







1 I. FACTS

2 A. *State v. Lawson*

3 On August 21, 2003, Noris and Sherl Hilde embarked on a weekend  
4 camping trip in the Umpqua National Forest, driving to a location where Mr. Hilde had  
5 pitched a tent the weekend before to claim the campsite. When they arrived at the  
6 campsite with their trailer, they found defendant's yellow truck in their parking space and  
7 discovered that defendant had moved into their tent. When Mr. Hilde told defendant that  
8 it was their tent, defendant apologized and told them that he thought that it had been  
9 abandoned. Defendant gathered his gear, loaded it into his truck, and moved to a vacant  
10 campsite nearby, where he stayed in view of the Hildes for about 40 minutes before  
11 leaving the area. According to Mrs. Hilde's later recollections, defendant had been  
12 wearing a dark or black shirt and a black hat with white lettering.

13 Later that evening, at approximately 10:00 p.m., Mrs. Hilde was shot in the  
14 chest with a large caliber hunting rifle as she stood at the window of the trailer. Mr.  
15 Hilde called 9-1-1, but was shot while speaking with the 9-1-1 operator, and he died  
16 shortly thereafter. The 9-1-1 dispatcher called back and spoke with Mrs. Hilde, who told  
17 the dispatcher that she and her husband had been shot, that she did not know who shot  
18 them, and that "they" -- referring to the shooter or shooters -- had wanted the Hildes'  
19 truck. When emergency personnel arrived, they found Mrs. Hilde lying in the trailer,  
20 critically wounded but conscious. Mrs. Hilde was transported out of the camp and  
21 transferred to an ambulance at the highway and then to a helicopter, which flew her to a  
22 hospital in Bend. An ambulance attendant testified that Mrs. Hilde was rambling and

1 hysterical while en route to the hospital. According to the testimony of various

1 medicated and in fragile condition, but she could speak. She told detectives that after her  
2 husband was shot, the perpetrator had entered the trailer and put a pillow over her face.  
3 She said that she did not know who he was, and that she could not see the man because it  
4 was dark and because of the pillow. She was apologetic that she was unable to help the  
5 police more and did not think she could identify anyone.

6           Approximately one month after the incident, on September 22, 2003, the  
7 police again interviewed Mrs. Hilde. At that interview, Mrs. Hilde told the detectives  
8 that, notwithstanding the pillow over her face, she had briefly seen the man who came to  
9 her trailer after the shootings. However, she was again unable to pick defendant's  
10 photograph out of a lineup. She said that the perpetrator was wearing a dark shirt and a  
11 baseball cap, but did not tell police that it was the same man that she and Mr. Hilde had  
12 encountered at their campsite earlier that day.

13           The police interviewed Mrs. Hilde again a week later, on October 1, 2003.

1                   Some time later, a worker at the rehabilitation facility where Mrs. Hilde  
2 was convalescing showed her a newspaper photograph of defendant with a caption that  
3 identified him as the suspect who had been arrested for the shootings. Approximately  
4 one month before defendant's trial -- two years after the shootings, and unbeknownst to  
5 defendant and his lawyers -- police investigators exposed Mrs. Hilde to defendant's  
6 likeness several more times. On one occasion, the investigating detective showed Mrs.  
7 Hilde a single photograph of defendant wearing a dark shirt and a dark hat with white  
8 lettering. On another, the detective took Mrs. Hilde to the courthouse, where she  
9 personally observed defendant during a pretrial hearing. Later that day, in the detective's  
10 office, Mrs. Hilde inadvertently came across one of the earlier photo lineups she had  
11 viewed without successfully identifying a suspect from the various photographs. She was  
then able to pick defendant's picture out of the lineup.

- 1 walked away, presumably to look for the truck keys. Accordingly to Mrs. Hilde, when he
- 2 came back, she turned her head to look at him from under the cushion and recognized



1 court determined that the process had been suggestive, then the court was required to  
2 determine (1) whether the witness had based the identification at issue on an independent  
3 source separate from the suggestive elements, or (2) whether other aspects of the  
4 identification substantially excluded the risk that it had been influenced by the suggestive  
5 elements. *See Classen*, 285 Or at 232 (describing two-step process). To aid in the  
6 second step of that process, *Classen* identified a set of nonexclusive considerations to be  
7 used in determining whether an identification had a source independent of the otherwise  
8 suggestive procedure. Those factors included:

- 9 • The opportunity that the witness had to clearly view the persons involved in the  
10 crime and the attention that he or she gave to their identifying features.
- 11
- 12 • The timing and completeness of the description given by the witness after the  
13 event.
- 14
- 15 • The degree of certainty expressed by the witness in describing the persons  
16 involved in the crime and making subsequent identifications.
- 17
- 18 • The lapse of time between the original observation and the subsequent  
19 identification.
- 20

21 *Id.* at 232-33.

22 The Court of Appeals concluded that the process leading to Mrs. Hilde's  
23 identification of defendant had, indeed, been suggestive. Weighing the factors set out in  
24 *Classen*, it nevertheless held that, under the totality of the circumstances, her  
25 identification of defendant had been independent of the suggestive procedures. As a  
26 result, the Court of Appeals concluded that the trial court had correctly determined that  
27 the reliability of Mrs. Hilde's identification of defendant was a question properly left to  
28 the jury.

1 B. *State v. James*

2                   Shortly before 11:00 on a December morning in 2006, Pendleton Police

3 Officer Gomez responded to a theft complaint at a local Safeway store. The thieves had

4 left before Officer Gomez arrived, but Officer Gomez interviewed store employees and

- 1 The smaller suspect, they said, was approximately five feet tall, weighed about 110
- 2 pounds, and wore a long black coat with a hood, baggy blue pants, and a backpack.

1 back seat of one of the cars with the door open; his hands were cuffed behind his back  
2 and he was wearing his denim jacket and a pair of sunglasses. Officer Gomez's report  
3 contained no details regarding the identification process, stating only that the employees  
4 "both positively identified the subjects as the persons who stole the beer." However, at  
5 defendant's suppression hearing nearly two years later, Officer Gomez testified that he  
6 had asked the employees something like, "Is this them?," after which the two employees  
7 "walked right up" to Guerrero and then looked in through the open car door at defendant,  
8 "immediately" identifying both men as the perpetrators of the earlier theft.

9           In August 2008, defendant was charged with second-degree robbery,  
10 fourth-degree assault, carrying a concealed weapon, harassment, and third-degree theft.  
11 Before trial, defendant filed a motion to suppress both the out-of-court identification and  
12 any in-court eyewitness identification that might be made by the employees, arguing that  
13 the identification procedure in the Safeway parking lot was unduly suggestive and  
14 unreliable, violating federal due process protections and this court's ruling in *Classen*. At  
15 the suppression hearing, Officer Gomez testified that, when he first spoke to the store  
16 employees, they were "pretty adamant" that they would be able to identify the  
17 perpetrators, noting that the pair were "funny looking because [one perpetrator] was so  
18 big and [the other] was so small, and so by clothing, size." Officer Gomez described the  
19 circumstances of the identification as follows:

20           "I took Mr. Guraro [*sic*] out of the car. Officer Byram at the time

1           that's him, and identified both of them as being the persons who stole the  
2           beer and assaulted them."

3   Officer Gomez testified further that he had photographed each suspect shortly after the  
4   identification, and he identified two photographs entered into evidence as the pictures he  
5   had taken. The photograph of defendant showed defendant with a moustache and a small  
6   goatee, wearing baggy blue jeans with several red bandanas hanging down from the  
7   beltline, a white tank top, a blue denim jacket, and sunglasses. The other photograph  
8   showed Guerrero wearing black pants, a black hooded sweatshirt, and a white T-shirt.

