

**THE LINCHPIN OF IDENTIFICATION EVIDENCE:
THE UNRELIABILITY OF EYEWITNESSES AND THE NEED FOR
REFORM IN WEST VIRGINIA**

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I. INTRODUCTION

You see, but you do not observe. The distinction is clear.

– Sherlock Holmes¹

Twelve jurors stare at you. Your hands tremble. Breathing becomes difficult. Cold sweat trickles down your forehead. As the prosecution questions its star witness, a hushed silence ensnares the courtroom’s gallery when that witness points at you and says, “That’s the person I saw do it.”

Countless innocent defendants nationwide have experienced this feeling; fortunately, West Virginia resident Roland Willis did not. Willis was arrested in early 2013 after four eyewitnesses conclusively identified him as the perpetrator in the stabbing of an 18-year-old man in Charleston, West

¹ SIR ARTHUR CONAN DOYLE, *A Scandal in Bohemia*, in THE ADVENTURES OF SHERLOCK HOLMES 1, 2 (1892).

Virginia.² Yet, as the investigation continued, *all* four witnesses were proven wrong.³

Roland Willis's story is not an anomaly. Playing a role in nearly 72% of cases later overturned through DNA, eyewitness misidentification "is the single greatest cause of wrongful convictions nationwide."⁴ This revelation, however, is not a recent discovery. Decades before the Innocence Project⁵ brought misidentification to the limelight, the United States Supreme Court, in 1967, recognized this glaring trend: "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identifications."⁶ This assertion holds true even today. In West Virginia alone, DNA testing has exonerated five innocent people who served a combined 44 years in prison for crimes they did not commit: Gerald Davis, Dewey Davis, William O'Dell Harris, Larry Holdern, and Glen Woodall.⁷ All had the same contributing cause to their convictions—eyewitness misidentification.⁸

Despite its perceived unreliability, eyewitness evidence maintains a powerful aura over jurors. Prominent eyewitness scholar Dr. Elizabeth F. Loftus⁹ states, "[E]yewitness testimony is likely to be believed by jurors, especially when it is offered with a high level of confidence, even though the accuracy of an eyewitness and the confidence of that witness may not be

² Ashley B. Craig, *Police Drop Charges Against Man in Club Impulse Shooting*, CHARLESTON DAILY MAIL, Jan. 31, 2013, <http://www.charlestondaily.com/News/Kanawha/201301310246> (using a photo lineup, all four eyewitnesses identified Willis "without hesitation").

³ *Id.*

⁴ *Eyewitness Misidentification*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited Oct. 10, 2014).

⁵ Founded by Barry C. Scheck and Peter J. Neufeld in 1992, the Innocence Project's mission is to exonerate the wrongfully convicted utilizing DNA testing. *About the Organization*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/What_is_the_Innocence_Project_How_did_it_get_started.php (last visited Sept. 23, 2014). As of March 2, 2014, 312 people have been exonerated. *Id.* Its website provides continual updates to the number of people exonerated. *Id.*

⁶ *United States v. Wade*, 388 U.S. 218, 228 (1967).

⁷ *Search the Profiles*, INNOCENCE PROJECT, <http://www.innocenceproject.org/know/Search-Profiles.php?check=check&title=&yearConviction=&yearExoneration=&jurisdiction=WV&cause=Eyewitness+Misidentification&perpetrator=&compensation=&conviction=&x=7&y=1> (last visited Sept. 23, 2014). While it cannot make up for their lost years, all five thankfully have been financially compensated by the state for their wrongful incarceration. *Id.*

⁸ *Id.*

⁹ Specializing in cognitive psychology, human memory, and psychology and law, Dr. Loftus is the Distinguished Professor of Social Ecology, and Professor of Law, and Cognitive Science at the University of California Irvine. *Elizabeth F. Loftus*, UCI SOCIAL ECOLOGY, <http://socialecology.uci.edu/faculty/eloftus> (last visited Sept. 23, 2014).

related to one another at all.”¹⁰ Two key attributes of eyewitness evidence are its unreliability and its profound effect on juries.¹¹ These alone reflect why change is needed.

To assess the reliability of eyewitness evidence, the majority of courts today use the test created in *Manson v. Brathwaite*.¹² Since 1977, when *Manson* was decided, over 2,000 scientific research studies have been conducted on eyewitnesses.¹³ Still, the *Manson* test has not incorporated these findings; most courts apply the test exactly as formulated in 1977.

This continued adherence to outdated beliefs is unacceptable. Eyewitness research, primarily focusing on two distinct concepts—labeled system variables and estimator variables—has revealed that eyewitnesses are not as reliable as once believed to be. System variables are aspects “under the direct control of the criminal justice system,” whereas estimator variables are “manipulable in research, [but] they cannot be controlled in actual criminal cases.”¹⁴ Despite the conceptual differences between them, both variable types have been shown to negatively impact eyewitnesses’ accuracy.¹⁵

Prompted by the wealth of available data, a few states recently have rejected the *Manson* test and instead created their own standard to judge eyewitness evidence.¹⁶ Other states—including West Virginia—need to follow suit. Thus, this Note argues that West Virginia should formulate a new standard incorporating what research has explicitly revealed: eyewitnesses are not reliable. This new standard would reduce wrongful convictions based on faulty eyewitnesses in two ways: (1) more available means for defendants to challenge the reliability of identification evidence in pretrial hearings, and (2) revising jury instructions to educate jurors about the limits of identification evidence.

Implementing such a drastic change in West Virginia’s legal system first requires understanding the development of jurisprudence regarding eyewitness identification. Part II of this Note, therefore, chronicles how the Supreme Court’s analysis on identification evidence has evolved from a per se exclusionary rule to a totality of the circumstances test. Next, Part III discusses

¹⁰ *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (quoting ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 19 (1979)).

¹¹ *Id.* at 350–55.

¹² 432 U.S. 98 (1977); *see infra* Part II.C.

¹³ *See Perry v. New Hampshire*, 132 S. Ct. 716, 738 (2012) (Sotomayor, J., dissenting).

¹⁴ Gary L. Wells, *Applied Eyewitness-Testimony Research: System Variables and Estimator Variables*, 36 J. PERSONALITY & SOC. PSYCHOL. 1546, 1548 (1978). Examples of system variables include lineup instructions, double-blind lineup administrations, and facial composites; examples of estimator variables include stress, presence of a weapon, race, and amount of light present. *See infra* Part IV.B–C.

¹⁵ *See infra* Part IV.B–C.

¹⁶ *See infra* Part III.B.1–3.

how eyewitness evidence is challenged in the courts by articulating the tests used in West Virginia and those recently created in New Jersey, Oregon, and Massachusetts. Part IV discusses the factors which prompted those three states to reject the *Manson* test—the scientific data on how human memory functions, system variables, and estimator variables. Finally, Part V concludes by articulating three reasons why West Virginia should reject the *Manson* test and outlining the proposed standard that the West Virginia courts should adopt instead.

II. THE SUPREME COURT’S JOURNEY ON EYEWITNESS EVIDENCE

The cornerstone of eyewitness identification jurisprudence begins with three Supreme Court cases called the “*Wade* Trilogy.” Following these seminal cases, the Supreme Court has been inconsistent on deciding how defendants can challenge identification evidence. Part II.A therefore explains the initial constitutional protections created by the “*Wade* Trilogy” decisions before Part II.B describes how subsequent cases have rendered these protections completely obsolete. Part II.C then concludes with the current Supreme Court endorsed standard.

A. Implementing Constitutional Protection: The “*Wade* Trilogy”

On June 12, 1967, the Supreme Court decided three cases establishing, for the first time, constitutional boundaries on eyewitness identification: *United States v. Wade*,¹⁷ *Gilbert v. California*,¹⁸ and *Stovall v. Denno*¹⁹ (known collectively as the “*Wade* Trilogy”).

Recognizing that “identification evidence is peculiarly riddled with innumerable dangers,” the Supreme Court in *Wade* mandated that counsel be present at all pretrial identification lineups.²⁰ Classifying pretrial lineups as a “critical” stage due to potential prejudice, the Court determined that having counsel present would “operate[] to assure that the accused’s interests w[ould] be protected consistently with our adversary theory of criminal prosecution.”²¹ Although in *Wade* the defendant’s lineup was conducted without counsel present, the Court remanded the case to allow the State the opportunity to show

¹⁷ 388 U.S. 218 (1967).

¹⁸ 388 U.S. 263 (1967).

¹⁹ 388 U.S. 293 (1967).

²⁰ *Wade*, 388 U.S. at 228, 237.

²¹ *Id.* at 227, 236.

that the in-court identification was based on other observations of the suspect—an “independent source”—rather than the illegal lineup.²²

In *Gilbert*, the defendant’s lineup was likewise conducted without counsel present, but unlike in *Wade*, the tainted identification was admitted at trial.²³ Unlike *Wade*’s holding, which allowed for the State to show that the identification was based on some independent source,²⁴ the Court in *Gilbert* ruled that the State was prohibited from doing so because the jury had been exposed to the tainted identification evidence.²⁵ The Court reasoned that “only a per se exclusionary rule . . . can be an effective sanction to assure that law enforcement authorities will respect the accused’s constitutional right to the presence of his counsel at the critical lineup.”²⁶

In the final companion case, the Court in *Stovall* recognized defendants’ due process rights by holding that identification procedures “unnecessarily suggestive and conducive to irreparable mistaken identification” deny due process.²⁷ To determine what “unnecessarily suggestive” means, courts were required to examine the “totality of the circumstances.”²⁸ However, the Court added that the totality of the circumstances standard could be relaxed depending on the facts of each case.²⁹ Unlike the *Wade* and *Gilbert* decisions, here a defendant’s due process rights applied to all identification procedures whether or not formal charges had been filed.³⁰

Overall, the “*Wade* Trilogy” established three main protections for defendants:

- (1) They required the presence of counsel at all pretrial lineups and showups taking place after June 12, 1967;
- (2) [e]ven if counsel is present, the identification procedure may not be so

²² *Id.* at 220, 240–42 (“We do not think this disposition can be justified without first giving the Government the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification.”).

²³ *Gilbert*, 388 U.S. at 269, 272–73. In *Gilbert*, testimony of nine eyewitnesses who identified Gilbert from the illegal lineup was admitted both at the trial and at the sentencing hearing. *Id.* at 272.

²⁴ *Wade*, 338 U.S. at 242.

²⁵ *Gilbert*, 388 U.S. at 272–73.

²⁶ *Id.* at 273 (“[T]he desirability of deterring the constitutionally objectionable practice must prevail over the undesirability of excluding relevant evidence.”).

²⁷ *Stovall v. Denno*, 388 U.S. 293, 301–02.

²⁸ *Id.* at 302.

²⁹ *Id.* In *Stovall*, the police brought the defendant to the witness’s hospital room—without counsel present—for an identification. *Id.* at 295. Because the police did not know how much longer the witness would live and because there were no other witnesses to the crime, the Court held there was no due process violation based on the totality of the circumstances. *Id.* at 302.

³⁰ See Charles A. Pulaski, Neil v. Biggers: *The Supreme Court Dismantles the Wade Trilogy’s Due Process Protection*, 26 STAN. L. REV. 1097, 1103 (1974).

unnecessarily suggestive as to be conducive to a mistaken identification. Otherwise, there is a violation of due process; and (3) [i]f these safeguards are violated, various sanctions will be imposed.³¹

Unfortunately, these constitutional protections did not withstand the passage of time. As discussed below, the Supreme Court quickly began weakening, and later completely removing, these protections.

B. Dismantling the “Trilogy”: The Emphasis on Reliability

Does *Wade*’s holding of right to counsel apply to identification procedures occurring *before* the indictment?³² Four short years after the “*Wade Trilogy*” decisions, the Supreme Court addressed this issue in *Kirby v. Illinois*.³³ Before the defendant in *Kirby* was indicted for robbery, the victim identified the defendant as the perpetrator.³⁴ Although counsel was not present and the defendant was not advised of his Sixth Amendment right, the Supreme Court decided that the right to counsel does not apply to pre-indictment procedures.³⁵ Reasoning that counsel is only required after “the initiation of adversary judicial criminal proceedings,” the Court held that identification procedures fall outside this stage.³⁶

Consequently, a portion of the “*Wade Trilogy*” rules falls into disuse because law enforcement can now delay formal proceedings until after conducting such identification procedures.³⁷ The due process protections from *Stovall* became, at least for the time being, the foremost protection for defendants from suggestive identification procedures.³⁸

Nine months after *Stovall*, the Supreme Court heard due process arguments on police using photographs for identification purposes.³⁹ In *Simmons v. United States*,⁴⁰ the defendant claimed the photographic array

³¹ ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 184 (1979); *see also* United States v. Wade, 388 U.S. 218, 228, 237 (1967); *Stovall*, 388 U.S. at 301–02.

³² *See* Kirby v. Illinois, 406 U.S. 682, 684 (1972).

³³ 406 U.S. 682 (1972).

³⁴ *Id.* at 684–85.

³⁵ *Id.* at 685, 690; *see also* Powell v. Alabama, 287 U.S. 45, 57 (1932).

³⁶ *Kirby*, 406 U.S. at 688–89 (triggering Sixth Amendment right to counsel includes a “formal charge, preliminary hearing, indictment, information, or arraignment”).

³⁷ *See* LOFTUS, *supra* note 31, at 185.

³⁸ *See* Pulaski, *supra* note 30, at 1103.

³⁹ *See* Simmons v. United States, 390 U.S. 377, 381, 383 (1968).

⁴⁰ 390 U.S. 377 (1968).

violated his due process rights.⁴¹ While acknowledging the “hazards of initial identification by photograph[s],” the Supreme Court otherwise noted that police commonly use this procedure and that cross-examination at trial would lessen the likelihood of misidentification.⁴² The Court held that identification evidence would be excluded only if “the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.”⁴³

Although the standards set forth in *Stovall* and *Simmons* may, at first glance, look similar, they both suggest a different inquiry.⁴⁴ *Stovall* focused on whether the identification procedure was “suggestive” and “unnecessary”; *Simmons*, on the other hand, focused on proof of an “irreparable misidentification.”⁴⁵ *Simmons* required a defendant to prove “irreparable misidentification,” whereas no burden was placed on the defendant in *Stovall* because the Court then did not inquire whether the identification was actually correct or not.⁴⁶ While *Stovall* was seen as the more restrictive interpretation of the two,⁴⁷ the Supreme Court would not resolve these differences until 1972 in *Neil v. Biggers*.⁴⁸

Biggers fundamentally changed how courts determined if a defendant’s due process rights were violated.⁴⁹ *Biggers* held that unnecessarily suggestive identification procedures would *not* automatically result in excluding the identification evidence.⁵⁰ Despite the suggestive procedure, courts still had to view the totality of the circumstances to assess the potential for misidentification.⁵¹ The Court then laid out five factors (known as the “*Biggers* factors”) to test the identification evidence’s reliability:

⁴¹ *Id.* at 383. One day after the bank robbery, FBI agents showed eyewitnesses group photos containing both Simmons and his co-defendant; these pictures were obtained from the co-defendant’s sister. *Id.* at 380–81.

⁴² *Id.* at 384.

⁴³ *Id.* Affirming Simmons’s conviction, the Court reasoned that because the robbery took place in the afternoon, the perpetrators wore no masks, and the identification was made only one day later, there was no evidence of irreparable misidentification. *Id.*

⁴⁴ See Pulaski, *supra* note 30, at 1108–09.

⁴⁵ *Id.* at 1107–09.

⁴⁶ *Id.*

⁴⁷ *Id.* at 1113–14.

