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What U.S. Defense Attorneys Know About Facial Composites

A Thesis in Partial Fulfillment of the Requirements for the Masters in Forensic Psychology

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Abstract

The Innocence Project's DNA exoneration database (2018) indicates that approximately 27% of wrongful conviction cases containing eyewitness evidence also included a composite or sketch[1] of the perpetrator. This statistic is alarming, given that composites are rarely used in criminal investigations (PERF, 2013), but not surprising considering "good" composites are notoriously difficult to construct (e.g., Wells, Charman, & Olson, 2005). It is well understood that eyewitness evidence can be particularly persuasive evidence of guilt for juries and thus we were interested in learning more about how defense attorneys prepare for trial with respect to this specific type of eyewitness evidence. The overall purpose of this study was to assess the level of knowledge, education, training, and litigation experience defense attorneys have regarding composites through a survey methodology. We hypothesized that participants would have some knowledge about general eyewitness identification issues but would mostly be poorly trained and educated on composites. We also hypothesized that defense attorneys would report having been relatively unsuccessful in their attempts to suppress composite evidence at trial. The results supported our hypotheses. We anticipate that the results may benefit defense attorneys in future motions to suppress, both at trial and post-conviction hearings, and assist them in protecting their clients from wrongful conviction.

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[1]In this paper, the term "composite" will be used to refer to both composites and sketches unless there is a specific reference to artist rendered sketches.

What U.S. Defense Attorneys Know About Eyewitness Composites

Based on the results of post-conviction DNA testing in the United States, it has been determined that the leading contributing factor to wrongful convictions is eyewitness misidentification (Innocence Project, 2018). Of the 356 wrongful conviction DNA cases to date, approximately 70% involved erroneous eyewitness identifications and testimony. Further, cases where a composite or sketch was involved in the wrongful prosecution of these individuals represent 27.2% of the "eyewitness" exonerees. This is a staggering number, as the use of composites is relatively rare in the criminal investigations (Police Executive Research Forum (PERF), 2013). In their recent survey, PERF found that although 35% of the 592 agencies in the survey reported using composites as an investigative tool, the average number of composites created per agency in 2010 (of the 192 that reported using composites that year) was three, with a median of one. This data suggests that composites are not used that often in criminal investigations. To further complicate matters surrounding the reliability of composites, 90.9% of agencies in the PERF survey reported that they have no written policy for the construction or administration of composites, and thus the appear to be few "standards" for their use in police agencies. Given that composites appear to be overly represented in wrongful convictions, and that they are rarely used in criminal investigations, we aimed in this study to assess the level of knowledge, education, and training defense attorneys have with composites, as well as their efforts to suppress this generally unreliable form of evidence at trial.

Facial Composite Systems and Facial Recognition Issues

In many cases, the key piece of evidence that can link someone to a crime is a description of the perpetrator that was given by a witness or crime victim. The description is then used, in some way, to search for a potential suspect. In addition to showing witnesses photos, one of the

options available to law enforcement is to ask witnesses to create a composite or sketch of the

perpetrator. Facial composites are created using composite systems, some are feature-based and

others are based on holistic processing (Zahradnikova, Duchovicova, & Schreiber, 2016).

Featured-based composite systems, such as Identikit, Photofit Kit, and Mac-a-Mug Pro, are

designed so that the witness may input individual facial features so the system can create a

complete facial composite (Kovera, Pappas, Penrod, & Thill, 1997). Holistic-based composite

systems, such as E-FIT and PRO-fit, present the witness with a completed facial composite and

the witness is then asked to edit the composite or select from a group of composites. Holistic-

based composite systems are preferred as research has shown that people process faces

holistically, meaning that we do not generally process individual features but rather the face as a

"whole" (Fodarella, Kuivaniemi-Smith, Gawrylowicz, & Frowd, 2015; McIntyre, Hancock,

Frowd, & Langton, 2016; Richler & Gauthier, 2014; Rossion, 2013). Feature-based systems

therefore do not properly reflect how we process faces. A lesser used alternative to computer

software systems is the use of sketch artists. Sketch artists were used before the implementation

of computer software systems and are still used today in some cases. Sketch artists sit with a

witness and render a sketch based off of the description given by the witness. One of the issues

created by this technique is that the composite can vary depending on the artist's technique and

expertise. Different artists can also render different composites due to interpretation from a

witness's description (Laughery & Fowler, 1980). Another issue with using a sketch artist is that

they also work in a piecemeal fashion and therefore are not as effective as holistic composite

software systems.

Frowd et al. (2005) examined whether there were differences in eyewitness identification

performance across different holistic based composite systems (E-FIT, PROfit, FACES, and

EvoFIT) and sketch artists. Participants were asked to inspect a photograph of a celebrity and

later construct a composite from one of the composite methods listed above. Evaluation was

assessed by asking independent observers to name the composites either through matching

(sorting) or by choosing a photograph from an array (line-up). The researchers found that

composite naming was low (3% overall) and sketches were named best at 8%. The researchers

also found that likeness to a suspect can be achieved, however, majority of the composites

created could not be accurately identified. Finally, issues with creating an "accurate" facial

composite can extend far beyond software systems. For example, if a witness has a poor memory

for the perpetrator (e.g., due to distance, Lampinen, Erickson, Moore, & Hittson, 2014), the

description and resulting composite will not be accurate.

Effects of Composites on Eyewitness Identification

It would seem to be common sense that even if a witness created a composite that did not

resemble the perpetrator, the witness should still be able to identify the perpetrator when given

the opportunity at a lineup. However, research suggests that this may not be the case, in part due

to the malleability of memory (e.g., Loftus, 2003; Loftus, Miller, & Burns, 1978; Stoffels, 2013).

Jenkins and Davies (1985) found that when witnesses were presented with a misleading

(inaccurate) composite of a target, they were significantly more likely to misreport information

about the target's appearance. For example, in their study they used incorrect hairstyles or an

added mustache in the misleading composite. Those who misreported the targets appearance

would tell the researchers that the target had either a certain hairstyle or a mustache when the

opposite was true. In a second experiment, Jenkins and Davies (1985) found that when a

composite was shown to the witness prior to recall, this was more damaging to the eyewitness's

memory than seeing the composite immediately after the incident. During recall, if a witness has

the composite face freshly in their mind, the witness is more likely to select a person that resembles the composite, rather than their original memory (Wells & Hasel, 2007).

