

STATE v. HENDERSON: A MODEL FOR ADMITTING EYEWITNESS IDENTIFICATION TESTIMONY

AMY D. TRENARY*

*Eyewitness identification testimony is notoriously unreliable and has significantly contributed to wrongful convictions. Most courts use the standard set forth by the Supreme Court in *Manson v. Brathwaite* to assess whether eyewitness identifications are sufficiently reliable to present to the jury. But in the thirty-five years since *Manson*, an extensive body of research has amassed that calls into question the continuing validity of that standard. Researchers have identified numerous system variables (procedural elements subject to official control) and estimator variables (factors related to the witness, perpetrator, and event) that affect the accuracy of eyewitness identifications. The *Manson* standard fails to account for most of these factors. In response, the New Jersey Supreme Court in *State v. Henderson* retooled its state constitutional due process test for admitting eyewitness identification testimony and mandated more comprehensive jury instructions that warn jurors of the vulnerability of eyewitness identifications to both system and estimator variables. Until the Supreme Court is willing to revise the *Manson v. Brathwaite* standard, state courts should consider adopting more comprehensive due process requirements, as well as jury instructions that better embody the current state of scientific understanding about the complexities of memory and the fallibility of eyewitnesses.*

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INTRODUCTION

McKinley Cromedy was walking across a street, minding his own business, when a college student recognized him as the intruder who had robbed and raped her nearly eight months earlier.¹ The young woman immediately alerted the police.² Fifteen minutes later, the victim viewed Cromedy from behind a two-way mirror at the police station and confirmed that he was the man who had attacked her.³ At trial, the woman assuredly identified Cromedy and told the jury, “It was him,” explaining that, “It’s just something you don’t forget.”⁴ She was so confident in her identification that the jury convicted Cromedy without any physical evidence connecting him to the crime.⁵

The victim studied her attacker during the incident, immediately described him in detail to the police, and then helped create a composite sketch of the perpetrator.⁶ She was sure that she would never forget the face of the person who raped her, so when the victim saw Cromedy she knew that he was the right man.⁷ But unfortunately, the victim was as confident as she was wrong. After serving more than five years in prison, Cromedy was exonerated and released when DNA testing proved his innocence.⁸ The true perpetrator has never been identified.⁹

In the years since McKinley Cromedy was exonerated, eyewitness misidentification has been “widely recognized as the single greatest cause of wrongful convictions in this country.”¹⁰ The Innocence Project has catalogued more than

1. *State v. Cromedy*, 727 A.2d 457, 459 (N.J. 1999), *abrogated by* *State v. Henderson*, 27 A.3d 872 (N.J. 2011).

2. *Id.*

3. *Id.*

4. Tom Avril, *Eyewitness’ Blind Spot*, PHILA. INQUIRER, May 22, 2006, http://articles.philly.com/2006-05-22/news/25401477_1_face-recognition-black-men-eyewitness.

5. *Cromedy*, 727 A.2d at 459.

6. *Id.*

7. Avril, *supra* note 4. The victim even identified Cromedy’s unique gait, which she described as “a combination of a swagger and a roll.” BRANDON L. GARRETT, *CONVICTING THE INNOCENT* 250 (2011) (quoting the *Cromedy* trial transcript).

8. *McKinley Cromedy Profile*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/McKinley_Cromedy.php (last visited Mar. 3, 2013).

9. *Id.*

10. *State v. Delgado*, 902 A.2d 888, 895 n.6 (N.J. 2006) (citing *State v. Dubose*, 699 N.W.2d 582, 592 (Wis. 2005)).

three hundred post-conviction DNA exonerations.¹¹ As many as three-quarters of those wrongful convictions involved eyewitness misidentifications.¹² Moreover, a review of published scientific research suggests that one-third to one-half of eyewitness identifications are simply wrong.¹³

Yet in the face of increasing concerns about the inaccuracy of well-intentioned eyewitness identifications,¹⁴ courts persist in using outmoded criteria for determining whether such eyewitnesses should be permitted to testify at trial. Modern courts fairly unanimously continue to rely on the Supreme Court's toothless *Manson v. Brathwaite* standard¹⁵ to assess the admissibility of eyewitness testimony.¹⁶ Until recently, this tally also included New Jersey—the state where McKinley Cromedy was misidentified and wrongfully convicted.¹⁷ But in

11. *Innocence Project Case Profiles*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/known/> (last visited Mar. 3, 2013). DNA exonerations generally stem only from sexual assaults or other types of cases that yield testable biological evidence. Defendants wrongfully convicted of armed robbery, drive-by shootings, and burglary are significantly more difficult to identify because no biological evidence is available. JAMES M. DOYLE, TRUE WITNESS: COURTS, COPS, SCIENCE, AND THE BATTLE AGAINST MISIDENTIFICATION 35 (2005); Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 L. & HUM. BEHAV. 1, 1 (2009).

12. Report of the Special Master at 16–17, *State v. Henderson*, No. A-8-08 (N.J. June 18, 2011), [http://www.judiciary.state.nj.us/pressrel/HENDERSON%20FINAL%20BRIEF%20.PDF%20\(00621142\).PDF](http://www.judiciary.state.nj.us/pressrel/HENDERSON%20FINAL%20BRIEF%20.PDF%20(00621142).PDF).pdf [hereinafter *Report of the Special Master*] (citing *Facts on Post-Conviction DNA Exonerations*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Facts_on_Post_Conviction_DNA_Exonerations.php (last visited Mar. 3, 2013)); see also GARRETT, *supra* note 7, at 9, 279 fig. A.5.

13. *Report of the Special Master*, *supra* note 12, at 15–16.

14. See BARRY SCHECK ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT 157 (2003) (“The mistakes made by eyewitnesses or victims rise from the very core of their humanity: emotional, wounded spirits trying to make themselves or someone else whole.”).

15. 432 U.S. 98 (1977). The infirmities of the *Manson v. Brathwaite* standard are discussed *infra* Part I. See also DOYLE, *supra* note 11, at 76 (“The number of qualifiers is nearly comical.”).

16. Sandra Guerra Thompson, *Eyewitness Identifications and State Courts As Guardians Against Wrongful Conviction*, 7 OHIO ST. J. CRIM. L. 603, 631–32 (2010). Utah uses a somewhat broader “totality of the circumstances” iteration of *Manson* and has developed a different set of reliability factors that has also been adopted by Kansas. *State v. Ramirez*, 817 P.2d 774, 781 (Utah 1991); *State v. Hunt*, 69 P.3d 571, 576 (Kan. 2003). Almost all other states and the District of Columbia apply *Manson*, more or less. Nicholas A. Kahn-Fogen, *Manson and Its Progeny: An Empirical Analysis of American Eyewitness Law*, 3 ALA. C.R. & C.L.L. REV. 175, 191 (2012) (noting that Massachusetts and New York have reverted to a *per se* approach).

17. See *State v. Cromedy*, 727 A.2d 457 (N.J. 1999), *abrogated by State v.*

the thirty-five years since *Manson v. Brathwaite*, thousands of peer-reviewed research articles¹⁸ have indicated that the *Manson* standard fails to account for most of the factors that contribute to the integrity of eyewitness identifications.¹⁹

In *State v. Henderson*, the New Jersey Supreme Court recognized that this burgeoning body of social science research has rendered the *Manson* standard untrustworthy.²⁰ The *Henderson* court mandated a two-pronged corrective strategy.²¹ New Jersey courts must now conduct a more thorough pretrial inquiry to scrutinize the reliability of eyewitness identification testimony before admitting it.²² In addition, jurors must receive more comprehensive instructions to inform their evaluation of the reliability of eyewitness identifications.²³ *Henderson* represents a radical but appropriate judicial response to the undeniable evidence, both scientific and anecdotal, that has called the *Manson* framework into doubt. New Jersey's approach provides a model for both increasing the likelihood that eyewitness testimony is reliable and ensuring that jurors do not give such testimony more weight than it deserves.

This Note proposes that criminal defendants' constitutional due process rights would be better served by the more sophisticated system for vetting testimony and educating the jury required under *Henderson*. It proceeds by briefly encapsulating in Part I the scientific research that points to a multitude of factors that affect eyewitness identifications and memory. Part II then discusses the deficiencies of the *Manson* standard in light of these scientific developments and explores the reasons why common sense and cross-examination are insufficient tools for exposing the weaknesses in eyewitness testimony to the jury. Part III explores the progressive context in which the New Jersey Supreme Court decided to act,

Henderson, 27 A.3d 872 (N.J. 2011).

18. See Wells & Quinlivan, *supra* note 11, at 1.

19. *Id.* (citing Steven D. Penrod, *Eyewitness Identification Evidence: How Well Are Witnesses and Police Performing?*, 54 CRIM. JUST. MAG. 36 (2005)) ("Overall, the empirical data indicate that eyewitness identification evidence is not performing very well.")

20. See *State v. Henderson*, 27 A.3d 872, 918–19 (N.J. 2011).

21. See *id.* at 918–22.

22. See *id.* at 922–24.

23. See *id.* at 925–26. New Jersey's revised jury instructions for eyewitness identification cases are available at http://www.judiciary.state.nj.us/pressrel/2012/jury_instruction.pdf (effective Sept. 4, 2012).

including a series of predecessor cases, law enforcement cooperation, and growing evidence of misidentifications. Finally, Part IV proposes that more thorough procedures, such as those required by *Henderson*, would help prevent misidentifications and wrongful convictions. Until the Supreme Court is willing to recognize broader federal due process protections by revising the *Manson* framework,²⁴ state courts should follow New Jersey's lead and expand the due process requirements under their own constitutions. At the very least, jurisdictions should adopt more comprehensive instructions for educating juries about the complexities of human memory and the fragilities of eyewitness identification testimony.

I. PERSUASIVE SCIENTIFIC RESEARCH ABOUT MEMORY AND IDENTIFICATIONS

This Part begins by discussing the *Henderson* court's use of a special master to incorporate relevant scientific evidence into the record on appeal. It then provides a synopsis of the scientific research that shaped the *Henderson* court's restructuring of its state constitutional due process requirements for admitting eyewitness testimony. This Part concludes by explaining how neither jurors' common sense impressions nor skilled cross-examination of eyewitnesses at trial provide sufficient protection against misidentifications by earnest eyewitnesses.

A. *The Henderson Special Master Hearing*

In the past few decades, a remarkable body of high-consensus scientific research has identified many variables that interact with one another to affect eyewitness performance.²⁵ In *Henderson*, the court acknowledged that these research findings suggest shortcomings in the prevailing standard for admitting eyewitness identification and appointed a special master to preside over a plenary hearing to determine

24. If the recent *Perry* case is any indication, the Court does not appear poised to revise *Manson* any time soon. See *Perry v. New Hampshire*, 132 S.Ct. 716, 730 (2012) (confirming the continued validity of *Manson v. Brathwaite*).

25. *Report of the Special Master*, *supra* note 12, at 9 (“[O]ver two thousand studies on eyewitness memory have been published in a variety of professional journals over the past thirty years. . . .”) (citing Gary L. Wells et al., *From the Lab to the Police Station: A Successful Application of Eyewitness Research*, 55 AM. PSYCHOL. 581, 581–82 (2000)).

which eyewitness reliability factors remain valid.²⁶ The special master hearing generated over two thousand pages of transcripts and incorporated the opinions of seven expert witnesses,²⁷ as well as the results of hundreds of research studies.²⁸

After reviewing the submitted research, the special master concluded that the science “abundantly demonstrates the many vagaries of memory encoding, storage and retrieval; the malleability of memory; the contaminating effects of extrinsic information; the influence of police interview techniques and identification procedures; and the many other factors that bear on the reliability of eyewitness identifications.”²⁹ The special master further opined that the existing standard for examining the reliability of eyewitness testimony “neither recognizes nor systematically accommodates the full range of influences shown by science to bear on the reliability of such testimony.”³⁰

The New Jersey Supreme agreed with the special master than the science was both reliable and useful, acknowledging that the extensive research represents the “gold standard in terms of the applicability of social science research to the law.”³¹ The validity of the research is bolstered by the fact that experiments have been replicated, subjected to peer-review scrutiny, evaluated through supportive meta-analyses, and sometimes replicated in non-laboratory settings.³²

26. *State v. Henderson*, 39 A.3d 147, 148 (N.J. 2009). The special master was retired appellate division judge Geoffrey Gaulkin. Prior to his twenty-two-year stint on the bench, Judge Gaulkin worked as a prosecutor. Richard Pérez-Peña, *Use of Eyewitnesses in New Jersey Courts Needs Change, Ex-Judge Says*, N.Y. TIMES, June 21, 2010, <http://www.nytimes.com/2010/06/22/nyregion/22witness.html>. By delegating the task to a special master, the *Henderson* court ensured that its advisory decision-maker had sufficient time and resources to sort through and synthesize the amassed research about eyewitness memory. Judge Gaulkin’s return from retirement likely ensured that he was particularly available for the daunting task of reviewing decades’ worth of flourishing scientific inquiry.

27. *See Henderson*, 27 A.3d at 884–85. Testimony was garnered from three psychology professors (Drs. Gary Wells, Steven Penrod, and Roy Malpass) about “the state of scientific research in the field of eyewitness identification,” three law professors (James Doyle, Jules Epstein, and Dr. John Monahan) about “the intersection of eyewitness identification research and the legal system,” and one prosecution investigator (James Gannon) about “practical constraints police officers sometimes face in conducting investigations.” *Id.*

28. *See id.* at 877.

29. *Report of the Special Master*, *supra* note 12, at 72–73.

30. *Id.* at 76. The specific deficiencies identified are discussed *infra* Part II.

31. *Henderson*, 27 A.3d at 916 (quoting the testimony of Dr. John Monahan from the special master’s remand hearing).

