ValpoScholar **Valparaiso University Law Review**

Volume 47
Number 1

*pp.*357-398

Fall 2012

I Never Forget a Face: New Jersey Sets the Standard in Eyewitness Identification Reform

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I NEVER FORGET A FACE: NEW JERSEY SETS THE STANDARD IN EYEWITNESS IDENTIFICATION REFORM

I. INTRODUCTION

Employed at age seventeen with no criminal background, Marlon was a productive member of his local high school, studying to be an electrical sound engineer through an apprentice program.[1] But any dreams and aspirations were shattered when he was identified at a "show-up" identification on March 25, 2011.[2] On that evening, Marlon was wearing a bright orange vest and waiting for the Green Line Train, a part of the Chicago Transit Authority's train system, with his friend Jonas after picking up his paycheck. At this moment, Marlon found himself at "the wrong place at the wrong time."

After riding on the Blue Line in the same train car as a group of other African American and Hispanic individuals, Marlon and Jonas exited the train to transfer to the Green Line and waited on the upper level platform. While they were waiting, police testimony and reports indicate that a group of five or six black youth surrounded, assaulted, and robbed a twenty-two year old Hispanic man, Louis Fuentes, on the lower platform. After the assault, the youth fled to the upper level platform. Police arrived minutes later, interviewed witnesses who were on the scene, and then searched for the group of five perpetrators on the upper platform. The police found Marlon and Jonas waiting peacefully for the next train and arrested them. Marlon tried to explain that he had just come from work and even showed them his paycheck, but the officers arrested these two black youth anyway. Subsequently, the police led Marlon to the ambulance where Fuentes remembered Marlon's orange vest and identified him as one of his attackers.

Unfortunately, many state courts rarely exclude such identifications, and Marlon's judge chose not to exclude this one. Marlon's case is still pending, and he will likely be convicted of attempted robbery, among other things, in large part because of the eyewitness identification. Marlon's conviction will ultimately be decided by a jury, but the overwhelming evidence shows that jurors place substantial weight on eyewitness testimony regardless of its lack of reliability.[3] After

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[1] Because the case is still pending, "Marlon" is not the individual's real name. It has been changed for confidentiality reasons and because Marlon is a juvenile.

[2] *See infra* notes 80–82 and accompanying text (explaining that a show-up identification occurs when an officer apprehends a suspect, brings the suspect before the witness, and subsequently asks the witness to make an identification).

[3] *See* Elizabeth F. Loftus, Timothy P. O'Toole & Catharine F. Easterly, *Juror Understanding of Eyewitness Testimony: A Survey of 1000 Potential Jurors in the District of*

reviewing 250 DNA exonerations in the past thirty years, researchers have found that eyewitness identification played a contributing role in seventy-five percent of those convictions.[4] Consequently, state courts

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Columbia 1, 3 (2004) [hereinafter *Survey*], https://www.westshore.edu/personal/jrpoindexter/sociology/PDS%20Poll%20-%20Juror%20Knowledge%20of%20Eyewitness%20Factors%20-%20article%20by%20Dr.%20Elizabeth%20Loftus%20and%20Tim%20-O'Toole.pdf ("[J]urors actually suffer from a basic misunderstanding of how memory generally works, and similarly do not understand how particular factors, such as the effects of stress or the use of a weapon, affect the accuracy of eyewitness testimony."); *see also* Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) ("[T]here is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'"). *See generally* BRIAN L. CUTLER & MARGARET BULL KOVERA, EVALUATING EYEWITNESS IDENTIFICATION 3 (2010) (noting that an eyewitness identification may be the only evidence connecting the suspect to the crime and suggesting that eyewitnesses often have an extremely difficult task because they have little to gain and may even feel that their individual safety may be threatened by the individual they are accusing); Christian Sheehan, Note, *Making the Jurors the "Experts": The Case for Eyewitness Identification Jury Instructions*, 52 B.C. L. REV. 651, 674 (2011) (noting that jury instructions are the best way to educate jurors about the dangers of eyewitness testimony because expert testimony is often available only to wealthy defendants, creating a situation in which indigent defendants receive little of its benefit).

[4] *See* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 6–11, 48 (2011) (suggesting that after reviewing the cases of the 250 individuals who were exonerated he has identified patterns in how criminal prosecutions typically go wrong, including: false confessions, unreliable eyewitness identifications, flawed forensic evidence, dishonest informants, ineffective defense counsel, inability to appeal, the extended period of time it takes to be exonerated, and the reluctance of the criminal justice system as a whole to respond); *see also* Sheehan, *supra* note 3, at 653 ("Despite growing proof of the inaccuracy of traditional eyewitness identifications, eyewitnesses remain powerful tools for law enforcement as nearly 80,000 suspects are targeted each year based on eyewitness reports."); *Fact Sheet*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Eyewitness_Identification_Reform.php (last visited July, 28 2012) [hereinafter *Fact Sheet*] (explaining that eyewitness misidentifications are the leading factor in wrongful convictions and suggesting reform in the following areas by: (1) using a double blind procedure/blind administrator; (2) instructing the witness that "the suspect may or may not be present in the lineup"; (3) composing the lineup in a manner that does not bring unreasonable attention to the defendant; (4) taking a confidence statement immediately following the identification; and (5) recording the entire lineup procedure). *See generally* PETER NEUFELD & BARRY SCHECK, THE INNOCENTS (2003) (telling the stories of fifty individuals who were wrongfully convicted and suggesting that there are countless others who remain behind bars because of prosecutors who refuse to agree to post-conviction DNA testing and Congress who has not passed legislation ensuring that defendants have the right to DNA testing); Jessica A. Levitt, Note, *Competing Rights Under the Totality of the Circumstances Test: Expanding DNA Collection Statutes*, 46 VAL. U. L. REV. 117 (suggesting that all fifty states adopt legislation allowing DNA samples to be collected from arrestees); *250 Exonerated: Too Many Wrongly Convicted*, INNOCENCE PROJECT 3 (2011) [hereinafter *250 Exonerated*], http://www.innocenceproject.org/docs/InnocenceProject_250.pdf (finding that the 250 exonerated individuals spent an average of thirteen years in prison individually before they were exonerated and collectively spent 3,160 years behind bars).

must consider whether there are adequate safeguards in place to prevent the damaging effects of erroneous eyewitness testimony.[5]

New Jersey has taken the lead on this issue and recently established new guidelines.[6] First, this Note describes the variables that implicate eyewitness accuracy and how jurors understand these variables.[7] This Note also examines how the Supreme Court has dealt with the admissibility of eyewitness identifications and discusses the New Jersey Supreme Court's new approach.[8] Second, this Note evaluates the Supreme Court's current approach in light of modern scientific data and compares it to New Jersey's approach.[9] Last, this Note proposes that each state adopt a modified version of New Jersey's approach.[10]

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5 *See infra* Part IV (suggesting that state courts adopt a modified version of New Jersey's approach); *see also* Sheehan, *supra* note 3, at 653–54 (acknowledging that the legal system has attempted to address this issue through various procedural safeguards but recognizing that these safeguards do not address the psychological factors affecting memory); Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 461 (1989) ("Whether treated as a moral, constitutional, or popular sentiment inquiry, the greater injustice is almost universally seen in the conviction of the innocent.") (footnotes omitted).

6 *See* State v. Henderson, 27 A.3d 872, 878 (N.J. 2011) (departing from the Supreme Court's jurisprudence and announcing a more comprehensive framework, which incorporates modern scientific data). *See generally* Adam Liptak, *34 Years Later, Supreme Court Will Revisit Eyewitness IDs*, N.Y. TIMES, Aug. 22, 2011, http://www.nytimes.com/2011/08/23/us/23bar.html (pointing to the a report compiled at the request of New Jersey's Supreme Court as potential guidance for the Supreme Court in the future); *Troy Davis Execution Fuels Eyewitness ID Debate*, USA TODAY, Sept. 27, 2011, http://www.usatoday.com/news/nation/story/2011-09-27/troy-davis-eyewitness-testimony/50563754/1 [hereinafter *Troy*] (noting that the Supreme Court had not ruled on the issue of eyewitness identification since 1977 and anticipating a change in its jurisprudence); Benjamin Weiser, *In New Jersey, Rules are Changed on Witness IDs*, N.Y. TIMES, Aug. 24, 2011, http://www.nytimes.com/2011/08/25/nyregion/in-new-jersey-rules-changed-on-witness-ids.html (estimating that New Jersey's decision will have a national impact because New Jersey is a leading authority in the area of criminal law); Editorial, *What Did They Really See?* N.Y. TIMES, Aug. 26, 2011, http://www.nytimes.com/2011/08/27/opinion/what-did-eyewitnesses-really-see.html (urging the Supreme Court to "pay close attention" to New Jersey's recent decision). *But see* Perry v. New Hampshire, 132 S. Ct. 716, 730 (2012) (declining to substantially revise its eyewitness identification jurisprudence).

7 *See infra* Part II.A (explaining how the infrastructure of the criminal justice system along with psychological variables affect the reliability of an eyewitness identification).

8 *See infra* Part II.B (discussing the Supreme Court's jurisprudence in the last thirty years and explaining how New Jersey separated itself from the Supreme Court's approach).

9 *See infra* Part III (suggesting that the Supreme Court has failed to incorporate thirty years of scientific data and examining the strengths and weaknesses of New Jersey's approach to eyewitness identification).

10 *See infra* Part IV (suggesting that New Jersey still needs to rid itself of some of the vestiges of the traditional Supreme Court approach).

II. BACKGROUND

An eyewitness's memory is not infallible; rather, scientific research suggests that memory is susceptible to distortion depending on the presence of certain variables.[11] But even if memory was always dependable, the criminal justice system and its procedures are not.[12] Part II.A examines the various factors affecting the reliability of an eyewitness identification.[13] Part II.B summarizes the Supreme Court's approach to eyewitness identification and also discusses New Jersey's manner of dealing with questionable eyewitness identifications.[14]

A. Eyewitness Accuracy: Variables and More Variables

Memory functions differently depending on a plethora of different variables, all of which can affect the accuracy of eyewitness testimony.[15] First, Part II.A.1 discusses the competing commitments to truth-seeking in the criminal justice system.[16] Next, Part II.A.2 analyzes memory and the ways in which it may be affected depending on the particular circumstances.[17] Third, Part II.A.3 considers police procedure and how it

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11 *See infra* Part II.A.2 (describing the variables that affect memory); *see also* Loftus et al., *supra* note 3, at 4–5 ("[H]uman memory is more selective than a video camera; the sensory environment contains a vast amount of information but the memory process perceives and accurately records only a very small percentage of that information. . . . [H]uman memory can change in dramatic and unexpected ways."); Calvin TerBeek, *A Call for Precedential Heads: Why the Supreme Court's Eyewitness Identification Jurisprudence is Anachronistic and Out-of-Step with the Empirical Reality*, 31 LAW & PSYCHOL. REV. 21, 24–27 (2007) (providing a thorough outline of the relevant factors that affect a witness's memory).

12 *See infra* Part II.A.1, 3 (discussing the various professions and procedures that contribute to the accuracy of an identification); *see also* Steven J. Joffee, Comment, *Long Overdue: Utah's Incomplete Approach to Eyewitness Identification and Suggestions for Reform*, 2010 UTAH L. REV. 443, 447–49 (2010) (providing an overview of the ways in which police procedure may influence a witness's identification); Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin's New Governance Experiment*, 2006 WIS. L. REV. 645, 723–27 (2006) (discussing the competing goals and interests of law enforcement, defense lawyers, and prosecutors and maintaining that these three groups are sometimes only partially committed to truth seeking).

13 *See infra* Part II.A (analyzing the various factors that may affect how a witness remembers a particular event and examining how jurors understand these variables).

14 *See infra* Part II.B (discussing the Supreme Court's eyewitness identification jurisprudence and New Jersey's approach).

15 *See* Part II.A (discussing these variables).

16 *See infra* Part II.A.1 (providing a general overview of the moral professional commitments of law enforcement, defense attorneys, and prosecutors).

17 *See infra* Part II.A.2 (explaining the three stages of memory and factors that affect each stage).

affects the reliability of an identification.[18] Last, Part II.A.4 discusses juror understanding of these variables.[19]

1. Variables in the Commitment to Truth-Seeking

At least theoretically, the common goal of convicting the guilty and freeing the innocent is what motivates law enforcement personnel, defense attorneys, and prosecuting attorneys.[20] However, in reality, conflicting professional commitments may leave these groups only partially committed to seeking the truth in each and every case.[21] Thus, the admissibility of an eyewitness identification may depend, at least partly, on the moral imperative of the three groups involved.[22] Police officers, in particular, face unique challenges while pursuing truth in this country's criminal justice system.[23]

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18 *See infra* Part II.A.3 (describing the effect of commonly used police procedures).

19 *See infra* Part II.A.4 (discussing the average juror's knowledge of how memory works in relation to an identification).

20 Kruse, *supra* note 12, at 723 ("DNA exonerations have served as a rallying point for problem-solving approaches to criminal justice reform because they remind diverse stakeholders, whose interests and viewpoints are most often at odds in the highly adversarial context of the criminal justice system, of their common interest in ensuring accurate convictions."); *see also In re* Winship, 397 U.S. 358, 372 (Harlan, J., concurring) ("[I]t is far worse to convict an innocent man than to let a guilty man go free."). *See generally* GARRETT, *supra* note 4, at 182 ("Errors are the insects in the world of law, traveling through it in swarms, often unnoticed in their endless procession. Many are plainly harmless; some appear ominously harmful."); Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 198 (1983) ("At least in theory, our system prefers erroneous acquittals over erroneous convictions."); Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 576 (1973) ("Unfortunately, there is a conflict between these two desires: the more we want to prevent errors in the direction of convicting the innocent, the more we run the risk of acquitting the guilty."); Alexander Volokh, *n Guilty Men,* 146 U. PA. L. REV. 173, 198 (1997) (discussing the history of the constitutional value scheme, which embraces a presumption of innocence).