⁴⁸ 409 U.S. 188 (1972).

⁴⁹ See Jack P. Lipton, *Legal Aspects of Eyewitness Testimony*, in PSYCHOLOGICAL ISSUES IN EYEWITNESS IDENTIFICATION 7, 11 (Siegfried L. Sporer et al. eds., 1996) (commenting on how “drastic” the change was).

⁵⁰ *Biggers*, 409 U.S. at 199.

⁵¹ *Id.*

(1) [O]pportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at confrontation, and (5) the length of time between the crime and the confrontation.⁵²

The *Biggers* decision thus set the stage for *Manson v. Brathwaite*⁵³ and *Perry v. New Hampshire*,⁵⁴ in which the Supreme Court set forth the current standard for challenging eyewitness identification evidence.

C. Manson & Perry: *The Majority Standard Today*

After the *Biggers* decision, appellate courts seemingly developed two approaches to identification evidence: a per se approach and a totality of the circumstances approach.⁵⁵ The per se approach “focuse[d] on the procedures employed and require[d] exclusion of the out-of-court identification evidence . . . whenever it has been obtained through unnecessarily suggested confrontation procedures.”⁵⁶ The totality of the circumstances approach, on the other hand, admitted tainted identification evidence as long as the “identification possesse[d] certain features of reliability” after comparing it against the *Biggers* factors.⁵⁷

To set a uniform interpretation, the Supreme Court in *Manson* famously declared, “[R]eliability is the linchpin in determining the admissibility of identification testimony.”⁵⁸ To challenge identification evidence's reliability, *Manson* established a two-step test: (1) the court must first decide whether the evidence was obtained through unnecessarily suggestive means; and, if so, (2) the court must determine if the suggestive procedures render the identification unreliable by examining the five *Biggers* factors.⁵⁹

⁵² *Id.* at 199–200.

⁵³ 432 U.S. 98 (1977).

⁵⁴ 132 S. Ct. 716 (2012).

⁵⁵ *Manson*, 432 U.S. at 110.

⁵⁶ *Id.* (noting that the rationale behind the per se approach was the “elimination of evidence of uncertain reliability, deterrence of the police and prosecutors, and the stated ‘fair assurance against awful risks of misidentification’”).

⁵⁷ *Id.* Recognized as more lenient, the totality of the circumstances standard “serves to limit the societal costs imposed by a sanction that excludes relevant evidence from consideration and evaluation by the trier of fact.” *Id.*

⁵⁸ *Id.* at 114.

⁵⁹ See Robert Couch, *A Model for Fixing Identification Evidence After Perry v. New Hampshire*, 111 MICH. L. REV. 1535, 1537 (2013); see also *Perry v. New Hampshire*, 132 S. Ct. 716, 724 (2012).

The Court listed three reasons for rejecting the per se approach.⁶⁰ First, the Court believed that the jury should hear all reliable, even if somewhat tainted, identification evidence because “[j]uries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.”⁶¹ Second, the Court reasoned that the totality approach would deter police from using unnecessarily suggestive procedures.⁶² Third, the Court opined that the totality approach would further justice because the per se approach would deny the jury key evidence thereby increasing the probability of the guilty going free.⁶³

After *Manson*, an eyewitness evidence case would not make it to the Supreme Court again for the next 30 years. In 2012, the Court reviewed *Perry v. New Hampshire*⁶⁴ to address whether a defendant’s due process rights are violated by suggestive identification circumstances *not* arranged by the police.⁶⁵ The 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.”⁶⁶

Although briefly acknowledging the significant development in scientific research on eyewitnesses,⁶⁷ as discussed by Justice Sonia M. Sotomayor in the lone dissent,⁶⁸ the Court determined that constitutional safeguards during trial, including cross-examination, jury instructions, evidentiary rules, and expert testimony, would adequately protect defendants from questionable eyewitness evidence.⁶⁹ The *Manson* test was thereby left unchanged.

⁶⁰ *Manson*, 432 U.S. at 111–13 (labeling an exclusionary rule as a “[d]raconian sanction”).

⁶¹ *Id.* at 112, 116.

⁶² *Id.* at 112.

⁶³ *Id.* at 112–13.

⁶⁴ 132 S. Ct. 716 (2012).

⁶⁵ *Id.* at 723. A police officer questioned Perry in an apartment parking lot after he was found near several vandalized cars. *Id.* at 721. As Perry and the officer were talking outside, another officer arrived and asked an eyewitness in her apartment to describe the suspect; the witness then looked out her kitchen window and identified Perry. *Id.* at 722. One month later, the witness was shown a photographic array containing Perry’s picture: the witness failed to identify Perry from it. *Id.* After being convicted, Perry argued that the nighttime identification violated due process because it was essentially a one-person lineup guaranteeing that the eyewitness would only pick him. *Id.*

⁶⁶ *Id.* at 728.

⁶⁷ *Id.* (noting the amicus brief submitted by the American Psychological Association).

⁶⁸ *Id.* at 738–39 (Sotomayor, J., dissenting) (over 2,000 studies on eyewitness identification has been conducted over the past three decades). Justice Sotomayor chastised the majority for adopting an “artificially narrow conception of the dangers of suggestive identifications” *Id.* at 739.

⁶⁹ *Id.* at 728–29 (acknowledging that the jury still convicted Perry even after being made aware of the identification’s weaknesses through cross examination and closing arguments).

III. DIFFERENT APPROACHES TO CHALLENGE EYEWITNESS EVIDENCE IN COURT TODAY

While the Supreme Court—and West Virginia—remains committed to the *Manson* test, some states have become aware of its flaws. Part III.A describes the current method West Virginia courts employ today to judge eyewitness evidence. Part III.B then details how certain states have abandoned the Supreme Court’s analysis and instead drafted their own approach on how to assess identification evidence’s reliability.

A. *Eyewitness Evidence in West Virginia Courts*

Echoing the Supreme Court, West Virginia courts have declared the overall “concern is on the reliability of the [eyewitness identification] testimony.”⁷⁰ Thus, West Virginia officially adopted the totality of the circumstances standard in determining whether to suppress in-court identifications based on suggestive out-of-court procedures.⁷¹ This standard was later clarified to include whether the out-of-court identification itself should be suppressed.⁷² Therefore, the current standard in West Virginia is the *Manson* test:

In determining whether an out-of-court identification of a defendant is so tainted as to require suppression of an in-court identification [or testimony as to the out-of-court identification itself] a court must look to the totality of the circumstances and determine whether the identification was reliable, even though the confrontation procedure was suggestive, with due regard given to such factors as [the five *Biggers* factors].⁷³

Although West Virginia still utilizes *Manson*, it has, unlike most states, begun to recognize eyewitness misidentification as an increasing problem. To remedy this, West Virginia enacted new legislation, titled the Eyewitness Identification Act,⁷⁴ to prevent misidentifications from occurring.⁷⁵

⁷⁰ State v. Boykins, 320 S.E.2d 134, 137 (W. Va. 1984).

⁷¹ See, e.g., State v. Casdorff, 230 S.E.2d 476, 481 (W. Va. 1976).

⁷² See State v. Spence, 388 S.E.2d 498, 503–04 (W. Va. 1989); State v. Boyd, 280 S.E.2d 669, 678 (W. Va. 1981) (clarifying that the *Biggers* test should also apply in determining whether the out-of-court identification itself should be suppressed).

⁷³ E.g., *Spence*, 388 S.E.2d at 503–04.

⁷⁴ W. VA. CODE §§ 62-1E-1 to -3 (2014).

⁷⁵ See Lawrence Messina, *Bill Targets Witness Errors Senate Proposal Would Help Prevent Misidentification*, CHARLESTON GAZETTE & DAILY MAIL, Feb. 23, 2007, 2007 WLNR 3583924 (“Eyewitness misidentification is a serious problem, and the reforms being considered in West Virginia are proven to increase the accuracy of identifications.”).

The West Virginia Eyewitness Identification Act was passed in 2007 and was recently amended in 2013. This statute requires all West Virginia law enforcement agencies that conduct eyewitness identification procedures to create “specific written procedures for conducting photo lineups, live lineups, and showups” that comply with the statute’s recommendations.⁷⁶ For example,

⁷⁶ W. VA. CODE § 62-1E-3. Section 62-1E-2 of the West Virginia Eyewitness Identification Act completely lists the recommendations:

(a) Prior to a lineup or showup, law enforcement should record as complete a description as possible of the perpetrator provided by the eyewitness, in the eyewitness’s own words. This statement should also include information regarding the conditions under which the eyewitness observed the perpetrator including location, time, distance, obstructions, lighting and weather conditions. The eyewitness should also be asked if he or she wears or has been prescribed glasses or contact lenses and whether he or she was wearing them at the time of the witnessed event. The administrator should record whether or not the eyewitness was wearing glasses or contact lenses at the time of the lineup or showup.

(b) After completing the requirements of subsection (a) of this section, but before a lineup or showup, the eyewitness should be given the following instructions:

(1) That the perpetrator may or may not be present in the lineup, or, in the case of a showup, may or may not be the person that is presented to the eyewitness;

(2) That the eyewitness is not required to make an identification;

(3) That it is as important to exclude innocent persons as it is to identify the perpetrator;

(4) That the investigation will continue whether or not an identification is made; and

(5) That the administrator does not know the identity of the perpetrator.

(c) Nothing should be said, shown or otherwise suggested to the eyewitness that might influence the eyewitness’s identification of any particular lineup or showup member, at any time prior to, during or following a lineup or showup.

(d) All lineups should be conducted blind unless to do so would place an undue burden on law enforcement or the investigation. If conducting a blind lineup would place an undue burden on law enforcement or the investigation, then the administrator shall use the folder shuffle method.

(e) All lineups should be conducted in a sequential presentation. When there are multiple suspects, each identification procedure shall include only one suspect.

(f) At least four fillers should be used in all lineups. The fillers shall resemble the description of the suspect as much as practicable and shall not unduly stand out.

(g) In a photo lineup, there should be no characteristics of the photos themselves or the background context in which they are placed which shall make any of the photos unduly stand out.

(h) In a live lineup, all lineup participants must be out of view of the eyewitness prior to the identification procedure.

(i) If there are multiple eyewitnesses for the same lineup:

(1) Each eyewitness should view the lineup or lineups separately;

(2) The suspect should be placed in a different position in the lineup for each eyewitness; and

one recommendation is that police should only give the following instructions to an eyewitness before conducting a live lineup:

- (1) That the perpetrator may or may not be present in the lineup, or, in the case of a showup, may or may not be the person that is presented to the eyewitness;
- (2) That the eyewitness is not required to make an identification;
- (3) That it is as important to exclude innocent persons as it is to identify the perpetrator;
- (4) That the investigation will continue whether or not an identification is made; and
- (5) That the administrator does not know the identity of the perpetrator.⁷⁷

While the statute's opponents argued, in 2007 when the act was first passed, that it "[ies] the hands of law enforcement,"⁷⁸ the statute's detailed recommendations—ranging from how to conduct a lineup to how many people

(3) The eyewitnesses should not be permitted to communicate with each other until all identification procedures have been completed.

(j) Showups should only be performed using a live suspect and only in exigent circumstances that require the immediate display of a suspect to an eyewitness. A law-enforcement official shall not conduct a showup with a single photo; rather a photo lineup must be used.

(k) Law-enforcement officers should make a written or video record of a lineup which shall be provided to the prosecuting attorney in the event that any person is charged with the offense under investigation. The written record shall include all steps taken to comply with this article which shall include the following information:

- (1) The date, time and location of the lineup;
- (2) The names of every person in the lineup, if known, and all other persons present at the lineup;
- (3) The words used by the eyewitness in any identification, including words that describe the eyewitness's certainty or uncertainty in the identification at the time the identification is made;
- (4) Whether it was a photo lineup or live lineup;
- (5) The number of photos or individuals that were presented in the lineup;
- (6) Whether the lineup administrator knew which person in the lineup was the suspect;
- (7) Whether, before the lineup, the eyewitness was instructed that the perpetrator might or might not be presented in the lineup;
- (8) Whether the lineup was simultaneous or sequential;
- (9) The signature, or initials, of the eyewitness, or notation if the eyewitness declines or is unable to sign; and
- (10) A video of the lineup and the eyewitness's response may be included.

W. VA. CODE § 62-1E-2.

⁷⁷ W. VA. CODE §§ 62-1E-2(b)(1)–(5).

⁷⁸ Messina, *supra* note 75. State Senator Evan Jenkins stated "this legislation is tying the hands of law enforcement in a fluid environment We really need to address crime in this state, and this is a step in the wrong direction." *Id.*

must be included—aim to reduce the possibility of incorrect identifications.⁷⁹ This statute recognizes that the police can have a powerful impact on eyewitnesses.⁸⁰ Yet, it only deals with collecting eyewitness evidence on the ground level; admitting and challenging this evidence in the court system, however, is an entirely different matter.⁸¹

B. Leading the Reform Movement: New Jersey, Oregon, and Massachusetts

Thirty-seven years have passed since the Supreme Court announced the *Manson* test. During this time, *Manson* remained the status quo. However, in 2011, New Jersey issued *State v. Henderson*.⁸² Oregon soon followed a year later with *State v. Lawson*.⁸³ Massachusetts continued the trend in 2013.⁸⁴ Change had officially begun.

1. Due Process Upheaval: New Jersey's Answer

Acknowledging that a “vast body of scientific research about human memory has emerged,” the Supreme Court of New Jersey in *State v. Henderson* declared that the *Manson* test needed revision.⁸⁵

Stemming from a murder investigation where the defendant was identified through a photo array, the court formulated a new framework for challenging eyewitness evidence: (1) the defendant must present evidence of “suggestiveness” to obtain a pretrial hearing; (2) the State then must establish that the identification is reliable, accounting for both estimator and system variables; (3) the defendant still has the overall burden to show a “substantial likelihood of irreparable misidentification” through either cross-examining eyewitnesses, presenting expert testimony, or by introducing evidence linked with both types of variables; and (4) the court should suppress the identification if it determines, after weighing the evidence, that the defendant demonstrated

⁷⁹ See *supra* note 76 for a complete list.

⁸⁰ See *infra* Part IV.B.

⁸¹ See *supra* Parts II.A–C, III.A.

⁸² 27 A.3d 872 (N.J. 2011). In *Henderson*, the court appointed a Special Master to evaluate the current scientific evidence on eyewitnesses. *Id.* at 877. After interviewing seven experts, the Special Master presented the court 2,000 transcript pages and reports on hundreds of scientific studies. *Id.* The court adopted much of what the Special Master reported. *Id.*

⁸³ 291 P.3d 673 (Or. 2012).

⁸⁴ COMMONWEALTH OF MASS., SUPREME JUDICIAL COURT STUDY GROUP ON EYEWITNESS EVIDENCE (July 25, 2013), available at <http://www.mass.gov/courts/docs/sjc/docs/eyewitness-evidence-report-2013.pdf>.

