004.pdf> [<https://perma.cc/SU88-RAGU>].

132. Keith A. Findley, *Implementing the Lessons from Wrongful Convictions: An Empirical Analysis of Eyewitness Identification Reform Strategies*, 81 MO. L. REV. 377, 388 (2016).

133. *See Eyewitness Misidentification*, *supra* note 15.

134. *Id.*

model policies for law enforcement to follow.<sup>135</sup> Additionally, Kansas and Nebraska have passed legislation to encourage the adoption of written procedures.<sup>136</sup> Neither Missouri nor Iowa has made any eyewitness reform.<sup>137</sup>

Kansas began its eyewitness reform in 2016 due to concerns about eyewitness misidentification.<sup>138</sup> Kansas now requires its law enforcement agencies to adopt written procedures for conducting lineups in collaboration with local prosecutors.<sup>139</sup> It is recommended that these written procedures include practices such as using blinded procedures, providing witness instructions before the lineup that the suspect may not be present, using non-suspect fillers in the lineup who match the witness's description of the suspect, and obtaining written confidence statements immediately after the lineup to describe the eyewitness's confidence in the identification.<sup>140</sup> To help law enforcement create these written procedures, the Kansas County and District Attorneys Association created a model policy.<sup>141</sup> The general procedures of the model policy include alternatives to the reforms listed above, including using different lineups for different witnesses and suspects, videotaping or audiotaping the identification procedure, and additional operational procedures for conducting each type of lineup.<sup>142</sup> As of March 2020, Kansas has had three exonerations involving mistaken eyewitness identifications.<sup>143</sup>

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135. *Id.*

136. *Id.*

137. *Id.*

138. Tony Rizzo & Joe Robertson, *Eyewitness to Injustice: How Mistakes Put a KC Doppelganger in Prison for 17 Years*, KAN. CITY STAR (June 18, 2017), <https://www.kansascity.com/article156716199.html> [<https://perma.cc/38UH-2KAH>].

139. H.B. 2151, 2015 Leg., Reg. Sess. (Kan. 2015), <https://legiscan.com/KS/text/HB2151/2015> [<https://perma.cc/452Y-HD9E>].

140. *Id.* § 2(d).

141. *See generally* KAN. CTY. & DIST. ATTORNEYS ASS'N, CONTEMPORARY ISSUES IN CRIMINAL INVESTIGATION AND PROSECUTION WORKING GROUP: EYEWITNESS IDENTIFICATION MODEL POLICY (2016), <http://www.kcdaa.org/resources/Documents/Model%20Policy%20-%20Eyewitness%20Identification%20-%20FINAL1.pdf> [<https://perma.cc/ZF3Q-DRRD>].

142. *Id.*

143. Kansas Exonerations Following Mistaken Witness Identifications, NAT'L REGISTRY OF EXONERATIONS [hereinafter Kansas Exonerations], <http://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View={B8342AE7-6520-4A32-8A064B326208BAF8}&FilterField1=State&FilterValue1=Kansas&FilterField2=Contributing%5F0020%5FFactors%5F0020&FilterValue2=Mistaken%20Witness%20ID> [<https://perma.cc/K5W9-LPNB>].



Nebraska has full eyewitness reforms in place.<sup>144</sup> Nebraska requires its law enforcement agencies to adopt written policies for eyewitness suspect identifications.<sup>145</sup> The minimum standards for those policies are: “(a) standards which describe the administration of a lineup, (b) procedures governing the instructions given by a peace officer to an eyewitness, and (c) procedures for documentation of the eyewitness's level of certainty of an identification.”<sup>146</sup> If an agency does not adopt a policy regarding eyewitness identifications, that agency would be required to adopt the model policy written by the Nebraska Commission on Law Enforcement and Criminal Justice.<sup>147</sup> The model policy describes procedures to conduct show-ups, lineups, and photographic identifications.<sup>148</sup> The policy also includes minimum standards such as independent administration of live or photo lineups, instructions to the witness that they do not have to make an identification, the collection of confidence statements immediately after an identification, and the use of non-suspects in the lineup that match the description of the suspect.<sup>149</sup> Nebraska has had one exoneration involving a mistaken eyewitness identification as of January 2019.<sup>150</sup>

Arkansas has also passed a model policy for eyewitness identification.<sup>151</sup> In 2012, the Arkansas Association of Chiefs of Police passed a model policy in response to victims who were misidentified by eyewitnesses.<sup>152</sup> While Arkansas has had two exonerations involving

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144. See *Eyewitness Misidentification*, *supra* note 15.

