IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review v. SHAWN EDWIN HAUGEN, Defendant-Appellant, Petitioner on Review	Josephine County Circuit Court Case No. 10CR0636 CA A151535 SC S063754

BRIEF ON THE MERITS OF PETITIONER ON REVIEW AND EXCERPT OF RECORD

Review of the Decision of the Court of Appeals
on Appeal from a Judgment of the Circuit Court for Josephine County
Honorable Pat Wolke, Judge

Opinion Filed: September 30, 2015
Author of Opinion: Garrett, J.
Before: Ortega, Presiding Judge, and DeVore, Judge, and Garrett, Judge.

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STATEMENT OF THE CASE

In its order allowing review, this court limited review to the following question:

> "When the trial was conducted before this court's decision in *State v. Lawson/James*, 352 Or 724, 291 P3d 673 (2012), which set forth new standards for the admission of eyewitness testimony, was the Court of Appeals required to remand the case for a new hearing on the admissibility of the eyewitness testimony?"

Defendant concludes that the Court of Appeals was required to do so in this case and requests that this court reverse the decisions of the trial court and Court of Appeals.

Question Presented and Proposed Rule of Law

Question Presented. When the trial was conducted before this court's decision in *State v. Lawson/James*, 352 Or 724, 291 P3d 673 (2012), which set forth new standards for the admission of eyewitness testimony, was the Court of Appeals required to remand the case for a new hearing on the admissibility of the eyewitness testimony?

Proposed Rule of Law. When a trial court denies a defendant's motion to exclude eyewitness identification evidence prior to this court's decision in *Lawson/James*, the Court of Appeals is required to remand the case for a new hearing on the admissibility of the eyewitness identification evidence unless

there is little likelihood that the application of the new *Lawson/James* standards would affect the trial court's decision. When the record would have developed differently in ways that could have affected the trial court's decision whether to exclude the evidence, one cannot say that there is little likelihood that an application of those new standards would have affected the trial court's decision.

Summary of Argument

Defendant asks this court to apply the established principle that a reviewing court may affirm on an alternative basis only if the record would not have developed differently had that alternative basis been litigated before the trial court. Here, the trial court denied defendant's motion to suppress eyewitness identification evidence using the now-discredited *Classen* test. While this case was on appeal, this court announced in *Lawson/James* new procedures for determining the admissibility of such evidence based on the Oregon Evidence Code. This court also took notice of new scientific variables that are relevant to determining the admissibility of such evidence.

In announcing the new test, this court considered whether it was necessary to remand the two cases on review to the trial court for a new hearing. In *Lawson*, this court determined that the record presented substantial questions regarding the reliability of the identification evidence and remanded

the case to the trial court for a new hearing and trial where the parties could present evidence and arguments based on the new procedures and science. In *James*, this court affirmed the trial court's decision, finding that the evidence could not have been excluded under the new procedures.

On appeal, defendant argued that this case, like *Lawson*, presented sufficient questions about the reliability of the eyewitness identification evidence to merit remand for a new hearing and trial. The state argued that the record was sufficient for the Court of Appeals to apply *Lawson/James* in the first instance and asked the court to affirm. The Court of Appeals accepted the state's invitation, applied the *Lawson/James* procedures to the record developed under *Classen*, and affirmed.

But had the parties litigated this case under *Lawson/James*, the defendant would have presented evidence of several estimator and system variable concerns that could have affected the trial court's decision. Because the record would have developed differently under *Lawson/James* in ways that could have affected the trial court's decision, the Court of Appeals was required to remand this case to the trial court to litigate those issues in the first instance.

Summary of Historical and Procedural Facts

Historical Facts[1]

On the night of September 29, 2011, Bruce went to the Red Rock Lounge. (Tr 104). went to the back patio where there was a group of six or eight motorcycle gang members, including members of the Vagos and the Freebirds. (Tr 106, 110). They were wearing their gang "colors," which included denim vests with patches that read, "We Get What We Get" and "Vagos Southern Oregon." (Tr 110).

was talking with a friend when Vagos member Steve asked him, "Do you know Bob (Tr 112). responded, "Well, yes, I do. I understand he used to be a Vago." (Tr 112). then "flew off the handle" and started "ranting and raving," called a "snitch" a "low life," and said that did not deserve to live. (Tr 112). just nodded his head. (Tr 112).

had never met defendant before that evening. (Tr 115). overheard some of the other Vagos teasing defendant about being a car salesman. (Tr 115).

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[1] Because defendant was convicted, defendant provides an overview of the facts—other than the facts relating to identification of defendant, which will be discussed separately—in the light most favorable to the state. *State v. Lawson*, 239 Or App 363, 365, 244 P3d 860 (2010), *rev'd on other grounds*, 352 Or 724, 291 P3d 673 (2012).

left the bar around 12:30 a.m. (Tr 115). Defendant was standing in the hall near the exit when passed him. (Tr 116). Defendant told to "Have a good fucking night" as he walked by. (Tr 116).

When exited the bar, the first person he saw was (Tr 117). thought he heard something behind him, turned around, and saw someone that he could not identify holding the door shut. (Tr 117). asked "Are you here to kick us out?" (Tr 117). responded, "Well, no. I'm going home. I just want to walk to my car." (Tr 117-18). felt apprehensive. (Tr 118).

passed defendant as he exited the bar. (Tr 118). As he did so, defendant touched on the shoulder, and said, "Well, walk to your car." (Tr 118). responded, "Okay." (Tr 118). As began to walk to his car, defendant struck him on the side of the head. (Tr 118-19). fell to the ground. (Tr 120). "saw bells, and stars, and red, and black." (Tr 140). Defendant kicked him "in the chest or the shoulder or something." (Tr 140).

tried to get up, but hit him on the side of his head with a small hammer almost knocking out. (Tr 140). staggered to his truck and drove home. (Tr 144).

called the police later that night. (Tr 159). told the dispatcher that he believed he was punched and that "I was just blind-sided when I came out." (Tr 159-60). Officer John Nicklason that night and

interviewed (Tr 408). was unable to give Nicklason any information about his assailants other than they were Vagos. (Tr 408). According to Nicklason, "recognized them as a group that came into the bar, but couldn't recognize them specifically individually." (Tr 408). told Nicklason that he could not give him a description because it was a dark and brief encounter. (Tr 409). He also told Nicklason that he thought he was punched, but was not sure. (Tr 409-10).

