## THE CREATION AND CONCLUSIONS OF THE THIRD CIRCUIT TASK FORCE ON EYEWITNESS IDENTIFICATIONS

*BY THEODORE MCKEE*

In 2016, the Third Circuit sat en banc to hear the case of *Commonwealth v. Dennis*.[1] Little did the court realize the sustained impact this single appeal would have on its approach to criminal law.

The en banc court was there to review the Commonwealth's appeal of the federal district court's grant of habeas relief to Dennis based upon his claims that the prosecution improperly withheld *Brady* evidence. Dennis had been sentenced to death following a jury trial. The evidence included time-stamped documents that corroborated his alibi testimony and, had they been disclosed before trial, would have established that Dennis could not have been the one who fired the fatal shot. The majority agreed with his claim. The dissent, however, focused on the fact that, despite the alleged *Brady* violations and the probative value of the withheld evidence, "it is hard to discount the identification testimony of three identification witnesses."[2]

Even though a total of nine people had witnessed the shooting, only three witnesses who had identified Dennis as the killer were called to testify at trial. Each of those three witnesses viewed ▶
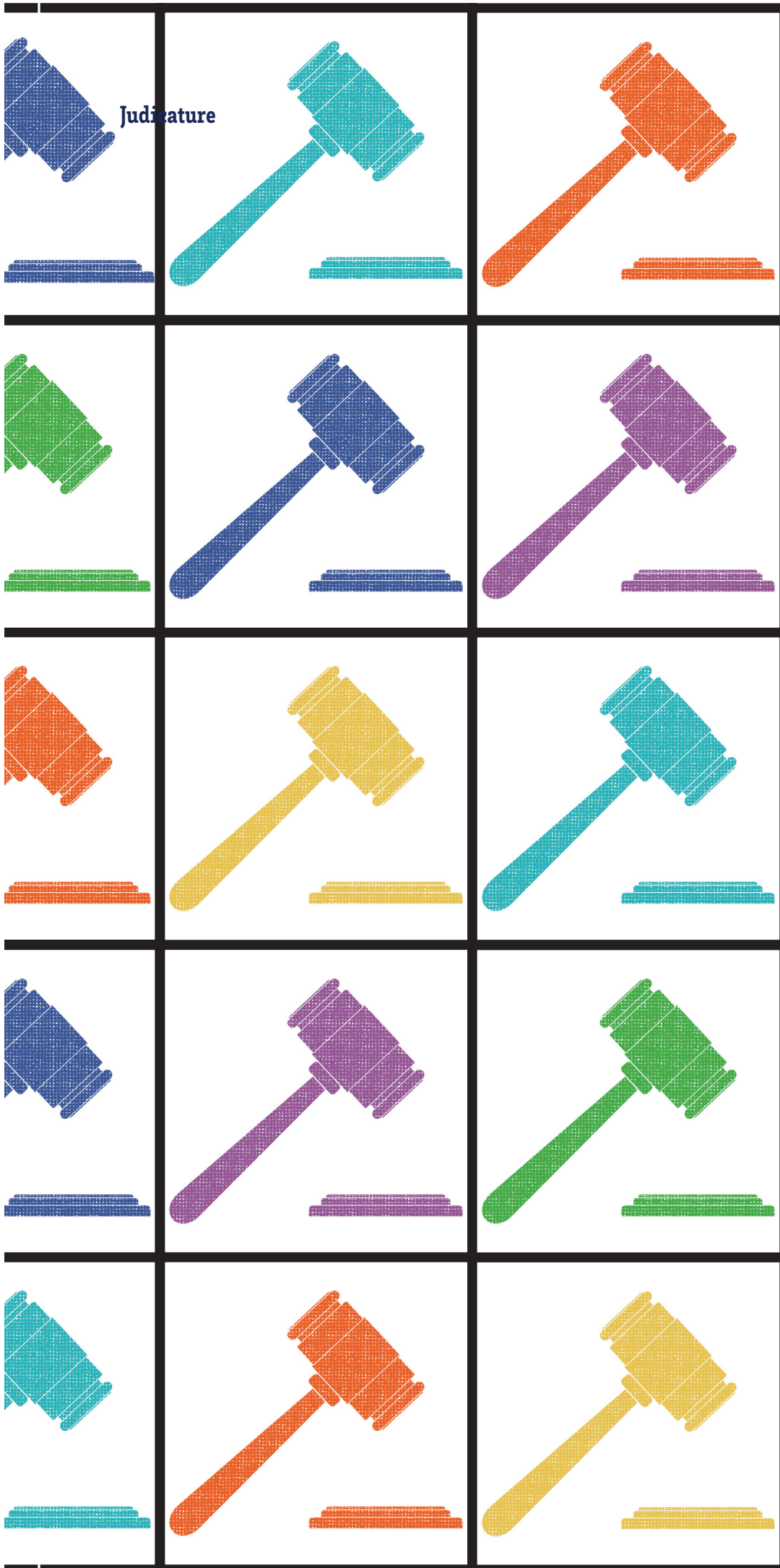
*THE DENNIS CASE SEEMED TO ME THE PERFECT SPRINGBOARD TO DO SOMETHING TO HELP REDUCE THE NUMBER OF WRONGFUL CONVICTIONS, AND THEREBY AID LAW ENFORCEMENT BY INCREASING THE ACCURACY AND STRENGTH OF EYEWITNESS IDENTIFICATIONS.*

