

## A Judicial Response to a Longstanding Problem: Faulty Eyewitness Identification

Recently the Oregon Supreme Court, in a unanimous decision, upended how eyewitness identification is to be used in criminal trials. The article in The New York Times (2012) indicated that misidentification is the country's leading cause of wrongful conviction. Indeed, Rattner found that of 210 cases of DNA exoneration 52% of those cases of wrongful conviction were due to faulty eyewitness ID.

Prior to the recent ruling of by the Oregon Supreme Court, trial courts had to assume eyewitness ID was admissible unless defendants could show they were unreliable. Trial courts also relied heavily on the eyewitness's report of their own reliability, even though that was an issue. With the recent Oregon Supreme Court decision, the court took into account three decades of scientific research showing that memory and perception can be highly unreliable. "Because of the alterations to memory that suggestions can cause," the court said, "it is incumbent on courts and law enforcement personnel to treat eyewitness memory just as carefully as they would other forms of trace evidence-like DNA, blood stains, or fingerprints, the evidentiary value of which could be impaired or destroyed by contamination." The justices further ruled that even if the state proved that an ID is likely to be well-founded, a judge can still bar its use if the defendant establishes that it might be the result of "suggestive police procedures."

### Deviation from the Scientific Standard

There has been a consistent use of procedures that resulted in an increase in faulty eyewitness ID, such as presenting all individuals in a lineup at one time. Despite a multitude of research studies, such as by Gary Wells, showing that sequential presentation in lineups resulted in a significant decrease in error, [law enforcement](#) continues to use traditional lineups. At the same time, with respect to child interviewing techniques, Charles Lamb (2008) established a gold standard for child investigative interviewing. Leading and suggestive questioning continues to be used by law enforcement. Unfortunately it is treated by some prosecutors as fact, whereas the Oregon Supreme Court decision shows that it should not be assumed as fact but should be tested like any other form of evidence.

### The Fallout

In the administration of Attorney General Janet Reno, there was an alarm sounded about the astronomical error rate in eyewitness ID such that Attorney General Reno established a [committee of psychologists](#), public defenders, prosecutors, and law enforcement personnel. These individuals came up with Guidelines For Eyewitness Identification (Department of Justice). These addressed lineups, assessment of state of mind of witnesses by the lead investigator, etcetera, yet one finds these guidelines rarely used, and as a consequence years later, fast forward to the 21st century, one finds it difficult for a day note to go by picking up the paper and reading about an individual who has spent years in prison for a crime that he did not commit. This recently was graphically exposed in the Los Angeles area wherein an eyewitness had identified an individual as committing a murder in an underground garage but years later the eyewitness stated that he did not have his glasses on and that he gave an affirmative answer to the police because "they kept hammering me."

### Factors Influencing Faulty Eyewitness ID

There are event factors that can influence faulty ID such as stress, i.e., addressed by the Yerkes-Dodson formula which found that the degree of impairment of [memory increases](#) with stress level. Moreover, there is fading of memories with time and increased errors when individuals are forced to answer questions.

### Photo Lineups and Mug Shots

Research establishes that witnesses forget facial factors quickly.

### **Effect of Violence**

Buckhart (1974) staged a mock assault in an experiment. Seven weeks later, individuals were to pick the perpetrator from six photos. Sixty percent of the individuals did not correctly ID the perpetrator and two-thirds of these individuals incorrectly chose an innocent bystander at the crime scene.

### **General Eyewitness Ability**

This factor of general eyewitness ability takes into account that some individuals are not detail-oriented. They do not process information such as the average person and have memory impairments and are less well-organized than the average person. This increases error level.

### **Procedures**

Willis and Tuttle (1986) note that there is no clear set of rules for investigators to follow and no standardized set of practices. There are federal standards for eyewitness ID, but these appear to be seldom followed.

### **Confidence Malleability**

Individuals in the legal system can contaminate confidence of an eyewitness who can be manipulated by the timing and content of statements and questions to the eyewitness.

### **Mug Shot as a Detriment**

An eyewitness retains a memory of an image of a photo rather than the person actually seen. Ceci showed that witnesses misidentify a familiar face without a conscious recollection of a previous face and that memory for a target individual can be suggestively influenced by viewing faces and intervening mug shot photos.

### **Trace Alteration Hypothesis**

The trace alteration hypothesis posits that loosely integrated, poor memory permits increased trace intrusions from suggestive external stimuli.

### **Coexistence Hypothesis**

This hypothesis notes that suggestive information is more likely to coexist with memory for original information if the original information is poor and has begun to disintegrate.

### **Cross-Race ID**

The race effect shows that some faces are recognized more accurately by one's own race than cross-race identification.

### **Conclusions**

It is hoped that California and other states will look to the precedent-setting decision of the Oregon Supreme Court to upend eyewitness ID procedures. Hopefully this will not go by the wayside as happened with the federal commission to revamp eyewitness ID procedures. It is heartening that the

court saw to treat eyewitness ID testimony in the same manner as any other type of evidence which needs to be tested for reliability. It behooves all in the judicial system and all individuals involved with eyewitness ID to perceive accounts of these witnesses through the lens of the research and science and with the understanding that memory is fragile and frequency inaccurate. We can do nothing but a robust effort in this area, as even the wrongful incarceration of one individual is one too many.

**References:**

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