Suppression Hearing Evidence

Pre-Identification Interview

On October 5, 2010, Detective Ryan Brown interviewed (P Tr 221). told Detective Brown that when he at the bar there were eight to ten members of the Vagos motorcycle gang there and that they were dressed in their gang colors. (P Tr 241).

sat down next to his friend when a "little fat guy" asked him, "Do you know Bob (P Tr 240). said, "Yes, I do." (P Tr 240). The man responded, "Oh, you would admit to that?" (P Tr 240). responded, "Yeah." (P Tr 240). The man responded that was "a puke," "a scumbag," "a rat," and "the lowest form of life on earth." (P Tr 240). responded, "Yeah, I don't know." (P Tr 240). Other than that conversation, did not interact with the Vagos members while inside the bar. (P Tr 242).

told Detective Brown that when he exited the bar "the little fat puke" who was "probably in his 40s" with "a long ponytail" was standing in front of him and asked, "Well, are you here to kick us out?" (P Tr 248). responded, "No." (P Tr 248).

told Detective Brown that there was also "a great big stout guy" there, approximately 225-230 pounds, in his late 20s or early 30s, not fat. (P Tr 249). Detective Brown interjected and asked if the guy was "pretty buff." (P Tr 249). said, "Oh, yeah." (P Tr 249). Detective Brown told "I think I know who you're talking about. Okay." (P Tr 249).[2]

said the man was a "big stout guy" and that "it seems like he's some kind of used car salesman or something." (P Tr 249). said that he overheard "some of the other guys" "giving him grief" about "wearing a shirt and tie and selling cars." (P Tr 249-50).

told Detective Brown that there were two other people present when he walked outside. (P Tr 250). He described one as having "a long ponytail" and the other as a "Hispanic looking guy, real buff type, probably 5'10", a hundred and ninety pounds or so" "kind of going back and forth." (P Tr 251).

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[2] Detective Brown testified at trial that he had Ryan in mind because he is "a very well put together individual." (Tr 932).

told Detective Brown that after "the little fat guy" asked him whether he was there to kick them out, "the great big buff kid" standing on right side told "Walk to your car." (P Tr 252). responded, "Okay, well, have a good night." (P Tr 252). told Detective Brown that, "he just blasted me in the side." (P Tr 252).

said that "the little fat guy" had a hammer, and that was one of the last things he saw "because they almost put me out." (P Tr 252). Detective Brown asked if the fat guy hit him with the hammer, and said, "Yeah, and the other chap--," then Detective Brown interjected and said, "And the other buff guy hits you on the right side of your face?" (P Tr 253). said, "Yeah, somebody kicked me. I think it was actually the big guy when I was going down. I'm pretty sure it was him who kicked me." (P Tr 253).

Detective Brown told "Okay. And what we'll do here in a minute, Bruce, I'll show you some photographs and maybe that will help us once we have some photos we can go through and we'll identify who the little fat guy is * * *." (P Tr 253).

The First Identification

Before beginning the identification procedure, Detective Brown gave the following instructions:

> "DETECTIVE BROWN: So I'm going to read you these directions. You're about to be shown some photographs. Just because the police officer is showing you these photos, you are in

> no way obligated to identify anybody, okay? The person who committed the crime may or may not be in this group of photographs. Study the photos carefully before you make any comments or make any decisions.
>
> "And if you select somebody we'll do a process, and in this case what I'll probably do is pull the picture out, I'll have you sign, initial it, and then we'll kind of go through the descriptors and stuff like that so that you and I are on the same page.
>
> "MR. Cool.
>
> "DETECTIVE BROWN: Okay, you have any questions about that -- about what I'm going to ask you to do here? Typically, we just have like six small photographs, but because there's so many people involved in this I'm just going to show you a group of photographs.
>
> "MR. Okay.
>
> "DETECTIVE BROWN: And you can take your time going through those. If you identify somebody, let me know."

(P Tr 255-56).

Detective Brown showed a series of 23 Department of Motor Vehicle photographs that had taken from a police booklet of photographs of known motorcycle gang members. (P Tr 307).

The first person identified was Chris said that he believed that had been arrested before and that he was a good man. Detective Brown confirmed that it was and agreed with assessment of (P Tr 256).

identified a second person, stating, “This chap was there. They were calling him Ronnie.” (P Tr 256). Detective Brown confirmed the person’s identity, stating, “That’s because his name is Ron (P Tr 256-57). said that he was present, but he could not say that he was involved in the assault. (P Tr 257). said if he was, he did not see it. (P Tr 257).

then identified a third person, defendant:

> “MR. This sure looks like the guy that hit me right here.
>
> “DETECTIVE BROWN: With his fist? With a fist or with a ball-peen hammer?
>
> “MR. No, he hit me -- he kicked me and hit me, I’m pretty sure it was him.”

(P Tr 257). Detective Brown told that the man’s nickname was “White Boy” and that they were going to set his photograph aside for the time being:

> “DETECTIVE BROWN: This was the one. Okay, who you are referring to -- we’ll just call him ‘White Boy’ for now. So if you want to -- we’ll set him aside.
>
> “MR. Okay.”

(P Tr 257).

identified a fourth person, stating that he looked like he was one of the people present, and that he did not know his gang affiliation. Detective

Brown told the person was "Mr. Zammetti," President of the Freebirds. (P Tr 258).

asked Detective Brown how old the pictures were. (P Tr 258). Detective Brown told that they were a couple of years old, that he could give better descriptions of what they currently looked like, pointed out two who were in prison, and described a new hairstyle worn by another, at which point identified that person as present during the incident:

> "DETECTIVE BROWN: This gentleman now has a flat top. Short on the sides and a flat top.
>
> "MR. Does he wear a lot of rings on his fingers?
>
> "DETECTIVE BROWN: Yeah.
>
> "MR. He was present also.
>
> "DETECTIVE BROWN: Okay, he put hands on you?
>
> "MR. Not that I saw.
>
> "DETECTIVE BROWN: Okay.
>
> "MR. Yeah, but he had rings literally on every finger.
>
> "DETECTIVE BROWN: Okay. This guy, he's a pretty tall lad. He's still bald as far as I know. That guy's in prison."

(P Tr 258-59).

then identified a sixth individual, stating, "That looks like Mr. Coelho." (P Tr 259). Detective Brown said that is was. (P Tr 259).

then said that Coelho is "a real asshole," and Detective Brown agreed. (P Tr 259). said that Coelho was present at the bar but that he did not see him outside. (P Tr 259). Detective Brown told that Coelho "looks pretty much like that now." (P Tr 260).

identified a seventh individual, stating that "it looks like it might be Tony" and that he had spoken with him a couple of weeks ago. (P Tr 260). Detective Brown told that his name was in fact Anthony and that he was a member of the Freebirds. (P Tr 260).

looked at two more photographs that he did not recognize before Detective Brown interjected and described one of the individuals in the photograph as now having more gray hair and a long ponytail. He also told that his name was Steve or "Six Ball." (P Tr 261). After hearing that information, said that he believed that was one of the people involved:

> "DETECTIVE BROWN: This gentleman now has a little bit more gray. I'm talking about 'Six Ball,' or Steve He's got more gray, but he's got a ponytail that long on his back.
>
> "MR. That sure looks like the little fat man right there. He looks different in this. His hair appears darker. But that sure looks like him because he did -- his hair was lighter and the ponytail was probably about that long.
>
> "DETECTIVE BROWN: So he just -- is he taller or shorter than you?
>
> "MR. Probably a bit shorter.

"DETECTIVE BROWN: I'm going to pull him out.

