

AS FAR AS THE EYE CAN SEE

Challenging eye-witness testimony with science.

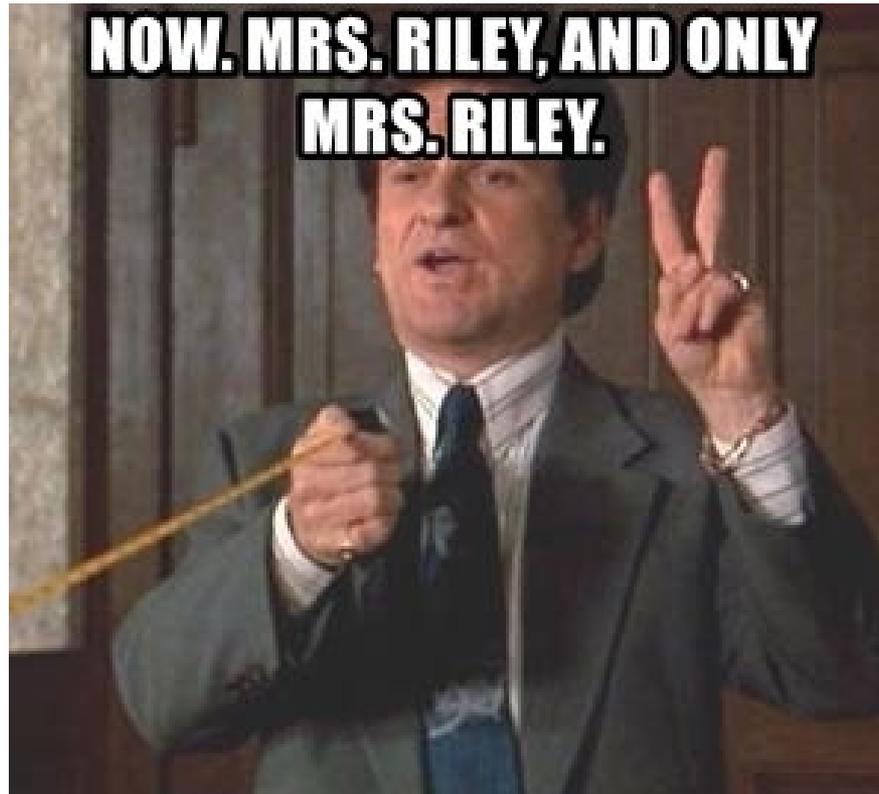


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Mistaken witness identification is the leading cause of wrongful convictions in the United States.

Eyewitness Identification Task Force, Report to the Judiciary Committee of the Connecticut General Assembly (February 8, 2012)

70% of the more than 350 wrongful convictions overturned by post-conviction DNA evidence were obtained because of eyewitness identification testimony.

-The Innocence Project

One-third of those convictions were
obtained because of the testimony of two
mistaken eyewitnesses.

-The Innocence Project

MYTHS ABOUT EYEWITNESS TESTIMONY

#1

Human memory works like a video camera, accurately recording what we see and hear so it can be retrieved and reviewed later.

(Psychologists have found that memories are reconstructed rather than played back each time we recall them. The act of remembering, is “more akin to putting puzzle pieces together than retrieving a video recording.” Memory is a constructive, dynamic and selective process. State v Henderson, 208 NJ 208 (2011))

MYTHS ABOUT EYEWITNESS TESTIMONY

#2

Once you experience an event and form a memory of it, that memory does not change.

(Memory does not improve with time. The scientific literature clearly establishes that memory decay is irreversible and delays between the event and the testimony can affect reliability.)

MYTHS ABOUT EYEWITNESS TESTIMONY

#3

The more confident eyewitness testimony is, the more likely it is to be accurate.

(While jurors tend to give more weight to the testimony of eyewitnesses who report that they are very sure about their identifications studies indicate that highly confident eyewitnesses are generally only slightly more accurate—and sometimes no more so—than those who are less confident)

MYTHS ABOUT EYEWITNESS TESTIMONY

#4

Those who witness a stressful event are more likely to accurately remember it.

(Witness stress at the time of the event or the identification process actually reduces the accuracy of eyewitness testimony, according to scientific research.)

The brain abhors a vacuum. Under the best of observation conditions, the absolute best, we only detect, encode and store in our brains bits and pieces of the entire experience in front of us, and they're stored in different parts of the brain. So now, when it's important for us to be able to recall what it was that we experienced, we have an incomplete, we have a partial store, and what happens? Below awareness, with no requirement for any kind of motivated processing, the brain fills in information that was not there, not originally stored, from inference, from speculation, from sources of information that came to you, as the observer, after the observation. But it happens without awareness such that you don't, aren't even cognizant of it occurring. It's called reconstructed memories. It happens to us in all the aspects of our life, all the time.

Scott Fraser, Forensic Psychologist

Ted Talk May 2012

The extensive and comprehensive scientific research, as reflected in hundreds of peer reviewed studies and meta-analyses, convincingly demonstrates the fallibility of eyewitness identification testimony and pinpoints an array of variables that are most likely to lead to a mistaken identification.

