Through the Looking Glass: An Overdue Look into Philippine Jurisprudence and the Issues Surrounding Eyewitness Testimony

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I. INTRODUCTION

Eyewitness identification remains to be pervasive and highly persuasive evidence used in courts — eyewitness testimony that positively identifies and directly implicates the accused is compelling and vital evidence and, more often than not, could lead to conviction.[1] In the United States (U.S.), it has

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1. AMINA MEMON, ET AL., PSYCHOLOGY AND LAW: TRUTHFULNESS, ACCURACY AND CREDIBILITY 107 (2003); Innocence Project, Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of a Misidentification, para. 1, *available at* http://www.innocenceproject.org/reevaluating-lineups-why-witnesses-make-mistakes-and-how-to-reduce-the-chance-of-a-misidentification (last accessed May 12, 2017); EDIE GREENE &

been estimated that around 77,000 people a year are charged with crimes solely on the basis of eyewitness identification.[2] It is a powerful piece of evidence — a witness who testifies that he or she saw the accused fire the gun provides direct evidence of guilt, whilst physical evidence such as a fingerprint only indicates that the accused got into physical contact with an object and not necessarily links an accused to the crime.[3]

The aforementioned notwithstanding, challenges exist for police officers, prosecutors, and courts alike in their reliance, most of the time, on eyewitness observers.[4] Psychological research would especially show that eyewitness identification is not as reliable as it seems.[5] Eyewitness reports are susceptible to mistake and, more often than not, "the desire to get a case 'nailed down' overshadows the goal of discovering the truth."[6] In fact, mistaken eyewitness identification is the identified leading cause of wrongful convictions in the U.S. and the United Kingdom, and consistently yields a high error rate in correctly identifying the perpetrator of a crime.[7] Moreover, research shows that albeit confidence is afforded weight in trials, the same does not automatically mean that the eyewitness identification is

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KIRK HEILBRUN, WRIGHTSMAN'S PSYCHOLOGY AND THE LEGAL SYSTEM, 113 (2011); & People v. Teehankee, Jr., 249 SCRA 54, 94 (1995).

2. MEMON, ET AL., *supra* note 1, at 108. *See also* GREENE & HEILBRUN, *supra* note 1, at 113.

3. MEMON, ET AL., *supra* note 1, at 108.

4. GREENE & HEILBRUN, *supra* note 1, at 113.

5. *Teehankee, Jr.*, 249 SCRA at 94-95. The Court said that

> while eyewitness identification is significant, it is not as accurate and authoritative as the scientific forms of identification evidence such as the fingerprint or [deoxyribonucleic acid]DNA testing. Some authors even describe eyewitness evidence as 'inherently suspect.'
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> ...
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> *Dangers of unreliability in eyewitness testimony arise ... for whenever people attempt to acquire, retain, and retrieve information accurately, they are limited by normal human fallibilities and suggestive influences.*

Id.

6. GREENE & HEILBRUN, *supra* note 1, at 113.

7. Innocence Project, *supra* note 1, at 6-7 & MEMON, ET AL., *supra* note 1, at 108. *See also* Robert Norris, et al., *"Than That One Innocent Suffer": Evaluating State Safeguards Against Wrongful Convictions*, 74 ALB. L. REV. 1301, 1304-08 (2010).

accurate and correct.[8] There are several factors that affect such positive identification evidence. More recently, the introduction of deoxyribonucleic acid (DNA) testing procedures has shed further light on the unreliability of eyewitness identification — people positively identified by eyewitnesses, who were innocent of the crime imputed against them, were eventually exonerated through the use of DNA testing.[9]

In light of this, the Philippine Supreme Court has always been remindful about dealing with positive identification evidence. As the Court held in the highly popularized case of *Lejano v. People*,[10] and as reiterated in the more recent case of *Franco v. People*,[11]

> [a] judge must keep an open mind. He [or she] must guard against slipping into hasty conclusion, often arising from a desire to quickly finish the job of deciding a case. A positive declaration from a witness that he [or she] saw the accused commit the crime should not automatically cancel out the accused's claim that he [or she] did not do it. A lying witness can make as positive an identification as a truthful witness can. The lying witness can also say as forthrightly and unequivocally, 'He [or she] did it!' without blinking an eye.[12]

With such a reminder from no less than the Supreme Court, one cannot help but ask what factors and circumstances should then be taken into consideration in gauging the reliability or credibility of positive identification and/or eyewitness testimony, especially since wrongful convictions brought by mistaken identification in the Philippines is nothing new. Cases one can take into account are *Lejano* and *People v. Larrañaga*.[13] On one hand, *Lejano* deals with the Supreme Court setting aside the conviction and ordering the immediate release of the accused on the ground of unreliability of positive identification.[14] On the other hand, despite Francisco Larrañaga's claim that

8. Innocence Project, *supra* note 1, at 6-7.

9. MEMON, ET AL., *supra* note 1, at 108 & GREENE & HEILBRUN, *supra* note 1, at 113.

10. Lejano v. People, 638 SCRA 104 (2010).

11. Franco v. People, G.R. No. 191185, Feb. 1, 2016, *available at* http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/february2016/191185.pdf (last accessed May 12, 2017).

12. *Id.* at 12 (citing *Lejano*, 638 SCRA at 150-51 & 316).

13. People v. Larrañaga, 421 SCRA 530 (2004).

14. *Lejano*, 638 SCRA at 150-51 & 316.

he was wrongfully convicted on the basis of mistaken identification, the Supreme Court confirmed his conviction.[15] Still maintaining his innocence throughout the whole ordeal, Larrañaga brought his case before the United Nations Human Rights Committee, which consequently brought his case to worldwide attention.[16] With respect to such high risk of wrongful convictions brought by mistaken identification, legal psychology research provides useful insight as to what circumstances and factors need to be taken into consideration when confronted with positive identification and/or eyewitness testimony. Thus, this Article shall delve into the issue of eyewitness testimony and identification accuracy. Applying a legal psychology lens on the matter of how eyewitness testimony is appreciated in the Philippine criminal justice system, the Article shall try to assess how compatible present jurisprudential pronouncements and practices are to what has been provided by research so far, in terms of eyewitness perception, memory, and estimator as well as system variables that influence identification accuracy.

II. DOCTRINE ON POSITIVE IDENTIFICATION IN PHILIPPINE JURISPRUDENCE

In answering the question of what constitutes positive identification of a perpetrator of a crime and when the same is reliable enough to establish guilt beyond reasonable doubt, the Supreme Court held that the identification "does not always require direct evidence from an eyewitness; otherwise, no conviction will be possible in crimes where there are no eyewitnesses. Indeed, trustworthy circumstantial evidence can equally confirm the identification and overcome the constitutional presumption of innocence of the accused."[17] Henceforward, the Court distinguishes between two types of positive identification — identification by direct evidence, through the testimony of the eyewitness to the very commission of the act; and identification by circumstantial evidence, which includes where the accused

15. *Larrañaga*, 421 SCRA at 573-74 & 585-87.

16. Francisco Juan Larrañaga v. Philippines, United Nations Human Rights Committee, Comm. No. 1421/2005, U.N. Doc. CCPR/C/87/D/1421/2005 (Sep. 14, 2006).

17. People v. Caliso, 659 SCRA 666, 677 (2011).

and the victim were last seen together immediately before or after the crime.[18] As the Court explained in *People v. Gallarde*,[19]

> Positive identification pertains essentially to proof of identity and not [per se] to that of being an eyewitness to the very act of commission of the crime. There are two types of positive identification. A witness may identify a suspect or accused in a criminal case as the perpetrator of the crime as an eyewitness to the very act of the commission of the crime. This constitutes direct evidence. There may, however, be instances where, although a witness may not have actually seen the very act of commission of a crime, he [or she] may still be able to positively identify a suspect or accused as the perpetrator of a crime as for instance when the latter is the person or one of the persons last seen with the victim immediately before and right after the commission of the crime. This is the second type of positive identification, which forms part of circumstantial evidence, which, when taken together with other pieces of evidence constituting an unbroken chain, leads to only fair and reasonable conclusion, which is that the accused is the author of the crime to the exclusion of all others. If the actual eyewitnesses are the only ones allowed to possibly positively identify a suspect or accused to the exclusion of others, then nobody can ever be convicted unless there is an eyewitness, because it is basic and elementary that there can be no conviction until and unless an accused is positively identified. Such a proposition is absolutely absurd, because it is settled that direct evidence of the commission of a crime is not the only matrix wherefrom a trial court may draw its conclusion and finding of guilt. If resort to circumstantial evidence would not be allowed to prove identity of the accused on the absence of direct evidence, then felons would go free and the community would be denied proper protection.[20]

When it comes to credibility of positive identification, jurisprudence consistently holds that for the testimonial evidence to be believed,

> it must *firstly*, proceed from the mouth of a credible witness ... [that is, one who] is without previous conviction of a crime; who is not a police character and has no police record; who has not perjured in the past; whose

18. *Id.* (citing People v. Gallarde 325 SCRA 835, 849-50 (2000)). *See also* People v. Villarico, Sr., 647 SCRA 43, 60-61 (2011) (citing *Gallarde*, 325 SCRA at 849-50) & People v. Pondivida, 692 SCRA 217, 222 (2013) (citing *Caliso*, 659 SCRA at 677-78).

19. People v. Gallarde, 325 SCRA 835 (2000).

20. *Id.* at 849-50.

> affidavit is not incredible; who has good standing in the community; and one who is reputed to be trustworthy and reliable. *Secondly*, the person's testimony must in itself be credible.
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> ...

Evidence to be believed, must not only proceed from the mouth of a credible witness, but it must be credible in itself — such as the common experience and observation of mankind can approve as probable under the circumstances. We have no test of the truth of human testimony, except its conformity to our knowledge, observation, and experience. Whatever is repugnant to these belongs to the miraculous and is outside of judicial cognizance.[21]

In light of the foregoing, the Court as a general rule affords the trial court's assessment great weight, and even considers the same conclusive and binding.[22] The reason is obvious — having the full opportunity to observe directly the witnesses' deportment and manner of testifying, the trial court is in a better position than the appellate court to evaluate properly testimonial evidence.[23] An exception to this rule is when the trial court's findings be tainted, however, with glaring errors, arbitrariness, oversight of some fact, or circumstance of weight and influence — in such a situation, the Court shall step in and, if need be, will set aside the trial court's findings.[24] With this in mind, the Court had in numerous occasions overturned convictions — like what it did in *Lejano* — because it either found that the identification was incredible due to inconsistencies and improbabilities, or that there was no adequate positive identification.[25]

Closely related to this, the Court recognizes that "identification that does not preclude the reasonable possibility of mistake cannot be accorded

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21. *Lejano*, 638 SCRA at 162-63 (2010) (J. Carpio-Morales, concurring opinion) (emphasis omitted) (citing Daggers v. Van Dyck, 37 N.J. Eq. 130, 132 (Ch. 1883) (U.S.)). *See also* Locsin v. Philippine Long Distance Telephone Company, 602 SCRA 740, 748-49 (2009) & Lee Eng Hong v. Court of Appeals, 241 SCRA 392, 398 (1995).