32. *Id.*

The overriding principle that has emerged is that “memory does not function like a videotape, accurately and thoroughly capturing and reproducing a person, scene or event,” but is instead “a constructive, dynamic and selective process.”³³ Memories must endure the complex processing required for encoding, storage, and retrieval.³⁴ In the encoding or acquisition stage, the witness perceives an event and enters the information into memory.³⁵ The storage or retention stage is the period between when the memory is encoded and when the witness attempts to retrieve it.³⁶ The retrieval stage represents the witness’s attempt to recall the stored information from memory.³⁷ Memories are vulnerable to distortion, contamination, and falsification at each step.³⁸ Eyewitnesses encode limited data bits and then their brains tend to fill in the gaps with whatever else seems plausible under the circumstances.³⁹ Memories rapidly and continuously decay and may be covertly contaminated by suggestive influence—including by law enforcement officers during interviewing and identification procedures.⁴⁰

The scientific literature reflects a broad consensus about which variables can affect the reliability of eyewitness identifications, but it also recognizes that those variables are merely advisory in any particular case.⁴¹ Even the most

33. *Report of the Special Master*, *supra* note 12, at 9 (citing Robert Buckhout, *Eyewitness Testimony*, 15 JURIMETRICS J. 171, 171 (1975) (reprinted from 231 SCI. AM. 23 (1974))).

34. *Report of the Special Master*, *supra* note 12, at 9–10 (citing ELIZABETH F. LOFTUS ET AL., *EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL* 13 (4th ed. 2007); ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY* 21 (2d ed. 1996)).

35. LOFTUS ET AL., *EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL*, *supra* note 34, at 13.

36. *Id.*

37. *Id.*

38. *Report of the Special Master*, *supra* note 12, at 10 (citing LOFTUS, *EYEWITNESS TESTIMONY*, *supra* note 34, at 21–22).

39. *Report of the Special Master*, *supra* note 12, at 10 (citing hearing testimony of Dr. Gary Wells).

40. *Id.* (citing DANIEL L. SCHACTER, *THE SEVEN SINS OF MEMORY* 5 (2001); Patricia J. Bailey & Sheri H. Mecklenburg, *The Prosecutor’s Perspective on Eyewitness Experts in the Courtroom*, in *EXPERT TESTIMONY ON THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION* 223, 230–31 (Brian L. Cutler ed., 2009); Elizabeth F. Loftus & Edith Greene, *Warning: Even Memory for Faces May Be Contagious*, 4 LAW & HUM. BEHAV. 323 (1980)).

41. *Report of the Special Master*, *supra* note 12, at 14 (citing Steven E. Clark & Ryan D. Godfrey, *Eyewitness Identification Evidence and Innocence Risk*, 16 PSYCHONOMIC BULL. & REV. 22, 25 (2009); Heather D. Flowe et al., *Limitations of Expert Psychology Testimony on Eyewitness Identification*, in *EXPERT TESTIMONY*

sophisticated science is unable to discern whether the identification provided by any particular eyewitness is accurate or not.⁴² Additionally, science cannot be used to parse out the degree to which any variable may have influenced a particular witness or contributed to a particular misidentification.⁴³ Nonetheless, eyewitness identification testimony is untrustworthy and poses an “unusual threat to the truth-seeking process.”⁴⁴ As a result, even probabilistically applied scientific findings may be invaluable to judges and juries who must evaluate eyewitness reliability, regardless of whether the science “confirms commonsense views or dispels preconceived but not necessarily valid intuitions.”⁴⁵

B. System and Estimator Variables

The factors that the *Henderson* court found to be the most persuasive are discussed in the following Subsections. Tracking the scientific literature, the *Henderson* court separated these factors into two categories: “system variables” and “estimator variables.”⁴⁶ System variables are factors over which the justice system maintains control, such as the type of procedure used to elicit the identification and the contents of police officers’ communications while interacting with eyewitnesses.⁴⁷ Estimator variables are factors related to the witness, perpetrator, and event that are beyond systemic control.⁴⁸ Although the government and law enforcement may only exercise authority over the system variables, researchers agree that both system and estimator variables affect the reliability of eyewitness identifications.⁴⁹ While understanding estimator variables may provide a basis for retrospective inquiry into the likelihood of mistaken identification, understanding system

ON THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION 201 (Brian L. Cutler ed., 2009)).

42. *Report of the Special Master, supra* note 12, at 14.

43. *Id.*

44. *Manson v. Brathwaite*, 432 U.S. 98, 119 (1977) (Marshall, J., dissenting).

45. *Report of the Special Master, supra* note 12, at 74–75.

46. The distinction between system and estimator variables was first drawn in the 1970s by psychologist and eyewitness memory expert Gary Wells. See Gary L. Wells, *Applied Eyewitness-Testimony Research: System Variables and Estimator Variables*, 36 J. PERSONALITY & SOC. PSYCHOL. 1546, 1548 (1978).

47. *Report of the Special Master, supra* note 12, at 11–12 (citing Wells, *supra* note 46).

48. *Id.*

49. *Id.* at 12 (citing hearing testimony of Drs. Gary Wells and Steven Penrod).

variables allows insight into how to prevent eyewitness identification errors before they are made.⁵⁰ Each of these types of factors is discussed in turn.

1. System Variables

The *Henderson* opinion discusses the following system variables that affect the reliability of eyewitness identifications. These factors are of special import to the justice system because they are under the control of police officials and may therefore be used to improve police procedures and reduce the incidence of mistaken identifications.⁵¹

a. Lineup Administration and Double-Blind Testing

The reliability of eyewitness testimony is highly dependent upon the police procedures used to conduct the lineup, regardless of whether the police use a live lineup or an array of photos.⁵² The most important procedure for ensuring that lineup identifications are reliable is double-blind testing, which requires the officer administering the lineup to be unaware of which person the primary investigators have identified as the suspect.⁵³ This safeguard is essential to preventing unintentional but unavoidable verbal and nonverbal influences on the witness that affect the accuracy of the identification.⁵⁴ Avoiding such influence is particularly important because “neither the administrator nor the witness is ordinarily aware of . . . the unintentional suggestions,” and as a result, “neither is in position to report or dissipate the taint.”⁵⁵

50. Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANN. REV. PSYCHOL. 277, 279 (2003).

51. *See Report of the Special Master*, *supra* note 12, at 11 (citing Wells, *Applied Eyewitness-Testimony Research*, *supra* note 46).

52. *Report of the Special Master*, *supra* note 12, at 19 (citing Gary L. Wells & C.A. Elizabeth Luus, *Police Lineups as Experiments: Social Methodology as a Framework for Properly Conducted Lineups*, 16 PERSONALITY & SOC. PSYCHOL. BULL. 106 (1990)).

53. *Report of the Special Master*, *supra* note 12, at 19–21 (citing hearing testimony of Dr. Gary Wells).

54. *Id.* at 20 (citing Richard Rosenthal & Donald B. Rubin, *Interpersonal Expectancy Effects: The First 345 Studies*, 3 BEHAV. & BRAIN SCI. 377 (1978)).

55. *Report of the Special Master*, *supra* note 12, at 20 (citing Steven E. Clark et al., *Lineup Administrator Influences on Eyewitness Identification Decisions*, 15 J. EXPERIMENTAL PSYCHOL.: APPLIED 63 (2009); Sarah M. Greathouse &

b. *Witness Instructions*

Researchers also unequivocally recommend advising the eyewitness that the perpetrator may or may not be in the lineup and that the witness need not feel compelled to make an identification.⁵⁶ This instruction has been shown to substantially decrease the risk of misidentification in two ways.⁵⁷ First, it eliminates the inference that the “police would not conduct a lineup without a suspect, that the suspect is in the array, and that it is [the witness’s] job to pick the right person.”⁵⁸ Second, the instruction counteracts eyewitnesses’ tendency to exercise relative judgment in selecting the person in the lineup who looks the most like the perpetrator, even when the actual culprit is not in the lineup.⁵⁹ The instructions that investigators give to eyewitness are one of the most useful techniques for enhancing the reliability of identifications,⁶⁰ particularly for preventing misidentifications when the true perpetrator is absent from the lineup.⁶¹

Margaret Bull Kovera, *Instruction Bias and Lineup Presentation Moderate the Effects of Administrator Knowledge on Eyewitness Identification*, 25 LAW & HUM. BEHAV. 299 (2001); see also Lynn Garrioch & C.A. Elizabeth Brimacombe, *Lineup Administrators’ Expectations: Their Impact on Eyewitness Confidence*, 25 LAW & HUM. BEHAV. 299, 313 (2001) (noting that lineup administrators affected witness confidence even when instructed to refrain from giving witnesses any feedback about the identification).

56. *Report of the Special Master*, *supra* note 12, at 21 (citing Nancy Mehrkens Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 LAW & HUM. BEHAV. 283 (1997); Steven E. Clark, *A Re-Examination of the Effects of Biased Lineup Instructions in Eyewitness Identification*, 29 LAW & HUM. BEHAV. 395 (2005); Michael R. Leippe et al., *Cueing Confidence in Eyewitness Identifications: Influence of Biased Lineup Instructions and Pre-Identification Memory Feedback Under Varying Lineup Conditions*, 33 LAW & HUM. BEHAV. 194, 196 (2009); Roy S. Malpass & Patricia G. Devine, *Eyewitness Identification: Lineup Instructions and the Absence of the Offender*, 66 J. APPLIED PSYCHOL. 482 (1981); *State v. Ledbetter*, 881 A.2d 290 (Conn. 2005), *cert. denied*, 547 U.S. 1082 (2006)).

57. *Report of the Special Master*, *supra* note 12, at 22.

58. *Id.* (citing hearing testimony of Dr. Roy Malpass); see also Malpass & Devine, *supra* note 56, at 489 (“It appears that there is a general biased task orientation, a tendency for witnesses to understand that the task of the eyewitness is to choose someone.”).

59. *Report of the Special Master*, *supra* note 12, at 22 (citing Gary L. Wells, *The Psychology of Lineup Identifications*, 14 J. APPLIED SOC. PSYCHOL. 89 (1984); Gary L. Wells, *What Do We Know About Eyewitness Identification*, 48 AM. PSYCHOLOGIST 553 (1993)).

60. *Report of the Special Master*, *supra* note 12, at 23 (citing hearing testimony of Dr. Roy Malpass).

61. *Id.* at 23–24 (citing Steblay, *supra* note 56; Clark, *supra* note 56).

c. Lineup Array Construction

Mistaken identifications are more likely when the suspect “stands out” from the other people used as fillers during lineup or photo array identification.⁶² A lineup or array composition may be biased in various ways, including when more than one suspect is placed in the lineup, when an insufficient number of fillers are used, or when fillers are selected who do not match the witness’s description of the perpetrator.⁶³ Biased lineups increase the likelihood that an innocent person will be incorrectly identified and inflate the witness’s confidence about having made a correct identification.⁶⁴

To perform a valid identification, it is crucial that investigators place only a single suspect among a lineup or array of fillers.⁶⁵ Including more than one suspect increases the likelihood of a “lucky” guess.⁶⁶ Researchers also agree that fair and reliable identifications must be made from an array that contains fillers who match the eyewitness’s initial description of the perpetrator and are sufficiently similar to the suspect’s appearance such that the suspect does not particularly stand out.⁶⁷

d. Multiple Identification Procedures

Performing multiple lineups with the same suspect and the

62. *Report of the Special Master*, *supra* note 12, at 24 (citing Roy G. Malpass et al., *Lineup Construction and Lineup Fairness*, in *THE HANDBOOK OF EYEWITNESS PSYCHOLOGY, VOL. II: MEMORY FOR PEOPLE*, 155, 155–56 (R.C.L. Lindsay et al. eds., 2007)).

63. *Report of the Special Master*, *supra* note 12, at 24 (citing Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 *LAW & HUM. BEHAV.* 603, 630–35 (1998); Gary L. Wells et al., *Eyewitness Evidence: Improving Its Probative Value*, 7 *PSYCHOL. SCI. PUB. INT’L* 45, 60–63 (2006); Wells & Olson, *supra* note 50, at 287; Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 *WIS. L. REV.* 615, 623).

64. *Report of the Special Master*, *supra* note 12, at 24–25 (citing Wells et al., *Eyewitness Identification Procedures*, *supra* note 63, at 608).

65. *Report of the Special Master*, *supra* note 12, at 25 (citing hearing testimony of Dr. Gary Wells).

66. *Id.*

67. *Id.* at 26–27 (citing Gunter Koehnken et al., *Forensic Applications of Line-Up Research*, in *PSYCHOLOGICAL ISSUES IN EYEWITNESS IDENTIFICATION* 205, 217–20 (Siegfried L. Sporer et al. eds., 1996); Steven E. Clark et al., *Regularities in Eyewitness Identification*, 32 *LAW & HUM. BEHAV.* 187 (2008); Steven E. Clark & Jennifer L. Tunnicliff, *Selecting Lineup Foils in Eyewitness Identification Experiments: Experimental Control and Real-World Simulation*, 25 *LAW & HUM. BEHAV.* 199, 212 (2001)).

same witness may undermine the reliability of any identification that is eventually made.⁶⁸ When the witness fails to identify the suspect during the first lineup, the police may later attempt another identification by placing the same suspect in a second lineup with different fillers. When this occurs, the witness may mistake an innocent suspect for the perpetrator during the second lineup merely because the suspect seemed familiar.⁶⁹ However, the witness is likely unaware that the suspect seems familiar—not because the suspect was the actual perpetrator, but only because the witness saw the suspect in the first lineup.⁷⁰ Similarly, the problem of mistaken identification is compounded because innocent people who are initially misidentified become more likely to again be misidentified in a subsequent lineup.⁷¹

e. Showup Procedures

A showup is a procedure in which the witness is presented only a single suspect for identification, typically very soon after the crime.⁷² Showup identifications are justified as necessary under certain circumstances, such as to protect public safety when a suspect is immediately picked up in vicinity of the crime or to rule out innocent bystanders before arrest.⁷³

Research has shown that showup identifications conducted within two hours of the event do not appear to risk an increased likelihood of misidentification.⁷⁴ However, outside of

68. *Id.* at 27 (citing Koehnken et al., *supra* note 67, at 217–20; Kenneth A. Deffenbacher et al., *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference*, 30 LAW & HUM. BEHAV. 287 (2006)).

