Nebraska Innocence Project
Seminar
Vision Correction: Examining Eyewitness Identifications Through the Lens of LB1000 and the Exoneration of Richard Jones

Richard Jones - Missouri exoneree; Joe Howard - Dornan Troia; Mark Sundermeier - Omaha Police Dept.

October 11, 2017
Embassy Suites La Vista
Vision Correction: Examining Eyewitness Identifications Through the Lens of LB1000 and the exoneration of Richard Jones

October 11, 2017

Richard Jones, Missouri Exonoree
Tracy Hightower-Henne, Executive Director, NE Innocence Project
Joe Howard, Criminal Defense Attorney, Dornan Law Team
Mark Sundermeier, Omaha Police Department, retired
Richard Jones
Contributing Factors in DNA Exoneration Cases Nationwide (N=351)

- Eyewitness misidentification (n=246): 71%
- Misapplication of forensic science (n=159): 46%
- False confessions (n=98): 28%
- Informants (n=58): 17%
- Multiple contributing factors (n=178): 51%
Why is eyewitness misidentification so common?

• Perception and memory are unreliable.
• Making a stranger identification is a difficult task.
• Traditional police procedures undermine the reliability and accuracy of identifications.
• The existing legal framework fails to ensure reliability.
Sec. 4. (1) On or before January 1, 2017, the Nebraska State Patrol, each county sheriff, each city or village police department, and any other law enforcement agency in this state which conducts eyewitness suspect identifications shall adopt a written policy on eyewitness suspect identifications and provide a copy of such policy to the Nebraska Commission on Law Enforcement and Criminal Justice. The policy shall include the minimum standards developed by the commission relating to the following:

a) Standards which describe the administration of a lineup,
b) procedures governing the instructions given by a peace officer to an eyewitness, and
c) procedures for documentation of the eyewitness’s level of certainty of an identification.
Sec. 4. (2) The Nebraska Commission on Law Enforcement and Criminal Justice shall distribute a standard model written policy on suspect identification by eyewitnesses. Any law enforcement agency described in subsection (1) of this section which fails to adopt its own policy as required by this section shall adopt the commission’s standard model written policy.

• Legislative Findings (DNA Testing Act)
  • (6) DNA testing responds to serious concerns regarding wrongful convictions, especially those arising out of mistaken eyewitness identification testimony
Nebraska Eyewitness Identification Model Policy


Minimum standards include:

1. Independent administration of live or photo lineup meaning that the officer is not administering the lineup or photo array and has no knowledge of the suspect’s identity.

2. Instructions to the witness that they should not feel they have to make an identification and the investigation will continue regardless whether an identification is made.

3. Use of non-suspect “fillers” that generally match the witness’ description of the perpetrator and do not make the suspect stand out.

4. Eliciting a witness statement immediately after an identification is made, in which the witness is asked to state in his or her own words the level of certainty in the selection.
Nebraska Eyewitness Identification Model Policy

5. Do not conduct showups when the suspect(s) are in patrol cars, handcuffed, or physically restrained by police officers, unless necessary due to safety concerns.
6. Do not take suspects to the witness’ residence, unless it is in the scene of the crime.
7. Caution the witness that the person he or she is about to see, may or may not be the perpetrator.
8. Separate witnesses and do not allow communication between them before or after conducting the showup.
9. If one witness identifies the suspect, use a lineup or photo array for remaining witnesses.
Nebraska Eyewitness Identification Model Policy

10. Do not present the same suspect to the same witness more than once.
11. Do not require showup suspects to put on clothing worn by, speak words uttered by, or perform other actions of the perpetrator.
12. Officers should scrupulously avoid words or conduct of any type that may suggest to the witness that the individual is or may be the perpetrator.
13. Ask the witness how certain he or she is of any identification that is made of the suspect.
14. Remind the witness not to talk about the showup to other witnesses until police or prosecutors deem it permissible.
15. Record the identification process using an in-car camera.
16. Document the time and location of the showup, officers present, and the outcome of the procedure.

• Issue: Were the identification procedures conducted by state actors impermissibly suggestive?

• If so, balance the effects of suggestion against (non-exhaustive) “reliability factors:”
  • Opportunity to view;
  • Degree of attention;
  • Certainty;
  • Accuracy of description;
  • Time between crime and confrontation.

• Suppress where “[s]ubstantial probability of an irreparable misidentification” (*Simmons v. United States*, 390 U.S. 377 (1968))
Problems with *Manson*

1. Fails to consider the quality of the witness’ memory
2. Ignores the effect of suggestion on memory
   - a. ignores the suggestion from non-state actors (i.e. social media)
3. Self-reported factors are subjective and can be unreliable
4. Some reliability factors are not well correlated with accuracy
5. Does not include some “good factors”
6. Practical problems
NAS Report (2014)

• “The Manson v. Brathwaite ruling was not based on research conducted by scientists on visual perception, memory, and eyewitness identification, and it fails to include important advances that have strengthened standards for judicial review of eyewitness identification evidence at the state level.” (p. 13)
NAS Report (2014)

• “The Manson v. Brathwaite test ...evaluates the “reliability” of eyewitness identifications using factors derived from prior rulings and not from empirically validated sources. It includes factors that are not diagnostic of reliability and treats factors such as the confidence of a witness as independent markers of reliability when, in fact, it is now well established that confidence judgments may vary over time and can be powerfully swayed by many factors. The best guidance for legal regulation of eyewitness identification evidence comes not, however, from constitutional rulings, but from the careful use and understanding of scientific evidence to guide fact-finders and decision-makers.” (p. 30)
Litigating Eyewitness Identifications

STRATEGY: Challenge ongoing validity of *Manson*

- Test is no longer valid – cite to NAS, *Henderson* and *Lawson*+, scientific research and wrongful conviction cases
- Propose a new legal framework
  - Totality of the circumstances test that considers all system and estimator variables;
  - Robust pretrial hearings where witness testifies;
  - Estimator variables alone or non-state actor suggestion can trigger hearing;
  - Ensure jurors have proper context/information: instructions and experts.

*State v. Henderson, 27 A.3d  872 (N.J. 2011); State v. Lawson, 352 Or. 724 (2012)*
Litigating Eyewitness Identifications

STRATEGY 1: Challenge ongoing validity of *Manson*: *Henderson* approach – pretrial hearing available where:

- (1) defendant shows “some evidence of suggestion that could lead to a mistaken identification”; (2) the State must then offer proof to show that the proffered eyewitness identification is reliable, considering both system and estimator variables, and (3) the ultimate burden is on the defendant to prove a very substantial likelihood of irreparable misidentification.
Litigating Eyewitness Identifications

STRATEGY 2: Challenge ongoing validity of *Manson*: Lawson approach

• Rule 401 – Relevant? (almost always, yes)

• Rule 602 – Personal knowledge?
  • Proponent must show “both that the witness had an adequate opportunity to observe or otherwise personally perceive the facts to which the witness will testify, and did, in fact, observe or perceive them, thereby gaining personal knowledge of the facts.”
  • Helps to ensure reliability by focusing on what the witness knows, not what is or may be the result of suggestion and/or memory contamination.
Litigating Eyewitness Identifications

STRATEGY 2: Challenge ongoing validity of *Manson*: *Lawson* approach

- Rule 701 – Lay opinion testimony?
  - Proponent must establish by a preponderence that the proposed testimony is both **rationally based on the witness's perceptions**
    - If W did not get a good look at the face, not enough to support inference of identification;
    - Where evidence of “impermissible basis” for the inference, then issue of fact.
  - and **helpful** to the trier of fact
    - Testimony must communicate lay opinion testimony to be admitted only when the opinion communicates more to the jury than the sum of the witness's describable perceptions. more to the jury than the sum of the witness's describable perceptions.
Litigating Eyewitness Identifications

STRATEGY 2: Challenge ongoing validity of *Manson*: *Lawson* approach

- Rule 403
  - Probative value:
    - Direct relationship to reliability of evidence;
    - Duplicative, confusing, misleading – especially multiple ID procedures and in-court IDs
  - Prejudicial: jury research; confidence inflation; absence of context (jury instructions/expert testimony)
    - Especially so where police suggestion: “in cases in which an eyewitness has been exposed to suggestive police procedures, trial courts have a heightened role as an evidentiary gatekeeper because “traditional” methods of testing reliability—like cross-examination—can be ineffective at discrediting unreliable or inaccurate eyewitness identification evidence.”
  - Intermediate remedies (= for some of the testimony prejudice > probative value)
Litigating Eyewitness Identifications

STRATEGY 3: Pre-trial judicial inquiry (NAS approach)

“Judges have an affirmative obligation to insure the reliability of evidence presented at trial. To meet this obligation, the committee recommends that, as a appropriate, a judge make basic inquiries when [ID evidence] is offered.” (p. 109)

• Judges should, minimally, inquire about prior lineups, information given to e/w, instructions, blind; but contours dictated by facts.

• Time to entertain requests for additional discovery, review reports/recordings, agency procedures/whether followed.

• Issues with procedures or indicia of unreliability → hearing.

Benefits:

• No need to establish “undue suggestion” or state action to obtain a hearing.

• Totality of the circumstances evaluation.

• Can bring the witness to testify.

• Intermediate remedies.
Litigating Eyewitness Identifications

STRATEGY 4: Offer alternative to all-or-nothing approach (suppress/admit)

• No in-court IDs/challenge
• Limitations on testimony
  • W can testify about observations but not identification (Lawson)
  • W cannot testify about certainty
• ID can come in but with a cautionary instruction re: procedure used and its effects
• Ask for suppression, be happy with instructions and/or expert
Litigating Eyewitness Identifications

STRATEGY 4: Offer alternative to all-or-nothing approach (suppress/admit): Legal Arguments for an Expert

  • The right to present a complete defense includes the presentation of expert testimony by indigent defendants where that testimony is “crucial” to an indigent’s defense. *See Ake v. Oklahoma*, 470 U.S. 68, 79 (1985); *Crane*, 476 U.S. at 690 (“the blanket exclusion of the proffered testimony about the circumstances of petitioner's confession deprived him of a fair trial”).
Litigating Eyewitness Identifications

STRATEGY 4: Offer alternative to all-or-nothing approach (suppress/admit): Legal Arguments for an Expert

- Argue that “corroboration” cannot be determined pre-trial where that evidence has not been tested
  - Extraneous evidence connecting defendant with the crime “plays no part in [the] analysis” of whether the identification was reliable. -- *Manson v. Brathwaite*, 432 U.S. 98, 116 (1977)
  - Courts cannot look solely to the state’s evidence (i.e., corroboration) in limiting the defendant’s right to present his case. Where rulings excluding experts look only to the strength of the state’s case and do not find that the expert fails for legitimate evidentiary reasons (cumulative, confusing, delay, etc.) make this argument. *Holmes v. South Carolina*
  - 54 percent of exoneration cases involve multiple contributing causes of w/c
- Where expert is being called to testify to police practices, then argue *Kyles v. Whitley* -- critical that defendant be able to expose the effects of bad police work as it goes to probative value of the evidence.
Making the most of admissibility challenges

• Suppression
  • Consider alternatives

• Discovery
  • Need broad discovery to prepare
  • Preview testimony of the eyewitness and the cop
  • Investigate police practices
    • Practice in jurisdiction; best practices generally

• Educate the judge
  • Attach research to motion (NAS Report, *Lawson* appendix, Expert report/affidavit)
  • Call an expert
  • Post-hearing motions
Motions re: Police Practices in light of LB1000

• Getting best practices in your case beyond what is required by law:
  • Protective order prohibiting multiple procedures;
  • Full disclosure of all procedures – dates, individuals involved, search parameters; ID’ing and non-ID’ing witnesses;
  • Notice re: witness attending court and permission to excuse or block client;
  • Questioning witnesses re: contact with third parties and disclosure to D (see Henderson);
  • Separation of witnesses at ID procedures and thereafter;
  • Gag order re: media disclosure on case/client photo.

• Motion requesting preservation of all notes and information, including photos shown; request that all statements of witness be documented and turned over
Challenging In-Court IDs

• Arguments:
  • As suggestive as a showup with none of the benefits;
  • Highly persuasive to the jury but not probative of guilt
    • Passage of time
    • Only one right choice
    • No possibility of error
    • Has previously viewed D [and if not, should be barred]
  • Certainty
  • Jury tends to overvalue these IDs
  • Best evidence is fair procedure, closest in time
Jury Instructions

Traditional instructions are not helpful:
• Not very clear (plain English)
• Do not explain how the factors affect reliability
• Do not give jurors guidance about how to evaluate the evidence before them
• When given at the end of evidence, do not work to counter jurors’ misconceptions

Better approach – see *Henderson* and MA instructions

Timing is critical – instructions should be given before testimony (including instruction that ID is opinion testimony; nature of memory; etc.)

Written instructions in the jury room seem to help
Jury Instructions: Reliability

Model Inst. 1.35.10: Identification, Reliability

Identity is a question of fact for you to determine. Your determination of identity is dependent upon the credibility of the witness or witnesses offered for this purpose. You should consider all of the factors previously charged you regarding credibility of witnesses.

Some, but not all, of the factors you may consider in assessing reliability of identification are

1) the opportunity of the witness to view the alleged perpetrator at the time of the alleged incident,
2) the witness's degree of attention toward the alleged perpetrator at the time of the alleged incident,
3) the possibility of mistaken identity,
4) whether the witness's identification may have been influenced by factors other than the view that the witness claimed to have,
5) whether the witness on any prior occasion did not identify the defendant in this case as the alleged perpetrator, and
6) the length of the time between the crime and the out-of-court identification.
Jury Instructions: NJ System Variable Instructions

In evaluating the reliability of a witness’s identification, you should also consider the circumstances under which any out-of-court identification was made, and whether or not it was the result of a suggestive procedure, including everything done or said by law enforcement to the witness during the identification process. You should consider the following factors:

• **Lineup Composition**: A suspect should not stand out from other members of the lineup. The reason is simple: an array of look-alikes forces witnesses to examine their memory. In addition, a biased lineup may inflate a witness’s confidence in the identification because the selection process seemed so easy to the witness. It is, of course, for you to determine whether the lineup was biased or not and whether the composition of the lineup had any affect on the reliability of the identification.

• **Multiple Viewing**: When a witness views a person in multiple identification procedures, the witness's memory of the actual perpetrator can be replaced by the witness's memory of the person seen in the multiple procedures. In this way, when a witness views an innocent suspect in multiple identification procedures, the risk of mistaken identification is increased. You may consider whether the witness viewed the suspect multiple times and, if so, whether viewing the suspect in multiple procedures affected the reliability of the identification.
Jury Instructions: Weapon Focus

[IF A WEAPON WAS INVOLVED] and whether the witness saw a weapon during the event -- the visible presence of a weapon may reduce the reliability of an identification if the crime is of short duration, but the longer the event, the more time the witness has to adapt to the presence of the weapon.
Jury Instructions: Cross Race (MA)

[IF WITNESS AND OFFENDER ARE OF DIFFERENT RACES] and whether the witness and the offender are of different races – research has shown that people of all races may have greater difficulty in accurately identifying members of a different race than they do in identifying members of their own race.
Jury Instructions: Cautionary Instructions

Also, consider cautionary instruction where best practices are not followed – instruction should explain why the failure to follow best practices is a problem and how the jury should respond.

• *State v. Ledbetter*, 881 A.2d 290 (Conn. 2005) (trial court should instruct jury regarding risk of mis-ID from failure to instruct witness that suspect might not be present in lineup)

• *State v. King*, 2007 WL 325507 (N.J.Super.A.D. Feb. 06, 2007) (where the police did not instruct witness that suspect may not be present and, in fact, told witness the opposite, trial court was required to properly instruct the jury that such practices increase the chance of misidentification)
Jury Instructions: Cautionary Instructions

• General cautionary instruction
  • *State v. Long*, 721 P.2d 483 (Utah 1986) (requiring cautionary instruction on fallibility of eyewitness identifications)

• Given the unduly suggestive procedures used in this case [or specify failures]:
  • you should examine the eyewitness’s testimony with great caution. Adapted from Accomplice Testimony Instruction in Manual of Model Criminal Jury Instructions (Ninth Circuit Court of Appeals, 2005), Rule 4.9
  • “you must look with particular care at the testimony of an [eyewitness] and scrutinize it very carefully before you accept it.” *State v. Marra*, 222 Conn. 506, 524-25 (1992) (accomplice testimony instruction)
Jury Instructions: Case to Support ID Jury Instructions

• *Kyles v. Whitley*, 514 U.S. 419, 446 & n. 15 (1995) (instruction regarding **police failure to use procedures that have been proven to decrease the risk of error**)

• *State v. Ledbetter*, 881 A.2d 290 (Conn. 2005) (trial court should instruct jury regarding risk of mis-ID from **failure to instruct witness that suspect might not be present in lineup**) See also *State v. King*, 2007 WL 325507 (N.J.Super.A.D. Feb. 06, 2007)

• *State v. Delgado*, 902 A.2d 888 (N.J. 2006) (cautionary instruction about the **police failure to contemporaneously document identification procedure in writing**)

[Image: NEBRASKA INNOCENCE PROJECT]
Q&A

THANK YOU!
Subject: **Eyewitness Identification**

Policy Number: (If applicable, policy number here)

Effective Date: (If applicable, effective date here)

Revision Date(s): (If the policy is revised, revision date here)

**PURPOSE**

It is the purpose of this policy to establish guidelines for eyewitness identifications using showups, photo arrays, and lineups.¹

Minimum Standards on Eyewitness Identification as Required by LB1000.

LB1000 of 2016 requires all law enforcement agencies in the state to adopt a written policy on eyewitness identification that includes the minimum standards set forth by the Nebraska Commission on Law Enforcement and Criminal Justice. The minimum standards shall include:

1. Independent administration of the live or photo lineup, meaning that the officer administering the lineup or photo array has no knowledge of the suspect’s identity. If this is not practical, a functional equivalent (FE) procedure shall be used, as described in the model policy issued by the Nebraska Commission on Law Enforcement and Criminal Justice.
2. Instructions to the witness that they should not feel they have to make an identification and the investigation will continue regardless of whether an identification is made.
3. Use of non-suspect “fillers” that generally match the witness’s description of the perpetrator and do not make the suspect stand out.
4. Eliciting a witness confidence statement immediately after an identification is made, in which the witness is asked to state in his or her own words the level of certainty in the selection.

¹This is in keeping with the intent of LB1000 of the One Hundred and Fourth Nebraska Legislature, Second Session. Please consult your legal advisor for any local ordinances which affect your agency.
POLICY

Eyewitness identification is a frequently used investigative tool. Officers shall strictly adhere to the procedures set forth herein, in order to maximize the reliability of identifications and gather evidence that conforms to contemporary eyewitness identification protocols.

DEFINITIONS

*Functional Equivalent (FE) Procedures:* Procedures used when an independent administrator is not available. FE procedures permit the investigative officer to conduct a photo array using procedures that preclude him or her from knowing the suspect is presented to the witness.

*Independent Administrator:* The officer administering the lineup or photo array who has no knowledge of the suspect’s identity.

*Lineup:* Live presentation of individuals, before an eyewitness, for the purpose of identifying or eliminating suspects.

*Photo Array:* Showing photographs to an eyewitness for the purpose of identifying or eliminating suspects.

*Sequential:* Presentation of photos or individuals in a live lineup to a witness one at a time rather than all at once.

*Showup:* The presentation of a suspect to an eyewitness in a short time frame following commission of a crime to confirm or eliminate him or her as the perceived perpetrator. Showups, also referred to as *field identifications*, are conducted in a contemporaneous time frame and setting with the crime.

*Simultaneous:* Presentation of photos or individuals in a live lineup to a witness all at once.

PROCEDURES

A. Showups

The use of showups should be avoided whenever possible in preference for the use of a photo array or a lineup. However, when circumstances require the prompt display of a suspect to a witness, the following guidelines shall be followed to minimize potential suggestiveness:

1. Document the witness’s description of the perpetrator prior to conducting the showup.
2. Use showups only when the suspect is detained within a reasonably short time frame following the offense.
3. Do not use single suspect showups if probable cause to arrest the suspect has already been established.
4. Transport the witness to the location of the suspect whenever possible, rather than bringing the suspect to the witness.
5. Do not conduct showups when the suspect(s) are in patrol cars, handcuffed, or physically restrained by police officers, unless necessary due to safety concerns.

6. Do not take suspects to the witness’s residence, unless it is the scene of the crime.

7. Caution the witness that the person he or she is about to see, may or may not be the perpetrator.

8. Separate witnesses and do not allow communication between them before or after conducting the showup.

9. If one witness identifies the suspect, use a lineup or photo array for remaining witnesses.

10. Do not present the same suspect to the same witness more than once.

11. Do not require showup suspects to put on clothing worn by, speak words uttered by, or perform other actions of the perpetrator.

12. Officers should scrupulously avoid words or conduct of any type that may suggest to the witness that the individual is or may be the perpetrator.

13. Ask the witness how certain he or she is of any identification that is made of the suspect. Document the exact words used by the witness without prompting the witness to elaborate.

14. Remind the witness not to talk about the showup to other witnesses until police or prosecutors deem it permissible.

15. Record the identification process using an in-car camera or other audiovisual recording device where available.

16. Document the time and location of the showup, the officers present, and the outcome of the procedure.

B. Photographic Identifications

1. Creating a Photo Array
   a. The photo array should consist of a minimum of six photographs. Use a minimum of five non-suspect filler photos together with only one suspect photo. It is recommended that a non-suspect filler photo be used as the lead photo and that two blank photos be introduced following the sixth photo. Number all photos and blanks.
   b. Use contemporary photographs of individuals who are reasonably similar in age, height, weight, and general appearance and are of the same sex and race, in accordance with the witness’s description of the suspect. Do not mix color and black and white photos; use photos of the same size and basic composition; never mix mug shots with other photos; and do not include more than one photo of the same suspect.
   c. Cover any portions of mug shots or other photos that provide identifying information on the subject, and similarly cover other photos used in the array.

2. Conducting the Photo Array
   a. An investigator or officer who is unaware of the identity of the suspect, acting as an independent administrator, shall present the photos, if possible.
   b. If an independent administrator is not available, the investigative officer shall use the following FE procedures:
      1) Place the suspect and filler photos in a folder. Include four blank folders, for a total of ten.
      2) Shuffle the folders before giving them to the witness.
3) The officer administering the array should position him or herself so that he or she cannot see inside the folders as they are viewed by the witness.

c. Whenever reasonably possible, make an audiovisual recording of the Photo Array identification procedure.

d. Give the witness a copy of the following instructions prior to presenting the photo array and read the instructions aloud before the identification procedure.

“You will be asked to view a series of photos of individuals. It is just as important to clear innocent persons from suspicion as to identify guilty parties. I don’t know whether the person being investigated is included in this series. Individuals present in the series may not appear exactly as they did on the date of the incident because features such as head hair and facial hair are subject to change. You should not feel that you have to make an identification. If you do identify someone, I will ask you to describe in your own words how certain you are. Take as much time as you need to examine each photo. [If you make identification, I will continue to show you the remaining photos in the series (if using sequential presentation)]. Regardless of whether you make identification, we will continue to investigate the incident. Since this is an ongoing investigation, you should not discuss the identification procedures or results with anyone.

e. Position the photos so that the witness does not know the number of photos that will be shown.

f. Show the photo array to only one witness at a time; separate witnesses so they will not be aware of the responses of other witnesses.

g. Avoid multiple identification procedures in which the same witness views the same suspect more than once.

h. Do not comment on selections or outcomes of the procedures in any way.

i. Ask the witness how certain he or she is of any identification that is made of the suspect. Document the exact words used by the witness without prompting the witness to elaborate.

j. Ask the witness to complete and sign the photo display form.

k. Preserve the photo array, together with full information about the identification process for future reference.

C. Lineups

1. Creating the Lineup

   a. Use a minimum of six persons who are reasonably similar in age, height, weight, and general appearance and are of the same sex and race.

   b. If there is more than one suspect, include one each in separate lineups.
2. Conducting the Lineup
   a. An independent administrator shall conduct the lineup whenever reasonably possible.
   b. If an independent administrator is unavailable, the investigating officer must take all reasonable precautions to avoid giving any unintentional cues to the witness.
   c. Present a copy of the instructions contained in B.2.d above (adapted for lineups instead of photo array) of this policy to the witness and read them aloud before proceeding with the identification process.
   d. Present each individual sequentially or simultaneously to a single witness. In the case of multiple witnesses, present the lineup to each witness separately.
   e. Whenever possible, make an audiovisual recording of the lineup and identification process. If this is not possible, take and preserve a still photograph of each individual in the lineup and document all persons present during the lineup.
   f. Ask the witness how certain he or she is of any identification that is made of the suspect. Document the exact words used by the witness without prompting the witness to elaborate.
   g. Upon completion of the lineup, ask the witness to sign and date the record of results.

3. The primary investigating officer is responsible for the following:
   a. Scheduling the lineup on a date and at a time that is convenient for all concerned parties, to include the prosecuting attorney, defense counsel, and all witnesses.
   b. Fulfilling the necessary legal requirements for transfer of the subject to the lineup location should he or she be incarcerated at a detention center. The officer shall make arrangements for picking up the prisoner, to include a timely notice to the detention center concerning the pickup.
   c. Making arrangements to have persons act as fill-ins at the lineup who are of the same race, sex, approximate height, weight, age, and physical appearance and who are similarly clothed.
   d. Avoiding the use of fill-ins who so closely resemble the suspect that a person familiar with the suspect might find it difficult to distinguish the suspect from the fillers.
   e. Creating a consistent appearance between the suspect and the fillers with respect to any unique or unusual features (e.g., scars, tattoos, and facial hair) used to describe the perpetrator by artificially adding or concealing that feature.
   f. Placing suspects in different positions in each lineup, both across cases and with multiple witnesses in the same case.
   g. Ensuring that the prisoner has been informed of his or her right to counsel if formal charges have been made against him or her and that he or she has the opportunity to retain counsel or request that counsel be provided.
   h. Obtaining a written waiver on the prescribed departmental form should the prisoner waive his or her right to counsel.
   i. Allowing counsel representing the accused sufficient time to confer with his or her client prior to the lineup and to observe the manner in which the lineup is conducted.
   j. Ensuring all persons in the lineup are numbered consecutively and are referred to only by number.
k. Ensuring that a complete written record and, if possible, an audiovisual recording of the lineup proceedings are made and retained.

l. Ensuring that witnesses are not permitted to see or be shown any photos of the accused immediately prior to the lineup.

m. Ensuring that only one witness views the lineup at a time and that witnesses are not permitted to speak with one another during lineup proceedings.

n. Scrupulously avoiding the use of statements, clues, and casual comments or providing unnecessary or irrelevant information that in any manner may influence the witness’s decision-making process or perception.
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PROPOSED JURY INSTRUCTIONS

[Client], through undersigned counsel, pursuant to [his/her] rights under the Fifth and Sixth Amendments to the United States Constitution, respectfully moves the Court to issue the attached proposed jury instructions on evaluating eyewitness identification evidence. In this [Offense] case, which turns on a [single] [stranger] identification by the government’s witness, it is vital that the Court instruct the jury “on the importance of carefully evaluating the identification testimony and the circumstances surrounding the identification.” Smith v. United States, 343 A.2d 40, 42-43 (D.C. 1975).

The primary purpose of this jurisdiction’s model (“Redbook”) identification instruction is to prevent wrongful convictions stemming from misidentifications, but the instruction is based on scientific and scholarly work that is now several decades old. Because it has not been updated to reflect the considerable advances in science regarding eyewitness identifications, the instruction will fail to provide the jurors with an accurate guide for their consideration of eyewitness identifications. The current instruction does not accurately instruct the jury regarding variables that can affect a witness’s memory and confidence, the value of a witness’s statement of confidence, the nexus between identification and memory and the variables that affect
memory, or the effect of factors such as stress, the presence of a weapon, and racial or ethnic differences between the perpetrator and the witness. Providing the Redbook instruction without modifications based on the scientific advancements of the past few decades will inject an unnecessary risk of a wrongful conviction into this trial. This Court should consider the current science on eyewitness identifications, as well as the decisions of the high courts of a number of other jurisdictions that have acknowledge the scientific advancements and that have incorporated the current science into their model jury instructions. This Court should follow those other jurisdictions and provide an accurate and up-to-date identification instruction that minimizes the risk in this case of a wrongful conviction based on misidentification.

The “current” Redbook instruction, initially promulgated by the D.C. Circuit in an appendix to United States v. Telfaire, 469 F.2d 552, 555 (D.C. Cir. 1972) (per curiam) because “[t]he presumption of innocence that safeguards the common law system must be a premise that is realized in instruction and not merely a promise,” is, at its core, based on studies and scholarly works that are all at least sixty years old. Indeed, some of the studies on which it is based are more than eighty years old. The instruction was adopted based on D.C. Circuit opinions from the late-1960’s and early-1970’s, including Macklin v. United States, 409 F.2d 174 (D.C. Cir. 1969), and United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972) (per curiam); see also Criminal Jury Instructions for the District of Columbia § 5.06 cmt. (2d ed. 1972); see also Smith v. United States, 343 A.2d 40, 43 & n.5 (D.C. 1975). The D.C. Circuit opinions Macklin and Telfaire were in turn based on a series of cases decided by the Supreme Court in 1967: United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); and Stovall v. Denno, 388 U.S. 293 (1967). Those cases, particularly Wade, were based on what was then the current academic

1 Macklin, 409 F.2d at 178; Telfaire, 469 F.2d at 555-56.
study of the problems affecting eyewitness identifications.\(^2\) For example, the \textit{Wade} opinion relied on what it called “one of the most comprehensive studies” of pretrial identifications, which was conducted by Williams and Hammelmann and published in 1963. \textit{Wade}, 388 U.S. at 235 (quoting Identification Parades, Part I, (1963) Crim.L.Rev. 479, 483). The Court also considered scholarly works from as far back as 1930. \textit{Id.} at 229, n.7 (citing \textit{inter alia} F. Gorphe, \textit{Showing Prisoners to Witness for Identification}, 1 Am. J. Police Sci. 79 (1930)).\(^3\)

In the several decades since the studies that influence the Redbook identification instruction were conducted, there have been considerable advancements in the science regarding eyewitness identifications. Indeed, the fact that the Redbook instruction does not accurately reflect the accepted science on identifications has been acknowledged by the National Academy of Sciences (NAS). The NAS, in its landmark 2014 report entitled Identifying the Culprit:

\(^2\) Crafting jury instructions based on extra-record scientific research nothing novel. In developing its jury instruction on how to evaluate evidence of a defendant’s flight, for example, the D.C. Circuit reviewed the “available empirical data,” \textit{Miller v. United States}, 320 F.2d 767, 772 (D.C. Cir. 1963) (opinion of Bazelon, C.J.), in “numerous psychological authorities,” \textit{Austin v. United States}, 414 F.2d 1155, 1157 (D.C. Cir. 1969), and concluded that “[t]he observation that feelings of guilt may be present without actual guilt in so-called normal as well as neurotic people has been made by many recognized scholars and is a significant factor in the contemporary view of the dynamics of human behavior;” \textit{Miller}, 320 F.2d at 772; \textit{see also id.} at 772 nn. 10–11. Thus, when evidence of flight is introduced into a case, the jury should be instructed “that flight does not necessarily reflect feelings of guilt, and that feelings of guilt, which are present in many innocent people, do not necessarily reflect actual guilt.” \textit{Id.} at 773; \textit{see also id.} at 774 (opinion of Fahy, J.) (agreeing with Chief Judge Bazelon’s opinion); \textit{Austin}, 414 F.2d at 1157–58.

Assessing Eyewitness Identification (hereinafter “NAS Report”), attached as Exhibit X, directly criticized the inadequacy of instructions like the current Redbook instruction.4

The Redbook instruction’s failure to account for the tremendous scientific advances regarding eyewitness identifications means that it fails to serve its primary purpose: protecting against the risk of wrongful convictions caused by misidentifications. The opinions on which the Redbook instruction is based acknowledged the need for the jury to be instructed on the factors affecting eyewitness identifications in order to avoid wrongful convictions and “the very real danger of mistaken identification as a threat to justice.” Telfaire, 469 F.2d at 555 (recognizing that the risk of a misidentification leading to the conviction of an innocent person weighed in favor of creating a model instruction and concluding that “[t]he presumption of innocence that safeguards the common law system must be a premise that is realized in instruction and not merely a promise”); Macklin, 409 F.2d at 177-178 (“[w]ithout doubt, conviction of the wrong man is the greatest single injustice that can arise in our system of criminal law” and an identification instruction “at least is a step in the right direction” towards limiting the risk of that injustice); see also Smith, 343 A.2d at 43 (“to the lessen the chance of … a miscarriage of justice, the jury should be instructed on the importance of carefully evaluating the identification testimony and the circumstances surrounding the identification”).

Eyewitness misidentification is the leading contributor to wrongful convictions in the United States. Eyewitness misidentification contributed to four of the exonerations in DC.5 As

---

4 The NAS Report wrote: “[w]ith the exception of the New Jersey instructions, jury instructions have tended to address only certain subjects, or to repeat the problematic Manson v. Braithwaite language, which was not intended as instructions for jurors.” (The Massachusetts instructions had not yet been finalized at the time of the release of the NAS Report.) NAS Report at 112. Though the Redbook instruction repeats some of the factors identified for consideration by courts in Manson, the primary defect lies in the instruction’s failure to instruct on a variety of well-established factors known to affect identification, such as stress, presence of a weapon, and identification of a person of another race.
the Court of Appeals has recognized in 2009, “Every major study of wrongful convictions in the last decade has concluded that eyewitness misidentification is the most common cause of wrongful convictions in America. Of the first 200 DNA-based exonerations, 79% of the cases involved an eyewitness misidentification.” Benn v. United States (“Benn II), 978 A.2d 1257, 1290 (D.C. 2009) (quoting Professor Cynthia E. Jones, The Right Remedy for the Wrongly Convicted: Judicial Sanctions for the Destruction of DNA Evidence, 77 Fordham L.Rev. 2893, 2929 (May 2009)). “The decisions of the Supreme Court and of this court recognizing the potential for misidentification when the accused is a stranger to the witness are grounded in reality. They provide the legal context in which judicial discretion must be exercised at the trial court level.” Id. Because the Redbook instruction is based on woefully out-dated science, it fails to apprise the jury of issues that must be considered for properly evaluating identification testimony and therefore increases the risk of wrongful conviction.

For several years the Redbook Committee has acknowledged in the comments to the identification instruction that its members do not agree about what changes are necessary for the instruction. The Redbook Committee has effectively abdicated any responsibility for the instruction and explicitly left trial courts in charge of determining what identification instruction should be provided. The Court of Appeals has also recently indicated, in Corbin v. United States, 120 A.3d 588 (D.C. 2015), that trial courts have the discretion to either provide the current model instruction or to change the instruction to account for the widely accepted social science regarding eyewitness identifications.

5 National Registry of Exonerations, A Project of the University of Michigan Law School, Detailed View of Cases at http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited DATE)
As a result of the inadequacies identified by the National Academy of Sciences and the Redbook Committee’s inaction, D.C.’s current instruction lags behind several other jurisdictions that have taken steps to respond to both the scientific consensus on the factors that affect reliability and the role misidentifications have played in wrongful convictions. New Jersey and Massachusetts have adopted instructions for use in every case. Alaska and Oregon have adopted revised standards for admissibility of eyewitness identification testimony and Alaska has instructed its Criminal Pattern Jury Instructions Committee to develop jury instructions consistent with the scientific principles it relied upon in revising its admissibility standard. In so doing, these jurisdictions have recognized the scientific consensus that exists surrounding certain factors that affect the reliability of eyewitness identifications. CLIENT respectfully submits that this Court should share the same concern regarding wrongful convictions and should modify the instruction based on the accepted science, and use an identification instruction that is consistent with those other jurisdictions.

The proposed instructions are adapted from model instructions formulated in other jurisdictions where courts have carefully and thoroughly evaluated the decades of science underlying eyewitness identifications, as adduced through expert testimony and a multitude of peer-reviewed scientific studies, and concluded that “enhanced jury charges” that reflect the state of the science are necessary to help jurors weigh eyewitness identification evidence. This Court should rely on the in-depth analyses conducted by the other jurisdictions and update the identification instruction accordingly.6

---

6 Because legislative facts are broadly applicable beyond an individual case, courts need not reinvent the wheel each time a ruling calls for analysis of scientific research. Instead, courts can and do rely on previous analyses of the identical issue by other courts. See Porter, 618 A.2d at 635 (holding that, in deciding whether a scientific methodology is generally accepted, court may consider, inter alia, “judicial opinions in other jurisdictions”).
In particular, the defense’s proposed instructions rely on the Massachusetts Model Jury Instructions on Eyewitness Identification, issued on November 16, 2015, in the wake of Com. v. Gomes, 22 N.E.3d 897 (Mass. 2015), its predecessor model jury instruction in New Jersey from State v. Henderson, 27 A.3d 872 (N.J. 2011), as well as on the principles espoused in the NAS Report and in State v. Lawson, 291 P.3d 673 (Or. 2012) and State v. Guilbert, 49 A.3d 705 (Conn. 2012). The instruction primarily relies on the Massachusetts instruction because it is built on the National Academy of Sciences Report as well as the principled decisions of the highest courts of Oregon, Connecticut, and New Jersey.

The NAS Report

The NAS Report was authored by an ad hoc study committee charged with assessing the state of research on eyewitness identifications and making recommendations as appropriate. The committee consisted of federal judges (including multiple judges from the U.S. Court of Appeals for the District of Columbia), state court judges, prominent law and social science professors, members of the National Academy of Sciences, a police chief, a federal defender, and a district attorney. The committee “analyzed relevant published and unpublished research, external submissions, and presentations made by various experts and interested parties.” NAS Report at xiii. The preface of the report recognized:

Basic research has progressed for many decades, is of high quality, and is largely definitive. Research of this category identifies principled and insurmountable limits of vision and memory that inevitably affect eyewitness accounts, bear on conclusions regarding accuracy, and provide a broad foundation for the committee’s recommendations.

Id.
And as the D.C. Court of Appeals recently acknowledged (even before the landmark NAS Report was published), “we have learned much to cause us to reexamine our view that average lay persons serving as jurors are well equipped to call upon their common sense knowledge of the reliability of eyewitness identifications, even when aided by cross-examination, to assess the credibility of such testimony.” Minor v. United States, 57 A.3d 406, 413-14 (D.C. 2012); see also In re L.C., 92 A.3d 290, 296 (D.C. 2014) (“this court [has] recognized that the insights of modern psychological research into the factors influencing eyewitness identifications are not matters of common knowledge or common sense and are, indeed, often counterintuitive.”)

**Model Jury Instructions in Massachusetts and New Jersey**

*State v. Henderson*, 27 A.3d 872 (N.J. 2011), is a groundbreaking opinion that largely adopted its court-appointed Special Master’s report extensively documenting the “vast body of scientific research about human memory” in the context of eyewitness identifications. The Special Master “presided over a hearing that probed testimony by seven experts and produced more than 2,000 pages of transcripts along with hundreds of scientific studies” *id.* at 877; the research presented represented the “gold standard in terms of the applicability of social science research to the law,” as “[e]xperimental methods and findings have 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.” *Id.* at 916.

As a result of the Special Master’s findings, the New Jersey Supreme Court changed its standard for the admissibility of eyewitness identification evidence, *id.* at 919, and ordered revisions to the model jury instruction on eyewitness identifications that reflected the scientific testimony elicited by the Special Master. *Id.* at 878 (“[W]e have asked the Criminal Practice
Committee and the Committee on Model Criminal Jury Charges to draft proposed revisions to the current model charge on eyewitness identification and address various system and estimator variables.”)

Building on the work started by the New Jersey Special Master, the Justices of the Massachusetts Supreme Judicial Court (SJC) convened the Study Group on Eyewitness Identification in 2011, which issued its report in July 2013 (hereinafter “Study Group Report”). The Study Group’s members were judges, prosecutors, defenders, law enforcement personnel, and academics. The Study Group “reviewed key scientific research, law review articles, the emerging case law, statutes, and police practices nationwide, among other authorities.” SJC Report at 2. The Study Group’s “scientifically grounded set of recommendations” were “geared towards reducing juror confusion and increasing judicial involvement in implementing procedures and remedies that reduce the risk of wrongful convictions.” Id. at 11. One of the key recommendations of the Study Group Report was a revision of the Massachusetts eyewitness identification jury instructions. The recommended instructions set out to describe how memory works, instruct the jury of principles that “are generally accepted within the social science community; that is, the variables that are not substantially in dispute,” and contain some instructions that would be given in every case and some that the trial judge should give or omit, depending on the evidence in the case. Id. at 55. With those principles in mind, the Study Group drafted revisions to the eyewitness identification jury instructions, and submitted those instructions as a recommendation with its report.

Subsequent to the issuing of the Study Group Report, the Massachusetts Supreme Judicial Court (SJC) reconvened and decided Commonwealth v. Gomes, 22 N.E. 3d 897 (Mass. 2015) on January 12, 2015. In Gomes, Massachusetts issued a provisional eyewitness
identification instruction based on the findings of the Study Group. The SJC “conclude[d] that there are scientific principles regarding eyewitness identification that are ‘so generally accepted’ that it is appropriate in the future to instruct juries regarding these principles so that they may apply the principles in their evaluation of eyewitness identification evidence.” *Com. v. Gomes*, 22 N.E.3d 897, 900 (2015).

Notably, the report of the Massachusetts Study Group on Eyewitness Identification found inadequacies in the then-Massachusetts instruction that are likewise present in the current Redbook instruction. The Study Group found that, though the instructions “enumerate several factors that jurors should consider in assessing identification testimony,” there were three deficiencies with the instructions. Ex. X at 54. First, the instructions failed to instruct the jury on some factors “that social scientists have proved can influence the accuracy of an identification, such as stress, the perpetrator’s use of a weapon, and the racial or ethnic difference between the perpetrator and the witness.” *Id.* Second, the instructions “fail to explain the nexus between identification and memory; that is, the jury is not informed that certain... variables influence memory at its different stages, and therefore affect the reliability of an identification.” *Id.* Third, the instructions fail to instruct the jury on the ways in which these “variables can affect a witness’s memory and confidence”—which is important because research shows that jurors rely heavily on a witness’s expressed confidence. *Id.*

---

7 The Massachusetts Study Group on Eyewitness Identification was convened by the Justices of the Massachusetts Supreme Judicial Court in the fall of 2011. The Study Group’s Report, attached here as Exhibit X, was relied on by the Supreme Judicial Court in *Gomes*, 22 N.E.3d 897, a significant Massachusetts eyewitness identification decision, discussed in further detail below at pages X-X.

8 The then-model instruction in Massachusetts came from the Supreme Judicial Court’s decision in *Com. v. Rodriguez*, 391 N.E.2d 889, 897 (Mass. 1979), that appended instructions taken from *United States v. Telfaire*, 469 F.2d 552, 558-559 (D.C. Cir. 1972). The current Redbook instruction was adopted from the *Telfaire* instruction.
The NAS Report was pending publication at the time of the *Gomes* decision. The Court in *Gomes* thus had the benefit of the NAS Report and cites the report in some of its findings. The SJC then allowed for a comment period on the instructions and released a model instruction on November 16, 2015. That instruction incorporates many of the uncontroversial findings in the NAS Report. That model instruction was an influence for the attached, proposed instruction.

**Reforms in Oregon and Alaska**

Following the lead of the New Jersey Supreme Court, the Supreme Court of Oregon in 2012 relied on the advances in scientific research underpinning eyewitness identifications to revise its legal test for the admissibility of eyewitness identification evidence and to adopt several additional procedures for determining the admissibility of such evidence. *State v. Lawson*, 291 P.3d 673 (Or. 2012). As in *Henderson*, the *Lawson* opinion engaged in extensive and useful discussion of the recent scientific research that establishes the factors known to affect the reliability of eyewitness identifications. The *Lawson* court appended a “summary of the scientific research and literature this court examined for these cases,” that cited to and explained the most prominent scientific research studies that outlined findings on each factor known to affect eyewitness reliability. *Id.* at 700. Oregon courts have not yet incorporated these findings into jury instructions; however, courts do take judicial notice of these findings and can communicate them to jurors accordingly.

And most recently, Alaska’s Supreme Court, relying on the work of the New Jersey Special Master and the Massachusetts Study Group, altered its standard for admissibility of eyewitness identification evidence. Quoting the NAS Report, the Alaska Supreme Court stated that, “‘[t]he past few decades have seen an explosion of additional research that has led to important insights into how vision and memory work, what we see and remember best, and what
causes these processes to fail.” Young v. State, 374 P.3d 395, 414 (Alaska 2016) reh'g denied (July 19, 2016). The Alaska Supreme Court ruled that courts should consider factors, based on decades of scientific research, that could affect the reliability of identifications. The court also found that, “jury instructions specific to eyewitness identifications are necessary for the jury's proper understanding of the issue[,] … [m]any of the factors that affect reliability are counterintuitive and, therefore, not coterminous with common sense[, and] [t]hus while science has firmly established the inherent unreliability of human perception and memory” that reality is outside the understanding of the average juror. Id. at 428. The Court went on to “refer the issue of eyewitness-specific jury instructions to the Criminal Pattern Jury Instructions Committee and ask that it draft a model instruction appropriate for use in future cases, consistent with the principles we announce today.” Id. The Jury Instructions Committee has yet to issue a new instruction.

This Court’s Discretion to Instruct the Jury on Factors that Affect Identification

The Court of Appeals in Corbin recognized that the “trial court has broad discretion in formulating jury instructions.” Corbin v. United States, 120 A.3d 588, 606 (D.C. 2015) (internal quotations and citations omitted). The Court in Corbin found that the trial court in that case did not abuse its discretion in failing to give proposed jury instructions based on New Jersey’s jury instructions. In determining that the trial judge did not abuse his discretion, the court noted that “the defense counsel's proposed instructions cited to Henderson and several other cases in footnotes without any explanation or citation to the scientific studies cited in those cases. Instead, the instructions referred generally to the results of those studies[.]” Id. at 605. The trial court in Corbin did not have the benefit of the NAS Report, attached, or the Study Group Report from Massachusetts, attached, or the numerous studies explained in and attached to this motion. The
attached studies are primarily meta-analyses. A meta-analysis is “a statistical technique for combining and contrasting the findings from independent studies[.]” *Minor*, 57 A.3d at 417 (D.C. 2012). Further, the attached instruction draws mostly from the more recent Massachusetts instruction, developed after another round of study and influenced by the NAS Report.

The trial court in *Corbin* also expressed its preference to “stick with the Redbook.” *Id.* at 607. Though traditionally revisions to the model Redbook instructions are made through the Redbook Committee, the Redbook Committee recently indicated that no substantive revisions will be made to the Identification instruction in the Committee. The 2016 Redbook release includes an updated comment on the Identification instruction: “Because the Committee remains unable to agree about whether, and under what circumstances, additional instruction is necessary, the Committee believes that if any significant changes to the instruction are to be made those changes are best decided outside of this Committee through litigation.” When *Corbin* was decided, the trial court could likely have thought that if any change were to be made to the Redbook model instruction, that change would be made through the Committee. That is no longer the case. [CLIENT] should not be forced to go to trial with an inadequate instruction that the Redbook Committee will not endorse but also will not change.

It is unnecessary here for this Court to reinvent the wheel in instructing the jury in a manner that better guards against wrongful convictions based on mis-identifications. As Connecticut’s highest court observed of factors contributing to misidentification: “this broad based judicial recognition tracks a *near perfect scientific consensus*. The extensive and comprehensive scientific research, as reflected in hundreds of peer reviewed studies and meta-analyses, convincingly demonstrates the fallibility of eyewitness identification testimony and
pinpoints an array of variables that are most likely to lead to a mistaken identification.” State v. Guilbert, 49 A.3d 705, 720-21 (Conn. 2012) (emphasis added).

The courts of New Jersey and Massachusetts have already appointed a respective Special Master and Study Group to review the research and both have concluded that there is a consensus on the relevance of particular factors. It is efficient and appropriate for this Court to rely on those findings, as other courts have. It would be unnecessarily expensive and time-consuming to defendants, courts, and juries to require expert testimony in every single case that involves eyewitness identification, even though the factors identified in the attached instruction are well-established. It is unnecessary and overly burdensome for the defense to be required to call an expert in every case in which a witness made an identification to talk about factors that, in the words of the Connecticut Supreme Court, have reached “a near perfect scientific consensus.”

9 The Alaska Supreme Court, in responding to an argument from the prosecution that the Court should not consider scientific evidence that was not “subjected to the adversarial process at trial,” stated:

Other states' high courts have followed different procedural paths when modifying their standards for evaluating eyewitness identifications. The special master appointed by the New Jersey Supreme Court “to evaluate scientific and other evidence about eyewitness identifications ... presided over a hearing that probed testimony by seven experts and produced more than 2,000 pages of transcripts along with hundreds of scientific studies,” then issued an extensive report on which the court heavily relied. Other courts, acknowledging the scientific consensus, have not required that the science be tested again in a trial-like process. The Massachusetts Supreme Judicial Court convened a “Study Group” in 2011 to determine how it could improve its model jury instructions for the evaluation of eyewitness identifications. In 2015 the court “review [ed] the scholarly research, analyses by other courts, amici submissions, and the Study Group Report and comments” and adopted new standards. The supreme courts of Connecticut, Hawai‘i, Oregon, Utah, and Wisconsin, while noting judicial trends, have also relied directly on the scientific research to explain why their standards should be modified. Young, 374 P.3d at 414-15 (internal footnotes omitted).

10 However, this Court also has the authority to appoint its own committee, special master, or study group to review the research and/or the authority to order a hearing on the research.
The Redbook instruction is read in every case in which there is an identification, not just in cases in which expert testimony is presented. This is because “identification testimony presents special problems of reliability.” Telfaire, 469 F.2d at 555. If the Court is to read identification instructions in every case, whether expert testimony is presented or not, it should read instructions that tell the jury about factors on which researchers have reached a near perfect consensus, instead of giving the outdated, incomplete, and overly vague Redbook instruction. The current instructions tell the jury to consider some factors related to reliability, without any guidance on how to consider these factors and omit entirely some factors for which other courts have recognized a consensus. Because the Redbook Committee has expressed its unwillingness to change the instruction, either this Court should exercise its discretion to give the new, updated instruction proposed by the defense rather than continue to give an instruction based on science that is woefully out-of-date, and put [CLIENT] at risk of being wrongly convicted.

AUTHORITY FOR PROPOSED INSTRUCTIONS

The following memorandum accompanies the proposed defense jury instructions. The attached instructions are outlined as follows:

Introduction (including description of human memory, the research on which is outlined below at pages X-X)
1. Opportunity to View the Event
   a. Characteristics of the Witness (including stress, the research on which is outlined below at pages X-X)
   b. Duration (pages X-X)
   c. Weapon Focus (pages X-X)
   d. Distance (pages X-X)
   e. Lighting
   f. Disguise/Changed Appearance (pages X-X)
   g. Alcohol (pages X-X)
2. Cross-racial Identification (pages X-X)
3. Passage of Time (pages X-X)
4. Expressed Certainty (pages X-X)
5. Exposure to Outside Information (pages X-X)
6. Identification Procedures (pages X-X)
7. Failure to Identify or Inconsistent Identification (pages X-X)

Conclusion

**Human Memory**

**Redbook Instruction on Human Memory:** None

**Proposed Instruction:** People have the ability to recognize other people from past experiences and to identify them at a later time, but research has shown that there are risks of making mistaken identifications. That research has focused on the nature of memory and the factors that affect the reliability of eyewitness identifications.

The mind does not work like a video recorder. A person cannot just replay a mental recording to remember what happened. Memory and perception are much more complicated. Remembering something requires three steps. First, a person sees an event. Second, the person's mind stores information about the event. Third, the person recalls stored information. At each of these stages, a variety of factors may affect -- or even alter -- a person’s memory of what happened and thereby affect the accuracy of a later identification. This can happen without the person being aware of it.

This instruction is adopted from the Massachusetts instruction. A fundamental fact about human memory, accepted by researchers but often not appreciated by lay people is that memory is not like a videotape. “Research has shown that human memory is not like a video recording that a witness need only replay to remember what happened. Memory is far more complex.”

*Com. v. Gomes*, 22 N.E.3d 897, 919 (2015). The NAS Report recognized that memory is not like a pristinely preserved video recording: “Human vision does not capture a perfect, error-free trace of a witnessed event…. The recognition of one person by another—a seemingly commonplace and unremarkable everyday occurrence— involves complex processes that are limited by noise and subject to many extraneous influences.” NAS Report at 15. The NAS Report additionally described the three stages of remembering and their susceptibility to influence:

Like vision, memory is also beset by noise. Encoding, storage, and remembering are not passive, static processes that record, retain, and divulge their contents in an informational vacuum, unaffected by outside influences. The contents cannot be treated as a veridical permanent record, like photographs stored in a safe. On the
contrary, the fidelity of our memories for real events may be compromised by many factors at all stages of processing, from encoding through storage, to the final stages of retrieval. Without awareness, we regularly encode events in a biased manner and subsequently forget, reconstruct, update, and distort the things we believe to be true.

*Id.* at 59-60.

The D.C. Court of Appeals recognized this point in *Benn II*, admonishing that while “most potential jurors believe that a person’s memory functions like a camera, capable of retrieving a captured image on demand,” memory in fact “is influenced by a variety of factors[.]”

*Benn II*, 978 A.2d at 1267 n.26.

The proposed instruction, which addresses these basic precepts and notes that human memory is not foolproof will counter common but incorrect intuitions that jurors hold about how recall works, and will aid the jury in more accurately weighing eyewitness testimony. *See Henderson*, 27 A.3d at 895 (“Science has proven that memory is malleable. The body of eyewitness identification research further reveals that an array of variables can affect and dilute memory and lead to misidentifications.”); *see* NAS Report at 119 (“As this report indicates, however, the malleable nature of human visual perception, memory, and confidence; the imperfect ability to recognize individuals; and policies governing law enforcement procedures can result in mistaken identifications with significant consequences.”) The proposed instruction is in line with the way that the NAS Report describes the operation of memory. The instruction gives the jurors information about which they would not otherwise be aware, as recognized by the D.C. Court of Appeals in *Benn II*. And the proposed instruction gives jurors information that is addressed in no way by the current Redbook identification instruction.

**Stress**

*Redbook Instruction on Stress: None*
Proposed Instruction on Stress:

1) a) Characteristics of the Witness: You should consider the physical and mental characteristics of the witness when the observation was made. For example, how good was the witness's eyesight? Was the witness experiencing illness, injury, or fatigue? Was the witness under a high level of stress? High levels of stress may reduce a person's ability to make an accurate identification.

This instruction is adopted from the Massachusetts instruction. The presence of high levels of eyewitness stress has been widely established by the science to be an important factor in assessing the reliability of eyewitness identifications. The NAS Report found, “[u]nder conditions of high stress, a witness’ ability to identify key characteristics of an individual’s face (e.g., hair length, hair color, eye color, shape of face, presence of facial hair) may be significantly impaired.” NAS Report at 94 (citing C. A. Morgan III et al., “Misinformation Can Influence Memory for Recently Experienced, Highly Stressful Events,” International Journal of Law and Psychiatry 36(1): 11–17 (2013)). The Massachusetts SJC Study Group Report likewise concluded, “[h]igh levels of stress or fear can have a negative impact on a witness’s ability to make accurate identifications.” Study Group Report at 59.

The 2013 Morgan study, cited by the NAS Report as finding that when a witness experiences conditions of high stress, key characteristics of an individual, like hair length and color and facial features, can be harder to identify, is attached as Exhibit X, as well as the two most prominent studies on stress and eyewitness identification. The first of these studies, attached as Exhibit X, is a meta-analysis, Kenneth A. Deffenbacher, Brian H. Bornstein, Steven D. Penrod, and E. Kiernan McGorty, A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory, 28 L. & Hum. Behav. 687, 699 (2004). This meta-analysis was cited by the Study Group Report at pages 29 and 60, the NAS Report at page 94, Henderson, 27 A.3d at 904, and Lawson, 291 P.3d at 700. The Study Group Report described the results of the study, “A
A meta analysis of 27 independent studies conducted on the effects of stress on identification accuracy showed that, while 59 percent of the 1,727 participants correctly identified the target individual in a target-present lineup after a low-stress encounter, only 39 percent did so after high-stress encounters.” Ex. X at 59-60. The researchers wrote that the conclusions “regarding the negative effect of stress on eyewitness identification accuracy” and “that heightened stress debilitates eyewitness recall” were “safe” conclusions. Ex. X at 700.


Military survival school participants were subjected to two 40–minute interrogations, each by different interrogators, following a 12–hour period of confinement without food and sleep in a mock prisoner of war camp. One interrogation was conducted under high-stress conditions, involving physical confrontation, while the other was conducted under low-stress conditions, involving only deceptive questioning. When asked the next day to identify their interrogators, only 30 percent of the participants correctly identified their high-stress interrogator, while 60 percent correctly identified their low-stress interrogator. The study also noted an associated increase in false identifications—56 percent of the participants falsely identified another person as their high-stress interrogator, compared to 38 percent who did so with regard to their low-stress interrogator.

*Lawson*, 291 P.3d at 700-01 (internal citations omitted).

In *Gomes*, the Massachusetts court found that the fact that “high levels of stress can reduce an eyewitness’s ability to make an identification” was one of five recognized principles that were generally accepted in the scientific community. *Gomes*, 22 N.E.3d at 913. The highest courts in Connecticut and Oregon have similarly accepted the scientific consensus that high stress at the time of observation may adversely affect an eyewitness’s perception and memory, and thus their ability to accurately identify. *Lawson*, 291 P.3d at 687; *Guilbert*, 49 A.3d at 722

In Benn II, and again in Minor, the D.C. Court of Appeals noted that while the “average juror is likely to believe that witnesses remember the details of violent events better than nonviolent ones,” in fact the scientific research establishes that the “opposite is true.” Minor, 57 A.3d at 415 (citing Benn II, 978 A.2d at 1268 & n.36). See also People v. Campbell, 847 P.2d 228, 233 (Col. Ct. App. 1992)(“[C]ontrary to average juror expectations, stress actually decreases rather than increases accuracy of perception. . . .”), United States v. Burton, 1998 U.S. Dist. LEXIS 18730 at *1, *34 (E.D. Tenn. Oct. 8, 1998) (“The results of the psychological research [on stress and accuracy] could well be counter intuitive to a juror, i.e., ‘common sense’ might tell one that if a weapon is present, the recollection of the event, and the face of the perpetrator, would somehow be forever etched in the mind of the witness (known as the ‘flashbulb effect’).”)

A jury instruction that reflects the prevailing legal and scientific consensus on the relationship between high levels of stress and inaccurate identifications will thus aid jurors by giving them the proper tools to evaluate such identifications.

**Exposure Duration (Length of Encounter)**

**Redbook Instruction on Exposure Duration (Length of Encounter):**

A number of factors may affect the accuracy of an identification of the defendant by an alleged eyewitness.

1. The witness’s opportunity to observe the criminal acts and the person committing them, including but not limited to, the length of the encounter… .
Proposed Instruction on Exposure Duration (Length of Encounter):

1) b) Duration. The amount of time an eyewitness has to observe an event may affect the reliability of an identification. Although there is no minimum time required to make an accurate identification, a brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure to the perpetrator. In addition, time estimates given by witnesses may not always be accurate because witnesses tend to think events lasted longer than they actually did.

