

**STATE OF NEW JERSEY v. LARRY R. HENDERSON**

**DOCKET NO. 62,218**

**REMAND HEARING**

**PROPOSED LEGAL FINDINGS (AMENDED)**

**The Renovation of Manson: A Dynamic New Legal Architecture For Assessing  
and Regulating Eyewitness Evidence**

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Barry C. Scheck

Ezekiel R. Edwards

INNOCENCE PROJECT

100 Fifth Avenue, 3rd Floor

New York, N.Y. 10011

Telephone: (212) 364-5340

Facsimile: (212) 364-5341

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## I. INTRODUCTION

1. Since the Supreme Court laid out its two-part admissibility test for eyewitness testimony in Manson v. Brathwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977), a test mirrored by New Jersey in State v. Madison, 109 N.J. 223 (1988), “times have changed.” See State v. Copeland, 226 S.W.3d 287, 299 (Tenn. 2007) (holding that it was an abuse of discretion to exclude expert testimony regarding cross-racial identifications and confirming feedback and noting that there are now “literally hundreds of articles in scholarly, legal, and scientific journals” that “detail the extensive amount of behavioral science research” in the eyewitness identification field). Simply put, we now know much more, based on an impressive and rigorous body of scientific research, about the numerous factors that can contaminate witnesses’ memories, pressure witnesses into making identifications, and increase the risk of misidentification. Many of the conclusions drawn by the Manson court in 1977 concerning the factors that affect identification accuracy are now known by social scientists to “blink[] psychological reality.” Manson, supra, 432 U.S. at 136, 97 S. Ct. at 2263, 53 L. Ed. 2d at 166 (Marshall, J., dissenting). What has not changed since 1977, however, is the “unusual threat to the truth-seeking process posed by the frequent untrustworthiness of eyewitness identification testimony,” Id. at 119-20, 97 S. Ct. at 2255, 53 L. Ed. 2d at 157. Indeed, since 1989, there have been 254 wrongful convictions exposed by DNA testing, 75% of which involved eyewitness

misidentifications; of the misidentification cases, nearly 40% involved two or more mistaken eyewitnesses in the same case. Thus, not only has science made enormous strides in our understanding of eyewitness identification evidence, post-conviction DNA testing has confirmed what scholars and judges long knew or feared: that eyewitness error is a common contributing factor in the conviction of innocent people.

2. In light of scientific findings since Manson and the proven fallibility of eyewitness identification evidence, the Manson/Madison test must be renovated to reflect the critical threshold of scientific knowledge represented by the numerous meta-analyses published in the field over the past three decades, and thus minimize the risk of wrongful conviction based on eyewitness error. Specifically, a dynamic new legal architecture is needed for the assessment, regulation, and presentation of eyewitness testimony, one that:

- (1) incorporates the robust scientific findings in the field of eyewitness identification that already exist and provides a pathway for trial and appellate courts to consider carefully new findings, or adjust old findings, only when the scientific authority for those findings is firmly established;
- (2) substantially improves judicial assessment of the reliability of eyewitness evidence at pre-trial hearings by eliminating Manson's confounded "balancing test;"

- (3) substantially improves the data available at pre-trial judicial assessments of reliability by putting the burden of going forward on the state to call the eyewitness and demonstrate that the integrity of the eyewitness's memory – the "trace evidence" – has not been fatally compromised;
- (4) substantially improves the data available at pre-trial judicial assessments of reliability by considering factors that could have distorted eyewitness memory in addition to potentially suggestive actions of law enforcement;
- (5) focuses on the reliability of the identification testimony as opposed to finding "fault" with state actors;
- (6) encourages courts to take testimony from eyewitness identification experts to improve the data available at pre-trial judicial assessments about factors that could have distorted eyewitness memory, and to allow courts to evaluate better whether it would be appropriate or necessary for the jury to hear the expert at trial;
- (7) expands the remedies available to judges after pre-trial judicial assessments to include precise in limine rulings, rather than only all-or-nothing suppression;
- (8) allows courts to provide helpful context and appropriate guidance for juries to evaluate the reliability of eyewitness testimony through carefully tailored jury instructions that are based on well-established science (meta-analyses);

- (9) in cases where the court's confidence in the reliability of the identification has been undermined, allows courts to provide the jury with a strongly-worded cautionary instruction to treat the identification evidence with great caution and distrust;
- (10) through carefully tailored but strongly worded jury instructions, provides incentives for the police to use "best practice" identification procedures demonstrated to reduce the risk of error and generate more reliable self-reports by eyewitnesses about their memory.

## **II. THE MANSON TEST AS CURRENTLY CONSTITUTED DOES NOT ACHIEVE ITS GOAL OF USING "RELIABILITY AS A LINCHPIN" TO PROTECT DUE PROCESS AND FAIR TRIAL INTERESTS**

3. Manson arose in an era when the exclusionary rule was being used by the Supreme Court as a remedy to deter police from violating citizens' constitutional rights. But, as the Manson court recognized, unnecessarily suggestive identification procedures themselves do not violate a suspect's constitutional rights because "[u]nlike a warrantless search, a suggestive preindictment identification procedure does not in itself intrude upon a constitutionally protected interest." Manson, *supra*, 432 U.S. at 113 n.13, 97 S. Ct. at 2252 n.13, 53 L. Ed. 2d at 153 n.13. The constitutionally protected interest at stake in eyewitness identification cases is the due

process right to a fair trial. See also United States ex. rel. Kirby v. Sturges, 510 F.2d 397, 406 (7th Cir. 1975) (“[T]he due process clause applies only to proceedings which result in a deprivation of life, liberty or property. The due process issue, therefore, does not arise until testimony about the showup – or perhaps obtained as a result of the showup – is offered at the criminal trial.”).

4. Therefore, the Manson Court focused on the trustworthiness of the identification evidence and declared reliability to be the linchpin for its admissibility. Manson, supra, 432 U.S. at 114, 97 S. Ct. at 2253, 53 L. Ed. 2d at 154. It feared that a per se rule suppressing unnecessarily suggestive out-of-court identification procedures “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.” Id. at 112, 97 S. Ct. at 2252, 53 L. Ed. 2d at 152. While conceding that a per se suppression rule has a “significant deterrent effect” in preventing the use of unnecessarily suggestive procedures, the Court still worried that the “rigidity” and “inflexibility” of a per se rule “may result, on occasion, in the guilty going free” and would make error by trial courts “more likely.” Ibid.

5. The Manson Court was by no means refusing to acknowledge the “awful risks of misidentification,” id. at 110, 97 S. Ct. at 2251, 53 L. Ed. 2d at 151, or the dangers posed by unnecessarily suggestive identification procedures, but believed that juries would understand that “[s]uggestive procedures often will vitiate the weight of

evidence” and juries could be counted on to appropriately “discount” it, id. at 112 n.12, 97 S. Ct. at 2253 n.12, 53 L. Ed. 2d at 152. By developing what it believed was a flexible “totality of the circumstances” approach that stressed “reliability” and forced trial courts to make detailed, pre-trial assessments of evidence, the Manson Court envisioned that its two-part balancing test would improve the “administration of justice” and produce more accurate verdicts. Ibid.

6. It is now clear that the Manson test, as currently configured, does not meet the objectives the Court set for it. Ironically, Manson was written the very year, 1977, that eyewitness identification research started to advance towards its current status as the “gold standard” for the reliable application of social science to the law. 29T 49:13-15. Without the benefit of three decades of empirical findings, the Manson framework suffers from five serious flaws that increase the chance of wrongful convictions based on eyewitness misidentifications: its balancing test is skewed by a scientific confound, it focuses solely on police misconduct, it limits trial courts to an inflexible, all-or-nothing suppression remedy, it does virtually nothing to deter unnecessarily suggestive identification procedures, and it fails to provide much needed “context” and guidance for jurors on how to evaluate eyewitness identification evidence.