22. People v. Macapanas, 620 SCRA 54, 69 (2010) & People v. Pringas, 531 SCRA 828, 845 (2007).

23. *Macapanas*, 620 SCRA at 69 (citing People v. Escultor, 429 SCRA 651, 661 (2004)).

24. *Id.* & *Pringas*, 531 SCRA at 845.

25. *See Franco*, G.R. No. 191185; *Caliso*, 659 SCRA at 678-80; & *Lejano*, 638 SCRA at 150-51 & 316.

any evidentiary force."[26] Any "intervention of any mistake or the appearance of weakness in identification"[27] would simply then mean that the constitutional presumption of innocence shall be sustained until the contrary is proved, and despite any cloud of doubt over the innocence of the accused.[28]

Thus, in the case of *People v. Caliso*,[29] the Court overturned the conviction of the accused for the crime of murder due to the fact that the sole witness' positive identification was unreliable and prone to mistake.[30] In this case, the witness positively identified the accused as the perpetrator of the crime even if the former, while hiding behind a cluster of banana leaves, only saw the back of the perpetrator who was then wearing a pair of shorts with the number "11" written on the side.[31] The trial court found the accused guilty due to the lack of ill motive and confident testimony provided by said witness who honestly believed that the accused was the perpetrator of the crime.[32] The Court, however, was unconvinced, saying that

> [a] witness' familiarity with the accused, although accepted as basis for a positive identification, does not always pass the test of moral certainty due to the possibility of mistake.
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> No matter how honest [Soledad] Amegable's testimony might have been, her identification of [Delfin] Caliso by a sheer look at his back for a few minutes could not be regarded as positive enough to generate that moral certainty about Caliso being the perpetrator of the killing, absent other

26. *Villarico, Sr.*, 647 SCRA at 54 (citing People v. Fronda, 328 SCRA 185, 194 (2000); Natividad v. Court of Appeals, 98 SCRA 335, 346 (1980); People v. Beltran, 61 SCRA 246, 250 (1974); People v. Manambit, 271 SCRA 344, 377 (1997); & People v. Maongco, 230 SCRA 562, 575 (1994)).

27. *Villarico, Sr.*, 647 SCRA at 54 (citing People v. Raquel, 265 SCRA 248, 259 (1996); People v. Salguero, 198 SCRA 357, 366 (1991); & *Natividad*, 98 SCRA 335, 346 (1980)).

28. *Villarico, Sr.*, 647 SCRA at 54 (citing Pecho v. People, 262 SCRA 518, 533 (1996); Perez v. Sandiganbayan, 180 SCRA 9, 13 (1989); People v. Sadie, 149 SCRA 240, 244 (1987); & U.S. v. Gutierrez, 4 Phil. 493, 495-96 (1905)).

29. People v. Caliso, 659 SCRA 666 (2011).

30. *Id.* at 678-80.

31. *Id.* at 669-70.

32. *Id.* at 673. The Regional Trial Court said "that as to the killing of AAA, the identification by Amegable that the man she had seen submerging AAA in the murky river was no other than Caliso himself was reliable." *Id.*

> reliable circumstances showing him to be AAA's killer. Her identification of him in that manner lacked the qualities of exclusivity and uniqueness, even as it did not rule out her being mistaken. Indeed, there could be *so many* other individuals in the community where the crime was committed whose backs might have looked like Caliso's back. Moreover, many factors could have influenced her perception, including her lack of keenness of observation, her emotional stress of the moment, her proneness to suggestion from others, her excitement, and her tendency to assume. The extent of such factors [is] not part of the records; hence, the trial court and the [Court of Appeals] could not have taken them into consideration. But the influence of such varied factors could not simply be ignored or taken for granted, for it is even a well-known phenomenon that the members of the same family, whose familiarity with one another could be easily granted, often inaccurately identify one another through a sheer view of another's back. Certainly, an identification that does not preclude a reasonable possibility of mistake cannot be accorded any evidentiary force.
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> Amegable's recollection of the perpetrator wearing short pants bearing the number "11" did not enhance the reliability of her identification of Caliso. For one, such pants were not one-of-a-kind apparel, but generic. Also, they were not offered in evidence. Yet, even if they had been admitted in evidence, it remained doubtful that they could have been linked to Caliso without proof of his ownership or possession of them in the moments before the crime was perpetrated.

Nor did the lack of bad faith or ill motive on the part of Amegable to impute the killing to Caliso guarantee the reliability and accuracy of her identification of him. The dearth of competent additional evidence that eliminated the possibility of any human error in Amegable's identification of Caliso rendered her lack of bad faith or ill motive irrelevant and immaterial, for even the most sincere person could easily be mistaken about her impressions of persons involved in startling occurrences such as the crime committed against AAA. It is neither fair nor judicious, therefore, to have the lack of bad faith or ill motive on the part of Amegable raise her identification to the level of moral certainty.[33]

It is also significant to note that in the aforementioned case, the physical examination of the accused was inconclusive as to his involvement in the crime.[34]

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33. *Id.* at 678-80 (citing People v. Fronda, 328 SCRA 185, 194-95 (2000); *Natividad*, 98 SCRA at 346; *Beltran*, 61 SCRA at 250 (1974); *Manambit*, 271 SCRA at 377; & *Maongco*, 230 SCRA at 575).

34. *Caliso*, 659 SCRA at 680. The Court said that

The foregoing notwithstanding, the Court decided contrariwise on other cases wherein familiarity of the eyewitnesses with the accused was also a factor. In the case of *People v. Villarico, Sr.*,[35] the Court sustained the conviction of the accused after being positively identified by two witnesses who were relatives of the victim and neighbors with the accused.[36] In sustaining the conviction, the Court noted that it was not necessary for the eyewitnesses to see who actually pulled the trigger that caused the death of the victim; it was enough that they saw the four accused before and after the commission of the crime.[37]

> The collective recollections of both Remedios [Cagatan] and Francisco [Cagatan] about seeing the four accused standing near the door to the kitchen immediately *before* and *after* the shooting of Haide [Cagatan] inside the kitchen were categorical enough, and warranted no other logical inference than that the four accused were the persons who had just shot Haide. Indeed, neither Remedios nor Francisco needed to have actually seen who of the accused had fired at Haide, for it was enough that they testified that the four armed accused: (*a*) had strategically positioned themselves by the kitchen door *prior* to the shooting of Haide; (*b*) had still been in the same positions *after* the gunshots were fired; and (*c*) had continuously aimed their firearms at the kitchen door even as they were leaving the crime scene.[38]

As regards the issue of familiarity, the Court sustained the positive identification of the two witnesses on the ground that they were relatives of the victim and neighbors of the accused. Albeit, one witness was previously attending to her child who was then answering the call of nature, and by being seen by one of the accused, a gun was pointed to the former causing

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> [t]he injuries found on the person of Caliso by Dr. [Joseph] Fuentecilla, as borne out by the medical certificate ... did not support the culpability of Caliso. The injuries, which were mostly mere scratch marks, were not even linked by the examining physician to the crime charged. Inasmuch as the injuries of Caliso might also have been due to other causes, including one related to his doing menial labor most of the time, their significance as evidence of guilt is nil.
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> *Id.*

35. People v. Villarico, Sr., 647 SCRA 43 (2011).

36. *Id.* at 55.

37. *Id.*

38. *Id.*

her to fall on the ground; while, the other witness came out of the toilet after hearing a gunshot and jumped to a hole prior to seeing the accused.[39]

The close relationship of Remedios and Francisco with the victim as well as their familiarity with the accused who were their neighbors assured the certainty of their identification as Haide's assailants. In *Marturillas v. People*, the Court observed that the familiarity of the witness with the assailant erased any doubt that the witness could have erred[ ] and noted that a witness related to the victim had a natural tendency to remember the faces of the person involved in the attack on the victim, because relatives, more than anybody else, would be concerned with seeking justice for the victim and bringing the malefactor before the law.[40]

The Court used the same line of reasoning vis-à-vis familiarity in *Ibañez v. People*,[41] when it gave more weight, among other things, to the positive identification of the victim considering that there was so much familiarity among the victim and the four accused.[42] The perpetrators and the witness were neighbors in this case.[43] Significantly so, more weight is afforded when the one who positively identified the accused is familiar with both the latter and the victim.[44] As the Court held in *People v. Jalbonian*,[45] "where the prosecution eyewitness was familiar with both the victim and the accused, and where the *locus criminis* afforded good visibility, and where no improper motive can be attributed to the witness for testifying against the accused, then [his] version of the story deserves much weight[.]"[46]

One can further note that with eyewitness testimony, more than one positive identification could be involved, just like in the *Villarico, Sr.* case. In assessing the weight of such testimonies, the Court normally sustains the positive identification presented when they are straightforward and consistent with one another on material details, regardless of whether there might be inconsistencies on minor details of each testimony.[47] This notwithstanding, a

39. *Id.* at 48.

40. *Id.* at 55-56 (citing Marturillas v. People, 487 SCRA 273, 301 (2006)).

41. Ibañez v. People, 782 SCRA 291, 312 (2016).

42. *Id.*

43. *Id.* at 297.

44. People v. Jalbonian, 700 SCRA 280, 293 (2013).

45. *Id.*

46. *Id.* (citing People v. Villacorta, 657 SCRA 270, 278 (2011)).

