PROBLEM AREAS IN POSITIVE IDENTIFICATION, ALIBI AND EMERGING ROLE OF FORENSIC SCIENCE IN THE APPRECIATION OF EVIDENCE

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I. INTRODUCTION

Alibi is defined as a statement, buttressed by facts and corroborated by incontrovertible evidence, establishing the impossibility for the individual to have committed the act charged against him. Alibi, in the absence of any convincing evidence that it is physically impossible on the part of the accused to be in the crime scene, is always considered by the Supreme Court as the weakest defense. Positive Identification, on the other hand, is given a greater weight by the court more so that the accused was positively identified by a competent witness. However, the theory of alibi or positive identification is not perfect. There are certain flaws during trial that may affect alibi or positive identification. In our judicial system, judges rely solely on testimonial evidence which sometimes are unreliable due to certain factors. Hence, this article tends to show that courts must not solely rely on testimonial evidence. It is about time that forensic science be appreciated in the evaluation of evidence.

II. ESTABLISHED DOCTRINES REGARDING POSITIVE IDENTIFICATION AND ALIBI

A. Alibi as a Defense

In our jurisdiction, the accused is presumed innocent until proven guilty in all criminal prosecutions.[2] This presumption undergirds the entirety of Philippine criminal procedure and is a core component of criminal due process that must be offered to all accused, lest the proceedings be voided. Therefore, it is the responsibility of the prosecution to establish the defendant's guilt beyond a reasonable doubt. More specifically, the State has the burden of proof to show: (1) The correct identification of the author of the crime; and

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[2] CONST., (1987), art. III, sec 14, par. 2.

(2) The actuality of the commission of the offense, with the participation of the accused.

It is clear that in every criminal prosecution, the identity of the offender, like the crime itself, must be established by proof beyond a reasonable doubt.[3] Only proof beyond a reasonable doubt suffices to overturn the presumption of innocence.[4] Hence, the prosecution cannot rely on the weakness of the defense, especially not if they have failed to prove his identity and culpability in the act. However, when the prosecution has discharged its burden and proven the identity of the accused beyond a reasonable doubt the burden shifts on the accused, to adduce evidence that he or she did not commit the offense.

From these well-established doctrines come the Supreme Court's long entrenched attitudes on alibi as a defense. There are many defenses available to an accused in order to rebut the State's evidence, but alibi is regarded as one of the least effective of such defenses. Indeed, in a long line of cases, the Court has consistently looked at the defense of alibi with disfavor, even characterizing it as inherently weak,[5] and when invoked, is more likely to be rejected by the Court.

Hence, the rule is that alibi cannot prosper when the accused has been positively identified by the complainant. A positive identification of the accused, when categorical, consistent and straightforward, and without any showing of ill motive on the part of the eyewitness testifying on the matter, prevails over the defense of alibi and denial.[6]

The rationale behind the Court's attitude towards alibi is due to the ease with which an alibi can be fabricated, thus rendering such defense largely unreliable.[7] Bias can easily creep into alibi, especially when such corroborating testimonies come from friends, relatives and supporters, and are marred by discrepancies.[8] It is difficult to ascertain the veracity of the alibi in order to rebut it, thanks to the frailty of human memory with regard to small details.[9]

This is not an ironclad rule, however. Despite the Supreme Court's attitude toward alibi, it has recognized alibi as an acceptable defense in certain instances. In order for the defense of alibi to prosper, it must be demonstrated that the person charged with the crime was not only somewhere else when the offense was committed, but was so far away that it would have been physically

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[3] *Angcaco v. People,* 378 SCRA 297 (2002).
[4] *Corpuz Jr v. People,* 810 SCRA 345 (2016).
[5] *People v. Violeja,* G.R. No. 177140, October 17, 2002.
[6] *People v. Silongan,* 401 SCRA 459 (2003).
[7] *People v. Dadao,* G.R. No. 201860, January 22, 2014.
[8] *People v. Malones,* 425 SCRA 318 (2004).
[9] *People v. Molleda,* 86 SCRA 667 (1978).

impossible to have been at the place of the crime or its immediate vicinity at the time of its commission.[10] The requirements of time and place must be strictly met. Where there is even the least chance for the accused to be present at the crime scene, the defense of alibi will not hold water.[11]

Moreover, alibi as a defense must be supported by clear and convincing evidence.[12] This becomes especially significant if the evidence for the prosecution is inherently weak and betrays a lack of concreteness on the question of whether or not appellants are the authors of the crimes charged. In such cases, alibi may prove instrumental to the resolution of the case. In the words of former Justice J.B.L. Reyes, speaking for the Court in the case of *People v. Fraga:*[13] "The rule that alibi must be satisfactorily proven was never intended to change the burden of proof in criminal cases; otherwise, we will see the absurdity of an accused being put in a more difficult position where the prosecution's evidence is vague and weak than where it is strong."

Physical Impossibility

The main factor that leads Courts to appreciate alibi as a defense is the degree of physical impossibility attendant in the circumstances at hand. For alibi to prosper, the accused must not only prove that he was somewhere else when the crime was committed; he must also convincingly demonstrate the physical impossibility of his presence at the *locus criminis* at the time of the incident.[14] Mere denial and alibi are not only weak defenses, but they cannot prevail over credible evidence particularly when, on their face, they do not demonstrate the physical impossibility of an accused's presence at the place and time of the commission of the offense.[15]

Physical impossibility refers to distance and the facility of access between the crime scene and the location of the accused when the crime was committed. There must be a demonstration that they were so far away and could not have been physically present at the crime scene and its immediate vicinity when the crime was committed.[16]

A few examples in our law and jurisprudence may illustrate how Courts appreciate distance for the purposes of ascertaining physical impossibility. In

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[10] *People v. Baro,* G.R. No. 146327-29, June 5, 2002.
[11] *People v. Castro,* G.R. No. 172874, December 17, 2008.
[12] *People v. Condemena,* G.R. No L-22426, May 29, 1968; *People v. Barrios,* G.R. No. L-34725, July 30, 1979.
[13] *People v. Fraga*, G.R. No. L-12005, August 31, 1960.
[14] *People v. Besmonte,* 397 SCRA 513 (2003).
[15] *People v. Lozada,* 406 SCRA 494 (2003).
[16] *People v. Tulagan,* 896 SCRA 307 (2019).

People v. Mosquerra,[17] the Court used the fact that the distance of the Mina de Oro Hotel where accused-appellant in that case claimed to have been staying from the *locus delicti* was estimated at one-and-a-half to two (1 ½-2) kilometers only, a distance which was not too far to traverse even by walking. Similarly, in *People v. Niem,*[18] the Court considered a distance of 600 yards, or around 0.5 km, as not being long enough a distance that the accused could not have momentarily left the place to commit the crime. Even the distance between Quezon City and Cebu was considered by the Court as not satisfying the requisite of physical impossibility in the case of *People v. Larranaga,*[19] as it would have taken only one hour to travel by plane from Manila to Cebu and that there were four airline companies plying the route, making it possible for the accused-appellant to have traveled back and forth.

B. Positive Identification

Nonetheless, despite the leeway which the Supreme Court occasionally bestows onto the defense of alibi, positive identification remains a strong evidentiary presumption to overcome. To repeat, the rule in our jurisdiction is that positive identification of the accused, when categorical, consistent, and straightforward, and without any showing of ill motive on the part of the eyewitness testifying on the matter, prevails over the defense of alibi.[20]

What does positive identification entail? To paraphrase the Supreme Court, positive identification entails essentially proof of identity and not per se to that of being an eyewitness to the commission of the crime.[21] There are two types of positive identification. The first is when a witness identifies a suspect or accused in a criminal case as the perpetrator of the commission of the crime. This form of positive identification constitutes direct evidence. The second consists of cases where, although a witness may not have actually seen the commission of the crime itself, he may still be able to identify a suspect or accused as the perpetrator of a crime. This type of positive identification constitutes circumstantial evidence.[22] Thus, positive identification can be provided not only by a witness actually identifying the accused as the one who

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17 *People v. Mosquerra*, 362 SCRA 441 (2001).
18 *People v. Niem*, 75 Phil 668 (1945).
19 People v. Larrañaga, G.R. No. 138874-75, January 31, 2006.
20 *People v. Silongan,* 401 SCRA 459 (2003).
21 *People v. Gallarde,* G.R. No. 133025, February 17, 2000.
22 *People v. Francisco,* 363 SCRA 637 (2001).

perpetrated the crime, but also by one who has seen the accused at the scene of the crime, on or about the time of the alleged crime.

It should be noted, however, that knowing the identity of an accused is different from knowing his name. Hence, the positive identification of the malefactors should not be disregarded just because the names of some of them were supplied to the eyewitnesses. For the wright of eyewitness account is premised on the fact that the said eyewitness saw the accused commit the crime, and not because he or she knew their names.[23]

Positive identification enjoys a strong presumption for a myriad of reasons. For one, the courts afford great weight to the good faith of witnesses. In more than a few cases, courts have appreciated positive identification by invoking perceived human nature. If an appellant has naught to do with a crime, it would be against human nature and the presumption of good faith that prosecution witnesses would falsely testify against an accused. Overcoming such presumption would then require evidence to show why a prosecution witness would falsely testify against an accused.[24] Other factors which may help the court appreciate positive identification are the witness' relationship to, and familiarity with the accused.

