

IN THE COURT OF APPEALS OF THE STATE OF OREGON
STATE OF OREGON,

Plaintiff-Respondent,

v.

TRAVIS SHAYNE DYE,

Defendant-Appellant.

KLAMATH Co. Cir. Ct.
Case No. 1202081CR

CA A155696

**BRIEF OF *AMICUS CURIAE*
OREGON INNOCENCE PROJECT
IN SUPPORT OF APPELLANT DYE**

Appeal from Judgment of the Circuit Court
for KLAMATH County

The Honorable Dan Bunch, Judge

Steven T. Wax (OSB #850120)
Email: wax@oregoninnocence.org
Aliza B. Kaplan (OSB #135523)
Email: kaplan@oregoninnocence.org
Janis C. Puracal (OSB #132288)
Email: puracal@oregoninnocence.org
Oregon Innocence Project
P.O. Box 40588
Portland, OR 97240
(503) 944-2271

Michael R. Levine (OSB #931421)
Email: michael@levinemchenry.com
Matthew G. McHenry (OSB #043571)
Email: matthew@levinemchenry.com
Levine & McHenry LLC
1001 SW Fifth Avenue
Suite 1414
Portland, OR 97204
(503) 546-3927

(April 2015)

TABLE OF CONTENTS

I. STATEMENT OF *AMICUS CURIAE*1

II. SUMMARY OF ARGUMENT1

III. STATEMENT OF FACTS3

 A. The Allegations of Abuse4

 B. The Months After the Alleged Abuse6

 C. Trial and the Offer of Proof on False Memories9

IV. ARGUMENT.....10

 A. The trial court erred when it found that expert testimony on false memories is inadmissible under *Southard*.11

 B. Expert testimony is admissible to educate the jury about the general phenomenon of false memories and the circumstances in the particular case that are consistent with those that may lead to false memories.13

 1. The creation of false memories is a phenomenon outside the experience of the average juror.16

 2. An expert on false memory science does not make an improper comment on the credibility of a witness.....29

 C. False memories have led to wrongful convictions around the country that were later overturned.....33

V. CONCLUSION.....39

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Barlow v. State</i> , 507 SE2d 416 (Ga. 1998)	16, 25
<i>DeLong v. State</i> , No. 2-04-410-CR, 2-04-411-CR, 2006 WL 3334061 (Tex. App., Nov. 16, 2006)	16, 26, 32, 33
<i>Jenkins v. Comm.</i> , 308 SW3d 704 (Ky. 2010).....	16, 25, 32
<i>State v. Gherasim</i> , 153 Or App 313, 323, 956 P2d 1054 (1998).....	13, 15, 31
<i>State v. Lawson</i> , 352 Or 724, 291 P3d 673 (2012)	<i>passim</i>
<i>State v. Middleton</i> , 294 Or 427, 438, 657 P2d 1215 (1983).....	14, 15, 30, 31
<i>State v. Remme</i> , 173 Or App 546, 23 P3d 374 (2001)	13, 30
<i>State v. Sargent</i> , 738 A2d 351 (N.H. 1999)	16, 25
<i>State v. Smith</i> , 809 So.2d 556 (Ct. App. La. 2002) (Downing, J., dissent)	37
<i>State v. Southard</i> , 347 Or 127, 218 P3d 104 (2009)	11, 12, 13

Statutes

OEC 403.....	12
OEC 702.....	10, 13, 14, 15

Other Authorities

Daniel Reisberg, <i>The Science of Perception and Memory: A Pragmatic Guide for the Justice System</i> , 262 (2014)	<i>passim</i>
Elizabeth F. Loftus et al., <i>Eyewitness Testimony: Civil and Criminal</i> § 2-2, 12–13 (4th ed. 2007).....	17, 18
Elizabeth F. Loftus, <i>Memory Faults and Fixes, Issues in Science and Technology</i> , 43 (2002)	18, 37
Frederic C. Bartlett, <i>Remembering: A Study in Experimental and Social Psychology</i> , 213 (1932)	17
Hal Arkowitz and Scott O. Lilienfeld, <i>Why Science Tells Us Not to Rely on Eyewitness Accounts</i> , <i>Scientific American</i> , Jan. 8, 2009	17
Oregon Interviewing Guidelines (3rd ed., 2012)	24

I. STATEMENT OF *AMICUS CURIAE*

Oregon Innocence Project (OIP) is an initiative of the Oregon Justice Resource Center. The mission of OIP is to (1) exonerate the innocent, (2) educate and train law students, and (3) promote legal reforms aimed at preventing wrongful convictions.

OIP is the only program in Oregon dedicated to securing the release of wrongfully convicted inmates. Additionally, OIP works with community partners to build support for comprehensive criminal justice reform to improve trial procedures, interrogation techniques, discovery practices, and other Oregon policies that do not serve to protect the innocent or punish the guilty.

OIP appears as *amicus curiae* in this matter to urge the Court to enhance the truth-seeking functions of the criminal justice system by permitting expert testimony based on sound science that has been accepted in other cases. OIP advocates for decisions based on scientific evidence, whenever possible. To that end, such evidence must be made available to the decision-maker—the trier of fact in this case.

II. SUMMARY OF ARGUMENT

The trial court erred when it found that expert testimony on perception and memory and the factors that may distort these processes is irrelevant and impermissible vouching. The Oregon Supreme Court, in *State v. Lawson*,

encouraged the use of these very experts in the context of eyewitness identification evidence, where the witness's memory may have been contaminated to produce a false memory of the perpetrator's identity.

The *Lawson* court explored 30 years of scientific research that proves the human memory is vulnerable to suggestion in a variety of ways, many of which are contrary to the average juror's understanding. The *Lawson* court gave trial judges a heightened gatekeeping role when eyewitness identification evidence is at issue.

The trial court's gatekeeping role is equally important any time memory-based evidence is at issue and factors exist that increase the likelihood of a memory error. *Lawson* requires the trial court to determine the admissibility of the memory-based testimony under the Oregon Evidence Code. The testimony may be subject to exclusion under Rules 602 and 701 if the State fails to prove the testimony is rationally based on the witness's first-hand perceptions and not tainted by suggestion and other factors that distort memory. The testimony may be further subject to exclusion under Rule 403 if the defendant proves that the prejudice from the tainted testimony outweighs any probative value. If the trial court determines the testimony is admissible, it must, nonetheless, consider lesser remedies, including the availability of expert testimony to educate the jury about the impact of factors that may distort perception and memory.