9           Defendant argued that the showup identification procedure was unduly  
10   suggestive, noting that defendant and Guerrero were the only suspects presented to the  
11   witnesses, the second officer may have prompted the witnesses prior to their  
12   identification, and that defendant was presented in handcuffs, in the back seat of a police  
13   car, wearing sunglasses that obscured his facial features. Moreover, defendant contended  
14   that, given the suggestiveness of the process, there was insufficient indicia of reliability  
15   to substantially exclude the risk of misidentification, pointing out that (1) Native  
16   Americans make up a large portion of the Pendleton community, which borders a  
17   reservation; and (2) the witnesses' description of the perpetrators was vague, focusing on  
18   generic items of clothing, and omitting key details like the red bandanas hanging from  
19   defendant's beltline and defendant's hair color, hairstyle, and facial hair.

20           Applying the two-part process set out in *State v. Classen*, the trial court  
21   denied defendant's motion to suppress the identifications. The trial court found that the  
22   identification procedure was, indeed, suggestive under the first part of the *Classen*

1 inquiry:

2 "First, the Defendants were cuffed and in police custody. Second,  
3 only [Mr. Guerrero] was actually taken from the vehicle. \* \* \* Defendant,  
4 Mr. James, remained in the car. And his appearance was thereby limited to  
5 a degree by the observing witnesses. Third, the State produced no evidence  
6 as to what the witnesses were told before the show-up."

7 The court nevertheless concluded that the identification had been based on sources  
8 independent of the suggestive procedures:

9 "First, the two witnesses got a very good look at the Defendants, and  
10 in particular Defendant James. The witnesses indicated they were confident  
11 they could identify the Defendant if they saw him again. And this is  
12 reasonable in light of the fact that they actually got into a physical  
13 confrontation with this Defendant, Mr. James, including the witnesses  
14 being shoved and one witness being struck in the face by the suspect, Mr.  
15 James.

16 "Secondly, the witnesses gave Officer Gomez a very good  
17 description of the suspects. One was quite large. One was quite small.  
18 They both appeared to be Indian. Their clothes were identified to  
19 considerable specificity. They indicated that the witnesses [*sic*], when they  
20 left, had stolen beer of an unusual size; 40-ounce bottles, and unusual  
21 brands, at least in this Court's experience.

22 "One particular was mentioned as Steel Reserve 211. These were in  
23 a backpack. They indicated the Defendant James was wearing a white tank  
24 top. And the Court heard evidence that this was in mid-December and that  
25 is very unusual wear in December in Pendleton in that Pendleton is known  
26 to be quite cold.

27 "Third, five hours later when Officer Gomez had contact with the  
28 Defendants on an unrelated item, he immediately knew that the Defendants

1 Defendants.

2 "Therefore, given the totality of the circumstances in this particular  
3 case, I am satisfied that the suggestive show-up confrontation did not cause  
4 or contribute to the witness's identification of Defendant James. The  
5 surrounding circumstances were strong and in place before the show-up  
6 identification. Motion to suppress is denied."

Defendant's case was tried to a jury in October 2008. At trial, Officer





1 and other potentially relevant factors, "the ultimate issue [is] whether an identification  
2 made in a suggestive procedure has nevertheless been demonstrated to be reliable despite  
3 that suggestiveness." *Id.* (footnote omitted).

4 In establishing the two-step process described above -- particularly the  
5 factors used in determining whether an identification procedure had been suggestive --  
6 *Classen* relied on the United States Supreme Court's 1977 decision in *Manson v.*  
7 *Brathwaite*, 432 US 98, 97 S Ct 2243, 53 L Ed 2d 140 (1977). In *Manson* -- like *Classen*  
8 -- the Court determined that reliability was the linchpin in determinations regarding the  
9 admissibility of identification testimony. In *Manson*, however, the Supreme Court  
10 articulated that truism as a matter of fundamental fairness under the Due Process Clause  
11 of the Fourteenth Amendment. *Classen*, in contrast, was decided as matter of Oregon  
12 evidence law, *see State v. Johanesen*, 319 Or 128, 130, 873 P2d 1065 (1994) (so noting),  
13 a difference that this court took pains to recognize, pointing out that

14 "the Supreme Court does not purport to make the law of evidence for the  
15 states. The Court's decisions under the 14th amendment only pronounce  
16 constitutional tests which a state's rules of evidence, and their application in  
17 a particular case, may not fail; but these decisions assume that there is an  
18 applicable state rule in advance of the issue of its constitutionality. The  
19 rules governing the admissibility of evidence in state courts are the  
20 responsibility of the states before a Supreme Court decision and remain so  
21 afterwards, within the constitutional limits laid down in the decision.

22 "Evidence law has long provided for excluding certain evidence as a  
23 class when its questionable reliability vitiates the value of its possible  
24 truthfulness in the particular case, apart from any question of constitutional  
25 law."

26 *Classen*, 285 Or at 226 (citations omitted).

27 Under the rules of evidence generally in use among the states, relevant



1 Based on our extensive review of the current scientific research and literature, we  
2 conclude that the scientific knowledge and empirical research concerning eyewitness  
3 perception and memory has progressed sufficiently to warrant taking judicial notice of  
4 the data contained in those various sources as legislative facts that we may consult for  
5 assistance in determining the effectiveness of our existing test for the admission of  
6 eyewitness identification evidence. *See State v. O'Key*, 321 Or 285, 309 n 35, 899 P2d  
7 663 (1995) (noting that "[t]he validity of proffered scientific evidence \* \* \* is a question  
8 of law" to be determined by judicial notice of legislative facts submitted to the court); *see*  
9 *also State v. Clowe*, 310 Or 686, 692 n 7, 801 P2d 789 (1990) ("Facts utilized by a court  
10 to 'help [it] to determine the context of the law and policy and to exercise its judgment or  
11 \* \* \* discretion in determining what course of action to take' have been described as judicial



1 description of each variable and a summary of the scientific research reviewed by this  
2 court in these cases are set forth in the appendix to this opinion.

3 A. *System Variables*

4 1. *Blind Administration*

5 Ideally, all identification procedures should be conducted by a "blind"  
6 administrator -- a person who does not know the identity of the suspect. In police lineup  
7 identifications, lineup administrators who know the identity of the suspect can  
8 consciously or unconsciously suggest that information to the witness.

9 2. *Preidentification Instructions*

10 The likelihood of misidentification is significantly decreased when  
11 witnesses are instructed prior to an identification procedure that a suspect may or may not  
12 be in the lineup or photo array, and that it is permissible not to identify anyone.

13 3. *Lineup Construction*

14 An identification procedure is essentially an informal and unscientific  
15 experiment conducted by law enforcement officials to test their hypothesis that a  
particular suspect is, in fact, the perpetrator that they seek. The known-innocent subjects

1 and thus is less likely to misidentify innocent suspects. In traditional identification  
2 procedures, police display a number of persons or photographs simultaneously to an  
eyewitness. Witnesses permitted to view all the subjects simultaneously have a tendency

1 negative effect of multiple viewings may result from the witness's inability to discern the  
2 source of his or her recognition of the suspect, an occurrence referred to as source  
3 confusion or a source monitoring error. A similar problem occurs when the police ask a  
4 witness to participate in multiple identification procedures. Whether or not the witness  
5 selects the suspect in an initial identification procedure, the procedure increases the  
6 witness's familiarity with the suspect's face. If the police later present the witness with  
7 another lineup in which the same suspect appears, the suspect may tend to stand out or  
8 appear familiar to the witness as a result of the prior lineup, especially when the suspect  
9 is the only person who appeared in both lineups.