21 *See infra* Part II.A (outlining the professional commitments of law enforcement, defense attorneys, and prosecutors).

22 *See generally* MODEL RULES of PROF'L CONDUCT R. 3.8 (2004) (outlining the duties and responsibilities of prosecutors and holding them to a higher standard because of the considerable discretion inherent in their position); Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1258 (1993) (explaining that most public defenders are motivated by a deep sense of discontentment with the current justice system, which compels them to vigorously defend both the guilty and innocent in the system); Robert K. Olson, *Miscarriage of Justice: A Cop's View*, 86 JUDICATURE, Sept.–Oct. 2002, at 74, 74 (illustrating the complexities and conflicts of interest involved in the life of a police officer).

23 *See infra* note 24 and accompanying text (discussing some of the challenges facing police officers).

Law enforcement personnel are committed to preserving the safety of the general public who abide by the law and apprehending those who jeopardize the safety of the public by breaking the law.[24] Consequently, the motivating moral imperative is to punish lawbreakers who threaten the safety of others.[25] The values of public safety and truth-telling may compete for the commitment of law enforcement in certain instances, especially when defense attorneys are waiting to exploit each and every procedural shortcoming.[26]

Criminal defense lawyers are committed to preserving the rights of the accused individual, regardless of innocence or guilt.[27] The defense

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[24] Kruse, *supra* note 12, at 723–24 ("Law enforcement's primary professional commitment is to public safety, which may lead to the desire to get dangerous criminals off the street by any means possible."). *See generally* GARRETT, *supra* note 4, at 49–50 (providing that in cases where individuals were wrongly convicted, police may have genuinely believed they had the guilty party, but may have unintentionally utilized an unreliable procedure because of inadequate training, loose standards, and little accountability from judges); Olson, *supra* note 22, at 74–75 (2002) (explaining that there are several factors that may prevent law enforcement from apprehending the perpetrator including: a strenuous workload, a skewed concept of innocence, pressure to solve cases, and poorly trained personnel).

[25] Olson, *supra* note 22, at 74. Olson has served as the Chief of Police in Minneapolis since 1995 and describes the general mindset of his colleagues as follows: "[G]uilt is guilt" and the offender either "did it" or "did not." *Id*. Police officers do not see guilt and innocence as a matter of degree. *Id*. "The detective wants to know whether the suspect committed a criminal act or not." *Id*.

[26] *See* Kruse, *supra* note 12, at 723–24 (explaining that excluding an eyewitness identification may seem like a "loophole" in the system, which may force law enforcement officers to make a choice between excluding evidence relevant to the proceeding and admitting evidence that is not entirely reliable). *See generally* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 985–86 (1997) (providing that during an interrogation police may employ ethically questionable tactics in an effort to gain a confession at the expense of observing lawful procedures).

[27] *See* Ogletree, *supra* note 22, at 1246 (explaining that the Sixth Amendment guarantees criminal defendants the right to counsel; thus, defense attorneys need not worry about guilt or innocence). *See generally* Strickland v. Washington, 466 U.S. 668, 689, 694 (1988) (holding that the Constitution requires that indigent defendants receive minimally effective counsel, but it need only fall "within [a] wide range of reasonable professional assistance" and that in order to have a guilty verdict overturned for reason of ineffective assistance of counsel, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"); GARRETT, *supra* note 4, at 205 ("Ineffective assistance of counsel is one of the most frequently raised claims during postconviction proceedings, and 32% of these DNA exonerees (52 of 165 cases) asserted that their trial was unfair because their defense lawyer was inadequate."); Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1645 (2005) ("[T]he strategy of pursuing accuracy through adversarial processes--through well-equipped defense counsel in particular--has reached a political limit. Broadly speaking, legislatures are interested in accurate criminal adjudication, but they do not view zealous defense attorneys as the best

lawyer tends to see criminal defendants in the context of "societal ills, understandable human weakness, and tragic cycles of harm," which causes him to believe that justice does not always demand punishment for the law-breaker.[28] Thus, preventing the conviction of the innocent and helping the guilty avoid punishment are equally noble moral imperatives.[29] This worldview motivates the defense attorney to search tirelessly for any error on the part of law enforcement or the prosecutor in order to obtain a dismissal or acquittal for the client.[30] Prosecutors, however, generally see the criminal justice system from a much different perspective.[31]

Prosecutors are committed to observing procedural rules and exercising prosecutorial discretion in an effort to advance substantive justice.[32] The prosecutor's commitment to procedural compliance may

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way to achieve that goal."); Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443, 458–82 (1999) (arguing that criminal defense work has its roots in Jewish and Christian teaching); Holly R. Stevens, Colleen E. Sheppard, Robert Spangenbeg, Aimee Wickman & Jon B. Gould., *State, County and Local Expenditures for Indigent Defense Services Fiscal Year 2008*, CENTER FOR JUST., LAW & SOC'Y at GEO. MASON U. 1, 6–7 (2010), http://www.thecrimereport.org/system/storage/2/5c/a/1071/abareport_indigentdefense.pdf (examining the inadequate amount of money that states and localities spend to provide defense counsel to indigent defendants, which inevitably results in ineffective defense counsel at trial).

[28] Kruse, *supra* note 12, at 724; *see also* Barbara Allen Babcock, *The Duty to Defend*, 114 YALE L.J. 1489, 1517 (2005) ("[P]ublic defending [is] a sacred duty that requires a certain soul-set and selflessness that only a special class of people is capable of achieving: a mindset that values freedom over justice any day."); Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 SETON HALL L. REV. 893, 895–96 (2008) (arguing that while the legal system claims to put the risk of error on the government, practically speaking the legal system puts the burden on the accused; moreover, this practice is inconsistent with the constitutional doctrine that innocence-protection is of the utmost importance).

[29] *See* Ogletree, *supra* note 22, at 1246–50 (exploring the various justifications and motivations that motivate defense attorneys).

[30] *See id.* (discussing the tensions that criminal defense attorneys must struggle with as they pursue their client's best interest). *See generally* Brown, *supra* note 27, at 1601 (arguing that defense attorneys must represent criminal defendants with "fewer legal tools" than prosecutors).

[31] See *infra* notes 32–35 and accompanying text (examining the role and influence of the prosecutor in today's adversarial system).

[32] *See* GARRETT, *supra* note 4, at 208 (asserting that the prosecutor plays an imperative role in cases involving eyewitness identifications because prosecutors present most of the evidence, call most of the witnesses, communicate with police, and have access to all of the evidence that is in police custody); *see also* Berger v. United States, 295 U.S. 78, 88 (1935) (explaining that a prosecutor's role is to ensure that "justice shall be done," and not simply to increase his own reputation by securing convictions). *See generally* Darden v. Wainwright, 477 U.S. 168, 181 (1986) (holding that judges may order a new trial for prosecutorial misconduct only in the most extreme cases in which the conduct, "so infected the trial with unfairness as to make the resulting conviction a denial of due process");

conflict with law enforcement's interest in punishing law-breakers, because the prosecutor may choose to reduce or drop charges on the basis of the strength and admissibility of the evidence.[33] A prosecutor has a higher duty to carefully exercise discretion because a defense attorney may figuratively fight to the death for the rights of his client regardless of guilt or innocence while the prosecutor should not move forward unless convinced the defendant is truly guilty.[34] But, in practice, while defense attorneys attempt to exploit every procedural shortcoming of law enforcement and prosecutors, prosecutors are also

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Kathleen A. Ridolfi & Maurice Possley, *Preventable Error: A Report on Prosecutorial Misconduct in California, 1997–2009*, VERITAS INITIATIVE (2010), http://law.scu.edu/ncip/file/ProsecutorialMisconduct_BookEntire_online%20version.pdf (pointing out that prosecutors in California are rarely sanctioned or disciplined for misconduct, which does little to deter prosecutorial misconduct); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 91 (1991) (explaining that in closing statements prosecutors may nearly misrepresent facts to the jury because the procedural guidelines for prosecutors allow for them to make arguments about inferences to be drawn from the facts); Ken Armstrong & Maurice Possley, *Trial & Error Part 1: The Verdict: Dishonor*, CHI. TRIB., January 11, 1999, http://www.chicagotribune.com/news/watchdog/chi-020103trial1,0,479347.story ("The failure of prosecutors to obey the demands of justice--and the legal system's failure to hold them accountable for it--leads to wrongful convictions. . . . It also fosters a corrosive distrust in a branch of government that America holds up as a standard to the world.").

[33] *See* Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 736–38 (1996) (arguing that prosecutors and law enforcement have a tremendous amount of discretion at their disposal). *See generally* STANDARDS FOR CRIMINAL JUSTICE § 3-3.9(a) (2008) ("A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction."); Zacharias, *supra* note 32, at 59 (noting that prosecutors have at their disposal the state's resources, as well as close relationships with the police and grand jury).

[34] *See* Zacharias, *supra* note 32, at 64 (explaining that, because of her power and prestige, a prosecutor must commit herself to the fairness of the adversarial system by not taking advantage of its shortcomings); *see also Berger*, 295 U.S. at 88 (stating that while a prosecutor "may strike hard blows, he is not at liberty to strike foul ones" or use "improper methods calculated to produce a wrongful conviction"); Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU. L. REV. 669, 680–81 (1992) (arguing that the "probable cause" standard is in reality a "heightened suspicion" standard, which does little protect those who are not guilty); Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485, 509–12 (2000) (illustrating the lengths that a criminal defense attorney will go to protect her client). The author concludes by saying:

> The best criminal defense lawyers have some sense of what the truth is, but are not hamstrung by it. Good criminal trial lawyers know how to use various aspects of the truth in order to construct a compelling narrative—one that jurors will accept, or one that will at least raise reasonable doubt. But, generally, criminal defense lawyers cannot and must not spend much time or energy worrying about the truth. After all, most criminal defendants are not innocent, and the truth is usually not helpful to the defense.

Id. at 511.

tempted to secure a conviction utilizing whatever means possible regardless of guilt or innocence.[35] An identification's admissibility may be influenced by the various parties involved, but its reliability may be affected by the three stages of memory.[36]

2. Variables in the Three Stages of Memory

As counterintuitive as it may seem, memory is not an infallible recording device.[37] On the contrary, scientific studies from the past thirty-four years show that multiple factors affect a person's ability to reconstruct and recall a past event.[38] Researchers divide the memory process into three distinct stages: (1) the process of perceiving, (2) retaining, and (3) retrieving a particular event.[39] As the event is taking place, a witness is in the process of consciously or subconsciously collecting information, which is known as the perception stage.[40] During the retention stage, the witness will file away or store this initial perception until he or she attempts to recall the information.[41] This

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35 *See* Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 395–401 (1992) (explaining that prosecutors have an expanding role in today's criminal system, which allows a prosecutor to employ intrusive undercover tactics, aggressive grand jury interaction, and an increased power to bring charges); *see also* GARRETT, *supra* note 4, at 209 (arguing that prosecutorial misconduct is extremely difficult to prove because courts rarely recommend sanctions and are reluctant to "call out prosecutors on misconduct or ethical lapses"); Melilli, *supra* note 34, at 682–83 (noting that disciplinary rules do little to deter misconduct because the judiciary rarely disciplines prosecutors for violating them).

36 *See infra* notes 39–43 and accompanying text (describing the three stages of memory).

37 ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL, § 2-2, 12 (4th ed. 2007) ("[W]e do not simply record [events] in our memory as a videotape recorder would. The situation is much more complex."); *see also* Loftus et al., *supra* note 3, at 4–5 (discussing the various factors that influence a witness's memory of a particular event).

38 *See* Loftus, *supra* note 37, at § 2-5, 19–20 (citing a study in which the participants were shown a thirty second simulated bank robbery and then asked to estimate how long it lasted and only a very small percentage of the participants guessed the amount of time correctly).

39 *See* Derek Simmonsen, *Teach Your Jurors Well: Using Jury Instructions to Educate Jurors About Factors Affecting the Accuracy of Eyewitness Testimony*, 70 MD. L. REV. 1044, 1049 (2011) (suggesting that the average person does not understand the fundamentals of how memory works); Loftus, *supra* note 37, at § 2-2, 12–13 (showing how each of these three stages of memory may be affected by different variables).

40 *See* Simmonsen, *supra* note 39, at 1049 (explaining that at this stage the eyewitness may be affected by variables that are part of the event itself and variables that exist subconsciously in the eyewitness); *see also* Loftus, *supra* note 37, at § 2-2, 12–15 (labeling this the "acquisition" stage).

41 *See* Loftus, *supra* note 37, at § 2-2, 13 & § 3-2(a), 53–54 (noting that how an eyewitness remembers an event is affected by the normal process of forgetting and by subsequent interactions with third parties); Simmonsen, *supra* note 39, at 1051 ("Receiving new information after an event can change how a person later remembers that event.").

remembering is known as the retrieval stage.[42] Various dangers accompany each stage, threatening to pollute the elusive "perfect" memory.[43]

The facts surrounding the event ("event factors") affect the witness's perception of the event.[44] The physical proximity of the witness to the event, the lighting conditions, and the duration of the event are relevant factors in an identification analysis.[45] The degree of stress and the level of violence also affect the ability of a witness to make a reliable identification.[46] Closely connected to stress and violence is the presence of a weapon, which can muddle the perception of an eyewitness.[47] In addition to the event factors, every individual has intrinsic traits, which may also affect his or her perception.[48]

Certain characteristics inherent in the witness or the suspect tend to make identifications more or less reliable ("witness factors").[49] Perhaps

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42 *See* Scott Woller, Note, *Rethinking the Role of Expert Testimony Regarding the Reliability of Eyewitness Identifications in New York*, 48 N.Y.L. SCH. L. REV. 323, 341–45 (2004) (providing an outline of factors that may influence a memory during the retrieval stage).

43 *See id*. (discussing the dangers that accompany a memory during each stage); *see also* Simmonsen, *supra* note 39, at 1051 ("[T]he concept of memory involves multiple stages and a myriad of factors that can influence how a person perceives and remembers events.").