Research has also shown that creating a composite may reduce the chances that a witness can later identify the perpetrator in a lineup (Topp-Manriquez, McQuiston, & Malpass, 2016; Wells et al., 2005). In one study (Kempen & Tredoux, 2012), researchers divided participants into three groups who had been exposed briefly to a target. The first group constructed composites, the second group of participants only viewed a composite, and the third group was a control and performed a distractor task. The researchers found that merely being exposed to a composite could contaminate the memory trace for the original target and constructing a composite decreases identification performance (Kempen & Tredoux, 2012).

The overall results of the research described above show that there should be a concern among those in the criminal justice system about the use of composites in criminal investigations and proceedings. It would appear, based on the data, that composite evidence could easily be shown to be unreliable evidence and routinely suppressed in criminal proceedings. However, the Innocence Project data on the prevalence of composites in exoneration cases suggests otherwise. We aimed to explore potential reasons behind this suppression deficiency in the current paper.

Effects of Eyewitness Testimony and Evidence on Innocent Individuals

When a major crime occurs, facial composites are often posted in public places or in newspapers, in the hopes that more witnesses will come forward to assist in the identification of the suspect. Therefore, a serious potential problem can occur when other witnesses or the general public view a facial composite that is not an accurate likeness of the actual perpetrator. If an innocent individual looks similar to the misleading composite, he or she may be at risk of becoming a victim of a misidentification (Innocence Project, 2009). Further, after a suspect has

been "apprehended" on the basis of their resemblance to a composite, it is likely that law enforcement will place that suspect into a subsequent identification procedure, either a photo array or a live lineup. It should not be particularly surprising to anyone when a witness then selects this suspect from the photo array or lineup, as the suspect was selected based on their similarity to the witness' composite. The issue here, however, is whether or not the composite was a good fit or representation to the actual perpetrator – the individual it was meant to represent. At this time, researchers have not found or created a "litmus test" for composites, which allow law enforcement (prosecutors, judges, juries) to make the critical determination of "accuracy".

Research has repeatedly demonstrated that both eyewitness testimony and eyewitness evidence can be highly incriminating at trial. In fact, the impact of eyewitness evidence is comparable to, or can even be more compelling than, several other forms of evidence, such as: physical evidence (McAllister & Bregman, 1986; Skolnick & Shaw, 2001), polygraph evidence (Myers & Arbuthnot, 1997), character evidence (Kassin & Neumann, 1997), alibis (McAllister & Bregman, 1989), and even confession evidence (Kassin & Neumann, 1997).

What makes eyewitness testimony even more believable to juries and judges is the consistency and confidence of an eyewitness (e.g., Douglass & Pavletic, 2012). When an individual becomes a witness, they are usually subjected to some form of an identification procedure. Once the witness makes an identification that is determined to be a "positive ID" of the perpetrator, the witness is typically asked to make several additional identifications of that same person (e.g., at pre-trial hearings, at trial; Steblay & Dysart, 2016). This tends to make the witness not only more confident, but also more believable; a phenomenon referred to as confidence malleability (Douglass & Pavletic, 2012). In addition to repeated identifications,

which is likely to happen in composite cases, merely telling a witness that they have made the

correct identification decision can also cause a significant increase in confidence (Steblay, Wells,

& Douglass, 2014). To prevent confidence malleability during composite construction, a report

by the Innocence Project (2009) urges investigators to not add any comments or clues to what

they think they know about the suspect when a witness is assisting with a composite. However,

the results of repeated procedures and feedback following composite construction will likely

have negative impacts on the veracity of the witness' confidence statements both before and

during trial testimony.

Legal Professional's Knowledge on Eyewitness Identification Issues

Research has shown that composites can be very unreliable and the presentation of

unreliable evidence in a courtroom can have very serious consequences for an innocent

individual (Innocence Project, 2018). The criminal justice system was designed to protect these

individuals by providing them with a lawyer and an impartial jury. To investigate what these

groups of individuals and others know about eyewitness accuracy, researchers have conducted

(many) surveys to determine how knowledgeable the members of the criminal justice system are

when it comes to eyewitness identification.

An early survey conducted by Brigham and WolfsKeil (1983) focused on what Florida

judges, prosecutors, public defenders, and private defense attorneys knew about eyewitness

identification issues and their beliefs on these issues as they pertained to the courtroom.

Participants were asked about their opinions on several aspects of eyewitness identification,

including the amount of emphasis placed on eyewitness evidence by judges and juries. They

found that prosecutors felt that eyewitness evidence is relatively accurate and that judges and

juries put the right amount of emphasis on the evidence. Defense attorneys, however, felt that

eyewitness identifications are often inaccurate and are overemphasized by triers of fact.

In the decades since Brigham and WolfsKeil's (1983) study, it is unlikely that these beliefs have changed in significant ways. For example, Wise and Safer (2004) surveyed US judges and found that this sample was often wrong about important eyewitness issues, such as confidence being a good indicator of accuracy at trial. Five years later, Wise, Pawlenko, Safer and Meyer (2009) conducted a similar study that compared prosecutors and defense attorneys' knowledge and beliefs about eyewitness testimony. They found that defense attorneys were significantly more knowledgeable than prosecutors on almost every issue discussed in the study, including stress, weapon focus, forgetting curve, mug-shot-induced bias, confidence-accuracy, and post-event information. Wise and colleagues did not ask participants about composite related evidence. When it comes to juror knowledge, many surveys have been conducted in various countries (Desmarais & Read, 2011). In a meta-analytic review of that data, covering over 30 years of research, Desmarais and Read (2011) found that overall, jurors were less knowledgeable than experts (from Kassin, Tubb, Hosch, & Memon, 2001) on variables such as confidence malleability, question wording, alcohol intoxication, and attitudes and expectation. When jurors are compared to attorneys on eyewitness knowledge, attorneys appear to be more knowledgeable than jurors (Malavanti, Terrell, Dasse, & Weaver, 2014).

