

Defense Strategies and Tactics in Eyewitness ID Cases

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Executive & Policy Director
Washington Innocence Project

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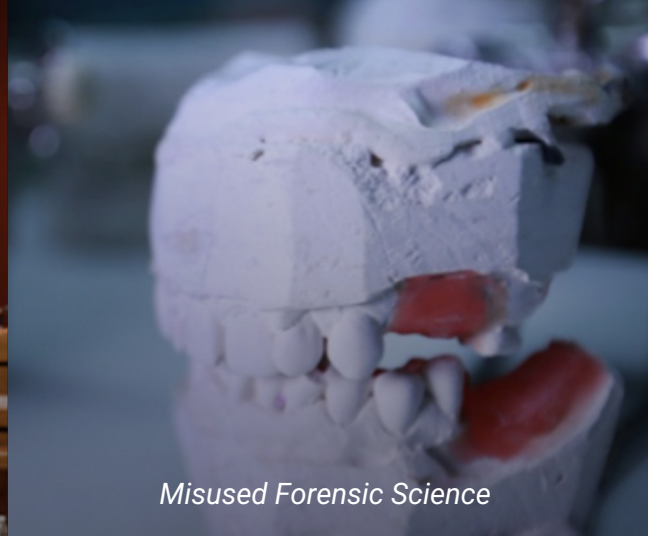
Senior Staff Attorney
Innocence Project



False Confessions



Official Misconduct



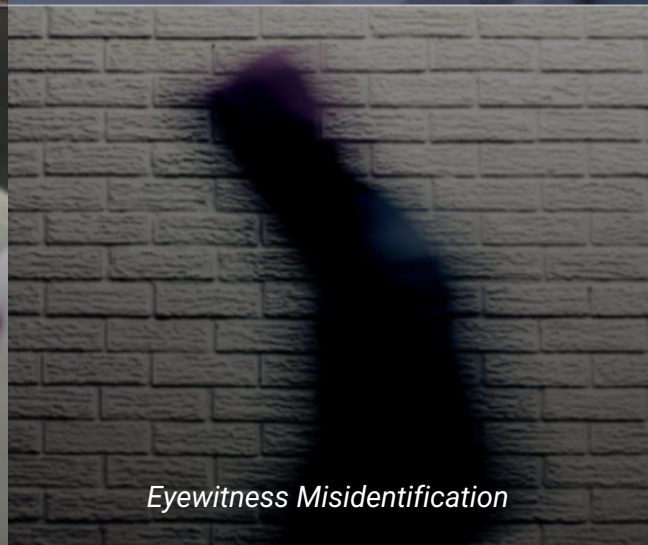
Misused Forensic Science



Jailhouse Informants



Access to Post-Conviction DNA Testing

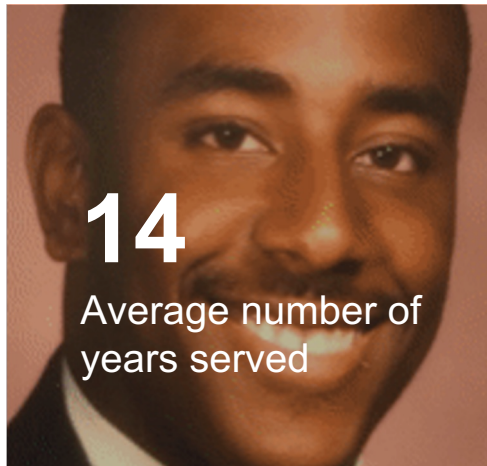


Eyewitness Misidentification



@RyanElkins

DNA Exonerations in the United States



Source: Innocence Project

1989

The first DNA exoneration took place

375

DNA exonerees to date

37

States where exoneration have been won

5,284

Total number of years served

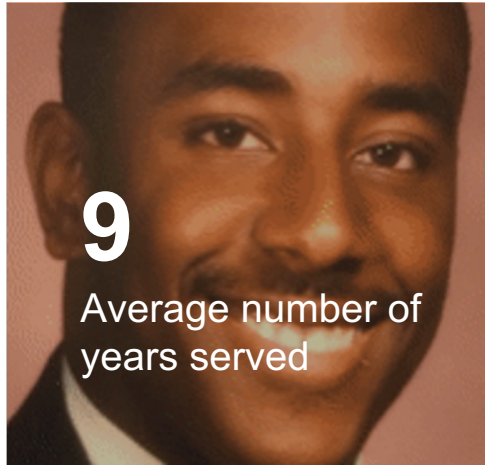
26.6

Average age at the time of wrongful conviction

43

Average age at exoneration

ALL Exonerations in the United States



Source: National Registry of Exonerations

1989

Data begins with the first DNA exoneration

3,299

Exonerations to date (DNA and Non-DNA)

50+

All 50 States + DC, Guam, and Puerto Rico

28,150

Total number of years lost

47

Years served by Anthony Mazza (MA - 2021)

?