44 *See* Sheehan, *supra* note 3, at 656 (exploring how the various event factors affect the eyewitness's perception of events); Woller, *supra* note 42, at 341 ("Event factors are factors inherent in an event itself.").

45 *See* Sheehan, *supra* note 3, at 656 (explaining that identification becomes increasingly difficult with greater distance and poor lighting). *See generally* Suzannah B. Gambell, Comment, *The Need to Revisit the* Neil v. Biggers *Factors: Suppressing Unreliable Eyewitness Identifications*, 6 WYO. L. REV. 189, 197 (2006) (arguing that the accuracy of an eyewitness identification increases in proportion to the amount of time the witness had to view the event).

46 *See* Gambell, *supra* note 45, at 198–99 (explaining that violence and high levels of stress narrow a witness's attention and trigger defense mechanisms, which allows an individual to confront the threatening situation; however, this reaction can impair a witness's ability to accurately identify the perpetrator and hinder the witness from recalling relevant details about the crime); *see also* Roger B. Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 AM. CRIM. L. REV. 1013, 1023 (1995) (indicating that the common perception of stress among lay people is that it enhances an impression left upon an eyewitness; however, a witness in an extremely stressful situation is more likely to misidentify a suspect).

47 *See* Gambell, *supra* note 45, at 198–99 (explaining the phenomenon known as "weapon focus," in which a weapon draws a witness's attention away from the face of the perpetrator and toward the weapon itself, making it more difficult for a witness to make a positive identification or describe the perpetrator at a later date).

48 *See infra* notes 49–56 and accompanying text (discussing the probable effect of the various witness factors on an eyewitness identification).

49 Sheehan, *supra* note 3, at 656–57 (providing a thorough list of witness factors that affect perception, paying particularly close attention to the effect of violence on the eyewitness); *see also* Woller, *supra* note 42, at 342 ("Witness factors, on the other hand, are factors that are inherent in the witness herself.").

the most obvious witness factors involve visual defects pertaining to the witness's eyesight, including age, darkness adaptation, depth perception, and color blindness.[50] Also, a witness is more likely to accurately identify a suspect whose face contains some distinguishing feature.[51] Furthermore, the elderly and very young produce mistaken identifications at a much higher rate than other adults.[52] However, an eyewitness's perception or acquisition may also be influenced by cultural and personal features.[53]

Various cultural and personal characteristics influence how a witness perceives sensory data in the perception phase of memory.[54] The cliché, "they all look alike," is at least partially true when it comes to cross racial identifications.[55] Scientific studies have shown that an eyewitness is more likely to accurately identify someone of the same race than someone of another race.[56] Additionally, juries tend to believe the

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50 *See* LAWRENCE TAYLOR, EYEWITNESS IDENTIFICATION, §§ 1, 2-1 (1982) (pointing out the obvious problems these disabilities create); *see also* Gambell, *supra* note 45, at 198 ("The witness's line of sight and the amount of lighting should also be considered."). *See generally* Henry F. Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*, 2 FED. CTS. L. REV. 1, 9 (2007) (mentioning alcohol and drug intoxication as other factors that affect an eyewitness's memory).

51 *See* TerBeek, *supra* note 11, at 24 (explaining that unusual faces make an accurate identification much more likely).

52 *Id.* at 24. *See generally* State v. Michaels, 642 A.2d 1372, 1379 (N.J. 1994) ("[T]he use of coercive or highly suggestive interrogation techniques can create a significant risk that the interrogation itself will distort the child's recollection of events, thereby undermining the reliability of the statements and subsequent testimony concerning such events."); Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 CORNELL L. REV. 33, 34 (2000) (suggesting that children should still be permitted to testify and recommends that in some circumstances judges allow experts to speak on the suggestibility of children); Michael R. Keenan, *Child Witnesses: Implications of Contemporary Suggestibility Research in a Changing Landscape*, 26 DEV. MENTAL HEALTH L. 100, 101 (2007) (explaining that children are much more susceptible to leading questions than adults although they are reliable witnesses when answering open-ended questions).

53 *See infra* notes 54–56 and accompanying text (discussing the various dangers involved when an eyewitness identifies a person of another race).

54 *See* Sheehan, *supra* note 3, at 657 (explaining how cultural bias, personal prejudice, and prior experiences influence an individual's perception).

55 *See* TerBeek, *supra* note 11, at 26–27 (suggesting this "other-race effect" has been proved with such certainty that it should be considered a fact); Bethany Shelton, Comment, *Turning a Blind Eye to Justice: Kansas Courts Must Integrate Scientific Research Regarding Eyewitness Testimony into the Courtroom*, 56 KAN. L. REV. 949, 951–52 (2008) (showing that identifying someone of another race is more difficult than identifying someone of your own race).

56 *See* GARRETT, *supra* note 4, at 73 (articulating the racial disparity among exoneree cases). Of those who were exonerated by DNA evidence, Garrett found that white women misidentified black men in 71 out of 93 cases involving a cross-racial identification. *Id.* In addition, race may be a factor in a criminal case because prosecutors tend to increase the charges leveled against a black defendant when the victim is white because evidence

testimony of a confident eyewitness even though studies show that confidence has little correlation with accuracy.[57] Prosecutors and defense attorneys alike know that there is no more powerful piece of evidence than a witness who stands before the jury and points a finger at who he or she believes is the perpetrator.[58] An eyewitness's confidence may be inflated or deflated depending on his or her exposure to outside influences and post identification feedback.[59] Even if a memory is not distorted by event and witness factors in the perception phase, it remains susceptible to distortion in the retention stage.[60]

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suggests that white jurors may be harsher on black defendants when the victim is white. *Id*. Gary L. Wells & Elizabeth A. Olson, *The Other-Race Effect in Eyewitness Identification: What Do We Do About It?*, 7 PSYCHOL. PUB. POL'Y & L. 230, 232–38 (2001) (offering studies to show that the risk of misidentification is higher when trying to identify someone of a different race). *See generally* Lawrence A. Greenfeld, *Sex Offenses and Offenders*, U.S. DEP'T OF JUST. 1, 11 (1997), http://bjs.ojp.usdoj.gov/content/pub/pdf/SOO.PDF (showing that the victim and attacker are of the same race in 88% of rape cases and determining that rape victims are almost evenly divided among blacks and whites); MICHELLE ALEXANDER, THE NEW JIM CROW 4, 8–9 (2010). The author argues that incarceration of people of color in America operates in much the same way as Jim Crow laws during the Civil Rights Movement. *Id*. at 4. Two million people are held in prisons and jails in America today and "[o]ne in three young African American men is currently under the control of the criminal justice system—in prison, in jail, on probation, or on parole." *Id.* at 8–9. The author notes that, once released, incarcerated individuals are "confined to the margins of mainstream society and denied access to the mainstream economy. They are legally denied the ability to obtain employment, housing, and public benefits—much as African Americans were once forced into a segregated second-class citizenship in the Jim Crow era." *Id*. at 4. *See generally* Estella Baker, *From"Making Bad People Worse" to "Prison Works": Sentencing Policy In England And Wales in the 1990s*, 7 CRIM. L.F. 639 (1996) (illustrating that incarceration creates additional problems in our society).

[57] *See* Gambell, *supra* note 45, at 202 (describing various influences that affect a witness's confidence); *see also* GARRETT, *supra* note 4, at 49 (suggesting that eyewitness confidence is often created by events that occurred prior to trial). In 92 out of 161 trial transcripts obtained from the trials of exonerated individuals the eyewitnesses admitted that they were not absolutely certain they had the right man when they made the initial identification. *Id*. at 49.

[58] Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting); *see* Gambell, *supra* note 45, at 202 (suggesting that prosecutors and defense attorneys may also be misled by a confident eyewitness).

[59] *See* Sheehan, *supra* note 3, at 658–59 (explaining how post-event information from the police, media, or other witnesses may have an extremely influential effect on witnesses during the retention phase); Peter J. Cohen, *How Shall They Be Known?* Daubert v. Merrell Dow Pharmaceuticals *and Eyewitness Identification*, 16 PACE L. REV. 237, 246 (1996) ("Post-event exposure to newly released information can dramatically affect the memory of the original event. . . . When witnesses later learn new information which conflicts with the original input, many will compromise between what they saw and what they were told later on."); Fradella, *supra* note 50, at 10 (asserting that discussions with third parties are more likely to negatively influence a memory than the mere passage of time).

[60] *See infra* notes 61–63 and accompanying text (describing the retention stage and the factors that may affect a memory during this stage).

After the initial perception and acquisition of the information, the witness will then commit the information to memory, which is known as the retention stage.[61] During this stage, the amount of information the witness processed and the retention interval are two factors that may lead to an inaccurate identification.[62] Thus, a witness who retrieves a large amount of data after an extended period of time will probably be less reliable than a witness who recalls a small amount of information after a brief period of time.[63] Although a memory may be unscathed through the first two phases, it must then pass through the retrieval phase before an eyewitness may testify accurately.[64]

In addition to the dangers inherent in the perception and retention phases, a phenomenon known as "unconscious transference" may threaten the accuracy of an identification during the retrieval phase.[65] This occurs when a witness mistakenly combines or confuses two similar memories and mistakenly identifies a person from an unrelated memory as the person at the scene of the crime, resulting in a misidentification.[66] Event and witness factors may influence a witness's memory, but interactions with third parties, including law enforcement, may also affect identifications.[67]

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61 Sheehan, *supra* note 3, at 657–58 ("The accuracy of an identification can also be negatively impacted during the retention and retrieval phases of memory."). *See generally* Fradella, *supra* note 50, at 7–8 (discussing the effect of the passage of time, amount of data to be retained, and post-event information on this stage of memory).

62 Fradella, *supra* note 50, at 7–8; *see also* Cohen, s*upra* note 59, at 246 (explaining that the amount of time between acquisition and retrieval is a significant factor in the quality of a memory).

63 *See* Sheehan, *supra* note 3, at 657–58.

64 *See infra* notes 65–67 and accompanying text (discussing unconscious transference and its effects on a subsequent identification).

65 *See* Francis A. Gilligan, Edward J. Imwinkelried & Elizabeth F. Loftus, *The Theory of "Unconscious Transference": The Latest Threat to the Shield Laws Protecting the Privacy of Victims of Sex Offenses*, 38 B.C. L. REV. 107, 111–14 (1996) (providing a detailed description of the various factors that contribute to the occurrence of unconscious transference); *see also* Sean S. Hunt, *The Admissibility of Eyewitness-Identification Expert Testimony in Oklahoma*, 63 OKLA. L. REV. 511, 520 (2011) ("The witness's brain unconsciously superimposes memories on top of each other, usually at the expense of memorial accuracy.").

66 *See* Hunt, *supra* note 65, at 520 (stating that even confident eyewitnesses may confuse memories because of unconscious transference).

67 *See infra* notes 68–85 and accompanying text (outlining commonly used police procedures and their effect on an identification).

3. Variables in the System & Police Procedure

Police officers have the challenging task of balancing administrative efficiency and procedural fairness in a society rampant with crime.[68] Police procedure in line-ups may intentionally or unintentionally affect the reliability of an identification.[69] Although different jurisdictions have taken precautionary steps to ensure more reliable line-up procedures, three types of bias remain prevalent within the system: (1) foil bias, (2) instruction bias, and (3) presentation bias.[70]

Foil bias may arise when a line-up is organized so that the suspect physically stands out from the other "fillers" in some way.[71]

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[68] *See* ALEXANDER, *supra* note 56, at 8–9 (stating that our nation's jails and prisons held less than 350,000 people in 1972 compared to over two million today).

[69] Melissa B. Russano, Jason J. Dickinson, Sarah M. Greathouse & Margaret Bull Kovera., *"Why Don't You Take Another Look at Number Three?": Investigator Knowledge and Its Effects on Eyewitness Confidence and Identification Decisions*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 355, 358–59; *see* Jennifer L. Devenport, Steven D. Penrod & Brian L. Cutler, *Eyewitness Identification Evidence: Evaluating Commonsense Evaluations*, 3 PSYCHOL. PUB. POL'Y & L. 338, 344 (1997) (arguing that even judges and attorneys are not fully aware of the effect of certain factors on memory); *see also* Amy Bradfield Douglass, Caroline Smith & Rebecca Fraser-Thill, *A Problem with Double-Blind Photospread Procedures: Photospread Administrators Use One Eyewitness's Confidence to Influence the Identification of Another Witness*, 29 LAW & HUM. BEHAV. 543, 543–62 (2005) (showing that one witness's memory may be influenced when exposed to the identification of another witness).

[70] Sheehan, *supra* note 3, at 659. *See generally* Amy L. Bradfield, Gary L. Wells & Elizabeth A. Olson, *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPLIED PSYCHOL. 112, 117 (2002); Ryan M. Haw & Ronald P. Fisher, *Effects on Administrator-Witness Contact on Eyewitness Identification Accuracy*, 89 J. APPLIED PSYCHOL. 1106, 1106–07 (2004); R.C.L. Lindsay, Joanna D. Pozzulo, Wendy Craig, Kang Lee & Samantha Corber, *Simultaneous Lineups, Sequential Lineups, and Showups: Eyewitness Identification Decisions of Adults and Children*, 21 LAW & HUM. BEHAV. 391, 402 (1997); Mark R. Phillips, Bradley D. McAuliff, Margaret Bull Kovera & Brian L. Cutler, *Double-Blind Photoarray Administration as a Safeguard Against Investigator Bias*, 84 J. APPLIED PSYCHOL. 940, 941 (1999); Carolyn Semmler, Neil Brewer & Gary L. Wells, *Effects of Postidentification Feedback on Eyewitness Identification and Nonidentification Confidence*, 89 J. APPLIED PSYCHOL. 334, 342–43 (2004); Siegfried Ludwig Sporer et al., *Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies*, 118 PSYCHOL. BULL. 315, 324 (1995); Gary L. Wells & Amy L. Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED SCI. 360, 360 (1998).