This instruction is adopted from the New Jersey instruction. Research shows that witnesses are often inaccurate in their estimates of the length of encounters. Attached as Exhibit X, Elizabeth Loftus, Jonathan W. Schooler, Stanley M. Boone, and Donald Kline, *Time Went by so Slowly: Overestimation of Event Duration by Males and Females*, 1 Applied Cognitive Psychology 3-13 (1987), has been cited to explain witness time estimation by the Study Group Report at pages 28, 63; by *Lawson*, 291 P.3d at 702; and by *Henderson*, 27 A.3d at 905. The court in *Lawson* explained the Loftus study: “Studies also show that witnesses consistently and significantly overestimate short durations of time (generally, durations of 20 minutes or less), especially during highly stimulating, stressful, or unfamiliar events.” *Lawson*, 291 P.3d at 702. The Loftus study summarizes research that found that witnesses routinely overestimated the length of crimes and then goes on to describe the three experiments at issue in the study in which participants watched videos of simulated crimes and were asked to estimate the length of the simulated crimes. *Ex. X at 3-5*. In discussing results, the study found “[t]aken together, the three experiments show pervasive overestimation of the duration of the videotape.” *Id.* at 10.

Research shows that a shorter encounter is less likely to yield an accurate identification than a longer one. Brian Bornstein, Kenneth Deffenbacher, Steven Penrod, and E. Kiernan McGorty, attached as Exhibit X, *Effects of Exposure Time and Cognitive Operations on Facial Identification Accuracy: a Meta-Analysis of Two Variables Associated with Initial Memory*
Strength 18(5) Psychology, Crime, and Law 473-490 (2012), is cited by the NAS Report at 97-98; the Study Group Report at 28; Lawson, 291 P.3d at 702. The NAS Report cites the Bornstein study in writing, “[m]eta-analyses on the effects of exposure time have found that relatively long exposure durations produce greater accuracy[.]”

[IF TOTAL DURATION OF EVENT WAS LESS THAN 30 SECONDS: And the Lawson court wrote of the Bornstein study, Scientific studies indicate that longer durations of exposure (time spent looking at the perpetrator) generally result in more accurate identifications. [The Bornstein] meta-analysis shows that the beneficial effect of longer exposure time on accuracy is greatest between the shortest durations, up to approximately 30 seconds. In contrast, for durations over 30 seconds, only substantial increases in exposure time produced marked improvement in witness performance. Lawson, 291 P.3d at 702 (internal citations omitted).]

Though “length of the encounter” is currently a factor contained in the existing D.C. jury instruction for jurors to consider in evaluating eyewitness evidence, the current language does not reflect the prevailing scientific understanding of how exposure duration affects the reliability of eyewitness identifications. With respect to violent crimes, as the D.C. Court of Appeals has acknowledged in citing the scientific research related to exposure duration and the accuracy of identifications, “witnesses most often think that the incident lasted longer than it did. . . . In other words, there is less time for the exposure-duration effect to increase the accuracy of an eyewitness’s identification than a lay person might otherwise assume.” Minor, 57 A.3d at 415 (citing Benn II, 978 A.2d at 1268 &n.37 and studies contained therein).

The model instruction adopted by the New Jersey Supreme Court integrates this scientific research by noting that time estimates given by witnesses may not always be accurate because witnesses tend to think that events take longer than they actually did. See Henderson, 27 A.3d at 905 (“studies have shown, and the Special Master found, ‘that witnesses consistently tend to
overestimate short durations, particularly where much was going on or the event was particularly stressful.”). The instruction also builds on the current language in the D.C. instruction to incorporate the studies that establish that “a brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure.” Id. at 905 (citing research). As the New Jersey Supreme Court recognized, an instruction on the actual effects that the time interval for viewing the perpetrator may have on the witness’s ability to make an accurate identification will guide the jury in more effectively weighing that witness’s testimony.

The proposed instruction would better instruct jurors, based on established research and legal recognition of research, on how to consider testimony regarding duration.

**Weapon Focus**

**Redbook Instruction on Weapon Focus:** None.

**Proposed Instruction on Weapon Focus:**

1) c) **Weapon Focus.** You should consider whether the witness saw a weapon during the event. If the event is of short duration, the visible presence of a weapon may distract the witness’s attention away from the person's face. But the longer the event, the more time the witness may have to get used to the presence of a weapon and focus on the person's face.

   This instruction is adopted from the Massachusetts instruction. “When a visible weapon is used during a crime, it can distract a witness and draw his or her attention away from the culprit. ‘Weapon focus’ can thus impair a witness’s ability to make a reliable identification and describe what the culprit looks like if the crime is of short duration.” Henderson, 27 A.3d at 904-905. Discussing the numerous studies and testimony before the Special Master, the Henderson court found that “when the interaction is brief, the presence of a visible weapon can affect the reliability of an identification and the accuracy of a witness’ description of the perpetrator” and noted that “the longer the duration, the more time the witness has to adapt to the presence of a weapon and focus on other details.” Id. at 905. See also Benn II, 978 A.2d at 1267
n.26 (citing studies that show that memory “is influenced by a variety of factors such as stress, including the stress induced by the presence of a weapon.”) The NAS Report explained the weapon focus as “a real-world case in point for eyewitness identification, in which attention is compellingly drawn to emotionally laden stimuli, such as a gun or a knife, at the expense of acquiring greater visual information about the face of the perpetrator[].” NAS Report at 55.

The *Henderson* court and the NAS Report both cited an influential meta-analysis that involved over 2,000 identifications, Nancy M. Steblay, *A Meta–Analytic Review of the Weapon Focus Effect*, 16 Law & Hum. Behav. 413, 415–17 (1992), attached as Exhibit X. Dr. Steblay’s meta-analysis is also cited by the NAS Report at 93; Study Group at 29; and *Lawson*, 291 P.3d at 702. Dr. Steblay explained, “Weapon focus refers to the visual attention that eyewitnesses give to a perpetrator’s weapon during the course of a crime. It is expected that the weapon will draw central attention, thus decreasing the ability of the eyewitness to adequately encode and later recall peripheral details.” Ex. X at 414. Dr. Steblay discussed the results of her extensive analysis, “The weapon focus effect has been found to be relatively robust across variations in stimulus presentation, experimental scenario, and experimenter and subject variables.” *Id.* at 421.

Notwithstanding the fact that this phenomenon is well-documented and accepted by courts, jurors often believe that the opposite is true—that the presence of a weapon can in fact focus the witness’s attention on the perpetrator. *See United States v. Norwood*, 939 F. Supp. 1132, 1137 (D.N.J. 1996) (“[W]hile scientific studies have consistently found that witness identifications are notably less accurate when a weapon was present, studies also reveal that many lay people erroneously believe the opposite to be true.”); *People v. Allen*, 875 N.E.2d 1221, 1232 (Ill. App. Ct. 2007) (“[R]easonable people well might believe an eyewitness will be more accurate when faced with a weapon . . . .”). And not only do laypeople believe the exact
converse of the conclusions of the scientific literature on weapon focus, but most jurors remain generally unaware of the extent which the presence of a weapon can disrupt or distort eyewitness perception or memory. See, e.g., United States v. Mathis, 264 F.3d 321, 342 (3d Cir. 2001) (holding that “the degree and scope of memory distortion that . . . a weapon typically causes for eyewitnesses are not matters that would necessarily be apparent to jurors,” and “it is difficult to comprehend how weapons’ destructive effect on memory might be elucidated through cross-examination”); United States v. Lester, 254 F. Supp. 2d 602, 612 (E.D. Va. 2003) (finding phenomenon of weapon focus to “fall outside the common sense of the average juror”).

The proposed instruction informs jurors of an effect of which they would otherwise not be aware—and contains proper limiting language, noting that the effect is lessened for longer encounters. This limiting language is present in both the New Jersey and Massachusetts instructions and the proposed instruction is taken from the Massachusetts model instruction.

**Distance**

**Redbook Instruction on Distance:**

A number of factors may affect the accuracy of an identification of the defendant by an alleged eyewitness.

1. The witness’s opportunity to observe the criminal acts and the person committing them, including but not limited to… the distance between the various parties….

**Proposed Instruction on Distance:**

1) d) Distance. A person is easier to identify when close by. The greater the distance between an eyewitness and a perpetrator, the higher the risk of a mistaken identification. In addition, a witness’s estimate of how far he or she was from the perpetrator may not always be accurate because people tend to have difficulty estimating distances.

This instruction is adopted from the New Jersey instruction. “Research has shown that the physical distance between the witness and the perpetrator is an important estimator variable, as it directly affects the ability of the eyewitness to discern visual details,
including features of the perpetrator.” NAS Report at 92. The NAS Report cites Carla L. Maclean, C.A. Elizabeth Brimacombe, Meredith Allison, Leora C. Dahl, and Helena Kadlec, Post-Identification Feedback Effects: Investigators and Evaluators, 25(5) Applied Cognitive Psychology 739–752 (2011), which is attached as Exhibit X. The Maclean study positioned participants in seats close or farther from the screen to observe the video of a staged crime. Ex. X at 742. The “witnesses with a poor view reported that they had an inferior quality of view of the man who [committed the staged crime] and had a worse ability to make out the features of the culprit’s face.” Id. at 744.

The Redbook instruction informs the jury that it should consider the distance between the witness and the perpetrator but does not tell the jury how to consider that distance. The proposed instruction is taken from the model New Jersey instruction and better instructs the jury on how it should consider an eyewitness’s testimony regarding distance. The court in Henderson cites R.C.L. Lindsay, Carolyn Semmler, Nathan Weber, Neil Brewer, and Marilyn Lindsay, How Variations in Distance Affect Eyewitness Reports and Identification Accuracy, 32 Law & Hum. Behav. 526 (2008), attached as Exhibit X, stating, “Research has also shown that people have difficulty estimating distances.” Henderson, 27 A.3d at 906. The Lindsay study noted that “[p]revious research demonstrates that people have difficulty judging the distance between themselves and inanimate objects and between two inanimate objects” and sought to determine whether or not the same was true for estimation of distances between oneself and another person. Ex. X at 533. To do this, researchers had participants view targets at various distances and later asked witnesses to make identifications and to estimate the distance between the participants and the targets. Id. at 526. The researchers’ data found that the difficulties judging distance between inanimate objects were also present for estimation of distances between oneself and another
person and that judgment errors were often “substantial.” *Id.* at 528. The researchers further found that “[a]ccuracy of witness identification decisions was significantly influenced by the distance between the witness and the target at the time of exposure.” *Id.* at 533.

The proposed instruction tells the jury how to consider the effect that distance can have on identification, as described in the NAS Report. The instruction further informs jurors of the mistakes that people make in estimating distances. It goes farther than the Redbook instruction and gives jurors a set of considerations in its evaluation of considering the distance, instead of merely telling jurors that distance should be considered.

**Wearing Items that Obscure Appearance**

**Redbook Instruction on Wearing Items that Obscure Appearance: None**

**Proposed Instruction on Wearing Items that Obscure Appearance:**

1) f) **Wearing Items that Obscure Appearance:** If the perpetrator wears items that obscure part of his or her appearance, the wearing of those items can affect a witness’s ability both to remember and identify the perpetrator. Items like hats, sunglasses, or masks can reduce the accuracy of an identification.

This instruction was adapted from the New Jersey Instruction “[T]he hair and hairline have been found to be important cues for identification accuracy.” Brian L. Cutler, Ph.D., *A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy*, 4 Cardozo Pub. L. Pol'y & Ethics J. 327, 332 (2006), attached as Exhibit X. Dr. Cutler’s article examined data from six studies in which masking of the hair and hairline was manipulated. The studies showed that “[i]n data from over 1300 eyewitnesses, the percentage of correct judgments on identification tests was lower among eyewitnesses who viewed perpetrators wearing hats (44%) than among eyewitnesses who viewed perpetrators whose hair and hairlines were visible (57%).” *Id.* The trend was “present in each study” and “not qualified by type of lineup[.]”
Gomes, Lawson, and Henderson also all recognized the impact of disguises on one’s ability to make an identification. See Gomes, 22 N.E. at 920 at FN 5; Lawson, 291 P.3d at 703 (“studies show that hats, hoods, and other items that conceal a perpetrator's hair or hairline also impair a witness's ability to make an accurate identification.”); Henderson, 27 A.3d at 907 (2011) (“Disguises and changes in facial features can affect a witness' ability to remember and identify a perpetrator.”). The court in Henderson further recognized research that found that jurors are unaware of the effect of a disguise on the ability to make an identification. Henderson, 27 A.3d. at 911 (Citing a study conducted by Dr. Cutler, attached as Exhibit X, Juror Sensitivity to Eyewitness Identification Evidence, 14 Law & Hum. Behav. 185, 186-87 (1990), that had potential jurors evaluate testimony from a witness who either testified that the robber was wearing a hat that completely covered his head or not hat at all, that jurors were “insensitive to the effects of disguise” Henderson, 27 A.3d. at 911). The proposed instruction serves to instruct jurors of the effects that a disguise can have on an ability to make an identification and to remember a face.

Alcohol

Redbook Instruction on Alcohol: None

Proposed Instruction on Alcohol:

1) g) Alcohol: The influence of alcohol can affect the reliability of an identification. An identification made by a witness under the influence of a high level of alcohol at the time of the incident tends to be more unreliable than an identification by a witness who drank a small amount of alcohol or no alcohol.

This instruction is adopted from the New Jersey instruction. Research shows that alcohol consumption can impair a witness’s ability to make a correct identification. As the Special Master in Henderson found, “the effects of alcohol on identification accuracy show that high levels of alcohol promote false identifications and… low alcohol intake produces fewer
misidentifications than high alcohol intake. … That finding is undisputed.” *Henderson*, 27 A.3d at 906 (internal quotations omitted). Attached as Exhibit X is an article detailing research on which *Henderson* and *Lawson* both relied: Jennifer E. Dysart et al., *The Intoxicated Witness: Effects of Alcohol on Identification Accuracy from Showups*, 87 *J. Applied Psychol.* 170, 174 (2002). Dysart’s study finds that “intoxicated participants were more likely than sober participants to make a false identification from a target-absent showup.” *Id.* at 174. Further, in summarizing other research, Dysart notes that “intoxication while witnessing an event was associated with a lower rate of correct identifications” when the level of arousal was low. *Id.* at 171. The court in *Lawson* similarly recognized “intoxicated witnesses are more likely to misidentify an innocent suspect than their sober counterparts.” *Lawson*, 291 P.3d at 703.

**Cross-Racial Identification**

**Redbook Instruction on Cross-Racial Identification:** None.

**Proposed Instruction on Cross-Racial Identification:**

2. **Cross-Racial Identification.** If the witness and the person identified appear to be of different races (or ethnicities), you should consider that people may have greater difficulty in accurately identifying someone of a different race (or ethnicity) than someone of their own race (or ethnicity).

This instruction is adopted from the Massachusetts instruction. Witnesses are better at identifying members of their own race than members of other races. This concept is referred to as “own-race bias.” As the NAS Report explained, “[o]wn-race bias occurs in both visual discrimination and memory tasks, in laboratory and field studies, and across a range of races, ethnicities, and ages. Recent analyses revealed that cross-racial (mis)identification was present in 42 percent of the cases in which an erroneous eyewitness identification was made.” NAS Report at 96 (citing The Innocence Project, “What Wrongful Convictions Teach Us About Racial
Inequality, available at:

http://www.innocenceproject.org/Content/What_Wrongful_Convictions_Teach_Us_About_Racial_Inequality.php.) Further, “the existence of own-race bias is generally accepted[.]” Id.

The leading study on cross-racial identification, Christian A. Meissner and 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. 3-35 (2001), is attached as Exhibit X. The Meissner study is a meta-analysis that analyzed data from 39 research articles, involving 91 independent samples, and nearly 5,000 participants. The study is cited by the NAS Report at 96; the Study Group Report at 31, 66; *Lawson*, 291 P.3d at 703; and *Henderson*, 27 A.3d at 907. The meta-analysis found that “[p]articipants were 1.56 times more likely to falsely identify a novel other-race face when compared with performance on own-race faces” but “participants were 2.23 times more likely to accurately discriminate an own-race face as new versus old when compared with performance on other-race faces.” Ex. X at 15, 16.

“Despite widespread acceptance of the cross-racial identification effect in the scientific community, fewer than half of jurors surveyed understand the impact of that factor.” *Lawson*, 291 P.3d at 703-704 (citing Richard S. Schmechel et. al., *Beyond the Ken? Testing Juror’s Understanding of Eyewitness Reliability Evidence*, 46 Jurimetrics 177, 200 (2006)). The Connecticut Supreme Court found a consensus in the judiciary as well—“Courts across the country now accept that… cross-racial identifications are considerably less accurate than same race identifications.” *Guilbert*, 49 A.3d at 721-22.

The Massachusetts Supreme Judicial Court held that, because there is a “near consensus in the relevant scientific community” that “research has shown that people of all races may have greater difficulty in accurately identifying members of a different race than they do in identifying
members of their own race,” the model cross-racial identification instruction “must be given in trials… where there is a cross-racial identification.” *Com. v. Bastaldo*, 32 N.E.3d 873, 880 (Mass. 2015). The SJC further held that “we shall direct that a cross-racial instruction be given unless all parties agree that there was no cross-racial identification.” *Id.* at 883.

The proposed instruction reflects the scientific and judicial consensus by informing the jury that if people are of different races, the identification may be more difficult. Given the role that cross-racial identification has played in wrongful convictions, it is critical that this instruction be given.

**Passage of Time**

**Redbook Instruction on Passage of Time:**

A number of factors may affect the accuracy of an identification of the defendant by an alleged eyewitness. …

2. Any subsequent identification and the circumstances surrounding that identification, including the length of time that elapsed between the crime and the identification….

**Proposed Instruction on Passage of Time:**

3. **Passage of time.** You should consider how much time passed between the event observed and the identification. Generally, memory is most accurate immediately after the event and begins to fade soon thereafter.

This instruction is adopted from the Massachusetts instruction. The more time that passes between the crime and the identification, the weaker a witness’s memory. “As time passes, memories become less stable.” NAS Report at 15. The NAS Report further explained,

Retirement interval, or the amount of time that passes from initial observation and encoding of a memory to a future time when the initial observation must be recalled from memory, can affect identification accuracy. Laboratory studies have demonstrated that stored memories are more likely to be forgotten with the increasing passage of time and can easily become “enhanced” or distorted by events that take place in this retention interval…. The amount of time between viewing a crime and the subsequent identification procedure can be expected to similarly affect the accuracy of the eyewitness identification, either independently or in combination with other variables.
Id. at 98.

The leading, extensive meta-analysis of the effect of the retention interval in 53 facial memory studies, Kenneth A. Deffenbacher, Brian H. Bornstein, and E. Kiernan McGorty, \textit{Forgetting the Once–Seen Face: Estimating the Strength of an Eyewitness's Memory Representation}, 14 J. Experimental Psychol.: Applied 139-150 (2008), is attached as Exhibit X, and is cited by the NAS Report at 98; the Study Group Report at 32, 70; \textit{Lawson}, 291 P.3d at 705; \textit{Henderson}, 27 A.3d at 907. The Deffenbacher meta-analysis examined the results of 53 studies and found that “increased delay of a test for recognition memory for the once-seen face portends decreased probability of correct recognition judgments.” Ex. X at 142. The results of the meta-analysis “confirm that there is indeed a statistically reliable association between longer retention intervals and decreased face recognition memory… . That is, there is an increase in positive forgetting as the delay increases between encoding of a face and test of one’s memory for it.” \textit{Id.} at 148.

\textit{Henderson}, relying on the findings of the Special Master, also stated that “[m]emories fade with time”, “memory decay is ‘irreversible,’ and that “delays between the commission of a crime and the time of identification is made can affect reliability” and “[t]hat basic principle is not in dispute.” 27 A.3d. at 907. \textit{See also Guilbert}, 49 A.3d at 721-22 (“Courts across the country now accept that… a person’s memory diminishes rapidly over a period of hours rather than days or weeks.”) (citing \textit{State v. Chapple}, 660 P.2d 1208 (Az.1983); \textit{Commonwealth v. Christie}, 98 S.W.3d 485, 490 (Ky.2002); \textit{Henderson}, 27 A.3d 872.)

The current Redbook instruction states that the jury should consider “the length of time that elapsed between the crime and the identification” but gives the jury no guidance on how to
consider the length of time. The proposed instruction better reflects the judicial and scientific consensus on the impact of passage of time on memory.

Confidence and Accuracy/Post-Event Information

Redbook Instruction on Confidence and Accuracy/Post-Event Information:

A number of factors may affect the accuracy of an identification of the defendant by an alleged eyewitness.
2. Any subsequent identification and the circumstances surrounding that identification, including… suggestive circumstances that may have influenced the witness, [and any statements or actions by law enforcement officers concerning the identification]… .

Proposed Instruction on Confidence and Accuracy/Post-Event Information:

4. **Expressed certainty.** You should consider that a witness’s statement of how certain he/she is in an identification, standing alone, is generally not a reliable indicator of the accuracy of the identification, especially where the witness did not describe that level of certainty when the witness first made the identification.

5. **Exposure to outside information.** You should consider that the accuracy of identification testimony may be affected by information that the witness received between the event and the identification, or received after the identification. Such information may include identifications made by other witnesses, physical descriptions given by other witnesses, photographs or media accounts, or any other information that may affect the independence or accuracy of a witness's identification. Exposure to such information before or after the witness makes an identification not only may affect the accuracy of an identification, but also may affect the witness's certainty in the identification and the witness's memory about the quality of his or her opportunity to view the event. The witness may not realize that his or her memory has been affected by this information.

An identification made after suggestive conduct by the police or others should be scrutinized with great care. Suggestive conduct may include anything that a person says or does prior to, during, or after an identification procedure that might influence the witness to identify a particular individual. Suggestive conduct need not be intentional, and the person doing the "suggesting" may not realize that he or she is doing anything suggestive.

These instructions are adopted from the Massachusetts instruction. Though the scientific research has established, and the courts have acknowledged, that “a witness’s level of confidence [at trial], standing alone, may not be an indication of the reliability of the identification,” Henderson, 27 A.3d 872 at 899, eyewitness confidence at trial has an extremely powerful effect
on jurors. See id. at 911 (citing research that shows that eyewitness confidence is “the most powerful predictor of verdicts regardless of other variables.”) (internal citations and quotations omitted); see Gomes, 22 N.E.3d at 913 (“there is a near consensus that jurors tend to give more weight to a witness’s certainty in evaluating the accuracy of an identification than is warranted by the research.”) (internal citations and quotations omitted); see Lawson, 291 P.3d at 704 (“Despite widespread reliance by judges and juries on the certainty of an eyewitness’s identification, studies show that, under most circumstances, witness confidence or certainty is not a good indicator of identification accuracy.”); see Perry v. New Hampshire, 132 S. Ct. 716, 739, 181 L. Ed. 2d 694 (2012) (Sotomayor, J. dissenting) (“Study after study demonstrates that… jurors place the greatest weight on eyewitness confidence in assessing identifications even though confidence is a poor gauge of accuracy; and that suggestiveness can stem from sources beyond police-orchestrated procedures.”)

In Benn II, and again in Minor, the D.C. Court of Appeals cited studies that “concluded that jurors believe that the more confident a witness seems, the more accurate that witness’s testimony will be,”11 but that the “correlation between a witness’s expression of certainty in an identification and its accuracy is, at a minimum, greatly overstated, and perhaps unwarranted.” Minor, 57 A.3d at 414; Benn II, 978 A.2d at 1268, 1277 (“with respect to the correlation between confidence and accuracy of an identification . . . the scientific research findings are

---

11 See also State v. Chapple, 660 P.2d 1208, 1221 (Ariz. 1983) (en banc) (concluding that the average juror is unaware of how “witnesses frequently incorporate into their identifications inaccurate information gained subsequent to the event and confused with the event”); People v. McDonald, 690 P.2d 709, 720 (Cal. 1984), overruled on other grounds by People v. Mendoza, 4 P.3d 265 (Cal. 2000) (holding that “the effects on memory of the witness’s exposure to subsequent information or suggestions, and the effects on recall of bias or cues in identification procedures or methods of questioning” are “either not widely known to laypersons or not fully appreciated by them”).

counterintuitive”). Certainly, the studies illustrate that eyewitness confidence in the ability to make an identification before viewing a lineup—i.e. before viewing multiple suspects—does not correlate with accuracy. See Henderson, 27 A.3d at 899 n.7 (citing research).

One of the reasons that a witness’s level of confidence may not be a reliable indicator of accuracy is that post-identification feedback—or confirmatory feedback that signals to the witness that his/her identification is correct—can “increase confidence in an identification, regardless of whether the identification is correct.” NAS Report at 92 (citing A. B. Douglass and N. K. Steblay, “Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect,” Applied Cognitive Psychology 20(7): 859–869 (2006)). Thus, “Law enforcement’s maintenance of neutral pre-identification communications—relative to the identification of a suspect—is seen as vital to ensuring that the eyewitness is not subjected to conscious or unconscious verbal or behavioral cues that could influence the eyewitness’ identification.” Id. at 91-92. The Henderson court wrote that post-identification confirmatory feedback can “reduce doubt and engender a false sense of confidence.” Henderson, 27 A.3d. at 899 (discussing “substantial research about confirmatory feedback” and confidence malleability.) From this, the New Jersey Supreme Court concluded that “[c]onfirmatory feedback can distort memory,” and as a result, “to the extent confidence may be relevant in certain circumstances, it

12 See also Newsome v. McCabe, 319 F.3d 301, 305 (7th Cir. 2003) (discussing a wide range of social science research that establishes low correlation between a witness’s confidence and the accuracy of the identification); United States v. Downing, 753 F.2d 1224, 1231 (3d Cir. 1985) (noting that lack of correlation between confidence and accuracy “goes beyond what an average juror might know as a matter of common knowledge,” and may “directly contradict ‘common sense.’”); United States v. Lester, 254 F. Supp. 2d 602, 612 (E.D.Va. 2003) (“[T]he correlation (or lack thereof) between confidence and accuracy . . . do[es] seem to fall outside the common sense of the average juror.”); see also United States v. Norwood, 939 F. Supp. 1132, 1139 (D.N.J. 1996) (finding that the fact that “witnesses oftentimes profess considerable confidence in erroneous identifications is fairly counterintuitive”) (quoting United States v. Stevens, 935 F.2d 1380, 1400 (3d Cir. 1991)).
must be recorded in the witness’s own words before any possible feedback. To avoid possible distortion, law enforcement officers should make a full record—written or otherwise—of the witness’ statement of confidence once an identification is made.” *Id.* at 900. In other words, in requiring that officers undertake procedures to assess the eyewitness’s confidence in his or her identification at the time of the identification, the Court codified the research finding that a person’s confidence in his or her identification is likely to increase over time, due to the influence of post-event information, but that this increase in confidence is not necessarily correlated with accuracy.

The proposed instruction cautions the jury against over-valuing expressed confidence at trial, especially when that confidence was not expressed at the initial identification. This is consistent with the findings of what the Study Group and the Oregon Supreme Court in *Lawson* called a “much-cited study”: Gary L. Wells and Amy L. Bradfield, “*Good, You Identified the Suspect*: Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience,” 83 (3) Journal of Applied Psychology 360-276. Dr. Wells’ study is attached as Exhibit X and is cited by the SJC Report at 22, 62, 69; *Perry*, 132 S.Ct. at 739 FN 5 (Sotomayor, J. dissenting); *Lawson*, 291 P.3d at 710-11; and *Henderson*, 27 A.3d at 872. The *Lawson* court described the findings of the study:

One much-cited study on the effects of post-identification confirming feedback staged an experiment in which witnesses, after making an incorrect identification from a target-absent lineup, were told either, “Good, you identified the suspect,” “Actually, the suspect was number ____,” or given no feedback at all. The witnesses were then asked to answer questions regarding the incident and the identification task. The study found that the witnesses who received confirming feedback were not only more certain in the accuracy of their identification, but also reported having had a better view of the perpetrator, noticing more details of the perpetrator's face, paying closer attention to the event they witnessed, and making their identifications quicker and with greater ease than participants who were given no feedback or disconfirming feedback.

*Lawson*, 291 P.3d at 710.
Also attached, as Exhibit X, is a more recent (and also frequently cited) meta-analysis that examined the effect of feedback on memory, Douglass and Steblay, Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect, 20 Applied Cognitive Psychol. 859, 865-866 (2006), and is cited by the NAS Report at 92; Study Group at 83; Lawson, 291 P.3d at 711; and Henderson, 27 A.3d at 889. The Study Group described the findings of this meta-analysis, “A more recent meta-analysis examining the results of 20 experiments involving over 2,400 participants confirmed that studies on this factor have produced ‘remarkably consistent’ effects and ‘provide dramatic evidence that post identification feedback can compromise the integrity of a witness’s memory.’” Study Group at 83, quoting Ex. X at 865-66.

An instruction that cautions the jury about the relationship between confidence and accuracy is thus necessary to mitigate jurors’ deeply ingrained and misguided intuitions about a witness that appears absolutely certain in his or her identification on the stand. An instruction that informs jurors that witnesses can be influenced by communication from other sources is necessary for jurors to understand the established connection between inaccurate identifications and pre-and post-identification procedure communications.

1. Identification Procedures

Redbook Instructions on Identification Procedures:

A number of factors may affect the accuracy of an identification of the defendant by an alleged eyewitness.
2. Any subsequent identification and the circumstances surrounding that identification, including… suggestive circumstances that may have influenced the witness, [and any statements or actions by law enforcement officers concerning the identification]… .

Proposed Instructions on Identification Procedures:

6. Identification procedures.
[a. If there was evidence of a photographic array or a lineup] An identification may occur through an identification procedure conducted by police, which involves showing the witness a (set of photographs) (lineup of individuals).

Where a witness identified the defendant from a (set of photographs) (lineup), you should consider all of the factors I have already described about a witness’s perception and memory.

You also should consider whether anything about the defendant’s (photograph) (physical appearance in the lineup) made the defendant stand out from the others. A suspect should not stand out from other members of the lineup. The reason is simple: an array of look-alike faces forces witnesses to examine their memory. In addition, a lineup in which the defendant stands out may inflate a witness’s confidence in the identification because the selection process seemed so easy to the witness. It is, of course, for you to determine whether the composition of the lineup had any effect on the reliability of the identification.

You should consider whether the person (showing the photographs) (presenting the lineup) knew who was the suspect and could have, even inadvertently, influenced the identification, and whether anything was said to the witness that may have influenced the identification. You should consider that an identification made by picking a defendant out of a group of similar individuals is generally less suggestive than one that results from the presentation of a defendant alone to a witness.]

[b.] You have heard that the police showed the witness a number of photographs. The police have photographs of people from a variety of sources, including the Registry of Motor Vehicles. You should not make any negative inference from the fact that the police had a photograph of the defendant.

c. If there was evidence of a showup] In this case, the witness identified the defendant during a “showup,” that is, the defendant was the [only] person shown to the witness at that time. Even though such a procedure is suggestive in nature, it is sometimes necessary for the police to conduct a “showup” or one-on-one identification procedure. Although the benefits of a fresh memory may balance the risk of undue suggestion, showups conducted a longer time after an event present a heightened risk of misidentification. Also, police officers must instruct witnesses that the person they are about to view may or may not be the person who committed the crime and that they should not feel compelled to make an identification. In determining whether the identification is reliable or the result of an unduly suggestive procedure, you should consider how much time elapsed after the witness last saw the perpetrator, whether the appropriate instructions were given to the witness, and all other circumstances surrounding the showup.

a. Biased lineup

This instruction is adopted from the Massachusetts instruction. The court in Lawson wrote that an identification procedure is like a “pseudo-scientific experiment” conducted by law
enforcement to test the hypothesis that the suspect is the perpetrator. *Lawson*, 291 P.3d at 706. But, as in any experiment, “the validity of the results depends largely on the careful design and unbiased implementation of the underlying procedures.” *Id.* And, if “the suspect stands out from the other subjects in any way that might lead the witness to select the suspect based on something other than her own memory, the experiment fails to achieve its purpose.” *Id.* “Properly constructed lineups test a witness' memory and decrease the chance that a witness is simply guessing.” *Henderson*, 27 A.3d at 897. Attached as Exhibit X is a chapter from the Handbook of Eyewitness Psychology—Roy S. Malpass, Colin G. Tredoux, and Dawn McQuiston-Surrett, *Lineup Construction and Lineup Fairness* in 2 The Handbook of Eyewitness Psychology: Memory for People 155 (R.C.L. Lindsay et. al. eds., 2007). The Malpass chapter is cited by the Study Group at 23; *Lawson*, 291 P.3d at 706; *Henderson*, 27 A.3d at 891. On lineup structure, the authors write, “[d]ecades of empirical research suggests that mistaken eyewitness identifications are more likely to occur when the suspect stands out in a lineup.” Ex. X at 2. The proposed instruction reflects the judicial and scientific recognition that a lineup in which a suspect stands out from the fillers is a biased one and may be inaccurate.

b. Blind administration

This instruction is adopted from the Massachusetts instruction. The NAS Report made only eleven recommendations and one was that lineups be administered blind. NAS Report at 106-07. As the NAS Report explained, “[e]ven when lineup administrators scrupulously avoid comments that could identify which person is the suspect, unintended body gestures, facial expressions, or other nonverbal cues have the potential to inform the witness of his or her location in the lineup or photo array.” *Id.* at 106. The proposed instruction informs jurors that lineups should be conducted blindly—a principle that is well-established in law enforcement
(and part of the Metropolitan Police Department General Order 304.07) as well as recognized by the courts and accepted in the scientific community. The proposed instruction tells jurors to consider whether or not the procedure was blind and informs them that if it was not, the administrator “could have, even inadvertently, influenced the identification[.]” This instruction is precisely in line with the findings of the NAS Report.

c. Feedback

See Section 9 for a description of the law and research on feedback.

**Showup Identifications**

Courts have recognized the problems with showups, which are “essentially single-person lineups: a single suspect is presented to a witness to make an identification,” usually “at the scene of a crime soon after its commission.” *Henderson*, 27 A.3d at 902-903. Indeed, while noting that show-ups are “sometimes necessary,” the *Henderson* court noted that the inherent suggestivity of show-ups had led some courts to limit their admissibility. *Id.*, citing *State v. Dubose*, 699 N.W.2d 582, 584–85 (Wis. 2005); *Commonwealth v. Martin*, 850 N.E.2d 555, 562–63 (Mass. 2006); *State v. Duuvon*, 571 N.E.2d 654, 656 (N.Y. 1991). As the *Henderson* court discussed, this suggestivity is due to a number of factors established by the research, including the fact that “showups increase the risk that witnesses will base identifications more on similar distinctive clothing than on similar facial features,” and the fact that show-ups “fail to provide a safeguard against witnesses with poor memories or those inclined to guess, because every mistaken identification in a showup will point to a suspect.” *Id.* at 903. *See also Lawson*, 291 P.3d at 686 (“Police showups are generally regarded as inherently suggestive—and therefore less reliable than properly administered lineup identifications—because the witness is always aware of whom police officers have targeted as a suspect.”); *Fields v. United States*, 484 A.2d 570, 574
(D.C. 1984) (“It is generally conceded that a degree of suggestivity is inherent in any on-the-scene viewing of a suspect in the custody of police.”)

Moreover, the jury instruction should reflect the possibilities of suggestion by the administrators of showup procedures. Such language would be helpful to the jury because, as other courts have recognized, lay people are generally unaware of the degree to which external factors—such as suggestive statements by the police or the fact that suspects in a showup are often viewed in handcuffs and under a spotlight—can distort both perception and memory and thereby undermine the accuracy of an identification. See Chapple, 660 P.2d at 1221 (average juror is unaware of how “witnesses frequently incorporate into their identifications inaccurate information gained subsequent to the event and confused with the event”); McDonald, 690 P.2d at 720 (holding that “the effects on recall of bias or cues in identification procedures or methods of questioning” are “either not widely known to laypersons or not fully appreciated by them.”)

Research shows and courts recognize that showups conducted shortly after the crime (within minutes) tend to be more reliable than those conducted more than two hours after the crime.

Showups are most likely to be reliable when they occur immediately after viewing a criminal perpetrator in action, ostensibly because the benefits of a fresh memory outweigh the inherent suggestiveness of the procedure. In as little as two hours after an event occurs, however, the likelihood of misidentification in a showup procedure increases dramatically.

State v. Lawson, 291 P.3d 673, 708 (2012). The study on which the Lawson court relied, A. Daniel Yarmey, Meagan J. Yarmey, and A. Linda Yarmey, Accuracy of Eyewitness Identifications in Showups and Lineups 20(4) Law and Human Behavior (1996) is attached as Exhibit X and is also cited by Study Group at 26; and Henderson, 27 A.3d at 903. The Yarmey study tested witnesses’ ability to identify in showups compared to six-person lineups, testing immediately after viewing the target, 30 minutes later, 2 hours later, and 24 hours later in two
different experiments. Ex. X at 464, 470. The study found that “[i]nnocent suspects were at significantly less risk in being falsely identified in a six-persons lineup than in a one-person lineup, especially with 2-h and 24-h retention intervals.” Id. at 473. The court in Lawson explained, “the immediate showup identification of an innocent suspect produced a misidentification rate of 18 percent (compared to 16 percent in an immediate lineup); a delay of only two hours increased the misidentification rate to 58 percent (compared to 14 percent in a lineup).” Lawson, 291 P.3d at 708.

For the aforementioned reasons, this Court should issue to the jury the proposed instructions relating to [witness’s] eyewitness identification in this case. If the Court determines that it will not give the entirety of Defendant’s instruction or determines that some of the wording of the instruction is unacceptable to the court, Defendant respectfully seeks the opportunity to request instructions on discrete parts of the instruction and/or the opportunity to revise language to satisfy the court’s concerns.

**Conclusion**

WHEREFORE for all the reasons stated above and any others that may appear to the Court, [CLIENT] respectfully requests that this motion be granted.
Respectfully submitted,

__________________________
Counsel for Client
Public Defender Service for D.C.
633 Indiana Avenue NW
Washington, DC 20004

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing filing has been served by e-mail on AUSA, United States Attorney’s Office for the District of Columbia, on DATE.

___________________________
This instruction should be given in any case in which the jury heard eyewitness evidence that positively identified the defendant and in which the identification of the defendant as the person who committed or participated in the alleged crime(s) is contested. Where there is no positive identification but a partial identification of the defendant, as discussed in Commonwealth v. Franklin, 465 Mass. 895, 910-12 (2013), this instruction or "some variation" of it should be given upon request. The instruction is set forth at 473 Mass. 1051 (2015).

The Commonwealth has the burden of proving beyond a reasonable doubt that the defendant is the person who committed (or participated in) the alleged crime(s). If you are not convinced beyond a reasonable doubt that the defendant is the person who committed (or participated in) the alleged crime(s), you must find the defendant not guilty.

Where a witness has identified the defendant as the person who committed (or participated in) the alleged crime(s), you should examine the identification with care. As with any witness, you must determine the witness’s credibility, that is, do you believe the witness is being honest? Even if you are convinced that the witness believes his or her identification is correct, you still must consider the possibility that the witness made a mistake in the identification. A witness may honestly believe he or she saw a person, but perceive or remember the event inaccurately. You must
decide whether the witness’s identification is not only truthful, but accurate.

People have the ability to recognize others they have seen and to accurately identify them at a later time, but research and experience have shown that people sometimes make mistakes in identification.

The mind does not work like a video recorder. A person cannot just replay a mental recording to remember what happened. Memory and perception are much more complicated. Remembrance something requires three steps. First, a person sees an event. Second, the person’s mind stores information about the event. Third, the person recalls stored information. At each of these stages, a variety of factors may affect — or even alter — someone’s memory of what happened and thereby affect the accuracy of identification testimony. This can happen without the witness being aware of it.

I am going to list some factors that you should consider in determining whether identification testimony is accurate.

1. **Opportunity to view the event.** You should consider the opportunity the witness had to observe the alleged offender at the time of the event. For example, how good a look did the witness get of the person and for how long? How much attention was the witness paying to the person at
that time? How far apart were the witness and the person? How good were the lighting conditions? You should evaluate a witness’s testimony about his or her opportunity to observe the event with care.iii

You should consider whether the person was disguised or had his or her facial features obscured. For example, if the person wore a hat, mask, or sunglasses, it may affect the witness’s ability to accurately identify the person.iv

You should consider whether the person had a distinctive face or feature.v

You should consider whether the witness saw a weapon during the event. If the event is of short duration, the visible presence of a weapon may distract the witness’s attention away from the person’s face. But the longer the event, the more time the witness may have to get used to the presence of a weapon and focus on the person’s face.vi
2. Characteristics of the witness. You should consider the physical and mental characteristics of the witness when the observation was made. For example, how good was the witness’s eyesight? Was the witness experiencing illness, injury, or fatigue? Was the witness under a high level of stress? High levels of stress may reduce a person’s ability to make an accurate identification.\(^\text{vii}\)

a. If there was evidence that the witness and the person identified are family members, friends, or longtime acquaintances.

If the person identified is a witness’s family member, friend, or longtime acquaintance, you should consider the witness’s prior familiarity with the person.\(^\text{viii}\)

b. If there was evidence that drugs or alcohol were involved. You should consider whether, at the time of the observation, the witness was under the influence of alcohol or drugs and, if so, to what degree.
Omit the following instruction only if all parties agree that there was no cross-racial identification. The trial judge has the discretion to add the references to ethnicity to the instruction. See Commonwealth v. Bastaldo, 472 Mass. 16, 29-30 (2015).

3. **Cross-racial identification.** If the witness and the person identified appear to be of different races (or ethnicities), you should consider that people may have greater difficulty in accurately identifying someone of a different race (or ethnicity) than someone of their own race (or ethnicity). ix

4. **Passage of time.** You should consider how much time passed between the event observed and the identification. Generally, memory is most accurate immediately after the event and begins to fade soon thereafter. x

5. **Expressed certainty.** You may consider a witness’s identification even where the witness is not free from doubt regarding its accuracy. But you also should consider that a witness’s expressed certainty in an identification, standing alone, may not be a reliable indicator of the accuracy of the identification, xi especially where the witness did not
describe that level of certainty when the witness first made the identification.\textsuperscript{xii}

6. **Exposure to outside information.** You should consider that the accuracy of identification testimony may be affected by information that the witness received between the event and the identification,\textsuperscript{xiii} or received after the identification.\textsuperscript{xiv} Such information may include identifications made by other witnesses, physical descriptions given by other witnesses, photographs or media accounts, or any other information that may affect the independence or accuracy of a witness’s identification.\textsuperscript{xv} Exposure to such information not only may affect the accuracy of an identification, but also may affect the witness’s certainty in the identification and the witness’s memory about the quality of his or her opportunity to view the event.\textsuperscript{xvi} The witness may not realize that his or her memory has been affected by this information.\textsuperscript{xvii}

An identification made after suggestive conduct by the police or others should be scrutinized with great care. Suggestive conduct may include anything that a person says or does that might influence the witness to identify a particular individual.\textsuperscript{xviii} Suggestive conduct need not
be intentional, and the person doing the “suggesting” may not realize that
he or she is doing anything suggestive.\textsuperscript{xix}

7. Identification procedures.

\textbf{a. If there was evidence of a photographic array or a lineup.} An identification
may occur through an identification procedure conducted by
police, which involves showing the witness a (set of
photographs) (lineup of individuals). Where a witness identified
the defendant from a (set of photographs) (lineup), you should
consider all of the factors I have already described about a
witness’s perception and memory. You also should consider
the number of (photographs shown) (individuals in the lineup),
whether anything about the defendant’s (photograph) (physical
appearance in the lineup) made the defendant stand out from
the others,\textsuperscript{xx} whether the person (showing the photographs)
(presenting the lineup) knew who was the suspect and could
have, even inadvertently, influenced the identification,\textsuperscript{xxi} and
whether anything was said to the witness that may have
influenced the identification.\textsuperscript{xxii} You should consider that an
identification made by picking a defendant out of a group of similar individuals is generally less suggestive than one that results from the presentation of a defendant alone to a witness.

b. Upon request, the judge should also give an instruction about the source of the defendant’s photograph within the array.

You have heard that the police showed the witness a number of photographs. The police have photographs of people from a variety of sources, including the Registry of Motor Vehicles. You should not make any negative inference from the fact that the police had a photograph of the defendant.

c. If there was evidence of a showup. An identification may occur through an identification procedure conducted by police known as a showup, in which only one person is shown to a witness. A showup is more suggestive than asking a witness to select a person from a group of similar individuals, because in a showup only one individual is shown and the witness may believe that the police consider that individual to be a potential suspect. You should consider how much time has passed between the event and the showup because the risk of an inaccurate
identification arising from the inherently suggestive nature of a showup generally increases as time passes.\textsuperscript{xxiv}

d. If there was evidence of a photographic array, lineup, or showup. You should consider whether the police, in showing the witness (a set of photographs) (a lineup) (a showup), followed protocols established or recommended by the Supreme Judicial Court or the law enforcement agency conducting the identification procedure that are designed to diminish the risk of suggestion.

If any of those protocols were not followed, you should evaluate the identification with particular care.

The trial judge may take judicial notice of police protocols regarding eyewitness identification that have been established or recommended by the Supreme Judicial Court, and include in the instruction those established or recommended protocols that are relevant to the evidence in the case. See Commonwealth v. Walker, 460 Mass. 590, 604 (2011) (“Unless there are exigent or extraordinary circumstances, the police should not show an eyewitness a photographic array . . . that contains fewer than five fillers for every suspect photograph. . . . We expect police to follow our guidance to avoid this needless risk”); Commonwealth v. Silva-Santiago, 453 Mass. 782, 797-98 (2009) (“What is practicable in nearly all circumstances is a protocol to be employed before a photographic array is provided to an eyewitness, making clear to the eyewitness, at a minimum that: he will be asked to view a set of photographs; the alleged wrongdoer may or may not be in the photographs depicted in the array; it is just as important to clear a person from suspicion as to identify a person as the wrongdoer; individuals depicted in the photographs may not appear exactly as they did on the date of the incident because features such as weight and head and facial hair are subject to change; regardless of whether an identification is made, the investigation will continue; and the procedure requires the administrator to ask the witness to state, in his or her own words, how certain he or she is of any identification”); \textit{id.} at 798 (“We decline at this time to hold that the absence of any protocol or comparable warnings to the eyewitnesses requires that the identifications be found inadmissible, but we expect such protocols to be used in the future”); \textit{id.} at 797 (“We have yet to conclude that an identification procedure is unnecessarily suggestive unless it is administered by a law enforcement officer who does not know the identity of the suspect [double-blind procedure], recognizing that it may not be practicable in all situations. At the same time, we acknowledge that it is the better practice [compared to a non-blind procedure] because it eliminates the risk of conscious or unconscious suggestion”). If the Legislature were to establish police protocols by statute, the judge should instruct the jury that they may consider
protocols established by the Legislature. The judge also may take judicial notice of those protocols and include them in the instruction.

The trial judge also may include established or recommended procedures where the evidence shows that they were established or recommended by the law enforcement agency conducting the investigation at the time of the identification procedure.

e. If there was evidence of a multiple viewings of the defendant by the same witness.

You should consider whether the witness viewed the defendant in multiple identification procedures or events. When a witness views the same person in more than one identification procedure or event, it may be difficult to know whether a later identification comes from the witness’s memory of the original event, or from the witness’s observation of the person at an earlier identification procedure or event.xxv

8. Failure to identify or inconsistent identification. You should consider whether a witness ever failed to identify the defendant, or made an identification that was inconsistent with the identification that the witness made at the trial.

9. Totality of the evidence. In evaluating the accuracy of a witness’s identification, you should consider all of the relevant factors that I have
discussed, in the context of the totality of the evidence in this case.

Specifically, you should consider whether there was other evidence in the case that tends to support or to cast doubt upon the accuracy of an identification. If you are not convinced beyond a reasonable doubt that the defendant is the person who committed (or participated in) the alleged crime(s), you must find the defendant not guilty.

NOTES:

1. **Expert testimony.** Whether to permit expert testimony on the general reliability of eyewitness identifications generally rests in the judge’s discretion. The weight of authority is against the general admissibility of such expert testimony, but some jurisdictions favor its admission if special factors are present (typically, lack of corroboration, or discrepancies, concerning the identification). At least where there is other evidence corroborating the identification, the admissibility of such evidence is consigned to the judge’s discretion. Before admitting such evidence the judge must, at minimum, find that it meets the general requirements for expert testimony: that it is relevant to the circumstances of the identification; that it will help, rather than confuse or mislead, the jury; that the underlying basis of the opinion, and any tests or assumptions, are reliable; and that the opinion is sufficiently tied to the facts of the case so that it will aid the jury in resolving the matter. General acceptance by other experts is a factor, but is not controlling. Commonwealth v. Santoli, 424 Mass. 837, 841-45 (1997); Commonwealth v. Hyatt, 419 Mass. 815, 818 (1995); Commonwealth v. Francis, 390 Mass. 89, 95-102 (1983); Commonwealth v. Weichell, 390 Mass. 62, 77-78 (1983), cert. denied, 465 U.S. 1032 (1984); Commonwealth v. Jones, 362 Mass. 497, 501-02 (1972) (psychological characteristics and dangers of recall are probably “well within the experience of” ordinary jurors). Expert testimony on a particular witness’s visual acuity is proper. Commonwealth v. Sowers, 388 Mass. 207, 215-16 (1983).


3. **Evidence of prior identifications.** A witness’s testimony as to his own prior identification is admissible to corroborate his in-court identification, and is not hearsay. Commonwealth v. Nassar, 351 Mass. 37, 42 (1966) (photograph); Commonwealth v. Locke, 335 Mass. 106, 112 (1956) (lineup). A third party may testify as to another witness’s prior identification even in the absence of any in-court identification and even when the witness denies having made an identification. Commonwealth v. Le, 444 Mass. 431, 438 (2005). A third party’s testimony is also admissible to impeach an identification witness who now denies having made the prior identification. Commonwealth v. Daye, 393 Mass. 55, 60 (1984); Commonwealth v. Swenson, 368 Mass. 268, 274 (1975). Where a witness is unavailable after a good faith, unsuccessful effort to obtain his or her testimony, evidence of his prior in-court identification is admissible if it was made under oath and subject to
cross-examination; it may be admitted by means of a transcript or by the testimony of someone who was present. Commonwealth v. Furtick, 386 Mass. 477, 480 (1982); Commonwealth v. Bohannon, 385 Mass. 733, 740-49 (1982). The Supreme Judicial Court has held that this doctrine is consistent with Crawford v. Washington, 541 U.S. 36 (2004), where “a reasonable person in the [witness’s] position would not have anticipated this his statement would be used against the defendant in prosecuting the crime.” Commonwealth v. Robinson, 451 Mass. 672, 680 (2008).

4. Reliability. If the defendant proves by a preponderance of evidence that a prior identification was unnecessarily suggestive in all the circumstances, the identification may not be admitted at trial. Article 12 of the Massachusetts Declaration of Rights requires this rule of per se exclusion of out-of-court identification evidence, without regard to reliability, whenever the identification has been obtained through unnecessarily suggestive confrontation procedures. Commonwealth v. Johnson, 420 Mass. 458, 461-64 (1995). Massachusetts thus follows the former Wade-Gilbert-Stovall Federal rule instead of the current reliable-in-the-totality-of-circumstances rule adopted in Manson v. Brachwale, 432 U.S. 98, 114 (1977). Any subsequent identifications may be admitted only if the prosecution proves by clear and convincing evidence that they have an independent source, considering (1) the extent of the witness’s opportunity to observe the perpetrator at the time of the crime (the “most important factor” because the firmer the contemporaneous impression, the less the witness is subject to the influence of subsequent events,” Commonwealth v. Bodden, 391 Mass. 356, 361 (1984)); (2) any prior errors in description; (3) any prior errors in identifying another person; (4) any prior failures to identify the defendant; (5) any other suggestions; and (6) the lapse of time between the crime and the identification. Commonwealth v. Johnson, 420 Mass. 458, 464 (1995); Commonwealth v. Botelho, 369 Mass. 860, 869 (1976).


ENDNOTES TO MODEL INSTRUCTION:

See Study Group Report, supra note i, at 16, quoting Henderson, 208 N.J. at 245 (three stages involved in forming memory: acquisition — “the perception of the original event”; retention — “the period of time that passes between the event and the eventual recollection of a particular piece of information”; and retrieval — “the stage during which a person recalls stored information”).

For a detailed discussion of the three stages of memory and how those stages may be affected, see Study Group Report, supra note i, at 15-17; National Research Council of the National Academies, Identifying the Culprit: Assessing Eyewitness Identification 59-69 (2014) (National Academies) (“Encoding, storage, and remembering are not passive, static processes that record, retain, and divulge their contents in an informational vacuum, unaffected by outside influences”); see also State v. Guilbert, 306 Conn. 218, 235-36 (2012); Henderson, 208 N.J. at 247; Loftus et al., supra note i, at § 2-2, at 15 (“Numerous factors at each stage affect the accuracy and completeness of an eyewitness account”).

See D. Reisberg, The Science of Perception and Memory: A Pragmatic Guide for the Justice System 51-52 (2014) (witnesses may not accurately remember details, such as length of time and distance, when describing conditions of initial observation); see also Lawson, 352 Or. at 744 (information that witness receives after viewing event may falsely inflate witness’s “recollections concerning the quality of [his or her] opportunity to view a perpetrator and an event”).

See Study Group Report, supra note i, at 30, quoting Lawson, 352 Or. at 775 (Appendix) (“[S]tudies confirm that the use of a disguise negatively affects later identification accuracy. In addition to accoutrements like masks and sunglasses, studies show that hats, hoods, and other items that conceal a perpetrator’s hair or hairline also impair a witness’s ability to make an accurate identification”; Henderson, 208 N.J. at 266 (“Disguises and changes in facial features can affect a witness’[s] ability to remember and identify a perpetrator”: State v. Clopten, 223 P.3d 1103, 1108 (Utah 2009) (“A)ccuracy is significantly affected by factors such as the amount of time the culprit was in view, lighting conditions, use of a disguise, distinctiveness of the culprit’s appearance, and the presence of a weapon or other distractions”); Wells & Olson, Eyewitness Testimony, 54 Ann. Rev. Psychol. 277, 281 (2003) (Wells & Olson) (“Simple disguises, even those as minor as covering the hair, result in significant impairment of eyewitness identification”); see also Cutler, A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy, 4 Cardozo Pub. L. Pol’y & Ethics J. 327, 332 (2006) (“In data from over 1300 eyewitnesses, the percentage of correct judgments on identification tests was lower among eyewitnesses who viewed perpetrators wearing hats [44%] than among eyewitnesses who viewed perpetrators whose hair and hairlines were visible [57%]”).

Witnesses are better at remembering and identifying individuals with distinctive features than they are those possessing average features); Clopten, 223 P.3d at 1108; Wells & Olson, supra note iv, at 281 (“Distinctive faces are much more likely to be accurately recognized than nondistinctive faces” but “what makes a face distinctive is not entirely clear”); see also Shapiro & Penrod, Meta-Analysis of Facial Identification Studies, 100 Psychol. Bull. 139, 140, 145 (1986) (meta-analysis finding that distinctive targets were “easier to recognize than ordinary looking targets”).

See Study Group Report, supra at 130 (“A weapon can distract the witness and take the witness’s attention away from the perpetrator’s face, particularly if the weapon is directed at the witness. As a result, if the crime is of short duration, the presence of a visible weapon may reduce the accuracy of an identification. In longer events, this distraction may decrease as the witness adapts to the presence of the weapon and focuses on other details”: Guilbert, 306 Conn. at 253; Lawson, 352 Or. at 771-72 (Appendix); see also Kassin, Hosch, & Memon, On the “General Acceptance” of Eyewitness Testimony Research: A New Survey of the Experts, 56 Am. Psychol. 405, 407-12 (2001) (Kassin et al.) (in 2001 survey, eighty-seven per cent of experts agree that principle that “[t]he presence of a weapon impairs an eyewitness’s ability to accurately identify the perpetrator’s face” is reliable enough to be presented in court); Maass & Köhnken, Eyewitness Identification: Simulating the “Weapon Effect,” 13 Law & Hum. Behav. 397, 405-06 (1989); Steblay, A Meta-Analytic Review of the Weapon Focus Effect, 16 Law & Hum. Behav. 413, 415-17 (1992) (meta-analysis finding “weapon-
absent condition[s] generated significantly more accurate descriptions of the perpetrator than did the weapon-present condition”); id. at 421 (“To not consider a weapon’s effect on eyewitness performance is to ignore relevant information. The weapon effect does reliably occur, particularly in crimes of short duration in which a threatening weapon is visible”); Wells & 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, 11 (2009) (Wells & Quinlivan). But see National Academies, supra note ii, at 93-94 (recent meta-analysis “indicated that the effect of a weapon on accuracy is slight in actual crimes, slightly larger in laboratory studies, and largest for simulations”).

See Gomes, 470 Mass. at 372-73; Study Group Report, supra note i, at 29, quoting Special Master’s Report, supra note i, at 43 (while moderate levels of stress might improve accuracy, “eyewitness under high stress is less likely to make a reliable identification of the perpetrator”); Lawson, 352 Or. at 769 (Appendix); see also Deffenbacher, Bornstein, Penrod, & McGorty, A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory, 28 Law & Hum. Behav. 687, 699 (2004) (finding “considerable support for the hypothesis that high levels of stress negatively impact both accuracy of eyewitness identification as well as accuracy of recall of crime-related details”); Morgan, Hazlett, Doran, Garrett, Hoyt, Thomas, Baranoski, & Southwick, Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress, 27 Int’l J.L. & Psychiatry 265, 272-74 (2004). But see Study Group Report, supra note i, quoting Henderson, 208 N.J. at 262 (“There is no precise measure for what constitutes ‘high’ stress, which must be assessed based on the facts presented in individual cases”).

See Study Group Report, supra note i, at 135 (recommending instruction stating, “If the witness had seen the defendant before the incident, you should consider how many times the witness had seen the defendant and under what circumstances”); see also Pezdek & Stolzenberg, Are Individuals’ Familiarity Judgments Diagnostic of Prior Contact?, 20 Psychol. Crime & L. 302, 306 (2014) (twenty-three per cent of study participants misidentified subjects with unfamiliar faces as familiar, and only forty-two per cent correctly identified familiar face as familiar); Read, The Availability Heuristic in Person Identification: The Sometimes Misleading Consequences of Enhanced Contextual Information, 9 Applied Cognitive Psychol. 91; 94-100 (1995). See generally Coleman, Newman, Vidmar, & Zoeller, Don’t I Know You?: The Effect of Prior Acquaintance/Familiarity on Witness Identification, Champion, Apr. 2012, at 52, 53 (“To a degree,” increased interaction time may produce “marginally more accurate identifications,” but increased interaction time may also generate more incorrect identifications); Schwartz, Memory for People: Integration of Face, Voice, Name, and Biographical Information, in SAGE Handbook of Applied Memory 9 (2014) (“familiarity exists on a continuum from very familiar [your spouse’s face] to moderately familiar [the face of the person who works downstairs] to completely unfamiliar [a person you have never met]. Unfortunately, little research directly addresses the continuum from [familiar] to unfamiliar”).

See Study Group Report, supra note i, at 31 (“A witness may have more difficulty identifying a person of a different race or ethnicity”); Kassin et al., supra note vi, at 407-12 (in 2001 survey, ninety per cent of experts agree that principle that “[e]yewitnesses are more accurate when identifying members of their own race than members of other races” is reliable enough to be presented in court); Meissner & Brigham, Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review, 7 Psychol., Pub. Pol’y, & L. 3, 15 (2001) (meta-analysis of thirty-nine research articles concluding that participants were “1.4 times more likely to correctly identify a previously viewed own-race face when compared with performance on other-race faces” and “1.56 times more likely to falsely identify a novel other-race face when compared with performance on own-race faces”); Wells & Olson, supra note iv, at 280-81; see also Commonwealth v. Zimmerman, 441 Mass. 146, 154-55 (2004) (Cordy, J., concurring); State v. Cabagbag, 127 Haw. 302, 310-11 (2012); Lawson, 352 Or. at 775 (Appendix); National Academies, supra note ii, at 96, citing Grimsley, Innocence Project, What Wrongful Convictions Teach Us About Racial Inequality, Innocence Blog (Sept. 26, 2012, 2:30 P.M.), at http://www.innocenceproject.org/Content/What_Wrongful_Condictions_Teach_Us_About_Racial_Inequality.php [http://perma.cc/KX2J-XECN] (“Recent analyses revealed that cross-racial [mis]identification was present in 42 percent of the cases in which an erroneous eyewitness identification was made”).

