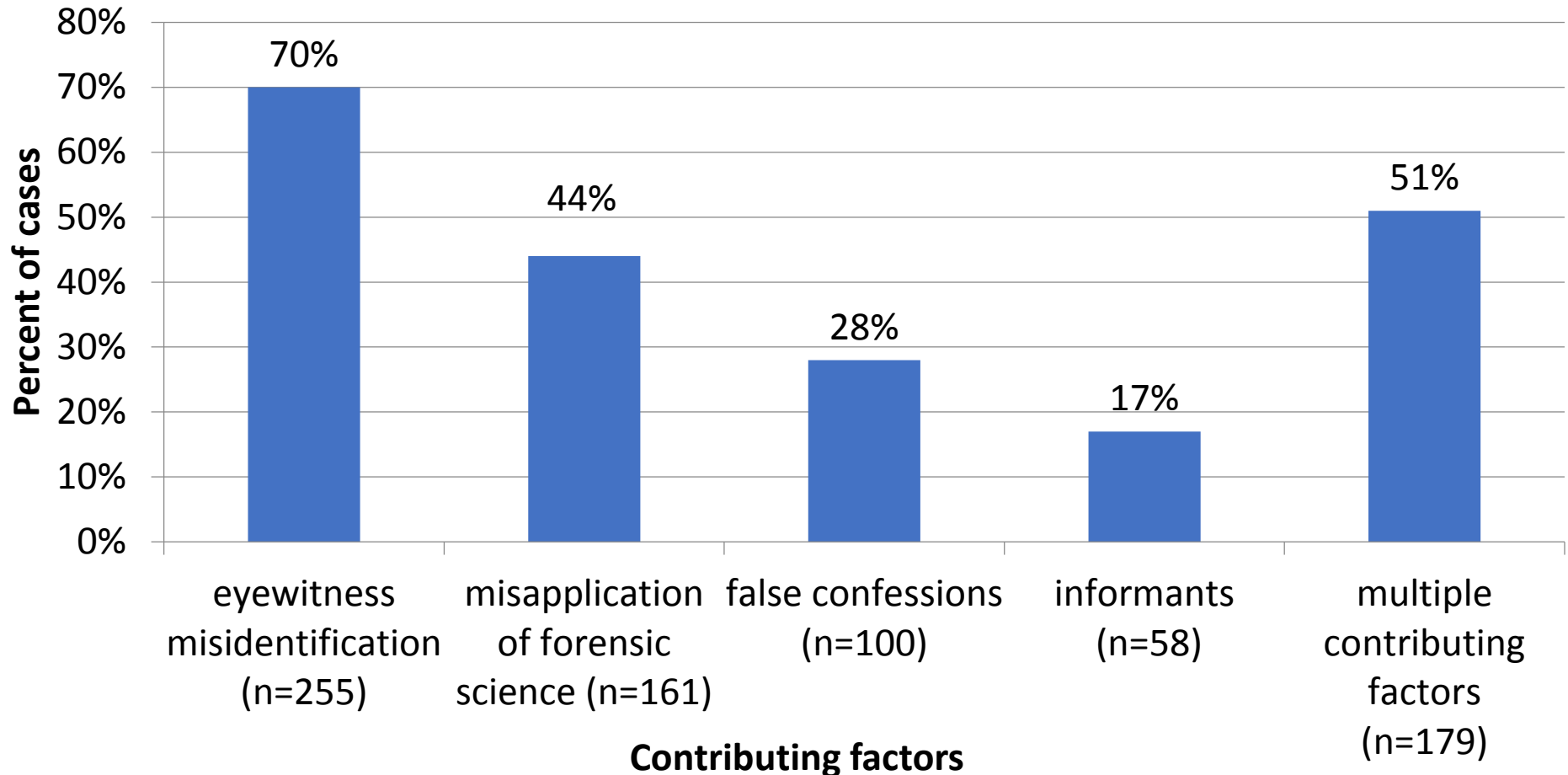




Eyewitness Evidence: Science-Based Litigation Strategies

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Strategic Litigation

Contributing Factors in DNA Exoneration Cases Nationwide (N=365)



Today's Agenda

- **Crash course in the science of eyewitness memory**
- **Suppression motions**
 - *Manson* and its problems
 - Challenging *Manson*
 - Applying science to *Manson*
 - Other approaches to suppression
- **When suppression is denied: Intermediate Remedies**
 - Excluding in-court identifications
 - Seeking enhanced jury instructions
 - Using expert testimony