Appellant Dye, here, did not ask that the child witness be excluded and, instead, requested the lesser remedy of expert testimony to educate the jury about a possible memory error. The trial court failed to understand the science at issue and the extent to which that science contradicts commonly held perceptions of the average juror. The trial court also failed to understand the scope of the expert's proposed testimony, which follows the Oregon Supreme Court's rulings on the scope of permissible testimony that bears on witness credibility, but does not supplant the jury's determination of credibility. Under Oregon law, expert testimony on memory science is admissible, provided there is a reasonable likelihood that circumstances exist that are consistent with the general phenomenon of false memories and the expert does not offer the ultimate conclusion as to whether the memory is false.

III. STATEMENT OF FACTS

Amicus adopts Appellant Dye's Statement of Facts. This appeal arises out of a trial court ruling to exclude expert testimony from Dr. Daniel Reisberg, a Professor of Psychology at Reed College and expert on cognitive psychology—the study of perception and memory.¹ Dr. Reisberg was prepared to offer testimony about the factors that may distort perception and memory to create false memories,

¹ Tr. 317-18.

and whether and to what degree those factors were present in this case.²

Dr. Reisberg would further offer testimony about the commonly held beliefs about memory error that have proved contrary to scientific evidence.

A. The Allegations of Abuse

Appellant Travis Dye was convicted of sexual penetration and sexual abuse of a young girl who was 9-years-old at the time of the alleged abuse.³ The girl (“C”) was living part-time with her mother and part-time with her father.⁴ C’s mother, Agnes, lived in a single-wide, two-bedroom trailer with her boyfriend, Ollie, at the time of the abuse.⁵ Appellant Dye is Ollie’s step-brother.⁶

One night in May, C was staying at the trailer with her mother, brother, cousin, and Ollie, and Dye was visiting.⁷ Dye and Ollie worked together as firefighters, and Dye had come to the trailer after work with Ollie.⁸ C says she and Dye were watching television in the living room at the foot of the hide-a-bed where

² *Id.*

³ Tr. 117.

⁴ Tr. 412.

⁵ Tr. 129, 139, 461.

⁶ Tr. 414.

⁷ Tr. 420.

⁸ *Id.*

her mother and Ollie had fallen asleep.⁹ C's four-month-old half-sister, Alita, was asleep in a crib in the same room, and her mother would wake up periodically to feed her.¹⁰ C's brother, Harrison, and cousin, Tyler, fell asleep in Harrison's bedroom just next to the room where the rest of the family, including C and Dye, were staying.¹¹

At some point that night, while the television was still on and Agnes and Ollie were asleep next to them, C says Dye "started putting his hand up [C's] pants" and "started touching" C's vagina.¹² She says he also inserted his finger into her vagina, and "it hurt."¹³ When Dye did not respond to C's demands to stop, C says she wrapped herself in her blanket with her back against the wall.¹⁴ When Dye still tried to touch her, she says she got up and went into her bedroom.¹⁵ According to C, Dye entered her bedroom and asked her if she wanted to watch television with

⁹ Tr. 123.

¹⁰ Tr. 122, 423.

¹¹ Tr. 149.

¹² Tr. 123-24.

¹³ Tr. 125.

¹⁴ *Id.*

¹⁵ *Id.*

him.¹⁶ C said, “no.”¹⁷ C says her mother and Ollie slept throughout the encounter.¹⁸

B. The Months After the Alleged Abuse

C did not tell her mother about Dye’s behavior that night.¹⁹ But, a couple of months later,²⁰ C and her mother were talking about messiness in C’s room, and C mentioned that she had not slept in her room since the night Dye was there.²¹ C’s mother reportedly asked her why she slept in the room the night Dye was there since C likes to sleep on the living room floor by her mother when she does not have school the next day.²² C allegedly said that Dye “just got real annoying” and “kept talking to me and he wouldn’t be quiet.”²³ C’s mother agreed that Dye “is quite annoying.”²⁴ Then, according to her own testimony, C’s mother asked “baby

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Tr. 137.

¹⁹ Tr. 126.

²⁰ Tr. 467.

²¹ Tr. 427-28.

²² Tr. 419.

²³ Tr. 428.

²⁴ *Id.*

girl, did Travis [Dye] touch you?”²⁵ C, crying, reportedly said that he had.²⁶ C’s mother recalled that she then asked if Dye had accidentally touched C’s “boobies” while they were “messing around.”²⁷ C said no.²⁸ Her mother then asked if Dye had touched C’s “private parts.”²⁹ C said that he had, and her mother continued questions about where and how.³⁰ C’s mother also testified that she told C that she “knew how hard it was for her to tell” because she (C’s mother) “was touched when I was a little girl and I never told anybody and I know it’s scary and it’s hard and she did nothing wrong.”³¹

C reportedly did not want her mother to tell her father or anyone else about the alleged abuse, and her mother agreed.³² Her mother testified that she told C that she would eventually have to tell someone.³³ She told C that Dye was a “sick

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Tr. 430.

³¹ Tr. 471.

³² Tr. 431-32.

³³ *Id.*

freak” who “was going to go away and that we would work on it together.”³⁴ C’s mother then told Ollie’s dad, her sister, her mom, her dad, Ollie, and Harrison about the alleged abuse.³⁵

Agnes again questioned her daughter, C, about the alleged abuse on their next visit.³⁶ Agnes also testified that she privately counseled C “to motivate her to tell CARES and her dad and the police so that [Dye] would go to jail and protect her so he’ll go away so he doesn’t touch his own kids.”³⁷ Agnes testified that she had experience with CARES because her sister’s son suffered abuse.³⁸ Agnes reported that she gave C a “deadline” to tell her dad or the police by Christmas break.³⁹

C’s father later questioned C after a tip from Agnes’ brother-in-law, and C began to cry.⁴⁰ C’s father called the police who questioned C about the abuse and set up an appointment with CARES.⁴¹

³⁴ Tr. 430, 433.

³⁵ Tr. 434-35.

³⁶ Tr. 436-37.

³⁷ Tr. 441.

³⁸ Tr. 434, 439.

³⁹ Tr. 472.

⁴⁰ Tr. 163-66.

⁴¹ Tr. 167.

C. Trial and the Offer of Proof on False Memories

Dye was charged with sexual penetration and sexual abuse. The State offered no physical evidence of abuse.

Dye offered Dr. Reisberg as an expert on false memories.⁴² In an offer of proof, Dr. Reisberg testified generally to the science behind the creation of false memories.⁴³ He also offered a more specific opinion that there exist circumstances in this case that are consistent with those that may lead to false memories.⁴⁴ Dr. Reisberg was explicit that he would not, and could not, give any opinion about whether C's memories were, in fact, false.⁴⁵

The trial court found that Dr. Reisberg's general testimony about false memories was not specific to the facts of this case and would not be helpful to the jury. The trial court further found that Dr. Reisberg's entire testimony would constitute impermissible vouching.