[71] *See* Donald P. Judges, *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement*, 53 ARK. L. REV. 231, 258–59 (2000) (explaining that eyewitnesses sometimes choose the person in the lineup that most resembles the perpetrator even when the suspect is not in the line-up); Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL'Y & L. 765, 771 (1995) (discussing how an innocent suspect is much more likely to be chosen in a line-up if the individual matches the eyewitness's description, but the other fillers do not); Loftus, *supra* note 37, at § 4–9 (explaining that a filler is an individual in the line-up who is known to be innocent and that the most reliable identifications occur when the suspect does not stand

Conspicuous characteristics include: age, race, clothing, height and weight, hair style, facial hair, tattoos, and any other distinguishing features.[72] If the witness correctly identifies the suspect in a line-up of physically similar individuals, then the risk of misidentification is lessened.[73] But even if the line-up is organized properly, an officer may skew the results by offering feedback to the witness during the procedure.[74]

Instruction bias occurs when the administering officer intentionally or unintentionally offers feedback to the witness.[75] The risk of bias is reduced substantially when the officer, before the witness views the line-up, informs the witness that the suspect may or may not be present in the line-up.[76] The officer should be very conscious of his or her body language to avoid sending any confirmatory signals and behave as objectively as possible even if the witness makes a positive identification.[77] A practice known as "blind administration" practically

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out from the other fillers because this type of procedure is the best test of the eyewitness's memory).

72 Gambell, *supra* note 45, at 196.

73 *See id*. at 193, 195–96 (citing unreliable police procedures as one of the reasons for misidentifications); *see also* N.C. GEN. STAT. § 15A-284.52(5) (2008) (requiring that the suspect shall "not unduly stand out from the fillers" and that the fillers "shall resemble, as much as practicable, the eyewitness's description of the perpetrator in significant features, including any unique or unusual features").

74 See *infra* notes 75–79 and accompanying text (discussing the ways in which an officer may influence an eyewitness).

75 *See* Michael R. Leippe, *The Case for Expert Testimony About Eyewitness Memory*, 1 PSYCHOL. PUB. POL'Y & L. 909, 916 (1995) (suggesting that instruction bias also occurs if the administering officer fails to tell the eyewitness that the perpetrator may or may not be present in the line-up); Wells & Seelau, *supra* note 71, at 769 (explaining that some eyewitnesses approach a line-up assuming that the perpetrator is definitely among those individuals in the line-up and asserting that it is the administrator's duty to inform the eyewitness that the perpetrator may or may not be present); *see also* § 15A-284.52(3) (requiring law enforcement to instruct eyewitnesses, "[t]he perpetrator might or might not be presented in the lineup," and that "[i]t is as important to exclude innocent persons as it is to identify the perpetrator"); Lisa K. Rozzano, *The Use of Hypnosis in Criminal Trials: The Black Letter of the Black Art*, 21 LOY. L.A. L. REV. 635, 645 (1987) (explaining that some jurisdictions admit identifications that occurred after the police hypnotized the witness even though hypnotism has not been linked with an increase in accuracy and may even cause the witness to be more susceptible to suggestion).

76 *See* Sheehan, *supra* note 3, at 660 (explaining that knowledge that the suspect may not be present helps ensure that the witness accurately identifies the perpetrator instead of choosing the individual who most closely resembles the suspect relative to the others in the lineup); U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE: A TRAINER'S MANUAL FOR LAW ENFORCEMENT 32 (2003) [hereinafter MANUAL] ("Fair composition of a lineup enables the witness to provide a more accurate identification or nonidentification. . . . The investigator should compose the lineup in such a manner that the suspect does not unduly stand out.").

77 *See* MANUAL, *supra* note 76, at 42–43 ("The identification procedure should be conducted in a manner that promotes the reliability, fairness, and objectivity of the

eliminates the risk of instruction bias because the administering officer is not informed which individual is the suspect.[78] However, the most damning form of bias occurs in a show-up identification.[79]

Law enforcement may present the suspect to the witness in an inherently suggestive manner giving rise to presentation bias.[80] Perhaps the most controversial method is referred to as a show-up identification.[81] In a show-up, the police bring the suspected perpetrator before the witness and ask the witness to make an identification.[82]

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witness's identification."). *See generally* Deah S. Quinlivan, Jeffery S. Neuschatz, Angelina Jimenez, Andrew D. Cling, Amy Bradfield Douglass & Charles A. Goodsell, *Do Prophylactics Prevent Inflation? Post-Identification Feedback and the Effectiveness of Procedures to Protect Against Confidence-Inflation in Earwitnesses*, 33 LAW & HUM. BEHAV. 111, 112 (2009) (indicating that more research needs to be done in order to determine whether suggestive procedures affect voice lineups in the same manner as eyewitness lineups).

78 *See* Fradella, *supra* note 50, at 17 (referring to this as a "double-blind" procedure); Steven Penrod, *Eyewitness Identification Evidence: How Well are Witnesses and Police Performing?*, 18 CRIM. JUST., Spring 2003, at 45 (explaining that blind administration reduces the risk of error when an eyewitness has a poor memory of the perpetrator); Wells & Seelau, *supra* note 71, at 775–76 (suggesting that agents and officers who are closely involved in a case should not administer line-ups); *Fact Sheet*, *supra* note 4 (listing jurisdictions who have adopted sequential double blind procedures: New Jersey; North Carolina; Boston, Mass.; Northamptom, Mass.; Madison, Wisc.; Winston-Salem, N.C.; Hennepin, Minn.; Ramsey-County, Minn.; Santa Clara County, Calif.; and Virginia Beach, Virginia); *see also* § 15A-284.52(b)(1) (requiring that an "[i]ndependent administrator" oversee the line-up); Amy Klobuchar, Nancy K. Mehrkens Steblay & Hilary Lindell Caligiuri, *Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 381, 405–10 (2006) (offering suggestions for law enforcement when implementing blind administration).

79 *See infra* notes 81–82 and accompanying text (describing the process law enforcement follows when administering a show-up identification).

80 Sheehan, *supra* note 3, at 661; *see also* Ryann M. Haw, Jason J. Dickinson & Christian A. Meissner, *The Phenomenology of Carryover Effects Between Show-up and Line-up Identification*, 15 MEMORY 117, 118 (2007) (stating that when a witness participates in multiple lineup procedures, such as a photo array and subsequent live line up, the eyewitness is more likely to make an erroneous identification).

81 *See* Gambell, *supra* note 45, at 193–94 (identifying the rare circumstances when a show-up may be necessary but explaining that most courts view show-ups as presumptively suggestive); *see also* Manson v. Brathwaite, 432 U.S. 98, 133–34 (1977) (holding that show-up identifications "give no assurance that the witness can identify the criminal from among a number of persons of similar appearance [which is] surely the strongest evidence that there was no misidentification"); Stovall v. Denno, 388 U.S. 293, 302 (1967) ("The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned."); Bibbins v. Baton Rouge, 489 F. Supp. 2d 562, 570 (M.D. La. 2007) ("An impermissibly suggestive identification . . . has a 'permanency' effect to it in the sense that the eyewitness can never get back to the original, pre-tainted memory.").

82 Gambell, *supra* note 45, at 193.

The most widely accepted police practice, a simultaneous line-up, is to present the suspect in a line-up with other fillers.[83] But in this procedure, even if the police do not intentionally influence a lineup procedure, there is still the risk that the witness will identify the individual that most closely resembles the perpetrator.[84] Even assuming that law enforcement utilized the best practices available, jurors are generally unequipped to effectively evaluate a witness's testimony about an identification.[85]

4. Lack of Juror Understanding of These Variables

Unfortunately, most jurors are not aware of these variables and are more likely to believe the testimony of an eyewitness instead of more reliable evidence.[86] In reality, eyewitness testimony is probably the most compelling piece of evidence in the eyes of a juror even though it is one of the least reliable.[87] Thus, courts have traditionally used two types of

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[83] *See* Judges, *supra* note 71, at 254 (describing both live and photo array line-up identifications as necessities of police procedure); *see also* Gambell, *supra* note 45, at 194–95 (comparing simultaneous lineups with sequential line-ups, where the police show the witness potential suspects one at a time in order to force the witness to compare the person he is viewing with his memory and not with the other individuals in a line-up).

[84] Judges, *supra* note 71, at 255–56. Relative judgment occurs when "the witness consciously compares various features of the members of the array and selects the individual who most closely resembles the witness's mental representation of the perpetrator." *Id*. at 255. *See* Wells & Seelau, *supra* note 71, at 768 (explaining that relative judgment occurs when the eyewitness chooses the individual in the line-up who most resembles her memory of the perpetrator in comparison with the other members of the line-up).

[85] *See infra* notes 86–88 and accompanying text (discussing the average juror's ability to evaluate eyewitness testimony).

[86] *See* Loftus, *supra* note 3, at 2 (contending that courts often fail to provide jurors with the necessary information that would enable them to make an informed decision); *see also* Nancy Mehrkens Steblay, Jasmina Besirevic, Solomon M. Fulero & Bella Jimenez-Lorente, *The Effects of Pre-trial Publicity on Juror Verdicts: A Meta-Analytic Review*, 23 LAW & HUM. BEHAV. 219, 220 (1999) (discussing whether juries are more likely to convict when there has been pre-trial publicity); *see also* Paula L. Hannaford-Agor, Valerie P. Hans, Nicole L. Mott & G. Thomas Munsterman, *Are Hung Juries a Problem?*, NAT'L CENTER FOR ST. CTS. 1, 50 (2002), http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesProblem Pub.pdf (discussing the amount of weight that jurors give to police, co-defendants, eyewitnesses, informants, defendants, and experts).

[87] *See* Watkins v. Sowders, 449 U.S. 341, 352–53 (1981) (Brennan, J., dissenting) (acknowledging that jurors are strongly affected by the testimony of an eyewitness); *see also* Devenport et al., *supra* note 69, at 346–47 (discussing psychological studies that explore juror sensitivity to various factors). The studies conclude that the majority of survey participants are sensitive to the effect of a cross-racial identification and exposure to a prior photo-array, but most participants were not conscious of the effects of age and retention interval. *Id.*

safeguards to educate jurors on the dangers of eyewitness identification: expert testimony and jury instructions.[88]

Psychological experts have the skills needed to explain and clarify characteristics of memory that are counterintuitive and that most jurors would not otherwise be able to understand.[89] In addition, an expert may be able to provide a framework for the average juror, ensuring that the juror has all the requisite tools to evaluate the merits of an identification.[90] However, courts have failed to create a consistent criteria to determine whether an expert should be permitted to testify in a particular case.[91] Specifically, judges who oppose expert testimony feel that it invades the decision-making authority of the juror to determine

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[88] *See* Sheehan, *supra* note 3, at 664–65, 674 (discussing the advantages and disadvantages of admitting expert testimony and suggesting that jury instructions are the most effective way to educate jurors); *see also* Tanja Rapus Benton, Stephanie A. McDonnell, Neil Thomas, David F. Ross & Nicholas Honerkamp, *On the Admissibility of Expert Testimony on Eyewitness Identification: A Legal and Scientific Evaluation*, 2 TENN. J. L. & POL'Y 392, 404–05 (2006) (noting that ninety-eight percent of states take a discretionary approach when deciding whether to admit an eyewitness expert and discussing each state's rationale for taking a specific approach); Steven I. Friedland, *On Common Sense and the Evaluation of Witness Credibility*, 40 CASE W. RES. L. REV. 165, 173–74 (1990) (arguing that the jury system is vital to a democratic society because the jury represents the community and speaks for the community as a whole).

[89] *See* Hunt, s*upra* note 65, at 513 (describing the role of the expert in a jury trial and explaining the potential value of permitting experts to educate jurors); Richard S. Schmechel, Timothy P. O'Toole, Catherine Easterly & Elizabeth F. Loftus, *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS J. 177, 180 (2006) ("Typically, eyewitness [identification] experts are prepared to testify in court about the extent to which the research literature explains how a particular factor, considered alone or in combination with others, likely would affect the reliability of an identification.").

[90] *See* Mark S. Brodin, *Behavioral Science Evidence in the Age of* Daubert*: Reflections of a Skeptic*, 73 U. CIN. L. REV. 867, 889–91 (2005) (discussing the benefits of allowing an expert to testify at trial and concluding that courts often preclude expert testimony at trial because expert testimony "is unnecessary because an unassisted jury is perfectly capable of weighing the weaknesses of eyewitness testimony after cross-examination by defense counsel"); Fradella, *supra* note 50, at 24–25 (arguing that jury instructions are inadequate to educate jurors on the complexities involved in eyewitness identification and providing numerous reasons why expert testimony is the best method to accomplish the goal of educating the jury).

[91] *See* Cutler & Kovera, *supra* note 3, at 10–14 (indicating that recent DNA exonerations have caused many judges to become more favorable towards expert testimony on eyewitness identifications and mistaken identifications); Fradella, *supra* note 50, at 21–22 (discussing the inability of courts to agree on whether experts should be allowed to testify about the complexities of eyewitness identification. *But see* Paul C. Gianelli, Ake v. Oklahoma: *The Right to Expert Assistance in a Post*-Daubert*, Post-DNA World*, 89 CORNELL L. REV. 1305, 1307 (2004) (contending that expert testimony favors the wealthy because indigent defendants cannot afford to hire an expert).

whether a witness is believable.[92] Thus, judges who oppose the use of experts may use jury instructions to inform jurors on the science of memory.[93]

Jury instructions are generally permitted to educate jurors on the dangers of eyewitness identification.[94] Most courts acknowledge that jurors simply do not have an adequate understanding of how memory works to make an informed decision and feel more comfortable with an instruction than with an expert.[95] Jury instructions are also an inexpensive and efficient way to address the dangers of eyewitness identification.[96] Opponents argue that judges decrease the credibility of an eyewitness in the eyes of the jury by giving an instruction on only this type of testimony.[97] The Supreme Court's struggle to account for the

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92 Fradella, *supra* note 50, at 21; *see also* United States v. Lumpkin, 192 F.3d 280, 289 (2d Cir. 1999) ("[I]n reviewing the use of expert testimony, we . . . look to see if it will usurp either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying that law to the facts before it.") (quoting United States v. Duncan, 42 F.3d 97, 101 (2d Cir. 1994)) (internal quotation marks omitted); United States v. Hall, 165 F.3d 1095, 1107 (7th Cir. 1999) ("[T]he credibility of eyewitness testimony is generally not an appropriate subject matter for expert testimony because it influences a critical function of the jury—determining the credibility of witnesses."); Jules Epstein, *The Great Engine That Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 STETSON L. REV. 727, 727–28 (2007) (asserting that many judges believe cross-examination is the best way to analyze whether an eyewitness identification is reliable and tracing this belief all the way back to mid-eighteenth century England).