10 7. *Suggestive Questioning, Cowitness Contamination, and Other*  
11 *Sources of Post-Event Memory Contamination*

12 The way in which eyewitnesses are questioned or converse about an event  
13 can alter their memory of the event. The use of suggestive wording and leading questions  
14 tend to result in answers that more closely fit the expectation embedded in the question.  
15 Witness memory can become contaminated by external information or assumptions  
16 embedded in questions or otherwise communicated to the witness.

17 8. *Suggestive Feedback and Recording Confidence*

18 Post-identification confirming feedback tends to falsely inflate witnesses'  
19 confidence in the accuracy of their identifications, as well as their recollections  
20 concerning the quality of their opportunity to view a perpetrator and an event.  
21 Confirming feedback, by definition, takes place after an identification and thus does not  
22 affect the result of the identification itself. It can, however, falsely inflate witness

1 confidence in the reports they tender regarding many of the factors commonly used by  
2 courts and jurors to gauge eyewitness reliability. As a result, the danger of confirming  
3 feedback lies in its potential to increase the *appearance* of reliability without increasing  
4 reliability itself.

5 B. *Estimator Variables*

6 1. *Stress*

7 High levels of stress or fear can have a negative effect on a witness's ability  
8 to make accurate identifications.

9 2. *Witness Attention*

10 In assessing eyewitness reliability, it is important to consider not only what  
11 was within the witness's view, but also on what the witness was actually focusing his or  
12 her attention. It is a common misconception that a person's memory operates like a  
13 videotape, recording an exact copy of everything the person sees. A person's capacity for  
14 processing information is finite, and the more attention paid to one aspect of an event  
15 decreases the amount of attention available for other aspects.

16 3. *Duration of Exposure*

17 Longer durations of exposure (time spent looking at the perpetrator)  
18 generally result in more accurate identifications.

19 4. *Environmental Viewing Conditions*

20 The conditions under which an eyewitness observes an event can  
21 significantly affect the eyewitness's ability to perceive and remember facts regarding that  
22 event. The basic environmental conditions of distance and lighting, combined with any





1            9.    *Level of Certainty*

2                    Under most circumstances, witness confidence or certainty is not a good  
indicator of identification accuracy. Retrospective self-

1 accomplish its goal of ensuring that only sufficiently reliable identifications are admitted  
2 into evidence. Not only are the reliability factors listed in *Classen* -- opportunity to view  
3 the alleged perpetrator, attention to identifying features, timing and completeness of  
4 description given after the event, certainty of description and identification by witness,  
5 and lapse of time between original observation and the subsequent identification -- both  
6 incomplete and, at times, inconsistent with modern scientific findings, but the *Classen*  
7 inquiry itself is somewhat at odds with its own goals and with current Oregon evidence  
law.

1                    When a criminal defendant has challenged the admissibility of eyewitness  
identification evidence

1 B. *Classen's Second-Part Inquiry Fails to Account for the Influence of Suggestion on*  
2 *Evidence of Reliability*

3 A second problem with the *Classen* test arises from the tendency of trial  
4 courts applying the *Classen* factors to rely heavily on the eyewitnesses' self-reports to  
5 establish the existence or nonexistence of suggestibility factors. However, the current  
6 scientific knowledge and understanding regarding the effects of suggestive identification  
7 procedures indicates that self-reported evidence of the *Classen* factors can be inflated by  
8 the suggestive procedure itself. That fact creates in turn a sort of feedback loop in which  
9 self-reports of reliability, which can be exaggerated by suggestiveness, are then used to  
10 prove that suggestiveness did not adversely affect the reliability of an identification. That  
11 result is contrary to the scientific research establishing that suggestiveness *adversely*  
12 affects reliability.

13 Because of the alterations to memory that suggestiveness can cause, it is  
14 incumbent on courts and law enforcement personnel to treat eyewitness memory just as  
15 carefully as they would other forms of trace evidence, like DNA, bloodstains, or  
16 fingerprints, the evidentiary value of which can be impaired or destroyed by  
17 contamination. Like those forms of evidence, once contaminated, a witness's original  
18 memory is very difficult to retrieve; it is, however, only the original memory that has any  
19 forensic or evidentiary value. In that regard, *Classen's* second-part analysis correctly  
20 identifies the original memory as the sole source of evidentiary value in eyewitness  
21 identifications, but fails to recognize the difficulty of attempting to distinguish between

1 the original memory and the new memory corrupted by later suggestiveness.<sup>4</sup>

V.

1 scientific studies we have reviewed have identified a number of factors that contribute to  
2 the likelihood of mistaken identification, nearly all of those factors are probabilistic in  
3 nature -- they can indicate only a statistical likelihood of misidentification within a broad  
4 population of people studied, not whether any one identification is right or wrong.

5           Despite those shortcomings, eyewitness evidence can be extremely  
6 probative of guilt and, in many cases, may be the only evidence connecting a guilty  
7 defendant to a crime. Therefore, we must attempt to strike a proper balance between the  
8 utility of that evidence in convicting the guilty and its proclivity, on occasion, to  
9 inculcate the innocent.

10           As described above, over the past 30 years, a voluminous body of scientific

1 "could be the robber."



1 the certainty expressed by the identifier about that description, and (6) the

1 rules of evidences applicable to the issues in a particular case.

2 Under the OEC, "[a]ll relevant evidence is admissible," unless Oregon law  
3 or the federal constitution provide otherwise. OEC 402. Evidence is relevant if it has  
4 "any tendency to make the existence of any fact that is of consequence to the  
5 determination of the action more probable or less probable than it would be without the  
6 evidence." OEC 401. Eyewitness identification evidence will nearly always meet that  
7 basic standard for relevance.<sup>8</sup> However, the OEC also contains a number of specific  
8 exceptions and conditions to admissibility that can override those general provisions. As  
9 we explain in greater detail below, two provisions, OEC 602 and OEC 701, may also be  
10 pertinent in establishing the admissibility of eyewitness identification evidence.

11 1. *Requirement of Personal Knowledge Under OEC 602*

12 OEC 602 provides that "a witness may not testify to a matter unless  
13 evidence is introduced sufficient to support a finding that the witness has personal

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"(b) must be accompanied by the moving party's brief which must be adequate reasonably to apprise the court and the adverse party of the arguments and authorities relied upon."

<sup>8</sup> In evaluating alleged eyewitness testimony, a trial court should also keep in mind that ORS 44.370 provides:

"A witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which the witness testifies, by the character of the testimony of the witness, or by evidence affecting the character or motives of the witness, or by contradictory evidence. Where the trial is by the jury, they are the exclusive judges of the credibility of the witness."

1 knowledge of the matter." When a criminal defendant raises that kind of evidentiary  
2 challenge in a pretrial motion to exclude eyewitness identification evidence, the  
3 proponent of the evidence (in that context, the state) must offer evidence showing both  
4 that the witness had an adequate opportunity to observe or otherwise personally perceive  
5 the facts to which the witness will testify, and did, in fact, observe or perceive them,  
6 thereby gaining personal knowledge of the facts. *See* OEC 602 Commentary (1981) ("A  
7 party that offers testimony has the burden of establishing that the witness had an  
8 opportunity to observe the fact."). The rule expressly permits evidence of personal  
9 knowledge to consist of the witness's own testimony. OEC 602.

10           As the legislative commentary to OEC 602 explains, the purpose of the  
11 personal knowledge requirement is to ensure reliability:

12           "The 'rule requiring that a witness who testifies to a fact which can be  
13           perceived by the senses must have had an opportunity to observe, and must  
14           have actually observed the fact' is 'one of the most pervasive manifestations'  
15           of the common law's 'insistence upon the most reliable sources of  
16           information.' ORE 602 simply codifies that common law requirement."