"MR. Yeah, I believe he's one of the ones involved. I wanted to come back to him, but –

"DETECTIVE BROWN: Sure.

"MR. -- that's why I asked you when I looked at his picture how old these pictures are.

"DETECTIVE BROWN: Yeah, and unfortunately -- we're going to try and remedy that, but –

"MR. Oh, that's good. That's –

"DETECTIVE BROWN: -- this is the best that we can do right now.

"MR. That's all right. We'll work with what we've got."

(P Tr 261-62).

looked at photographs of two more people. He said that he believed one was present but then said he honestly could not say for sure that he was present. (P Tr 262). He did not recognize the other person. (P Tr 262).

Detective Brown said another individual was pretty stocky, his hair was short, and described what clothing he typically wears. After hearing that information from Detective Brown, stated that he thought that person was present, but he was unsure whether he was involved in the assault:

"DETECTIVE BROWN: Okay. This gentleman is a pretty stocky kid. He wears his hair short. He typically has -- when I've

seen him, he typically has a green bandana with a ball cap over it. But he's a pretty stout lad.

"MR. He looks like the one that -- the one I was telling you is pretty -- about 5'10", 190, maybe. Real stout built.

"DETECTIVE BROWN: Yeah, he's probably bigger than 180, because I'm two and some change and he's bigger than me.

"MR. That's a guess. Kind of a big -- yeah.

"DETECTIVE BROWN: So do you think he was present, or do you think he was involved?

"MR. I think he was present. I don't know that he was involved –

"DETECTIVE BROWN: Okay.

"MR. -- but he was present. Yeah, but this does, in fact, look like the little short fat man I was telling you about."

(P Tr 262-63).

Detective Brown pulled out the photographs of the people that had said were possibly present or involved in the assault. For the first time, Detective Brown returned to defendant's picture, affirmatively stating that he was one of the people that were involved in the assault:

"DETECTIVE BROWN: And who I'm pulling out as being present, so far I've got 'Cornfed,' I've got I've got 'Hardwire,' and I have Zammetti. The people that are involved that we have at this point are Steve and 'White Boy.'

"MR. Sure looks like it."

(P Tr 263).

Detective Brown asked if he thought "Six Ball" was the short, fat guy. said, "Yeah, I do." (P Tr 263). Detective Brown asked if he thought "Six Ball" was the guy who hit him with the "ball-peen hammer." (P Tr 264). responded, "I believe so. Yes." (P Tr 264). Detective Brown described what "Six Ball" looked like now. (P Tr 264).

Detective Brown told that he had some recent photographs that he took within the last couple of days and that he was going to see "if maybe that will jar some memories." (P Tr 264).

Before doing that, Detective Brown asked some more questions about the people that assaulted him and asked to give him a percentage of how certain he was that the photographs were of the persons who assaulted him:

> "DETECTIVE BROWN: But let's get back to the ones that you have selected. So again, I've gone over who we -- who you believe was present, and now I've got these two photographs. Can you describe -- well, you said the short, fat guy. He's the one that hit you with the hammer, right?
>
> "MR. Well, he hit me and kicked me both. And after that I –
>
> "DETECTIVE BROWN: And you're talking about the other man. You're talking about -- this would be the buff kid?
>
> "MR. Yeah.
>
> "DETECTIVE BROWN: Okay.
>
> "MR. He's a big guy.
>
> "DETECTIVE BROWN: How tall do you think he is?

"MR. Six two (6'2"). Six one (6'1").

"DETECTIVE BROWN: Okay.

"MR. Something like that. It's a guess.

"DETECTIVE BROWN: And you believe this is the one that originally punched you, right?

"MR. I believe so.

"DETECTIVE BROWN: And then kicked you.

"MR. Yes.

"DETECTIVE BROWN: What percentage would you put on that?

"MR. Seventy-five (75). Say 80 percent.

"DETECTIVE BROWN: Eighty (80) percent? Okay.

"MR. Yeah.

"DETECTIVE BROWN: Now this -- the one that we've identified as the little fat guy –

"MR. Yeah.

"DETECTIVE BROWN: -- do you know what hand he had the hammer in?

"MR. You know, I honestly can't say.

"DETECTIVE BROWN: Okay, but you saw him with a hammer, and then –

"MR. Yeah, a little –

"DETECTIVE BROWN: -- you see him hit you with the hammer?

"MR. Yeah, I saw it coming. And after that I -- it was -- I don't remember much after that except just trying to collect myself and get out of there.

"DETECTIVE BROWN: And as this picture stands right now, what percentage would you put it on?

"MR. About the same?

"DETECTIVE BROWN: About 80?

"MR. Yeah.

"DETECTIVE BROWN: Okay. And what I intend to do when we're done with this here in a minute, I'm going to get some more current photos –

"MR. Okay, good.

"DETECTIVE BROWN: -- and maybe that will help a little bit.

"MR. You're on the ball.

"DETECTIVE BROWN: I try, man. I'm a busy guy. I'm a busy guy."

(P Tr 264-67).

Detective Brown asked if they said anything to him during the assault. said he remembered that "White Boy" told him to "have a good fucking night" as he was leaving the bar:

"DETECTIVE BROWN: Okay. Are they taunting you? Are they saying anything? Do you remember anything?

"MR. I never -- I honestly -- if they did, I didn't hear it. All I remember is the initial conversation. Also this bastard here -- I didn't use the word –

"DETECTIVE BROWN: You're pointing to 'White Boy' –

"MR. Yeah. Yeah, that's the -- say his name again?

"DETECTIVE BROWN: 'White Boy.'

"MR. 'White Boy,' oh, that's a good name. But in any event, he did, in fact, make one more comment to me just prior to my leaving. He said, 'Have a good fucking night.'

"DETECTIVE BROWN: Okay.

"MR. I do in fact, remember that comment.

"DETECTIVE BROWN: And that's after you picked yourself up off the ground?

"MR. No, no, no. No, this was before –

"DETECTIVE BROWN: This was before you went outside?

"MR. This is before I went outside. I didn't -- you know, I didn't think much of it.

"DETECTIVE BROWN: Okay.

"MR. He wasn't being real personable and –

"DETECTIVE BROWN: Sure.

"MR. -- you know, just like leaving – you know, 'Have a good fucking night.' He did in fact, say that."

(P Tr 267-68).

Detective Brown asked if he was able to defend himself from the assault. responded that he wasn't because he was "blind-sided." (P Tr 270-71).

Detective Brown told that he was going to show him some different photographs, stating, "I'm going to pull some different photographs and then maybe that will register something for you." (P Tr 272).