State v. Guilbert, 306 Conn. 218, 235-236 49 A.3d 705 (2012)

VARIABLES THAT BEAR ON EYEWITNESS RELIABILITY

- Stress
- Time
- Distance and Lighting
- Confirmatory Feedback/Eyewitness Talk
- Selective Attention
- Unconscious Transference
- Cross-racial Identification

STRESS

Research proves that stress can diminish a witnesses ability to recall and give accurate eyewitness testimony about an event or identification.

See e.g., Morgan, Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress, 27 Int'l J. L. & Psychiatry 265 (2004)

K. Deffenbacher et al., "A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory," 28 Law & Hum. Behav. 687, 699-704 (2004)

TIME

Reliable eyewitness testimony may be affected by the amount of time the witness had to observe the event.

See e.g., Colin G Tredoux et al., Eyewitness Identification in 1 Encyclopedia of Applied Psychology 875, 877 (2004)

Loftus et al., Time Went By So Slowly; Overestimation of Event Duration in Males and Females, 1 Applied Cognitive Psychology 3, 10 (1987)

DISTANCE AND LIGHTING

Clarity decreases with distance. This and poor lighting conditions can diminish the reliability of eyewitness testimony.

See, e.g. Lindsay et al., How Variations in Distance Affect Eyewitness Reports and Identification Accuracy, 32 Law & Human Behavior 526 (2008)

DISTANCE AND LIGHTING

Scientific research shows that:

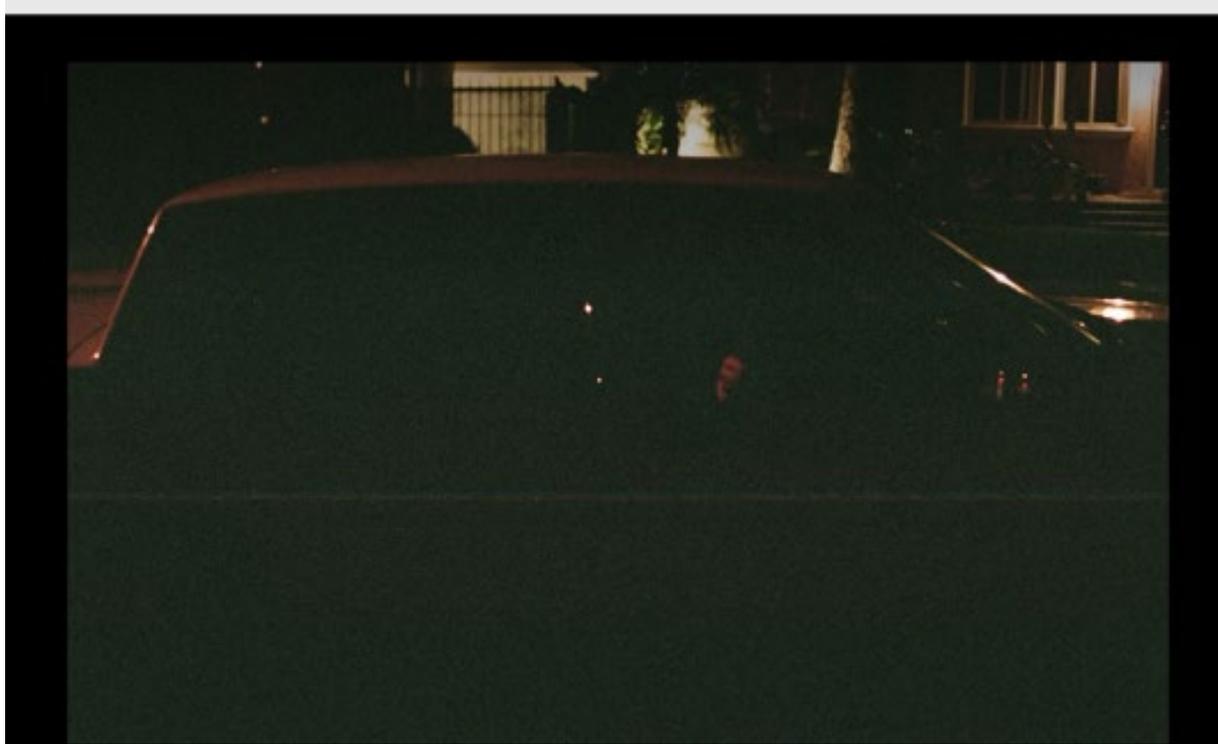
If lighting is bad, there is no reliable color perception, which is crucial for face recognition;

If lighting is bad, there is only scotopic vision, which means there would be very little resolution, what we call boundary or edge detection;

Where the light is coming from plays a role in perception and ability to see; and,

If lighting is bad, the eyes could be totally dilated such that the depth of field, the distance at which a witness can focus and see details is severely affected.

DISTANCE AND LIGHTING



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EYE WITNESS TALK

Post-event discussion among eye witnesses influences eye witness testimony.

Survey: 86% of eye witnesses discussed event with other eye witnesses PRIOR to giving interview, statement or testimony.