Dennis or his photo on three occasions: in a photo spread, in the lineup, and at trial where they made in-court identifications. Subsequent research would reveal the danger that a witness may subsequently identify a suspect based on a familiarity arising from a prior identification procedure rather than from the actual crime. I was impressed by the obvious problems with the eyewitness identifications in this case and the fact that the identifications had such a strong influence on the dissent's position.

The dissent, by contrast, thought that we should defer to the Pennsylvania Supreme Court's rejection of Dennis's *Brady* claim based upon our limited scope of review under the Antiterrorism and Effective Death Penalty Act (AEDPA),[3] and its finding that, based on the unimpeached identification testimony, "Dennis 'still received a fair trial resulting in a verdict worthy of confidence.'"[4]

I felt compelled to write a concurring opinion exploring the research in the area of eyewitness identifications and explaining why the identifications in the case were unreliable. Such an opinion certainly amplified the majority's reasoning in *Dennis*. But it could not do anything to mitigate the underlying problems that can arise from convictions based upon faulty identification testimony — a problem that has been dramatically illustrated by DNA exonerations demonstrating that a suspect was incorrectly identified by at least one (and often multiple) witnesses. The *Dennis* case seemed to me the perfect springboard to do something to help

reduce the number of wrongful convictions, and thereby aid law enforcement by increasing the accuracy and strength of eyewitness identifications.

As I was then chief judge, I ordered the creation of the Third Circuit Task Force on Eyewitness Identifications and served as co-chair alongside Judge Mitchell Goldberg of the Federal District Court for the Eastern District of Pennsylvania. Our goal was to respond meaningfully to the scientific developments in the field of eyewitness identification and to apply this new knowledge in criminal cases. The Task Force was asked to make recommendations to promote reliable practices for eyewitness investigations and to effectively deter unduly suggestive identification procedures that raise the risk of wrongful convictions. At the time it was formed, no other federal court had undertaken such an investigation into eyewitness identifications, though several state courts had done so.

On Sept. 27, 2019, after more than three years of inquiry, debate, and discussion, the Third Circuit Task Force on Eyewitness Identifications unanimously adopted its Final Report.

**The task force membership included** one prominent eyewitness researcher as well as a practitioner/academician who was familiar with the existing research. But the majority of the members were circuit and district judges representing each of the federal districts within the Third Circuit as well as an Assistant United States Attorney, public defenders, and representatives of law enforcement. The task force

remained keenly aware throughout its work that the overwhelming majority of investigations and trials involving eyewitness testimony are the province of state court prosecutions. Nevertheless, the task force believed a federal task force composed primarily of judges and practitioners could play a meaningful role in educating all involved in the criminal justice system about the many issues surrounding eyewitness identifications and thereby minimize their role in erroneous convictions.

The membership was shaped by a belief that the report would be viewed as a tool for practitioners rather than as an academic tome. User-friendliness was key: The objective from the beginning was to make a practical product that would help educate practitioners and judges about the difficulties of ensuring accurate eyewitness identifications and to make recommendations toward improving such identifications.