The Second Identifications

When Detective Brown resumed the interview, he showed a recent surveillance photograph, "photograph A." Before could finish telling Detective Brown who was in the photograph, Detective Brown interjected and told that the person in the photograph was Steve the one said hit him with the hammer. told Detective Brown that he was "99.9%" certain was the person who hit him with the hammer:

> "DETECTIVE BROWN: It took me some time to pull some more recent photos up. And you and I really haven't chatted about anything. I introduced you to my boss, but that was about it. I took some photographs on Sunday that you have pointed out some people that are involved. And I want to show you a little bit more recent photographs because there are some significant differences in both the gentlemen that you have said that have assaulted you.
>
> "So let me start with -- and I'm going to mark on these as we go so that when I refer to my report later -- I'm going to show you -- I'm going to mark it with photograph A from my surveillance photographs. Do you recognize anybody in that photo?
>
> "MR. Yeah, this is definitely the chap here, the –

"DETECTIVE BROWN: So you're pointing to 'Six Ball' -- Steve.

"MR. Yeah.

"DETECTIVE BROWN: And you're saying he's the one that hit you with the hammer?

"MR. Oh yeah, that's exactly how he looked the other night, yeah.

"DETECTIVE BROWN: So how certain are you of that photograph?

"MR. Absolutely real certain. Real certain.

"DETECTIVE BROWN: So a percentage for me.

"MR. We'll say -- how about 99 and 9/10ths percent.

"DETECTIVE BROWN: Ninety-nine point nine (99.9)?

"MR. Yeah."

(P Tr 273-74).

Detective Brown showed photograph "B," and reminded that he had told Detective Brown earlier that the person in that photograph had been present at the assault, but now had "a Mohawk or a flat top." (P Tr 275).

said that he could not honestly recognize him, but after confirmed with Detective Brown that the man "wears a lot of rings," said that he was 90% sure that he was there:

"DETECTIVE BROWN: Unfortunately, I'm just starting to get caught up on my surveillance so – let me show you that photograph. You recognize anybody in that photograph? I will end up marking that photograph B here in just a minute. Not that it matters, but -- and if you don't, that's fine too. You had told me earlier that you thought that this young man was present?

"MR. Yes.

"DETECTIVE BROWN: And where'd my other photo go? And that this young man was present.

"MR. Yes.

"DETECTIVE BROWN: If you can't tell, I told you this gentleman now has a Mohawk or a flat top. That would be this gentleman.

"MR. Yeah.

"DETECTIVE BROWN: And this picture is the side photograph of this gentleman.

"MR. Yeah, the side photo, I can't recognize anything.

"DETECTIVE BROWN: And that's fine.

"MR. I can't honestly say. But he wears a lot of rings, correct?

"DETECTIVE BROWN: This gentleman does, yeah.

"MR. Yeah, he was definitely there. Yeah.

"DETECTIVE BROWN: And the gentleman you're pointing to is 'Hardwire.' Okay. And how – what percentage do you think it is that he was at least present?

"MR. Ninety (90) percent.

> "DETECTIVE BROWN: Okay, so I'm just going to put 90 percent 'Hardwire' present.
>
> "MR. 'Hardwire,' that's a good name.
>
> "DETECTIVE BROWN: Electrician.
>
> "MR. Yeah, he's a good name.
>
> "DETECTIVE BROWN: I'll put that one over here. I'm not going to have you initial that because he wasn't one of the ones that actually assaulted you.
>
> "MR. Yeah, I don't believe so."

(P Tr 275-76).

Detective Brown showed "photograph C," directed towards the "gentleman with the headband on" and asked him if he could identify him in that "grainy photograph." (P Tr 276). said, "God, no." (P Tr 276).

Detective Brown showed "photograph D" and asked him if anybody "jumped" out at him. said that he recognized "White Boy" in the photograph and that he was 80% certain he was the person who hit him:

> "DETECTIVE BROWN: I'm now going to show you photograph D. Just tell me if you think anybody jumps out on that photograph.
>
> "MR. That looks like my brother, 'White Boy.' Yeah.
>
> "DETECTIVE BROWN: And by 'White Boy,' you're talking about the gentleman that struck you in the face –
>
> "MR. Yeah.

> "DETECTIVE BROWN: -- and then kicked you in the face?
>
> "MR. Yeah.
>
> "DETECTIVE BROWN: Okay, can you circle who you think 'White Boy' is in that photograph number D? And that one I will need initials, date.
>
> "MR. What time is it now?
>
> "DETECTIVE BROWN: Let's make this one 11:53. Just to mix it up a little bit. Ten five ten (10-5-10). Perfect. And this last one, this photograph number E, as in Edward, I'm going to write on here that he punched and kicked you. And how certain are you of that?
>
> "MR. Real certain. Eighty (80) percent certain, you know, near recollection. I was -- he did a number on me."

(P Tr 277-78).

Detective Brown showed a final photograph, "photograph E," and asked if he could identify anyone in that photograph. said he recognized "the short stout guy." Detective Brown told that was "Cornfed," and said that he was "definitely there" but did not recall whether he assaulted him. also identified Ron and "White Boy" in the photograph and said that he now was 90% sure that "White Boy" was the one who punched and kicked him:

> "DETECTIVE BROWN: And the last photograph I have marked as E, as in Edward. I don't know if you can maybe identify who you think is in that one.

"MR. This is the short stout guy I was telling you about right here.

"DETECTIVE BROWN: Okay.

"MR. That looks like –

"DETECTIVE BROWN: And the short stout guy that you just circled, will you just put a one on top of that, or somewhere near that? And who you've identified there is 'Cornfed?'

"MR. Yeah, that's -- he was definitely there. There's no question about it.

"DETECTIVE BROWN: Did he put any hands on you?

"MR. I don't know.

"DETECTIVE BROWN: Not that you know of?

"MR. Not that I know of, but it's just possible that he did.

"DETECTIVE BROWN: Okay, but he was present.

"MR. He was present. And this is my little short fat friend.

"DETECTIVE BROWN: Okay, put a two above that if you would. That would be -- would that be the guy -- what did he do to you?

"MR. He hit me with the hammer.

"DETECTIVE BROWN: And you're pointing to 'Six Ball' or Steve

"MR. Yeah. And this is my brother, 'White Boy,' it looks like.

"DETECTIVE BROWN: Okay, and that's number three that you circled. So on photograph E, one, we have 'Cornfed' as being present?

"MR. Uh-huh, (affirmative).

"DETECTIVE BROWN: And this is –

"MR. That looks like it might be Ronnie.

"DETECTIVE BROWN: That is Ronnie, yeah. That's okay; we don't need to circle him.

"MR. Yeah, yeah.

"DETECTIVE BROWN: But number two and number three that you've circled on photograph E, number two is the one that hit you with the hammer?

"MR. Uh-huh, (affirmative).

"DETECTIVE BROWN: Number three is the one that punched you and kicked you.

"MR. Yes.

"DETECTIVE BROWN: And what percentage are you of that?

"MR. I'll say 90 percent.

"DETECTIVE BROWN: Okay. If you want to -- I'm just going to put 90 percent on top here.

"MR. Yeah."

(P Tr 278-80).

