

# Training For Success

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## Interviewing and Testimony

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**‘Eyewitness identification evidence is so unreliable that there is no way it should be used as evidence’. Critically evaluate this claim.**

### Introduction

Criminal justice systems around the World incorporate measures that quantify and direct the way in which eyewitness testimony may be validated. Domestically this important constitutional gauge is enshrined by Parliament under the auspices of Code D of the Police and Criminal Evidence Act (1984). Such evidence, when delivered with poise and confidence by a witness within the confines of the majesty of a court of law can often be wholly persuasive. As the former US Supreme Court Justice William J. Brennan once eloquently stated, “there is nothing more convincing [to a jury] than a live human being who takes the stand, points a finger at the defendant, and says ‘That’s the one!’” (Watkins v. Souders 1982).

Yet this important raft of prosecution activity is often at best informed conjecture and at worst a wrongful identification of an innocent party. This review will critically examine the human susceptibility to both internal and external influences that may lead to inaccurate and confusing recall and in some cases a plethora of untruths. Such is the unenviable track record of this

type of evidential stream it is arguable that the headline presumption that



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eyewitness identification evidence is so unreliable that there is no way it should be used as evidence is a reasonable response to the catalogue of wrongful convictions of innocent people.

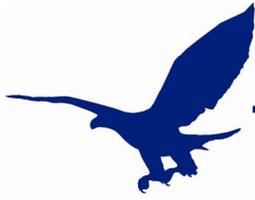
In evaluating this assertion the physiological dimensions of the human mind will be examined, especially the manner in which memory is stored, processed and ultimately recovered and articulated. Furthermore, contemporary scientific research coupled with a series of international criminal cases will seek to prove a damning verdict on the reliance of eyewitness evidence.

## **Historical context**

Globally eyewitness evidence has long been considered by many legal scholars and researchers as being suspect and in many cases wholly unreliable.

As way back as 1904 a committee of enquiry was established to review the trials of Adolf Beck. Unbelievably on two separate occasions he was wrongly convicted by virtue of flawed eyewitness identification. In both criminal trials a number of witnesses identified Beck as a fraudster who had stolen items of jewellery from them. The crimes were in fact carried out by William Wyatt. This process led directly to the birth of the Court of Appeal (Bogan 2004).

This notion was elegantly embraced in 'Convicting the Innocent' by Edwin



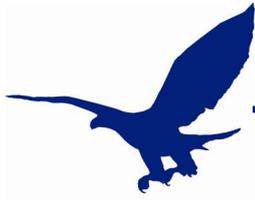
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Borchard in 1932. The decision in the 1967 US Supreme Court case, United States v. Wade (1967), graphically acknowledged this issue when Justice Brennan stated, “The vagaries of eyewitness identification are well-known: the annals of criminal law are rife with instances of mistaken identification”. Furthermore the justices in this key case quoted a legal text by Patrick Wall that articulated the following assertion: “Mistaken identifications have been responsible for more miscarriages of justice than any other factor – more so perhaps, than all other factors combined” (Wall 1965).

A government enquiry chaired by Lord Devlin in the United Kingdom reviewed the issue of identification evidence and reported in 1976. The Devlin report led directly to a landmark judgement in the Court of Appeal which created an obligation that in cases of disputed identification the trial judge must caution the jury about the dangers of eyewitness testimony. Indeed the special warning should crucially point out that confident eyewitnesses may be mistaken and should instruct the jury to consider carefully the complete circumstances of the identification (R. v. Turnbull 1977).

Latterly research by Huff (1987, pg 99-115) concluded that a staggering 300 out of 500 of (60%) erroneous convictions were down to eyewitness error. Research by Wells and Bradfield (1998, pg 360-376 ) exposed the fact that evidential DNA results cleared twenty four out of twenty eight people (86%) who had previously been identified via eyewitness testimony.



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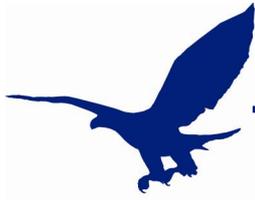
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Cutler and Penrod (1995) determined that if five percent of convictions were wrongful due to eyewitness identification being mistaken then 7,500 wrongful convictions would occur annually within England and Wales. In addition Cutler and Penrod (1995) scrutinised eyewitness identification reliability during “controlled studies performed in a ‘natural setting’”. In this trial, an individual enters a shopping outlet and carries out an unforgettable task (for example, settling the bill with high volume coinage only) to guarantee drawing the assistants attention. Latterly the assistant views an album of ‘suspects’ and is encouraged to identify the ‘customer’. The percentage of correct identification was a dismal 41%.

