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# 34 Years Later, Supreme Court Will Revisit Eyewitness IDs

**By ADAM LIPTAK**

WASHINGTON — Every year, more than 75,000 eyewitnesses identify suspects in criminal investigations. Those identifications are wrong about a third of the time, a pile of studies suggest.

Mistaken identifications lead to wrongful convictions. Of the first 250 DNA exonerations, 190 involved eyewitnesses who were wrong, as documented in "Convicting the Innocent," a recent book by Brandon L. Garrett, a law professor at the University of Virginia.

Many of those witnesses were as certain as they were wrong. "There is absolutely no question in my mind," said one. Another was "120 percent" sure. A third said, "That is one face I will never forget." A fourth allowed for a glimmer of doubt: "This is the man, or it is his twin brother."

In November, the Supreme Court will return to the question of what the Constitution has to say about the use of eyewitness evidence. The last time the court took a hard look at the question was in 1977. Since then, the scientific understanding of human memory has been transformed.

Indeed, there is no area in which social science research has done more to illuminate a legal issue. More than 2,000 studies on the topic have been published in professional journals in the past 30 years.

What they collectively show is that it is perilous to base a conviction on a witness's identification of a stranger. Memory is not a videotape. It is fragile at best, worse under stress and subject to distortion and contamination.

The unreliability of eyewitness identification is matched by its power.

"There is almost nothing more convincing," Justice William J. Brennan Jr. wrote in a 1981 dissent, quoting from a leading study, "than a live human being who takes the stand, points a finger at the defendant, and says, 'That's the one!' "

The American Psychological Association, in a friend-of-the-court brief in the new Supreme Court case, said "research shows that juries tend to 'over believe' eyewitness testimony."

Experts in the field are pleased that the Supreme Court will again consider the place of eyewitness evidence in the criminal justice system.

"It is exciting that the court has actually taken an eyewitness ID case for the first time in many years," Professor Garrett said, "even if it might be the wrong case on the wrong issue." The justices are likely to rule only about which kinds of eyewitness identifications warrant a closer look from judges — just those made after the police used improperly suggestive procedures or all problematic ones?

The larger and more important question of what that closer look should involve is probably not in play in the case, Perry v. New Hampshire, No, 10-8974.

The state of the law is thus likely to remain jumbled. On the one hand, the court has said that the due process clause of the Constitution requires the exclusion of at least some eyewitness testimony on the ground that it is unreliable. On the other, judges are told to use a two-step analysis involving the weighing of multiple factors that in practice allows almost all such evidence to be presented to the jury.

Barry C. Scheck, a director of the Innocence Project at the Benjamin N. Cardozo School of Law, said that what is needed in this area is a new "legal architecture," one in which judges play an authentic gatekeeping role.

He pointed to a pioneering report last year from a special master appointed by the New Jersey Supreme Court. The special master, Geoffrey Gaulkin, suggested that memory should be treated "as a form of trace evidence: a fragment collected at the scene of a crime, like a fingerprint or blood smear, whose integrity and reliability need to be monitored and assessed from the point of its recovery to its ultimate presentation at trial."

There are all sorts of ways in which investigators could do a better job when they have witnesses try to identify suspects.

One is double-blind administration of lineups, photo arrays and the like, in which neither the person conducting the exercise nor the witness knows the "correct" answer. Another is to tell the witness that the suspect may not be present at all.

Judges, too, could help matters by instructing juries about the limitations of eyewitness testimony and by letting experts testify about the nature of memory. The best solution is probably a preliminary hearing, outside the presence of the jury, to determine whether the

evidence is trustworthy.

But the current Supreme Court can be wary of using the due process clause to correct flaws in the criminal justice system. In 2009, for instance, the court said that inmates have no right under the due process clause to test DNA evidence that could prove their innocence. Chief Justice John G. Roberts Jr., writing for the majority in the 5-to-4 decision, said the matter was better handled by state legislatures.

"We are reluctant to enlist the federal judiciary in creating a new constitutional code of rules for handling DNA," Chief Justice Roberts wrote.

The justices may have the same impulse as they consider reforms in the use of eyewitness evidence: it may be a good idea, but not every good idea is mandated by the Constitution.