PART 1:
A Crash Course
in the Science of
Eyewitness Memory

Making an Identification Is a Difficult Task



1. Who was that?

2. Did you notice anything odd?



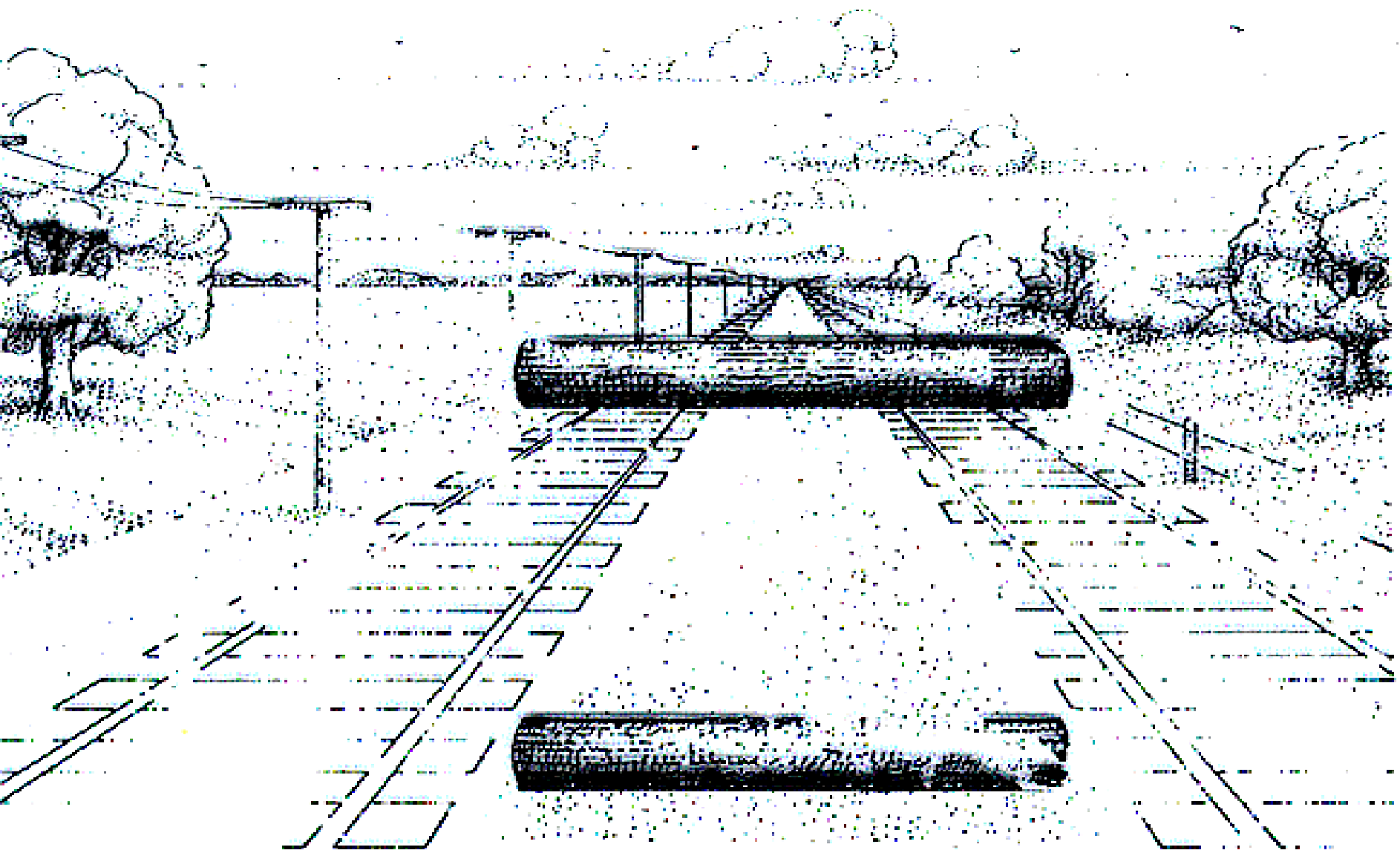
Memory is not like a videotape

Ability to see accurately is limited





Perception is interpretive



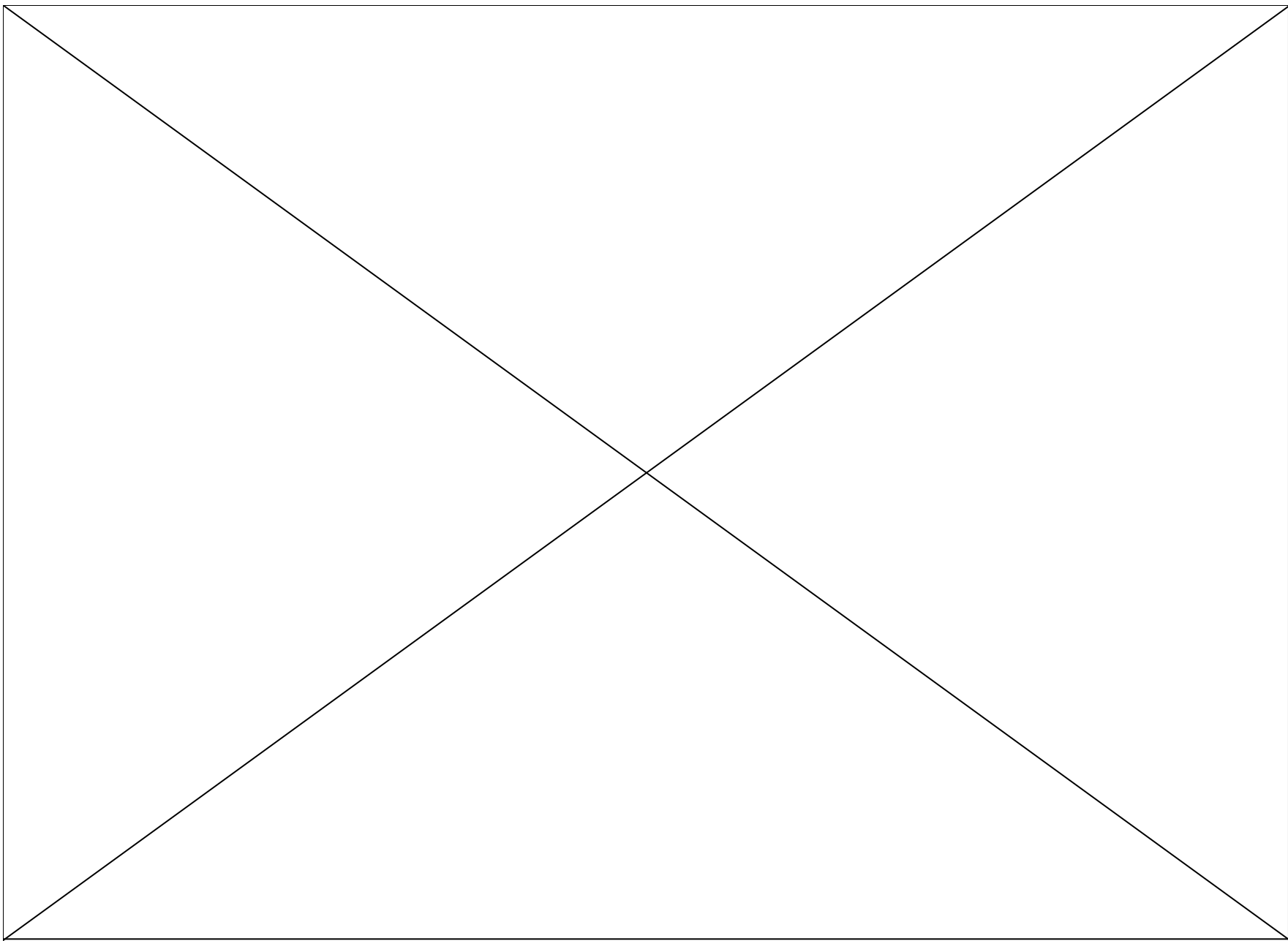