69. *See, e.g.*, State v. Cromedy, 727 A.2d 457, 459–60 (N.J. 1999) (victim misidentified an innocent person eight months after viewing his photograph in an unsuccessful identification attempt immediately after the crime), *abrogated by* State v. Henderson, 27 A.3d 872 (N.J. 2011); GARRETT, *supra* note 7, at 188–89 (Steven Barnes and Anthony Green were both exonerated after unsuccessfully challenging the admission of eyewitness identifications where their photos were presented in multiple arrays).

70. *Report of the Special Master*, *supra* note 12, at 28 (citing Koehnken et al., *supra* note 67, at 218).

71. *Id.* (citing Deffenbacher et al., *supra* note 68).

72. BRIAN L. CUTLER & MARGARET BULL KOVERA, EVALUATING EYEWITNESS IDENTIFICATION 24 (2010).

73. *Report of the Special Master*, *supra* note 12, at 29 (citing hearing testimony of Dr. Gary Wells).

74. *See id.* (citing A. Daniel Yarmey et al., *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 LAW & HUM. BEHAV. 459 (1996)).

that narrow time window, showups are twice as likely to result in false identifications as regular lineup or photo array procedures that use fillers.⁷⁵ As a result, some researchers have suggested that when a showup cannot be conducted within two hours of an event that it is more reliable to instead arrest the suspect in order to conduct a lineup.⁷⁶

f. Witness Feedback

Witnesses' memories of events and their confidence in the accuracy of those memories are "highly malleable" and vulnerable to being altered by information that the witness receives either before or after making an identification.⁷⁷ Before identification, police use of leading or suggestive interview techniques creates a risk of contaminating the eyewitness's memories.⁷⁸ Researchers recommend instead using cognitive interview techniques to elicit more accurate

75. *Report of the Special Master, supra* note 12, at 30 (citing Nancy Steblay et al., *Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison*, 27 LAW & HUM. BEHAV. 459, 523 (2003)).

76. *Report of the Special Master, supra* note 12, at 29–30 (citing hearing testimony of Dr. Gary Wells; NAT'L INST. OF JUSTICE, DEP'T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999); *Roll Call Training Bull. No. 2008–27, One Person Show-Up*, DALLAS POLICE ACAD. (2008), <http://www.cga.ct.gov/jud/eyewitness/docs/dallas/Dallas,%20TX%20Show-up%20Policy.pdf>).

77. *Report of the Special Master, supra* note 12, at 30–31 (citing Gary L. Wells & Amy L. Bradfield, "Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, 83 J. APPLIED PSYCHOL. 360 (1998); Daniel B. Wright & Elin M. Skagerberg, *Postidentification Feedback Affects Real Eyewitnesses*, 18 PSYCHOL. SCI. 172 (2007); Amy L. Bradfield et al., *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPLIED PSYCHOL. 112 (2002); Amy Bradfield Douglass & Nancy Steblay, *Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect*, 20 APPLIED COGNITIVE PSYCHOL. 859 (2006); Susan Dixon & Amina Memon, *The Effects of Post-Identification Feedback on the Recall of Crime and Perpetrator Details*, 19 APPLIED COGNITIVE PSYCHOL. 935 (2005); Carolyn Semmler et al., *Effects of Postidentification Feedback on Eyewitness Identification and Nonidentification Confidence*, 89 J. APPLIED PSYCHOL. 334 (2004)).

78. *Report of the Special Master, supra* note 12, at 31 (citing Elizabeth F. Loftus, *Leading Questions and the Eyewitness Report*, 7 COGNITIVE PSYCHOL. 560, 566 (1975); Elizabeth F. Loftus & John C. Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 J. VERBAL LEARNING & VERBAL BEHAV. 585, 586 (1974); Ronald P. Fisher & Nadja Schreiber, *Interview Protocols to Improve Eyewitness Memory*, in THE HANDBOOK OF EYEWITNESS PSYCHOLOGY, VOL I: MEMORY FOR EVENTS 53, 54–55 (Michael P. Toglia et al. eds., 2006); Ronald P. Fisher, *Interviewing Victims and Witnesses of Crime*, 1 PSYCHOL. PUB. POL'Y & L. 732 (1995)).

details from witnesses with less risk of corrupting the integrity of the details recalled.⁷⁹ Cognitive techniques require the police to eschew suggestive inquiries in favor of open-ended questions, to refrain from interrupting the witness, and to instruct the witness about the type of information and level of detail required for the investigation without volunteering any specific details.⁸⁰ Officers may also use specific techniques to test the integrity of the witness's story, such as asking the witness to recall the events in reverse direction after reporting the sequence of events as it actually unfolded.⁸¹

After identification, witnesses' confidence in their identifications, as well as their memories of faces and events, are vulnerable to the effects of investigator feedback.⁸² Feedback that signals approval results in inflated witness confidence, and the effect of this confidence is amplified by jurors' tendency to find eyewitness identifications more persuasive when the witness is more certain.⁸³ Research suggests, however, that "a witness's self-reported confidence . . . is not a reliable indicator of accuracy."⁸⁴ This false

79. *Report of the Special Master, supra* note 12, at 32–33 (citing hearing testimony of Drs. Steven Penrod & Gary Wells; Wells, *Eyewitness Identification: Systemic Reforms, supra* note 63, at 55; R. Edward Geiselman et al., *Enhancement of Eyewitness Memory: An Empirical Evaluation of the Cognitive Interview*, 12 J. POLICE SCI. & ADMIN. 74 (1984)).

80. *Report of the Special Master, supra* note 12, at 32 (citing Gary L. Wells et al., *From the Lab to the Police Station: A Successful Application of Eyewitness Research*, 55 AM. PSYCHOLOGIST 581, 582–84 (2000); Wells, *Eyewitness Identification: Systemic Reforms, supra* note 63, at 55–57; Fisher & Schreiber, *supra* note 78, at 58–63; RONALD R. FISHER & R. EDWARD GEISELMAN, MEMORY-ENHANCING TECHNIQUES FOR INVESTIGATIVE INTERVIEWING: THE COGNITIVE INTERVIEW (1992)).

81. *Report of the Special Master, supra* note 12, at 32; *see also* Wells et al., *Eyewitness Evidence: Improving Its Probative Value, supra* note 63, at 57; R. Edward Geiselman & Robin Callot, *Reverse Versus Forward Recall of Script-Based Texts*, 4 APPLIED COGNITIVE PSYCHOL. 141 (1990).

82. *Report of the Special Master, supra* note 12, at 33 (citing Wells & Bradfield, *supra* note 77; Wright & Skagerberg, *supra* note 77; Bradfield et al., *supra* note 77; Douglass & Steblay, *supra* note 77; Dixon & Memon, *supra* note 77; Semmler et al., *supra* note 77).

83. *Report of the Special Master, supra* note 12, at 35 (citing Gary L. Wells et al., *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification*, 64 J. APPLIED PSYCHOL. 440 (1979); R.C.L. Lindsay et al., *Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?*, 66 J. APPLIED PSYCHOL. 79 (1981); Gary L. Wells et al., *The Tractability of Eyewitness Confidence and Its Implications for Triers of Fact*, 66 J. APPLIED PSYCHOL. 688 (1981)).

84. *Report of the Special Master, supra* note 12, at 35 (citing Neil Brewer & Gary L. Wells, *The Confidence-Accuracy Relationship in Eyewitness Identification: Effects of Lineup Instructions, Foil Similarity, and Target-Absent Base Rates*, 12

confidence has contributed to the problem of wrongful convictions.⁸⁵ This is particularly problematic because the *Manson* standard, discussed *infra*, recognizes the degree of the eyewitness's confidence as one of the factors to inform the reliability analysis.⁸⁶

g. Composite Likenesses

Witnesses are often asked to work with police artists or, more recently, software interfaces to reconstruct an image of a perpetrator's likeness from memory.⁸⁷ Research into these composite likenesses has led to pronounced consensus that both computer-generated and hand-drawn composites are largely ineffective.⁸⁸ These studies have shown that "different witnesses create quite different, and often unrecognizable, pictures of the same person."⁸⁹ Creating composites tends to contaminate witnesses' memories, increasing the likelihood of

J. EXPERIMENTAL PSYCHOL.: APPLIED 11 (2006); James D. Sauer et al., *Multiple Confidence Estimates as Indices of Eyewitness Memory*, 137 J. EXPERIMENTAL PSYCHOL.: GENERAL 528 (2008); Bruce W. Behrman & Sherrie L. Davey, *Eyewitness Identification in Acutal Criminal Cases: An Archival Analysis*, 25 LAW & HUM. BEHAV. 475 (2001); Robert Buckhout et al., *Eyewitness Identification: Effects of Suggestion and Bias in Identification from Photographs*, 6 BULL. PSYCHONOMIC SOC'Y 71 (1975)).

85. *Report of the Special Master*, *supra* note 12, at 34 (citing hearing testimony of Dr. Gary Wells ("Mistaken identifications per se do not result in the conviction of innocent people. Convictions of the innocent occur when eyewitnesses are both mistaken and certain.")).

86. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977); *see also infra* Part II.

87. *Report of the Special Master*, *supra* note 12, at 38 (citing Gary L. Wells & Lisa E. Hasel, *Facial Composite Production by Eyewitnesses*, 16 CURRENT DIRECTIONS PSYCHOL. SCI. 6 (2007)).

88. *Report of the Special Master*, *supra* note 12, at 38–39 (citing Wells & Hasel, *supra* note 87, at 7–8; Vicki Bruce et al., *Four Heads Are Better Than One: Combining Face Composites Yields Improvements in Face Likeness*, 87 J. APPLIED PSYCHOL. 894, 894 (2002); Charlie D. Frowd et al., *Contemporary Composite Techniques: The Impact of a Forensically-Relevant Target Delay*, 10 LEGAL CRIMINOLOGICAL PSYCHOL. 63, 64 (2005); Margaret Bull Kovera et al., *Identification of Computer-Generated Facial Composites*, 82 J. APPLIED PSYCHOL. 235, 235–36, 244–45 (1997)).

89. *Report of the Special Master*, *supra* note 12, at 39 (citing Wells & Hasel, *supra* note 87, at 7–8; Bruce et al., *supra* note 88, at 894; Frowd et al., *supra* note 88, at 64; Kovera et al., *supra* note 88, at 235–36, 244–45). Curiously, composites created by multiple witnesses can often be morphed together to produce a more accurate representation than either individual composite. *Report of the Special Master*, *supra* note 12, at 39 (citing Lisa E. Hasel & Gary L. Wells, *Catching the Bad Guy: Morphing Composite Faces Helps*, 31 LAW & HUM. BEHAV. 193 (2007); Bruce et al., *supra* note 88).

later misidentifications.⁹⁰ Furthermore, media broadcasting of composite images may compound the problem by further contaminating eyewitness memories and increasing other witnesses' confidence.⁹¹

h. Simultaneous and Sequential Lineups

The risk of misidentifying an innocent person is greater when the police use the traditional lineup procedure, presenting the entire array simultaneously,⁹² as compared to a lineup showing the array individually and sequentially.⁹³ The consensus explanation is that sequential lineups help to inhibit the witness's use of relative judgment to choose the person who looks the most like the actual perpetrator.⁹⁴ However, lineup procedures involve many components,⁹⁵ and researchers are continuing to investigate the individual components' effect on the relative reliability of various lineup procedures.⁹⁶ Ongoing

90. *Report of the Special Master*, *supra* note 12, at 39 (citing OFFICE OF THE ATT'Y GEN., WIS. DEPT OF JUSTICE, MODEL POLICY AND PROCEDURE FOR EYEWITNESS IDENTIFICATION 26 (2005); Gary L. Wells et al., *Building Face Composites Can Harm Lineup Identification Performance*, 11 J. EXPERIMENTAL PSYCHOL.: APPLIED 147 (2005)).

91. GARRETT, *supra* note 7, at 150.

92. *Report of the Special Master*, *supra* note 12, at 39–40 (citing R.C.L. Lindsay & Gary L. Wells, *Improving Eyewitness Identifications from Lineups: Simultaneous Versus Sequential Lineup Presentation*, 70 J. APPLIED PSYCHOL. 556, 561, 563 (1985)).

93. *Report of the Special Master*, *supra* note 12, at 40; *see also* Steblay et al., *supra* note 75, at 464; Lindsay & Wells, *supra* note 92, at 561, 563; *In re* Investigation of Thomas, 733 N.Y.S.2d 591, 596 (N.Y. Sup. Ct. 2001) (ordering sequential lineup, because “the scientific community is unanimous in finding that sequential lineups are fairer and result in a more accurate identification”).

94. *Report of the Special Master*, *supra* note 12, at 40 (citing Steblay et al., *supra* note 75, at 459–60). For example, a rape victim who was blindfolded and told police that she barely caught a glimpse of her rapist chose Habib Abdal as the “one man that looked closest to my description that I had in my head . . . of the assailant.” The victim then identified Abdal from a five-year-old mugshot. Abdal spent sixteen years in prison before he was exonerated by DNA. GARRETT, *supra* note 7, at 45–47.

95. *Report of the Special Master*, *supra* note 12, at 41 (citing Roy G. Malpass et al., *Response to Lindsay, Mansour, Beaudry, Leach and Bertrand's 'Sequential Lineup Presentation: Patterns and Policy'*, 14 LEGAL CRIMINOLOGICAL PSYCHOL. 25, 26 (2009)). Dr. Malpass and his colleagues observed that “we do not know whether sequential presentation *per se* leads to fewer false identifications.” Malpass et al., *supra*, at 26.

96. *Report of the Special Master*, *supra* note 12, at 41–42. The special master noted, for example, unanswered questions about various components of the sequential lineup: “Where does the suspect appear in the sequence? Does the witness know the number of persons available for viewing? Does the sequential

research comparing simultaneous and sequential lineups also seeks to determine the effects of different lineup protocols on the ultimate identification.⁹⁷

i. In-Court Identifications

When an eyewitness testifies at trial, pretrial identifications that were influenced by suggestive procedures are likely to be reduplicated during in-court confrontation.⁹⁸ Researchers believe that when an unfairly suggestive pretrial identification procedure is used, the residual suggestion simply carries over and influences the moment when the witness is asked, “Do you see the person that you identified here in the courtroom today?”⁹⁹

2. Estimator Variables

Estimator variables are “factors that can undermine the accuracy of eyewitness identifications but derive from the particular characteristics of the events, witnesses and perpetrators and are beyond the control of law enforcement personnel and procedures.”¹⁰⁰ Despite being beyond the control of officials, estimator variables are as relevant to the reliability of eyewitness identifications as are system variables.¹⁰¹ These factors are as capable as system variables of affecting an eyewitness’s ability to perceive and remember an event,¹⁰² and

showing terminate upon a positive identification, tentative or firm? Is the witness allowed to go back over the array?” *Id.* at 41.