Misdemeanors and Pleas



WashIP Clients

26 Freed, Exonerated, and
Still Fighting

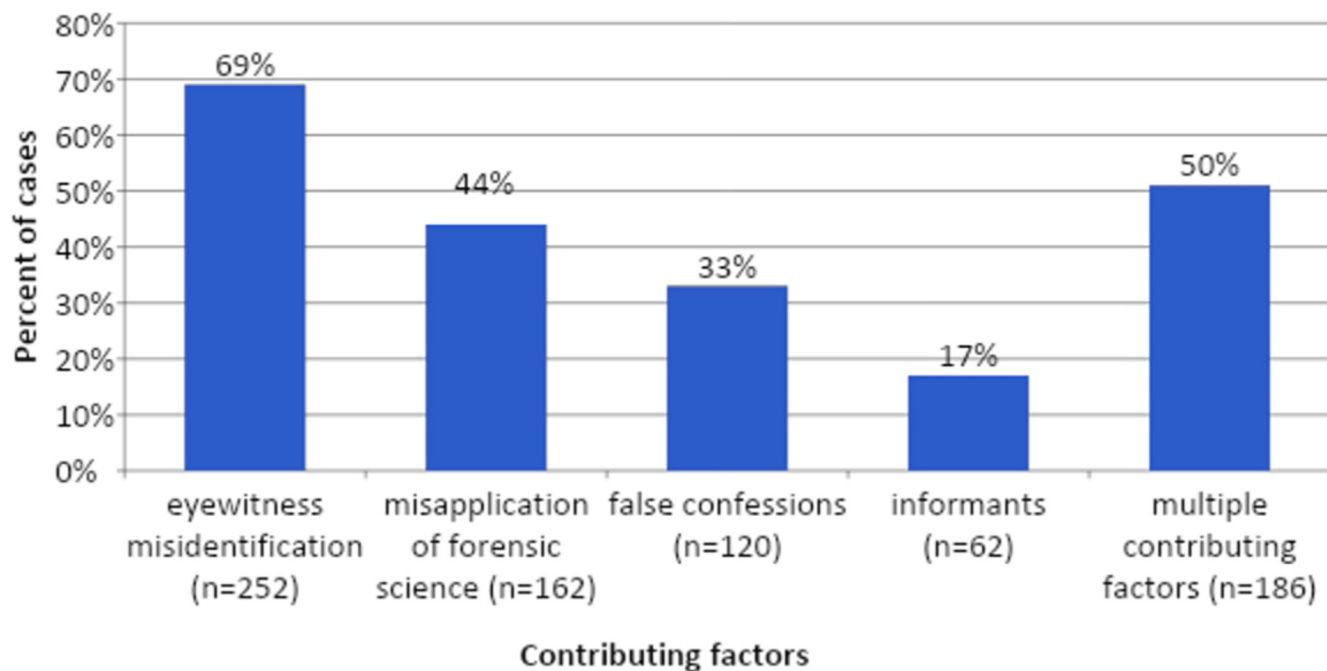
10 Non-DNA Exonerations

5 DNA-based Exonerations

9 Freed Clients

2 Freed + Still Fighting

Contributing factors in DNA Exoneration Cases Nationwide (N=375)



Case in Point: Washington Mistaken Eye-ID Exonerations



Alan Northrop



Larry Davis

EVIDENCE OF LINEUP BIAS



2 (6%)



5 (15%)



22 (65%)



4 (12%)



1 (3%)



0 (0%)



3 (9%)



1 (3%)



17 (50%)



10 (29%)



1 (3%)



2 (6%)

CCPA006233

WASHINGTON STATE EYEWITNESS POLICY COMMITTEE

With the development of DNA testing and the subsequent emergence of known cases of wrongful conviction contributed to, in part, by mistaken eyewitness identifications, there is renewed focus on developing new policies to enhance the quality of the eyewitness evidence gathered during criminal investigations. Although these efforts to make change have been formalized in some jurisdictions throughout the United States, there has been no comprehensive effort to review and revise eyewitness evidence collection procedures in Washington State.

In June 2013, the Washington State Eyewitness Policy Committee (WSEPC) formed to discuss eyewitness evidence collection procedures in Washington State. This committee is comprised of law enforcement, legal, and scientific professionals including:

- George Delgado, Chief – Des Moines Police Department
- Nathan Janes, Homicide Detective – Seattle Police Department
- Mark Larson, Chief Deputy – King County Prosecuting Attorney’s Office
- Tom McBride, Executive Secretary – Washington Association of Prosecuting Attorneys
- Stephen Ross, Assistant Professor – University of Washington, Tacoma
- Colette Tvedt, Criminal Defense Attorney, Shroeter, Goldmark & Bender (til July 2014)
- Neil Woodruff, Detective – King County Sheriff’s Department
- Lara Zarowsky, Policy Director – Innocence Project Northwest