Amicus OIP did not review Dye's conviction on the merits and takes no position on his guilt or innocence. *Amicus* OIP, instead, offers this brief based on

⁴² Tr. 315.

⁴³ Tr. 320-38.

⁴⁴ Tr. 338-45.

⁴⁵ Tr. 355-56.

an understanding of the science related to false memories and the need for jury education to prevent wrongful convictions.

IV. ARGUMENT

There is no dispute by the parties on appeal that the research behind false memories is scientifically valid or that Dr. Reisberg is qualified to testify on that subject.⁴⁶ The only issue on appeal related to Dr. Reisberg's expert opinion is whether that opinion would be helpful to the trier of fact under OEC 702.⁴⁷

Expert testimony on false memories falls into three categories: (1) general testimony on the phenomenon of false memories; (2) whether and to what degree the factors that can create false memories exist in a particular case; and (3) the ultimate conclusion as to whether the complaining witness suffers from a false memory. Dr. Reisberg testified to Categories 1 and 2; he did not offer any testimony on Category 3.

Amicus OIP agrees that Category 3 is not at issue in this case and should generally be excluded in the absence of corroborating evidence, based on the current state of scientific research. Appellant Dye has argued that Category 1 should be admissible and, on appeal, takes no position on Category 2, although

⁴⁶ Appellant's Opening Brief at 11 n.1.

⁴⁷ Appellant Dye raised three assignments of error on appeal. *Amicus* OIP writes only on the first assignment of error related to expert testimony on perception and memory.

Category 2 testimony was offered in the trial court.⁴⁸ *Amicus* OIP proposes a rule broader than that suggested by Appellant Dye. Categories 1 and 2 should be admissible under established Oregon law. The proposed rule will narrow the cases at issue to only those where there is a reasonable likelihood that circumstances exist that are consistent with those that can lead to false memories.

A. The trial court erred when it found that expert testimony on false memories is inadmissible under *Southard*.

The trial court in this case held that general testimony on false memories (Category 1 above) is irrelevant and that all testimony on false memories (Categories 1, 2, and 3 above) is inadmissible because it constitutes impermissible “vouching” under the Oregon Supreme Court’s holding in *State v. Southard*, and related cases.⁴⁹

⁴⁸ Appellant’s Opening Brief at 19 n.3.

⁴⁹ Tr. 485-86 (“I think you guys were following me last evening what I said I think we got kind of above the line, meaning before 8:17 p.m. and below the line testimony. The above the line testimony is arguably very general and does not necessarily, although I think it’s debatable, go to the facts and circumstances of this case or the victim in this case[.] * * * I think there’s a strong argument that it would be irrelevant if we say that and we mean that, that it’s just very general and really isn’t going to assist the jury. * * * I think where we’re left with false memory testimony is that we are directly commenting by one witness to the jury on whether or not this particular witness is telling the truth in this case.”). The trial court referred to several cases in its ruling, the most recent of which was *Southard*, and the State argued that “after *Southard* * * * the world has changed in terms of what we do.” Tr. 380.

Southard does not apply here. In *Southard*, the court held that a medical expert could not testify to the ultimate question of whether the child had been sexually abused in absence of physical evidence of abuse.⁵⁰ The *Southard* court found the expert's ultimate conclusion of "sexual abuse" was scientifically valid, but inadmissible under OEC 403 because the conclusion was based solely on the expert's assessment of the witness's credibility.⁵¹ There was, therefore, the "risk that the jury will not make its own credibility determination, which it is fully capable of doing, but will instead defer to the expert's implicit conclusion that the victim's reports of abuse are credible."⁵² The court ruled that the expert's "ultimate conclusion" was inadmissible.⁵³

Under *Southard's* narrow holding, an expert on false memories should not testify to the ultimate conclusion of whether the child is suffering from a false memory—Category 3 above. Reisberg, however, did not offer any "ultimate conclusion," and, in fact, was clear that he could not make any such conclusion.⁵⁴ Reisberg, instead, offered only general testimony about the phenomenon of false

⁵⁰ *State v. Southard*, 347 Or 127, 141, 218 P3d 104 (2009).

⁵¹ *Id.* at 139.

⁵² *Id.* at 141.

⁵³ *Id.*

⁵⁴ Tr. 355-56.

memories and testimony about whether and to what extent the factors that can create false memories were present in this case—Categories 1 and 2 above.⁵⁵

Southard does not answer—or even address—the question of whether an expert can testify to Categories 1 and 2.

B. Expert testimony is admissible to educate the jury about the general phenomenon of false memories and the circumstances in the particular case that are consistent with those that may lead to false memories.

To be admissible under Oregon law, expert testimony must be “helpful to the trier of fact” under OEC 702. Oregon courts hold that testimony is helpful to the trier of fact if it concerns a phenomenon outside the experience of the average juror.⁵⁶

For example, in *State v. Gherasim*, this Court found the expert opinion of a psychiatrist would be helpful to the jury to understand the phenomenon of “dissociative amnesia.”⁵⁷ In that case, the defendant was convicted of sexual abuse after the victim testified that he had sexually assaulted her.⁵⁸ According to the defendant, however, he was a passerby who found the victim after the assault and

⁵⁵ Tr. 316-76.

⁵⁶ *State v. Remme*, 173 Or App 546, 562, 23 P3d 374 (2001).

⁵⁷ 153 Or App 313, 323, 956 P2d 1054 (1998).

⁵⁸ *Id.* at 315.

tried to help her.⁵⁹ The defense offered the testimony of a psychiatrist who could explain to the jury that the victim suffered from dissociative amnesia, which caused her to involuntarily block from her conscious mind the details of the traumatic event, with the resulting memory gaps being filled with details from later events with the defendant.⁶⁰ The Oregon Court of Appeals ruled the trial court had erred when it excluded the testimony that would have been helpful to the jury: “Although it may be commonly understood that people who experience traumatic events are sometimes confused about the details of those events, the medical/psychiatric dynamics of that phenomenon—and, particularly, how they might be related to a particular individual’s circumstances—are not a matter of common knowledge.”⁶¹ The court found the expert opinion was, therefore, helpful under OEC 702.⁶²

Likewise, in *State v. Middleton*, the Oregon Supreme Court found the expert opinions of social workers would be helpful under OEC 702 to understand the phenomenon of false recantations by victims of familial sex abuse.⁶³ The experts there testified that a young victim of familial sex abuse “often feels guilty about

⁵⁹ *Id.* at 317.

