When Jennifer Thompson picked Ronald Cotton—suspect number five—from a line-up, she was “absolutely certain” she had identified the man who raped her in July 1984. She said she knew she was right because, during the rape, she had studied his eyes, his voice, his height, and even the shape of his ears. She was determined to identify him later if she survived. Thompson’s repeated strong and confident identification of Cotton during pretrial proceedings and at trial led to his 1985 conviction and sentence of life imprisonment plus 50 years.

In 1995, DNA evidence proved Thompson’s identification to be wrong. She erred because her memory of the rapist was skewed by suggestive pretrial identification procedures: working with police on a composite sketch of the suspect inclined her to identify Cotton’s mug shot, which bore a resemblance to her assailant; selecting his mug shot primed her to pick him out of a line-up; and picking him out of the line-up led her to identify him with absolute certainty at trial. Investigators’ positive reactions to her repeated identification of Cotton further reinforced Thompson’s misguided certainty that he was her rapist.¹

The Ronald Cotton story is far from unique in its tale of unreliable eyewitness confidence and the inaccuracy of an identification leading to a wrongful conviction. Of the 239 DNA exonerations documented by late 2009, 73 percent—or 175 cases—involved positive eyewitness testimony—ultimately proved to be erroneous.² This should not be surprising. In 1937 John Wigmore drew attention to the many problems of eyewitness identification in The Science of Judicial Proof.³ Reliance on an eyewitness’s confidence misdirects law enforcement officials, inappropriately bolsters the confidence of other witnesses, negates credible exculpatory evidence, and contributes to the over-reliance on eyewitness testimony by jurors and many judges. A major difficulty is that frequently judges feel their hands are tied by a legal precedent that has continued to vex courts across the country.

Origins of a precedent
A trilogy of cases under U.S. v. Wade, decided in 1967, also recognized the frailties of eyewitness identification. The foundation of the trilogy was the Wade Court’s acknowledgment of the “high incidence of miscarriage of justice” caused by mistaken eyewitness identifications, Is it time for the Supreme Court to yield to solid science and overturn Biggers’ reliability on the “common sense” confidence criterion?

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5 This new factor appears to have been the product of the Bigger Court’s “common sense” intuition rather than being based on Wade, any other Court precedent, or, indeed, on any empirical evidence.


7. See, e.g., Saul M. Kassin et. al., On the “General Acceptance” of Eyewitness Testimony Research, 56 AM. PSYCH. 405, 407–12 (2001) (reporting that 87% of scientists surveyed believed it was proper to offer expert testimony at trial that “an eyewitness’s confidence is not a good predictor of . . . accuracy”).


11. Id. at 513.


greater at the end of the period than it was at the beginning. Additionally, in situations where social pressures or incentives to perform correctly are high – such as in a trial setting – eyewitnesses try especially hard to “get it right.”

In short, over the last 30 years, research has convincingly established that the “common sense” Biggers confidence factor is generally unsuitable for determining the reliability of eyewitness testimony. Under conditions specific to a trial, confidence is likely to be an even less reliable predictor of accuracy.

Contaminating criminal proceedings

As the Court was aware in Wade, considering confidence as a factor in determining the reliability of eyewitness testimony can adversely affect the investigation, pretrial, trial, and appellate stages of a criminal case. At the investigation and pretrial stages, the factor shapes decisions about whom or what to investigate and whether to prosecute. Whenever an identification is made, police routinely are instructed to document the confidence level of the eyewitness. If the witness expresses some degree of uncertainty about what she witnessed, the police may redouble their efforts to develop additional evidence of the suspect’s guilt or may abandon some avenues of investigation; if the witness expresses a high degree of certainty, the police more often will curtail their investigation or thereafter focus entirely on the suspect identified. In both cases, the police may be inappropriately narrowing the investigations, because they are assuming, contrary to scientific fact, that certainty equates with accuracy. Such misdirected investigations frequently lead to wrongful convictions.

Prosecutors are also subject to this kind of misdirection. For example, in cases that depend heavily upon the testimony of an eyewitness, prosecutors may decide not to charge the actual perpetrator because an eyewitness cannot express sufficient confidence in the identification. Conversely, a prosecutor may pursue a case primarily because of the eyewitness’s certainty about an identification and ignore other evidence that raises doubt.

At the trial stage, courts often appear to favor the testimony of highly certain eyewitnesses, in the process subtly encouraging witnesses to express greater confidence so their testimony will be admitted and they will not disappoint the prosecutors, the police, even the victims of the crimes. Jurors also tend to give more weight to eyewitness testimony than is justified, particularly focusing on the confidence with which the eyewitness identifies the defendant.