The Trial Court's Decision

In denying defendant's motion, the trial court applied the controlling case law at the time, specifically, *State v. Classen*, 285 Or 221, 590 P2d 1198 (1979) and *State v. Lawson*, 239 Or App 363, 244 P3d 860 (2010), *rev'd*, 352 Or 724, 291 P3d 673 (2012). In its letter opinion, the trial court determined that Detective Brown did not violate Grants Pass Department of Public Safety guidelines on witness identification when conducting the identification procedure and stated that it could find no legal reason why the procedure in this case was unduly suggestive. *Letter Opinion*, ER-7-10

In determining the reliability of the identification independent of the photographic lineup, the trial court framed the issue as "the likelihood of a positive identification of the defendant assuming that no photographic lineup had taken place." ER-8. Relying on the Court of Appeals opinion in *Lawson*, the trial court discounted the inconsistencies and incompleteness of initial report of the crime, as well as the fact that was seriously injured. ER-9. The trial court relied on the following facts to conclude that "with or without the photographic lineup, the defendant in this case would have been a prime suspect in any event": that five days later, described his assailant as (1) a member of the Vagos, (2) as present at the Red Rock Lounge wearing Vagos regalia, (3) as tall and solidly built, and (4) as being car salesman. ER-9.

The trial court also applied the four *Classen* factors. As for ability to observe his assailant, the trial court concluded that although "may not have had a perfect view of his assailant at the precise time of the assault, since he testified that he was 'sucker punched,'" was definite that the person who "sucker punched" him was the same person who told him to have a "good fucking night." ER-9.

As for the timing and completeness of the identification, the trial court stated, "The description given to Detective Brown was five days after the assault, and included all of the details set forth above." ER-9.

As for certainty in making the identification, the trial court stated:

> "Using DMV photographs that were years old, the defendant was 80% certain; but questioned the age of the photographs. In response, Detective Brown provided the defendant with surveillance photographs of the suspects that were two days old, which Mr. was able to identify with almost 100% certainty."

ER-9.

And as for the lapse of time between the event and identification, the trial court stated, "this was a very short period of only five days." ER-10.

Trial Evidence

After the state presented its evidence at trial, including the contested identification evidence, Dr. Daniel Reisberg testified on behalf of defendant. Dr. Reisberg is a psychology professor at Reed College and an expert in the

area of memory perception and eyewitness identification. (Tr 1136, 1142). Dr. Reisberg called Detective Brown's identification procedure "bizarre," "dreadful," and "among the worst I have ever seen." (Tr 1161, 1163, 1175).[3]

Court of Appeals Opinion

While this case was on appeal, this court issued its opinion in *Lawson/James*. Defendant argued that, in light of the new procedure and science endorsed by this court in *Lawson/James*, the record presented substantial questions about whether it was more likely than not that identifications were the product of his own perceptions at the time of the incident or the product of a suggestive identification procedure. In light of those questions, and consistent with this court's opinion in *Lawson*, defendant requested that the Court of Appeals remand the case to the trial court so that it could receive evidence and hear arguments based on the new procedures and science. (App Br at 11-25).

In response, the state invited the Court of Appeals to decide the eyewitness identification issue in the first instance under the new test in *Lawson/James*, arguing that "the trial court necessarily concluded" that "the identifications were more likely a product of the victim's observations rather than any suggestive police procedures" and that "the probative value of the

[3] Defendant describes Dr. Reisberg's testimony in greater detail in the argument section of this brief.

identifications was not substantially outweighed by the danger of unfair prejudice[.]" (Resp Br at 1).

The Court of Appeals accepted the state's invitation and agreed with its conclusion. Using a record that the parties had developed in the trial court with the *Classen* test in mind, the Court of Appeals applied *Lawson/James* in the first instance and concluded that "[identifications of defendant [met] the threshold requirements for admissibility under *Lawson/James*." *State v. Haugen*, 274 Or App 127, 150, 360 P3d 560 (2015).

Argument

I. The Court of Appeals could apply the new *Lawson/James* test to affirm the trial court's decision only if the record was sufficient to support that alternative basis for affirmance.

In *Lawson/James*, this court changed the procedures for determining the admissibility of eyewitness identification evidence after the trial court had made its decision under the old *Classen* procedures. Here, the state asked the Court of Appeals to affirm the trial court's decision on an alternative basis by applying the new *Lawson/James* procedures. The Court of Appeals accepted the state's invitation and applied the *Lawson/James* procedures to the record developed under the *Classen* test below. It concluded that identifications of defendant met the threshold requirements for admissibility under *Lawson/James* and affirmed on that basis.

But as *Outdoor Media Dimensions, Inc. v. State*, 331 Or 634, 659-660, 20 P3d 180 (2001), instructs, a reviewing court—as a matter of discretion—is permitted to affirm the ruling of a lower court on an alternative basis only if the record is sufficient to support the proffered alternative basis for affirmance. That requires:

> "(1) that the facts of record be sufficient to support the alternative basis for affirmance; (2) that the trial court's ruling be consistent with the view of the evidence under the alternative basis for affirmance; and (3) *that the record materially be the same one that would have been developed had the prevailing party raised the alternative basis for affirmance below*."

Id. (Emphasis added).

This court's decisions in the three *Lawson/James* cases it has decided have been consistent with those requirements. In those cases, this court has recognized that under circumstances where the record was clear that an application of the new procedures could not have affected the trial court's decision, remand was unnecessary. Conversely, when the record raised questions about the reliability of the identification evidence under the new procedures and science, and new evidence could be introduced bearing on those questions, this court has remanded for a new hearing so that the parties could develop a record on those issues, and the trial court could make a decision on that new record.

For example, in *Lawson*, this court reviewed the circumstances surrounding the witness's identification of the defendant and determined that remand was required. In that case, this court noted that there were estimator variable concerns, including: (1) evidence that the witness was under tremendous stress and in poor mental and physical condition when she observed the suspect; (2) the environmental conditions were poor; and (3) the witness made the identification two years after initially viewing the perpetrator. *Lawson/James*, 352 Or at 763-64. It also noted several system variable concerns including: (1) police use of leading questions that implicitly communicated their belief that defendant was the perpetrator; (2) multiple viewings; and (3) alterations in the witness's statements over time that indicated a memory altered by suggestion and confirming feedback. *Id*. at 764-65.

Instead of analyzing those concerns under the new procedures and determining whether the evidence would have been admissible, this court remanded *Lawson* to the trial court to allow it to receive new evidence and argument. In so doing, this court implicitly recognized that, had the parties and trial court been on notice of the new procedures and science, the record would have developed differently and the result could have been different.

In contrast, in *James*, this court concluded that an application of the revised test could not have resulted in the exclusion of the eyewitness identification evidence and affirmed. In reviewing the evidence on the record,

this court could find no material estimator variable concerns: (1) within minutes of the crime, the witnesses provided detailed descriptions of the perpetrators; (2) the witnesses were face-to-face with the perpetrators and had observed them for a lengthy period of time; (3) the environmental conditions were favorable; (4) the perpetrators had distinctive features. *Id*. at 766.