In Bastaldo, 472 Mass. at 28-29, the court concluded that there is “not yet a near consensus in the
relevant scientific community that people are generally less accurate at recognizing the face of someone of a different ethnicity than the face of someone of their own ethnicity” (emphasis added). However, there are studies that “support the conclusion that people are better at recognizing the faces of persons of the same ethnicity than a different ethnicity.” *Id.*; see Gross, Own-Ethnicity Bias in the Recognition of Black, East Asian, Hispanic and White Faces, 31 Basic & Applied Social Psychol. 128, 132 (2009) (study revealed that white participants recognized white faces better than they recognized Hispanic, Asian, and black faces, but found no significant difference between Hispanic participants’ recognition of white faces and Hispanic faces); Platz & Hosch, Cross-Racial/Ethnic Eyewitness Identification: A Field Study, J. Applied Social Psychol. 972, 979, 981 (1988) (Mexican-American and white convenience store clerks better recognized customers of their own group than customers of other group); see also Chiroro, Tredoux, Radaelli, & Meissner, Recognizing Faces Across Continents: The Effect of Within-Race Variations on the Own-Race Bias in Face Recognition, 15 Psychonomic Bull. & Rev. 1089, 1091 (2008) (white South African participants better recognized white South African faces than white North American faces, and black South African participants better recognized black South African faces than black North American faces).

See Study Group Report, *supra* note i, at 31-32, quoting Lawson, 352 Or. at 778 (Appendix) (“The more time that elapses between an initial observation and a later identification procedure [a period referred to in eyewitness identification research as a ‘retention interval’] . . . the less reliable the later recollection will be. . . . [D]ecay rates are exponential rather than linear, with the greatest proportion of memory loss occurring shortly after an initial observation, then leveling off over time”); National Academies, *supra* note ii, at 15 (“For eyewitness identification to take place, perceived information must be encoded in memory, stored, and subsequently retrieved. As time passes, memories become less stable”).


See *Henderson*, 208 N.J. at 254 (“to the extent confidence may be relevant in certain circumstances, it must be recorded in the witness[s] own words” before any possible influence from any extraneous information, known as feedback, that confirms witness’s identification); *Lawson*, 352 Or. at 745 (“Retrospective self-reports of certainty are highly susceptible to suggestive procedures and confirming feedback, a factor that further limits the utility of the certainty variable”); Wells & Bradfield, Distortions in Eyewitnesses’ Recollections: Can the Postidentification-Feedback Effect Be Moderated?, 10 Psychol. Sci. 138, 138 (1999) (Distortions) (“The idea that confirming feedback would lead to confidence inflation is not surprising. What is surprising, however, is that confirming feedback that is given after the identification leads eyewitnesses to misremember how confident they were at the time of the identification”); see also *Commonwealth v. Crayton*, 470 Mass. 228, 239 (2014) (“Social science research has shown that a witness’s level of confidence in an identification is not a reliable predictor of the accuracy of the identification, especially where the level of confidence is inflated by [an identification procedure’s] suggestiveness”).

See *Gomes*, 470 Mass. at 373-74; Study Group Report, *supra* note i, at 21-22; Special Master’s Report, *supra* note i, at 30-31 (“An extensive body of studies demonstrates that the memories of witnesses for events and faces, and witnesses’ confidence in their memories, are highly malleable and can readily be altered by information received by witnesses both before and after an identification procedure”); *Lawson*, 352 Or. at 786 (Appendix) (“The way in which eyewitnesses are questioned or converse about an event can alter their memory of the event”).

See Study Group Report, *supra* note i, at 22, quoting *Henderson*, 208 N.J. at 255 (postidentification feedback “affects the reliability of an identification in that it can distort memory, create a false sense of confidence, and alter a witness[s] report of how he or she viewed an event”); Special Master’s Report, *supra*
note i, at 33 (“A number of studies have demonstrated that witnesses’ confidence in their identifications, and
their memories of events and faces, are readily tainted by information that they receive after the identification
procedure”); Steblay, Wells, & Douglass, The Eyewitness Post Identification Feedback Effect 15 Years Later:
significantly inflates eyewitness reports on an array of testimony-relevant measures, including attention to and
view of the crime event, ease and speed of identification, and certainty of the identification decision”); see also
eyewitness’s level of confidence in his or her identification, there is also a substantial risk that the eyewitness’s
memory of the crime at trial will ‘improve’ ”).

XX See Study Group Report, supra note i, at 22, quoting Lawson, 352 Or. at 788 (Appendix) (“[T]he
danger of confirming feedback [whether by law enforcement, other witnesses, or the media] lies in its
tendency to increase the appearance of reliability without increasing reliability itself”); Henderson, 208 N.J.
at 253 (“Confirmatory or post-identification feedback presents the same risks. It occurs when police signal
to eyewitnesses that they correctly identified the suspect”); Lawson, 352 Or. at 777-78 (Appendix); Hope, Ost,
in Susceptibility to Misinformation, 127 Acta Psychologica 476, 481 (2008); Skagerberg, Co-Witness
have to be presented by the experimenter or an authoritative figure [e.g., police officer] in order to affect a
witness[‘s] subsequent crime-related judgments”).

XXI See Study Group Report, supra note i, at 117, 136 n.4, citing Principles of Neural Science, Box 62-1,
at 1239 (Kandel, Schwartz, & Jessell eds., 2000); see also Clark, Marshall, & Rosenthal, Lineup
Administrator Influences on Eyewitness Identification Decisions, 15 J. Experimental Psychol.: Applied 63, 72
(2009) (Clark, Marshall, & Rosenthal) (“Most witnesses appeared to be unaware of the influence” of lineup
administrator in staged experiment).

XXII See Study Group Report, supra note i, at 140, quoting Wells & Quinlivan, supra note vi, at 6 (“From
the perspective of psychological science, a procedure is suggestive if it induces pressure on the eyewitness
to make a lineup identification [a suggestion by commission], fails to relieve pressures on the witness to make
a lineup selection [a suggestion by omission], cues the witness as to which person is the suspect, or cues the
witness that the identification response was correct or incorrect”).

XXIII See Study Group Report, supra note i, at 22-23, quoting Lawson, 352 Or. at 779 (Appendix)
(“research shows that lineup administrators who know the identity of the suspect often consciously or
unconsciously suggest that information to the witness”); National Academies, supra note ii, at 91-92 (“Law
enforcement’s maintenance of neutral pre-identification communications — relative to the identification of a
suspect — is seen as vital to ensuring that the eyewitness is not subjected to conscious or unconscious verbal
or behavioral cues that could influence the eyewitness’ identification”).
Although showups conducted within five minutes of an encounter were significantly better than...
chance, identifications performed [thirty minutes] or longer after a low-impact incident are likely to be unreliable”); Dysart & Lindsay, The Effects of Delay on Eyewitness Identification Accuracy: Should We Be Concerned?, in 2 Handbook of Eyewitness Psychology 370 (2007) (results of studies support conclusion that showups, “if they are to be used, should be used within a short period after the crime, perhaps a maximum of [twenty-four] hours,” but acknowledging that “such a conclusion is highly speculative, given the minimal amount of data available”).

xv See Gomes, 470 Mass. at 375-76; Study Group Report, supra note i, at 25, quoting Special Master’s Report, supra note i, at 27-28 (“The problem is that successive views of the same person create uncertainty as to whether an ultimate identification is based on memory of the original observation or memory from an earlier identification procedure”); Henderson, 208 N.J. at 255; Deffenbacher, Bornstein, & Penrod, Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference, 30 Law & Hum. Behav. 287, 306 (2006) (Deffenbacher, Bornstein, & Penrod) (“prior mugshot exposure decreases accuracy at a subsequent lineup, both in terms of reductions in rates for hits and correct rejections as well as in terms of increases in the rate for false alarms”).

In Gomes, 470 Mass. at 376 n.37, quoting Study Group Report, supra note i, at 31, the Supreme Judicial Court noted that support for the phenomenon of “unconscious transference,” which occurs “when a witness confuses a person seen at or near the crime scene with the actual perpetrator,” was not as conclusive as the support for mugshot exposure. Unconscious transference nevertheless has substantial support and is relevant to the issue of multiple viewings of a person identified. See Study Group Report, supra note i, at 31, quoting Special Master’s Report, supra note i, at 46 (“The familiar person is at greater risk of being identified as the perpetrator simply because of his or her presence at the scene. . . . This ‘bystander error’ most commonly occurs when the observed event is complex, i.e., involving multiple persons and actions, but can also occur when the familiarity arises from an entirely unrelated exposure”); Lawson, 352 Or. at 785-86 (“Yet another facet of the multiple viewing problem is the phenomenon of unconscious transference. Studies have found that witnesses who, prior to an identification procedure, have incidentally but innocently encountered a suspect may unconsciously transfer the familiar suspect to the role of criminal perpetrator in their memory”); Guilbert, 306 Conn. at 253-54 (“the accuracy of an eyewitness identification may be undermined by an unconscious transference, which occurs when a person seen in one context is confused with a person seen in another”); see also Deffenbacher, Bornstein, & Penrod, supra note xxv, at 301, 304-05 (although negative impact of unconscious transference was less pronounced than that of mugshot exposure, both types of errors considered “products of the same basic transference design”); Ross, Ceci, Dunning, & Toglia, Unconscious Transference and Mistaken Identity: When a Witness Misidentifies a Familiar but Innocent Person, 79 J. Applied Psychol. 918, 923 (1994) (witnesses in experiment who viewed bystander in staged robbery “were nearly three times more likely to misidentify the bystander than were control subjects” who did not view bystander).
IDENTIFICATION: IN-COURT IDENTIFICATION ONLY

(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 burden of proving the identity of the person who committed the crime is upon the State. For you to find defendant guilty, the State must prove beyond a reasonable doubt that this person is the person who committed the crime. (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.

The State has presented testimony of [insert name of witness who identified defendant]. You will recall that this witness identified the defendant as the person who committed [insert the offense(s) charged]. 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. It is your function to determine whether the witness’s identification of (defendant) is reliable and believable, or whether it is based on a mistake or for any reason is not worthy of belief. You must decide whether it is sufficiently reliable evidence upon which to conclude that (this defendant) is the person who committed the offense[s] charged.

Eyewitness identification evidence must be scrutinized carefully. Human beings have the ability to recognize other people from past experiences and to identify them at a later time, but research has shown that there are risks of making mistaken identifications. That research has focused on the nature of memory and the factors that affect the reliability of eyewitness identifications.

Human memory is not foolproof. Research has revealed that human memory is not like a video recording that a witness need only replay to remember what happened. Memory is far more complex. The process of remembering consists of three stages: acquisition -- the perception of the original event; retention -- the period of time that passes between the event and the eventual recollection of a piece of information; and retrieval -- the stage during which a person recalls stored information. At each of these stages, memory can be affected by a variety of factors.

Relying on some of the research that has been done, I will instruct you on specific factors you should consider in this case in determining whether the eyewitness identification evidence is reliable. In evaluating this identification, you should consider the observations and perceptions on which the identification was based, the witness’s ability to make those observations and perceive events, and the circumstances under which the identification was made. Although nothing may appear more convincing than a witness’s categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken. Therefore,

---

3  Id. at 245-46.
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.\(^4\)

In deciding what weight, if any, to give to the identification testimony, you should consider the following factors that are related to the witness, the alleged perpetrator, and the criminal incident itself.\(^5\) [choose appropriate factors]:

(1) **The Witness’s Opportunity to View and Degree of Attention**: In evaluating the reliability of the identification, you should assess the witness’s opportunity to view the person who committed the offense at the time of the offense and the witness’s degree of attention to the perpetrator at the time of the offense. In making this assessment you should consider the following [choose appropriate factors from (a) through (g) below]:

(a) **Stress**: Even under the best viewing conditions, high levels of stress can reduce an eyewitness’s ability to recall and make an accurate identification. Therefore, you should consider a witness’s level of stress and whether that stress, if any, distracted the witness or made it harder for him or her to identify the perpetrator.\(^6\)

(b) **Duration**: The amount of time an eyewitness has to observe an event may affect the reliability of an identification. Although there is no minimum time required to make an accurate identification, a brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure to the perpetrator. In addition, time estimates given by witnesses may not always be accurate because witnesses tend to think events lasted longer than they actually did.\(^7\)

(c) **Weapon Focus**: You should consider whether the witness saw a weapon during the incident and the duration of the crime. 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 may reduce the reliability of a subsequent identification if the crime is of short duration. In considering this factor, you should take into account the duration of the crime because the longer the event, the more time the witness may have to adapt to the presence of the weapon and focus on other details.\(^8\)

---

\(^5\) Henderson, supra, 208 N.J. at 247.
\(^6\) Id. at 261-62.
\(^7\) Id. at 264.
\(^8\) Id. at 262-63.
(d) Distance: A person is easier to identify when close by. The greater the distance between an eyewitness and a perpetrator, the higher the risk of a mistaken identification. In addition, a witness’s estimate of how far he or she was from the perpetrator may not always be accurate because people tend to have difficulty estimating distances.9

(e) Lighting: Inadequate lighting can reduce the reliability of an identification. You should consider the lighting conditions present at the time of the alleged crime in this case.10

(f) Intoxication: The influence of alcohol can affect the reliability of an identification.11 An identification made by a witness under the influence of a high level of alcohol at the time of the incident tends to be more unreliable than an identification by a witness who drank a small amount of alcohol.12

(g) Disguises/Changed Appearance: The perpetrator’s use of a disguise can affect a witness’s ability both to remember and identify the perpetrator. Disguises like hats, sunglasses, or masks can reduce the accuracy of an identification.13 Similarly, if facial features are altered between the time of the event and a later identification procedure, the accuracy of the identification may decrease.14

(2) Prior Description of Perpetrator: Another factor for your consideration is the accuracy of any description the witness gave after observing the incident and before identifying the perpetrator. Facts that may be relevant to this factor include whether the prior description matched the person picked out later, whether the prior description provided details or was just general in nature, and whether the witness's testimony at trial was consistent with, or different from, his/her prior description of the perpetrator. [Charge if appropriate: You may also consider whether the witness did not identify the defendant at a prior identification procedure or chose a different suspect or filler.]

(3) Confidence and Accuracy: You heard testimony that (insert name of witness) expressed his/her level of certainty that the person he/she selected is in fact the person who committed the crime. As I explained earlier, a witness’s level of confidence, standing alone, may not be an indication of the reliability of the identification.15 Although some research has found that highly confident

9    Id. at 264.
10   Ibid.
11   If there is evidence of impairment by drugs or other substances, the charge can be modified accordingly.
12   Henderson, supra, 208 N.J. at 265.
13   Id. at 266.
14   Ibid.
15   Id. at 254 (quoting Romero, supra, 191 N.J. at 76).
witnesses are more likely to make accurate identifications, eyewitness confidence is generally an unreliable indicator of accuracy.\(^{16}\)

(4) **Time Elapsed**: Memories fade with time. As a result, delays between the commission of a crime and the time an identification is made can affect the reliability of the identification. In other words, the more time that passes, the greater the possibility that a witness’s memory of a perpetrator will weaken.\(^{17}\)

(5) **Cross-Racial Effects**: Research has shown that people may have greater difficulty in accurately identifying members of a different race.\(^{18}\) You should consider whether the fact that the witness and the defendant are not of the same race may have influenced the accuracy of the witness’s identification.

[ The jury should also be charged on any other relevant factors in the case.]

You may consider whether the witness was 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.\(^{19}\) Such information can affect the independent nature and reliability of a witness’s identification and inflate the witness’s confidence in the identification.

You are also free to consider any other factor based on the evidence or lack of evidence in the case that you consider relevant to your determination whether the identification was reliable. Keep in mind that the presence of any single factor or combination of factor(s), however, is not an indication that a particular witness is incorrect. Instead, you may consider the factors that I have discussed as you assess all of the circumstances of the case, including all of the testimony and documentary evidence, in determining whether a particular identification made by a witness is accurate and thus

\(^{16}\) Id. at 253-55.

\(^{17}\) Id. at 267.

\(^{18}\) This instruction must be given whenever there is a cross-racial identification. Id. at 299 (modifying State v. Cromedy, 158 N.J. 112, 132 (1999)).

worthy of your consideration as you decide whether the State has met its burden to prove identification beyond a reasonable doubt. If you determine that the in-court identification resulted from the witness's observations or perceptions of the perpetrator during the commission of the offense, you may consider that evidence and decide how much weight to give it. If you instead decide that the identification is the product of an impression gained at the in-court identification procedure, the identification should be afforded no weight. The ultimate issue of the trustworthiness of the identification is for you to decide.

If, after considering all of the evidence, you determine that the State has not proven beyond a reasonable doubt that (defendant) was the person who committed this offense [these offenses], then you must find him/her not guilty. If, on the other hand, after considering all of the evidence, you are convinced beyond a reasonable doubt that (defendant) was correctly identified, you will then consider whether the State has proven each and every element of the offense[s] charged beyond a reasonable doubt.
IDENTIFICATION: IN-COURT AND OUT-OF-COURT IDENTIFICATIONS

(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 burden of proving the identity of the person who committed the crime is upon the State. 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 proven each and every element of the offense charged beyond a reasonable doubt, but also whether the State has proven beyond a reasonable doubt that this defendant is the person who committed it.

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. It is your function to determine whether the witness’s identification of the defendant is reliable and believable, or whether it is based on a mistake or for any reason is not worthy
of belief. You must decide whether it is sufficiently reliable evidence that this defendant is the person who committed the offense[s] charged.

Eyewitness identification evidence must be scrutinized carefully. Human beings have the ability to recognize other people from past experiences and to identify them at a later time, but research has shown that there are risks of making mistaken identifications. That research has focused on the nature of memory and the factors that affect the reliability of eyewitness identifications.

Human memory is not foolproof. Research has revealed that human memory is not like a video recording that a witness need only replay to remember what happened. Memory is far more complex. The process of remembering consists of three stages: acquisition -- the perception of the original event; retention -- the period of time that passes between the event and the eventual recollection of a piece of information; and retrieval -- the stage during which a person recalls stored information. At each of these stages, memory can be affected by a variety of factors.

Relying on some of the research that has been done, I will instruct you on specific factors you should consider in this case in determining whether the eyewitness identification evidence is reliable. In evaluating this identification, you should consider the observations and perceptions on which the identification was based, the witness’s ability to make those observations and perceive events, and the circumstances under which the identification was made. Although nothing may appear more convincing than

---

3 Id. at 245-46.
a witness’s categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken. Therefore, when analyzing such testimony, be advised that a witness’s level of confidence, standing alone, may not be an indication of the reliability of the identification.4

If you determine that the out-of-court identification is not reliable, you may still consider the witness’s in-court identification of the defendant if you find that it resulted from the witness’s observations or perceptions of the perpetrator during the commission of the offense, and that the identification is reliable. If you find that the in-court identification is the product of an impression gained at the out-of-court identification procedure, it should be afforded no weight. The ultimate question of the reliability of both the in-court and out-of-court identifications is for you to decide.5

To decide whether the identification testimony is sufficiently reliable evidence 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 for considering credibility that I have already explained to you. In addition, you should consider the following factors that are related to the witness, the alleged perpetrator, and the criminal incident itself.6 In particular, you should consider [choose appropriate factors from one through five below]:

1. The Witness’s Opportunity to View and Degree of Attention: In evaluating the reliability of the identification, you should assess the witness’s opportunity

5  Wade, supra, 388 U.S. at 229-32, 241, 87 S. Ct. at 1933-35, 1940, 18 L. Ed. 2d at 1158-60, 1165 (manner in which lineup or other identification procedure conducted relevant to reliability of out-of-court identification and in-court identification following out-of-court identification, and jury's credibility determinations).
6  Henderson, supra, 208 N.J. at 247.
to view the person who committed the offense at the time of the offense and the witness’s degree of attention to the perpetrator at the time of the offense. In making this assessment you should consider the following [choose appropriate factors from (a) through (g) below]:

(a) **Stress**: Even under the best viewing conditions, high levels of stress can reduce an eyewitness’s ability to recall and make an accurate identification. Therefore, you should consider a witness’s level of stress and whether that stress, if any, distracted the witness or made it harder for him or her to identify the perpetrator.7

(b) **Duration**: The amount of time an eyewitness has to observe an event may affect the reliability of an identification. Although there is no minimum time required to make an accurate identification, a brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure to the perpetrator. In addition, time estimates given by witnesses may not always be accurate because witnesses tend to think events lasted longer than they actually did.8

(c) **Weapon Focus**: You should consider whether the witness saw a weapon during the incident and the duration of the crime. 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 may reduce the reliability of a subsequent identification if the crime is of short duration. In considering this factor, you should take into account the duration of the crime because the longer the event, the more time the witness may have to adapt to the presence of the weapon and focus on other details.9

(d) **Distance**: A person is easier to identify when close by. The greater the distance between an eyewitness and a perpetrator, the higher the risk of a mistaken identification. In addition, a witness’s estimate of how far he or she was from the perpetrator may not always be accurate because people tend to have difficulty estimating distances.10

(e) **Lighting**: Inadequate lighting can reduce the reliability of an identification. You should consider the lighting conditions present at the time of the alleged crime in this case.11

---

7  Id. at 261-62.
8  Id. at 264.
9  Id. at 262-63.
10 Id. at 264.
11 Ibid.
(f) **Intoxication**: The influence of alcohol can affect the reliability of an identification.\(^{12}\) An identification made by a witness under the influence of a high level of alcohol at the time of the incident tends to be more unreliable than an identification by a witness who drank a small amount of alcohol.\(^{13}\)

(g) **Disguises/Changed Appearance**: The perpetrator’s use of a disguise can affect a witness’s ability both to remember and identify the perpetrator. Disguises like hats, sunglasses, or masks can reduce the accuracy of an identification.\(^{14}\) Similarly, if facial features are altered between the time of the event and a later identification procedure, the accuracy of the identification may decrease.\(^{15}\)

(2) **Prior Description of Perpetrator**: Another factor for your consideration is the accuracy of any description the witness gave after observing the incident and before identifying the perpetrator. Facts that may be relevant to this factor include whether the prior description matched the photo or person picked out later, whether the prior description provided details or was just general in nature, and whether the witness's testimony at trial was consistent with, or different from, his/her prior description of the perpetrator. [**Charge if appropriate**: You may also consider whether the witness did not identify the defendant at a prior identification procedure or chose a different suspect or filler.]

(3) **Confidence and Accuracy**: You heard testimony that (insert name of witness) made a statement at the time he/she identified the defendant from a photo array/line-up concerning his/her level of certainty that the person/photograph he/she selected is in fact the person who committed the crime. As I explained earlier, a witness’s level of confidence, standing alone, may not be an indication of the reliability of the identification.\(^{16}\) Although some research has found that highly confident witnesses are more likely to make accurate identifications, eyewitness confidence is generally an unreliable indicator of accuracy.\(^{17}\)

(4) **Time Elapsed**: Memories fade with time. As a result, delays between the commission of a crime and the time an identification is made can affect the reliability of the identification. In other words, the more time that passes, the greater the possibility that a witness’s memory of a perpetrator will weaken.\(^ {18}\)

\(^{12}\) If there is evidence of impairment by drugs or other substances, the charge can be modified accordingly.

\(^{13}\) [*Henderson*, supra, 208 N.J. at 265.]

\(^{14}\) Id. at 266.

\(^{15}\) *Ibid.*

\(^{16}\) Id. at 254 (*quoting* *Romero*, supra, 191 N.J. at 76).

\(^{17}\) Id. at 253-55.

\(^{18}\) Id. at 267.
(5) Cross-Racial Effects: Research has shown that people may have greater difficulty in accurately identifying members of a different race.\(^\text{19}\) You should consider whether the fact that the witness and the defendant are not of the same race may have influenced the accuracy of the witness’s identification.

[The jury should also be charged on any other relevant factors in the case.]

In evaluating the reliability of a witness’s identification, you should also consider the circumstances under which any out-of-court identification was made, and whether it was the result of a suggestive procedure. In that regard, you may consider everything that was done or said by law enforcement to the witness during the identification process.

You should consider the following factors: [\textbf{Charge if appropriate}]:\(^\text{20}\)

\begin{itemize}
  \item \textbf{(1) Lineup Composition}: A suspect should not stand out from other members of the lineup. The reason is simple: an array of look-alikes forces witnesses to examine their memory. In addition, a biased lineup may inflate a witness’s confidence in the identification because the selection process seemed so easy to the witness.\(^\text{21}\) It is, of course, for you to determine whether the composition of the lineup had any effect on the reliability of the identification.
  
  \item \textbf{(2) Fillers}: Lineups should include a number of possible choices for the witness, commonly referred to as “fillers.” The greater the number of choices, the more likely the procedure will serve as a reliable test of the witness’s memory. A minimum of six persons or photos should be included in the lineup.\(^\text{22}\)
  
  \item \textbf{(3) Multiple Viewings}: When a witness views the same person in more than one identification procedure, it can be difficult to know whether a later identification comes from the witness’s memory of the actual, original event or of an earlier identification procedure. As a result, if a witness views an innocent suspect in multiple identification procedures, the risk of mistaken identification is increased. You may consider whether the witness viewed the suspect multiple times during
\end{itemize}

\(^{19}\) This instruction must be given whenever there is a cross-racial identification. \textit{Id.} at 299 (modifying \textit{State v. Cromedy}, 158 N.J. 112, 132 (1999)).

\(^{20}\) The following factors consist of “the system … variables … for which [the Court] found scientific support that is generally accepted by experts.” \textit{Henderson}, supra, 208 N.J. at 298-99.

\(^{21}\) \textit{Id.} at 251.

\(^{22}\) \textit{Ibid.}
the identification process and, if so, whether that affected the reliability of the identification. 23

[CHARGE IN EVERY CASE IN WHICH THERE IS A SHOWUP PROCEDURE]

(4) Showups: In this case, the witness identified the defendant during a “showup,” that is, the defendant was the only person shown to the witness at that time. Even though such a procedure is suggestive in nature, it is sometimes necessary for the police to conduct a “showup” or one-on-one identification procedure. Although the benefits of a fresh memory may balance the risk of undue suggestion, showups conducted more than two hours after an event present a heightened risk of misidentification. Also, police officers must instruct witnesses that the person they are about to view may or may not be the person who committed the crime and that they should not feel compelled to make an identification. In determining whether the identification is reliable or the result of an unduly suggestive procedure, you should consider how much time elapsed after the witness last saw the perpetrator, whether the appropriate instructions were given to the witness, and all other circumstances surrounding the showup. 24

[CHARGE (a) and (b) IN EVERY CASE IN WHICH THE POLICE CONDUCT AN IDENTIFICATION LINEUP PROCEDURE] 25

In determining the reliability of the identification, you should also consider whether the identification procedure was properly conducted.

(a) Double-blind: A lineup administrator who knows which person or photo in the lineup is the suspect may intentionally or unintentionally convey that knowledge to the witness. That increases the chance that the witness will

23 Id. at 255-56. If either “mugshot exposure” (no identification in first lineup/photo array, but later identification of someone from the first array in second lineup/photo array) or “mugshot commitment” (selection of person in lineup who was identified in previous photo array) are part of the evidence, the jury should be instructed on the concepts implicated by those terms without using the word “mugshot.” See Model Jury Charge (Criminal) on “Identity-Police Photos.”
24 Henderson, supra, 208 N.J. at 259-61.
25 “To help jurors weigh that evidence, they must be told about relevant factors and their effect on reliability.” Id. at 219 (asking the Criminal Practice Committee and the Committee on Model Criminal Jury Charges to draft proposed revisions to this charge “and address various system and estimator variables”).
identify the suspect, even if the suspect is innocent. For that reason, whenever feasible, live lineups and photo arrays should be conducted by an officer who does not know the identity of the suspect.26

[CHARGE IF BLIND ADMINISTRATOR IS NOT USED]

If a police officer who does not know the suspect’s identity is not available, then the officer should not see the photos as the witness looks at them. In this case, it is alleged that the person who presented the lineup knew the identity of the suspect. It is also alleged that the police did/did not compensate for that by conducting a procedure in which the officer did not see the photos as the witness looked at them.

[RESUME MAIN CHARGE]

You may consider this factor when you consider the circumstances under which the identification was made, and when you evaluate the overall reliability of the identification.27

(b) Instructions: You should consider what was or what was not said to the witness prior to viewing a photo array.28 Identification procedures should begin with instructions to the witness that the perpetrator may or may not be in the array and that the witness should not feel compelled to make an identification. The failure to give this instruction can increase the risk of misidentification. If you find that the police [did/did not] give this instruction to the witness, you may take this factor into account when evaluating the identification evidence.29

[CHARGE IF FEEDBACK IS AN ISSUE IN THE CASE]

(c) Feedback: Feedback occurs when police officers, or witnesses to an event who are not law enforcement officials, signal to eyewitnesses that they correctly identified the suspect. That confirmation may reduce doubt and engender or produce a false sense of confidence in a witness. Feedback may also falsely enhance a witness’s recollection of the quality of his or her view of an event. It is for you to determine whether or not a witness’s

26 Id. at 248–50.
27 Ibid.
29 Henderson, supra, 208 N.J. at 250.
recollection in this case was affected by feedback or whether the recollection instead reflects the witness’s accurate perception of the event.\textsuperscript{30}

[RESUME MAIN CHARGE]

You may consider whether the witness was 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.\textsuperscript{31} Such information can affect the independent nature and reliability of a witness’s identification and inflate the witness’s confidence in the identification.

You are also free to consider any other factor based on the evidence or lack of evidence in the case that you consider relevant to your determination whether the identifications were reliable. Keep in mind that the presence of any single factor or combination of factor(s), however, is not an indication that a particular witness is incorrect. Instead, you may consider the factors that I have discussed as you assess all of the circumstances of the case, including all of the testimony and documentary evidence, in determining whether a particular identification made by a witness is accurate and thus worthy of your consideration as you decide whether the State has met its burden to prove identification beyond a reasonable doubt. If you determine that the in-court or out-of-court identifications resulted from the witness's observations or perceptions of the perpetrator during the commission of the offense, you may consider that evidence and decide how much weight to give it. If you instead decide that the identification(s) is/are the product of an impression gained at the in-court and/or out-of-court identification


procedures, the identifications should be afforded no weight. The ultimate issue of the trustworthiness of an identification is for you to decide.

If, after consideration of all of the evidence, you determine that the State has not proven beyond a reasonable doubt that (defendant) was the person who committed this offense [these offenses], then you must find him/her not guilty. If, on the other hand, after consideration of all of the evidence, you are convinced beyond a reasonable doubt that (defendant) was correctly identified, you will then consider whether the State has proven each and every element of the offense[s] charged beyond a reasonable doubt.
IDENTIFICATION: OUT-OF-COURT IDENTIFICATION ONLY

(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 burden of proving the identity of the person who committed the crime is upon the State. For you to find (defendant) guilty, the State must prove beyond a reasonable doubt that this person is the person who committed the crime. (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.

The State has presented testimony that on a prior occasion before this trial, [insert name of witness who identified defendant] identified (defendant) as the person who committed [insert the offenses charged]. 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. It is your function to determine whether the witness’s identification of (defendant) is reliable and believable or whether it is based on a mistake or for any reason is not worthy of belief. You must decide whether it is sufficiently reliable evidence that (this defendant) is the person who committed the offense[s] charged.

Eyewitness identification evidence must be scrutinized carefully. Human beings have the ability to recognize other people from past experiences and to identify them at a later time, but research has shown that there are risks of making mistaken identifications. That research has focused on the nature of memory and the factors that affect the reliability of eyewitness identifications.

Human memory is not foolproof. Research has revealed that human memory is not like a video recording that a witness need only replay to remember what happened. Memory is far more complex. The process of remembering consists of three stages: acquisition -- the perception of the original event; retention -- the period of time that passes between the event and the eventual recollection of a piece of information; and retrieval -- the stage during which a person recalls stored information. At each of these stages, memory can be affected by a variety of factors.

Relying on some of the research that has been done, I will instruct you on specific factors you should consider in this case in determining whether the eyewitness identification evidence is reliable. In evaluating this identification, you should consider the observations and perceptions on which the identification was based, the witness’s ability to make those observations and perceive events, and the circumstances under which the identification was made. Although nothing may appear more convincing than a witness’s categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken. Therefore, when analyzing such testimony, be advised that a witness’s level of confidence, standing

---

3 Id. at 245-46.
alone, may not be an indication of the reliability of the identification. In deciding what weight, if any, to give to the identification testimony, you should consider the following factors that are related to the witness, the alleged perpetrator, and the criminal incident itself:5 [choose appropriate factors from one through five below]:

(1) The Witness’s Opportunity to View and Degree of Attention: In evaluating the reliability of the identification, you should assess the witness’s opportunity to view the person who committed the offense at the time of the offense and the witness’s degree of attention to the perpetrator at the time of the offense. In making this assessment you should consider the following [choose appropriate factors from (a) through (g) below]:

(a) Stress: Even under the best viewing conditions, high levels of stress can reduce an eyewitness’s ability to recall and make an accurate identification. Therefore, you should consider a witness’s level of stress and whether that stress, if any, distracted the witness or made it harder for him or her to identify the perpetrator.6

(b) Duration: The amount of time an eyewitness has to observe an event may affect the reliability of an identification. Although there is no minimum time required to make an accurate identification, a brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure to the perpetrator. In addition, time estimates given by witnesses may not always be accurate because witnesses tend to think events lasted longer than they actually did.7

(c) Weapon Focus: You should consider whether the witness saw a weapon during the incident and the duration of the crime. 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 may reduce the reliability of a subsequent identification if the crime is of short duration. In considering this factor, you should take into account the duration of the crime because the longer the event, the more time the witness may have to adapt to the presence of the weapon and focus on other details.8

(d) Distance: A person is easier to identify when close by. The greater the distance between an eyewitness and a perpetrator, the higher the risk of a

---

5 Henderson, supra, 208 N.J. at 247.
6 Id. at 261-62.
7 Id. at 264.
8 Id. at 262-63.
mistaken identification. In addition, a witness’s estimate of how far he or she was from the perpetrator may not always be accurate because people tend to have difficulty estimating distances.9

(e) Lighting: Inadequate lighting can reduce the reliability of an identification. You should consider the lighting conditions present at the time of the alleged crime in this case.10

(f) Intoxication: The influence of alcohol can affect the reliability of an identification.11 An identification made by a witness under the influence of a high level of alcohol at the time of the incident tends to be more unreliable than an identification by a witness who drank a small amount of alcohol.12

(g) Disguises/Changed Appearance: The perpetrator’s use of a disguise can affect a witness’s ability both to remember and identify the perpetrator. Disguises like hats, sunglasses, or masks can reduce the accuracy of an identification.13 Similarly, if facial features are altered between the time of the event and a later identification procedure, the accuracy of the identification may decrease.14

(2) Prior Description of Perpetrator: Another factor for your consideration is the accuracy of any description the witness gave after observing the incident and before identifying the perpetrator. Facts that may be relevant to this factor include whether the prior description matched the photo or person picked out later, whether the prior description provided details or was just general in nature, and whether the witness's testimony at trial was consistent with, or different from, his/her prior description of the perpetrator. [Charge if appropriate: You may also consider whether the witness did not identify the defendant at a prior identification procedure or chose a different suspect or filler.]

(3) Confidence and Accuracy: You heard testimony that (insert name of witness) made a statement at the time he/she identified the defendant from a photo array/line-up concerning his/her level of certainty that the person/photograph he/she selected is in fact the person who committed the crime. As I explained earlier, a witness’s level of confidence, standing alone, may not be an indication of the reliability of the identification.15 Although some research has found that

9    Id. at 264.
10   Ibid.
11   If there is evidence of impairment by drugs or other substances, the charge can be modified accordingly.
12   Henderson, supra, 208 N.J. at 265.
13   Id. at 266.
14   Ibid.
15   Id. at 254 (quoting Romero, supra, 191 N.J. at 76).
highly confident witnesses are more likely to make accurate identifications, eyewitness confidence is generally an unreliable indicator of accuracy.\textsuperscript{16}

\textbf{(4) Time Elapsed}: Memories fade with time. As a result, delays between the commission of a crime and the time an identification is made can affect the reliability of the identification. In other words, the more time that passes, the greater the possibility that a witness’s memory of a perpetrator will weaken.\textsuperscript{17}

\textbf{(5) Cross-Racial Effects}: Research has shown that people may have greater difficulty in accurately identifying members of a different race.\textsuperscript{18} You should consider whether the fact that the witness and the defendant are not of the same race may have influenced the accuracy of the witness’s identification.

[The jury should also be charged on any other relevant factors in the case.]

In evaluating the reliability of a witness’s identification, you should also consider the circumstances under which the out-of-court identification was made, and whether it was the result of a suggestive procedure. In that regard, you may consider everything that was done or said by law enforcement to the witness during the identification process. You should consider the following factors: \textbf{[Charge if appropriate]}:\textsuperscript{19}

\textbf{(1) Lineup Composition}: A suspect should not stand out from other members of the lineup. The reason is simple: an array of look-alikes forces witnesses to examine their memory. In addition, a biased lineup may inflate a witness’s confidence in the identification because the selection process seemed so easy to the witness.\textsuperscript{20} It is, of course, for you to determine whether the composition of the lineup had any effect on the reliability of the identification.

\textsuperscript{16} Id. at 253-55.
\textsuperscript{17} Id. at 267.
\textsuperscript{18} This instruction must be given whenever there is a cross-racial identification. Id. at 299 (modifying State v. Cromedy, 158 N.J. 112, 132 (1999)).
\textsuperscript{19} The following factors consist of “the system … variables … for which [the Court] found scientific support that is generally accepted by experts.” Henderson, supra, 208 N.J. at 298-99.
\textsuperscript{20} Id. at 251.
(2) **Fillers:** Lineups should include a number of possible choices for the witness, commonly referred to as “fillers.” The greater the number of choices, the more likely the procedure will serve as a reliable test of the witness’s memory. A minimum of six persons or photos should be included in the lineup.\(^{21}\)

(3) **Multiple Viewings:** When a witness views the same person in more than one identification procedure, it can be difficult to know whether a later identification comes from the witness's memory of the actual, original event or of an earlier identification procedure. As a result, if a witness views an innocent suspect in multiple identification procedures, the risk of mistaken identification is increased. You may consider whether the witness viewed the suspect multiple times during the identification process and, if so, whether that affected the reliability of the identification.\(^{22}\)

---

**[CHARGE IN EVERY CASE IN WHICH THERE IS A SHOWUP PROCEDURE]**

(4) **Showups:** In this case, the witness identified the defendant during a “showup,” that is, the defendant was the only person shown to the witness at that time. Even though such a procedure is suggestive in nature, it is sometimes necessary for the police to conduct a “showup” or one-on-one identification procedure. Although the benefits of a fresh memory may balance the risks of undue suggestion, showups conducted more than two hours after an event present a heightened risk of misidentification. Also, police officers must instruct witnesses that the person they are about to view may or may not be the person who committed the crime and that they should not feel compelled to make an identification. In determining whether the identification is reliable or the result of an unduly suggestive procedure, you should consider how much time elapsed after the witness last saw the perpetrator, whether the appropriate instructions were given to the witness, and all other circumstances surrounding the showup.\(^{23}\)

---

\(^{21}\) Ibid.

\(^{22}\) Id. at 255-56. If either “mugshot exposure” (no identification in first lineup/photo array, but later identification of someone from the first array in second lineup/photo array) or “mugshot commitment” (selection of person in lineup who was identified in previous photo array) are part of the evidence, the jury should be instructed on the concepts implicated by those terms without using the word “mugshot.” See Model Jury Charge (Criminal) on “Identity-Police Photos.”

\(^{23}\) Henderson, supra, 208 N.J. at 259-61.
[CHARGE (a) AND (b) IN EVERY CASE IN WHICH THE POLICE CONDUCT AN IDENTIFICATION LINEUP PROCEDURE]²⁴

In determining the reliability of the identification, you should also consider whether the identification procedure was properly conducted.

(a) Double-blind: A lineup administrator who knows which person or photo in the lineup is the suspect may intentionally or unintentionally convey that knowledge to the witness. That increases the chance that the witness will identify the suspect, even if the suspect is innocent. For that reason, whenever feasible, live lineups and photo arrays should be conducted by an officer who does not know the identity of the suspect.²⁵

[CHARGE IF BLIND ADMINISTRATOR IS NOT USED]

If a police officer who does not know the suspect’s identity is not available, then the officer should not see the photos as the witness looks at them. In this case, it is alleged that the person who presented the lineup knew the identity of the suspect. It is also alleged that the police [did/did not] compensate for that by conducting a procedure in which the officer did not see the photos as the witness looked at them.

[RESUME MAIN CHARGE]

You may consider this factor when you consider the circumstances under which the identification was made, and when you evaluate the overall reliability of the identification.²⁶

(b) Instructions: You should consider what was or what was not said to the witness prior to viewing a photo array.²⁷ Identification procedures should begin with instructions to the witness that the perpetrator may or may not be in the array and that the witness should not feel compelled to make an identification. The failure to give this instruction can increase the risk of misidentification. If you find that the police [did/did not] give this

²⁴ “To help jurors weigh that evidence, they must be told about relevant factors and their effect on reliability.” Id. at 219 (asking the Criminal Practice Committee and the Committee on Model Criminal Jury Charges to draft proposed revisions to this charge “and address various system and estimator variables”).
²⁵ Id. at 248-50.
²⁶ Ibid.
instruction to the witness, you may take this factor into account when evaluating the identification evidence.28

[CHARGE IF FEEDBACK IS AN ISSUE IN THE CASE]

(c) Feedback: Feedback occurs when police officers, or witnesses to an event who are not law enforcement officials, signal to eyewitnesses that they correctly identified the suspect. That confirmation may reduce doubt and engender or produce a false sense of confidence in a witness. Feedback may also falsely enhance a witness’s recollection of the quality of his or her view of an event. It is for you to determine whether or not a witness’s recollection in this case was affected by feedback or whether the recollection instead reflects the witness’s accurate perception of the event.29

[RESUME MAIN CHARGE]

You may consider whether the witness was 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.30 Such information can affect the independent nature and reliability of a witness’s identification and inflate the witness’s confidence in the identification.

You are also free to consider any other factor based on the evidence or lack of evidence in the case that you consider relevant to your determination whether the identification was reliable. Keep in mind that the presence of any single factor or combination of factor(s), however, is not an indication that a particular witness is incorrect. Instead, you may consider the factors that I have discussed as you assess all of the circumstances of the case, including all of the testimony and documentary evidence,

28 Henderson, supra, 208 N.J. at 250.
in determining whether a particular identification made by a witness is accurate and thus
worthy of your consideration as you decide whether the State has met its burden to prove
identification beyond a reasonable doubt. If you determine that the out-of-court
identification resulted from the witness's observations or perceptions of the perpetrator
during the commission of the offense, you may consider that evidence and decide how
much weight to give it. If you instead decide that the identification is the product of an
impression gained at the out-of-court identification procedure, the identification should
be afforded no weight. The ultimate issue of the trustworthiness of the identification is
for you to decide.

If, after considering all of the evidence, you determine that the State has not
proven beyond a reasonable doubt that (defendant) was the person who committed this
offense [these offenses], then you must find him/her not guilty. If, on the other hand,
after consideration of all of the evidence, you are convinced beyond a reasonable doubt
that (defendant) was correctly identified, you will then consider whether the State has
proven each and every element of the offense[s] charged beyond a reasonable doubt.
Glover, a trained Negro undercover state police officer, purchased heroin from a seller through the open doorway of an apartment while standing for two or three minutes within two feet of the seller in a hallway illuminated by natural light. A few minutes later, Glover described the seller to another police officer as being a colored man, approximately five feet eleven inches tall, dark complexion, black hair, short Afro style, and having high cheekbones, and of heavy build.

The other police officer, suspecting from the description that respondent might be the seller, left a police photograph of respondent at the office of Glover, who viewed it two days later and identified it as the picture of the seller. In a Connecticut court, respondent was charged with, and convicted of, possession and sale of heroin, and at his trial, held some eight months after the crime, the photograph was received in evidence without objection and Glover testified that there was no doubt that the person shown in the photograph was respondent and also made a positive in-court identification without objection. After the Connecticut Supreme Court affirmed the conviction, respondent filed a petition for habeas corpus in Federal District Court, alleging that the admission of the identification testimony at his state trial deprived him of due process of law in violation of the Fourteenth Amendment. The District Court dismissed the petition, but the Court of Appeals reversed, holding that evidence as to the photograph should have been excluded, regardless of reliability, because the examination of the single photograph was unnecessary and suggestive, and that the identification was unreliable in any event.


(a) Reliability is the linchpin in determining the admissibility of identification testimony for confrontations occurring both prior to and after Stovall v. Denno, 388 U.S. 293, wherein it was held that the determination depends on the “totality of the circumstances.” Id. at 302. The factors to be weighed against the corrupting effect of the suggestive procedure in assessing reliability are set
out in *Neil v. Biggers*, 409 U.S. 188, and include the witness' opportunity to view the criminal
Page 99
at the time of the crime, the witness' degree of attention, the accuracy of his prior description of
the criminal, the level of certainty demonstrated at the confrontation, and the time between the

(b) Under the totality of the circumstances in this case, there does not exist "a very substantial
no casual observer but a trained police officer, had a sufficient opportunity to view the suspect,
accurately described him, positively identified respondent's photograph as that of the suspect, and
made the photograph identification only two days after the crime. Pp. 114-117.
527 F.2d 363, reversed.
BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C.J., and STEWART,
WHITE, POWELL, REHNQUIST, and STEVENS, JJ., joined. STEVENS, J., filed a concurring
opinion, post, p. 117. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined,
post, p. 118.

BLACKMUN, J., lead opinion

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue as to whether the Due Process Clause of the Fourteenth
Amendment compels the exclusion, in a state criminal trial, apart from any consideration of
reliability, of pretrial identification evidence obtained by a police procedure that was both
suggestive and unnecessary. This Court's decisions in *Stovall v. Denno*, 388 U.S. 293 (1967), and
*Neil v. Biggers*, 409 U.S. 188 (1972), are particularly implicated.

1
Jimmy D. Glover, a full-time trooper of the Connecticut State Police, in 1970 was assigned to
the Narcotics Division in an undercover capacity. On May 5 of that year, about
Page 100
7:45 p.m., e.d.t., and while there was still daylight, Glover and Henry Alton Brown, an informant,
got to an apartment building at 201 Westland, in Hartford, for the purpose of purchasing
narcotics from "Dickie Boy" Cicero, a known narcotics dealer. Cicero, it was thought, lived on the
third floor of that [97 S.Ct. 2246] apartment building. Tr. 45-46, 68.[1] Glover and Brown entered
the building, observed by backup Officers D'Onofrio and Gaffey, and proceeded by stairs to the
third floor. Glover knocked at the door of one of the two apartments served by the stairway.[2] The
area was illuminated by natural light from a window in the third floor hallway. *Id.* at 27-28. The
door was opened 12 to 18 inches in response to the knock. Glover observed a man standing at the
door and, behind him, a woman. Brown identified himself. Glover then asked for "two things" of
narcotics. *Id.* at 29. The man at the door held out his hand, and Glover gave him two $10 bills. The
door closed. Soon the man returned and handed Glover two glassine bags.[3] While the door was
open, Glover stood within two feet of the person from whom he made the purchase and observed
his face. Five to seven minutes elapsed from the
Page 101
time the door first opened until it closed the second time. *Id.* at 30-33.
Glover and Brown then left the building. This was about eight minutes after their arrival. Glover drove to headquarters, where he described the seller to D’Onofrio and Gaffey. Glover at that time did not know the identity of the seller. Id. at 36. He described him as being a colored man, approximately five feet eleven inches tall, dark complexion, black hair, short Afro style, and having high cheekbones, and of heavy build. He was wearing at the time blue pants and a plaid shirt. Id. at 36-37. D’Onofrio, suspecting from this description that respondent might be the seller, obtained a photograph of respondent from the Records Division of the Hartford Police Department. He left it at Glover’s office. D’Onofrio was not acquainted with respondent personally, but did know him by sight and had seen him “[s]everal times” prior to May 5. Id. at 63-65. Glover, when alone, viewed the photograph for the first time upon his return to headquarters on May 7; he identified the person shown as the one from whom he had purchased the narcotics. Id. at 36-38.

The toxicological report on the contents of the glassine bags revealed the presence of heroin. The report was dated July 16, 1970. Id. at 75-76.

Respondent was arrested on July 27 while visiting at the apartment of a Mrs. Ramsey on the third floor of 201 Westland. This was the apartment at which the narcotics sale had taken place on May 5.[4]

Respondent was charged, in a two-count information, with possession and sale of heroin, in violation of Conn.Gen.Stat. (Rev. of 1958, as amended in 1969), §§ 19-481a and 19-480a (1977).[5] [97 S.Ct. 2247] At his trial in January, 1971, the photograph from which Glover had identified respondent was received in evidence without objection on the part of the defense. Tr. 38. Glover also testified that, although he had not seen respondent in the eight months that had elapsed since the sale, “there [was] no doubt whatsoever” in his mind that the person shown on the photograph was respondent. Id. at 41-42. Glover also made a positive in-court identification without objection. Id. at 37-38.

No explanation was offered by the prosecution for the failure to utilize a photographic array or to conduct a lineup.

Respondent, who took the stand in his own defense, testified that, on May 5, the day in question, he had been ill at his Albany Avenue apartment (“a lot of back pains, muscle spasms . . . a bad heart . . . high blood pressure . . . neuralgia in my face, and sinus,” id. at 106), and that at no time on that particular day had he been at 201 Westland. Id. at 106, 113-114. His wife testified that she recalled, after her husband had refreshed her memory, that he was home all day on May 5. Id. at 164-165. Doctor Wesley M. Vietzke, an internist and assistant professor of medicine at the University of Connecticut, testified that respondent had consulted him on April 15, 1970, and that he took a medical history from him, heard his complaints about his back and facial pain, and discovered that he had high blood pressure. Id. at 129-131. The physician found respondent, subjectively, “in great discomfort.” Id. at 135. Respondent in fact underwent surgery for a herniated disc at L5 and S1 on August 17. Id. at 157.

The jury found respondent guilty on both counts of the information. He received a sentence of not less than six nor
more than nine years. His conviction was affirmed per curiam by the Supreme Court of Connecticut. *State v. Brathwaite*, 164 Conn. 617, 325 A.2d 284 (1973). That court noted the absence of an objection to Glover's in-court identification and concluded that respondent "has not shown that substantial injustice resulted from the admission of this evidence." *Id.* at 619, 325 A.2d at 285. Under Connecticut law, substantial injustice must be shown before a claim of error not made or passed on by the trial court will be considered on appeal. *Ibid.*

Fourteen months later, respondent filed a petition for habeas corpus in the United States District Court for the District of Connecticut. He alleged that the admission of the identification testimony at his state trial deprived him of due process of law to which he was entitled under the Fourteenth Amendment. The District Court, by an unreported written opinion based on the court's review of the state trial transcript,[6] dismissed respondent's petition. On appeal, the United States Court of Appeals for the Second Circuit reversed, with instructions to issue the writ unless the State gave notice of a desire to retry respondent and the new trial occurred within a reasonable time to be fixed by the District Judge.[7] 527 F.2d 363 (1975).

In brief summary, the court felt that evidence as to the photograph should have been excluded, regardless of reliability,

Page 104

because the examination of the single photograph was unnecessary and suggestive. And, in the court's view, the evidence was unreliable in any event. We granted certiorari. 425 U.S. 957 (1976).

II

*Stovall v. Denno*, supra, decided in 1967, concerned a petitioner who had been convicted [97 S.Ct. 2248] in a New York court of murder. He was arrested the day following the crime and was taken by the police to a hospital where the victim's wife, also wounded in the assault, was a patient. After observing Stovall and hearing him speak, she identified him as the murderer. She later made an in-court identification. On federal habeas, Stovall claimed the identification testimony violated his Fifth, Sixth, and Fourteenth Amendment rights. The District Court dismissed the petition, and the Court of Appeals, en banc, affirmed. This Court also affirmed. On the identification issue, the Court reviewed the practice of showing a suspect singly for purposes of identification, and the claim that this was so unnecessarily suggestive and conducive to irreparable mistaken identification that it constituted a denial of due process of law. The Court noted that the practice "has been widely condemned," 388 U.S. at 302, but it concluded that "a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it." *Ibid.* In that case, showing Stovall to the victim's spouse "was imperative." The Court then quoted the observations of the Court of Appeals, 355 F.2d 731, 735 (CA2 1966), to the effect that the spouse was the only person who could possibly exonerate the accused; that the hospital was not far from the courthouse and jail; that no one knew how long she might live; that she was not able to visit the jail; and that taking Stovall to the hospital room was the only feasible procedure, and, under the circumstances, "the usual police station line-up . . . was out of the question." 388 U.S. at 302.
Neil v. Biers, supra, decided in 1972, concerned a respondent who had been convicted in a Tennessee court of rape, on evidence consisting in part of the victim's visual and voice identification of Biggers at a stationhouse showup seven months after the crime. The victim had been in her assailant's presence for some time, and had directly observed him indoors and under a full moon outdoors. She testified that she had "no doubt" that Biggers was her assailant. She previously had given the police a description of the assailant. She had made no identification of others presented at previous showups, lineups, or through photographs. On federal habeas, the District Court held that the confrontation was so suggestive as to violate due process. The Court of Appeals affirmed. This Court reversed on that issue, and held that the evidence properly had been allowed to go to the jury. The Court reviewed Stovall and certain later cases where it had considered the scope of due process protection against the admission of evidence derived from suggestive identification procedures, namely, Simmons v. United States, 390 U.S. 377 (1968); Foster v. California, 394 U.S. 440 (1969); and Coleman v. Alabama, 399 U.S. 1 (1970).[8] The Court concluded that general [97 S.Ct. 2249] guidelines emerged from these cases "as to the relationship between suggestiveness and misidentification." The "admission of evidence of a showup, without more, does not violate due process." 409 U.S. at 198. The Court expressed concern about the lapse of seven months between the crime and the confrontation, and observed that this "would be a seriously negative factor in most cases." Id. at 201. The "central question," however, was whether, under the "totality of the circumstances," the identification was reliable even though the confrontation procedure was suggestive. Id. at 199. Applying that test, the Court found "no substantial likelihood of misidentification. The evidence was properly allowed to go to the jury." Id. at 201. Biggers well might be seen to provide an unambiguous answer to the question before us: the admission of testimony concerning a suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability.[9] In one passage, however, the Court observed that the challenged procedure occurred pre-Stovall, and that a strict rule would make little sense with regard to a confrontation that preceded the Court's first indication that a suggestive procedure might lead to the exclusion of evidence. Id. at 199. One perhaps might argue that, by implication, the Court suggested that a different rule could apply post-Stovall. The question before us, then, is simply whether the Biggers analysis applies to post-Stovall confrontations as well to those pre-Stovall.

III

In the present case, the District Court observed that the sole evidence tying Brathwaite to the possession and sale of the heroin consisted in his identifications by the police undercover agent, Jimmy Glover.

App. to Pet. for Cert. 6a. On the constitutional issue, the court stated that the first inquiry was whether the police used an impermissibly suggestive procedure in obtaining the out-of-court
identification. If so, the second inquiry is whether, under all the circumstances, that suggestive procedure gave rise to a substantial likelihood of irreparable misidentification. *Id.* at 9a. *Biggers* and *Simmons* were cited. The court noted that, in the Second Circuit, its controlling court, it was clear that "this type of identification procedure [display of a single photograph] is impermissibly suggestive," and turned to the second inquiry. App. to Pet. for Cert. 9a. The factors *Biggers* specified for consideration were recited and applied. The court concluded that there was [97 S.Ct. 2250] no substantial likelihood of irreparable misidentification. It referred to the facts: Glover was within two feet of the seller. The duration of the confrontation was at least a "couple of minutes." There was natural light from a window or skylight, and there was adequate light to see clearly in the hall. Glover "certainly was paying attention to identify the seller." *Id.* at 10a. He was a trained police officer who realized that later he would have to find and arrest the person with whom he was dealing. He gave a detailed description to D'Onofrio. The reliability of this description was supported by the fact that it enabled D'Onofrio to pick out a single photograph that was thereafter positively identified by Glover. Only two days elapsed between the crime and the photographic identification. Despite the fact that another eight months passed before the in-court identification, Glover had "no doubt" that Brathwaite was the person who had sold him heroin.

The Court of Appeals confirmed that the exhibition of the single photograph to Glover was "impermissibly suggestive," 527 F.2d at 366, and felt that, in addition, "it was unnecessarily so." *Id.* at 367. There was no emergency and little urgency. The court said that, prior to the decision in *Biggers*, except in cases of harmless error, a conviction secured as the result of admitting an identification obtained by impermissibly suggestive and unnecessary measures could not stand. *Ibid.* It noted what it felt might be opposing inferences to be drawn from passages in *Biggers*, but concluded that the case preserved the principle "requiring the exclusion of identifications resulting from `unnecessarily suggestive confrontation'" in post-*Stovall* situations. 527 F.2d at 368. The court also concluded that, for post-*Stovall* identifications, *Biggers* had not changed the existing rule. Thus:

Evidence of an identification unnecessarily obtained by impermissibly suggestive means must be excluded under *Stovall*. . . . No rules less stringent than these can force police administrators and prosecutors to adopt procedures that will give fair assurance against the awful risks of misidentification.

527 F.2d at 371. Finally, the court said, even if this conclusion were wrong, the writ, nevertheless, should issue. It took judicial notice that, on May 5, 1970, sunset at Hartford was at 7:53 p.m. It characterized Glover's duty as an undercover agent as one "to cause arrests to be made," and his description of the suspect as one that "could have applied to hundreds of Hartford black males." *Ibid.* The in-court identification had "little meaning," for Brathwaite was at the counsel table. The fact that respondent was arrested in the very apartment where the sale was made was subject to a "not implausible" explanation from the respondent, "although evidently not credited by the jury." And the court was troubled by "the long and unexplained delay" in the arrest.
It was too great a danger that the respondent was convicted because he was a man D’Onofrio had previously observed near the scene, was thought to be a likely offender, and was arrested when he was known to be in Mrs. Ramsey’s apartment, rather than because Glover "really remembered him as the seller." Id. at 371-372.

IV

Petitioner, at the outset, acknowledges that "the procedure in the instant case was suggestive [because only one photograph was used] and unnecessary" [because there was no emergency or exigent circumstance]. Brief for Petitioner 10; Tr. of Oral Arg. 7. The respondent, in agreement with the Court of Appeals, proposes a per se rule of exclusion that he claims is dictated by the demands of the Fourteenth Amendment’s guarantee of due process. He rightly observes that this is the first case in which this Court has had occasion to rule upon strictly post-Stovall out-of-court identification evidence of the challenged kind.

Since the decision in Biggers, the Courts of Appeals appear to have developed at least two approaches to such evidence. See Pulaski, Neil v. Biggers: The Supreme Court Dismantles the Wade Trilogy’s Due Process Protection, 26 Stan.L.Rev. 1097, 1111-1114 (1974). [97 S.Ct. 2251] The first, or per se approach, employed by the Second Circuit in the present case, focuses on the procedures employed and requires exclusion of the out-of-court identification evidence, without regard to reliability, whenever it has been obtained through unnecessarily suggested confrontation procedures. The justifications advanced are the elimination of evidence of uncertain reliability, deterrence of the police and prosecutors, and the stated "fair assurance against the awful risks of misidentification." 527 F.2d at 371. See Smith v. Coiner, 473 F.2d 877, 882 (CA4), cert. denied sub nom. Wallace v. Smith, 414 U.S. 1115 (1973).