145. NEB. REV. STAT. § 81-1455 (2016).

146. *Id.* § 81-1455(1).

147. *Id.* § 81-1455(2).

148. *Eyewitness Identification*, NEB. COMM'N ON LAW ENF'T & CRIM. JUST., [http://www.innocenceproject.org/wp-content/uploads/2016/07/NE-Commission-on-Law-Enforcement-Criminal-Justice-Eyewitness-Identification-Model-Policy\\_-4-27-16.docx](http://www.innocenceproject.org/wp-content/uploads/2016/07/NE-Commission-on-Law-Enforcement-Criminal-Justice-Eyewitness-Identification-Model-Policy_-4-27-16.docx) [https://perma.cc/ZM29-KJYN].

149. *Id.*

150. Nebraska Exonerations Following Mistaken Witness Identifications, NAT'L REGISTRY OF EXONERATIONS [hereinafter Nebraska Exonerations], <http://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View={B8342AE7-6520-4A32-8A064B326208BAF8}&FilterField1=State&FilterValue1=Nebraska&FilterField2=Contributing%5F0020%5FFactors%5F0020&FilterValue2=Mistaken%20Witness%20ID> [https://perma.cc/HP7G-T374].

151. See *Eyewitness Misidentification*, *supra* note 15.

152. J.R. Wilson, Editorial, *To Avoid Mistakes: Vital to Get Eyewitness IDs Right*, ARK. DEMOCRAT-GAZETTE (Mar. 19, 2016, 3:29 AM), <https://www.arkansasonline.com/news/2016/mar/19/to-avoid-mistakes-20160319/?f=opinion> [https://perma.cc/2HG6-B43D].

eyewitness misidentification,<sup>153</sup> the Arkansas Association of Chiefs of Police adopted a model policy to decrease the chances of the perpetrator going free and committing a similar crime due to misidentification.<sup>154</sup> The model policy adopted in Arkansas is very similar to the model policy adopted in Nebraska. It suggests using blind procedures during photo and live lineups, providing instructions that the suspect may not be in the lineup, retrieving confidence statements regarding eyewitnesses' certainty in their identification, and collecting audio or video recordings of all identification procedures.<sup>155</sup> Unlike the Nebraska policy, however, the model policy in Arkansas is not mandatory.<sup>156</sup> In addition to these four reforms, Arkansas provides an alternative to using blind procedures in the event that they are not feasible.<sup>157</sup> Arkansas guidelines suggest using a process known as folder shuffling.<sup>158</sup> During folder shuffling, the photos are presented in a way that prevents the officer from knowing the exact photo the eyewitness is viewing.<sup>159</sup> Therefore, the administrator is blinded just as in a blind procedure.

Iowa has not initiated any reform policy to guide law enforcement agencies in conducting eyewitness identifications,<sup>160</sup> although there have been efforts to encourage law enforcement to use evidence-based best practices of eyewitness identifications.<sup>161</sup> Nevertheless, in 2018, Iowa's Criminal and Juvenile Justice Planning Advisory Council recognized that

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153. Arkansas Exonerations Following Mistaken Witness Identifications, NAT'L REGISTRY OF EXONERATIONS [hereinafter Arkansas Exonerations], <http://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View={B8342AE7-6520-4A32-8A064B326208BAF8}&FilterField1=State&FilterValue1=Arkansas&FilterField2=Contributing%5F0020%5FFactors%5F0020&FilterValue2=Mistaken%20Witness%20ID> [https://perma.cc/88R7-4DAX].