47. People v. Mamaruncas, 664 SCRA 182, 194-95 (2012).

finding of guilt is not uncommon on the basis of one witness only.[48] As the Court held in *Jalbonian*,

> [a] [f]inding of guilt based on the testimony of a lone witness is not uncommon. 'For although the number of witnesses may be considered a factor in the appreciation of evidence, preponderance is not necessarily with the greatest number and conviction can still be had on the basis of the credible and positive testimony of a single witness. Corroborative evidence is deemed necessary 'only when there are reasons to warrant the suspicion that the witness falsified the truth or that his observation had been inaccurate.'[49]

In light of these pronouncements, the Court generally treats positive identification as compelling evidence especially when the same is "categorical and consistent and without any showing of ill motive on the part of the eyewitness testifying on the matter[.]"[50] Inconsistencies on minor details are deemed trivial, as long as there is no inconsistency in the vivid and complete narration of the primary occurrence and positive identification of the accused.[51] In fact, the Court believes that these inconsistencies bolster the credibility of the witness' testimony as it erases the suspicion of the witness having been coached or rehearsed.[52] It is when the testimony appears totally flawless, the Court holds, that a court might have some misgiving as to its veracity.[53] The Court presumes, unless proven to the contrary, that a witness is not moved by ill will and/or bias and thus, deserving of belief and credence.[54] Such identification and/or testimony shall henceforth prevail "over a denial which, if not substantiated by clear and convincing evidence[,] is negative and self-serving evidence undeserving of weight in

48. People v. Rivera, 412 SCRA 224, 236 (2003).

49. *Jalbonian*, 700 SCRA at 292 (citing People v. Tulop, 289 SCRA 316, 332 (1998)).

50. People v. Caisip, 290 SCRA 451, 456 (1998) (citing People v. Ondalok, 272 SCRA 631, 632 (1997)). *See also Ibañez*, 782 SCRA at 312 & People v. Salahuddin, 781 SCRA 154, 177 (2016).

51. *Mamaruncas*, 664 SCRA at 194-95 (citing People v. Bernabe, 604 SCRA 216, 231 (2009)).

52. *Macapanas*, 620 SCRA at 73 (citing People v. Murillo, 352 SCRA 105, 118 (2001)).

53. *Id.* (citing People v. Albior, 352 SCRA 35, 46 (2001)).

54. *Jalbonian*, 700 SCRA at 293 (citing People v. Manulit, 635 SCRA 426, 437 (2010)).

law."[55] The latter, according to the Court, cannot be given greater evidentiary value over the testimony of credible witnesses who testify on affirmative matters.[56] In other words, the Court gives substantial weight into the apparent confidence, straightforwardness, and consistency of positive identification, and in general, eyewitness testimony.

In relation to this, the Court had the occasion to discuss out-of-court identification, which for all means and purposes affects in-court identification later on. The Court enumerated three ways by which out-of-court identification by a witness may be conducted by law enforcement officers as follows —

Out-of-court identification is conducted by the police in various ways. It is done thru *show-ups* where the suspect alone is brought face to face with the witness for identification. It is done thru *mug shots* where photographs are shown to the witness to identify the suspect. It is also done thru *line-ups* where a witness identifies the suspect from a group of persons lined up for the purpose.[57]

And since any corruption or contamination of out-of-court identification shall ultimately affect in-court identification, the Court took it upon itself to formulate governing rules, otherwise known as the "totality of circumstances test" —

In resolving the admissibility of and relying on out-of-court identification of suspects, courts have adopted the totality of circumstances test where they consider the following factors: (1) the witness' opportunity to view the criminal at the time of the crime; (2) the witness' degree of attention at that time; (3) the accuracy of any prior description given by the witness; (4) the level of certainty demonstrated by the witness at the identification; (5) the length of time between the crime and the identification; and[ ] (6) the suggestiveness of the identification procedure.[58]

Notably, the totality of circumstances test is not only meant to be witness-focused, but likewise, it is meant to consider any possible

55. *Caisip*, 290 SCRA at 456 (citing *Ondalok*, 272 SCRA at 632). *See also Salahuddin*, 781 SCRA at 177 & People v. Sevillano, 750 SCRA 221, 228 (2015) (citing Malana v. People, 549 SCRA 451, 466 (2008)).

56. *Caisip*, 290 SCRA at 456 (citing People v. Castillo, 273 SCRA 22, 32 (1997)).

57. *Teehankee, Jr.*, 249 SCRA at 95.

58. *Id. See also Macapanas*, 620 SCRA at 71.

suggestiveness of the identification procedure to which law enforcement officers are predominantly in control.[59]

The Supreme Court had the first opportunity to apply the totality of circumstances test in the aforementioned *People v. Teehankee, Jr.*,[60] a case involving the shooting of three individuals at night and where only one survived.[61] In this case, accused Claudio J. Teehankee, Jr. assailed the positive identification of three prosecution witnesses, namely: (1) lone surviving victim Jussi Leino; (2) Agripino Cadenas, who was a security guard of one of the nearby houses where the shooting took place; and (3) Vicente Mangubat, a stay-in driver in one of the neighboring houses, as well.[62] In assailing credibility, Teehankee questioned the irregularity of the identification procedures made by the police and that, prior to the identification, witnesses were already exposed to how he looked through pictures in newspaper and other media.[63] At the same time, Teehankee questioned the ability of the victim to identify his face given the short amount of time the alleged shooting took place coupled with the state of drunkenness the victim was then suffering from as the latter admittedly consumed at least five bottles of beer before the subject incident.[64] This notwithstanding, the Court held there was no mistaken identification by applying the totality of circumstances test. In justifying its decision, the Court stated that there is no hard and fast rule as to where witnesses should identify suspects.[65] At the same time, not only was there absence of ill motive on the part of the witness but during in-court testimony, he remained consistent during cross-examination — he did not waver in identifying the accused and was confident in saying that he was very sure of his identification and it could not be someone else.[66]

III. FACTORS AFFECTING EYEWITNESS ACCURACY

59. Lumanog v. People, 630 SCRA 42, 142 (2010) (J. Carpio, dissenting opinion).

60. People v. Teehankee, Jr., 249 SCRA 54 (1995).

61. *Id.* at 59.

62. *Id.* at 94.

63. *Id.* at 95-96.

64. *Id.* at 94.

65. *Id.* at 96.

66. *Teehankee, Jr.*, 249 SCRA at 96-97.

Given the existing jurisprudential doctrines vis-à-vis eyewitness testimony and/or positive identification, how does the same measure up with existing psychological research? Mistaken eyewitness identification has been the subject of a long list of extensive research — psychologists have studied many aspects affecting perception, retention, and information retrieval that may affect reliability of identification, including, among others, "varying capabilities of different types of witnesses, factors influencing memory, and the effect of post-identification events on eyewitness confidence and accuracy."[67] This shall be discussed below.

A. How Mistaken Eyewitness Identifications Occur

Mistakes in eyewitness identification can either occur during the crime itself, during investigation, or during trial.[68] During the crime itself, it may be too dark, events may have moved swiftly, or the encounter may be too brief for the victim or eyewitness to perceive the circumstances accurately.[69] During investigation of a crime, a witness may be confronted with a series of photographs or a physical line-up of suspects to decide whether the perpetrator is present; in such a case, the witness involved may want to help police officers solve the crime to the point that he or she may have implicit pressure to identify someone, even if there is no explicit encouragement coming from the police.[70] With regard the trial itself, an eyewitness may be observed to be confident and straightforward in identifying the accused as the perpetrator; the same shall normally be taken as an accurate and confident identification.[71] All of the abovementioned undermine many issues surrounding the accuracy of eyewitness identification as shall be further discussed below.

1. Information Processing

True enough, the Court acknowledges that identification testimony has at least three components.[72]

67. Norris, et al., *supra* note 7, at 1305.

68. GREENE & HEILBRUN, *supra* note 1, at 116.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Teehankee, Jr.*, 249 SCRA at 95.

First, witnessing a crime, whether as a victim or a bystander, involves perception of an event actually occurring. *Second*, the witness must memorize details of the event. *Third*, the witness must be able to recall and communicate accurately. *Dangers of unreliability in eyewitness testimony arise at each of these three stages, for whenever people attempt to acquire, retain, and retrieve information accurately, they are limited to normal human fallibilities and suggestive influences.*[73]

2. Perception

Perceptual abilities of humans are subject to errors albeit it may seem impressive.[74] More often than not, one tends to overestimate the height of a criminal or even the duration of a brief encounter.[75] Alternatively, one can underestimate the duration of a prolonged incident.[76]

In terms of eyewitness identification, weapon involvement during a crime is important.[77] Eyewitness memory can be negatively influenced by the presence of a weapon during the crime.[78] Called the "weapon focus effect," studies show that if a weapon is present when a crime is committed, one may devote more attention to it than to other aspects of the crime such as the features of the perpetrator who has the weapon.[79] It could also relatively impair the processing of auditory information, such as what the perpetrator might have said while holding said weapon in front of the victim or witness.[80] Generally speaking, when a person's attention is divided between two or more stimuli, one is more suggestible as a person cannot process more than one thing at once.[81] Consequently, such severely affects eyewitness accuracy wherein there is increased possibility of false

73. People v. Rodrigo, 564 SCRA 584, 600 (2008) (citing *Teehankee, Jr.*, 249 SCRA at 94-95). *See also* GREENE & HEILBRUN, *supra* note 1, at 115-16.

74. GREENE & HEILBRUN, *supra* note 1, at 116.

75. *Id.*

76. *Id.*

77. Carl Carlson, et al., *An Investigation of the Weapon Focus Effect and the Confidence-Accuracy Relationship for Eyewitness Identification*, 6 J. APPL. RES. IN MEMORY & COGNITION 82, 82 (2017).

78. *Id.*

79. *Id.* at 83 & GREENE & HEILBRUN, *supra* note 1, at 116.

80. GREENE & HEILBRUN, *supra* note 1, at 116-17.

81. *Id.* at 117.

identifications during identification procedures such as line-ups.[82] Nonetheless, a more recent study has shown that while the presence of a weapon increases the chance of false identification, in a line-up, for example, witnesses are more confident and calibrated in their identification.[83] Explainable by many factors, this means that one can tentatively argue that police officers

> could potentially trust an eyewitness who chooses from a line-up and then immediately supports this decision with high confidence. Unlike confidence expressed well after a line-up decision, which can be influenced by a variety of factors, including feedback from a case detective, confidence assessed immediately after a line-up correlates moderately strong with accuracy.[84]

3. Memory

Memory is built into three processes: encoding, storage, and retrieval.[85]

Encoding refers to the acquisition of information wherein many aspects of a stimulus can affect how it is encoded — stimuli that were only briefly seen or heard cannot be encoded fully; furthermore, when the complexity of an event increases, most of its aspects may possibly be misremembered.[86] It is also not quite true to state that a stressful situation may enhance encoding of events — mild stress or arousal might increase alertness and interest but extreme stress, as may be present in a crime, usually causes a person to encode information inaccurately or incompletely.[87]

The next step after encoding is storage. According to studies, memory fades as the retention interval — or the period of time between viewing the event and being questioned about it — increases.[88] The longer the time between witnessing a crime and identification, the more identification errors occur.[89] A study would suggest that the proportion of correct identifications

82. Carlson, et al., *supra* note 77, at 88-89.

83. *Id.* at 89.