Co-witness conformity-Eye witnesses are influenced to include things that they didn't actually see after talking with other eye witnesses.

Univ. of Huddersfield (UK) Psych. Video Experiment – Who started bar fight?

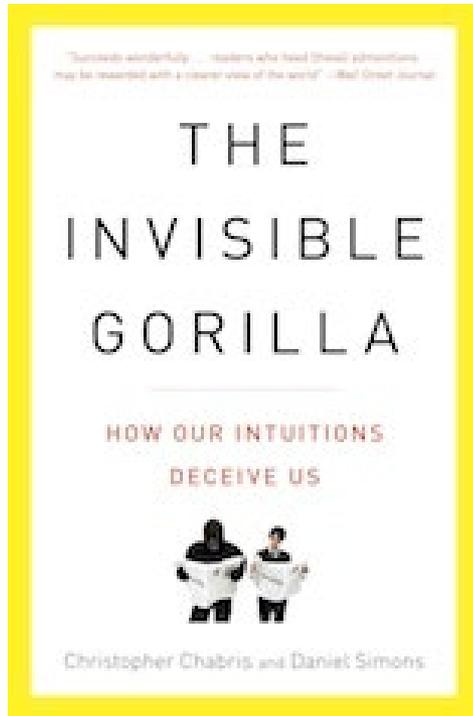
no actors-32% gave inaccurate 'eye witness statements' (attributable to poor eyesight or poor memory)

1 actor-52% adopted false narrative

2 actors-80% adopted false narrative

Witnesses with submissive or neurotic personalities are more likely to relay information through eye-witness talk.

THE INVISIBLE GORILLA



The Invisible Gorilla is a book published in 2010, co-authored by Christopher Chabris and Daniel Simons. This title of this book refers to an earlier research project by Chabris and Simons revealing that people who are focused on one thing can easily overlook something else.

SELECTIVE ATTENTION



<https://youtu.be/vJG698U2Mvo>

UNCONSCIOUS TRANSFERENCE

Memory error occurring when eyewitness misidentifies a familiar but innocent person. Generally witness has no conscious recollection of the previous encounter with the person.

Real world example: Train station ticket agent misidentified a former customer as robber even though customer had ironclad alibi.

CROSS-RACIAL IDENTIFICATION

Witnesses have more difficulty making eyewitness identification when the witness is asked to identify a person of another race.

Meissner & Brigham, Thirty Years of Investigating the Own-Race Bias in Memory of Faces; A Meta-Analytical Review, 7 Psychol. Pub. Policy & Law 3, 21 (2001)

HELPFUL RESEARCH

K. Deffenbacher et al., “Forgetting the Once–Seen Face: Estimating the Strength of an Eyewitness’s Memory Representation,” 14 J. Experimental Psychol.: Applied 139,147–48 (2008);

K. Deffenbacher et al., “Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference,” 30 Law & Hum. Behav. 287,306 (2006);

K. Deffenbacher et al., “A Meta–Analytic Review of the Effects of High Stress on Eyewitness Memory,” 28 Law & Hum. Behav. 687, 699–704 (2004);

A. Douglass & N. Steblay, “Memory Distortion in Eyewitnesses: A Meta–Analysis of the Post–Identification Feedback Effect,” 20 Applied Cognitive Psychol. 859, 864–65 (2006);

S. Kassin et al., “On the ‘General Acceptance’ of Eyewitness Testimony Research: A New Survey of the Experts,” 56 Am. Psychologist 405, 405–406 (2001);

N. Steblay, “A Meta–Analytic Review of the Weapon Focus Effect,” 16 Law & Hum. Behav. 413, 413, 420–22 (1992).

EXPERT TESTIMONY

Objections

- Reliability of eyewitness testimony is within general knowledge of average juror.
- Testimony invades province of jury to decide credibility.
- Traditional *Daubert*-type challenge on the research, methodology and other bases of the expert's opinions.

State v. Guilbert, 306 Conn. 218, 235-236 49 A.3d 705 (2012)

State v. Henderson, 208 N.J. 208, 27 A.3d 872 (2011)

EXPERT TESTIMONY

Focus is on reliability of eyewitness memory and fact that this is not within knowledge of average juror.

Should be permitted to inform jurors on factors that are regarded in the science as having an adverse effect on reliability of eyewitness testimony and relevant to the facts at issue.

Should not be permitted to give opinion evidence on credibility or accuracy of a specific witnesses eyewitness testimony.

The mission is **not** to make any eyewitness come across as a liar.

MODEL JURY INSTRUCTIONS ON EYEWITNESS IDENTIFICATION

Consider preliminary or contemporaneous instruction.

Massachusetts-

<https://www.mass.gov/law-library/model-jury-instructions-on-eyewitness-identification>

New Jersey-

<https://www.innocenceproject.org/wp-content/uploads/2017/06/NJ-Jury-Instruction.pdf>

CAVEAT: Research shows instruction that jurors should exercise caution in evaluating eyewitness testimony is less effective than expert testimony on potential unreliability of eyewitness evidence.

(comes too late, lost in forest of legalese, doesn't usually describe empirical research on the issue)



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