Perception is interpretive



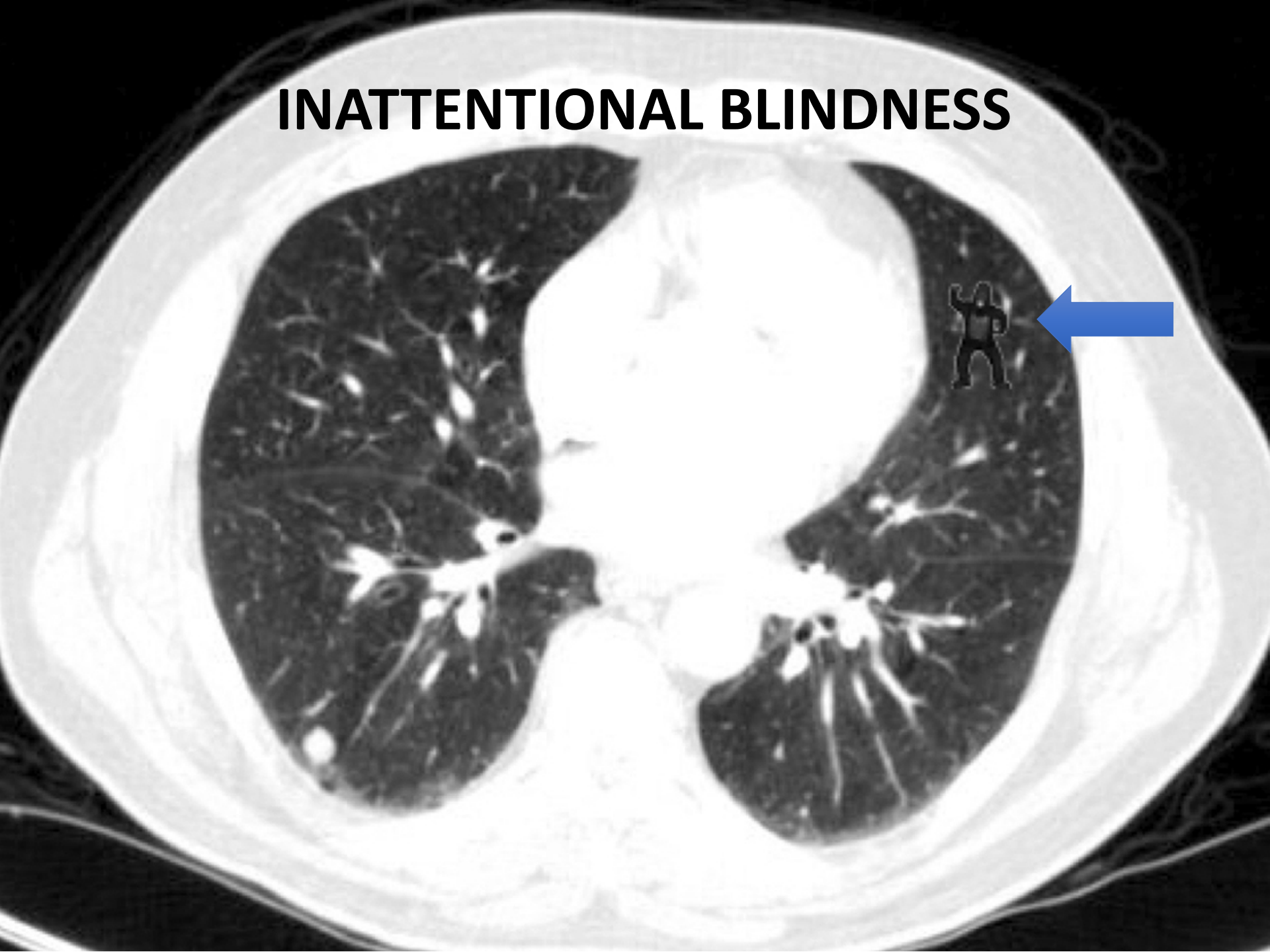
Memory is selective



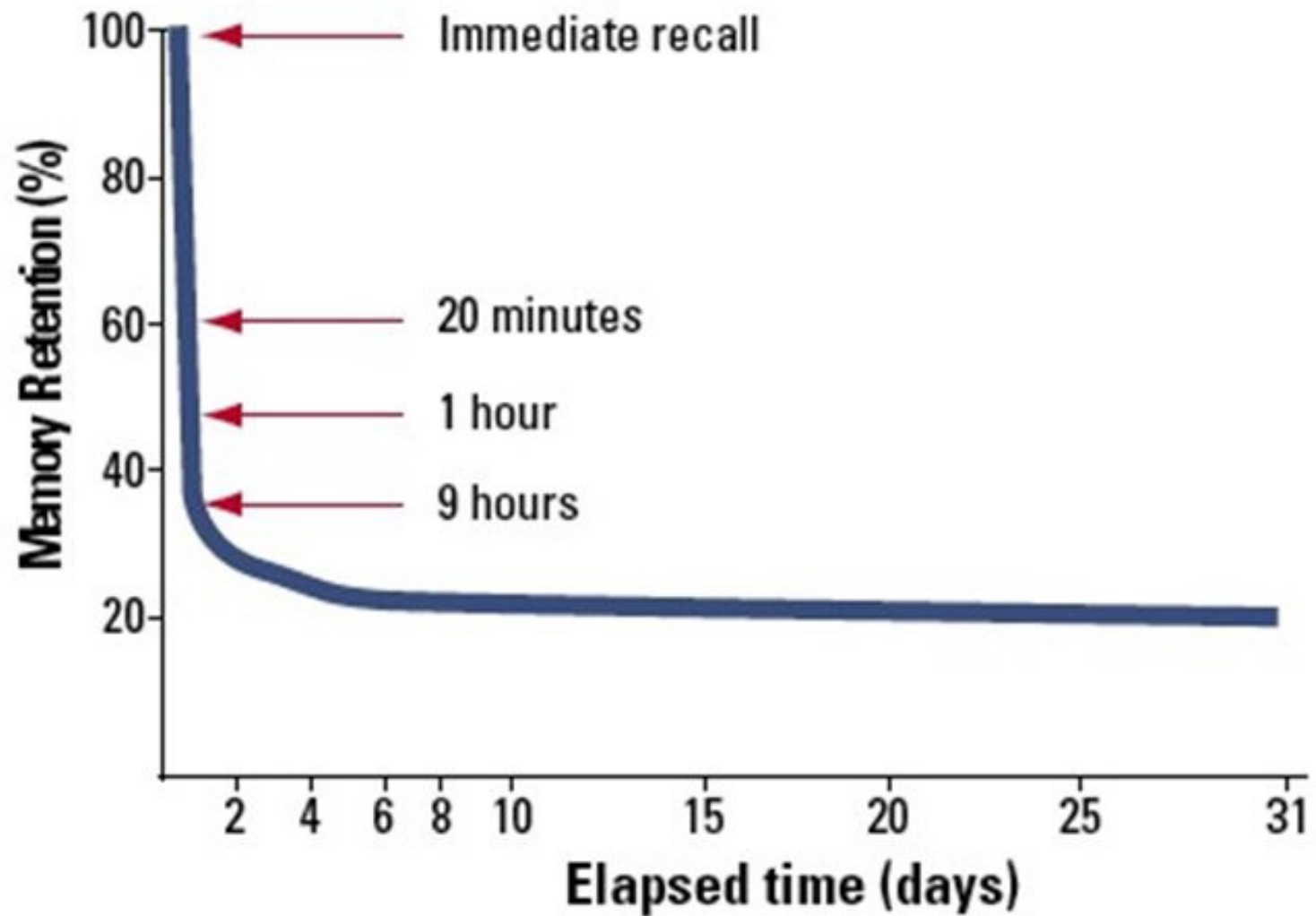
Attention is also selective



INATTENTIONAL BLINDNESS



**Memory deteriorates
over time**



**FORGETTING CURVE – EBBINGHAUS
(1873)**

Memory is capable of change

What Do You See?