84. *Id.*

85. GREENE & HEILBRUN, *supra* note 1, at 117.

86. *Id.*

87. *Id.*

88. *Id.*

89. MEMON, ET AL., *supra* note 1, at 117.

fell from 65% after one week, to 55% after a month, 50% after three months, and 10% after 11 months.[90] Moreover, a second phenomenon connected to information storage is post-event information, which is exposure to activities and other information after a person observes an event.[91] A long-line of studies confirm that exposure to post-event information by witnesses can affect how they remember an event.[92] More often than not, the confidence that a witness has in his or her identification can be affected by post-event identification occurrences, most of which may be under the direct control of the criminal justice system.[93] To illustrate, statements or feedback from line-up administrators or law enforcement officers post-identification can directly influence witnesses' confidence in their identification.[94]

The third and final step in establishing memory is retrieval of information. While most would dismiss this as a simple process, it is not. Several factors play a role in retrieval of information, as studies would show. For example, the wording of a question to the witness can affect information retrieval — asking someone "what was the man with the mustache doing with the little boy?" even when in actuality the man did not have a mustache can affect how the person asked remembers the appearance of the man later on, although it might not affect how he or she recalls what the man actually did.[95]

Also, in recalling what one did, a person produces memories, which are accurate but not necessarily relevant to the task at hand.[96] Called "unconscious transference," one may pick a person from a line-up or show-up who is not the actual criminal but instead, someone the former knew from somewhere else.[97] In addition, some psychologists often refer to the

90. Tim Valentine, et al., *Characteristics of eyewitness identification that predict the outcome of real lineups*, 17 APPL. COGNIT. PSYCHOL. 969, 988 (2003).

91. GREENE & HEILBRUN, *supra* note 1, at 118.

92. *Id.*

93. Norris, et al., *supra* note 7, at 1308.

94. *Id.*

95. GREENE & HEILBRUN, *supra* note 1, at 119.

96. *Id.*

97. *Id.*

"seven sins of memory" that affect recall, namely: transience, absent-mindedness, blocking, misattribution, suggestibility, bias, and persistence.[98]

The first three sins reflect different types of forgetting. Transience involves decreasing accessibility of information over time, absent-mindedness entails inattentive or shallow processing that contributes to weak memories of ongoing events or forgetting to do things in the future, and blocking refers to the temporary inaccessibility of information that is stored in memory. The next three sins all involve distortion or inaccuracy. Misattribution involves attributing a recollection or idea to the wrong source, suggestibility refers to memories that are implanted as a result of leading questions or comments during attempts to recall past experiences, and bias involves retrospective distortions and unconscious influences that are related to current knowledge and beliefs. The seventh and final sin, persistence, refers to pathological remembrances [—] information or events that we cannot forget, even though we wish we could.[99]

The aforementioned "sins" are not necessarily flaws that some studies might suggest, but rather, they could be tools in understanding the mechanism of memory, and subsequently, eyewitness testimony and/or positive identification.[100]

B. Variables that Affect Eyewitness Accuracy

Building on studies about information processing, research has then been made on variables that affect eyewitness accuracy — on the reasons why mistaken or false identifications occur. In relation thereto, research has found general categories of variables that affect eyewitness accuracy, namely, estimator variables and system variables.[101] Additionally, some would add another variable, postdiction variable, which "does not directly affect reliability of identification, but is a measurement of some process that correlates with reliability."[102]

98. David L. Schacter, *The Seven Sins of Memory: Insights from Psychology and Cognitive Neuroscience*, 54 AM. PSYCHOL. 182, 182 (1999). *See generally* DAVID SCHACTER, THE SEVEN SINS OF MEMORY: HOW THE MIND FORGETS AND REMEMBERS (2002).

99. *Id.*

100. *See* Schacter, *supra* note 98, at 196-98.

101. GREENE & HEILBRUN, *supra* note 1, at 120.

102. *Id.*

1. Impact of Estimator Variables

Estimator variables are those outside the control of the criminal justice system.[103] They are "estimators" because although they are capable of being manipulated in research, they cannot be controlled in an actual criminal situation and their effect can, at most, be estimated post-hoc.[104]

Estimator variables can be further sub-categorized into stable witness factors, malleable witness factors, style of presentation, stable target factors, malleable target factors, and environmental conditions.[105]

Witness attributes such as intelligence and gender are not particularly good predictors of identification accuracy.[106] Studies have found no clear evidence as to the superior gender in being able to identify people correctly from line-ups although women are found slightly more likely to make accurate identifications than men because the former likely would choose someone from a line-up.[107] Conversely, a witness' race or ethnicity could play a role in identification accuracy. Caution should be carried out when the eyewitness involved is of a different race or ethnic group from the person identified as the perpetrator of the crime. In a phenomenon termed the "other-race effect," it has been observed that eyewitnesses are better at recognizing and identifying members of their own race or ethnic group, as compared to members of other races or ethnic groups.[108]

In terms of age as a variable, there is strong evidence showing that it has a strong significance in eyewitness accuracy — older eyewitnesses and young children make more errors than younger and middle-aged adults.[109] Under some conditions, children would remember less and make more mistakes in recall than older adults.[110] As regards eyewitness identification, analysis of

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103. *Id.*

104. MEMON, ET AL., *supra* note 1, at 109.

105. *Id.* at 110.

106. *Id.*

107. GREENE & HEILBRUN, *supra* note 1, at 121 & Valentine, et al., *supra* note 90, at 986.

108. GREENE & HEILBRUN, *supra* note 1, at 121 & Valentine, et al., *supra* note 90, at 988.

109. GREENE & HEILBRUN, *supra* note 1, at 121 & MEMON, ET AL., *supra* note 1, at 110.

110. MEMON, ET AL., *supra* note 1, at 110.

findings would show that children five years and older do not differ significantly with adults in being able to correctly identify.[111] That said, children have the tendency to pick someone from a line-up even if the actual culprit is not there — thus opening themselves up to higher possibilities of error.[112] The same holds true for older witnesses.[113] Moreover, with respect to senior citizens, ageing is typically associated with a reduction of cognitive resources and an increased reliance on "familiarity" as basis for reaching a decision, as opposed to a conscious remembering of a prior episode as basis for decision-making.[114]

Based on the foregoing, one can say that children can be competent witnesses. It must be considered, however, that they have the inability to "reject" a target-absent array due to either cognitive or social factors — cognitive factors, on one hand, include the possibility that when the target is absent, children need to access other sufficient details of that person in their memory to make a decision that none of the other similar faces in the line-up is the target; as a social factor, on the other hand, children may get the false impression that a line-up must include the target and thus feel pressured to make a choice.[115] Additionally, children are susceptible to suggestibility; meaning, being subjected to repeated and/or suggestive questioning that affects memories of the general event and social demand factors.[116] Thus, the use of suggestive questioning or leading questions is highly discouraged with respect to child witnesses. Rather they should be asked open-ended questions through either investigative interviews or as done nowadays, through a structure interview protocol.[117]

In the Philippine criminal justice system, child witnesses are presumed qualified and competent witnesses under the Rule on Examination of a Child Witness.[118] The Rule provides for the factors that need to be

111. *Id.*

112. GREENE & HEILBRUN, *supra* note 1, at 128.

113. *Id.*

114. MEMON, ET AL., *supra* note 1, at 110.

115. *Id.* at 92-93.

116. *Id.* at 93-99 & GREENE & HEILBRUN, *supra* note 1, at 128-29.

117. *See* Greene, *supra* note 1, 129-32. *See generally* Livia L. Gilstrap et al., *Child Witnesses: Common Ground and Controversies in the Scientific Community*, 32 WM. MITCHELL L. REV. 59 (2005).

118. RULE ON EXAMINATION OF A CHILD WITNESS, A.M. No. 004-07-SC (Nov. 21, 2000).

considered "to create and maintain an environment that will allow children to give reliable and complete evidence, minimize trauma to children, encourage children to testify in legal proceedings, and facilitate the ascertainment of truth."[119] It bears to note however that the Rule allows, among other things, leading questions during direct examination of a child witness. And while the same may be intended to further the best interest of the child involved, it might be counterintuitive as suggestive questioning or leading questions, in general, affect the accuracy of testimony, as studies would suggest.

Closely related to age as a variable is the vulnerability of the witness, which may be in the form of physical or communicative disabilities or learning disabilities.[120] Studies show that vulnerable witnesses often have difficulty when asked to provide free recall or to respond to open questions, but very often reply to categorical "yes" or "no" questions.[121] They are negatively affected by misleading questions and those with developmental handicaps often suffer from an acquiescence tendency — meaning, they go along with suggestive questions especially when they feel disempowered in the interview setting, or they view the interviewer as an authority figure.[122]

In relation to this, the Supreme Court has yet to issue rules or guidelines in the handling of vulnerable witnesses. What is provided for thus far is the disqualification as a witness of a person suffering from mental incapacity or immaturity as follows[123] —

> Section 21. Disqualification by reason of mental incapacity or immaturity. [—] The following persons cannot be witnesses:
>
> (a) Those whose mental condition, at the time of their production for examination, is such that they are incapable of intelligently making known their perception to others;

Children whose mental maturity is such as to render them incapable of perceiving the facts respecting which they are examined and of relating them truthfully.[124]

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119. *Id.* § 2.

120. MEMON, ET AL., *supra* note 1, at 99.

121. *Id.* at 100.

122. *Id.* at 100-01.

123. 1989 REVISED RULES ON EVIDENCE, rule 130, § 21 (a) & (b).