**A. The “Balancing” Test is Confounded**

7. The first issue is the scientific confound that lies at the heart of the Manson “balancing” test. Under Manson, courts are first supposed to balance the corrupting effects of unduly suggestive identification procedures against “reliability factors” and then decide whether to suppress in-court and out-of-court identification evidence if they find a “very substantial likelihood of an irreparable misidentification.” The problem, of course, with such “balancing” is the undisputed scientific finding that both post-identification feedback and the use of unduly suggestive identification procedures, whether emanating from law enforcement or any other source, tends to artificially inflate post-identification self-reports from witnesses about key reliability factors – opportunity to observe, the degree of attention paid, certainty, and description. See State v. Greene, 2007 WL 1223906, at \*3 (N.J. Super. Ct. App. Div. 2007) (unpublished) (“[T]he interplay of the potentially corrupting effect of a suggestive identification procedure on the resulting identification is a matter of great concern to the administration of criminal justice”).

8. The consequences of this confound are profound. It artificially inflates the apparent reliability of the eyewitness identification both for judges deciding admissibility and for jurors trying to evaluate the real weight of the evidence. This, in turn, brings about an unintended but deeply disturbing result: the improper use of a suggestive procedure tends to make it *more* likely that courts and juries will find the

identification reliable – a truly perverse outcome! The Manson Court, of course, assumed exactly the opposite was true, that juries would realize that suggestive procedures “vitate the weight of the [identification] evidence” and would, accordingly, “discount” it. Manson, supra, 432 U.S. at 112 n.12, 97 S. Ct. at 2252 n.12, 53 L. Ed. 2d at 152 n.12.

9. Like the trial court in Henderson, for three decades judges have been insensitive to this cause-and-effect relationship between suggestion and reliability, applying the two-part test in a bifurcated manner that treats each analysis as two independent inquiries as opposed to symbiotic elements that must be assessed as a whole.<sup>1</sup>

10. Worse still, given Manson's all-or-nothing suppression remedy, trial courts take short cuts. They look at the “reliability” factors first, and if they find them (the witness claims she had a good opportunity to observe, is very certain, and paid attention), they give short shrift to reviewing suggestive procedures because they know that the in- and out-of-court identification will inevitably be admitted. As Tim

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<sup>1</sup> As the Appellate Division explained, “the [trial] judge made the [reliability] determination at the same time he declared that the procedure was not impermissibly suggestive. As held in Manson, evidence relating to the reliability of the identification must be weighed against ‘the corrupting effect of the suggestion itself.’ Because the trial judge did not find or appreciate the impermissible suggestiveness of the process, he never weighed that evidence against the corrupting nature of the process. Defendant is entitled to have the evidence reassessed through application of the proper framework.” State v. Henderson, 397 N.J. Super. 398, 414-15 (App. Div. 2008) (internal citation omitted).

O'Toole and Giovanna Shay observe, "the Manson factors have become reduced to a checklist to determine reliability, and a checklist is a poor means of making a subtle, fact-intensive, and case specific determination as to whether a given eyewitness identification is reliable, despite the use of suggestive police procedures." D88 at 113. Such a formulaic, rubberstamping approach is an abdication of the screening function trial courts must perform in eyewitness cases to make sure trials are fair and verdicts are accurate. On the other hand, the concept of social frameworks (see Section IIIA) proposed by amicus puts trial courts in a position where they can draw upon a rich body of scientific research, devise remedial cures that put unreliable aspects of the evidence into context, and ensure that the ultimate arbiters – the jury – get a scientifically sound perspective on factors affecting the accuracy of eyewitness identifications.

11. The confound also provides a perverse incentive to law enforcement who believe a suspect is guilty and hope an eyewitness can provide evidence to support their case – the more suggestive an identification procedure, the more likely an identification will be made, the more confirming feedback the witness will receive, and the more likely the witness will be certain about the identification itself, the opportunity to view, and the degree of attention paid. While the Manson Court recognized its approach would not "significantly" deter the use of suggestive police procedures, it still envisioned, misguided as its expectations were, that its two-part test

would curtail police suggestion to some extent, and it certainly did not intend to create an impetus for law enforcement to conduct biased lineups. Manson, supra, 432 U.S. at 112, 97 S. Ct. at 2252, 53 L. Ed. 2d at 152 (“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.”).

**B. Focus is Exclusively on Police Misconduct**

12. The seminal identification cases of the late 1960’s and 1970s, see United States v. Ash, 413 U.S. 300, 93 S. Ct. 2568, 37 L. Ed. 2d 619 (1973); Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972); Simmons v. United States, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968); Stovall v. Denno, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967); United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967), arose in the context of a contentious Supreme Court jurisprudence focused on the utility of the exclusionary rule as a remedy against misconduct by state actors. Accordingly, the Manson Court directed the first prong of its two-part test on whether law enforcement employed unnecessarily suggestive identification procedures. Consequently, in the decades since, New Jersey and many other courts conduct reliability assessments of identification evidence, if at all, only when there has been unnecessarily suggestive action by the state. However, given our

contemporary scientific knowledge that eyewitness memory is best understood as trace evidence susceptible to contamination from a wide spectrum of sources, it makes no sense to scrutinize identification evidence only through the prism of police misconduct. Unlike the law, science does not differentiate between “necessary” and “unnecessary” suggestion, since the necessity of suggestive police procedures is unrelated to its contaminating effects on memory. See State v. Hibel, 714 N.W.2d 194, 203 (Wis. 2006) (noting that unintentional, non-law enforcement suggestiveness can become a “key factor” in identification errors). As the Second Circuit observed, “the linchpin of admissibility ... is not whether the identification testimony was procured by law enforcement officers, as contrasted with civilians, but whether the identification is reliable.” Dunnigan v. Keane, 137 F.3d 117, 128 (2d Cir.), cert. denied, 525 U.S. 840, 119 S. Ct. 101, 142 L. Ed. 2d 81 (1998).

13. To be sure, suggestive police procedures can taint the memory of an eyewitness and render any subsequent identification unreliable, but equally pernicious contamination of eyewitness memory is often brought about by sources unconnected to law enforcement – family members, friends, other witnesses to the same event, media reports, or simply the passage of time. Indeed, current New Jersey jury instructions recognize as much, suggesting jurors 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.” S2 at 5. Therefore it makes little sense for courts to focus pre-trial assessments of suggestiveness solely on state action because by doing so they will surely miss non-state factors that contaminate eyewitness memory and fatally undermine the reliability of the identification evidence. See Dunnigan, supra, 137 F.3d at 128 (since the due process focus, in the identification context, is principally on the fairness of the trial, rather than on the conduct of the police, “[i]t follows that federal courts should scrutinize all suggestive identification procedures, not just those orchestrated by the police, to determine if they would sufficiently taint the trial so as to deprive the defendant of due process” (quoting United States v. Bouthot, 878 F.2d 1506, 1516 (1st Cir. 1989))); United States v. Ballard, 534 F. Supp. 749, 751 (M.D. Ala. 1982) (“[The] likelihood of misidentification arises whenever there has occurred an unnecessarily suggestive confrontation between an eyewitness and a suspect, regardless of whether the confrontation was deliberate or involved actions by the police.” (citing Green v. Loggins, 614 F.2d 219, 222 (9th Cir. 1980))); Commonwealth v. Jones, 666 N.E.2d 994, 1000-01 (1996) (“It is apparent that neither constitutional considerations nor the presence of State action ... are essential preconditions for a determination that certain relevant evidence should be kept from the trier of fact. ... Common law principles of fairness dictate that an unreliable identification arising from ... especially suggestive circumstances ... should not be admitted.”); State v. Chen, 402 N.J. Super. 62, 78

(App. Div. 2008), certif. granted, 197 N.J. 477 (2009) (“[T]he due process right to a fair trial requires exclusion of unreliable identification evidence, regardless of the source of the taint, based on the State’s attempt to use the evidence at trial.”).