As for the system variables, the trial court had agreed with the defendant that the show-up procedure was unduly suggestive, so remand was unnecessary on that point. *Id*. at 766-67.

That left this court to review whether the trial court erred in determining that "the suggestive show-up confrontation did not cause or contribute to the witness's identification" of the defendant. *Id*. at 767. In so doing, this court did not weigh the evidence itself, but reviewed the trial court's decision. This court determined that the trial court did not err in relying on the detail and accuracy of the eyewitness' descriptions to reach the factual conclusion that the witnesses' identifications of defendant were based on their original perceptions. *Id*.

Next, in *Hickman*, this court limited review to how, in the absence of any pre-trial suggestive police identification procedures, an in-courtroom identification "implicate[s] and affect[s] the analysis under *Lawson/James*." *State v. Hickman*, 355 Or 715, 726, 330 P3d 551 (2014). In so doing, this court concluded that because there were no estimator variable concerns or suggestive

pretrial procedures present, remand was unnecessary to determine whether the in-court identifications satisfied OEC 401, OEC 602, and OEC 701. *Id*. at 732-33.

This court then applied OEC 403 to the in-court identifications. It determined as a matter of law that when "no suggestiveness was in play beyond that inherent in a normal courtroom setting" and the defendant did not show other factors unfairly prejudiced him, a first time in-court identification is not unfairly prejudicial under OEC 403. *Id*. at 743.

In sum, remand was unnecessary in *James* and *Hickman* because there was no indication that the record would have developed differently in a way that could have affected the trial court's decision. In *Lawson*, remand was necessary because the parties did not have the opportunity to fully litigate several system and estimator variable concerns that could have affected the trial court's decision.

II. The record developed at the identification suppression hearing, the trial court's findings, and the additional evidence offered at trial highlight at least six estimator and system variable concerns that the parties would have litigated and that could have affected the trial court's decision.

Like *Lawson*, and unlike *James* and *Hickman*, the record in this case demonstrates that, had the parties litigated the issue under *Lawson/James*, they would have presented evidence and argument on several estimator and system

variable concerns that could have affected the trial court's decision. For that reason, the Court of Appeals erred in not remanding this case for a new hearing.

A. Estimator Variable Concerns

1. Stress, Witness Attention, and Duration of Exposure

The record contains significant estimator variable concerns. First, in its written decision, the trial court expressly discounted incomplete initial descriptions of his assailants, as well as the fact that was seriously injured in the attack. ER-9.

According to the state's theory of the case, defendant sucker-punched from the side as he walked to his car, kicked him while he was on the ground, and then hit in the head with a hammer. told the 9-1-1 dispatcher that he believed he was punched and that "I was just blind-sided when I came out." (Tr 159-60). was stressed and did not get a good look at the initial assailant.

When Officer John Nicklason the same night to interview was unable to give Nicklason any information about his assailants other than that they were Vagos. According to Nicklason, "recognized them as a group that came into the bar, but couldn't recognize them specifically individually." (Tr 408). told Nicklason that he could not give him a description because it was a dark and brief encounter. told Nicklason that he thought he was punched but was not sure.

Although the trial court expressly discounted that evidence, the new science noted in *Lawson/James* has shown that high levels of stress, witness inattention, shorter durations of exposure, poor environmental viewing conditions, and memory decay can undermine identification reliability. *Lawson/James*, 352 Or at 744-46.

Had the issue been litigated under *Lawson/James*, defendant could have presented Dr. Reisberg's testimony at the pretrial hearing to explain how

inability to provide the police with a detailed description of the perpetrator suggested that he did not have a good memory of who attacked him. Dr. Reisberg testified at trial that he was concerned by the fact that was unable to provide the police with much information about his attackers. He explained that if a person does not have much memory to begin with, he is not going to have much memory later, and that the witness is going to be susceptible to suggestion later:

> "[DR. REISBERG:] So you've got, you know, three or four or five different indications, all emphasizing again and again, how little the witness was reporting, or the victim was reporting that he saw. And so certainly, the thing that caught my attention immediately was a concern that this was likely to be a victim who had seen very little, because he's telling us the guy was unseen. He's telling us that the encounter was brief. He's telling us that it was dark.
>
> "And that's a situation in which if somebody doesn't see much to begin with, then they're not going to have much memory later on. I mean, basically if you don't write anything onto a page, you can't go back to that page and read it later. I mean you can't

> get water out of an empty bottle. And so if there was -- if he didn't see anything, then no information went into memory, and that is going to be a problem down the road.
>
> "* * * * *
>
> "If somebody, you know, didn't see very much and therefore, doesn't have much information in their memory, that memory is going to be really fragile and easy to push around in one way or another because the person won't have much of an anchor to hold onto.
>
> "And so when I saw that, I was certainly concerned both about the possibility that the victim just wouldn't be able to tell us very much, because he was telling us flat out, he did not see much. But I was also immediately sort of put on alert that when we got to the police investigation, we were going to want to be super careful, because this was going to be a case in which the memory was just, you know, as thin as could be, and therefore, going to be fairly easy to shove around if there was any sort of suggestion or slipup in the police investigation."

(Tr 1147-48). He also testified that laboratory studies have shown that if someone is "quite stressed, that does nasty things to the memory." (Tr 1149).

Had the issue been litigated under *Lawson/James*, defendant would have been on notice of the importance of Dr. Reisberg's testimony in determining the *admissibility*, and not just the *weight*, of the eyewitness identification evidence and presented it at the pretrial hearing. And had the trial court had the benefit of such information, it would have had reason to give more weight to inability to relate any details about his assailants immediately after the crime and factored that into its admissibility analysis.

2. Misplaced Familiarity

Second, both the trial court and the Court of Appeals considered it important that stated that the person who initially punched him was the car salesman that he had seen in the bar earlier and the same person who wished him a "good fucking night" as he left the bar. But had the issue been litigated under *Lawson/James,* defendant could have presented Dr. Reisberg's testimony that statements could have been an example of "misplaced familiarity" in which was correct that defendant was the person he saw in the bar, but incorrect that defendant was the person who sucker-punched him outside.

Dr. Reisberg testified that "misplaced familiarity" is where a person correctly realizes that someone is familiar but is incorrect about why he thinks the person is familiar:

> "[DR. REISBERG:] There's also a nastier version of that in which you correctly realize that somebody is familiar and you think you know why they're familiar, but you get that part wrong. And that's possible because it's two completely different memory systems. And that's the area that's called 'Misplaced Familiarity.'
>
> "It is a fairly common difficulty for IDs, because often in making an ID, a witness will say, gee, that guy looks familiar to me. And you know, under the circumstances, police are showing you photos, you know that you're trying to find the bad guy. You know, it's a reasonable assumption that he looks familiar because you saw him at the crime.
>
> "But you could be mistaken about that, and there's a number of, I think, well-documented cases in which witnesses have been correct that a face looks familiar, but make a mistake about why."

(Tr 1170-71).