⁸⁵ See *Henderson*, 27 A.3d at 877–78, 918–20 (“In the end, we conclude that the current standard for assessing eyewitness identification evidence does not fully meet its goals. It does not offer an adequate measure for reliability or sufficiently deter inappropriate police conduct.”).

an irreparable misidentification.⁸⁶ Yet, if the court admits the identification then the trial will proceed as normal; at the conclusion, however, the court will charge the jury with specially tailored jury instructions.⁸⁷

To obtain a pretrial hearing, “suggestive” evidence must exist; this pertains exclusively to system variables.⁸⁸ The court determined that estimator variables alone should not trigger a pretrial hearing because courts have no control over these variables; the number of pretrial hearings would increase astronomically; and the judge’s interpretation of each variable’s potential effect on the witness would play too large a role.⁸⁹ Once evidence is presented, however, then the court can examine both system and estimator variables together.⁹⁰ The court believed that encompassing both types would “address reliability with greater care and better reflect how memory works.”⁹¹ If the defendant’s allegation is shown to be groundless, the court can automatically end the hearing at any time.⁹²

The Supreme Court of New Jersey in *Henderson* broadened a defendant’s due process protection against faulty eyewitness evidence in two ways: it (1) increased procedural scrutiny and (2) completely rewrote jury instructions for cases using eyewitness evidence.⁹³ By not adopting a per se exclusionary rule, the *Henderson* test provides less of an incentive for prosecutors to cover up mistakes of law enforcement.⁹⁴ Simultaneously, police

⁸⁶ *Id.* at 879–82, 920. See *supra* note 14 and accompanying text for the definitions on system and estimator variables. For a list of system and estimator variables, see *infra* Part IV.B–C.

⁸⁷ *Id.* at 924–26.

⁸⁸ *Id.* at 920. System variables are actions under the criminal justice system’s control, such as how to conduct a lineup or showup. See *supra* note 14 and accompanying text. For a more detailed list of system variables, see *infra* Part IV.B.

⁸⁹ *Id.* at 923. The court believed focusing exclusively on estimator variables alone would be too much of a judgment call for judges: “it is difficult to image that a trial judge would preclude a witness from testifying because the lighting was ‘too dark,’ . . . How dark is too dark as a matter of law? . . . What guideposts would a trial judge use in making those judgment calls?” *Id.* In addition, the court was worried about overburdening the judicial system with an increase in pretrial hearings. *Id.* The court noted that in 2009 it conducted 200 *Wade* hearings; that number would increase if a defendant could motion for a hearing based on estimator variables alone, which could possibly exist in every eyewitness case. *Id.* For a list of estimator variables, see *infra* Part IV.C.

⁹⁰ *Id.* at 922. One of the principal goals behind the revised framework was to “allow all relevant system and estimator variables to be explored and weighed at pretrial hearings when there is some actual evidence of suggestiveness.” *Id.* at 919.

⁹¹ *Id.* at 922.

⁹² *Id.* at 920.

⁹³ See *id.* at 919; see also Amy D. Trenary, Note, *State v. Henderson: A Model for Admitting Eyewitness Identification Testimony*, 84 U. COLO. L. REV. 1257, 1296 (2013).

⁹⁴ See Jacob L. Zerkle, Note, *I Never Forget a Face: New Jersey Sets the Standard in Eyewitness Identification Reform*, 47 VAL. U. L. REV. 357, 388 (2012).

procedures should become more efficient as judges can now further investigate identification procedures during a defendant's pretrial hearing.⁹⁵ In addition, modern scientific data on eyewitnesses is incorporated because the judge can examine more variables.⁹⁶ Finally, by requiring the judge to inform the jury about such variables through jury instructions, jurors become more aware of such problems in identification evidence.⁹⁷

2. The Rules of Evidence: The Oregon Approach

Unlike New Jersey's focus on due process, Oregon decided in *State v. Lawson*⁹⁸ to strictly use the rules of evidence to address the growing problem of eyewitness misidentification.⁹⁹ In *Lawson*, the court created a three step approach to eyewitness evidence: (1) when a defendant files a motion to exclude the identification, the State, as the proponent, has the initial burden to establish its relevancy; (2) if the State satisfies step one, the defendant must then establish that the evidence's probative value is "substantially outweighed" by certain factors such as unfair prejudice; and (3) if the court concludes that the defendant has met this standard, it can exclude the identification or impose an intermediate remedy short of exclusion.¹⁰⁰

In *Lawson*, the court decided to focus solely on evidentiary procedures, believing that nothing plausible existed "to hinder the analysis of eyewitness reliability with purposeless distinctions between suggestiveness and other sources of unreliability."¹⁰¹ The *Lawson* court reasoned that evidentiary rules, not due process, are the preferred way to challenge an identification because "[a] trial court tasked with determining a constitutional claim must necessarily assume that the evidence is otherwise admissible; were it inadmissible on evidentiary grounds, the court would never reach the constitutional

⁹⁵ See *Henderson*, 27 A.3d at 923 ("More probing pretrial hearings about suggestive police procedures, though, can deter inappropriate police practices."); see also Zerkle, *supra* note 94, at 388.

⁹⁶ See *Henderson*, 27 A.3d at 922; see also Zerkle, *supra* note 94, at 389.

⁹⁷ See *Henderson*, 27 A.3d at 924–25 ("[I]t is the court's obligation to help jurors evaluate evidence critically and objectively to ensure a fair trial."); see also Zerkle, *supra* note 94, at 390.

⁹⁸ 291 P.3d 673 (Or. 2012).

⁹⁹ *Id.* at 690–91 (concluding that the Oregon Evidence Code is the proper way to determine admissibility of eyewitness evidence because the rules "articulate minimum standards of reliability intended to apply broadly to many types of evidence").

¹⁰⁰ *Id.* at 697; see OR. EVID. CODE 104 (Preliminary Questions), 307 (Allocation of the Burden of Producing Evidence), 602 (Lack of Personal Knowledge), 701 (Opinion Testimony by Lay Witnesses), 402 (Relevant Evidence Generally Admissible), and 403 (Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Undue Delay).

¹⁰¹ *Lawson*, 291 P.3d at 688–89.

question.”¹⁰² The court declared that requiring the defendant to establish evidence of a suggestive identification procedure first—like the due process structure mandates—is improper because the State administers and controls the evidence.¹⁰³

Although focusing on a different legal area, Oregon went one step further than New Jersey in some aspects. In Oregon, courts now must consider all factors that may affect an eyewitness’s reliability at once.¹⁰⁴ In addition, like in New Jersey, it allows judges to impose intermediate remedies such as permitting expert testimony or limiting the witness’s testimony.¹⁰⁵ Finally, the State has the initial burden—not the defendant (like in *Henderson*)—to establish the admissibility of the identification evidence.¹⁰⁶

3. The Study Group: Massachusetts’s Recommendations

The Massachusetts Supreme Judicial Court created the “Study Group on Eyewitness Identification” (Study Group) to deter suggestive identification procedures and reduce the risk of wrongful convictions.¹⁰⁷ The Study Group concluded that new scientific research rendered Massachusetts’s law inadequate, and thus proposed a new legal framework to deter suggestive identification procedures.¹⁰⁸

Because *Henderson* and *Lawson* offered conflicting dichotomies, Massachusetts declined to base its proposal on either respective approach.¹⁰⁹ *Henderson* was believed to be “over-inclusive” with the potential to burden judicial resources and slow the resolution of criminal matters.¹¹⁰ Regarding *Lawson*, placing the initial burden on the prosecution conflicted with current

¹⁰² *Id.* at 689 (“[A] trial court tasked with considering a question of evidentiary admissibility clearly cannot begin by assuming admissibility.”).

¹⁰³ *Id.*

¹⁰⁴ *See id.* at 694–95 (OR. EVID. CODE 403 encompasses both system and estimator variables). *But see* State v. Henderson, 27 A.3d 872, 920 (N.J. 2011) (only evidence of system variables will result in a pretrial hearing).

¹⁰⁵ *See Lawson*, 291 P.3d at 695; *see also Henderson*, 27 A.3d at 925 (judges under the *Henderson* test can also limit parts of identification testimony).

¹⁰⁶ *See Lawson*, 291 P.3d at 697. *Contra Henderson*, 27 A.3d at 920 (the defendant must first present evidence of suggestiveness to earn a hearing).

¹⁰⁷ COMMONWEALTH OF MASS., *supra* note 84, at 1 (the group consisted of prosecutors, judges, defense attorneys, law enforcement, and academic scholars).

¹⁰⁸ *Id.* at 41.

¹⁰⁹ *Id.* at 46–47.

¹¹⁰ *Id.* at 43; *see supra* note 89 and accompanying text (discussing New Jersey’s concern on overburdening the court system).

Massachusetts due process standards; it was also believed that treating all sources of reliability identically weakened defendants' due process rights.¹¹¹

Accordingly, Massachusetts recommended four routes a defendant could take to obtain a pretrial hearing on identification evidence:

- (1) [T]he defendant makes a preliminary showing of an unnecessarily suggestive identification procedure . . . ; or (2) the defendant makes a showing that a witness was involved in a highly suggestive confrontation with the defendant independent of any police involvement . . . ; or (3) that the police failed to follow certain specific [B]est [P]olice [P]ractices on eyewitness identification in a substantial way in conducting or arranging a pretrial identification procedure; or (4) when the pretrial eyewitness identification is uncorroborated and the defendant makes a showing of the presence of estimator variables casting doubt on the reliability of the identification.¹¹²

By increasing the threshold to obtain a hearing, the Massachusetts recommendations provide an incentive for the police to follow eyewitness identification procedures, and it allows the court to account for estimator variables by scrutinizing uncorroborated eyewitness evidence.¹¹³ At the hearing, both system and estimator variables will be examined.¹¹⁴

Once granted a pretrial hearing, the identification evidence may be excluded in three different ways.¹¹⁵ First, the out-of-court identification will be excluded if the defendant "proves by a preponderance of the evidence that the out-of-court identification was so unnecessarily suggestive that it was conducive to irreparable misidentification"¹¹⁶ For the in-court identification to be admissible, the Commonwealth, by clear and convincing evidence, must prove that it "is the product of a source independent of the tainted procedure and is reliable."¹¹⁷

Second, both the in-court *and* out-of-court identification will be excluded if the defendant by a preponderance of the evidence proves "the

¹¹¹ *Id.* at 44–46. The Study Group believed that "treating all sources of reliability alike—both police suggestiveness and estimator variable problems—runs the risk of weakening a defendant's due process rights concerning police conduct." *Id.* at 46. See *supra* note 100 and accompanying text for discussion of the State's initial burden under the *Lawson* test.

¹¹² *Id.* at 47 (citation omitted).

¹¹³ *Id.* at 47–48.

¹¹⁴ *Id.* at 111.

¹¹⁵ *Id.* at 110–11.

¹¹⁶ *Id.* at 111; see also *Stovall v. Denno*, 388 U.S. 293, 301–02 (1967).

¹¹⁷ COMMONWEALTH OF MASS., *supra* note 84, at 111 (both identifications will be excluded if the Commonwealth cannot prove so); see also *United States v. Wade*, 388 U.S. 218, 240 (1967).

pretrial eyewitness identification is unreliable, taking into account the totality of the circumstances in the case at bar, including system and estimator variables”¹¹⁸

Third, both the in-court *and* out-of-court identifications will be excluded if the “defendant proves by a preponderance of the evidence that the police failed in a substantial way to follow certain specific Best Police Practices”¹¹⁹ Nonetheless, if the case does proceed to trial, similar to *Henderson* and *Lawson*, the Study Group recommended that the judge be able to issue specific jury instructions, limit witness testimony, and permit introduction of expert testimony at trial.¹²⁰

A caveat does exist however. Despite the thoroughness of the Study Group’s report, its findings are still only recommendations; no guarantee exists that the Massachusetts judicial system will implement the changes.

What propelled New Jersey, Oregon, and Massachusetts to create these new eyewitness standards? Undoubtedly, the sheer amount of scientific data available detailing the unreliability of eyewitnesses propelled this change. Although these three approaches to identification evidence vary, they all have one thing in common: the overall belief that the *Manson* test is ineffective.

IV. THE SCIENCE PROMPTING STATES TO REJECT THE *MANSON* TEST

Jennifer Thompson was exhausted and frightened; yet, she was 100% positive she found her rapist after identifying Ronald Cotton in a lineup.¹²¹ Eleven years later, Ronald Cotton was released from prison as DNA proved his innocence.¹²² Why are eyewitnesses—even confident ones like Jennifer Thompson—unreliable? Is it because they “must testify about an encounter with a total stranger under circumstances of emergency or emotional stress,” or is it because “the witness’ recollection of the stranger can be distorted easily by the circumstances or by later actions of the police”?¹²³ This Part will show that the answer is a combination of both.

¹¹⁸ COMMONWEALTH OF MASS., *supra* note 84, at 111.

¹¹⁹ *Id.* (for a list of Massachusetts’s Best Police Practices, see pages 85–90 of the report).

¹²⁰ *Id.* at 112–13; *see also* State v. Henderson, 27 A.3d 872, 925 (2011); State v. Lawson, 291 P.3d 673, 695–96 (2012).

¹²¹ *What Jennifer Saw*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/dna/interviews/thompson.html> (last visited Nov. 19, 2014).

¹²² *Ronald Cotton*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Ronald_Cotton.php (last visited Nov. 19, 2014).

¹²³ *Manson v. Brathwaite*, 432 U.S. 98, 112 (1977).

A. *What the Brain Sees: How Memory Operates*

Memory is malleable; it is not permanently etched in stone.¹²⁴ Contrary to popular belief, the brain does not work like a videotape recorder.¹²⁵ Instead, memory can be more aptly described as “an imaginative reconstruction or construction” of imprecise, rudimentary fragments.¹²⁶

Memory is housed in the largest portion of the brain, the cerebrum,¹²⁷ which is divided into two hemispheres, each containing four lobes: frontal, temporal, parietal, and occipital.¹²⁸ Memory is specifically stored within those lobes.¹²⁹ The frontal lobe, the largest of the four, contains the prefrontal cortex, which plays an important part in memory because it controls head and eye movements.¹³⁰ Located in the back of the brain, the occipital lobe enables visual information—colors and shapes—to be received and processed.¹³¹ The parietal lobe gives meaning to objects from stored information as it receives different signals from other parts of the body.¹³² On each side of the brain are the temporal lobes, which help people recognize objects and human faces.¹³³ Working together, these four sections of the brain control how eyewitnesses perceive an event.

Human recollection can be divided into three stages: (1) acquisition, (2) retention, and (3) retrieval.¹³⁴ First, the witness perceives the incident—the acquisition stage.¹³⁵ Second, the witness commits the information to memory during the period of time between the event and its recall—the retention stage.¹³⁶ Finally, the witness recalls the stored information—the retrieval

¹²⁴ See ELIZABETH F. LOFTUS ET AL., *EYEWITNESS TESTIMONY CIVIL AND CRIMINAL* 14 (5th ed. 2013); see also LOFTUS, *supra* note 31, at 21.

¹²⁵ See LOFTUS ET AL., *supra* note 124, at 14.

¹²⁶ Brief for Amicus Curiae American Psychological Association in Support of Petitioner at 7, *Perry v. New Hampshire*, 132 S. Ct. 716 (2012) (No. 10-8974) (citing FREDERIC C. BARTLETT, *REMEMBERING: A STUDY IN EXPERIMENTAL AND SOCIAL PSYCHOLOGY* 213), available at <http://www.apa.org/about/offices/ogc/amicus/new-hampshire.pdf>.

¹²⁷ *Anatomy of the Brain*, AM. ASSOC. OF NEUROLOGICAL SURGEONS (June 2006), <http://www.aans.org/Patient%20Information/Conditions%20and%20Treatments/Anatomy%20of%20the%20Brain.aspx>.

¹²⁸ *Id.*; see also RITA CARTER ET AL., *THE HUMAN BRAIN BOOK: AN ILLUSTRATED GUIDE TO ITS STRUCTURE, FUNCTION, AND DISORDERS* 66–68 (2009).

¹²⁹ *Anatomy of the Brain*, *supra* note 127.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See LOFTUS ET AL., *supra* note 124, at 14.