14. Moreover, in some cases suggestion by state or non-state actors may not be a relevant issue at all because estimator variables could be so demonstrably weak that the identification evidence should be suppressed, or at least the jury should be instructed to treat it with great caution and distrust. 23T 65:2-6. Judge Gaulkin posed just such a hypothetical, where an eyewitness is intoxicated, has cataracts, and is 75 feet away from the perpetrator. 18T 74:23-75:5; 19T 7:8-24. Likewise, in cases where the distance between the witness and the perpetrator can be objectively established through testimonial evidence, scientific analysis can produce proof that any claim of identification exceeds the limitations of the human eye. A new technique developed by Dr. Geoffrey Loftus, which provides a relatively simple, inexpensive, and reliable way to perform this analysis, should be more widely utilized by counsel and courts at pre-trial admissibility proceedings. 23T 66:10-17; IP20; see Chen, supra, 402 N.J. Super. at 68 (“The judiciary has a responsibility to ensure that ‘evidence admitted at trial is sufficiently reliable’ to be of use to the jurors in a criminal trial, and the rules permit courts to exclude evidence that does not meet the threshold of reliability required for admission.”); see also Hibl, supra, 714 N.W.2d at 204 (“There may be some conceivable set of circumstances under which the admission of highly unreliable

identification evidence could violate a defendant's right to due process, even though a state-constructed identification procedure is absent.").

**C. The All-or-Nothing Test Forgoes Helpful Intermediate Remedies, Such as In Limine Rulings and "Contextual" Jury Instructions, Based on Findings Made at Pre-Trial Judicial Assessments of Reliability**

15. When courts apply Manson, their purpose is usually limited to answering one question: to suppress or not to suppress the identification evidence. Once courts decide that issue, they conceive of their mission as complete. The problem is that since it is unusual for courts to suppress identification evidence, they rarely see any purpose in identifying suggestive procedures that increase the risk of error or to make findings about other factors relating to the event or the witness which tend to decrease the reliability of the identification.

16. That would dramatically change, however, if it became clear that in limine rulings (such as limiting testimony based on artificially inflated self-reports about certainty and description) and "contextual" instructions (such as telling the jury that failure to comply with the Attorney General's Guidelines can increase the risk of misidentification) were available as intermediate remedies. With realistically attainable relief at stake, courts conducting pre-trial hearings would be compelled to perform comprehensive assessments of reliability, assessments which would require identifying and understanding the key estimator and system variables present in a given case. This

comparatively small alteration in the legal architecture will have a qualitatively large effect – creating a “learning environment” at admissibility hearings that induces the parties and the court to familiarize themselves with the uniquely rich body of scientific knowledge that exists about eyewitness identification evidence. Concomitantly, to address scientifically relevant reliability issues, trial courts and the parties would be directed toward gathering more data than they would ordinarily seek. As opposed to “all or nothing” rulings based on thin data and rote review of checklists, intermediate remedies generate a more substantive judicial screening process, more reliable evidence, and more accurate verdicts.

**D. Failure to Provide Jurors With “Context” and Guidance to Correct Misconceptions About Eyewitness Memory**

17. After re-focusing the analysis of eyewitness identification evidence on reliability and ensuring that juries were not be deprived of critical, if “flawed” evidence (“evidence with some element of untrustworthiness is customary grist for the jury mill”), the Manson Court was “content to rely upon the good sense and judgment of American juries.” Manson, supra, 432 U.S. at 116, 97 S. Ct. at 2254, 53 L. Ed. 2d at 155. The Court felt that “[j]uries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.” Ibid.

18. Unfortunately, longstanding research studies show that jurors have great difficulty distinguishing between accurate and inaccurate eyewitnesses. IP136 at 475-487. Mistaken eyewitnesses are telling the truth as they believe it, and thus the cognitive faculties jurors usually deploy in making credibility judgments about lying witnesses do not work in this context.<sup>2</sup> Even more troubling, research shows jurors have some fundamental misconceptions about eyewitness memory. IP10; IP51; IP112; IP136; IP137; IP138; D77; D85; D103; D104. Jurors tend to believe that memory works like a videotape, 15T 5:25-6:8; 26T 16:1-6, generally misunderstand the effect of confirming feedback on the self-reported factors in Manson, 26T 29:1-7, do not understand the effects of biased witness warnings, 26T 50:2-10, are not inherently sensitive to estimator variables such as disguises, weapon focus, violence during the event, retention intervals between the event and the identification procedure, foil bias, and cross-race identifications, 18T 15:19-18:7; 24T 40:14-45:23; D77, tend to rely heavily on eyewitness factors that are not good indicators of accuracy (particularly the witness's confidence in her identification), overestimate eyewitness identification

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<sup>2</sup> This also explains why cross-examination – the supposed great engine for uncovering truth –often sputters in the face of an honest but mistaken eyewitnesses, is insufficient, on its own, to guard against wrongful convictions based on mistaken identifications (as both the DNA exonerations and empirical study show), and serves as an inadequate substitute for expert testimony or jury instructions). D85; IP146 at 6 (“Cross-examination, a marvelous tool for helping jurors discriminate between witnesses who are intentionally deceptive and those who are truthful, is largely useless for detecting witnesses who are trying to be truthful but are genuinely mistaken.”); see State v. Clopten, supra, 223 P.3d 1103 (because eyewitnesses may express almost absolute certainty about identifications that are inaccurate, research shows the effectiveness of cross-examination is badly hampered).

accuracy rates, and are not familiar with the trace evidence analogy. 26T 18:12-16. It is, therefore, critically important to correct these scientifically incorrect notions and provide jurors with “context” or guidance about eyewitness testimony that is firmly grounded in sound science.

**E. Failure to Provide Significant Deterrence of Suggestive Identification Procedures**

19. The Manson Court lamented the “inflexibility” and “rigidity” of the exclusionary rule, and acknowledged that deterrence of improper police practices would be significantly diminished by not suppressing out-of-court identification procedures. Manson, supra, 432 U.S. at 114, 97 S. Ct. at 2253, 53 L. Ed. 2d at 1154. Perhaps the Court would have taken a more flexible and targeted approach to deterrence if, in 1977, the Attorney General’s Guidelines existed. These generally accepted best practices for conducting identification procedures are based on strong scientific research that minimizes the risk of misidentification. By adopting the intermediate remedies proposed by amicus that enforce compliance with the Guidelines and at the same time inform juries accurately about the risks created by Guideline violations, courts can achieve a greater measure of deterrence while also providing much needed guidance to the jury.

### **III. A NEW LEGAL FRAMEWORK TO ACCOMMODATE SCIENTIFIC FINDINGS**

20. In light of the explosion of peer-reviewed research in the field of eyewitness identification and the long understood but now irrefutable leading role of eyewitness error in wrongful convictions, the New Jersey Supreme Court, and courts across the country, should adopt a renovated legal framework for assessing and regulating eyewitness identification evidence that requires not the abrogation but modernization of the Manson frame.