He further explained that based on the phenomenon of misplaced familiarity, could have been correct about seeing defendant in the bar, but been mistaken that he was the person who hit him in the parking lot:

> "[DR. REISBERG:] I mean the scenario that one has to worry about is, I mean let us imagine that the victim saw the car salesman in the bar that night, later on made a mistake and decided that the guy he had seen in the bar was the guy who had attacked him. That's exactly the notion of misplaced familiarity. That's what we talked about earlier. It's a pattern that happens a lot."

(Tr 1270-71).

The concept of misplaced familiarity would have provided the trial court with a scientific reason to question statement that the person who sucker-punched him was the same person he saw earlier in the bar. And the trial court would have had reason to do so given the poor viewing conditions at the time of the assault and the suggestive identification procedures detailed below.

3. Level of Certainty

Third, the trial court relied on rising level of certainty in making the identifications in determining that the identifications were admissible. As the trial court noted, certainty level rose from 80% to nearly 100% by the end of the procedures. ER-9. But had the trial court applied *Lawson/James*, it would have known that rising level of certainty throughout the

procedure was a poor indicator of identification accuracy, but instead suggested that confidence was rising due to the suggestive identification procedure. *Lawson/James*, 352 Or at 745. And defendant could have presented Dr. Reisberg's testimony that, "if someone's certainty grows as time goes by, that's completely out of step with everything we know about how memory works, and is entirely in tuned with what we would expect if somebody's certainty has been artificially lifted by the circumstances." (Tr 1175).

B. System Variable Concerns

The record in this case presents at least three examples of system variable concerns that the parties did not have an opportunity to address, and the trial court did not have the opportunity to consider under the new procedures. Those system variable concerns include: (1) improper "lineup" construction; (2) suggestive feedback and questioning; and (3) multiple viewings.

In evaluating whether Detective Brown's procedure was suggestive under the *Classen* test, the trial court focused on whether his procedure deviated from the guidelines established by the Grants Pass Department of Public Safety's Procedures. The trial court found that Detective Brown followed those procedures, and that his procedure was the same as a traditional "six-pack" lineup, but containing 23 photographs instead of six, and shown sequentially

instead of all at one time. ER-8. The trial court could find no legal reason why the photographic lineup was unduly suggestive.

But had the issue been litigated under *Lawson/James* the parties and the trial court would not have focused on whether Detective Brown's procedure followed established guidelines. Instead, the parties would have focused on whether, in light of current scientific knowledge, his procedure was suggestive. And in light of the current scientific knowledge regarding the effects of suggestion and confirming feedback, the circumstances of this case present the parties with an opportunity to create a different record on remand that could affect the trial court's decision.

1. Improper "Lineup" Construction

First, if the trial court had decided the issue under *Lawson/James*, it would have known that Detective Brown's procedure was not a sequential lineup. In a proper lineup, "[t]he known-innocent subjects used as fillers should be selected first on the basis of their physical similarity with the witness's description of the perpetrator; if no description of a particular feature is available, then the lineup fillers should be chosen based on their similarity to the suspect." *Lawson/James*, 352 Or at 742. Instead of conducting a sequential lineup, Detective Brown showed a collection of photographs of known motorcycle gang members that Detective Brown suspected either witnessed or participated in the assault.

Had the issue been litigated under *Lawson/James*, defendant could have presented evidence demonstrating how having one suspect per lineup along with other persons who look similar to the suspect is an important safeguard against erroneous identifications, forces witnesses to be careful about their identifications, and guards against artificially inflating the witness's confidence in his identification:

> "[DR. REISBERG:] Then when you turn to the identification itself, the research community, law enforcement, the U.S. Department of Justice, have all made it clear that what you want to do first of all is to make sure that you've got one, and only one, suspect in each lineup so that, I mean among other things, that guarantees that if somebody is just, you know, guessing randomly, most of the time, they're going to pick somebody who is in the lineup just to fill it out with the right number of guys, and you will, I mean instantly, be able to spot those mistakes. So that's a really important safeguard.
>
> "But in addition, we've got powerful reason to believe that having those other five innocent people there, and making sure that they are properly selected, helps. Properly selected means that in a decent lineup -- no, in a correct lineup, in the lineup you should do, you've got one suspect, and then you've got five other people who are in reasonable ways matched to the suspect you're going after.
>
> "So if the suspect you're going after is a white, bald guy with a mustache, you want to make sure the other guys are, you know, white, bald guys with mustaches. If the person you're after is dark-skinned African American, you want to make sure the others are dark-skinned African Americans so that you've got basically, legitimate choices.
>
> "And there is, let's be clear, two different reasons why you need to have those legitimate choices. One of them is it's easy to document that that makes the IDs more accurate. Because you know, basically, it forces the person to; you know, stop, and look

> at the pictures because there's a real choice to be made. And it also will pull the person away from a choice in which they might say, 'ah, good enough.' Because in a proper lineup, they're all good enough.
>
> "You want to make sure you've got a match. So the first thing you want to do is increase accuracy with good choices.
>
> "The second reason why it is so important, is that in lots of police investigations one of the important pieces of information for us is how certain somebody is. I mean, are they saying 'That's him, I'd bet my life on it' or are they going to say, 'You know, gee, I'm guessing'?
>
> "And it turns out it is very easy to shove around somebody's certainty and to make them look more certain than they are. And one of the great ways to do that is to have a bunch of pictures in the lineup that couldn't possibly be the guy. And so if the witness feels like, ha, I can easily and quickly push these five over to the side, and I've only got one left, it turns out that that artificially increases somebody's confidence."

(Tr 1155-57). Defendant also could have elicited testimony describing how Detective Brown's procedure failed in that respect, undermining the accuracy of the identifications:

> "[DR. REISBERG:] I wish I could find a polite word for it, I found that procedure to be bizarre, because the procedure, first of all failed on the rule of one suspect per lineup, because there was no lineup. I mean basically, everybody was a suspect, so we failed on that step.
>
> "Since we had no lineups, there was no issue of having a properly constructed lineup with other faces that were in the right ballpark, so we failed on that test. And I've already said that can do double damage both to somebody's accuracy and to their confidence."

(Tr 1161-62).

2. Suggestive Feedback and Questioning

Second, had the issue been litigated under *Lawson/James*, defendant could have presented evidence about how Detective Brown provided with suggestive feedback during the procedure, and the trial court would have had to account for that evidence in reaching its decision. *See Lawson/James*, 352 Or at 744 ("Post-identification confirming feedback tends to falsely inflate witnesses' confidence in the accuracy of their identifications, as well as their recollections concerning the quality of their opportunity to view a perpetrator and an event.")

The record shows that during the procedure, Detective Brown suggested to that the people who assaulted him would be in the collection of photographs, confirmed the identities of persons that identified in the photographs, and provided additional information about the suspects in the photographs, sometimes prior to making an identification.

For example, Detective Brown told that he thought he knew the identity of a suspect. Prior to asking to identify the suspects, Brown asked to talk about what he remembered about the incident. told him that the person that he later identified as defendant was "a great big guy" about 230 pounds, not fat, and in his late 20's or early 30's. (P Tr 249). Brown asked if he was "Pretty buff?" When responded

affirmatively, Brown told that "I think I know who you're talking about." (P Tr 249).