124. *Id.*

It can be said that the Court is not quick in disqualifying persons with physical incapacities or communicative disabilities as witnesses. As held by the Court in the case of *People v. Tuangco*[125] —

> A deaf-mute is not incompetent as a witness. All persons who can perceive, and perceiving, can make known their perception to others, may be witnesses. Deaf-mutes are competent witnesses where they (1) can understand and appreciate the sanctity of an oath; (2) can comprehend facts they are going to testify on; and (3) can communicate their ideas through a qualified interpreter. Thus, in [*People v. De Leon*] and [*People v. Sasota*], the accused was convicted on the basis of the testimony of a deaf-mute. Although in [*People v. Bustos*] the testimony of a deaf-mute was rejected, this was because there were times during his testimony that the interpreter could not make out what the witness meant by the signs she used. In the instant case, the interpreter was a certified sign language interpreter with [22] years teaching experience at the Philippine School for the Deaf, had exposure in television programs and had testified in five other previous court proceedings. She possessed special education and training for interpreting sign language. The trial court evaluated her competence to put on record with accuracy the declaration made by [the] witness[,] Sanggalan[,] on the witness stand, and she testified that she employed the natural or homemade sign method. Needless to stress, the manner in which the examination of a deaf-mute should be conducted is a matter to be regulated and controlled by the trial court in its discretion, and the method adopted will not be reviewed by the appellate court in the absence of a showing that the complaining party was in some way injured by reason of the particular method adopted. The imperfections or inconsistencies cited in appellants' brief arise from the fact that there is some difficulty in eliciting testimony where the witness is deaf-mute, but these do not detract from the credibility of his testimony, much less justify the total rejection of the same. What is material is that he knew personally the accused-appellants, was with them on the fateful night when the incident happened, and had personally witnessed the rape-slay and theft three and one half [] meters away from the scene. He did not waver in the identification of the three accused despite rigorous cross-examination, and positively pointed to the accused-appellants as the persons who raped and killed Eugenio and took her personal effects. The trial court's assessment of the credibility of Sanggalan, whose testimony was found to be candid and straightforward, deserves the highest respect of this Court.

Moreover, the testimony of Sanggalan was corroborated by the doctor who conducted the autopsy. Dr. Aguda testified that Eugenio had nine []

125. People v. Tuangco, 345 SCRA 429 (2000).

stab wounds on the neck, fresh hymenal lacerations[,] and massive blood clots within the vaginal canal, caused, among others, by the entry of a hard foreign object like a bottle and that the abrasions and hematomas on the cadaver indicated that Eugenio struggled during the assault.[126]

In addition to the aforementioned stable witness factors, one should likewise consider malleable ones like alcohol and drug intoxication, which have a negative effect on encoding, storage, and recall.[127] People with high alcohol consumption are more susceptible to errors in identification than those with low alcohol consumption or none at all.[128] People who consumed alcohol or drugs, such as marijuana, are significantly impaired in recalling details, regardless of whether he or she recalled immediately or one week later.[129] In trying to explain the same, a study mentioned that intoxicated people tend to focus on salient cues or features in their environment during encoding.[130]

At this juncture, it becomes important to raise the factor of inconsistency and confidence in eyewitness accounts. More often than not, lawyers and judges correlate inconsistencies with accuracies.[131] Research, however, would show that inconsistencies in testimonies are not always related to accuracy.[132] Thus, there is basis in psychological research vis-à-vis Supreme Court's oft-quoted pronouncement that inconsistencies on minor details are deemed trivial, as long as there is no inconsistency in the vivid and complete narration of the primary occurrence and positive identification of the accused.[133]

It is another story, however, in terms of confidence. Under Philippine jurisprudence, as long as the witness concerned was straightforward, consistent, or otherwise confident in his or her identification, the same shall

126. *Id.* at 439-41 (citing People v. De Leon, 50 Phil. 539 (1927); People v. Sasota, 52 Phil. 281; & People v. Bustos, 51 Phil. 385 (1928)).

127. MEMON, ET AL., *supra* note 1, at 111 & HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR PEOPLE 11 (Rod C.L. Lindsay, et al. eds., 2014).

128. *Id.*

129. *Id.*

130. MEMON, ET AL., *supra* note 1, at 111.

131. *Id.*

132. *Id.*

133. *Mamaruncas*, 664 SCRA at 194-95 (citing *Bernabe*, 604 SCRA at 231) & *Macapanas*, 620 SCRA at 73 (citing *Murillo*, 352 SCRA at 118).

be generally considered compelling evidence against the denial or alibi of the accused, which is self-serving.[134] A direct relationship has long been attributed to identification accuracy and confidence. In fact, ample evidence supports the finding that "highly confident identifications, when compared to those made with low confidence, are likely to have a greater impact on police investigations and jury decision making."[135] To a certain extent, there is truth to this assumption because studies show that high-confidence statements during initial identification of suspects in unbiased identification procedures have a high correlation to accuracy while low-confidence statements, even if it turned to high-confidence ones during trial, are telling signs of inaccurate identification.[136] These findings notwithstanding, studies have shown that the confidence-accuracy relationship should not be taken for granted as the same is malleable and subject to many circumstances.[137] Thus, one should not jump into hasty conclusions just because a witness has been confident all along in his or her identification of the supposed perpetrator.

Estimator variables also play a role vis-à-vis the target or perpetrator, having static and malleable factors as well. In relation to this, studies show that facial distinctiveness has an effect — those rated as highly attractive or highly unattractive are better recognized than those who have typical faces.[138] Eyewitness accuracy is also shown to be greatly affected by disguises and changes in facial appearances between the crime and recognition test.[139]

Environmental conditions likewise play a role as an estimator variable. One was already mentioned above, which is exposure to a weapon. Additionally, one can mention the exposure duration, and how serious the perceived event is. Studies have confirmed that the longer the duration of exposure was, the more accurate identifications resulted.[140]

The issue of exposure duration was raised by the accused in *Teehankee, Jr.* The accused questioned the accuracy of identification considering that the

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134. *See Mamaruncas*, 664 SCRA at 194-95.

135. John Wixted, et al., *The Effect of Retention Interval on the Eyewitness Identification Confidence-Accuracy Relationship*, 5 J. APPL. RES. MEM. COGN. 192-203 (2016).

136. *Id.* at 201.

137. MEMON, ET AL., *supra* note 1, at 112.

138. *Id.*

139. *Id.* at 113.

140. *Id.*

alleged incident occurred only within five minutes and that the victim was likewise intoxicated, after consuming five bottles of beer.[141] However, the Supreme Court found such claims bereft of any merit, stating that the assailant was merely three to four meters away from Jussi Leino and the place was well lit by a light post.[142] Furthermore, the Court said —

> We are not likewise impressed with the contention that it was incredible for Leino to have remembered appellant's face when the incident happened within a span of five [ ] minutes. Five [ ] minutes is not a short time for Leino to etch in his mind the picture of appellant. Experience shows that *precisely because of the unusual acts of bestiality committed before their eyes, eyewitnesses, especially the victims to a crime, can remember with a high degree of reliability the identity of criminals. We have ruled that the natural reaction of victims of criminal violence is to strive to see the appearance of their assailants and observe the manner the crime was committed. Most often, the face and body movements of the assailant create an impression which cannot be easily erased from their memory.* In the case at bar, there is absolutely no improper motive for Leino to impute a serious crime to appellant. The victims and appellant were unknown to each other before their chance encounter. If Leino identified appellant, it must be because appellant was the *real* culprit.[143]

Admittedly, there is no study yet on the optimal time of exposure duration one must have to improve identification accuracy. Hence, five minutes could have been enough. However, the Court seemed not to have considered the issue of alcohol intoxication, which studies would show actually impairs all processes of building memory.[144] Additionally, when victim Leino was confronted by the assailant in this case, there was not only the presence of the weapon aimed at him but the event that his companions have already been shot and killed in front of him.[145]

2. Controlling System Variables

System variables are those factors in an identification in which the justice system has some control, and normally come into play after the crime or

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141. *Teehankee, Jr.*, 249 SCRA at 94.

142. *Id.* at 96-97.

143. *Teehankee, Jr.*, 249 SCRA at 97-98 (citing People v. Campa, 230 SCRA 431 (1994) & People v. Apawan, 235 SCRA 355 (1994)).

144. MEMON, ET AL., *supra* note 1, at 111.

145. *Teehankee, Jr.*, 249 SCRA at 96.

during investigation.[146] This is associated with how witnesses are questioned and how a line-up is constructed and shown to the eyewitness.[147] Two system variables were previously mentioned — post-event identification and the manner of formulating questions. In addition to this, there are likewise the following: (1) interviewing strategies; (2) instructions to eyewitnesses; (3) selection of filler photos; (4) line-up presentation methods; and (5) influence of feedback during a line-up.[148]

A standard police interview is composed of a "predetermined set of questions with little opportunity to follow-up, an expectation that the witness is willing to answer all questions, repeated interruptions, and time constraints."[149] Psychologists, however, suggest the use instead of a cognitive interview, which is based on a set of cues designed to facilitate memory retrieval as compared to a standard police interview questionnaire, wherein the interviewer shall engage the witness and establish rapport to elicit a narrative account of the event, and finally probe for details with specific questions.[150]

In the Philippines, the 2011 Philippine National Police (PNP) Field Manual on the Investigation of Crimes of Violence and Other Crimes[151] provided general guidelines on how police officers shall proceed in the interview of both witnesses and suspects after the crime has been committed.[152] Though neither making use of a specific questionnaire nor cognitive interview was provided, police officers are vaguely reminded to be open and neutral in their manner of questioning and avoid showing any bias towards or against the witness and/or suspect.[153]

146. GREENE & HEILBRUN, *supra* note 1, at 121.

147. *Id.*

148. *Id.* at 122.

149. *Id.*

150. *Id.*

151. Philippine National Police, Field Manual on the Investigation of Crimes of Violence and Other Crimes, *available at* http://didm.pnp.gov.ph/DIDM%20Manuals/Field%20Manual%20on%20Investigation%20of%20Crimes%20of%20Violence%20and%20other%20Crimes.pdf (last accessed May 12, 2017).

152. *Id.* at 35-38.

153. *Id.*

As regards the actual identification procedure led by police officers during an investigation, there are three ways by which this is conducted according to *Teehankee, Jr.*, namely: show-ups, mug shots or photo line-ups, and physical line-ups.[154] Ample evidence would show that in the conduct of these identification procedures, especially line-ups, it would be best if the instructor instructs the witness that it is possible that the culprit is not among those constituting the line-up.[155] Otherwise, a biased information condition may arise and the witness may assume that he or she has to actually pick someone, especially child witnesses or witnesses who are advanced in age.[156] Moreover, a suspect in a line-up deserves a fair test in which he or she would not stand out inappropriately from other innocent people — "foils" — in a line-up.[157] Thus, police officers should be cautious of its selection of fillers in the line-up to avoid the so-called "foil bias" — members of the line-up should more or less look fairly similar and be based on the initial description of the witness because suspects may stand out in the line-up in different ways.[158] Similarly, all members of the line-up should wear similar clothes to avoid any one of them from standing out and being chosen by the witness.[159] Furthermore, the line-up size should not be too little.[160] The more people in the line-up, the less likely is that the suspect is chosen by mere chance.[161] Research shows that an actual line-up should be composed of five to six people while a photo line-up should consist of six or eight photos.[162] Weirdly enough, the aforementioned guidelines in ensuring fairness and avoiding suggestibility does not exist at all in show-ups wherein only one suspect is presented to the witness. Biased information condition

154. *Teehankee, Jr.*, 249 SCRA at 95.