OEC 602

2.

1 be determined by the court." As we have held previously, that rule requires the  
2 proponent of the evidence to establish such facts to the court by a preponderance of the  
3 evidence. *State v. Carlson*, 311 Or 201, 209, 808 P2d 1002 (1991).

1 specific person as the person whom the witness saw. If, for example, a witness testified  
2 to observing a tall, dark-haired man of medium build from behind as he ran from the  
3 scene of the crime, the trial court permissibly could find that the witness had personal  
4 knowledge of the height, build, clothing, and hair color of the perpetrator, but no more,  
5 and limit the testimony accordingly.

6           When a witness's perceptions are capable of supporting an inference of  
7 identification, but are nevertheless met with competing evidence of an impermissible  
8 basis for that inference -- *i.e.*, suggestive police procedures -- an issue of fact arises as to  
9 whether the witness's subsequent identification was derived from a permissible or  
10 impermissible basis. When there are facts demonstrating that a witness could have relied  
11 on something other than his or her own perceptions to identify the defendant, the state --  
12 as the proponent of the identification -- must establish by a preponderance of the  
13 evidence that the identification was based on a permissible basis rather than an  
impermissible

1 witness's perceptions.

2 4. *Identification Must Be Helpful to the Trier of Fact*

3 The second aspect of OEC 701 requires the proponent of identification  
4 evidence to establish that the identification will be "[h]elpful to a clear understanding of  
5 testimony of the witness or the determination of a fact in issue." OEC 701(2). Although  
6 we anticipate that that burden will be easily satisfied in nearly all cases, it is conceivable  
7 that some statements of identification might not be particularly helpful to a jury.  
8 Consider, for example, the witness who observes a masked perpetrator with prominently  
9 scarred or tattooed hands. Although those features could be distinctive enough to provide  
10 a rational basis for an inference of identification, a jury may be equally capable of  
11 making the same inference by comparing the witness's description of those markings to  
12 objective evidence of the actual markings on the defendant. In such cases, the witness's  
13 opinion that defendant is the perpetrator provides the jury with little, if any, additional  
14 useful information. OEC 701 permits lay opinion testimony to be admitted only when  
15 the opinion communicates more to the jury than the sum of the witness's describable  
16 perceptions.

17 B. *Exclusion of Unduly Prejudicial, Confusing, Misleading, or Duplicative Evidence*  
18 *Under OEC 403*

19 When, in response to a criminal defendant's pretrial motion to exclude  
20 eyewitness identification evidence, the state as the proponent of that evidence succeeds in  
21 establishing that the evidence is not barred by OEC 402, the defendant as the opponent of  
22 the evidence assumes the burden of proving that OEC 403 nevertheless requires its

1 exclusion. *See O'Key*, 321 Or at 320 (OEC 403 generally favors admissibility, "[t]he  
2 'substantially outweighed' phrasing in OEC 403 in effect places the burden on the party  
3 seeking exclusion of the evidence"). OEC 403 provides:

4 "Although relevant, evidence may be excluded if its probative value  
5 is substantially outweighed by the danger of unfair prejudice, confusion of  
6 the issues, or misleading the jury, or by considerations of undue delay or  
7 needless presentation of cumulative evidence."

8 When the opponent of the evidence succeeds in that regard, the trial court can either  
9 exclude the evidence or fashion a remedy to restore a permissible balance between the  
10 probative value of the evidence and the countervailing concerns set out in OEC 403.

11 1. *Probative Value*

12 In determining whether eyewitness identification evidence should be  
13 excluded under OEC 403 or what intermediate remedies might be appropriate, a trial  
14 court must weigh the probative value of that evidence against the dangers and concerns  
15 listed in OEC 403. *See O'Key*, 321 Or at 319 ("Relevant evidence may be excluded under  
16 OEC 403 only if its persuasive force is substantially outweighed by any of the articulated  
17 dangers or considerations alone or in combination."). The trial court's first task in that  
18 regard is to determine the probative value of the identification evidence.

19 Probative value is essentially a measure of the persuasiveness that attaches  
20 to a piece of evidence. *See, e.g., id.* at 299 n 14 (noting that probative value concerns the  
21 strength of the relationship between the proffered evidence and the proposition sought to  
22 be proved). The persuasive force of eyewitness identification testimony is directly linked  
23 to its reliability. The more reliable a witness's testimony, the more persuasively it will



1 establish a particular fact at issue. Conversely, the less reliable a witness's testimony, the  
2 less persuasive it will be. Thus, in applying OEC 403 to eyewitness identification issues,  
3 trial courts must examine the relative reliability of evidence produced by the parties to  
4 determine the probative value of the identification. The more factors -- the presence of  
5 system variables alone or in combination with estimator variables -- that weigh against  
6 reliability of the identification, the less persuasive the identification evidence will be to  
7 prove the fact of identification, and correspondingly, the less probative value that  
8 identification will have.

9           Probative value is not an all-or-nothing proposition, however. Although the  
10 initial admissibility requirements for eyewitness identification evidence establish a  
11 minimum baseline of reliability, the persuasive power of the evidence that meets that  
12 standard may nevertheless vary greatly, and many identifications possessing relatively  
13 low probative value may still pass that initial test. Thus, even after finding that the  
14 evidence meets the minimum requirements of OEC 602 and 701, trial courts must still  
15 conduct a thorough examination of all the pertinent factors in order to determine the  
16 probative value of the evidence under OEC 403.

17           2.       *Unfair Prejudice and Other Countervailing Concerns*

18           After determining the probative value of the identification evidence before  
19 it, a trial court must then determine whether the evidence might unfairly prejudice the  
20 defendant or invoke the other concerns enumerated in OEC 403. As we have previously  
21 held, "'unfair prejudice' \* \* \* means an undue tendency to suggest a decision on an  
22 improper basis \* \* \*. [It] describes a situation in which the preferences of the trier of fact

1 are affected by reasons essentially unrelated to the persuasive power of the evidence to  
2 establish a fact of consequence." *State v. Lyons*, 324 Or 256, 280, 92

3 As a discrete evidentiary class, eyewitness identifications subjected to  
4 suggestive police procedures are particularly susceptible to concerns of unfair prejudice.  
5 Consequently, in cases in which an eyewitness has been exposed to suggestive police  
6 procedures, trial courts have a heightened role as an evidentiary gatekeeper because  
7 "traditional" methods of testing reliability -- like cross-examination -- can be ineffective  
8 at discrediting unreliable or inaccurate eyewitness identification evidence.<sup>9</sup>

9 C. *Intermediate Remedies*

10 Under OEC 403, trial courts may exclude particularly prejudicial aspects of  
11 a witness's testimony without excluding the identification itself. In essence, a partial  
12 exclusion order is no more than a determination under OEC 403 that the prejudicial effect

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1 can find such statements persuasive, even when contradicted by more probative indicia of  
2 reliability. Accordingly, when such statements are presented at trial, they ordinarily have  
3 little probative value, but significant potential for unfair prejudice. Thus, a trial court  
4 could admit an eyewitness's identification, but find that the prejudicial effect of the  
5 accompanying statement of certainty that was created by suggestive police procedures  
6 substantially outweighed its limited probative value. A court presented with such  
7 evidence could fashion an order permitting the witness to testify to the identification (*i.e.*,  
8 "defendant is the man that I saw rob the bank"), but prohibit testimony regarding the  
9 witness's level of certainty (*i.e.*, "I'm 100 percent sure that defendant is the man that I saw  
10 rob the bank"). By excluding the particularly prejudicial aspects of an eyewitness's  
11 testimony, trial courts may be able to admit other relevant and probative aspects of that  
12 testimony, even though the eyewitness's testimony on balance might otherwise have been  
13 unduly prejudicial.