SB 5714

Legislative Work Group on
Eyewitness Evidence

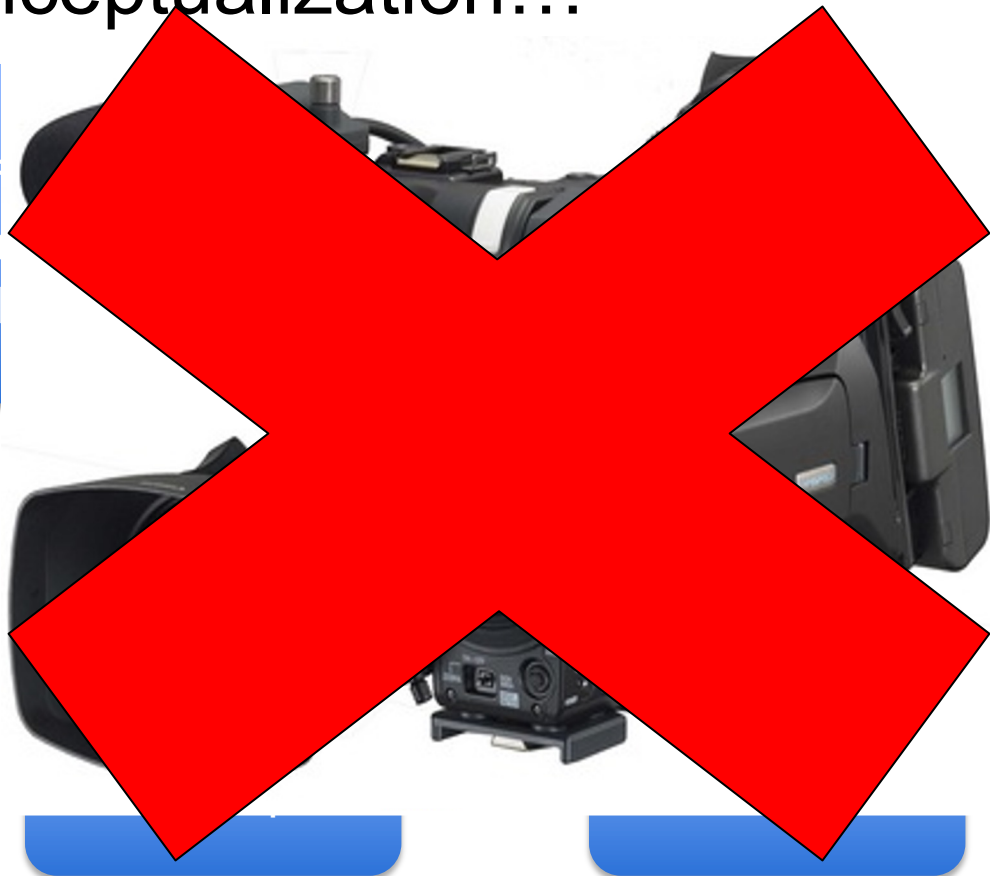
The Science of Eyewitness Memory

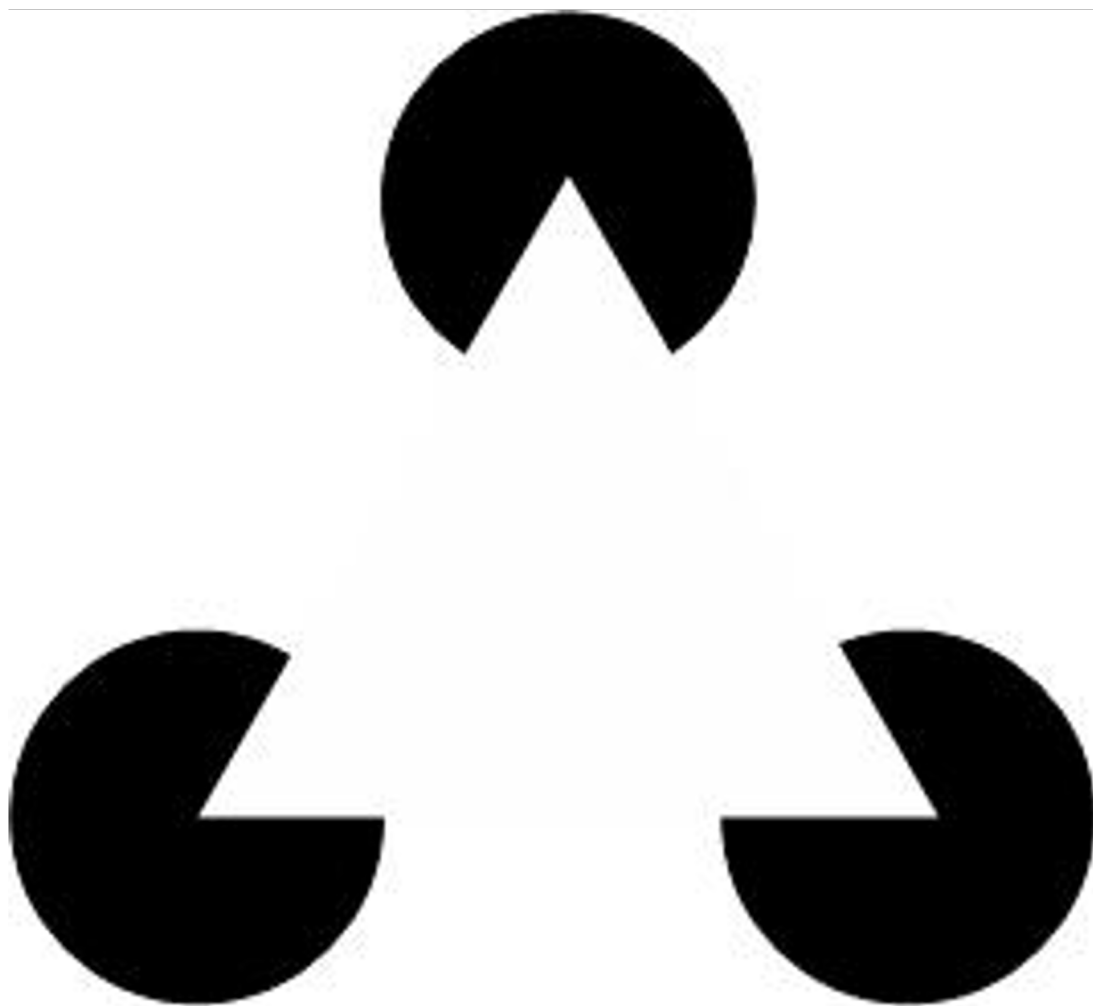


How Does Memory Work? One Conceptualization...

Eye =
Ear
Micro

Memory
trace =
recorded
reotape









A



B



C



D



E



F



G



H



I



J



K



L



M



N



O



A



B



C



D



E



F



G



H



I



J



K



L



M



N



O









Estimator Variables

System Variables

Encoding

acquisition of
new
information

Storage

maintenance
of encoded
memory

Retrieval

recalling
memory for
use

Witness event



Witnessing conditions

Witness characteristics

Culprit characteristics

View a lineup



Sequential v. Simul.