⁶⁰ *Id.* at 315.

⁶¹ *Id.* at 323.

⁶² *Id.*

⁶³ 294 Or 427, 438, 657 P2d 1215 (1983).

testifying against someone she loves and wonders if she is doing the right thing in so testifying.”⁶⁴ The court recognized that “[i]t would be useful to the jury to know that not just this victim but many child victims are ambivalent about the forcefulness with which they want to pursue the complaint, and it is not uncommon for them to deny the act ever happened.”⁶⁵ The court found the expert’s opinion would be helpful because it concerned a phenomenon outside the experience of the average juror: “Explaining this superficially bizarre behavior by identifying its emotional antecedents could help the jury better assess the witness’s credibility.”⁶⁶

As discussed below, the creation of false memories is a phenomenon outside the experience of the average juror, like false recantations in *Middleton* and dissociative amnesia in *Gherasim*. And, in absence of the ultimate conclusion (Category 3 above), such testimony does not constitute an improper comment on the witness’s credibility.

⁶⁴ *Id.* at 436.

⁶⁵ *Id.*

⁶⁶ *Id.*

1. The creation of false memories is a phenomenon outside the experience of the average juror.

(a) The Science

A false memory is “an untrue memory that the witness or complainant nonetheless believes to be true.”⁶⁷ Other courts finding expert testimony on false memories admissible have explained that “a false memory can be very detailed, and a person who has a false memory can be very confident and even emotional about the false memory.”⁶⁸ An expert on false memories cannot say whether a particular person is lying or that a particular memory is false.⁶⁹ The expert can say only whether the circumstances indicate suggestion of the sort that can lead to a false memory.⁷⁰

The study of false memories is based on a psychological understanding of the way in which memory works. Researchers describe the act of remembering as

⁶⁷ *DeLong v. State*, No. 2-04-410-CR, 2-04-411-CR, 2006 WL 3334061, at *5 (Tex. App., Nov. 16, 2006).

⁶⁸ *Id.* See also *Jenkins v. Comm.*, 308 SW3d 704, 710 (Ky. 2010) (admitting expert testimony on improper interviewing of children and false memories, and collecting cases); *Barlow v. State*, 507 SE2d 416 (Ga. 1998) (“We conclude that [expert testimony on improper interviewing of children and false memories] involves an area of expertise beyond the ken of the average layman[.]”); *State v. Sargent*, 738 A2d 351 (N.H. 1999) (“[W]e agree with those jurisdictions that find that the proper protocols and techniques used to interview child victim witnesses is a matter not within the knowledge and understanding of the average juror.”).

⁶⁹ *DeLong*, 2006 WL 3334061, at *5.

⁷⁰ *Id.*

“more akin to putting puzzle pieces together than retrieving a video recording.”⁷¹

The human memory is reconstructive.⁷² That is, rather than storing an exact replica of an event, perceptions are combined with elements of existing knowledge and experience to form a reconstructive memory.⁷³ That reconstruction (or, initially, a construction) can occur in any of the following three stages, which are conventionally used to describe the sequence of remembering.⁷⁴ In the first stage (acquisition), the person perceives the event or information.⁷⁵ In the second stage (retention), the person attempts to remember the event or information.⁷⁶ And finally, in the third stage (retrieval), the person tries to recall the event or stored information.⁷⁷ At each of the three stages, multiple factors can impact and/or alter a

⁷¹ Hal Arkowitz and Scott O. Lilienfeld, *Why Science Tells Us Not to Rely on Eyewitness Accounts*, SCIENTIFIC AMERICAN, Jan. 8, 2009, <http://www.scientificamerican.com/article/do-the-eyes-have-it/> (last visited April 30, 2015).

⁷² FREDERIC C. BARTLETT, REMEMBERING: A STUDY IN EXPERIMENTAL AND SOCIAL PSYCHOLOGY 213 (1932).

⁷³ *Id.*

⁷⁴ ELIZABETH F. LOFTUS ET AL., EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL § 2-2, 12–13 (4th ed. 2007).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

person's memory.⁷⁸ As a result, information passing through the memory process can be distorted.

Distortion can lead to false memories as a result of source confusion, which happens when a person misattributes the source of a memory.⁷⁹ According to Dr. Elizabeth Loftus, a leading psychologist in the area of false memories, “[p]eople integrate new materials into their memory, modifying what they believe they personally experienced. When people combine information gathered at the time of an actual experience with new information acquired later, they form a smooth and seamless memory and thereafter have great difficulty telling which facts came from which time.”⁸⁰ For example, in one study, researchers arranged for a magician to visit a pre-school and pull a rabbit out of a hat.⁸¹ There was no rabbit, however, and the trick seemingly failed.⁸² After the show, the children's teacher and an unfamiliar adult engaged in a scripted conversation in the children's

⁷⁸ *Id.*

⁷⁹ Tr. 336-37.

⁸⁰ Elizabeth F. Loftus, *Memory Faults and Fixes*, ISSUES IN SCIENCE AND TECHNOLOGY 43 (2002).

⁸¹ See DANIEL REISBERG, *THE SCIENCE OF PERCEPTION AND MEMORY: A PRAGMATIC GUIDE FOR THE JUSTICE SYSTEM* 262 (2014).

⁸² *Id.*

presence where they repeated a rumor that the rabbit got loose in the school.⁸³ One week later, the children were asked open-ended questions and almost one-third falsely reported having seen the fictitious rabbit.⁸⁴ Another group of children who had not heard the adults in conversation were allowed to “overhear” their peers reporting the missing rabbit.⁸⁵ The second group of children were asked open-ended questions and 55% reported having seen the fictional bunny.⁸⁶ The children had heard about an event and mistakenly came to believe that they had seen the event after confusing the source of their knowledge.

In another experiment, researchers gave college students a list of events that were said to have been reported by their parents.⁸⁷ The students were asked to recall details about the events.⁸⁸ Although some of the events were, in fact, reported by the participant’s parents, others were made up by experimenters, unbeknownst to the participant.⁸⁹ In the initial interview, none of the participants recalled the made-up event, although they recalled more than 80% of the true

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 71.