#### 14 D. *Expert Testimony*

15 As a result of the substantial degree of acceptance within the scientific  
16 community concerning data on the reliability of eyewitness identifications, federal and  
17 state courts around the country have recognized that traditional methods of informing  
18 factfinders of the pitfalls of eyewitness identification -- cross-examination, closing  
19 argument, and generalized jury instructions -- frequently are not adequate to inform  
20 factfinders of the factors affecting the reliability of such identifications. *See State v.*  
21 *Guilbert*, 306 Conn 218, 49 A3d 705 (2012) (finding that scientific research on the  
22 reliability of eyewitness identifications enjoys strong consensus in the scientific

1 community, that many factors affecting eyewitness identifications are unknown to  
2 average jurors or are contrary to common assumptions, and that cross-examination,  
3 closing argument, and generalized jury instructions are not effective in helping jurors  
4 spot mistaken identifications).<sup>10</sup>

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<sup>10</sup> In *Guibert*, the court compiled the following list of federal and state cases recognizing the scientific community's acceptance of the research regarding the reliability of eyewitness identification and the admission of expert testimony based on that research. We quote that list here.

"*Ferensic v. Birkett*, 501 F3d 469, 482 (6th Cir 2007) ('expert testimony on eyewitness identifications \* \* \* is now universally recognized as scientifically valid and of aid [to] the trier of fact for admissibility purposes'); *United States v. Smithers*, 212 F3d 306, 313 (6th Cir 2000) (noting that 'the science of eyewitness perception has achieved the level of exactness, methodology and reliability of any psychological research'); *United States v. Moore*, 786 F2d 1308, 1312 (5th Cir 1986) ('This [c]ourt accepts the modern conclusion that the admission of expert testimony regarding eyewitness identifications is proper. \* \* \* We cannot say [that] such scientific data [are] inadequate or contradictory. The scientific validity of the studies confirming the many weaknesses of eyewitness identification cannot be seriously questioned at this point.');

*United States v. Downing*, 753 F2d 1224, 1242 (3d Cir 1985) (noting 'the proliferation of empirical research demonstrating the pitfalls of eyewitness identification' and that

United States

1           Because many of the system and estimator variables that we described  
2 earlier are either unknown to the average juror or contrary to common assumptions,  
3 expert testimony is one method by which the parties can educate the trier of fact  
4 concerning variables that can affect the reliability of eyewitness identification. Expert

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well established); *State v. Henderson*, 208 NJ 208, 218, 27 A3d 872 (2011) (noting that, '[f]rom social science research to the review of actual police lineups, from laboratory experiments to DNA exonerations, [scientific research and studies demonstrate] that the possibility of mistaken identification is real,' that many studies reveal 'a troubling lack of reliability in eyewitness identifications,' and that '[t]hat evidence offers convincing proof that the current test for evaluating the trustworthiness of eyewitness identifications should be revised'); *People v. LeGrand*, 8 NY3d 449, 455, 867 NE2d 374, 835 NYS2d 523 (2007) ('[E]xpert psychological testimony on eyewitness identification [is] sufficiently reliable to be admitted, and the vast majority of academic commentators have urged its acceptance . \* \* \* [P]sychological research data [are] by now abundant, and the findings based [on the data] concerning cognitive factors that may affect identification are quite uniform and well documented. \* \* \*'); *State v. Copeland*, 226 SW3d 287, 299 (Tenn 2007) ('[s]cientifically tested studies, subject to peer review, have identified legitimate areas of concern' in area of eyewitness identifications); *Tillman v. State*, 354 SW3d 425, 441 (Tex Crim App 2011) ('[E]yewitness identification has continued to be troublesome and controversial as the outside world and modern science have cast doubt on this crucial piece of evidence.\* \* \* [A] vast body of scientific research about human memory has emerged. That body of work casts doubt on some commonly held views relating to memory \* \* \*'); *State v. Clopten*, 223 P3d 1103, 1108 (Utah 2009) ('empirical research has convincingly established that expert testimony is necessary in many cases to explain the possibility of mistaken eyewitness identification'); *State v. Dubose*, 285 Wis 2d 143, 162, 699 NW2d 582 (2005) ('[o]ver the last decade, there have been extensive studies on the issue of identification evidence')."

1 testimony may also provide an avenue to introduce and explain scientific research or  
2 other indicia of reliability not specifically addressed by our opinion in these cases. In that  
3 regard, the use of experts may prove vital to ensuring that the law keeps pace with  
4 advances in scientific knowledge, thus enabling judges and jurors to evaluate eyewitness  
5 identification testimony according to relevant and meaningful criteria. Of course, expert  
testimony must be predicated on scientific research

1 substantially outweighed by the danger of unfair prejudice, confusion of the issues,  
2 misleading the jury, or by considerations of undue delay or needless presentation of  
3 cumulative evidence. If the trial court concludes that the defendant opposing the  
4 evidence has succeeded in making that showing, the trial court can either exclude the  
5 identification, or fashion an appropriate intermediate remedy short of exclusion to cure  
6 the unfair prejudice or other dangers attending the use of that evidence. The decision  
7 whether to admit, exclude, or fashion an appropriate intermediate remedy short of  
8 exclusion is committed to the sound exercise of the trial court's discretion. *See [State v.](#)*  
9 *[Cunningham](#)*, 337 Or 528, 536, 99 P3d 271 (2004) (question whether relevant evidence  
10 should be excluded under OEC 403 because its probative value is substantially  
11 outweighed by the danger of unfair prejudice or other factors is reserved to the trial  
12 court's discretion).

13           Although we have revised the *Classen* test to incorporate pertinent rules of  
14 evidence, we anticipate that the trial courts will continue to admit most eyewitness  
15 identifications. That is so because, although possible, it is doubtful that issues concerning  
one or more of the estimator variables that we have identified 15

accuracy of eyewitness identification by using expert testimony and case-





1 the task of identifying the man she saw earlier in her campsite for about 40 minutes in  
2 broad daylight.  
3 Mrs. Hilde, however, was unable to identify defendant as either the

1 forget his face as long as I live," and later added that she "always knew it was him."

2           In light of current scientific knowledge regarding the effects of suggestion  
3 and confirming feedback, the preceding circumstances raise serious questions concerning  
4 the reliability of the identification evidence admitted at defendant's trial. In *Lawson*,  
5 because the Court of Appeals and trial court relied on the procedures set out in *Classen* --  
6 procedures that we have revised in this opinion -- we reverse and remand the case to the  
7 trial court for a new trial. Due to the novelty and complexity of the procedures we have  
8 articulated today, the parties must be permitted on retrial to (1) supplement the record  
9 with any additional evidence that may bear on the reliability of the eyewitness  
10 identifications at issue here, and (2) present arguments regarding the appropriate  
11 application of the new procedures set out in this opinion.

12 B.     *State v. James*

13           In *James*, we conclude that, unlike *Lawson*, application of the revised test  
14 that we have established here could not have resulted in the exclusion of the eyewitness  
15 identification evidence. Accordingly, we affirm defendant James's conviction. We do so  
16 for the following reasons.

17           Within minutes of the crime, the witnesses provided detailed descriptions to  
18 the police that included the race, height, weight, and clothing of both perpetrators. The  
19 witnesses initially described one of the perpetrators as "a fairly large guy; Indian male six  
20 feet to six feet two inches, 220 pounds, wearing baggy blue jeans, white tank top tee  
21 shirt"; the other was a "small guy," an "Indian male," a male approximately "five feet tall,  
22 110 pounds, wearing a black coat with a hood and baggy blue plants, carrying a black



1 could find that the witnesses did not have the personal knowledge necessary to identify  
2 the perpetrators.