The presumption accorded to positive identification can withstand even inconsistencies in the testimonies of witnesses. More often than not, courts will tolerate at least a slight degree of inconsistency, as long as they concern small details pertaining to minor or collateral matters. It is generally considered sufficient that a witness' verbal portrait of the assailant is reasonably descriptive of the latter's general appearance, characteristic and bearing; what is important is that the witness positively identifies the accused.[25]

III.PROBLEM AREAS

A. Mistaken Identity

Eyewitness identification is the bedrock of many pronouncements of guilt. However, despite our jurisdiction's strong adherence to the positive identification doctrine, there are dangers in according it a blanket primacy. Eyewitness identification is inherently prone to error, as is the appreciation by

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[23] *People v. Bernardo,* 423 SCRA 448 (2004).
[24] See: *People v. Angeles,* 92 SCRA 432 (1979).
[25] *People v. Sarmiento,* L-25183

observers, such as jurors, judges, and law enforcement officers of how an eyewitness identifies supposed culprits. Many organizations have repeatedly stressed the role flawed evidence of all sorts has played in the wrongful convictions of innocent persons.

The main issue is that human memory is intrinsically unreliable and can be likened to the same kind of muddled message received at the very end of a game of Telephone. Eyewitness identification is but a product of flawed human memory. In an expansive examination of 250 cases of wrongful conviction where convicts were subsequently exonerated by DNA testing, Professor Brandon Garett noted that as much as 190 or 76% of these wrongful convictions were occasioned by flawed eyewitness identifications.[26] Variables such as environmental factors, flawed procedures, and even the mere passage of time, can whittle away at one's memories of a specific event.

Another observer has more starkly characterized eyewitness identification as the leading cause of wrongful convictions.[27]

This is reflected in several issues, such as:

(a) Inherent difficulties *vis-a-vis* over-readiness

(b) Credibility *vis-a-vis* reliability;

(c) Confidence *vis-a-vis* accuracy;

Inherent Difficulties

Many authorities would argue that there is an inherent difficulty in identifying individuals, more particularly strangers. More often than not, witnesses assume that they are part of the prosecution team, and thus, in their desire to assist law enforcement bolsters a perception on their end that the identified suspect is guilty. According to some experts, this may motivate witnesses to readily identify the suspect as the perpetrator. Only the trial judge sees the brazen face of the liar, the glibness of the schooled witness, as well as the honest face of a truthful one.[28]

Accuracy

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[26] *People v. Nunez,* 842 SCRA 97 (2017), citing Davis, Deborah and Loftus, Elizabeth F., Dangers of Eyewitnesses for the Innocent; Learning from the Past and Projecting into the Age of Social Media, Vol. 46, p. 769, New Eng. L. Rev. 769, 2012.

[27] *People v. Nunez,* 842 SCRA 97 (2017), citing Thompson, Sandra Guerra, Daubert, Gatekeeping for Eyewitness Identifications, Vol. 65, p.596, S.M.U L. Rev 593,2012.

[28] *People v. Alcodia,* 398 SCRA 673 (2003).

It is the running consensus of some authorities that testimonial evidence delivered or presented with a high level of confidence, including expressions of certainty, does not necessarily correlate with the same degree of accuracy. Case law holds that a witness is not expected to remember an occurrence with perfect recollection of minor and minute details. The testimony of a witness must be considered and calibrated in its entirety and not by truncated portions thereof or isolated passages therein. A truth-telling witness is not always expected to give an error-free testimony, considering the lapse of time and the treachery of human memory. Failure of the witness to recall each and every occurrence may even serve to strengthen, rather than weaken, the credibility of a witness because they erase any suspicion of coached or rehearsed testimony.[29]

Credibility and Reliability

Honesty is the best policy, or so the truism goes. Yet, it is understandable that even honest people make mistakes. When it comes to criminal matters, more particularly in the identification of suspects, it poses a challenge to courts to discern which testimonies are credible and which ones are unreliable. In our jurisdiction, we have adopted the "totality of circumstances" test when it comes to appreciating the credibility of a witness' testimony. In the case of *People v. Teehankee Jr,*[30] the Supreme Court identified the factors employed in this test, which were first laid down by the U.S. Supreme Court in the case of *Neil v. Biggers:*[31]

1) The witness' opportunity to view the criminal at the time of the crime;
2) The witness' degree of attention at the time;
3) The accuracy of any prior description given by the witness;
4) The level of certainty demonstrated by the witness at the identification;
5) The length of time between the crime and the identification;
6) The suggestiveness of the identification procedure;

The credibility of witnesses in our jurisdiction is ascertained by considering the first two of the above-stated factors. Did the witness have the opportunity to view the malefactor at the time the crime was committed? What

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[29] *Tapdasan Jr v. People,* 392 SCRA 335 (2002).
[30] 249 SCRA 54 (1995).
[31] 409 U.S. 188 (1972).

was the degree of attention he had at the time? The latter takes into account the visibility of the accused and the extent of time, little and fleeting as it may have been, for the witness to be exposed to the perpetrators, peruse their features, and ascertain their identity.[32]

The totality of circumstances test also requires a consideration of the length of time between the crime and the identification of the witness. Ideally, then, a prosecution witness must identify the suspect immediately after the incident. The Supreme Court generally considers acceptable an identification made two (2) days after the commission of a crime, not so one that had an interval of five and a half (5 ½ months).[33]

The passage of time is not the only factor that diminishes memory. Equally jeopardizing is a witness' interactions with other individuals involved in the event. As noted by cognitive psychologist Elizabeth F. Loftus, "post-event information can not only enhance existing memories, but also change a witness' memory and even cause non-existent details to become incorporated into a previously acquired memory."[34]

When it comes to adjudging the credibility of witnesses in court, the findings of the trial court regarding the credibility of witnesses are generally afforded great weight, as it is the trial court that has the opportunity to observe the demeanor and conduct of the witnesses while testifying, and therefore, is in a better position to properly gauge their credibility. Appellate tribunals will generally not disturb the findings of fact of the trial court unless there is proof that said court, in making the finds, had failed to appreciate some fact or circumstance of weight and substance that would have altered the results of the case.[35]

Although the well-entrenched rule is that the testimony of a single witness is sufficient on which to anchor a judgment of conviction, it is required that such testimony must be credible and reliable.[36]

B. Factors Affecting Identification

Criminal prosecution may result in consequences as severe as deprivation of liberty, property, and, where capital punishment is imposed, life.

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[32] *People v. Nunez,* 842 SCRA 97 (October 4, 2017).
[33] *Id.*
[34] *Id.*
[35] *People v. Padiernos,* G.R. No. L-37284, February 27, 1976.
[36] *Francisco v. People,* 434 SCRA 122 (2004).

Prosecution that solely relies on eyewitness identification must be approached meticulously, cognizant of the inherent frailty of human memory. Eyewitnesses who have previously made admissions that they could not identify the perpetrators of the crime, but years later and after a highly suggestive process of presenting suspects, contradict themselves and claim they can identify the perpetrator with certainty are grossly wanting in credibility. Prosecution that relies solely on these eyewitnesses' testimonies fails to discharge its burden of proving an accused's guilt beyond reasonable doubt.[37]

Admittedly, there are certain factors to be taken into consideration when it comes to identification. Errors made in identification are typically influenced by the following:

(a) The witness himself;

(b) The perpetrator;

(c) The incident;

(d) The venue;

(e) Other factors;

Moreover, as mentioned, the human memory often does not accurately store, record, and retrieve images. We must, to a certain degree, reconstruct, interpret, and rationalize. It is not uncommon that when we attempt to recall a memory, especially one that belongs to the distant past or from a shocking experience, we somehow sanitize, reconstruct, reinterpret, or imagine it very differently from what actually occurred. A very good example is traumatic memory, which our mind attempts to suppress.

Most authorities attribute such misidentification to the following contributory factors:

(a) Fallibility of the witness;

(b) Circumstances where the observation is made; and

(c) Methods of identification used

Of course, this is not an exhaustive list. There are a multitude of other factors that may contribute to the misidentification of individuals by eyewitnesses. However, this paper will focus mainly on the three listed above.

Fallibility of the Witness

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[37] *People v. Nunez*, 842 SCRA 97 (2017).

As to the fallibility of witnesses, there are several factors that contribute to the same, such as:

(a) *Stress* -- Stressful situations or events often influence witnesses, often resulting in misidentification

(b) *Transference* -- This refers to identifying an individual who has been seen on a different and unrelated occasion;

(c) *Pressure* -- This refers to the urgent need for an individual to make a choice when identifying someone--such pressure, mostly emanating from law enforcers or the public, more often than not, lead to misidentification;

(d) *External Influence* -- This refers to influence exerted by other people, perhaps other witnesses, which would likely make witnesses conform with the general narrative.