155. GREENE & HEILBRUN, *supra* note 1, at 123.

156. *Id.* & MEMON, ET AL., *supra* note 1, at 120-21.

157. MEMON, ET AL., *supra* note 1, at 121.

158. *Id.*; GREENE & HEILBRUN, *supra* note 1, at 123; & Steven D. Penrod, *Eyewitness Testimony: How Well are Witnesses and Police Performing*, 18 CRIM. JUST. 36, 45 (2004).

159. MEMON, ET AL., *supra* note 1, at 123-24.

160. *Id.*

161. *Id.*

162. *See* Gary L. Wells, et al., *Eyewitness Evidence: Improving Its Probative Value*, 7 PSYCHOL. SCI. IN THE PUB. INTEREST 45, 62 (2006). *See also* Penrod, *supra* note 158, at 36.

and foil bias would then already exist in such kind of identification procedure.

In presenting the members of the line-up, witnesses traditionally see the suspect and other members of the line-up simultaneously.[163] Psychological research would overwhelmingly show, however, that to ensure fairness, sequential presentation should be used — witnesses tend to resort to relative judgment during simultaneous line-up presentations, wherein they tend to identify someone who in their opinion looks closely similar to the perpetrator relative to other members in the line-up.[164] In contrast, a witness shall use his or her absolute judgment during sequential presentations, wherein he or she shall compare each member of the line-up not with each other, but rather on his or her own memory of how the perpetrator looked like.[165]

Another variable that is significant in the conduct of identification procedures is the influence of feedback.[166] More often than not, the administrator of the line-up or the police officer involved knows who the suspect is amongst members of the line-up being presented to the witness. This, in turn, may cause the unintentional passing of information to the witness through non-verbal behavior, and consequently affect the accuracy of identification.[167] With respect to this, research suggests the use of double blind testing procedures, wherein the administrator himself does not have any knowledge of who the suspect is.[168] This shall eliminate the possibility of unwittingly or wittingly communicating something to the witness about which member of the line-up is the suspect, and can correspondingly reduce the rate of guessing by witnesses with poor memories.[169]

Considering the foregoing, the applicable manuals of the PNP mention the use of line-ups as an investigative measure. Unfortunately, however, no exact method or standard operating procedure of how such line-up should be conducted was prescribed. In fact, show-ups remain as an admittedly

163. GREENE & HEILBRUN, *supra* note 1, at 123-24 & Penrod, *supra* note 158, at 46.

164. GREENE & HEILBRUN, *supra* note 1, at 124 & MEMON, ET AL., *supra* note 1, at 123.

165. *Id.*

166. GREENE & HEILBRUN, *supra* note 1, at 125.

167. MEMON, ET AL., *supra* note 1, at 124.

168. *Id.* & Penrod, *supra* note 158, at 45.

169. Penrod, *supra* note 158, at 45.

recognized identification procedure even if it is wanting of all the standards that ensure fairness and lack of suggestibility. That said, the Supreme Court has taken note of the importance of identification procedure and the due process implications should there be suggestiveness in the same. Jurisprudence does not limit itself to formal line-up procedures as a way to elicit out-of-court identification.[170] In the case of *People v. Macapanas*,[171] the accused questioned his conviction for rape since he was only identified by the victim when he was brought by the police officers to the hospital where the victim was then confined for her injuries.[172] In sustaining his conviction,[173] the Court said that

> [w]hile appellant was not placed in a police line-up for identification by AAA, the absence of such police line-up does not make AAA's identification of appellant as the one [ ] who raped her, unreliable. There is no law or police regulation requiring a police line-up for proper identification in every case. Even if there was no police line-up, there could still be proper and reliable identification as long as such identification was not suggested or instigated to the witness by the police. What is crucial is for the witness to positively declare during trial that the person charged was the malefactor.[174]

In *People v. Pineda*,[175] the Court first had the opportunity to explain how photographic identification procedures should be conducted properly.[176]

> Although showing mug shots of suspects is one of the established methods of identifying criminals, the procedure used in this case is unacceptable. *The first rule in proper photographic identification procedure is that a series of photographs must be shown, and not merely that of the suspect. The second rule directs that when a witness is shown a group of pictures, their arrangement and display should in no way suggest which one of the pictures pertains to the suspect.* Thus [—]
>
> [W]here a photograph has been identified as that of the guilty party, any subsequent corporeal identification of that person may be based not upon

170. *Macapanas*, 620 SCRA at 70. (citing People v. Escote, Jr., 400 SCRA 603, 629 (2003)).

171. People v. Macapanas, 620 SCRA 54 (2010).

172. *Id.* at 59-60.

173. *Id.* at 77.

174. *Id.* at 70 (citing *Escote, Jr.*, 400 SCRA at 629 & People v. Martin, 567 SCRA 42, 49 (2008)).

175. People v. Pineda, 429 SCRA 478 (2004).

176. *Id.* at 497-98.

> the witness' recollection of the features of the guilty party, but upon his [or her] recollection of the photograph. *Thus, although a witness who is asked to attempt a corporeal identification of a person whose photograph he [or she] previously identified may say, 'That's the man that did it,' what he [or she] may actually mean is, 'That's the man whose photograph I identified.'*
>
> ...

A recognition of this psychological phenomenon leads logically to the conclusion that where a witness has made a photographic identification of a person, his [or her] subsequent corporeal identification of that same person is somewhat impaired in value, and its accuracy must be evaluated in light of the fact that he [or she] first saw a photograph.[177]

The Supreme Court in *Pineda* rejected the out-of-court identification of the sole witness to the crime on the basis that the photographic line-up only constituted the two photos of the accused.[178] Using the totality of circumstances test, the Court found that there was impermissible suggestibility in the photographic line-up conducted.[179]

> In the present case, there was impermissible suggestion because the photographs were only of appellant and [Celso] Sison, focusing attention on the two accused. The police obviously suggested the identity of the accused by showing only appellant and Sison's photographs to [Camillo] Ferrer and [Jimmy] Ramos.

The testimonies of Ferrer and Ramos show that their identification of appellant fails the totality of circumstances test. The out-of-court identification of appellant casts doubt on the testimonies of Ferrer and Ramos in court.[180]

It bears to note that in the case of *Pineda*, the Court was only able to scratch the surface with respect to the subject photographic line-up. While the Court was correct in holding the photographic line-up unreliable — as understandably, only pictures of the accused were shown the witness — the Court was not able to fully substantiate the standards that ought to be followed in such a procedure. As it has mentioned that the procedure

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177. *Id.* (citing People v. Villena, 390 SCRA 637 (2002) & PATRICK M. WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES 64-69, 74 & 81 (1965)). (emphases supplied).

178. *Pineda*, 429 SCRA at 497-98.

179. *Id.*

180. *Id.* at 498 (citing WALL, *supra* note 177, at 68-69).

followed by authorities was flawed, it failed to fully explain the proper procedure to be done. Moreover, one can question that while the Court held that the identification procedure done in *Pineda* was flawed, the Court nonetheless sustains show-ups as an identification procedure like it did in *Macapanas*. Following the same rationale in *Pineda,* there is arguably impermissible suggestibility when only one suspect is brought in front of a witness to be identified. It could even be worse in a show-up because not only pictures are brought, but the person suspected himself is brought to be identified by a witness in a crime.

Another case where the Court encountered the issue on improper identification procedure is *People v. Rodrigo*[181] — a robbery with homicide case where a single eyewitness positively identified the accused.[182] Prior to the in-court identification, however, the sole eyewitness — a widow of the deceased — was only shown a picture of the accused to which she was made to identify one of the malefactors.[183] In overturning the conviction of the accused,[184] the Court held —

> The greatest care should be taken in considering the identification of the accused especially[ ] when this identification is made by a sole witness and the judgment in the case totally depends on the reliability of the identification. This level of care and circumspection applies with greater vigor when, as in the present case, the issue goes beyond pure credibility [and] into constitutional dimensions arising from the due process rights of the accused.
>
> In the present case, the records show that [Lee] Rodrigo's arrest and eventual conviction were wholly based on the testimony of Rosita [Buna] who testified as an eyewitness and who identified Rodrigo as one of the perpetrators of the crime. To the prosecution, the trial court, and the appellate court, an eyewitness identification coming from the widow of the victim appeared to have been enough to qualify the identification as fully positive and credible. Thus, none of them appeared to have fully examined the real evidentiary worth of the identification Rosita made. The defense, for its part, grasped the possible flaw in the prosecution's case, but did not fully pursue its case and its arguments on the basis of the existing jurisprudence on the matter.

181. People v. Rodrigo, 564 SCRA 584 (2008).

182. *Id.* at 592.

183. *Id.*

184. *Id.* at 612.

> The aspect of this case that remains unexplored, despite the availability of supporting evidence, is Rosita's *out-of-court* identification of Rodrigo, done for the first time through a lone photograph shown to her at the police station, and subsequently, by personal confrontation at the same police station at an undisclosed time [—] presumably, soon after Rodrigo's arrest. Jurisprudence has acknowledged that *out-of-court* identification of an accused through photographs or mug shots is one of the established procedures in pinning down criminals. Other procedures for *out-of-court* identifications may be conducted through *show-ups* where the suspect alone is brought face to face with the witness [—] a procedure that appears to have been done in the present case as admitted by Rosita and noted in the decision [—] or through *line-ups* where a witness identifies the suspect from a group of persons lined up for the purpose.