With the exception of Brigham and WolfsKeil (1983), the knowledge surveys described above have primarily adapted their questionnaires from two eyewitness expert surveys conducted by Kassin and his colleagues (1989; 2001). These surveys asked eyewitness experts to give their opinion on various eyewitness phenomena and their reliability to be presented in court. Neither Kassin survey, however, asked experts about composite related issues. To our knowledge, even with all of the adaptations to the questionnaire, no study has included composites, until now.

Causes of Unsuccessful Motions to Suppress Eyewitness Evidence

One way to prevent unreliable evidence from being used against an individual is to file a motion to suppress the evidence with the goal of having a hearing and the result being that the evidence is suppressed. Unfortunately, motions to suppress (general) eyewitness identification evidence are rarely successful (Wells, Greathouse, & Smalarz, 2012). There are a number of reasons for this including flaws in the case law that is used in deciding suppression motions (*Manson v. Braithwaite*, 1977), the legal system's tendency to underestimate the power of suggestive procedures and overestimate the reliability of witnesses, and the resistance to have a system that would seemingly deny victims the right to point out their assailants.

Another component to unsuccessful motions is ineffectiveness of defense attorneys. Wells et al. (2012) describe a few actions defense attorneys can take that qualify them as ineffective, including not doing enough research, filing "boilerplate' motions, meaning they only alter their motions slightly from one another and do not take the time (or have the time) to write original motions, and developing a defeatist attitude, as they spend a great deal of time and effort trying to get evidenced suppressed, only for the judge to grant the evidence admissible. The cycle of defeat eventually causes attorneys to file motions because it is part of their job, but they don't put a lot of effort into them because they think that no matter what they do or how much effort they put in, the motions will always be unsuccessful. The researchers note that to combat these issues attorneys should update their motions to include the description of the perpetrator from the initial police report or the 911 call, as that is likely to be more accurate than the description given after the witness's memory has been compromised (*Manson v. Braithwaite*, 1977). The researchers also note that attorneys should make use of expert witnesses at hearings rather than the trial itself as their testimony would be more beneficial in the former (Wells et al.,

2012).

Current Study

The primary purpose of the current study was to assess the level of knowledge, education,

training, and experience that US defense attorneys have regarding composites. We hypothesized

that defense attorneys would have some knowledge about eyewitness reliability issues and

lineups, but would not be as knowledgeable about composites as they occur less frequently in

actual cases. We also hypothesized that defense attorneys would be trained on eyewitness

identification issues but not sufficiently trained on composites. We also predicted that defense

attorneys would report having little success when attempting to have composite evidence

suppressed in court. This prediction was based in part on the high percentage of individuals who

were wrongfully convicted by an unreliable composite (Innocence Project, 2016) and the

difficulty of having "general" eyewitness evidence suppressed at trial (Wells et al., 2012).

Methods

Participants

The Cardozo School of Law National Forensic College email list was used to recruit

participants[2]. We were able to access the list through a written request to the Innocence Project

and obtained an initial sample of 127 participants. In order for a respondent to be considered a

participant they needed to have passed the bar and had experience practicing as a defense

attorney (either public or private). After removing participants that did not fit the criteria to be

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[2] The NFC is a weeklong college for criminal defense lawyers who are supervisors, trainers, and experienced litigators who are or will be the forensic science experts or point people in their jurisdictions. The college prepares attorneys to litigate complex forensic science issues strategically and with the support of the nation's leading law firms and experts. Attendance is by invitation only.

included in the study (i.e., those who did not provide the year they passed the bar or had never

been a defense attorney), the final sample included 111 participants (63 females, 33 males, 15

did not report gender) with an average age of 43.68 years, SD= 11.13. With respect to formal

education, besides having a JD, 20.7% of participants also held a Master's degree.

Participants had passed the bar between 1977 and 2016 with the average year being 2001.

While 96.4% said they were still practicing law, 3.6% participants responded that they were

currently doing other work (e.g., an investigator, a law professor). When asked how many states

the participants were authorized to work in, 64.0% said they only worked in one state, 28.8%

were authorized to practice in two states, 5.4% can practice in three states, one participant (.9%)

can practice in four states, and one participant (.9%) can practice in five states, M = 1.46, SD=

.72. Overall, the number of states covered by our sample was 39 and the District of Columbia.

To get a better understanding of our participants' experience as defense attorneys, we

asked where they have worked and for how long. The majority of our sample (83.8%) had public

defender experience and had spent an average of 8.29 years (SD= 8.53) in this position. Another

38.7% of participants had private defense experience, M = 3.97 years, SD=7.30. We were also

interested in seeing if our participants had experience in other legal settings. Interestingly 9.9%

had prosecutorial experience, M = 0.34 years, SD= 1.18, 20.7% had been civil attorneys, M =

1.22 years, SD = 3.62, and 38.7% noted that they had also worked in other legal positions, M =

2.37 years, SD = 5.19, such as a mitigation specialist, law professor, or an investigator.

Materials

A composite questionnaire was developed that included a combination of closed and

open-ended questions (Appendix A). The survey was divided into four sections: knowledge of

eyewitness issues, education and training, experience with composites, and demographic questions. The survey was presented to participants using the platform SurveyMonkey.com.

Knowledge questions. The questions asked were adapted from the Kassin et al. (2001) study. Our study used nine of the 30 statements from Kassin et al. (2001) because many of the questions did not fit the scope of our study and would have resulted in a lengthy survey. We also added three new questions related to composites, as the Kassin et al. (2001) study did not include composite statements. These statements were created based on the relevant literature concerning composites (see Appendix A). Responses were given using a Likert-type scale ranging from 'Strongly Agree' to 'Strongly Disagree', and we included a 'not sure' option.

