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## Use of Eyewitnesses in New Jersey Courts Needs Change, Ex-Judge Says

By RICHARD PÉREZ-PEÑA

Courts should do more to gauge the accuracy of witnesses to crimes, and to let juries know how flawed their testimony can be, according to a former appellate judge assigned by the New Jersey Supreme Court to review the matter.

In a report released on Monday, the retired judge, Geoffrey Gaulkin, recommended that New Jersey, already a national leader in this area, should go beyond what any state or the federal court system has done. In particular, he wrote, judges should assess factors that might limit a witness's reliability in picking someone out of a lineup, either in person or in a photo array.

Mr. Gaulkin reviewed three decades of research on witness reliability, took testimony from experts and heard arguments last year from the state attorney general's office and from groups representing defendants. There have been more than 2,000 studies on the topic, he wrote, and on the whole, they indicate that about one-third of the witnesses who pick out suspects choose the wrong person. He called the research "sound, definitive and unquestionably fit for use in the courtroom."

Mr. Gaulkin's 64-page report is not binding on the State Supreme Court, which named him a year ago as a special master to investigate whether the procedures on eyewitness testimony are keeping up with science. "The short answer to the court's question," he wrote, "is that they are not."

For centuries, eyewitness testimony was considered the strongest of evidence. But Mr. Gaulkin, who was the Hudson County prosecutor before spending 22 years on the bench, contends that it should be treated as "trace evidence," like that found at a crime scene, whose validity must be proved, not assumed.

The governor's office declined to respond to the report as it was issued on Monday, as did the attorney general's office.

Barry C. Scheck, co-director of the defendant's group [the Innocence Project](#), said that while the limits of witness testimony had been known for years, such a comprehensive review ordered by a court was new, and "it's going to be influential around the country." The Innocence Project was one of the groups that Mr. Gaulkin consulted.

The current practices, which rest on a set of federal and state court rulings, have several profound flaws, Mr. Gaulkin found. At a pretrial hearing, for example, the defense can challenge a witness identification only on the basis that it was improperly influenced by the police. Yet studies show many other factors can also make a witness's testimony less accurate, like the passage of time, the witness's age or the presence of a weapon, which draws a witness's attention away from faces.

If a judge finds a lineup was conducted improperly, the prosecution can argue that the witness is reliable anyway, based on criteria like how certain the witness is, a factor juries weigh very heavily. Yet the research shows little connection between certainty and accuracy, and shows that

witnesses can be made to feel more certain than they were at first.

Even when there are lineup problems, judges usually agree with the prosecution that the witness is reliable enough to testify, Mr. Gaulkin found. Currently, the only alternative is to exclude the witness entirely, which he called a "Draconian remedy."

New Jersey has already added several safeguards to the system, like court rulings requiring that judges in some cases must instruct juries that witnesses often have trouble identifying people of other races.

In 2001, John Farmer, then the state attorney general, mandated that the police follow a set of best practices to reduce false identifications. Those practices were the nation's strictest at the time, but similar ones have since been adopted by several other states and local law enforcement agencies.

Among the Farmer rules are that a lineup must be conducted by an officer who does not know which person is the suspect, a witness must be instructed that the criminal might not be in the lineup and the police must show a witness an array of photos one at a time, not all at once. But if the police do not follow those rules, the system gives judges the choices they have always had: suppress the witness testimony completely, or allow it despite its flaws.

The state attorney general's office, under Gov. Jon S. Corzine, argued for minimal change in the current system. Other groups, like the Office of the Public Defender and the Association of Criminal Defense Lawyers, said failure to follow the rules should routinely result in witness exclusion.

Mr. Gaulkin took a position close to the one advocated by the Innocence Project. Before trial, a judge would assess the reliability of a witness, taking into account a wide range of factors, and later could instruct a jury about the possible limitations of that testimony. And judges and juries alike would have to understand the science of witness identification.

The State Supreme Court is expected to respond to his report later this year.

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