154. ARK. ASS'N OF CHIEFS OF POLICE, IDENTIFICATION PROCESS 1, 4 (2016) [hereinafter ARK. CHIEFS OF POLICE], [https://www.arkchiefs.org/plugins/show\\_image.php?id=156](https://www.arkchiefs.org/plugins/show_image.php?id=156) [https://perma.cc/9XP9-8Z33].

155. *Id.*

156. Compare ARK. CHIEFS OF POLICE, *supra* note 154, with NEB. REV. STAT. § 81-1455 (2016).

157. ARK CHIEFS OF POLICE, *supra* note 154.

158. *Id.*

159. *Id.*

160. See *Eyewitness Misidentification*, *supra* note 15.

161. *Id.*; see *Eyewitness Misidentification*, INNOCENCE PROJECT IOWA, <http://www.iowainnocence.org/eyewitness-misidentification> [https://perma.cc/3KB4-FGQL].

eyewitness identifications are an issue because of their unreliability.<sup>162</sup> Iowa has had one exoneration involving an eyewitness's misidentification.<sup>163</sup>

In 2016, Missouri was above the national average as one hundred percent of exonerees that were released due to DNA evidence were convicted based on eyewitness testimonies.<sup>164</sup> Furthermore, five out of nine exonerees in Missouri were convicted based on cross-racial identification.<sup>165</sup> Therefore, fifty-six percent of the exonerees in Missouri have been misidentified by cross-racial eyewitness identifications. As of 2020, forty-two percent of erroneous convictions are the result of cross-racial identification nationwide.<sup>166</sup> Most cross-racial identifications include white eyewitnesses wrongly convicting African Americans.<sup>167</sup> Out of 367 people who have been exonerated in the United States, sixty-one percent are African American, and African Americans make up the largest portion of the post-conviction exonerations overall.<sup>168</sup> These statistics show eyewitnesses are not always correct in their identifications and that African Americans are a significant proportion of those being accused.

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162. Steve Michael, IOWA DEP'T OF HUM. RTS., 2018 IOWA CRIMINAL AND JUVENILE JUSTICE ANNUAL PLAN UPDATE 5, <https://humanrights.iowa.gov/sites/default/files/media/2018%20Iowa%20Criminal%20and%20Juvenile%20Justice%20Annual%20Plan%20Update.pdf> [<https://perma.cc/L5DY-WT5T>].

163. Iowa Exonerations Following Mistaken Witness Identifications, NAT'L REGISTRY OF EXONERATIONS [hereinafter Iowa Exonerations], <http://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View={B8342AE7-6520-4A32-8A064B326208BAF8}&FilterField1=State&FilterValue1=Iowa&FilterField2=Contributing%5Fx0020%5FFactors%5Fx0020&FilterValue2=Mistaken%20Witness%20ID> [<https://perma.cc/7WWD-CY62>].

164. Tricia Bushnell & Amol Sinha, Opinion, *Show Me Real Eyewitness ID Reform*, ST. LOUIS POST-DISPATCH (Jan. 22, 2016), [https://www.stltoday.com/opinion/columnists/show-me-real-eyewitness-id-reform/article\\_74e36781-0ca1-5636-ab48-29e071ee9682.html](https://www.stltoday.com/opinion/columnists/show-me-real-eyewitness-id-reform/article_74e36781-0ca1-5636-ab48-29e071ee9682.html) [<https://perma.cc/7BYJ-MXTU>]; see also Missouri Exonerations Following Mistaken Witness Identifications, NAT'L REGISTRY OF EXONERATIONS [hereinafter Missouri Exonerations], <http://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View={B8342AE7-6520-4A32-8A064B326208BAF8}&FilterField1=State&FilterValue1=Missouri&FilterField2=Contributing%5Fx0020%5FFactors%5Fx0020&FilterValue2=Mistaken%20Witness%20ID> [<https://perma.cc/J8FX-8PRQ>] (showing that fifteen exonerations in Missouri resulted from eyewitness misidentifications).