Education and training. Participants were asked to respond to 15 statements that aimed to understand how they felt about their education and training in regards to being able to handle composite cases. The statements for education were asked in a 'Yes', 'No', and 'Cannot Recall' format. The statements for training were asked on a Likert-type scale ranging from 'Strongly Agree' to 'Strongly Disagree', and included a 'not sure' option. For example, in regards to education, we asked, "In law school, I attended a class/seminar that covered facial composites." and for training we asked, "I have received sufficient training on how to litigate cases that involve composite evidence."

Experience. This portion of the questionnaire was divided into two sections. The first asked the participants two questions regarding their courtroom experience with composite cases. Question one asked, "Approximately how many criminal defendant clients have you had over your career as a defense attorney?" The second question asked, "Over your career, approximately how many times have you had cases that meet the descriptions below?" The participants were then asked eight sub-questions that went into more detail about these cases. For

example, one sub-question stated, "My client was charged primarily on the basis of a positive eyewitness identification."

In the second Experience section, participants were asked three questions. The first asked participants if they have ever successfully litigated a motion to suppress a composite and how they feel they were able to be successful. The second question aimed to explore why motions are sometimes unsuccessful and do not get suppressed, so we asked the participants why they felt they were unsuccessful and what they felt they would do differently in future cases. The final question asked participants how they would explain composite evidence to a jury if a prosecutor brought one into evidence during a trial. We used open-ended questions for this section of the questionnaire because there is, to our knowledge, no published research on how defense attorneys litigate composite cases.

Demographic questions. Participants were asked questions about their age, gender identity, and where they lived. Participants also were asked questions about being an attorney, such as the year they passed the bar, whether they are still practicing or retired, years of experience, various degrees they may have, the state(s) where they practice, and what type of law they practice.

Procedure

Participation requests were sent via email (Appendix B) to all of individuals on the Cordozo Law School Forensic College email list. The participants all were volunteers that were not individually compensated for their participation; however, we informed participants that there would a raffle with cash prizes for those that participated in the study. The email included a link to the survey where participants were presented with the informed consent form (Appendix C). The participants were told that the results of the questionnaire might help forensic

psychologists and judicial organizations to create educational materials related to composites for defense attorneys. Participants then completed the questionnaire via Survey Monkey. We also provided an option for participants to receive a hard copy in the mail but no participant requested this option.

The beginning of the survey reminded participants that their answers were confidential. The survey was constructed so that each section had its own page. When needed, comment boxes were provided that had an unlimited amount of characters. There was no time limit to how long the participants had to complete the survey and the participants were provided with an option to opt out at any time. Each page had instructions that informed participants what the purpose of each section was. After the survey was complete, participants were debriefed (Appendix D) and told that they could request a final copy of the results when the study was completed or contact the researchers if they had questions, comments, or concerns about the project.

Results

All open-ended questions were coded using two research assistants. Where there were discrepancies in coding decisions, the coders discussed and resolved all differences.

Eyewitness Knowledge

Our first aim was to assess the level of general knowledge our defense attorney participants had on eyewitness identification topics with a special focus on composite-related topics. The questions used to assess this hypothesis were answered on a Likert-type scale but there was an answer for each question that we considered correct based on findings from empirical research and the Kassin et al. (2001) survey. For example, for true statements we considered "Strongly Agree" and "Somewhat Agree" correct; the inverse was used for false statements.

When we looked at the overall responses, we found our participants correctly answered on average 7.54 (SD=. 80) of the nine eyewitness identification statements. Thirteen (12.5%) participants answered all nine statements correctly, and one person answered just five statements correctly (this was the lowest score). Of the three composite related statements, participants answered on average 1.48 questions correctly (SD=. 86), with nine (8.7%) participants answering all three statements accurately and 16 (15.4%) being inaccurate on all three composite statements. Overall, we found support for our hypothesis that our participants would be knowledgeable on eyewitness identification topics, as 95.2% answered seven or more questions correctly. We also found support for our hypothesis that participants would be somewhat less knowledgeable on composite- related issues, with only 54.9% of the participants answering two or more statements correctly.

Participants' responses were then compared to the responses from eyewitness experts from Kassin et al.'s (2001) study. Since the participants in the Kassin et al. (2001) study were not asked composite related questions, we were only able to compare responses to the nine eyewitness questions (Table 1). There was no significant difference between the responses from the attorneys and the experts on majority of the items with the exception of 'Stress', X^2 (1, N = 175) = 27.10, p<.05, 'Forgetting Curve' X^2 (1, N = 175) = 23.30, p<.05, and 'Identification Speed' X^2 (1, N = 175) = 10.19, p<.05. Participants were more knowledgeable on the 'Stress' question and less knowledgeable on the 'Forgetting Curve' and 'Identification Speed' items. Other than these items, our participants answered similarly to the experts, and we can therefore conclude that they were quite knowledgeable on eyewitness identification topics included in the survey.

Education and Training

The second set of hypotheses focused on defense attorneys' training and education with composites. We asked defense attorneys about their previous education and training on eyewitness topics and asked them to respond with 'Yes', 'No', or 'Cannot Recall' (Table 2). We found that participants were highly trained with eyewitness identification topics, as 90.1% of

Table 1.

Percentage of agreement rate of defense attorneys on eyewitness knowledge questions adapted from Kassin et al. (2001) as well as composite related question taken from the literature review.

Topic	Defense Attorneys (n=111)	Experts (n=64)
Stress	100*	60
Weapon Focus	100	87
Forgetting Curve	41.3*	83
Cross-Race Bias	94.2	90
Unconscious Transference	94.2	81
Identification Speed	27.9*	40
Mugshot Induced Bias	98.1	95
Accuracy and Confidence	100	87
Post Event Information	98.1	94
Common Composite Creations	9.8	N/A
Composite Accuracy	58.7	N/A
Participation Impact	79.8	N/A

Note. * Indicates a significant difference between dispatchers and experts at p <. 05.

participants responded to at least one of the education or training statements with a 'yes'.

However, we found that participants generally were not trained in composite related issues as

only 20.8% of participants said 'yes' to at least one of the composite training questions. The

majority of our participants (79.0%) had been trained through CLE courses.