¹³⁵ *Id.*

¹³⁶ *Id.*

stage.¹³⁷ Numerous factors can distort a witness's accuracy during these stages.¹³⁸

During the acquisition stage—also called encoding—variables that can influence the information being stored are divided into either event or witness factors.¹³⁹ Event factors are details within the event itself such as the duration of the incident.¹⁴⁰ Witness factors, on the other hand, are factors exclusively pertaining to the witness; this includes age or gender.¹⁴¹ Because many of the factors that can distort an eyewitness's memory during the acquisition stage are beyond anyone's control, these factors are also known as “estimator variables.”¹⁴²

Following the acquisition stage, the witness commits the information to memory during the retention stage.¹⁴³ Four major variables exist during this stage that can potentially distort an eyewitness's memory: (1) length of retention interval; (2) verbal form of the post-event information; (3) violence of the event; and (4) whether any warning is given that the post-event information about to be received may be distorted.¹⁴⁴

Retrieving memory fragments can occur in many different ways.¹⁴⁵ A witness may be asked a specific question or could be presented with an object triggering the event's recollection.¹⁴⁶ The method or even the wording of the question itself can affect how an eyewitness retrieves information.¹⁴⁷ Likely occurring in court or a police station, many of the factors affecting retrieval are labeled “system variables” because exposure to them can be controlled.¹⁴⁸

It is therefore evident that many variables affect a witness's memory. Accordingly, each is described in more detail below. Besides being the most

¹³⁷ *Id.*

¹³⁸ *Id.* at 15; *see infra* Part IV.B–C.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*; *see* Wells, *supra* note 14, at 1548. *See infra* Part IV.C for a list of estimator variables.

¹⁴³ *See* LOFTUS ET AL., *supra* note 124, at 14; *see also* Zerkle, *supra* note 94, at 369.

¹⁴⁴ *See* LOFTUS ET AL., *supra* note 124, at 62.

¹⁴⁵ *Id.* at 66.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* When it comes to the type of questions asked, witnesses that are allowed to talk freely in the beginning and then answer specific questions towards the end produce the more accurate recall. *Id.* For how to word questions, the questions that yielded the more accurate result mentioned the actual event in them (leading questions). *Id.* at 66–67.

¹⁴⁸ *Id.* at 16; *see* Wells, *supra* note 14, at 1548. *See infra* Part IV.B for a list of system variables.

studied, the following lists of variables are the same ones that New Jersey, Oregon, and Massachusetts specifically discussed.¹⁴⁹

B. Ability to Control: System Variables

System variables are variables that can be controlled by the criminal justice system.¹⁵⁰ They are labeled as such because understanding them can lead to change in how the criminal justice system operates.¹⁵¹ Divided into two broad categories, interviewing witnesses and identifying suspects, many social influences exist that affect both.¹⁵² The system variables discussed here are (1) double-blind administration, (2) lineup instructions, (3) lineup construction, (4) feedback and confidence, (5) multiple viewings, (6) simultaneous versus sequential lineups, (7) facial composites, and (8) showups.

1. Double-Blind Administration

The ideal lineup consists of an administrator who knows neither the suspect's identity nor the suspect's position in the lineup.¹⁵³ Known as a double-blind procedure, its purpose is to "prevent an administrator from intentionally or unintentionally influencing a witness'[s] identification decision."¹⁵⁴ A lineup administrator can have a significant influence over the witness, especially if the administrator knows the suspect's position,¹⁵⁵ because an "experimenter's knowledge and beliefs about how participants should respond are communicated, directly or indirectly, through the experimenter's behavior"—this is called the *expectancy effect*.¹⁵⁶ Thus, if the administrator knows the identity of the suspect in the lineup, her words or subtle cues can

¹⁴⁹ See *State v. Henderson*, 27 A.3d 872, 896–909 (N.J. 2011); *State v. Lawson*, 291 P.3d 673, 686–88 (Or. 2012); COMMONWEALTH OF MASS., *supra* note 84, at 19–32.

¹⁵⁰ See Wells, *supra* note 14, at 1548.

¹⁵¹ *Id.*

¹⁵² See Gary L. Wells et al., *Eyewitness Evidence: Improving Its Probative Value*, 7 PSYCHOL. SCI. IN THE PUB. INT. 45, 55 (2006) [hereinafter *Eyewitness Evidence*].

¹⁵³ See *id.* at 63; see also *Henderson*, 27 A.3d at 897; LOFTUS ET AL., *supra* note 124, at 92–93.

¹⁵⁴ *Henderson*, 27 A.3d at 896.

¹⁵⁵ See Steven E. Clark et al., *Lineup Administrator Influences on Eyewitness Identification Decisions*, 15 J. EXPERIMENTAL PSYCHOL. 63, 63 (2009); see also Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 627–29 (1998) [hereinafter, *Recommendations*].

¹⁵⁶ Ryann M. Haw & Ronald P. Fisher, *Effects of Administrator-Witness Contact on Eyewitness Identification Accuracy*, 89 J. APPLIED PSYCHOL. 1106, 1106 (2004); see also *Recommendations*, *supra* note 155, at 627.

lead the witness to choose that suspect.¹⁵⁷ Although most witnesses are unaware of this influence, double-blind lineups should be used to eliminate this potential bias and allow witnesses to make selections strictly from memory alone.¹⁵⁸

2. Lineup Instructions

Before a lineup is conducted, two instructions can be given to a witness: neutral or biased.¹⁵⁹ A neutral instruction states that the suspect may or may not be present in the lineup and that the witness has the power to reject the lineup if he concludes the suspect is absent.¹⁶⁰ But a biased instruction, conversely, tells the witness that he should select someone from the lineup; the witness is not told that the suspect may not be present.¹⁶¹

Manipulating witnesses into believing the suspect is actually present relaxes their decision-making process thereby increasing the probability that a witness will select someone.¹⁶² Biased instructions lead to higher identification errors in target-absent lineups because the propensity to select a lineup member is dramatically higher; yet it has no similar effect for target-present lineups.¹⁶³ Neutral instructions, on the other hand, “result[] in fewer choices and fewer false identifications without a decrease in correct identifications.”¹⁶⁴ This illustrates the power of lineup instructions demonstrating why neutral instructions should always be given.¹⁶⁵

¹⁵⁷ See Haw & Fisher, *supra* note 156, at 1106–107; see also *Eyewitness Evidence*, *supra* note 152, at 630.

¹⁵⁸ Haw & Fisher, *supra* note 156, at 1107; *Recommendations*, *supra* note 155, at 627.

¹⁵⁹ Joanna D. Pozzulo & Julie Dempsey, *Biased Lineup Instructions: Examining the Effect of Pressure on Children’s and Adults’ Eyewitness Identification Accuracy*, 36 J. APPLIED SOC. PSYCHOL. 1381, 1383 (2006).

¹⁶⁰ *Id.* at 1383.

¹⁶¹ *Id.*

¹⁶² Roy S. Malpass & Patricia G. Devine, *Eyewitness Identification: Lineup Instructions and the Absence of the Offender*, 66 J. APPLIED PSYCHOL. 482, 487 (1981) [hereinafter *Eyewitness Identification*].

¹⁶³ *Id.* at 486; see also LOFTUS ET AL., *supra* note 124, at 91; Roy S. Malpass & Patricia G. Devine, *Guided Memory in Eyewitness Identification*, 66 J. APPLIED PSYCHOL. 343, 346–47 (1981); Nancy Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 LAW & HUM. BEHAV. 283, 294 (1997); Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court’s Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW & HUM. BEHAV. 1, 6–7 (2009); *Eyewitness Evidence*, *supra* note 152, at 60; *Recommendations*, *supra* note 155, at 629–30.

¹⁶⁴ *Eyewitness Identification*, *supra* note 162, at 487; *Recommendations*, *supra* note 155, at 629–30.

¹⁶⁵ LOFTUS ET AL., *supra* note 124, at 91.

3. Lineup Construction

Kevin Spacey, Gabriel Byrne, Benicio Del Toro, Stephen Baldwin, and Kevin Pollak walk into a room in a police station for a lineup: all have different hairstyles; two have facial hair; all are wearing different outfits; all are different heights. Despite being an iconic scene in the movie “THE USUAL SUSPECTS,” this is an incorrect way to conduct lineups.¹⁶⁶

Live lineups and photo arrays are the two main lineup types.¹⁶⁷ Unlike the more familiar live lineup, a photo array has a witness look through a group of photographs before making a selection.¹⁶⁸ There are several cardinal rules in conducting lineups. To the Department of Justice, four of these rules are essential however:

- (1) Include only one suspect in each identification procedure[;]
- (2) Select fillers who generally fit the witness’ description of the perpetrator. When there is a limited/inadequate description of the perpetrator provided by the witness, or when the description of the perpetrator differs significantly from the appearance of the suspect, fillers should resemble the suspect in significant features[;] . . . [(3)] Include a *minimum* of four [for photo arrays or five for live lineups] fillers (non-suspects) per identification procedure[;] and [(4)] Create a consistent appearance between the suspect and fillers with respect to any unique or unusual feature (e.g., scars, tattoos) used to describe the perpetrator by artificially adding or concealing that feature.¹⁶⁹

Under the Department of Justice’s recommendations, the overall goal is creating a fair lineup in which the suspect does not stand out, thereby allowing the witness to make an accurate identification.¹⁷⁰ Following these simple, basic rules allows this to happen.

¹⁶⁶ THE USUAL SUSPECTS (MGM Studios 1995).

¹⁶⁷ LOFTUS ET AL., *supra* note 124, at 87–88.

¹⁶⁸ *Id.* at 88.

¹⁶⁹ U.S. DEP’T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 29–31 (1999), available at <https://www.ncjrs.gov/pdffiles1/nij/178240.pdf>; see also Roy S. Malpass et al., *Lineup Construction and Lineup Fairness*, in 2 THE HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR PEOPLE 155, 156–60 (R. Lindsay et al., eds. 2007), available at <http://web.uct.ac.za/depts/psychology/plato/Malpass%20Tredoux%20McQuiston%20EW%20Handbook%202007.pdf>; *Eyewitness Evidence*, *supra* note 152, at 60; *Recommendations*, *supra* note 155, at 630–35; Wells & Quinlivan, *supra* note 163, at 7.

¹⁷⁰ U.S. DEP’T OF JUSTICE, *supra* note 169, at 29.

4. Feedback & Confidence

Information given to witnesses prior to the lineup can influence their accuracy;¹⁷¹ information presented afterwards can have a similar effect as well. Post-identification feedback, while it does not affect the result of the identification itself, falsely inflates the witness's confidence in his selection, which increases the appearance of reliability to the jury.¹⁷² Witnesses who are given post-identification feedback (e.g., being told that he or she picked the correct suspect) "significantly inflate their reports to suggest better witnessing conditions at the time of the crime, stronger memory at the time of the lineup, and sharper memory abilities in general."¹⁷³ Witnesses have been known to also "report they had a better view of the culprit [and] that they could make out details of the face."¹⁷⁴ Eliminating post-identification feedback is an important goal because it will prevent jurors from being "erroneously impressed by a falsely confident eyewitness."¹⁷⁵

5. Multiple Viewings

By viewing the same suspect multiple times in lineups, it becomes difficult to tell whether identifying the suspect comes from the original event's memory or from an earlier identification procedure.¹⁷⁶ One problem with multiple viewings results from two mental cognitions called *mugshot exposure* and *mugshot commitment*.¹⁷⁷ Mugshot exposure occurs when a witness first views a set of photos, fails to identify anyone at that time, and then selects someone at a later identification procedure who was present in the earlier

¹⁷¹ See *supra* Part IV.B.2.

¹⁷² Gary L. Wells & Amy L. Bradfield, 'Good, You Identified the Suspect': Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, 83 J. APPLIED PSYCHOL. 360, 372-74 (1998); see also LOFTUS ET AL., *supra* note 124, at 68-72.

¹⁷³ Amy B. Douglass & Nancy Steblay, *Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect*, 20 APPLIED COGNITIVE PSYCHOL. 859, 864-65 (2006); see also LOFTUS ET AL., *supra* note 124, at 70; Amy B. Douglass et al., *Moderators of Post-Identification Feedback Effects on Eyewitnesses' Memory Reports*, 15 LEGAL & CRIMINOLOGICAL PSYCHOL. 279, 279-80 (2010); Daniel B. Wright & Elin M. Skagerberg, *Postidentification Feedback Affects Real Eyewitnesses*, 18 PSYCHOL. SCI. 172, 176 (2007).

¹⁷⁴ Wells & Bradfield, *supra* note 172, at 374.

¹⁷⁵ Douglass & Steblay, *supra* note 173, at 865; see also *Recommendations*, *supra* note 155, at 635-36.

¹⁷⁶ See *State v. Henderson*, 27 A.3d 872, 900 (N.J. 2011); *State v. Lawson*, 291 P.3d 673, 708 (Or. 2012).

¹⁷⁷ See Kenneth A. Deffenbacher et al., *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference*, 30 LAW & HUM. BEHAV. 287, 287 (2006); see also *Henderson*, 27 A.3d at 900.

photos.¹⁷⁸ This effect “decreases accuracy for a given witness at a subsequent lineup, both in terms of decreased likelihood of being correct (including hit and correct rejection rates) and increased probability of committing a false alarm.”¹⁷⁹

Mugshot commitment, on the other hand, occurs when a witness identifies someone from the initial photoset who is then included in a later lineup procedure.¹⁸⁰ This negatively affects a witness’s accuracy because once a witness initially selects someone he will remain committed to his initial choice instead of examining other possible candidates.¹⁸¹ Therefore, it is important to prevent witnesses from viewing fillers or suspects more than once.

6. Simultaneous vs. Sequential Lineups

A lineup or photo array can be presented in two forms: simultaneously or sequentially.¹⁸² The simultaneous lineup presents lineup participants all at once.¹⁸³ The sequential method, instead, presents an unknown number of lineup participants, viewed one at a time, and requires the witness to make a decision on each lineup participant before moving on to the next person.¹⁸⁴

Witnesses in sequential lineups tend to make fewer selections, which reduce false identification errors; simultaneous lineups, on the other hand, motivate witnesses to make more identifications, thereby increasing both accurate and inaccurate selections.¹⁸⁵ This increase for simultaneous lineups results from witnesses using the *relative-judgment strategy*: a witness compares the lineup members to each other and chooses the one that best matches his memory of the suspect.¹⁸⁶ Yet, this can be problematic when the real suspect is not actually in the lineup at all. A witness, however, cannot use relative-judgments in sequential lineups because each person or picture is presented one at a time, thus giving the witness the ultimatum of deciding whether this person

¹⁷⁸ Deffenbacher et al., *supra* note 177, at 287; *see also* LOFTUS ET AL., *supra* note 124, at 86.

¹⁷⁹ Deffenbacher et al., *supra* note 177, at 302; *see also* Wells & Quinlivan, *supra* note 163, at 8.

¹⁸⁰ *See Henderson*, 27 A.3d 872 at 900.

¹⁸¹ Deffenbacher et al., *supra* note 177, at 290–91, 298; *see also* LOFTUS ET AL., *supra* note 124, at 86.

¹⁸² LOFTUS ET AL., *supra* note 124, at 88.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 88–89.

¹⁸⁵ Nancy Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 LAW & HUM. BEHAV. 459, 464, 468–69 (2001); *see also* *Eyewitness Evidence*, *supra* note 152, at 63–64.