#### **A. Summary of the Key Components of Our New Framework**

- 1. The prosecution has the burden of going forward to demonstrate the integrity of the eyewitness's memory just as if it were trace evidence found at a crime scene that was preserved, stored, and later subjected to experimental testing. This would ordinarily include, whenever possible, the testimony of the eyewitness about "reliability" factors – opportunity to observe, attention paid, differences between the initial description and the characteristics of the defendant, duration between the incident and the first identification procedure, any other witness or event variable that affects reliability, and evidence about identification procedures and other potential sources of suggestion or confirmatory feedback.**
- 2. To suppress either the out-of-court or in-court identification evidence, the defense would have to demonstrate, by a preponderance of the evidence, that there was a substantial probability of a misidentification.**
- 3. The defense may move, and the court on its own motion should consider, appropriate jury instructions to guide the jury as well as precise in limine relief.**

4. **These instructions would include carefully tailored and strongly worded instructions about law enforcement's failure to follow the Attorney General's Guideline procedures that have been demonstrated to reduce the risk of misidentification. As Justice Albin stated in his dissent in State v. Herrera, 187 N.J. 493, 528 (2006), "to a person whose fate depends on the accuracy of an identification, it is fundamentally unfair for the police to unnecessarily employ a technique that maximizes the potential for error." As such, jurors must be told about the error-reducing procedures put in place by the Attorney General, the harm those procedures were designed to prevent, and the fact that the police failed to follow such procedures.**
5. **If the trial court finds that the evidence should not be suppressed because the defense has not met its burden, but its confidence in the reliability of the identification evidence has been seriously undermined, the court may instruct the jury that it should weigh the identification with great caution and distrust.**

21. Notably, Manson in no way prohibits the central tenets of our design. Encouraging courts to be conversant with scientific findings that are generally accepted in the field of the eyewitness identification research, structuring pre-trial hearings so that courts elicit better data, and providing jurors with scientifically sound context for their assessment of eyewitness testimony, is entirely consistent with the Manson Court's objective that "reliability" is the "linchpin" for judicial analysis. Nor can there be any doubt that the remedial legal architecture proposed here can be implemented either by the exercise of supervisory powers or through state constitutional due process guarantees. State v. Romero, 191 N.J. 59, 74-75 (2007)

(when “more might be done to advance the reliability of our criminal justice system, our supervisory authority over the criminal courts enables us constitutionally to act”); see also State v. Ledbetter, 881 A.2d 290, 316 (Conn. 2005) (exercising supervisory authority to require an instruction to the jury in those cases where the police fail to provide warnings to witnesses); Commonwealth v. Johnson, 650 N.E.2d 1257, 1260 (Mass. 1995) (Manson does not satisfy article 12 of the Declaration of Rights of the Massachusetts Constitution); People v. Adams, 423 N.E.2d 379, 383-440 (N.Y. 1981) (state constitution affords additional protections above the bare minimum mandated by federal law); State v. Dubose, 699 N.W.2d 582, 596-97 (Wis. 2005) (relying on the Due Process Clause of the Wisconsin Constitution).

**B. “Social Frameworks”**

22. But perhaps the most important endorsement of the proposed legal framework was put forth in the testimony of Dr. John Monahan. See 29T. Dr. Monahan is a member of the Institute of Medicine of the National Academy of Sciences and holds joint appointments at the University of Virginia in the departments of Psychology, Psychiatry and the School of Law, where he serves as the John F. Shannon Distinguished Professor of Law. IP86. With his co-author Laurens Walker, this year Dr. Monahan published the Seventh Edition of *Social Science in Law*, and he is widely acclaimed to be this nation’s leading authority on the subject. IP53; IP87; IP88; IP163. In 1987, Monahan and Walker introduced the concept of “social

frameworks” for the proper use of social science evidence in court to improve adjudication, a model that has since gained broad acceptance. IP87 at 5. Put simply, our proposed legal framework jettisons the confounded Manson balancing test and replaces it with a practical application of Monahan and Walker’s “social frameworks.”

23. In a nutshell, Monahan explained his approach as “the use of generally applicable scientific research to provide a context that a fact finder can use to determine a specific fact in a case. The research would provide a general frame of reference or background to assist the finder of fact in resolving an empirical dispute that had to do with the particular people before the court. Social science research here would be used to inform the jury about things they might not know or to correct misimpression they might have.” 29T 33:17-25–34:1; IP53; IP87; IP88. These scientific findings could be conveyed through jury instructions or expert witnesses, but only if the findings are robust, meaning that they must have survived critical review in the scientific community, used valid research methods, and be generalizable to the legal question at issue. 29T 38:23-39:8. Indeed, Monahan believes one reason social frameworks is a particularly good fit for the assessment and regulation of eyewitness testimony is that “of all the substantive uses of social science in law, none has been more subjected to scientific scrutiny, none has used more valid research methods, none is more directly generalizable, and nowhere is there a larger body of research than in the area of eyewitness identification.” 29T 39:25-40:5.

24. Monahan and Walker believe that:

Social frameworks should be most helpful to the jury where they bring into question jurors' possibly flawed intuitions or inaccurate beliefs about behavior, such as the conditions under which eyewitness testimony tends to be more or less accurate. [footnote omitted] In these cases, social science research provides a framework for evaluating the reasonableness and credibility of a party's testimony or theory of a case, without the expert offering any case-specific inferences or linkages.

[IP87 at 1741-42.]

25. The introduction of a social framework is a very conservative approach to the use of science in courtrooms. It holds that neither a court's instructions nor an expert could opine whether a specific eyewitness in a particular case was accurate or inaccurate. Rather, the instructions and expert are limited to educating the jury about well-established social science findings, probabilistic by nature, regarding variables that decrease the reliability of identification evidence, which the jury should then consider when assessing the identification evidence.

26. Monahan and Walker suggest that courts should obtain social science research in the same manner in which they obtain legislative facts and scientific research for the purposes of interpreting law and establishing broad public policy – through legal briefs and expert testimony presented at pre-trial hearings, amicus briefs, or sua sponte judicial research. 29T 35:18-25. A court would then evaluate the admissibility of the research findings by assessing whether it has been generally

accepted, see Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), or is scientifically valid, see Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), depending on the applicable jurisdictional rules, 29T 35:25-36:3. These scientific findings would ordinarily evolve much the same way as case law, moving from trial courts through appellate courts, forming a common law of social frameworks in which certain robust findings would assume the force of legal precedent and thus bind courts in subsequent cases. 29T 48:15-25-49:1-3. Given the need for “general acceptance” under both Frye and Daubert, it was very unlikely that with “every new issue of a psychology journal” there would be a need to change findings or jury instructions. 29T 46:10-11. Other mechanisms that could help implement a social framework approach are special court committees “composed of lawyers, judges, and social scientists [who could] periodically review instructions to determine that they were reflective of the latest findings,” or special masters, as the New Jersey Supreme Court has done in the instant case. 29T 46:15-20.

27. Already, Monahan avers, a “very, very large number of findings” of eyewitness identification research – referred to by Monahan as “the gold standard in terms of the applicability of social science research to the law,” 29T 49:13-15, would be admissible since they are “generally accept[ed],” “scientifically valid,” “found in meta-analyses,” and “robust,” 29T 36:4-10.

28. The concept of social framework provides a dynamic structure which not only permits but encourages courts and counsel to review periodically the social science literature in order to promote the integration of new robust findings, ensure that prior empirical conclusions remain valid, and update pattern jury instructions as needed. As Monahan noted, “science marches on,” and thus while the anticipation is that strongly-supported findings will only gain further support or precision over time, any framework should avoid “ossifying” findings in perpetuity. 29T 46:5-9.

**C. Key Components of Renovated Legal Framework**

- 1. The prosecution has the burden of going forward to offer proof that the identification evidence it seeks to introduce against the defendant is reliable.**

29. Under State v. Ortiz, 203 N.J. Super. 518 (App. Div. 1985), a defendant, based solely on assertions of law enforcement, with little discovery, and without an opportunity to cross-examine a single witness, must make a threshold showing that “some evidence” of suggestiveness existed in the identification procedures in order to prompt a Wade hearing.

30. Yet scientific research has proven that there are many factors that could increase the risk of identification error that would not be revealed through minimal pre-hearing discovery only.<sup>3</sup> See Innocence Project, Proposed Science Findings pts.