        We also asked participants whether they felt their eyewitness training was self-taught, as

cost and availability of CLE courses may not be an option for all defense attorneys. When asked

about eyewitness knowledge, 57.4% said they were self-taught and 52.4% had self-taught

knowledge when it came to composites. Finally, when asked if they felt properly trained on how

to litigate eyewitness and composite cases, 45.0% of participants claimed they felt sufficiently

trained on how to litigate eyewitness identification cases, while only 13.9% felt they were

Location of Training/Education	Yes	No	Cannot Recall

sufficiently trained on how to litigate composite-related cases.

Table 2

In law school, I attended a class/seminar that covered the topic of eyewitness identification.	20.8% (21)	74.3% (75)	5.0% (5)
In law school, I attended a class/seminar that covered facial composites.	1.0% (1)	96.0% (107)	3.0% (3)
Since graduating from law school, I have attended at least one (CLE) session in which the topic of eyewitness identification was covered.	79.0% (79)	18.0% (18)	3% (3)
Since graduating from law school, I have attended at least one (CLE) session in which the topic of facial composites was covered.	19.8% (20)	74.3% (75)	5.9% (6)
I have consulted with an eyewitness identification expert in trial preparation.	54.5% (55)	44.6% (45)	1.0% (1)

Participant responses regarding where they were educated and trained on eyewitness

identification topics.

Knowledge through expert witnesses. Expert witnesses' in the field of eyewitness identification give consultations (primarily) for defense attorneys and often give the attorney they are consulting with a 'crash course' on various eyewitness topics related to the facts of case. Being that consultations are more one-on-one and can span over a longer amount of time than a classroom or CLE presentation, we asked participants if they had ever consulted with an eyewitness expert in trial preparation. We found that 66.0% of participants have attempted to contact an expert and that 54.5% of participants had consulted with an expert witness. An additional 29.7% of participants actually had an expert testify at a hearing or trial. We understand that not every defense attorney has the time and financial resources to use an expert witness but we wanted to get an understanding of how attorneys value experts. When asked if they believed it would be helpful to consult with an expert on eyewitness identification issues, 98.1% of participants agreed that it would be beneficial. When asked if it would be helpful to

consult with an expert on composite-related issues, 99.0 % of participants agreed that it would be beneficial.

Litigation confidence. Given our (supported) hypothesis that defense attorneys would be poorly trained in composite-related cases, we wanted to know how confident they felt in their ability to proficiently litigate these cases. Over two-thirds of our sample (69.3%) were confident in their abilities to proficiently litigate an eyewitness identification-related case whereas only 30.3% of participants had confidence in their ability to litigate composite-related cases. On the other end of the spectrum, 16.9% of participants were not confident in their ability to litigate an eyewitness case and more than half (50.5%) were not confident that they could proficiently litigate a composite related case.

Courtroom Experience with Composites

Our final hypotheses focused on the experiences of defense attorneys in the courtroom when they defend composite cases. To better understand the participants' level of experience, we asked about the number of clients they have had over their career and some characteristics of the charges their clients had faced. The total number of criminal defendant clients represented by our participants (n =98) was 126,443. Within that number 2,304 clients (1.8%) were charged primarily based on eyewitness identification evidence and a total of 409 clients (0.3%) were charged in part (310) or entirely (99) because of their similarity to a composite. Forty-eight of the participants represented the 310 clients that were charged in part because of their similarity to a composite and of those participants, 28 of them represented the 99 clients who were charged entirely because of their similarity to a composite. When asked if they had ever filed a motion to suppress composite evidence (and how many), 11 participants said they had, for a total of 43 motions to suppress composite evidence. In other words, in only 10.5% of cases where a

composite was present and used to implicate the defendant did the defense attorney file a motion to suppress that evidence. Only four participants stated that a judge granted them a hearing based on their motion, for a total of 17 hearings. And of the four participants who had a hearing, only one person was able to successfully have the evidence suppressed and they did this a total of three times. That is, composite evidence, a notoriously unreliable form of identification evidence, was suppressed in 0.7% of cases.

When asked how many of their clients were convicted through plea bargain or trial primarily on the basis of a positive eyewitness identification, 82 participants said that 1,534 of their clients were convicted. That means that of the 2,304 clients charged based on eyewitness evidence, 66.6% were convicted. When asked how many of their clients were convicted through plea bargain or trial in part because of their similarity to a composite, 29 participants said that 102 clients were convicted. That means that of the 409 clients charged based in part or entirely on similarity to a composite, 24.9% were convicted.

Participants' Attempts To Litigate Motions to Suppress

To gain a better insight as to why defense attorneys are unsuccessful at suppressing composites, we analyzed their responses to our open-ended questions. We examined participants' perceptions of success and of failure, and descriptions of strategies used to defend a composite case at trial. We had very few participants (7) who responded to our open-ended questions and therefore it was not possible to develop themes with this small sample.

The first question asked participants why they believe they were successful in having a composite suppressed. We only received one response, which was expected given our findings above. This participant wrote "A combination of the use of expert testimony for my client, the sketch artist's lack of training/experience and the perceiving witness's lack of certainty."

The second question we asked participants was, "If you have filed a motion to suppress a composite sketch and were unsuccessful, please describe why you believe your motion was denied and what you would do differently in the future when trying to suppress composite sketch evidence." Out of the seven participants who responded, four felt that they were unsuccessful due to issues with the judge. Others felt that they were unsuccessful due to a lack of resources, the unfavorable case law in the state where they were trying the case, or that they simply lacked the basis for suppression of evidence. For future cases, five participants noted that they should use an expert witness. Others noted that it would be important to use more science, affidavits, and/or motions and to do a much more aggressive discovery of the sketch artist's training/experience. Below is a response from one of the participants that describes the complexities of these cases and the many factors that go into each case:

> The judge simply lumped the arguments in with the Wade/other ID issues and did not decide it as a separate issue. I would file two separate motions to make it much more clear. I also would speak to an expert in that field to see about better ways of filing such a motion. I have only had one case where a composite sketch was used in all my years as a defense attorney.