Undistorted Image



You Can't “Untaint” Your Memory



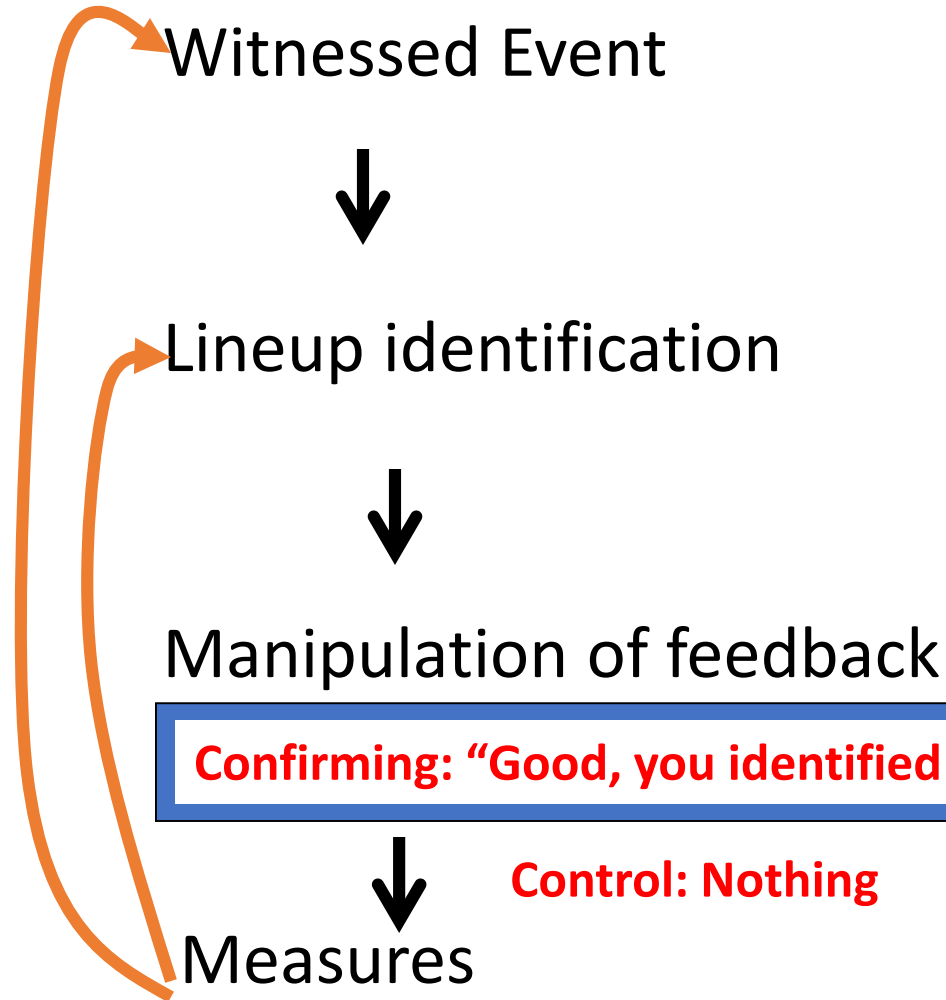
**Memory Can Be Easily
Contaminated**

How do eyewitness memories get contaminated?

- Statements/questions by third parties (police, co-witnesses)
- Media reports
- Memory Source Confusion
- Multiple identification procedures

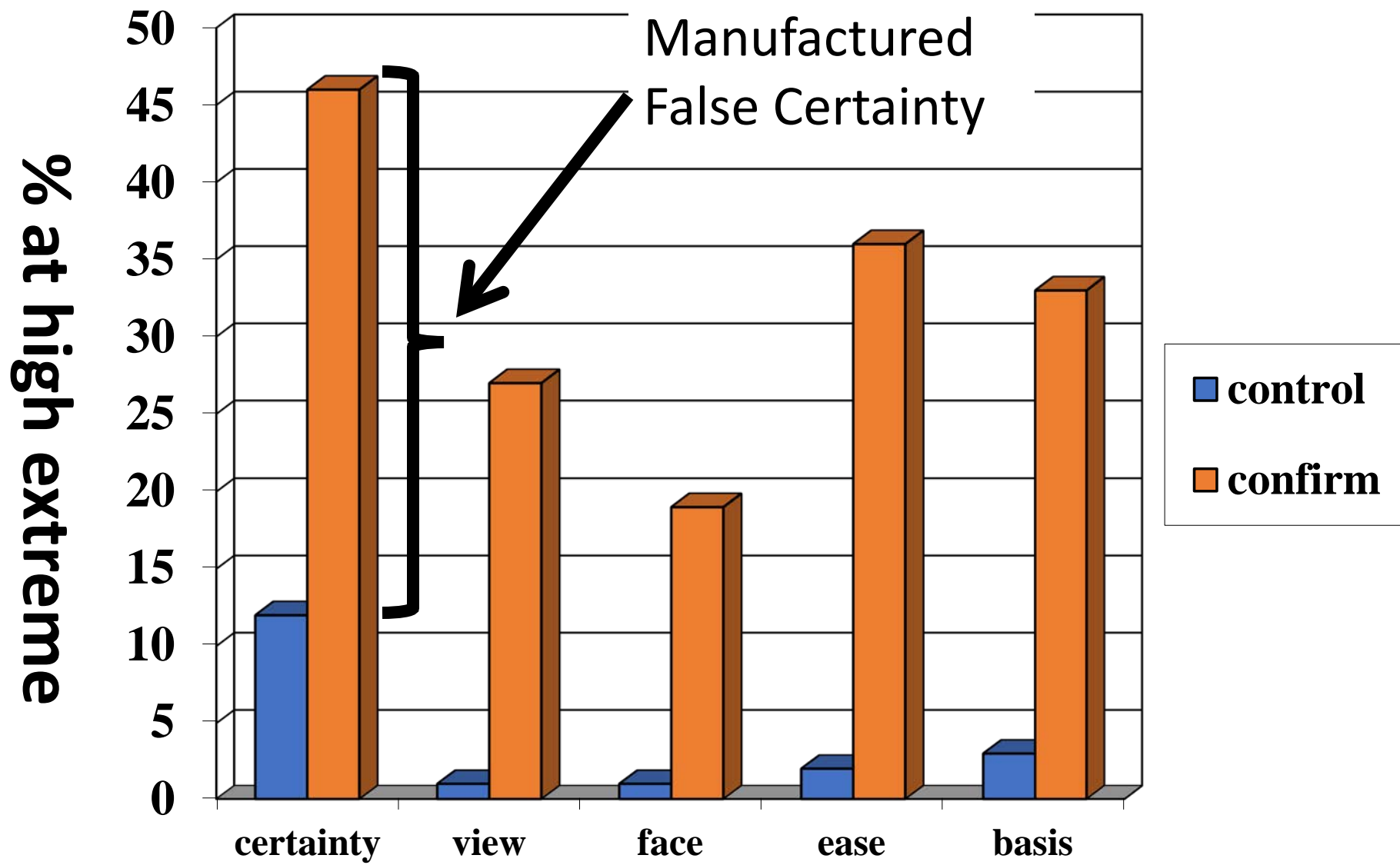
The Post-identification feedback paradigm

[Wells & Bradfield, *Journal of Applied Psychology*, 1998]



Following feedback, participants were asked:

- How **certain** were you **at the time your identification** that you identified the real gunman?
- How good was the **view** you had of the gunman?
- How closely were you paying **attention** to the gunman?
- How well could you make out details of the gunman's **face**?
- How **easy** was it for you to identify the gunman?
- How good of a **basis** did you think you had for making an identification?



Cognition is *designed* for:

- Incomplete observation and encoding into memory, favoring details necessary for current goals and details likely to be needed later
- Inference
- Incorporation of post-event information
- Reconstruction during retrieval

The Trace Evidence Analogy



Lineup Theory

- The lineup is a **memory test** that is designed to give investigators more information than they had before the identification
- It is not a *reasoning* task, but a *recognition* task
- Objectives for law enforcement:
 - construct true memory test
 - avoid any contamination
 - preserve the witness's actual memory

Identification Procedure as Memory Test

- Double blind or blinded administration
- Pre-procedure instructions
- Fair composition
- Recording, including a confidence statement
- Avoid multiple proceedings

Applied Eyewitness Research: Estimator and System Variables

Research on the factors that bear on the reliability of eyewitness identifications “**represents the ‘gold standard in terms of the applicability of social science research to the law.’** Experimental methods and findings have been tested and retested, subjected to scientific scrutiny through peer-reviewed journals, evaluated through the lens of meta-analyses, and replicated at times in real-world settings.”