97. *Id.* at 40–42 (citing hearing testimony of Dr. Gary Wells).

98. *Id.* at 42 (citing hearing testimony of Dr. Gary Wells). The special master described Dr. Wells’s testimony as “without contradiction.” *Id.*

99. *See id.* (citing Colin Tredoux et al., *Eyewitness Identification*, in *ENCYCLOPEDIA OF APPLIED PSYCHOL.*: Vol. I 875, 880 (Charles Spielberger ed., 2004). “[I]f the suspect did not commit the crime, it is still possible that familiarity can develop after the witness views mug shots and photo spreads containing pictures of the innocent suspect.” Tredoux et al. at 880. For that reason they concluded that “in-court identifications of a defendant provide little real evidence that the defendant actually committed the crime.” *Id.*

100. *Report of the Special Master*, *supra* note 12, at 42 (citing Wells, *Applied Eyewitness-Testimony Research*, *supra* note 46).

101. *Report of the Special Master*, *supra* note 12, at 42 (citing hearing testimony of Drs. Gary Wells & Steven Penrod); *see also* JIM PETRO & NANCY PETRO, *FALSE JUSTICE: EIGHT MYTHS THAT CONVICT THE INNOCENT* 146 (2010) (“While those in the justice system cannot control the estimator variables, understanding them can help ascertain the quality of the memory.”).

102. *Report of the Special Master*, *supra* note 12, at 42; *but see* Wells, *Applied Eyewitness-Testimony Research*, *supra* note 46, at 1548 (“Estimator-variable

are potentially relevant to all eyewitness evidence because they may occur at random in the real world.¹⁰³ The following sections describe the estimator variables known to affect identification reliability, as discussed in the *Henderson* opinion.

a. Stress

Moderate stress may help to increase cognitive processing and aid memory,¹⁰⁴ but high stress conditions increase the likelihood of mistaken identifications.¹⁰⁵ “Stress and fear ensure that the witness will not forget the event, but they interfere with the ability to encode reliable details.”¹⁰⁶ For example, a meta-analysis incorporating twenty-seven independent studies found that while 59 percent of eyewitnesses to a low-stress incident correctly identified the perpetrator, only 39 percent made a correct identification after a high-stress situation.¹⁰⁷ In another study, military trainees were generally only half as accurate at identifying the person who conducted a high-stress as compared to a low-stress interrogation.¹⁰⁸ Indeed, some of the subjects were rendered unable by the following day to identify even the gender of the high-stress interrogator.¹⁰⁹

b. Weapon Focus

research cannot alter the accuracy of a given witness’s account of a real crime; it can only reduce or increase the court’s reliance on the witness’s testimony.”).

103. *State v. Henderson*, 27 A.3d 872, 904 (N.J. 2011).

104. *Report of the Special Master*, *supra* note 12, at 43 (citing CUTLER & KOVERA, *supra* note 72, at 40).

105. *Report of the Special Master*, *supra* note 12, at 43 (citing Kenneth A. Deffenbacher, *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 LAW & HUM. BEHAV. 687 (2004); Tim Valentine & Jan Mesout, *Eyewitness Identification Under Stress in the London Dungeon*, 23 APPLIED COGNITIVE PSYCHOL. 151 (2008); Tredoux et al., *supra* note 99, at 878; Charles A. Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to High Intense Stress*, 27 INT’L J.L. & PSYCHIATRY 265 (2004)).

106. *Report of the Special Master*, *supra* note 12, at 43 (citing hearing testimony of Dr. Gary Wells).

107. *Id.* (citing Deffenbacher et al., *supra* note 105).

108. Morgan et al., *supra* note 105, at 267–69, 272. Some of the high-stress interrogations also included physical confrontation. The low-stress interrogations were akin to an interview.

109. *Report of the Special Master*, *supra* note 12, at 43 (citing hearing testimony of Dr. Roy Malpass).

The visible presence of a weapon during a crime has been shown to impair eyewitness memory and identification reliability by diverting the eyewitness's attention away from the perpetrator's face.¹¹⁰ This shift in focus interferes with the eyewitness's ability to encode, describe, and identify the perpetrator's face.¹¹¹ In addition, the weapon focus effect may be amplified when combined with stress,¹¹² and during crimes of short duration.¹¹³

c. Event Duration

A witness's ability to make an accurate identification is related to the amount of time that the witness was exposed to the perpetrator.¹¹⁴ Thus, momentary exposure is less likely to result in a successful identification than more protracted contact, although witnesses tend to overestimate short durations.¹¹⁵

d. Distance and Lighting

Visual acuity, recall, and identification accuracy all decrease in poor lighting.¹¹⁶ Clarity, of course, decreases with distance.¹¹⁷ Even with perfect vision and sufficient lighting,

110. *Id.* at 44 (citing Nancy Mehrkens Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 LAW & HUM. BEHAV. 413 (1992); Anne Maass & Günther Köhnken, *Eyewitness Identification: Simulating the Weapon Effect*, 13 LAW & HUM. BEHAV. 397 (1989); Elizabeth F. Loftus et al., *Some Facts About "Weapons Focus"*, 11 LAW & HUM. BEHAV. 55 (1987); Tredoux et al., *supra* note 99, at 878).

111. *Report of the Special Master*, *supra* note 12, at 44.

112. *Report of the Special Master*, *supra* note 12, at 44 (citing Deffenbacher et al., *supra* note 105).

113. *Report of the Special Master*, *supra* note 12, at 44 (citing Steblay, *supra* note 110, at 421).

114. *Report of the Special Master*, *supra* note 12, at 44 (citing Tredoux et al., *supra* note 99, at 877).

115. *Report of the Special Master*, *supra* note 12, at 44 (citing H.R. Schiffman & Douglas J. Bobko, *Effects of Stimulus Complexity on the Perception of Brief Temporal Intervals*, 103 J. EXPERIMENTAL PSYCHOL. 156 (1974); Irwin G. Sarason & Rick Stoops, *Test Anxiety and the Passage of Time*, 46 J. CONSULTING & CLINICAL PSYCHOL. 102 (1978); Elizabeth F. Loftus et al., *Time Went By So Slowly: Overestimation of Event Duration by Males and Females*, 1 APPLIED COGNITIVE PSYCHOL. 3 (1987)).

116. *Report of the Special Master*, *supra* note 12, at 45 (citing A. Daniel Yarney, *Verbal, Visual, and Voice Identification of a Rape Suspect Under Different Levels of Illumination*, 71 J. APPLIED PSYCHOL. 363, 368 (1986)).

117. *Report of the Special Master*, *supra* note 12, at 45 (citing Geoffrey R. Loftus & Erin M. Harley, *Why Is It Easier to Identify Someone Close Than Far*

facial perception begins to decay from as little as twenty-five feet and faces become practically unrecognizable past one hundred feet.¹¹⁸ To compound the problem, witnesses are particularly bad at estimating distances.¹¹⁹

e. Memory Decay

As soon as memories are made, they begin to irreversibly decay.¹²⁰ This deterioration process has consumed 20 percent of memory quality within just two hours, 30 percent within a day, and 50 percent within a month—leading to decreased accuracy of recall as time passes.¹²¹ Longer intervals between the event and identification are associated with fewer correct identifications.¹²² This decay rate is particularly meaningful when it is compared to the median 265 days that pass between arrest and conviction for felony dispositions.¹²³ Consequently, by the time most defendants get to trial, eyewitness memory has already significantly deteriorated.

f. Unconscious Transference

When a witness has seen a face before, the process of

Away?, 12 PSYCHONOMIC BULL. & REV. 43, 43 (2005); R.C.L. Lindsay et al., *How Variations in Distance Affect Eyewitness Reports and Identification Accuracy*, 32 LAW & HUM. BEHAV. 526 (2008); Christian A. Meissner et al., *Person Descriptions as Eyewitness Evidence*, in THE HANDBOOK OF EYEWITNESS PSYCHOLOGY, VOL II: MEMORY FOR PEOPLE 3, 8 (R.C.L. Lindsay et al. eds., 2007); Geoffrey R. Loftus, *Perception: Effects of Luminance on Available Information and Information-Extraction Rate*, 114 J. EXPERIMENTAL PSYCHOL.: GENERAL 324 (1985)).

118. *Report of the Special Master*, *supra* note 12, at 45 (citing Wells & Quinlivan, *supra* note 11, at 9–10; Loftus & Harley, *supra* note 117, at 63).

119. *Report of the Special Master*, *supra* note 12, at 45 (citing Lindsay et al., *supra* note 117; William M. Wiest & Brian Bell, *Stevens's Exponent for Psychophysical Scaling of Perceived, Remembered, and Inferred Distance*, 98 PSYCHOL. BULL. 457 (1985); Bob G. Witmer & Paul B. Kline, *Judging Perceived and Traversed Distance in Virtual Environments*, 7 PRESENCE 144 (1998)).

120. *Report of the Special Master*, *supra* note 12, at 45 (citing hearing testimony of Dr. Gary Wells).

121. *Id.* (citing Kenneth A. Deffenbacher et al., *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation*, 14 J. EXPERIMENTAL PSYCHOL.: APPLIED 139 (2008)).

122. *Report of the Special Master*, *supra* note 12, at 45 (citing Peter Shapiro & Steven Penrod, *Meta Analysis of Facial Identification Studies*, 100 PSYCHOL. BULL. 139 (1986)).

123. BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006 at 24 (2009). For the most serious felonies, the amount of time between arrest and sentencing increases. The median period between arrest and sentencing is 348 days for sexual assault convictions, and 505 days for murder convictions. *Id.*

unconscious transference may cause the witness to mistake a person seen at or near the crime scene—or in a previous lineup—for the actual perpetrator.¹²⁴ This type of “bystander error” is most commonly associated with complicated crimes involving multiple persons or actions, but may also occur when a mistaken familiarity derives from a completely unrelated context.¹²⁵ This variable may interact with the multiple administration system variable,¹²⁶ leading witnesses to mistakenly identify a person they have seen only in a prior lineup.¹²⁷

g. Eyewitness Age

Research has demonstrated that age has direct bearing on a person’s accuracy as an eyewitness.¹²⁸ Witness accuracy peaks in adolescence or early adulthood,¹²⁹ and both younger and older witnesses are considerably less accurate.¹³⁰

124. *Report of the Special Master*, *supra* note 12, at 46 (“A positive identification indicates that the person identified is familiar to the witness, but the familiar person may not be the culprit.”) (citing Kenneth A. Deffenbacher et al., *supra* note 68, at 289, 306).

125. *Report of the Special Master*, *supra* note 12, at 46 (citing Kenneth A. Deffenbacher et al., *supra* note 68). For example, a victim misidentified psychologist Dr. Donald Thompson from a photo lineup because she watched him participate in a live television panel discussion while she was raped. JAMES M. DOYLE, TRUE WITNESS: COPS, COURTS, SCIENCE, AND THE BATTLE AGAINST MISIDENTIFICATION 105 (2005).

126. *See supra* Part I.B.1.d.

127. *See, e.g.*, *State v. Cromedy*, 727 A.2d 457, 459–60 (N.J. 1999), *abrogated* by *State v. Henderson*, 27 A.3d 872 (N.J. 2011).

128. *Report of the Special Master*, *supra* note 12, at 46 (citing Thomas E. O’Rourke et al., *The External Validity of Eyewitness Identification Research: Generalizing Across Subject Populations*, 13 LAW & HUM. BEHAV. 385 (1989); Gary L. Wells & Elizabeth F. Loftus, *Eyewitness Testimony*, 54 ANN. REV. PSYCHOL. 277, 280 (2003); Joanna D. Pozzulo & R.C.L. Lindsay, *Identification Accuracy of Children Versus Adults: A Meta-Analysis*, 22 LAW & HUM. BEHAV. 549 (1998); James C. Bartlett & Amina Memon, *Eyewitness Memory in Young and Older Adults*, in THE HANDBOOK OF EYEWITNESS PSYCHOLOGY, VOL II: MEMORY FOR PEOPLE 309 (R.C.L. Lindsay et al. eds, 2007)).

129. Among adults, eighteen and nineteen year-olds demonstrate the highest percentage of correct identifications, and accuracy decreases with age. O’Rourke et al., *supra* note 128, at 392. Children as young as five are as good as adults at making correct identifications, but until at least early adolescence children are much more likely than adults to misidentify an innocent person in a target-absent lineup. Pozzulo & Lindsay, *supra* note 128, at 563, 565. It is not yet clear when adolescents’ overall identification accuracy reaches that of adults. *Id.* at 565.

130. *Report of the Special Master*, *supra* note 12, at 46 (citing O’Rourke et al., *supra* note 128; Bartlett & Memon, *supra* note 128, at 332; Yarmey, *supra* note 74; Pozzulo & Lindsay, *supra* note 128).

Children's accuracy increases with age,¹³¹ while witnesses in their sixties are half as accurate as the peak group.¹³²

h. Intoxication

Drugs and alcohol each have distinct effects on memory, although the results may differ depending upon the individual witness.¹³³ Studies examining the effects of alcohol on identifications have mostly found that the risk of false identifications is heightened with increased alcohol consumption.¹³⁴ Consumption of two to three drinks has been found to interfere with the encoding phase in which new memories are acquired, while the retrieval of memories remains relatively intact.¹³⁵ Researchers have observed that drunken eyewitnesses are equally as accurate as sober ones when choosing a perpetrator from a photo lineup or showup, but are significantly more likely to falsely identify an innocent person when the true perpetrator is not present.¹³⁶ The effects of specific drugs on eyewitnesses' abilities have received very little research attention to date.¹³⁷

131. *Report of the Special Master*, *supra* note 12, at 46 (citing Pozzulo & Lindsay, *supra* note 128).

