



## Protecting the innocent from misidentification and wrongful convictions

Modern science instructs that memory is not the vault that laypersons would believe, but instead, it is a fluid process that is easily manipulated. Contemporary research on the topic of memory (for instance, the research of Dr. Elizabeth Loftus and her studies in repressed memory and implanting false memories) is very instructional on the issue. Unfortunately, mistaken eyewitness identification remains a leading cause of wrongful convictions. The Innocence Project reports that “Eyewitness misidentification is the single greatest cause of wrongful convictions nationwide, playing a role in more than 75 percent of convictions overturned through DNA testing.” This is especially so in cross-race identifications with 46 percent of all misidentifications being cross-race identifications. Even the National Institute for Justice of the U.S. Justice Department has

recognized the need for eyewitness identification reform. While it may be too much to expect lay witnesses to understand the suspicion of the witness’ expression of absolute certainty in an identification or memory, judges, attorneys and law enforcement personnel are expected to be more expert.

The state of Ohio now codifies best practices relevant to lineup and photo array identifications. In large part because of the work of the University of Cincinnati College of Law, the Ohio General Assembly enacted S.B. 77, which became effective on July 6, 2010. Now found in R.C. 2933.81 to .831, Ohio mandates specific procedures for recording interrogations, and conducting photo arrays and lineups. The statutes require that photo lineups be conducted by a “blind administrator.” The administrator will



read a set of instructions and distribute certain folders to the witness. Five of the folders will contain photographs of non-suspects, one of the suspect and four blank photographs. All of the photographs are placed in folders and numbered specifically according to R.C. 2933.83(A)(6)(c) and (d). R.C. 2933.83(A)(6)(i) specifically instructs that the officer “shall not say anything to the eyewitness or give any oral or nonverbal cues.”

Some criticize the statute as not going far enough in protecting the trial from evidence gathered not in compliance with the statute. Instead of mandating that such evidence be excluded, R.C. 2933.83(C) goes only so far as to instruct that the evidence of a failure to comply with the statute is admissible at trial. One would think, that if the danger of wrongful convictions

from misidentification is important enough to legislate specific protections, the danger of misidentification should also require exclusion from evidence of any identification that does not comply with the statute’s mandates.

The statute also provides protections from wrongful convictions in that it mandates the preservation of biological evidence in most serious cases, for instance, aggravated murder and murder, manslaughters and many sex offenses. R.C. 2933.82 details the preservation period that is relevant for the specific offense. In general terms, law enforcement is obligated to secure the biological evidence recovered, which includes sexual assault kits, blood, semen, saliva skin, bone, etc., for the specific periods. The provision requires preservation of the evidence in murder

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and aggravated murder cases so long as the matter is unsolved and for a period of 30 years for some manslaughters, and some sex offenses where the matter remains unsolved. Otherwise, the government must only preserve the evidence until the expiration of the person's incarceration, probation and post-release control. R.C. 2933.82(B)(3) requires the evidence be preserved "in the amount and manner sufficient to develop a DNA profile." Care must still be given though in that R.C. 2933.82(B)(5) allows earlier destruction of evidence provided the government satisfies the notice provisions therein. R.C. 2933.82(B)(7) also allows destruction in convictions from a guilty or no contest pleas five years after the plea and exhaustion of all appeals.

In all, S.B. 77 was a significant move toward protecting the innocent and correcting wrongful convictions. The legislation was a considerable effort toward meaningful change in Ohio's

criminal justice system. Along with the open discovery reforms in Criminal Rule 16, 2010 was truly a remarkable year in Ohio jurisprudence. ♦

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Designed by Andrea Donahue and Natalie Zofko.  
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## Endnotes

- <sup>1</sup> [www.innocenceproject.org/fix/Eyewitness-Identification.php](http://www.innocenceproject.org/fix/Eyewitness-Identification.php).
- <sup>2</sup> Id.
- <sup>3</sup> [www.nij.gov/nij/topics/law-enforcement/investigations/eyewitness-identification/welcome.htm](http://www.nij.gov/nij/topics/law-enforcement/investigations/eyewitness-identification/welcome.htm).

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