Brown therefore had a suspect in mind prior to administering the identification procedure. Although Detective Brown later testified at trial that he suspected the assailant was Ryan what is important is that Detective Brown informed that he thought he knew the identity of his assailant, thereby implying that the suspect would be among the persons in the collection of photographs. That encouraged to identify someone from that collection.

Detective Brown also implied that the "little fat guy" would be in the collection, telling "what we'll do here in a minute, Bruce, I'll show you some photographs - - and maybe that will help us - - once we have some photos we can go through - - and we'll identify - - who the little fat guy is - - * * *." (P Tr 253). That statement further implied that one of his assailants would be in the collection of photographs and encouraged to identify someone.

Furthermore, as identified several of the persons who were present that evening, Detective Brown provided information about those persons such as their gang affiliation, gang names, the fact that some of them were in prison, and details about how their appearances have changed since the photographs were taken. He did that for Chris Ron defendant, Zammetti, "Hardwire," Coelho, Anthony, and

Additionally, Detective Brown provided information to about "Hardwire" before identified him. Detective Brown told that "Hardwire" "now has a flat top" haircut. (P Tr 259). When asked Detective Brown whether "Hardwire" wears a lot of rings, Detective Brown confirmed that he did. Only after that feedback did identify "Hardwire" as being present.

Detective Brown did the same thing with Steve Before said anything about photograph, Detective Brown told that the person in the photograph now has more gray and a long ponytail and that his name was Steve or "Six Ball." (P Tr 261). Only after hearing that additional information did identify as one of his assailants.

The feedback problem was most evident when Detective Brown showed the surveillance photographs. For example, for "photograph A," before told Detective Brown who was in the photograph, Detective Brown told that the person in the photograph was Steve (P Tr 273). For "photograph B," before made any identification, Detective Brown informed that the person had identified earlier as being present at the assault was in that photograph. (P Tr 275).

Had the issue been litigated under *Lawson/James*, defendant could have provided Dr. Reisberg's expert testimony explaining how Detective Brown's feedback could have undermined the accuracy of identifications by

encouraging to push his doubts aside and how it could have artificially inflated confidence level. (Tr 1159-61). Dr. Reisberg could have explained that although Detective Brown did not guide to a particular photograph, by giving confirming feedback and information, he encouraged to "make picks" which encouraged error. (P Tr 1247-48).

Dr. Reisberg also could have explained to the trial court that by giving feedback for each identification Detective Brown undermined the reliability of each of the subsequent identifications. (P Tr 1159-60). Importantly, initial identification of defendant was the third identification that made, and Detective Brown did not return to confirm that identification until he had identified several other individuals, with Detective Brown providing constant feedback along the way.

3. Multiple Viewings

Third, had the issue been litigated under *Lawson/James*, defendant could have presented evidence of how Detective Brown could have adversely affected the reliability of identifications by exposing to multiple viewings. As this court stated in *Lawson/James*, viewing a suspect multiple times can adversely affect the reliability of any identification that follows those viewings:

> "Viewing a suspect multiple times throughout the course of an investigation can adversely affect the reliability of any identification that follows those viewings. The negative effect of

> multiple viewings may result from the witness's inability to discern the source of his or her recognition of the suspect, an occurrence referred to as source confusion or a source monitoring error. A similar problem occurs when the police ask a witness to participate in multiple identification procedures. Whether or not the witness selects the suspect in an initial identification procedure, the procedure increases the witness's familiarity with the suspect's face. If the police later present the witness with another lineup in which the same suspect appears, the suspect may tend to stand out or appear familiar to the witness as a result of the prior lineup, especially when the suspect is the only person who appeared in both lineups."

Lawson/James, 352 Or at 743.

Here, Detective Brown subjected to two identification procedures. In the first procedure, Detective Brown showed 23 photographs of known motorcycle gang members. After had completed that identification procedure, Detective Brown told that he was going to show him some "more recent photographs because there are some significant differences in both the gentlemen that you have said that have assaulted you." (P Tr 273). In other words, Detective Brown told that he was going to show him some recent photographs of the persons that he had already identified.

Detective Brown then showed a series of surveillance photographs containing the images of the persons identified in the previous procedure. In those photographs identified defendant, and the others that had identified as present at the scene pursuant to the original procedure.

Based on those multiple viewings and *Lawson/James*, defendant could have argued that subsequent identification was not based on his initial viewing of his assailants, but instead on just having viewed defendant's DMV photograph in the first procedure.

III. The Court of Appeals erred in applying the new *Lawson/James* procedures because the trial court record is insufficient to support affirmance on that alternative basis.

Had the parties litigated the eyewitness identification issue under *Lawson/James*, defendant could have presented evidence of several estimator and system variable concerns that could have affected the trial court's decision. Under *Lawson/James*, defendant could have presented evidence supporting an argument that: (1) defendant's inability to initially describe his assailants meant that he did not have a good memory of his assailants and that his memory was vulnerable to suggestion; (2) due to misplaced familiarity, was mistaken in his belief that the person who sucker-punched him was the car salesman who had wished him a "good fucking night" earlier in the bar; and (3) rising level of certainty did not suggest that his identification was based on his own perceptions, but instead suggested that his memory was being influenced by suggestive procedures.

Furthermore, defendant could have introduced evidence supporting an argument that Detective Brown's procedure influenced defendant's

identifications due to improper "lineup" construction, suggestive feedback and questioning, and multiple viewings.

Because the trial court, in applying *Classen* to deny defendant's motion: (1) discounted inability to initially identify his assailants; (2) had no reason to question belief that the car salesman in the bar and assailant were the same person; (3) relied on rising level of certainty; (4) equated Detective Brown's procedure with a sequential six-pack procedure; and (5) could find no reason why Detective Brown's procedure was suggestive, one cannot say that the contrary evidence and argument summarized above could not have affected the trial court's decision.

In short, had the parties litigated this case under *Lawson/James*, one cannot say that the trial court's decision could not have been different. Under *Lawson/James*, defendant would have had evidence to offer and a compelling argument to make before the trial court that identifications of defendant were more likely the product of suggestive procedures than the witness's own perceptions at the time of the incident. This case should be reversed and remanded so that the parties can litigate this issue under *Lawson/James*.

CONCLUSION

For the above reasons, defendant respectfully requests this court reverse the decisions of the Court of Appeals and the trial court and remand the case for a new trial and hearing where the parties will have the opportunity to litigate defendant's motion under the proper legal framework.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief length

I certify that (1) this brief on the merits complies with the word-count limitation in in ORAP 9.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 11,190 words.

Type size

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

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on July 1, 2016.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Petitioner's Brief on the Merits will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Benjamin Gutman #160599, Solicitor General, attorney for Plaintiff-Respondent.

Respectfully submitted,

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ESigned

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