It is contended that the previous commentary supports the notion that it is an almost impossible task for witnesses to correctly identify suspects, especially aggrieved persons. This declaration will now be explored although it is perhaps fair to say that those of us sitting in the comfort of their own homes find such a process to be challenging, as illustrated in the “observation round” of ‘The Krypton Factor’ (Fox 1977).

## **Recall problems**

Probably one of the most common criminal justice models that engage with eyewitness evidence requires that the witness first describe the offender (notably their face) then, where necessary, participate in an identification parade.



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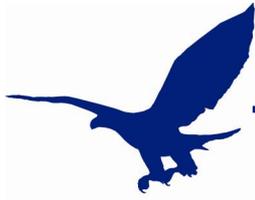
Psychologically the absorption of facial memory consists of three distinct methods, namely –

- Encoding,
- Storage,
- Retrieval.

Initially the description of the offender relies on recall whilst on the other hand real time identification (parade) relies upon the process of recognition (Ellis, 1984, pg 12-37).

Adding to the uncertainty of eyewitness identification research by Piggott, Brigham and Rothwell (1990, pg 84-88) and Wells (1993, pg 553-571) suggests that when verbally describing a person, witnesses generally collect a maximum of seven characteristics, namely –

- Age
- Height
- Build
- Gender
- Race (complexion)
- Hair
- General clothing



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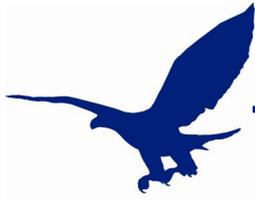
Hairstyle is most referred to (27%) followed by eyes and the nose (14% each) and face shape (13%) (Shepherd and Ellis 1996). Initial verbal descriptions, especially those provided to police after a crime has been committed do not usually contain a high degree of facial imagery (Lindsay 1994, pg 27-55).

Added to the manner in which the human memory processes information, key variables may influence the accuracy of recall, specifically estimator and system variables. Initially the former will be reviewed albeit both variables will be expanded in order to focus upon the drivers that engage with eyewitness testimony.

## **Estimator variables**

The seriousness of the crime tends to have a major impact on eyewitness evidence. Research (Leippe, Wells and Ostrom 1978, pg 345-351) concluded that eye witnesses are more likely to identify a suspect based on the gravity of the misdemeanour. Although the control experiment was wholly based on the monetary value of two separately stolen items nonetheless a more positive recall inclined towards the most expensive scenario albeit interestingly only when the witness was conscious of the respective values beforehand.

An explanation for this outcome was proposed by Cutler and Penrod (1995) in which heightened stress levels complimented more active recall, although only within certain parameters. Low and excessive stress levels produced poorer quality intelligence whilst a moderated increase paralleled an increase



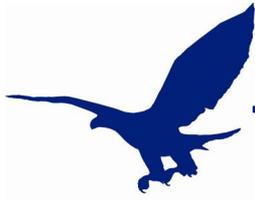
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in eyewitness accuracy. In research in the United States involving trained military students in high stress simulations involving a face to face forty minute cross-examination, in a well lit room, later identifications of interrogators produced a 68% failure rate (Morgan, Hazlett, Doran, Garrett, Hoyt, Thomas, Baranoski & Southwick 2004, pg 265-279). The inclusion of a weapon can act as a distraction too, thereby reducing overall recall of the offender's physical features (Maas and Köhnken 1989, pg 397-409).

It is perhaps unsurprising that the time the offender is under observation by a witness (Cutler and Penrod 1995) and the span between this event and a formal identification parade (Courtois and Müller 1981, pg 639-645) has a significant detrimental affect on eyewitness evidence. The rate of degradation of eyewitness recall is sharp. The arc of forgetfulness diminishes within twenty minutes after the primary encoding. This process carries on exponentially levelling off approximately forty eight hours later with an enormously reduced level of accuracy (Kassin 2001, pg 413-414). Other physical conditions such as lighting and the weather also conspire to reduce the accuracy of recall (Stern and Dunning 1994).

At the point of memory recovery environmental factors associated with lineups (be them 'live' or 'video') are critically important. Research has identified the phenomenon '*unconscious transference*', whereby "a different memory image may become combined or confused with one another. Also labeled as the '*bystander effect*', this occurrence manifests when a witness incorrectly



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identifies an individual from a lineup as the actual suspect when, in reality, the witness previously saw the individual either as a bystander at the event or in a completely different context” (Loftus 1976).