The task force did not attempt to take testimony in preparation for its report. Rather, members studied numerous pre-existing sources, including the record of the proceedings of the New Jersey Supreme Court Henderson Commission (which identified factors jurors should consider when determining the reliability of identification evidence); the Report of the National Academy of Science on Eye Witness Identifications (*Identifying the Culprit: Assessing Eyewitness Evidence*); and numerous studies and articles on the subject.

The task force focused on four key areas, which also formed the basis for

subcommittees: identifying scientific consensus on the subject of eyewitness identification, creating best practices for law enforcement agencies in order to minimize the likelihood of mistaken identifications, developing a repository of information as an educational resource for attorneys and judges, and assessing current relevant Third Circuit jury instructions in order to recommend any appropriate changes.

All task force members were encouraged to submit any conclusions or preliminary recommendations to any researcher for review, in order to promote broad communication and thought-sharing. And the final report was submitted to numerous recognized eyewitness researchers and scholars for review and comment, to ensure the science was widely vetted.[5]

The task force's ultimate and principal recommendations are as follows:

- Lineups and photo arrays should be administered double-blind. Where that is not practical, they should at least be blinded.
- Lineups and photo arrays should use fillers that match the witness's description of the perpetrator and look similar to the suspect; moreover, the suspect must not stand out from the group of fillers in any way. At least five fillers — and only one suspect — should be included in a lineup or photo array.
- Lineups and photo arrays should be used whenever possible (rather than show-ups, in which an eyewitness confronts a single suspect). When show-ups are used, they should be conducted as soon after the crime as practical and conducted in a manner that minimizes any suggestion that the person in custody is the perpetrator.
- Standard preliminary instructions

for the eyewitness identification process should be adopted and reduced to writing, and given to a witness before any identification procedure. These instructions should inform the witness that the investigation will continue whether or not an identification is made and that the actual perpetrator may or may not be present. The witness should not feel compelled to identify someone from the photo array or lineup.
- A verbatim statement of the witness's confidence in the accuracy of the identification decision should be obtained and recorded by the blind or blinded administrator immediately after any identification procedure, regardless of whether the procedure resulted in an identification.
- Multiple identification procedures with the same witness and suspect should be avoided.
- Witnesses should be kept separate from other witnesses during the entire identification process. They should also be instructed not to discuss the matter with one another and to avoid media and social media accounts of the event.
- Witnesses should be interviewed as soon as possible after the criminal event and before any attempt to identify anyone. Nonleading questions should be used during the eyewitness interview.
- Witnesses should not be shown large numbers of random arrest photographs (e.g., mug shots).
- Law enforcement agencies should only use composites and sketches of the perpetrator rarely and with great caution.
- A single photograph identification procedure should only be used when the perpetrator is believed to be a person already well known to the witness and, even then, should

only be used to confirm that the police and witness are referring to the same individual. Concomitantly, a single photo should never be used as a photographic show-up. Rather, any photo that is shown to a witness should be part of a carefully composed photo array.
- All law enforcement departments should be trained in appropriate procedures for enhancing the probability of an accurate eyewitness identification decision.
- Video and audio recordings should be made of all show-ups, lineups, and photo arrays.
- Law enforcement agencies should develop written policies on conducting eyewitness identifications of a suspect.
- The United States Court of Appeals for the Third Circuit should create and maintain a website containing information about eyewitness identifications, including seminal cases from federal and state courts, pertinent scientific research, academic articles, this report, and other resources that could assist in educating lawyers and judges.
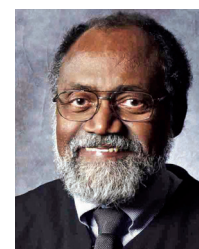


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1    834 F.3d 263 (3d Cir. 2016).
2    *Id.* at 313.
3    28 U.S.C. § 2254 *et. seq.*
4    834 F.3d at 365.
5    Although one of the subcommittees was tasked with identifying scientific consensus, ultimately it decided to categorize the science in terms of "majority view" and "minority view." In addition, then-Assistant United States Attorney and then-FBI Assistant Special Agent-in-Charge Christian Zajac separately expressed their views where they departed from those of the other Task Force members.