¹⁸⁶ Steblay et al., *supra* note 185, at 468–69; *see also* LOFTUS ET AL., *supra* note 124, at 88–89; *Eyewitness Evidence*, *supra* note 152, at 63.

is the suspect or not—this may explain why witnesses in sequential lineups make fewer selections.¹⁸⁷

Some researchers still remain skeptical of recommending sequential lineups over simultaneous lineups.¹⁸⁸ However, recent research in 2011 has reaffirmed the principle that “sequential procedure[s] reduce[] mistaken identifications with little or no reduction in accurate identifications.”¹⁸⁹ Thus, it seems sequential lineups are the better option in the long term.

7. Facial Composites

Occasionally, a witness will work with a sketch artist or computer program to construct a facial composite sketch of the suspect.¹⁹⁰ Today, computerized programs, like the FACES program, have replaced sketch artists in most law enforcement agencies.¹⁹¹ To use these programs, a witness recreates the suspect’s face one piece at a time.¹⁹²

Yet, despite these technological advances, “face composite[s] by an eyewitness [are] generally a poor representation of the original face[,]”¹⁹³ leading some researchers to conclude that “building a face composite diminishes the prospects that a person will later be able to identify that face from a six-person lineup.”¹⁹⁴ This may occur because of how people process faces. People tend to remember facial descriptions as a whole—the holistic approach—but computerized programs, however, require the witness to recreate the face in a piece-by-piece function.¹⁹⁵ New computer programs are

¹⁸⁷ Steblay et al., *supra* note 185, at 468–69.

¹⁸⁸ See Roy S. Malpass et al., *Public Policy and Sequential Lineups*, 14 LEGAL & CRIMINOLOGICAL PSYCHOL. 1, 8–11 (2009) (arguing that the “[i]nvestigation of sequential lineups is rife with inadequate science” because current studies have not properly isolated variables and studied them independently thus rendering results only causal connections).

¹⁸⁹ Gary L. Wells et al., *A Test of the Simultaneous vs. Sequential Lineup Methods: An Initial Report of the AJS National Eyewitness Identification Field Studies*, AM. JUDICATURE SOC’Y viiii, x (2011), available at <http://www.popcenter.org/library/reading/PDFs/lineupmethods.pdf>.

¹⁹⁰ Gary L. Wells & Lisa E. Hasel, *Facial Composites Production by Eyewitnesses*, 16 CURRENT DIRECTIONS IN PSYCHOL. SCI. 6, 6 (2007); see also LOFTUS ET AL., *supra* note 124, at 84–85; *Eyewitness Evidence*, *supra* note 152, at 64.

¹⁹¹ Wells & Hasel, *supra* note 190, at 6–7.

¹⁹² *Id.*; see also *Eyewitness Evidence*, *supra* note 152, at 64 (FACES includes “361 hair selections, 63 head shapes, 42 forehead lines, 410 sets of eyebrows, 514 sets of eyes, 593 noses, 561 sets of lips, 416 jaw shapes, 145 moustaches, 152 beards, 33 goatees, 127 sets of eyeglasses, 70 eye lines, 147 smile lines, 50 mouth lines, and 40 chin lines”).

¹⁹³ Wells & Hasel, *supra* note 190, at 6; see also LOFTUS ET AL., *supra* note 124, at 84; *Eyewitness Evidence*, *supra* note 152, at 64–65.

¹⁹⁴ Gary L. Wells et al., *Building Facial Composites Can Harm Lineup Identification Performance*, 11 J. EXPERIMENTAL PSYCHOL. 147, 151 (2005).

¹⁹⁵ See Wells & Hasel, *supra* note 190, at 9; see also LOFTUS ET AL., *supra* note 124, at 85.

being developed that use a “whole-face” method instead of the piecemeal method.¹⁹⁶

8. Showups

A showup occurs when a witness is shown a single suspect and asked to make an identification.¹⁹⁷ Compared to regular lineups, “identifications from one-person lineups are less accurate, and put innocent suspects at more risk, than identifications from six-person lineups.”¹⁹⁸ Showups do have some value however. If conducted immediately after the crime, showups can have similar reliability rates as lineups.¹⁹⁹ The caveat, though, is that the time window is small because accuracy rates have been found to substantially drop only 30 minutes later.²⁰⁰

Despite their potential benefits, showups have been considered “inherently suggestive,” leading some states to authorize their use in only strict circumstances.²⁰¹ This may be due to how the suspect is presented to the witness. Normally, a suspect is shown in handcuffs to the witness, which encourages the belief that he is the actual perpetrator.²⁰² With all of these dangers, a full lineup is the preferable method.

¹⁹⁶ See Wells & Hasel, *supra* note 190, at 9 (commenting that no data is available, however, indicating whether these whole-face programs are more effective than traditional composite programs).

¹⁹⁷ LOFTUS ET AL., *supra* note 124, at 86–87 (no fillers are present; it is only the witness and the suspect).

¹⁹⁸ Daniel A. Yarmey et al., *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 LAW & HUM. BEHAV. 459, 468 (1996); see also LOFTUS ET AL., *supra* note 124, at 87; Nancy Steblay et al., *Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison*, 27 LAW & HUM. BEHAV. 523, 533 (2003); Wells & Quinlivan, *supra* note 163, at 7.

¹⁹⁹ See Yarmey et al., *supra* note 198, at 468.

²⁰⁰ *Id.* at 468–69.

²⁰¹ See *State v. Henderson*, 27 A.3d 872, 903 (N.J. 2011) (citing *State v. Herrera*, 902 A.2d 177, 181 (N.J. 2006)). Wisconsin will only admit evidence from a showup if it was deemed necessary under the totality of the circumstances. *Id.* (citing *State v. Dubose*, 699 N.W.2d 582, 584–85 (Wis. 2005)). Massachusetts requires a “good reason” for conducting a showup. *Id.* (citing *Commonwealth v. Martin*, 850 N.E.2d 555, 562–63 (Mass. 2006)). New York suppresses evidence from showups unless exigent circumstances exist. *Id.* (citing *State v. Duuvon*, 571 N.E.2d 654, 656 (N.Y. 1991)).

²⁰² See LOFTUS ET AL., *supra* note 124, at 87.

C. Outside the Court's Grasp: Estimator Variables

Unlike system variables, estimator variables are beyond the legal system's control.²⁰³ Accounting for estimator variables is important for two reasons: (1) they are central to the understanding of why and when eyewitnesses are more likely to make mistakes; and (2) understanding system variables' importance is dependent on first understanding estimator variables.²⁰⁴ The estimator variables described here are (1) stress, (2) the weapon focus effect, (3) exposure duration, (4) distance & lighting, (5) witness characteristics, (6) perpetrator characteristics, (7) memory decay, (8) cross-race identification effect, (9) co-witness statements, and (10) speed of identification.

1. Stress

Even under immaculate viewing conditions, stress can hinder an eyewitness's ability to make an accurate identification.²⁰⁵ An optimal stress level exists at which human performance peaks and deviating from this impacts performance.²⁰⁶ Witnessing a crime potentially falls outside this range because "high levels of stress negatively impact[s] both accuracy of eyewitness identification as well as accuracy of recall of crime-related details."²⁰⁷ A 2004 experiment illustrates this effect.²⁰⁸ Over 500 military personnel members were placed in either a high-stress interrogation (involving threats and physical confrontation) or a low-stress interrogation; one day later, they were then asked to identify their interrogators.²⁰⁹ In live lineups, 70% of subjects from the high-stress interrogation scenario failed.²¹⁰ It was therefore concluded that "eyewitness memory for persons encountered during events that are personally relevant, highly stressful, and realistic in nature may be subject to substantial error."²¹¹

²⁰³ See Wells, *supra* note 14, at 1548.

²⁰⁴ *Eyewitness Evidence*, *supra* note 152, at 51.

²⁰⁵ *Id.* at 52.

²⁰⁶ See LOFTUS ET AL., *supra* note 124, at 30.

²⁰⁷ Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 LAW & HUM. BEHAV. 687, 699 (2004); see also LOFTUS ET AL., *supra* note 124, at 28–30; *Eyewitness Evidence*, *supra* note 152, at 52–53.

²⁰⁸ See generally Charles Morgan et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 INT'L J.L. & PSYCHIATRY 265 (2004).

²⁰⁹ *Id.* at 265–70.

²¹⁰ *Id.* at 272.

²¹¹ *Id.* at 274.

2. The Weapon Focus Effect

Weapon focus describes a witness's focused attention on a weapon, which diminishes the witness's ability to recall other details of the crime.²¹² Compared to situations when a weapon is present, "weapon-absent condition[s] generate[] significantly more accurate descriptions of the perpetrator."²¹³ This is true for two reasons.²¹⁴ First, weapons increase stress and anxiety above optimal levels.²¹⁵ As discussed, increased stress often leads to inaccurate identifications.²¹⁶ Second, people are highly fixated on weapons because their usage is mostly unexpected.²¹⁷ This effect has also been found to increase when the suspect threatens the witness while using a weapon.²¹⁸ The weapon focus effect, however, does not solely pertain to weapons; unusual objects have been found to exert a similar effect on participants as well.²¹⁹

3. Exposure Duration

The longer a person looks at something, common sense dictates the better his memory will be.²²⁰ One study exposed subjects to a simulated crime for either 12 or 45 seconds; afterwards, they were instructed to identify the suspect out of a lineup.²²¹ Results, as expected, revealed that longer exposure significantly increased accuracy rates for target-present and target-absent lineups.²²² In addition, witnesses also have been found to actually overestimate an incident's duration.²²³ Accordingly, if a witness testifies that an event lasted

²¹² See LOFTUS ET AL., *supra* note 124, at 33; *Eyewitness Evidence*, *supra* note 152, at 53.

²¹³ Nancy Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 LAW & HUM. BEHAV. 413, 415–17 (1992); see also Jonathan M. Fawcett et al., *Of Guns and Geese: A Meta-Analytic Review of the 'Weapon Focus' Literature*, 19 PSYCHOL., CRIME, & L. 35, 56 (2013), available at <http://www.tandfonline.com/doi/pdf/10.1080/1068316X.2011.599325>.

²¹⁴ See LOFTUS ET AL., *supra* note 124, at 33.

²¹⁵ *Id.*

²¹⁶ See *supra* Part IV.C.1.

²¹⁷ See LOFTUS ET AL., *supra* note 124, at 33.

²¹⁸ Fawcett et al., *supra* note 213, at 55–56.

²¹⁹ *Id.* at 37–38, 49, 56 (describing an unusual object as "an object that was unexpected given the context in which it was presented").

²²⁰ LOFTUS ET AL., *supra* note 124, at 19.

²²¹ See Amina Memon et al., *Exposure Duration: Effects on Eyewitness Accuracy and Confidence*, 94 BRIT. J. PSYCHOL. 339, 342–43 (2003).

²²² *Id.* at 348; see also LOFTUS ET AL., *supra* note 124, at 19; *Eyewitness Evidence*, *supra* note 152, at 53–54.

²²³ See LOFTUS ET AL., *supra* note 124, at 20–21.

longer than it actually did, jurors may use that time frame to positively judge the witness's recollection.²²⁴

4. Distance & Lighting

Certain environmental conditions can significantly affect an eyewitness's reliability.²²⁵ Unsurprisingly, "[a]ccuracy of witness identification decisions [are] significantly influenced by the distance between the witness and the target at the time of exposure."²²⁶ An increase in distance thus leads to a decrease in correct identifications; more surprising, however, is that increases in distance can also result in a decreased number of correct rejections in target-absent lineups.²²⁷ Researchers believe that witnesses who deem themselves too far away to make an accurate identification will resort to guessing instead.²²⁸

In addition to distance, the amount of lighting also influences accuracy. Witnessing an event in good lighting—as common sense suggests—leads to a more accurate identification.²²⁹ Witnesses are able to acquire more information in good lighting, which enables more information to be retrieved later.²³⁰ At night, identifications are more difficult because not enough light is present to activate certain receptor cells located in the eyes making objects appear to be more coarse and undefined.²³¹ Identifications made in daytime therefore should be considered more reliable than those made at night.

5. Witness Characteristics: Age & Gender

It is not uncommon today to see children called to testify as witnesses. One would assume that the younger the witness, the less reliable he would be.²³² Yet, children over age five have been discovered to have a relatively comparable correct identification rate in target-present lineups as adults; however, the accuracy rates drop for children under five.²³³ In target-absent

²²⁴ *Id.* at 20.

²²⁵ *Id.* at 17, 22–24.

²²⁶ R.C.L. Lindsay et al., *How Variations in Distance Affect Eyewitness Reports and Identification Accuracy*, 32 LAW & HUM. BEHAV. 526, 533 (2008); see also LOFTUS ET AL., *supra* note 124, at 22; Wells & Quinlivan, *supra* note 163, at 9–10.

²²⁷ Lindsay et al., *supra* note 226, at 533.

²²⁸ *Id.* at 535.

²²⁹ See LOFTUS ET AL., *supra* note 124, at 17.

²³⁰ *Id.*

²³¹ *Id.* at 17–18.

²³² *Id.* at 36.

²³³ Joanna D. Pozzulo & R.C.L. Lindsay, *Identification Accuracy of Children versus Adults: A Meta-Analysis*, 22 LAW & HUM. BEHAV. 549, 563 (1998) [hereinafter *Identification Accuracy*]; see also Joanna D. Pozzulo & Julie Dempsey, *Could Target Age Explain Identification Accuracy*

lineups though, adolescents produce a much lower correct rejection rate than adults.²³⁴ A possible explanation for this is because “line-up[s] place an implicit demand to make an ‘identification’ on the witness and this demand is greater for children than adults, resulting in a higher rate of false-positive responses.”²³⁵

When compared to young adults, an elderly witness’s capacity to make accurate identifications is significantly diminished.²³⁶ As people age, their sense of perception and awareness dwindles; accordingly, elderly witnesses are less likely to remember details about the suspect, the victim, or the environment.²³⁷ However, when identifying a person of their own age, elderly witnesses make more correct identifications than their younger counterparts.²³⁸ Nonetheless, identifications from elderly witnesses must be treated with slight skepticism.

Unlike age, where there is clear research support, there is no clear distinction between which gender makes the better witness—males or females.²³⁹ However, both genders are more accurate on different types of information: “[w]omen [are] more accurate and more resistant to suggestion about female-oriented details, whereas men [are] more accurate and resistant to suggestion about male-oriented details.”²⁴⁰ Females seem to more accurately remember details about clothing and the victim’s appearance while males, on the other hand, are more accurate about the perpetrator and the surrounding environment.²⁴¹ This occurs because men and woman pay closer attention—and can therefore process and store more information—to things that catch more of their interest.²⁴²

Differences Between Child and Adult Eyewitnesses?, 16 PSYCHIATRY, PSYCHOL. & L. S137, S137 (2009) [hereinafter *Target Age*]; LOFTUS ET AL., *supra* note 124, at 38.

²³⁴ *Identification Accuracy*, *supra* note 233, at 563–65.

²³⁵ *Target Age*, *supra* note 233, at S137.

²³⁶ A. Daniel Yarmey, *The Older Eyewitness*, in ELDERS, CRIME, AND THE CRIMINAL JUSTICE SYSTEM: MYTHS, PERCEPTIONS, AND REALITY IN THE 21ST CENTURY 127, 133 (Max B. Rothman et al., eds. 2000); *see also* LOFTUS ET AL., *supra* note 124, at 40.

²³⁷ Yarmey, *supra* note 236, at 130, 133.

²³⁸ *Id.* at 135.

²³⁹ *See* LOFTUS ET AL., *supra* note 124, at 41.

²⁴⁰ Peter A. Powers et al., *Eyewitness Accounts of Females and Males*, 64 J. APPLIED PSYCHOL. 339, 339 (1979).

²⁴¹ *Id.* at 344; *see also* LOFTUS ET AL., *supra* note 124, at 42.