The second, or more lenient, approach is one that continues to rely on the totality of the circumstances. It permits the admission of the confrontation evidence if, despite the suggestive aspect, the out-of-court identification possesses certain features of reliability. Its adherents feel that the per se approach is not mandated by the Due Process Clause of the Fourteenth Amendment. This second approach, in contrast to the other, is ad hoc, and serves to limit the societal costs imposed by a sanction that excludes relevant evidence from consideration and evaluation by the trier of fact. See United States ex rel. Kirby v. Sturges, 510 F.2d 397, 407-408 (CA7) (opinion by Judge, now MR. JUSTICE, STEVENS), cert. denied, 421 U.S. 1016 (1975); Stanley v. Cox, 486 F.2d 48


MR. JUSTICE STEVENS, in writing for the Seventh Circuit in Kirby, supra, observed: There is surprising unanimity among scholars in regarding such a rule [the per se approach] as essential to avoid serious risk of miscarriage of justice.

510 F.2d at 405. He pointed out that well known federal judges have taken the position that evidence of, or derived from, a showup identification should be inadmissible unless the prosecutor can justify his failure to use a more reliable identification procedure. Id. at 406. Indeed, the ALI Model Code of Pre-Arraignment Procedure §§ 160.1 and 160.2 (1975)
(hereafter Model Code) frowns upon the use of a showup or the display of only a single photograph.

The respondent here stresses the same theme and the need for deterrence of improper identification practice, a factor he regards as preeminent. Photographic identification, it is said, continues to be needlessly employed. He notes that the legislative regulation “the Court had hoped [United States v. Wade, 388 U.S. 218, 239 (1967),] would engender,” Brief for Respondent 15, has not been forthcoming. He argues that a totality rule cannot be expected to have a significant deterrent impact; only a strict rule of exclusion will have direct and immediate impact on law enforcement agents. Identification evidence is so convincing to the jury that sweeping exclusionary rules are required. Fairness of the trial is threatened by suggestive confrontation evidence, and thus, it is said, an exclusionary rule has an established constitutional predicate.

There are, of course, several interests to be considered and taken into account. The driving force behind United States v. Wade, 388 U.S. 218 (1967), Gilbert v. California, 388 U.S. 263 (1967) (right to counsel at a post-indictment lineup), and Stovall, all decided on the same day, was the Court’s concern with the problems of eyewitness identification. Usually the witness must testify about an encounter with a total stranger under circumstances of emergency or emotional stress. The witness’ recollection of the stranger can be distorted easily by the circumstances or by later actions of the police. Thus, Wade and its companion cases reflect the concern that the jury not hear eyewitness testimony unless that evidence has aspects of reliability. It must be observed that both approaches before us are responsive to this concern. The per se rule, however, goes too far, since its application automatically and peremptorily, and without consideration of alleviating factors, keeps evidence from the jury that is reliable and relevant.

The second factor is deterrence. Although the per se approach has the more significant deterrent effect, the totality approach also has an influence on police behavior. The police will guard against unnecessarily suggestive procedures under the totality rule, as well as the per se one, for fear that their actions will lead to the exclusion of identifications as unreliable.\[12\]

The third factor is the effect on the administration of justice. Here, the per se approach suffers serious drawbacks. Since it denies the trier reliable evidence, it may result, on occasion, in the guilty going free. Also, because of its rigidity, the per se approach may make error by the trial judge more likely than the totality approach. And in those cases in which the admission of identification evidence is error under the per se approach but not under the totality approach -- cases in which the identification is reliable despite an unnecessarily suggestive identification procedure -- reversal is a Draconian sanction.\[13\] Certainly, inflexible rules of exclusion that may frustrate, rather than promote, justice have not been viewed recently by this Court with unlimited enthusiasm. See, for example, the several opinions in Brewer v. Williams, 430 U.S. 387 (1977). See also United States v. Janis, 428 U.S. 433 (1976).

It is true, as has been noted, that the Court in Biggers referred to the pre-Stovall character of the confrontation in that case. 409 U.S. at 199. But that observation was only one factor in the
judgmental process. It does not translate into a holding that post-Stovall confrontation evidence automatically is to be excluded.

The standard, after all, is that of fairness as required by the Due Process Clause of the Fourteenth Amendment. See United States v. Lovasco, 431 U.S. 783, 790 (1977); Rochin v. California, 342 U.S. 165, 170-172 (1952). Stovall, with its reference to "the totality of the circumstances," 388 U.S. at 302, and Biggers, with its continuing stress on the same totality, 409 U.S. at 199, did not, singly or together, establish a strict exclusionary rule or new standard of due process Judge Leventhal, although speaking pre-Biggers and of a pre-Wade situation, correctly has described Stovall as protecting an evidentiary interest and, at the same time, as recognizing the limited extent of that interest in our adversary system.[14]

Page 114

We therefore conclude that reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-Stovall confrontations. The factors to be considered are set out in Biggers. 409 U.S. at 199-200. These include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

V

We turn, then, to the facts of this case and apply the analysis:

1. The opportunity to view. Glover testified that, for two to three minutes, he stood at the apartment door, within two feet of the respondent. The door opened twice, and each time the man stood at the door. The moments passed, the conversation took place, and payment was made. Glover looked directly at his vendor. It was near sunset, to be sure, but the sun had not yet set, so it was not dark or even dusk or twilight. Natural light from outside entered the hallway through a window. There was natural light, as well, from inside the apartment.

Page 115

2. The degree of attention. Glover was not a casual or passing observer, as is so often the case with eyewitness identification. Trooper Glover was a trained police officer on duty -- and specialized and dangerous duty -- when he called at the third floor of 201 Westland in Hartford on May 5, 1970. Glover himself was a Negro, and unlikely to perceive only general features of "hundreds of Hartford black males," as the Court of Appeals stated. 527 F.2d at 371. It is true that Glover's duty was that of ferreting out narcotics offenders, and that he would be expected in his work to produce results. But it is also true that, as a specially trained, assigned, and experienced officer, he could be expected to pay scrupulous attention to detail, for he knew that subsequently he would have to find and arrest his vendor. In addition, he knew that his claimed observations would be subject later to close scrutiny and examination at any trial.

3. The accuracy of the description. Glover's description was given to D'Onofrio within minutes after the transaction. It included the vendor's race, his height, his build, the color and style of his hair, and the high cheekbone facial feature. It also included clothing the vendor wore. No claim has been made that respondent did not possess the physical characteristics so described.
D'Onofrio reacted positively at once. Two days later, when Glover was alone, he viewed the photograph D'Onofrio produced and identified its subject as the narcotics seller.

4. The witness' level of certainty. There is no dispute that the photograph in question was that of respondent. Glover, in response to a question whether the photograph was that of the person from whom he made the purchase, testified: "There is no question whatsoever." Tr. 38. This positive assurance was repeated. Id. at 41-42.

5. The time between the crime and the confrontation. Glover's description of his vendor was given to D'Onofrio within minutes of the crime. The photographic identification took place only two days later. We do not have here the passage [97 S.Ct. 2254] of weeks or months between the crime and the viewing of the photograph.

These indicators of Glover's ability to make an accurate identification are hardly outweighed by the corrupting effect of the challenged identification itself. Although identifications arising from single-photograph displays may be viewed in general with suspicion, see Simmons v. United States, 390 U.S. at 383, we find in the instant case little pressure on the witness to acquiesce in the suggestion that such a display entails. D'Onofrio had left the photograph at Glover's office, and was not present when Glover first viewed it two days after the event. There thus was little urgency, and Glover could view the photograph at his leisure. And since Glover examined the photograph alone, there was no coercive pressure to make an identification arising from the presence of another. The identification was made in circumstances allowing care and reflection.

Although it plays no part in our analysis, all this assurance as to the reliability of the identification is hardly undermined by the facts that respondent was arrested in the very apartment where the sale had taken place, and that he acknowledged his frequent visits to that apartment. [15]

Surely, we cannot say that, under all the circumstances of this case, there is "a very substantial likelihood of irreparable misidentification." Id. at 384. Short of that point, such evidence is for the jury to weigh. We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.

Of course, it would have been better had D'Onofrio presented Glover with a photographic array including "so far as practicable . . . a reasonable number of persons similar to any person then suspected whose likeness is included in the array." Model Code § 160.2(2). The use of that procedure would have enhanced the force of the identification at trial, and would have avoided the risk that the evidence would be excluded as unreliable. But we are not disposed to view D'Onofrio's failure as one of constitutional dimension to be enforced by a rigorous and unbending exclusionary rule. The defect, if there be one, goes to weight, and not to substance. [16]

We conclude that the criteria laid down in Biggers are to be applied in determining the admissibility of evidence offered by the prosecution concerning a post-Stovall identification, and
that those criteria are satisfactorily met and complied with here.

The judgment of the Court of Appeals is reversed.

It is so ordered.

STEVENS, J., concurring

MR JUSTICE STEVENS, concurring.

While I join the Court's opinion, I would emphasize two points.

First, as I indicated in my opinion in United States ex rel. Kirby v. Sturges, 510 F.2d 397, 405-406 (CA7 1975), the arguments in favor of fashioning new rules to minimize the danger of convicting the innocent on the basis of unreliable eyewitness testimony carry substantial force. Nevertheless,

for the reasons stated in that opinion, as well as those stated by the Court today, I am persuaded that this rulemaking function can be performed "more effectively by the legislative process than by a somewhat clumsy judicial fiat," id. at 408, and that the Federal Constitution does [97 S.Ct. 2255] not foreclose experimentation by the States in the development of such rules.

Second, in evaluating the admissibility of particular identification testimony it is sometimes difficult to put other evidence of guilt entirely to one side. * MR. JUSTICE BLACKMUN's opinion for the Court carefully avoids this pitfall and correctly relies only on appropriate indicia of the reliability of the identification itself. Although I consider the factual question in this case extremely close, I am persuaded that the Court has resolved it properly.

MARSHALL, J., dissenting

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

Today's decision can come as no surprise to those who have been watching the Court dismantle the protections against mistaken eyewitness testimony erected a decade ago in United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); and Stovall v. Denno, 388 U.S. 293 (1967). But it is still distressing to see the Court virtually ignore the teaching of experience embodied in those decisions and blindly uphold the conviction of a defendant who may well be innocent.

The magnitude of the Court's error can be seen by analyzing the cases in the Wade trilogy and the decisions following it. The foundation of the Wade trilogy was the Court's recognition of the "high incidence of miscarriage of justice" resulting from the admission of mistaken eyewitness identification evidence at criminal trials. United States v. Wade, supra at 228. Relying on numerous studies made over many years by such scholars as Professor Wigmore and Mr. Justice Frankfurter, the Court concluded that "[i] he vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification." Ibid. It is, of course, impossible to control one source of such errors -- the faulty perceptions and unreliable memories of witnesses -- except through vigorously contested trials conducted by diligent counsel and judges. The Court in the Wade cases acted, however, to minimize the more preventable threat posed to accurate identification by "the degree of suggestion inherent in the manner in which the

The Court did so in *Wade and Gilbert v. California* by prohibiting the admission at trial of evidence of pretrial confrontations at which an accused was not represented by counsel. Further protection was afforded by holding that an in-court identification following an uncounseled lineup was allowable only if the prosecution could clearly and convincingly demonstrate that it was not tainted by the constitutional violation. Only in this way, the Court held, could confrontations fraught with the danger of misidentification be made fairer, and could Sixth Amendment rights to assistance of counsel and confrontation of witnesses at trial be effectively preserved. The crux of the *Wade* decisions, however, was the unusual threat to the truth-seeking process posed by the frequent untrustworthiness of eyewitness identification.

Page 120

This, combined with the fact that juries unfortunately are often unduly receptive to such evidence, is the fundamental fact of Judicial experience ignored by the Court today. *Stovall v. Denno,* while holding that the *Wade* prophylactic rules were not retroactive, was decided at the same time and reflects the same concerns about the reliability of identification testimony. *Stovall* recognized that, regardless of Sixth Amendment principles, "the conduct of a confrontation" may be "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to deny due process of law. 388 U.S. at 301-302. The pretrial confrontation in *Stovall* was plainly suggestive, and evidence of it was introduced at trial along with the witness' in-court identification. The Court ruled that there had been no violation of due process, however, because the unusual necessity for the procedure outweighed the danger of suggestion. *Stovall* thus established a due process right of criminal suspects to be free from confrontations that, under all the circumstances, are unnecessarily suggestive. The right was enforceable by exclusion at trial of evidence of the constitutionally invalid identification. Comparison with *Wade* and *Gilbert* confirms this interpretation. Where their Sixth Amendment holding did not apply, *Stovall* found an analogous Fourteenth Amendment right to a lineup conducted in a fundamentally fair manner. This interpretation is reinforced by the Court's statement that "a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it." 388 U.S. at 302 (emphasis added).

Significantly, several years later, *Stovall* was viewed in precisely the same way, even as the Court limited *Wade* and *Gilbert* to post-indictment confrontations:

The Due Process Clause . . . forbids a lineup that is unnecessarily suggestive and conducive to irreparable mistaken identification. *Stovall v. Denno,* 388 U.S. 293; *Foster v. California,* 394 U.S. 440.


The development of due process protections against mistaken identification evidence, begun in *Stovall,* was continued in *Simmons v. United States,* 390 U.S. 377 (1968). There, the Court developed a different rule to deal with the admission of in-court identification testimony that the accused claimed had been fatally tainted by a previous suggestive confrontation. In *Simmons,* the
The exclusionary effect of *Stovall* had already been accomplished, since the prosecution made no use of the suggestive confrontation. *Simmons*, therefore, did not deal with the constitutionality of the pretrial identification [97 S.Ct. 2257] procedure. The only question was the impact of the Due Process Clause on an in-court identification that was not itself unnecessarily suggestive. *Simmons* held that due process was violated by the later identification if the pretrial procedure had been "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." 390 U.S. at 384. This test focused, not on the necessity for the challenged pretrial procedure, but on the degree of suggestiveness that it entailed. In applying this test, the Court understandably considered the circumstances surrounding the witnesses' initial opportunity to view the crime. Finding that any suggestion in the pretrial confrontation had not affected the fairness of the in-court identification, *Simmons* rejected petitioner's due process attack on his conviction.

Again, comparison with the *Wade* cases is instructive. The inquiry mandated by *Simmons* is similar to the independent source test used in *Wade* where an in-court identification is sought following an uncounseled lineup. In both cases, the issue is whether the witness is identifying the defendant solely on the basis of his memory of events at the time of the crime, or whether he is merely remembering the person he picked out in a pretrial procedure. Accordingly, in both situations, the relevant inquiry includes factors bearing on the accuracy of the witness' identification, including his opportunity to view the crime.

Thus, *Stovall* and *Simmons* established two different due process tests for two very different situations. Where the prosecution sought to use evidence of a questionable pretrial identification, *Stovall* required its exclusion, because due process had been violated by the confrontation, unless the necessity for the unduly suggestive procedure outweighed its potential for generating an irreparably mistaken identification. The *Simmons* test, on the other hand, was directed to ascertaining due process violations in the introduction of in-court identification testimony that the defendant claimed was tainted by pretrial procedures. In the latter situation, a court could consider the reliability of the identification under all the circumstances.[5]

This distinction between *Stovall* and *Simmons* was preserved in two succeeding cases. *Foster v. California*, 394 U.S. 440 (1969), like *Stovall*, involved both unduly suggestive pretrial procedures, evidence of which was introduced at trial, and a tainted in-court identification. Accordingly, *Foster* applied the *Stovall* test, 394 U.S. at 442, and held that the police "procedure so undermined the reliability of the eyewitness identification as to violate due process." *Id.* at 443 (emphasis added). In contrast, in *Coleman v. Alabama*, 399 U.S. 1 (1970), where the witness' pretrial identification was not used to bolster his in-court identification, the plurality opinion applied the test enunciated in *Simmons*. It concluded that an in-court identification did not violate due process because it did not stem from an allegedly suggestive lineup.

The Court inexplicably seemed to erase the distinction between *Stovall* and *Simmons* situations in *Neil v. Biggers*, 409 U.S. 188 (1972). In *Biggers*, there was a pretrial confrontation that was clearly both suggestive and unnecessary.[6] Evidence of this, together with an in-court
identification, was admitted at trial. [97 S.Ct. 2258] Biggers was, in short, a case plainly cast in the 
Stovall mold. Yet the Court, without explanation or apparent recognition of the distinction, applied 
the Simmons test. The Court stated:

[T]he primary evil to be avoided is "a very substantial likelihood of irreparable misidentification." 
Simmons v. United States, 390 U.S. at 384. . . . It is the likelihood of misidentification which 
violates a defendant's right to due process. . . . 409 U.S. at 198. While this statement accurately describes the lesson of Simmons, it plainly 
ignores the teaching of Stovall and Foster that an unnecessarily suggestive pretrial confrontation itself violates due process.

But the Court did not simply disregard the due process analysis of Stovall. It went on to take 
the Simmons standard for assessing the constitutionality of an in-court identification -- "a very 
substantial likelihood of irreparable misidentification" -- and transform it into the "standard for the 
admissibility of testimony concerning [an] out-of-court identification." 409 U.S. at 198. It did so by 
deleting the word "irreparable" from the Simmons formulation. This metamorphosis could be 
accomplished, however, only by ignoring the fact that Stovall, fortified only months earlier by Kirby 
v. Illinois, see supra at 121, had established a test for precisely the same situation that focused on 
the need for the suggestive procedure. It is not surprising that commentators almost unanimously 
mourned the demise of Stovall in the Biggers decision.\[7\]

II

Apparently, the Court does not consider Biggers controlling in this case. I entirely agree, 
since I believe that Biggers was wrongly decided. The Court, however, concludes that Biggers is distinguishable because it, 
like the identification decisions that preceded it, involved a pre-Stovall confrontation, and because 
a paragraph in Biggers itself, 409 U.S. at 198-199, seems to distinguish between pre- and post- 
Stovall confrontations. Accordingly, in determining the admissibility of the post-Stovall identification 
in this case, the Court considers two alternatives, a per se exclusionary rule and a "totality of the 
circumstances" approach. Ante at 110-111. The Court weighs three factors in deciding that the 
totality approach, which is essentially the test used in Biggers, should be applied. Ante at 111-113. 
In my view, the Court wrongly evaluates the impact of these factors.

First, the Court acknowledges that one of the factors, deterrence of police use of 
unnecessarily suggestive identification procedures, favors the per se rule. Indeed, it does so 
heavily, for such a rule would make it unquestionably clear to the police they must never use a 
suggestive procedure when a fairer alternative is available. I have no doubt that conduct would 
quickly conform to the rule.

Second, the Court gives passing consideration to the dangers of eyewitness identification 
recognized in the Wade trilogy. It concludes, however, that the grave risk of error does not justify 
adoption of the per se approach because that would too often result in exclusion of relevant 
evidence. In my view, this conclusion totally ignores the lessons of Wade. The dangers of
mistaken identification are, as Stovall held, simply too great to permit unnecessarily suggestive
identifications. Neither Biggers nor the Court's opinion today points to any contrary empirical
evidence. Studies since Wade have only reinforced the validity of its assessment of the dangers of
identification [97 S.Ct. 2259] testimony.[8] While the Court is "content to
Page 126
rely on the good sense and judgment of American juries," ante at 116, the impetus for Stovall and
Wade was repeated miscarriages of justice resulting from juries' willingness to credit inaccurate
eyewitness testimony.

Finally, the Court errs in its assessment of the relative impact of the two approaches on the
administration of justice. The Court relies most heavily on this factor, finding that "reversal is a
Draconian sanction" in cases where the identification is reliable despite an unnecessarily
suggestive procedure used to obtain it. Relying on little more than a strong distaste for "inflexible
rules of exclusion," the Court rejects the per se test. Ante at 113. In so doing, the Court disregards
two significant distinctions between the per se rule advocated in this case and the exclusionary
remedies for certain other constitutional violations.

First, the per se rule here is not "inflexible." Where evidence is suppressed, for example, as
the fruit of an unlawful search, it may well be forever lost to the prosecution. Identification
evidence, however, can, by its very nature, be readily and effectively reproduced. The in-court
identification, permitted under Wade and Simmons if it has a source independent of an
uncounseled or suggestive procedure, is one example. Similarly, when a prosecuting attorney
learns that there has been a suggestive confrontation, he can easily arrange another
Page 127
lineup conducted under scrupulously fair conditions. Since the same factors are evaluated in
applying both the Court's totality test and the Wade-Simmons independent source inquiry, any
identification which is "reliable" under the Court's test will support admission of evidence
concerning such a fairly conducted lineup. The evidence of an additional, properly conducted
confrontation will be more persuasive to a jury, thereby increasing the chance of a justified
conviction where a reliable identification was tainted by a suggestive confrontation. At the same
time, however, the effect of an unnecessarily suggestive identification -- which has no value
whatsoever in the law enforcement process -- will be completely eliminated.

Second, other exclusionary rules have been criticized for preventing jury consideration of
relevant and usually reliable evidence in order to serve interests unrelated to guilt or innocence,
such as discouraging illegal searches or denial of counsel. Suggestively obtained eyewitness
testimony is excluded, in contrast, precisely because of its unreliability and concomitant
irrelevance. Its exclusion both protects the integrity of the truth-seeking function of the trial and
discourages police use of needlessly inaccurate and ineffective investigatory methods.

Indeed, impermissibly suggestive identifications are not merely worthless law enforcement
tools. They pose a grave threat to society at large in a more direct way than most governmental
disobedience of the law, see Olmstead v. United States, 277 U.S. 438, 471, 485 (1928) (Brandeis,
J., dissenting). For if the police and the public erroneously conclude, on the basis of an
unnecessarily suggestive confrontation, that the right man [97 S.Ct. 2260] has been caught and
For these reasons, I conclude that adoption of the *per se* rule would enhance, rather than detract from, the effective administration of justice. In my view, the Court's totality test will allow seriously unreliable and misleading evidence to be put before juries. Equally important, it will allow dangerous criminals to remain on the streets while citizens assume that police action has given them protection. According to my calculus, all three of the factors upon which the Court relies point to acceptance of the *per se* approach.

Even more disturbing than the Court's reliance on the totality test, however, is the analysis it uses, which suggests a reinterpretation of the concept of due process of law in criminal cases. The decision suggests that due process violations in identification procedures may not be measured by whether the government employed procedures violating standards of fundamental fairness. By relying on the probable accuracy of a challenged identification, instead of the necessity for its use, the Court seems to be ascertaining whether the defendant was probably guilty. Until today, I had thought that "Equal justice under law" meant that the existence of constitutional violations did not depend on the race, sex, religion, nationality, or likely guilt of the accused. The Due Process Clause requires adherence to the same high standard of fundamental fairness in dealing with every criminal defendant, whatever his personal characteristics and irrespective of the strength of the State's case against him. Strong evidence that the defendant is guilty should be relevant only to the determination whether an error of constitutional magnitude was nevertheless harmless beyond a reasonable doubt. See *Chapman v. California*, 386 U.S. 18 (1967). By importing the question of guilt into the initial determination of whether there was a constitutional violation, the apparent effect of the Court's decision is to undermine the protection afforded by the Due Process Clause. "It is therefore important to note that the state courts remain free, in interpreting state constitutions, to guard against the evil clearly identified by this case." *Oregon v. Mathiason*, 429 U.S. 492, 499 (1977) (MARSHALL, J., dissenting).[9]

III

Despite my strong disagreement with the Court over the proper standards to be applied in this case, I am pleased that its application of the totality test does recognize the continuing vitality of *Stovall*. In assessing the reliability of the identification, the Court mandates weighing "the corrupting effect of the suggestive identification itself" against the "indicators of [a witness'] ability to make an accurate identification." *Ante* at 114, 116. The Court holds, as *Neil v. Biggers* failed to, that a due process identification inquiry must take account of the suggestiveness of a confrontation and the likelihood that it led to misidentification, as recognized in *Stovall* and *Wade*. Thus, even if a witness did have an otherwise adequate opportunity to view a criminal, the later use of a highly suggestive identification procedure can render his testimony inadmissible. Indeed, it is my view that, assuming applicability of the totality test enunciated by the Court, the facts of the present case require that result.
I consider first the opportunity that Officer Glover had to view the suspect. Careful review of the record shows that he could see the heroin seller only for the time it took to speak three sentences of four or five short words, to hand over some money, Tr. 2-30, and later after the door reopened, to receive the drugs in return, id. at 30, 31-32. The entire face-to-face transaction could have taken as little as 15 or 20 seconds. But during this time, Glover's attention was not focused exclusively on the seller's face. He observed that the door was opened 12 to 18 inches, id. at 29, that there was a window in the room behind the door, id. at 33, and, most importantly, that there was a woman standing behind the man, id. at 29, 30. Glover was, of course, also concentrating on the details of the transaction -- he must have looked away from the seller's face to hand him the money and receive the drugs. The observation during the conversation thus may have been as brief as 5 or 10 seconds.

As the Court notes, Glover was a police officer trained in and attentive to the need for making accurate identifications. Nevertheless, both common sense and scholarly study indicate that while a trained observer such as a police officer is somewhat less likely to make an erroneous identification than the average untrained observer, the mere fact that he has been so trained is no guarantee that he is correct in a specific case. His identification testimony should be scrutinized just as carefully as that of the normal witness. Wall, supra, n. 1, at 14; see also Levine & Tapp, supra, n. 8, at 1088. Moreover, identifications made by policemen in highly competitive activities, such as undercover narcotic agents . . . should be scrutinized with special care.

Wall, supra, n. 1, at 14. Yet it is just such a searching inquiry that the Court fails to make here.

Another factor on which the Court relies -- the witness' degree of certainty in making the identification -- is worthless as an indicator that he is correct. Even if Glover had been unsure initially about his identification of respondent's picture, by the time he was called at trial to present a key piece of evidence for the State that paid his salary, it is impossible to imagine his responding negatively to such questions as "is there any doubt in your mind whatsoever" that the identification was correct. Tr. 34, 41-42. As the Court noted in Wade: "It is a matter of common experience that, once a witness has picked out the accused at the [pretrial confrontation], he is not likely to go back on his word later on."


Next, the Court finds that, because the identification procedure took place two days after the crime, its reliability is enhanced. While such temporal proximity makes the identification more reliable than one occurring months later, the fact is that the greatest memory loss occurs within hours after an event. After that, the drop-off continues much more slowly. Thus, the reliability of an identification is increased only if it was made within several hours of the crime. If the time gap is any greater, reliability necessarily decreases.
Finally, the Court makes much of the fact that Glover gave a description of the seller to D'Onofrio shortly after the incident. Despite the Court's assertion that, because "Glover himself was a Negro and unlikely to perceive only general features of `hundreds of Hartford black males,' as the Court of Appeals stated," ante at 115, the description given by Glover was actually no more than a general summary of the seller's appearance. See ante at 101. We may discount entirely the seller's clothing, for that was of no significance later in the proceeding. Indeed, to the extent that Glover noticed clothes, his attention was diverted from the seller's face. Otherwise, Glover merely described vaguely the seller's height, skin color, hairstyle, and build. He did say that the seller had "high cheekbones," but there is no other mention of facial features, nor even an estimate of age. Conspicuously absent is any indication that the seller was a native of the West Indies, certainly something which a member of the black community could immediately recognize from both appearance and accent.[12]

From all of this, I must conclude that the evidence of Glover's ability to make an accurate identification is far weaker than the Court finds it. In contrast, the procedure used to identify respondent was both extraordinarily suggestive and strongly conducive to error. In dismissing "the corrupting effect of the suggestive identification" procedure here, ante at 116, the Court virtually grants the police license to convict the innocent. By displaying a single photograph of respondent to the witness Glover under the circumstances in this record, almost everything that could have been done wrong was done wrong.

In the first place, there was no need to use a photograph at all. Because photos are static, two-dimensional, and often outdated, they are "clearly inferior in reliability" to corporeal procedures. Wall, supra, n. 1, at 70; People v. Gould, 54 Cal.2d 621, 631, 354 P.2d 865, 870 (1960). While the use of photographs is justifiable and often essential where the police have no knowledge of an offender's identity, the poor reliability of photos makes their use inexcusable where any other means of identification is available. Here, since Detective D'Onofrio believed that he knew the seller's identity, see ante at 101, 115, further investigation without resort to a photographic showup was easily possible. With little inconvenience, a corporeal lineup including Brathwaite might have been arranged.[13] Properly conducted, such a procedure would have gone far to remove any doubt about the fairness and accuracy of the identification.[14]

Worse still than the failure to use an easily available corporeal identification was the display to Glover of only a single picture, rather than a photo array. With good reason, such single-suspect procedures have "been widely condemned." Stovall v. Denno, 388 U.S. at 302. They give no assurance that the witness can identify the criminal from among a number of persons of similar appearance, surely the strongest evidence that there was no misidentification. In Simmons v. United States, our first decision involving photographic identification, we recognized the danger that a witness seeing a suggestively displayed picture will "retain in his memory the image of the photograph, rather than of the person actually seen." 390 U.S. at 383-384. "Subsequent
identification of the accused then shows nothing [97 S.Ct. 2263] except that the picture was a good likeness." Williams & Hammelmann, supra, n. 1, at 484. As Simmons warned, the danger of error is at its greatest when the police display to the witness only the picture of a single individual . . . [and] is also heightened if the police indicate to the witness that they have other evidence that . . . the person pictured committed the crime.

390 U.S. at 383.

Page 134

See also ALI, Model Code of Pre-Arraignment Procedure §§ 160.2(2), (5) (1975).

The use of a single picture (or the display of a single live suspect, for that matter) is a grave error, of course, because it dramatically suggests to the witness that the person shown must be the culprit. Why else would the police choose the person? And it is deeply ingrained in human nature to agree with the expressed opinions of others -- particularly others who should be more knowledgeable -- when making a difficult decision. [15] In this case, moreover, the pressure was not limited to that inherent in the display of a single photograph. Glover, the identifying witness, was a state police officer on special assignment. He knew that D'Onofrio, an experienced Hartford narcotics detective, presumably familiar with local drug operations, believed respondent to be the seller. There was at work, then, both loyalty to another police officer and deference to a better-informed colleague. [16] Finally, of course, there was Glover's knowledge that without an identification

Page 135

and arrest, government funds used to buy heroin had been wasted.

The Court discounts this overwhelming evidence of suggestiveness, however. It reasons that, because D'Onofrio was not present when Glover viewed the photograph, there was "little pressure on the witness to acquiesce in the suggestion." Ante at 116. That conclusion blinks psychological reality. [17] There is no doubt in my mind that, even in D'Onofrio's absence, a clear and powerful message was telegraphed to Glover as he looked at respondent's photograph. He was emphatically told that "this is the man," and he responded by identifying respondent then and at trial "whether or not he was in fact 'the man.'" Foster v. California, 394 U.S. at 443. [18]

[97 S.Ct. 2264] I must conclude that this record presents compelling evidence that there was "a very substantial likelihood of misidentification" of respondent Brathwaite. The suggestive display of respondent's photograph to the witness Glover likely erased any independent memory that Glover had retained of the seller from his barely adequate opportunity to observe the criminal.

IV

Since I agree with the distinguished panel of the Court of Appeals that the legal standard of Stovall should govern this case, but that even if it does not, the facts here reveal a substantial likelihood of misidentification in violation of respondent's right to due process of law, I would affirm the grant of habeas corpus relief. Accordingly, I dissent from the Court's reinstatement of respondent's conviction.

--------
Notes:
[1] The references are to the transcript of the trial in the Superior Court of Hartford County, Conn. 
The United States District Court, on federal habeas, pursuant to agreement of the parties, Tr. of 
Oral Arg. 23, conducted no evidentiary hearing.
[2] It appears that the door on which Glover knocked may not have been that of the Cicero 
apartment. Petitioner concedes, in any event, that the transaction effected "was with some other 
person than had been intended." Id. at 4.
[3] This was Glover's testimony. Brown later was called as a witness for the prosecution. He 
testified on direct examination that, due to his then use of heroin, he had no clear recollection of 
details of the incident. Tr. 81-82. On cross-examination, as in an interview with defense 
counsel the preceding day, he said that it was a woman who opened the door, received the 
money, and thereafter produced the narcotics. Id. at 84, 86-87. On redirect, he acknowledged that 
he was using heroin daily at the time, that he had had some that day, and that there was "an 
 inability to recall and remember events." Id. at 88-89.
[4] Respondent testified: "Lots of times I have been there before in that building." He also testified 
that Mrs. Ramsey was a friend of his wife, that her apartment was the only one in the building he 
ever visited, and that he and his family, consisting of his wife and five children, did not live there, 
but at 453 Albany Avenue, Hartford. Id. at 111-113.
[5] These statutes have since been amended in ways that do not affect the present litigation. See 
[6] Neither party submitted a request to the District Court for an independent factual hearing on 
respondent's claims. See n. 1, supra.
[7] Although no objection was made in the state trial to the admission of the identification 
testimony and the photograph, the issue of their propriety as evidence was raised on the appeal to 
the Supreme Court of Connecticut. Petitioner has asserted no claims related to the failure of the 
respondent either to exhaust state remedies or to make contemporaneous objections. The District 
Court and the Court of Appeals, each for a somewhat different reason, App. to Pet. for Cert. 7a- 
8a; 527 F.2d at 366, concluded that the merits were properly before them. We are not inclined now 
to rule otherwise.
[8] Simmons involved photographs, mostly group ones, shown to bank teller victims who made in- 
court identifications. The Court discussed the "chance of misidentification," 390 U.S. at 383; 
declined to prohibit the procedure "either in the exercise of our supervisory power or, still less, as 
a matter of constitutional requirement," id. at 384; and held that each case must be considered on 
its facts and that a conviction would be set aside only if the identification procedure "was so 
 impermissibly suggestive as to give rise to a very substantial likelihood of irreparable 
misidentification." Ibid. The out-of-court identification was not offered. Mr. Justice Black would 
have denied Simmons' due process claim as frivolous. Id. at 395-396.
Foster concerned repeated confrontations between a suspect and the manager of an office that 
had been robbed. At a second lineup, but not at the first and not at a personal one-to-one 
confrontation, the manager identified the suspect. At trial, he testified as to this and made an in-
court identification. The Court reaffirmed the Stovall standard and then concluded that the repeated confrontations were so suggestive as to violate due process. The case was remanded for the state courts to consider the question of harmless error.

In Coleman, a plurality of the Court was of the view that the trial court did not err when it found that the victim's in-court identifications did not stem from a lineup procedure so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. 399 U.S. at 6.

[9] MR. JUSTICE MARSHALL argues in dissent that our cases have "established two different due process tests for two very different situations." Post at 122. Pretrial identifications are to be covered by Stovall, which is said to require exclusion of evidence concerning unnecessarily suggestive pretrial identifications without regard to reliability. In-court identifications, on the other hand, are to be governed by Simmons, and admissibility turns on reliability. The Court's cases are sorted into one category or the other. Biggers, which clearly adopts the reliability of the identification as the guiding factor in the admissibility of both pretrial and in-court identifications, is condemned for mixing the two lines and for adopting a uniform rule.

Although it must be acknowledged that our cases are not uniform in their emphasis, they hardly suggest the formal structure the dissent would impose on them. If our cases truly established two different rules, one might expect at some point at least passing reference to the fact. There is none. And if Biggers departed so grievously from the past cases, it is surprising that there was not at least some mention of the point in MR. JUSTICE BRENNAN's dissent. In fact, the cases are not so readily sorted as the dissent suggests. Although Foster involved both in court and out-of-court identifications, the Court seemed to apply only a single standard for both. And although Coleman involved only an in-court identification, the plurality cited Stovall for the guiding rule that the claim was to be assessed on the "totality of the surrounding circumstances." 399 U.S. at 4. Thus, Biggers is not properly seen as a departure from the past cases, but as a synthesis of them.

[10] Although the per se approach demands the exclusion of testimony concerning unnecessarily suggestive identifications, it does permit the admission of testimony concerning a subsequent identification, including an in-court identification, if the subsequent identification is determined to be reliable. 527 F.2d at 367. The totality approach, in contrast, is simpler: if the challenged identification is reliable, then testimony as to it and any identification in its wake is admissible.

[11] The Fourth Circuit's then very recent decision in Smith v. Coiner, 473 F.2d 877 (1973), was described as one applying the second, or totality, test. 486 F.2d at 55.

[12] The interest in obtaining convictions of the guilty also urges the police to adopt procedures that show the resulting identification to be accurate. Suggestive procedures often will vitiate the weight of the evidence at trial, and the jury may tend to discount such evidence. Cf. McGowan, Constitutional Interpretation and Criminal Identification, 12 Wm. & Mary L.Rev. 235, 241 (1970).


[14] In essence what the Stovall due process right protects is an evidentiary interest. . . . It is part of
our adversary system that we accept at trial much evidence that has strong elements of untrustworthiness -- an obvious example being the testimony of witnesses with a bias. While identification testimony is significant evidence, such testimony is still only evidence, and, unlike the presence of counsel, is not a factor that goes to the very heart -- the "integrity" -- of the adversary process. Counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification -- including reference to both any suggestibility in the identification procedure and any countervailing testimony such as alibi. Clemons v. United States, 133 U.S.App.D.C. 27, 48, 408 F.2d 1230, 1251 (1968) (concurring opinion) (footnote omitted), cert. denied, 394 U.S. 964 (1969).

[15] Mrs. Ramsey was not a witness at the trial.

[16] We are not troubled, as was the Court of Appeals, by the "long and unexplained delay" in respondent's arrest. 527 F.2d at 372. That arrest took place on July 27. The toxicological report verifying the substance sold as heroin had issued only 11 days earlier, on July 16. Those 11 days after verification of the contents of the glassine bags do not constitute, for us, a "long" period. And with the positive toxicological report having been received within a fortnight, the arrest's delay perhaps is not "unexplained."

[1] In this case, for example, the fact that the defendant was a regular visitor to the apartment where the drug transaction occurred tends to confirm his guilt. In the Kirby case, where the conviction was for robbery, the fact that papers from the victim's wallet were found in the possession of the defendant made it difficult to question the reliability of the identification. These facts should not, however, be considered to support the admissibility of eyewitness testimony when applying the criteria identified in Neil v. Biggers, 409 U.S. 188. Properly analyzed, however, such facts would be relevant to a question whether error, if any, in admitting identification testimony was harmless.


[2] The accused, a Negro, was brought handcuffed by seven white police officers and employees of the District Attorney to the hospital room of the only witness to a murder. As the Court said of this encounter:

It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed to be guilty by the police. See Frankfurter, The Case of Sacco and Vanzetti 31-32.


[3] The police reasonably feared that the witness might die before any less suggestive confrontation could be arranged.


If the test enunciated in Stovall permitted any consideration of the witness' opportunity to observe the offender at the time of the crime, it was only in the narrowly circumscribed context of ascertaining the extent to which the challenged procedure was "conducive to irreparable mistaken
identification." It is noteworthy, however, that, in applying its test in Stovall, the Court did not advert to the significant circumstantial evidence of guilt, see United States ex rel. Stovall v. Denno, 355 F.2d 731, 733-734 (CA2 1966), nor discuss any factors bearing on the witness' opportunity to view the assailant.

[5] Mr. Justice Harlan, writing for the Court in Simmons, acknowledged that there was a distinction between that case and Stovall. After describing the factual setting and the applicable due process test, he noted that "[t]his standard accords with our resolution of a similar issue in Stovall." 390 U.S. at 384. He pointedly did not say that the cases were the same, nor did he rely on Stovall to set the standard.

[6] "The showup itself consisted of two detectives walking respondent past the victim." 409 U.S. at 195. The police also ordered respondent to repeat the words used by the criminal. Inadequate efforts were made to secure participants for a lineup, and there was no pressing need to use a showup.


Moreover, as the exhaustive opinion of the Michigan Supreme Court in People v. Anderson, supra, noted:

For a number of obvious reasons, however, including the fact that there is no on-going systematic study of the problem, the reported cases of misidentification are in every likelihood only the top of the iceberg. The writer of this opinion, for example, was able to turn up three very recent unreported cases right here in Michigan in the course of a few hours' inquiry.

389 Mich. at 179-180, 205 N.W.2d at 472.


[11] See, e.g., Levine & Tapp, supra, n. 8, at 1100-1101; Note, Pretrial Identification Procedures -- Wade to Gilbert to Stovall: Lower Courts Bobble the Ball, 55 Minn.L.Rev. 779, 789 (1971); People
v. Anderson, supra at 214-215, 205 N.W.2d at 491. Reviewing a number of its cases, the Court of Appeals for the District of Columbia Circuit concluded several years ago that while showups occurring up to perhaps 30 minutes after a crime are generally permissible, one taking place four hours later, far removed from the crime scene, was not. McRae v. United States, 137 U.S.App.D.C. 80, 87, 420 F.2d 1283, 1290 (1969).

[12] Brathwaite had come to the United States from his native Barbados as an adult. Tr. 99. It is also noteworthy that the informant who witnessed the transaction and was described by Glover as "trustworthy," id. at 47, disagreed with Glover's recollection of the event. The informant testified that it was a woman in the apartment who took the money from Glover and gave him the drugs in return. Id. at 887.

[13] Indeed, the police carefully staged Brathwaite's arrest in the same apartment that was used for the sale, see ante at 101, 116, indicating that they were fully capable of keeping track of his whereabouts and using this information in their investigation.

[14] It should be noted that this was not a case where the witness knew the person whom he saw committing a crime, or had an unusually long time to observe the criminal, so that the identification procedure was merely used to confirm the suspect's identity. Cf. United State v. Wade, 388 U.S. 218, 250, 251 (1967) (WHITE, J., dissenting). For example, had this been an ongoing narcotics investigation in which Glover had met the seller a number of times, the procedure would have been less objectionable.


[16] In fact, the trial record indicates that D'Onofrio was remarkably ill-informed, although it does not appear that Glover knew this at the time of the identification. While the Court is impressed by D'Onofrio's immediate response to Glover's description, ante at 108, 115, that cannot alter the fact that the detective, who had not witnessed the transaction, acted on a wild guess that respondent was the seller. D'Onofrio's hunch rested solely on Glover's vague description, yet D'Onofrio thought that the drugs had been purchased at a different apartment from the one Glover actually went to. Id. at 47, 68, 69. The identification of respondent provides a perfect example of the investigator and the witness bolstering each other's inadequate knowledge to produce a seemingly accurate but actually worthless identification. See Sobel, supra, n. 1, § 3.02, at 12.

[17] That the "identification was made in circumstances allowing care and reflection," ante at 116, is hardly an unequivocal sign of accuracy. Time for reflection can just as easily be time for reconstructing an image only dimly remembered to coincide with the powerful suggestion before the viewer.

[18] This discussion does not imply any lack of respect for the honesty and dedication of the police. We all share the frailties of human nature that create the problem. Justice Frank O'Connor of the New York Supreme Court decried the dangers of eyewitness testimony in a recent article that began with this caveat:
From the vantage point of ten years as District Attorney of Queens County (1956-1964) and six years on the trial bench (1969 to 1974), the writer holds in high regard the professional competence and personal integrity of most policemen. Laudable instances of police efforts to clear a doubtful suspect are legion. Deliberate, willful efforts to frame or railroad an innocent man are totally unknown, at least to me. Yet, once the best-intentioned officer becomes honestly convinced that he has the right man, human nature being what it is, corners may be cut, some of the niceties forgotten, and serious error committed.

O'Connor, supra, n.8, at n.1.

--------
STATE of New Jersey, Plaintiff-Appellant,
v.  
Larry R. HENDERSON, Defendant-Respondent.  
Supreme Court of New Jersey.  
August 24, 2011  
Reargued March 28, 2011.  

Deborah C. Bartolomey, Deputy Attorney General, argued the cause for appellant (Paula T. Dow, Attorney General of New Jersey, attorney).  
Joshua D. Sanders and Joseph E. Krakora, Assistant Deputy Public Defenders, argued the cause for respondent (Yvonne Smith Segars, Public Defender, attorney).  
Alison S. Perrone argued the cause for amicus curiae Association of Criminal Defense Lawyers of New Jersey.  
Barry C. Scheck, a member of the New York bar, argued the cause for amicus curiae Innocence Project, Inc. (Gibbons, attorneys; Mr. Scheck, Lawrence S. Lustberg, Newark, and Ellen P. Lubensky, on the briefs).  

OPINION  
RABNER, Chief Justice

Table of Contents

I. Introduction

II. Facts and Procedural History
   A. Facts
   B. Photo Identification and Wade Hearing
   C. Trial
   D. Appellate Division
   E. Certification and Remand Order

III. Proof of Misidentifications
IV. Current Legal Framework

V. Scope of Scientific Research

VI. How Memory Works
   A. System Variables
      1. Blind Administration
      2. Pre-identification Instructions
      3. Lineup Construction
      4. Avoiding Feedback and Recording Confidence
      5. Multiple Viewings
      6. Simultaneous v. Sequential Lineups
      7. Composites
      8. Showups
     
   B. Estimator Variables
      1. Stress
      2. Weapon Focus
      3. Duration
      4. Distance and Lighting
      5. Witness Characteristics
      6. Characteristics of Perpetrator
      7. Memory Decay
      8. Race Bias
      9. Private Actors
     10. Speed of Identification
     
   C. Juror Understanding
   D. Consensus Among Experts

VII. Responses to Scientific Studies

VIII. Parties' Arguments

IX. Legal Conclusions
   A. Scientific Evidence
   B. The Manson / Madison Test Needs to be Revised
I. Introduction

In the thirty-four years since the United States Supreme Court announced a test for the admission of eyewitness identification evidence, which New Jersey adopted soon after, a vast body of scientific research about human memory has emerged. That body of work casts doubt on some commonly held views relating to memory. It also calls into question the vitality of the current legal framework for analyzing the reliability of eyewitness identifications. See Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); State v. Madison, 109 N.J. 223, 536 A.2d 254 (1988).

In this case, defendant claims that an eyewitness mistakenly identified him as an accomplice to a murder. Defendant argues that the identification was not reliable because the officers investigating the case intervened during the identification process and unduly influenced the eyewitness. After a pretrial hearing, the trial court found that the officers' behavior was not impermissibly suggestive and admitted the evidence. The Appellate Division reversed. It held that the officers' actions were presumptively suggestive because they violated guidelines issued by the Attorney General in 2001 for conducting identification procedures.

After granting certification and hearing oral argument, we remanded the case and appointed a Special Master to evaluate scientific and other evidence about eyewitness identifications. The Special Master presided over a hearing that probed testimony by seven experts and produced more than 2,000 pages of transcripts along with hundreds of scientific studies. He later issued an extensive and very fine report, much of which we adopt.

We find that the scientific evidence considered at the remand hearing is reliable. That evidence offers convincing proof that the current test for evaluating the trustworthiness of eyewitness identifications should be revised. Study after study revealed a troubling lack of
reliability in eyewitness identifications. From social science research to the review of actual police lineups, from laboratory experiments to DNA exonerations, the record proves that the possibility of mistaken identification is real. Indeed, it is now widely known that eyewitness misidentification is the leading cause of wrongful convictions across the country.

We are convinced from the scientific evidence in the record that memory is malleable, and that an array of variables can affect and dilute memory and lead to misidentifications. Those factors include system variables like lineup procedures, which are within the control of the criminal justice system, and estimator variables like lighting conditions or the presence of a weapon, over which the legal system has no control. To its credit, the Attorney General's Office incorporated scientific research on system variables into the guidelines it issued in 2001 to improve eyewitness identification procedures. We now review both sets of variables in detail to evaluate the current Manson / Madison test.

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. It also overstates the jury's inherent ability to evaluate evidence offered by eyewitnesses who honestly believe their testimony is accurate.

Two principal steps are needed to remedy those concerns. First, when defendants can show some evidence of suggestiveness, all relevant system and estimator variables should be explored at pretrial hearings. A trial court can end the hearing at any time, however, if the court concludes from the testimony that defendant's threshold allegation of suggestiveness is groundless. Otherwise, the trial judge should weigh both sets of variables to decide if the evidence is admissible.

Up until now, courts have only considered estimator variables if there was a finding of impermissibly suggestive police conduct. In adopting this broader approach, we decline to order pretrial hearings in every case, as opposed to cases in which there is some evidence of suggestiveness. We also reject a bright-line rule that would require suppression of reliable evidence any time a law enforcement officer missteps.

Second, the court system should develop enhanced jury charges on eyewitness identification for trial judges to use. We anticipate that identification evidence will continue to be admitted in the vast majority of cases. To help jurors weigh that evidence, they must be told about relevant factors and their effect on reliability. To that end, we have asked the Criminal Practice Committee and the Committee on Model Criminal Jury Charges to draft proposed revisions to the current model charge on eyewitness identification and address various system and estimator variables. With the use of more focused jury charges on those issues, there will be less need to call expert witnesses at trial. Trial courts will still have discretion to admit expert testimony when warranted.

The factors that both judges and juries will consider are not etched in stone. We expect that the scientific research underlying them will continue to evolve, as it has in the more than thirty years since Manson. For the same reason, police departments are not prevented from improving their practices as we learn more about variables that affect memory. New approaches, though,
must be based on reliable scientific evidence that experts generally accept.

The changes outlined in this decision are significant because eyewitness identifications [27 A.3d 879] bear directly on guilt or innocence. At stake is the very integrity of the criminal justice system and the courts’ ability to conduct fair trials. Ultimately, we believe that the framework described below will both protect the rights of defendants, by minimizing the risk of misidentification, and enable the State to introduce vital evidence.

The revised principles in this decision will apply purely prospectively except for defendant Larry Henderson and defendant Cecilia Chen, the subject of a companion case also decided today. See State v. Chen, 207 N.J. 404, 25 A.3d 256 (2011). We remand defendant Henderson’s case for a new pretrial hearing consistent with this opinion to determine the admissibility of the eyewitness evidence introduced at his trial.

II. Facts and Procedural History
A. Facts
In the early morning hours of January 1, 2003, Rodney Harper was shot to death in an apartment in Camden. James Womble witnessed the murder but did not speak with the police until they approached him ten days later.

Womble and Harper were acquaintances who occasionally socialized at the apartment of Womble’s girlfriend, Vivian Williams. On the night of the murder, Womble and Williams brought in the New Year in Williams’ apartment by drinking wine and champagne and smoking crack cocaine. Harper had started the evening with them but left at around 10:15 p.m. Williams also left roughly three hours later, leaving Womble alone in the apartment until Harper rejoined him at 2:00 to 2:30 a.m.

Soon after Harper returned, two men forcefully entered the apartment. Womble knew one of them, co-defendant George Clark, who had come to collect $160 from Harper. The other man was a stranger to Womble.

While Harper and Clark went to a different room, the stranger pointed a gun at Womble and told him, "Don't move, stay right here, you're not involved in this." He remained with the stranger in a small, narrow, dark hallway. Womble testified that he "got a look at" the stranger, but not "a real good look." Womble also described the gun pointed at his torso as a dark semiautomatic.

Meanwhile, Womble overheard Clark and Harper argue over money in the other room. At one point, Harper said, "do what you got to do," after which Womble heard a gunshot. Womble then walked into the room, saw Clark holding a handgun, offered to get Clark the $160, and urged him not to shoot Harper again. As Clark left, he warned Womble, "Don't rat me out, I know where you live."

Harper died from the gunshot wound to his chest on January 10, 2003. Camden County Detective Luis Ruiz and Investigator Randall MacNair were assigned to investigate the homicide, and they interviewed Womble the next day. Initially, Womble told the police that he was in the apartment when he heard two gunshots outside, that he left to look for Harper, and that he found...
Harper slumped over in his car in a nearby parking lot, where Harper said he had been shot by two men he did not know.

The next day, the officers confronted Womble about inconsistencies in his story. Womble claimed that they also threatened to charge him in connection with the murder. Womble then decided to "come clean." He admitted that he lied at first because he did not want to "rat" out anyone and "didn't want to get involved" out of fear of retaliation against his elderly father. Womble led the investigators to [27 A.3d 880] Clark, who eventually gave a statement about his involvement and identified the person who accompanied him as defendant Larry Henderson.

The officers had Womble view a photographic array on January 14, 2003. That event lies at the heart of this decision and is discussed in greater detail below. Ultimately, Womble identified defendant from the array, and Investigator MacNair prepared a warrant for his arrest. Upon arrest, defendant admitted to the police that he had accompanied Clark to the apartment where Harper was killed, and heard a gunshot while waiting in the hallway. But defendant denied witnessing or participating in the shooting.

A grand jury in Camden County returned an indictment charging Henderson and Clark with the following offenses: first-degree murder, N.J.S.A. 2C:11-3(a)(1) or (2); second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a); fourth-degree aggravated assault, N.J.S.A. 2C:12-1(b)(4); third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b); and possession of a weapon having been convicted of a prior offense, N.J.S.A. 2C:39-7(a) (Henderson) and -7(b) (Clark).

B. Photo Identification and Wade Hearing

As noted above, Womble reviewed a photo array at the Prosecutor's Office on January 14, 2003, and identified defendant as his assailant. The trial court conducted a pretrial Wade [1] hearing to determine the admissibility of that identification. Investigator MacNair, Detective Ruiz, and Womble all testified at the hearing. Cherry Hill Detective Thomas Weber also testified.

Detective Weber conducted the identification procedure because, consistent with guidelines issued by the Attorney General, he was not a primary investigator in the case. See Office of the Attorney Gen., N.J. Dep't of Law and Pub. Safety, Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures 1 (2001) (Attorney General Guidelines or Guidelines). According to the Guidelines, discussed in detail below, primary investigators should not administer photo or live lineup identification procedures "to ensure that inadvertent verbal cues or body language do not impact on a witness." Ibid.

Ruiz and MacNair gave Weber an array consisting of seven "filler" photos and one photo of defendant Henderson. The eight photos all depicted headshots of African-American men between the ages of twenty-eight and thirty-five, with short hair, goatees, and, according to Weber, similar facial features. At the hearing, Weber was not asked whether he knew which photograph depicted the suspect. (Later at trial, he said he did not know.)

The identification procedure took place in an interview room in the Prosecutor's Office. At first, Weber and Womble were alone
in the room. Weber began by reading the following instructions off a standard form:

In a moment, I will show you a number of photographs one at a time. You may take as much time as you need to look at each one of them. You should not conclude that the person who committed the crime is in the group merely because a group of photographs is being shown to you. The person who committed the crime may or may not be in the group, and the mere display of the photographs is not meant to suggest that our office believes the person who committed the crime is in one of the photographs. You are absolutely not required to choose any of the photographs, and you should feel not obligated to choose any one. The photographs will be shown to you in random order. I am not in any way trying to influence your decision by the order of the pictures presented. Tell me immediately if you recognize the person that committed the crime in one of the photographs. All of the photographs will be shown to you even if you select a photograph. Please keep in mind that hairstyles, beards, and mustaches are easily changed. People gain and lose weight. Also, photographs do not always show the true complexion of a person. It may be lighter or darker than shown in the photograph. If you select a photograph, please do not ask me whether I agree with or support your selection. It is your choice alone that counts. Please do not discuss whether you selected a photograph with any other witness who may be asked to look at these photographs.

To acknowledge that he understood the instructions, Womble signed the form.

Detective Weber pre-numbered the eight photos, shuffled them, and showed them to Womble one at a time. Womble quickly eliminated five of the photos. He then reviewed the remaining three, discounted one more, and said he "wasn't 100 percent sure of the final two pictures." At the Wade hearing, Detective Weber recalled that Womble "just shook his head a lot. He seemed indecisive." But he did not express any fear to Weber.

Weber left the room with the photos and informed MacNair and Ruiz that the witness had narrowed the pictures to two but could not make a final identification. MacNair and Ruiz testified at the hearing that they did not know whether defendant's picture was among the remaining two photos.

MacNair and Ruiz entered the interview room to speak with Womble. According to MacNair's testimony at the Wade hearing, he and Ruiz believed that Womble was holding back— as he had earlier in the investigation— based on fear. Ruiz said Womble was "nervous, upset about his father."

In an effort to calm Womble, MacNair testified that he "just told him to focus, to calm down, to relax and that any type of protection that [he] would need, any threats against [him] would be put to rest by the Police Department." Ruiz added, "just do what you have to do, and we'll be out of here." In response, according to MacNair, Womble said he "could make [an] identification."

MacNair and Ruiz then left the interview room. Ruiz testified that the entire exchange lasted less than one minute; Weber believed it took about five minutes. When Weber returned to the room, he reshuffled the eight photos and again displayed them to Womble sequentially. This time, when Womble saw defendant's photo, he slammed his hand on the table and exclaimed, "[t]hat's the mother [- - - - - -] there." From start to finish, the entire process took fifteen minutes.
Womble did not recant his identification, but during the Wade hearing he testified that he felt as though Detective Weber was "nudging" him to choose defendant’s photo, and "that there was pressure" to make a choice.

After hearing the testimony, the trial court applied the two-part Manson / Madison test to evaluate the admissibility of the eyewitness identification. See Manson, supra, 432 U.S. at 114, 97 S.Ct. at 2253, 53 L.Ed.2d at 154; Madison, supra, 109 N.J. at 232-33, 536 A.2d 254. The test requires courts to determine first if police identification procedures were impermissibly suggestive; if so, courts then weigh five reliability factors to decide if the identification evidence is nonetheless admissible. See Manson, supra, 432 U.S. at 114, 97 S.Ct. at 2253, 53 L.Ed.2d at 154; Madison, supra, 109 N.J. at 232-33, 536 A.2d 254.

The trial court first found that the photo display itself was "a fair makeup." Under the totality of the circumstances, the judge concluded that the photo identification was reliable. The court found that there was "nothing in this case that was improper, and certainly nothing that was so suggestive as to result in a substantial likelihood of misidentification at all." The court also noted that Womble displayed no doubts about identifying defendant Henderson, that he had the opportunity to view defendant at the crime scene, and that Womble fixed his attention on defendant "because he had a gun on him."

C. Trial

The following facts—relevant to Womble’s identification of defendant—were adduced at trial after the court determined that the identification was admissible: Womble smoked two bags of crack cocaine with his girlfriend in the hours before the shooting; the two also consumed one bottle of champagne and one bottle of wine; the lighting was "pretty dark" in the hallway where Womble and defendant interacted; defendant shoved Womble during the incident; and Womble remembered looking at the gun pointed at his chest. Womble also admitted smoking about two bags of crack cocaine each day from the time of the shooting until speaking with police ten days later.

At trial, Womble elaborated on his state of mind during the identification procedure. He testified that when he first looked at the photo array, he did not see anyone he recognized. As he explained, "[m]y mind was drawing a blank ... so I just started eliminating photos." To make a final identification, Womble said that he "really had to search deep." He was nonetheless "sure" of the identification.

Womble had no difficulty identifying defendant at trial eighteen months later. From the witness stand, Womble agreed that he had no doubt that defendant— the man in the courtroom wearing "the white dress shirt" — "is the man who held [him] at bay with a gun to [his] chest."

Womble also testified that he discarded a shell casing from the shooting at an intersection five or six blocks from the apartment; he helped the police retrieve the casing ten days later. No guns or other physical evidence were introduced linking defendant to the casing or the crime scene.
Neither Clark nor defendant testified at trial. The primary evidence against defendant, thus, was Womble's identification and Detective MacNair's testimony about defendant's post-arrest statement.[2]

At the close of trial on July 20, 2004, the court relied on the existing model jury charge on eyewitness identification and instructed the jury as follows:

[Y]ou should consider the observations and perceptions on which the identification is based, and Womble's ability to [27 A.3d 883] make those observations and perceptions. If you determine that his out-of-court identification is not reliable, you may still consider Womble's in-court identification of Gregory Clark and Larry Henderson if you find that to be reliable. However, unless the identification here in court resulted from Womble's observations or perceptions of a perpetrator during the commission of an offense rather than being the product of an impression gained at an out-of-court identification procedure such as a photo lineup, it should be afforded no weight. The ultimate issues of the trustworthiness of both in-court and out-of-court identifications are for you, the jury to decide. To decide whether the identification testimony is sufficiently reliable evidence ... you may consider the following factors: First of all, Womble's opportunity to view the person or persons who allegedly committed the offense at the time of the offense; second, Womble's degree of attention on the alleged perpetrator when he allegedly observed the crime being committed; third, the accuracy of any prior description of the perpetrator given [b]y Womble; fourth, you should consider the fact that in Womble's sworn taped statement of January 11th, 2003 to the police ..., Womble did not identify anyone as the person or persons involved in the shooting of Rodney Harper .... Next, you should consider the degree of certainty, if any, expressed by Womble in making the identification.... [3]

You should also consider the length of time between Womble's observation of the alleged offense and his identification .... You should consider any discrepancies or inconsistencies between identifications .... Next, the circumstances under which any out-of-court identification was made including in this case the evidence that during the showing to him of eight photos by Detective Weber he did not identify Larry Henderson when he first looked at them and later identified Larry Henderson from one of those photos. .... You may also consider any other factor based on the evidence or lack of evidence in the case which you consider relevant to your determination whether the identification made by Womble is reliable or not. Defendant did not object to the charge or ask for any additional instructions related to the identification evidence presented at trial.