The third and final question we asked was, "If you have litigated a case where the prosecution introduced a witness' composite, please describe the strategies you used to explain the composite evidence to the jury. Feel free to use specific examples". We received responses from six participants to this open-ended question. One participant "used an eyewitness identification expert to describe the research on how composite sketches affect the witnesses' memories." The other five participants used discrediting strategies. As an example:

> I have tried a few with sketches but that was before experts were allowed. In one, the Commonwealth chose not to use the composite. In another, the sketch was produced months after the incident, and (I thought) looked little like my client. I used his arrest photo and the sketch side by side to show the dissimilarities. In another I compared the sketch to a jigsaw puzzle shoved together where it looked okay from a distance, but up

close you could see it didn't really look like him at all.

The responses given by the participants indicate that judges may be one of the key factors in unsuccessful motions. As mentioned in the literature review, judges tend to know less about eyewitness identification issues and yet the still find the evidence to be believable (Wise & Safer, 2004; Douglass & Pavletic, 2012). The participants also noted the importance of expert witnesses, which is consistent with our findings earlier in the section when we asked participants how they valued experts. This finding is also consistent with the recommendation given by Wells, Greathouse, and Smalarz (2012), who noted the importance of using expert witnesses in hearings.

Discussion

Previous research has attempted to assess what judges, experts, and lawyers know about eyewitness identification issues (Brigham & Wolfskeil, 1983; Kassin et al., 1989; Kassin et al., 2001; Wise & Safer, 2004; Wise et al., 2009). What these studies lacked, however, was an assessment of knowledge concerning composites. This study sought to fill a gap in our knowledge of composites by asking defense attorneys about their overall experience with and knowledge of composites. This is an important area for investigation because the presence of composite evidence in DNA exoneration cases is substantially higher than their use in criminal investigations. We hypothesized that participants would have some knowledge about general eyewitness identification issues (because this type of evidence is common) but would be less trained and educated on composites. The results showed that our sample of defense attorneys were very knowledgeable about eyewitness identification issues, as they answered quite similarly to experts in the field. In fact, because we sampled from the Cardozo Law School National Forensic College sample, we likely had a more educated group of defense attorneys than is

representative of defense attorneys across this United States. Thus, the lack of confidence in their ability to proficiently litigate composite cases and the paucity of successful motions to suppress are likely indicative of a larger problem nationally.

We also found that the vast majority of participants had been trained on eyewitness issues. This knowledge and training appears to have come from a variety of sources, including CLE courses, expert witness consultations, law school, and from their own experiences in the field (i.e. self-taught). In contrast, and as expected, we found participants to be less knowledgeable and trained on composite-related issues. Therefore, it was not surprising that over half the participants reported that they did not feel that they had sufficient training on how to litigate composite cases. This was not a reflection of general litigation confidence, as nearly 70 percent of respondents felt confident in their ability to proficiently litigate an eyewitness case. In summary, participants felt that they lacked sufficient training on both eyewitness issues and composite issues. However, in both cases, the participants gave higher levels of confidence to litigate these cases. One explanation for this could be that being self-taught can boost an attorney's confidence, as we found that nearly half of the participants are self-taught in both eyewitness and composite cases. Another explanation for this could be past experiences. Overall, this result suggests that more training and education on the topic of composites needs to be included in future CLE courses that address eyewitness identification.

In the field of forensic psychology, we know how invaluable expert witnesses are to court cases; their testimony educates judges and juries and can be vital to combating unreliable evidence. Our participants also seemed to hold expert witnesses in high regard, as nearly all participants viewed experts as a vital tool to use when preparing for trial and many had attempted to contact experts and consult with them during trial preparation. In an ideal world, where every

defense attorney has a manageable caseload and there are a sufficient number of eyewitness

identification expert witnesses willing and available to assist, we would expect to see expert

witnesses used more in trial preparation (and at hearings and trials). So, while it may seem like a

low number of participants in our study actually ended up calling an expert to testify during a

hearing or trial (29.7%), we believe that this figure is actually quite high. In comparison to the

frequency with which defendants across the United States are charged, in part, due to eyewitness

evidence, there are very few eyewitness identification expert witnesses available to testify in

criminal cases. Further, budget constraints on public defender services may not allow for an

expert witness to be hired. Thus, increased funding and additional training of expert witness is

also recommended as a partial solution to increased training for defense attorneys.

Consistent with research on motions to suppress identification evidence (Wells et al.,

2012), our final hypothesis predicted that participants would report having been generally

unsuccessful in their attempts to suppress composite evidence at trial. In fact, we found that

participants were decidedly unsuccessful at having their motions suppressed. From the entire

sample, only one person was able to successfully have their motions granted (three times).

Another jarring discovery is how few of the participants actually filed a motion to suppress

composite evidence; 11 participants to be precise. While we cannot speak for exact reasons

based on our survey, evidence from the literature gives a possible explanation. As mentioned in

an earlier section, defense attorneys may develop a defeatist attitude due to the fact that (it would

appear) no matter how much effort they put into their motions, judges consistently deny them

(Wells et al., 2012). It is possible that defense attorneys would rather put their energies into the

trial itself instead of filing motions to suppress evidence they believe will nonetheless be

admitted at trial. For those that had filed motions to suppress composite evidence, they believed

they were unsuccessful because of an issue with the judge(s). They also felt that they should have had an expert witness give their testimony to the judge in an effort to educate the judge on the issue at hand. A consequence to these motions being unsuccessful is that individuals are being convicted based, in part, on unreliable evidence. We are not suggesting that every person convicted of a crime based, in part, on eyewitness evidence is innocent. However, convicting individuals on the basis of notoriously unreliable evidence is contrary to the fair administration of justice.

As with all research, our study had a few limitations. First, using survey methodology, it was not possible to assess the full level of (nuanced) knowledge that our participants may have about eyewitness identification and composite issues. This is due in part to time constraints and the use of a questionnaire, as opposed to a dynamic interview where follow-up questions could be asked. Our study was also limited in that we had a small sample size. A larger sample size from a variety of different sources would likely yield results that resemble the general population of defense attorneys. Thus, we believe that our results likely overestimate the knowledge and training that defense attorneys have across the country as well as their "success" in motions to suppress composite evidence.