93 *See infra* notes 94–97 and accompanying text (discussing the strengths and weaknesses of allowing jury instructions instead of expert witnesses).

94 *See* Simmonsen, *supra* note 39, at 1058–61, 1076 (discussing the justice system's gradual acceptance of eyewitness science and detailing the slow process that courts went through to determine whether to permit expert testimony regarding eyewitness identification); *see also* Perry v. New Hampshire, 132 S.Ct. 716, 729 n.7 (2012) (listing the various states' versions of eyewitness identification jury instructions); United States v. Telfaire, 469 F.2d 552, 558–559 (D.C. Cir. 1972) (creating one of the most widely used pattern jury instructions for cases involving eyewitness identifications).

95 Simmonsen, s*upra* note 39, at 1080*; see also* Neil P. Cohen, *The Timing of Jury Instructions*, 67 TENN. L. REV. 681, 683 (2000) ("Jurors cannot perform their duties without being instructed on the law they are to apply."); Handberg, *supra* note 46, at 1061 ("[J]udges are already in the habit of giving jury instructions, so they will find it easy to incorporate a new instruction.").

96 Simmonsen, *supra* note 39, at 1081; *see also* Handberg, *supra* note 46, at 1060–61 (calling jury instructions a "low cost solution" because they may be administered with relative ease at the conclusion of a trial and suggesting that the judge is the best party to deliver guidelines on eyewitness identification to the jury because "the judge is nonpartisan and his task is to help the jury perform its function [and] the jury intuitively looks to the judge for guidance as to how it is supposed to behave").

97 Sheehan, *supra* note 3, at 671; *see also* Conley v. State, 607 S.W.2d 328, 330 (Ark. 1980) (refusing to overturn the trial court for not permitting a jury instruction because the instruction contained comments on the evidence and concerned the weight of the eyewitness testimony); Waller v. State, 581 S.W.2d 483, 484 (Tex. Crim. App. 1979) (stating that a jury instruction singling out the eyewitness identification would be improper

complexities of eyewitness identification is illustrated in its reluctance to incorporate scientific data into its approach over the past thirty years.[98]

B. The Supreme Court's Jurisprudence and New Jersey's Decision

Between 1967 and 1977, the Supreme Court established guidelines that continue to govern the admissibility of an eyewitness identification in most jurisdictions.[99] In 2011, New Jersey became the first state to significantly depart from the standard created by the Supreme Court.[100] Part II.B.1 reviews the slowly evolving jurisprudence of the Supreme Court, and Part II.B.2 examines New Jersey's departure from the framework utilized by the Supreme Court.[101]

1. Eyewitness Identification and the Supreme Court

In *United States v. Wade*, Justice Brennan wrote for the majority and penned the oft quoted and perhaps prophetic line, "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."[102] In this case, after allegedly robbing a bank, two bank employees identified Wade in a line-up without the presence of his lawyer, and Wade claimed that his Sixth Amendment rights had been violated.[103] The Court held that a criminal defendant has the right to counsel at a post-indictment line-up because

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because it would concern the weight of the evidence); Handberg, *supra* note 46, at 1061 (asserting that most jury instructions are unintelligible to most jurors because they are written to satisfy a legal standard and that "as the instructions become more legally sophisticated, they become less understandable to the average person").

98 *See infra* Part II.B (outlining the Supreme Court's jurisprudence on eyewitness identification from the past thirty years).

99 *See* Richard A. Wise, Clifford S. Fishman & Martin A. Safer, *How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case*, 42 CONN. L. REV. 435, 443 (2009) (noting that the Supreme Court has not added to its eyewitness identification jurisprudence since 1977). In an 8-1 decision, the Supreme Court held that "[t]he fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness." Perry v. New Hampshire, 132 S.Ct. 716, 728 (2012). A defendant has adequate protections against erroneous identifications including the right to counsel, compulsory process, cross-examination, trial by jury, the burden of proof, and jury instructions. *Id.* at 728–29.

100 *See infra* Part II.B.2 (summarizing New Jersey's revised approach).

101 *See* Part II.B (summarizing the Supreme Court's eyewitness identification jurisprudence and New Jersey's recent departure from it).

102 United States v. Wade, 388 U.S. 218, 228 (1967). Brennan also recognized that eyewitness evidence is "proverbially untrustworthy." *Id.*

103 *Id.* at 220.

of the potential for suggestiveness in line-up procedures.[104] Further, a pre-trial identification is inadmissible if the defendant was denied counsel.[105] The Court also held that a subsequent in-court identification would not be suppressed if the prosecutor could show that the identification was based on an independent source.[106]

In *Stovall v. Denno*, the perpetrator stabbed the victim eleven times, placing the victim in critical condition.[107] Not knowing whether the victim would live, the police handcuffed the defendant and conducted a show-up identification in the hospital room.[108] The victim positively identified the defendant, and the defendant argued that his due process rights had been violated by the suggestive manner of the show-up identification.[109] The Court held that the show-up identification did not violate the defendant's due process rights because the identification method was not "so unnecessarily suggestive and conducive to irreparable mistaken identification."[110] Thus, the Court created the "totality of the circumstances" test to determine whether the identification was unnecessarily suggestive.[111]

After five years, the Supreme Court decided *Neil v. Biggers* and again weighed in on the identification discussion.[112] In *Biggers*, a man threatened the victim in her kitchen with a butcher knife and eventually wrestled her to the ground.[113] After the victim's daughter began screaming, the perpetrator led the victim two blocks away into the woods and raped her.[114] Seven months later after viewing numerous suspects, the police conducted a show-up identification, and the victim identified the defendant as the perpetrator.[115] The Court held that the identification was admissible unless there was a substantial likelihood of misidentification.[116] The Court resurrected and modified the two prong

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104 *Id.* at 236–37. The Wade Court noted the importance of pre-trial identifications, as eyewitnesses rarely change their mind or recant their former identification. *Id*. at 229.

105 *Id.* at 226.

106 *Id.* at 239–40.

107 Stovall v. Denno, 388 U.S. 293, 295 (1967).

108 *Id.*

109 *Id.* at 295–96.

110 *Id.* at 301–02.

111 *Id.* at 302.

112 Neil v. Biggers, 409 U.S. 188, 189 (1972).

113 *Id.* at 193–94. The lights were off in her home and the entire confrontation took place at night. *Id*.

114 *Id.* at 194. *See generally* Elizabeth Hampson, Sari M. van Anders & Lucy I. Mullin, *A Female Advantage in the Recognition of Emotional Facial Expressions: Test of an Evolutionary Hypothesis*, 27 EVOLUTION & HUM. BEHAV. 27, 27 (2006) (concluding that women are generally better at identifying emotional facial expressions than men).

115 *Biggers*, 409 U.S. at 194–95.

116 *Id.* at 198.

due process analysis created in *Stovall* and *Wade*.[117] However, the Court distinguished itself from the *Wade* and *Stovall* courts by holding that the suggestibility of an identification will be weighed against its reliability; thus, the Court shifted its focus from suggestibility to reliability.[118] The totality of the circumstances framework includes five factors: (1) the witness's opportunity to view the perpetrator during the commission of the crime, (2) the witness' degree of attention, (3) the witness's accuracy in describing the criminal, (4) the witness's confidence in identifying the criminal, and (5) the amount of time between the crime and confrontation.[119]

Today most courts follow some version of the standard established in *Manson v. Brathwaite*.[120] In *Manson*, Glover approached and knocked on the door of a known drug dealer while working undercover.[121] After opening the door twelve to eighteen inches, the man accepted cash from Glover, closed the door, and subsequently re-opened the door to deliver two glassine bags to Glover.[122] Glover described the man to an officer at headquarters who retrieved a picture of the defendant.[123] Glover identified the defendant as the man who had sold him drugs.[124] The Court declared, "[r]eliability is the linchpin in determining the admissibility of an identification testimony. . . ."[125] Reiterating its holding in *Biggers*, the Court held that an unnecessarily suggestive eyewitness identification will not be excluded *per se* if the identification

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117 *Id.* at 199.

118 *Id.* at 198–99. *See generally* State v. Orlando, 634 A.2d 1039, 1043 (N.J. Super. Ct. App. Div. 1993) (providing an example of a court utilizing the *Manson* approach).

119 *Biggers*, 409 U.S. at 199; *see also* John C. Brigham, Adina W. Wasserman & Christian A. Meissner, *Disputed Eyewitness Identification Evidence: Important Legal and Scientific Issues*, 36 CT. REV. 12, 17 (1999) (arguing that opportunity to observe the criminal and the length between the crime and the identification are the only two of the *Biggers* factors that can be connected to the accuracy of an identification); Gambell, *supra* note 45, at 208–12 (discussing the circuit split over how to interpret *Manson* and also surveying the various approaches state courts have taken to this issue); Wells & Bradfield, *supra* note 70, at 361–62 (proving that suggestive police behavior may inflate witness confidence and that the witness's memory of the event may be altered, including his view of the attacker and the degree of focus that the witness placed on the perpetrator).

120 *See generally* Gambell, *supra* note 45, at 206–14 (discussing the *Biggers* test and the role it has played in the courts nationally); Timothy P. O'Toole & Giovanna Shay, Manson v. Brathwaite *Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 VAL. U. L. REV. 109 (2006) (arguing that Manson does not protect the Due Process rights of criminal defendants and suggesting a more effective approach)

121 Manson v. Brathwaite, 432 U.S. 98, 100–01 (1977).

122 *Id.* at 100.

123 *Id.* at 101.

124 *Id.*

125 *Id.* at 114.

is otherwise sufficiently reliable.[126] The Court held that an identification's reliability should be measured by weighing the *Biggers* factors against the suggestiveness of the procedure.[127] Most states have adopted some version of the test announced in *Manson*; however, New Jersey became the first state to significantly depart from the Supreme Court's method in *State v. Henderson*.[128]

2. Eyewitness Identification and New Jersey's Supreme Court

On August 24, 2011, New Jersey became the first state to reject the *Manson* test in favor of a more pro-defendant eyewitness identification framework.[129] On January 1, 2003, Rodney Harper and James Womble ushered in the New Year by drinking champagne and wine and smoking crack cocaine at Womble's girlfriend's apartment.[130] Sometime after 2:30 a.m., George Clark and another man armed with a gun forcefully entered the apartment in search of $160 owed to Clark by Harper.[131] Clark led Harper into another room while the unidentified man stood in a "small, narrow, dark hallway" and aimed the gun at Womble, telling him not to move.[132] Womble heard a gunshot, found Harper severely injured, and volunteered to retrieve the money for Clark.[133] Harper died from the gunshot wound nine days later.[134]

Detective Louis Ruiz and Investigator Randall MacNair interviewed Womble the following day.[135] Initially, Womble was uncooperative because he feared that the perpetrators would harm his elderly father, but he eventually made an identification after one of the officers told

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126 *Id.; see also* Gambell, *supra* note 45, at 214–15 (explaining that the Supreme Court's current approach makes it extremely difficult for an identification to be excluded because defense counsel must show that: (1) the police utilized an "impermissibly suggestive" identification procedure, and; (2) even if it was suggestive the identification may still be admissible if the State can show the identification is reliable under the totality of the circumstances).

127 *Manson*, 432 U.S. at 114; *see* Gambell, *supra* note 45, at 206 (discussing policy reasons for adopting the totality of the circumstance test). *See generally* Gary L. Wells & Dean S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW & HUM. BEHAV. 1 (2009).

128 State v. Henderson, 27 A.3d 872, 878–79 (N.J. 2011).

129 *Id.* at 918.

130 *Id.* at 879. "Womble smoked two bags of crack cocaine with his girlfriend in the hours before the shooting; the two also consumed one bottle of champagne and one bottle of wine; the lighting was 'pretty dark' in the hallway where Womble and defendant interacted; defendant shoved Womble during the incident." *Id.* at 882.

131 *Id.*

132 *Id.*

133 *Id.*

134 *Id.*

135 *Id.*

him, "[j]ust do what you have to do, and we'll be out of here."[136] In a photographic array of eight pictures, Womble easily discounted five of the photos and eventually dismissed a sixth, but he struggled to choose from the remaining two photos.[137] After considerable deliberation, Womble identified Henderson; however, Henderson argued that the witness mistakenly identified him as a result of suggestive procedures.[138]

At the *Wade* pre-trial hearing, the trial court found that the identification was admissible in spite of any suggestibility because it was reliable under the totality of the circumstances, and there was no substantial likelihood of misidentification.[139] The appellate division held that the identification procedure was impermissibly suggestive under the first prong of the *Manson* test and remanded for a new *Wade* hearing.[140] The New Jersey Supreme Court evaluated the evidence proffered by the parties and amici and rejected the traditional *Manson* test in favor of an approach more consistent with the scientific evidence.[141]

The New Jersey Supreme Court held that courts should consider the following non-exhaustive list of system variables to determine whether an identification is unnecessarily suggestive: (1) blind administration, (2) pre-identification instructions, (3) line-up construction, (4) feedback, (5) recording confidence, (6) multiple viewings, (7) show-ups, (8) private actors, and (9) other identifications.[142] The New Jersey Court went on to explain that if a court finds evidence of suggestiveness in the system variables, it should then consider the following non-exhaustive list of estimator variables to determine whether an identification is reliable: (1) stress, (2) weapon focus, (3) duration, (4) distance and lighting, (5) witness characteristics, (6) characteristics of perpetrator, (7) memory decay, (8) race-bias, (9) opportunity to view the criminal at the time of the crime, (10) degree of attention, (11) accuracy of prior description of the criminal, (12) level of certainty demonstrated at the confrontation, and (13) the time between the crime and the confrontation.[143] The defendant must proffer evidence that one of the identification

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136 *Id.* at 879, 881. "Womble did not recant his identification, but during the *Wade* hearing he testified that he felt as though Detective Weber was 'nudging' him to choose defendant's photo, and 'that there was pressure' to make a choice." *Id.* at 881.