165. Bushnell & Sinha, *supra* note 164.

166. DNA Exonerations Nationwide, INNOCENCE PROJECT, <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/> [<https://perma.cc/C5EQ-B9H8>]; see Connelly, *supra* note 64, at 126 (showing that forty percent of the exonerations were the result of cross-racial identifications as of 2015).

167. Doyle, *supra* note 17.

168. DNA Exonerations Nationwide, *supra* note 166.

## II. ANALYSIS

Missouri is in dire need of eyewitness identification reform.<sup>169</sup> Eyewitness misidentifications unfairly impact minorities.<sup>170</sup> This is important because the unjust relationship between African Americans and law enforcement was the underlying reason for the #BlackLivesMatter Movement.<sup>171</sup> In 2016, five exonerees in Missouri were convicted based on cross-racial eyewitness misidentifications.<sup>172</sup>

Still, Missouri has failed to adopt many proposals to reform eyewitness identifications, including bills introduced in the Senate and House of Representatives.<sup>173</sup> While there are innovations in place, such as those discussed earlier in this note, these innovations do not always guide law enforcement to the correct suspect.<sup>174</sup> Even with the use of innovations such as DNA evidence, African Americans are still being wrongly accused by eyewitnesses.<sup>175</sup> This is due to factors such as cross-racial bias, eyewitness errors, and police suggestiveness.<sup>176</sup>

In recent years, psychologists have tried eliminating cross-racial bias through training.<sup>177</sup> Each theory recommends that more contact is needed to improve the relationship between members of different races.<sup>178</sup> Even with the studies that have been done, it is still unclear whether systematic training could eliminate cross-racial bias within our social processes.<sup>179</sup> This may be because contact simply is not enough to rid individuals of cross-racial bias; there needs to be a change in racial attitudes as well.<sup>180</sup> Racial attitudes can

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169. Bushnell & Sinha, *supra* note 164.

170. Doyle, *supra* note 17.

171. See HARRIS, *supra* note 10.

172. Bushnell & Sinha, *supra* note 164.

173. See *supra* text accompanying note 112.

174. See Gould & Leo, *supra* note 52 (showing that some courts have not allowed fingerprint testing due to its unreliability); Harbison, *supra* note 113 (showing that the blood-typing technique results in a specific blood type rather than a particular suspect).

175. See Doyle, *supra* note 17, at 255 (showing that many African Americans are the victims of misidentification by white Americans); see also Bushnell & Sinha, *supra* note 164 (showing that five of nine African Americans in Missouri were convicted based on cross-racial bias).

176. See Connelly, *supra* note 64, at 141; Doyle, *supra* note 17, at 260; *Eyewitness Misidentification*, *supra* note 15.

177. See Brigham et al., *supra* note 47, at 258–59.

178. *Id.* at 273.

179. *Id.* at 275.

180. Doyle, *supra* note 17, at 255.

be indirectly influenced by the amount and quality of time spent with people from other races.<sup>181</sup>

The quality of the contact is important when considering young African American males who are presented in lineups.<sup>182</sup> African Americans, in general, have many negative stereotypes against them.<sup>183</sup> Even though we are in a new time where explicit racism does not always occur, implicit racism is still apparent in our society.<sup>184</sup> According to researchers Parker, Dewees, and Radelet, black defendants are more likely to be victimized by erroneous cross-racial identification than white defendants.<sup>185</sup> This may be because white eyewitnesses believe that people of color are more likely to conform to criminal stereotypes and participate in criminal acts. Accordingly, in the article by James M. Doyle, researcher Tricia Rose stated that “[t]he White American public . . . has been inundated with images of young Black men who appear to be fully invested in a life of violent crime, who have participated in drug-related gang shootings and other acts of violence for ‘no apparent reason.’”<sup>186</sup>

African Americans have been known to be depicted by others in a negative light.<sup>187</sup> When contact and attitudes are considered, it is apparent that the media also plays a role in the furthering of these harmful stereotypes.<sup>188</sup> Henry Louis Gates in 1994 claimed that black people have been portrayed as inherently satanic, slothful, lustful, or lascivious by the media.<sup>189</sup> With these negative stereotypes present, it is not difficult to understand why African Americans are more likely to be erroneously implicated in a crime by an eyewitness.