There are some instances wherein fallibility is to be expected. The crime of rape, for example, has been recognized as a prime example of this phenomenon. To paraphrase the Supreme Court in the case of *People v. Tolentino,* it is an understandable human frailty not to be able to recount with facility all the details of a dreadful and harrowing experience, and minor lapses in the testimony of a rape victim can be expected. After all, rape is a painful experience that is sometimes not remembered in detail, and the victim cannot be expected to immediately remember with accuracy every ugly detail of her harrowing experience, especially so when she might, in fact, have been trying not to remember the event. Thus, inaccuracies and inconsistencies are to be expected in the rape victim's testimony.[38]

As stated, the fallibility of eyewitness identification has been recognized and has been the subject of concerted scientific study for more than a century, with numerous studies already finding that eyewitness errors are one of the leading factors resulting in wrongful conviction. However, what is novel in Garrett's study is that he attempted to determine why mistaken identification often occurred. He came away with the following conclusions, both of which reveal the two-pronged nature of the unreliability of eyewitness evidence—(1) eyewitness identifications are subject to substantial error, and; (2) observer judgments of witness accuracy are likewise subject to substantial error.[39]

The bifurcated difficulty of misplaced reliance on eyewitness identification is borne not only by the intrinsic limitations of human memory, but can also

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[38] *People v. Tolentino,* 423, SCRA 448 (2004).

[39] Thompson, Sandra Guerra, Daubert Gatekeeping for Eyewitness Identifications, Vol. 65, p. 596, S.M.U. L. Rev 593, 2012, 808

be caused by environmental factors, flawed procedures, or the mere passage of time. Eyewitness science has pointed out the following issues regarding human memory:

1) The ability to match human faces to photographs, even when the target is present while the witness inspects the lineup or comparison photo, is poor and peaks at levels far below what may be considered reasonable doubt.

2) Eyewitness accuracy is further degraded by pervasive environmental characteristics typical of many criminal cases, such as suboptimal lighting, distance, angle of view, disguise, witness distress, and many other encoding conditions.

3) Memory is subject to distortion due to a variety of influences not under the control of law enforcement that occur between the criminal event and identification procedures and during such procedures.

4) The ability of those who must assess the accuracy of eyewitness testimony is poor for a variety of reasons. Witnesses' ability to report on many issues affecting or reflecting accuracy is flawed and subject to distortion (e.g., reports of duration of observation, distance, attention, confidence), thereby providing a flawed basis for others' judgments of accuracy.[40]

Likewise, decision-makers, such as jurists and judges, who specialize mainly in law and procedure, may simply not know better than what their backgrounds and acquired inclinations permit. The limits and determinants of performance for facial recognition are beyond the knowledge of legal practitioners, and the traditional safeguards, such as cross-examination, are not and cannot be effective in the absence of an accurate knowledge of the limits and determinants of witness performance among both the cross-examiners and the jurors who must judge the witness. Cross-examination also cannot be effective if the witness reports elicited by cross-examination are flawed. For example, with respect to factors such as original witnessing conditions (e.g., duration of exposure), post-event influences (e.g., conversations with co-witnesses), or police suggestion (e.g., reports of police comments or behaviors during identification procedures).[41]

Legal traditions in various jurisdictions have been responsive to the scientific reality of eyewitness identification. Until the latter half of the

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[40] *Id.*
[41] *Id.*

twentieth century, the general rule in the United States was that any problems with the quality of eyewitness identification evidence went to the weight, not the admissibility, of that evidence and that the jury bore the ultimate responsibility for assessing the credibility of an eyewitness' identification. In a trilogy of landmark cases on the same day in 1967, however, the Supreme Court ruled for the first time that the Constitution requires suppression of some identification evidence[42]—*United States v. Wade,*[43] *Gilbert v. California,*[44] and *Stovall v. Denno.*[45] In *Stovall,* the court held that, regardless of whether a defendant's Sixth Amendment rights were implicated or violated, some identification procedures are "so unnecessarily suggestive and conducive to irreparable mistaken identification" that eyewitness evidence must be suppressed as a matter of due process.[46]

In *Wade,* the U.S. Supreme Court noted that the factors judges should evaluate in deciding the independent source question include—

> "The prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to the lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification.[47]"

Nine months later, in *Simmons v. United States,*[48] the United States Supreme Court calibrated its approach by "focusing in that case on the overall reliability of the identification evidence rather than merely the flaws in the identification procedure." In that case, the Court ultimately noted that there was no due process violation in admitting the evidence because there was little doubt that the witnesses were actually correct in their identification.

Scholars have frequently characterized *Simmons* as the beginning of the Court's unraveling of the robust protection it had offered in *Stovall;* while *Stovall* provided a per se rule of exclusion for evidence derived from flawed procedures, *Simmons* rejected this categorical approach in favor of a reliability analysis that would often allow admission of eyewitness evidence even when an identification procedure was unnecessarily suggestive.[49]

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[42] Kahn-Fogel, Nicholas A. The Promises and Pitfalls of State Eyewitness Identification Reforms, Vol. 104, pp 104-105, KY L.J. 99, 2016
[43] 388 U.S. 218 (1967).
[44] 388 U.S. 263 (1967).
[45] 388 U.S. 293 (1967).
[46] Khan-Fogel, supra at 39; *Stovall v. Denno,* 388 U.S. 293 (1967).
[47] *United States v. Wade,* 388 U.S. 218 (1967).
[48] *Simmons v. United States,* 390 U.S. 377 (1968).
[49] *Id.*

In more recent Supreme Court decisions, the United States has reaffirmed its shift towards a reliability analysis, as opposed to a focus merely on problematic identification procedures, beginning in 1972 with *Neil v. Biggers.*[50] The *Biggers* Court stated that, at least in a case in which the confrontation and trial had taken place before *Stovall*, identification evidence would be admissible, even if there had been an unnecessarily suggestive procedure, so long as the evidence was reliable under the totality of the circumstances. To inform its reliability analysis, the *Biggers* Court articulated five factors it considered relevant to the inquiry:

1) The opportunity of the witness to view the criminal at the time of the crime;
2) The witness' degree of attention;
3) The accuracy of the witness' prior description of the criminal;
4) The level of certainty demonstrated by the witness at the confrontation;
5) The length of time between the crime and the confrontation;

The *Biggers* Court clearly proclaimed that the "likelihood of misidentification" rather than a suggestive procedure in and of itself, is what violates a defendant's due process rights. However, the *Biggers* Court left open the possibility that *per se* exclusion of evidence derived from unnecessarily suggestive confrontations might be available to defendants whose confrontations and trials took place after *Stovall.*[51]

The *Biggers* standard was further affirmed in 1977 in *Manson v. Braithwaite,*[52] wherein the Court made clear that the *Biggers* standard would govern all due process challenges to eyewitness identifications, stating that judges should weigh the five factors against "the corrupting effect of the suggestive identification." The reliability standard was affirmed as "the linchpin in determining the admissibility of identification testimony" and the per se exclusionary rule of *Stovall* was rejected. Moreover, *Manson* also extended the new standard to apply to pre-trial and in-court identification evidence, thus resulting in a unified analysis of all identification evidence in the wake of suggestive procedures.[53] *Manson* is the current federal standard and has been followed by the majority of the States.

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[50] 409 U.S. 188 (1972).
[51] Khan-Fogel, supra at 39
[52] 432, U.S. 98 (1977).
[53] Khan-Fogel, supra at 39

It is interesting to note that despite this rejection, the *Manson* Court recognized that the *Stovall* rule would promote greater deterrence against the use of suggestive procedures, even noting a "surprising unanimity" among scholars around this conclusion. However, the Court ultimately concluded that the cost to society of not being able to use reliable evidence of guilt in criminal proceedings would be too high.[54]

The United Kingdom, meanwhile, has adopted the Code of Practice for the Identification of Persons by Police Officers.[55] It "concerns the principal methods used by police to identify people in connection with the investigation of offences and the keeping of accurate and reliable criminal records" and covers eyewitness identifications. This Code puts in place measures advanced by the corpus of research in enhancing the reliability of eyewitness identification, specifically by impairing the suggestive tendencies of conventional procedures. Notable measures include having a parade of at least nine (9) people, when one (1) suspect is included to at least 14 people, when two (2) suspects are included,[56] and forewarning the witness that he or she may or may not actually see the suspect in the lineup.[57] Additionally, there should be a careful recording of the witness' pre-identification description of the perpetrator,[58] and explicit instructions for police officers to not "direct the witness' attention to any individual.[59]"

Domestically, jurisprudence recognizes that eyewitness identification is affected by "normal human fallibilities and suggestive influences.[60]" *People v. Teehankee Jr.* first introduced in this jurisdiction the totality of circumstances test already identified by *Neil v. Biggers,* as mentioned above, emphasizing the factors of the witness' opportunity to view the crime and his degree of attention at the time. Apart from extent or degree of exposure, the High Court has also appreciated a witness' specialized skills or extraordinary capabilities. *People v. Sanchez,* which concerned the theft of an armed car, featured a witness who was a trained guard, prompting the Court to note that he was particularly alert about his surroundings during the attack.