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<sup>3</sup> As Dr. Penrod noted, moreover, the State and the police department control identification evidence, from investigation to trial, and the defense often has no mechanisms other than pretrial hearings for gaining access to critical information surrounding the event, the police investigation, the lineup procedures (from the vantage point of both law

IV, V (Mar. 15, 2010) [hereinafter Proposed Science Findings] (explaining system and estimator variables). Most elusive are both the pre-identification contamination the witness may be exposed to through contact with co-witnesses, family, friends, the media, and law enforcement, and the post-identification confirming feedback the witness may receive from the same sources which could artificially inflate the witness's self-reports regarding both the circumstances under which she observed the perpetrator as well as her confidence in the accuracy of the identification. See Proposed Science Findings, supra, pt. IV.C (explaining post-identification feedback and inflation of self-reports). Just as coffee spilled on a blood stain at a crime scene contaminates the evidence whether spilled by a police officer, prosecutor, or a civilian, so too the source of contamination of an eyewitness's memory is of no import when measuring its impact on reliability. Any determination of whether blood evidence has been tainted by spilt coffee must begin by testing the blood as opposed to relying only on the testimony of the police officer who may have compromised the evidence. See Chen, supra, 402 N.J. Super. at 82-83 (“[I]n the proper discharge of their gate-keeping function pursuant to N.J.R.E. 403 and N.J.R.E. 104, trial courts should grant a request for a preliminary hearing when the reliability of the State's identification evidence is called into question by evidence of highly suggestive words or conduct by *private actors* that pose a significant risk of misidentification.” (footnote omitted) (emphasis

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enforcement and the witness), and post-event and post-identification contamination to which the witness has been exposed. 20T 50:6-52:15.

added)). In other words, the focus at pretrial hearings should include memory contamination from all possible sources, and the best way to evaluate such contamination is by hearing directly from the source of the trace evidence – the eyewitness.<sup>4</sup>

31. Therefore, in light of the uncontested empirical research, it is imperative that courts understand eyewitness memory as a form of trace evidence which is “from the first moments of an eyewitness’s interaction with the criminal justice system ... under assault from the questions, suggestions, and assertions of ... cops, lawyers, and bystanders.” IP52 at 92; see Proposed Science Findings, supra, pt. III.B.iii (explaining trace evidence). As such, courts should review eyewitness evidence in the same fashion they assess the collection and analyses of other types of trace evidence, Proposed Science Findings, supra, Findings # 14-15, and apply with equal force the legal standards that govern the admissibility of such evidence, 23T 94:21-95:13; Proposed Science Findings, supra, Findings # 16-17.

32. However, under Ortiz, where the defendant bears the initial burden of establishing the existence of unnecessary suggestion by state actors, reliability hearings are conducted in a very limited number of cases, and consequently identification evidence that could be rife with contamination and generated through suggestive procedures is admitted into evidence without scrutiny and without sufficient trial-

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<sup>4</sup> The perceptions and recollections of the eyewitness are also relevant regarding about what happened at an identification procedure, because they may differ markedly from the police officer who conducted it.

based safeguards. Moreover, as a result of the exclusive focus of Manson/Madison/Ortiz on state misconduct, even if a defendant is able to meet his burden of showing that suggestive procedures were used, at the pre-trial hearing the prosecution is obligated only to call police witnesses to establish the reliability of the evidence.

33. Therefore, State v. Ortiz should be overruled and replaced with the following framework: initially, the defendant bears the burden of placing the reliability of the identification evidence at issue, which he can do by alleging, via motion or affidavit, that the eyewitness's identification was in error (i.e., that, in fact, either he was not present at the scene of the crime, and thus could not have committed it, or that while he may have been present at the crime scene and/or seen by the eyewitness, he was not the person who committed the crime). By challenging the accuracy of the eyewitness's identification, the defendant places the reliability of such evidence at issue.

34. Once the defendant has alleged that the identification evidence is unreliable, the prosecution bears the burden of going forward to establish its reliability. The prosecutor's burden of proof in making its threshold reliability showing is appropriately low, in that it need only establish the conditional relevance of the evidence: i.e., that a reasonable jury could make the requisite factual determination – that the identification evidence is reliable – based on the evidence before it. See

N.J.R.E. 104(b). While this burden is minimal compared to the burden the defendant shoulders when seeking to suppress the identification evidence, it can be met only if the prosecution produces evidence with respect to two necessary elements: the reliability of the perception and memory of the witness and the specific identification procedures used to obtain the identification.

35. First, as a form of lay opinion testimony, eyewitness testimony should be governed in part by N.J.R.E. 701, under which a lay witness must have actual knowledge, acquired through the senses, of the matter about which he or she is about to testify and must help the trier of fact to understand either the witness' testimony or determine a fact in issue. State v. LaBrutto, 114 N.J. 187, 197-98 (1989). As stated in Chen, "rules governing admissibility of testimony and opinion evidence also serve to ensure reliability. Witnesses, other than experts, cannot testify unless they have 'personal knowledge' of the matter, N.J.R.E. 602, and 'opinions and inferences' offered by a lay witness must be excluded if not 'rationally based on the perception of the witness.'" Chen, supra, 402 N.J. Super. at 79. As such, for eyewitness identification evidence to be admissible, the prosecution must establish that, based on the facts and circumstances under which the eyewitness made her observations (i.e., estimator variables), and in light of the information to which the eyewitness has been exposed following the observation (from other witnesses, family, friends, the media, the Internet, the police, and the prosecution), the lay opinion evidence is rationally

based on the eyewitness's perception and memory. To make this "rational basis" showing, the prosecution must produce the eyewitness to testify as to the circumstances under which she saw the perpetrator and permit an inquiry into post-event information to which she has been exposed.

36. The second element the prosecution must establish to meet its burden going forward is eliciting proof from police witnesses concerning the out-of-court identification procedures (i.e., system variables), including whether or not law enforcement complied with the Attorney General Guidelines. See S20. However, the prosecution need not show compliance with the Guidelines as a prerequisite to meeting its burden going forward; merely putting forth evidence from law enforcement regarding the procedures that were used, whatever those procedures might have been, is sufficient.

**2. If the prosecution meets its burden of going forward, the burden shifts to the defendant to prove that there is a substantial probability of a mistaken identification.**

37. Once the prosecution has established the conditional relevance of the identification evidence, the burden shifts back to the defendant to prove, by a preponderance of the evidence, that the identification is nonetheless unreliable and hence should be suppressed. Specifically, the defendant must show that there exists a substantial probability of a mistaken identification. The defendant can make this showing either through cross-examination of the State's witnesses, by putting forth

his own evidence, or both. If the defendant meets this burden, both the out-of-court and prospective in-court identification evidence must be suppressed. If the defendant is unable to meet this burden, the identification evidence will be admitted.

38. This proposed burden-shift is not revolutionary; quite the contrary. Traditional rules of evidence normally require that the party seeking admission of the evidence bear the burden of establishing its evidentiary foundation – its relevance and reliability. In New Jersey, the judiciary has long had the gate-keeping authority to determine the reliability of evidence for the purposes of admission. See N.J.R.E. 104, 403, 803(a)(3); see also Chen, supra, 402 N.J. Super. at 68 (“The rules also permit courts to exclude evidence that is of such questionable reliability that its probative value is substantially outweighed by the risk of prejudice and misleading the jury.” (citations omitted)); Hibl, supra, 714 N.W.2d 194, 201 (Wis. 2006) (“Although most [‘accidental’ confrontations resulting in ‘spontaneous’] identifications will be for the jury to assess, the circuit court still has a limited gate-keeping function. It may exclude such evidence under [Wis. Stat.] § 904.03 if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.”)

39. In fact, our proposal is similar to – though requiring a much lower burden of proof than – the framework adopted by the New Jersey Supreme Court in State v.

Hurd<sup>5</sup> for the assessment of hypnotically-induced testimony: upon an objection by the defendant that the hypnotically induced testimony is unreliable, the prosecution must produce evidence establishing the rational basis for the witness's recollections and that the hypnosis was conducted according to an established protocol designed to minimize the risk of contaminating memory. As the Hurd Court stated:

Thus, once the defendant raises an objection to the introduction of hypnotic evidence, the burden must shift to the State to prove its admissibility. The determination of the admissibility of the proffered testimony should be made in a hearing out of the presence of the jury. At a minimum, the State should be required to produce the witness, the hypnotist who conducted the hypnotic session, the written information given to the hypnotist and the recording of the pre-hypnotic, hypnotic and post-hypnotic session.