⁸⁸ *Id.*

⁸⁹ *Id.*

events.⁹⁰ Repeated attempts at recall, however, changed the pattern.⁹¹ By the third interview, 25% of participants had created a false memory of the entirely fictitious event.⁹² Many were able to supply details of the event, although it never happened.⁹³

There are a number of factors that can lead to source confusion and, ultimately, a false memory. An expert on false memories considers these factors when assessing the degree of risk for a false memory in an individual case. For example, in the context of cases involving child testimony, an expert on false memories may consider:

Directive Questioning: According to Dr. Reisberg and other scientists, “[o]ne powerful way to produce a false report is through leading or suggestive questions.”⁹⁴ The questions may, but need not, be overtly suggestive.⁹⁵ “What matters is not the intention of the questioner (e.g., whether the questioner means to

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 260; Tr. 332-33.

⁹⁵ REISBERG, *supra* n.81 at 260.

lead the child or not).⁹⁶ Rather, what matters “is the perception of the child (i.e., whether the child perceives the presentation of the question, or the question itself, to imply that a particular answer is desired or expected).”⁹⁷

Feedback: Feedback from parents, teachers, and others may signal to a child whether his or her behavior or statements were met with approval.⁹⁸ Feedback can take many forms, including a verbal and explicit statement (“Yes, that’s right.”), a nonverbal cue (a nod of the head), an elaboration of the child’s utterances (implying endorsement), a restatement in the adult’s own words (implying a rejection), or even an emotional signal (a hug).⁹⁹ Studies show that “[c]hildren are sensitive to all of this informational feedback and often shift their accounts in a fashion guided by this feedback.”¹⁰⁰

Repeated Questions: “Repeated questions can gradually make a topic more and more familiar,” which can lead to source confusion “because the person can become confused about the source of the familiarity.”¹⁰¹ The person will

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 261; Tr. 341-42.

⁹⁹ REISBERG, *supra* n.81, at 261.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 262; Tr. 341.

mistakenly come to believe that the ideas in the questions are familiar because of an event related to those ideas, when, in fact, the familiarity has come from a different source—being asked about the ideas over and over.¹⁰²

Stereotype Induction: The induction of negative stereotypes that tell the listener that a person is bad or does bad things can create false memories.¹⁰³ The creation of the false memory need not be explicit and “often involves someone merely planting a ‘seed.’”¹⁰⁴ Moreover, the seed can sometimes be seemingly insignificant (“You know, grandpa sometimes does bad things.”).¹⁰⁵

(b) Juror Misperceptions

The Oregon Supreme Court first recognized the impact of source confusion on the judicial system in *State v. Lawson*.¹⁰⁶ There, the court judicially noticed the studies on source confusion and recognized the need for precautionary measures in

¹⁰² REISBERG, *supra* n.81, at 262.

¹⁰³ *Id.* at 264; Tr. 333.

¹⁰⁴ REISBERG, *supra* n.81, at 264.

¹⁰⁵ *Id.*

¹⁰⁶ 352 Or 724, 739-40, 291 P3d 673 (2012) (“Based on our extensive review of the current scientific research and literature, we conclude that the scientific knowledge and empirical research concerning eyewitness perception and memory has progressed sufficiently to warrant taking judicial notice of the data contained in those various sources as legislative facts that we may consult for assistance in determining the effectiveness of our existing test for the admission of eyewitness identification evidence.”).

cases involving eyewitness identification evidence.¹⁰⁷ The *Lawson* court discussed a number of factors that can lead to source confusion.¹⁰⁸

Significant for this Court's review is the *Lawson* court's recognition of the frequency with which laypeople hold beliefs contrary to the weight of scientific evidence on memory and perception.¹⁰⁹ In *Lawson*, the court held that “[b]ecause many of the [factors that influence memory] are either unknown to the average juror or contrary to common assumptions, expert testimony is one method by which the parties can educate the trier of fact concerning [those factors] that can affect the reliability of eyewitness identification.”¹¹⁰

Some of the same factors that are implicated in eyewitness identification cases overlap with the factors implicated in child testimony cases because they all address the same issue—source confusion.¹¹¹ Whether in eyewitness identification cases or in child testimony cases, those factors are just as unknown to the average juror or contrary to common assumptions. The Oregon Department of Justice, in

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 740-46. Dr. Reisberg was admitted as an expert in *Lawson* to discuss the distortion of perception and memory, and its impact on eyewitness identification evidence. Dr. Reisberg's research into memory errors applies equally whenever memory-based evidence is at issue. Tr. 337.

¹⁰⁹ *Id.* at 761.

¹¹⁰ *Id.*

¹¹¹ Tr. 336-37.

fact, relies on the scientific research about source confusion to train its investigators and interviewers in child abuse cases, rather than simply allowing them to rely on common assumptions.¹¹² The common assumptions of jurors are no less problematic.

For example, jurors tend to “over believe” a witness who says she is “certain” about her memory.¹¹³ Jurors look for verbal and visual cues, like tone and demeanor, to assess the witness’s certainty. Studies, however, confirm that certainty does not equal accuracy, as the *Lawson* court recognized.¹¹⁴ Witness confidence or certainty is highly susceptible to suggestive procedures and confirming feedback.¹¹⁵ Positive feedback, for instance, will reinforce the idea that the witness “got it right,” inflating confidence.¹¹⁶ Likewise, evidence suggests that

¹¹² Oregon Interviewing Guidelines (3rd ed., 2012) at 39-41 (summarizing some of the concerns about memory error), http://www.doj.state.or.us/victims/pdf/oregon_interviewing_guidelines.pdf (last visited April 30, 2015). *See also Id.* at 3 (“Regional forensic interviewers developed the guidelines after a thorough research and literature review, taking their collective experience into consideration as well. . . . Interviewers must be knowledgeable of practice guidelines, research, child development, and use of interview tools, and they should be prepared to support their decisions in individual cases.”).

¹¹³ REISBERG, *supra* n.81, at 237 (citing studies); *Lawson*, 352 Or at 777.

¹¹⁴ REISBERG, *supra* n.81, at 76; *Lawson*, 352 Or at 778.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

people become more confident when they tell and then re-tell what happened.¹¹⁷

Confidence can be inflated without any corresponding effect on accuracy. Yet, jurors mistakenly believe a confident witness is an accurate witness.¹¹⁸

As another example, jurors look for signs that a witness is “telling the truth” and believe they can trust an honest witness. A witness suffering from a false memory, however, is not lying.¹¹⁹ She truly believes that what she sees in her mind is accurate and, as a result, cross-examination is ineffective to test the reliability of her recollection.¹²⁰ The *Lawson* court recognized the same problem in the context

¹¹⁷ *Id.* at 78.