The degree of a witness' attentiveness is the result of many factors, among others — exposure, time, frequency of exposure, the criminal incident's degree

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[54] *Id.*

[55] Code of Practice for the Identification of Persons by Police Officers, available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/181118/pace-code-d_2008.pdf> (last visited October 3, 2017)

[56] *Id.*, Annex B, par 19

[57] *Id.*, Annex B, par 16

[58] *Id.*, Sec 3.2(a)

[59] *Id.*, Sec 3.2(b)

[60] *People v. Teehankee Jr.,* 319 Phil. 128, 179; 249 SCRA 54, 95 (1995).

of violence, the witness' stress levels and expectations, and the witness' activity during the commission of the crime.[61]

The degree of a crime's violence affects a witness' stress levels. A focal point of psychological studies has been the effect of the presence of a weapon on a witness' attentiveness. Since the 1970s, it has been hypothesized that the presence of a weapon captures a witness' attention, thereby reducing his or her attentiveness to other details such as the perpetrator's facial and other identifying features.[62] Research on this has involved an enactment model involving two (2) groups — first, an enactment with a gun; and second, an enactment of the same incident using an implement like a pencil or a syringe as substitute for an actual gun. Both groups are then asked to identify the culprit in a lineup. Results reveal a statistically significant difference in the accuracy of an eyewitness identification between the two groups[63]—

> "The influence of [a weapon focus] variable on the eyewitness' performance can only be estimated post hoc. Yet the data here do offer a rather strong statement: To not consider a weapon's effect on eyewitness performance is to ignore relevant information. The weapon effect does not reliably occur, particularly in crimes of short duration in which a threatening weapon is visible. Identification accuracy and feature accuracy of eyewitnesses are likely to be affected, although as previous research has noted… there is not necessarily a concordance between the two.[64]

Our jurisprudence has yet to give due appreciation to scientific data on weapon focus. Instead, what is prevalent is the contrary view which empirical studies discredit.[65]

For instance, in *People v. Sartagoda* —

> "The most natural reaction for victims of criminal violence [is] to strive to see the looks and faces of their assailants and observe the manner in which the crime was committed. Most often the face of the assailant and body movements thereof, create a lasting impression which cannot easily be erased from their memory."[66]

Rather than a sweeping approbation of a supposed natural propensity for remembering the faces of assailants, the High Court now emphasizes the need for courts to appreciate the totality of circumstances in the identification of perpetrators of crimes.

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[61] Loftus, Elizabeth F., Eyewitness Testimony, pp 23-51, 1996.
[62] Steblay, Nancy Merhrkens, A Meta-Analytic Review of the Weapon Focus Effect, 16 Law and Human Behavior, 413, 414 (1992)
[63] *Id*., at p 420
[64] *Id* at p. 421
[65] See Dissenting Opinion of J. Leonen in *People vs. Pepino*
[66] *People v. Sartagoda,* 293 Phil. 259; 221 SCRA 251 (1993).

Apart from the witness' opportunity to view the perpetrator during the commission of the crime and the witness' degree of attention at the time, the accuracy of any prior description given by the witness is equally vital. Logically, a witness' credibility is enhanced by the extent to which his or her initial description of the perpetrator matches the actual appearance of the person ultimately prosecuted for the offense. Nevertheless, discrepancies, when accounted for, should not be fatal to the prosecution's case. For instance, in *Lumanog v. People,*[67] the High Court recognized that age estimates cannot be made accurately, and accounted for the circumstances under which the witness' identification could be affected.

The totality of circumstances test also requires a consideration of the degree of certainty demonstrated by the witness at the moment of identification. What is most critical here is the initial identification made by the witness during the investigation and case build-up, not identification during trial.[68]

A witness' certainty is tested in court during cross-examination. In several instances, the High Court has considered a witness' straight and candid recollection of the incident, undiminished by the rigors of cross-examination, as an indicator of credibility.[69] Still, certainty on the witness stand is by no means conclusive. By the time the witness takes the stand, he or she shall have likely made narrations to investigators, to responding police, or barangay officers, to the public prosecutor, to any possible private prosecutors, to the families of the victims, other sympathizers, and even to the media. The witness, then, may have established certainty, not because of a foolproof cognitive perception and recollection of events, but because of consistent reinforcement borne by becoming an experienced narrator. Repeated narrations before different audiences may also prepare a witness for the same kind of scrutiny that he or she will encounter during cross-examination. Again, what is more crucial is certainty at the onset or on initial identification, not in a relatively belated stage of criminal proceedings.

The totality of circumstances test also requires a consideration of the length of time between the crime and the identification of a witness. It is well-established that people are less accurate and complete in their eyewitness accounts after a long reunion than a short one.[70] Ideally then, a prosecution witness must identify the suspect immediately after the incident. The High Court has considered acceptable an identification made two (2) days after the

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[67] 630 SCRA 42 (2010).
[68] See Dissenting Opinion of J. Leonen in *People vs. Pepino*
[69] See: *People v. Ramos,* 371 Phil 66, (1999); and *People v. Guevara,* 258A Phil 909, 916-918 (1989).
[70] Loftus, Elizabeth F., Eyewitness Testimony, pp 54-55, 1996.

commission of a crime,[71] not so one that had an interval of five and a half (5 ½ months).[72] Equally jeopardizing is the witness' interactions with other individuals involved in the event. As noted by cognitive psychologist Elizabeth F. Loftus, "post-event information can not only enhance existing memories but also change a witness' memory and even cause nonexistent details to become incorporated into a previously acquired memory."[73]

Thus, the totality of circumstances test also requires a consideration of the suggestiveness of the identification procedure undergone by a witness. Both verbal and nonverbal information might become inappropriate cues or suggestions to a witness.

> "A police officer may tell a witness that a suspect has been caught and the witness should look at some photographs or come to view a lineup and make an identification. Even if the policeman does not explicitly mention a suspect, it is likely that the witness will believe he is being asked to identify a good suspect who will be one of the members of the lineup or set of photos… if the officer should unintentionally stare a bit longer at the suspect, or change his tone of voice when he says "Tell us whether you think it is number one, two, THREE, four, five, or six, the witness' opinion might be swayed."[74]

In appraising the suggestiveness of identification procedure, the High Court has previously considered prior or contemporaneous[75] actions of law enforcers, media or even fellow witnesses.

One of the most notable cases dealing with the subject is *People v. Escordial,*[76] a prosecution for robbery with rape wherein the victim and her companions were blindfolded throughout the incident. The victim, however, felt a "rough projection" on the perpetrator's back, and also gained familiarity with the perpetrator's voice by hearing him speak. Escordial recounted the investigative process which brought the perpetrator into custody. After several individuals were interviewed, the investigating officer had an inkling of who to look for. He "found accused-appellant in a basketball court and 'invited' him to go to the police station for questioning." When the suspect was brought to the police station, the rape victim was already there, and upon seeing the suspect enter, the victim requested to see the suspect's back. When the victim saw a "rough projection" on his back, she identified the suspect as the perpetrator. Four other witnesses were brought in and they all identified the

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71 *People v. Teehankee Jr,* 249 SCRA 54 (1995).
72 *People v. Rodrigo,* 586 Phil. 515 (2008).
73 Loftus, Elizabeth F., Eyewitness Testimony, pp 54-55, 1996.
74 Id., pp. 73-74
75 *People v. Algarme,* 578 SCRA 601, 619 (2009).
76 373 SCRA 585 (2002).

suspect, despite there being four others with the suspect in the cell during the showup.

The Court found the showup to have been tainted with irregularities, noting that the out-of-court identification could have been the subject of objections to its admissibility, though they were never raised. Despite this, however, the Court found that the prosecution failed to establish the accused's guilt beyond a reasonable doubt and acquitted him, noting that the victim was blindfolded throughout the ordeal, thus rendering her account unreliable as she had admitted she could only recognize her perpetrator through his eyes and voice. It also found the officer's improper suggestion to have possibly aided in the identification of the suspect.

The Court cited with approval the following excerpt from an academic journal—

> "Various social psychological factors also increase the danger of suggestibility in a lineup confrontation. Witnesses, like other people, are motivated by a desire to be correct and to avoid looking foolish. By arranging a lineup, the police have evidenced their belief that they have caught the criminal; witnesses, realizing this, probably will feel foolish if they cannot identify anyone and therefore, may choose someone despite residual uncertainty. Moreover, the need to reduce psychological discomfort often motivates the victim of a crime to find a likely target for feelings of hostility.
>
> Finally, witnesses are highly motivated to behave like those around them. This desire to conform produces an increased need to identify someone in order to show the police that they too, feel that the criminal is in the lineup, and makes the witnesses particularly vulnerable to any clues conveyed by the police or other witnesses as to whom they suspect of the crime."[77]

People v. Pineda,[78] meanwhile, involved six (6) perpetrators committing robbery with homicide aboard a passenger bus. A passenger recalled that one of the perpetrators was referred to as "Totie" by his companions. The police previously knew that a certain Totie Jacob belonged to the robbery gang of Rolando Pineda. At the time, Pineda and another companion were in detention for another robbery. The police presented photographs of Pineda and his companion to the witnesses, who positively identified the two as among the perpetrators. The Court found the identification procedure unacceptable It

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[77] *People v. Escordial,* 373 SCRA 585 (2002), citing Woocher, Frederic D., Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Witness Identification, 29 STAN L. REV 969 (1977).