137 *Id.*

138 *Id.* at 877.

139 *Id.* at 882.

140 *Id.* at 883–84. At the new trial, the parties produced over 360 exhibits, including 200 published scientific studies, and also called seven eyewitness identification expert witnesses and three law professors. *Id.* at 884–85.

141 *Id.* at 878–79, 918.

142 *Id.* at 920–21.

143 *Id.* at 921–22.

procedures in the system was suggestive in order to obtain a pre-trial hearing.[144] A court may then evaluate both the system and estimator variables and determine whether the identification is admissible.[145]

The topic of eyewitness identification presents significant and unique challenges to the judicial system because of the complexity of the variables that influence reliability.[146] The problem only worsens when a jury is the arbiter of whether an identification is reliable.[147] Moreover, the Supreme Court has not incorporated reliable scientific data into its approach.[148] Nonetheless, New Jersey's departure from the Supreme Court's *Manson* framework is a giant step in the right direction.[149]

III. ANALYSIS

The legal system's reluctance to incorporate thirty years of scientific research into its method of analyzing eyewitness identification has injured hundreds of criminal defendants and discredited the criminal justice system.[150] Criminal defense attorneys have filed motion after motion, and researchers have conducted study after study, yet the current *Manson* framework has remained virtually unchanged.[151] Recent DNA exonerations illustrate the failure of the *Manson* approach to ensure reliable identification procedures, deter improper police practices, and prepare a jury to make an informed decision.[152] Although courts have utilized the *Manson* approach for over thirty years, New Jersey's model incorporates reliable scientific research, deters suggestive police practices

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144 *Id.* at 922.

145 *Id.*

146 *See supra* Part II.A.1–3 (discussing the variables that influence memory).

147 *See supra* Part II.A.4 (considering the average juror's ability to evaluate eyewitness identification).

148 *See supra* Part II.B.1 (providing a brief history of the Supreme Court's approach to eyewitness identification testimony).

149 *See supra* Part II.B.2 (describing New Jersey's departure from the Supreme Court's jurisprudence). *But see* Massachusetts v. Walker, 953 N.E.2d 195, 209–10 (Mass. 2011) (declining to follow New Jersey's approach when "the defendant did not move to suppress the identification and where the issue is whether the defendant's attorney was ineffective in failing to do so").

150 *See* GARRETT, *supra* note 4, at 6–11 (reviewing the cases of 250 exonerated individuals and concluding that the overwhelming majority of those cases could have been prevented by amended procedures).

151 *See* Wells & Quinlivan, *supra* note 127, at 1-2 (advocating for a change in the Supreme Court's approach to eyewitness identification).

152 *See* NEUFELD & SCHECK, *supra* note 4, at 9 (explaining how the DNA exonerations from the past thirty years are our best reminder that the system is not working correctly); Wells & Quinlivan, *supra* note 127, at 1–2 (explaining that all of the exoneration cases had to pass through the *Manson* framework, providing evidence that *Manson* is not keeping out erroneous identifications).

without providing an unnecessary burden on law enforcement, and uses jury instructions to equip juries with the understanding necessary to properly evaluate the data.[153] New Jersey's model is not immune from criticism, but it is a step in the right direction and ultimately is in the best interest of law enforcement, prosecutors, and defense attorneys.[154]

First, Part III.A of this Note analyzes the weaknesses inherent in the *Manson* approach to evaluating eyewitness identification.[155] Second, Part III.B evaluates New Jersey's attempt to incorporate scientific data, deter suggestive police procedures, and address the limitations of jurors.[156] Last, Part III.C considers the overall effect of New Jersey's approach on the criminal justice system as a whole.[157]

A. Assessing the Adequacy of the Traditional Manson *Approach to Eyewitness Identification*

Although *Neil v. Biggers* was decided in 1972, most studies on eyewitness identification were published after 1975.[158] As a result, the five factors introduced in *Biggers* are largely under-inclusive and out of touch with scientific reality.[159] Consequently, the *Manson* method of weighing the *Biggers* factors against the corrupting effect of a suggestive identification procedure fails to incorporate modern scientific findings into its analysis, deter suggestive police procedures, and provide juries with the information needed to make the best decision.[160]

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

154 *See infra* Part III.B (exploring the advantages and disadvantages to law enforcement, prosecutors, and defense attorneys).

155 *See infra* Part III.A (arguing that scientific research has rendered the *Manson* framework inadequate and in need of revision).

156 *See infra* Part III.B (explaining that New Jersey's approach is the best attempt to address the scientific data).

157 *See infra* Part III.C (suggesting that New Jersey's method benefits everyone involved).

158 *See* Gambell *supra* note 45, at 192 (suggesting that the large amount of research on memory has rendered several of the *Biggers* factors unreliable). *See generally supra* note 119 and accompanying text (explaining why three of the *Biggers* factors are no longer reliable).

159 Gambell, *supra* note 45, at 220–21. Two of the factors have since been verified by scientific data, but three have little correlation with accuracy. *Id.* For example, *Biggers* includes eyewitness confidence as a factor even though it has no bearing on the accuracy of an identification. *Id.* Eighty-seven percent of psychologists affirmed that they would testify in court that confidence does not indicate accuracy. *Id*.

160 *See supra* note 81 and accompanying text (explaining that courts rarely find an identification procedure as unnecessarily suggestive). *See generally supra* note 86 and accompanying text (suggesting that the average juror is not aware of the dangers accompanying eyewitness testimony).

1. *Manson*'s Test Fails to Deter Suggestive Police Practices and May Reward Suggestive Procedures

Manson's two prong test fails to deter improper police practices and may sometimes even reward suggestive police procedures.[161] A court will not proceed to the reliability prong of the analysis until it decides that the police utilized a suggestive procedure; however, at this point the damage has been done because a suggestive procedure may have already influenced three of the five reliability factors.[162] For example, confirmatory feedback received during the retention phase causes the witness to solidify that memory as confirmed by the outside influence; thus, the witness's degree of certainty will increase in proportion to the suggestiveness of the procedure.[163] Second, a witness's opportunity to view the culprit may be distorted if the witness inaccurately perceives the amount of time the witness had to view the perpetrator or the distance the witness was away from the perpetrator or receives confirmatory feedback in the process.[164] Third, a witness's ability to recall his degree of attention during the commission of the crime may be distorted by suggestive procedures because "attention" is purely a subjective variable that may not be measured against other objective criteria.[165]

The Court in *Manson* did not want to adopt a *per se* exclusionary rule that would exclude an identification altogether if the procedure was suggestive.[166] Understandably, some identifications may still be reliable

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[161] *See supra* Part II.A.3 (outlining the most commonly used police procedures and indicating which variables have the potential to be influenced by suggestive procedures).

[162] *See* Wells & Quinlivan, *supra* note 127, at 9 (suggesting that there is nothing inherently flawed in adopting a two prong test; however, the criteria upon which the two prongs rest lends itself to encouraging suggestive procedures).

[163] *See* Simmonsen, *supra* note 39, at 1052–54 (stating that confidence should not be used in the analysis because there is no correlation between confidence and accuracy and citing specific studies showing that suggestive remarks confirming an initial identification makes witnesses more confident that their original identification was correct).

[164] *See* Wells & Quinlivan, *supra* note 127, at 9–10 (discussing a phenomenon known as "visual hindsight illusion" that occurs when a viewer mistakenly assumes the identity of a person); *see also* Brigham, *supra* note 119, at 17 (suggesting that opportunity to observe the criminal, if not distorted by suggestive procedures, is one of the *Biggers* factors that can be connected to the accuracy of an identification).

[165] *See* Gambell, *supra* note 45, at 198–99 (explaining how violence and high levels of stress can narrow a witness's attention and trigger defense mechanisms potentially impairing a witness's ability to accurately identify the perpetrator and hinder the witness from recalling relevant details about the crime); *see also* Handberg, *supra* note 46, at 1023 (asserting that jurors generally do not understand how stress and other objective factors influence a witness's ability to make an accurate and reliable identification).

[166] *See* Gambell, *supra* note 45, at 214–15 (suggesting that a *per se* exclusionary rule would alleviate many of the potential dangers that defendants face from eyewitness identification

even though the procedure utilized was flawed.[167] However, trial judges rarely exclude an identification because of suggestiveness, assuming that thorough cross-examination and the discernment of the jury will weed out any erroneous identifications.[168] Thus, the totality of the circumstances test vests trial judges with the discretion to exclude or admit a suggestive identification but fails to offer clear guidelines for when an identification should be suppressed.[169] Consequently, normative judicial practice provides little incentive for police to change their procedures because police misconduct is rarely cited as grounds to exclude an identification.[170]

2. The *Biggers* Test, as Utilized by *Manson*, is Under-Inclusive and Neglects the Scientific Data

Courts should consider the factors discussed in New Jersey's decision in addition to the five factors established in *Biggers* because three of the *Biggers* factors rely on the witness's self-reporting.[171] Currently, courts must rely mainly on the witness's recollection or

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and comparing the failure to exclude suggestive identifications to "allowing a coerced or involuntary confession").

167 *See* State v. Orlando, 634 A.2d 1039, 1043–44 (N.J. Super. Ct. App. Div. 1993) (offering an extreme example of an identification made by a kidnapped victim who viewed her perpetrator for six hours and her identification was deemed reliable even though the police utilized an unnecessarily suggestive procedure).

168 *See* Epstein, *supra* note 92, at 727–29, 751 (providing that cross-examination is not necessarily the best way to analyze whether an eyewitness identification is reliable even though many judges believe it is the best method); Sheehan, *supra* note 3, at 665 (concluding that cross examination and the jury serve the purpose of exposing a dishonest or biased witness, but these two safeguards are "ill equipped to confront an honest but mistaken witness who, because she is giving testimony she believes to be true, will not display the demeanor of someone who is lying"); *see also* Perry v. New Hamphire, 132 S.Ct. 716, 721 (2012) ("When no improper law enforcement activity is involved . . . it suffices to test reliability through . . . 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.").

169 Gambell, *supra* note 45, at 215–16; *see* TerBeek, *supra* note 11, at 46, 51 (explaining that the Supreme Court's lack of consistency has resulted in numerous cases where innocent people have been imprisoned and encouraging the Supreme Court to "reverse[] its stale eyewitness jurisprudence [so] that the problems inherent in eyewitness identifications can be fully remedied").

170 Kruse, *supra* note 12, at 670–71 ("A suggestive identification procedure thus becomes the source of the very factors that are used by a judge to test its reliability in the *post hoc* setting of a completed investigation, effectively insulating an unduly suggestive eyewitness identification from legal challenge.").

171 State v. Henderson, 27 A.3d 872, 918 (N.J. 2011); *see* Gambell, *supra* note 45, at 217 (arguing that the Supreme Court did not intend for the *Biggers* factors to be an exhaustive list and that courts should be willing to consider other factors in their analysis).

impression of the event when evaluating the witness's opportunity to view the perpetrator, degree of attention, and confidence.[172] But in reality, the witness may or may not be aware of how the presence of other factors may distort memory; thus, a court is at the mercy of the witness's self-reporting.[173]

First, contrary to public opinion, the stress of a situation does not focus a witness's attention on the face of the perpetrator thereby increasing its accuracy.[174] A witness's attention will be negatively affected by the overall stress level, the presence of a weapon, and the amount of violence.[175] In these situations, an individual's survival instincts focus his or her attention on self-preservation, which actually causes the witness to pay less attention to the perpetrator than the witness would without the presence of such factors.[176] Second, a confident eyewitness is no more likely to be correct than a witness who is not confident.[177] To say it another way, the scientific community agrees that an eyewitness's confidence does not increase or decrease accuracy.[178] Even though confidence is among the most unreliable factors, juries commonly believe a confident eyewitness even if it means ignoring hard scientific data.[179] Third, a court should consider the witness's opportunity to view the perpetrator, but not to the exclusion of other relevant factors such as: the proximity of the witness to the event,

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172 *See supra* Part II.B.1 (summarizing the Supreme Court's current approach to eyewitness identification).

173 *Henderson*, 27 A.3d at 896–900; *see* Simmonsen, *supra* note 39, at 1048–49 (suggesting that most eyewitnesses and jurors do not understand the fundamentals of how memory works); Loftus, *supra* note 37, at § 2-2, 12–13 (showing how each of these three stages of memory may be affected by the presence of different factors).

174 *See* Gambell, *supra* note 45, at 198–99 (explaining that high levels of stress inhibit an individual's ability to confront a threatening situation); *see also* Handberg, *supra* note 46, at 1023 (indicating that high amounts of stress are more likely to result in a misidentification).

175 *See* Sheehan, *supra* note 3, at 656–57 (providing a thorough examination of the effect of violence of the eyewitness).

176 *See supra* notes 46–47 and accompanying text (discussing the effects of violence, stress, and weapon focus on an eyewitness); *see also* Gambell, *supra* note 45, at 198–99 (arguing that a weapon has a magnetic presence that draws a witness's attention away from the face of the perpetrator and toward the weapon itself, making it more difficult for a witness to make a positive identification or describe the perpetrator at a later date).