[State v. Hurd, 173 N.J.Super. 333, 364-65 (1980). See also State v. Armstrong, 329 N.W.2d 386, 394-95 (Wis. 1983), vacated on other grounds, 700 N.W.2d 98 (2005) (“[T]he burden should be on the proponent to demonstrate that the hypnotic session was not affected by impermissible suggestiveness such as to render the subsequent testimony inadmissible.”).]

40. Indeed, some jurisdictions already follow our proposed rule that the prosecution should bear the burden going forward with regards to eyewitness identification evidence. See State v. Walden, 905 P.2d 974, 985 (Ariz. 1995) (“The state has the burden of proving by clear and convincing evidence that the pretrial identification procedures were not unduly suggestive.” (citing State v. Dessureault, 453 P.2d 951, 955 (Ariz. 1969))); Jones v. State, 909 A.2d 650, 661 (Md. 2006) (“It is not reasonable to require specific factual allegations of suggestivity before a defendant

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<sup>5</sup> It should be noted, however, that Hurd applies Manson's two-part admissibility test in which reliability assessments are contingent upon findings of procedural suggestiveness.

may call a witness in a suppression motion.”); People v. Chipp, 75 N.Y.2d 327, 335, cert. denied, 498 U.S. 833, 111 S. Ct. 99, 112 L. Ed. 2d 70 (1990) (“The People have the initial burden of going forward to establish the reasonableness of the police conduct and the lack of any undue suggestiveness in a pretrial identification procedure.”); Commonwealth v. Johnson, 668 A.2d 97, 103 (Pa. 1995) (“The burden is on the Commonwealth to establish that the identification procedure was not suggestive.” (citing Commonwealth v. Hughes, 555 A.2d 1264, 1272-73 (Pa. 1989))); State v. Lufkins, 309 N.W.2d 331, 335 (S.D. 1981) (noting that, by statute, South Dakota mandates that “defendant is entitled to a preliminary hearing”).

41. This customary “proponent-based” burden of proving reliability is also consistent with other types of scientific evidence for which the prosecution seeks admissibility. As the Appellate Division stated in State v. Chen:

Requiring a preliminary hearing to assess the impact of suggestive conduct by private actors is consistent with the approach our Supreme Court took in addressing the problem of evidence suggested by hypnosis in Hurd and by ‘coercive and suggestive’ interrogation techniques in Michaels. It also is consistent with the Court’s efforts to limit the potential for wrongful conviction based on unreliable identification evidence. ... We require this preliminary hearing in recognition of the potential that the use of such highly suggestive techniques may undermine the reliability, and a fortiori the probative value, of the identification evidence; the enhanced risk of misidentification attributable to suggestiveness at the time of the initial identification; and the risk of prejudice and misleading the jury that is so likely to result in wrongful conviction based on misidentification.

[Chen, supra, 402 N.J. Super. at 82.]

42. In sum, given the view of scientists in the field that eyewitness memory is best understood as trace evidence subject to degradation and contamination, and consistent with traditional rules of evidence, once the defendant places the reliability of the eyewitness identification at issue, the prosecution – the proponent of the evidence – should bear the burden of going forward to establish its conditional relevance. This lightly borne burden is met by establishing through the eyewitness a rational basis for her perception and memory and offering proof from the police concerning the out-of-court identification procedures they employed. Making the critical inquiry into the existence and extent of memory trace contamination – regardless of its source – is entirely consistent with Manson’s declaration of reliability as the linchpin for the admissibility of identification evidence. To assess potential contamination, courts should have as much information as possible regarding contact between witnesses, or between the witness and other actors, both after the incident and after the identification procedures, and only testimony from the eyewitness, not the police, can adequately address this issue. 26T 75:15-23, 76:11-24, 77:15-19.<sup>6</sup> See also Chen, supra, 402 N.J. Super. at 68 (“Even when law enforcement agents are not involved, evidence that an identification was made under highly suggestive circumstances that pose a significant risk of misidentification calls the reliability of the

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<sup>6</sup> It is worth noting that while at first glance it might seem that a requirement that eyewitnesses testify at pre-trial hearings is unduly burdensome on the prosecution and the witnesses themselves, in fact such testimony, particularly if it bears strong indicia of reliability, will often result in guilty pleas in cases that would otherwise go to trial, thereby obviating the need for the eyewitnesses to testify at trial, and otherwise saving the State valuable pecuniary and prosecutorial resources.

initial and subsequent identifications into question. Upon a request supported by such evidence, a trial court should conduct a hearing to assess whether the evidence is sufficiently reliable or whether its reliability is so diminished by the suggestive circumstances that the probative value is substantially outweighed by the risk of prejudice and misleading the jury.” (citations omitted)). Under this framework, trial courts and the parties will have ready access to the most important information underlying the reliability of identification evidence, resulting in more informed admissibility determinations, the promulgation of appropriate trial-based mechanisms to enhance juries’ assessment of such evidence, and more reliable verdicts.

**3. Courts must establish and follow rules for weighing identification evidence.**

43. In light of scientific research having proven the contaminating effect on witnesses’ memories of post-event information, we know that not every piece of identification evidence is equally reliable. Identification evidence is often a combination of multiple identifications, descriptions, interactions, and witness self-reports of the event, occurring at different points on the timeline between the incident and trial. Research has revealed that these various temporal evidentiary components can also be markers of the artificial enhancement, degradation, and contamination of such evidence. See Proposed Science Findings, supra, pt. IV.C (explaining inflation of self-reports). For example, research has demonstrated that because of the corrupting

effect of post-event information, “primary” identification evidence – the witness’s initial description of the perpetrator, event, opportunity to view, degree of attention, the event’s duration, as well as the first identification procedure, the witness’s initial identification, and the witness’s confidence in that identification – is more reliable than the witness’s subsequent self-reports or identifications. Despite this, it is very common for trial and appellate judges to rely on a witness’s confidence statements or descriptions or self-reports at the time of the hearing or trial, as opposed to at the time of the identification. 18T 41:14-17. But by the time a witness testifies, it is very likely that her confidence has been inflated in multiple ways. 18T 40:24-41:1.

44. The limited correlation between confidence and accuracy is relevant only with regards to confidence measured at the time of the identification, before there has been an opportunity for confirming feedback to intervene and artificially raise the witness’s level of confidence. 18T 41:1-5 (though even contemporaneous confidence is of limited value, as research has found that even witnesses who are highly confident at the time of the identification are inaccurate 10-25% of the time), D4 at 153; 20T 11:18-12:2); see also D73 at 26 (“[O]ur data reinforce what researchers have known for a long time: Namely, an extremely confident witness can be ‘just plain wrong’ regardless of the encoding and identification test conditions that shape the patterns of identification responding. In other words, our findings merely reinforce the conclusion stated earlier that confidence can provide a strong pointer for police

investigators but certainly cannot be taken as unequivocal evidence of identification accuracy”); Proposed Science Findings, supra, pt. IV.C.iii (explaining the confidence-accuracy relationship). Indeed, the Attorney General Guidelines recognize the importance of securing a contemporaneous statement of certainty as well as prohibiting positive reinforcement in the identification: “If an identification is made, avoid reporting to the witness any information regarding the individual he or she has selected prior to obtaining the witness’ statement of certainty.” S20 at §§ II.A.4., II.B.6, II.C.5, II.D.8; see also D73 at 11 (“Although researchers agree that courtroom expressions of confidence are uninformative, our findings indicate that confidence assessments obtained immediately after a positive identification can provide a useful guide for investigators about the likely accuracy of an identification.”).