[78] 473 Phil. 517 (2004).

then articulated two rules for out-of-court identifications through photographs—

> "The first rule in proper photographic identification procedure is that a series of photographs must be shown, and not merely that of the suspect. The second rule directs that when a witness is shown a group of pictures, their arrangement and display should in no way suggest which one of the pictures pertains to the suspect."

Non-compliance with these rules suggests that any subsequent corporeal identification made by a witness may not actually be the result of a reliable recollection of the criminal incident. Instead, it will simply confirm false confidence induced by the suggestive presentation of a photograph to a witness.

Pineda further identified 12 danger signals that might indicate erroneous identification:

1) The witness originally stated that he could not identify anyone;
2) The identifying witness knew the accused before the crime, but made no accusation against him when questioned by the police;
3) A serious discrepancy exists between the identifying witness' original description and the actual description of the accused;
4) Before identifying the accused at the trial, the witness erroneously identified some other person;
5) other witnesses to the crime fail to identify the accused;
6) Before trial, the witness sees the accused but fails to identify him;
7) Before the commission of the crime, the witness had limited opportunity to see the accused;
8) The witness and the person identified are of different racial groups;
9) During his original observation of the perpetrator of the crime, the witness was unaware that a crime was involved;
10) A considerable time elapsed between the witness' view of the criminal and his identification of the accused;
11) Several persons committed the crime; and
12) The witness fails to make a positive trial identification.

Pineda further underscored that "the more important duty of the prosecution is to prove the identity of the perpetrator and not to establish the existence of the crime." Establishing the identity of the perpetrators is a

difficult task because of this jurisdiction's tendency to rely more on testimonial evidence rather than on physical evidence. Unlike the latter, testimonial evidence can be swayed by improper suggestion. Legal scholar Patrick M. Wall notes that improper suggestion "probably accounts for more miscarriages of justice than any other single factor."[79] Marshall Houts, who served the Federal Bureau of Investigation and the American judiciary, concurs and considers eyewitness evidence as "the most unreliable form of evidence.[80]"

In *People v. Rodrigo,*[81] which involved the same circumstances as *Pineda,* the High Court categorically stated that a suggestive identification violates the right of the accused to due process, denying him or her a fair trial. Said the Court—

> "The greatest care should be taken in considering the identification of the accused, especially when this identification is made by a sole witness and the judgment in the case totally depends on the reliability of the identification. This level of care and circumspection applies with greater vigor when, as in the present case, the issue goes beyond pure credibility into constitutional dimensions arising from the due process rights of the accused."

Circumstances Observation was Made

As to the circumstances the observation is made, the factors that contribute are the following:

(a) *Familiarity* — Refers to whether or not the perpetrator is known to the witness or simply a stranger;

(b) *Brevity* — Refers to the length of time the witness observed the accused;

(c) *Lightning and Obstruction* — Refers to matters of visibility either as to the ambient location or to the ability of the witness to see;

(d) *Distance* — Refers to the distance between the witness and the suspect;

(e) *Intervening Time* — Refers to the total period of time within which the observation was made by the witness;

(f) *Description* — Refers to certain features that may or may not be identifiable with the accused;

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[79] Wall, Patrick M. Eye-Witness Identification in Criminal Cases, p. 26 (1995)
[80] Houts, Marshall, From Evidence to Proof, pp. 10-11 (1956)
[81] 586 Phil. 515 (2008).

(g) *Exculpatory Identification* — Refers to an earlier identification of another individual by another witness;

A single one of these factors, or a combination thereof, effectively contributes to misidentification of an individual by a witness. Absent arbitrariness or oversight or circumstance of significance and influence, courts usually will not interfere with the credence given to the testimony of witnesses, as assessments of credibility are generally left to the trial court whose proximate contact with those who take the witness stand places it in a more competent position to discriminate between a true and false testimony.[82]

Familiarity

The identification of a person could be established through familiarity with one's physical features.[83]

In *People v. Bagsit,*[84] one of the main contentions was that the vision of the witness, Richard, had been obscured by a glare of light, thus rendering his identification of the appellant impossible. The Court, in reversing this contention, not only noted that the glare did not make identification impossible, but placed great stock in the fact that the appellant and Richard were from the same locality and had been neighbors since childhood. This familiarity reduced any possible error Richard may have committed in identifying the appellant.

In *People v. Mapalao,*[85] the appellant was identified by witnesses who saw both his face and the gun he used by the side of the door facing him. Another witness identified appellant through his voice, as during the flight, they had been joking with each other. The Court held that the fact that these witnesses had spent the whole day with the appellant, in the same vehicle, and who themselves were the victims of the hold-up committed by the appellant, gave them a familiarity with the appellant, which made their identification more reliable.

In *People v. Morales,*[86] the appellant tried to refute a witness' identification of him by claiming that he was only 5'4 tall, and could not be mistaken for a six-footer. The Court was not convinced and held that the witness was lying at the lower double-deck bed while the accused was standing about one foot away

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[82] *People v. Quirol,* 473 SCRA 509 (2005).
[83] *People v. Mante,* 312 SCRA 673 (1999).
[84] 409 SCRA 350 (2003).
[85] 197 SCRA 79 (1991).
[86] 343 SCRA 276 (2000).

from her, creating an impression that the accused-appellant was taller than his actual height. The Court affirmed the rule that familiarity with the physical features of a person is an acceptable means of proper identification.

Lighting and Obstruction

This refers to the illumination of the crime scene, which allows the witness to observe the situation and make a proper narrative as to the turn of events. This is important, especially if the witness is to make a positive identification of the culprit. Jurisprudence has constantly held that visibility is a vital factor in determining whether an eyewitness could have identified the perpetrator of a crime. It is settled that when conditions of visibility are favorable and when the witnesses do not appear to be biased, their assertion as to the identity of the malefactor should normally be accepted.[87]

Aside from illumination, issues as to obstruction arise in determining if the witness had an unobstructed or clear view of the events that took place.

In *Tapdasan Jr v. People,*[88] the Court considered a light emanating from the headlights of a passing vehicle as sufficient illumination to enable the witness in that case to identify the petitioner, and held that wicklamps, flashlights and even moonlight or starlight may be considered sufficient illumination in proper cases. In *People v. Caraang,*[89] the Court similarly considered the moonlight illuminating the place where the witnesses were brought as sufficient illumination which enabled them to observe and remember the face of the appellant.

Description

The Supreme Court has acknowledged that victims of violence strive to see the appearance of the perpetrators of the crime and observe the manner in which the crime is being committed, and not unduly concentrate on extraneous features and physical attributes unless they are striking. A failure to accurately observe certain physical features of the malefactors need not be taken against the witness, seeing as the identification of malefactors is not an easy task. The carelessness or superficiality of observers, the rarity of powers of graphic

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87 *People v. Caraang,* 418 SCRA 321 (2003).
88 392 SCRA 335 (2002).
89 418 SCRA 321 (2003).

description, and the varying force with which peculiarities of form, color or expression strike different people make recognition difficult.[90]

Jurisprudence on this issue has varied, and the Supreme Court takes stock of the circumstances attending to each case. For example, in *People v. Delmo,*[91] the Supreme Court took excused the failure to accurately observe certain physical features of the malefactors, and gave weight to the testimony offered because the witness had clearly and readily identified the offenders in open court without hesitation, despite the appellants' attempts to change their physical appearances by shaving off their mustaches and beards and putting on weight. Meanwhile, the Supreme Court ruled the opposite way in *People v. Corro,* holding that the differing descriptions offered by the rape victim as to the actual rapist's identity gave rise to a reasonable doubt, as the description did not fit the appellant's actual appearance.

Methods of Identification

As to methods of identification, there are also several factors that contribute to misidentification, as follows:

(a) *Confrontation* — this refers to allowing a face-to-face confrontation between the accused and the witness or victim;

(b) *Police Line-ups* — Common in other jurisdictions, this refers to having the witness make an identification based on a line-up of possible suspects;

(c) *Rogues' Gallery* — This refers to making the witness make an identification based on a prepared set of mug shots, or what we usually call a rogue's gallery.

(d) *Street Identification* — Refers to the practice of accompanying the witness to the scene of the crime with the purpose of making an identification;

Confrontation

Confrontation refers to the practice of allowing the witness and the suspect to meet face-to-face in order to make a positive identification.

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[90] *People v. Delmo,* 390 SCRA 395 (2002).
[91] 390 SCRA 395 (2002).

In *People v. Arellano,*[92] the Court noted that the show-ups therein, where the suspect was brought face-to-face with the witness, was properly done considering that all the six (6) factors were substantially satisfied. —

1) The victim and one eyewitness had more than sufficient time to observe the rapist;
2) Terez and Mendez's attention were focused on the appellant who struck fear into their hearts, especially Terez, who was raped;
3) Terez and her eyewitness, Mendez, gave prior accurate descriptions of appellant which became the source of the cartographic sketch;
4) There is no higher degree of certainty than the testimony of Terez, who was raped;
5) The crime was committed on August 28, 1992, and appellant was identified by Mendez on September 13, 1992, while she was buying softdrinks at a store; Terez identified appellant on September 14, 1992; in both instances, their memories of appellant were still fresh as only sixteen to seventeen days had passed since the commission of the crime;
6) Suggestiveness was non-existent because after the rape, appellant was seen by Mendez at a nearby store and pointed to the authorities;

In *People v. Alshiaka,*[93] the Court held that there was no objectionable suggestion from the police where the witness did not incriminate the accused merely because the latter was the lone suspect presented by the police but because he was certain that he recognized the accused as one of his abductors.