132. *Report of the Special Master*, *supra* note 12, at 46–47 (citing Bartlett & Memon, *supra* note 128, at 332).

133. LOFTUS ET AL., EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL, *supra* note 34, at 46.

134. *Report of the Special Master*, *supra* note 12, at 47 (citing Jennifer E. Dysart et al., *The Intoxicated Witness: Effects of Alcohol on Identification Accuracy from Showups*, 87 J. APPLIED PSYCHOL. 170 (2002); Meissner et al., *supra* note 117; John C. Yuille & Patricia A. Tollestrup, *Some Effects of Alcohol on Eyewitness Memory*, 75 J. APPLIED PSYCHOL. 268 (1990)); *but see* Nadja Schreiber Compo et al., *Intoxicated Eyewitnesses: Better Than Their Reputation?*, 36 LAW & HUM. BEHAV. 77, 81 (2012) (suggesting that drunken eyewitnesses are no worse than sober ones).

135. LOFTUS ET AL., EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL, *supra* note 34, at 47 (citing ISABEL M. BIRNBAUM & ELIZABETH S. PARKER, ALCOHOL AND HUMAN MEMORY (1977); Shahin Hashtroudi et al., *On Elaboration and Alcohol*, 22 J. VERBAL LEARNING & VERBAL BEHAV. 164 (1983)).

136. *See* Dysart et al., *supra* note 134, at 5. Researchers' descriptions of alcohol's effects on memory closely resemble descriptions of children's recall abilities. *See supra* Part I.B.2.g.

137. *See* LOFTUS ET AL., EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL, *supra* note 34, at 48–50. Consumption of marijuana in doses typical of social use has been shown to affect the encoding phase during which new memories are acquired. *Id.* (citing Loren Miller et al., *Marijuana: An Analysis of Storage and Retrieval Deficits in Memory with the Technique of Restricted Reminding*, 8 PHARMACOLOGY BIOCHEM. & BEHAV. 327 (1978); Loren Miller & Roland J. Braconnier, *Cannabis: Effects on Memory and the Cholinergic Limbic System*, 93

i. *Distinctive Features, Disguises, and Facial Changes*

Distinctive faces are more accurately remembered and identified,¹³⁸ but disguises (such as sunglasses, hats, or masks) have the opposite effect.¹³⁹ Changes to a suspect's appearance between the event and the identification (such as growing or shaving off facial hair) may also impair accuracy, possibly by as much as 50 percent.¹⁴⁰

j. *Cross-Racial Identifications*

Witnesses are more accurate at identifying perpetrators of their own race as compared to other races,¹⁴¹ and misidentifications are more likely in cross-racial identifications.¹⁴² While various explanations have been

PSYCHOL. BULL. 441 (1983)). The one published study that directly addresses the effects of marijuana on eyewitness recall found that subjects who had smoked marijuana demonstrated less accurate recall than sober subjects on the day of the event, but that there were no differences between the two groups when they were re-tested one week later. *Id.* (citing John C. Yuille et al., *An Exploration on the Effects of Marijuana on Eyewitness Memory*, 21 INT'L J. LAW & PSYCHIATRY 117 (1998)). On the other hand, poor recall related to alcohol intoxication has been found to persist after a week. Yuille & Tollestrup, *supra* note 134, at 272.

138. *Report of the Special Master, supra* note 12, at 47 (citing John C. Brigham, *Target Person Distinctiveness and Attractiveness as Moderator Variables in the Confidence-Accuracy Relationship in Eyewitness Identifications*, 11 BASIC & APPLIED PSYCHOL. 101 (1990)).

139. *Report of the Special Master, supra* note 12, at 47 (citing Brian L. Cutler et al., *Improving the Reliability of Eyewitness Identification: Putting Context in Context*, 72 J. APPLIED PSYCHOL. 629 (1987)).

140. *Report of the Special Master, supra* note 12, at 47 (citing K.E. Patterson & A.D. Baddeley, *When Face Recognition Fails*, 3 J. EXPERIMENTAL PSYCHOL.: HUM. LEARNING & MEMORY 406 (1977)).

141. *Report of the Special Master, supra* note 12, at 48 (citing Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL'Y & L. 3 (2001); Roy S. Malpass & Jerome Kravitz, *Recognition for Faces of Own and Other Race*, 13 J. PERSONALITY & SOC. PSYCHOL. 330 (1969); Robert K. Bothwell et al., *Cross-Racial Identification*, 15 PERSONALITY & SOC. PSYCHOL. BULL. 19 (1989); Tara Anthony et al., *Cross-Racial Facial Identification: A Social Cognitive Integration*, 18 PERSONALITY & SOC. PSYCHOL. BULL. 296 (1992); Kirin F. Hilliar et al., *Now Everyone Looks the Same: Alcohol Intoxication Reduces the Own-Race Bias in Face Recognition*, 34 LAW & HUM. BEHAV. 367 (2010)).

142. *Report of the Special Master, supra* note 12, at 48 (citing Meissner & Brigham, *supra* note 141, at 15). Even the *Manson v. Brathwaite* Court recognized the role of race in making accurate identifications. See Jules Epstein, *The Great Engine That Couldn't: Science, Mistaken Identification, and the Limits of Cross-Examination*, 36 STETSON L. REV. 727, 760 (2007) (citing *Manson v. Brathwaite*, 432 U.S. 98, 115 (1977) (because the witness was black, he was "unlikely to

posited for witnesses' better ability to identify people of their own race, the factors that appear to best explain cross-racial identification deficiencies include the amount of contact that witnesses have with persons who belong to other racial groups, the amount of attention witnesses pay to persons of other races, and the amount of time that witnesses spend encoding features that are not as useful in identifying people from other racial groups.¹⁴³

Each of the system and estimator variables discussed here was influential on the *Henderson* court's decision to uproot *Manson*. The court found that the amassed research "casts doubt on some commonly held views relating to memory" and provides "convincing proof that the current test for evaluating the trustworthiness of eyewitness identifications should be revised."¹⁴⁴ Further, the court rejected the State's arguments that currently available tools—jurors' common sense and vigorous cross-examination—are sufficient to counteract misconceptions about how memory works.¹⁴⁵ The following section concludes this Part by discussing special concerns that are raised when scientific understanding presents a picture not in harmony with common sense, and exploring the limitations of effectively cross-examining honest but mistaken witnesses.

C. *The Limited Utility of Common Sense and Cross-Examination*

The scientific findings discussed above are particularly troubling when considered alongside the fact that jurors generally know little about the results of scientific inquiry into eyewitness testimony, and indeed often hold beliefs that are incompatible with research results.¹⁴⁶ Survey data show that

perceive only general features" of other black men)).

143. See John C. Brigham et al., *The Influence of Race on Eyewitness Memory*, in THE HANDBOOK OF EYEWITNESS PSYCHOLOGY, VOL. II: MEMORY FOR PEOPLE, 257, 265–71 (R.C.L. Lindsay et al. eds., 2007).

144. State v. Henderson, 27 A.3d 872, 877 (N.J. 2011).

145. *Id.* at 915, 924.

146. See *Report of the Special Master*, *supra* note 12, at 48 (citing, e.g., Melissa Boyce et al., *Belief of Eyewitness Identification Evidence*, in THE HANDBOOK OF EYEWITNESS PSYCHOLOGY, VOL II: MEMORY FOR PEOPLE 501 (R.C.L. Lindsay et al. eds., 2007); John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 LAW & HUM. BEHAV. 19 (1983); Tanja Rapus Benton et al., *Has Eyewitness Testimony Research Penetrated the American Legal System? A Synthesis of Case History, Juror Knowledge, and Expert Testimony*, in THE HANDBOOK OF EYEWITNESS

“jurors underestimate the importance of proven indicators of accuracy (e.g., lineup instructions, memory retention interval, lighting conditions, cross-race identification, weapon presence), tend to rely heavily on factors that the research finds are not good indicators of accuracy (e.g., witness confidence), and tend to overestimate witness accuracy rates.”¹⁴⁷

Neither jurors nor scientists can distinguish accurate from inaccurate identifications because eyewitnesses are usually genuinely mistaken, not intentionally lying.¹⁴⁸ Cross-examination often proves to be an insufficient tool because eyewitnesses tend to be confident in their identifications, regardless of whether or not they are accurate.¹⁴⁹ Unfortunately, jurors often rely on the common sense (but completely wrong) belief that the eyewitness’s confidence in her identification accurately reflects her reliability.¹⁵⁰ After all, “there is almost *nothing more convincing* than a live human

PSYCHOLOGY, VOL II: MEMORY FOR PEOPLE 453 (R.C.L. Lindsay et al. eds., 2007); John S. Shaw III et al., *A Lay Perspective on the Accuracy of Eyewitness Testimony*, 29 J. APPLIED SOC. PSYCHOL. 52 (1999); Pozzulo & Lindsay, *supra* note 128; Gary L. Wells & Michael R. Leippe, *How Do Triers of Fact Infer the Accuracy of Eyewitness Identifications? Using Memory for Peripheral Detail Can Be Misleading*, 66 J. APPLIED PSYCHOL. 682 (1981); Brian L. Cutler et al., *Juror Sensitivity to Eyewitness Identification Evidence*, 14 LAW & HUM. BEHAV. 185 (1990); Richard S. Schmechel et al., *Beyond the Ken? Testing Jurors’ Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS J. 177 (2006); Tanja Rapus Benton et al., *Eyewitness Memory Is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts*, 20 APPLIED COGNITIVE PSYCHOL. 115 (2006)).

147. *Report of the Special Master, supra* note 12, at 49 (citing Benton et al., *Has Eyewitness Testimony Research Penetrated the American Legal System?*, *supra* note 146, at 475–87; Boyce et al., *supra* note 146).

148. *Report of the Special Master, supra* note 12, at 50 (citing Brian L. Cutler & Steven D. Penrod, *The Ability of Jurors to Differentiate Between Accurate and Inaccurate Eyewitnesses*, in *MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW* (1995); Wells et al., *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification, supra* note 83; Lindsay et al., *supra* note 83; Wells et al., *The Tractability of Eyewitness Confidence and Its Implications for Triers of Fact, supra* note 83).

149. GARRETT, *supra* note 7, at 54; DOYLE, *supra* note 11, at 43 (the longer a defense attorney cross-examines, the more opportunities the eyewitness has to demonstrate confidence to the jury). Jurors tend to believe a confident but mistaken eyewitness just as much as a confident and correct one given similar viewing context. DOYLE, *supra* note 11, at 44 (citing Lindsay et al., *supra* note 83).

150. *Report of the Special Master, supra* note 12, at 50 (citing Cutler et al., *supra* note 146; Wells et al., *Eyewitness Evidence: Improving Its Probative Value, supra* note 63, at 65; Wells et al., *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification, supra* note 83; Lindsay et al., *supra* note 83; Wells et al., *The Tractability of Eyewitness Confidence and Its Implications for Triers of Fact, supra* note 83).

being who takes the stand, points a finger at the defendant, and says "That's the one!"¹⁵¹

In addition, because most eyewitnesses are honestly mistaken, "cross-examination is of limited utility."¹⁵² An eyewitness's sincere belief that his or her testimony is accurate is likely to render typical cross-examination techniques ineffective.¹⁵³ For example, cross-examiners usually try to show that a witness is testifying inaccurately by eliciting a suspicious demeanor.¹⁵⁴ But with a sincerely mistaken eyewitness, such "aggressive probing" is likely only to reveal the demeanor of a "sincere, truth-telling witness."¹⁵⁵ Cross-examination is intended to "winnow out truth from falsehood,"¹⁵⁶ so it proves to be an ineffective tool for exposing mistaken identifications to the jury.¹⁵⁷ Further, eyewitnesses are often innocent victims or bystanders "with no particular ax to grind."¹⁵⁸ Jurors are more likely to sympathize with this type of witness and to see the case through their eyes, and as a result, may be likely to perceive cross-examination techniques as particularly offensive.¹⁵⁹

These basic failures are stacked on top of the "enormous" disadvantage that cross-examiners face when questioning eyewitnesses.¹⁶⁰ Jurors often have a "nearly religious faith in the accuracy of eyewitness accounts."¹⁶¹ This blind faith in eyewitness accuracy may lead jurors to dismiss or ignore evidence that shows, contrary to jurors' preconceptions, that the witness might be wrong.¹⁶² Thus, jurors may generally

151. *Watkins v. Sowders*, 449 U.S. 341, 352 (Brennan, J., dissenting) (quoting ELIZABETH LOFTUS, *EYEWITNESS TESTIMONY* 19 (1979)).

152. *Report of the Special Master*, *supra* note 12, at 50 (citing hearing testimony of Professor Jules Epstein).

153. LOFTUS ET AL., *EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL*, *supra* note 34, at 292.

154. *Id.* ("Normally if a witness is lying, concealing facts, or stretching the truth, the adversary system expects that, when confronted by a skilled lawyer, the witness will display a wealth of gestures, pauses, hesitations, and tones that will demonstrate to the jurors that the witness is dissembling.")

155. *Id.*

156. Epstein, *supra* note 142, at 727 (citing John H. Wigmore, 5 *EVIDENCE* § 1367 (3d ed. 1940)).

157. *Id.* at 766 ("A tool designed from its inception to root out liars is ill-suited for the task of exposing the risk or reality of mistaken identification.")

158. LOFTUS ET AL., *EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL*, *supra* note 34, at 292.

159. *Id.* at 293.

160. *Id.* at 291.

161. *Id.*

162. *Id.* (citing James M. Doyle, *Applying Lawyers' Expertise to Scientific*

resist cross-examination and other “efforts to undermine their faith in what ‘common sense’ has always told them is true.”¹⁶³

The ubiquity of gut-level misunderstandings about memory and eyewitness identifications and their resistance to effective cross-examination—the “greatest legal engine ever invented for the discovery of truth”¹⁶⁴—compounds the problem of presenting eyewitness identification testimony to the jury. In light of these concerns and the scientific consensus about memory, the *Henderson* court held that the prevailing *Manson* standard for admitting eyewitness identification testimony “does not adequately meet its stated goals: it does not provide a sufficient measure for reliability, it does not deter, and it overstates the jury’s innate ability to evaluate eyewitness testimony.”¹⁶⁵

Part II now explains the *Manson v. Brathwaite* standard and explores the *Henderson* court’s reasons for questioning its sufficiency.