¹¹⁸ *See Lawson*, 352 Or at 778 (“Jurors, however, tend to be unaware of the generally weak relationship between confidence and accuracy, and are also unaware of how susceptible witness certainty is to manipulation by suggestive procedures or confirming feedback.”) (citations omitted).

¹¹⁹ Tr. 320-21; *see also Jenkins*, 308 SW3d at 711 (“So what happens is inappropriate biased interviews suggest events to children that they imagine. The more the children are asked about these imaginary events, the more the child visualizes the imaginary events. The more the child imagines these imaginary events, the more familiar the events become. As events become more familiar, the child becomes genuinely and sincerely convinced that he is reporting accurate recall when in fact all he is doing is describing imaginary events that have been suggested to him via repeated leading suggestive questions.”).

¹²⁰ *Sargent*, 738 A2d at 353 (“Furthermore, if a child witness sincerely believes that the suggested sexual abuse actually occurred, cross-examination of that child may not effectively test the reliability of the child’s recollection.”); *Barlow*, 507 SE2d at 418 (“However, ‘cross-examination of a child witness could be ineffectual if the child sincerely takes his or her recollections to be grounded in fact and does not remember the improper interview procedures which may have suggested them.’”).

of eyewitness identifications, where the witness has produced a false memory of the perpetrator's identity.¹²¹ Jurors will, nonetheless, believe the witness is telling the truth because the witness does not exhibit the tell-tale signs of deception, like hesitation, inconsistencies, and avoiding eye contact. The witness is truthful, but mistaken, and scientists confirm that there is no way to tell whether a memory is false, absent corroborating evidence.¹²²

As yet another example of the way in which common perceptions are contrary to scientific evidence, jurors tend to believe that suggestion must be overt or intentional to create a memory error. Intentional suggestion is not the only way to produce a false memory. Research proves there are many paths toward a false memory, including the use of leading questions, neutral but repeated questions, or neutral questions preceded by a stereotype induction.¹²³ False memories can arise in conversations with an adult who has suspicions about some prior event, or even with no direct questioning of the child at all.¹²⁴ The pre-school children who recalled seeing the "missing" bunny above simply overheard conversations from

¹²¹ *Lawson*, 352 Or at 758.

¹²² REISBERG, *supra* n.81 at 81-82, 87, 287; *DeLong*, 2006 WL 3334061, at *5.

¹²³ REISBERG, *supra* n.81 at 267.

¹²⁴ *Id.*

their peers. Contrary to what most laypeople understand, false memories can be created in many ways and do not require a specific “recipe.”¹²⁵

Laypeople are often unaware of how little it takes to produce a false memory, how far a false memory can go, and how firmly entrenched a false memory will become.¹²⁶ In one study, children interacted with a man called “Mr. Science” who demonstrated four science activities.¹²⁷ Three months later, the children’s parents were given storybooks about the visit with Mr. Science, with instructions to read the story aloud to the child three times.¹²⁸ The book included descriptions of the actual demonstrations, as well as demonstrations the child had not experienced.¹²⁹ The book also described two events involving body touch that had not occurred at all: first, an event in which Mr. Science put something “yucky” in the child’s mouth and, second, an event where Mr. Science pushed so hard on the child’s bare stomach (to apply a reward sticker) that it hurt.¹³⁰ The children were then

¹²⁵ REISBERG, *supra* n.81 at 267.

¹²⁶ *Id.* at 258.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

interviewed about the Mr. Science visit.¹³¹ In an immediate interview, roughly 30-40% of children of all age groups reported they had experienced the fictitious events, including the unpleasant touching experience.¹³² In follow-up interviews with more careful questioning, the false reports increased for 3-year-olds to 53% and 4-year-olds to 58%.¹³³ The number decreased for 7- and 8-year-olds, but still 15% reported the suggested events, despite warnings they were possibly untrue.¹³⁴ No one deliberately tried to manipulate the children, but the frequency of false reports was high and included reports of painful skin-to-skin contact.¹³⁵ A percentage of those reports remained in place even when the memories were challenged.¹³⁶

It is true that jurors generally know that our memories can “play tricks” on us. Most jurors, however, don’t know how powerful or how frequent those tricks can be. Moreover, most jurors mistakenly think that the tricks will manifest themselves in a way that is obvious to an unbiased observer. An expert on false

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

memories can educate jurors about the ways in which memory operates contrary to our expectations. The expert—like the jurors—cannot tell whether the memory is, indeed, accurate or false, absent objective corroborating evidence. The focus, instead, is on determining the risk of a memory error. The expert should educate the jury about the factors that make suggestion easier and may lead to false memories. It is then up to the jury to translate the risk of error into its decision about whether error has, indeed, occurred in that case. Absent psychological training to understand perception, memory, and factors that influence these processes, jurors are ill-equipped to understand that there exists a risk of memory error. Even jurors who understand that the risk exists need to then know how to assess the degree of risk. In many cases, the science suggests that jurors underestimate the degree of risk. An expert on false memories and the factors that can lead to false memories is helpful when the jury is relying on a memory-based report to make its decision. Expert testimony on false memories should be admissible when a memory error is at issue.

2. An expert on false memory science does not make an improper comment on the credibility of a witness.

Psychological evidence to assist the jury in assessing the witness's ability to perceive, remember, and relate is admissible and does not constitute improper "vouching" under Oregon law so long as the expert does not answer the "ultimate"

question of whether the witness is credible.¹³⁷ Such testimony may “tend to show that another witness either is or is not telling the truth,” but that, “by itself, will not render evidence inadmissible.”¹³⁸ Oregon courts, instead, make the principled distinction between (1) *inadmissible* expert testimony that supplants the jury’s assessment of credibility by making a direct comment on truthfulness and (2) *admissible* expert testimony that assists the jury’s assessment of credibility by providing useful, nonconclusive information from which inferences as to credibility may be drawn.¹³⁹

This Court, in *State v. Remme*, analyzed the Oregon Supreme Court’s rulings on expert testimony that bear on credibility and concluded that, although the expert cannot offer an opinion on the “ultimate” question of whether the witness is truthful (Category 3 above), he or she can testify to the “penultimate” question of whether the witness’s account comports with the more general phenomenon or dynamics bearing on credibility (Categories 1 and 2 above).¹⁴⁰ The expert can “connect the

¹³⁷ *Remme*, 173 Or App at 562.

¹³⁸ *Middleton*, 294 Or at 435.