- *State v. Henderson*, 208 N.J. 208, 283 (2011)

Resources on Memory and Factors that Affect Identification Accuracy

State v. Henderson, 27 A.3d 872 (N.J. 2011)

State v. Lawson, 291 P.3d 673 (Or. 2012) – appendix summarizes scientific findings

National Academy of Sciences (NAS), *Identifying the Culprit* (2014)

Forming Strong Memories: Estimator Variables

- Age
- Race
- Stress
- Distance
- Duration of the observation
- Weapon focus
- Duration between event and recall (retention interval)
- Attention
- Lighting
- Intoxication or other physiological conditions
- Disguise

Preserving and Testing Memories: System Variables

- Number and type of identification procedures
- Type of administrator
- Pre-procedure instructions
- Lineup composition
- Feedback
- Recording

The Eyewitness and the Jury

- Jurors have many misconceptions about eyewitness perception and memory.
- Jurors believe eyewitnesses – even when they are discredited
 - ...more than other witnesses
 - ...more than scientific evidence
- Confidence is single most important factor in whether a factfinder will believe witnesses
- Problem: This is not about truth-telling!

Confident Eyewitnesses

- **Under pristine circumstances, certainty has a good relationship with accuracy.**
 - First procedure
 - One suspect/lineup
 - Suspect does not stand out
 - Witness told the offender may not be present
 - Blind administration
 - Confidence immediately recorded
- **Otherwise, confidence and accuracy not well correlated**
- **Low confidence is always indicative of low reliability.**
- **Confidence is highly malleable**

PART 2:
Applying the Science
In Your Litigation

Motions to Suppress: **The *Manson* Test**

The *Manson v. Brathwaite* Balancing Test

“Reliability is the linchpin in determining admissibility of eyewitness identification evidence.”

1. Were the procedures (conducted by state actors, *Perry v. NH*) impermissibly suggestive? If so –
2. Balance effects of suggestion against “reliability factors.”
 - Opportunity to view
 - Degree of attention
 - Certainty/confidence
 - Accuracy of description
 - Time between crime and confrontation

Manson v. Brathwaite, 432 U.S. 98 (1977)

Suppress only if: “very substantial likelihood of irreparable misidentification.” *Simmons v. United States*, 390 U.S. 377 (1968)

Manson in Missouri

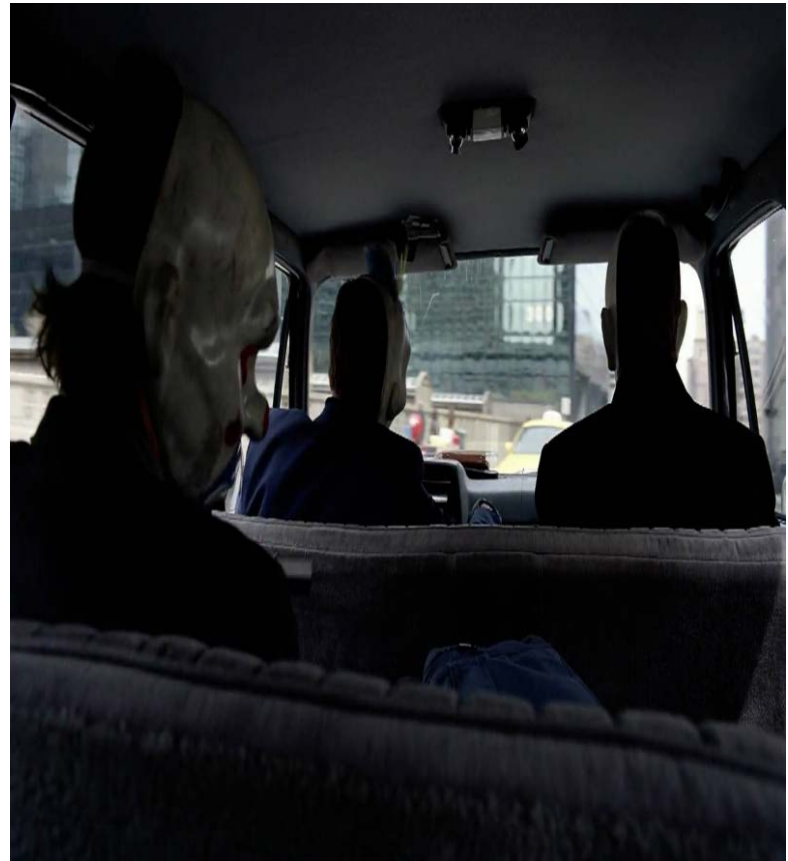
State v. Higgins, 592 S.W.2d 151 (Mo. 1979)

State v. Story, 646 S.W.2d 68 (Mo. 1983)

State v. Weaver, 912 S.W.2d 499 (Mo. 1995)

**What's wrong with the
Manson balancing test?**

Problem 1: Fails to consider the quality of the witness's memory.



Problem 2: Ignores suggestion from non-state actors



Problem 3: Ignores the effect of suggestion on memory

- **Opportunity to view**
- **Degree of attention**
- **Certainty/confidence**
- Accuracy of description
- Time between crime and confrontation

***Manson* creates perverse incentives**

“Rather than act as a deterrent, the [*Manson*] test may unintentionally reward suggestive police practices. The irony of the current test is that the more suggestive the procedure, the greater the chance eyewitnesses will seem confident and report better viewing conditions. Courts in turn are encouraged to admit identifications based on criteria that have been tainted by the very suggestive practices the test aims to deter.”

- ***State v. Henderson***, 27 A.3d 872, 918 (N.J. 2011)

Problem 4: Self-reported factors are subjective and can be unreliable

- **Opportunity to view**
- **Degree of attention**
- **Certainty/confidence**
- Accuracy of description
- Time between crime and confrontation

Problem 6: Does not include some important factors

- Estimator variables (e.g. cross-race, weapon, stress, intoxication)
- Prior non-identification or less-than-certain ID
- Identification speed
- Physical and mental acuity
- Whether ID was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion
- *See, e.g., State v. Ramirez*, 817 P.2d 774 (Utah 1991)

Problem 7: Practical problems

- **Courts are reluctant to suppress IDs and take case away from jury**
 - No intermediate remedies
- **Courts don't "balance" properly**
 - Often don't appreciate suggestion or make detailed findings
 - If there are any reliability factors, they assess independently, ignoring the corrupting effect of suggestion
 - Even though free to, often don't consider more than the enumerated reliability factors
 - Look to other corroboration (otherwise reliable – even though specifically forbidden under *Manson*)

NAS Report (2014)

- “The *Manson v. Brathwaite* ruling was not based on much of the research conducted by scientists on visual perception, memory, and eyewitness identification, and it fails to include important advances that have strengthened standards for judicial review of eyewitness identification evidence at the state level.” (p. 13)
- “The *Manson v. Brathwaite* test ...evaluates the “reliability” of eyewitness identifications using factors derived from prior rulings and not from empirically validated sources. It includes factors that are not diagnostic of reliability and treats factors such as the confidence of a witness as independent markers of reliability when, in fact, it is now well established that confidence judgments may vary over time and can be powerfully swayed by many factors. **The best guidance for legal regulation of eyewitness identification evidence comes not, however, from constitutional rulings, but from the careful use and understanding of scientific evidence to guide fact-finders and decision-makers.**” (p. 30)

Manson “does not adequately meet its stated goals: it does not provide a sufficient measure for reliability, it does not deter, and it overstates the jury’s innate ability to evaluate eyewitness testimony.”

***State v. Henderson*, 27 A.3d 872 (N.J. 2011)**

Manson “does not accomplish its goal of ensuring that only sufficiently reliable identifications are admitted into evidence. . . . Not only are the reliability factors . . . both incomplete and, at times, inconsistent with modern scientific findings, but the [*Manson*] inquiry itself is somewhat at odds with its own goals and with current Oregon evidence law.”