Administrator influence

Culprit presence

Witness response



ID decision

Confidence statement

Estimator Variables

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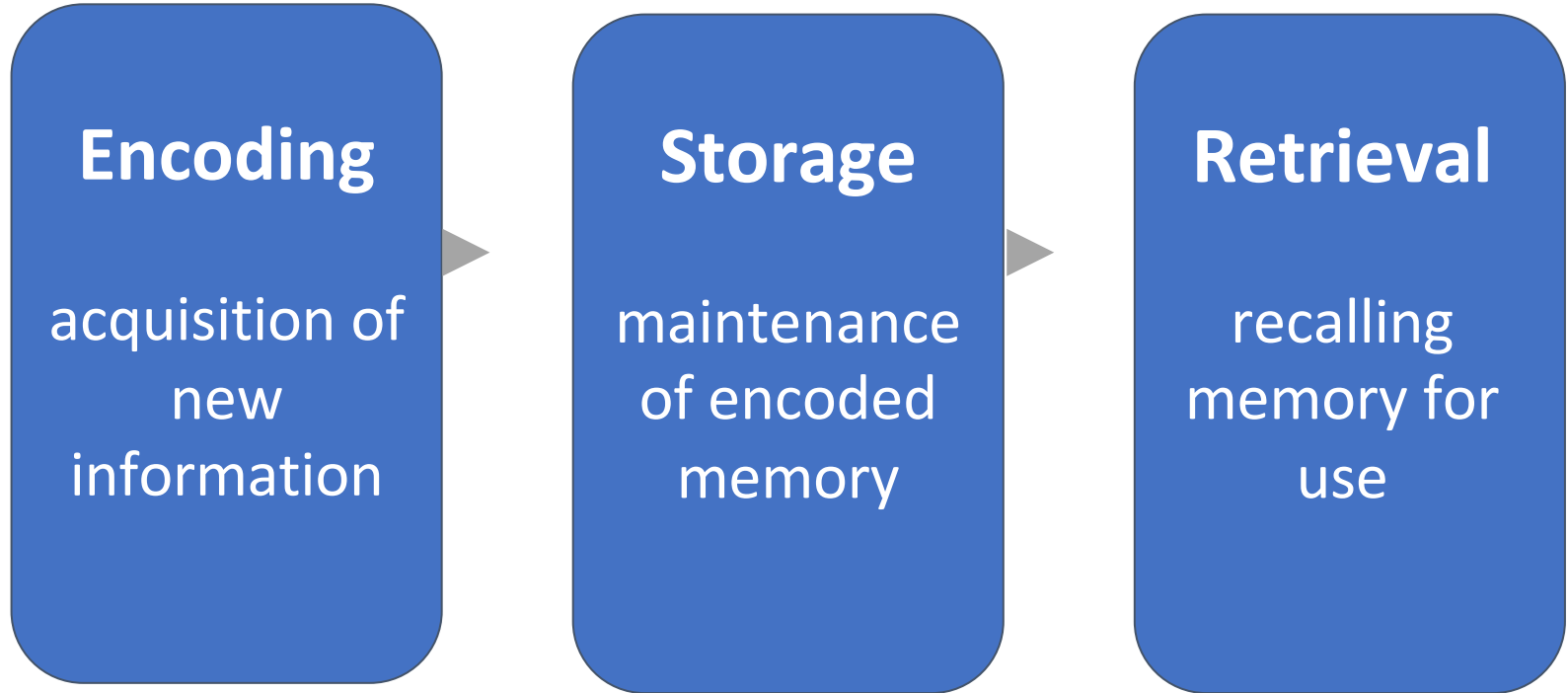
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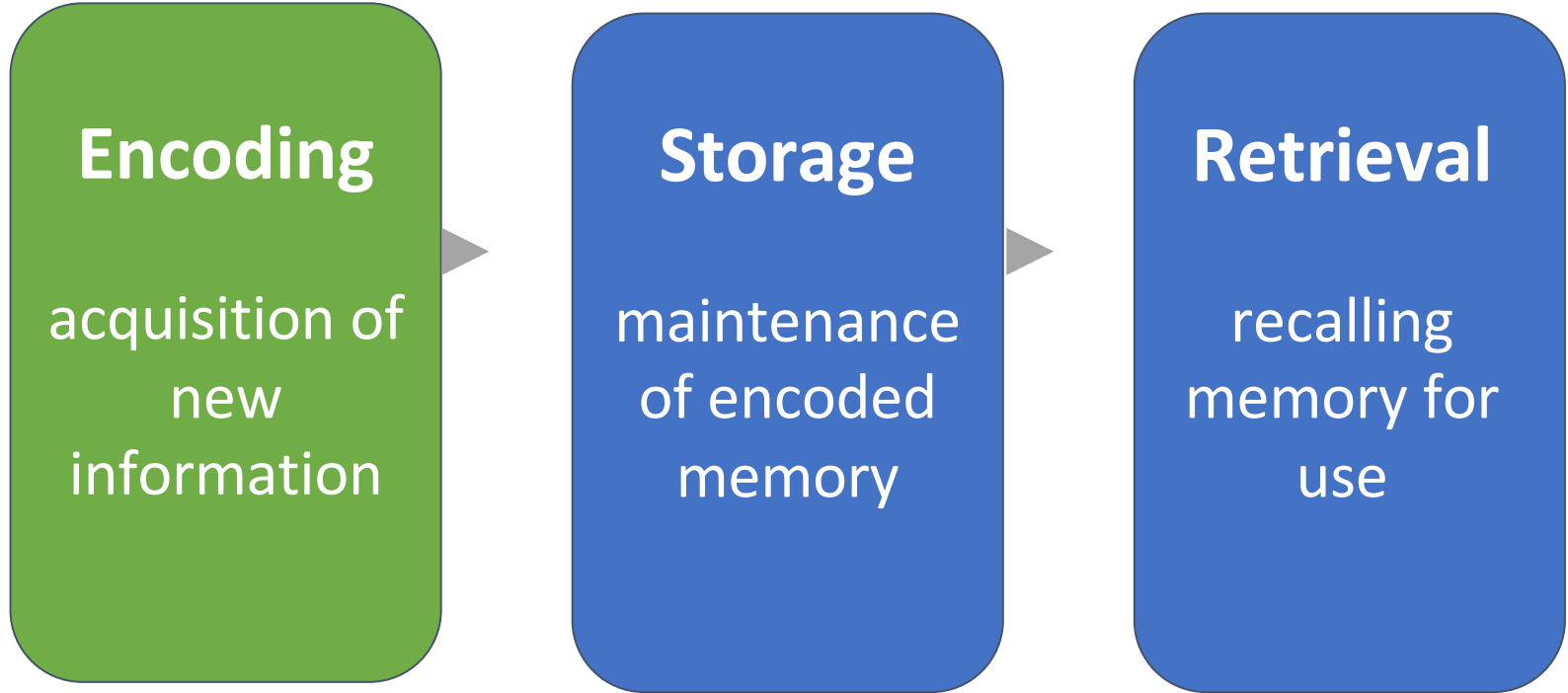
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Estimator Variables at Encoding