On July 20, 2004, the jury acquitted defendant of murder and aggravated manslaughter, and convicted him of reckless manslaughter, N.J.S.A. 2C:11-4(b)(1), aggravated assault, and two weapons charges. In a bifurcated trial the next day, the jury convicted defendant of the remaining firearms offense: possession by a previously convicted person. The court sentenced him to an aggregate eleven-year term of imprisonment, with a period of parole ineligibility of almost six years under the No Early Release Act, N.J.S.A. 2C:43-7.2. Defendant appealed his conviction and sentence.

D. Appellate Division

The Appellate Division presumed that the identification procedure in this case was
impermissibly suggestive under the first prong of the *Manson / Madison* test.


The panel anchored its finding to what it considered to be a material breach of the Attorney General Guidelines. *Id.* at 412, 937 A.2d 988. Among other things, the Guidelines require that

"'whenever practical' the person conducting the photographic identification procedure ‘ should be someone other than the primary investigator assigned to the case.'" *Id.* at 411, 937 A.2d 988 (citing *State v. Herrera*, 187 N.J. 493, 516, 902 A.2d 177 (2006)). The panel specifically found that the investigating officers, MacNair and Ruiz, "consciously and deliberately intruded into the process for the purpose of assisting or influencing Womble's identification of defendant." *Id.* at 414, 937 A.2d 988. The officers' behavior, the court explained, "certainly violate[d] the spirit of the Guidelines." *Id.* at 412, 937 A.2d 988. In such circumstances, the panel "conclude[d] that a presumption of impermissible suggestiveness must be imposed, and a new *Wade* hearing conducted." *Id.* at 400, 937 A.2d 988.

**E. Certification and Remand Order**

We granted the State’s petition for certification, 195 N.J. 521, 950 A.2d 907, 908 (2008), and also granted leave to appear as amicus curiae to the Association of Criminal Defense Lawyers of New Jersey (ACDL) and the Innocence Project (collectively "amici"). In their briefs and at oral argument, the parties and amici raised questions about possible shortcomings in the *Manson / Madison* test in light of recent scientific research.

In an unpublished Order dated February 26, 2009, attached as Appendix A, we "concluded that an inadequate factual record exist[ed] on which [to] test the current validity of our state law standards on the admissibility of eyewitness identification." App. A at *3. We therefore remanded the matter summarily to the trial court for a plenary hearing to consider and decide whether the assumptions and other factors reflected in the two-part *Manson / Madison* test, as well as the five factors outlined in those cases to determine reliability, remain valid and appropriate in light of recent scientific and other evidence. [*Ibid.*]

We appointed the Honorable Geoffrey Gaulkin, P.J.A.D. (retired and temporarily assigned on recall) to preside at the remand hearing as a Special Master.

Pursuant to the Order, the following parties participated in the remand hearing: the Attorney General, the Public Defender (representing defendant [4]), and amici.

The parties and amici collectively produced more than 360 exhibits, which included more than 200 published scientific studies on human memory and eyewitness identification. During the ten-day remand hearing, the Special Master heard testimony from seven expert witnesses. Three of them—Drs. Gary Wells, Steven Penrod, and Roy Malpass—testified about the state of scientific research in the field of eyewitness identification.

Dr. Wells, who was called as a witness by the Innocence Project, holds a Ph.D. in
Experimental Social Psychology and [27 A.3d 885] serves as a Professor of Psychology at Iowa State University. Since 1977, Dr. Wells has published more than 100 articles on eyewitness identification research. He assisted the Attorney General's Office in connection with the formulation of the Attorney General Guidelines.

Dr. Penrod, who was called as a witness by defendant, is a Distinguished Professor of Psychology at John Jay College of Criminal Justice in New York. He holds a degree in law and a Ph.D. in Psychology. Dr. Penrod has also published extensively in the area of eyewitness identification and has served on the editorial board of numerous psychology journals.

Dr. Malpass, who was called by the State, is also widely published. He holds a Ph.D., and his academic career spans more than four decades. Dr. Malpass is currently a Professor of Psychology and Criminal Justice at the University of Texas, El Paso, where he runs the university's Eyewitness Identification Research Lab.

Page 230

The parties and amici also presented the testimony of three law professors: James Doyle, Jules Epstein, and Dr. John Monahan. The professors discussed the intersection of eyewitness identification research and the legal system.

Dr. Monahan and Professor Doyle were called as witnesses by the Innocence Project. Dr. Monahan has a Ph.D. in Clinical Psychology, is a Distinguished Professor of Law at the University of Virginia, and holds dual appointments in the Departments of Psychology and Psychiatric and Neurobehavioral Sciences. He coauthored the casebook Social Science in Law (7th ed.2010), and has published extensively on that topic. Professor Doyle is Director of the Center for Modern Forensic Practice at John Jay College of Criminal Justice. In 1987, he co-authored a treatise titled Eyewitness Testimony: Civil and Criminal, which he regularly updates.

Defendant presented Professor Epstein as a witness. He is an Associate Professor of Law at Widener University School of Law, who has spent more than a decade representing criminal defendants in Philadelphia. He, too, has written extensively on eyewitness identification.

The State also called James Gannon to testify. From 1986 to 2007, he worked with the Morris County Prosecutor's Office, ultimately serving as Deputy Chief of Investigations. During his career, he investigated approximately 120 homicides. He continues to train law enforcement personnel locally and internationally. Gannon testified about practical constraints police officers sometimes face in conducting investigations.

III. Proof of Misidentifications

In this case, the parties heavily dispute the admissibility and reliability of Womble's eyewitness identification of defendant. We therefore begin with some important, general observations about eyewitness identification evidence, which are derived mostly from the remand hearing as well as prior case law.

Page 231

In 2006, this Court observed that eyewitness "[m]isidentification is widely recognized as the single greatest cause of wrongful convictions in this country." State v. Delgado, 188 N.J. 48, 60, 902 A.2d 888 (2006) (citations omitted); see also Romero, supra, 191 N.J. at 73-74, 922 A.2d 693 ("
Some have pronounced that mistaken identifications ‘present what is conceivably the greatest single threat to the achievement of our ideal that no innocent man shall be punished.’ “ (citation omitted)). That same year, the International Association of Chiefs of Police published training guidelines in which it concluded that " [of] all investigative procedures employed by police in criminal [27 A.3d 886] cases, probably none is less reliable than the eyewitness identification. Erroneous identifications create more injustice and cause more suffering to innocent persons than perhaps any other aspect of police work." Int'l Ass'n of Chiefs of Police, Training Key No. 600, Eyewitness Identification 5 (2006).

Substantial evidence in the record supports those statements. Nationwide, " more than seventy-five percent of convictions overturned due to DNA evidence involved eyewitness misidentification." Romero, supra, 191 N.J. at 74, 922 A.2d 693 (citing Innocence Project report); Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong 8-9, 279 (2011) [5] (finding same in 190 of first 250 DNA exoneration cases). In half of the cases, eyewitness testimony was not corroborated by confessions, forensic science, or informants. See The Innocence Project, Understand the Causes: Eyewitness Misidentification, http:// www. innocence project. org/ understand/ Eyewitness- Misidentification. php (last visited August 16, 2011). Thirty-six percent of the defendants convicted were misidentified by more than one eyewitness. Garrett, supra, at 50. As we recognized four years ago, " [i]t has been estimated that approximately 7,500 of every 1.5 million annual convictions for serious offenses may be based on misidentifications." Romero, supra, 191 N.J. at 74, 922 A.2d 693 (citing Brian L. Cutler & Steven D. Penrod, Mistaken Identification: The Eyewitness, Psychology, and the Law 7 (1995)).

New Jersey is not immune. The parties noted that misidentifications factored into three of the five reported DNA exonerations in our State. In one of those cases, this Court had reversed convictions for rape and robbery because the trial court failed to instruct the jury that people may have greater difficulty in identifying members of a different race. See State v. Cromedy, 158 N.J. 112, 121-23, 132, 727 A.2d 457 (1999) (citing social science studies). After the decision, DNA tests led to Cromedy's exoneration.

But DNA exonerations are rare. To determine whether statistics from such cases reflect system-wide flaws, police departments have allowed social scientists to analyze case files and observe and record data from real-world identification procedures.

Four such studies— two from Sacramento, California and two from London, England—produced data from thousands of actual eyewitness identifications. See Bruce W. Behrman & Sherrie L. Davey, Eyewitness Identification in Actual Criminal Cases: An Archival Analysis, 25 Law & Hum. Behav. 475 (2001) (compiling records from fifty-eight live police lineups from area around Sacramento); Bruce W. Behrman & Regina E. Richards, Suspect/Foil Identification in Actual Crimes and in the Laboratory: A Reality Monitoring Analysis, 29 Law & Hum. Behav. 279 (2005) (assessing 461 photo and live lineup records from same area); Tim Valentine et al., Characteristics of Eyewitness Identification that Predict the Outcome of Real Lineups, 17 Applied Cognitive Psychol. 969 (2003) (analyzing 584 lineup records from police stations in and around London); Daniel B. Wright & Anne T. McDaid, Comparing System and Estimator Variables Using
For the larger London study, 39% of eyewitnesses identified the suspect, 20% identified a filler, and 41% made no identification. See Wright & McDaid, supra, at 77. Thus, about one-third of eyewitnesses who made an identification (20 of 59) in real police investigations wrongly selected an innocent filler. The results were comparable for the Valentine study. See Valentine, supra, at 974. Across both Sacramento studies, 51% of eyewitnesses identified the suspect, 16% identified a filler, and 33% identified no one. See Behrman & Davey, supra, at 482; Behrman & Richards, supra, at 285. In other words, nearly 24% of those who made an identification (16 of 67) mistakenly identified an innocent filler.

Although the studies revealed alarming rates at which witnesses chose innocent fillers out of police lineups, the data cannot identify how many of the suspects actually selected were the real culprits. See Behrman & Davey, supra, at 478. Researchers have conducted field experiments to try to answer that more elusive question: how often are innocent suspects wrongly identified?


Each study unfolded with different variations of the following approach: a customer walked into a store and tried to buy a can of soda with a $10 traveler's check; he produced two pieces of identification and chatted with the clerk; and the encounter lasted about three minutes. See, e.g., Krafka & Penrod, supra, at 62. Two to twenty-four hours later, a different person entered the same store and asked the same clerk to identify the man with the traveler's check; the clerk was told that the suspect might not be among the six photos presented; and no details of the investigation were given. Ibid. Only after making a choice was the clerk told that he or she had participated in an experiment. Id. at 63.

Across the four experiments, researchers gathered data from more than 500 identifications. Dr. Penrod testified that on average, 42% of clerks made correct identifications, 41% identified photographs of innocent fillers, and 17% chose to identify no one. See Brigham et al., supra, at 677; Krafka & Penrod, supra, at 64-65; Pigott et al., supra, at 86-87; Platz & Hosch, supra, at 978. Those numbers, like the results from the Sacramento and London studies, reveal high levels of misidentifications.

In two of the studies, researchers showed some clerks target-absent arrays— lineups that purposely excluded the perpetrator and contained only fillers. See Krafka & Penrod, supra, at 64-65; Pigott et al., supra, at 86. In those experiments, Dr. Penrod testified that 64% of eyewitnesses
made no identification, but 36% picked a foil. See Krafka & Penrod, supra, at 64; Pigott et al., supra, at 86. Those field experiments suggest that when the true perpetrator is not in the lineup, eyewitnesses may nonetheless select an innocent [27 A.3d 888] suspect more than one-third of the time.

Any one of the above studies, standing alone, reveals a troubling lack of reliability in eyewitness identifications.

We accept that eyewitnesses generally act in good faith. Most misidentifications stem from the fact that human memory is malleable; they are not the result of malice. As discussed below, an array of variables can affect and dilute eyewitness memory.

Along with those variables, a concept called relative judgment, which the Special Master and the experts discussed, helps explain how people make identifications and raises concerns about reliability. Under typical lineup conditions, eyewitnesses are asked to identify a suspect from a group of similar-looking people. "[R]elative judgment refers to the fact that the witness seems to be choosing the lineup member who most resembles the witnesses' memory relative to other lineup members." Gary L. Wells, The Psychology of Lineup Identifications, 14 J. Applied Soc. Psychol. 89, 92 (1984) (emphasis in original). As a result, if the actual perpetrator is not in a lineup, people may be inclined to choose the best look-alike. Id. at 93. Psychologists have noted that "[t]his is not a surprising proposition." Gary L. Wells, What Do We Know About Eyewitness Identification?, 48 Am. Psychologist 553, 560 (1993). Also not surprising is that it enhances the risk of misidentification. Ibid.

In one relative-judgment experiment, 200 witnesses were shown a staged crime. Id. at 561. Half of the witnesses were then shown a lineup that included the perpetrator and five fillers; the other half looked at a lineup with fillers only. Ibid. All of the witnesses were warned that the culprit might not be in the array and were given the option to choose no one. Ibid. From the first group, 54% made a correct identification and 21% believed, incorrectly, that the perpetrator was not in the array. Ibid. If witnesses rely on pure memory instead of relative judgment, the accurate identifications from the first group should have translated roughly into 54% making no choice in the second, target-absent group. Instead, only 32% of witnesses from the second group said that the culprit was not present, while 68% misidentified a filler. Ibid. Consistent with the concept of relative judgment, witnesses chose other fillers who looked more like the perpetrator to them, instead of making no identification. Ibid.

Relative judgment touches the core of what makes the question of eyewitness identification so challenging. Without persuasive extrinsic evidence, one cannot know for certain which identifications are accurate and which are false— which are the product of reliable memories and which are distorted by one of a number of factors.

Nearly four decades ago, Chief Judge Bazelon remarked skeptically that in the face of such uncertainty, "we have bravely assumed that the jury is capable of evaluating [eyewitness] reliability."
United States v. Brown, 461 F.2d 134, 145 n. 1 (D.C.Cir.1972) (Bazelon, C.J., concurring & dissenting). Five years later, in Manson, supra, the Supreme Court noted that in most cases "[w]e are content to rely upon the good sense and judgment of American juries" because eyewitness identification "evidence with some element of untrustworthiness is customary grist for the jury mill." 432 U.S. at 116, 97 S.Ct. at 2254, 53 L.Ed.2d at 155. Justice Marshall, in dissent, expressed a contrary view. See id. at 120, 97 S.Ct. at 2255-56, 53 L.Ed.2d at 157 (Marshall, J., dissenting). A "fundamental fact of judicial experience," Justice Marshall wrote, is that jurors "unfortunately [27 A.3d 889] are often unduly receptive to [eyewitness identification] evidence." Ibid.

We presume that jurors are able to detect liars from truth tellers. But as scholars have cautioned, most eyewitnesses think they are telling the truth even when their testimony is inaccurate, and "[b]ecause the eyewitness is testifying honestly (i.e., sincerely), he or she will not display the demeanor of the dishonest or biased witness." See Jules Epstein, The Great Engine that Couldn't: Science, Mistaken Identity, and the Limits of Cross-Examination, 36 Stetson L.Rev. 727, 772 (2007). Instead, some mistaken eyewitnesses, at least by the time they testify at trial, exude supreme confidence in their identifications.

As discussed below, lab studies have shown that eyewitness confidence can be influenced by factors unrelated to a witness' actual memory of a relevant event. See Amy Bradfield Douglass & Nancy Steblay, Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-identification Feedback Effect, 20 Applied Cognitive Psychol. 859, 864-65 (2006) (addressing effects of confirmatory feedback on confidence). Indeed, this Court has already acknowledged that accuracy and confidence "may not be related to one another at all." See Romero, supra, 191 N.J. at 75, 922 A.2d 693 (citation omitted).

DNA exoneration cases buttress the lab results. Almost all of the eyewitnesses in those cases testified at trial that they were positive they had identified the right person. See Garrett, Page 237 supra, 63-64 (noting also that in 57% of the trials, "the witnesses had earlier not been certain at all").

In the face of those proofs, we are mindful of the observation that "there is almost nothing more convincing [to a jury] than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!' " Watkins v. Sowders, 449 U.S. 341, 352, 101 S.Ct. 654, 661, 66 L.Ed.2d 549, 558-59 (Brennan, J., dissenting) (quoting Elizabeth Loftus, Eyewitness Testimony 19 (1979)) (emphasis in original).

The State challenges the above concepts in various ways: it argues that some studies evaluating real police files and investigations are unreliable because it is unclear whether the witnesses were given proper pre-lineup warnings, see, e.g., Valentine et al., supra; that misidentification statistics gleaned from more than 200 nationwide DNA exonerations are insufficient to conclude that a serious problem exists; that the only DNA exonerations relevant to this case are the five cases from New Jersey, which all predated the Attorney General Guidelines; that exculpatory DNA evidence does not necessarily prove a defendant is innocent; and that DNA exoneration only remind us that the criminal justice system is imperfect.

That broad-brush approach, however, glosses over the consistency and importance of the
comprehensive scientific research that is discussed in the record. Recent studies—ranging from analyses of actual police lineups, to laboratory experiments, to DNA exonerations—prove that the possibility of mistaken identification is real, and the consequences severe.

IV. Current Legal Framework

The current standards for determining the admissibility of eyewitness identification evidence derive from the principles the United States Supreme Court set forth in Manson in 1977. See Manson, supra, 432 U.S. at 114, 97 S.Ct. at 2253, 53 L.Ed.2d at 154. New Jersey formally adopted Manson's framework in Madison, supra, 109 N.J. at 232-33, 536 A.2d 254.

Page 238

Madison succinctly outlined Manson's two-step test as follows:

[27 A.3d 890]

[A] court must first decide whether the procedure in question was in fact impermissibly suggestive. If the court does find the procedure impermissibly suggestive, it must then decide whether the objectionable procedure resulted in a "very substantial likelihood of irreparable misidentification." In carrying out the second part of the analysis, the court will focus on the reliability of the identification. If the court finds that the identification is reliable despite the impermissibly suggestive nature of the procedure, the identification may be admitted into evidence. [Madison, supra, 109 N.J. at 232, 536 A.2d 254 (citations omitted).]

As the Supreme Court explained, "reliability is the linchpin in determining the admissibility of identification testimony." Manson, supra, 432 U.S. at 114, 97 S.Ct. at 2253, 53 L.Ed.2d at 154. To assess reliability, courts must consider five factors adopted from Neil v. Biggers: (1) the "opportunity of the witness to view the criminal at the time of the crime"; (2) "the witness's degree of attention"; (3) "the accuracy of his prior description of the criminal"; (4) "the level of certainty demonstrated at the time of the confrontation"; and (5) "the time between the crime and the confrontation." Madison, supra, 109 N.J. at 239-40, 536 A.2d 254 (quoting Manson, supra, 432 U.S. at 114, 97 S.Ct. at 2253, 53 L.Ed.2d at 154 (citing Neil v. Biggers, 409 U.S. 188, 199, 93 S.Ct. 375, 382, 34 L.Ed.2d 401, 411 (1972)) (internal quotation marks omitted). Those factors are to be weighed against "the corrupting effect of the suggestive identification itself." Manson, supra, 432 U.S. at 114, 97 S.Ct. at 2253, 53 L.Ed.2d at 154.

Procedurally, a defendant must first "proffer ... some evidence of impermissible suggestiveness" to be entitled to a Wade hearing. State v. Rodriguez, 264 N.J.Super. 261, 269, 624 A.2d 605 (App.Div.1993) (citations omitted), aff'd o.b., 135 N.J. 3, 637 A.2d 914 (1994); State v. Ortiz, 203 N.J.Super. 518, 522, 497 A.2d 552 (App.Div.1985). At the hearing, if the court decides the procedure "was in fact impermissibly suggestive," it then considers the reliability factors. See Madison, supra, 109 N.J. at 232, 536 A.2d 254. The State then "has the burden of proving by clear and convincing evidence that the identification[] ... had a source independent of the police-conducted identification procedures."

Page 239

Id. at 245, 536 A.2d 254 (citing Wade, supra, 388 U.S. at 240, 87 S.Ct. at 1939, 18 L.Ed.2d at 1164) (additional citation omitted). Overall, the reliability determination is to be made from the totality of the circumstances. Id. at 233, 87 S.Ct. 1926 (citing Neil v. Biggers, supra, 409 U.S. at
Manson, supra, intended to address several concerns: problems with the reliability of eyewitness identification; deterrence; and the effect on the administration of justice. 432 U.S. at 111-13, 97 S.Ct. at 2251-52, 53 L.Ed.2d at 152-53. Underlying Manson's approach are certain assumptions: that jurors can detect untrustworthy eyewitnesses, see id. at 116, 97 S.Ct. at 2254, 53 L.Ed.2d at 155; and that the test would deter suggestive police practices, see id. at 112, 97 S.Ct. at 2252, 53 L.Ed.2d at 152. As to the latter point, the Court adopted a totality approach over a per se rule of exclusion to avoid " keep[ing] evidence from the jury that is reliable and relevant." Ibid.

Manson and Madison provide good examples for how the two-pronged test is applied. In Manson, supra, an undercover narcotics officer, Trooper Glover, observed a defendant during a drug buy. 432 U.S. at 100-01, 97 S.Ct. at 2245-46, 53 L.Ed.2d at 145-46. Glover did not know [27 A.3d 891] the person and described him to backup officers after the transaction. Based on the description, one of the officers left a photo of the defendant on Glover's desk. Glover later identified the defendant from the single photo. Id. at 101, 97 S.Ct. at 2246, 53 L.Ed.2d at 145-46.

Although the Court recognized that " identifications arising from single-photograph displays may be viewed in general with suspicion," it found that the corrupting effect of the challenged identification did not outweigh Glover's ability to make an accurate identification. Id. at 116, 97 S.Ct. at 2254, 53 L.Ed.2d at 155 (citation omitted). After assessing each of the five reliability factors, the Court concluded that the identification was admissible because it could not " say that under all the circumstances of this case there is ' a very substantial likelihood of irreparable misidentification.'"

This Court applied the same test in Madison. Two months after an armed robbery, a detective administering a photo lineup showed a victim twenty-four black-and-white photographs containing at least one photo of the defendant. Madison, supra, 109 N.J. at 225, 536 A.2d 254. Next, the detective showed the victim an additional thirty-eight color photographs, " thirteen or fourteen of which depicted defendant as the center of attention at a birthday celebration held in his honor." Id. at 235, 536 A.2d 254.

The Court found the identification procedure " impermissibly suggestive" based on " the sheer repetition of defendant's picture." Id. at 234, 536 A.2d 254. It then remanded to the trial court to evaluate, under the second prong, " whether the identification[ ] ... had an independent source" that could outweigh the substantial suggestiveness of the process. See id. at 245, 536 A.2d 254.

Since Madison, this Court, on occasion, has refined the Manson / Madison framework. In Cromedy, supra, the Court examined numerous social science studies showing that identifications are less reliable when the witness and perpetrator are of different races. 158 N.J. at 121, 727 A.2d 457. In response, the Court held that jury instructions on the reliability of cross-racial identifications are necessary when " identification is a critical issue in the case" and there is no independent
More recently in *Romero, supra*, the Court recognized that "[j]urors likely will believe eyewitness testimony ‘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 related to one another at all.’" 191 N.J. at 75, 922 A.2d 693 (quoting *Watkins, supra*, 449 U.S. at 352, 101 S.Ct. at 661, 66 L.Ed.2d at 558 (Brennan, J., dissenting)). The Court cited "social science research noting the fallibility of eyewitness identifications"

and directed that juries be instructed as follows in eyewitness identification cases:

Although nothing may appear more convincing than a witness's categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken. Therefore, when analyzing such testimony, be advised that a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification. [*Id. at 75-76, 922 A.2d 693.*]

[27 A.3d 892] In *Delgado, supra*, the Court directed that "[l]aw enforcement officers make a written record detailing [a]ll out-of-court identification procedure[s], including the place where the procedure was conducted, the dialogue between the witness and the interlocutor, and the results." 188 N.J. at 63, 902 A.2d 888. See also *Herrera, supra*, 187 N.J. at 504, 902 A.2d 177 (finding showup identification procedures inherently suggestive).

Despite those important, incremental changes, we have repeatedly used the *Manson / Madison* test to determine the admissibility of eyewitness identification evidence. As we noted in *Herrera*, "[u]ntil we are convinced that a different approach is required after a proper record has been made in the trial court, we continue to follow the [*Manson / Madison*] approach." *Ibid.*; see also *State v. Adams*, 194 N.J. 186, 201, 943 A.2d 851 (2008).

That record is now before us. It enables us to consider whether the *Manson / Madison* framework remains valid and appropriate or if a different approach is required. To make that determination, we first look to the scope of the scientific evidence since 1977. We then examine its content.

V. Scope of Scientific Research

Virtually all of the scientific evidence considered on remand emerged after *Manson*. In fact, the earliest study the State submitted is from 1981, and only a handful of the more than 200 scientific articles in the record pre-date 1970.

During the 1970s, when the Supreme Court decided *Manson*, researchers conducted some experiments on the malleability of human memory. But according to expert testimony, that decade produced only four published articles in psychology literature containing the words "eyewitness" and "identity" in their abstracts. By contrast, the Special Master estimated that more than two thousand studies related to eyewitness identification have been published in the past thirty years.

Some recent studies have successfully gathered real-world data from actual police identification procedures. See, e.g., Behrman & Davey, *supra*; Valentine et al., *supra*. But most eyewitness identification research is conducted through controlled lab experiments. Unlike
analyses of real-world data, experimental studies allow researchers to control and isolate variables. If an experiment is designed well, scientists can then draw relevant conclusions from different conditions.

There have been two principal methods of conducting eyewitness lab research. In some experiments, eyewitnesses have been shown staged events without knowing they were witnessing something artificial. See, e.g., Krafka & Penrod, supra. In other studies, witnesses generally knew they were participating in an experiment from the outset. See e.g., Lynn Garrioch & C.A. Elizabeth Brimacombe, Lineup Administrators’ Expectations: Their Impact on Eyewitness Confidence, 25 Law & Hum. Behav. 299 (2001). Most experiments manipulate variables, like the witness' and suspect's race, for example, and use target-present and target-absent lineups to test the effect the variable has on accuracy. (The scientific literature often uses the term "lineup" to refer to live lineups and/or photo arrays; we sometimes use the word interchangeably as well.)

Authoritative researchers generally present the results of their experiments in peer-reviewed psychology journals. "The peer review process is a method of quality control that ensures the validity and reliability of experimental research." Roy S. Malpass et al., The Need for Expert Psychological Testimony on Eyewitness Identification, in Expert Testimony on the [27 A.3d 893] Psychology of Eyewitness Identification 3, 14 (Brian L. Cutler ed., 2009). The process is designed to ensure that studies "have passed a rigorous test and are generally considered worthy of consideration by the greater scientific community" before they are published. Ibid. Of the hundreds of laboratory studies in the record, nearly all have been published in prominent, peer-reviewed journals.

Although one lab experiment can produce intriguing results, its data set may be small. For example, if only twenty people participated in an experiment, it may be difficult to generalize the results beyond the individual study. Meta-analysis aims to solve that problem.

"A meta-analysis is a synthesis of all obtainable data collected in a specified topical area. The benefits of a meta-analysis are that greater statistical power can be obtained by combining data from many studies." Id. at 15. The more consistent the conclusions from aggregated data, the greater confidence one can have in those conclusions. More than twenty-five meta-analyses were presented at the hearing.

Despite its volume and breadth, the record developed on remand has its limitations. Results from meta-analysis, for example, still come mostly from controlled experiments. See State v. Marquez, 291 Conn. 122, 967 A.2d 56, 75 (2009) (noting lack of "real-world data" in certain research areas (citation omitted)).[6] To determine whether such experiments reliably predict how people behave in the real world, researchers have tried to compare results across different types of studies.

Dr. Penrod presented data from a meta-analysis comparing studies in which witnesses knew they were participating in experiments and those in which witnesses observed what they thought were real crimes and were not told otherwise until after making an identification. See Ralph Norman Haber & Lyn Haber, A Meta-
Analysis of Research on Eyewitness Lineup Identification Accuracy, Paper presented at the Annual Convention of the Psychonomics Society, Orlando, Florida 8-9 (Nov. 16, 2001). The analysis revealed that identification statistics from across the studies were remarkably consistent: in both sets of studies, 24% of witnesses identified fillers. See id. at 9 (also finding 34% filler identification rates when witnesses observed slideshows or videos of crimes). Those statistics are similar to data from real cases. As discussed in section III above, in police investigations in Sacramento and London, roughly 20% of eyewitnesses identified fillers. See Behrman & Davey, supra, at 482; Behrman & Richards, supra, at 285; Valentine et al., supra, at 974; Wright & McDaid, supra, at 77. Thus, although lab and field experiments may be imperfect proxies for real-world conditions, certain data they have produced are relevant and persuasive.

Critics, including the State, point out that most experiments occur on college campuses and use college students as witnesses in a way that does not replicate real life. Expert testimony, though, highlighted [27 A.3d 894] that college students are among the best eyewitnesses in light of their general health, visual acuity, recall, and alertness. But real eyewitnesses, the critics contend, act more carefully when they identify real suspects. As the Special Master noted, it is hard to credit that argument in light of archival studies and the exoneration cases. Even with the best of intentions, misidentifications occur in the real world.

A similar criticism suggests that lab experiments cannot replicate the intensity and stress that crime victims experience, which leaves stronger memory traces. But as discussed below, studies have shown consistently that high degrees of stress actually impair the ability to remember. See, e.g., Kenneth A. Deffenbacher et al., A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory, 28 Law & Hum. Behav. 687, 687, 699 (2004).

Finally, the State argues that lab studies are designed so that about half of the participants will not be able to make an identification; a "base rate" of 50% is commonly used with half of the witnesses viewing a lineup with the suspect and half looking at fillers only. The State argues those results cannot be generalized to the real world, where the actual base rate may be much higher.

As Dr. Wells testified, statistical analysis permits researchers to estimate the results under any base rate. That said, in reality, we simply cannot know how often the suspect in an array is the actual perpetrator. But not knowing real-world base rates does not render experimental studies meaningless.

To be sure, many questions about memory and the psychology of eyewitness identifications remain unanswered. And eyewitness identification research remains probabilistic, meaning that science cannot say whether an identification in an actual case is accurate or not. Instead, science has sought to answer, in the aggregate, which identification procedures and external variables are tied to an increased risk of misidentification.

Mindful of those limitations, we next examine the research on human memory.

VI. How Memory Works

Research contained in the record has refuted the notion that memory is like a video recording, and that a witness need only replay the tape to remember what happened. Human memory is far more complex. The parties agree with the Special Master's finding that memory is a
constructive, dynamic, and selective process.

The process of remembering consists of three stages: acquisition—"the perception of the original event"; retention—"the period of time that passes between the event and the eventual recollection of a particular piece of information"; and retrieval—the"stage during which a person recalls stored information." Elizabeth F. Loftus, *Eyewitness Testimony* 21 (2d ed.1996). As the Special Master observed,

[36x788]Page 246

[27 A.3d 895]at each of those stages, the information ultimately offered as "memory" can be distorted, contaminated and even falsely imagined. The witness does not perceive all that a videotape would disclose, but rather "get[s] the gist of things and constructs a "memory" on "bits of information ... and what seems plausible." The witness does not encode all the information that a videotape does; memory rapidly and continuously decays; retained memory can be unknowingly contaminated by post-event information; [and] the witness's retrieval of stored "memory" can be impaired and distorted by a variety of factors, including suggestive interviewing and identification

Researchers in the 1970s designed a number of experiments to test how and to what extent memories can be distorted. One experiment began by showing subjects film clips of auto accidents. Elizabeth F. Loftus & John C. Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 J. Verbal Learning & Verbal Behav. 585, 586 (1974). Researchers then asked test subjects to estimate the speed at which the cars traveled, and the answers differed markedly based on the question posed. On average, those asked "how fast were the cars going when they smashed into each other?" guessed higher speeds than subjects asked the same question with the word collided, bumped, hit, or contacted. *Ibid.* The first group estimated a median speed of 40.5 miles per hour when the cars "smashed"; the last group guessed the speed at 31.8 miles per hour when the cars "contacted." *Ibid.* Thus, a simple difference in language was able to cause a substantial change in the reconstruction of memory.

A similar study showed college students a film of a car accident and asked some of them to guess how fast the car was going "along the country road"; the rest were asked how fast the car was going when it "passed the barn" along the country road. Elizabeth F. Loftus, *Leading Questions and the Eyewitness Report*, 7 Cognitive Psychol. 560, 566 (1975). One week later, the same students were asked if they had seen a barn in the film. Approximately 17% of students who were originally asked the "passed the barn" question said there was a barn, and just under 3% from the other group remembered a barn. *Ibid.* In reality, there was no barn. *Ibid.; see also* Elizabeth F. Loftus & Jacqueline E. Pickrell, *The Formation of False Memories*, 25 Psychiatric Annals 720 (1995); Elizabeth F. Loftus & Guido Zanni, *Eyewitness Testimony: The Influence of the Wording of a Question*, 5 Bull. Psychonomic Soc'y 86 (1975).

Science has proven that memory is malleable. The body of eyewitness identification research further reveals that an array of variables can affect and dilute memory and lead to
misidentifications.

Scientific literature divides those variables into two categories: system and estimator variables. System variables are factors like lineup procedures which are within the control of the criminal justice system. Gary L. Wells, *Applied Eyewitness-Testimony Research: System Variables and Estimator Variables*, 36 J. Personality & Soc. Psychol. 1546, 1546 (1978). Estimator variables are factors related to the witness, the perpetrator, or the event itself—like distance, lighting, or stress—over which the legal system has no control. Ibid.

We review each of those variables in turn. For each, we address relevant scientific evidence, the Special Master's findings, and instances where the State takes issue with those findings.

We summarize findings for each of those variables consistent with the proper standards for reviewing special-master reports and scientific evidence. Courts generally defer to a special master's credibility findings regarding the testimony of expert witnesses. *State v. Chun*, 194 N.J. 54, 96, 943 A.2d 114 (2008) (citing *State v. Locurto*, 157 N.J. 463, 471, 724 A.2d 234 (1999)). We evaluate a special master's factual findings in the same manner as we would the findings and conclusions of a judge sitting as a finder of fact. We therefore accept the fact findings to the extent [27 A.3d 896] that they are supported by substantial credible evidence in the record, but we owe no particular deference to the legal conclusions of the Special Master. [ *Id.* at 93, 943 A.2d 114 (citations omitted).]

Scientific theories can be accepted as reliable when they are "based on a sound, adequately-founded scientific methodology involving data and information of the type reasonably relied on by experts in the scientific field." *State v. Moore*, 188 N.J. 182, 206, 902 A.2d 1212 (2006) (quoting *Rubanick v. Witco Chem. Corp.*, 125 N.J. 421, 449, 593 A.2d 733 (1991)); see also *Hisenaj v. Kuehner*, 194 N.J. 6, 17, 942 A.2d 769 (2008). In general, proponents can prove the reliability of scientific evidence by offering "(1) the testimony of knowledgeable experts; (2) authoritative scientific literature; [and] (3) persuasive judicial decisions which acknowledge such general acceptance of expert testimony." *Rubanick, supra*, 125 N.J. at 432, 593 A.2d 733 (internal citation and quotation marks omitted); see *Moore, supra*, 188 N.J. at 206, 902 A.2d 1212. We also look for general acceptance of scientific evidence within the relevant scientific community. *Chun, supra*, 194 N.J. at 91, 943 A.2d 114 (citing *State v. Harvey*, 151 N.J. 117, 169-70, 699 A.2d 596 (1997) (citing *Frye v. United States*, 293 F. 1013, 1014 (D.C.Cir.1923) (remaining citations omitted))).

**A. System Variables**

We begin with variables within the State's control.

**1. Blind Administration**

An identification may be unreliable if the lineup procedure is not administered in double-blind or blind fashion. Double-blind administrators do not know who the actual suspect is. Blind administrators are aware of that information but shield themselves from knowing where the suspect is located in the lineup or photo array.

Dr. Wells testified that double-blind lineup administration is "the single most important characteristic that should apply to eyewitness identification" procedures. Its purpose is to prevent
an administrator from intentionally or unintentionally influencing a witness' identification decision.

Research has shown that lineup administrators familiar with the suspect may leak that information "by consciously or unconsciously communicating to witnesses which lineup member is the suspect." See Sarah M. Greathouse & Margaret Bull Kovera, Instruction Bias and Lineup Presentation Moderate the Effects of Administrator Knowledge on Eyewitness Identification, 33 Law & Hum. Behav. 70, 71 (2009). Psychologists refer to that phenomenon as the "expectancy effect": "the tendency for experimenters to obtain results they expect ... because they have helped to shape that response." Robert Rosenthal & Donald B. Rubin, Interpersonal Expectancy Effects: The First 345 Studies, 3 Behav. & Brain Sci. 377, 377 (1978). In a seminal meta-analysis of 345 studies across eight broad categories of behavioral research, researchers found that "[t]he overall probability that there is no such thing as interpersonal expectancy effects is near zero." Ibid.

Even seemingly innocuous words and subtle cues—pauses, gestures, hesitations, or smiles—can influence a witness' behavior. Ryann M. Haw & Ronald P. Fisher, Effects of Administrator-Witness Contact on Eyewitness Identification Accuracy, 89 J. Applied Psychol. 1106, 1107 (2004); see also Steven E. Clark et al., Lineup Administrator Influences on Eyewitness Identification Decisions, 15 J. Experimental Psychol.: Applied 63, 66-73 (2009). Yet the witness is often unaware that any [27 A.3d 897] cues have been given. See Clark et al., supra, at 72.

The consequences are clear: a non-blind lineup procedure can affect the reliability of a lineup because even the best-intentioned, non-blind administrator can act in a way that inadvertently sways an eyewitness trying to identify a suspect. An ideal lineup administrator, therefore, is someone who is not investigating the particular case and does not know who the suspect is.

The State understandably notes that police departments, no matter their size, have limited resources, and those limits can make it impractical to administer lineups double-blind in all cases. An alternative technique, which Dr. Wells referred to as the "envelope method," helps address that challenge. It relies on single-blind administration: an officer who knows the suspect's identity places single lineup photographs into different envelopes, shuffles them, and presents them to the witness. The officer/administrator then refrains from looking at the envelopes or pictures while the witness makes an identification. This "blinding" technique is cost-effective and can be used when resource constraints make it impractical to perform double-blind administration.

We find that the failure to perform blind lineup procedures can increase the likelihood of misidentification.

2. Pre-identification Instructions

Identification procedures should begin with instructions to the witness that the suspect may or may not be in the lineup or array and that the witness should not feel compelled to make an identification. There is a broad consensus for that conclusion. The Attorney General Guidelines currently include the instruction; the Special Master considers it "uncontroversial"; and the State
agrees that "[w]itness instructions are regarded as one of the most useful techniques for enhancing the reliability of identifications" (quoting the Special Master).

Pre-lineup instructions help reduce the relative judgment phenomenon described in section III. Without an appropriate warning, witnesses may misidentify innocent suspects who look more like the perpetrator than other lineup members.


The failure to give proper pre-lineup instructions can increase the risk of misidentification.

Page 251

3. Lineup Construction

The way that a live or photo lineup is constructed can also affect the reliability of an identification. Properly constructed lineups test a witness' memory and decrease the chance that a witness is simply guessing.

A number of features affect the construction of a fair lineup. First, the Special Master found that "mistaken identifications [27 A.3d 898] are more likely to occur when the suspect stands out from other members of a live or photo lineup." See Roy S. Malpass et al., *Lineup Construction and Lineup Fairness*, in 2 *The Handbook of Eyewitness Psychology: Memory for People*, at 155, 156 (R.C.L. Lindsay et al. eds., 2007). As a result, a suspect should be included in a lineup comprised of look-alikes. The reason is simple: an array of look-alikes forces witnesses to examine their memory. In addition, a biased lineup may inflate a witness' confidence in the identification because the selection process seemed easy. See David F. Ross et al., *When Accurate and Inaccurate Eyewitnesses Look the Same: A Limitation of the 'Pop-Out' Effect and the 10-to 12-Second Rule*, 21 Applied Cognitive Psychol. 677, 687 (2007); Gary L. Wells & Amy L. Bradfield, *Measuring the Goodness of Lineups: Parameter Estimation, Question Effects, and Limits to the Mock Witness Paradigm*, 13 Applied Cognitive Psychol. S27, S30 (1999).

Second, lineups should include a minimum number of fillers. The greater the number of choices, the more likely the procedure will serve as a reliable test of the witness' ability to distinguish the culprit from an innocent person. As Dr. Wells testified, no magic number exists, but there appears to be general agreement that a minimum of five fillers should be used. See Nat'l Inst. of Justice, U.S. Dept of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* 29 (1999); Attorney General Guidelines, *supra*, at 2.

Third, based on the same reasoning, lineups should not feature more than one suspect. As
the Special Master found, "if multiple suspects are in the lineup, the reliability of a positive identification is difficult to assess, for the possibility of 'lucky' guesses is magnified."

The record is unclear as to whether the use of fillers that match a witness' pre-lineup description is more reliable than fillers that resemble an actual suspect (to the extent there is a difference between the two). Compare Steven E. Clark & Jennifer L. Tunnicliff, Selecting Lineup Foils in Eyewitness Identification Experiments: Experimental Control and Real-World Simulation, 25 Law & Hum. Behav. 199, 212 (2001), and Gary L. Wells et al., The Selection of Distractors for Eyewitness Lineups, 78 J. Applied Psychol. 835, 842 (1993), with Stephen Darling et al., Selection of Lineup Foils in Operational Contexts, 22 Applied Cognitive Psychol. 159, 165-67 (2008). Further research may help clarify this issue.

We note that the Attorney General Guidelines require that fillers "generally fit the witness' description" and that "[w]hen there is a limited or 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." Attorney General Guidelines, supra, at 2-3; see also R.C.L. Lindsay et al., Default Values in Eyewitness Descriptions, 18 Law & Hum. Behav. 527, 528 (1994) ("Innocent suspects may be at risk when the witness provides a limited or vague description of the criminal and the lineup foils, although selected to match the description, are noticeably different from the suspect in appearance.").

Of course, all lineup procedures must be recorded and preserved in accordance with the holding in Delgado, supra, 188 N.J. at 63, 902 A.2d 888, to ensure that parties, courts, and juries can later assess the reliability of the identification.

We find that courts should consider whether a lineup is poorly constructed when evaluating the admissibility of an identification. When appropriate, jurors should be told that poorly constructed or biased lineups can affect the reliability of an identification and enhance a witness' confidence.

4. Avoiding Feedback and Recording Confidence

Information received by witnesses both before and after an identification can affect their memory. The earlier discussion of Dr. Loftus' study—in which she asked students how fast a car was going when it passed a non-existent barn—revealed how memories can be altered by pre-identification remarks. Loftus, Leading Questions and the Eyewitness Report, supra, at 566.

Confirmatory or post-identification feedback presents the same risks. It occurs when police signal to eyewitnesses that they correctly identified the suspect. That confirmation can reduce doubt and engender a false sense of confidence in a witness. Feedback can also falsely enhance a witness' recollection of the quality of his or her view of an event.

There is substantial research about confirmatory feedback. A meta-analysis of twenty studies encompassing 2,400 identifications found that witnesses who received feedback "expressed significantly more ... confidence in their decision compared with participants who received no feedback." Douglass & Steblay, supra, at 863. The analysis also revealed that "those
who receive a simple post-identification confirmation regarding the accuracy of their identification 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.” Id. at 864-65; see also Gary L. Wells & Amy L. Bradfield, "Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, 83 J. Applied Psychol. 360 (1998).

The effects of confirmatory feedback may be the same even when feedback occurs forty-eight hours after an identification. Gary L. Wells et al., Distorted Retrospective Eyewitness Reports as Functions of Feedback and Delay, 9 J. Experimental Psychol.: Applied 42, 49-50 (2003). And those effects can be lasting. See Jeffrey S. Neuschatz et al., The Effects of Post-Identification Feedback and Age on Retrospective Eyewitness Memory, 19 Applied Cognitive Psychol. 435, 449 (2005).

The Court concluded in Romero, supra, "that a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification." 191 N.J. at 76, 922 A.2d 693. The hearing confirmed that observation. The Special Master found that eyewitness confidence is generally an unreliable indicator of accuracy, but he acknowledged research showing that highly confident witnesses can make accurate identifications 90% of the time. The State places great weight on that research. See, e.g., Neil Brewer & Gary L. Wells, The Confidence-Accuracy Relationship in Eyewitness Identification: Effects of Lineup Instructions, Foil Similarity, and Target-Absent Base Rates, 12 J. Experimental Psychol.: Applied 11, 15 (2006); Siegfried Ludwig Sporer et al., Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies, 118 Psychol. Bull. 315, 315-19, 322 (1995); see also Gary L. Wells & Elizabeth A. Olson, Eyewitness Testimony, 54 Ann. Rev. Psychol. 277, 283-84 (2003) (noting complexity of issue).[7] [27 A.3d 900] We glean certain principles from this information. Confirmatory feedback can distort memory. As a result, to the extent confidence may be relevant in certain circumstances, it must be recorded in the witness’ own words before any possible feedback. To avoid possible distortion, law enforcement officers should make a full record—written or otherwise—of the witness’ statement of confidence once an identification is made. Even then, feedback about the individual selected must be avoided.

We rely on our supervisory powers under Article VI, Section 2, Paragraph 3 of the State Constitution in requiring that practice. See Delgado, supra, 188 N.J. at 63, 902 A.2d 888 (requiring written record of identification procedure).

To be sure, concerns about feedback are not limited to law enforcement officers. As discussed below, confirmatory feedback from non-State actors can also affect the reliability of identifications and witness confidence. See infra at section VI.B.9. See, e.g., C.A. Elizabeth Luus & Gary L. Wells, The Malleability of Eyewitness Confidence: Co-Witness and Perseverence Effects, 79 J. Applied Psychol. 714, 717-18 (1994).

Our focus at this point, though, is on system variables. To reiterate, we find that feedback
affects the reliability of an identification in that it can distort memory, create a false sense of confidence, and alter a witness' report of how he or she viewed an event.

5. Multiple viewings

Viewing a suspect more than once during an investigation can affect the reliability of the later identification. The problem, as the Special Master found, is that successive views of the same person can make it difficult to know whether the later identification stems from a memory of the original event or a memory of the earlier identification procedure.

It is typical for eyewitnesses to look through mugshot books in search of a suspect. Investigations may also involve multiple identification procedures. Based on the record, there is no impact on the reliability of the second identification procedure "when a picture of the suspect was not present in photographs examined earlier." Gunter Koehnken et al., Forensic Applications of Line-Up Research, in Psychological Issues in Eyewitness Identification 205, 218 (Siegfried L. Sporer et al. eds., 1996).

Multiple identification procedures that involve more than one viewing of the same suspect, though, can create a risk of "mugshot exposure" and "mugshot commitment." Mugshot exposure is when a witness initially views a set of photos and makes no identification, but then selects someone—who had been depicted in the earlier photos—at a later identification procedure. A meta-analysis of multiple studies revealed that although 15% of witnesses mistakenly identified an innocent person viewed in a lineup for the first time, that percentage increased to 37% if the witness had seen the innocent person in a prior mugshot. Kenneth A. Deffenbacher et al., Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference, 30 Law & Hum. Behav. 287, 299 (2006).

Mugshot commitment occurs when a witness identifies a photo that is then included in a later lineup procedure. Studies [27 A.3d 901] have shown that once witnesses identify an innocent person from a mugshot, "a significant number" then "reaffirm[] their false identification" in a later lineup—even if the actual target is present. See Koehnken et al., supra, at 219.

Thus, both mugshot exposure and mugshot commitment can affect the reliability of the witness' ultimate identification and create a greater risk of misidentification. As a result, law enforcement officials should attempt to shield witnesses from viewing suspects or fillers more than once.

6. Simultaneous v. Sequential Lineups

Lineups are presented either simultaneously or sequentially. Traditional, simultaneous lineups present all suspects at the same time, allowing for side-by-side comparisons. In sequential lineups, eyewitnesses view suspects one at a time.

Defendant and amici submit that sequential lineups are preferable because they lead to fewer misidentifications when the culprit is not in the lineup. The Attorney General Guidelines recommend that sequential lineups be utilized when possible, but the State also points to recent studies that have called that preference into doubt. Because the science supporting one procedure over the other remains inconclusive, we are unable to find a preference for either.
The strongest support for sequential lineups comes from a 2001 meta-analysis comparing data from more than 4,000 lineup experiments. See Nancy Stebly et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 Law & Hum. Behav. 459 (2001). Across studies, simultaneous procedures produced more of both accurate and inaccurate identifications, and sequential procedures produced fewer misidentifications in target-absent lineups. *Id.* at 466, 468-69. In other words, witnesses were more likely to make selections—accurate and inaccurate—with simultaneous lineups, and they made fewer, but more accurate, identifications with sequential, target-absent lineups.

Some experts believe that the theory of relative judgment helps explain the results; with sequential lineups, witnesses cannot compare photos and choose the lineup member that best matches their memory. *See id.* at 469. Those researchers note that "[t]o the extent any difference ... is due to correct guessing, there is no reason to recommend simultaneous lineups." *Ibid.*

Other experts, including Dr. Malpass, are unconvinced. They believe that researchers have not yet clearly shown that sequential presentation is the "active ingredient" in reducing misidentifications. Roy S. Malpass et al., *Public Policy and Sequential Lineups*, 14 Legal & Criminological Psychol. 1, 5-6 (2009); Dawn McQuiston-Surrett et al., *Sequential v. Simultaneous Lineups: A Review of Methods, Data, and Theory*, 12 Psychol. Pub. Pol'y & L. 137, 163 (2006) ("We believe that current explanations for why sequential presentation should reduce both mistaken identifications and correct identifications are underdeveloped."); *see also* Scott D. Gronlund et al., *Robustness of the Sequential Lineup Advantage*, 15 J. Experimental Psychol.: Applied 140, 149 (2009) ("Based on our study [of more than 2,000 participants], the sequential advantage does not appear to be a robust finding.").

As research in this field continues to develop, a clearer answer may emerge. For now, there is insufficient, authoritative evidence accepted by scientific experts for a court to make a finding in favor of either procedure. *See Rubanick, supra*, 125 N.J. at 432, 449, 593 A.2d 733. As a result, we do not limit either one at this time.

7. Composites

When a suspect is unknown, eyewitnesses sometimes work with artists who draw composite sketches. Composites can also be prepared with the aid of computer software or non-computerized "tool kits" that contain picture libraries of facial features. Gary L. Wells & Lisa E. Hasel, *Facial Composite Production by Eyewitnesses*, 16 Current Directions Psychol. Sci. 6, 6-7 (2007).

As the Special Master observed, based on the record, "composites produce poor results." In one study, college freshman used computer software to generate composites of students and teachers from their high schools. Margaret Bull Kovera et al., *Identification of Computer-Generated Facial Composites*, 82 J. Applied Psychol. 235, 239 (1997). Different students who had attended the same schools were only able to name 3 of the 500 people depicted in the composites. *Id.* at
241. *But see* Wells & Hasel, *supra*, at 6 (acknowledging rarity of studies comparing sketch artists, whose skills vary widely, to computer systems).

Researchers attribute those results to a mismatch between how composites are made and how memory works. *See* Wells & Hasel, *supra*, at 9. Evidence suggests that people perceive and remember faces "holistically" and not "at the level of individual facial features." *Ibid.* Thus, creating a composite feature-by-feature may not comport with the holistic way that memories for faces "are generally processed, stored, and retrieved." *See ibid.*

It is not clear, though, what effect the process of making a composite has on a witness' memory—that is, whether it contaminates or confuses a witness' memory of what he or she actually saw. *Compare* Gary L. Wells et al., *Building Face Composites Can Harm Lineup Identification Performance*, 11 J. Experimental Psychol.: Applied 147, 148, 154 (2005) (finding "that building a composite significantly lowered accuracy for identifying the original face"), *with* Michael A. Mauldin & Kenneth R. Laughery, *Composite Production Effects on Subsequent Facial Recognition*, 66 J. Applied Psychol. 351, 355 (1981) (finding "[w]hen subjects produce a[ ] ... composite ... they are more likely to recognize the target face in a subsequent recognition task").

As Dr. Wells acknowledged, "[t]he sparse, underpowered, and inconsistent literature on the effects of composite production on later recognition stands in contrast to the import of the question." Wells et al., *Building Face Composites Can Harm Lineup Identification Performance*, *supra*, at 148. We also note that researchers "are not yet prepared to argue that the use of composites should be significantly curtailed in criminal investigations." *Id.* at 155.

Without more accepted research, courts cannot make a finding on the effect the process of making a composite has on a witness. *See Rubanick, supra*, 125 N.J. at 432, 449, 593 A.2d 733. We thus do not limit the use of composites in investigations.

8. Showups

Showups are essentially single-person lineups: a single suspect is presented to a witness to make an identification. Showups often occur at the scene of a crime [27 A.3d 903] soon after its commission. The Special Master noted that they are a "useful—and necessary—technique when used in appropriate circumstances," but they carry their "own risks of misidentifications."

By their nature, showups are suggestive and cannot be performed blind or double-blind. Nonetheless, as the Special Master found, "the risk of misidentification is not heightened if a showup is conducted immediately after the witnessed event, ideally within two hours" because "the benefits of a fresh memory seem to balance the risks of undue suggestion."

We have previously found showups to be "inherently suggestive," *see Herrera, supra*, 187 N.J. at 504, 902 A.2d 177, and other states have limited the admissibility of showup identifications. In Wisconsin, evidence of a showup is inadmissible unless, based on the totality of circumstances, the showup was necessary.

Page 260


Studies that have evaluated showup identifications illustrate that the timeframe for their reliability appears relatively small. A Canadian field experiment that analyzed results from more than 500 identifications revealed that photo showups performed within minutes of an encounter were just as accurate as lineups. A. Daniel Yarmey et al., Accuracy of Eyewitness Identifications in Showups and Lineups, 20 Law & Hum. Behav. 459, 464 (1996). Two hours after the encounter, though, 58% of witnesses failed to reject an "innocent suspect" in a photo showup, as compared to 14% in target-absent photo lineups. Ibid.

Researchers have also found that "false identifications are more numerous for showups [compared to lineups] when an innocent suspect resembles the perpetrator." See Nancy Steblay et al., Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison, 27 Law & Hum. Behav. 523, 523 (2003) (conducting meta-analysis). In addition, research reveals that showups increase the risk that witnesses will base identifications more on similar distinctive clothing than on similar facial features. See Jennifer E. Dysart et al., Show-ups: The Critical Issue of Clothing Bias, 20 Applied Cognitive Psychol. 1009, 1019 (2006); see also Yarmey et al., supra, at 461, 470 (showing greater likelihood of misidentification when culprit and innocent suspect looked alike and wore same clothing).

Experts believe the main problem with showups is that—compared to lineups—they fail to provide a safeguard against witnesses with poor memories or those inclined to guess, because every mistaken identification in a showup will point to the suspect. In essence, showups make it easier to make mistakes.

Thus, the record casts doubt on the reliability of showups conducted more than two hours after an event, which present a heightened risk of misidentification. As with lineups, showup administrators should instruct witnesses that the person they are about to view may or may not be the culprit and that they should not feel compelled to make an identification. That said, lineups are a preferred identification procedure because we continue to believe that showups, while sometimes necessary, are inherently suggestive. See Herrera, supra, 187 N.J. at 504, 902 A.2d 177.

B. Estimator variables

Unlike system variables, estimator variables are factors beyond the control of the criminal justice system. See Wells, Applied Eyewitness-Testimony Research: System Variables and Estimator Variables, supra, at 1546. They can include factors related to the incident, the witness, or the perpetrator. Estimator variables are equally capable of affecting an eyewitness' ability to perceive and remember an event. Although the factors can be isolated and tested in lab experiments, they occur at random in the real world.

1. Stress

Even under the best viewing conditions, high levels of stress can diminish an eyewitness' ability to recall and make an accurate identification. The Special Master found that "while moderate levels of stress improve cognitive processing and might improve accuracy, an
eyewitness under high stress is less likely to make a reliable identification of the perpetrator." The State agrees that high levels of stress are more likely than low levels to impair an identification.

Scientific research affirms that conclusion. A meta-analysis of sixty-three studies showed "considerable support for the hypothesis that high levels of stress negatively impact both accuracy of eyewitness identification as well as accuracy of recall of crime-related details." See Deffenbacher et al., A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory, supra, at 687, 699.

One field experiment tested the impact of stress on the memories of military personnel. See Charles A. Morgan III et al., Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress, 27 Int'l J.L. & Psychiatry 265 (2004). More than 500 active-duty military personnel, with an average of four years in the service, experienced two types of interrogation after twelve hours of confinement in survival school training: "a high-stress interrogation (with real physical confrontation) and a low-stress interrogation (without physical confrontation)." Id. at 267-68. Both interrogations lasted about 40 minutes. Id. at 268. Twenty-four hours later, the subjects were shown either a live lineup or a sequential or simultaneous photo array, and asked to identify their interrogators. Id. at 269-70.

Across the procedures, subjects performed more poorly when they identified their high-stress interrogators. Id. at 272. For example, when viewing live line-ups, 30% of subjects accurately identified high-stress interrogators, but 62% did so for low-stress interrogators. Ibid. The study's authors concluded that

[Contrary to the popular conception that most people would never forget the face of a clearly seen individual who had physically confronted them and threatened them for more than 30 minutes], ... these data provide robust evidence that eyewitness memory for persons encountered during events that are personally relevant, highly stressful, and realistic in nature may be subject to substantial error. [Id. at 274.]

Although the study was conducted under a rather different setting, all three experts at the hearing considered its findings in the context of eyewitness evidence.

We find that high levels of stress are likely to affect the reliability of eyewitness identifications. There is no precise measure for what constitutes "high" stress, which must be assessed based on the facts presented in individual cases.

2. Weapon Focus

When a visible weapon is used during a crime, it can distract a witness and draw [27 A.3d 905] his or her attention away from the culprit. "Weapon focus" can thus impair a witness' ability to make a reliable identification and describe what the culprit looks like if the crime is of short duration.

A meta-analysis of nineteen weapon-focus studies that involved more than 2,000 identifications found a small but significant effect: an average decrease in accuracy of about 10% when a weapon was present. Nancy M. Steblay, A Meta-Analytic Review of the Weapon Focus Effect, 16 Law & Hum. Behav. 413, 415-17 (1992). In a separate study, half of the witnesses
observed a person holding a syringe in a way that was personally threatening to the witness; the other half saw the same person holding a pen. Anne Maass & Gunther Kohnken, *Eyewitness Identification: Simulating the "Weapon Effect"*, 13 Law & Hum. Behav. 397, 401-02 (1989). Sixty-four percent of witnesses from the first group misidentified a filler from a target-absent lineup, compared to 33% from the second group. See id. at 405; see also Kerri L. Pickel, *Remembering and Identifying Menacing Perpetrators: Exposure to Violence and the Weapon Focus Effect*, in 2 *The Handbook of Eyewitness Psychology: Memory for People*, supra, at 339, 353-54 (noting that "unusual items [like weapons] attract attention").