For example, after Michael Brown’s death, he was negatively depicted. In a *New York Times* article, Michael Brown was described as “no angel.”<sup>190</sup> Instead of focusing solely on the shooting, the article went on to discuss his stealing, his involvement with drugs and alcohol, and his interest in rapping.

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181. See Brigham et al., *supra* note 47, at 267.

182. Doyle, *supra* note 17, at 255–56.

183. *Id.* at 256.

184. See Parker et al., *supra* note 90.

185. *Id.*

186. Doyle, *supra* note 17, at 256.

187. *Id.*

188. *Id.*

189. *Id.*

190. Eligon, *supra* note 1.

<sup>191</sup> While Darren Wilson pulled the trigger, Michael Brown's personal life was displayed in a negative light to rationalize the officer's violence towards him.<sup>192</sup> In the end, Officer Wilson was not indicted for the murder of Michael Brown.<sup>193</sup>

Regarding police suggestiveness, the *Guide* offers policies that will make identification more neutral, but police officers do not always follow the best practices of the *Guide*.<sup>194</sup> Like Johnny Briscoe, who was depicted in a lineup while in a prison uniform, other African Americans have been depicted by their mug shots.<sup>195</sup> These formats cause African American suspects to be considered as part of an outgroup because they seem to be more guilty of a crime.<sup>196</sup> With this lineup format in place, eyewitness believe that if African American suspects were connected to a crime in the past, it is more likely for them to be guilty of a crime in the future.<sup>197</sup> When white eyewitnesses are asked to identify African Americans who are unfairly displayed in a lineup, errors are encouraged because mistakes affect veteran criminals who will simply have to pay the price in extra time served and society will have to pay for security.<sup>198</sup>

Some states like Kansas, Nebraska, and Arkansas have recognized the effects of unreliable eyewitness identifications by implementing safeguards.<sup>199</sup> Each of these states recommends at least four reforms including double-blind administration, instructions that the suspect may not be present in the lineup, the use of non-suspects that are similar in appearance to the described suspect, and recorded statements of an eyewitness's confidence immediately after a positive identification is made.<sup>200</sup> Nebraska has not only recommended that these reforms be

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191. *Id.*

192. *See id.*

193. Kohler, *supra* note 9.

194. *See Connelly, supra* note 64, at 138.

195. Doyle, *supra* note 17, at 256–57 (showing that mugshots are used in lineup procedures); *see also Johnny Briscoe, supra* note 20 (describing how Johnny Briscoe was presented in a prison uniform during a lineup procedure).

196. Doyle, *supra* note 17, at 256–57.

197. *Id.* at 257.

198. *Id.*

199. *Eyewitness Misidentification, supra* note 15.

200. *See* NEB. REV. STAT. § 81-1455 (2016) (mandating eyewitness reforms in Nebraska); ARK. CHIEFS OF POLICE, *supra* note 154 (noting eyewitness reforms in Arkansas); KAN. CITY DIST. ATTORNEYS ASS'N, *supra* note 141 (noting eyewitness reforms in Kansas).

practiced by its law enforcement agencies, but it mandates that these reforms be used.<sup>201</sup> These four techniques have been supported by psychological literature and studies.<sup>202</sup> They have also been reinforced by groups such as the American Bar Association, the American Psychology Association, and the National Academy of Sciences.<sup>203</sup>

The recency of the reforms in states like Kansas, Arkansas, and Nebraska makes it difficult to see how these reforms have been applied in practice. It is also difficult to see the benefits of the reforms because the number of innocent people falsely accused by eyewitness is unknown.<sup>204</sup> Nevertheless, in Missouri, adopting these four reforms would be better than having no instructional policy in place to increase the reliability of eyewitness identifications. The scientific acceptance of these reforms, coupled with the enforcement of these reforms from Kansas, Arkansas, and Nebraska, prove that they are an acceptable means of decreasing eyewitness misidentification.<sup>205</sup>