Similarly, based on the same false assumptions, some judges deny motions to allow expert witnesses or refuse to issue cautionary jury instructions about eyewitness identifications. They reason, as the Supreme Court did in Biggers, that lay jurors can intuitively assess the reliability of eyewitness testimony. Part of this reasoning is based on the assumption that judicial instructions alone will sensitize jurors to the problems of eyewitness identification, including the eyewitness’ confidence, but empirical research indicates that such instructions are likely to be ineffective. Finally, the presence of a highly confident eyewitness may lead experts and other witnesses to testify more confidently, themselves, fortified by the eyewitness’ confidence.

The problem for courts

Although many appellate courts unquestioningly apply the Biggers factors, others have long been struggling to reconcile the chasm between what Biggers requires and what is scientifically sound. Some courts have circumvented the flawed standard altogether by addressing the problem of eyewitness testimony under standards based on their own state constitutions. For example, courts in Massachusetts, New York, and Wisconsin have relied upon their state constitutions to adopt per se rules that exclude all eyewitness testimony obtained using unnecessarily suggestive procedures. Additionally, courts in Michigan and Utah have adopted tests under their constitutions that specifically exclude the consideration of the confidence factor.

Other courts have sought to blunt the impact of eyewitness testimony admitted under the standard by permitting experts to testify about the scientifically demonstrated unreliability of such testimony. For example, in a case involving suggestive pretrial procedures and the testimony of two confident eyewitnesses, the Arizona Supreme Court ruled that the trial court erred in refusing to permit expert testimony on eyewitness identification, reasoning that Dr. Loftus’ testimony and some experimental data indicate that there is no relationship between the confidence which a witness has in her identification and the actual accuracy of that identification. We cannot assume that the average juror would be aware of the variables concerning identification and memory about which Dr. Loftus was qualified to testify.

Other appellate courts simply downplay the confidence factor in affirming a conviction, reasoning that an eyewitness’s confidence is

15. See, e.g., MURDER ON A SUNDAY MORNING (Centre National de la Cinématographie 2001) (illustrating a documentary example of this phenomenon from Jacksonville, FL, in which the police ended their investigation only a few hours after the homicide once the eyewitness husband confidently but erroneously identified sixteen-year-old Brenton Butler as his wife’s killer).
18. State v. Chapple, 660 P.2d 1208, 1221 (Ariz. 1983); see also United States v. Hall, 165 F.3d 1095, 1118 (7th Cir. 1999) (Eastbrook, J., concurring) (“Jurors who think they understand how memory works may be mistaken, and if these mistakes influence their evaluation of testimony then they may convict innocent persons.”).
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influenced by the suggestive procedure itself. That is, unlike the other four elements of the Biggers test, the eyewitness’s degree of certainty can be recorded only after the suggestive procedure has been used. Thus, the degree of certainty can be “engendered by the suggestive element itself.”

Still other jurisdictions have tried to address the problem outside the courts. For example, the U.S. Department of Justice and Illinois, New Jersey, North Carolina, and Texas created commissions that recommended adoption of more scientific and less suggestive techniques for conducting lineups and photospreads. Still other jurisdictions, including Wisconsin, have enacted or are considering enacting laws that standardize scientifically validated identification procedures.19

The precedent perseveres

Litigants in both federal and state courts have challenged identifications as violations of due process. Many have petitioned the U.S. Supreme Court for review, but the Court routinely refuses to hear challenges to the Biggers test. In one such case, Ledbetter v. Connecticut, the Connecticut Supreme Court upheld use of the Biggers confidence factor while simultaneously recognizing that it was contrary to scientific research.20 Ledbetter petitioned the U.S. Supreme Court for certiorari review, and an amicus brief signed by 21 leading experts in the field was submitted on his behalf.21 Among other things, the brief drew attention to the large body of scientific research that directly challenges the confidence factor.

The Court rejected Ledbetter’s petition in 2006, and other such challenges since then. The result is that a flawed standard continues to privilege a factor of reliability that science and experience counsel should be abandoned. At the same time, challenges to the confidence factor continue unabated in state and federal courts.22

Time for science to prevail?

When it was adopted by the Supreme Court in 1972, the Biggers confidence factor was based upon widely shared “common sense” beliefs and understandings about a direct relationship between the confidence of an eyewitness and the accuracy of his or her identification. Without the benefit of scientific research, the Court thus fashioned a constitutional standard that comport with an intuitive understanding generally shared by judges, lawyers, and the general public. The common sense origin of the decision’s confidence factor likely accounts for both its longevity and its power to do great harm. The decision may have seemed to make sense at the time, but experience and scientific research have now shown that it was wrong.

More than 75 years ago, Justice Brandeis noted that in “cases involving the Federal Constitution, . . . [t]he Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.”23 Is it time for the Supreme Court to finally yield to judicial concern backed by solid science and overturn the confidence criterion in Biggers? 24