Viewing Conditions: Distance, Lighting, Duration

Disguise

Multiple Perpetrators

Weapon Focus

Stress

Own-Race Bias (Cross-Race Effect)

Estimator Variables at Encoding

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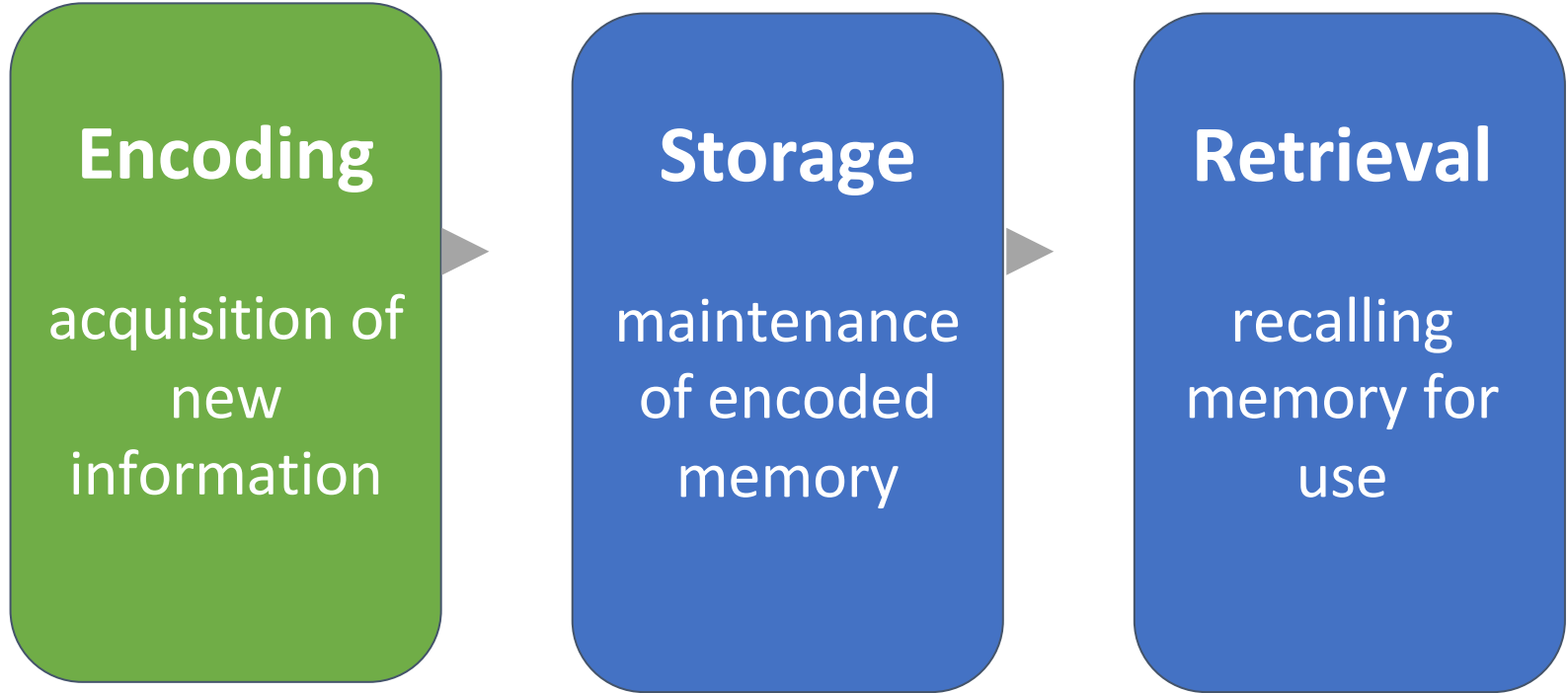
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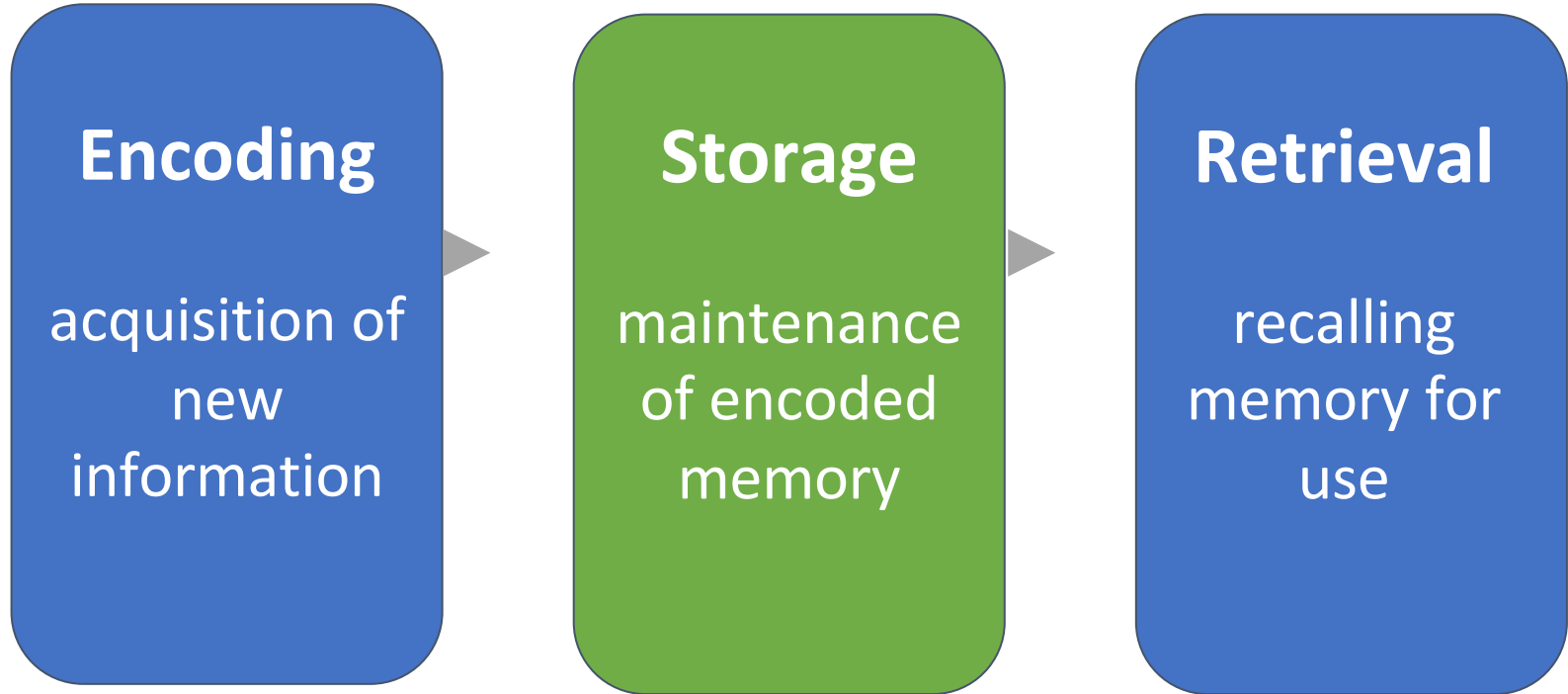
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Estimator Variables at Storage