Like Missouri, Iowa has not initiated any policy to guide law enforcement agencies in conducting eyewitness identifications.<sup>206</sup> However, Iowa has only had one exoneration involving an eyewitness misidentification.<sup>207</sup> Missouri, on the other hand, has had fifteen exonerations involving mistaken witness identifications.<sup>208</sup> The number of known innocent people convicted based on eyewitness misidentification in Missouri is much larger than those in Kansas, Nebraska, Arkansas, and Iowa combined.<sup>209</sup>

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201. NEB. REV. STAT. § 81-1455 (2016).

202. See Findley, *supra* note 132.

203. See RESOLUTION 111C, *supra* note 131; Findley, *supra* note 132.

204. Gould & Leo, *supra* note 52, at 832.

205. See *supra* text accompanying notes 200 and 203.

206. *Eyewitness Misidentification*, *supra* note 15.

207. See Iowa Exonerations, *supra* note 163. Please note that by the use of the term “only” I am not discounting that part of this person’s life was taken away due to a wrongful conviction.

208. Missouri Exonerations, *supra* note 164.

209. Compare *id.* (noting that twelve people from Missouri were convicted due to eyewitness misidentification), with Kansas Exonerations, *supra* note 143 (noting that three people from Kansas were convicted due to eyewitness misidentification), Nebraska Exonerations, *supra* note 150 (noting that one person from Nebraska was convicted due to eyewitness misidentification), Iowa Exonerations, *supra* note 163, (noting that one person from Iowa was convicted due to eyewitness misidentification), and Arkansas Exonerations, *supra* note 153 (noting that two people from Arkansas were convicted due to eyewitness misidentification).

### III. PROPOSALS

Based on the events in Ferguson and the unreliability of eyewitnesses in our criminal justice system, there needs to be a change at the investigational level to ensure that eyewitness accounts are valid. Therefore, Missouri eyewitness-identification laws regulating lineup procedures need to change. Missouri needs to follow other Midwestern states by adopting laws that improve police investigation procedures involving eyewitnesses. Missouri should require all law enforcement agencies to create a set of procedures for eyewitness identifications that include at a minimum double-blind procedures, instructions that the suspect may not be present in a lineup, procedures ensuring that all non-suspect fillers are similar in appearance to the suspect, procedures for retrieving confidence statements, and procedures for voice or audio recordings of the identification procedures. By making these changes, Missouri can decrease misidentification and, in turn, decrease the disproportionate number of African Americans wrongly convicted based on eyewitness misidentifications. Changes on the investigation level will aid the #BlackLivesMatter movement by decreasing the number of African Americans being treated unfairly by law enforcement due to African Americans being falsely accused of crimes they did not commit.

#### *A. Reform 1: Double-Blind Administration*

In a double-blind approach, the investigator is unaware of the identity of the suspect when providing the identifications.<sup>210</sup> The witness is also made aware that the investigator does not know the identity of the suspect.<sup>211</sup> This practice decreases the possibility that a police officer's suggestiveness will interfere with an investigation.<sup>212</sup> Various researchers have shown that biased expectations can unknowingly be communicated.<sup>213</sup> The double-blind approach increases fairness by minimizing police officers' beliefs regarding investigations.

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210. SIMON, *supra* note 39, at 83.

211. *Id.*

212. Phillips et al., *supra* note 89.

213. See NAT'L RESEARCH COUNCIL, *supra* note 14, at 13.



Police have opposed the double-blind approach because they feel as if they are not trusted and that it may cost too much money.<sup>214</sup> Regarding lack of trust, officers feel insulted by being forced to employ the double-blind approach because it appears as if police officers cannot conduct their own investigations. Officers should be placated by knowing that the double-blind approach is a well-known method that is scientifically proven.<sup>215</sup> If experimenters, researchers, and scientists use this approach to minimize their biases when conducting studies, then police officers should do the same. Those who advocate for this technique are not claiming that officers cannot conduct their investigations correctly; they are saying that implicit suggestions beyond the officers' control may occur during their investigation. The double-blind approach is a safeguard against intentional and unintentional suggestive techniques.<sup>216</sup>