II. THE *MANSON V. BRATHWAITE* STANDARD AND ITS SHORTCOMINGS

In the 1977 case of *Manson v. Brathwaite*, the Supreme Court articulated the prevailing standard that trial courts use to evaluate the admissibility of eyewitness identification testimony.¹⁶⁶ The *Manson* Court was primarily concerned with formulating a test to determine whether suggestive police procedures¹⁶⁷ have rendered identification testimony inadmissible under the Due Process Clause of the Fourteenth

Experts, 25 WM. & MARY L. REV. 619 (1984)).

163. LOFTUS ET AL., EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL, *supra* note 34, at 291 (citing Ruth McGaffey, *The Expert Witness and Source Credibility—The Communication Perspective*, 2 AM. J. TRIAL ADVOC. 57, 60 (1978)).

164. *California v. Green*, 399 U.S. 149, 158 (1970) (quoting Wigmore, *supra* note 156, § 1367).

165. *State v. Henderson*, 27 A.3d 872, 918 (N.J. 2011).

166. 432 U.S. 98 (1977). The United States Supreme Court recently held that *Manson v. Brathwaite* remains the prevailing due process analysis for eyewitness identifications, and declined to extend protections to suggestive circumstances that are not the result of law enforcement conduct. *Perry v. New Hampshire*, 132 S.Ct. 716, 724–25 (2012).

167. The *Manson* opinion did not define what it meant by “suggestive” procedures. It was not until *Perry v. New Hampshire* that the Court explained that due process protections are required “when the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime.” 132 S.Ct. 716, 720 (2012).

Amendment.¹⁶⁸ Under *Manson*, “reliability is the linchpin” when determining whether eyewitness testimony should be admitted at trial.¹⁶⁹

When the New Jersey Supreme Court initially adopted the *Manson* analysis, it concisely summarized *Manson’s* two-step test as follows:

[A] court must first decide whether the procedure in question was in fact impermissibly suggestive. If the court does find the procedure impermissibly suggestive, it must then decide whether the objectionable procedure resulted in a “very substantial likelihood of irreparable misidentification.” In carrying out the second part of the analysis, the court will focus on the reliability of the identification. If the court finds that the identification is reliable despite the impermissibly suggestive nature of the procedure, the identification may be admitted into evidence.¹⁷⁰

The first step requires courts to account for the potential “degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification.”¹⁷¹ A procedure is considered suggestive if law enforcement actions pressured the eyewitness to make an identification (or failed to relieve pressures on the witness to do so).¹⁷² Procedures are also suggestive when investigators give the witness cues about which person is the suspect, or whether the identification was correct or incorrect.¹⁷³

If an identification is initially determined to be impermissibly suggestive, the court must consider any factors that might counterbalance the suggestiveness to produce a reliable identification.¹⁷⁴ To guide the second step reliability analysis, *Manson* instructs trial courts to apply a five-factor test¹⁷⁵ when assessing whether the totality of the

168. *Manson*, 432 U.S. at 114.

169. *Id.*

170. *State v. Madison*, 536 A.2d 254, 258–59 (N.J. 1988) (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)).

171. *United States v. Wade*, 388 U.S. 218, 228 (1967).

172. *Wells & Quinlivan*, *supra* note 11, at 6 (2009). One effective way to relieve pressure on the witness to make an identification is to inform the witness that the culprit may or may not be present in the lineup. *Id.*; *see supra* Part I.B.1.b.

173. *Id.*

174. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

175. The United States Supreme Court initially identified the five factors

circumstances reflects that the eyewitness testimony is reliable despite suggestive police conduct.¹⁷⁶ The five factors to be considered are: (1) the opportunity of the witness to view the perpetrator at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the perpetrator; (4) the level of certainty the witness demonstrated during the identification; and (5) the amount of time between the crime and the identification.¹⁷⁷ To determine whether the testimony should be admitted, these factors are weighed against the degree to which the suggestiveness of the identification procedures corrupted the result.¹⁷⁸

The *Henderson* court identified three assumptions upon which the Court relied in formulating the *Manson* standard: "(1) that it would adequately measure the reliability of eyewitness testimony, (2) that the test's focus on suggestive police procedure would deter improper practices, and (3) that jurors would recognize and discount untrustworthy eyewitness testimony."¹⁷⁹ The *Henderson* court concluded that these assumptions and other factors relevant to the *Manson* standard are no longer valid for the following five reasons.¹⁸⁰

First, *Manson* does not adequately measure the reliability of eyewitness testimony because the test stands in conflict with the research consensus that both system and estimator variables must be taken into consideration in order to fully assess the reliability of eyewitness identifications.¹⁸¹ *Manson* requires defendants to show that system variables (factors related to law enforcement identification processes) created an impermissibly suggestive identification procedure before the court may consider any estimator variables (incidental factors

incorporated into the *Manson* standard in the case of *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972). In *Biggers*, the victim identified the defendant after being attacked and raped by a stranger, first in her dark kitchen and then outdoors by moonlight. *Id.* at 193–94. Seven months later, the victim later provided voice and visual identifications of the defendant, Archie Biggers, during a showup procedure at the police station. *Id.* at 195. Upon review, the Court held that although the identification procedure the police used had been unnecessarily suggestive, it was nonetheless reliable when considering the totality of the circumstances and therefore posed no significant risk of misidentification. *Id.* at 199–200.

176. *Manson*, 432 U.S. at 114 (citing *Biggers*, 409 U.S. at 199–200).

177. *Id.*

178. *Id.*

179. *State v. Henderson*, 27 A.3d 872, 918 (N.J. 2011) (citing *Manson*, 432 U.S. at 112–16).

180. *Id.*

181. *Report of the Special Master*, *supra* note 12, at 12; *see also supra* Part I.B.

that cannot be controlled by the criminal justice system) that may also have compromised the reliability of the identification.¹⁸² Thus, the *Manson* standard guides courts to think too narrowly about what constitutes suggestiveness.¹⁸³

Second, many of the reliability factors that trial courts must consider under *Manson*'s second prong are untrustworthy because they may be skewed by suggestive procedures.¹⁸⁴ Three of the five *Biggers* elements—the opportunity to view the crime, witness's degree of attention, and degree of certainty at the time of identification—rely on the witness's self-reports, which are susceptible to contamination by suggestive identification procedures.¹⁸⁵ “Self-reporting by eyewitnesses is an essential part of any investigation, but when reports are tainted by suggestive process, they become poor measures in a balancing test designed to bar unreliable evidence.”¹⁸⁶

Third, instead of producing a deterrent effect, the *Manson* standard may actually reinforce suggestive police procedures.¹⁸⁷ The *Henderson* court noted the irony that “the more suggestive the procedure, the greater the chance eyewitnesses will seem confident and report better viewing conditions.”¹⁸⁸ Thus, the five factors courts should consider under *Manson* to counterbalance evidence of suggestiveness may be contaminated because the factors can be skewed by the suggestive procedure itself.

Fourth, *Manson*'s “all-or-nothing approach” prescribes suppression as the only available remedy for questionable eyewitness testimony, yet in practice few judges choose to suppress eyewitness evidence.¹⁸⁹ The *Henderson* court was concerned that such a binary approach was insufficient to accommodate the complexities of eyewitness identifications and that as a result, trial judges were more likely to admit relevant but questionably reliable evidence.¹⁹⁰

Finally, the *Manson* standard instructs judges to look to “the totality of the circumstances” in determining whether

182. *Report of the Special Master, supra* note 12, at 12. Both types of variables are discussed in more detail, *supra* Part I.B.1–2.

183. *See* Wells & Quinlivan, *supra* note 11, at 14–16.

184. *Henderson*, 27 A.3d at 918.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 918–19.

190. *Id.* at 919.

eyewitness testimony is reliable; however, in practice, trial courts are more likely to merely review the five factors in checklist fashion.¹⁹¹ *Manson* provides no advice on which additional factors may be considered, and fact finders are often left to decide for themselves which variables are more relevant than others.¹⁹² The *Henderson* court found this lack of guidance unacceptable in light of our current understanding of those variables.

The *Henderson* court's criticisms of the *Manson* standard are consistent with the New Jersey Supreme Court's prior opinions, which reflect a progressive awareness of cognitive and administrative factors that contribute to identification reliability.¹⁹³ These predecessor cases, discussed in Part III, paved the way for the court's willingness to refine its approach to eyewitness testimony. Part III also explores other efforts within the New Jersey legal and law enforcement communities that may have primed the court to recognize the need for reform. Combined with mounting evidence that eyewitness misidentifications have contributed to wrongful convictions, this environment set the stage for the *Henderson* court's decision to overhaul its system for admitting eyewitness identification testimony.

III. NEW JERSEY'S PROGRESSIVE APPROACH TO EYEWITNESS IDENTIFICATIONS IN THE FACE OF INCREASING EVIDENCE OF MISIDENTIFICATIONS

This Part examines three factors that may have contributed to the *Henderson* court's decision to overhaul its procedures for admitting eyewitness identification testimony. First, a series of predecessor cases primed the court to apply social science data to create holistic and practical procedural safeguards. Second, New Jersey law enforcement agencies

191. *Id.*

192. *Id.* "A separate concern is the malleability, if not the manipulability, of this test, where judicial discretion can easily and selectively find reliability." Epstein, *supra* note 142, at 754 (citing George C. Thomas III, *The Criminal Procedure Road Not Taken: Due Process and the Protection of Innocence*, 3 OHIO ST. J. CRIM. L. 169, 192 (2005) (stating that "[r]ather than manifest any real concern about the risk of false identification, the Court has crafted a 'totality of the circumstances' test that is completely malleable. If a trial court wants to admit an identification that came from a suggestive, unnecessary procedure, it can do so.")).

193. *See infra* Part III.A.

voluntarily adopted improved identification procedures that better comport with our current understanding of how memories are formed, stored, and retrieved. And third, the court recognized that erroneous eyewitness identifications have contributed to most wrongful convictions.

A. Predecessor Cases

Following its initial adoption of the *Manson* standard,¹⁹⁴ the New Jersey Supreme Court issued a series of opinions illustrating its forward-looking approach to accommodating a growing scientific understanding of eyewitness identifications. These cases helped to pave the way for the *Henderson* court's abrogation of the *Manson* standard.

In the 1999 *Cromedy* case, discussed at the introduction to this Note, the New Jersey Supreme Court relied on social science research showing that cross-racial identifications are less accurate than same-race identifications.¹⁹⁵ The court responded to this disparity by directing trial courts to use jury instructions to address the unreliability of cross-racial identifications,¹⁹⁶ particularly when the identification is critical to the case and is not corroborated by independent evidence.¹⁹⁷ The unanimous *Cromedy* decision marked the inception of the court's enhanced use of cautionary instructions to guide the jury's use of eyewitness identification evidence.¹⁹⁸

The 2007 case *State v. Romero* declined to extend the *Cromedy* holding to require jury instructions for cross-ethnic identifications but did lead to new instructions urging jurors to critically consider the many factors that affect eyewitness reliability.¹⁹⁹ The *Romero* court recognized that eyewitness

194. See *State v. Madison*, 536 A.2d 254 (N.J. 1988).

195. *State v. Cromedy*, 727 A.2d 457, 461–62 (N.J. 1999).

196. New Jersey's current iteration of the *Cromedy* instruction states: "Research has shown that people may have greater difficulty in accurately identifying members of a different race. You should consider whether the fact that the witness and the defendant are not of the same race may have influenced the accuracy of the witness's identification." *New Jersey Model Jury Charges, Identification: In-Court and Out-of-Court Identifications*, NEW JERSEY COURTS § (5), <http://www.judiciary.state.nj.us/criminal/charges/idinout.pdf> (effective Sept. 4, 2012).

197. *Cromedy*, 727 A.2d at 467.

198. *Id.* at 467–68.

199. 922 A.2d 693, 695 (N.J. 2007). The *Romero* court cited the lack of social science research linking unreliable identifications to ethnic differences in the same way that racial differences had been shown to affect reliability. *Id.* at 698–

testimony is an area that requires “vigilant supervision” because of the significant impact that eyewitness identifications have in criminal prosecutions.²⁰⁰ This provided sufficient justification for the court to demand that the jury instructions call special attention to the scrutiny and critical analysis required when evaluating eyewitness testimony in all cases.²⁰¹ As a result, *Romero* required trial courts to add the following language immediately before the instructions, informing the jury of the factors it may consider when gauging the reliability and believability of eyewitness testimony:

Although nothing may appear more convincing than a witness’s categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken. Therefore, when analyzing such testimony, be advised that a witness’s level of confidence, standing alone, may not be an indication of the reliability of the identification.²⁰²

This type of instruction is intended not only to direct jurors’ attention to the factors that affect eyewitness testimony reliability, but also to explain how those factors work.²⁰³ Even though New Jersey’s pattern jury instructions already included specific factors relevant to eyewitness testimony,²⁰⁴ the *Romero* court cited concern about the fallibility of eyewitness testimony and the extent to which such testimony has been implicated in wrongful convictions as justification for further improving the instructions.²⁰⁵

In 2006, the court in *State v. Herrera* expanded its use of scientific information about perception and memory to address

99 (referencing a lack of meta-analysis of cross-ethnicity bias and sparse, shaky research specifically addressing the ability of non-Hispanic witnesses to reliably identify Hispanic suspects, in contrast to compilation studies relied upon in *Cromedy* relating to cross-racial bias).

200. *Id.* at 695.

201. *Id.* at 702.

202. *Id.* at 702–03.

203. LOFTUS ET AL., EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL, *supra* note 34, at 434.

204. *Romero*, 922 A.2d at 700. The factors integrated into the instruction recounted in *Romero* were: (1) opportunity to view the perpetrator, (2) degree of attention, (3) accuracy of the description reported, (4) degree of witness certainty, (5) time between the incident and identification, and (6) the circumstances under which the identification was made. *Id.*

205. *Id.* at 702.