Post-Event Information

Retention Interval

Estimator Variables at Storage

Post-Event Information

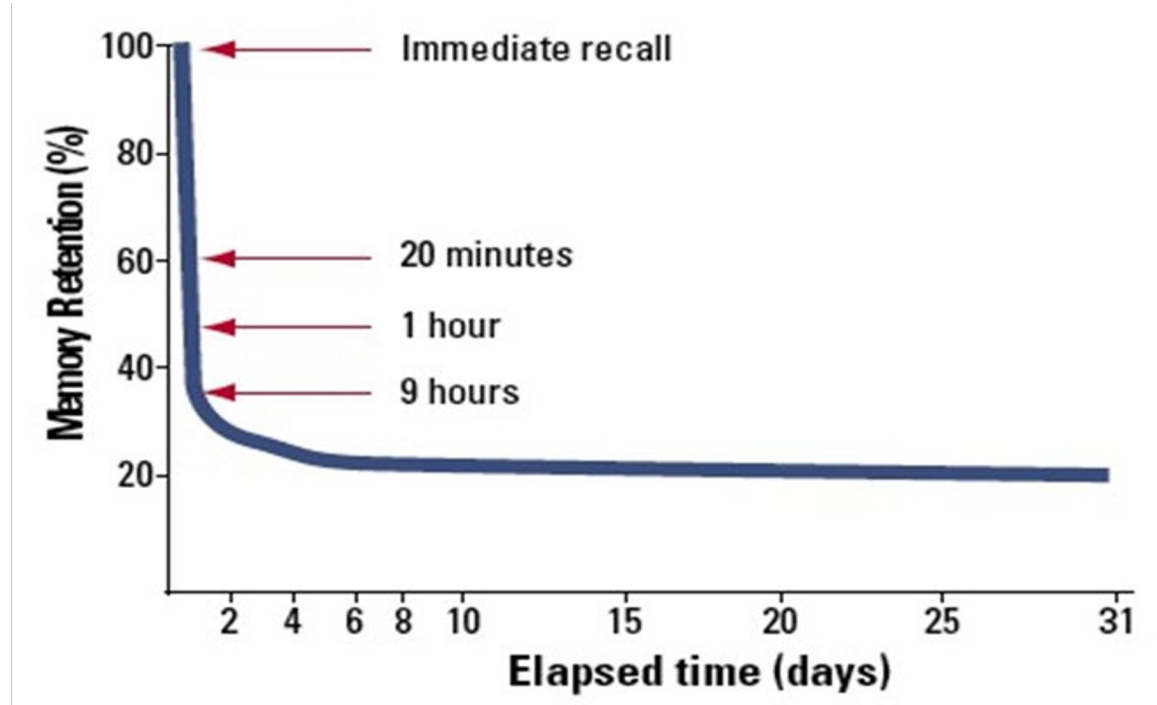
Retention Interval

Estimator Variables at Storage

Post-Event Information

Retention Interval

The Forgetting Curve



Estimator Variables