In regard to cost, officers believe it is a waste of money to hire someone to hide the identity of the suspect.<sup>217</sup> Using the double-blind procedure, however, does not require hiring someone for the position. It means the investigating officer does not need to be in the room during the identification. Therefore, a secretary, sheriff, or other officer outside of the investigation can initiate the identification to rid the process of biases. Furthermore, technology can be used to scramble the participants so that the investigating officer does not know who would be displayed at a given time.<sup>218</sup>

### *B. Reform 2: Instructions*

Missouri should require that each law enforcement agency create a uniform set of instructions to be read to witnesses prior to the identification.<sup>219</sup> The instructions should include, at a minimum, notification to the eyewitness that the suspect may not be present in the identification procedure. By including this instruction, the eyewitness may be more

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214. Wells et al., *supra* note 73, at 594.

215. See NAT'L RESEARCH COUNCIL, *supra* note 14, at 106 (showing that the double-blind procedure is a method accepted in medical and experimental studies).

216. *See id.*

217. Wells et al., *supra* note 73, at 594.

218. *Id.*

219. See NAT'L RESEARCH COUNCIL, *supra* note 14, at 107.

comfortable not making an identification.<sup>220</sup> Furthermore, if an eyewitness is not pressured to choose a suspect, the chances of an eyewitness misidentifying a suspect when they are confused will decrease.<sup>221</sup> Instructions can also diminish effects of weapon focus, stress and fear, the duration of the exposure, and retention intervals.<sup>222</sup> This is because the witness may not choose anyone if they are assured that the investigation will continue with or without an identification.<sup>223</sup> While an identification is helpful, it is better to receive an identification where the eyewitness is sure, rather than when they are unsure because uncertainty increases the likelihood of misidentification.

One concern a law enforcement agency may have is the time it will take to compose the instructions. Officers are busy and may consider that their time is better spent investigating rather than composing a set of instructions that the witness may not appreciate. While it will take time to make the instructions, there are several model policies by other law enforcement agencies that could decrease the amount of time it would take to compose the instructions.<sup>224</sup>

### *C. Reform 3: Fillers*

Law enforcement agencies should ensure that non-suspect fillers<sup>225</sup> look similar in appearance to the description given of the suspect. When officers know the suspect, they may leave incriminating identifiers such as the orange jumpsuit that Johnny Briscoe wore when he was misidentified.<sup>226</sup> Ensuring that all members look the same in a lineup avoids issues such as eyewitnesses misidentifying a lineup participant because of their prior criminal behavior. Accordingly, it would allow an eyewitness to make an identification without suggestiveness from the investigative officer.

Law enforcement agencies may be concerned about the amount of time and resources needed to choose a non-suspect filler who looks like the

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220. *See id.*

221. Phillips et al., *supra* note 89, at 949.

222. *See* NAT'L RESEARCH COUNCIL, *supra* note 14, at 35.

223. *See* Wells et al., *supra* note 73, at 594.

224. *See, e.g.,* ARK. CHIEFS OF POLICE, *supra* note 154.

225. Wells et al., *supra* note 73, at 584–85 (defining fillers as the known innocent members of a lineup).

226. *See Johnny Briscoe, supra* note 20.

description of the suspect. Even though more time may be required than without such a requirement, the additional time is warranted because it is part of a proper and careful investigation. Furthermore, the strength of an eyewitness's identification is so compelling in our legal system<sup>227</sup> that special attention is needed at the beginning of the investigational process to decrease the chances of misidentification. Regarding resources, the non-suspect filler does not need to look identical to the description of the suspect. The filler should look close enough to the described suspect to avoid outright suggestiveness by the administrator during the procedure.