More worryingly, research supports the notion that by choosing the wrong individual during the identification process “increases the likelihood that the same individual will be selected in future lineups or in-court identifications, despite the inaccuracy of the original identification” (Gorenstein & Ellsworth 1981). Research has shown that the articulation of erroneous information during the identification process can increase the likelihood of eyewitness distortion. Examples include multiple or leading questions posed by interviewers (Loftus, Altman and Geballe 1975, pg 162-165).

Witness factors such as age and ethnicity can negatively influence eyewitness recall. Generally adults are more accurate than children (Chance and Goldstein 1984, pg 64-85). The following quote elegantly connects with the issue of ethnicity “...*other things being equal, individuals of a given race are distinguishable from each other in proportion to our familiarity, to our contact with the race as a whole...*” (Feingold 1914, pg 40).

Even straightforward disguises including a simple change in hairstyle or the wearing of sunglasses, for example, can also have a wholly detrimental effect on eyewitness testimony (Cutler and Penrod 1995).



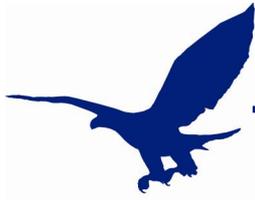
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## **System variables**

System variables can also skew the vulnerability of eyewitness evidence still further. Notwithstanding the posture of the revised Codes of Practice contained within the Police and Criminal Evidence Act 1984 it is arguable that these seemingly robust measures only add to the susceptibility of human recall. Aggressive interviewing by the police, especially where more than one officer is involved, can seriously undermine the already delicate recall mechanisms. Unwitting transmission by investigators to witnesses during the early stages of enquiry can weaken ensuing identification parades (Lindsay 1994). Indeed, public appeals via the media (allowable under the auspices of the Codes of Practice) can edify this worrying trend. The theory of unconscious transference (Read, 1991; Ross, Ceci, Dunning and Toglia, 1994, pg 80) classifies this notion as *“the inability of an eyewitness to distinguish between a familiar but innocent person and an assailant observed at the scene of a crime or in some other context.”*

When witnesses are encouraged to supply a ‘full and complete’ narrative of the offender (as arguably investigators would do so in most if not all prevailing circumstances) “they tend to guess, often inaccurately, about the features they are not sure of. These inaccurate guesses interfere with their later ability to recognise the person’s face in a lineup, thereby producing a higher level of misidentifications than for those who were not, ironically, urged to give a ‘full and complete’ description” (Meissner 1998).



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It is contended that the most damning evidence of identification procedures, be they involving a 'live' line up or video counterparts (VIPER<sup>1</sup> and PROMAT<sup>2</sup>) is contained within research that centres upon those line ups that do not include the actual offender. These events can typically occur when the police correctly suspect an individual of being responsible for the crime in question, when it was actually committed by another who does not appear in the process.

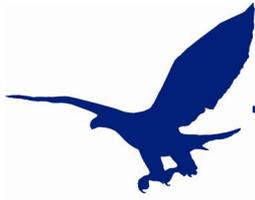
Here the innocent police suspect faces an appreciably raised risk of being wrongly identified as the wrongdoer (Wells and Olsen 2003). This outcome is edified since the police suspect will undoubtedly reflect the characteristics of the person described by the witness in the initial stages of the investigation. This term has been labelled the 'relative judgement effect' where the witness is more likely to pick out the person who looks the guiltiest, notwithstanding that the genuine wrongdoer is excluded from the process. As a Police Inspector in charge of VIPER at Slough (Thames Valley Police) during 2005 I can add anecdotal evidence of this trend.

Even the Home Office, it is argued, has to accept defeat in their attempts to improve identification processes within England and Wales. The following table illustrates graphically the woefully low success rates from the largest UK force, the Metropolitan Police –

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<sup>1</sup> Video Identity Parade Electronically Recorded