***State v. Lawson*, 291 P.3d 673 (Or. 2012)**

“Developments in the science related to the reliability of eyewitness identifications, and courts’ responses to those developments, have significantly weakened our confidence in the [*Manson*] test as a tool for preventing the admission of unreliable evidence at trial, and therefore its capacity for protecting the due process rights afforded by the Alaska Constitution Ultimately, the movement away from the [*Manson*] test in other jurisdictions, in reliance on advances in the relevant research, convinces us that conditions have changed. We conclude that the legal landscape is very different than it was when we decided to follow [*Manson*] 37 years ago, and this new diversity of opinions among the high courts of states throughout the country is another reason to conclude that the ‘changed conditions’ element of the test for overruling precedent is satisfied.”

Young v. State, 374 P.3d 395 (Alaska 2016)

Manson/Biggers framework “is insufficiently protective of the defendant’s due process rights under the [Connecticut] state constitution.”

State v. Harris, 191 A.3d 119 (Conn. 2018)

Litigating motions to suppress: Applying the research

STRATEGY 1

Challenge ongoing validity of *Manson*

- Test is no longer valid
 - Cite to NAS, *Henderson/Lawson/Young/Harris*, scientific research, and wrongful conviction cases
- Propose a new legal framework
 - Totality of the circumstances test that considers all system and estimator variables;
 - Robust pretrial hearings where witness testifies;
 - Estimator variables alone or non-state actor suggestion can trigger hearing;
 - Ensure jurors have proper context and information – instructions and experts.

STRATEGY 2

Make *Manson* conform with science

- In order to determine whether “unduly suggestive,” must look at strength and independence of memory
 - Estimator variables
 - Contamination
- Suggestiveness determinations must be made in light of scientific research and documented
 - Explain what suggestive system variables do: increase rate of choosing or increase likelihood that client will be selected
 - Where possible, consider independent analysis of the procedure

STRATEGY 2

Make *Manson* conform with science

- **“Reliability factors”** should only be those that are scientifically valid/objectively verifiable -- and should account for suggestion.
- **Opportunity to view**
 - Distance; time; lighting; but also cross-race, disguise, visual acuity, etc.
 - Self-reports of opportunity to view must be seen in light of research
- **Degree of attention**
 - Counter claims of high attention w/research on impact of stress, weapon focus
- **Certainty**
 - ONLY relevant to accuracy when documented at a pristine ID procedure
 - Certainty inflation can demonstrate suggestion or contamination
- **Accuracy of description**
 - Generally not relevant to ability to identify BUT research shows that the presence of inaccurate descriptors correlated with reduced accuracy
- **Time between crime and confrontation**
- **Other factors:** e.g. prior non-IDs, speed to identification, memory “improvement”, multiple procedures, etc.
 - See *Henderson, Lawson, NAS* for good summary of other relevant factors.

STRATEGY 3

Pre-trial judicial inquiry (NAS approach)

“Judges have an affirmative obligation to insure the reliability of evidence presented at trial. To meet this obligation, the committee recommends that, as appropriate, a judge make basic inquiries when [ID evidence] is offered.” (p. 109)

- Judges should, minimally, inquire about prior lineups, information given to eyewitness, instructions, blind administration. Contours dictated by facts.
- Time to entertain requests for additional discovery, review reports/recordings, agency procedures/whether followed.
- Issues with procedures or indicia of unreliability → hearing.

Benefits:

- No need to establish “undue suggestion” or state action to obtain a hearing.
- Totality of the circumstances evaluation.
- Can bring the witness to testify.
- Intermediate remedies.

STRATEGY 4

Evidentiary Approach (*Lawson*)

- **Rule 401 – Relevant?**
- **Rule 602 – Personal knowledge?**
 - Proponent must show “both that the witness had an **adequate opportunity to observe or otherwise personally perceive** the facts to which the witness will testify, and **did, in fact, observe or perceive them**, thereby gaining personal knowledge of the facts.”
 - Helps to ensure reliability by focusing on what the witness knows, not what is or may be the result of suggestion and/or memory contamination.
- **Rule 701 – Lay opinion testimony?**
 - Proponent must establish by a preponderance that the proposed testimony is both **rationally based on the witness's perceptions...**
 - If W did not get a good look at the face, not enough to support inference of identification;
 - Where evidence of “impermissible basis” for the inference, then issue of fact.
 - ...and **helpful to the trier of fact**
 - Lay opinion testimony to be admitted only when the opinion communicates more to the jury than the sum of the witness's describable perceptions.

STRATEGY 4

Evidentiary Approach (*Lawson*)

- **Rule 403**
 - **Probative value:**
 - Direct relationship to reliability of evidence;
 - **Prejudice:** jury research; confidence inflation; absence of context (jury instructions/expert testimony)
 - Especially so where police suggestion: “In cases in which an eyewitness has been exposed to suggestive police procedures, trial courts have a heightened role as an evidentiary gatekeeper because traditional methods of testing reliability—like cross-examination—can be ineffective at discrediting unreliable or inaccurate eyewitness identification evidence.”
 - **Duplicative, confusing, misleading** – especially multiple ID procedures and in-court IDs
- Court can order intermediate remedies (e.g. excluding some testimony)

STRATEGY 4

Evidentiary Approach

- **Benefits:**

- No requirement of undue suggestion or state action;
 - Burden shifts to state to establish reliability of evidence;
 - Totality of circumstances;
 - Can be used when due process analysis fails;
 - Can be used to address each identification;
 - Court can order intermediate remedies
- *State v. Chen*, 27 A.3d 930 (N.J. 2011)
 - *Com. v. Kyle Johnson*, 45 N.E.3d 83 (Mass. 2016)

What to do when suppression is denied?

Seek intermediate remedies!

- Challenge in-court identifications
- Seek enhanced jury instructions
- Use expert testimony

Challenging In-Court Identifications

“All the evidence points rather strikingly to the conclusion that there 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!’”

-*Watkins v. Sowders*, 449 U.S. 341, 352
(1981)(Brennan, J. dissenting)

Limiting In-Court Identifications

- **In-court ID is a dramatic, highly persuasive moment**
- **But it is not a scientifically-sound ID procedure, and is not reliably probative of guilt**
 - Passage of time: months or years after event
 - Much opportunity for contamination between crime and trial:
has previously viewed D, learned more about case
 - Not a memory test: only one right choice, with no possibility of error
 - Pressure to make the identification
 - No possibility of blind administration
 - Pre-procedure instructions would be meaningless
 - Statement of confidence is not correlated with accuracy
- **As suggestive as a show-up with none of the benefits**
- **Best evidence is scientifically-sound procedure, closest in time**

Legal Developments in MA

- ***Comm. v. Choeurn*, 845 N.E.2d 310 (2006)**
 - Excluded in-court ID where their inherent suggestiveness is magnified by the impermissible suggestiveness of an out-of-court ID procedure.
- ***Comm. v. Crayton*, 21 N.E.3d 157 (Mass. 2014)**
 - No out-of-court ID procedure
 - In-court identifications may be more suggestive than show-ups: “Eyewitnesses may identify the defendant out of reliance on the prosecutor and in conformity with what is expected of them rather than because their memory is reliable.”
 - If no out-of-court procedure, “we shall treat the in-court ID as an in-court show-up, and shall admit it in evidence only where there is ‘good reason’ for its admission.”
 - Burden rests on P to move in limine to admit an in-court ID
- ***Comm. v. Collins*, 21 N.E.3d 528 (Mass. 2014)**
 - EW failed to ID the D in a photo array
 - “The danger is that the jury may disregard or minimize the earlier failure to make a positive ID during a nonsuggestive ID procedure, and give undue weight to the unnecessarily suggestive in-court ID.”
 - Witnesses who fail to make a positive out-of-court ID “are likely to regard the D’s prosecution as confirmation that the D is the ‘right’ person and, as a result, may develop an artificially inflated level of confidence in their in-court ID [T]here is also a substantial risk that the eyewitness’s memory of the crime at trial will ‘improve.’”
 - “Where a witness before trial has made something less than an equivocal positive ID of the D during a nonsuggestive ID procedure, we shall ... admit the witness’s in-court showup ID of the D only where there is ‘good reason’ for it.”