#### *D. Reform 4: Confidence Statements*

Confidence statements should be retrieved from the eyewitness the moment the eyewitness makes a positive identification.<sup>228</sup> The confidence statement should be documented verbatim so that it can be used in conjunction with an eyewitness's identification, because the witness may display more confidence at trial than during the initial identification.<sup>229</sup> An eyewitness's increased confidence can be due to factors other than the eyewitness's memory of the suspect during the crime.<sup>230</sup> During trial, juries are likely to believe in confident witnesses, even though confident witnesses are not more likely to be correct than less confident ones.<sup>231</sup> If an eyewitness appears more confident in trial than they were at the initial identification, confidence statements can be used to show the jury the extent to which an eyewitness was sure of their identification. Accordingly, the jury's reliance on an eyewitness can decrease if the eyewitness's confidence is low. If a law enforcement agency has concerns about the amount of resources needed to gather confidence statements, their concern is outweighed by the increased risk that an eyewitness's false confidence persuades a jury to convict an innocent person.

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227. CUTLER & PENROD, *supra* note 69, at 6.

228. See NAT'L RESEARCH COUNCIL, *supra* note 14, at 108.

229. *Id.*

230. *Id.*

231. CUTLER & PENROD, *supra* note 69, at 185.

*E. Reform 5: Recording*

Lastly, law enforcement agencies need to document identifications by video recording.<sup>232</sup> Video recordings allow the entire identification procedure to be observed for suggestiveness. The suggestiveness of the procedure could be assessed against the eyewitness identification, indicating how reliable the identification was. Disadvantages of video recording identifications are its cost and the eyewitness not wanting to be recorded.<sup>233</sup> Nevertheless, the initial eyewitness identification needs to be preserved. Law enforcement agencies are free to find non-intrusive and cheap methods to record the identifications.

## CONCLUSION

In a dissenting opinion, Justice William Brennan wrote, “[T]here is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says ‘That’s the one!’”<sup>234</sup> Justice Brennan’s comment shows not only the strength of an eyewitness’s testimony but also how dangerous it can be. Safeguards need to be put into place to prevent the impact that eyewitness misidentifications have on innocent people’s lives, especially African Americans who have an increased likelihood of being misidentified by an eyewitness.

There are various factors that can contribute to wrongful convictions in cross-racial cases, most notably cross-racial bias. Since the advent of DNA evidence, large rates of African Americans have been exonerated because of eyewitness testimonies. Wrongful convictions decrease African American exonerees’ participation within society, ruin their family ties, create psychological and economic problems, and decrease their trust within the legal system. Race has caused many African Americans to lose most of their lives in prison because of false eyewitness identifications. The fact that there is no coherent system in place to prevent this from happening in Missouri is a miscarriage of justice.

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232. See NAT’L RESEARCH COUNCIL, *supra* note 14, at 108.

233. *Id.* at 109.

234. Connelly, *supra* note 64, at 131 (alteration in original) (quoting *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting)).

While states like Kansas, Arkansas, and Nebraska have recommended eyewitness identification reforms, Missouri has failed to adopt any reform measures. This is problematic because Missouri has seen bountiful evidence that reforms in eyewitness identifications are needed. Through Darren Wilson's indictment proceeding in Ferguson, the state of Missouri has learned that eyewitnesses are unreliable. This has also been evidenced by exonerations of innocent people who were wrongfully convicted due to eyewitness misidentifications. Since there is inconsistent research on how to eliminate or control cross-racial bias, my proposed reforms do not involve changing the eyewitness. Instead, my proposal suggests that the reforms involve preventable sources of error at the investigational level of an eyewitness's identification. These changes meet the aims of the #BlackLivesMatter movement by decreasing the disparity of African Americans treated unfairly by law enforcement due to eyewitness misidentifications. Therefore, Missouri law enforcement agencies should be mandated to create a set of procedures for using double-blind administrations, providing instructions to the eyewitnesses, using non-suspect fillers that are similar to the suspect's description, collecting confidence statements from the eyewitnesses, and recording identifications. All these reforms have been scientifically proven and adopted by others to act as a safeguard in protecting African Americans, and all other suspects, from being falsely convicted through cross-racial identification.