²⁴² Powers et al., *supra* note 240, at 345–46; *see also* LOFTUS ET AL., *supra* note 124, at 42.

6. Perpetrator Characteristics

Disguises, ranging from sunglasses to clothing, are enough to lower an eyewitness's accuracy.²⁴³ For example, the number of correct identifications in one study dropped from 57% to 44% when the suspect's hair and hairline were covered using a hat or hood.²⁴⁴ One characteristic that can affect eyewitnesses is the presence of facial hair. Another study found that an eyewitness's accuracy lowered if facial features, like a suspect growing facial hair, changed between the incident and recall.²⁴⁵

7. Memory Decay

Memories never improve, and as time progresses, "memory strength will be weaker at longer retention intervals than at briefer ones."²⁴⁶ Labeled the *forgetting curve*, people forget new information soon after learning it; the amount they later forget levels off as time continues.²⁴⁷ The difference in reliability then between an identification made ten minutes and two hours after an incident may be substantially greater than the reliability between an identification made two weeks and two months after the same incident.²⁴⁸

Progression of time alone, however, is not the sole reason for memory loss; forgetting is mostly caused by what occurs during that time passage.²⁴⁹ This phenomenon is called *interference*: new information prevents a person from remembering the original, stored information.²⁵⁰ Estimating the power of memory decay, however, depends on the initial memory encoded during the acquisition stage because a witness can only forget information that was

²⁴³ See *Eyewitness Evidence*, *supra* note 152, at 54.

²⁴⁴ See Brian L. Cutler, *A Sample Of Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 327, 332–33 (2006).

²⁴⁵ K. E. Patterson & A. D. Baddeley, *When Face Recognition Fails*, 3 J. EXPERIMENTAL PSYCHOL.: HUM. LEARNING & MEMORY 406, 414–16 (1977); see also LOFTUS ET AL., *supra* note 124, at 82–83.

²⁴⁶ Kenneth A. Deffenbacher et al., *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation*, 14 J. EXPERIMENTAL PSYCHOL.: APPLIED 139, 142 (2008); see also *Eyewitness Evidence*, *supra* note 152, at 54.

²⁴⁷ HERMANN EBBINGHAUS, *MEMORY: A CONTRIBUTION TO EXPERIMENTAL PSYCHOLOGY* 76–79 (1913); see also LOFTUS ET AL., *supra* note 124, at 51–52.

²⁴⁸ See LOFTUS ET AL., *supra* note 124, at 52; see also *State v. Lawson*, 291 P.3d 673, 705 (Or. 2012).

²⁴⁹ LOFTUS ET AL., *supra* note 124, at 55.

²⁵⁰ *Id.* at 54.

properly encoded to begin with.²⁵¹ Therefore, memory decay must be examined in combination with the other variables that affect the acquisition stage.²⁵²

8. Cross-Race Identification Effect

A potential indicator of an accurate identification is whether the eyewitness and the person identified share the same race or ethnicity.²⁵³ People of one race (e.g., Caucasian) have a harder time recognizing people of a different race (e.g., African-American).²⁵⁴ This discrepancy originates from a mental cognition called the *out-group homogeneity effect*.²⁵⁵ The out-group homogeneity effect is “the phenomenon that members of out-groups are generally seen as less variable and less diverse than members of in-groups”; this effect thus makes majority race individuals view out-group members of a minority race as similar to each other than in-group members of the majority race.²⁵⁶

There are many possible explanations for this effect. One is that people encode better information about their own race, when compared to other races, and create a better representation for what their own race looks like.²⁵⁷ Other explanations are that different races have common distinctive features amongst themselves or perhaps people just pay less attention to others of another race.²⁵⁸ This could explain why minority races are wrongfully convicted more often than non-minorities.²⁵⁹

²⁵¹ Lawson, 291 P.3d at 705.

²⁵² *Id.* (the other variables include cross-race bias, the weapon focus effect, distance, lighting, and duration).

²⁵³ Kathy Pezdek et al., *Cross-Race (But Not Same-Race) Face Identification Is Impaired by Presenting Faces in a Group Rather than Individually*, 36 LAW & HUM. BEHAV. 488, 488 (2012).

²⁵⁴ See Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL’Y & L. 3, 21–22 (2001); LOFTUS ET AL., *supra* note 124, at 100–03; *Eyewitness Evidence*, *supra* note 152, at 52.

²⁵⁵ Pezdek et al., *supra* note 253, at 489.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 493; see Meissner & Brigham, *supra* note 254, at 22–23.

²⁵⁸ See Arthur L. Rizer III, *The Race Effect on Wrongful Convictions*, 29 WM. MITCHELL L. REV. 845, 855 (2003); see also LOFTUS ET AL., *supra* note 124.

²⁵⁹ See Valena Elizabeth Beety, *What the Brain Saw: The Case of Trayvon Martin and the Need for Eyewitness Identification Reform*, 90 DENV. U. L. REV. 331, 341–42 (2012); Rizer, *supra* note 258, at 857–60.

9. Co-Witness Statements

Post-identification feedback, as already discussed in Part IV.B.4, can affect an eyewitness's identification.²⁶⁰ However, this feedback does not have to strictly come from an authoritative figure like a law enforcement officer.²⁶¹ When more than one witness is present, discussion about the suspect's identify can "influence an individual's subsequent judgments despite lack of confirmation regarding whether they had made a correct identification."²⁶² Thus, witnesses who speak amongst themselves about what each saw are more "susceptible to misinformation from their co-witness and, as a consequence, produce[] less accurate recall accounts . . ."²⁶³ This is especially true if the witnesses are previously acquainted with one another because acquaintances are "significantly more likely to incorporate information obtained solely from their co-witness into their own accounts."²⁶⁴

The *hindsight bias* may explain a witness's influence over another.²⁶⁵ The hindsight bias refers to how people view details leading up to the event when they know what the outcome of the event will be; if each witness agrees on the suspect's identify, then each reasonably concurs that they must have paid close attention to the crime if they both ended up at the same conclusion.²⁶⁶ This can lead to highly inflated opinions of their reliability, which can then lead to a witness's increased willingness to testify at trial.²⁶⁷ Witnesses therefore should be separated from one another or should be refrained from speaking to each other about what each saw.

10. Speed of Identification

Also called response latency, "witnesses who make accurate identifications from lineups do so faster than do those who make inaccurate identifications."²⁶⁸ No general time frame exists though. Reasoning that

²⁶⁰ See *supra* Part IV.B.4.

²⁶¹ Elin M. Skagerberg, *Co-Witness Feedback in Line-Ups*, 21 APPLIED COGNITIVE PSYCHOL. 489, 494 (2007).

²⁶² *Id.*

²⁶³ Lorraine Hope et al., "With a Little Help from my Friends . . .": *The Role of Co-Witness Relationship in Susceptibility to Misinformation*, 127 ACTA PSYCHOLOGICA 476, 481 (2008); see also Helen M. Paterson & Richard I. Kemp, *Comparing Methods of Encountering Post-Event Information: The Power of Co-Witness Suggestion*, 20 APPLIED COGNITIVE PSYCHOL. 1083, 1095–98 (2006).

²⁶⁴ Hope et al., *supra* note 263, at 481.

²⁶⁵ See Skagerberg, *supra* note 261, at 495.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 495–96.

²⁶⁸ *Eyewitness Evidence*, *supra* note 152, at 67 (citations omitted).

automatic decision-making is more indicative of accurate identification, one study concluded that more accurate identifications were made within 10 to 12 seconds.²⁶⁹ But, another study concluded that the time range for accurate identifications can occur between 5 and 29 seconds.²⁷⁰ While it is still generally agreed upon that faster identifications are more accurate, the problem is determining what “fast” means.

From describing how memory functions to system and estimator variables, these scientific findings represent over 30 years of research revealing eyewitness’s true accuracy. However, the Supreme Court still believes that constitutional safeguards at trial can adequately protect innocent defendants from unreliable eyewitnesses.²⁷¹ The West Virginia legal system, on the other hand, cannot continue to turn a blind eye to this empirical data.

V. TIME FOR WEST VIRGINIA TO BREAK FROM THE SUPREME COURT

The Supreme Court has described eyewitness misidentification as “the primary evil to be avoided.”²⁷² As the number of wrongful convictions climb, continued use of the *Manson* test renders this statement meaningless. It is imperative that West Virginia moves away from the *Manson* test. Part V.A therefore explains the *Manson* test’s ineffectiveness while Part V.B describes the new framework that West Virginia courts should adopt.

A. *West Virginia Must Reject the Manson Test*

New Jersey, Oregon, and Massachusetts demonstrate that different approaches today can improve upon the outdated *Manson* test. The *Manson* test may have been adequate in 1977, but 30 years of extensive research has since rendered it ineffective. Three reasons exist why West Virginia needs to reject the *Manson* test.

1. The “*Biggers* Factors” are Misleading

The five *Biggers* factors—opportunity to view, degree of attention, accuracy of prior description, level of certainty, length of time between incident and identification—are poor indicators of a witness’s reliability. First, three of the five factors are self-reports: the witness must report on what his view of the

²⁶⁹ See David Dunning & Scott Perretta, *Automaticity and Eyewitness Accuracy: A 10- to 12-Second Rule for Distinguishing Accurate from Inaccurate Positive Identifications*, J. APPLIED PSYCHOL. 87, 951–62 (2002).

²⁷⁰ Nathan Weber et al., *Eyewitness Identification Accuracy and Response Latency: The Unruly 10–12 Second Rule*, J. APPLIED EXPERIMENTAL PSYCHOL. 139, 143–46 (2004).

²⁷¹ See *Perry v. New Hampshire*, 132 S. Ct. 716, 728–29 (2012).

²⁷² *Neil v. Biggers*, 409 U.S. 188, 198 (1972).

crime was, how close he paid attention, and how certain he is in the identification.²⁷³ Yet, self-reports should not be considered reliable.²⁷⁴ Is it not odd “that an eyewitness, whose credibility as a witness is being assessed, would be asked to report on his or her own credibility?”²⁷⁵ In addition, these three factors are also a product of the suggestive procedure itself—the same procedure a court would be evaluating using the *Manson* test.²⁷⁶ Thus, it is nearly impossible for a court to separate the two procedures from one another.

Second, the *Biggers* factors completely ignore what research has uncovered: other variables distort memory. A witness’s degree of attention can be distracted due to stress or the presence of a weapon.²⁷⁷ A witness’s level of certainty is unrelated to accuracy levels because, for example, co-witness statements or post-identification feedback can inflate a witness’s confidence in his identification.²⁷⁸ A witness’s opportunity to view the crime can be affected by distance, the amount of lighting present, duration, or even the suspect’s race.²⁷⁹ All these have been found to detrimentally affect a witness’s accuracy.²⁸⁰ By viewing just the *Biggers* factors alone, courts using the *Manson* test effectively isolate themselves from every other detail that can influence a witness.

2. Reasons for Applying *Manson* No Longer Exist

When endorsing the *Manson* test over the *per se* exclusionary rule, the Supreme Court believed that juries would be able to tell the difference between questionable and non-questionable identification evidence, and that the *Manson* test would deter law enforcement agencies from using suggestive identification procedures.²⁸¹ Unfortunately, the opposite has occurred.

Eyewitness evidence has an immense impact on jurors. When using eyewitness evidence in court, “there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and

²⁷³ See Wells & Quinlivan, *supra* note 163, at 9.

²⁷⁴ *Id.* (commenting that self-reports are not reliable because the witness may change his answer based on the situation, how socially desirable the answers are, and by trying to remain consistent with past answers).

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 9, 16 (suggestive identification procedures can inflate a witness’s self-reports); see *infra* Part V.A.2.

²⁷⁷ Wells & Quinlivan, *supra* note 163, at 10–11; see *supra* Part IV.C.1–2.

²⁷⁸ Wells & Quinlivan, *supra* note 163, at 11–12; see *supra* Parts IV.B.4, IV.C.9.

²⁷⁹ Wells & Quinlivan, *supra* note 163, at 9–10; see *supra* Parts IV.C.3–4, 8.

²⁸⁰ See *supra* Part IV.B–C.

²⁸¹ See *Manson v. Brathwaite*, 432 U.S. 98, 111–13 (1977).

says, “That’s the one!”²⁸² Adding a single eyewitness to a case skyrockets the probability that the jury will convict the defendant.²⁸³ When compared to other types of evidence, convictions were highest among cases involving eyewitnesses when compared to those using different types of experts.²⁸⁴

Yet, jurors remain blind to the dangers of this evidence. Several misconceptions about eyewitness evidence still permeate through jurors’ minds. Jurors believe witnesses under stress remember details better.²⁸⁵ Jurors believe witnesses underestimate the duration of events.²⁸⁶ Jurors believe that the more confident a witness is, the more accurate he is.²⁸⁷ All three are wrong.²⁸⁸ But somehow the *Manson* test remains “content to rely upon the good sense and judgment of American juries” believing they “are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.”²⁸⁹ Its faith is grossly misplaced. Research has since concluded that jurors cannot consistently distinguish accurate versus inaccurate eyewitnesses.²⁹⁰ Juries thus cannot be solely trusted with such crucial evidence without guidance. This is where excluding unreliable identification evidence along with jury instructions comes into play.

Finally, the *Manson* test does not deter suggestive identification procedures. Deterrence, by its definition, must decrease the probability that the identification will be admitted for the effect to properly work.²⁹¹ However, the exact opposite occurs. As already discussed, the three *Biggers* factors (certainty, view, attention) are self-reports made by the eyewitness; these self-reports, however, are products of the suggestive procedures themselves.²⁹² These suggestive procedures therefore do not deter police from using them—instead, police unknowingly may be encouraged to use them because these procedures inflate the witness’s certainty, their view, and degree of attention.²⁹³

²⁸² *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (quoting LOFTUS, *supra* note 31, at 19).

²⁸³ LOFTUS ET AL., *supra* note 124, at 119 (finding that adding one eyewitness increases percentage of guilt from 18% to 72%).

²⁸⁴ *Id.* at 123 (the other experts were a fingerprint analyst, polygraph expert, and handwriting expert).

²⁸⁵ *Id.* at 125–26.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 126.

²⁸⁸ *See supra* Parts IV.B.4, IV.C.1, 3.

²⁸⁹ *Manson v. Brathwaite*, 432 U.S. 98, 116 (1977).

²⁹⁰ BRIAN L. CUTLER & STEVEN D. PENROD, *MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW* 181–86 (1st ed. 1995).

²⁹¹ *See Wells & Quinlivan, supra* note 163, at 17.

²⁹² *Id.* at 9, 16.

²⁹³ *Id.* at 17. This is not in any way asserting that police intentionally use suggestive identification procedures because it will increase the chance the evidence will be admitted; this is

Because of these inflated scores, a judge using the *Manson* test to assess the evidence's reliability would more than likely admit it because, based on the *Biggers* factors, it would seem like the identification was in fact reliable.²⁹⁴ With seemingly no threat of exclusion, the *Manson* test subtly provides an incentive to use the very suggestive procedures it was created to eliminate.²⁹⁵

3. *Manson & Perry* Ignore Thirty Years of Scientific Research

Despite over 2,000 studies conducted since *Manson*, this data inexplicitly "merits barely a parenthetical mention" by the Supreme Court.²⁹⁶ The Court's apparent aversion to scientific data is bewildering because landmark court decisions in the past have relied on such research before.²⁹⁷ In *Brown v. Board of Education*,²⁹⁸ the Court overturned the "separate but equal doctrine" in public schools after research revealed "the detrimental effect" segregation had on African-American children.²⁹⁹ More recently in *Roper v. Simmons*,³⁰⁰ the Court held that sentencing juveniles to the death penalty violated the Eighth Amendment because research concluded that youths lack maturity, are more susceptible to negative influences, and that their brains are underdeveloped.³⁰¹

Why does the Court now decide to turn its back on 30 years of research? It cannot argue that the research is underdeveloped or untrustworthy. This data has "been tested and retested, subjected to scientific scrutiny through peer-reviewed journals, evaluated through the lens of meta-analyses, and replicated at times in real-world settings."³⁰² Its validity has furthermore been recently re-established in a brand new report released in late Fall 2014 from the

simply stating that any police officer would want a witness who has confidence, paid close attention to the crime, and reported having a good view of everything that happened.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Perry v. New Hampshire*, 132 S. Ct. 716, 738 (2012) (Sotomayor, J., dissenting).