Weapon focus can also affect a witness' ability to describe a perpetrator. A meta-analysis of ten studies showed that "weapon-absent condition[s] generated significantly more accurate descriptions of the perpetrator than did the weapon-present condition." Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, supra, at 417.

The duration of the crime is also an important consideration. Dr. Steblay concluded that weapon-focus studies speak to real-world "situations in which a witness observes a threatening object ... in an event of short duration." Id. at 421. As Dr. Wells testified, the longer the duration, the more time the witness has to adapt to the presence of a weapon and focus on other details.

Thus, when the interaction is brief, the presence of a visible weapon can affect the reliability of an identification and the accuracy of a witness' description of the perpetrator.

**Page 264**

**3. Duration**

Not surprisingly, the amount of time an eyewitness has to observe an event may affect the reliability of an identification. The Special Master found that "while there is no minimum time required to make an accurate identification, a brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure." See Colin G. Tredoux et al., *Eyewitness Identification*, in 1 *Encyclopedia of Applied Psychology* 875, 877 (Charles Spielberger ed., 2004).

There is no measure to determine exactly how long a view is needed to be able to make a reliable identification. Dr. Malpass testified that very brief but good views can produce accurate identifications, and Dr. Wells suggested that the quality of a witness' memory may have as much to do with the absence of other distractions as with duration.

Whatever the threshold, studies have shown, and the Special Master found, "that witnesses consistently tend to overestimate short durations, particularly where much was going on or the event was particularly stressful." See, e.g., Elizabeth F. Loftus et al., *Time Went by So Slowly: Overestimation of Event Duration by Males and Females*, 1 *Applied Cognitive Psychol.* 3, 10 (1987).

**4. Distance and Lighting**

It is obvious that a person is easier to recognize when close by, and that clarity decreases with distance. We also know that poor lighting makes it harder to see well. Thus, greater distance between a witness and a perpetrator and poor lighting conditions can diminish the reliability of an identification.

Scientists have refined those common-sense notions with further study. See, e.g., R.C.L.
Lindsay et al., *How Variations in Distance Affect Eyewitness Reports and Identification Accuracy*, 32 *Law & Hum. Behav.* 526 (2008). Research has also shown that people have difficulty estimating distances. See, e.g., *id.* at 533.

**Page 265**

5. Witness Characteristics

Characteristics like a witness’ age and level of intoxication can affect the reliability of an identification.

The Special Master found that "the effects of alcohol on identification accuracy show that high levels of alcohol promote false identifications" and that "low alcohol intake produces fewer misidentifications than high alcohol intake." See also Jennifer E. Dysart et al., *The Intoxicated Witness: Effects of Alcohol on Identification Accuracy from Showups*, 87 *J. Applied Psychol.* 170, 174 (2002). That finding is undisputed.

The Special Master also found that "[a] witness's age ... bears on the reliability of an identification." A meta-analysis has shown that children between the ages of nine and thirteen who view target-absent lineups are more likely to make incorrect identifications than adults. See Joanna D. Pozzulo & R.C.L. Lindsay, *Identification Accuracy of Children Versus Adults: A Meta-Analysis*, 22 *Law & Hum. Behav.* 549, 563, 565 (1998). Showups in particular "are significantly more suggestive or leading with children." See Jennifer E. Dysart & R.C.L. Lindsay, *Show-up Identifications: Suggestive Technique or Reliable Method?*, in 2 *The Handbook of Eyewitness Psychology: Memory for People* 137, 147 (2007).

Some research also shows that witness accuracy declines with age. Across twelve studies, young witnesses—ranging from nineteen to twenty-four years old—were more accurate when viewing target-absent lineups than older witnesses—ranging from sixty-eight to seventy-four years old. See James C. Bartlett & Amina Memon, *Eyewitness Memory in Young and Older Adults*, in 2 *The Handbook of Eyewitness Psychology: Memory for People*, supra, at 309, 317-19. On average, 53% of young witnesses recognized that the target was not in the lineup, compared to only 31% of older witnesses. *Id.* at 318.

But the target's age may matter as well. As Dr. Penrod testified, "there's an own-age bias," meaning that witnesses are

"better at recognizing people of [their] own age than ... people of other ages." That effect may appear in studies that use college-age students as targets, for example. See *id.* at 321-23 (concluding that "young adults show better memory for young faces ... than older faces, whereas seniors show either no effect or the opposite effect") ; see also Melissa Boyce et al., *Belief of Eyewitness Identification Evidence*, in 2 *The Handbook of Eyewitness Psychology: Memory for People*, supra, at 501, 512 ("Perhaps people should only use age as a factor in deciding whether to believe an eyewitness if there is a large age difference between the witness and the suspect.")

Thus, the data about memory and older witnesses is more nuanced, according to the scientific literature. In addition, there was little other testimony at the hearing on the topic. Based on the record before [27 A.3d 907] us, we cannot conclude that a standard jury instruction
questioning the reliability of identifications by all older eyewitnesses would be appropriate for use in all cases.

6. Characteristics of Perpetrator

Disguises and changes in facial features can affect a witness' ability to remember and identify a perpetrator. The Special Master found that "[d]isguises (e.g., hats, sunglasses, masks) are confounding to witnesses and reduce the accuracy of identifications." According to the State, those findings are "so well-known that criminals employ them in their work."

Disguises as simple as hats have been shown to reduce identification accuracy. See Brian L. Cutler et al., Improving the Reliability of Eyewitness Identification: Putting Context into Context, 72 J. Applied Psychol. 629, 635 (1987).

If facial features are altered between the time of the event and the identification procedure—if, for example, the culprit grows a beard—the accuracy of an identification may decrease. See K.E. Patterson & A.D. Baddeley, When Face Recognition Fails, 3 J. Experimental Psychol.: Hum. Learning & Memory 406, 410, 414 (1977).

7. Memory Decay

Memories fade with time. And as the Special Master observed, memory decay "is irreversible"; memories never improve. As a result, delays between the commission of a crime and the time an identification is made can affect reliability. That basic principle is not in dispute.

A meta-analysis of fifty-three "facial memory studies" confirmed "that memory strength will be weaker at longer retention intervals [the amount of time that passes] than at briefer ones." 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). In other words, the more time that passes, the greater the possibility that a witness' memory of a perpetrator will weaken. See Krafka & Penrod, supra, at 65 (finding substantial increase in misidentification rate in target-absent arrays from two to twenty-four hours after event). However, researchers cannot pinpoint precisely when a person's recall becomes unreliable.

8. Race-bias

"A cross-racial identification occurs when an eyewitness is asked to identify a person of another race." Cromedy, supra, 158 N.J. at 120, 727 A.2d 457. In Cromedy, after citing multiple social science sources, this Court recognized that a witness may have more difficulty making a cross-racial identification. Id. at 120-23, 131, 727 A.2d 457.


Cross-racial recognition continues to be a factor that can affect the reliability of an identification. See also infra at section X.
9. Private Actors

The current Model Jury Charge states that judges should refer to "factors relating to suggestiveness, that are supported by the evidence," including "whether the witness was 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." *Model Jury Charge (Criminal), " Identification: [27 A.3d 908]* In-Court and Out-of-Court Identifications" (2007). The charge was added after this Court in *Herrera* invited the Model Jury Charge Committee to consider including express references to suggestibility. *Herrera, supra*, 187 N.J. at 509-10, 902 A.2d 177 (citing *State v. Long*, 721 P.2d 483 (Utah 1980)). In response, the Committee relied heavily on proposed charging language in *Long*.

The Model Jury Charge properly reflects that private— that is, non-State— actors can affect the reliability of eyewitness identifications, just as the police can. The record on remand supports that conclusion. Studies show that witness memories can be altered when co-eyewitnesses share information about what they observed. Those studies bolster the broader finding "that post-identification feedback does not have to be presented by the experimenter or an authoritative figure (e.g. police officer) in order to affect a witness' subsequent crime-related judgments." See Elin M. Skagerberg, *Co-Witness Feedback in Line-ups*, 21 *Applied Cognitive Psychol.* 489, 494 (2007). Feedback and suggestiveness can come from co-witnesses and others not connected to the State.

Co-witness feedback may cause a person to form a false memory of details that he or she never actually observed. In an early study, 200 college students "viewed a film clip, read and evaluated a description of that film ostensibly given by another witness, and wrote out their own description based on their memory of the film." Elizabeth F. Loftus & Edith Greene, *Warning: Even Memory for Faces May Be Contagious*, 4 *Law & Hum. Behav.* 323, 328 (1980). The short film depicted a man who parked his car, briefly entered a small grocery store, and upon returning, "got into an argument with a young man who looked as if he were trying to break into the car." *Ibid.*

Some of the students were shown accurate descriptions of the event, and the rest read descriptions that contained false details. *See ibid.* Some students, for example, observed a young man with straight hair but then read testimony that described the hair as wavy. *Id.* at 328-29. "This procedure was intended to simulate the situation where a witness to an event is subsequently exposed, either through conversation or reading a newspaper article, to a version given by another witness." *Id.* at 324. Results showed that one-third (34%) of students included a false detail—like wavy hair—when they later described the target. *Id.* at 329. By contrast, only 5% of the students who read a completely factual narrative made similar mistakes. *Ibid.* In a related experiment, "[i]f the other witness referred to a misleading detail [a nonexistent mustache], [69]% of the subjects later ‘recognized’ an individual with that feature. Control subjects did so far less often (13%)." *Id.* at 323, 330.

More recent studies have yielded comparable findings. *See* 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) (noting that all participants "were susceptible to misinformation from their co-witness and, as a consequence, produced less accurate recall accounts than participants who did not interact with another witness" ); 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, 1083 (2006) ("Results suggest that co-witness information had a particularly strong influence on eyewitness memory, whether encountered through co-witness discussion or indirectly through a third party."); John S. Shaw, III et al., Co-Witness Information Can Have Immediate Effects on Eyewitness Memory Reports, 21 Law. & Hum. Behav. 503, 503, 516 (1997) ("[W]hen participants received incorrect information about a co-witness's response, they were significantly more likely to give that incorrect response than if they received no co-witness information."); Rachel Zajac & Nicola Henderson, Don’t It Make My Brown Eyes Blue: Co-Witness Misinformation About a Target's Appearance Can Impair Target-Absent Lineup Performance, 17 Memory 266, 275 (2009) ("[P]articipants who were [wrongly] told by the [co-witness] that the accomplice had blue eyes were significantly more likely than control participants to provide this information when asked to give a verbal description.").

One of the experiments evaluated the effect of the nature of the witnesses' relationships with one another and compared co-witnesses who were strangers, friends, and couples. Hope et al., supra, at 478. The study found that "witnesses who were previously acquainted with their co-witness (as a friend or romantic partner) were significantly more likely to incorporate information obtained solely from their co-witness into their own accounts." Id. at 481.

Private actors can also affect witness confidence. See Luus & Wells, supra, at 714. In one study, after witnesses made identifications—all of which were incorrect—some witnesses were either told that their co-witness made the same or a different identification. Id. at 717. Confidence rose when witnesses were told that their co-witness agreed with them, and fell when co-witnesses disagreed. See id. at 717-18; see also Skagerberg, supra, at 494-95 (showing similar results).

In addition, all three experts, Drs. Malpass, Penrod, and Wells, testified at the remand hearing that co-witnesses can influence memory and recall.

To uncover relevant information about possible feedback from co-witnesses and other sources, we direct that police officers ask witnesses, as part of the identification process, questions designed to elicit (a) whether the witness has spoken with anyone about the identification and, if so, (b) what was discussed. That information should be recorded and disclosed to defendants. We again rely on our supervisory powers under Article VI, Section 2, Paragraph 3 of the State Constitution in requiring those steps. See Delgado, supra, 188 N.J. at 63, 902 A.2d 888.

Based on the record, we find that non-State actors like co-witnesses and other sources of information can affect the independent nature and reliability of identification evidence and inflate
witness confidence— in the same way that law enforcement feedback can. As a result, law
enforcement officers should instruct witnesses not to discuss the identification process with fellow
witnesses or obtain information from other sources.

We address this issue further in Chen, supra.

10. Speed of Identification

The Special Master also noted that the speed with which a witness makes an identification
can be a reliable indicator of accuracy. The State agrees. (Although the factor is not a pure system
or estimator variable, we include it at this point for convenience.)

Laboratory studies offer mixed results. Compare Steven M. Smith et al., Postdictors of
Eyewitness Errors: Can False Identifications Be Diagnosed?, 85 J. Applied Psychol. 542, 542
(2000) (noting "[d]ecision time and lineup fairness were the best postdictors of accuracy"), and
David Dunning & Scott Perretta, Automaticity and Eyewitness Accuracy:

[27 A.3d 910] A 10- to 12-Second Rule for Distinguishing Accurate from Inaccurate Positive
Identifications, 87 J. Applied Psychol. 951, 959 (2002) (finding across four studies that
identifications were nearly 90% accurate when witnesses identified targets within ten to twelve
seconds of seeing a lineup), with Ross et al., supra, at 688 (noting that rapid identifications were
only 59%, not 90%, accurate and finding twenty-five seconds to be "time boundary" between
accurate and inaccurate identifications).

Because of the lack of consensus in the scientific community, we make no finding on this
issue. See Rubanick, supra, 125 N.J. at 432, 449, 593 A.2d 733. To the extent speed is relevant in
any

Page 272
event, researchers also caution that it may only be considered if the lineup is fair and unbiased.
See Ross et al., supra, at 688-89.

C. Juror Understanding

Some of the findings described above are intuitive. Everyone knows, for instance, that bad
lighting conditions make it more difficult to perceive the details of a person's face. Some findings
are less obvious. Although many may believe that witnesses to a highly stressful, threatening
event will "never forget a face" because of their intense focus at the time, the research suggests
that is not necessarily so. See supra at section VI.B.1.

Using survey questionnaires and mock-jury studies, experts have attempted to discern what
lay people understand, and what information about perception and memory are beyond the ken of
the average juror. Based on those studies, the Special Master found "that laypersons are largely
unfamiliar" with scientific findings and "often hold beliefs to the contrary." Defendant and amici
agree. The State does not. The State argues that the sources the Special Master cited are
unreliable, and that jurors generally understand how memory functions and how it can be
distorted.

The parties devote much attention to this issue. But the debate relates largely to the need for
enhanced jury instructions and the possible use of expert testimony. Left unanswered amidst
many objections is this question: if even only a small number of jurors do not appreciate an
important, relevant concept, why not help them understand it better with an appropriate jury
charge?

Survey questionnaires provide the most direct evidence of what jurors know about memory and eyewitness identifications. Researchers conducting the surveys ask jurors questions about memory and system and estimator variables. The results can then be compared to expert responses in separate surveys.

Survey studies have generated varied results. The Special Master relied on data from a 2006 survey (the "Benton Survey") that asked 111 jurors in Tennessee questions about eyewitness identification and memory. See Tanja Rapus Benton et al., *Eyewitness Memory Is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts*, 20 Applied Cognitive Psychol. 115, 118 (2006). Juror responses differed from expert responses on 87% of the issues. Id. at 119-21. Among other issues, only 41% of jurors agreed with the importance of pre-lineup instructions, and only 38% to 47% agreed with the effects of the accuracy-confidence relationship, weapon focus, and cross-race bias. Id. at 120. By comparison, about nine of ten experts agreed on the effects of all of those issues. Ibid.

The State disputes the Benton study for various reasons and instead highlights results from Canadian surveys conducted in 2009, which showed a substantially higher level of juror understanding. See J. Don Read & Sarah L. Desmarais, *Expert Psychology* [27 A.3d 911] *Testimony on Eyewitness Identification: A Matter of Common Sense?*, in *Expert Testimony on the Psychology of Eyewitness Identification*, at 115, 120-27. The majority of jury-eligible participants in those surveys agreed with experts on the importance of lineup instructions, the accuracy-confidence relationship, cross-race bias, and weapon focus. See id. at 121-22. Still, as the survey authors acknowledged, "substantial differences in knowledge and familiarity between experts and laypersons were readily apparent for 50% of the eyewitness topics." Id. at 127.

Mock-jury studies provide another method to try to discern what jurors know. The State argues that mock-jury research is unreliable because it is not possible to replicate the atmosphere of a criminal trial in a mock-trial setting. While true, that comment does not justify scuttling the studies entirely. Also, the growing use of mock trials by the private bar undercuts the strength of the assertion. See generally Martha Neil, *Practice Makes Perfect: Mock Trials Gain Ground as a Way to Get Inside Track in Real Trial*, 89 A.B.A.J. 34 (2003).

The Special Master did cite the studies. In one mock-jury experiment, researchers showed jurors different versions of a videotaped mock trial about an armed robbery of a liquor store. Page 274

Brian L. Cutler et al., *Juror Sensitivity to Eyewitness Identification Evidence*, 14 Law & Hum. Behav. 185, 186-87 (1990). To test how sensitive jurors were to the effect of weapon focus, some heard an eyewitness testify that the defendant pointed a gun at her during the robbery, while others heard that the gun was hidden in the robber's jacket. Id. at 188. Similarly, some jurors heard the eyewitness declare that she was 80% confident that she had correctly identified the robber, while others heard that she was 100% confident. Id. at 189 Researchers used similar
methods to test reactions to eight other system and estimator variables. See id. at 188-89.

The study revealed that mock-jurors "were insensitive to the effects of disguise, weapon presence, retention interval, suggestive lineup instructions, and procedures used for constructing and carrying out the lineup" but "gave disproportionate weight to the confidence of the witness." Id. at 190. Stated otherwise, eyewitness confidence "was the most powerful predictor of verdicts" regardless of other variables. Id. at 185. The authors thus concluded that jurors do "not evaluate eyewitness memory in a manner consistent with psychological theory and findings." See id. at 190.

Neither juror surveys nor mock-jury studies can offer definitive proof of what jurors know or believe about memory. But they reveal generally that people do not intuitively understand all of the relevant scientific findings. As a result, there is a need to promote greater juror understanding of those issues.

D. Consensus Among Experts

The Special Master found broad consensus within the scientific community on the relevant scientific issues. Primarily, he found support in a 2001 survey of sixty-four experts, mostly cognitive and social psychologists. See Saul M. Kassin et al., On the "General Acceptance" of Eyewitness Testimony Research: A New Survey of the Experts, 56 Am. Psychologist 405, 407 (2001) (the "Kassin Report"). Ninety-two percent of the participating experts had published articles or books on eyewitness identification, and many in the group had testified as expert witnesses in almost 1,000 court cases, collectively. Id. at 409.

Ninety percent or more of the experts found research on the following topics reliable: suggestive wording; lineup instruction [27 A.3d 912] bias; confidence malleability; mugshot bias; post-event information; child suggestivity; alcohol intoxication; and own-race bias. Id. at 412. Seventy to 87% found the following research reliable: weapon focus; the accuracy-confidence relationship; memory decay; exposure time; sequential presentation; showups; description-matched foils; child-witness accuracy; and lineup fairness. Ibid.

The State suggests that some of the experts surveyed in the Kassin Report had motives to overstate the science because they were also forensic consultants who have been paid for testifying at trials. See id. 414-15. As a result, the State discounts the results in the Report. The Report's authors recognized this potential for bias and looked for distinctions between answers provided by "forensic consultants" and the 44% of scientists who had never testified in court. Ibid. The analysis revealed "no significant difference" between the two groups. Id. at 415.

The studies and meta-analyses published in the ten years since the Kassin Report show a growing consensus in certain areas of eyewitness identification research. For example, only 60% of experts in 2001 found research on the relationship between stress and identification accuracy to be reliable. Id. at 412. At the remand hearing, all three experts testified that results from the military stress experiment, see Morgan III et al., supra, and other studies have reinforced views about the relationship between high stress and the reliability of identifications.

Among the experts who testified on remand, there was broad consensus regarding the
Special Master’s findings. The State’s expert, Dr. Malpass, agreed with nearly all of the conclusions offered by Drs. Wells and Penrod. As Dr. Malpass wrote in 2009, "there is general agreement about the scientific findings of the eyewitness community," as evidenced by meta-analytic reviews, primary texts, and surveys of scientific experts, and "[a] review of these areas suggests that it would be very difficult to sustain the position that many of the findings in research on eyewitness memory lack general agreement within the scientific community." Malpass et al., The Need for Expert Psychological Testimony on Eyewitness Identification, supra, at 15.

VII. Responses to Scientific Studies

Beyond the scientific community, law enforcement and reform agencies across the nation have taken note of the scientific findings. In turn, they have formed task forces and recommended or implemented new procedures to improve the reliability of eyewitness identifications. See, e.g., Ad Hoc Innocence Comm. to Ensure the Integrity of the Criminal Process, Am. Bar Ass’n, Achieving Justice: Freeing the Innocent, Convicting the Guilty (2006); Int’l Ass’n of Chiefs of Police, supra; Nat’l Inst. of Justice, U.S. Dep’t of Justice, Eyewitness Evidence: A Guide for Law Enforcement, supra.

New Jersey has been at the forefront of that effort. In 2001, under the leadership of then-Attorney General John J. Farmer, Jr., New Jersey became "the first state in the Nation to officially adopt the recommendations issued by the Department of Justice" and issue guidelines for preparing and conducting identification procedures. See Letter from Attorney General John J. Farmer, Jr., to All County Prosecutors et al., at 1 (Apr. 18, 2001) (AG Farmer Letter), available at http://www.state.nj.us/lps/dcj/agguide/photoid.pdf.

The Attorney General Guidelines "incorporate[d] more than 20 years of scientific research on memory and interview techniques." Ibid. The preamble describes the document as a list of "best practices." See [27 A.3d 913] Attorney General Guidelines, supra, at 1. The list is divided into two broad categories: composing photo or live lineups, and conducting identification procedures. Many, but not all, of the practices measure up to current scientific standards. Although we have discussed parts of the Guidelines in the preceding sections, we summarize them as a whole for the sake of completeness.

The Guidelines applied the following "best practices" to live and photo lineups: "Include only one suspect in each identification procedure"; select fillers based on the "witness' description of the perpetrator"; if the description is limited, inadequate, or differs significantly from the suspect's appearance, "fillers should resemble the suspect in significant features"; include a minimum of four or five fillers; consider placing the suspect in different lineup positions when conducting more than one lineup in a case with multiple witnesses; and "[a]void reusing fillers in lineups" when showing the same witness a new suspect. Id. at 1-3. When constructing photo lineups, officers should also "[e]nsure that no writings or information concerning previous arrest(s) will be visible to the witness"; "[v]iew the array, once completed, to ensure that the suspect does
not unduly stand out"; and "[p]reserve the presentation order of the photo lineup" and the photos themselves. Id. at 2.

The Guidelines also set out specific rules for administering lineups. To avoid administrator feedback, "the person conducting the photo or live lineup identification procedure should be someone other than the primary investigator assigned to the case." Id. at 1. If that is impractical, the non-blind lineup administrator "should be careful to avoid inadvertent signaling to the witness of the 'correct' response." Ibid.

Under the Guidelines, administrators should instruct witnesses "that the perpetrator may not be among those in the photo array or live lineup and, therefore, they should not feel compelled to make an identification." Ibid. The Guidelines also state a preference for sequential over simultaneous lineup presentation. See ibid.

During the procedure, administrators must "avoid saying anything to the witness that may influence the witness' selection." Id. at 3-6. If the witness makes an identification, officers should "avoid reporting to the witness any information regarding the individual he or she has selected prior to obtaining the witness' statement of certainty." Ibid.

Officers must record the results obtained from the witness. See id. at 7. As part of that process, officers are to record both the outcome of the identification and "the witness' own words regarding how sure he or she is." Ibid. If a witness fails to make an identification, that too should be recorded. Ibid. In addition, officers should instruct witnesses not to discuss the procedure or its results with other witnesses. Id. at 4-7.

The Attorney General Guidelines are thorough and exacting. We once again commend the Attorney General's Office for responding to important social scientific evidence and promoting the reliability of eyewitness identifications. See Delgado, supra, 188 N.J. at 62, 902 A.2d 888; see also Romero, supra, 191 N.J. at 74, 922 A.2d 693. Since 2001, when the recommended Guidelines went into effect, they may well have prevented wrongful convictions.

However, the Guidelines are a series of recommended best practices. The Attorney General expressly noted that identifications that do not follow the recommended Guidelines should not be deemed "inadmissible or otherwise in error." AG

[27 A.3d 914] Farmer Letter, supra, at 3. Although the State argues that the Court should defer to other branches of government to deal with the evolving social scientific landscape, it remains the Court's obligation to guarantee that constitutional requirements are met, and to ensure the integrity of criminal trials. See Romero, supra, 191 N.J. at 74-75, 922 A.2d 693 (citing court's supervisory authority under N.J. Const. art. VI, § 2, ¶ 3); Delgado, supra, 188 N.J. at 62, 902 A.2d 888 (same); see also State v. Daniels, 182 N.J. 80, 95-96, 861 A.2d 808 (2004).

Other state and local authorities have instituted similar changes to their eyewitness identification procedures. In 2005, for example, the Attorney General of Wisconsin issued a set of identification guidelines recommending, among other things, "double-blind, sequential photo arrays and lineups with non-suspect fillers chosen to minimize suggestiveness, non-biased instructions to eyewitnesses, and assessments of


**VIII. Parties’ Arguments**

The parties and amici submitted voluminous briefs of high quality, both before and after the remand hearing. We summarize their positions without repeating arguments already addressed. In short, defendant and amici endorse the Special Master’s factual and scientific findings in their entirety. We have already discussed many of the State’s responses to those findings. We now outline the parties’ and amici’s arguments as to the Appellate Division decision and the viability of the *Manson* / *Madison* framework in light of the record developed on remand.

The State argues vigorously against the Appellate Division’s holding that a breach of the Attorney General Guidelines results in a presumption of impermissible suggestiveness. The State contends that such an approach would penalize the Attorney General for adopting Guidelines designed to improve identification practices, and reward defendants who intimidate witnesses. In this case, the State submits, two officers merely tried to reassure a threatened and reluctant witness; they did not attempt to influence the witness’ selection of a particular photograph. The State maintains that the Appellate Division’s response would hamper this and like prosecutions and hinder policy makers in the future.

As to the current *Manson* / *Madison* framework, the State argues that there is insufficient evidence to warrant a change in the familiar procedure for evaluating eyewitness identification evidence. First, the State believes that the likelihood of misidentifications is overstated. See, supra, at section III.

Second, the State offers various arguments as to why the *Manson* / *Madison* framework is an adequate construct to evaluate identification evidence before trial: the right to a pretrial *Wade* hearing is already extensive and requires only "some showing" of impermissible suggestiveness; the *Manson* / *Madison* test is broad enough to incorporate all system and estimator variables; and the *Manson* / *Madison* test instructs judges to focus on confidence demonstrated at the time of confrontation, before any post-identification, confirmatory feedback.

Along with *Manson* / *Madison*, the State identifies other safeguards that protect against wrongful convictions: the Attorney General Guidelines; pretrial, open-file discovery, see R. 3:13-3; exclusion of highly prejudicial identifications that result from suggestive conduct or words by a private actor under *N.J.R.E.* 403; jury voir dire; numerous peremptory jury challenges; cross-examination; defense summations; and comprehensive jury instructions.
Because eyewitness identification science is probabilistic—meaning that it cannot determine if a particular identification is accurate—the State also argues that the legal system should continue to rely on jurors to assess the credibility of eyewitnesses. To guide juries, the State favors appropriate, flexible jury instructions. The State maintains that expert testimony is not advisable because the relevant subjects are not beyond the ken of the average juror.

Among other things, the State also rejects the use of the analogy that human memory is like trace evidence, which all the other parties advance.

Defendant embraces the decision of the Appellate Division and agrees that a violation of the Attorney General Guidelines should create a presumption of impermissible suggestiveness. With regard to the *Manson* / *Madison* test, defendant and amici argue that more than thirty years of scientific evidence undercut the assumptions underlying the Supreme Court's decision in *Manson*. They believe that for the following reasons, the *Manson* / *Madison* framework is insufficient to ensure defendants' due process rights to a fair trial: courts only consider the five reliability factors in *Manson* / *Madison* after finding suggestiveness, even though some of those factors may themselves be unreliable because of suggestive police behavior; the framework focuses only on police misconduct despite research that shows estimator variables and feedback from private actors can also affect reliability; its all-or-nothing remedy of suppression is too inflexible; it fails to provide jurors context and guidance; and it does not deter suggestive police procedures.

To correct those flaws, defendant and the ACDL initially proposed two alternative frameworks to replace *Manson* / *Madison*. Among other arguments, they analogized to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and argued that eyewitness evidence should be excluded per se if an identification procedure violated the Attorney General Guidelines or if a judge found other evidence of suggestiveness.

Consistent with the Special Master's report, they now urge this Court to require a reliability hearing in every case in which the State intends to present identification evidence. At the hearing, they submit that a wide range of system and estimator variables would be relevant, and the State should bear the burden of establishing reliability. In addition, they agree with the Special Master that juries should receive expanded instructions that address specific variables and are tailored to the facts of the case.

The Innocence Project proposes a different scheme along the following lines: defendants would first have to allege that an identification was unreliable; the burden would then shift to the State to prove, in essence, that neither estimator nor system variables rendered the identification unreliable—to be accomplished through testimony of the eyewitness about the circumstances under which she saw the perpetrator, and proof from law enforcement about the identification procedure used; the burden would next shift back to the defendant to prove by a preponderance of evidence "that there exists a substantial probability of a mistaken identification"; and if the court does not suppress the evidence, defendant could file motions to seek to limit or redact identification testimony and present expert testimony at trial.
Notably, under the Innocence Project's approach, a violation of the Attorney General
Guidelines would be a factor for the trial court— and juries— to consider; it would not lead to per
se exclusion. At the admissibility hearing, the Innocence Project recommends that trial courts
consider both system and estimator variables, and be required to make detailed findings about
them; afterward, judges would be in a position before trial to tell the parties which instructions, if
any, they plan to give the jury about relevant variables in the case.

Finally, the Innocence Project encourages this Court to adopt comprehensive jury
instructions that are easy to understand, so that jurors can evaluate eyewitness evidence appropriately. The Innocence Project maintains that those instructions should be read to the jury both before an eyewitness' testimony and at the conclusion of the case. If at the end of trial the court doubts the accuracy of an identification, the Innocence Project argues that the judge should give a cautionary instruction to treat that evidence with great caution and distrust.

The State argues that the Innocent Project's proposal would invite an unnecessary pretrial
fishing expedition in every criminal case involving eyewitness evidence. Instead, the State
contends that the initial burden should remain on defendants to show some
evidence of suggestiveness, which the State claims is not an onerous threshold.

IX. Legal Conclusions
A. Scientific Evidence

We find that the scientific evidence presented is both reliable and useful. See Moore, supra,
188 N.J. at 206, 902 A.2d 1212. Despite arguments to the contrary, we agree with the Special
Master that "[t]he science abundantly demonstrates the many vagaries of memory encoding,
storage, and retrieval; the malleability of memory; the contaminating effects of extrinsic
information; the influence of police interview techniques and identification procedures; and the
many other factors that bear on the reliability of eyewitness identifications."

The research presented on remand is not only extensive, but as Dr. Monahan testified, it
represents the "gold standard in terms of the applicability of social science research to the law." Experimental methods and findings have 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. As reflected above, consensus exists among the experts who testified
on remand and within the broader research community. See Chun, supra, 194 N.J. at 91, 943
A.2d 114; see also Frye, supra, 293 F. at 1014.

[27 A.3d 917] Other courts have accepted eyewitness identification research pertaining to a
number of the variables discussed. See, e.g., United States v. Bartlett, 567 F.3d 901, 906 (7th
Cir.2009) (confidence-accuracy relationship and memory decay), cert. denied, ___ U.S. __, 130
S.Ct. 1137, 175 L.Ed.2d 971 (2010); United States v. Brownlee, 454 F.3d 131, 142-44 (3d
Cir.2006) ("inherent unreliability" of eyewitness identifications and accuracy-confidence
relationship); United States v. Smith, 621 F.Supp.2d 1207, 1215-17 (M.D.Ala.2009) (cross-racial
identifications, impact of high stress, and feedback); State v. Chapple, 135 Ariz. 281, 660 P.2d
1208, 1220-22 (1983) (memory decay, stress, feedback, and confidence-accuracy);
People v. McDonald, 37 Cal.3d 351, 208 Cal.Rptr. 236, 690 P.2d 709, 718 (1984) ("The consistency of the results of [eyewitness identification] studies is impressive, and the courts can no longer remain oblivious to their implications for the administration of justice."), overruled on other grounds by People v. Mendoza, 23 Cal.4th 896, 98 Cal.Rptr.2d 431, 4 P.3d 265 (2000); Benn v. United States, 978 A.2d 1257, 1265-68 (D.C.2009) (citing expert consensus regarding system and estimator variables); People v. LeGrand, 8 N.Y.3d 449, 835 N.Y.S.2d 523, 867 N.E.2d 374, 380 (2007) (confidence-accuracy relationship, feedback, and confidence malleability); State v. Copeland, 226 S.W.3d 287, 299-300, 302 (Tenn.2007) (weapons effect, stress, cross-racial identification, age, and opportunity to view); State v. Clopten, 223 P.3d 1103, 1113 & n. 22 (Utah 2009) (citing with approval research on multiple system and estimator variables). But see Marquez, supra, 967 A.2d at 77 (finding scientific literature "is far from universal or even well established" and that "research is in great flux") (discussed supra at 243 n. 6, 27 A.3d at 893 n. 6).

This is not our first foray into the realm of eyewitness identification research and its applicability to the law. In Cromedy, this Court relied on numerous social scientific studies when we held that special jury instructions were needed in appropriate cases involving cross-racial identifications. See Cromedy, supra, 158 N.J. at 120-23, 131, 727 A.2d 457. We observed that "the empirical data ... provide[d] an appropriate frame of reference for requiring ... jury instructions." Id. at 132, 727 A.2d 457.

More recently in Romero, supra, this Court held that "there [was] insufficient data to support the conclusion that, as a matter of due process, people of the same race but different ethnicity ... require a Cromedy instruction whenever they are identified by someone of a different ethnicity." 191 N.J. at 71-72, 922 A.2d 693. Of the three studies the Court reviewed, one included a small number of participants and two "did not test for the reliability of identifications of Hispanics by non-Hispanics." Id. at 70-71, 922 A.2d 693. The Court distinguished the dearth of social scientific research in the field of cross-ethnic bias from "the convincing social science data demonstrating the potential unreliability of cross-racial identifications." See id. at 69, 922 A.2d 693.

When social scientific experiments in the field of eyewitness identification produce "an impressive consistency in results," those results can constitute adequate data on which to base a ruling. See Cromedy, supra, 158 N.J. at 132, 727 A.2d 457. Thus, based on the testimony and ample record developed at the hearing, we recognize that a number of system and estimator variables can affect the reliability of eyewitness identifications. We recount those variables after considering the vitality of the Manson/Madison framework, a question we turn to now.

[27 A.3d 918] B. The Manson/Madison Test Needs to Be Revised

When this Court adopted the framework outlined in Manson, it recognized that suggestive police procedures may "so irreparably taint[ ] the out-of-court and in-court identifications" that a defendant is denied due process. Madison, supra, 109 N.J. at 239, 536 A.2d 254. To protect due process concerns, the Manson Court's two-part test rested on three assumptions: (1) that it would adequately measure the reliability of eyewitness testimony; (2) that the test's focus on suggestive police procedure would deter improper practices; and (3) that jurors would recognize and discount
untrustworthy eyewitness testimony. See *Manson*, supra, 432 U.S. at 112-16, 97 S.Ct. at 2252-54, 53 L.Ed.2d at 152-55.

We remanded this case to determine whether those assumptions and other factors reflected in the two-part *Manson* / *Madison* test are still valid. We conclude from the hearing that they are not.

The hearing revealed that *Manson* / *Madison* does not adequately meet its stated goals: it does not provide a sufficient measure for reliability, it does not deter, and it overstates the jury's innate ability to evaluate eyewitness testimony.

First, under *Manson* / *Madison*, defendants must show that police procedures were "impermissibly suggestive" before courts can consider estimator variables that also bear on reliability. See *Madison*, supra, 109 N.J. at 232, 536 A.2d 254. As a result, although evidence of relevant estimator variables tied to the *Neil v. Biggers* factors is routinely introduced at pretrial hearings, their effect is ignored unless there is a finding of impermissibly suggestive police conduct. In this case, for example, the testimony at the *Wade* hearing related principally to the lineup procedure. Because the court found that the procedure was not "impermissibly suggestive," details about the witness' use of drugs and alcohol, the dark lighting conditions, the presence of a weapon pointed at the witness' chest, and other estimator variables that affect reliability were not considered at the hearing. (They were explored later at trial.)

Second, under *Manson* / *Madison*, if a court finds that the police used impermissibly suggestive identification procedures, the trial judge then weighs the corrupting effect of the process against five "reliability" factors. *Id.* at 239-40, 536 A.2d 254. But three of those factors—the opportunity to view the crime, the witness' degree of attention, and the level of certainty at the time of the identification—rely on self-reporting by eyewitnesses; and research has shown that those reports can be skewed by the suggestive procedures themselves and thus may not be reliable. Self-reporting by eyewitnesses is an essential part of any investigation, but when reports are tainted by a suggestive process, they become poor measures in a balancing test designed to bar unreliable evidence.

Third, rather than act as a deterrent, the *Manson* / *Madison* test may unintentionally reward suggestive police practices. The irony of the current test is that the more suggestive the procedure, the greater the chance eyewitnesses will seem confident and report better viewing conditions. Courts in turn are encouraged to admit identifications based on criteria that have been tainted by the very suggestive practices the test aims to deter.

Fourth, the *Manson* / *Madison* test addresses only one option for questionable eyewitness identification evidence: suppression. Yet few judges choose that [27 A.3d 919] ultimate sanction. An all-or-nothing approach does not account for the complexities of eyewitness identification evidence.

Finally, *Manson* / *Madison* instructs courts that "the reliability determination is to be made from the totality of the circumstances in the particular case." *Id.* at 239, 536 A.2d 254. In practice,
trial judges routinely use the test's five reliability factors as a checklist. The State maintains that courts may consider additional estimator variables. Even if that is correct, there is little guidance about which factors to consider, and courts and juries are often left to their own intuition to decide which estimator variables may be important and how they matter.

As a result of those concerns, we now revise the State's framework for evaluating eyewitness identification evidence.¹⁰

Page 288
C. Revised Framework

Remedying the problems with the current Manson / Madison test requires an approach that addresses its shortcomings: one that allows judges to consider all relevant factors that affect reliability in deciding whether an identification is admissible; that is not heavily weighted by factors that can be corrupted by suggestiveness; that promotes deterrence in a meaningful way; and that focuses on helping jurors both understand and evaluate the effects that various factors have on memory— because we recognize that most identifications will be admitted in evidence.

Two principal changes to the current system are needed to accomplish that: first, the revised framework should allow all relevant system and estimator variables to be explored and weighed at pretrial hearings when there is some actual evidence of suggestiveness; and second, courts should develop and use enhanced jury charges to help jurors evaluate eyewitness identification evidence.

The new framework also needs to be flexible enough to serve twin aims: to guarantee fair trials to defendants, who must have the tools necessary to defend themselves, and to protect the State's interest in presenting critical evidence at trial. With that in mind, we first outline the revised approach for evaluating identification evidence and then explain its details and the reasoning behind it.

[27 A.3d 920] First, to obtain a pretrial hearing, a defendant has the initial burden of showing some evidence of suggestiveness that could lead to a mistaken identification. See State v. Rodriguez, supra, 264 N.J.Super. at 269, 624 A.2d 605; State v. Ortiz, supra, 203 N.J.Super. at 522, 497 A.2d 552; cf. State v. Michaels, 136 N.J. 299, 320, 642 A.2d 1372 (1994) (using same standard to trigger pretrial hearing to determine if child-victim's statements resulted from suggestive or coercive interview techniques). That evidence, in general, must be tied to a system— and not an estimator— variable. But see Chen, supra (extending right to hearing for suggestive conduct by private actors).

Second, the State must then offer proof to show that the proffered eyewitness identification is reliable— accounting for system and estimator variables— subject to the following: the court can end the hearing at any time if it finds from the testimony that defendant's threshold allegation of suggestiveness is groundless. We discuss this further below. See infra at 290-91, 27 A.3d at 920-21).

Third, the ultimate burden remains on the defendant to prove a very substantial likelihood of
irreparable misidentification. See Manson, supra, 432 U.S. at 116, 97 S.Ct. at 2254, 53 L.Ed.2d at 155 (citing Simmons, supra, 390 U.S. at 384, 88 S.Ct. at 971, 19 L.Ed.2d at 1253); Madison, supra, 109 N.J. at 239, 536 A.2d 254 (same). To do so, a defendant can cross-examine eyewitnesses and police officials and present witnesses and other relevant evidence linked to system and estimator variables.[11]

Fourth, if after weighing the evidence presented a court finds from the totality of the circumstances that defendant has demonstrated a very substantial likelihood of irreparable misidentification, the court should suppress the identification evidence. If the evidence is admitted, the court should provide appropriate, tailored jury instructions, as discussed further below.

To evaluate whether there is evidence of suggestiveness to trigger a hearing, courts should consider the following non-exhaustive list of system variables:

1. **Blind Administration.** Was the lineup procedure performed double-blind? If double-blind testing was impractical, did the police use a technique like the "envelope method" described above, to ensure that the administrator had no knowledge of where the suspect appeared in the photo array or lineup?

2. **Pre-identification Instructions.** Did the administrator provide neutral, pre-identification instructions warning that the suspect may not be present in the lineup and that the witness should not feel compelled to make an identification?

3. **Lineup Construction.** Did the array or lineup contain only one suspect embedded among at least five innocent fillers? Did the suspect stand out from other members of the lineup?

4. **Feedback.** Did the witness receive any information or feedback, about the suspect or the crime, before, during, or after the identification procedure?

5. **Recording Confidence.** Did the administrator record the witness' statement of confidence immediately after the identification, before the possibility of any confirmatory feedback?

6. **Multiple Viewings.** Did the witness view the suspect more than once as part of [27 A.3d 921] multiple identification procedures? Did police use the same fillers more than once?

7. **Showups.** Did the police perform a showup more than two hours after an event? Did the police warn the witness that the suspect may not be the perpetrator and that the witness should not feel compelled to make an identification?

8. **Private Actors.** Did law enforcement elicit from the eyewitness whether he or she had spoken with anyone about the identification and, if so, what was discussed?

9. **Other Identifications Made.** Did the eyewitness initially make no choice or choose a different suspect or filler?

The court should conduct a *Wade* hearing only if defendant offers some evidence of suggestiveness. If, however, at any time during the hearing the trial court concludes from the testimony that defendant's initial claim of suggestiveness is baseless, and if no other evidence of suggestiveness has been demonstrated by the evidence, the court may exercise its discretion to end the hearing. Under those circumstances, the court need not permit the defendant or require the State
to elicit more evidence about estimator variables; that evidence would be reserved for the jury.

By way of example, assume that a defendant claims an administrator confirmed an eyewitness’ identification by telling the witness she did a "good job." That proffer would warrant a Wade hearing. Assume further that the administrator credibly denied any feedback, and the eyewitness did the same. If the trial court finds that the initial allegation is completely hollow, the judge can end the hearing absent any other evidence of suggestiveness. In other words, if no evidence of suggestiveness is left in the case, there is no need to explore estimator variables at the pretrial hearing. Also, trial courts always have the authority to direct the mode and order of proofs, and they may exercise that discretion to focus pretrial hearings as needed.

If some actual proof of suggestiveness remains, courts should consider the above system variables as well as the following non-exhaustive list of estimator variables to evaluate the overall reliability of an identification and determine its admissibility:

1. Stress. Did the event involve a high level of stress?
2. Weapon focus. Was a visible weapon used during a crime of short duration?
3. Duration. How much time did the witness have to observe the event?
4. Distance and Lighting. How close were the witness and perpetrator? What were the lighting conditions at the time?
5. Witness Characteristics. Was the witness under the influence of alcohol or drugs? Was age a relevant factor under the circumstances of the case?
6. Characteristics of Perpetrator. Was the culprit wearing a disguise? Did the suspect have different facial features at the time of the identification?

7. Memory decay. How much time elapsed between the crime and the identification?
8. Race-bias. Does the case involve a cross-racial identification?

Some of the above estimator variables overlap with the five reliability factors outlined in Neil v. Biggers, supra, 409 U.S. at 199-200, 93 S.Ct. at 382, 34 L.Ed.2d at 411, which we nonetheless repeat:

9. Opportunity to view the criminal at the time of the crime.
10. Degree of attention.

11. Accuracy of prior description of the criminal.
12. Level of certainty demonstrated at the confrontation.

Did the witness express high confidence at the time of the identification before receiving any feedback or other information?

13. The time between the crime and the confrontation. (Encompassed fully by "memory decay" above.)

The above factors are not exclusive. Nor are they intended to be frozen in time. We recognize that scientific research relating to the reliability of eyewitness evidence is dynamic; the field is very different today than it was in 1977, and it will likely be quite different thirty years from now. By providing the above lists, we do not intend to hamstring police departments or limit them from improving practices. Likewise, we do not limit trial courts from reviewing evolving, substantial, and generally accepted scientific research. But to the extent the police undertake new practices, or
courts either consider variables differently or entertain new ones, they must rely on reliable scientific evidence that is generally accepted by experts in the community. See Chun, supra, 194 N.J. at 91, 943 A.2d 114; Moore, supra, 188 N.J. at 206, 902 A.2d 1212; Rubanick, supra, 125 N.J. at 432, 593 A.2d 733.

We adopt this approach over the initial recommendation of defendant and the ACDL that any violation of the Attorney General Guidelines should require per se exclusion of the resulting eyewitness identification. Although that approach might yield greater deterrence, it could also lead to the loss of a substantial amount of reliable evidence. We believe that the more flexible framework outlined above protects defendants' right to a fair trial at the same time it enables the State to meet its responsibility to ensure public safety.

D. Pretrial Hearing

As stated above, to obtain a pretrial hearing, a defendant must present some evidence of suggestiveness. Pretrial discovery, which this opinion has enhanced in certain areas, would reveal, for example, if a line-up did not include enough fillers, if those fillers did not resemble the suspect, or if a private actor spoke with the witness about the identification. Armed with that and similar information, defendants could request and receive a hearing.

The hearing would encompass system and estimator variables upon a showing of some suggestiveness that defendant can support. For various reasons, estimator variables would no longer be ignored in the court's analysis until it found that an identification procedure was impermissibly suggestive. First, broader hearings will provide more meaningful deterrence. To the extent officers wish to avoid a pretrial hearing, they must avoid acting in a suggestive manner. Second, more extensive hearings will address reliability with greater care and better reflect how memory works. Suggestiveness can certainly taint an identification, which justifies examining system variables. The same is true for estimator variables like high stress, weapon-focus, and own-race bias. Because both sets of factors can alter memory and affect eyewitness identifications, both should be explored pretrial in appropriate cases to reflect what Manson acknowledged: that "reliability is the linchpin in determining the admissibility of identification testimony." Manson, supra, 432 U.S. at 114, 97 S.Ct. at 2253, 53 L.Ed.2d at 154.

But concerns about estimator variables alone cannot trigger a pretrial hearing; only system variables would. This approach differs from the procedure endorsed [27 A.3d 923] by the Special Master and proposed by defendant and amici, which would essentially require pretrial hearings in every case involving eyewitness identification evidence. Several reasons favor the approach we outline today.

First, we anticipate that eyewitness identification evidence will likely not be ruled inadmissible at pretrial hearings solely on account of estimator variables. For example, it is difficult to imagine that a trial judge would preclude a witness from testifying because the lighting was "too dark," the witness was "too distracted" by the presence of a weapon, or he or she was under "too much" stress while making an observation. How dark is too dark as a matter of law? How much is too much? What guideposts would a trial judge use in making those judgment calls? In all
likelihood, the witness would be allowed to testify before a jury and face cross-examination
designed to probe the weaknesses of her identification. Jurors would also have the benefit of
enhanced instructions to evaluate that testimony— even when there is no evidence of
suggestiveness in the case. As a result, a pretrial hearing triggered by, and focused on, estimator
variables would likely not screen out identification evidence and would largely be duplicated at
trial.

Second, courts cannot affect estimator variables; by definition, they relate to matters outside
the control of law enforcement. More probing pretrial hearings about suggestive police procedures,
though, can deter inappropriate police practices.

Third, as demonstrated above, suggestive behavior can distort various other factors that are
weighed in assessing reliability. That warrants a greater pretrial focus on system variables.

Fourth, we are mindful of the practical impact of today's ruling. Because defendants will now
be free to explore a broader range of estimator variables at pretrial hearings to assess the
reliability of an identification, those hearings will become more intricate. They will routinely involve
testimony from both the police and eyewitnesses, and that testimony will likely expand as more
substantive areas are explored. Also, trial courts will retain discretion to allow expert testimony at
pretrial hearings.

In 2009, trial courts in New Jersey conducted roughly 200 Wade hearings, according to the
Administrative Office of the Courts. If estimator variables alone could trigger a hearing, that
number might increase to nearly all cases in which eyewitness identification evidence plays a part.
We have to measure that outcome in light of the following reality that the Special Master observed:
judges rarely suppress eyewitness evidence at pretrial hearings. Therefore, to allow hearings in
the majority of identification cases might overwhelm the system with little resulting benefit.

We do not suggest that it is acceptable to sacrifice a defendant's right to a fair trial for the
sake of saving court resources, but when the likely outcome of a hearing is a more focused set of
jury charges about estimator variables, not suppression, we question the need for hearings
initiated only by estimator variables.

Appellate review does remain as a backstop to correct errors that may not be caught at or
before trial, and the enhanced framework may provide a greater role in that regard in certain
cases. If a reviewing court determines that identification evidence should not have been admitted
in accordance with the above standards, it can reverse a conviction.

We also note that trial courts should make factual findings at pretrial hearings about relevant
system and estimator variables to lay the groundwork for proper jury charges and to
facilitate meaningful appellate review.

Finally, we do not adopt the analogy between trace evidence and eyewitness identifications.
To be sure, like traces of DNA or drops of blood, memories are part of our being. By necessity,
though, the criminal justice system collects and evaluates trace evidence and eyewitness
identification evidence differently. Unlike vials of blood, memories cannot be stored in evidence
lockers. Instead, we must strive to avoid reinforcement and distortion of eyewitness memories
from outside effects, and expose those influences when they are present. But we continue to rely
on people as the conduits of their own memories, on attorneys to cross-examine them, and on juries to assess the evidence presented. For that reason, we favor enhanced jury charges to help jurors perform that task.

**E. Trial**

As is true today, juries will continue to hear about all relevant system and estimator variables at trial, through direct and cross-examination and arguments by counsel. In addition, when identification is at issue in a case, trial courts will continue to "provide[] appropriate guidelines to focus the jury's attention on how to analyze and consider the trustworthiness of eyewitness identification." *Cromedy, supra*, 158 N.J. at 128, 727 A.2d 457. Based on the record developed on remand, we direct that enhanced instructions be given to guide juries about the various factors that may affect the reliability of an identification in a particular case.

Those instructions are to be included in the court's comprehensive jury charge at the close of evidence. In addition, instructions may be given during trial if warranted. For example, if evidence of heightened stress emerges during important testimony, a party may ask the court to instruct the jury midtrial about that variable and its effect on memory. Trial courts retain discretion to decide when to offer instructions.

As discussed earlier, the State maintains that many jurors, through their life experiences and intuition, generally understand how memory works. *See supra* at section VI.C. To the extent some jurors do not, the State argues that cross-examination, defense summations, the current jury charge, fellow jurors, and other safeguards can help correct misconceptions.

But we do not rely on jurors to divine rules themselves or glean them from cross-examination or summation. Even with matters that may be considered intuitive, courts provide focused jury instructions. For example, we remind jurors to scrutinize the testimony of a cooperating witness with care. *See Model Jury Charge (Criminal), " Testimony of Cooperating Co-Defendant or Witness"* (2006). A simple reason underlies that approach: it is the court's obligation to help jurors evaluate evidence critically and objectively to ensure a fair trial.

Moreover, science reveals that memory and eyewitness identification evidence present certain complicated issues. *See supra* at section VI; *see also* *Cromedy, supra*, 158 N.J. at 120-23, 727 A.2d 457. In the past, we have responded by developing jury instructions consistent with accepted scientific findings. *See Cromedy, supra*, 158 N.J. at 132-33, 727 A.2d 457 (requiring cross-racial identification charge). We acted similarly in response to social science evidence about Battered Women's Syndrome and Child Sexual Abuse Accommodation Syndrome. *See State v. Townsend*, 186 N.J. 473, 500, 897 A.2d 316 (2006); *State v. P.H.*, 178 N.J. 378, 399-400, 840 A.2d 808 (2004). Ultimately, as the Special Master found, *27 A.3d 925* "[w]hether the science confirms commonsense views or dispels preconceived but not necessarily valid intuitions, it can properly and usefully be considered by both judges and jurors in making their assessments of eyewitness reliability." ( *citing P.H., supra*, 178 N.J. at 395, 840 A.2d 808).

Expert testimony may also be introduced at trial, but only if otherwise appropriate. The
Rules of Evidence permit expert testimony to "assist the trier of fact to understand the evidence or
to determine a fact in issue." N.J.R.E. 702. Expert testimony is admissible if it meets three criteria: (1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony. [State v. Jenewicz, 193 N.J. 440, 454, 940 A.2d 269 (2008) (citations omitted).]

Those criteria can be met in some cases by qualified experts seeking to testify about the import and effect of certain variables discussed in section VI. That said, experts may not opine on the credibility of a particular eyewitness. See State v. Frisby, 174 N.J. 583, 595, 811 A.2d 414 (2002); see also State v. W.B., 205 N.J. 588, 613, 17 A.3d 187 (2011) (precluding "expert testimony about the statistical credibility of victim-witnesses").

Page 298

Other federal and state courts have also recognized the usefulness of expert testimony relating to eyewitness identification. See, e.g., Bartlett, supra, 567 F.3d at 906; Brownlee, supra, 454 F.3d at 141-44; Chapple, supra, 660 P.2d at 1220; McDonald, supra, 208 Cal.Rptr. 236, 690 P.2d at 721; Benn, supra, 978 A.2d at 1270; LeGrand, supra, 835 N.Y.S.2d 523, 867 N.E.2d at 377-79; Copeland, supra, 226 S.W.3d at 300; Clopten, supra, 223 P.3d at 1108.

We anticipate, however, that with enhanced jury instructions, there will be less need for expert testimony. Jury charges offer a number of advantages: they are focused and concise, authoritative (in that juries hear them from the trial judge, not a witness called by one side), and cost-free; they avoid possible confusion to jurors created by dueling experts; and they eliminate the risk of an expert invading the jury’s role or opining on an eyewitness' credibility. See United States v. Hall, 165 F.3d 1095, 1119-20 (7th Cir.) (Easterbrook, J., concurring), cert. denied, 527 U.S. 1029, 119 S.Ct. 2381, 144 L.Ed.2d 784 (1999). That said, there will be times when expert testimony will benefit the trier of fact. We leave to the trial court the decision whether to allow expert testimony in an individual case.

Finally, in rare cases, judges may use their discretion to redact parts of identification testimony, consistent with Rule 403. For example, if an eyewitness' confidence was not properly recorded soon after an identification procedure, and evidence revealed that the witness received confirmatory feedback from the police or a co-witness, the court can bar potentially distorted and unduly prejudicial statements about the witness' level of confidence from being introduced at trial.

X. Revised Jury Instructions

To help implement this decision, we ask the Criminal Practice Committee and the Committee on Model Criminal Jury Charges to draft proposed revisions to the current charge on eyewitness identification and submit them to this Court for review before they are implemented. Specifically, we ask them to consider all of the system and estimator variables in section [27 A.3d 926] VI for which we have found scientific support that is generally accepted by experts, and to modify the current model charge accordingly.

Although we do not adopt the sample charges offered by the Innocence Project, we ask the Committees to examine their format and recommendations with care. We also invite the Attorney
General, Public Defender, and ACDL to submit proposed charges and comments to the Committees.

We add a substantive point about the current charge for cross-racial identification. In 1999, the Court in Cromedy directed that the charge be given "only when ... identification is a critical issue in the case, and an eyewitness's cross-racial identification is not corroborated by other evidence giving it independent reliability." Cromedy, supra, 158 N.J. at 132, 727 A.2d 457. Since then, the additional research on own-race bias discussed in section VI.B.8, and the more complete record about eyewitness identification in general, justify giving the charge whenever cross-racial identification is in issue at trial.

Because of the widespread use the revised jury instructions will have in upcoming criminal trials, we ask the Committees to present proposed charges to the Court within ninety days.

XI. Application
We return to the facts of this case. After Womble, the eyewitness, informed the lineup administrator that he could not make an identification from the final two photos, the investigating officers intervened. They told Womble to focus and calm down, and assured him that the police would protect him from retaliation. "Just do what you have to do," they instructed. From that exchange, Womble could reasonably infer that there was an identification to be made, and that he would be protected if he made it. The officers conveyed that basic message to him as they encouraged him to make an identification.

The suggestive nature of the officers' comments entitled defendant to a pretrial hearing, and he received one. Applying the Manson/Madison test, the trial judge admitted the evidence. We now remand to the trial court for an expanded hearing consistent with the principles outlined in this decision. Defendant may probe all relevant system and estimator variables at the hearing. In addition to suggestiveness, the trial court should consider Womble's drug and alcohol use immediately before the confrontation, weapon focus, and lighting, among other relevant factors.

We express no view on the outcome of the hearing. If the trial court finds that the identification should not have been admitted, then the parties should present argument as to whether a new trial is needed. We do not review the record for harmless error only because the parties have not yet argued that issue. If Womble's identification was properly admitted, then defendant's conviction should be affirmed.

XII. Retroactivity Analysis
Today's decision announces a new rule of law. For decades, trial courts have applied the Manson/Madison test to determine the admissibility of identification evidence. This opinion "breaks new ground" by modifying that framework. See State v. Cummings, 184 N.J. 84, 97, 875 A.2d 906 (2005) ( quoting State v. Knight, 145 N.J. 233, 250-51, 678 A.2d 642 (1996)). Because the holding "is sufficiently novel and unanticipated," we must consider whether the new rule should be applied retroactively. Knight, supra, 145 N.J. at 251, 678 A.2d 642 (citing State v. Lark, 117 N.J. 331, 339, 567 A.2d 197 (1989)).
When a decision sets forth a new rule, three factors are considered to determine whether to apply the rule retroactively: "(1) the purpose of the rule and whether it would be furthered by a retroactive application, (2) the degree of reliance placed on the old rule by those who administered it, and (3) the effect a retroactive application would have on the administration of justice."


The factors are not of equal weight. The first factor—the purpose of the rule—"is often the pivotal consideration." Ibid. (quoting State v. Burstein, 85 N.J. 394, 406, 427 A.2d 525 (1981)). When, as here, "the new rule is designed to enhance the reliability of the factfinding process," courts consider "the likelihood of untrustworthy evidence being admitted under the old rule" and "whether the defendant had alternate ways of contesting the integrity of the evidence being introduced against him." Burstein, supra, 85 N.J. at 408, 427 A.2d 525.

The remaining two factors "come to the forefront" when the rule's purpose alone does not resolve the question of retroactivity. Knight, supra, 145 N.J. at 252, 678 A.2d 642. As to the second factor—the degree of reliance on the prior rule—the central consideration is "whether the old rule was administered in good faith reliance [on] then-prevailing constitutional norms." State v. Purnell, 161 N.J. 44, 55, 735 A.2d 513 (1999) (quotation marks and citations omitted; alteration in original). The third factor—the effect on the administration of justice—"recognizes that courts must not impose unjustified burdens on our criminal justice system." Knight, supra, 145 N.J. at 252, 678 A.2d 642. When the effect is unknown but undoubtedly substantial, that weighs in favor of limited retroactive application. See State v. Bellamy, 178 N.J. 127, 142-43, 835 A.2d 1231 (2003); Purnell, supra, 161 N.J. at 56, 735 A.2d 513; State v. Czachor, 82 N.J. 392, 409-10, 413 A.2d 593 (1980).