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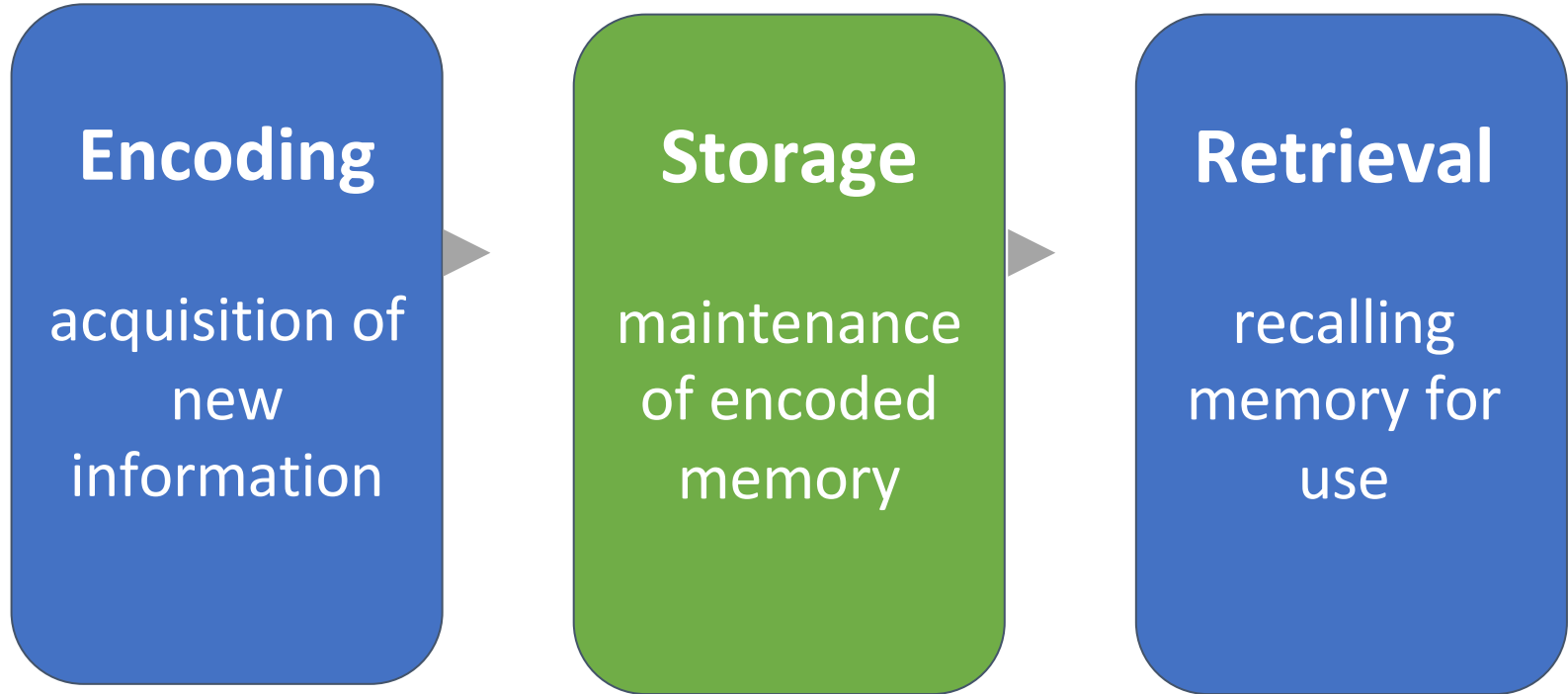
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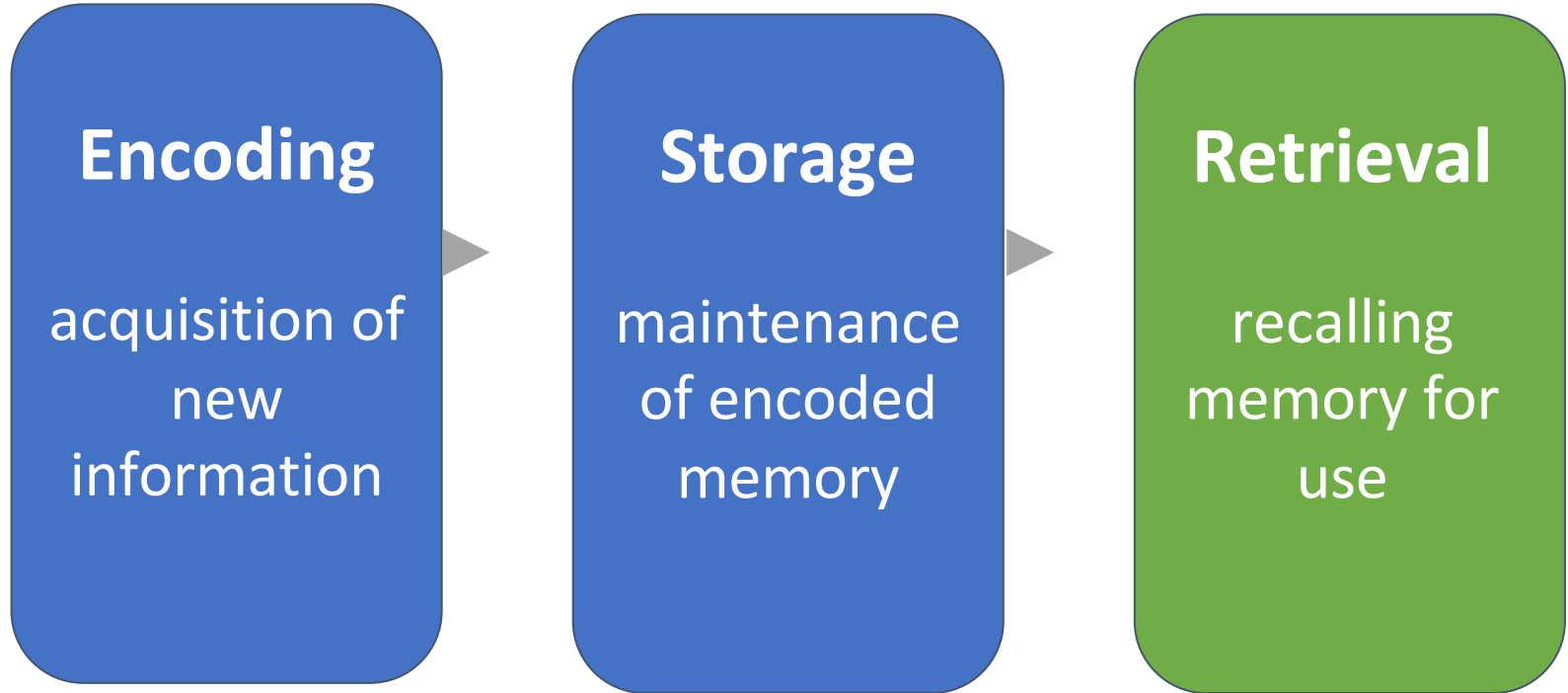
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Identifying the Culprit