²⁹⁷ See Shari R. Berkowitz & Naser L. Javaid, *It's Not You, It's the Law: Eyewitness Memory Scholars' Disappointment with Perry v. New Hampshire*, 19 PSYCHOL., PUB. POL'Y, & L. 369, 375 (2013).

²⁹⁸ 347 U.S. 483 (1954).

²⁹⁹ *Id.* at 494 ("A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system."); see also Berkowitz & Javaid, *supra* note 297, at 375.

³⁰⁰ 543 U.S. 551 (2005).

³⁰¹ *Id.* at 569–70; see also Berkowitz & Javaid, *supra* note 297, at 375.

³⁰² *State v. Henderson*, 27 A.3d 872, 916 (N.J. 2011) (calling it the "gold standard in terms of the applicability of social science research to the law").

National Academy of Sciences.³⁰³ In addition, New Jersey, Oregon, and Massachusetts are not the only courts to rely on identification research; other courts across the country have relied upon it as well.³⁰⁴ Yet, the “highest court in the land” chooses not to. West Virginia should not repeat the Supreme Court’s mistake by following this narrow viewpoint.

B. The Proposed Standard To Challenge Identification Evidence in West Virginia

West Virginia should incorporate procedures used by New Jersey, Oregon, and Massachusetts. If adopted, West Virginia would take a giant step forward in preventing the “primary evil” that the Supreme Court initially wanted to avoid.

1. Obtaining a Pretrial Hearing

In West Virginia, a defendant has one way to challenge the reliability of identification evidence: present evidence of suggestive identification procedures.³⁰⁵ Instead of a narrow, one-way approach, there should be three distinct opportunities for a defendant to have a hearing on the reliability of identification evidence. This Part explains each.

i. Police Fail To Follow the Eyewitness Identification Act

A defendant should be granted a hearing if the law enforcement agency conducting the identification procedure has not yet adopted guidelines under the Eyewitness Identification Act. As of January 1, 2014, all West Virginia law enforcement agencies that conduct eyewitness identification procedures are required to “adopt specific written procedures for conducting photo lineups, live lineups and showups.”³⁰⁶ If a defendant presents evidence to the contrary, then that identification evidence should be excluded at a hearing unless it can be shown by clear and convincing evidence that the identification “is the product of a source independent of the tainted procedure and is reliable.”³⁰⁷

³⁰³ See generally THE NATIONAL ACADEMY OF SCIENCES, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION (2014), available at http://sites.nationalacademies.org/PGA/stl/Eyewitness_ID/index.htm.

³⁰⁴ See *Henderson*, 27 A.3d at 917 (other courts, to name a few, include the federal Seventh Circuit, Third Circuit, and Middle District of Alabama, and state courts in Arizona, California, D.C., New York, Tennessee, and Utah).

³⁰⁵ E.g., *State v. Spence*, 388 S.E.2d 498, 503–04 (W. Va. 1989).

³⁰⁶ W. VA. CODE §§ 62-1E-1 to -3 (2014).

³⁰⁷ COMMONWEALTH OF MASS., *supra* note 84, at 111; see also *United States v. Wade*, 388 U.S. 218, 240 (1967).

Although very drastic, this exclusionary rule is appropriate. First, this option will rarely, if ever, be applied because most agencies have presumably complied with the statute. Second, law enforcement agencies have had since July 2013 to create identification procedures; no excuse exists for not having these ready for 2014, especially when the statute itself lists recommendations that the police may use.³⁰⁸ Without “specific written procedures” guiding police, a witness being unknowingly influenced potentially increases; research has demonstrated that many variables affecting witness’s accuracy come from police interaction.³⁰⁹ The statute was enacted to decrease misidentifications—not adopting these procedures defeats this purpose.

Exclusionary rules are not unheard of for identification evidence. Implementing such a rule reverts back to the “*Wade* Trilogy” decisions where the Supreme Court held in *Gilbert* that “only a per se exclusionary rule . . . can be an effective sanction to assure that law enforcement authorities will respect the accused’s constitutional rights”³¹⁰ In addition, an exclusionary rule here would fully deter agencies from not complying with the statute to avoid crucial evidence being excluded. Deterrence was one of the focal points behind the *Manson* test.³¹¹

ii. Police Do Not Follow Proper Identification Procedures

A defendant should be granted a pretrial hearing if evidence of any system variable is presented.³¹² A defendant would be able to earn a hearing if, for example, the lineup administrator provided post-identification feedback, used biased lineup instructions, or did not construct the lineup with the correct number of fillers.³¹³ These system variables are extremely important to examine because of their negative effect on a witness’s memory.³¹⁴ While it can be argued that allowing hearings for any system variable will undoubtedly slow the court system, the Eyewitness Identification Act should reduce the occurrence of system variables because police are supposed to now follow a strict set of guidelines.³¹⁵ Yet, a new standard is still needed in case the adopted guidelines are not properly followed.

While the list discussed in Part IV.B contains the most common variables, it is not intended to be exclusive. As research continues to develop,

³⁰⁸ See *supra* note 76 for a list of recommendations.

³⁰⁹ See *supra* Part IV.B.

³¹⁰ *Gilbert v. California*, 388 U.S. 263, 273 (1967).

³¹¹ See *Manson v. Brathwaite*, 432 U.S. 98, 112 (1977).

³¹² See *State v. Henderson*, 27 A.3d 872, 920 (N.J. 2011).

³¹³ *Id.* at 920–21.

³¹⁴ See *supra* Part IV.B.

³¹⁵ See W. VA. CODE § 62-1E-3 (2014).

courts should not strictly adhere to the ones listed here. For the courts to consider a new variable, there must be ample support behind it. As New Jersey noted in *Henderson*, the research must be published in peer-reviewed journals, be generally accepted by the scientific community, be replicated in real-world scenarios, and be subject to meta-analysis studies as well.³¹⁶ Peer-reviewed journals ensure the “validity and reliability of experimental research,” and meta-analyses ensure that the data results can be generalized to a larger population size.³¹⁷

Once evidence is presented, the court would examine both system and estimator variables together.³¹⁸ As previously discussed, system variables are not the only things that distort a witness’s memory.³¹⁹ Examining estimator variables as well would allow the identification evidence to be properly and thoroughly scrutinized. In addition, this will deter police officers from making similar mistakes in the future knowing that their actions could lead to a full-fledged hearing.

While it is normally the jury’s job to weigh the evidence’s credibility, research has shown that most juries do not fully understand the impact such variables have on eyewitnesses.³²⁰ Despite what the Supreme Court thinks, constitutional safeguards at trial are not 100% foolproof.³²¹

iii. Uncorroborated Eyewitness & Estimator Variables Present

A defendant should be granted a pretrial hearing if there is a single eyewitness and estimator variables are detected.³²² Although the Supreme Court believes otherwise, police actions are not the only things that can affect an eyewitness’s memory: stress, distance, co-witness statements, human memory, and the perpetrator’s characteristics all have been shown to influence witnesses in some way.³²³ However, estimator variables alone should not trigger pretrial hearings because every case involving an eyewitness will undoubtedly involve a number of these variables. To prevent defendants from filing motions for pretrial hearings—a fear shared by the New Jersey court³²⁴—

³¹⁶ *Henderson*, 27 A.3d at 892–94.

³¹⁷ *Id.* at 893. A meta-analysis is “a synthesis of all obtainable data collected in a specified topical area.” *Id.*

³¹⁸ *Id.* at 922.

³¹⁹ See *supra* Part IV.C.

³²⁰ See Berkowitz & Javaid, *supra* note 297, at 373–74.

³²¹ See *Perry v. New Hampshire*, 132 S. Ct. 716, 728–29 (2012); see also Berkowitz & Javaid, *supra* note 297, at 373–74 (noting that closing arguments, cross-examination and other trial techniques may not convince a jury to disregard a faulty eyewitness).

³²² See COMMONWEALTH OF MASS., *supra* note 84, at 47.

³²³ See *Perry*, 132 S. Ct. at 728; see *supra* Part IV.C.

³²⁴ See *State v. Henderson*, 27 A.3d 872, 923 (N.J. 2011).

defendants must also fulfill an additional requirement: the eyewitness's identification must be uncorroborated.

Hence, the defendant must show that the witness's uncorroborated identification was unreliable due to the presence of an estimator variable. This can involve asking, for example, whether a weapon was present, whether it was a cross-racial identification, or how much time had passed between the crime and identification.³²⁵ Uncorroborated identifications coupled with estimator variables are among the most dangerous types of identifications because the jury will only be influenced by that one witness; without another witness to support the testimony, no one will exactly know for sure just how accurate that one witness was.

2. Burden on the State & Defendant

After the defendant presents enough evidence to obtain a hearing, the State should then offer evidence demonstrating that the identification is still reliable despite the presence of both system and estimator variables.³²⁶ Having the State demonstrate reliability directly complies with the Supreme Court's notion that "reliability is the linchpin in determining the admissibility of identification testimony"³²⁷

However, the defendant should still have the overall burden to prove a "substantial likelihood of irreparable misidentification" to have the evidence excluded.³²⁸ To accomplish this, the defendant can present expert witnesses, cross-examine police officials, cross-examine eyewitnesses, and present other witnesses and other relevant evidence all linked to both system and estimator variables. Following this, the decision then rests with the judge.

3. Power of the Judge: Intermediate Remedies & Jury Instructions

During these pretrial hearings, the judge continues the principle of being a "gatekeeper" by maintaining a high amount of discretion.³²⁹ Because of the predictable increase in the number of hearings, the judge therefore has the power to end the hearing at any time if the defendant's claim is proven baseless.³³⁰ Allowing the judge to end hearings relatively quickly if the defendant has no claim should somewhat alleviate the fear that the increase in hearings would clog and slow the judicial system.

³²⁵ *Id.* at 921.

³²⁶ *Id.* at 879–82, 920.

³²⁷ *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

³²⁸ *See Henderson*, 27 A.3d at 879–82.

³²⁹ *See generally* *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993).

³³⁰ *See Henderson*, 27 A.3d at 920.

At the end of the State's and defendant's arguments, the judge will then weigh the totality of the circumstances accounting for both system and estimator variables. Three options are now available: (1) the identification can be excluded; (2) the identification can be admitted; or (3) an intermediate remedy can be used.

If an intermediate remedy is used, the judge can either allow expert testimony or limit the eyewitness's testimony at trial.³³¹ For example, if the witness testifies about receiving post-identification feedback then the judge will allow the witness to testify about the identification but not about their level of certainty.

If the identification is admitted, then the judge must charge the jury with specific jury instructions. With "[j]urors seldom enter[ing] a courtroom with the knowledge that eyewitness identifications are unreliable," and because "this reality is outside 'the jury's common knowledge,' and often contradicts jurors' 'commonsense' understandings," these instructions must be properly worded and timely delivered.³³² Besides being given at the end of trial, these instructions may also be given after the witness testifies under the judge's discretion.

VI. CONCLUSION

Eyewitnesses play a crucial role in the criminal justice system. In some cases, eyewitnesses may be the difference between conviction and acquittal. Nonetheless, eyewitnesses are not perfect. Human memory is not infallible. Both law enforcement officers and the surrounding environment can significantly distort an eyewitness's accuracy: the volumes of current research out there support this. Yet, the Supreme Court in *Manson*, and later in *Perry*, ignored this and remained committed to traditional—but outdated—beliefs. As a result, innocent people in West Virginia, much like Gerald Davis, Dewey Davis, William O'Dell Harris, Larry Holdern, and Glen Woodall, continue to be sentenced to prison for crimes they did not commit.

The proposed changes outlined in Part V accomplish what the legal system refuses to do: change the *Manson* test. By providing more opportunities to scrutinize identification evidence and educate jurors on the issues accompanying such evidence, the number of innocent defendants convicted from an unreliable eyewitness may one day decrease. Before this can happen, however, the courts must stop turning a blind eye and be receptive to change. John Henry Wigmore, former dean of Northwestern Law School, once said, "When the psychologists are ready for the courts, the courts will be ready for

³³¹ *Id.* at 925; see *State v. Lawson*, 291 P.3d 673, 695 (Or. 2012) (en banc).

³³² *United States v. Brownlee*, 454 F.3d 131, 142 (3d Cir. 2006).

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the psychologists.”³³³ Researchers, psychologists, and scientists have been ready for the past 30 years—West Virginia needs to listen.

*Jared T. Dotson**

VII. APPENDIX: SAMPLE JURY INSTRUCTIONS

The following is a list of sample jury instructions created by the Innocence Project issued in their brief to the Supreme Court addressing how judges should charge the jury on eyewitness evidence.³³⁴ These instructions are not a final product and are instead to be used as guidelines.

[Preliminary guideline: This Instruction will need to be tailored to fit the facts of the case with respect to the issues of identification.]

One of the most important issues in this case is the identification of the accused as the perpetrator of the crime.

[(Defendant) as part of [his/her] general denial of guilt contends that the State has not presented sufficient reliable evidence to establish beyond a reasonable doubt that [he/she] is the person who committed the alleged offense. The State has the burden of proving the identity of the person who committed the crime beyond a reasonable doubt. For you to find this defendant guilty, the State must prove beyond a reasonable doubt that this defendant is the person who committed the crime. The defendant has neither the burden nor the duty to show that the crime, if committed, was committed by someone else, or to prove the identity of that other person. You must determine, therefore, not only whether the State has proved each and every element of the offense charged beyond a reasonable doubt, but also whether the State has proved beyond a reasonable doubt that this defendant is the person who committed it.]

³³³ James M. Doyle, *Ready for the Psychologists: Learning from Eyewitness Errors*, 48 CT. REV.: THE J. OF THE AM. JUDGES ASS'N 4, 4 (2012), available at <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1382&context=ajacourtreview>.

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³³⁴ *Proposed Legal Findings*, INNOCENCE PROJECT, http://www.innocenceproject.org/docs/Henderson_Proposed_Legal_Findings_Innocence-Project.pdf (last visited Feb. 3, 2014) (emphasis added).

[The State has presented the testimony of [insert name of witness who identified defendant]. You will recall that this witness identified the defendant in court as the person who committed [insert the offense(s) charged]. The State also presented testimony that on a prior occasion before this trial, this witness identified the defendant as the person who committed this offense [these offenses]. According to the witness, [his/her] identification of the defendant was based upon the observations and perceptions that [he/she] made of the perpetrator at the time the offense was being committed. You may consider that eyewitnesses are often not able to accurately recall the source of their memories. In other words, their belief that the identification was based on observations at the time of offense may be wrong. When a witness makes an identification, that witness is expressing an opinion that may be accurate or that may be inaccurate: that the person identified is the person who committed a crime. Eyewitnesses can be truthful, but mistaken. Eyewitness mistakes have long been – and continue to be – the leading cause of wrongful convictions. Even where a witness believes that her testimony is accurate, it is your function to determine whether the witness' identification of the defendant is reliable, or whether it is based on a mistake or for any reason is not worthy of belief.