The Court can apply a new rule in one of four ways: (1) "purely prospectively ... to cases in which the operative facts arise after the new rule has been announced"; (2) "in future cases and in the case in which the rule is announced, but not in any other litigation that is pending or has reached final judgment at the time the new rule is set forth"; (3) "pipeline retroactivity," rendering it applicable in all future cases, the case in which the rule is announced, and any cases still on direct appeal"; and (4) "complete retroactive effect ... to all cases." Knight, supra, 145 N.J. at 249, 678 A.2d 642 (internal citations omitted).

Applying the relevant factors, we first note that defendants have been able to challenge identification evidence under Manson and Madison and present arguments both before and at trial. Second, both the State and trial courts have, without question, relied in good faith on settled constitutional principles in applying the Manson/Madison test for many years. Last, there is no doubt that applying the new framework retroactively would affect an immense number of cases—far too many to tally—because eyewitness identifications are a staple of criminal trials. To reopen the vast group of cases decided over several decades, which relied not only on settled law but also on eyewitness memories that have long since faded, [27 A.3d 928] would "wreak havoc on the administration of justice." State v. Dock, 205 N.J. 237, 258, 15 A.3d 1 (2011).
We therefore apply today's ruling to future cases only, except for defendant Henderson (and defendant Cecilia Chen, the subject of a companion case filed today). As to future cases, today's ruling will take effect thirty days from the date this Court approves new model jury charges on eyewitness identification.

XIII. Conclusion

At the core of our system of criminal justice is the "twofold aim ... that guilt shall not escape or innocence suffer." *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314, 1321 (1935). In the context of eyewitness identification evidence, that means that courts must carefully consider identification evidence before it is admitted to weed out unreliable identifications, and that juries must receive thorough instructions tailored to the facts of the case to be able to evaluate the identification evidence they hear.

To be effective, both tasks cannot rely on a dated, analytical framework that has lost some of its vitality. Rather, they must be informed by sound evidence on memory and eyewitness identification, which is generally accepted by the relevant scientific community. Only then can courts fulfill their obligation both to defendants and the public.

The modified framework to evaluate eyewitness identification evidence in this opinion attempts to meet that challenge. It relies on the developments of the last thirty years of science to promote fair trials and ensure the integrity of the judicial process.

The framework avoids bright-line rules that would lead to suppression of reliable evidence any time a law enforcement officer makes a mistake. Instead, it allows for a more complete exploration of system and estimator variables to preclude sufficiently unreliable identifications from being presented and to aid juries in weighing identification evidence.

We add that enhanced hearings are not meant to be the norm in every case. They will only be held when defendants allege some evidence of suggestiveness, and even then, courts retain the power to end a hearing if the testimony reveals that defendant's claim of suggestiveness is entirely baseless.

We also expect that in the vast majority of cases, identification evidence will likely be presented to the jury. The threshold for suppression remains high. Juries will therefore continue to determine the reliability of eyewitness identification evidence in most instances, with the benefit of cross-examination and appropriate jury instructions.

As a result, we believe that it is essential to educate jurors about factors that can lead to misidentifications, which in and of itself will promote deterrence. To that end, we have reviewed various system and estimator variables in detail, which should assist in the development of enhanced model jury charges. Using those charges in future criminal trials is a critical step in the overall scheme.

We thank Judge Gaulkin, the parties, and amici for their exemplary service in conducting and participating in a thorough, useful remand hearing. They have provided a valuable service to the Court and the public.
XIV. Judgment

For the reasons set forth above, we modify and affirm the judgment of the Appellate Division, and modify the framework for assessing eyewitness identification evidence in criminal cases. We [27 A.3d 929] remand to the trial court for further proceedings consistent with this opinion.

For modification and affirmance/remandment — Chief Justice RABNER and Justices LONG, LaVECCHIA, ALBIN, RIVERA-SOTO and HOENS— 6.

Opposed — None.

Appendix A: Remand Order

SUPREME COURT OF NEW JERSEY
A-8 September Term 2008
STATE OF NEW JERSEY, Plaintiff-Respondent,
v.
LARRY R. HENDERSON, Defendant-Appellant.

ORDER

This matter having come to the Court on a grant of certification, 195 N.J. 521, 950 A.2d 907, 908 (2008), to address whether evidence of eyewitness identification used against defendant was impermissibly suggestive and thus inadmissible under the two-part test applied in Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), and followed as a state law standard in State v. Madison, 109 N.J. 223, 232-33, 536 A.2d 254 (1988);

And that test requiring inquiry into, first, whether the identification procedure was impermissibly suggestive, and second, whether the procedure was so suggestive as to result in a very substantial likelihood of irreparable misidentification, Madison, supra, 109 N.J. at 232, 536 A.2d 254;

And the second inquiry requiring consideration of five factors: (1) the opportunity of the witness to view the suspect at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the suspect; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation, id. at 239-40, 536 A.2d 254;

And the Court having granted leave to appear as amicus curiae to the Association of Criminal Defense Lawyers of New Jersey and The Innocence Project;

And the parties and amici having submitted arguments about the reliability of identification evidence and the current framework for evaluating the admissibility of such evidence;

And the Court having noted previously that, based on recent empirical research, "[m]isidentification is widely recognized as the single greatest cause of wrongful convictions in this country," State v. Delgado, 188 N.J. 48, 60-61 & n. 6, 902 A.2d 888 (2006);

And the Court having further recognized that in 2001 the New Jersey Attorney General established Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures to reduce suggestive eyewitness identifications in this state, State v. Herrera, 187 N.J.
And the parties and amici having raised and argued questions about the possible shortcomings of the *Manson* / *Madison* test in light of more recent scientific research;

And this Court having determined on prior occasions that when resolution of a critical issue depends on a full and complete record the Court should await, before decision, the development of such a record, *State v. Moore*, 180 N.J. 459, 460-61, 852 A.2d 1073 (2004); *Am. Trucking Ass'ns v. State*, 164 N.J. 183, 183-84, 752 A.2d 1286 (2000); see also *Herrera*, supra, 187 N.J. at 504, 902 A.2d 177;

And the Court having heard argument of the parties and having concluded that an inadequate factual record exists on which it can test the current validity of our state law standards on the admissibility of eyewitness identification;

And the Court having concluded that, until such a record is established, the Court should not address the question of the admissibility of the eyewitness identification presented in this case;

And for good cause appearing;

It is ORDERED that the matter is remanded summarily to the trial court for a plenary hearing to consider and decide whether the assumptions and other factors reflected in the two-part *Manson* / *Madison* test, as well as the five factors outlined in those cases to determine reliability, remain valid and appropriate in light of recent scientific and other evidence; and it is further 

ORDERED that, subject to any rulings by the trial court regarding the proofs to be submitted on remand, defendant and the State each shall present before that court testimony and other proof, including expert testimony, in support of their respective positions; and it is further 

ORDERED that the Attorney General of New Jersey and the Office of the Public Defender, as well as amici, The Association of Criminal Defense Lawyers of New Jersey and The Innocence Project, shall each participate in developing the aforesaid record; and it is further 

ORDERED that on the entry of the trial court's opinion on remand, the parties and amici shall each have twenty-one days within which to file briefs and appendices in this Court and five days thereafter to file any responding briefs; and it is further 

ORDERED that on the completion of the briefing, the Court will determine whether additional oral arguments are required; and it is further 

ORDERED that jurisdiction is otherwise retained.

Page 307

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 26th day of February, 2009.

Stephen W. Townsend

CLERK OF THE SUPREME COURT

Chief Justice RABNER and Justices LONG, LaVECCHIA, ALBIN, WALLACE, RIVERA-SOTO, and HOENS join in the Court's Order.

Notes:
The prosecution played a tape of Clark's statement at trial as well. It placed Henderson at the apartment but largely exculpated him. According to the record, the parties acknowledged that references in the statement to a co-defendant, namely Henderson, would have to be redacted under *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). Defense counsel did not seek redaction, though, specifically because the court had admitted the photo lineup and because of the tape's exculpatory nature.

After defendant's conviction, this Court decided *State v. Romero*, 191 N.J. 59, 76, 922 A.2d 693 (2007), which held that jurors are to be warned that "a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification."

Defendant was still in prison on September 17, 2009, when the remand proceedings began. Through counsel, he waived his right to appear. Defendant was paroled on November 30, 2009, after which he again waived his appearance.

This book was published after the remand hearing, and a part was submitted to the Court and addressed by the parties. The book analyzes the first 250 DNA exoneration cases in the United States, and its author reviewed the full trial record in most of those matters. See Garrett, *supra*, at 7.

In *Marquez, supra*, the Connecticut Supreme Court concluded that "scientific literature ... with respect to eyewitness identification procedures is far from universal or even well established, and that the research is in great flux." 967 A.2d at 77. *Marquez* considered six scientific articles and reports in reaching that conclusion, *id.* at 72-78, including an Illinois field study that has been strongly criticized, *see id.* at 75 & n. 24; *see also* Daniel L. Schacter et al., *Policy Forum: Studying Eyewitness Investigations in the Field*, 32 Law & Hum. Behav. 3 (2008). The more extensive record presented and tested on remand provides a stronger basis for an assessment of eyewitness identification research.

This section focuses only on post-identification confidence. Meta-analysis shows that eyewitness confidence in the ability to make an identification before viewing a lineup does not correlate with accuracy. See Brian L. Cutler & Steven D. Penrod, *Forensically Relevant Moderators of the Relation Between Eyewitness Identification Accuracy and Confidence*, 74 J. Applied Psychol. 650, 652 (1989).

We do not consider the disputed Illinois field study, see Sheri H. Mecklenburg, Ill. Police Dep't, *Report to the Legislature of the State of Illinois: The Illinois Pilot Program on Sequential Double-Blind Identification Procedures* (2006), referred to *supra* at 231 n. 5, 27 A.3d at 886 n. 5.

The State correctly notes that there is no way to know the precise number of identifications that may have been suppressed at the trial court level, but even the State conceded at oral argument that suppression "does not happen often." We also note that with the exception of one case reversed on appeal, we have found no reported Appellate Division decision since 1977 that reversed a conviction because the trial court failed to suppress identification evidence. *State v. Ford*, 165 N.J.Super. 249, 398 A.2d 101 (1978), *rev'd on dissent*, 79 N.J. 136, 398 A.2d 95 (1979). (The Special Master found one unreported Appellate Division decision, which we do not cite consistent with *Rule* 1:36-3.)
We have no authority, of course, to modify Manson. The expanded protections stem from the due process rights guaranteed under the State Constitution. Compare N.J. Const. art. I, § 1 (" All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."); U.S. Const. amend. XIV, § 1 (" No State shall ... deprive any person of life, liberty, or property, without due process of law."); Jamgochian v. N.J. State Parole Bd., 196 N.J. 222, 239, 952 A.2d 1060 (2008) (" We have, from time to time, construed Article 1, Paragraph 1 [of the New Jersey Constitution] to provide more due process protections than those afforded under the United States Constitution."); see also State v. Reid, 194 N.J. 386, 396-97, 945 A.2d 26 (2008) (recognizing greater protection of individual rights under New Jersey Constitution).

A defendant, of course, may make a tactical choice not to explore an estimator variable pretrial, in order to "save up" cross-examination for trial.

The Appellate Division directed that the matter be assigned to a different judge on remand. See Henderson, supra, 397 N.J.Super. at 416, 937 A.2d 988. That issue is moot because the original trial judge has retired.
In these two criminal cases consolidated for purposes of opinion, each defendant's conviction was based, for the most part, on eyewitness identification evidence. In State v. Lawson, 239 Or.App. 363, 244 P.3d 860 (2010), the Court of Appeals concluded that, despite the state's use of unduly
suggestive pretrial identification procedures, under the test first articulated by this court in *State v. Classen*, 285 Or. 221, 590 P.2d 1198 (1979), the victim’s identification of defendant Lawson had been reliable enough to allow the jury to consider it in its deliberations. In *State v. James*, 240 Or.App. 324, 245 P.3d 705 (2011)— again relying on *Classen* — the Court of Appeals similarly concluded that, although the witnesses had been subject to an unduly suggestive police procedure in the course of identifying defendant James, those identifications had nevertheless been sufficiently reliable, and were therefore admissible at trial.

In the 30-plus years since *Classen* was decided, there have been considerable developments in both the law and the science on which this court previously relied in determining the admissibility of eyewitness identification evidence. We allowed review in each of these cases to determine whether the *Classen* test is consistent with the current scientific research and understanding of eyewitness identification. In light of the scientific research, which we discuss below, we now revise the test set out in *Classen* and adopt several additional procedures, based generally on applicable provisions of the Oregon Evidence Code (OEC), for determining the admissibility of eyewitness identification evidence.

I. FACTS

A. *State v. Lawson*

On August 21, 2003, Noris and Sherl Hilde embarked on a weekend camping trip in the Umpqua National Forest, driving to a location where Mr. Hilde had pitched a tent the weekend before to claim the campsite. When they arrived at the campsite with their trailer, they found defendant’s yellow truck in their parking space and discovered that defendant had moved into their tent. When Mr. Hilde told defendant that it was their tent, defendant apologized and told them that he thought that it had been abandoned. Defendant gathered his gear, loaded it into his truck, and moved to a vacant campsite nearby, where he stayed in view of the Hildes for about 40 minutes before leaving the area. According to Mrs. Hilde's later recollections, defendant had been wearing a dark or black shirt and a black hat with white lettering.

Later that evening, at approximately 10:00 p.m., Mrs. Hilde was shot in the chest with a large caliber hunting rifle as she stood at the window of the trailer. Mr. Hilde called 9-1-1, but was shot while speaking with the 9-1-1 operator, and he died shortly thereafter. The 9-1-1 dispatcher called back and spoke with Mrs. Hilde, who told the dispatcher that she and her husband had been shot, that she did not know who shot them, and that "they" — referring to the shooter or shooters— had wanted the Hildes’ truck. When emergency personnel arrived, they found Mrs. Hilde lying in the trailer, critically wounded but conscious. Mrs. Hilde was [291 P.3d 679] transported out of the camp and transferred to an ambulance at the highway and then to a helicopter, which flew her to a hospital in Bend. An ambulance attendant testified that Mrs. Hilde was rambling and hysterical while en route to the hospital. According to the testimony of various ambulance and medical personnel, Mrs. Hilde continued to refer to the perpetrator as "they," and stated alternately at various times that the shooter was the man who had been at their campsite earlier in the day, that the pilot of the helicopter was the shooter, and that she did not know who
the perpetrator was and had not seen "their" face or faces. Mrs. Hilde was near death when she arrived at the hospital, and immediately went into surgery.

The second day after the shooting, August 23, 2003, a police detective attempted to interview Mrs. Hilde in the hospital. Mrs. Hilde was heavily medicated and sedated, and could not speak due to a breathing tube in her throat. Her hands had been restrained to prevent her from attempting to remove the tube or other lines, and she could respond to questions only by nodding or shaking her head. The detective first showed Mrs. Hilde a black-and-white photo lineup that included a picture of defendant, who had come to the attention of police after he volunteered to the police that he had encountered the Hildes at their campsite on the morning of the day they were shot. When the detective asked whether she saw in the lineup the person who shot her, Mrs. Hilde shook her head no. The detective then, using leading questions, asked Mrs. Hilde whether she had seen the person who shot her earlier in the day, whether he had been in their tent, and whether he drove a yellow truck. Mrs. Hilde nodded "yes" in response to those questions.

The police again attempted to interview Mrs. Hilde approximately two weeks later, on September 3, 2003. Mrs. Hilde was still in the hospital and still medicated and in fragile condition, but she could speak. She told detectives that after her husband was shot, the perpetrator had entered the trailer and put a pillow over her face. She said that she did not know who he was, and that she could not see the man because it was dark and because of the pillow. She was apologetic that she was unable to help the police more and did not think she could identify anyone.

Approximately one month after the incident, on September 22, 2003, the police again interviewed Mrs. Hilde. At that interview, Mrs. Hilde told the detectives that, notwithstanding the pillow over her face, she had briefly seen the man who came to her trailer after the shootings. However, she was again unable to pick defendant's photograph out of a lineup. She said that the perpetrator was wearing a dark shirt and a baseball cap, but did not tell police that it was the same man that she and Mr. Hilde had encountered at their campsite earlier that day.

The police interviewed Mrs. Hilde again a week later, on October 1, 2003. At the outset of that interview, one of the detectives and Mrs. Hilde reviewed her answers to the leading questions that she had been asked at the first interview. Mrs. Hilde had no recollection of that interview. Mrs. Hilde nevertheless told the detectives that she now believed that the perpetrator was the man who had been in their camp earlier in the day. However, she "could not swear" it was him, because she claimed to have seen his face only in profile. Mrs. Hilde declined to view a profile lineup, telling the detective that she did not think she would be able to pick her attacker out of the lineup. The detectives then informed Mrs. Hilde that "the man that you’ve identified is the person that we have in custody," and identified defendant Samuel Lawson by name.

Some time later, a worker at the rehabilitation facility where Mrs. Hilde was convalescing showed her a newspaper photograph of defendant with a caption that identified him as the suspect who had been arrested for the shootings. Approximately one month before defendant's trial—two
years after the shootings, and unbeknownst to defendant and his lawyers—police investigators exposed Mrs. Hilde to defendant's likeness several more times. On one occasion, the investigating detective showed Mrs. Hilde a single photograph of defendant wearing a dark shirt and a dark hat with white lettering. On another, the detective took Mrs. Hilde to the courthouse, where she personally observed defendant during a pretrial hearing. Later that day, in the detective's office, Mrs. Hilde inadvertently came across one of the earlier photo lineups she had viewed without successfully identifying a suspect from the various photographs. She was then able to pick defendant's picture out of the lineup.\[1\]

At trial, Mrs. Hilde identified defendant as the man who had shot both her and her husband. She testified that, following the shootings, she had heard the perpetrator approaching the trailer. Afraid that the perpetrator would kill her if she saw him, she looked away from the door. She testified that the perpetrator had put a cushion over her face and demanded the keys to the Hildes' truck. She then testified that he walked away, presumably to look for the truck keys. Accordingly to Mrs. Hilde, when he came back, she turned her head to look at him from under the cushion and recognized him as the man who had been in their camp earlier. When asked whether she had any doubt as to her identification, Mrs. Hilde responded: "Absolutely not. I'll never forget his face as long as I live." She later added that she "always knew it was him."

Defendant moved to strike that identification on the ground that it had been tainted by suggestive police procedures. The trial court denied defendant's motion, finding that Mrs. Hilde had had significant opportunity to observe defendant in the campground on the day of the crime, and in doing so, had noted his demeanor, his "loping" walk, and that he was wearing a dark shirt and black cap with white lettering. Having found that Mrs. Hilde's in-court identification was based on her personal observations, the trial court went on to state that, under the circumstances, the reliability and probative value of that identification were questions for the jury. Ultimately, the jury convicted defendant on five counts of aggravated murder, three counts of attempted aggravated murder, and two counts of first-degree robbery.

Defendant appealed that judgment, arguing in part that Mrs. Hilde should not have been permitted to identify defendant in court because police officers had used "unduly suggestive" identification procedures prior to defendant's trial. To address that issue, the Court of Appeals relied on the two-step procedure first articulated by this court in State v. Classen. Under Classen, the Court of Appeals first was required to determine whether the underlying identification process had either been suggestive or had otherwise departed needlessly from the procedures designed to avoid such suggestiveness. If the court determined that the process had been suggestive, then the court was required to determine (1) whether the witness had based the identification at issue on an independent source separate from the suggestive elements, or (2) whether other aspects of the identification substantially excluded the risk that it had been influenced by the suggestive elements. See Classen, 285 Or. at 232, 590 P.2d 1198 (describing two-step process). To aid in the second step of that process, Classen identified a set of nonexclusive considerations to be used in determining whether an identification had a source independent of the otherwise suggestive procedure. Those factors included:
• The opportunity that the witness had to clearly view the persons involved in the crime and the attention that he or she gave to their identifying features.

Page 732

• The timing and completeness of the description given by the witness after the event. • The degree of certainty expressed by the witness in describing the persons involved in the crime and making subsequent identifications.

[291 P.3d 681]

• The lapse of time between the original observation and the subsequent identification.

lid. at 232-33, 590 P.2d 1198.

The Court of Appeals concluded that the process leading to Mrs. Hilde's identification of defendant had, indeed, been suggestive. Weighing the factors set out in Classen, it nevertheless held that, under the totality of the circumstances, her identification of defendant had been independent of the suggestive procedures. As a result, the Court of Appeals concluded that the trial court had correctly determined that the reliability of Mrs. Hilde's identification of defendant was a question properly left to the jury.

B. State v. James

Shortly before 11:00 on a December morning in 2006, Pendleton Police Officer Gomez responded to a theft complaint at a local Safeway store. The thieves had left before Officer Gomez arrived, but Officer Gomez interviewed store employees and obtained descriptions of the two suspects, which he memorialized in an incident report filed later that day. According to one store clerk, while walking down an aisle in the store, he had heard the "clanging" of bottles and then came upon two men, a "large Indian" and a "small Indian," stuffing 40-ounce bottles of beer into a backpack. The clerk went to alert the assistant manager, pointing the pair out to him as they were leaving the store. The two Safeway employees pursued the two perpetrators, yelling for them to stop. The smaller man exited the store and waited outside while the larger man turned to the employees and, blocking the door, prevented them from pursuing the smaller man. According to the store clerk, when he tried to push past the larger man, the larger man "went after" the clerk, "got in his face," and pushed him back. The larger man also attempted to punch the clerk but missed, striking the assistant manager instead. The employees then retreated, and the two suspects ran across the parking lot, got into a gray van, and drove away.

When Officer Gomez arrived at the crime scene, the clerk and the assistant manager related the incident set out above, describing the two thieves as a large male and a small male, both Native American, and both in their mid-20s. According to the Safeway employees, the larger suspect was between six feet and six feet two inches tall, weighed approximately 220 pounds, and wore a white tank top and baggy blue jeans. The smaller suspect, they said, was approximately five feet tall, weighed about 110 pounds, and wore a long black coat with a hood, baggy blue pants, and a backpack. Although there were surveillance cameras in the store, the employees informed Officer Gomez that none of the cameras worked.

Later that day, Officer Gomez observed two men at a nearby fast food restaurant that he believed matched the descriptions given earlier by the Safeway store employees. The taller of the
men was defendant James; the shorter man was Manuel Guerrero. Both men appeared to be inebriated. Officer Gomez approached the two men and questioned them about the incident at Safeway. Both men denied having been to Safeway or having driven a motor vehicle at any time that day. With Guerrero's consent, Officer Gomez searched Guerrero's backpack and discovered one unopened 40-ounce bottle of Steel Reserve 211 malt liquor and a denim jacket, which defendant put on. Officer Gomez asked defendant and Guerrero if they would be willing to go to the Safeway with him to "clear the matter up." Both men consented and were handcuffed and driven to the Safeway store. A second officer, who had come to assist Officer Gomez, drove ahead to prepare for the pending identification. When Officer Gomez arrived at the Safeway just after 4:00 p.m., the clerk and the assistant manager were walking out of the store with the second officer. As the employees approached, Guerrero stood handcuffed by the police cars while defendant remained seated in the back seat of one of the cars with the door open; his hands were cuffed behind his back and he was wearing his denim jacket and a pair of sunglasses. Officer Gomez's report contained no details regarding the identification process, stating only that the employees "both positively identified the subjects as the persons who stole the beer." However, at defendant's suppression hearing nearly two years later, Officer Gomez testified that he had asked the employees something like, "Is this them?," after which the two employees "walked right up" to Guerrero and then looked in through the open car door at defendant, "immediately" identifying both men as the perpetrators of the earlier theft.

In August 2008, defendant was charged with second-degree robbery, fourth-degree assault, carrying a concealed weapon, harassment, and third-degree theft. Before trial, defendant filed a motion to suppress both the out-of-court identification and any in-court eyewitness identification that might be made by the employees, arguing that the identification procedure in the Safeway parking lot was unduly suggestive and unreliable, violating federal due process protections and this court's ruling in Classen. At the suppression hearing, Officer Gomez testified that, when he first spoke to the store employees, they were "pretty adamant" that they would be able to identify the perpetrators, noting that the pair were "funny looking because [one perpetrator] was so big and [the other] was so small, and so by clothing, size." Officer Gomez described the circumstances of the identification as follows:

"I took Mr. Guraro [sic] out of the car. Officer Byram at the time had went ahead of me to Safeway to have [the employees] meet us outside. I pulled to the front of the store. As I was exiting Mr. Guraro [sic], I had him out of the car; both [of the employees] walked up to my patrol car and identified Guraro [sic] immediately, that's him. Looked in the backseat, that's him, and identified both of them as being the persons who stole the beer and assaulted them."

Officer Gomez testified further that he had photographed each suspect shortly after the identification, and he identified two photographs entered into evidence as the pictures he had taken. The photograph of defendant showed defendant with a moustache and a small goatee, wearing baggy blue jeans with several red bandanas hanging down from the beltline, a white tank top, a blue denim jacket, and sunglasses. The other photograph showed Guerrero
wearing black pants, a black hooded sweatshirt, and a white T-shirt.

Defendant argued that the showup identification procedure was unduly suggestive, noting that defendant and Guerrero were the only suspects presented to the witnesses, the second officer may have prompted the witnesses prior to their identification, and that defendant was presented in handcuffs, in the back seat of a police car, wearing sunglasses that obscured his facial features. Moreover, defendant contended that, given the suggestiveness of the process, there was insufficient indicia of reliability to substantially exclude the risk of misidentification, pointing out that (1) Native Americans make up a large portion of the Pendleton community, which borders a reservation; and (2) the witnesses' description of the perpetrators was vague, focusing on generic items of clothing, and omitting key details like the red bandanas hanging from defendant's beltline and defendant's hair color, hairstyle, and facial hair.

Applying the two-part process set out in State v. Classen, the trial court denied defendant's motion to suppress the identifications. The trial court found that the identification procedure was, indeed, suggestive under the first part of the Classen inquiry:
"First, the Defendants were cuffed and in police custody. Second, only [Mr. Guerrero] was actually taken from the vehicle. * * * Defendant, Mr. James, remained in the car. And his appearance was thereby limited to a degree by the observing witnesses. Third, the State produced no evidence as to what the witnesses were told before the show-up."

The court nevertheless concluded that the identification had been based on sources independent of the suggestive procedures:
"First, the two witnesses got a very good look at the Defendants, and in particular Defendant James. The witnesses indicated they were confident they could identify the Defendant if they saw him again. And this is reasonable in light of the fact that they actually got into a physical [291 P.3d 683] confrontation with this Defendant, Mr. James, including the witnesses being shoved and one witness being struck in the face by the suspect, Mr. James. " Secondly, the witnesses gave Officer Gomez a very good description of the suspects. One was quite large. One was quite small. They both appeared to be Indian. Their clothes were identified to considerable specificity. They indicated that the witnesses [ sic ], when they left, had stolen beer of an unusual size; 40-ounce bottles, and unusual brands, at least in this Court's experience. " One particular was mentioned as Steel Reserve 211. These were in a backpack. They indicated the Defendant James was wearing a white tank top. And the Court heard evidence that this was in mid-December and that is very unusual wear in December in Pendleton in that Pendleton is known to be quite cold. " Third, five hours later when Officer Gomez had contact with the Defendants on an unrelated item, he immediately knew that the Defendants were likely to be suspects in the incident at the local Safeway store. Officer Gomez then found a bottle of beer, a 40-ounce bottle of beer [of] the correct brand, Steel Reserve 211[,] in a backpack that was in the possession of the Defendants. " And the Court notes that that backpack had a jacket which the Defendant claimed was his, and in fact put it on, as well as sunglasses which he put on. And fourth, at the show-up confrontation with the witnesses, the witnesses firmly and immediately identified both Defendants. " Therefore, given the totality of the circumstances in this particular case, I am satisfied that the
suggestive show-up confrontation did not cause or contribute to the witness's identification of Defendant James. The surrounding circumstances were strong and in place before the show-up identification. Motion to suppress is denied."

Defendant's case was tried to a jury in October 2008. At trial, Officer Gomez and the clerk from the Safeway store described the identification procedure, and the clerk went on to identify defendant as the larger of the two perpetrators. The jury subsequently found defendant guilty of second-degree robbery, harassment, and third-degree theft; the trial court sentenced defendant to a mandatory minimum sentence of 70 months' incarceration. Defendant appealed his conviction, arguing that the identification evidence was unreliable and should have been suppressed. The Court of Appeals affirmed, holding that the identification evidence was properly admitted under Classen.

In seeking review, defendant James directly, and the amici supporting defendant Lawson's petition for review, both urge this court to revisit Classen and with it, the procedures for determining the admissibility of eyewitness identification. Having accepted that invitation, we begin our analysis by examining Classen and its legal underpinnings.

II. THE CLASSSEN TEST

In State v. Classen, this court acknowledged that "the unreliability of eyewitness identification under suggestive circumstances is widely recognized, and that the procedures used to minimize this unreliability bear on the admissibility of evidence of such identification."
285 Or. at 232, 590 P.2d 1198. Deciding the admissibility of such evidence, this court continued, required a two-step process:
"As a practical matter, in the context of a motion by a defendant to suppress identification evidence on the ground that it is the product of a suggestive procedure, the decision on its admissibility involves two steps. First, the court must determine whether the process leading to the offered identification was suggestive or needlessly departed from procedures prescribed to avoid such suggestiveness. If so, then the prosecution must satisfy the court that 'the proffered identification has a source independent of the suggestive confrontation' or photographic display, or that other aspects of the identification at the time it was [291 P.3d 684] made substantially exclude the risk that it resulted from the suggestive procedure."
Id. (footnote and internal citation omitted).

Classen listed five nonexclusive factors for courts to consider in determining whether an identification had been made independent of suggestive procedures:
"These [factors] include the opportunity that the witness had at the time to get a clear view of the persons involved in
the crime and the attention he or she gave to their identifying features, the timing and completeness of the description given by the witness after the event, the certainty expressed by the witness in that description and in making the subsequent identification, and, of course, the lapse of time between the original observation and the subsequent identification."
Id. at 232-33, 590 P.2d 1198. *Classen* emphasized, however, that those factors were not intended to be exhaustive:

"These are not to be taken as a mechanical checklist of 'constitutional' facts. Obviously other facts may also be important, such as the age and sensory acuity of the witness, or a special occupational concern with people's appearance or physical features, or the frequency of his or her contacts with individuals sharing the general characteristics of the person identified[.]"

Id. at 233, 590 P.2d 1198 (internal citation omitted). The court made it clear that, in considering those and other potentially relevant factors, "the ultimate issue [is] whether an identification made in a suggestive procedure has nevertheless been demonstrated to be reliable despite that suggestiveness." *Id.* (footnote omitted).

In establishing the two-step process described above—particularly the factors used in determining whether an identification procedure had been suggestive—*Classen* relied on the United States Supreme Court's 1977 decision in *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). In *Manson*—like *Classen*—the Court determined that reliability was the linchpin in determinations regarding the admissibility of identification testimony. In *Manson*, however, the Supreme Court articulated that truism as a matter of fundamental fairness under the Due Process Clause of the Fourteenth Amendment. *Classen*, in contrast, was decided as matter of Oregon evidence law, *see State v. Johanesen*, 319 Or. 128, 130, 873 P.2d 1065 (1994) (so noting), a difference that this court took pains to recognize, pointing out that "the Supreme Court does not purport to make the law of evidence for the states. The Court's decisions under the 14th Amendment only pronounce constitutional tests which a state's rules of evidence, and their application in a particular case, may not fail; but these decisions assume that there is an applicable state rule in advance of the issue of its constitutionality. The rules governing the admissibility of evidence in state courts are the responsibility of the states before a Supreme Court decision and remain so afterwards, within the constitutional limits laid down in the decision."

Evidence law has long provided for excluding certain evidence as a class when its questionable reliability vitiates the value of its possible truthfulness in the particular case, apart from any question of constitutional law." *Classen*, 285 Or. at 226, 590 P.2d 1198 (citations omitted).

Under the rules of evidence generally in use among the states, relevant evidence may be excluded at trial if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *See, e.g.*, OEC 403 (so stating). In *Perry v. New Hampshire*, 565 U.S. __, ----, 132 S.Ct. 716, 181 L.Ed.2d 694 (2012), the Supreme Court recently recognized that that evidentiary rule is an important safeguard against unreliable eyewitness identification evidence. In the two cases presently before us, each defendant contends that, under *Classen*, the eyewitness identification evidence should not have been admitted at trial. In addressing that question in these cases, we have decided that, in light of the recent scientific research surrounding eyewitness identifications, it is important for this court to revisit and augment the process outlined in *Classen*. We turn to those inquiries.
III. FACTORS KNOWN TO AFFECT THE RELIABILITY OF EYEWITNESS IDENTIFICATION EVIDENCE

Since 1979— the year that this court decided Classen — there have been more than 2,000 scientific studies conducted on the reliability of eyewitness identification. Amici curiae in these two cases— particularly the Innocence Network and a group of academics and university professors who have conducted, published, and reviewed a wide range of scientific research on the subject of eyewitness identification— submitted extensive data and analysis to this court regarding many of those studies. Based on our extensive review of the current scientific research and literature, we conclude that the scientific knowledge and empirical research concerning eyewitness perception and memory has progressed sufficiently to warrant taking judicial notice of the data contained in those various sources as legislative facts that we may consult for assistance in determining the effectiveness of our existing test for the admission of eyewitness identification evidence. See State v. O'Key, 321 Or. 285, 309 n. 35, 899 P.2d 663 (1995) (noting that "[t]he validity of proffered scientific evidence * * * is a question of law" to be determined by judicial notice of legislative facts submitted to the court); see also State v. Clowes, 310 Or. 686, 692 n. 7, 801 P.2d 789 (1990) ("Facts utilized by a court to 'help [it] to determine the context of the law and policy and to exercise its judgment or discretion in determining what course of action to take' have been described as judicial notice of legislative facts." (alteration in original)).

The scientific literature generally divides the factors affecting the reliability of eyewitness identifications into two categories: system variables and estimator variables. System variables refer to the circumstances surrounding the identification procedure itself that are generally within the control of those administering the procedure. Estimator variables, by contrast, generally refer to characteristics of the witness, the alleged perpetrator, and the environmental conditions of the event that cannot be manipulated or adjusted by state actors. We find that construct useful and employ it here in summarizing the potentially relevant issues that emerge from the scientific research. Our purpose in summarizing the scientific research is to determine whether, in light of that research, the test established in Classen adequately ensures the reliability of particular eyewitness identification evidence that has been subjected to suggestive police procedures, and, ultimately, whether a factfinder can properly assess and weigh the reliability of eyewitness identification evidence. In identifying and describing the variables identified in the research, however, we do not seek to enshrine those variables in Oregon substantive law. We recognize that the scientific research is "probabilistic" — meaning that it cannot demonstrate that any specific witness is right or wrong, reliable or unreliable, in his or her identification. Rather, we believe that it is imperative that law enforcement, the bench, and the bar be informed of the existence of current scientific research and literature regarding the reliability of eyewitness identification because, as an evidentiary matter, the reliability of eyewitness identification is central to a criminal justice system dedicated to the dual principles of accountability and fairness. We also recognize [291 P.3d 686] that, although there now exists a large body of scientific research regarding eyewitness identification, the research is ongoing. Therefore, our acknowledgment of
the existence of that research in these cases is not intended to preclude any party in a specific case from validating scientific acceptance of further research or from challenging particular aspects of the research described in this opinion.

The following is a list of the system and estimator variables identified in the research, accompanied by a very brief description of each variable. A more complete description of each variable and a summary of the scientific research reviewed by this court in these cases are set forth in the appendix to this opinion.

A. System Variables

1. Blind Administration

   Ideally, all identification procedures should be conducted by a "blind" administrator—a person who does not know the identity of the suspect. In police lineup identifications, lineup administrators who know the identity of the Page 742 suspect can consciously or unconsciously suggest that information to the witness.

2. Preidentification Instructions

   The likelihood of misidentification is significantly decreased when witnesses are instructed prior to an identification procedure that a suspect may or may not be in the lineup or photo array, and that it is permissible not to identify anyone.

3. Lineup Construction

   An identification procedure is essentially an informal and unscientific experiment conducted by law enforcement officials to test their hypothesis that a particular suspect is, in fact, the perpetrator that they seek. The known-innocent subjects used as lineup fillers should be selected first on the basis of their physical similarity with the witness's description of the perpetrator; if no description of a particular feature is available, then the lineup fillers should be chosen based on their similarity to the suspect.

4. Simultaneous versus Sequential Lineups

   In a lineup procedure in which the witness is presented with each individual person or photograph sequentially, the witness is less able to engage in relative judgment, and thus is less likely to misidentify innocent suspects. In traditional identification procedures, police display a number of persons or photographs simultaneously to an eyewitness. Witnesses permitted to view all the subjects simultaneously have a tendency to make a "relative judgment"—choosing the person or photograph that most closely resembles the perpetrator from among the other subjects—as opposed to making an "absolute judgment"—comparing each subject to their memory of the perpetrator and deciding whether that subject is the perpetrator.

5. Showups

   A "showup" is a procedure in which police officers present an eyewitness with a single suspect for identification, often (but not necessarily) conducted in the field shortly after a crime has taken place. Police showups are generally Page 743 regarded as inherently suggestive—and therefore less reliable than properly administered lineup identifications—because the witness is always aware of whom police officers have targeted as a
suspect. When conducted properly and within a limited time period immediately following an incident, a showup can be as reliable as a lineup. A showup is most likely to be reliable when it occurs immediately after the witness has observed a criminal perpetrator in action because the benefit of a fresh memory outweighs the inherent suggestiveness of the procedure.

6. Multiple Viewings (Mugshot Exposure, Mugshot Commitment, Source Monitoring Errors, Source Confusion)

Viewing a suspect multiple times throughout the course of an investigation can adversely affect the reliability of any identification that follows those viewings. The negative effect of multiple viewings may result from the witness's inability to discern the source of his or her recognition of the suspect, an occurrence referred to as source confusion or a source monitoring error. A similar problem occurs when the police ask a witness to participate in multiple identification procedures. Whether or not the witness selects the suspect in an initial identification procedure, the procedure increases the witness's familiarity with the suspect's face. If the police later present the witness with another lineup in which the same suspect appears, the suspect may tend to stand out or appear familiar to the witness as a result of the prior lineup, especially when the suspect is the only person who appeared in both lineups.

7. Suggestive Questioning, Cowitness Contamination, and Other Sources of Post-Event Memory Contamination

The way in which eyewitnesses are questioned or converse about an event can alter their memory of the event. The use of suggestive wording and leading questions tend to result in answers that more closely fit the expectation embedded in the question. Witness memory can become contaminated by external information or assumptions embedded in questions or otherwise communicated to the witness.

8. Suggestive Feedback and Recording Confidence

Post-identification confirming feedback tends to falsely inflate witnesses' confidence in the accuracy of their identifications, as well as their recollections concerning the quality of their opportunity to view a perpetrator and an event. Confirming feedback, by definition, takes place after an identification and thus does not affect the result of the identification itself. It can, however, falsely inflate witness confidence in the reports they tender regarding many of the factors commonly used by courts and jurors to gauge eyewitness reliability. As a result, the danger of confirming feedback lies in its potential to increase the appearance of reliability without increasing reliability itself.

B. Estimator Variables

1. Stress

High levels of stress or fear can have a negative effect on a witness's ability to make accurate identifications.

2. Witness Attention

In assessing eyewitness reliability, it is important to consider not only what was within the witness's view, but also on what the witness was actually focusing his or her attention. It is a common misconception that a person's memory operates like a videotape, recording an exact
copy of everything the person sees. A person's capacity for processing information is finite, and the more attention paid to one aspect of an event decreases the amount of attention available for other aspects.

3. Duration of Exposure

Longer durations of exposure (time spent looking at the perpetrator) generally result in more accurate identifications.

4. Environmental Viewing Conditions

The conditions under which an eyewitness observes an event can significantly affect the eyewitness's ability to perceive and remember facts regarding that event. The basic environmental conditions of distance and lighting, combined with any aspect of the viewing environment—fog, heavy rain, or other weather conditions, cracked or dirty windows, glare, reflection, shadow, or even physical obstructions within the witness's line of sight—can potentially impair an eyewitness's ability to clearly view an event or a perpetrator.

5. Witness Characteristics and Condition

An eyewitness's ability to perceive and remember varies with the witness's physical and mental characteristics. Although different witnesses and fact patterns may implicate different variables, some common variables that affect the ability to perceive and remember include visual acuity, physical and mental condition (illness, injury, intoxication, or fatigue), and age.

6. Description

Contrary to a common misconception, there is little correlation between a witness's [291 P.3d 688] ability to describe a person and the witness's ability to later identify that person.

7. Perpetrator Characteristics—Distinctiveness, Disguise, and Own-Race Bias

Witnesses are better at remembering and identifying individuals with distinctive features than they are those possessing average features. The use of a disguise negatively affects later identification accuracy. Witnesses are significantly better at identifying members of their own race than those of other races.

8. Speed of Identification (Response Latency)

Accurate identifications generally tend to be made faster than inaccurate identifications.

9. Level of Certainty

Under most circumstances, witness confidence or certainty is not a good indicator of identification accuracy. Retrospective self-reports of certainty are highly susceptible to suggestive procedures and confirming feedback, a factor that further limits the utility of the certainty variable. Witness certainty, although a poor indicator of identification accuracy in most cases, nevertheless has substantial potential to influence jurors.

10. Memory Decay (Retention Interval)

Memory generally decays over time. Decay rates are exponential rather than linear, with the greatest proportion of memory loss occurring shortly after an initial observation, then leveling off over time.
IV. THE RULE IN CLASSEN IS INADEQUATE TO ENSURE THAT UNRELIABLE EVIDENCE WILL BE EXCLUDED

When Classen was decided 33 years ago there was no statutory evidence code. Therefore, it was necessary for this court to fashion its own evidentiary rule governing the admissibility of identification evidence. Classen, 285 Or. at 232, 590 P.2d 1198. The rule in Classen was "designed to protect the reliability of the verdict, i.e., to minimize the danger of convicting the innocent on the basis of unreliable identification evidence." Johanesen, 319 Or. at 134, 873 P.2d 1065.

In light of the variables identified in the scientific research that we have briefly identified above (and in light of the scientific research and literature we have reviewed, see Appendix at 53), we conclude that the process outlined in Classen does not accomplish its goal of ensuring that only sufficiently reliable identifications are admitted into evidence. Not only are the reliability factors listed in Classen—opportunity to view the alleged perpetrator, attention to identifying features, timing and completeness of description given after the event, certainty of description and identification by witness, and lapse of time between original observation and the subsequent identification—both incomplete and, at times, inconsistent with modern scientific findings, but the Classen inquiry itself is somewhat at odds with its own goals and with current Oregon evidence law.

A. Classen's Threshold Requirement of Suggestiveness Inhibits Courts from Considering Evidentiary Concerns

Under the process established in Classen, trial courts cannot consider whether an identification is reliable until some evidence of suggestiveness is first introduced. Such a requirement, however, conflates evidentiary principles with due process concerns. A constitutional due process analysis might properly consider suggestiveness as a separate prerequisite to further inquiry because the Due Process Clause is not implicated absent some form of state action, such as the state's use of a suggestive identification procedure. See Perry, 132 S.Ct. at 730 ("[T]he Due Process Clause does not require a preliminary judicial inquiry into reliability of an eyewitness identification when the identification was not procured under unnecessary suggestive circumstances arranged by law enforcement."). As a matter of state evidence law, however, there is no reason to hinder the analysis of eyewitness reliability with purposeless distinctions between suggestiveness [291 P.3d 689] and other sources of unreliability.

When a criminal defendant has challenged the admissibility of eyewitness identification evidence by an appropriate pretrial motion, the manner in which Classen apportions the burden of proof in identification matters reflects more concern for due process principles than principles of evidence law. In the context of a due process challenge, it is the defendant who generally bears the initial burden of proof because it is the defendant who must allege and must prove a constitutional violation. In evidentiary matters, however, the proponent of the evidence—in identification matters, usually the state, although not necessarily so—traditionally bears the initial burden of establishing the admissibility of the proffered evidence. See OEC 307 (providing that "}
[t]he burden of producing evidence as to a particular issue is on the party against whom a finding on the issue would be required in the absence of further evidence” ). Although Classen purported to announce an evidentiary rule, it nevertheless adopted the same burden structure used in federal due process analysis by requiring a defendant to bear the initial burden of producing some evidence of suggestiveness. 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 question. However, a trial court tasked with considering a question of evidentiary admissibility clearly cannot begin by assuming admissibility. In sum, Classen ’s burden-of-proof structure improperly requires defendants who have filed pretrial motions to exclude eyewitness identification evidence to first

establish that an identification procedure was suggestive, even though the state— as the administrator of that procedure— controls the bulk of the evidence in that regard.

B. Classen’s Second-Part Inquiry Fails to Account for the Influence of Suggestion on Evidence of Reliability

A second problem with the Classen test arises from the tendency of trial courts applying the Classen factors to rely heavily on the eyewitnesses’ self-reports to establish the existence or nonexistence of suggestibility factors. However, the current scientific knowledge and understanding regarding the effects of suggestive identification procedures indicates that self-reported evidence of the Classen factors can be inflated by the suggestive procedure itself. That fact creates in turn a sort of feedback loop in which self-reports of reliability, which can be exaggerated by suggestiveness, are then used to prove that suggestiveness did not adversely affect the reliability of an identification. That result is contrary to the scientific research establishing that suggestiveness adversely affects reliability.

Because of the alterations to memory that suggestiveness can cause, it is incumbent on courts and law enforcement personnel to treat eyewitness memory just as carefully as they would other forms of trace evidence, like DNA, bloodstains, or fingerprints, the evidentiary value of which can be impaired or destroyed by contamination. Like those forms of evidence, once contaminated, a witness’s original memory is very difficult to retrieve; it is, however, only the original memory that has any forensic or evidentiary value. In that regard, Classen ’s second-part analysis correctly identifies the original memory as the sole source of evidentiary value in eyewitness identifications, but fails to recognize the difficulty of attempting to distinguish between the original memory and the new memory corrupted by later suggestiveness.[4]

[291 P.3d 690]

V. NEW PROCEDURES FOR DETERMINING THE ADMISSIBILITY OF EYEWITNESS IDENTIFICATION EVIDENCE

As stated earlier, in Classen, this court acknowledged that " extensive research and commentary by psychologists and jurists on the dangers of misidentification and ways to minimize them stretches back at least half a century" and " that the unreliability of eyewitness identification under suggestive circumstances is widely recognized." 285 Or. at 227, 232, 590 P.2d 1198. That
said, a perfect solution to the problem of misidentification has thus far eluded us, a difficulty that may lie in the fact that, while empirical evidence suggests that a certain percentage of eyewitness identifications are incorrect,[5] we often have no way to determine whether or not a particular eyewitness is accurate in identifying a specific individual. As we previously observed, although the scientific studies we have reviewed have identified a number of factors that contribute to the likelihood of mistaken identification, nearly all of those factors are probabilistic in nature—they can indicate only a statistical likelihood of misidentification within a broad population of people studied, not whether any one identification is right or wrong.

Despite those shortcomings, eyewitness evidence can be extremely probative of guilt and, in many cases, may be the only evidence connecting a guilty defendant to a crime. Therefore, we must attempt to strike a proper balance between the utility of that evidence in convicting the guilty and its proclivity, on occasion, to inculpate the innocent.

As described above, over the past 30 years, a voluminous body of scientific knowledge has been developed on the subject of eyewitness identification. In light of the scientific findings discussed above, we conclude that the methodology set out in Classen is not adequate to the task of ensuring the reliability of eyewitness identification evidence that has been subjected to suggestive police procedures. Consequently, we now revise the Classen test for determining the admissibility of eyewitness identification evidence based on the generally applicable provisions of the OEC.

In fact, this court has already concluded that the admissibility of eyewitness identification evidence offered by the defense, arising from suggestive defense procedures, is appropriately determined under the OEC. In Johanesen, 319 Or. at 134, 873 P.2d 1065, the defendant sought to impeach the robbery victim's identification of the defendant by introducing evidence that, in response to a photographic display of pictures of other possible suspects in the robbery, the victim had stated that one of the men in the display "could be the robber."

The state, arguing against admission of the defense evidence, asserted that the Classen test applied to photographic identification evidence offered by the defense for impeachment purposes. This court rejected the state's argument that the Classen test applied to identification evidence offered by the defendant. Instead, this court concluded that admissibility of the proffered evidence should be determined under the OEC. Applying the OEC, the court concluded that proffered evidence met the test for relevance under OEC 401, was not barred by OEC 402, but was subject to potential exclusion under OEC 403. With regard to the application of OEC 403, this court made two important observations. First, the court described the judicial function under OEC 403: "OEC 403 articulates the judicial power to exclude relevant evidence because of probative dangers or considerations. Relevant evidence may be excluded under OEC 403 only if its persuasive force ('probative value') is substantially outweighed by one or more of the articulated dangers or considerations. This requires that the probative value of the evidence be compared to the articulated reasons for exclusion and permits exclusion only if one or more of [291 P.3d 691] those reasons 'substantially outweigh' the probative value. OEC 403
favors admissibility, while concomitantly providing the means of keeping distracting evidence out of the trial."

*Johanesen*, 319 Or. at 136, 873 P.2d 1065 (footnotes and citation omitted). Second, the court observed that:

"In making this OEC 403 determination with respect to out-of-court photographic identification evidence offered by a criminal defendant, factors of the kind identified by this court in *State v. Classen*, supra, 285 Or. at 232-33 [590 P.2d 1198] are relevant, although, as noted, *Classen* itself is not controlling. These factors include (1) the procedures used to minimize the unreliability of the identification, (2) the opportunity that the identifier had at the time to get a clear view of the person involved in the crime, (3) the attention that the identifier gave to the assailant's features, (4) the timing and completeness of the description given by the identifier after the event, (5) the certainty expressed by the identifier about that description, and (6) the lapse of time between the original observation and the subsequent identification. Other facts also may be important, such as (7) the age and sensory acuity of the identifier, (8) the identifier's special occupational concern with people's appearance or physical features, and (9) the frequency of the identifier's contacts with individuals sharing the general characteristics of the person identified."

*Id.* at 138, 873 P.2d 1065.

Although none of the OEC's provisions pertain specifically to eyewitness identification evidence, as the court observed in *Johanesen*, those rules nevertheless articulate minimum standards of reliability intended to apply broadly to many types of evidence. With additional guidance regarding the proper application of those general rules, we conclude that the OEC-based procedures set out below will address the majority of concerns that might arise at trial regarding the reliability of eyewitness identification evidence, particularly in those cases involving suggestive pretrial police procedures.

Page 752

A. Preliminary Questions of Fact Regarding the Admissibility of Eyewitness Identification Evidence

When a criminal defendant files a pretrial motion to exclude eyewitness identification evidence, the trial court's determination should be guided by the following rules of evidences applicable to the issues in a particular case.

Under the OEC, "all relevant evidence is admissible," unless Oregon law or the federal constitution provide otherwise. OEC 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." OEC 401. Eyewitness identification evidence will nearly always meet that basic standard for relevance. However, the OEC also contains a number of specific exceptions and conditions to admissibility that can override those general provisions. As we explain in greater detail below, two provisions, OEC 602 and OEC 701, may also be pertinent in establishing the admissibility of eyewitness identification evidence.

1. Requirement of Personal Knowledge Under OEC 602

OEC 602 provides that "a witness may not testify to a matter unless evidence is introduced
sufficient to support a finding that the witness has personal knowledge of the matter." When a
criminal defendant raises that kind of evidentiary challenge in a pretrial motion to exclude
eyewitness identification evidence, the proponent of the evidence (in that
Page 753
context, the state) must offer evidence showing both that the witness had an adequate opportunity
to observe or otherwise personally perceive the facts to which the witness will testify, and did, in
fact, observe or perceive them, thereby gaining personal knowledge of the facts. See OEC 602
Commentary (1981) (" A party that offers testimony has the burden of establishing that the witness
had an opportunity to observe the fact." ). The rule expressly permits evidence of personal
knowledge to consist of the witness's own testimony. OEC 602.

As the legislative commentary to OEC 602 explains, the purpose of the personal knowledge
requirement is to ensure reliability:
" The ' rule requiring that a witness who testifies to a fact which can be perceived by the senses
must have had an opportunity to observe, and must have actually observed the fact' is ' one of the
most pervasive manifestations' of the common law's ' insistence upon the most reliable sources of
information.' ORE 602 simply codifies that common law requirement."
OEC 602 Commentary (1981) (citation omitted). Although perhaps somewhat counter-intuitive,
inquiring into the extent of an eyewitness's personal knowledge— when raised as an issue in a
case— promotes the reliability of eyewitness evidence just as with any other type of evidence.
Indeed, many of the reliability concerns surrounding eyewitness identification evidence stems from
the basic premise that eyewitness testimony can be led or prompted by suggestive identification
procedures, suggestive questioning, and/or memory contamination from other sources.

2. Requirements for Admission of Lay Opinion Testimony Under OEC 701

A statement of identification potentially can be a kind of lay opinion testimony that is based
on a number of inferences and assumptions made by the witness regarding his or her perceptions.
See, e.g., OEC 701(2) Commentary (1981) (noting that lay opinion testimony " may allow a
witness to communicate in shorthand what the witness has perceived— things such as the speed
of an automobile, the identity of a person, the appearance of another person, the
Page 754
sound of footsteps, footprints, distance, uncomplicated illness or injury, apparent age, and so
forth" (emphasis added)). The ultimate conclusion in an eyewitness identification— i.e., that a
defendant on trial is the same person that the witness saw at the scene— cannot itself be
observed, but rather must be inferred by the witness.

OEC 701 requires that the proponent of lay opinion testimony establish that the proposed
testimony is both rationally based on the witness's perceptions and helpful to the trier of fact:
" If the witness is not testifying as an expert, testimony of the witness in the form of opinions or
inferences is limited to those opinions or inferences which are: " (1) Rationally based on the
perception of the witness; and " (2) Helpful to a clear understanding of testimony of the witness or
the determination of a fact in issue."
OEC 701. Unlike OEC 602, OEC 701 does not expressly specify a standard of proof. However,
under OEC 104(1), all " [p]reliminary questions concerning the qualification of a person to be a
witness, the existence of a privilege or the admissibility of evidence shall be determined by the court." As we have held previously, that rule requires the proponent of the evidence to establish such facts to the court by a preponderance of the evidence. State v. Carlson, 311 Or. 201, 209, 808 P.2d 1002 (1991).

[291 P.3d 693] 3. Identification Must Be Rationally Based on the Witness's Perception

When a defendant has filed a pretrial motion to exclude eyewitness identification and raises an issue implicating OEC 701, the first part of an OEC 701 inquiry requires that the trial court initially consider what the witness actually perceived (essentially, the OEC 602 inquiry described above), and then determine whether the witness's identification of the defendant was "rationally based" on those perceptions. To satisfy its burden, the proponent of the identification evidence (generally the state) must demonstrate by a preponderance of the evidence that the witness perceived sufficient facts to support an inference of identification and that the identification was, in fact, based on those perceptions.

Initially, the proponent of the evidence must establish that the witness could make a rational inference of identification from the facts that the witness actually perceived. Human facial features will ordinarily be sufficiently distinctive to serve as a rational basis for an inference of identification. Thus, a witness who got a clear look at the perpetrator's face could rationally base a subsequent identification on a comparison of facial features, even if the witness was unable to verbally communicate every specific similarity between the two faces.

Conversely, nonfacial features like race, height, weight, clothing, or hair color, generally lack the level of distinction necessary to permit the witness to identify a specific person as the person whom the witness saw. If, for example, a witness testified to observing a tall, dark-haired man of medium build from behind as he ran from the scene of the crime, the trial court permissibly could find that the witness had personal knowledge of the height, build, clothing, and hair color of the perpetrator, but no more, and limit the testimony accordingly.

When a witness's perceptions are capable of supporting an inference of identification, but are nevertheless met with competing evidence of an impermissible basis for that inference—i.e., suggestive police procedures—an issue of fact arises as to whether the witness's subsequent identification was derived from a permissible or impermissible basis. When there are facts demonstrating that a witness could have relied on something other than his or her own perceptions to identify the defendant, the state—as the proponent of the identification—must establish by a preponderance of the evidence that the identification was based on a permissible basis rather than an impermissible one, such as suggestive police procedures.

Because the outcome of that inquiry will turn on a preponderance of the evidence, a trial court need not conclusively determine whether the witness's identification was based on the witness's actual perceptions. Instead, the trial court need only ascertain whether it was more likely that the witness's identification was based on his or her own perceptions than on any other source.

Finally, we note that, although a defendant may choose to present evidence of particular
suggestive influences, the burden ultimately rests on the proponent of the evidence (generally the state) to prove that the identification was rationally based on the witness's perceptions.

4. Identification Must Be Helpful to the Trier of Fact

The second aspect of OEC 701 requires the proponent of identification evidence to establish that the identification will be "[h]elpful to a clear understanding of testimony of the witness or the determination of a fact in issue." OEC 701(2). Although we anticipate that that burden will be easily satisfied in nearly all cases, it is conceivable that some statements of identification might not be particularly helpful to a jury. Consider, for example, the witness who observes a masked perpetrator with prominently scarred or tattooed hands. Although those features could be distinctive enough to provide a rational basis for an inference of identification, a jury may be equally capable of making the same inference by comparing the witness's description of those markings to objective evidence of the actual markings on the defendant. In such cases, the witness's opinion that defendant is the perpetrator [291 P.3d 694] provides the jury with little, if any, additional useful information. OEC 701 permits lay opinion testimony to be admitted only when the opinion communicates more to the jury than the sum of the witness's describable perceptions.

B. Exclusion of Unduly Prejudicial, Confusing, Misleading, or Duplicative Evidence Under OEC 403

When, in response to a criminal defendant's pretrial motion to exclude eyewitness identification evidence, the state as the proponent of that evidence succeeds in establishing that the evidence is not barred by OEC 402, the defendant as the opponent of the evidence assumes the burden of proving that OEC 403 nevertheless requires its exclusion. See O'Key, 321 Or. at 320, 899 P.2d 663 (OEC 403 generally favors admissibility, "[t]he 'substantially outweighed' phrasing in OEC 403 in effect places the burden on the party seeking exclusion of the evidence"). OEC 403 provides:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence."

When the opponent of the evidence succeeds in that regard, the trial court can either exclude the evidence or fashion a remedy to restore a permissible balance between the probative value of the evidence and the countervailing concerns set out in OEC 403.

1. Probative Value

In determining whether eyewitness identification evidence should be excluded under OEC 403 or what intermediate remedies might be appropriate, a trial court must weigh the probative value of that evidence against the dangers and concerns listed in OEC 403. See O'Key, 321 Or. at 319, 899 P.2d 663 ("Relevant evidence may be excluded under OEC 403 only if its persuasive force is substantially outweighed by any of the articulated dangers or considerations alone or in combination."). The trial court's first task in that regard is to determine the probative value of the identification evidence.

Probative value is essentially a measure of the persuasiveness that attaches to a piece of
evidence. See, e.g., id. at 299 n. 14, 899 P.2d 663 (noting that probative value concerns the strength of the relationship between the proffered evidence and the proposition sought to be proved). The persuasive force of eyewitness identification testimony is directly linked to its reliability. The more reliable a witness's testimony, the more persuasively it will establish a particular fact at issue. Conversely, the less reliable a witness's testimony, the less persuasive it will be. Thus, in applying OEC 403 to eyewitness identification issues, trial courts must examine the relative reliability of evidence produced by the parties to determine the probative value of the identification. The more factors—the presence of system variables alone or in combination with estimator variables—that weigh against reliability of the identification, the less persuasive the identification evidence will be to prove the fact of identification, and correspondingly, the less probative value that identification will have.