The initial photographic identification in this case carries serious constitutional law implications in terms of *the possible violation of the due process rights of the accused* as it may deny him his *rights to a fair trial* to the extent that his *in-court* identification proceeded from and was influenced by impermissible suggestions in the earlier photographic identification. In the context of this case, the investigators might not have been fair to Rodrigo if they themselves, purposely or unwittingly, fixed in the mind of Rosita, or at least actively prepared her mind to, the thought that Rodrigo was one of the robbers. Effectively, this act is no different from coercing a witness in identifying an accused, varying only with respect to the means used. Either way, the police investigators are the real actors in the identification of the accused; evidence of identification is effectively created when none really exists.[185]

Given the foregoing, there was an obvious unreliability of the identification procedure followed by the police officers. Psychological research has been remindful of adding foils to line-ups because a suspect deserves fairness during an identification procedure. In the case of *Rodrigo*, the Court was correct in stating that the right to fairness was put down the drain because the police authorities ultimately led the witness to identify the accused as one of the perpetrators. While ultimately there could have been no ill motive on the part of a grieving widow to implicate someone for a crime he did not commit, the Court was correct in pinpointing the vital role police officers or investigators play in ensuring accuracy of identification procedures and the concomitant consequences the same play vis-à-vis the due process rights of an accused or suspect.

185. *Id.* at 597-99 (citing *Villena*, 390 SCRA at 650 & *Teehankee, Jr.*, 249 SCRA at 95).

The cases of *Pineda* and *Rodrigo* notwithstanding, the Court seemed to have taken a different turn in the case of *Lumanog v. People*,[186] which involved the murder of former Chief of the Metropolitan Command Intelligence and Security Group of the Philippine Constabulary, Rolando N. Abadilla.[187] Though the prosecution presented many witnesses, its chief witness was a security guard who was then stationed near the car of the deceased when the latter was ambushed and killed by the accused.[188] According to this eyewitness account, he saw two men walking back and forth in front of him and when the victim's car passed by in front of the building the witness was stationed in, four men surrounded the car and fired gunshots towards the victim.[189] Upon killing the victim, one of the men pointed a gun at the witness and ordered the witness to go out of his guard post and lie face down to the floor.[190]

In connection to this, the accused assailed, among other things, the out-of-court identification made by the chief prosecution witness.[191] During the first out-of-court identification, the witness was only shown a photograph of one of the accused before the former identified the latter.[192] Notably, the identified accused was the one who executed the extrajudicial confession without assistance of counsel when he was apprehended initially by the police.[193] The second identification procedure was also questionable — the originally identified accused was also part of the line-up while police officers who joined the line-up were actually in their police uniforms at the time, as to make the identification process suggestive and, hence, not valid.[194] In other words, there was allegedly impermissible suggestibility, biased information, foil bias, and clothing bias during the identification procedures.[195] The Court, however, was unconvinced, notwithstanding that

186. Lumanog v. People, 630 SCRA 42 (2010).

187. *Id.* at 54.

188. *Id.* at 56.

189. *Id.* at 74-75.

190. *Id.* at 199.

191. *Id.* at 124.

192. *Lumanog*, 630 SCRA at 74.

193. *Id.* at 107-08.

194. However, the Supreme Court ruled that this claim was unsubstantiated. *Id.* at 124.

195. *Id.*

at the same time, the extrajudicial confession made by one of the identified accused was considered invalid in the same subject decision.[196] In explaining its decision, the Court cited the different danger signals one must consider vis-à-vis mistaken identification:

(1) the witness originally stated that he [or she] could not identify anyone;

(2) the identifying witness knew the accused before the crime, but made no accusation against him [or her] when questioned by the police;

(3) a serious discrepancy exists between the identifying witness' original description of the accused;

(4) before identifying the accused at the trial, the witness erroneously identified some other person;

(5) other witnesses to the crime fail to identify the accused;

(6) before trial, the witness sees the accused but fails to identify him [or her];

(7) before the commission of the crime, the witness had limited opportunity to see the accused;

(8) the witness and the person identified are of different racial groups;

(9) during his original observation of the perpetrator of the crime, the witness are unaware that a crime was involved;

(10) a considerable time elapsed between the witness' view of the criminal and the identification of the accused;

(11) several persons committed the crime; and

(12)the witness fails to make a positive trial identification.[197]

Applying the same together with the totality of circumstances test, the Court sustained the conviction of the accused albeit its finding that the extrajudicial confession initially given by one of the positively identified accused is invalid and that forensic or physical evidence does not necessarily match the positive identification.[198]

> Examining the records, we find nothing irregular in the identification made by [Freddie] Alejo at the police station for which he executed the *Karagdagang Sinumpaang Salaysay* dated [21 June] 1996, during which he

196. *Id.* at 107-08, 113, & 124.

197. *Pineda*, 429 SCRA at 503-04 (citing WALL, *supra* note 177, at 90-130).

198. *Lumanog*, 630 SCRA at 124-27.

> positively identified Joel de Jesus and Lorenzo delos Santos as those lookouts who had pointed their guns at him demanding that he buck down at his guardhouse. In any case, the trial court did not rely solely on said out-of-court identification considering that Alejo also positively identified appellants during the trial. Thus, even assuming *arguendo* that Alejo's out-of-court identification was tainted with irregularity, his subsequent identification in court cured any flaw that may have attended it. We have held that the inadmissibility of a police line-up identification should not necessarily foreclose the admissibility of an independent in-court identification.
>
> ...
>
> Appellants claimed that if Alejo was referring to appellant Joel de Jesus who pointed a gun at him, his description did not jibe at all since Joel de Jesus was just 22 years old and not 30-35 years of age, and who stands 5'9" and not 5'5"-5'6". And if indeed it was appellant Lenido Lumanog whom Alejo saw as the gunman who had grabbed the victim by the neck after opening the cars left front door, his description again failed because far from being "*maitim*[,"] Lumanog was in fact fair-complexioned.
>
> We are not persuaded. Alejo positively identified Joel de Jesus in a line-up at the police station and again inside the courtroom as the first lookout who pointed a gun at him. Though his estimate of Joel's age was not precise, it was not that far from his true age, especially if we consider that being a tricycle driver who was exposed daily to sunlight, Joel's looks may give a first impression that he is older than his actual age. Moreover Alejo's description of Lumanog as dark-skinned was made two [ ] months prior to the dates of the trial when he was again asked to identify him in court. When [the] defense counsel posed the question of the discrepancy in Alejo's description of Lumanog who was then presented as having a fair complexion and was 40 years old, the private prosecutor manifested the possible effect of Lumanog's incarceration for such length of time as to make his appearance different at the time of trial.

Applying the totality[]of[]circumstances test, we[,] thus[,] reiterate that Alejo's out-[of-]court-identification is reliable, for reasons that, *first*, he was very near the place where [Colonel Rolando] Abadilla was shot and thus had a good view of the gunmen, not to mention that the two [ ] lookouts directly approached him and pointed their guns at them; *second*, no competing event took place to draw his attention from the event; *third*, Alejo immediately gave his descriptions of at least two [ ] of the perpetrators, while affirming he could possibly identify the others if he would see them again, and the entire happening that he witnessed; and *finally*, there was no evidence that the police had supplied or even suggested to Alejo that appellants were the suspects, except for Joel de Jesus whom he refused to just pinpoint on the basis of a photograph shown to him by the police officers,

insisting that he would like to see said suspect in person. More importantly, Alejo during the trial had positively identified appellant Joel de Jesus independently of the previous identification made at the police station. Such in-court identification was positive, straightforward[,] and categorical.[199]

Such pronouncement does not sit well with the doctrines previously laid down by the Court in the cases of *Pineda* and *Rodrigo*.[200] As such, there was strong dissent from some members of the Court.[201] Justice Antonio T. Carpio, in his dissenting opinion, argued that the factual milieu surrounding the identification procedure in *Lumanog* falls squarely with the factual milieu in *Rodrigo*.[202] Thus, the majority should have followed the same route as the Court did in *Rodrigo*.[203] By sustaining the out-of-court identification by reason of it being remedied by the in-court identification, there were serious implications against the right to due process and to be presumed innocent of the accused.[204] Justice Carpio was also of the opinion that, contrary to the majority opinion, the above-quoted danger signals that merit a finding of a mistaken identification were readily apparent:

(1) a serious discrepancy exists between the identifying witness original description and the actual description of the accused;

(2) the limited opportunity on the part of the witness to see the accused before the commission of the crime;

(3) a considerable time elapsed between the witness view of the criminal and his identification of the accused; and

(4) several persons committed the crime.[205]

Henceforth, the in-court identification should have not been held to have cured the out-of-court identification.[206]

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199. *Id.*

200. *Pineda*, 429 SCRA at 478 & *Rodrigo*, 564 SCRA at 584.

201. *Lumanog*, 630 SCRA at 138-39. Then Justice Maria Lourdes P.A. Sereno, Justice Roberto A. Abad, and Justice Antonio T. Carpio expressed their dissent to this Decision. *Id.*

202. *Id.* at 145 (J. Carpio, dissenting opinion).

203. *Id.*

204. *Id.* at 146.

205. *Id.* at 151.

206. *Lumanog*, 630 SCRA at 150.

In addition to the above, the majority's decision in *Lumanog* does not sit well with psychological research. At the onset, it is dangerous for the Court to hold that in-court identification can cure any irregularity or flaw that occurred during out-of-court identification. As mentioned earlier, any corruption or suggestibility that occurred during out-of-court identification procedures ultimately affects in-court identification.[207] Instead of thinking that out-of-court identification and in-court identification are mutually exclusive from each other, they are instead a continuum and one affects the other.[208] Psychological research is replete with evidence on the untoward effects of post-event information, the different biases that exist during identification procedures, and its effect on the confidence-accuracy relationship that is carried over to trial. The Court failed to realize in *Lumanog*, unlike in *Pineda* and *Rodrigo*, that unreliable and/or questionable identification procedures have due process repercussions.[209] By violating standards on how identification procedures should be conducted by the police, any subsequent in-court identification emanating from such violative out-of-court identification procedure should not have been given any merit at all nor should it have been held by the Court as cured and remedied.[210] At the end of the day, the suspect or accused had the right to a fair identification procedure, in which he or she shall not be identified merely by chance.[211] While indeed, jurisprudence would state that line-up procedures are not part of custodial investigation, and thus, the right to counsel does not attach, the same admits of an exception wherein the investigating officers have already zeroed in on the suspect even before custodial investigation has truly begun.[212] In such an instance, the right to counsel becomes operative.[213] As the Court held in *People v. Escordial*,[214]

> [a]n out-of-court identification of an accused can be made in various ways. In a show-up, the accused alone is brought face to face with the witness for identification, while in a police line-up, the suspect is identified by a witness from a group of persons gathered for that purpose. During

207. *Id.* at 147-48.

208. *Id.* at 147.

209. *Id.*

210. *Id.* at 150.

211. *Id.* at 146.