<sup>2</sup> Profile Matching



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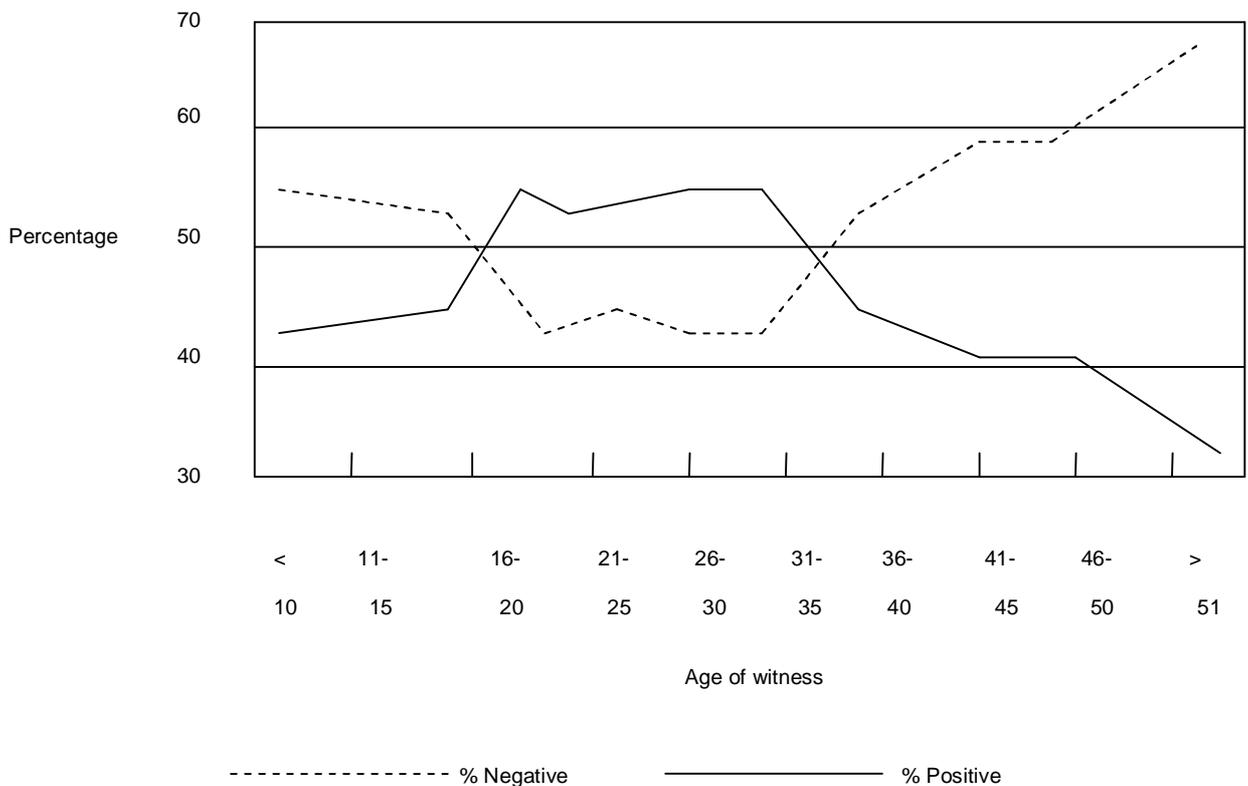
**Table 1: Outcome of parade, by crime type**

Crime type	n	Positive (%)	Negative (%)
Robbery	709	45	55
Theft	177	53	47
Burglary	170	45	55
Assault	331	53	47
Other	389	51	49

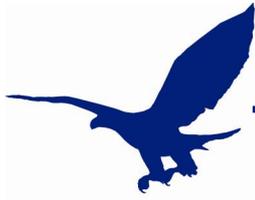
(Tables 1 above and 2 below: Pike, Brace and Kynan 2002)

In terms of the age of the witness the outcomes are even less inspiring as outlined in the table below –