Legal Developments in CT:

State v. Dickson, 141 A.3d 810 (Conn. 2016)

- “We are hard-pressed to imagine how there could be a *more* suggestive ID procedure than placing a witness on the stand in open court, confronting the witness with the person who the state has accused of committing the crime, and then asking the witness if he can identify the person who committed the crime. If this procedure is not suggestive, then *no* procedure is suggestive.”
- First time in-court IDs and in-court IDs that are tainted by an unduly suggestive out-of-court ID, implicate due process protections and must be prescreened by the trial court.
 - P must request permission
 - Permission may be granted “only if [the court] determines there is no factual dispute as to the identity of the perpetrator, or the ability of the particular eyewitness to ID the defendant is not at issue.”
 - P may request permission to conduct an out-of-court ID procedure.
 - If eyewitness failed to make an ID in a previous out-of-court ID procedure, court should not allow a second procedure absent good reason.
- “The best practice is to conduct a nonsuggestive ID procedure as soon after the crime as is possible.”

Limiting In-Court Identifications

- **Position 1: Bar in-court identifications altogether**
 - Prosecution should rely on best evidence
 - Prejudice > probative value
 - In-court identifications simply mask problems with prior IDs
- **Position 2: Limit in-court identifications:**
 - If no out-of-court procedure (*Crayton, Dickson*)
 - If out-of-court procedure was suggestive (*Carr, Dickson*)
 - If out-of-court ID was negative or equivocal (*Collins*)
- **No testimony about certainty of in-court ID**

DUE PROCESS

1. Unnecessarily suggestive ID procedure arranged by law enforcement (esp. if memory is weak)

2. Reliability factors do not salvage such a suggestive ID procedure, and are in fact artificially inflated by that very suggestiveness (e.g. confidence)

Time: months/years after event

Certainty: only correlates with accuracy when recorded as part of a pristine, non-suggestive ID proceeding

Multiple proceedings and/or other exposure to defendant's image:
delve into contamination

Information learned about defendant between event and trial:
delve into contamination

Opportunity to view, degree of attention, accuracy of description:
case-specific analysis

EVIDENTIARY

Relevant? Almost always, yes.

Based on personal knowledge? Delve into the eyewitness's personal observations and perception: are they sufficiently detailed?

Rationally based on the witness's perceptions? Is ID based on perceptions, or an impermissible basis (i.e. state or non-state contamination)?

Limited probative value

- Inherently suggestive procedure
- Passage of time
- Multiple prior proceedings and/or exposures to the defendant's image
- Other contamination (i.e. information learned about defendant between event and trial)

Highly prejudicial: juror research about lack of understanding about factors that influence memory; overvaluing of eyewitness evidence, esp. confident eyewitnesses, even if inaccurate

Duplicative/cumulative of prior ID proceedings

Improper vouching

Seek Expert Testimony

Admissibility Under Mo. Rev. Stat. 490.065 (Aug. 2017)

- Expert testimony will help the jury understand the eyewitness's testimony & assist in the jury's ultimate determination of its verdict
 - Scientific consensus around estimator and system variables that impact the reliability of eyewitness memory
 - Eyewitness memory is fallible, plays outsized role in wrongful convictions
 - Many of the estimator and system variables are unknown to the average juror and contrary to common assumptions (e.g. certainty/accuracy, cross-race, stress)
- Expert testimony is based on sufficient facts and data
 - Extensive and comprehensive scientific research on all key estimator and system variables
- Expert testimony is product of reliable principles and methods
 - Near-perfect consensus in the scientific community
- Expert has reliably applied principles/methods to the facts of case

Legal Arguments for the Expert

- **Right to “present a complete defense.”** *State v. Brown*, 103 S.W.3d 923, 929 (Mo. Ct. App. 2003) (citing *Crane v. Kentucky*, 476 U.S. 683, 690 (1986))
- **That includes the presentation of expert testimony** where that testimony is “crucial” to an indigent’s defense. See *Ake v. Oklahoma*, 470 U.S. 68, 79 (1985); *Crane*, 476 U.S. at 690 (“the blanket exclusion of the proffered testimony about the circumstances of petitioner’s confession deprived him of a fair trial”).
- **Where expert is being called to testify to police practices**, then argue *Kyles v. Whitley*, 514 U.S. 419, 446 n.15 (1995)” effects of bad police work as it goes to probative value of the evidence.
- **Cross-examination and closing argument are inadequate tools** because mistaken eyewitnesses are sincere. See *Alsbach v. Bader*, 700 S.W.2d 823, 829 (Mo. 1985)(finding, in the context of post-hypnotic testimony, that “[e]ffective cross examination would be seriously impeded by the witness’s confidence in the accuracy of his recall”).
- **“Corroborating evidence” cannot be used to deny an expert.**
 - Extraneous evidence connecting defendant with the crime “plays no part in [the] analysis” of whether the identification was reliable. *Manson v. Brathwaite*, 432 U.S. 98, 116 (1977)
 - Courts cannot look solely to the state’s evidence (i.e., corroboration) in limiting the defendant’s right to present his case. That evidence hasn’t been tested at trial. *Holmes v. South Carolina*, 547 U.S. 319 (2006).

Invasion on the Jury's Province: MO Case Law

- “Generally, expert testimony is inadmissible *if it relates to the credibility of witnesses because this constitutes an invasion of the province of the jury* The fact that in many instances identifications may be unreliable and that the state's case and the subsequent determination of guilt or innocence may depend on the *credibility of eyewitness identifications*, does not leave a criminal defendant without protection if the trial court, in its discretion, denies the admissibility of expert testimony in this regard.” ***State v. Lawhorn***, 762 S.W.2d 820, 823 (1988).
- Testimony relates to the factors that impact the *reliability* of eyewitness identifications generally and does not in any way address the credibility or ultimate accuracy of the eyewitness's ultimate identification.
- ***State ex rel. Gardner v. Wright***, 562 S.W.3d 311 (Mo. Ct. App. 2018) (permitting expert testimony pursuant to Mo. Rev. Stat. § 490.065 regarding delayed disclosures in child sex abuse cases and noting that concerns about an expert's testimony touching on the issue of credibility, “only exist[] if the testimony comments explicitly or implicitly on the particular victim's credibility Thus, generalized testimony about [] common behavior” is proper, even though testimony regarding whether a specific witness is lying would not be)

**Seek Enhanced
Jury Instructions**

Missouri's Jury Instruction (410.02)

Eyewitness identification must be evaluated with particular care.