Page 758

Probative value is not an all-or-nothing proposition, however. Although the initial admissibility requirements for eyewitness identification evidence establish a minimum baseline of reliability, the persuasive power of the evidence that meets that standard may nevertheless vary greatly, and many identifications possessing relatively low probative value may still pass that initial test. Thus, even after finding that the evidence meets the minimum requirements of OEC 602 and 701, trial courts must still conduct a thorough examination of all the pertinent factors in order to determine the probative value of the evidence under OEC 403.

2. Unfair Prejudice and Other Countervailing Concerns

After determining the probative value of the identification evidence before it, a trial court must then determine whether the evidence might unfairly prejudice the defendant or invoke the other concerns enumerated in OEC 403. As we have previously held,

[291 P.3d 695] " 'unfair prejudice' * * * means an undue tendency to suggest a decision on an improper basis * * *. [I]t describes a situation in which the preferences of the trier of fact are affected by reasons essentially unrelated to the persuasive power of the evidence to establish a fact of consequence." State v. Lyons, 324 Or. 256, 280, 924 P.2d 802 (1996).

As a discrete evidentiary class, eyewitness identifications subjected to suggestive police procedures are particularly susceptible to concerns of unfair prejudice. Consequently, in cases in which an eyewitness has been exposed to suggestive police procedures, trial courts have a heightened role as an evidentiary gatekeeper because "traditional" methods of testing reliability—like cross-examination—can be ineffective at discrediting unreliable or inaccurate eyewitness identification evidence.[9]

Page 759

C. Intermediate Remedies

Under OEC 403, trial courts may exclude particularly prejudicial aspects of a witness's testimony without excluding the identification itself. In essence, a partial exclusion order is no more than a determination under OEC 403 that the prejudicial effect of some testimonial evidence substantially outweighs its probative value. As we have already noted, witnesses' self-appraisal of their certainty regarding identifications they have made, especially when elicited after they have received confirming feedback from suggestive police procedures, is a poor indicator of reliability.
At the same time, jurors can find such statements persuasive, even when contradicted by more probative indicia of reliability. Accordingly, when such statements are presented at trial, they ordinarily have little probative value, but significant potential for unfair prejudice. Thus, a trial court could admit an eyewitness's identification, but find that the prejudicial effect of the accompanying statement of certainty that was created by suggestive police procedures substantially outweighed its limited probative value. A court presented with such evidence could fashion an order permitting the witness to testify to the identification (i.e., "defendant is the man that I saw rob the bank"), but prohibit testimony regarding the witness's level of certainty (i.e., "I'm 100 percent sure that defendant is the man that I saw rob the bank"). By excluding the particularly prejudicial aspects of that testimony, even though the eyewitness's testimony on balance might otherwise have been unduly prejudicial.

D. Expert Testimony

As a result of the substantial degree of acceptance within the scientific community concerning data on the reliability of eyewitness identifications, federal and state courts around the country have recognized that traditional methods of informing factfinders of the pitfalls of eyewitness identification—cross-examination, closing argument, and generalized jury instructions—frequently are not adequate to inform factfinders of the factors affecting the reliability of such identifications. See State v. Guilbert, 306 Conn. 218, 49 A.3d 705 (2012) (finding that scientific research on the reliability of eyewitness identifications enjoys strong consensus in the scientific community, that many factors affecting eyewitness identifications are unknown to average jurors or are contrary to common assumptions, and that cross-examination, closing argument, and generalized jury instructions are not effective in helping jurors spot mistaken identifications).[10]

Because many of the system and estimator variables that we described earlier are either unknown to the average juror or contrary to common assumptions, expert testimony is one method by which the parties can educate the trier of fact concerning variables that can affect the reliability of eyewitness identification. Expert testimony may also provide an avenue to introduce and explain scientific research or other indicia of reliability not specifically addressed by our opinion in these cases. In that regard, the use of experts may prove vital to ensuring that the law keeps pace with advances in scientific knowledge, thus enabling judges and jurors to evaluate eyewitness identification testimony according to relevant and meaningful criteria. Of course, expert testimony must be predicated on scientific research; must meet the threshold admissibility requirements for scientific evidence, see O'Key, 321 Or. at 299-300, 899 P.2d 663 (setting out test for the admission of scientific evidence); and must be relevant to a disputed issue in the case, such that the testimony will assist the jury in resolving that issue.

To summarize: Under this revised test governing the admission of eyewitness testimony, when a criminal defendant files a pretrial motion to exclude eyewitness identification [291 P.3d
evidence, the state as the proponent of the eyewitness identification must establish all preliminary facts necessary to establish admissibility of the eyewitness evidence. See OEC 104; OEC 307. When an issue raised in a pretrial challenge to eyewitness identification evidence specifically implicates OEC 602 or OEC 701, those preliminary facts must include, at minimum, proof under OEC 602 that the proffered eyewitness has personal knowledge of the matters to which the witness will testify, and proof under OEC 701 that any identification is both rationally based on the witness's first-hand perceptions and helpful to the trier of fact.

If the state satisfies its burden that eyewitness evidence is not barred by OEC 402, the burden shifts to the defendant to establish under OEC 403 that, although the eyewitness evidence is otherwise admissible, the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence. If the trial court concludes that the defendant opposing the evidence has succeeded in making that showing, the trial court can either exclude the identification, or fashion an appropriate intermediate remedy short of exclusion to cure the unfair prejudice or other dangers attending the use of that evidence. The decision whether to admit, exclude, or fashion an appropriate intermediate remedy short of exclusion is committed to the sound exercise of the trial court's discretion. See State v. Cunningham, 337 Or. 528, 536, 99 P.3d 271 (2004) (question whether relevant evidence should be excluded under OEC 403 because its probative value is substantially outweighed by the danger of unfair prejudice or other factors is reserved to the trial court's discretion).

Although we have revised the Classen test to incorporate pertinent rules of evidence, we anticipate that the trial courts will continue to admit most eyewitness identifications. That is so because, although possible, it is doubtful that issues concerning one or more of the estimator variables that we have identified will, without more, be enough to support an inference of unreliability sufficient to justify the exclusion of the eyewitness identification. In that regard, we anticipate that when the facts of a case reveal only issues regarding estimator variables, defendants will not seek a pretrial ruling on the admission of the eyewitness identification. Instead, defendants will likely prefer to probe the issues regarding estimator variables through cross-examination, and to educate the factfinder about the potential effects of relevant estimator variables on the accuracy of eyewitness identification by using expert testimony and case-specific jury instructions.

If the state's administration of one or more of the system variables (either alone or combined with estimator variables) results in suggestive police procedures, that fact can, in turn, give rise to an inference of unreliability that is sufficient to undermine the perceived accuracy and truthfulness of an eyewitness identification— only then may a trial court exclude the eyewitness identification under OEC 403.

In the end, we intend the test to be a flexible one that will enable the state to hold offenders accountable and, at the same time, protect a criminal defendant's right to a fair trial.

VI. APPLICATION TO LAWSON AND JAMES
A. State v. Lawson

The record in Lawson raises serious concerns regarding the reliability of the identification evidence proffered below. First, as to the estimator variables present in this case, we note that the eyewitness—Mrs. Hilde—was under tremendous stress and in poor physical and mental condition when she first observed the man who entered her trailer after she had been shot. She had sustained a critical gunshot wound to the chest, she was unsure whether her husband was alive or dead, and she feared that the perpetrator intended to further harm her or her husband. High levels of stress and fear—coupled with the debilitating effects of a physical injury such as a bullet wound—tend to impair a witness's ability to encode information into memory. Second, the environmental viewing conditions were poor. It was [291 P.3d 698] dark inside the trailer, and Mrs. Hilde was lying on the floor when she encountered the perpetrator. The perpetrator covered her face with a pillow shortly after entering the trailer for the specific purpose of obscuring Mrs. Hilde's view of him. Mrs. Hilde claims to have viewed the perpetrator for only a few seconds at most, and only in profile, and she recalled that the perpetrator was wearing a hat when she viewed him, obscuring key identifying features like his hair and hairline. Finally, Mrs. Hilde's in-court identification of defendant Lawson took place over two years after her brief view of the perpetrator. Memory decays over time, and the effects of that memory loss are exacerbated when the initial encoding of the memory is impaired by other variables.

There are a number of system variables at play here as well. Police detectives first interviewed Mrs. Hilde in the hospital where she was heavily medicated and intubated, and could not speak or move her hands. The police questioned her using leading questions that implicitly communicated their belief that defendant was the shooter, to which Mrs. Hilde could respond only by nodding or shaking her head. Due to her fragile physical and mental condition, as well as the circumstances discussed above that impaired her ability to view the perpetrator and encode her observations into memory, Mrs. Hilde would have been especially susceptible to memory contamination from suggestive questioning. Once implanted in her mind, the suggestion that the police believed that the man she saw earlier at their campsite was also the perpetrator could have affected every subsequent attempt she made to recall the event. From that point forward, it would have been extremely difficult for Mrs. Hilde to mentally separate the task of identifying the perpetrator from her brief glimpse of his profile in the dark from the task of identifying the man she saw earlier in her campsite for about 40 minutes in broad daylight.

Mrs. Hilde, however, was unable to identify defendant as either the perpetrator or the man previously in her campsite until after she had seen defendant or his photograph in suggestive circumstances on several additional occasions. Mrs. Hilde was shown photographic lineups containing defendant's photograph on at least two occasions while she was in the hospital, but was unable to identify defendant in either lineup. It was not until after she had seen a newspaper article with a picture of defendant, and was later brought by police to a preliminary hearing to view defendant in person, that she was able to identify him. Those instances introduce further uncertainty as to whether Mrs. Hilde's identification of defendant was based on her brief initial
viewing of the perpetrator, or on the numerous subsequent viewings of defendant under circumstances that were highly suggestive of his guilt.

Page 765

The alterations in Mrs. Hilde's statements over time are indicative of a memory altered by suggestion and confirming feedback. She initially told the police that she had not seen the perpetrator's face and could not identify him. After a series of leading questions inculpating defendant, she agreed with police that defendant was the perpetrator, but still could not identify him. After several viewings of defendant in person and in photographs, she was able to pick defendant out of a series of photographs. And finally, at trial, over two years after the initial incident, Mrs. Hilde identified defendant as the perpetrator under circumstances comparable to a showup. When asked if she had any doubt as to her identification, Mrs. Hilde said, "[a]bsolutely not. I'll never forget his face as long as I live," and later added that she "always knew it was him."

In light of current scientific knowledge regarding the effects of suggestion and confirming feedback, the preceding circumstances raise serious questions concerning the reliability of the identification evidence admitted at defendant's trial. In Lawson, because the Court of Appeals and trial court relied on the procedures set out in Classen — procedures that we have revised in this opinion— we reverse and remand the case to the trial court for a new trial. Due to the novelty and complexity of the procedures we have articulated today, the parties must be permitted on retrial to (1) supplement the record with any additional evidence that may bear on the reliability of the eyewitness identifications at issue here, and (2) present arguments regarding the appropriate application of the new procedures set out in this opinion.

B. State v. James

In James, we conclude that, unlike Lawson, application of the revised test that we have established here could not have resulted in the exclusion of the eyewitness identification evidence. Accordingly, we affirm defendant James's conviction. We do so for the following reasons.

Within minutes of the crime, the witnesses provided detailed descriptions to the police that included the race, height, weight, and clothing of both perpetrators. The witnesses initially described one of the perpetrators as "a fairly large guy; Indian male six feet to six feet two inches, 220 pounds, wearing baggy blue jeans, white tank top tee shirt"; the other was a "small guy," an "Indian male," a male approximately "five feet tall, 110 pounds, wearing a black coat with a hood and baggy blue plants, carrying a black backpack."

Five hours later, the officer who had investigated the Safeway robbery received a report of a disturbance at a local fast food restaurant. When the officer arrived at the restaurant he recognized the men about whom the complaint had been made as "exactly" matching the description of the Safeway robbery suspects. In particular, the officer noted that, although the type of clothing was not unusual, wearing a tank-top T-shirt without a coat in December was unusual, as was the notable difference in height between the two men. The witnesses later confirmed that the men the officer had apprehended were the men they had seen at the store.

We analyze the admissibility of those identifications under the framework we have outlined
above. First, we conclude that the OEC requirement of personal knowledge was met. The witnesses were face-to-face with the perpetrators and had clear opportunities to observe their features. Although some estimator variables could have negatively affected the witnesses’ perceptions, others indicate that the witnesses' observations were reliable. For instance, although the clerk may have experienced stress when one of the perpetrators tried to punch him, that incident occurred only after the clerk had watched and reported the perpetrator’s actions. Both witnesses observed the perpetrators for a lengthy period of time both in, and as they were leaving, the store; the environmental conditions were conducive to their doing so, and the perpetrators were not wearing disguises. Although the perpetrators were of a different race than were the witnesses, they had distinctive features. The trial court may have erred in considering the level of certainty with which the witnesses testified, but no reasonable decisionmaker could find that the witnesses did not have the personal knowledge necessary to identify the perpetrators.

That is not the end of the inquiry outlined above, however. Because there was evidence that the witnesses' later identification of defendant occurred during a "show up" procedure, and the trial court found that procedure to be unduly suggestive, defendant raised a question of fact as to whether the witnesses' identifications were derived from their initial untainted observations or from that suggestive procedure. The state, as the proponent of the witnesses' identifications was required to establish by a preponderance of the evidence that the witnesses' identifications were based on their original observations.

The trial court evaluated the evidence that the parties preferred on that issue and was "satisfied that the suggestive show up confrontation did not cause or contribute to the witnesses' identification of defendant James." Although the trial court mistakenly considered the witnesses’ certainty about their identification in that analysis, the court also carefully considered and explicitly relied on other facts which supported its conclusion. The trial court found that the witnesses "got a very good look" at the perpetrators and described their unique features with particularity. The trial court also found that the witnesses had observed and described the clothing that defendant and his companion were wearing (one item of which was unusual for that location at that time of year) and a specific bottle of beer that was found in defendant's possession along with other items that defendant admitted belonged to him. The witnesses' accuracy in describing those details demonstrated the reliability of their observations. The trial court did not err in reaching its factual conclusion that the witnesses' identifications of defendant were based on their original observations.

The final issues in our analysis are whether the witnesses' identifications were helpful to the trier of fact and whether OEC 403 required their exclusion. To both of those points, defendant could argue that the witnesses' identification of the men did not provide the jury with information that was any more helpful than their complete descriptions of the perpetrators and that, as a result, its persuasive value was limited and outweighed by the unfair prejudice introduced by the identifications. However, in this case, we think that the concerns of unfair prejudice were negligible. The descriptions of defendant and his companion so closely matched the two men apprehended by police, that the witnesses' subsequent identifications of defendant as one of the
men that they had seen in the store prejudiced defendant little, if at all. We conclude that the trial court did not err in admitting the witnesses' identifications of defendant.\footnote{11}

The decision of the Court of Appeals and the judgment of the circuit court in \textit{State v. Lawson} are reversed and the case is remanded for a new trial. The decision of the Court of Appeals in \textit{State v. James} is affirmed.

\section*{APPENDIX}

Set out below is a summary of the scientific research and literature this court examined for these cases, organized according to the categories of variables— estimator and system—identified in that body of work. As described in our opinion, estimator variables generally refer to characteristics of the witness, the perpetrator, and the environmental conditions of the event that cannot be manipulated or adjusted by state actors. In contrast, system variables refer to the circumstances of the identification procedure itself that generally are within the control of those administering the procedure.

\subsection*{I. ESTIMATOR VARIABLES}

\subsubsection*{A. Stress}

High levels of stress or fear can have a negative effect on a witness's ability to make accurate identifications. Although moderate amounts of stress may improve focus in some circumstances, research shows that high levels of stress significantly impair a witness's ability to recognize faces and encode details into memory. \textit{See} Charles A. Morgan III \textit{et al.}, \textit{Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress}, 27 Int'l J. L. & Psychiatry 265, 275-76 (2004) (so stating). When under high amounts of stress, witnesses are often unable to remember particular details—like facial features or clothing—that are not immediately relevant to the basic survival response triggered by adrenaline and other hormones that are released in highly stressful situations. \textit{Id.}

A meta-analysis\footnote{12} of 27 independent studies conducted on the effects of stress on identification accuracy showed that, while 59 percent of the 1,727 participants correctly identified the target individual in a target-present lineup after a low-stress encounter, only 39 percent did so after high-stress encounters. Kenneth A. Deffenbacher \textit{et al.}, \textit{A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory}, 28 Law & Hum. Behav. 687 (2004). In another study, military survival school participants were subjected to two 40-minute interrogations, \textbf{[291 P.3d 701]} each by different interrogators, following a 12-hour period of confinement without food and sleep in a mock prisoner of war camp. Morgan, \textit{Accuracy of Eyewitness Memory}, 27 Int'l J. L. & Psychiatry 265 (2004). One interrogation was conducted under high-stress conditions, involving physical confrontation, while the other was conducted under low-stress conditions, involving only deceptive questioning. \textit{Id.} When asked the next day to identify their interrogators, only 30 percent of the participants correctly identified their high-stress interrogator, while 60
percent correctly identified their low-stress interrogator. *Id.* The study also noted an associated increase in false identifications—56 percent of the participants falsely identified another person as their high-stress interrogator, compared to 38 percent who did so with regard to their low-stress interrogator. *Id.*

The negative effect of stress on the reliability of eyewitness identifications contradicts a common misconception that faces seen in highly stressful situations can be "burned into" a witness's memory. Consequently, the amount of stress inflicted on an eyewitness has the potential to impair a jury's ability to fairly and accurately weigh reliability, because jurors may incorrectly assume that stress increases reliability. In addition, stress may also interact with other factors to compound unreliability. Studies demonstrate, for example, that witnesses are more likely to overestimate short durations of time in high-stress situations than in low-stress situations. *See* Elizabeth F. Loftus *et al.*, *Time Went by so Slowly: Overestimation of Event Duration by Males and Females*, 1 Applied Cognitive Psychol. 3 (1987) (so stating).

B. Witness Attention

In assessing eyewitness reliability, it is important to consider not only what was within the witness's view, but also on what the witness was actually focusing his or her attention. It is a common misconception that a person's memory operates like a videotape, recording an exact copy of everything the person sees. Studies show, however, that memory in fact works much differently. A person's capacity for processing information is finite, and the more attention paid to one aspect of an event decreases the amount of attention available for other aspects. 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, 10-11 (2009).

One commonly encountered example of that fact is the weapon-focus effect. Studies consistently show that the visible presence of a weapon during an encounter negatively affects memory for faces and identification accuracy because witnesses tend to focus their attention on the weapon instead of on the face or appearance of the perpetrator, or on other details of the encounter. *See*, e.g., Kerri L. Pickel, *Remembering and Identifying Menacing Perpetrators: Exposure to Violence and the Weapon Focus Effect*, in 2 The Handbook of Eyewitness Psychology: Memory for People 339 (R.C.L. Lindsay *et al.* eds., 2007). That diminished attention factor frequently impairs the witness's ability to encode things such as facial details into memory, resulting in decreased accuracy in later identifications. Although the weapon-focus effect is perhaps the most well-documented illustration regarding the effects of witness distraction, some studies indicate that the effect is not limited to dangerous or threatening objects but, in fact, extends to any object that attracts the witness's attention by virtue of being unusual or out of place in the context in which it is encountered. *See* *Id.* at 353-54 (discussing experiments involving unusual rather than threatening items). Studies have documented similar impairment of identification performance when witnesses viewed the target holding unusual, but nonthreatening, objects like a stalk of celery or a toy doll. *Id.*

The negative effect of weapon-focus on identification accuracy may be magnified when
combined with stress, short exposure times, poor viewing conditions, or longer retention intervals, and may also result in less [291 P.3d 702] accurate initial descriptions of the perpetrator. Id.; Nancy Mehrkens Steblay, A Meta-Analytic Review of the Weapon Focus Effect, 16 Law & Hum. Behav. 413, 417 (1992). In addition, evidence regarding a witness's attention is particularly susceptible to the inflating effects of confirming feedback. Studies demonstrate that witnesses generally do not contemporaneously observe their own degree of attention or other viewing conditions as they observe an event. Gary L. Wells, "Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, 83 J Applied Psychol. 360 (1998). Thus, when asked later how closely they were paying attention, witnesses may rely more heavily on external context clues—like confirming feedback—than on independent recollection.

C. Duration of Exposure

Scientific studies indicate that longer durations of exposure (time spent looking at the perpetrator) generally result in more accurate identifications. Brian H. Bornstein et al., Effects of Exposure Time and Cognitive Operations on Facial Identification Accuracy: A Meta-Analysis of Two Variables Associated with Initial Memory Strength, 18 Psychology, Crime & Law 473 (2012). One meta-analysis shows that the beneficial effect of longer exposure time on accuracy is greatest between the shortest durations, up to approximately 30 seconds. Id. In contrast, for durations over 30 seconds, only substantial increases in exposure time produced marked improvement in witness performance. Id. However, it is impossible to determine conclusively that any particular duration of exposure is too short to make an accurate identification, nor so long as to entirely eliminate the possibility of a mistaken identification. Indeed, at least one study has noted decreases in identification accuracy with longer viewing durations, in cases where the appearance of the person to be identified has changed significantly between the identification and the initial viewing. J. Don Read et al., Changing Photos of Faces: Effects of Exposure Duration and Photo Similarity on Recognition and the Accuracy-Confidence Relationship, 16 Experimental Psychol.: Learning, Memory, and Cognition 870 (Sept 1990).

Studies also show that witnesses consistently and significantly overestimate short durations of time (generally, durations of 20 minutes or less), especially during highly stimulating, stressful, or unfamiliar events. Loftus, Time Went by so Slowly, 1 Applied Cognitive Psychol. 3; A. Daniel Yarmey, Retrospective Duration Estimations for Variant and Invariant Events in Field Situations, 14 Applied Cognitive Psychol. 45 (2000).

D. Environmental Viewing Conditions

The conditions under which an eyewitness observes an event can significantly affect the eyewitness’s ability to perceive and remember facts regarding that event. Although we limit our discussion here to the basic environmental conditions of distance and lighting, we have already noted that any aspect of a viewing environment can potentially impair an eyewitness’s ability to clearly view an event or a perpetrator.

Unsurprisingly, studies confirm that visual perception decreases with either distance or
diminished lighting. In the case of distance, unlike variables subject to probability determinations, scientists have identified certain dispositive endpoints beyond which humans with normal, unaided vision are physically incapable of discerning facial features. Studies also show that witnesses who receive post-identification feedback confirming the validity of their identification tend to report more favorable initial viewing conditions than witnesses who do not receive such feedback. Wells, *et al.*, "Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts their Reports of the Witnessing Experience, 83 Applied Psychol. 360 (1998).

E. Witness Characteristics and Condition

An eyewitness's ability to perceive and remember varies with the witness's physical and mental characteristics. Although different witnesses and fact patterns may implicate different variables, some common variables that affect the ability to perceive and remember include visual acuity, physical and mental condition (illness, injury, intoxication, or fatigue), and age. Studies demonstrate, [291 P.3d 703] for example, that intoxicated witnesses are more likely to misidentify an innocent suspect than their sober counterparts. See Jennifer E. Dysart *et al.*, The Intoxicated Witness: Effects of Alcohol on Identification Accuracy from Showups, 87 J. Applied Psychol. 170 (2002) (finding that 78 percent of participants with blood alcohol levels less than .04 percent correctly rejected a showup where the perpetrator was absent, while only 48 percent of participants with higher blood alcohol levels—averaging .09 percent—did so).

Age can also significantly affect the reliability of a witness's identification, memory, and perception. Studies show that children and elderly witnesses are generally less likely to make accurate identifications than adults, especially in target-absent conditions. Gary L. Wells & Elizabeth A. Olson, Eyewitness Testimony, 54 Ann. Rev. Psychol. 277, 280 (2003).

F. Description

Contrary to a common belief, studies reveal that there is little correlation between a witness's ability to describe a person and the witness's ability to later identify that person. Christian A. Meissner *et al.*, Person Descriptions as Eyewitness Evidence, in 2 The Handbook of Eyewitness Psychology: Memory for People 3 (R.C.L. Lindsay *et al.*, eds., 2007). Indeed, some studies show a negative effect on identification accuracy after witnesses have attempted to produce a composite of a suspect or provide detailed verbal descriptions of facial features, a development that might result from the different cognitive mechanisms employed to verbally describe faces as opposed to recognizing them. *Id.* Other studies indicate that witnesses who focus on memorizing particular facial features at a viewing rather than on the face as a whole may be able to better describe those features, but tend to perform less accurately in later identification procedures. *Id.*

G. Perpetrator Characteristics—Distinctiveness, Disguise, and Own-Race Bias

Witnesses are better at remembering and identifying individuals with distinctive features than they are those possessing average features. See Peter N. Shapiro & Steven Penrod, Meta-Analysis of Facial Identification Studies, 100 Psychol. Bull. 139 (1986) (summarizing
results of a number of studies on target distinctiveness). However, identification accuracy drops significantly when an individual's facial features have changed since the witness's initial observation. K.E. Patterson & A.D. Baddeley, *When Face Recognition Fails*, 3 Experimental Psychol. 406, 410 (1977) (finding that recognition performance dropped by over 50 percent when researchers manipulated the target's facial appearance after the initial opportunity to view by changing hairstyles or adding or removing facial hair). Similarly, studies confirm that the use of a disguise negatively affects later identification accuracy. In addition to accoutrements like masks and sunglasses, studies show that hats, hoods, and other items that conceal a perpetrator's hair or hairline also impair a witness's ability to make an accurate identification. See, e.g., 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 (2006) (summarizing cumulative results of six studies showing that identification accuracy dropped from 57 percent to 44 percent when perpetrator hair and hairline cues were masked).

Studies also indicate that witnesses are significantly better at identifying members of their own race than those of other races. See Christian A. Meisner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A MetaAnalytic Review*, 7 Psychol., Pub. Pol'y, & L. 3 (2001) (summarizing results of three decades of studies demonstrating effect of own-race bias in eyewitness identifications). Indeed, one study found that cross-racial identifications were 1.56 times more likely to be incorrect than same-race identifications. Conversely, subjects were 2.2 times more likely to accurately identify a person of their own race than a person of another race. Id. at 15-16 (2001). Despite widespread acceptance of the cross-racial identification effect in the scientific community, fewer than half of jurors surveyed understand the impact of that factor. Richard S. Schmechel et al.,


Page 776

H. Speed of Identification (Response Latency)

Accurate identifications generally tend to be made faster than inaccurate identifications. Gary L. Wells *et al.*, *Eyewitness Evidence: Improving Its Probative Value*, 7 Psychol. Sci. Pub. Int. 45, 67-68 (2006). Some researchers posit that faster identifications correlate with accuracy because the automatic cognitive process associated with facial recognition operates faster than the deliberative cognitions used to make relative judgments, a process that is more likely to result in misidentification. Id.

The usefulness of that variable is nevertheless limited by the fact that studies have been unable to agree upon the exact boundaries of the effect. Id. One study found that the most accurate identifications were made within 10 to 12 seconds. Id. (citing David Dunning & Scott Perretta, *Automaticity and Eyewitness Accuracy: A 10-12 Second Rule for Distinguishing Accurate from Inaccurate Positive Identifications*, Applied Psychol., 87, 951-962 (2002)). A later study, however, noted a positive correlation to accuracy with response times ranging from five to 29 seconds, but also found that identifications made faster than those optimal time boundaries were not highly accurate. Id. (citing Nathan Weber *et al.*, *Eyewitness Identification Accuracy and
Response Latency: The Unruly 10-12 Second Rule, Experimental Psychol. Applied, 139-147 (2004)).

It is worth noting that, although identification speeds can be measured objectively by the administrator of the identification procedure, witnesses' self-reports regarding their deliberative process— i.e., how long it took the witness to make an identification, how difficult it was, whether the defendant just "popped out" at them, or whether the witness employed a process of elimination or other relative judgment to arrive at the identification— are not highly reliable. Id. As with self-reports concerning many of the other factors previously discussed, witnesses' perception of their own deliberative process can be manipulated by suggestive procedures and confirming feedback. Id. Additionally, studies have shown that suggestive identification procedures can result in quicker identifications without any corresponding increase in accuracy. See, e.g., David F. Ross et al., When


I. Level of Certainty

Despite widespread reliance by judges and juries on the certainty of an eyewitness's identification, studies show that, under most circumstances, witness confidence or certainty is not a good indicator of identification accuracy. Regarding prospective certainty— the witness's confidence prior to the identification procedure in his or her ability to make an identification— a number of meta-analytic studies have found no correlation between certainty and identification accuracy. In contrast, retrospective certainty— witness confidence in the accuracy of their identification after it has occurred— may have a weak correlation with accuracy. See Gary L. Wells & Elizabeth A. Olsen, Eyewitness Testimony, 54 Ann. Rev. Psychol. 277, 283 (2003) (describing studies). The effect, however appears only within the small percentage of extremely confident witnesses who rated their certainty at 90 percent or higher, and even those individuals were wrong 10 percent of the time. Id.

Research also shows that retrospective self-reports on eyewitness certainty are highly susceptible to suggestive procedures and confirming feedback, a factor that further limits the utility of the certainty variable. Wells, "Good, You Identified the Suspect," 83 J. Applied Psychol. 360. Witnesses who receive confirming feedback i.e., are told or otherwise made aware that they made a correct identification— report higher levels of retrospective confidence than witnesses who receive either no feedback or disconfirming feedback. Id. It appears, moreover, that confirming feedback may inflate confidence to a greater degree in mistaken identifications than in correct identifications. See, [291 P.3d 705] e.g., Amy L. Bradfield et al., The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy, 87 J. Applied Psychol. 112, 115 (2002) (reporting that inaccurate witness self-reports increased from an average of 49 percent certain to an average of 67 percent certain after receiving confirming feedback, while the same feedback increased
accurate witnesses’ certainty only from an average of 80 percent to 85 percent).

Finally, we note that witness certainty, although a poor indicator of identification accuracy in most cases, nevertheless has substantial potential to influence jurors. Studies show that eyewitness confidence is the single most influential factor in juror determinations regarding the accuracy of an eyewitness identification. See, e.g., Gary L. Wells et al., Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification, 64 J. Applied Psychol. 440, 446 (1979); Michael R. Leippe et al., Cueing Confidence in Eyewitness Identifications: Influence of Biased Lineup Instructions and Pre-Identification Memory Feedback Under Varying Lineup Conditions, 33 Law & Hum. Behav. 194, 194 (2009) (summarizing prior research). Jurors, however, tend to be unaware of the generally weak relationship between confidence and accuracy, and are also unaware of how susceptible witness certainty is to manipulation by suggestive procedures or confirming feedback. See, e.g., Tanja R. Benton et al., Eyewitness Memory is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts, 20 Applied Cognitive Psychol. 115, 120 (2006) (finding that only 38 percent of jurors surveyed correctly understood the relationship between accuracy and confidence and only 50 percent of jurors recognized that witnesses’ confidence can be manipulated). As a result, jurors consistently tend to overvalue the effect of the certainty variable in determining the accuracy of eyewitness identifications.

J. Memory Decay (Retention Interval)

It is a well-known fact that memory decays over time. The more time that elapses between an initial observation and a later identification procedure (a period referred to in eyewitness identification research as a "retention interval")—or even a subsequent attempt to recall the initial observation—the less reliable the later recollection will be. An aspect of memory decay that is less well known, however, is that decay rates are exponential rather than linear, with the greatest proportion of memory loss occurring shortly after an initial observation, then leveling off over time. See Kenneth A. Deffenbacher, Forgetting the Once-Seen

Face: Estimating the Strength of an Eyewitness's Memory Representation, 14 J. Experimental Psychol.: Applied 139, 148 (2008). As a result, the difference in reliability between an identification made 10 minutes after an incident and one made two hours after an incident maybe significantly greater than the difference between an identification made two weeks after an incident and one made two months after the same incident.

Estimating the effect of memory decay, however, turns in large part on the strength and quality of the initial memory encoded; a witness forgets, over time, only what was encoded into the witness's memory to begin with. Scientists generally agree that memory never improves. Henderson, 208 N.J. at 267, 27 A.3d 872. Consequently, memory decay must be viewed in conjunction with other variables that affect the initial encoding of memories, such as cross-racial identification, weapon-focus, degree of attention, distance, lighting, and duration of initial exposure.

II. SYSTEM VARIABLES

A. Blind Administration
In police lineup identifications, research shows that lineup administrators who know the identity of the suspect often consciously or unconsciously suggest that information to the witness. Steven E. Clark et al, Lineup Administrator Influences on Eyewitness Identification Decisions, 15 J. Experimental Psychol.: Appl. 63 (2009). In the most obvious cases of improper suggestion, a lineup administrator may tell a witness outright who the putative suspect in a lineup is, or otherwise make other comments suggesting the suspect's identity. However, studies show that, even in the absence of suggestive verbal communication, lineup administrators can nevertheless convey suggestive information to witnesses nonverbally through tone of voice, pauses, demeanor, facial expressions, and body language. Such nonverbal communications may be difficult to detect and prevent. Indeed, studies show that both witnesses and administrators are generally unconscious of the influence that the lineup administrator's behavior has on identification process. See Ryauu M. Haw & Ronald P. Fisher, Effects of Administrator-Witness Contact on Eyewitness Identification Accuracy, 89 J. Applied Psychol. 1106, 1110 (2004) (summarizing findings of other studies). That said, however, administrator knowledge significantly affects reliability.

To guard against that influence, experts recommend that all identification procedures be conducted by a "blind" administrator— a person who does not know the identity of the suspect. To realize the full value of blind administration, witnesses should also be advised of that fact in order to prevent them from attempting to infer suggestive information from an administrator's words or conduct.

B. Pre-identification Instructions

Studies show that the likelihood of misidentification is significantly decreased when witnesses are instructed prior to an identification procedure that a suspect may or may not be in the lineup or photo array, and that it is permissible not to identify anyone. Indeed, one study found that in target-absent lineup procedures, witnesses who were warned that the perpetrator might not be in the lineup misidentified a suspect only 33 percent of the time, compared to 78 percent of the witnesses not so instructed. Roy S. Malpass & Patricia G. Devine, Eyewitness Identification: Lineup Instructions and the Absence of the Offender, 66 J. Applied Psychol. 482, 485 (1981). There appears to be little downside to giving such instructions. According to a 2005 meta-analysis, unbiased instructions greatly increased correct suspect rejections in target-absent lineups, but had no appreciable effect on the rate of correct identifications in target-present lineups. Steven E. Clark, A Re-examination of the Effects of Biased Lineup Instructions in Eyewitness Identification, 29 Law & Hum. Behav. 395, 397 (2005).

C. Lineup Construction

An identification procedure is essentially a pseudo-scientific experiment conducted by law enforcement officials to test their hypothesis that a particular suspect is, in fact, the perpetrator that they seek. Wells & Olsen, Eyewitness Testimony, 54 Ann. Rev. Psychol. 277, 285 (2003). However, like any experiment, the validity of the results depends largely on the careful design and unbiased implementation of the underlying procedures. The purpose behind embedding a suspect
in a group of "filler" subjects known to be innocent is to test the witness's memory. If, however, the suspect stands out from the other subjects in any way that might lead the witness to select the suspect based on something other than her own memory, the experiment fails to achieve its purpose.

Experts generally recommend that the subjects used as lineup fillers should be selected first on the basis of their agreement with the witness's description of the perpetrator; if no description of a particular feature is available, then experts recommend that lineup fillers be chosen based on their similarity to the suspect. Roy S. Malpass et al., *Lineup Construction and Lineup Fairness*, in 2 The Handbook of Eyewitness Psychology: Memory for People 155, 157-58 (R.C.L. Lindsay et al., eds., 2007); National Institute of Justice, U.S. Dep't of Just., *Eyewitness Evidence: A Guide for Law Enforcement* 29 (1999). If a suspect differs significantly from the witness's description, the [291 P.3d 707] lineup fillers should be matched to the suspect rather than the description in order to prevent the suspect from standing out. *Id.* Suspects should not be displayed in distinctive clothing or in clothing that matches the witness's description unless all of the lineup fillers are also dressed alike; a suspect's distinctive features— scars, tattoos, etc.— should either be concealed or artificially added to all of the lineup fillers. *Id.* Lineups should contain only one suspect and utilize a sufficient number of fillers to minimize the likelihood that a witness will select the suspect based on chance rather than memory. *Id.* Most sources recommend a minimum of five fillers to one suspect. *Id.* Any increase in the number of lineup fillers correspondingly decreases the probability of misidentification occurring by chance alone. Ultimately, if for any reason a suspect disproportionately stands out from the lineup fillers surrounding him or her, then the identification procedure is suggestive— and the reliability of any resulting identification decreases correspondingly.

**D. Simultaneous versus Sequential Lineups**

In traditional identification procedures, a number of persons or photographs are displayed simultaneously to an eyewitness. Some studies demonstrate, however, that witnesses permitted to view all the subjects together have a tendency to make a "relative judgment"— choosing the person or photograph that most closely resembles the perpetrator from among the other subjects— as opposed to making an "absolute judgment"— comparing each subject to their memory of the perpetrator and deciding whether that subject is the perpetrator or not. Relative judgments process have been found to increase the likelihood of misidentification, especially in target-absent lineups. To correct that problem, researchers recommend an alternative lineup procedure in which the witness is presented with each individual person or photograph sequentially. Because the witness views only one person or photograph at a time, researchers posit that the witness is less able to engage in relative judgment, and thus less likely to misidentify innocent suspects. Nancy Steblay et al, *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 Law & Hum. Behav. 459, 463-64 (2001). Studies show a moderate trend toward fewer misidentifications in sequential lineups than in simultaneous lineups. *Id.* at 463-64 (reporting that, in the combined results of 30 experiments collected from 19 previous research papers, 51 percent of witnesses presented with
simultaneous target-absent lineups misidentified a person, while only 28 percent did so in sequential lineups).

Other recent studies, however, challenge the validity of that finding, cautioning that the different outcomes in sequential and simultaneous lineups may be attributable to other factors. Specifically, some research shows that sequential lineups may result in more misidentifications when not conducted by a blind administrator, and that other factors such as differing methods of witness instruction and questioning may explain the difference in results. Dawn McQuiston-Surrett et al., Sequential vs. Simultaneous Lineups: A Review of Methods, Data, and Theory, 12 Psychol. Pub. Pol'y & L. 137, 143-51 (2006); Roy S. Malpass, et al, Public Policy and Sequential Lineups, 14 Legal & Criminological Psychology 1 (2009).

E. Showups

A "showup" is a procedure in which police officers present an eyewitness with a single suspect for identification, often (but not necessarily) conducted in the field shortly after a crime has taken place. Showups are widely regarded as inherently suggestive—and therefore less reliable than properly administered lineup identifications—because the witness is always aware of who police officers have targeted as a suspect. Furthermore, unlike lineups, showups have no mechanism to distinguish witnesses who are guessing from those who actually recognize the suspect. In an unbiased lineup, an unreliable witness will often be exposed by a "false positive" response identifying a known innocent subject. By contrast, because showups involve a lone suspect, every witness who guesses will positively identify the suspect, and every positive identification is regarded as a "hit." For that reason, misidentifications [291 P.3d 708] that occur in showups are less likely to be discovered as mistakes.

Despite those shortcomings, some research indicates that, when conducted properly and within a limited time period immediately following an incident, showups can be equally as reliable as lineups. Showups are most likely to be reliable when they occur immediately after viewing a criminal perpetrator in action, ostensibly because the benefits of a fresh memory outweigh the inherent suggestiveness of the procedure. In as little as two hours after an event occurs, however, the likelihood of misidentification in a showup procedure increases dramatically. In one study, the immediate showup identification of an innocent suspect produced a misidentification rate of 18 percent (compared to 16 percent in an immediate lineup); a delay of only two hours increased the misidentification rate to 58 percent (compared to 14 percent in a lineup). David A. Yarmey et al., Accuracy of Eyewitness Identifications in Showups and Lineups, 20 Law & Hum. Behav. 459, 464 (1996).

Studies also demonstrate that showups pose a particularly high risk of misidentification for innocent suspects who happen to look like the perpetrator. A 2003 meta-analysis found that, when an innocent suspect closely resembled a perpetrator, 23 percent of witnesses misidentified the suspect in a showup, compared to 17 percent of the witnesses presented with the same suspect in a lineup. Nancy Steblay et al, Eyewitness Accuracy Rates in Police Showup and Lineup
Presentations: A Meta-Analytic Comparison, 27 Law & Hum. Behav. 523, 533 (2003). In addition, witnesses at a showup may be more inclined to base their identifications on clothing rather than on facial features. Studies indicate that showups present an especially high risk of misidentification for suspects wearing clothing similar to that of the perpetrator. Jennifer E. Dysart et al., Show-Ups: The Critical Issue of Clothing Bias, 20 Applied Cognitive Psychology 1009 (2006).

F. Multiple Viewings (Mugshot Exposure, Mugshot Commitment, Source Monitoring Errors, Source Confusion)

Viewing a suspect multiple times throughout the course of an investigation adversely affects the reliability of any identification that follows those viewings. Researchers posit that the negative effect of multiple viewings may result from the witness’s inability to discern the source of his or her recognition of the suspect, an occurrence referred to as source confusion or a source monitoring error. Because of the possibility of source confusion, once a witness has viewed the suspect in any context other than the initial incident, it is impossible to determine whether a subsequent identification is based on the observation of the initial incident or on the subsequent viewing of the suspect.

Researchers have identified several specific types of multiple viewing problems that often occur in eyewitness identifications. One, referred to as "mugshot exposure," occurs when police officials have a witness peruse random mugshots on file from previous cases in an attempt to generate leads. Studies show that prior exposure to an innocent suspect's mugshot increases the likelihood that the witness will subsequently misidentify the suspect as the perpetrator, based on the witness’s sense of recognition generated by the previously viewed picture. Kenneth A. Deffenbacher et al., Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference, 30 Law & Hum. Behav. 287 (2006). The mugshot exposure problem can be exacerbated when the witness actually identifies an innocent person's mugshot as someone who is, or resembles, the perpetrator, resulting in a related effect referred to as "mugshot commitment." When a later identification procedure includes the person whose mugshot the witness previously identified, studies show that witnesses are disproportionately likely to remain "committed" to the person whose mugshot they had previously selected. Id.

A similar problem occurs when a witness is asked to participate in multiple identification procedures. Whether or not the witness selects the suspect in an initial identification procedure, the procedure increases the witness’s familiarity with the suspect's face. If the witness is later presented with another [291 P.3d 709] lineup in which the same suspect appears, the suspect may tend to stand out or appear familiar to the witness as a result of the prior lineup, especially when the suspect is the only person repeated in both lineups. Henderson, 208 N.J. at 255-56, 27 A.3d 872; Deffenbacher, Mugshot Exposure Effects, 30 Law & Hum. Behav. at 299. As with mugshot exposure, the problem is exacerbated if a witness actually identifies a suspect in an initial lineup or photo array. In subsequent identification procedures, such witnesses are likely to simply remain committed to the person that they initially identified rather than reexamine their initial memory of the perpetrator. Henderson, 208 N.J. at 256, 27 A.3d 872; see also David F. Ross et al,
Unconscious Transference and Mistaken Identity: When a Witness Misidentifies a Familiar but Innocent Person, 79 Applied Psychol. 918, 929 (discussing another study that found that 89 percent of subjects who misidentified a person in an initial, target-absent lineup also misidentified the same person in a second lineup—despite the fact that the second lineup also contained the true perpetrator). For those reasons, successive identification procedures can be unreliable as tests of a witness’s memory regarding an actual perpetrator, and thus may have little probative value.

Yet another facet of the multiple viewing problem is the phenomenon of unconscious transference. Studies have found that witnesses who, prior to an identification procedure, have incidentally but innocently encountered a suspect may unconsciously transfer the familiar suspect to the role of criminal perpetrator in their memory. See Ross, Unconscious Transference and Mistaken Identity, 79 J. Applied Psychol. 918. The phenomenon is most problematic when a witness is vaguely familiar with a suspect but unconscious of why that is so. The result, often, is that the witness mistakenly attributes that familiarity to having previously observed the suspect at the crime scene. See J.D. Read et al., The Unconscious Transference Effect: Are Innocent Bystanders Ever Misidentified?, 4 Applied Cognitive Psychol. 26 (1990) (noting that, to produce unconscious transference errors, a witness's familiarity with the suspect's face must not be "so high as to elicit recall of the misidentified person's correct context or identity").

Although multiple viewings of a suspect always introduce a degree of doubt as to the reliability of an identification, studies suggest that witnesses may be most susceptible to source monitoring errors when their initial memory trace is weakest. See, e.g., Deffenbacher, Mugshot Exposure Effects, 30 Law & Hum. Behav. at 288 (noting that "failure of memory for facial source or context is all the more problematic when viewing of the perpetrator has occurred under less than optimal viewing conditions"). Thus, the presence of estimator variables indicating weak initial encoding may magnify the suggestive effects of multiple viewings.

G. Suggestive Questioning, Cowitness Contamination, and Other Sources of Post-Event Memory Contamination

The way in which eyewitnesses are questioned or converse about an event can alter their memory of the event. Elizabeth F. Loftus & Guido Zanni, Eyewitness Testimony: The Influence of the Wording of a Question, 5 Bull. Psychonomic Soc'y 86 (1975). Studies show that the use of suggestive wording and leading questions tend to result in answers that more closely fit the expectation embedded in the question. For example, in one study, participants who had viewed a short video of a traffic accident were asked various questions about what they had seen in the video. Id. Although there was no broken headlight in the video, participants who were asked "Did you see the broken headlight?" were more than twice as likely to answer "Yes" than those who were asked "Did you see a broken headlight?" Id. (emphasis added).

Witness memory, moreover, can become contaminated by external information or assumptions embedded in questions or otherwise communicated to the witness. In one study,
participants were asked, after viewing a short video, to estimate the speed of a car in the video either "when it passed the barn" or without mention of a barn. Elizabeth F. Loftus, *Leading Questions and the Eyewitness Report*, 7 Cognitive Psychol. 560, 566

[291 P.3d 710] (1975). One week later, the participants were asked whether they had seen a barn in the video. *Id.* Although there was no barn in the video, 17 percent of the subjects who had been asked the question presupposing the existence of a barn reported having seen the barn, compared to two percent of the subjects to whom no barn had been mentioned. *Id.*

Another study found that participants’ estimations of a vehicle’s speed differed according to whether a question used the words "collided," "bumped," "contacted," "hit," or "smashed" to describe the taped car accident that they viewed. Elizabeth F. Loftus & John C. Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 J. Verbal Learning & Verbal Behav. 585 (1974). Participants who were asked how fast the cars were going when they "smashed" into each other estimated an average speed of 40.5 miles per hour, whereas participants who were presented with the same question using the word "hit" or "contacted" estimated average speeds of 34.0 and 31.8 miles per hour, respectively. *Id.* at 586. A follow-up experiment found that participants questioned using the word "smashed" were more than twice as likely to erroneously report seeing broken glass in the video as participants questioned using the word "hit" or not questioned at all. *Id.* at 587.

Post-event memory contamination is generally categorized as a system variable because state actors are often the entities engaged in questioning eyewitnesses to crimes. That said, however, witness memory is equally susceptible to contamination by nonstate actors. One common source of third-party memory contamination is cowitness interaction. When a witness is permitted to discuss the event with other witnesses or views another witness's identification decision, the witness may alter his or her own memory or identification decision to conform to that of the cowitness. Elin M. Skagerberg, *Co-Witness Feedback in Line-Ups*, 21 Applied Cognitive Psychol. 489 (2007). In one study, half of the participants were shown a sequence of photographs illustrating a theft involving a single person, while the other half viewed the same theft but with two persons. *Id.* at 490 (discussing another study). When questioned individually, 97 percent of the participants correctly remembered the number of people involved in the theft that they viewed. *Id.* However, after discussing the event with another participant who had viewed the alternate scenario, one of the participants in more than 75 percent of the pairs changed their answer to conform to their partner's recollections. *Id.*

H. Suggestive Feedback and Recording Confidence

As noted above, post-identification confirming feedback tends to falsely inflate witnesses’ confidence in the accuracy of their identifications, as well as their recollections concerning the quality of their opportunity to view a perpetrator and an event. Confirming feedback, by definition, takes place after an identification and thus does not affect the result of the identification itself. It does, however, falsely inflate witness confidence in the reports they tender regarding many of the factors commonly used by courts and jurors to gauge eyewitness reliability. As a result, the danger
of confirming feedback lies in its tendency to increase the appearance of reliability without increasing reliability itself.

The detrimental effects of post-identification feedback are well-established in the scientific literature. One much-cited study on the effects of post-identification confirming feedback staged an experiment in which witnesses, after making an incorrect identification from a target-absent lineup, were told either, "Good, you identified the suspect," "Actually, the suspect was number ____," or given no feedback at all. The witnesses were then asked to answer questions regarding the incident and the identification task. The study found that the witnesses who received confirming feedback were not only more certain in the accuracy of their identification, but also reported having had a better view of the perpetrator, noticing more details of the perpetrator's face, paying closer attention to the event they witnessed, and making their identifications quicker and with greater ease than participants who were given no feedback or disconfirming feedback. Wells, [291 P.3d 711] "Good, You Identified the Suspect," 83 J. Applied Psychology 360 (1998). A more recent meta-analysis examining the results of 20 experiments involving over 2,400 participants confirmed that studies on this factor have produced "remarkably consistent" effects, and "provide dramatic evidence that post-identification feedback can compromise the integrity of a witness's memory." Amy B. Douglass & Nancy Steblay, Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect, 20 Applied Cognitive Psychol. 859, 865-66 (2006).

Witnesses often receive confirming feedback from the administrator of the identification procedure directly after making an identification, but they may also obtain feedback from other sources, such as news accounts identifying the suspect as the perpetrator, conversations with other witnesses, or pretrial witness preparation sessions. Skagerberg, Co-Witness Feedback in Line-Ups, 21 Applied Cognitive Psychol. 489 (2007). Indeed, eyewitnesses who are subsequently called to testify in criminal proceedings are always subjected to some degree of confirming feedback because they can infer that they identified the right person from the fact that the state is prosecuting the suspect they identified.

To moderate the effect of this factor, researchers recommend that administrators of identification procedures record the witness's certainty statements immediately after an identification has been made, and before the witness is given any feedback. Some studies have reported moderate success in inoculating witnesses against the effects of confirming feedback by asking the witnesses to reflect or report on their level of certainty prior to being given confirming feedback. Gary L. Wells & Amy L. Bradfield, Distortions in Eyewitnesses' Recollections: Can the Postidentification-Feedback Effect Be Moderated?, 10 Psychol. Sci. 138 (1999).
The record clearly shows that the state failed to disclose to defense counsel that Mrs. Hilde was shown a second (or third) photographic lineup, that a detective took Mrs. Hilde to court to view defendant in person prior to trial, and that Mrs. Hilde was given a single photograph of defendant in the same clothes he wore the morning of the shooting. That kind of information is essential to an accurate determination of the reliability of an eyewitness's identification and is the kind of potentially exculpatory evidence that the state is constitutionally required to disclose to a defendant.

Nothing in the record reflects what the other officer said to the Safeway employees in advance of the identification. That officer was not called to testify at the suppression hearing or at trial.

We have also reviewed the recent opinion of the New Jersey Supreme Court in New Jersey v. Henderson, 208 N.J. 208, 27 A.3d 872 (2011), together with the report of the Special Master engaged in that case to inquire into the factors affecting the reliability of eyewitness identification evidence. Like the two cases here, Henderson involved issues concerning eyewitness identification evidence and the process used in New Jersey to ensure the reliability of that evidence. Prior to Henderson, that process required defendants to first demonstrate that police procedures had been impermissibly suggestive, after which a trial court would weigh the corrupting effect of the identification process against the same reliability factors set out in Classen. The factors affecting the reliability of eyewitness identifications that we discuss are similar to those described in Henderson. See Henderson, 208 N.J. at 237-38, 27 A.3d 872 (setting out two-step process and describing system and estimator variables affecting the reliability of eyewitness identification evidence).

The current scientific research emphasizes how difficult it is for either the court or the witness to analytically separate the witness's original memory of the incident from later recollections tainted by suggestiveness. See, e.g., 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, 14-15 (2008) (noting that eyewitness experts " do not generally accept the idea that a mistaken identification, whether it arises from a suggestive procedure or not, can somehow be ' erased' or corrected by a subsequent identification test, no matter how ' fair' that subsequent test might be" ). Rather, eyewitness researchers generally believe that, " once an eyewitness has mistakenly identified someone, that person ' becomes' the witness' memory and the error will simply repeat itself." Id. at 9.

Eyewitness misidentification has contributed to date to 72 percent of the 301 wrongful convictions revealed by DNA evidence. http:// www. innocence project. org/ content/ facts_ on_ post conviction_ DNA_ exonerations. php (last visited Nov. 16, 2012); see also Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong 48 (2011) (76 percent of the first 250 convictions overturned due to DNA evidence since 1989 involved eyewitness misidentification).

OC 801(4)(a)(C), however, exempts from the definition of hearsay, statements " of identification of a person after perceiving the person," as long as the declarant testifies at trial and is subject to cross-examination concerning the statement.
A criminal defendant's motion to suppress/exclude eyewitness evidence should meet the requirements of UTCR 4.060, which provides, in pertinent part:

(1) All motions to suppress evidence: 
(a) must make specific reference to any constitutional provision, statute, rule, case or other authority upon which it is based; and
(b) must be accompanied by the moving party's brief which must be adequate reasonably to apprise the court and the adverse party of the arguments and authorities relied upon.

In evaluating alleged eyewitness testimony, a trial court should also keep in mind that ORS 44.370 provides:

A witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which the witness testifies, by the character of the testimony of the witness, or by evidence affecting the character or motives of the witness, or by contradictory evidence. Where the trial is by the jury, they are the exclusive judges of the credibility of the witness.

In one study testing the effectiveness of cross-examination in exposing inaccurate eyewitnesses, mock jurors watched both accurate and inaccurate eyewitnesses testify and then submit to cross-examination regarding their identification. The jurors believed 80 percent of the accurate eyewitnesses, but also 79.5 percent of the inaccurate eyewitnesses—evidencing a dangerous inability to distinguish accurate from inaccurate eyewitness testimony, even with the assistance of thorough cross-examination. See R.C.L. Lindsey et al., Can People Detect Eyewitness-Identification Inaccuracy Within and Across Situations?, 66 J. Applied Psychol. 79 (1981) (discussing an experiment conducted for another study).

In Guibert, the court compiled the following list of federal and state cases recognizing the scientific community's acceptance of the research regarding the reliability of eyewitness identification and the admission of expert testimony based on that research. We quote that list here.

Ferensic v. Birkett, 501 F.3d 469, 482 (6th Cir. 2007) (‘expert testimony on eyewitness identifications * * * is now universally recognized as scientifically valid and of aid [to] the trier of fact for admissibility purposes’); United States v. Smithers, 212 F.3d 306, 313 (6th Cir. 2000) (noting that ‘the science of eyewitness perception has achieved the level of exactness, methodology and reliability of any psychological research’); United States v. Moore, 786 F.2d 1308, 1312 (5th Cir. 1986) (This [c]ourt accepts the modern conclusion that the admission of expert testimony regarding eyewitness identifications is proper. * * * We cannot say [that] such scientific data [are] inadequate or contradictory. The scientific validity of the studies confirming the many weaknesses of eyewitness identification cannot be seriously questioned at this point.’); United States v. Downing, 753 F.2d 1224, 1242 (3d Cir. 1985) (noting ‘the proliferation of empirical research demonstrating the pitfalls of eyewitness identification’ and that ‘the consistency of the results of these studies is impressive’); United States v. Feliciano, United States District Court, Docket No. CR-08-0932-01 PHX-DGC [2009 WL 3748588] (D.Ariz. Nov 5, 2009) (‘[t]he degree of acceptance [of the scientific data on the reliability of eyewitness identifications] within the scientific community ... is substantial’); People v. McDonald, 37 Cal.3d 351, 364-65, 690 P.2d 709, 208 Cal.Rptr. 236 (1984) (‘[E]mpirical studies of the psychological factors affecting eyewitness identification have proliferated, and reports of their results have appeared at an ever-accelerating
pace in the professional literature of the behavioral and social sciences. * * * The consistency of the results of these studies is impressive, and the courts can no longer remain oblivious to their implications for the administration of justice.’), *overruled in part on other grounds by People v. Mendoza,* 23 Cal.4th 896, 4 P.3d 265, 98 Cal.Rptr.2d 431 (2000); *Brodes v. State,* 279 Ga. 435, 440-41, 614 S.E.2d 766 (2005) (scientific validity of research studies concerning unreliability of eyewitness identifications is well established); *State v. Henderson,* 208 N.J. 208, 218, 27 A.3d 872 (2011) (noting that, ‘[f]rom social science research to the review of actual police lineups, from laboratory experiments to DNA exonerations, [scientific research and studies demonstrate] that the possibility of mistaken identification is real,’ that many studies reveal ‘a troubling lack of reliability in eyewitness identifications,’ and that ‘[t]hat evidence offers convincing proof that the current test for evaluating the trustworthiness of eyewitness identifications should be revised’); *People v. LeGrand,* 8 N.Y.3d 449, 455, 867 N.E.2d 374, 835 N.Y.S.2d 523 (2007) (‘[E]xpert psychological testimony on eyewitness identification [is] sufficiently reliable to be admitted, and the vast majority of academic commentators have urged its acceptance. * * * [P]sychological research data [are] by now abundant, and the findings based [on the data] concerning cognitive factors that may affect identification are quite uniform and well documented. * * * ’); *State v. Copeland,* 226 S.W.3d 287, 299 (Tenn.2007) (‘[s]cientifically tested studies, subject to peer review, have identified legitimate areas of concern in area of eyewitness identifications); *Tillman v. State,* 354 S.W.3d 425, 441 (Tex.Crim.App.2011) (‘[E]yewitness identification has continued to be troublesome and controversial as the outside world and modern science have cast doubt on this crucial piece of evidence. * * * [A] vast body of scientific research about human memory has emerged. That body of work casts doubt on some commonly held views relating to memory * * *.’); *State v. Clopten,* 223 P.3d 1103, 1108 (Utah 2009) (‘empirical research has convincingly established that expert testimony is necessary in many cases to explain the possibility of mistaken eyewitness identification’); *State v. Dubose,* 285 Wis.2d 143, 162, 699 N.W.2d 582 (2005) (‘over the last decade, there have been extensive studies on the issue of identification evidence’)."

*State v. Guilbert,* 306 Conn. at 234 n. 8, 49 A.3d 705 (brackets in original; some citations and internal quotation marks omitted).

[11] For the reasons described above, we also conclude that the witnesses' in-court identification of defendant also satisfied the Due Process Clause.

[12] A meta-analysis is a type of study in which researchers combine and analyze the results of multiple previously published studies on a certain subject in order to evaluate their cumulative findings in a broader context, and over larger sample sizes. Meta-analyses do not involve conducting any new experiments, but are nevertheless highly regarded in the scientific community for their ability to synthesize a large amount of data and illustrate a general consensus in a particular field. *See Roy S. Malpass et al, The Need for Expert Psychological Testimony on Eyewitness Identification,* in Expert Testimony on the Psychology of Eyewitness Identification 14 (B. Cutler ed., 2009) (describing utility of meta-analytic studies).

[13] The term "retention interval" refers to the duration of time between the witness's initial observation of the perpetrator and the identification event.

[14] "Target-absent" refers to a lineup or photo array that does not contain the suspect. Target-
absent lineups occur in actual practice when the police officials mistakenly fix their suspicion on an innocent person. Scientific research on target-absent lineups is particularly relevant to the reliability of identifications because nearly all wrongful convictions based on eyewitness misidentification result from target-absent procedures. That is so because when the target (the actual perpetrator) is present, misidentifications will generally implicate only known-innocent foils, and therefore be immediately recognized as mistakes.