Street Identification

As previously stated, street identification refers to the practice of bringing the witness back to the scene of the crime in order to refine his testimony and with the possibility of finding leads as to the identification of the suspected perpetrator. This is often referred to in other jurisdictions as conducting a "canvass" of the area with the purpose of finding other witnesses or possible leads that would lead to a positive identification of a suspect.

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92 343 SCRA 276 (2000).
93 261 SCRA 637 (1996).

There is no hard and fast rule as to the place where suspects are identified by witnesses. Identification may be done in the open field. It is often done in hospitals while the crime and the criminal are still fresh in the mind of the victim. This rule was applied by the Court in *People v. Teehankee Jr,* wherein the totality of circumstances showed that the alleged irregularities cited by the appellant therein did not result in his misidentification or a denial of his due process rights.

Other Factors

Aside from the above-mentioned factors, certain investigative misconduct also contribute to either contamination, memory distortion or suggestibility—misidentification that leads to conviction:

(a) *Expectation* — More often than not, communication made by law enforcement to victims or witnesses such as that the individual singled out is most likely the perpetrator creates an expectation in the mind of said witnesses, thereby leading to a positive identification

(b) *Singling Out* — Refers to undue involvement of law enforcement or investigators in the identification of the witness of the individual;

(c) *Irregular Process* — Refers to highly irregular and unconventional means of providing the witness with identification tools, such as photographs, thereby leading to a misidentification;

(d) *Highlight* — Refers to creating a predisposition for a witness to identify or choose an individual;

(e) *Contamination* — Refers to the influence of opinions, media accounts, and overall bias created;

(f) *Reinforcement* — Refers to actions made by law enforcement or other persons, be it deliberate or not, that tends to influence the confidence or certainty in the identification;

Contamination

Contamination deals with the influence of opinions, media accounts, and the overall bias created regarding the case, particularly on the identification of suspects.

The corruption of out-of-court identification corrupts the integrity of in-court identification during the trial.[94]

One notable case is that of *People v. Rodrigo.*[95] In this case, the Court noted that the initial photographic identification to the accused potentially violate his due process rights, because his in-court identification was influenced by impermissible suggestions in said initial photographic identification. Said the Court, "The investigators might not have been fair to Rodrigo if they themselves, purposely or unwittingly, fixed in the mind of Rosita, or at least actively prepared her mind to, the thought that Rodrigo was one of the robbers. Effectively, the act is no different from coercing a witness in identifying an accused, varying only with respect to the means used. Either way, the police investigators are the real actors in the identification of the accused; evidence of identification is effectively created when none really exists."

Another dangerous element, in that case, was that Rosita provided no other description of Rodrigo and the other two accused, whether in her Sinumpaang Sinalaysay or in court. All that was in her Sinumpaang Salaysay was Rodrigo's name, and the fact that he was a "suspect." There was thus no basis to compare Rosita's, or any other witnesses' immediate recollection of what transpired at the crime scene and the description of her perpetrators with Rosita's photographic identification and her in-court identification at the trial.

Moreover, the identification of Rodrigo happened a month after the crime happened, a long month wherein the police had not made any headway in their investigation. She did not even know Rodrigo's name until she got information from a person who, glaringly, was not even presented as a witness. The photographic identification made of Rodrigo, who was expressly noted to be a "suspect" in the Sinumpaang Sinalaysay, was done by showing his lone photograph. This means the police did not even give Rosita the option to identify him from among several photographed suspects; instead, the police's actions had effectively branded Rodrigo as *the* suspect.

Reinforcement

It is a common occurrence that actions made by law enforcement, investigators, or other persons, deliberate or not, tend to influence the confidence or certainty in the identification process. Thus, more often than

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[94] *People v. Navales,* 337 SCRA 436 (2000).
[95] 564 SCRA 584 (2000).

not, these factors tend to influence the selection by the witness of suspects in the process.

When confronted with such a situation, the Court, in the case of *People v. Villena,* acknowledged the role identification of an accused through mugshots plays as one of the established procedures in identifying criminals. In that case, the prosecution witnesses were shown three pictures, and they pointed to the appellant therein's picture, identifying him as one of the malefactors. However, the picture conspicuously showed him holding up a board with the following markings, "***EFREN VILLENA, ROBBERY HOLDUP, LINGAYEN, PANGASINAN."*** The Court found such markings suggestive as it placed within the witnesses' minds that the accused had committed a similar crime in the area, thereby placing the idea that the suspect therein was a criminal. To avoid charges of impermissible suggestion, said the Court, there should be nothing in the photograph that would focus attention on a single person.

IV. CHALLENGES

While the primacy placed by our jurisprudence on positive identification makes it pivotal in determining the conviction of an accused, the factors outlined above demonstrate a pressing need to re-examine our Courts' staunch adherence to this doctrine. We must revisit and refine our established predispositions, biases and practices, allowing our appreciation of the defense of alibi to be utilized more effectively in securing justice.

It is strongly submitted that our legal system must acknowledge, recognize, accept, and utilize innovations in the field of forensic science in order to assist, reinforce, and ensure that the true perpetrators are properly charged, and to aid prosecution and judicial determination of guilt with a tried and tested scientific approach.

Acknowledgement

It is respectfully submitted that the very first thing legal practitioners must do is to actively discern and ascertain the testimony of the witness—to really *listen* to what the witness is trying to say. This avoids the long-established practice of trying to subsume the witness' statements into the prepared, and often *"de kahon"* narratives seen in court-bound affidavits.

Taking into consideration the factors earlier observed, litigants, especially defense counsels, must be vigilant as to recognize the existence of said factors that unduly influence a witness' identification as to its nature, modality, relevance, admissibility, and truthfulness.

There is ample jurisprudential basis for such a conclusion. Judges are already expected to exercise their discretion wisely and take whatever action necessary in order to properly evaluate the merits of a case, and are urged not simply to make blanket conclusions. In *People v. Ancheta,* the Supreme Court emphasized that a presiding judge enjoys a great deal of latitude in examining witnesses within the course of evidentiary rules. The presiding judge should see to it that a testimony should not be complete or obscure. In *People v. Zheng Bai Hui,* the Court reiterated that a severe examination by a trial judge of some of the witnesses for the defense in an effort to develop the truth and to get at the real facts affords no justification for a charge that he has assisted the prosecution, as it is precisely a trial judge's role to put as many questions as necessary to witnesses in order to elicit relevant facts to make the record speak the truth. Otherwise, a judge would be remiss in their duties and would permit a miscarriage of justice.[96]

Other rules of procedure also support the above submission. For example, in the Rule on Examination of a Child Witness, Judges are also mandated to ensure that questions propounded to child witnesses are stated in a form that is appropriate to the developmental level of a child, protect them from harassment or undue embarrassment, and avoid a waste of time.[97]

Beyond Documentation

It is also submitted that the identification procedure be recorded with the end in view of preserving the same and attesting to its truthfulness and reliability.

In this jurisdiction, it is common practice that statements and sworn affidavits are prepared by law enforcement officers. This means that more often than not, they are not reflective of the affiant has actually witnessed. This practice also opens the floodgates to widespread coaching and the proliferation of heavily-prepared statements.

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[96] *Ancheta* and *Zheng Bai Hui,* as cited in *People v. Canete,* 400 SCRA 109 (2003).
[97] Rule on the Examination of Child Witnesses, Sec 19.

Moreover, with the advent and proliferation of electronic and digital devices that could easily record and store lengthy testimonies, it is submitted that the use of electronic recording and digital storing devices be the norm rather than the exception, to ensure the integrity and truthfulness of the testimony elicited from witnesses.

Not only will recording witness statements ensure its reliability, but it will also afford both parties the opportunity to review such statements in their raw form, free from annotations and editorial touches usually present in most affidavits.

Yet, we must be ever-mindful of laws that regulate such recording, and initiate remedial legislative measures to institute this proposed practice.

Scrutiny

It is also respectfully submitted that an enhanced emphasis be given to the duty of judges, more particularly lower court judges, to scrutinize and highlight the factors undermining the identification process.

Lower courts are considered the first line of defense of the judicial process as they are in a unique position to physically observe the decorum, attitude, and conduct of the witness while being subjected to direct and cross-examination. More often than not, the body language, manner of answering questions, and rapport with the prosecution and defense counsel, elicits valuable insight as to the temperament of the witness, including the candidness and truthfulness of the proffered statements.

Discretionary Exclusion

'Discretionary exclusion' refers to actions taken by courts, either at the first instance but usually on the appellate level, to exclude evidence that is deemed unfair or unreliable, or contrary to public policy, or evidence considered highly prejudicial and of little probative value. As a natural progression from the earlier discussion about the scrutiny judges must take, discretionary exclusion takes the scrutiny process a step further and actually orders the evidence excluded from consideration.