¹³⁹ *Remme*, 173 Or App at 562. According to the *Remme* court, the “common principle underlying [the Oregon Supreme Court’s rulings in] *Middleton*, *Milbradt*, and *Keller* is that expert testimony must assist, not supplant, the jury’s assessment of credibility.” *Id.*

¹⁴⁰ *Id.*

dots” up until the last one.¹⁴¹ So long as the testimony concerns a phenomenon outside the experience of the average juror and at least the last dot is left unconnected, the expert’s opinion on the “penultimate” question is admissible.¹⁴²

In *Middleton*, the Oregon Supreme Court recognized that expert testimony on false recantations may support the credibility of the victim, but is not improper so long as the expert does not directly comment on the victim’s truthfulness.¹⁴³ In *Gherasim*, this Court recognized that the psychiatrist’s opinion that the victim suffered from dissociative amnesia was admissible evidence on the victim’s “ability to accurately perceive, remember, and recount the critical events,” and was not an impermissible comment on whether the witness was telling the truth.¹⁴⁴ The *Gherasim* court analogized the testimony to “that of an ophthalmologist who testifies that an eyewitness has impaired vision or that of a psychologist who testifies the witness suffers from dementia.”¹⁴⁵ The *Lawson* analogy is also helpful.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Middleton*, 294 Or at 435.

¹⁴⁴ *Gherasim*, 153 Or App at 320-21.

¹⁴⁵ *Id.* (citations omitted).

There, the court encouraged the use of experts on perception and memory in eyewitness identification cases.¹⁴⁶

Dr. Reisberg’s testimony, here, was not impermissible vouching. First, Dr. Reisberg did not—and could not—offer an impermissible comment on the truthfulness of the witness.¹⁴⁷ An expert on false memories does not evaluate whether the witness is telling the truth or lying.¹⁴⁸ The Supreme Court of Kentucky, admitting the testimony of an expert on false memories, correctly observed that the expert opinion “assumes the witness is testifying truthfully—but may be mistaken in his or her belief.”¹⁴⁹ The opinion “pertains to the reliability or accuracy of the witness’s belief or recollection not the truthfulness or untruthfulness of the witness.”¹⁵⁰

Second, Dr. Reisberg did not offer the ultimate conclusion about whether the child’s memory was false (Category 3 above). An expert on false memories cannot say whether a particular memory is false.¹⁵¹ Experts agree there is currently no way

¹⁴⁶ *Lawson*, 352 Or at 761.

¹⁴⁷ Tr. 320-21.

¹⁴⁸ *Id.*

¹⁴⁹ *Jenkins*, 308 SW3d at 711.

¹⁵⁰ *Id.*

¹⁵¹ *DeLong*, 2006 WL 3334061, at *5.

to draw the ultimate conclusion, and Dr. Reisberg, here, so testified.¹⁵² The experts can say only that the circumstances in the case are consistent with those that can lead to false memories (Categories 1 and 2 above).¹⁵³ The role of the expert is to educate the jury about perception, memory, and the factors that may distort these processes. The Oregon Supreme Court, in *Lawson*, encouraged reliance on these very experts and, Dr. Reisberg was admitted in that case as an expert on the risks of memory error.¹⁵⁴ Expert testimony on the general phenomenon of false memories and the particular circumstances in the case that are consistent with the general phenomenon is admissible under Oregon law.

C. False memories have led to wrongful convictions around the country that were later overturned.

Over 120 people around the country have proved they were wrongfully convicted of sexually abusing a child and won release from prison, according to the National Registry of Exonerations at the University of Michigan.¹⁵⁵ Some of those

¹⁵² Tr. 355-56.

¹⁵³ *Id.* See also *DeLong*, 2006 WL 3334061, at *5 (“Dr. Loftus testified that she could not say whether a particular person is lying or that a particular memory is a false memory—in other words, that she could not comment directly on the truthfulness of a complainant’s allegations—but she could say whether the circumstances indicated suggestion of the sort that can lead to a false memory.”).

¹⁵⁴ *Lawson*, 352 Or at 759-61.

¹⁵⁵ National Registry of Exonerations, <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> (last visited April 30, 2015).

defendants were convicted on the basis of what was later thought to be a false memory. In 1987, Teobaldo Guce was wrongfully convicted of sexually abusing his 5-year-old daughter after a physician, Dr. Sabbagh, conducted a routine examination and concluded that the girl had been raped and sodomized.¹⁵⁶ The girl repeatedly denied having been abused when questioned by the doctor and social workers. A private doctor examined the girl just five days after Sabbagh's examination and found no signs of rape or sodomy. The girl and her 7-year-old sister were, nonetheless, repeatedly interviewed by social workers until they finally implicated their father, Guce. The 5-year-old said Guce had raped her in her bed, and the 7-year-old said she saw the rape. Guce was convicted and sentenced. Four years later, the girls recanted to their minister and their new foster parents. Additional experts also examined the girls and determined neither had been raped or sodomized. The federal district court in New York ordered a hearing to address the possibility that the girl's initial accusations were the result of lengthy interrogations and suggestive questioning by Dr. Sabbagh and the social workers, and the prosecution ultimately agreed that the recantations were credible. Guce's habeas petition was granted, and he was released.

¹⁵⁶ Teobaldo Guce, National Registry of Exonerations, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4301> (last visited April 30, 2015).

In 1985, Albert Algarin was wrongfully convicted of sex abuse after a 4-year-old girl alleged she had been raped by Algarin, a teacher's aide at the girl's day care center.¹⁵⁷ After the girl's mother reported the abuse, detectives interviewed 60 children from the day care center and determined that 18 of them had been abused. Algarin was convicted along with two others. All three convictions were later reversed on appeal. And, in 1994, a CBS News investigation raised questions about whether any of the abuse had happened and whether the allegations were the result of coercive and suggestive questioning by the authorities. The CBS News investigation revealed that each of the children had been questioned more than 80 times before trial. At one point, one of the children identified the trial judge as his molester.

In 1987, Violet Amirault was wrongfully convicted of sexually abusing a number of children at the Fells Acres Day School that she owned in Massachusetts.¹⁵⁸ According to the National Registry of Exonerations, the case started with a 5-year-old boy who told his uncle that he was undressed at the school, and that allegation "triggered one of the first in a series of investigations of child

¹⁵⁷ Albert Algarin, National Registry of Exonerations, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3876> (last visited April 30, 2015).