177 *See supra* notes 57–59 and accompanying text (explaining that a confident eyewitness is not more reliable than a witness who is not as confident and suggesting that confidence may be affected by post-event information and interactions).

178 *See supra* notes 57–59 and accompanying text (illustrating how the scientific community is in agreement on this issue).

179 *See generally* Survey, *supra* note 3, at 1–6, 11–12 (citing surveys showing what most jurors believe about eyewitness identification).

the lighting conditions, the duration of the event, any visual defects inherent in the witness, and the race of the witness and perpetrator.[180]

3. *Manson* Does Not Account for Jurors' Inability to Accurately Process Eyewitness Data

Manson fails to adequately prepare a jury to make an informed decision.[181] Because courts rarely exclude a suggestive procedure, most eyewitness evidence is presented to the jury despite its potentially adverse effects in determining whether the identification should be admissible.[182] Unfortunately, the average juror will often believe an eyewitness even if the eyewitness is contradicted by more reliable evidence.[183] Studies suggest that eyewitness evidence is the most compelling to the juror and that jurors are unaware of the implications of extrinsic evidence on the identification.[184] Without jury instructions or expert testimony, jurors do not have the requisite knowledge to make an informed decision.[185]

In conclusion, the *Manson* Court could not have known the implications of its decision before many of the scientific studies on memory and eyewitness identification were published thirty years ago.[186] However, recent DNA exonerations and modern scientific data illustrate that the two prong *Manson* test generally fails to preclude wrongful police procedures, include relevant scientific research, and inform juries of factors to consider in making their decision.[187] As a

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180 *See* Gambell, *supra* note 45, at 218–19 (arguing that courts should not consider this factor in isolation because other estimator variables impact how a witness remembers his opportunity to view the suspect).

181 *See supra* notes 86–98 and accompanying text (exploring the general knowledge of jurors and discussing the benefits of both jury instructions and expert testimony).

182 *See* Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (acknowledging that jurors are strongly affected by the testimony of an eyewitness); Devenport et al., *supra* note 69, at 347–48 (suggesting that jurors will ignore more credible evidence in light of eyewitness testimony).

183 Devenport et al., *supra* note 69, at 347–48.

184 *See* Sheehan, *supra* note 3, at 664 (stating that eyewitness evidence is often the most compelling to the average juror notwithstanding the existence of contrary more reliable evidence).

185 *See supra* notes 86–98 and accompanying text (discussing the advantages and disadvantages of jury instructions and expert testimony).

186 *See* Gambell, *supra* note 45, at 217–18 (arguing that the Court did not intend for the *Biggers* factors to be an exhaustive list because it knew that science would change the way we understand memory).

187 State v. Henderson, 27 A.3d 872, 878 (N.J. 2011); *see* GARRETT, *supra* note 4, at 48 (reviewing the cases of the 250 exonerated individuals and explaining that "suggestive identification procedures and unreliable identifications" were two recurring problems).

result, the New Jersey Supreme Court resolved to confront these weaknesses in its landmark decision *State v. Henderson*.[188]

B. New Jersey's Approach Addresses the Weaknesses Inherent in the Manson *Framework*

On August 24, 2011, the New Jersey Supreme Court attempted to resolve the weaknesses inherent in the *Manson* decision in *State v. Henderson*.[189] To do so, the New Jersey Supreme Court adopted a new standard for assessing the reliability of an eyewitness identification.[190] The goal of this new test was to protect the rights of criminal defendants from police misconduct and uninformed jurors while allowing the prosecution to introduce relevant evidence at trial.[191] This approach differs from *Manson* in two ways: (1) the defendant must offer only *some* evidence of suggestiveness, triggered by a system variable, in order to receive a pre-trial hearing, at which time the judge will examine *all* relevant system and estimator variables; and (2) jury instructions should be crafted so that the jury can accurately evaluate identification evidence.[192]

1. New Jersey's Test Deters Suggestive Police Practices While Simultaneously Protecting the Interests of Law Enforcement and Prosecutors

New Jersey's approach protects defendants by deterring suggestive police procedures and protects the interests of law enforcement and prosecutors by avoiding bright line rules that suppress eyewitness identifications.[193] New Jersey sought to deter police by providing for a

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

189 *Id.* at 919.

190 *Id.* at 878–79.

191 *Id.* at 918–19.

192 *Id.* at 919–20. After the defendant has showed some evidence of suggestiveness, the State must offer proof showing that the identification is reliable. *Id.* at 920. Then, the burden shifts to the defendant to prove a "very substantial likelihood of irreparable misidentification." *Id.* After examining the relevant evidence, if the court decides that the defendant has carried his burden and demonstrated a "very substantial likelihood of irreparable misidentification," the court should suppress the identification; if not, the court should craft appropriate jury instructions. *Id.* At any point, the court may abandon the hearing if it feels like the defendant's claim is groundless. *Id.*

193 *See* Manson v. Brathwaite, 432 U.S. 98, 112–13 (1977) (indicating that the Supreme Court wanted to avoid a *per se* exclusionary rule if an identification was procured with some suggestiveness); *Henderson*, 27 A.3d at 922 (following the Supreme Court's approach in *Manson* and avoiding a *per se* rule that would exclude an identification if the identification was accompanied by any suggestiveness). The court reasoned that,

more probing investigation into certain procedures that are within the State's control.[194] Although suggestive procedures may continue to affect the same estimator variables, an analysis that includes the additional factors will make it unlikely that the identification will be corrupted by suggestiveness.[195] Most estimator variables operate independently of the criminal justice system; thus, the reason for the distinction between system and estimator variables.[196] For example, stress, weapon focus, duration, distance, lighting, witness characteristics, characteristics of the perpetrator, memory decay, and race-bias cannot be significantly altered by the intentional or unintentional actions of law enforcement.[197]

Even if the defendant offers proof of suggestiveness, an identification will not be suppressed unless the defendant can show a very substantial likelihood of irreparable misidentification.[198] Although judges continue to hold a large amount of discretion, the New Jersey approach provides judges with much clearer guidelines for when an identification should be excluded.[199] Also, at a pre-trial *Wade* hearing, a court will give the prosecution an opportunity to show why the identification is reliable despite a showing of suggestiveness.[200] By avoiding a *per se* exclusionary rule, prosecutors will have much less incentive to cover up the mistakes of law enforcement, and defense attorneys will have a forum to voice their concerns.[201] At the same time, common police practices will improve because judges will have a greater opportunity to probe further into suggestive procedures during the *Wade* hearing, and certain procedures are considered inherently suspect.[202]

"Although the approach might yield greater deterrence, it could also lead to the loss of a substantial amount of reliable evidence." *Id.* at 922.

194 *See Henderson*, 27 A.3d at 920–21, 923 (stating that courts should consider the following system variables when evaluating suggestiveness: blind administration, pre-identification instructions, line-up construction, feedback, recording confidence, multiple viewings, show-ups, private actors, and any other identifications made).

195 *Id.* at 922–23.

196 *Id.* at 904.

197 *Id.* at 904–07 (stating that these variables offer a more objective approach for courts to follow because they are not as easily influenced by the intentional or unintentional actions of law enforcement); *see also* Gambell, *supra* note 45, at 198–200 (giving examples of estimator variables including: visual acuity, depth perception, darkness adaptation, color blindness, stress, presence of a weapon, cross-racial dynamic, and memory alterations).

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

199 *Id.* at 878.

200 *Id.* at 920.

201 *Id.* at 922.

202 *Id.*

New Jersey's approach also incorporates reliable scientific data while protecting the interests of the parties involved.[203]

2. New Jersey Incorporated Scientific Data by Adding Eight New Factors

New Jersey's approach incorporates modern scientific research on the way memory works, including eight additional estimator variables.[204] Although courts, by necessity, will continue to rely on witness self-reporting, this approach enables the court to evaluate the factors that may have affected a witness's experience.[205] In addition, the three *Biggers* factors, which are easily manipulated, may be evaluated in light of the other estimator and system variables, instead of in isolation.[206] For example, the witness's degree of attention will be considered alongside stress, the presence of a weapon, and race-bias.[207] A judge may choose to place little weight on a confident eyewitness after analyzing the other estimator and system variables.[208] And the witness's opportunity to view the event will be evaluated in conjunction with the lighting, duration, and distance from the event.[209] New Jersey's test not only takes into account modern scientific data, it also attempts to equip jurors with the requisite tools to understand the data.[210]

3. New Jersey's Test Accounts for the Limited Knowledge of the Juror

New Jersey's decision takes into account jurors' limitations by requiring a judge to educate the jury on relevant estimator variables

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[203] *See infra* Part III.B.2 (analyzing New Jersey's decision to incorporate modern scientific data).

[204] *Henderson*, 27 A.3d at 921.

[205] *Id.* at 904; *see* Wells & Quinlivan, *supra* note 127, at 9–12 (expressing concern over the *Manson* Court's decision to rely so heavily on "retrospective self-reports" and explaining that "[p]art of the problem is that retrospective self-reports are highly malleable in response to even slight changes in context (e.g., who is asking the question), the social desirability of the responses, the need to appear consistent, and reinterpretations of the past based on new events").

[206] *See Henderson*, 27 A.3d at 921–22 (adding eight additional estimator variables to the existing five *Biggers* factors and stating that New Jersey courts should consider them all together).

[207] *Id.*

[208] *See id.* (providing an approach that allows a judge to evaluate the entire situation instead of only the five *Biggers* factors).

[209] *Id.*

[210] *See id.* at 925–26 (requiring the Criminal Practice Committee and the Committee on Model Criminal Jury Charges to create revised jury instructions incorporating the findings from its decision in *Henderson*).

through jury instructions.[211] Although jurors are the final arbitrators of guilt or innocence, the admissibility of an identification no longer depends on the lay-person's understanding of how memory works.[212] There is no doubt that eyewitness identification will continue to be an extremely convincing piece of evidence, but these instructions will provide a framework by which jurors can process the data they are given.[213] In summary, New Jersey has modified the *Manson* test by incorporating modern scientific data, which helps prevent suggestive police procedures and educates jurors.[214] Although this decision is a step in the right direction, it is not without its weaknesses.

C. Criticisms of the New Jersey Approach

Critics contend that New Jersey's approach is overly burdensome on law enforcement, the judicial system, and prosecutors.[215] However, Part III.C.1 discusses the advantages and disadvantages for law enforcement.[216] Part III.C.2 explains that the long-term benefits of an approach like the one adopted by New Jersey outweighs the initial burden on the judiciary.[217] Part III.C.3 analyzes New Jersey's decision to adopt all five of the *Biggers* factors.[218]

1. The Burden on Law Enforcement is *De Minimus*

New Jersey's decision places a greater burden on law enforcement, requiring time, administrative inconvenience, and additional training.[219] However, this burden is outweighed by the need to protect the wrongly accused and ensure the accuracy of the criminal justice system.[220] For

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211 *See id.* at 924–25 (requiring the use of jury instructions, but also allowing the use of expert testimony in appropriate circumstances).

212 *Id.* at 924. "But we do not rely on jurors to divine rules themselves or glean them from cross-examination or summation. Even with matters that may be considered intuitive, courts provide focused jury instructions." *Id.*

213 *Id.*

214 *Id.* at 878–79.

215 *Id.* at 914–16, 927.

216 *See infra* Part III.C.1 (arguing that the burden is relatively small and, ultimately, New Jersey's reform is in the best interest of law enforcement).

217 *See infra* Part III.C.2 (exploring the ramifications of this decision on the judiciary and once again determining that the benefits outweigh the costs).

218 *See infra* III.C.3 (questioning and evaluating New Jersey's decision to include all five of the *Biggers* factors).

219 *See Fact Sheet*, *supra* note 4 (providing examples of procedures that require extra time but will help eliminate erroneous identifications).

220 *See 250 Exonerated*, *supra* note 4 (finding that the 250 exonerated individuals spent an average of thirteen years in prison before they were exonerated and concluding that the cost of reform is worth the inconvenience).

example, blind administration requires the time of an administrator who is not involved in the investigation and does not know which person is the suspect.[221] Constructing fair line-ups by making sure that the members of the line-up are similar in attire and physical appearance will cost police the time and effort it takes to find suitable fillers.[222] Minimizing the use of show-up identifications may inconvenience police because of the relative ease by which a show-up is administered; however, taking the time and effort to organize a line-up generally outweighs the need for administrative efficiency because of the inherent suggestiveness of show-ups.[223] Eliminating feedback and multiple viewings, administering pre-lineup instructions, and recording the confidence of the witness are reforms that may be implemented with relative ease.[224] In sum, the harm prevented by implementing these extra safeguards outweighs the relatively minimal strain on law enforcement.[225] The harm prevented also offsets the inconvenience to the judiciary.[226]

2. The Long Term Benefits Outweigh the Initial Burden on the Judiciary

Permitting a defendant to obtain a pre-trial hearing will consume judicial time and resources.[227] Although these hearings may require more time and resources than the *Manson* test, the benefits of ensuring an identification's reliability outweigh the burdens.[228] However, in the cases in which an identification is in question, the judge may dismiss the

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[221] *See supra* notes 78–79 and accompanying text (explaining that although blind administration requires extra effort, it is one of the easiest reforms for law enforcement to implement).

[222] *See supra* notes 68–74 and accompanying text (discussing the dangers that arise when police fail to construct a line-up with physically similar individuals).

[223] *See supra* notes 80–82 and accompanying text (explaining that although a show-up is easily administered, the procedure itself is inherently suggestive).

[224] State v. Henderson, 27 A.3d 872, 896–901 (N.J. 2011); *see Fact Sheet*, *supra* note 4 (offering other suggestions for eyewitness identification reform).

[225] *See supra* Part III.C.1 (explaining why the burden on law enforcement is relatively small).

[226] *See infra* Part III.C.2 (arguing that the burden on the judiciary is outweighed by ensuring that innocent individuals are not wrongly convicted).