One example of discretionary exclusion is in the case of *People v. Flores.*[98] In this case, the Court found serious doubts in the testimony of the victim, Cristina Dulay, as to whether one of the robbers in the case had consummated the act of rape on her. The Court found glaring incredulities in her testimony, such as her allegation that she was menstruating at the time the rape occurred, which was put into doubt by the medical officer's finding that there was still semen present in her vaginal canal, without any mention of blood being mixed therein. The Court also found her allegation that the man actually lit a match to check if she was menstruating to be unnatural, as it was improbable that a man seized of beastly desire could find the time to verify if his victim was menstruating and proceed to commit the act anyway despite such knowledge. The fact that no one corroborated Dulay's claim also cast doubt on her allegations.

Passivity

Passivity refers to the predilection of appellate bodies to adopt the findings of the courts *a quo.* To appreciate the extent of such practice, we find in our local jurisprudence numerous examples reinforcing this trend, to the point of instituting it as a revered doctrine. Numerous appellate court decisions begin with statements to the effect that the findings of lower courts will not be disturbed as to the appreciation of the factual milieu of evidence presented. Of course, this principle is subject to qualifications and exceptions.

As early as 1913, the Court had already instituted this policy, holding in one case that—

> "It is to be expected that the testimony of several witnesses to the events which transpired in rapid succession, which were attended by hurry and excitement, and with the opportunity for observation so greatly hindered by the darkness of the night, will disagree in the details. If the witnesses in the present case should agree in their testimony that all the events occurred in precisely the same order and in the same manner, that fact would itself be a suspicious circumstance. It must be remembered that much of the work of putting out the fire was done by persons who did not appear as witnesses at all. With so many assisting in putting out fires, and the fact that it occurred in the nighttime, it is not strange that some should see what others did not see, that to witnesses observing the same incident should differ in some respects in describing it later, or that gaps in the evidence should appear because persons who assisted in putting out the fire were not called as witnesses. The fact that a united and orderly narrative of

[98] 23 SCRA 309 (1968).

> the fire in the bodega cannot be drawn from the testimony of the various witness who took part in extinguishing it tends rather to stamp the testimony of each as being truthful to the best of his observation. Furthermore, the conflicting testimony was for the lower court to weigh. The court has repeatedly refused to disturb a finding of guilt when the evidence was conflicting and there was enough before the court to warrant a conviction where evidence of the prosecution true, and conflicting evidence offered by the defense false, unless from the record it appeared that there was reasonable doubt as to the correctness of the trial court's classification of the evidence as true or false."[99]

Fast forward to the late 1960s and this policy was reiterated:

> "When the issue is one of credibility of witnesses, appellate courts will not generally disturb the findings of the court a quo, considering that it is in a better position to decide the question, having seen and heard the witnesses themselves and observed their deportment and manner of testifying during the trial, unless it is shown that it has overlooked certain facts of substance and value that, if considered, might affect the result of the case."[100]

Unreliable Identification

It is submitted that an unreliable identification alone cannot sustain a conviction. Thus, it would greatly unburden court dockets if, at the investigation level, witness narratives are scrutinized first for their reliability and credibility. We must reiterate at this point that we rely on the strength of the prosecution evidence, not on the weakness of the evidence for the defense.

Thus, in one case, the High Court emphasized that in reviewing rape cases, it is guided by these three principles. —

1) An accusation of rape can be made with facility; it is difficult to prove but more difficult for the person accused, though innocent, to disprove;
2) In view of the intrinsic nature of the crime where only two persons are usually involved, the testimony of the complainant must be scrutinize with extreme caution; and

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[99] *United States v. Go Foo Suy and Go Jancho,* 25 Phil. 187 (1913).
[100] *People v. Berganio,* 110 Phil 332 (1960).

3) The evidence for the prosecution must stand or fall on its own merit, and cannot be allowed to draw strength from the weakness of the evidence of the defense.[101]

However, it should be noted that in our case law, the variations in the declarations of the witnesses respecting collateral, peripheral and incidental matters do not impair the verisimilitude of the testimonies of such witnesses and the probative weight thereof on the corpus delicti and the perpetrators thereof. Minor inconsistencies in the testimonies of said witnesses strengthen, rather than weaken, their credibility, as such testimonies clearly show that the witnesses are neither rehearsed, nor coached. Moreover, the testimonies of witnesses should be calibrated and considered in their entirety and not in truncated parts.[102]

V. FINAL CONSIDERATIONS

Revisiting Alibi

To date, current jurisprudence on alibi still echoes the doctrine that was established many decades ago. Lower courts, true and faithful as they are to such established doctrine, perpetuate the same ad infinitum, with their decisions sounding off like a mantra, reinforce and ensure said doctrine permeates the jurisprudential horizon.

Yet, it is clear that our legal system and its attitudes toward alibi need to change. Positive identification is not the powerful legal defense our Court seems to think it is. Even the Court's own decisions seem to realize this, albeit implicitly. For example, the Court noted the many danger signs which could affect eyewitness testimony in the case of People v. Nunez:[103]

1) The witness originally stated that he could not identify anyone;
2) The identifying witness knew the accused before the crime, but made no accusation against him when questioned by the police;
3) A serious discrepancy exists between the identifying witness' original description and the actual description of the accused;

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[101] *People v. Novio,* 404 SCRA 462 (2003).
[102] *People v. Patoc,* 398 SCRA 62 (2003).
[103] 842 SCRA 97 (2017).

4) Before identifying the accused at the trial, the witness erroneously identified some other person;
5) Other witnesses to the crime fail to identify the accused;
6) Before trial, the witness sees the accused but fails to identify him;
7) Before the commission of the crime, the witness had limited opportunity to see the accused;
8) The witness and the person identified are of different racial groups;
9) During his original observation of the perpetrator of the crime, the witness was unaware that a crime was involved;
10) A considerable time elapsed between the witness' view of the criminal and his identification of the accused;
11) Several persons committed the crime; and
12) The witness fails to make a positive identification.

The fact that there are so many danger signs hints at the weaknesses of positive identification, which suggests that it should not so easily be used as a magic sword with which to defeat the defense of alibi without first considering other factors. It is here where the challenge lies—that of revisiting current doctrines, current predispositions, current practices, with the end in view of refining our judicial process and ensuring that justice is truly served within the hallowed halls of the judiciary.

The Problem with Wrongful Convictions

Our discussion at the beginning dealt with the problems and challenges that faced law enforcement, prosecution, and the courts in how to sift through evidence. From a cursory survey of our jurisprudential history, we see that there have been a number of reversals of convictions made.

The American system from which we derive our own, grounded in British common law, has long erred on the side of protecting innocence. Thus, we have the fundamental law's presumption of an accused's innocence until he is proven guilty in a court of law. We, therefore, universally subsume into a mantra of sorts what English jurist William Blackstone long ago declared—"It is better that ten guilty escape than one innocent suffer."

This led the Court to observe, in *People v. Mateo,*[104] the prevalence of wrongful convictions, quoting statistics to the effect that within the eleven-year period since the reimposition of the death penalty between 1993 until 2004, capital punishment had been imposed in approximately 1,493 cases, out of which 907 had been reviewed by the Supreme Court and 230 of them being affirmed upon review (25.36% of the total number). The Court rendered a judgment of acquittal in 65 cases. In sum, the cases where the death penalty had been modified made up 71.77% of the total number of cases brought before it on automatic review, meaning a total of 651 out of 907 cases. This trend prompted the Court to prescribe an intermediate review by the Court of Appeals before the Supreme Court's automatic review comes into play, in order to thoroughly scrutinize the imposition of the death penalty.

The Emergence of Forensic Science; History of Forensic Science

The history of forensic science dates back thousands of years. Fingerprinting was one of its first applications, with the ancient Chinese having used fingerprints to identify business documents. In 1892, a eugenicist named Sir Francis Galton established the first system for classifying fingerprints. Sir Edward Henry, commissioner of the Metropolitan Police of London, developed his own system in 1896 based on the direction, flow, pattern, and other characteristics in fingerprints. The Henry Classification System became the standard for criminal fingerprinting techniques worldwide.

In 1835, Scotland Yard's Henry Goddard became the first person to use physical analysis to connect a bullet to the murder weapon. Bullet examination became more precise in the 1920s, when American physician Calvin Goddard created the comparison microscope to help determine which bullets came from which shell casings. And in the 1970s, a team of scientists at the Aerospace Corporation in California developed a method for detecting gunshot residue using scanning electron microscopes.

In 1836, a Scottish chemist named James Marsh developed a chemical test to detect arsenic, which was used during a murder trial. Nearly a century later, in 1930, scientist Karl Landsteiner won the Nobel Prize for classifying human blood into its various groups. His work paved the way for the future use of blood in criminal investigations. Other tests were developed in the mid-1900s

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[104] 433 SCRA 640 (2004).

to analyze saliva, semen, and other bodily fluids, as well as to make blood tests more precise.

With all of the new forensic techniques emerging in the early 20th century, law enforcement discovered that it needed a specialized team to analyze evidence found at crime scenes. To that end, Edmond Locard, a professor at the University of Lyons, set up the first police crime laboratory in France in 1910. For his pioneering work in forensic criminology, Locard became known as the "Sherlock Holmes of France."