212. Gamboa v. Cruz, 162 SCRA 642, 648 (1988).

213. *Id.*

214. People v. Escordial, 373 SCRA 585 (2002).

custodial investigation, these types of identification have been recognized as 'critical confrontations of the accused by the prosecution,' which necessitate the presence of counsel for the accused. This is because the results of these pre-trial proceedings 'might well settle the accused's fate and reduce the trial itself to a mere formality.' We have[,] thus[,] ruled that any identification of an uncounseled accused made in a police line-up, or in a show-up for that matter, after the start of the custodial investigation is inadmissible as evidence against him [or her].[215]

In addition, the discrepancies in the witness' initial descriptions of the accused should have been taken into account in this case. As mentioned by Justice Carpio, this, by itself, should have been taken as a danger signal of mistaken identification. The discrepancies in description by the eyewitness evince faulty perception and encoding. As mentioned earlier, estimator variables come at play vis-à-vis eyewitness accuracy. The Court should have then considered that the ambush was an intense and violent event, that even being proximate to the location of the crime, the witness was possibly overwhelmed and unable to have paid good enough attention to the accused. There was also the plausible weapon-focus effect when one of the accused pointed a gun to the eyewitness and ordered him to go down to the floor. Significantly, the same could equally be said to the other witnesses presented by the prosecution. While some information could have been accurate in accordance to what they observed, the same may still be incomplete in some aspects, such as how the perpetrators looked like. The event was understandably surprising, violent, and traumatic; as such, the processing information regarding the same might have proven difficult.

Significantly, the pronouncement that in-court identification could cure an out-of-court identification was nothing new in *Lumanog* as the same was likewise used in *Macapanas* when the accused questioned the out-of-court identification made by the victim.[216] Using the totality of circumstances test and the subsequent identification by the victim of the accused in court, however, the Court sustained the identification as valid.[217] More recently, the Court used the same line reasoning found in *Lumanog* in the 2013 case of *People v. Sabangan*,[218] when the accused questioned the heavily suggestible

215. *Id.* at 607 (citing *Teehankee, Jr.*, 249 SCRA at 70; United States v. Wade, 388 U.S. 218, 224 (1967); & People v. Macam, 238 SCRA 306, 314-15 (1994)).

216. *Macapanas*, 620 SCRA at 71.

217. *Id.*

218. People v. Sabangan, 712 SCRA 522 (2013).

out-of-court identification made by prosecution witnesses.[219] The accused averred that police officers made him sit outside a police outpost while the latter fetched the witnesses from their respective homes and boarded said witnesses into a heavily tinted vehicle that then passed in front of the accused so that the witnesses could be asked whether the accused is the perpetrator of the crime.[220] The Court, however, found nothing wrong in the scenario and, using the totality of circumstances test established in *Teehankee, Jr.*, sustained the out-of-court identification of the accused.[221] According to the Court, prior to this questioned out-of-court identification of the accused, the subject witnesses previously identified the accused already through a photographic line-up.[222] Thus, the second out-of-court identification could be deemed as a confirmation of an earlier out-of-court identification.[223] Additionally, the Court noted the consistency and candor of each witness' testimony during the trial and in relation thereto, the Court reiterated that an "out-of-court identification does not necessarily foreclose the admissibility of an independent in-court identification and that, even assuming that an out-of-court identification was tainted with irregularity, the subsequent identification in court cured any flaw that may have attended it."[224]

The same observations in *Lumanog* can be equally applied in the *Sabangan* case. Although the second out-of-court identification procedure was arguably only to confirm a previous identification by the witnesses involved, the same is seemingly tainted already by factors such as information bias, information feedback from investigators, and obvious foil bias because there was not even the use of a single foil in the second identification procedure — it was only accused who was zeroed in by investigating officers. This was further coupled with post-event information, not only between the authorities and the witnesses, but also between the witnesses themselves who could have confirmed with one another the identity of the accused as well as the events that transpired surrounding the crime. These factors taken together, and as supported by ample evidence from psychological research, would obviously bolster suggestibility and affect

219. *Id.* at 540-41.

220. *Id.* at 541.

221. *Id.* at 546-47 (citing *Teehankee, Jr.*, 249 SCRA at 95).

222. *Sabangan*, 712 SCRA at 547.

223. *Id.* at 547-48.

224. *Id.* at 548 (citing *Lumanog*, 630 SCRA at 125).

confidence and accuracy during in-court proceedings. Thus, the Court should have then considered with more merit the arguments of the accused. Contrary to what the Court has pronounced, any subsequent identification in court cannot cure any taint of irregularity during out-of-court identifications. Any irregularity or impermissible suggestibility employed during out-of-court identifications should then be carried over to the weight or reliability of any subsequent out-of-court identification. Weirdly enough, the Court noticeably contradicts itself with its pronouncement in the same case because, by quoting *Teehankee, Jr.*, it acknowledges that any corruption or contamination of any out-of-court identification shall ultimately affect in-court identification; hence, the need to formulate the totality of circumstances test. And yet, one finds the Court likewise saying that in-court identifications exist independently of out-of-court ones, and should there have been any taint of irregularity in the latter, the same can be ultimately cured with in-court identification.[225] The same then seems so irreconcilable and ultimately not in adherence to psychological research vis-à-vis identification accuracy.

IV. IMPLICATIONS ON POLICY

In measuring present policies within the Philippine criminal justice system with existing psychological research on eyewitness testimony and positive identification, one can observe that although the Supreme Court leaves to the discretion of trial courts the assessment of the reliability and credibility of eyewitness testimony, it has been remindful of what ought to be taken into account in assessing the same. Given the different jurisprudential pronouncements, one can say that although the Court does not explicitly voice out specificities on issues on memory, estimator variables, or system variables, it acknowledges the issues that surround eyewitness testimony and identification accuracy. On that end, it would seem that the Court had scratched the surface in terms of applying a legal psychology lens on the matter. However, these existing standards and parameters are not enough because by fully entrusting the assessment of eyewitness testimony and identification accuracy to the trial courts, the same shall be done on an ad hoc basis, and there is no assurance that these assessments shall be compatible with legal, psychological research. That said, courts, or actors involved in criminal proceedings in general, would benefit better should it take into consideration the ample psychological research already made on eyewitness testimony and the corresponding suggestions on

225. *Lumanog*, 630 SCRA at 124-27.

how to avoid or prevent mistaken identification. It is highly suggested that the Supreme Court revisit existing rules and policies as well as provide more specific standards and parameters that shall govern the handling of eyewitnesses from day one until the end of the trial. Such standards or rules shall be supported by results and/or evidence gathered on studies on the matter. In this way, an assessment of eyewitness testimony shall be more attuned to human knowledge and experience, as has been repeatedly held by no less than the Supreme Court. In close relation to this, the Court should reconsider the long-placed dichotomy between out-of-court identification and in-court identification, wherein any taint of irregularity in the former could be cured in the latter. The same is not supported by research. Many factors come into play in between these two events that affect reliability, suggestibility, and accuracy, among other things. Besides, the in-court identification is necessarily a result of the out-of-court identification procedure the witness was subjected to. Moreover, one must not forget that there is absence of due process considerations, as Justice Carpio argued in his dissenting opinion in the case of *Lumanog*, should any taint of irregularity or impermissible suggestibility during out-of-court identification be found negligible as long as the same has been "cured" by the witness during in-court identification.[226] It does not sit well, too, with what has been previously acknowledged that corruption or contamination of an out-of-court identification procedure shall trickle down its effect to in-court identification.

Furthermore, one must not neglect the vital role law enforcement officers play in eyewitness testimony and identification accuracy. System variables, as mentioned earlier, are in control of the criminal justice system[227] and this starts with police officers who admittedly first respond to the crime and initiate investigation. With regard to this, a reading of existing police manuals, which should provide standard operating procedures to investigating officers on how to handle interviews and interrogations among other things, shows that these are bereft of clear standards as to how interviews should be conducted, or what are the best standards that one needs to keep in mind vis-à-vis line-up procedures. Given the lack of clear, defined, and delineated parameters, police officers are then left on their own on how to handle witnesses and identification procedures. Therefore, it is more likely than not that these are conducted on an ad hoc basis absent any safeguards that should protect the suspects or an accused from questionable

226. *Lumanog*, 630 SCRA at 166 (J. Carpio, dissenting opinion).

227. GREENE & HEILBRUN, *supra* note 1, at 121.

practices. The cases of *Macapanas*, *Pineda*, *Rodrigo*, *Lumanog*, and *Sabangan*, attest to the susceptibility of some police officers to resorting to questionable means in their investigation of crimes. Unfortunately, however, only the accused in *Pineda* and *Rodrigo* were able to escape the trenches of wrongful conviction by virtue of mistaken identification while the convictions in *Macapanas*, *Lumanog*, and *Sabangan* remain to be highly doubtful due to the questionable identification procedures involved.

V. CONCLUSION

This Article delved into the issue of eyewitness testimony and identification accuracy. Applying a legal psychology lens on the matter of how eyewitness testimony is appreciated in the Philippine criminal justice system, this Article tried to assess how compatible present jurisprudential pronouncements and practice are to what has been provided by research, so far, in terms of eyewitness perception, memory, and estimator as well as system variables that influence identification accuracy. It was found out that the Court is aware of the various issues surrounding eyewitness testimony and identification accuracy. Nonetheless, more has yet to be done as there are many more aspects that are incompatible with evidence provided by research. In relation to this, it is suggested that actors in criminal proceedings will greatly benefit from applying the results of research to the assessment of eyewitness testimony and identification accuracy. On one hand, the Supreme Court can move further from its broader pronouncements and be more specific in its rules or standards vis-à-vis assessment of eyewitness testimony. The same shall constitute as guidelines to the trial courts, which has been left the discretion to assess credibility and reliability of witnesses. On the other hand, the PNP and other law enforcement officers can benefit too from delineated and clearly defined parameters that shall govern investigations, for example, eyewitness testimonies and out-of-court identification procedures. Said parameters or rules shall be likewise based on what is provided in research that can avoid or lessen mistaken identification.

In closing, one can observe that the issue of eyewitness testimony and identification accuracy ultimately does not affect the witness and suspect alone. It affects also the courts and law enforcement officers who are actors, too, in criminal proceedings. While characteristics or attributes affecting a witness or suspect cannot truly be controlled or modified, courts and law enforcement officers contrariwise can manipulate the so-called system variables to make more efficient the processes of eliciting accurate and reliable eyewitness testimony and evaluating the same.