“showup” procedures.²⁰⁶ As discussed, a showup occurs when the police present a witness with a single suspect and ask, “Is this the guy?”²⁰⁷ The *Herrera* court intimated that showup procedures are inherently suggestive, and therefore should only be admissible when shown to be sufficiently reliable under the totality of the circumstances.²⁰⁸ However, the court determined that the record on appeal in the case was insufficient to support changing the rule to a totality test.²⁰⁹ After reviewing the *Manson* standard and the defendant’s arguments for abandoning it, the court concluded that “[u]ntil we are convinced that a different approach is required after a proper record has been made in the trial court, we continue to follow the Supreme Court’s approach.”²¹⁰

Soon thereafter, in *State v. Delgado*, the court mandated that “law enforcement officers make a written record detailing the out-of-court identification procedure, including the place where the procedure was conducted, the dialogue between the witness and the interlocutor, and the results.”²¹¹ Without these precautions, out-of-court identifications are rendered inadmissible.²¹² The *Delgado* decision was premised on an implicit recognition that law enforcement actions may impact the reliability of eyewitness identifications and, thus, requires that officers carefully document their procedures and interactions for later analysis.²¹³

These cases illustrate the evolution in the New Jersey Supreme Court’s judicial decision-making in eyewitness

206. 902 A.2d 177 (N.J. 2006).

207. See *supra* Part I.B.1.e; see also LOFTUS ET AL., EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL, *supra* note 34, at 90.

208. *Herrera*, 902 A.2d at 185.

209. *Id.* at 181.

210. *Id.* at 183. The *Herrera* court’s demand for a proper record before overhauling the *Manson* standard foreshadowed *Henderson*’s unique procedural course. The *Henderson* court recognized *Manson*’s “possible shortcomings,” but concluded that there was an “inadequate factual record” upon which to test the validity of the current standard. *State v. Henderson*, 39 A.3d 147, 148 (N.J. 2009) (order remanding the case “for a plenary hearing to consider and decide whether the assumptions and other factors reflected in the two-part *Manson/Madison* test, as well as the five factors outlined in those cases to determine reliability, remain valid in light of recent scientific and other evidence”).

211. 902 A.2d 888, 897 (N.J. 2006).

212. *Id.*

213. *Id.* at 894 (“[T]he dialogue between a law enforcement officer and a witness may be critical to understanding the level of confidence or uncertainty expressed in the making of an identification and whether any suggestiveness, even unconsciously, seeped into the identification process.”).

identification cases during the years leading up to *Henderson*. This trend toward requiring more comprehensive identification standards was accompanied by a parallel process within the national law enforcement community,²¹⁴ with New Jersey at the forefront of reform. As discussed in the following section, the *Henderson* court's decision to improve New Jersey's procedures for vetting eyewitness identification testimony was in line with the state's history of cooperative efforts among the scientific, legal, and law enforcement communities.

B. Law Enforcement Engagement and Cooperation

In addition to its predecessor cases, the New Jersey Supreme Court may have also been influenced by its state law enforcement community's voluntary efforts to improve the use of identification procedures in New Jersey. The *Henderson* court noted that law enforcement and reform agencies throughout the country have begun to accept the scientific findings on eyewitness identifications, and in response, have implemented revised procedures aimed at increasing their reliability.²¹⁵ In 2001, New Jersey became the first state to adopt the Department of Justice's new identification procedure guidelines,²¹⁶ offering more "thorough and exacting" practices and procedures.²¹⁷ The New Jersey Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures were designed to "improve the eyewitness identification process" and "ensure that the criminal justice system will fairly and effectively elicit accurate and reliable eyewitness evidence."²¹⁸

214. *State v. Henderson*, 27 A.3d 872, 912 (N.J. 2011) (citing, AD HOC INNOCENCE COMM. TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS, AM. BAR ASS'N, *ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY* (2006); Int'l Ass'n of Chiefs of Police, *Training Key No. 600, Eyewitness Identification* (2006); NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, *EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT* (1999)).

215. *Henderson*, 27 A.3d at 912. However, many police departments still have no written procedures and no formal training on how to conduct lineups and photo arrays. BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 53 (2011).

216. *Henderson*, 27 A.3d at 912 (citing Letter from Attorney General John J. Farmer, to All County Prosecutors, et al., *Attorney General Guidelines for Preparing and Conducting Photo and Life Lineup Procedures* 1 (Apr. 18, 2001), <http://www.state.nj.us/lps/dcj/agguide/photoid.pdf> [hereinafter *Attorney General Guidelines*]).

217. *Henderson*, 27 A.3d at 913.

218. *Attorney General Guidelines*, *supra* note 216.

One issue that Henderson raised on appeal was whether or not violation of the Attorney General Guidelines (the “Guidelines”) results in a presumption that the identification procedure was suggestive. The intermediate appellate court held that, at least when the investigating officers violate the Guidelines by “consciously and deliberately intrud[ing] into the process for the purpose of assisting or influencing [the] identification,” the court must presume “that the procedure was impermissibly suggestive.”²¹⁹ But the New Jersey Supreme Court rejected this interpretation, instead describing the Guidelines as “a series of recommended best practices” and noting that “identifications that do not follow the recommended Guidelines should not be deemed ‘inadmissible or otherwise in error.’”²²⁰ While it was impressed with the Guidelines, the court explained that it wanted to avoid “hamstring[ing]” law enforcement in a way that would prevent investigators from continuing to improve their procedures.²²¹

The *Henderson* court largely touted the Guidelines as beneficial and applauded the police for their voluntary cooperation, but it also noted that “[m]any, but not all, of the practices measure up to current scientific standards.”²²² The court of appeals had chosen the Guidelines as a convenient yardstick, but the higher court found that the Guidelines insufficiently encapsulated all of the factors known to influence eyewitness identifications.²²³ As a result, the *Henderson* opinion advised that evolving police and judicial approaches to identification testimony should be evaluated according to their compatibility with reliable scientific evidence.²²⁴ Because New Jersey law enforcement was already at the cutting edge of implementing improved procedural guidelines for handling eyewitnesses, the *Henderson* court was able to assuredly rely on ongoing police cooperation in implementing continuous improvements.

A non-hostile law enforcement community accustomed to revising its eyewitness procedures was beneficial for creating an environment ripe for change but was not sufficient to

219. *State v. Henderson*, 937 A.2d 988, 997–98 (N.J. Super. Ct. App. Div. 2008).

220. *State v. Henderson*, 27 A.3d 872, 913 (N.J. 2011).

221. *Id.* at 922.

222. *Id.* at 913.

223. *Id.*

224. *Id.*

remedy the problem of unreliable eyewitness evidence. As the *Henderson* special master noted, “While it may be true—indeed, one would hope—that the promulgation of the Attorney General Guidelines in 2001 has resulted in fewer wrongful convictions, nothing in the record suggests that New Jersey has thereby solved, or even substantially alleviated, the problem of mistaken identifications.”²²⁵ Thus, even if the police were doing a better job at obtaining identification evidence, it was not enough to prevent eyewitnesses from misidentifying criminal suspects.

C. Evidence of Misidentifications

Finally, growing evidence of eyewitness misidentifications also impacted the *Henderson* court’s decision to overhaul its procedures for admitting eyewitness identification testimony. In fact, the court devoted an entire section of the *Henderson* opinion to the problem.²²⁶ The *Henderson* court was convinced that “the possibility of mistaken identification is real, and the consequences severe.”²²⁷ Yet it was faced with the antiquated *Manson* admissibility standard that leaves too much discretion to judges, invests too much trust in police procedural integrity, and allocates too much responsibility to jurors’ common—and unfortunately often mistaken—understanding of eyewitness reliability.²²⁸

Several years before the *Henderson* case, the New Jersey Supreme Court acknowledged that eyewitness misidentifications are the primary cause of wrongful convictions.²²⁹ DNA exoneration statistics compiled by the Innocence Project show

225. *Report of the Special Master*, *supra* note 12, at 76 (citing *State v. Romero*, 922 A.2d 693, 701–02 (N.J. 2007)).

226. *See Henderson*, 27 A.3d at 885–89.

227. *Id.* at 889. Approximately 20 percent of misidentifications may represent intentional attempts to frame the suspect. SURVIVING JUSTICE: AMERICA’S WRONGFULLY CONVICTED AND EXONERATED 120 (Lola Vollen & Dave Eggers eds., 2005).

228. *See, e.g., Report of the Special Master*, *supra* note 12, at 79 (“The short answer to the Court’s question whether the *Manson* test and procedures are ‘valid and appropriate in light of recent scientific and other evidence’ is that they are not.”).

229. *State v. Delgado*, 902 A.2d 888, 895 n.6 (N.J. 2006) (citing *State v. Dubose*, 699 N.W.2d 582, 592 (Wis. 2005) (recognizing, in barring most showup identifications, that “research strongly supports the conclusion that eyewitness misidentification is now the single greatest source of wrongful convictions in the United States, and responsible for more wrongful convictions than all other causes combined”)).

that 75 percent of wrongful conviction cases involved incorrect eyewitness identifications.²³⁰ Surprisingly, 38 percent of misidentifications involved multiple witnesses identifying the same wrong person, and in 50 percent of the convictions the eyewitness testimony was uncorroborated by forensic or other evidence.²³¹ In addition, research surveys have shown that as many as one-quarter of real eyewitnesses choose the wrong person in police identification procedures.²³²

In combination with this misidentification evidence, the precedent case law was trending toward increased skepticism about the infallibility of eyewitness testimony, and law enforcement was on board with continually improving identification procedures. As a result, the *Henderson* court was in a prime position to set forth a revised framework as an alternative to *Manson*. Part IV now advocates use of the model set forth by the *Henderson* court as a basis for more widespread reform of procedures used to analyze and then compartmentalize eyewitness identification testimony.

IV. HENDERSON AS A MODEL FOR DUE PROCESS AND JURY EDUCATION

The court in *State v. Henderson* broadened protections for criminal defendants who are confronted with eyewitness

230. *Report of the Special Master, supra* note 12, at 16–17 (citing *Facts on Post-Conviction DNA Exonerations*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited Mar. 3, 2013)).

231. *Report of the Special Master, supra* note 12, at 17 (citing *Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of Misidentification*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/docs/Eyewitness_ID_Report.pdf (last visited Mar. 3, 2013)). Perhaps the most disturbing example of multiple misidentifications is the case of former Marine Kirk Bloodsworth, who was misidentified by *five* separate eyewitnesses as the man seen walking with nine-year-old Dawn Hamilton into the woods where she was raped and murdered. The “courtroom erupted in wild applause” when Bloodsworth was convicted and sentenced to death, but he was later exonerated by DNA evidence. DOYLE, *supra* note 11, at 51, 127. The DNA evidence also revealed the true perpetrator, who later pled guilty to the crime. Stephanie Hanes, *Guilty Plea Closes '84 Case of Rosedale Girl's Murder*, BALTIMORE SUN, May 21, 2004, http://articles.baltimoresun.com/2004-05-21/news/0405210277_1_ruffner-down-hamilton-bloodsworth.

232. DOYLE, *supra* note 11, at 35 (citing Bruce W. Behrman & Sherrie L. Davey, *Eyewitness Identification in Actual Criminal Cases: An Archival Analysis*, 25 LAW & HUM. BEHAV. 475 (2001); Daniel B. Wright & Anne T. McDaid, *Comparing System & Estimator Variables Using Data from Real Lineups*, 10 APPLIED COGNITIVE PSYCHOL. 75 (1996)).

identification testimony in two ways. First, *Henderson* recognized that an increased level of procedural scrutiny should be required before allowing defendants to be identified by eyewitnesses.²³³ As discussed, these expanded procedural protections stemmed from scientific research suggesting that complex, multi-factorial analysis is necessary to effectively determine whether eyewitness evidence is reliable.²³⁴ Second, the *Henderson* court initiated a complete revision of the state's jury instructions for cases involving eyewitness identification testimony.²³⁵ A more comprehensive system for educating jurors is necessary to counteract common sense misperceptions about eyewitness reliability.²³⁶ Both of these protective measures serve as strong models for other jurisdictions that wish to reform their procedural requirements for admitting eyewitness testimony. Moreover, progressive revisions to both the procedural gatekeeping requirements and jury instructions are likely to help reduce the unacceptably high incidence of misidentifications and resulting wrongful convictions.²³⁷

A. *Relevant and Meaningful Due Process Standards*

The United States Supreme Court's outmoded due process standard for admitting eyewitness identification testimony reflects a debunked understanding of human memory.²³⁸ The constitutional framework laid out in *Neil v. Biggers* in 1972²³⁹ and then reinforced and clarified by *Manson v. Brathwaite* in 1977²⁴⁰ is out of sync with the scientific understanding that has emerged over the decades since these cases were decided.²⁴¹ In

233. *State v. Henderson*, 27 A.3d 872, 919–24 (N.J. 2011).

234. *See supra* Part I.

235. *Henderson*, 27 A.3d at 925–26.

236. *See infra* Part IV.B.

237. *See* Wells & Quinlivan, *supra* note 11, at 18 (noting that “*Manson* is flawed” and suggesting that alternatives must be considered in order to prevent wrongful convictions).

238. *See, e.g.*, Epstein, *supra* note 142, at 753 (“There may be no greater divide between science and law in identification cases than in the setting of the constitutional standard for establishing the reliability of identification testimony and its admissibility.”).

239. 409 U.S. 188 (1972).

240. 432 U.S. 98 (1977).