3           That is not the end of the inquiry outlined above, however. Because there  
4 was evidence that the witnesses' later identification of defendant occurred during a "show  
5 up" procedure, and the trial court found that procedure to be unduly suggestive,  
6 defendant raised a question of fact as to whether the witnesses' identifications were  
7 derived from their initial untainted observations or from that suggestive procedure. The  
8 state, as the proponent of the witnesses' identifications was required to establish by a  
9  
10 original observations.

11           The trial court evaluated the evidence that the parties proffered on that issue  
12 and was "satisfied that the suggestive show up confrontation did not cause or contribute  
13 to the witnesses' identification of defendant James." Although the trial court mistakenly  
14 considered the witnesses' certainty about their identification in that analysis, the court  
15 also carefully considered and explicitly relied on other facts which supported its  
16 conclusion. The trial court found that the witnesses "got a very good look" at the  
17 perpetrators and described their unique features with particularity. The trial court also  
18 found that the witnesses had observed and described the clothing that defendant and his  
19 companion were wearing (one item of which was unusual for that location at that time of  
20 year) and a specific bottle of beer that  
21 other items that defendant admitted belonged to him. The witnesses' accuracy in  
22 describing those details demonstrated the reliability of their observations. The trial court

1 did not err in reaching its factual conclusion that the witnesses' identifications of  
2 defendant were based on their original observations.

3           The final issues in our analysis are whether the witnesses' identifications  
4 were helpful to the trier of fact and whether OEC 403 required their exclusion. To both  
5 of those points, defendant could argue that the witnesses' identification of the men did not  
6 provide the jury with information that was any more helpful than their complete  
7 descriptions of the perpetrators and that, as a result, its persuasive value was limited and  
8 outweighed by the unfair prejudice introduced by the identifications. However, in this  
9 case, we think that the concerns of unfair prejudice were negligible. The descriptions of  
10 defendant and his companion so closely matched the two men apprehended by police,  
11 that the witnesses' subsequent identifications of defendant as one of the men that they had  
12 seen in the store prejudiced defendant little, if at all. We conclude that the trial court did  
13 not err in admitting the witnesses' identifications of defendant.<sup>11</sup>

14           The decision of the Court of Appeals and the judgment of the circuit court  
15 in *State v. Lawson* are reversed and the case is remanded for a new trial. The decision of  
16 the Court of Appeals in *State v. James* is affirmed.

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<sup>11</sup> For the reasons described above, we also conclude that the witnesses' in-court identification of defendant also satisfied the Due Process Clause.



1           A meta-analysis<sup>12</sup> of 27 independent studies conducted on the effects of  
2 stress on identification accuracy showed that, while 59 percent of the 1,727 participants  
3 correctly identified the target individual in a target-present lineup after a low-stress  
4 encounter, only 39 percent did so after high-stress encounters. Kenneth A. Deffenbacher  
5 *et al.*, *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28  
6 *Law & Hum Behav* 687 (2004). In another study, military survival school participants  
7 were subjected to two 40-minute interrogations, each by different interrogators, following  
8 a 12-hour period of confinement without food and sleep in a mock prisoner of war camp.  
9 Morgan, *Accuracy of Eyewitness Memory*, 27 *Int'l J L & Psychiatry* 265 (2004). One  
10 interrogation was conducted under high-stress conditions, involving physical  
11 confrontation, while the other was conducted under low-stress conditions, involving only  
12 deceptive questioning. *Id.* When asked the next day to identify their interrogators, only  
13 30 percent of the participants correctly identified their high-stress interrogator, while 60  
14 percent correctly identified their low-stress interrogator. *Id.* The study also noted an  
15 associated increase in false identifications -- 56 percent of the participants falsely  
16 identified another person as their high-stress interrogator, compared to 38 percent who

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<sup>12</sup> A meta-analysis is a type of study in which researchers combine and analyze the results of multiple previously published studies on a certain subject in order to evaluate their cumulative findings in a broader context, and over larger sample sizes. Meta-analyses do not involve conducting any new experiments, but are nevertheless highly regarded in the scientific community for their ability to synthesize a large amount of data and illustrate a general consensus in a particular field. *See* Roy S. Malpass *et al.*, *The Need for Expert Psychological Testimony on Eyewitness Identification*, in *Expert Testimony on the Psychology of Eyewitness Identification* 14 (B. Cutler ed., 2009) (describing utility of meta-



1 did so with regard to their low-stress interrogator. *Id.*

2           The negative effect of stress on the reliability of eyewitness identifications  
3 contradicts a common misconception that faces seen in highly stressful situations can be  
4 "burned into" a witness's memory. Consequently, the amount of stress inflicted on an  
5 eyewitness has the potential to impair a jury's ability to fairly and accurately weigh  
6 reliability, because jurors may incorrectly assume that stress *increases* reliability. In  
7 addition, stress may also interact with other factors to compound unreliability. Studies  
8 demonstrate, for example, that witnesses are more likely to overestimate short durations  
9 of time in high-stress situations than in low-stress situations. *See* Elizabeth F. Loftus *et*  
10 *al.*, *Time Went by so Slowly: Overestimation of Event Duration by Males and Females*, 1  
Applied Cognitive Psychol

1 effect. Studies consistently show that the visible presence of a weapon during an encounter negative

1 *Effect*, 16 Law & Hum Behav 413, 417 (1992). In addition, evidence regarding a  
2 witness's attention is particularly susceptible to the inflating effects of confirming  
3 feedback. Studies demonstrate that witnesses generally do not contemporaneously  
4 observe their own degree of attention or other viewing conditions as they observe an  
5 event. Gary L. Wells, "Good, You Identified the Suspect": Feedback to Eyewitnesses  
6 Distorts Their Reports of the Witnessing Experience, 83 J Applied Psychol 360 (1998).  
7 Thus, when asked later how closely they were paying attention, witnesses may rely more  
8 heavily on external context clues -- like confirming feedback -- than on independent  
9 recollection.

#### 10 C. *Duration of Exposure*

11 Scientific studies indicate that longer durations of exposure (time spent  
12 looking at the perpetrator) generally result in more accurate identifications. Brian H.  
13 Bornstein *et al.*, *Effects of Exposure Time and Cognitive Operations on Facial*  
14 *Identification Accuracy: A Meta-Analysis of Two Variables Associated with Initial*  
15 *Memory Strength*, 18 Psychology, Crime & Law 473 (2012). One meta-analysis shows  
16 that the beneficial effect of longer exposure time on accuracy is greatest between the  
17 shortest durations, up to approximately 30 seconds. *Id.* In contrast, for durations over 30  
18 seconds, only substantial increases in exposure time produced marked improvement in  
19 witness performance. *Id.* However, it is impossible to determine conclusively that any  
20 particular duration of exposure is too short to make an accurate identification, nor so long  
21 as to entirely eliminate the possibility of a mistaken identification. Indeed, at least one  
22 study has noted *decreases* in identification accuracy with longer viewing durations, in



1 confirming the validity of their identification tend to report more favorable initial viewing  
2 conditions than witnesses who do not receive such feedback. Wells, *et al.*, "Good, You  
3 Identified the Suspect": Feedback to Eyewitnesses Distorts their Reports of the  
4 Witnessing Experience, 83 Applied Psychol 360 (1998).

