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President's Column

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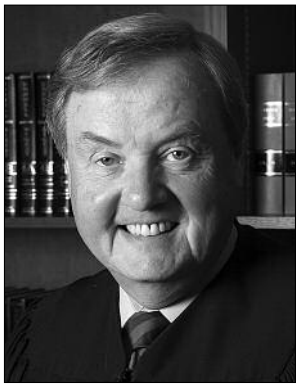
President's Column

On the Road to Making Better Judges™

Kevin S. Burke

The American Judges Association Executive Committee had a fascinating discussion last spring. Like many things in life the topic wasn't planned; it just happened. The discussion began with reflection: what does the American Judges Association stand for? What is it that our association can do to justify judges joining? The answer was simple: The mission of the AJA is to make better judges. And so we modified our motto. Yes, the AJA will continue to be the Voice of the Judiciary®, but our goal is not just to be a voice for judges, but also to seek to make better judges.



This edition of *Court Review* is as important as any we have ever published because the entire focus is on helping judges better understand and deal with eyewitness-identification issues. I hope you do two things with it. First, take the time to read this issue. Second, after you read it, share this issue of *Court Review* with a colleague who is not currently a member of the AJA. Better yet, share the edition and offer your colleague a free one-year membership. Just send an email with your colleague's name and address and email it to Shelley Rockwell (srockwell@ncsc.org). For AJA to be an effective voice and an influence on making better judges, we need to expand our membership.

Justice William J. Brennan, Jr. once wrote, "[t]here is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'" Any trial judge knows all too well just how right Justice Brennan was. Researcher Elizabeth Loftus demonstrated the strength of eyewitness testimony in a mock-trial experiment: some jurors heard a case with an eyewitness, some without. With no eyewitness, only 18% of jurors gave guilty verdicts; with an eyewitness, the guilty rate rose to 72%. Even when the identification was impeached with strong evidence, the guilty rate was still 68%. But since Justice Brennan wrote, social scientists have proven that eyewitness identification is not only powerful—it also is often unreliable.

Despite this, the United States Supreme Court limited the constitutional challenges to eyewitness testimony in a case decided earlier this year. A man named Barion Perry had been detained at the crime scene, handcuffed after being suspected of breaking into cars. Without specifically being asked by police to identify the suspect, a neighbor pointed out Perry from a nearby window as the alleged thief. In an opinion written by Justice Ginsburg, the Court held that there was no due-process violation when law-enforcement officers haven't engaged in any improper conduct, and officers hadn't arranged for neighbor's identification of the handcuffed defendant. Even so, Justice Ginsberg did warn police and prosecutors to be careful about the trustworthiness of eyewitness testimony, and Justice Sotomayor issued a forceful dissent.

Although the United States Supreme Court has decided the due-process issue at the federal level, other issues—how to treat eyewitness testimony, what instructions to give, and what judges can learn from social scientists—remain alive.

Faced with these problems, the New Jersey Supreme Court devoted considerable time to examining what judges should do about eyewitness testimony. As a result, New Jersey jurors will be getting instructions from judges encouraging them to consider eyewitness testimony more skeptically. Also new are evidence-gathering rules spelling out how law enforcement and other investigators should record details on how an identification is made. While some proponents of the New Jersey rules claim that these changes will strengthen the justice system, save money, and reduce appeals, the real issue is this: Can we tolerate convicting and incarcerating people for crimes in which they are actually innocent?

In an article written right before the oral argument in Barion Perry's case Adam Liptak of the *New York Times* said, "Every year, more than 75,000 eyewitnesses identify suspects in criminal investigations. Those identifications are wrong about a third of the time, a pile of studies suggest." The system of justice inherently involves human error and it always will. As Katharine Graham once said, "A mistake is just another way of doing things." The goal of good judges must be to get it right all of the time. This issue of *Court Review* is our contribution toward reaching that goal.