



National Eyewitness Identification Reform Litigation Network Now Available to Provide Litigation Support

By: Keith Findley*

Effective litigation strategies in eyewitness identification cases have never been more important than they are today, and help is now available for those of you who are handling such cases.

Wisconsin is at the forefront of a movement to reform eyewitness identification procedures and laws. By statute, law enforcement in this state are now required to adopt written policies and procedures governing eyewitness identifications, with a focus on minimizing the risks of eyewitness error. The Wisconsin Department of Justice has promulgated a state-of-the-art set of guidelines, based on the latest scientific research, that is designed to enhance reliability of identifications. And the Wisconsin Supreme Court has changed the legal standards for admissibility of eyewitness identifications in a case that directly limits the admissibility of showup identification evidence. *State v. Dubose*, 2005 WI 126, 285 Wis.2d 143, 699 N.W.2d 582. More than just limiting showup identifications, however, *Dubose* puts a new premium on ensuring that police avoid unnecessary suggestiveness in all identifications procedures.

Defense counsel now have a critical role to play to ensure that the advances promised by these reforms are actually achieved. Defense counsel must be aware of the new guidelines and requirements, the latest scientific research on eyewitness identifications, and the most effective eyewitness identification litigation strategies, so that they can challenge police when they fail to employ “best practices.”

To facilitate eyewitness reform through litigation, the Public Defender Service for the District of Columbia, the National Legal Aid & Defender Association, the National Association of Criminal Defense Lawyers, and the Innocence Project, have combined to create a new Eyewitness Identification Reform Litigation Network, with designated point people in each state. I am the point person for Wisconsin.

The Eyewitness Identification Reform Litigation Network has become a clearinghouse of sorts for eyewitness reform litigation. Specifically, the Network is working to locate appropriate cases for creating strong trial records and favorable appellate decisions which incorporate the past 30 years of psychological research. The Network is available to brainstorm and work with counsel to incorporate the psychological research at trial, including assistance in the following areas: (a) voir dire; (b) issues involving the suppression of exculpatory identification evidence in violation of *Brady v. Maryland*; (c) suppression motions based on due process; (d) other motions, including those to suppress confidence statements, to compel introduction of expert testimony before the jury, and to mandate use of best-practices by police such as documentation of witness statements, use of blind procedures, selection of fillers, etc.; (e) working with and presenting experts on the psychological research surrounding eyewitness memory both at trial and during pre-trial motions; (f) jury instructions incorporating the psychological research; and (g) formulating potential closing arguments and case theories.

In appropriate cases, as well, the Innocence Network—an international association of innocence projects—may be available to provide amicus support.

To facilitate our joint efforts in this regard, the Eyewitness Identification Litigation Strategy Network asks that you let us know whenever you become aware of eyewitness identification cases with the following characteristics:

- The government’s case relies exclusively or primarily on eyewitness identification testimony by a stranger.
- The case involves factors on which extensive psychological research exists and which casts doubt on the reliability of the identification. These factors include:
 - Police procedures that create the risk of misidentification:
 - Lineup composition (poor choice of fillers, too few fillers, more than one suspect in a lineup)
 - Lineup procedure (unnecessary showups, simultaneous instead of sequential presentation of suspects or photographs, particularly if done non-blind)
 - Use of non-blind lineup administrators
 - Failing to instruct witnesses properly prior to conducting an identification procedure
 - Providing witnesses with confirming feedback during and after the identification
 - Failing to obtain confidence statements from witnesses during initial interview and contemporaneous with identification procedure
 - Failing to separate multiple witnesses
 - Failing to record identification procedures
 - Using suggestive interviewing techniques
 - Event characteristics that elevate the chances of misidentification (in addition to more common-sense factors such as distance, duration, lighting, etc.):
 - Cross-racial identifications
 - Presence of weapon
 - Trauma

If you have a case that has any of these features, or if you have any cases with what appear to you to have significant eyewitness identification issues, let me know, and we can see if the Network might be able to provide assistance in strategizing and litigating your case.

I can be contacted at 608-262-4763, or kafindle@wisc.edu, or the Wisconsin Innocence Project, UW Law School, 975 Bascom Mall, Madison, WI 53706.

***Keith Findley** teaches in the clinical programs at the UW Law School's Frank J. Remington Center, where he has served as co-director of the Criminal Appeals Project and where he co-directs the Wisconsin Innocence Project (which he co-founded with Professor John Pray). Through the Wisconsin Innocence Project, students investigate and litigate claims of actual innocence based upon newly discovered evidence on behalf of wrongly convicted prisoners. Through the Criminal Appeals Project, students work under public defender and court appointments representing state and federal defendants appealing their criminal convictions and sentences. Keith's primary areas of expertise are in criminal defense work and appellate advocacy. He has previously worked as an Assistant State Public Defender in Wisconsin, both in the Appellate and Trial Divisions. He has litigated hundreds of postconviction and appellate cases, at all levels of state and federal courts, including the United States Supreme Court. At the Law School, he has taught criminal procedure, and regularly teaches courses on appellate advocacy and wrongful convictions. He also lectures and teaches nationally on appellate advocacy and wrongful convictions.