[227] *Henderson*, 27 A.3d at 923 ("[W]e are mindful of the practical impact of today's ruling. Because defendants will now be free to explore a broader range of estimator variables at pretrial hearings to assess the reliability of an identification, those hearings will become more intricate.").

[228] *Id*. at 878–79 ("The changes outlined in this decision are significant because eyewitness identifications bear directly on guilt or innocence. At stake is the very integrity of the criminal justice system and the courts' ability to conduct fair trials.").

hearing at any time if the defense does not have a legitimate claim.[229] In addition, a thorough investigation into an identification's reliability may avoid confusion later in the trial and ultimately ensure that the guilty party is not still roaming the streets.[230] Moreover, research shows that criminal defendants will be less likely to reoffend if they believe they have been treated fairly by the system.[231] The wrongful convictions of the past thirty years are reminders of the high cost of admitting an erroneous identification: the innocent lose their liberty and the guilty go free.[232] Nevertheless, New Jersey's new test would be more accurate if the court had excluded two of the *Biggers* factors.[233]

3. Two of the *Biggers* Factors Have Little Objective Scientific Value

Although New Jersey incorporated modern scientific findings into its approach to eyewitness testimony, it included two factors from *Biggers* that have little objective value: degree of attention and eyewitness confidence.[234] Although these two factors are part of the Supreme Court's original test, they are no longer relevant to a reliability inquiry because the additional factors make them obsolete.[235] Concededly, a witness's credibility is implicated if he or she admits to not paying attention; however, the reverse is not necessarily true.[236] For example, even if an eyewitness claims a certain level of attention, a court will confirm or discount that testimony based on other factors such as the presence of a weapon, amount of stress (implicated by amount of violence), and duration of the event.[237] Like degree of attention,

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229 *Id.* at 920.

230 *See, e.g.*, *Troy*, *supra* note 6 (providing a case in which there was a doubt as to whether the defendant was guilty, partly because several of the eyewitnesses later expressed hesitancy about their identification of the defendant).

231 *See supra* note 56 (discussing the high rate of incarceration in the United States and arguing that rehabilitation is not a central focus in our prison system).

232 *See supra* note 152 and accompanying text (arguing that the current *Manson* framework is partly to blame for the high rate of wrongful convictions).

233 *See infra* Part III.C.3 (explaining that two of the *Biggers* factors have very little objective value).

234 *See supra* note 119 (noting the circuit split over how to interpret the *Biggers* factors).

235 *See* State v. Henderson, 27 A.3d 872, 921–22 (adopting the five *Biggers* factors because the New Jersey Court felt as if the overlap was not harmful to the additional eight factors).

236 *See* Wells & Bradfield, *supra* note 70, at 374–75 ("[A]s long as the eyewitness comes across strongly on some or most of the five Biggers' criteria, it is assumed that the suggestive procedure was not problematic.").

237 *Henderson*, 27 A.3d at 921–22.

testimony about confidence is not relevant unless the witness is expressing a lack of confidence.[238]

DNA evidence has provided a lens through which the justice system can conclusively look at the past thirty years and evaluate the flaws in eyewitness identification jurisprudence.[239] But one question still remains even with these much needed reforms instituted by New Jersey: In the future, how will judges and attorneys know if New Jersey's approach is working?[240] The "success" of an identification hearing depends on your point of view: The defense attorney is advocating for suppression of the identification while the prosecutor is arguing for its admissibility. Regardless of how you define success, New Jersey's decision is a step in the right direction, because it solidifies the rights of criminal defendants, holds law enforcement accountable, and provides jurors with much needed information to make an accurate decision.[241]

IV. CONTRIBUTION

As discussed in Part III, New Jersey should not have incorporated all five factors from the Supreme Court's *Biggers* test because two of these factors are based on the witness's self-reporting.[242] The New Jersey Supreme Court's decision to adopt degree of attention and eyewitness confidence prolongs the life of two factors, which really have no objective value.[243] However, a model approach would take into account police suggestiveness, incorporate reliable scientific evidence, and exclude outdated factors utilized by the Supreme Court.[244] Consequently, this Note urges states to adopt the prescribed model approach, similar to what was adopted in New Jersey, so that states will have a more objective and reliable method of analyzing an eyewitness identification.[245]

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238 *See supra* notes 57–59 and accompanying text (considering confidence as a factor and concluding that confidence has very little correlation with accuracy when a witness is expressing a high level of confidence).

239 *See supra* note 152 (suggesting that 250 DNA exonerations should serve as a reminder that the current *Manson* test is not working).

240 *Henderson*, 27 A.3d at 922 ("We recognize that scientific research relating to the reliability of eyewitness evidence is dynamic; the field is very different today than it was in 1977, and it will likely be quite different thirty years from now.").

241 *Id.* at 878.

242 *See supra* Part III.C.3.

243 Steblay, *supra* note 126, at 471.

244 *See infra* Part IV.A–C (suggesting that a modified version of New Jersey's test will accomplish these aims).

245 *See id.* (modeling after New Jersey's decision but revising two of the *Biggers* factors).

A. Some Evidence of Suggestiveness Triggers a Pre-trial Wade *Hearing*

The first step in the model judicial reasoning is to determine whether there is some evidence of suggestiveness at a pretrial hearing.[246] To determine this, courts should consider whether: (1) a blind administrator performed the line-up procedure; (2) the administrator instructed the witness that "the suspect may not be present in the lineup and [you] should not feel compelled to make an identification;" (3) the line-up was constructed with at least five fillers who were similar in appearance to the suspect; (4) the witness received any confirmatory feedback; (5) the witness viewed the suspect multiple times; (6) the police administered a show-up identification with instructions that the individual in custody may or may not be the perpetrator; (7) the witness chose any other suspect before choosing the alleged perpetrator; and (8) any other relevant factors influenced the identification.[247] Up to this point, the defense may not introduce any evidence pertaining to estimator variables.[248]

These hearings may become burdensome if every trial with an eyewitness identification must first hold a pretrial hearing. However, if at any time during the hearing the judge in his discretion determines that the defendant has provided no evidence of suggestiveness or is wasting the court's time, he may terminate the hearing.[249] Once the court has concluded that the defendant has not offered any credible evidence of suggestiveness, the defendant may not introduce any evidence pertaining to estimator variables.[250] Thus, even though in many instances these pretrial hearings add an extra step in a judicial proceeding, a court need not waste its time listening to baseless claims.[251]

If the defendant persuades the court that some evidence of suggestiveness was present, the burden shifts to the State to show that the identification was nevertheless reliable.[252] During this phase of the hearing, both the prosecutor and defense may offer estimator variables for the court's consideration.[253] The ultimate burden rests on the defendant to show "a very substantial likelihood of irreparable misidentification."[254]

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246 State v. Henderson, 27 A.3d 872, 920 (N.J. 2011).
247 *Id.* at 920–921.
248 *Id.* at 921.
249 *Id.*
250 *Id.*
251 *Id.*
252 *Id.*
253 *Id.*
254 *Id.* at 920.

B. Consider All Relevant Estimator Variables During the Pretrial Hearing

Once the defendant has presented evidence of suggestiveness and the court is persuaded that some part of the identification process was suggestive, the court should consider all relevant estimator variables.[255] Variables a court should consider include: (1) the amount of stress during the event; (2) whether a weapon was present and visible; (3) the amount of time the witness had to observe the event; (4) the proximity of the witness to the perpetrator; (5) the lighting and other characteristics pertaining to the scene of the crime; (6) any distinguishing characteristics of the perpetrator; (7) memory decay; and (8) race bias.[256] A court should not be discouraged from using some factors from the *Biggers* analysis, such as the witness's opportunity to view the criminal, the accuracy of any prior descriptions of the perpetrator, and the time between the crime and the confrontation even though, for the most part, these three factors are encompassed by other factors mentioned previously.[257]

However, courts should not consider the witness's degree of attention or the level of confidence demonstrated by the eyewitness because these factors do not contribute anything that is not already taken into account by the previous factors.[258] Even assuming that the witness has not received any feedback from law enforcement or private actors, some people, because of personality, are more confident than others. In addition, the confident eyewitness may be more likely to feel that he paid adequate attention. Thus, a court should not consider these factors when offered to establish the credibility of an eyewitness. However, in its discretion, a court *may* consider these two factors when offered to discredit a witness because, even though these factors are not indicia of reliability, they do indicate a lack of reliability.

For example, imagine bystander X witnesses a crime and tells police at a properly administered line-up, "I am absolutely positive that is the man. I was standing in the bank when he robbed it." Notwithstanding X's good intentions, other factors may have negatively influenced his perception of the perpetrator, such as: whether the perpetrator had a weapon visible, what kind of lighting the bank had, how close X was to the perpetrator when he ran out, X's degree of stress, how long it took for the perpetrator to rob the bank, whether X was up against the wall or on the ground, how long it took the police to respond, the perpetrator's race, and X's disguise, if any. Certainly X felt as if he was paying close

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255 *Id.* at 921.

256 *Id.*

257 *Id.* at 921–22.

258 *See supra* notes 57–58, 119 and accompanying text (explaining why these two factors contribute very little to a court's analysis of reliability).

attention and may even feel confident as he tells police, but as explained earlier in this Note, the scientific data confirms that both of these factors are easily manipulated subconsciously by the existence of other factors.

Imagine the same situation, except that this time, when interviewed by police, X admits that he was jamming to some tunes on his iPod, was standing off to the side, and did not even know that a robbery was occurring. At the line-up, X says that he is not sure if he identified the right man. Both the fact that he was not paying close attention during the commission of the crime and the fact that he is now uncertain of whether he identified the correct man are incredibly relevant pieces of information that a court should consider. Courts should consider all relevant estimator variables during this stage excluding the witness's degree of attention and confidence unless those are offered to discredit the eyewitness.

One of the appealing features of this approach is that courts may add or delete factors as scientific research progresses.[259] The flexibility of this approach will place a substantial amount of discretion in the hands of each individual state in order to determine which variables have gained enough approval in the scientific arena to warrant consideration.[260]

C. Educate the Jurors at Trial

Once an identification passes through the pre-trial hearing and is admitted into evidence, the jury needs to be educated about the variables that affect memory.[261] A judge should have the discretion to choose whether experts testify or whether the judge should exclude experts in lieu of jury instructions.[262] The judge should take into account whether both sides can afford to call experts, whether the jurors will be overly influenced by an expert's testimony, and whether the expert may invade the jurors' role by making a determination about an eyewitness's credibility.

This general approach, much like the one adopted by New Jersey, will provide a flexible yet reliable guide to state courts when analyzing an eyewitness identification. Courts must provide a pre-trial *Wade* hearing when the defendant introduces some evidence of suggestiveness; however, they should not consider an eyewitness's confidence and degree of attention when examining relevant estimator variables. This approach recognizes the landmark contribution New Jersey made to the legal community in its decision in *Henderson* but

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259 *Henderson*, 27 A.3d. at 922.
260 *Id.*
261 *Id.* at 924.
262 *Id.* at 925.

encourages states to go a little further by excluding two of the *Biggers* factors when adopting a similar approach. New Jersey's decision represents a giant step in the right direction, but this Note's amended version of New Jersey's approach will provide states with the model reasoning necessary to create a more consistent framework for excluding erroneous identifications.

V. CONCLUSION

The complexities involved in an eyewitness identification have been largely unaddressed by most courts for over thirty years.[263] This failure is evidenced by the fact that seventy-five percent of individuals who were exonerated by DNA evidence were incarcerated, at least in part, due to an erroneous eyewitness identification.[264] However, New Jersey has provided a framework for other states and jurisdictions to follow, as reform inevitably takes place across the United States. This new approach accomplishes the goals *Manson* was meant to accomplish by deterring police misconduct, incorporating reliable scientific data, and accounting for jurors' limitations.[265] In addition, New Jersey's model is not overly burdensome on law enforcement or the judicial system as a whole, protecting the competing interests of law enforcement, prosecutors, and defense attorneys.

Unfortunately, New Jersey did not go far enough when it amended its approach to eyewitness identification. By leaving intact two of the *Biggers* factors, courts will continue to rely on two almost entirely subjective factors in their analysis of whether an identification is reliable. New Jersey has pioneered the way to a new and improved approach to eyewitness identification, but other courts will do well to amend New Jersey's test by excluding eyewitness confidence and degree of attention as estimator variables. Judges and juries will be able to reach a determination of reliability without sifting through the subjectivity implicit in these two factors.

Now, back to Marlon's story. What if Illinois had adopted a version of New Jersey's approach before Marlon was arrested? Marlon's story may have ended differently. In its pre-trial hearing, the court noted that the police had no reason to utilize a show-up identification instead of placing Marlon in a typical line-up. Also, the officer failed to instruct

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263 *See supra* Part II.B (summarizing the Supreme Court's jurisprudence on eyewitness identification).

264 *See* GARRETT, *supra* note 4 (studying the cases of 250 incarcerated individuals and concluding that seventy-five percent were imprisoned partly due to an erroneous identification).

265 *Henderson*, 27 A.3d at 921–23.

Louis that Marlon may or may not be the suspect. After accepting these facts as *some* evidence of suggestiveness, it went on to consider that: (1) Louis was beaten by five or six individuals which inevitably resulted in a considerable amount of stress; (2) the victim is a different race than the attackers; (3) the entire event occurred over a span of only seconds or minutes; (4) the attack happened at night; and (5) unconscious transference may have caused Louis to confuse Marlon with one of his attackers because Louis had previously noticed Marlon's orange vest while riding the train.

Although the court did not think these facts were enough to suppress the identification altogether, the court crafted jury instructions and informed the jury of the different dangers inherent in an identification of this type. The judge even gave the defense attorney permission to call an expert because of the precarious nature of the identification in this case. Marlon's case went to the jury and . . .

Marlon was given a fair trial. And a fair trial could have been the beginning of a happy ending for at least 250 other individuals who were wrongfully convicted because judges and juries were ill-equipped to deal with the complexities of memory.

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