45. Therefore, as a general rule, when assessing the identification’s reliability (including Manson’s reliability factors) for both admissibility purposes and in order to fashion appropriate intermediate remedies should the evidence be admitted, courts must place greater, if not exclusive, weight on the “primary” evidence detailed above (the witness’s initial description of the perpetrator, of her opportunity to view, degree of attention, the witness’s first identification, etc.).

46. To the extent that courts are to consider the witness’s certainty at all, such consideration should be limited to the initial confidence statement taken at the time of

the identification rather than at a later period (during the investigation or at a pre-trial hearing). 18T 40:20-24, 42:2-10; 26T 34:24-35:11.

4. **This proposed framework facilitates courts' formulation of meaningful intermediate remedies, such as granting in limine motions and devising narrowly-tailored jury instructions, and assists their evaluation and circumscription of expert testimony.**

47. As opposed to the current all-or-nothing approach under Manson/Madison, under our framework the court's gate-keeping responsibilities do not end with its decision regarding admissibility. Rather, after a pre-trial hearing where basic but critical information about the reliability of an eyewitness identification is elicited, trial courts will be in a position to inform the parties before the trial starts about what instructions, if any, it will give concerning important estimator and system variables that have been shown through meta-analytic reviews to increase or decrease identification accuracy. Such instructions, when they are given, will not only assist the jury in assessing the reliability of identification evidence, but having advance knowledge of such instructions will help the prosecution and defense correspondingly shape their approach to voir dire, openings, witness examinations, and closing arguments.

48. Similarly, our framework puts trial courts in a good position to make sound decisions about in limine motions. For example, especially when certainty statements have not been taken from a witness at the time of an out-of-court

identification, as required by the Attorney General's Guidelines, courts might decide to preclude the witness from making any statement about her level of certainty at the time of the trial. See S20 at § II.E.1.

49. This proposed framework would also provide an incentive for either the defense or prosecution to present expert testimony at pre-trial hearings, as experts might be able to provide trial courts with useful analysis not only regarding the ultimate issue of admissibility but also about appropriate jury instructions. In turn, hearing from experts at the pre-trial hearing would also allow trial courts to make well-informed decisions about whether to permit expert testimony at trial, and if so, to set clear limits about what the expert can and cannot say.

5. **To determine both the admissibility of the evidence as well as whether the jury will need guidance in evaluating the evidence, courts must make detailed findings during admissibility hearings concerning the presence of estimator and system variables proven through robust scientific research to contaminate eyewitness memory or increase or decrease identification reliability, including law enforcement's noncompliance with the Attorney General Guidelines and/or use of other suggestive identification procedures.**

50. Pretrial hearing testimony from the police and eyewitnesses will enable courts to investigate the presence of all variables that have been rigorously studied by science, particularly those shown through meta-analytic reviews to increase or decrease identification accuracy, and make specific findings regarding each. 19T 6:18-

7:3. See Greene, supra, at \*1 (unpublished opinion) (remanding for findings regarding the impact of an impromptu pre-Wade showup and for failure to resolve other factual disputes or consider this and other suggestive circumstances, stating “because ...the judge did not resolve a number of important factual disputes generated during the hearing, and because the judge also did not make findings regarding the suggestive events that preceded the Wade hearing, we decline to defer to his findings and reverse and remand for a new Wade hearing.”) These findings will enhance the treatment of admitted identification of evidence in a number of ways: first, such findings will result in more informed admissibility decisions; second, courts will be in a better position to decide the necessity of expert testimony to educate the jury about the robust empirical research underlying variables impacting identification accuracy; third, findings will form the basis for narrowly-tailored jury instructions to ensure that juries are properly guided in their assessments of the evidence; and fourth, findings will serve as trial guideposts for the defense and prosecution during voir dire, opening statements, cross-examinations, and closing arguments.

**i. System Variables Requiring Careful Evaluation By Courts**

51. A useful reference guide for courts scrutinizing the system variables in a given case are the New Jersey Attorney General Guidelines governing identification procedures throughout the state. See S20. Recognizing that “a scientific approach to

the collection and evaluation of eyewitness evidence is far more likely to result in improved effectiveness,” IP111 at 8; IP21; IP22 at 12, the Guidelines sought to unite science and practice to reduce the risk of wrongful conviction. Embracing the lineup-as-scientific experiment analogy, see IP21, the Guidelines relied on science to offer “a powerful set of tools” to law enforcement agencies in the design and conduct of eyewitness identification procedures, 14T 52:15-19, arming it immediately with a whole set of concomitant recommended safeguards, 14T 61:7-13.

52. According to Dr. Malpass and Dr. Wells, as well as the National Institute of Justice and the Wisconsin Department of Justice, because eyewitness identification evidence is a form of trace evidence, handling it like DNA evidence – by professionals trained in eyewitness identification science and conducted using procedures based on the scientific method – enhances its reliability. 26T 20:24-21:12; IP146 at 622-23; IP23 at 2 (“[Our Guide] sets out rigorous criteria for handling eyewitness evidence that are as demanding as those governing the handling of physical trace evidence.”); IP75a at 2 (“[L]ike trace evidence, [eyewitness evidence] is susceptible to contamination if not handled properly. The result can be failure to identify the true perpetrator or erroneous identification of an innocent person.”).

53. The Guidelines include numerous best practices proven by robust scientific research, including in many instances meta-analyses, to decrease the risk of mistaken identification, and which law enforcement should follow in every case.

Since every provision of the Guidelines was designed to prevent a specific harm to identification evidence, when courts assess the overall reliability of identification evidence for admissibility purposes, courts should make specific findings at pre-trial hearings whether law enforcement complied with each provision of the Guidelines, with noncompliance providing a basis for either preclusion of the evidence or intermediate remedies, including narrowly-tailored jury instructions explaining the purpose of the Guideline provision and the risk created by the state's noncompliance with it. See S20 at § III.C.6; Proposed Eyewitness Identification Instructions infra pp. 66-78. The Guideline provisions which courts should assess for compliance include:

- (1) Appropriate admonishments to witnesses. See S20 at § I.B (“The witness should be instructed prior to the photo or live lineup identification procedure 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.”); 18T 65:15-20. Based on the robustness of the scientific findings that proper witness warnings, also known as unbiased instructions, lead to fewer false identifications, 25T 20:19-22, it is very important for courts to consider whether unbiased instructions were given when assessing the reliability of eyewitness identification evidence. 25T 86:20-25; 26T 49:16-21; see Proposed Science Findings, supra, pt. IV.B.

(2) Appropriate selection of fillers. D56; 17T 65:16-24; IP85; 26T 59:8-11; see S20 at §§ I.E.2, I.F.2 (the police should “select fillers (non-suspects) who generally fit the witness’ description of the perpetrator”). It is important for courts to consider the lineup bias present in a lineup and the effective size of the lineup when assessing the reliability of eyewitness identification evidence, and to hear from experts before trial on these issues. 26T 56:4-14. While courts often examine lineup factors such as the size, color, or placement of a suspect’s photo in a photo array when assessing the degree of the procedure’s suggestiveness, courts often fail to evaluate these factors within the larger context of lineups as scientific experiments designed, in theory, to test the memory of eyewitnesses. 14T 57:17-24. It is important for courts to take into account the method by which fillers are selected when assessing the reliability of eyewitness identification evidence. 26T 59:12-17. See Proposed Science Findings, supra, pt. IV.E.i.