¹⁵⁸ Violet Amirault, National Registry of Exonerations, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3863> (last visited April 30, 2015).

sex abuse at day care and pre-school facilities across the country in the 1980s and 1990s—a convulsion of child sex abuse hysteria driven by suggestive and coercive interviewing techniques by social workers, therapists and law enforcement.” No physical evidence of abuse was ever presented, but four children testified that they were taken to a “magic room” where they were sexually abused and photographed in the nude. Amirault was convicted, along with her son and daughter who worked at the school. Amirault’s case went up on appeal and back for retrial, where Middlesex Superior Court Judge Isaac Borenstein found that the children were manipulated by investigators who succumbed to a “climate of panic, if not hysteria.” The judge viewed videotapes of the children’s interrogations and found that questioners pushed children to give certain answers. The judge wrote in his opinion: “On and on and on, refusing to take ‘no’ for an answer, and it’s only one example of the overwhelming evidence in this case of how investigators, however well-intentioned, just would not take no, and overwhelmed these kids.” Amirault was posthumously exonerated in 1998, nearly one year after she died of cancer.

Cases like those of Amirault, Algarin, and Guce raise serious concerns about memory-based evidence used to convict in absence of physical findings.¹⁵⁹

¹⁵⁹ These are just a few of the cases where false memories have resulted in wrongful convictions. Going back as far as the Salem Witch Trials in 1692, courts have been concerned about the reliability of memory-based evidence and the likelihood of wrongful convictions in absence of corroborating evidence. The most widely known cases seem to mirror the hysteria of the Salem Witch Trials,

Although some question the legitimacy of exonerations based on victim recantation, the recantation, at a minimum, calls the original conviction into doubt. It is in the best interest of everyone—the defendant, the victim, the prosecution, and the court—to arm jurors with science to make a more informed decision the first time around.

The documented instances of wrongful conviction in child sex abuse cases suggest that jurors are not well-prepared on their own to critically assess memory-based evidence. Jurors naturally want to sympathize with the complaining witness, especially when that witness offers compelling and emotional details of sexual abuse. In Amirault’s case, the jurors seemingly tried to make sense out of fantastical allegations by the children that included being bitten by robots if they refused to engage in sex and being attacked with knives, despite no physical evidence.¹⁶⁰ The average juror lacks a scientific understanding of perception and

with the day care abuse cases in the 1980s and the repressed memory familial abuse cases in the 1990s. See Violet Amirault, National Registry of Exonerations, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3863> (last visited April 30, 2015); Loftus, *Memory Faults and Fixes*, *supra* n.78; *State v. Smith*, 809 So.2d 556, 567 (Ct. App. La. 2002) (Downing, J., dissent) (“During the 1980’s criminal prosecutions based on ‘repressed memories’ sent many an innocent person to jail for crimes alleged to have been committed decades before the victim ‘remembered’ the abuse. Sadly our court system did not learn the lesson of the Salem Witch Trials. Numerous studies show that when children are exposed to forms of suggestion the error rates can be as high as 50%.”) (citations omitted).

¹⁶⁰ Violet Amirault, National Registry of Exonerations, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=386>

memory to fully evaluate a witness's testimony and determine the risk of memory error.

Because the witness believes that what she sees in her memory is the truth, typical trial tools, like cross-examination and closing argument, are ineffective to expose a mistaken, yet sincere, witness. Expert testimony can educate the jury in a way that defense counsel cannot.

Oregon courts should encourage the use of experts who offer a principled, scientific basis upon which to assess the risk of a false memory. As discussed above, so long as the expert does not offer the ultimate conclusion as to whether the memory is false, the testimony is admissible and is no different than the State's reliance on experts to opine on false recantations and other phenomena outside the experience of the average juror. Educating jurors about the science behind perception and memory only furthers the Court's truth-seeking function, and it is reasonable that all parties agree on that ultimate goal.

It is further reasonable to agree that admitting expert testimony on false memories will not open the floodgates—Dr. Reisberg testified that our memories are largely accurate.¹⁶¹ Expert testimony on false memories is relevant only where

3 (last visited April 30, 2015).

¹⁶¹ Tr. 355.

there is a reasonable likelihood that circumstances exist that are consistent with the general phenomenon of false memories.

V. CONCLUSION

Amicus OIP respectfully requests the Court rule that expert testimony on false memories is admissible, provided there is a reasonable likelihood that circumstances exist that are consistent with the general phenomenon of false memories and the expert does not offer the ultimate conclusion as to whether the memory is false.

Dated: April 30, 2015

Respectfully submitted,

OREGON INNOCENCE PROJECT

/s/ Janis C. Puracal

Steven T. Wax (OSB #850120)

Email: wax@oregoninnocence.org

Aliza B. Kaplan (OSB #135523)

Email: kaplan@oregoninnocence.org

Janis C. Puracal (OSB #132288)

Email: puracal@oregoninnocence.org

P.O. Box 40588

Portland, OR 97240

(503) 944-2271

LEVINE & MCHENRY LLC

/s/ Michael R. Levine

Michael R. Levine (OSB #931421)

Email: michael@levinemchenry.com

Matthew G. McHenry (OSB #043571)

Email: matthew@levinemchenry.com

Levine & McHenry LLC

1001 SW Fifth Avenue

Suite 1414

Portland, OR 97204

(503) 546-3927

CERTIFICATE OF FILING

I certify that I electronically filed the foregoing *BRIEF OF AMICUS CURIAE* with the State Court Administrator for the Court of Appeals of the State of Oregon by using the appellate electronic filing system on April 30, 2015.

CERTIFICATE OF SERVICE

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

<p>PETER GARTLAN (OSB #870467) Chief Defender MARY M. REESE (OSB #862651) Senior Deputy Public Defender Office of Public Defense Services 1175 Court Street NE Salem, OR 97301 Telephone: (503) 378-3349 Email: Mary.Reese@opds.state.or.us</p> <p>Attorneys for Appellant Travis Dye</p>	<p>ELLEN F. ROSENBLUM (OSB #753239) Attorney General ANNA M. JOYCE (OSB #013112) Solicitor General 1162 Court St. NE Salem, Oregon 97301-4096 Telephone: (503) 378-4402 Email: anna.joyce@doj.state.or.us</p> <p>Attorneys for Respondent State of Oregon</p>
---	---

/s/Janis C. Puracal

Janis C. Puracal (OSB #132288)
Email: puracal@oregoninnocence.org
Oregon Innocence Project
P.O. Box 40588
Portland, OR 97240
(503) 944-2271

CERTIFICATE OF COMPLIANCE

I certify that (1) BRIEF OF *AMICUS CURIAE* complies with the word count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief, as described in ORAP 5.05(2)(a), is 7,998 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

/s/Janis C. Puracal

Janis C. Puracal (OSB #132288)

Email: puracal@oregoninnocence.org

Oregon Innocence Project

P.O. Box 40588

Portland, OR 97240

(503) 944-2271