In order to determine whether an identification made by a witness is reliable or mistaken, you should consider all of the factors mentioned in Instruction No. 1 concerning your assessment of the credibility of any witness. You should also consider the following factors.

One, the witness's eyesight; *Two*, the lighting conditions at the time the witness viewed the person in question; *Three*, the visibility at the time the witness viewed the person in question; *Four*, the distance between the witness and the person in question; *Five*, the angle from which the witness viewed the person in question; *Six*, the weather conditions at the time the witness viewed the person in question; *Seven*, whether the witness was familiar with the person identified; *Eight*, any intoxication, fatigue, illness, injury or other impairment of the witness at the time the witness viewed the person in question; *Nine*, whether the witness and the person in question are of different races or ethnicities; *Ten*, whether the witness was affected by any stress or other distraction or event, such as the presence of a weapon, at the time the witness viewed the person in question; *Eleven*, the length of time the witness had to observe the person in question; *Twelve*, the passage of time between the witness's exposure to the person in question and the identification of the defendant; *Thirteen*, the witness's level of certainty of [his] [her] identification, bearing in mind that a person may be certain but mistaken; *Fourteen*, the method by which the witness identified the defendant, including whether it was [i. at the scene of the offense;] [ii. (In a live or photographic lineup.) In determining the reliability of the identification made at the lineup, you may consider such factors as the time elapsed between the witness's opportunity to view the person in question and the lineup, who was in the lineup, the instructions given to the witness during the lineup, and any other circumstances which may affect the reliability of the identification;] [iii. (In a live or photographic show-up.) A "show-up" is a procedure in which law enforcement presents an eyewitness with a single suspect for identification. In determining the reliability of the identification made at the show-up, you may consider such factors as the time elapsed between the witness's opportunity to view the person in question and the show-up, the instructions given to the witness during the show-up, and any other circumstances which may affect the reliability of the identification;]

Fifteen, any description provided by the witness after the event and before identifying the defendant; *Sixteen*, whether the witness's identification of the defendant was consistent or inconsistent with any earlier identification(s) made by the witness; and *Seventeen*, [other factors.] [any other factor which may bear on the reliability of the witness's identification of the defendant.] It is not essential the witness be free from doubt as to the correctness of the identification. However the state has the burden of proving the accuracy of the identification of the defendant to you, the jury, beyond a reasonable doubt before you may find [him] [her] guilty.

General Considerations

Traditional instructions are not helpful.

- Do not *explain* how the factors affect reliability
- Do not give jurors guidance about how to evaluate the evidence before them
- Focus the jury on credibility rather than reliability
- When given at the end of evidence, do not work to counter jurors' misconceptions

Better approach – see NJ and MA instructions

Timing is critical – instructions should be given before testimony (including instruction that ID is opinion testimony; nature of memory; etc.)

Written instructions in the jury room seem to help

Massachusetts general memory instruction

Where a witness has identified the defendant as the person who committed (or participated in) the alleged crime(s), you should examine the identification with care. As with any witness, you must determine the witness's credibility, that is, do you believe the witness is being honest?

Even if you are convinced that the witness believes his or her identification is correct, you still must consider the possibility that the witness made a mistake in the identification. A witness may honestly believe he or she saw a person, but perceive or remember the event inaccurately. You must decide whether the witness's identification is not only truthful, but accurate.

People have the ability to recognize others they have seen and to accurately identify them at a later time, but research and experience have shown that people sometimes make mistakes in identification.

The mind does not work like a video recorder. A person cannot just replay a mental recording to remember what happened. Memory and perception are much more complicated.

Remembering something requires three steps. First, a person sees an event. Second, the person's mind stores information about the event. Third, the person recalls stored information. At each of these stages, a variety of factors may affect — or even alter — someone's memory of what happened and thereby affect the accuracy of identification testimony. This can happen without the witness being aware of it.

Weapon Focus (MA)

You should consider whether the witness saw a weapon during the event. If the event is of short duration, ***the visible presence of a weapon may distract the witness's attention away from the person's face***. But the longer the event, the more time the witness may have to get used to the presence of a weapon and focus on the person's face.

Cross-Race (MA)

If the witness and the person identified appear to be of different races (or ethnicities), you should consider that ***people may have greater difficulty in accurately identifying someone of a different race (or ethnicity) than someone of their own race (or ethnicity).***

Additional MA Estimator Variable Instructions

- Disguise
- Distinctive features
- Personal familiarity
- Intoxication
- Passage of time
- Expressed certainty
- Exposure to outside information

Lineup Composition (NJ)

A suspect should not stand out from other members of the lineup. ***The reason is simple: an array of look-alikes forces witnesses to examine their memory. In addition, a biased lineup may inflate a witness's confidence in the identification because the selection process seemed so easy to the witness.*** It is, of course, for you to determine whether the lineup was biased or not and whether the composition of the lineup had any affect on the reliability of the identification.

Multiple Viewings (NJ)

When a witness views the same person in more than one identification procedure, ***it can be difficult to know whether a later identification comes from the witness's memory of the actual, original event or of an earlier identification procedure. As a result, if a witness views an innocent suspect in multiple identification procedures, the risk of mistaken identification is increased.*** You may consider whether the witness viewed the suspect multiple times and, if so, whether viewing the suspect in multiple procedures affected the reliability of the identification.

Other System Variables

- Fillers
- Showups
- Lineups
 - Double-blind
 - Instructions
 - Feedback

Cautionary Instructions (NJ)

Double-blind: A lineup administrator who knows which person or photo in the lineup is the suspect may intentionally or unintentionally convey that knowledge to the witness. That increases the chance that the witness will identify the suspect, even if the suspect is innocent. For that reason, whenever feasible, live lineups and photo arrays should be conducted by an officer who does not know the identity of the suspect.

If a police officer who does not know the suspect's identity is not available, then the officer should not see the photos as the witness looks at them. ***In this case, it is alleged that the person who presented the lineup knew the identity of the suspect. It is also alleged that the police did/did not compensate for that by conducting a procedure in which the officer did not see the photos as the witness looked at them.***

Cases To Support ID Jury Instructions

- ***Commonwealth v. Bastaldo***, 472 Mass. 16 (2015) – cross-race instruction must be given unless the parties agree otherwise
- ***People v. Boone***, 2017 NY Slip Op 08713 (2017): “In light of the near consensus among cognitive and social psychologists that people have significantly greater difficulty in accurately identifying members of a different race than in accurately identifying members of their own race, the risk of wrongful convictions involving cross-racial identifications demands a new approach. We hold that when identification is an issue in a criminal case and the identifying witness and defendant appear to be of different races, upon request, a party is entitled to a charge on cross-racial identification.”
- ***State v. Ledbetter***, 881 A.2d 290 (Conn. 2005) (trial court should instruct jury regarding risk of misID from failure to instruct witness that suspect might not be present in lineup). *See also State v. King*, 2007 WL 325507 (N.J.Super.A.D. Feb. 06, 2007)
- ***Kyles v. Whitley***, 514 U.S. 419, 446 & n. 15 (1995): use to argue for instruction regarding police failure to use procedures that have been proven to decrease the risk of error
- ***State v. Delgado***, 902 A.2d 888 (N.J. 2006) (requiring police to contemporaneously document identification procedure in writing as condition of admissibility): use to argue for cautionary instruction about failure to document.



Thank you.

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