5 E. *Witness Characteristics and Condition*

6 An eyewitness's ability to perceive and remember varies with the witness's  
7 physical and mental characteristics. Although different witnesses and fact patterns may  
8 implicate different variables, some common variables that affect the ability to perceive  
9 and remember include visual acuity, physical and mental condition (illness, injury,  
10 intoxication, or fatigue), and age. Studies demonstrate, for example, that intoxicated  
11 witnesses are more likely to misidentify an innocent suspect than their sober counterparts.  
12 See Jennifer E. Dysart *et al.*, *The Intoxicated Witness: Effects of Alcohol on Identification*  
13 *Accuracy from Showups*, 87 J Applied Psychol 170 (2002) (finding that 78 percent of  
participants with blood alcohol levels less than .04 percent correctly reb4 379.25 TmETqecitth blood alc

1 F. *Description*

2           Contrary to a common belief, studies reveal that there is little correlation  
3 between a witness's ability to describe a person and the witness's ability to later identify  
4 that person. Christian A. Meissner *et al.*, *Person Descriptions as Eyewitness Evidence*, in  
5 2 *The Handbook of Eyewitness Psychology: Memory for People* 3 (R.C.L. Lindsay *et al.*,  
6 eds., 2007). Indeed, some studies show a negative effect on identification accuracy after  
7 witnesses have attempted to produce a composite of a suspect or provide detailed verbal  
8 descriptions of facial features, a development that might result from the different  
9 cognitive mechanisms employed to verbally describe faces as opposed to recognizing  
10 them. *Id.* Other studies indicate that witnesses who focus on memorizing particular  
11 facial features at a viewing rather than on the face as a whole may be able to better  
12 describe those features, but tend to perform less accurately in later identification  
13 procedures. *Id.*

14 G. *Perpetrator Characteristics -- Distinctiveness, Disguise, and Own-Race Bias*

15           Witnesses are better at remembering and identifying individuals with  
16 distinctive features than they are those possessing average features. *See* Peter N. Shapiro  
17 & Steven Penrod, *Meta-Analysis of Facial Identification Studies*, 100 *Psychol Bull* 139  
18 (1986) (summarizing results of a number of studies on target distinctiveness). However,  
19 identification accuracy drops significantly when an individual's facial features have  
20 changed since the witness's initial observation. K.E. Patterson & A.D. Baddeley, *When*  
21 *Face Recognition Fails*, 3 *Experimental Psychol*

1 target's facial appearance after the initial opportunity to view by changing hairstyles or  
2 adding or removing facial hair). Similarly, studies confirm that the use of a disguise  
3 negatively affects later identification accuracy. In addition to accoutrements like masks  
4 and sunglasses, studies show that hats, hoods, and other items that conceal a perpetrator's  
5 hair or hairline also impair a witness's ability to make an accurate identification. *See,*  
6 *e.g.,* Brian L. Cutler, *A Sample of Witness, Crime, and Perpetrator Characteristics*  
7 *Affecting Eyewitness Identification Accuracy*, 4 *Cardozo Pub L Pol'y & Ethics J* 327, 332  
8 (2006) (summarizing cumulative results of six studies showing that identification  
9 accuracy dropped from 57 percent to 44 percent when perpetrator hair and hairline cues  
10 were masked).

11           Studies also indicate that witnesses are significantly better at identifying  
12 members of their own race than those of other races. *See* Christian A. Meisner & John C.  
13 Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-*  
14 *Analytic Review*, 7 *Psychol, Pub Pol'y, & L* 3 (2001) (summarizing results of three  
15 decades of studies demonstrating effect of own-race bias in eyewitness identifications).  
16 Indeed, one study found that cross-racial identifications were 1.56 times more likely to be  
17 incorrect than same-race identifications. Conversely, subjects were 2.2 times more likely  
18 to accurately identify a person of their own race than a person of another race. *Id.* at 15-  
19 16 (2001). Despite widespread acceptance of the cross-racial identification effect in the  
20 scientific community, fewer than half of jurors surveyed understand the impact of that





1 whether the witness employed a process of elimination or other relative judgment to  
2 arrive at the identification -- are not highly reliable. *Id.* As with self-reports concerning  
3 many of the other factors previously discussed, witnesses' perception of their own  
4 deliberative process can be manipulated by suggestive procedures and confirming  
5 feedback. *Id.* Additionally, studies have shown that suggestive identification procedures  
6 can result in quicker identifications without any corresponding increase in accuracy. *See,*  
7 *e.g.,* David F. Ross *et al.*, *When Accurate and Inaccurate Eyewitnesses Look the Same: A*  
8 *Limitation of the 'Pop-Out' Effect and the 10- to 12-Second Rule*, 21 *Applied Cognitive*  
9 *Psychol* 677-90 (2007).

10 I. *Level of Certainty*

11 Despite widespread reliance by judges and juries on the certainty of an  
12 eyewitness's identification, studies show that, under most circumstances, witness  
13 confidence or certainty is not a good indicator of identification accuracy. Regarding  
14 *prospective* certainty -- the witness's confidence *prior to* the identification procedure in  
15 his or her ability to make an identification -- a number of meta-analytic studies have  
16 found no correlation between certainty and identification accuracy. In contrast,  
17 *retrospective* certainty -- witness confidence in the accuracy of their identification *after* it  
18 has occurred -- may have a weak correlation with accuracy. *See* Gary L. Wells &  
19 Elizabeth A. Olsen, *Eyewitness Testimony*, 54 *Ann Rev Psychol* 277, 283 (2003)  
20 (describing studies). The effect, however appears only within the small percentage of  
21 extremely confident witnesses who rated their certainty at 90 percent or higher, and even  
22 those individuals were wrong 10 percent of the time. *Id.*



1 Behav 194, 194 (2009) (summarizing prior research). Jurors, however, tend to be  
2 unaware of the generally weak relationship between confidence and accuracy, and are  
3 also unaware of how susceptible witness certainty is to manipulation by suggestive  
4 procedures or confirming feedback. See, e.g., Tanja R. Benton *et al.*, *Eyewitness Memory*  
5 *is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to*  
6 *Eyewitness Experts*, 20 *Applied Cognitive Psychol* 115, 120 (2006) (finding that only 38  
7 percent of jurors surveyed correctly understood the relationship between accuracy and  
8 confidence and only 50 percent of jurors recognized that witnesses' confidence can be  
9 manipulated). As a result, jurors consistently tend to overvalue the effect of the certainty  
10 variable in determining the accuracy of eyewitness identifications.

J.



1 administrators are generally unconscious of the influence that the lineup administrator's  
2 behavior has on identification process. See Ryauu M. Haw & Ronald P. Fisher, *Effects of*  
3 *Administrator-Witness Contact on Eyewitness Identification Accuracy*, 89 J Applied  
4 Psychol 1106, 1110 (2004) (summarizing findings of other studies). That said, however,  
5 administrator knowledge significantly affects reliability.

6 To guard against that influence, experts recommend that all identification

1 Malpass & Patricia G. Devine, *Eyewitness Identification: Lineup Instructions and the*  
2 *Absence of the Offender*, 66 J Applied Psychol 482, 485 (1981). There appears to be  
3 little downside to giving such instructions. According to a 2005 meta-analysis, unbiased  
4 instructions greatly increased correct suspect rejections in target-absent lineups, but had  
5 no appreciable effect on the rate of correct identifications in target-present lineups.