We believe that future research on this topic should ask attorneys to provide redacted copies of the motions to suppress that they have submitted in actual cases. The redaction would be important for confidentiality of the participant as well as their client(s). In addition, future research should collect transcripts of suppression hearings to see what arguments were made by the defense attorneys and prosecutors. Any written decisions made by the judges in these cases would also be useful to assist in determining why a motion was successful or denied. On this issue, most of our participants gave general explanations for the motion's failure, such as an

issue with the judge. Future research should also adapt this survey and administer it to judges to examine what they know about composites, how reliable they view the evidence, and why they often deny motions to suppress the evidence.

Decades of scientific research has shown that composite evidence is extremely unreliable. It is our hope that this study can aid defense attorneys in their future composite cases and aid in the (appropriate) suppression of this unreliable evidence by further educating judges on this issue. We hope that this study inspires change in the criminal justice system by advancing the knowledge of all of the members of the court on composites and helping protect innocent individuals from being wrongfully convicted.

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Appendix A

Composite Questionnaire

Practice history

* 2. In what state/territory do you currently reside?

* 3. In what year did you pass the bar?

* 4. Are you currently practicing law?

○ Yes

○ No, I am retired

○ Other (please specify)

* 5. In what states are you (or have you been) licensed to practice law? Select all that apply.

☐ AL	☐ ME	☐ OR
☐ AK	☐ MD	☐ PA
☐ AZ	☐ MA	☐ RI
☐ AR	☐ MI	☐ SC
☐ CA	☐ MN	☐ SD
☐ CO	☐ MS	☐ TN
☐ CT	☐ MO	☐ TX
☐ DE	☐ MT	☐ UT
☐ FL	☐ NE	☐ VT
☐ GA	☐ NV	☐ VA
☐ HI	☐ NH	☐ WA
☐ ID	☐ NJ	☐ WV
☐ IL	☐ NM	☐ WI
☐ IN	☐ NY	☐ WY
☐ IA	☐ NC	☐ Guam
☐ KS	☐ ND	☐ Puerto Rico
☐ KY	☐ OH	☐ US Virgin Islands
☐ LA	☐ OK	

☐ Other (please specify)

[   ]

* 6. Please indicate the number of years you have been (or were) employed in each position listed below. Enter "0" if applicable.

Public defender [   ]

Private defense attorney [   ]

Prosecutor [   ]

Civil attorney [   ]

Other [   ]

Eyewitness Questions

The following questions examine your knowledge in the area of eyewitness identification.

* 7. Please select your level of agreement for each statement below.

	Strongly agree	Agree	Neither agree or disagree	Disagree	Strongly disagree	Not sure
Very high levels of stress can impair the accuracy of eyewitness testimony.	○	○	○	○	○	○
The presence of a weapon can impair an eyewitness's ability to accurately identify the perpetrator's face.	○	○	○	○	○	○
The rate of memory loss for an event is greatest right after the event and then levels off over time.	○	○	○	○	○	○
Eyewitnesses are more accurate when identifying members of their own race/ethnicity than members of other races/ethnicities.	○	○	○	○	○	○
Eyewitnesses sometimes identify someone they have seen in another context as a culprit to a crime, instead of the actual perpetrator.	○	○	○	○	○	○
The quicker an eyewitness makes a positive identification, the more accurate he or she is likely to be.	○	○	○	○	○	○

* 8. Please select your level of agreement for each statement below.

	Strongly agree	Agree	Neither agree or disagree	Disagree	Strongly disagree	Not sure
Exposure to mug shots of a suspect increases the likelihood that the witness will later choose that suspect from a lineup.	○	○	○	○	○	○
An eyewitness's confidence can be influenced by factors that are unrelated to identification accuracy.	○	○	○	○	○	○
Eyewitness testimony about an event can reflect not only what they actually saw but information they obtained after the event.	○	○	○	○	○	○
In the United States, the most common technique that is used to produce facial composites is the use of a police sketch artist.	○	○	○	○	○	○
Eyewitnesses typically produce facial composites that accurately portray the perpetrator.	○	○	○	○	○	○
Participating in the creation of a facial composite will have no impact on an eyewitness' later ability to recognize the perpetrator (e.g., from a lineup).	○	○	○	○	○	○

Training and Education

The following questions are related to your training and experiences with eyewitness identification and facial composite cases. Please answer as accurately as you can.

* 9. Please select the best answer for each question below.

	Yes	No	Cannot recall
In law school, I attended a class/seminar that covered the topic of eyewitness identification.	○	○	○
In law school, I attended a class/seminar that covered facial composites.	○	○	○
Since graduating from law school, I have attended at least one (CLE) session in which the topic of eyewitness identification was covered.	○	○	○
Since graduating from law school, I have attended at least one (CLE) session in which the topic of facial composites was covered.	○	○	○
I have consulted with an eyewitness identification expert in trial preparation.	○	○	○
I have had an eyewitness identification expert testify at a hearing or trial.	○	○	○
I have never attempted to contact an eyewitness expert.	○	○	○

* 10. Please indicate whether you agree or disagree with the following statements.

	Strongly agree	Somewhat agree	Neither agree or disagree	Somewhat disagree	Strongly disagree	Not sure
My knowledge about eyewitness identification is self-taught.	◯	◯	◯	◯	◯	◯
My knowledge about composite sketches is self-taught.	◯	◯	◯	◯	◯	◯
I have received sufficient training on how to litigate cases that involve eyewitness identification evidence.	◯	◯	◯	◯	◯	◯
I have received sufficient training on how to litigate cases that involve composite sketch evidence.	◯	◯	◯	◯	◯	◯
I am confident that I can proficiently defend a case where eyewitness identification plays a significant role in the state's case against my client.	◯	◯	◯	◯	◯	◯
I am confident that I can proficiently defend a case where a composite sketch plays a significant role in the state's case against my client.	◯	◯	◯	◯	◯	◯
It would be helpful to consult with an eyewitness identification expert when preparing to litigate an eyewitness identification case.	◯	◯	◯	◯	◯	◯
It would be helpful to consult with an eyewitness identification expert when preparing to litigate a case that includes composite sketch evidence.	◯	◯	◯	◯	◯	◯

Experience

* 11. Approximately how many criminal defendant clients have you had over your career as a defense attorney?