**Table 2: Parade outcome by witness age**



Considered separately even the flagship VIPER process fares little better with



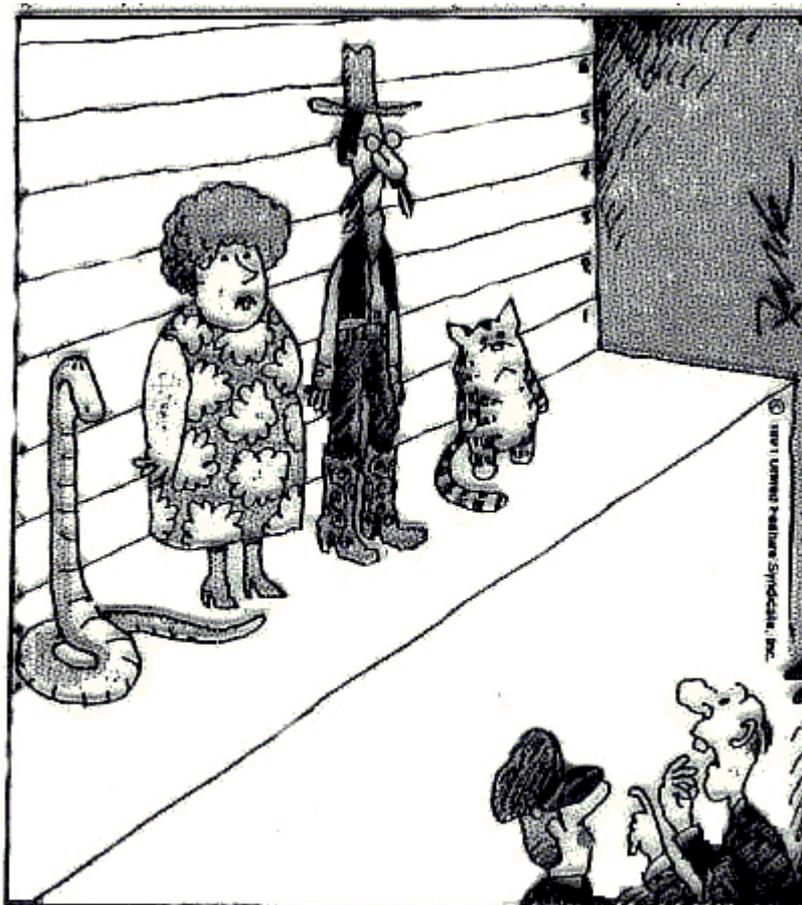
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a 39% success rate (compared to 35% achieved in 'live' line ups). (Pike, Brace and Kynan 2002).

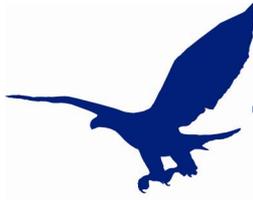
## Conclusion

Notwithstanding continual attempts by disparate criminal justice systems to embrace and safeguard eyewitness testimony and therefore promote its status the overwhelming conclusion, it is contended, cannot hide the fragile nature of the human mind nor negate the grand list of influences that can turn the process of recall often into one of farce as the following cartoon lampoons.



"It was ... the cat! No, the woman! Heck, it could have been any one of them."

(Fulero 2007)

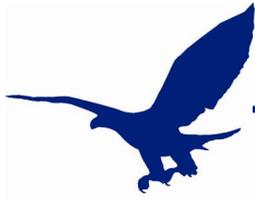


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This may seem an unfair review given the reliance placed upon this evidential tool by law enforcers. However, the strands of research depict a less convincing state of affairs and the somewhat romantic vision of the success of human recall is perhaps perpetuated occasionally by the somewhat over ambitious claims by members of the criminal justice system. For example, the press release by Lothian and Borders Police on the 21<sup>st</sup> October 2004 proudly announced - 'SIX MONTHS ON - VIPER AN OUTSTANDING SUCCESS'. Douglas Brown, Area Procurator Fiscal for Lothian and Borders said: "VIPER is an excellent example of modernisation improving the service delivered to victims and witnesses across Lothian and Borders. Through the innovative use of technology the process of participating in identification parades has been made less stressful for victims of crime."(Lothian & Borders 2004). It is submitted that often this type of chest thumping can only increase the inappropriate standing of eyewitness testimony in the minds of the general public and especially those that ultimately sit on a jury.

A more poignant report on the vagaries of eyewitness testimony was a case involving Jennifer Thompson who latterly recorded her reflections in a newspaper report, "*I Was Certain, but I Was Wrong*" (New York Times 2000). At court, recalling her account of rape she declared, "I studied every single detail on the rapist's face. I looked at his hairline; I looked for scars, for tattoos, for anything that would help me identify him. When and if I survived the attack, I was going to make sure that he was put in prison and he was going to rot." Highly persuasive, detailed and convincing. But wholly wrong.



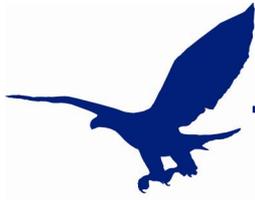
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After eleven years the accused Ronald Cotton was cleared of the charge by DNA evidence.