**Assessing
Eyewitness Identification**

6⁶

6⁰

5⁶

5⁰

4⁶

2020: Scientists updated best practices for conducting lineups



AMERICAN
PSYCHOLOGICAL
ASSOCIATION



American
Psychology-Law
Society

Law and Human Behavior

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<http://dx.doi.org/10.1037/lhb0000359>

Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence

Gary L. Wells
Iowa State University

Margaret Bull Kovera
John Jay College and the Graduate Center, City University of
New York

Amy Bradfield Douglass
Bates College

Neil Brewer
Flinders University

Christian A. Meissner
Iowa State University

John T. Wixted
University of California, San Diego



**Prelineup
Interview**



**Evidence-
Based
Suspicion**



**Video
Recording**



**Do Not
Repeat IDs
w/ Suspect**



**No
Showups**

MINIMUM Standards - WAPA, WASPC, State

WASHINGTON
ASSOCIATION OF
PROSECUTING ATTORNEYS

Model Policy

Eyewitness Identification – Minimum Standards
Adopted April 16, 2015



MINIMUM Standards for Collecting Evidence

1. **Selecting the Appropriate Identification Procedure**
 - a. ONE trip to the well
2. **Select the Appropriate Fillers**
 - a. Match to the description, don't let anyone stand out,
3. **Minimize Suggestiveness (or perceived suggestiveness)**
 - a. BLIND (or blinded) administration
4. **Properly Instruct Witnesses**
 - a. Don't assume I know who it is, Not choosing is an option,
5. **Avoid Witness Contamination**
 - a. Separate multiple witnesses, no post-identification feedback
6. **Document the Procedure**
 - a. Video best, audio second, written third



Challenging Eyewitness Identification Evidence

The Current Two-Part Test for Suppression

1. Was the procedure unnecessarily suggestive?
1. If so, did the suggestive procedure give rise to a substantial likelihood of irreparable misidentification.

State v. Vaughn, 101 Wn.2d 604, 607, 682 P.2d 878 (1984)

[*Manson v. Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 \(1977\)](#)

What's *Impermissibly* Suggestive?

- Your client's face is noticeable larger than the others
- Lighter background than others
- Your client is the only person in the procedure with facial hair
- Your client's skin tone is noticeable lighter or darker than the others

NOTE: Adjustments officers make to control for inconsistent features don't work.

The *Biggers* Factors

1. The opportunity of the witness to view the criminal at the time of the crime
2. The witness' degree of attention
3. The accuracy of the witness' prior description
4. The level of certainty demonstrated by the witness at the confrontation, and
5. The length of time between the crime and the confrontation

Problems with the Current Two-Part Test

1. Suggestiveness prong ignores the quality of the witness's memory
2. Ignores suggestion from non-state actors
3. Reliability inquiry ignores the effect of suggestion
4. Self-reporting is subjective and can be unreliable
5. Most of the reliability factors are poorly correlated with accuracy
6. Does not explicitly name some important reliability factors
7. It's not practical

A close-up, slightly blurred photograph of a business meeting. In the foreground, a person's hand in a light-colored suit sleeve holds a silver pen. In the background, another person in a blue suit is visible, looking at a tablet. The overall scene is professional and collaborative.

When to Seek Help From an Expert

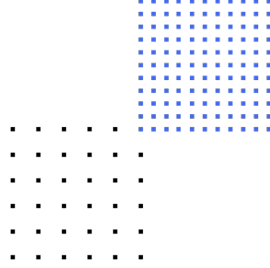
Seek an Expert When the Case Involves:

- Certainty v. Accuracy
- Weapon focus
- Own-race bias
- Multiple identification procedures
- Unconscious transference

Working With an Expert

1. Check your discovery rules
2. Rehearse with your expert witness
3. Ask your experts what areas they're least comfortable with
4. Assume that your adversaries have transcripts from previous testimony

Shifting Social Science



State v. Derri, 199 Wn.2d 658 (2022)

“[M]istaken eyewitness identification is a leading cause of wrongful conviction.”

We hold that when a trial court uses the *Brathwaite* test, it must apply relevant, widely accepted modern science on eyewitness identification at each step of the test. See *State v. O'Dell*, 183 Wash.2d 680, 695, 358 P.3d 359 (2015) (court may adapt legal frameworks by considering “advances in the scientific literature”); *State v. Bowman*, 198 Wash.2d 609, 633, 498 P.3d 478 (2021) (Yu, J., concurring) (court should look to “empirical data ... to support and expand on our jurisprudence where appropriate”); *676 *Wyman v. Wallace*, 94 Wash.2d 99, 102, 615 P.2d 452 (1980) (“[A] court can take notice of scholarly works, scientific studies, and social facts.”)



**MOTION TO SUPPRESS EVIDENCE OF
[WITNESS]'S EYEWITNESS
IDENTIFICATION**

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