* 12. Over your career, approximately how many times have you had cases that meet the descriptions below?

	Number of cases
My client was charged primarily on the basis of a positive eyewitness identification.	
My client was charged - in part - because of his/her similarity to a composite sketch.	
My client was charged almost entirely on the basis of his/her similarity to a composite sketch.	
I filed a motion to have a composite sketch suppressed.	
Based on my motion, the judge held a suppression hearing and heard evidence on the composite sketch.	
I was successful in my motion to have the composite sketch suppressed.	
My client was convicted - through plea bargain or trial - primarily on the basis of a positive eyewitness identification.	
My client was convicted - through plea bargain or trial - in part because of his/her similarity to a composite sketch.	

Open Ended

Lastly, we have a few open-ended questions that go into more detail about the cases you have had involving composite sketches. Please write as much as you like for these open-ended questions but do not include any identifying information about your client.

13. If you have successfully litigated a motion to suppress a composite sketch, please describe why you believe you were successful in having the sketch suppressed.

14. If you have filed a motion to suppress a composite sketch and were unsuccessful, please describe why you believe your motion was denied and what you would do differently in the future when trying to suppress composite sketch evidence.

15. If you have litigated a case where the prosecution introduced a witness' composite sketch, please describe the strategies you used to explain the composite sketch evidence to the jury. Feel free to use specific examples.

Demographics

Finally, we need some basic information about you for our analyses.

16. What is your age?

[   ]

17. What is your gender?

( ) Female

( ) Male

( ) Prefer not to say

( ) Other (please specify)

[   ]

* 18. What degrees you have earned? Select all that apply.

[ ] PhD

[ ] JD

[ ] Master's

[ ] Bachelor's

[ ] Associate's

[ ] Other (please specify)

[   ]

Appendix B

Email Request

Dear Potential Participant,

I am writing to let you know about a study being conducted by Marisa Jaross and Dr. Jennifer Dysart at John Jay College of Criminal Justice. We received your email from the NACDL [or Innocence Project] list serves. The purpose of this research study is to gain a better understanding of what defense attorneys know about eyewitness identification and, in particular, composite sketches.

If you are a defense attorney practicing in the United States, you are eligible to participate in this study. Your participation in this study is voluntary. Although you will not be paid for participating, we will be holding a raffle with three cash prizes for those who do participate. Whether or not you participate in this study, it will have no effect on your relationship with John Jay College of Criminal Justice or NACDL [The Innocence Project].

If you are interested in learning more, please click on the link to the survey. This will take you to a consent form that requires you to read the form. If you continue to the survey we assume that you have read the potential risks for this study. We will not be asking for signatures to ensure that your answers will remain anonymous. If you would like to participate but do not wish to do the survey online, email us and we will send you a hard copy of the survey as well as a pre-paid return envelope.

There is no need for you to respond if you are not interested in participating in this study. If you do not respond you may receive a follow-up email that you can simply disregard.

Thank you for your time and consideration.

Sincerely,
Marisa Jaross & Dr. Jennifer Dysart

Appendix C

Consent Form

Dear Research Participant,

Thank you for taking the time to consider participating in this important research on composite sketches used in eyewitness identification cases. You have been given a link to this survey on composite sketches because you are a defense attorney who practices or practiced in the United States. If you are not a defense attorney or were not a defense attorney, we apologize for any inconvenience and thank you for your time.

The purpose of this research study is to assess the level of knowledge, training, education, and experience that defense attorneys have with composite sketch cases. The results of the survey will be distributed nationally to assist defense attorneys when preparing to defend a case that involves a composite sketch created by an eyewitness.

If you volunteer to participate in this research study, we will ask you to answer questions pertaining to eyewitness identification cases generally, followed by questions specifically related to composite sketches. We will also ask you to provide demographic information that will assist in our analyses and the distribution of the results. We expect the survey to take between 15 and 30 minutes, depending on how much information you would like to provide. Your results will be kept confidential.

Risks and Benefits:

If you feel any discomfort as a result of answering the questions in this survey, you can withdraw your participation at anytime without any penalty or punishment. If you decide at any point in time during the study that you wish to withdraw, you may click the "Withdraw" button on the screen. The screen will ask whether you want to leave an incomplete survey or discard all answers. Just choose one choice and the screen will allow you to withdraw from the survey.

Although you may not directly benefit from your participation in this research study, we hope that other defense attorneys will benefit. Based on the possible publication of the results of this study, defense attorneys may be able to utilize the findings to aid in their defense of composite sketch cases.

Compensation for participation:

Although you will not be paid for participation, we are providing a lottery and will randomly choose five participants to receive a cash reward. The first three winners will receive $100 each and another two winners will receive $50. Entry into the lottery is optional and is only open for those who complete the survey.

New Information:

As required by ethics regulations, you will be notified about any new information regarding this study that may affect your willingness to participate.

* 1. To consent to participate in this survey, please select "Yes" below.

○   Yes, I agree to participate

Appendix D

Debriefing Form

Thank you for participating in this study! The general purpose of this research is to assess the level of knowledge, education, training, and experiences that defense attorneys have about composite sketches.

The results from this study will help us gain insight into how much U.S. defense attorneys know about composite sketches. Through this understanding we hope to aid defense attorneys in their future cases and help prevent innocent defendants from being wrongfully convicted. Further, the more people who complete the survey, the stronger the conclusions we will be able to make regarding the state of knowledge and experience with composite sketch cases. Therefore, if you would like to send this survey to other defense attorneys you know, we would be truly appreciative.

Again, thank you for your participation in this study. If you have further questions, please contact Dr. Jennifer Dysart at 212-484-1160 or at jdysart@jjay.cuny.edu.