On April 26<sup>th</sup> 1999 the television personality Jill Dando was murdered. Barry George was convicted albeit he has fought the conviction via a number of appeals (and continues to do so with a retrial having been ordered during November 2007). In the book '*Jill Dando, Her Life and Death*' (Cathcart 2001) the author Brian Cathcart centres upon three eyewitness accounts appertaining to the whereabouts of George shortly before the act was committed. The witnesses had participated in a video identification (which included George) and in Cathcart's words, "They sort of picked him out and sort of didn't. One, Charlotte de Rosnay, asked to see two faces again. One was George's. She thought and thought until she was asked if she could make a positive identification. She couldn't. Her mother-in-law, who had been staying with her at the time, lingered on the same two faces and said she had a 'gut feeling' that George was the man. She, too, couldn't be positive. The third witness was also interested in George, but couldn't be sure." (*Guardian Unlimited* 2002).

As Managing Director of a UK based risk consultancy (Training For Success) I have personally spoken to ex-offenders, especially those convicted of violent crimes such as armed robbery. It is submitted that the following passage, written by an ex-offender only adds significant weight to the deduction that eyewitness identification evidence is so unreliable that there is no way it



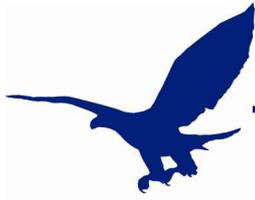
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should be used as evidence.

"One thing that really shocked me at court was how poorly the witnesses over the years, poorly described me. On my first serious visit to court I was up on a Blagg, 'Armed Robbery', for which I received a four-year term. I couldn't believe my eyes when an Asian lady drew a picture of the offender which was all blacked out with an arm extended. The drawing itself was very intimidating, although surprisingly it looked nothing like me or what I was wearing. Amazingly I was wearing a bright yellow shell suit and a patterned bandana. That was then. We often counted on fear, intimidation and the sheer stupidity of people's stereotypical belief systems." (McCabe, P, personal E-mail communication, November 12, 2007).

As a primary investigatory tool alone (as opposed to the evidence used to prefer a criminal charge) eyewitness evidence should, if submitted, not be excluded. It would perhaps be perverse to suggest that law enforcers could not rely on this aspect in the early, often quick moving, investigation timeline. To attend a crime scene and be frustrated from using eyewitness evidence would be inappropriate as, in most circumstances, this is the only evidence at hand. However, once the detention has been authorised the evidential collection must, it is contended, not rely on this issue to exclusively frame a case against the suspect. Arguably other, more reliable, evidential streams currently exist, for example, Deoxyribonucleic Acid (DNA) analysis, Closed Circuit Television, fingerprints and clothing fibres. Although outside the remit



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of this review many criminal justice systems have nonetheless sought to refine the identification process in order to lessen the likelihood of wrongful convictions. As illustrated in this appraisal such bodies face an uphill task, if not an impossible one. It is perhaps worthy of note that as one of the five human senses eyewitness evidence appears to have an elevated position and has, in many countries, specific criminal legislation and guidance. It is contended that most investigators would shy away from building a case solely around hearing, smell, taste or touch. Is not sight alone just as vulnerable?

As a final denunciation of eyewitness testimony the findings of research by Wells and Luus (1990, pg 106-117) sum up the process as no more than an 'experiment'. Law enforcement investigators begin with a premise that the suspect is guilty then construct an experiment (the identification process) to test this notion then evaluate the outcome and if necessary revise their theory. As this review has demonstrated the ingredients of the 'experiment' are so unpredictable that the outcome can only be described as volatile. And that, it is contended, is insufficient to reach, at least domestically, the constitutional rigours of the rule of law.

One last point! Test your own eyewitness capability. What is the order (left to right) of the identification parade cartoon exhibited earlier in this review? Also, what style of headgear is the female character wearing?

**Word count – 3,012 (excluding permitted exceptions)**



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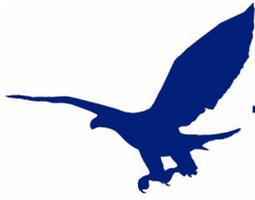
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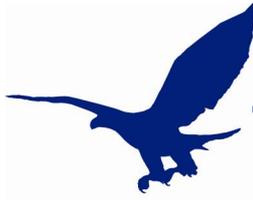
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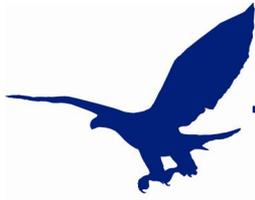
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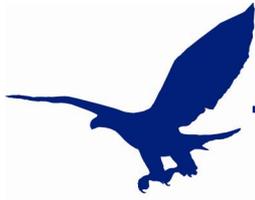
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