Steven E. Clark, *A Re-*

1 Psychology: Memory for People 155, 157-58 (R.C.L. Lindsay *et al.*, eds., 2007); National  
2 Institute of Justice, U.S. Dep't of Just, *Eyewitness Evidence: A Guide for Law*  
3 *Enforcement* 29 (1999). If a suspect differs significantly from the witness's description,  
4 the lineup fillers should be matched to the suspect rather than the description in order to  
5 prevent the suspect from standing out. *Id.* Suspects should not be displayed in  
6 distinctive clothing or in clothing that matches the witness's description unless all of the  
7 lineup fillers are also dressed alike; a suspect's distinctive features -- scars, tattoos, etc. --  
8 should either be concealed or artificially added to all of the lineup fillers. *Id.* Lineups  
9 should contain only one suspect and utilize a sufficient number of fillers to minimize the  
10 likelihood that a witness will select the suspect based on chance rather than memory. *Id.*  
11 Most sources recommend a minimum of five fillers to one suspect. *Id.* Any increase in  
12 the number of lineup fillers correspondingly decreases the probability of misidentification

1 judgment" -- comparing each subject to their memory of the perpetrator and deciding  
2 whether that subject is the perpetrator or not. Relative judgments process have been  
3 found to increase the likelihood of misidentification, especially in target-absent lineups.  
4 To correct that problem, researchers recommend an alternative lineup procedure in which  
5 the witness is presented with each individual person or photograph sequentially. Because  
6 the witness views only one person or photograph at a time, researchers posit that the  
7 witness is less able to engage in relative judgment, and thus less likely to misidentify  
8 innocent suspects. Nancy Steblay *et al.*, *Eyewitness Accuracy Rates in Sequential and*  
9 *Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 *Law & Hum*  
10 *Behav* 459, 463-64 (2001). Studies show a moderate trend toward fewer  
11 misidentifications in sequential lineups than in simultaneous lineups. *Id.* at 463-64  
12 (reporting that, in the combined results of 30 experiments collected from 19 previous  
13 research papers, 51 percent of witnesses presented with simultaneous target-absent  
14 lineups misidentified a person, while only 28 percent did so in sequential lineups).

15           Other recent studies, however, challenge the validity of that finding,  
16 cautioning that the different outcomes in sequential and simultaneous lineups may be  
17 attributable to other factors. Specifically, some research shows that sequential lineups  
18 may result in *more* misidentifications when not conducted by a blind administrator, and  
19 that other factors such as differing methods of witness instruction and questioning may  
20 explain the difference in results. Dawn McQuiston-Surrett *et al.*, *Sequential vs.*  
21 *Simultaneous Lineups: A Review of Methods, Data, and Theory*, 12 *Psychol Pub Pol'y &*  
L 137, 143-51 (2006);



Legal & Criminological Psychology 1 (2009).

1 (compared to 16 percent in an immediate lineup); a delay of only two hours increased the  
2 misidentification rate to 58 percent (compared to 14 percent in a lineup). David A.  
3 Yarmey *et al.*, *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 *Law*  
4 *& Hum Behav* 459, 464 (1996).

5           Studies also demonstrate that showups pose a particularly high risk of  
6 misidentification for innocent suspects who happen to look like the perpetrator. A 2003  
7 meta-analysis found that, when an innocent suspect closely resembled a perpetrator, 23  
8 percent of witnesses misidentified the suspect in a showup, compared to 17 percent of the  
9 witnesses presented with the same suspect in a lineup. Nancy Steblay *et al.*, *Eyewitness*  
10 *Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic*  
11 *Comparison*, 27 *Law & Hum Behav* 523, 533 (2003). In addition, witnesses at a showup  
12 may be more inclined to base their identifications on clothing rather than on facial  
13 features. Studies indicate that showups present an especially high risk of  
14 misidentification for suspects wearing clothing similar to that of the perpetrator. Jennifer  
15 E. Dysart *et al.*, *Show-Ups: The Critical Issue of Clothing Bias*, 20 *Applied Cognitive*  
16 *Psychology* 1009 (2006).

17 F.     *Multiple Viewings (Mugshot Exposure, Mugshot Commitment, Source Monitoring*  
18         *Errors, Source Confusion)*

19  
20           Viewing a suspect multiple times throughout the course of an investigation  
21 adversely affects the reliability of any identification that follows those viewings.  
22 Researchers posit that the negative effect of multiple viewings may result from the  
23 witness's inability to discern the source of his or her recognition of the suspect, an



1 identification procedure, the procedure increases the witness's familiarity with the  
2 suspect's face. If the witness is later presented with another lineup in which the same  
3 suspect appears, the suspect may tend to stand out or appear familiar to the witness as a  
4 result of the prior lineup, especially when the suspect is the only person repeated in both  
5 lineups. *Henderson*, 208 NJ at 255-56; Deffenbacher, *Mugshot Exposure Effects*, 30 Law  
& Hum Behav at 299. As

1 Psychol 918. The phenomenon is most problematic when a witness is vaguely familiar  
2 with a suspect but unconscious of why that is so. The result, often, is that the witness  
3 mistakenly attributes that familiarity to having previously observed the suspect at the  
4 crime scene. See J. D. Read *et al.*, *The Unconscious Transference Effect: Are Innocent*  
5 *Bystanders Ever Misidentified?*, 4 *Applied Cognitive Psychol* 26 (1990) (noting that, to  
6 produce unconscious transference errors, a witness's familiarity with the suspect's face  
7 must not be "so high as to elicit recall of the misidentified person's correct context or  
8 identity").

9           Although multiple viewings of a suspect always introduce a degree of  
10 doubt as to the reliability of an identification, studies suggest that witnesses may be most  
11 susceptible to source monitoring errors when their initial memory trace is weakest. See,  
12 *e.g.*, Deffenbacher, *Mugshot Exposure Effects*, 30 *Law & Hum Behav* at 288 (noting that  
13 "failure of memory for facial source or context is all the more problematic when viewing  
14 of the perpetrator has occurred under less than optimal viewing conditions"). Thus, the  
15 presence of estimator variables indicating weak initial encoding may magnify the  
16 suggestive effects of multiple viewings.

17 G.    *Suggestive Questioning, Cowitness Contamination, and Other Sources of Post-*  
18        *Event Memory Contamination*

19

1 result in answers that more closely fit the expectation embedded in the question. For  
2 example, in one study, participants who had viewed a short video of a traffic accident  
3 were asked various questions about what they had seen in the video. *Id.* Although there  
4 was no broken headlight in the video, participants who were asked "Did you see *the*  
5 broken headlight?" were more than twice as likely to answer "Yes" than those who were  
6 asked "Did you see *a* broken headlight?" *Id.* (emphasis added).

7           Witness memory, moreover, can become contaminated by external  
8 information or assumptions embedded in questions or otherwise communicated to the  
9 witness. In one study, participants were asked, after viewing a short video, to estimate  
10 the speed of a car in the video either "when it passed the barn" or without mention of a  
11 barn. Elizabeth F. Loftus, *Leading Questions and the Eyewitness Report*, 7 *Cognitive*  
12 *Psychol* 560, 566 (1975). One week later, the participants were asked whether they had  
13 seen a barn in the video. *Id.* Although there was no barn in the video, 17 percent of the  
14 subjects who had been asked the question presupposing the existence of a barn reported  
15 having seen the barn, compared to two percent of the subjects to whom no barn had been  
16 mentioned. *Id.*

17           Another study found that participants' estimations of a vehicle's speed  
18 differed according to whether a question used the words "collided," "bumped,"  
19 "contacted," "hit," or "smashed" to describe the taped car accident that they viewed.  
20 Elizabeth F. Loftus & John C. Palmer, *Reconstruction of Automobile Destruction: An*  
21 *Example of the Interaction Between Language and Memory*, 13 *J Verbal Learning &*  
22 *Verbal Behav* 585 (1974). Participants who were asked how fast the cars were going



1 H. *Suggestive Feedback and Recording Confidence*

2                   As noted above, post-identification confirming feedback tends to falsely  
3 inflate witnesses' confidence in the accuracy of their identifications, as well as their  
4 recollections concerning the quality of their opportunity to view a perpetrator and an





1 *Feedback Effect Be Moderated?*, 10 Psychol Sci 138 (1999).