August Vollmer, chief of the Los Angeles Police, established the first American police crime laboratory in 1924. When the Federal Bureau of Investigation was first founded in 1908, it did not have its own forensic crime laboratory; that came in 1932.

By the close of the 20th century, forensic scientists had a wealth of high-tech tools at their disposal for analyzing evidence, from polymerase chain reaction (PCR) for DNA analysis, to digital fingerprinting techniques with computer search capabilities.[105]

The first written account of using medicine and entomology to solve criminal cases is attributed to the book Xi Yuan Lu ("Washing Away Wrongs"), written in China in 1248 by Song Ci (1186-1249), a director of justice, jail and supervision during the Song dynasty. Song Ci introduced regulations concerning autopsy reports to court, how to protect the evidence in the examining process, and explained why forensic workers must demonstrate impartiality to the public. He devised methods for making antiseptic and for promoting the reappearance of hidden injuries to dead bodies and bones (using sunlight and vinegar under a red-oil umbrella); for calculating the time of death (allowing for weather and insect activity); described how to wash and examine the dead body to ascertain the reason for death. The book had also described methods for distinguishing between suicide and faked suicide.

In one of Song Ci's accounts, the case of a person murdered with a sickle was solved by an investigator who instructed each suspect to bring his sickle to one location. He realized it was a sickle by testing various blades on an animal carcass and comparing the wounds. Flies, attracted by the smell of blood, eventually gathered on a single sickle. In light of this, the owner of the sickle confessed to the murder. The book also described how to distinguish between a drowning (water in the lungs) and strangulation (broken neck

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[105] History of Forensics - How Forensic Lab Techniques Work, by Stephanie Watson from How Stuff Works

cartilage) and described evidence from examining corpses to determine if a death was caused by murder, suicide, or accident.[106]

Methods from around the world involved saliva and examination of the mouth and tongue to determine innocence or guilt, as a precursor to the Polygraph test. In ancient India, some suspects were made to fill their mouths with dried rice and spit it back out. Similarly, in ancient China, those accused of a crime would have rice powder placed in their mouths. In ancient Middle Eastern cultures, the accused were made to lick hot metal rods briefly. It is thought that these tests had some validity since a guilty person would produce less saliva and have a drier mouth; the accused would be considered guilty if rice was sticking to their mouths in abundance or if their tongues were severely burned due to lack of shielding from saliva.[107]

As discussed earlier, courts mostly rely on testimonial evidence. It is very seldom that you see expert witnesses being presented to testify on the results of forensic examinations conducted on the crime scene, if any. The numerous issues surrounding testimonial evidence, which have already been discussed above, should make our judicial system reconsider its preference for testimonial evidence and adopt a forensic-based approach instead.

Forensic science plays three important roles in the judicial process:

1) It establishes the elements of a crime. For example, testing suspected controlled substances proves they are drugs, and thus, that the crime has been committed. It associates defendants with crime, or disassociates them more accurately;

2) Forensic evidence, particularly fingerprint and firearm evidence, can conclusively associate a defendant with a crime;

3) Forensic evidence such as blood, semen, hairs, and fibers, an also tentatively associate a defendant;

4) Forensic evidence can also help exonerate a defendant while laboratory results are inconclusive or when they definitely disassociate the defendant from the crime;

5) Forensic evidence helps reconstruct the crime or the crime scene;

The importance attached to forensic evidence varies in relation to the case, the type of evidence, and the prosecutor's perspective. Forensic evidence is

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[106] Song Ci, and Brian E. McKnight. *The washing away of wrongs: forensic medicine in thirteenth-century China*, Ann Arbor: Center for Chinese Studies, U of Michigan, 1981. Print. p.3

[107] Parmeshwarand, Swami (2003). Encyclopaedic Dictionary of the Dharmasastra, Volume 1. New Delhi: Sarup & Sons, p. 499. ISBN 8176253650.

regarded as more important and more likely to be gathered and analyzed in violent crimes than property crimes.[108]

Forensic evidence can also provide the missing link in many cases which were formerly regarded as cold or unsolvable. The case of Jane Britton, who disappeared in 1969, was only solved upon the advent of forensic evidence in 2012, when crime scene DNA was found to match that of a serial sexual predator who had been convicted back in 1973. The death of Krystal Beslanowitch, whose skull was crushed by a rock in 1995, was only solved in 2013 when DNA was extracted from the rock and was matched with the DNA of a local airport shuttle-bus driver who had recently been released from prison after having been convicted in 1987.[109]

DNA Analysis

DNA analysis is one of the most powerful tools for human identification, and has clear forensic applications in identity testing (crime scene and mass disaster investigations) and parentage determination. It has attracted widespread use in the years since its adoption, often resolving long-unsolved cases and making it possible to resolve cases which were previously thought to be unsolvable.

DNA, or deoxyribonucleic acid, is the fundamental building block of a person's entire genetic makeup. DNA is present in all human cells, and is the same in every cell. It is composed of sugar, phosphate, and nitrogen bases, namely Adenine (A), Guanine, (G), Cytosine (C) and Thymine (T). The order of the nitrogen bases determines the so-called DNA sequence. Once samples are processed, possible sources of DNA profile/s are evaluated. Sources may include:

(a) The victim;

(b) Human handlers, such as crime scene investigators, medico-legal officers, forensic analysts, and lawyers;

(c) The perpetrator of the crime;

The presence of two or more mismatches between the evidentiary stain and the suspect's reference sample necessarily excludes him as the source of

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[108] Use of Forensic Evidence by the police and courts, U.S. Department of Justice National Institute of Justice by Joseph L. Peterson, Oct 1987

[109]Lauren Cahn, *13 Mysteries Finally Solved by Forensics,* Reader's Digest (2019) available at https://www.rd.com/list/forensics-solved-mysteries-cold-cases.

the evidentiary sample. Notably, mismatches do not necessarily equate with innocence, but merely show that the suspect is not the source of the evidentiary sample. Other evidence collected from the crime scene may still contain the suspect's DNA or that the suspect did not leave sufficient DNA, if he is indeed the real perpetrator of the crime. Alternatively, the suspect may not have left sufficient DNA at the crime scene and other physical evidence (e.g. ballistics, shoe print evidence) and information (e.g. eyewitness testimony) must be used to further the case.

Nonetheless, the exclusion of a suspect as a possible source of non-victim DNA that is not that of any known human handler is crucial in criminal investigations since this indicates the presence of another individual at the crime scene who remains unaccounted for.

If a suspect's reference sample is consistent with the DNA profile of the evidentiary sample, however, then the suspect remains a prime candidate source of the sample. Since only a selected set of STR markers are analyzed, there remains a probability that another individual has the same DNA profiled. If the alleles comprising the DNA profile are rare, then this profile may be attributed to only a few persons in a given population, and the likelihood of the suspect being the source of evidence is higher. Hence, it is essential that the significance of matching profiles must be estimated using established statistical principles. In addition, match probability estimates and/or likelihood ratios must accompany all DNA reports submitted to courts to assist in the proper evaluation of the weight of DNA evidence.

The inclusion or exclusion of a suspect greatly contributes to the reconstruction of events that transpired and the progress of criminal investigations. In this manner, DNA evidence is objective and irrevocable, unlike some witness' statements that may be partial or subject to various psychosocial influences.

How DNA evidence makes a difference in the criminal justice system

Since 1989, there have been tens of thousands of cases where prime suspects were identified and pursued, until DNA testing prior to conviction proved that they were wrongly accused. In more than 25% of cases in a National Institute of Justice study, suspects were excluded once DNA testing was conducted during the criminal investigation.[110]

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[110] https://innocenceproject.org/dna-exonerations-in-the-united-states

It is a welcome development that in most jurisdictions, the use of forensic science as a tool for law enforcement to determine the culpability or guilt of suspects are on the rise. Forensic science clears the cobwebs of guesswork in sifting through evidence, as long as one has the proper training in searching for, acquiring and preserving it, ultimately for final use by the courts.

Yet, domestically, numerous problems hound the full utilization of this approach. The foremost problem is lack of acceptance. While most would admit and accept the fact that forensic science would greatly ease and assist in the proper acquisition of evidence, the costs of such use for now is too high. Note that most crime laboratories in the country, such as those operated by the PNP, the NBI and the PDEA, lack some vital equipment needed to perform their task.

Moreover, there is a lack of qualified and trained personnel to perform the tasks within an operating crime laboratory. This is not due to lack of qualified people, but lack of interest in being overworked and underpaid. Most would rather seek employment in the private sector locally, or abroad.

Another factor to consider is that the current slew of legal practitioners are too set in their ways in following the current practice, ingrained through long years of study and reinforced by long-settled legal practices. Much effort, time and resources are needed to realign the perspectives of today's legal practitioners. This is compounded by the dearth of forensic evidence availing from law enforcement. All of this makes it easier for those in the legal profession to just continue with what they are comfortable with.

On a deeper level, if we advocate strongly for a full application of forensic evidence, we must not only recognize the limitation on resources we currently face, but also the complexity of our criminal justice system. How can we seamlessly institutionalize the use of forensic evidence at every level? Can we be assured today that prosecutors would be comfortable using scientific evidence? Any lapse or mistake, regardless of how miniscule, may discourage the further use of scientific evidence in a judicial setting.