Witness Certainty

Although nothing may appear more convincing than a witness's categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken. Indeed, an eyewitness's confidence in his or her identification is a weak predictor of the accuracy of his or her identification. Witnesses can be highly confident, but mistaken. Therefore, when analyzing such testimony, be advised that a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification.

In evaluating the identifications, you should consider the observations and perceptions on which the identifications were based, and the witness' ability to make those observations and perceptions. If you determine that the out-of-court identification is not reliable, you may still consider whether the witness' in-court identification of the defendant is reliable. If you find that the in-court identification is based on the witness having seen the defendant at the out-of-court identification procedure, rather than the result of the witness' observations or perceptions of the perpetrator during the commission of the offense, you should not afford the in-court identification any weight. Likewise, you should consider the circumstances under which the witness attempted to observe and perceive the perpetrator before deciding how much, if any, weight should be given to the in-court identification. You should bear in mind that in-court identifications are generally less reliable than other identifications because they occur furthest in time from the incident, the witness has most likely already seen the defendant in an earlier procedure, and they are

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inherently suggestive, as the person in the courtroom suspected of having committed the offense is usually self-evident to even the casual observer. The ultimate issues of the accuracy of both the in-court and out-of-court identifications are for you to decide.

To decide whether the identification testimony is sufficiently reliable evidence upon which to conclude that this defendant is the person who committed the offense[s] charged, you should evaluate the testimony of the witness in light of the factors that I have already explained to you. In addition, you should consider the following:

Memory Does Not Work Like a Videotape

Memory is not recorded, stored, or played back in the same way as a videotape. Memory is much more of a selective process. People do not recall entire events, but rather reconstruct them. People often preserve pieces of information in their memory and fill in any gaps with information they learn after having formed the original memory.

Post-Event Information

What information did the witness receive about the event, suspect, or perpetrator after the incident? What information did the witness receive about the event, suspect, or perpetrator after the identification procedure? Witnesses' memories for events and facial details, as well as their confidence in their identifications, are easily tainted, distorted, or completely altered by visual and verbal information that the witness receives after the event and/or identification procedure. The source of the information is irrelevant; it can come from the police and prosecutors, but it can also come from other witnesses, family members, and the media. There is a danger that witnesses will incorporate post-event information into their memories even if the information is incorrect. Witnesses are typically not aware that they have incorporated post-event info into their memories. Exposure to incorrect information after an event can lead witnesses to misremember events and people, and thereby increase the risk of mistaken identification.

Confirming Feedback

Providing "confirming feedback" to a witness, such as the police conveying to a witness, verbally or non-verbally, that he or she made a correct identification, can make the witness more confident in the accuracy of that identification, even if the witness had identified an innocent person. In addition, conveying to a witness that he or she made a correct identification can also alter the witness's memory for the event, for instance by making the witness think he or she had a better opportunity to observe the perpetrator, got a better look at the perpetrator's face, and paid more attention to the perpetrator, than he or she actually did. In this way, conveying to a witness that he or she made a correct

identification can increase the chance that an innocent person is wrongly convicted. You should take this into account when evaluating the reliability of the identification evidence in this case.

[if the court has not precluded a witness's testimonial statement of certainty despite the failure of law enforcement to record a statement of certainty contemporaneous with the witness's identification:]

Because a witness's confidence in her identification can be falsely inflated by feedback the witness receives about the alleged accuracy of her identification, the police should record, at the time of the witness's identification and in the witness's own words, the witness's certainty about her identification. In this case, the police failed to document the witness's confidence at the time of the identification. Failure to take a certainty statement means you have no information about whether the witness was confident at the time of the out-of-court identification, and thus makes it impossible to determine whether subsequent statements of certainty by the witness have been falsely inflated. Therefore, you should disregard the witness's testimony regarding her degree of confidence in her identification.

Co-Witness Contamination

Was the witness exposed to opinions, descriptions, or identifications given by other witnesses, to photographs or newspaper accounts, or to any other information or influence that may have affected the independence of his/her identification? There is a danger that a witness will incorporate this information into her memory of the event, thus altering her memory of the event.

Pre-Trial Identifications Generally

You must determine the "reliability" of the pre-trial identification (the lineup, show-up or photo-spread). You should consider the following:

Out-of-Court Identification

You must consider the "reliability" of the pre-trial identification process involving the witness, as the process that was used might make the courtroom identification which you heard during the trial more or less reliable. In this case, the witness [attended a lineup], [looked at photographs of possible suspects], and/or [was shown a single individual in a "show-up."] You should consider the circumstances of this out-of-court identification, and whether or not it was the product of a suggestive procedure, including everything done or said by law enforcement to the witness before, during, or after the identification process.

In making this determination you should consider the following circumstances:

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Whether anything was said to the witness prior to viewing a photo array, line-up or showup;

Prejudicial Disclosure of Information about Defendant to Witness

Did the police investigators say or do anything during the photo array, line-up or showup that would “suggest” that the defendant was the perpetrator? During the identification procedure, did the police reveal to the witness information regarding [defendant’s] prior arrest? Disclosure of this information during an identification procedure is highly prejudicial and can increase the chance that a suspect will be identified even if the suspect is innocent. You should take the failure of the police to conceal this information from the witness into account when evaluating the reliability of the identification evidence in this case.

Double-Blind

Did the officer who conducted the lineup or photo-spread know who was the police suspect? [Or: In this case, the person administering the lineup knew who the police suspect was.]

A lineup administrator who knows which lineup member is the police suspect may inadvertently convey this knowledge to the witness, thereby increasing the chance that the witness will identify the suspect even if the suspect is innocent. For this reason, the Attorney General Guidelines require that lineups and photo-spreads should be conducted by an officer who does not know the identity of the suspect to avoid any possibility that the officer will influence the witness to identify that suspect. By using an officer who knew the identity of the suspect, the police increased the chance of an erroneous identification. You should take this into account when evaluating the reliability of the identification evidence in this case.

Admonition to Witness

Was the witness informed, prior to viewing the show-up, lineup, or photo-spread, informed that the perpetrator might not be among the people in the display and that the witness should not feel compelled to make an identification?

[Or: In this case, the police failed to give a warning that perpetrator may or may not be in the lineup and that the witness should not feel compelled to make an identification.]

Psychological studies have shown that implying to a witness that a suspect is present in an identification procedure or failing to warn the witness that the perpetrator may or may not be in the procedure increases the likelihood that the witness will select one of the individuals in the procedure, even when the perpetrator is not present. For this reason, the Attorney General Guidelines

require that the police warn the witness that the perpetrator may not be in the lineup and that therefore the witness should not feel compelled to make an identification. The failure of the identification procedure administrator to follow this provision of the Guidelines tends to increase the probability of a misidentification.

You should take this into account when evaluating the reliability of the identification evidence in this case.

Filler Selection

Did the photo array shown to the witness contain multiple photographs of the defendant?

Were “all in the lineup but the [defendant] known to the identifying witness?”

In a fair lineup all lineup members should match the eyewitness’s pre-lineup description of the perpetrator, and the defendant should not stand out unfairly. For this reason, the Attorney General Guidelines recommend that fillers (non-suspects) generally fit the witness’ description of the perpetrator.” In this case, the police failed to select the lineup fillers to match the descriptive characteristics provided by the witness [and/or did not select fillers in such a way that avoided the defendant standing out]. Failure to select fillers in this way can cause an innocent suspect to stand out unfairly and thus increases the chance of an erroneous identification. You should take this failure into account when evaluating the reliability of the identification evidence in this case.

Was “only the [defendant] required to wear distinctive clothing which the culprit allegedly wore?”

Number of Fillers

In this case, the police used only X fillers in the lineup procedure. The Attorney General Guidelines call for using a minimum of X for a [photo/live] lineup procedure. Failure to construct a [photo/live] lineup with a minimum of X fillers increases the chance that an innocent suspect will be identified. You should take this into account when evaluating the reliability of the identification evidence in this case.

Multiple Viewings

When a witness views an innocent suspect in multiple identification procedures, the witness’s memory of the actual perpetrator can be replaced by the witness’s memory of the innocent person seen in the multiple procedures. In other words, the witness’s memory trace of the innocent person can become stronger than the witness’s memory trace of the actual perpetrator. In this way,

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when a witness views an innocent suspect in multiple identification procedures, the risk of mistaken identification is increased.

Filler Identifications and Non-Identifications

Was the witness's identification made spontaneously and remain consistent thereafter?

If you find the witness failed to pick out the defendant during an identification procedure, or

If you find the witness picked out a different person than the defendant at an identification procedure, or

If you find the witness was uncertain when identifying the defendant at the lineup, photo-spread or show-up,

Then you should carefully consider whether this factor alone calls into question the reliability of the witness's identification of the defendant at trial.

Composites

Composites generally bear very little resemblance to the actual perpetrator. Thus, you should not place undue weight on the fact that defendant bears some resemblance to the composite. In addition, asking an eyewitness to help put together a composite can contaminate the eyewitness's memory for the perpetrator and thus decrease an eyewitness's ability to identify the true perpetrator in a subsequent lineup. In this way, composites can increase the risk of mistaken identification.

Simultaneous Lineups

People naturally tend to select the person from a lineup who looks most like the perpetrator relative to other members of the lineup, even when the perpetrator is absent from the lineup. This is referred to as using a "relative judgment." The danger of the relative judgment process is that even when the actual perpetrator is not in the lineup, some member of the lineup will always look the most like the perpetrator. People are most likely to use relative judgment when the police use simultaneous lineups, where the witness is shown lineup members all at once, as opposed to when the police use sequential lineups, where the witness is shown lineup members one at a time. As a result, an innocent person is at greater risk of being misidentified in a simultaneous lineup than in a sequential lineup.

Showups

In this case, the defendant was identified at a showup procedure. Showup identification procedures are where the police present the witness with only one

choice, as opposed to lineups, where the police present the witness with several choices. Showups produce a higher rate of mistaken identifications than lineups when an innocent suspect resembles the actual perpetrator, but nonetheless may be permissible when necessary and where a lineup is not feasible. You should consider how soon after the incident the showup was conducted. The further in time from the crime a showup is conducted, the greater the chance of a mistaken identification compared to a lineup. In determining how much weight to give such an identification, you should consider whether the show-up was necessary, when it took place in relation to the crime, and you should further consider all of the facts surrounding the show-up, including whether the suspect was in hand-cuffs or otherwise restrained by the police, what was said to the witness before, during, and after the showup, and whether the police warned the witness that the person in the showup may not be the perpetrator, the witness did not have to make an identification, and the investigation would continue whether or not the witness made an identification.

No Pre-Trial Identification

Did the police fail to conduct a pre-trial identification procedure where such a procedure could reasonably have been done? An identification at a fair pre-trial identification procedure is generally more reliable than an identification of the defendant in the courtroom. You should determine whether the State provided a satisfactory reason why there was no lineup or photo-spread conducted prior to trial.

In-Court Identification

Identifications made by witnesses at initial identification procedures are more reliable than later identifications. For this reason, in-court identifications are less reliable than previous identifications. In assessing the reliability of the identification evidence in this case, you should assign more weight to the first identification, if the procedure was fair, than to the in-court identification.

Opportunity to Observe

You must take into account whether the witness had an adequate opportunity and ability to observe the perpetrator of the crime. You should consider whether the witness had enough time to view the incident, whether the lighting conditions were adequate, whether the witness was close enough to see the perpetrator, whether the witness was able to pay attention to the perpetrator or whether the witness was distracted, whether the witness was in the proper condition to view the perpetrator, whether any obstacles impaired the witness's observations, and whether anything occurred during the incident that may have distracted the witness. You should also bear in mind that while witnesses' self-reports can be extremely reliable, they can also be unreliable, particularly if a witness has been exposed to suggestive identification procedures or post-event information.

Regarding the witness's opportunity to observe, you should consider:

Duration of Incident

How much time did the witness have to view the perpetrator? You should independently examine the event as described by the witness, along with any estimate by the witness or others of how long it took. The shorter the amount of time the witness had to view the perpetrator's face, the less reliable the identification. Time estimates by a witness can be inaccurate, and witnesses have a tendency to think events lasted longer than they actually did.

Distance

The greater the distance between an eyewitness and a perpetrator, the less reliable the eyewitness's identification.

Disguise

If a perpetrator wears a disguise, covers his or her hairline with a hat, or changes his or her glasses, hairstyle, or facial hair, there is an increased risk of a mistaken identification. In this case, the perpetrator _____. You should take this into account when evaluating the reliability of the identification evidence in this case.

Weapon Focus

You should consider whether a weapon was visible to the witness during the incident. The presence of a weapon can distract the witness and take the witness's attention away from the perpetrator's face. As a result, the presence of a visible weapon reduces the reliability of a subsequent identification. Whether the visibility of a weapon distracted the witness or made it harder for him or her to identify the face or other distinguishing features of the perpetrator is for you to decide.

Level of Stress

You should consider how stressful the event may have been to the witness. Highly stressful events have a negative effect on memory and increase the risk of a mistaken identification. Whether the event was stressful for the witness, the level of the witness's stress, and whether the stressful nature of the event distracted the witness or made it harder for him or her to identify the face or other distinguishing features of the perpetrator, is for you to decide.

Witness's Condition

You should consider the witness's physical and emotional condition at the time of the incident, as they may relate to witness's powers of observation. For example, was the witness intoxicated during his or her observations? Does the witness need prescription eyewear and, if so, was the witness wearing such

eyewear during the incident? Whether the witness's condition made it harder for him or her to identify the face or other distinguishing features of the perpetrator, is for you to decide.

Cross-Race

When evaluating the reliability of the identification evidence in this case, you should take this into account that the eyewitness and the perpetrator were of different races. Eyewitnesses are less accurate at recognizing a perpetrator of a different race than at recognizing a perpetrators of the same race. Even people with no prejudice against other races and substantial contact with persons of other races still experience difficulty in accurately identifying members of a different race. Quite often people do not recognize this difficulty in themselves. Whether the fact that the identifying witness is not of the same race as the perpetrator and/or the defendant, and whether that fact might have had an impact on the witness's original perception, and/or the accuracy of the subsequent identification, is for you to decide.

In addition, you should consider:

Time Between the Incident and the Confrontation

How soon after the crime or event did the identification take place? Memory can be degraded or lost by the passage of time. Memory for an event can begin to decrease significantly immediately after the event. As time goes by, identifications become less reliable. The sooner after the incident the identification procedure took place, the more reliable the memory of the witness. Therefore, you should consider how much time passed between the incident and the first identification procedure.

Discrepancies between Identifications, If Any

Did the witness provide only a general description of the perpetrator? Was there a variation between the description the witness provided and the defendant's appearance? Witnesses should be asked by the police to provide as much detail as possible in their descriptions of the perpetrator. The inability of a witness to provide distinctive details of the perpetrator, where these details might be expected (given the characteristics of the defendant) may call into question the reliability of the witness's identification of the defendant at trial.

Child and Elderly Witnesses

Identifications made by children and the elderly are less reliable than identifications made by adults. You should take this into account when evaluating the reliability of the identification evidence in this case.

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Police Witnesses

Police officers are no better than other people at making accurate identifications. You must determine the accuracy of police officials' identifications in the same way and by the same standards as you would determine the accuracy of any other witness. The identification testimony of a police official is not entitled to special or exclusive weight merely because the witness is a police official.

It is entirely up to you whether to accept or reject a witness' identification. The factors I have discussed have been shown to be the best indicators of the reliability or unreliability of eyewitness identification. In the end, you must determine whether the identification testimony is reliable.