241. The *Henderson* court was not the first to criticize *Manson's* sufficiency for ensuring criminal defendants' due process rights. In fact, the special master's report cited twenty other cases that have recognized scientific developments and updated discrete portions of the way the *Manson* standard is applied as a result. *See Report of the Special Master, supra* note 12, at 61–72. The most progressive

addition, continuing evidence of the primary role of eyewitness misidentification in wrongful convictions proves that the current system—including *Manson*—is not working as intended.²⁴²

More importantly, “the science on the five factors in *Manson* points to very serious problems.”²⁴³ None of the five *Manson* factors is unequivocally related to identification accuracy, and three of the factors (certainty, view, and attention) are self-reported by the eyewitness and, thus, susceptible to being distorted by suggestive procedures.²⁴⁴ Psychologist Gary Wells, who has devoted his career to studying eyewitness memory,²⁴⁵ noted that the “failure of the three self-reported *Manson* criteria to be independent of the suggestive procedure creates an ‘ironic test’ in the second inquiry,” where the reliability factors come under consideration only when they are least likely to indicate reliability after having been distorted by a suggestive procedure.²⁴⁶ This “net effect undermines safeguards intended by the Court and destroys incentives to avoid suggestive procedures.”²⁴⁷

In response to these concerns, the *Henderson* court created an expanded pretrial hearing procedure that compels judges to weigh all relevant variables after a defendant has made an initial showing that the identification may have involved suggestiveness.²⁴⁸ While evidence of suggestiveness must generally be tied to official conduct, *Henderson*’s companion case extended the right to a pretrial hearing to suggestive

examples may be the three states that have adopted higher standards for scrutinizing showups. See *Commonwealth v. Austin*, 657 N.E.2d 458, 461 (Mass. 1995) (unnecessarily suggestive showups are excluded *per se* with no exigency requirement); *People v. Grant*, 843 N.Y.S.2d 911, 913 (N.Y. Sup. Ct. 2007) (showups are presumed to be suggestive and suppressed absent exigent circumstances); *State v. Dubose*, 699 N.W.2d 582, 594–95 (Wis. 2005) (showup admitted only if it was necessary under the totality of the circumstances).

242. In response to evidence of wrongful convictions, ten states have passed statutes requiring police departments to implement written procedures designed to reduce the risk of misidentifications. Mark Hansen, *Show Me Your ID: Cops and Courts Update Their Thinking on Using Eyewitnesses*, A.B.A. J. (May 2012), http://www.abajournal.com/magazine/article/show_me_your_id_cops_courts_re-evaluate_their_use_of_eyewitnesses.

243. Wells & Quinlivan, *supra* note 11, at 16.

244. *Id.*

245. Dr. Wells maintains a treasure trove of information and news about eyewitness memory at his website: <http://www.psychology.iastate.edu/~gwells/> (last visited Mar. 3, 2013).

246. Wells & Quinlivan, *supra* note 11, at 16–17 & Figure 1.

247. *Id.* at 1.

248. *State v. Henderson*, 27 A.3d 872, 919–23 (N.J. 2011).

conduct initiated by private actors.²⁴⁹ Once the defendant presents evidence of suggestiveness, the state must prove that the eyewitness identification is indeed reliable, accounting for both system and estimator variables.²⁵⁰ The defendant maintains the ultimate burden of proving “a very substantial likelihood of irreparable misidentification.”²⁵¹ The court should suppress the identification if it finds from the totality of the circumstances that there exists a substantial likelihood of irreparable misidentification.²⁵²

Henderson’s landmark reforms stand in stark contrast to many other jurisdictions’ eyewitness identification procedures, which at best reflect minor revisions based on piecemeal acknowledgments of some scientific findings.²⁵³ The most efficient route to widespread reform would be for the United States Supreme Court to revise its interpretation of the federal constitutional due process requirements for admitting eyewitness testimony.²⁵⁴ But unless or until the Supreme Court is willing to reconsider *Manson*, state courts should follow *Henderson’s* lead and broaden their state constitutional protections to ensure that defendants are sufficiently shielded against misidentification. The central focus of a revised inquiry for admitting eyewitness identification testimony should be the

249. *Id.* at 920; *State v. Chen*, 27 A.3d 930, 943 (N.J. 2011).

250. *Henderson*, 27 A.3d at 920.

251. *Id.* (citing *Manson v. Brathwaite*, 432 U.S. 98, 116 (1977)).

252. *Henderson*, 27 A.3d at 920.

253. *See, e.g.*, *State v. Marquez*, 967 A.2d 56, 85 (Conn. 2009) (requiring the use of double-blind lineup procedures “whenever reasonably practicable”); *Commonwealth v. Santoli*, 680 N.E.2d 1116, 1121 (Mass. 1997) (forbidding jury instructions permitting reliance on witness confidence as a reliability factor). Only one other state, Oregon, has undertaken a more comprehensive review of its procedures for admitting eyewitness testimony. *State v. Lawson*, 352 Or. 724 (2012) (eliminating the requirement that the defendant make a showing of suggestiveness and relying on the evidentiary principles to guide admissibility). A few other states have instituted *per se* suppression of out-of-court identifications obtained using unnecessarily suggestive procedures to promote deterrence. *See People v. Adams*, 423 N.E.2d 379 (N.Y. 1981); *Commonwealth v. Johnson*, 650 N.E.2d 1257 (Mass. 1995); *State v. Dubose*, 699 N.W.2d 582 (Wis. 2005).

254. The Court declined such an opportunity in *Perry v. New Hampshire*, the first eyewitness identification case it has heard in thirty-four years. 132 S. Ct. 716 (2012). *Perry* asked the Court to expand pretrial hearing requirements to include both system and estimator variables, but the Court maintained that, absent suggestive law enforcement conduct, “it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.” *Id.* at 721.

consideration of both system and estimator variables. However, revising the due process requirements alone would be insufficient to ensure that defendants are protected against potential misidentifications. As the next section explains, jurors must also receive adequate instructions to overcome their common sense, but wrong, understandings of how memory works.

B. Effectively Educating the Jury About Memory and Eyewitnesses

In addition to improved gatekeeping, the *Henderson* court recognized that its revised framework for admitting eyewitness identification testimony must include measures that help jurors understand and evaluate the many variables that affect memory.²⁵⁵ “[W]hile science has firmly established the inherent unreliability of human perception and memory, this reality is outside the jury’s common knowledge and often contradicts jurors’ commonsense understandings.”²⁵⁶ Both system and estimator variables are relevant to the jury’s ability to discern eyewitness credibility, but research results often clash with jurors’ typical understanding of witness memory and accuracy.²⁵⁷ Juries are left to sort out the reliability of eyewitness testimony based on their own experience and the instructions that the court provides, but these tools are inadequate for evaluating the complicated and multi-factorial process that results in memories. Instead, juries need much more direct information about how they should scrutinize eyewitness identification testimony so that they are not deceived by the many common misperceptions about memory that have been discussed in this Note. The alternative is grim: “Jurors who *think* they understand how memory works may be

255. *Henderson*, 27 A.3d at 919.

256. *United States v. Brownlee*, 454 F.3d 131, 142 (internal citations omitted).

257. The prime example of this mismatch is eyewitness confidence. *See, e.g., Brodes v. State*, 614 S.E.2d 766, 771 (Ga. 2005) (“In light of the scientifically-documented lack of correlation between a witness’s certainty in his or her identification of someone as the perpetrator of a crime and the accuracy of that identification, . . . we can no longer endorse an instruction authorizing jurors to consider the witness’s certainty in his/her identification as a factor to be used in deciding the reliability of that identification.”); Wells et al., *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification*, *supra* note 83, at 446 (witness confidence does not enable jurors to discriminate between accurate and inaccurate eyewitnesses); *see also infra* Part I.B.

mistaken, and if these mistakes influence their evaluation of testimony then they may convict innocent persons.”²⁵⁸

The jury instructions that eventually arose from the *Henderson* court’s reform mandate provide jurors with significantly more comprehensive information about how to assess eyewitness testimony.²⁵⁹ The instructions for in-court identifications, for example, advise jurors that it is their “function to determine whether the witness’s identification of (defendant) is reliable and believable, and whether it is based on a mistake or for any reason not worthy of belief.”²⁶⁰ The instructions then explore the frailties and imperfections of human memory, plainly warning: “Human memory is not foolproof.”²⁶¹ They describe how memory is “far more complex” than simply playing back a perfect recording of an event, and expressly reference the scientific research in a way that bolsters the credibility of the instructions.²⁶² The in-court identification instruction lists numerous estimator variables that may affect an eyewitness’s identification, including many factors affecting the eyewitness’s opportunity to view the perpetrator (such as stress, duration, and weapon focus), and the effects of prior descriptions, time delays, and cross-racial identifications.²⁶³ The jury instructions warn of various sources of pre- and post-identification contamination and remind jurors that they should consider the complicated interactions between identified influences.²⁶⁴ Finally, the instructions exhort jurors to recognize that “a witness’s level of confidence, standing alone, may not be an indication of the reliability of the identification.”²⁶⁵ The model also gives the trial court discretion to instruct jurors about any other relevant factors.²⁶⁶

The revised New Jersey jury instructions for identifications involving police procedures add information to

258. *United States v. Hall*, 165 F.3d 1095, 1118 (7th Cir. 1999) (Easterbrook, J., concurring) (“A court should not dismiss scientific knowledge about everyday subjects. Science investigates the mundane as well as the exotic. That a subject is within daily experience does not mean that jurors know it *correctly*.”).

259. *See New Jersey Model Jury Charges, Identification: In-Court Identifications Only*, NEW JERSEY COURTS (effective Sept. 14, 2012), http://www.judiciary.state.nj.us/pressrel/2012/jury_instruction.pdf.

260. *Id.* at 1.

261. *Id.* at 2.

262. *Id.*

263. *Id.* at 3–5.

264. *Id.* at 5.

265. *Id.* at 4.

266. *Id.* at 5.

educate jurors about system variables as well.²⁶⁷ The instructions urge jurors to “consider the circumstances under which any out-of-court identification was made, and whether it was the result of suggestive procedure[,]” including “everything that was done or said by law enforcement to the witness during the identification process.”²⁶⁸ In compliance with the *Henderson* opinion, the system variables discussed in the jury instructions address lineup composition, fillers, multiple viewings, showups, and double-blind administration.²⁶⁹

Other states have modified their jury instructions for eyewitness identifications,²⁷⁰ but none have been as comprehensive as the instructions that arose out of *Henderson*.²⁷¹ The New Jersey instructions oblige the jury to give eyewitness identification testimony the more thorough and skeptical treatment that it deserves. Eyewitnesses are by no means infallible, yet they are disproportionately confident and convincing.²⁷² Jurors must constantly attempt to judge witness credibility and reliability and deserve to have better information about which factors should affect those judgments.²⁷³ Other states would benefit from using the New Jersey pattern instructions as a guide to revising their procedures for educating the jury about the vulnerabilities and limitations of eyewitness identification evidence.

CONCLUSION

267. See *New Jersey Model Jury Charges, Identification: In-Court and Out-of-Court Identifications*, NEW JERSEY COURTS (effective Sept. 14, 2012), http://www.judiciary.state.nj.us/pressrel/2012/jury_instruction.pdf.

268. *Id.* at 6.

269. *Id.* at 6–8.

270. Most notably, Utah has held that failure to provide a requested jury instruction about the factors relevant to eyewitness testimony violates the due process clause of the state constitution. *State v. Long*, 721 P.2d 483, 492 (Utah 1986).

271. See, e.g., *Brodes v. State*, 614 S.E.2d 766 (Ga. 2005) (prohibiting trial courts from instructing jurors that they may consider an eyewitness’s confidence in judging the reliability of the identification); *Commonwealth v. Santoli*, 680 N.E.2d 1116 (Mass. 1997) (same); *but see United States v. McGuire*, 200 F.3d 668 (10th Cir. 1999) (no special eyewitness instruction required).

272. See, e.g., *LOFTUS ET AL., EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL*, *supra* note 34, at 291 (citing jurors’ “nearly religious faith” in eyewitness accuracy).

273. See *Long*, 721 P.2d at 492 (“Given the great weight jurors are likely to give eyewitness testimony, and the deep and generally unperceived flaws in it, to convict a defendant on such evidence without advising the jury of the factors that should be considered in evaluating it could well deny the defendant due process of law . . .”).

The reliability of eyewitness identification testimony is an old problem that demands a new solution. In 1927, Justice Frankfurter noted that the “identification of strangers” is “proverbially untrustworthy.”²⁷⁴ Today we know that adage to be true with a level of scientific certainty that demands a proportional response. Researchers have estimated that approximately 7,500 of the 1.5 million annual serious offense convictions may have been based upon misidentifications.²⁷⁵ These estimates are disturbing and cannot be reconciled with the promises of due process guaranteed by the United States Constitution and echoed in the individual state constitutions under which the vast majority of criminal cases are brought to trial.²⁷⁶

In *Henderson*, the New Jersey Supreme Court seized upon the opportunity to make a bold move to reconcile the law with the state of scientific knowledge. While the legal and law enforcement environment appears to be warming to the idea that the current test for admitting eyewitness testimony may no longer capture all of the factors relevant to eyewitness identifications, the United States Supreme Court has not yet been presented with the right case to prompt an overhaul of *Manson v. Brathwaite*.²⁷⁷ In the meantime, state courts that are presented with adequate circumstances to justify change should consider the ever-expanding body of scientific research in deciding how to shape their state constitutional due process protections for admitting eyewitness identification testimony. *Henderson* provides a model for states wishing to ensure that mistaken eyewitnesses do not unnecessarily send innocent people to prison or death. States should use *Henderson* as a starting point and experiment with developing novel

274. *State v. Romero*, 922 A.2d 693, 701 (N.J. 2007) (citing Felix Frankfurter, *The Case of Sacco and Vanzetti* 30 (1927)). Frankfurter wondered, “What is the worth of identification testimony even when uncontradicted?” *Id.*

275. BRIAN L. CUTLER & STEVEN D. PENROD, *MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW* 7 (1995).

276. Only 183,986 suspects were arrested for federal offenses in 2009. Meanwhile, that same year, state courts racked up 20.5 million new criminal cases. Compare U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *Federal Justice Statistics, 2009* (Dec. 2011), <http://bjs.ojp.usdoj.gov/content/pub/pdf/fjs09.pdf>, with NAT'L CTR. FOR STATE COURTS, COURT STATISTICS PROJECT, *EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2009 STATE COURT CASELOADS*, at 19 (2011), <http://www.courtstatistics.org/FlashMicrosites/CSP/images/CSP2009.pdf>.

277. 432 U.S. 98 (1977).

approaches to counteracting the age-old problem of honestly mistaken eyewitnesses who, through the tricks and imperfections of memory, inadvertently identify the wrong person.