(3) Conducting the identification procedure double-blind. See S20 at § I.A (“In order to ensure that inadvertent verbal cues or body language do not impact on a witness, whenever practical, considering the time of day, day of the week, and other personnel conditions within the agency or department, the person conducting the photo or live lineup identification procedure should be someone other than the primary investigator assigned to the case.”). Double-

blind testing, a staple of science, is critical as it enhances the reliability of identification evidence in numerous ways. First, they protect against what scientists call the experimenter expectancy effect, where administrators put pressure on or cue witness to make specific decisions. Second, they reinforce other best practices, such as warning witnesses that that the perpetrator may not be in the lineup and selecting fillers in such a way to avoid bias against the suspect. Third, they eliminate the chance that the administrator can provide immediate feedback to the witness confirming the accuracy of her identification. Fourth, they protect against administrators tainting witnesses' certainty statements. And fifth, since a blind administrator is not aware of who the suspect is, the administrator would not be able to selectively record data depending on its consistency with the hypothesis (i.e., whether or not the witness picked the suspect or a filler). 14T 60:10-16; see Proposed Science Findings, supra, pt. IV.D.

- (4) Obtaining a certainty statement in the words of the witness at the time of the identification. 14T 59:15-60:4; see S20 at § II.A.4 ("If an identification is made, avoid reporting to the witness any information regarding the individual he or she has selected prior to obtaining the witness' statement of certainty."); Proposed Science Findings, supra, pt. IV.C.iii.

- (5) Avoiding providing confirming feedback to the witness regarding his or her identification prior to obtaining a statement of certainty from the witness. See S20 at § II.A.4 (“If an identification is made, avoid reporting to the witness any information regarding the individual he or she has selected prior to obtaining the witness’ statement of certainty.”).
- (6) Using a sufficient number of fillers. See S20 at §§ I.E.4, I.F.4 (police should “include a minimum of five fillers (nonsuspects) per [photo] identification procedure” and “a minimum of four fillers (nonsuspects) per [live] identification procedure”).
- (7) Avoiding disclosure of information to the witness about the police suspect during the identification procedure. See S20 at § I.E.7 (“Ensure that no writings or information concerning previous arrest(s) will be visible to the witness.”).
- (8) Recording the identification procedure. See S20 at § II.E (“When conducting an identification procedure, the lineup administrator or investigator shall preserve the outcome of the procedure by documenting any identification or nonidentification results obtained from the witness. Preparing a complete and accurate record of the outcome of the identification procedure is crucial. This record can be a critical document in the investigation and any subsequent

court proceedings.”); see also State v. Delgado, 188 N.J. 48, 51 (2006) (holding that out-of-court identification evidence must be suppressed if the police fail to make a detailed record of an identification procedure). It is critical that police document not only identifications of suspects, but non-identifications and filler identifications.

54. In addition to the system variables covered by the Guidelines, courts should also consider and make findings regarding:

- (9) Non-identifications. When evaluating the identification from a scientific point of view, courts should take into consideration when a witness failed to identify the defendant at an initial identification procedure (by identifying a filler or not choosing anyone) before picking the defendant at a second identification procedure. 22T 67:14-68:5. In United States v. Wade, supra, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149, the failure of the witness to identify the suspect in the first procedure was explicitly cited by the Supreme Court as a reliability factor in evaluating the admission of eyewitness testimony, although it is not repeated specifically in Manson. 22T 68:14-20; IP82 at 420 (“[It] is clear that [when evaluating the reliability of an identification] one must consider the response of each eyewitness, not just those who identify the suspect, in order to assess the likely guilt of the suspect. In fact, almost without exception, the probability of guilt associated

with an identifying eyewitness is reduced more by the addition of a nonidentifying eyewitness than it is increased by a second identifying eyewitness.”).

- (10) Law enforcement’s use of composite sketches when evaluating the reliability of eyewitness identification evidence. 26T 72:1-9; See Proposed Science Findings, supra, pt. IV.H.

**ii. Estimator Variables Requiring Careful Evaluation By Courts**

- (1) Cross-racial identifications. See 19T 9:13-16; 26T 81:2-6, 83:8-11.
- (2) Weapon focus. See 19T 9:1-5; 26T 86:13-19.
- (3) Level of witness’s stress. See 26T 91:13-17.
- (4) Distance. See 19T 9:11-12; 23T 61:25-62:2, 66:4-9; 26T 98:4-11.
- (5) Duration of the event. See 26T 105:7-12.
- (6) Whether the perpetrator was wearing a “disguise”. See 26T 101:12-19.
- (7) Amount of time between the incident and the identification (i.e., the extent of the forgetting curve). See 15T 13:24-14:5.
- (8) Condition of the witness (for instance, whether the witness was intoxicated) (19T 7:18-24)

**6. On the basis of findings at pre-trial hearings, courts should exclude or fashion remedies for specific portions of identification evidence found to have been at particular risk of contamination.**

55. There may be cases where the identification evidence does not raise a substantial probability of a mistaken identification, yet aspects of the identification evidence are so contaminated, or scientifically unreliable, that the prejudice of permitting the jury to hear such evidence outweighs its probative value. In such cases, even though the court is admitting the identification evidence generally, it should preclude portions of such evidence, either sua sponte or upon a defendant's motion in limine. 18T 54:16-18.

56. The most common type of evidence to which this remedy would apply is inflated confidence statements in cases where either the police failed to document the witness's certainty at the time of the confrontation or where the witness has been exposed to confirming feedback. In such instances, it is impossible for courts or juries to evaluate properly a witness's highly persuasive trial testimony regarding her confidence in the identification, proffered months or even years after the identification. See Proposed Science Findings, supra, pt. IV.C.iii. Therefore, if law enforcement fails to obtain a certainty statement in the witness's own words at the time of the out-of-court confrontation, or where there has been confirming feedback, courts should prohibit the witness from testifying at trial (and the prosecution from

arguing to the jury) about the witness's confidence in the identification (i.e., that she was or is "100% certain" or "could never forget his face").

57. If a witness's testimonial confidence in such cases has nonetheless been placed before the jury, courts must instruct juries about the weak correlation between confidence and accuracy, as well as the significance of the police failure to document witness confidence contemporaneous with the identification and/or how confirming feedback can inflate certainty artificially. See S2 at 3 n.9 (New Jersey jury charge on eyewitness identification stating that, "facts that may be relevant to [the degree of certainty expressed by the witness in making any identification] include whether witnesses making the identification received inadvertent or intentional confirmation, whether certainty was expressed at the time of the identification or some time later, whether intervening events following the identification affected the witness's certainty, and whether the identification was made spontaneously and remained consistent thereafter").

Under no circumstances should courts permit such testimony and then simply instruct jurors that they may consider the witness's confidence as a factor tending towards reliability. See Brodes v. State, 614 S.E.2d 766, 769 (Ga. 2005) (refusing to endorse, and advising trial courts to refrain from providing, an instruction authorizing jurors to consider a witness's level of certainty in his/her identification as a factor to be considered in deciding the reliability of that identification) (internal footnote

omitted)); State v. Hunt, 69 P.3d 571, 576 (Kan. 2003) (adopting the Utah Supreme Court’s refined analysis of the Biggers factors as explained in State v. Long, 721 P.2d 483 (Utah 1986), and State v. Ramirez, 817 P.2d 774 (Utah 1991)); Commonwealth v. Santoli, 680 N.E.2d 1116 (Mass. 1997) (holding that eyewitness jury instructions cannot permit jury to consider the strength of the identification in assessing its accuracy); Romero, *supra*, 191 N.J. at 76 (“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.”); State v. Long, 721 P.2d 483, 490 (Utah 1986) (“Research has also undermined the common notion that the confidence with which an individual makes an identification is a valid indicator of the accuracy of the recollection.”).

**7. Courts must provide juries with proper guidance and “context” so that they can to evaluate the eyewitness evidence appropriately.**

58. A central pillar upon which Manson rests is its faith that jurors can differentiate accurate versus inaccurate identifications. However, the “fundamental fact of judicial experience” is that juries “unfortunately are often unduly receptive to [eyewitness identification] evidence,” Manson, *supra*, 432 U.S. at 120, 97 S. Ct. at 2255-56, 53 L. Ed. 2d at 157 (Marshall, J., dissenting). See Proposed Science Findings,

supra, pt. IX. Mistaken eyewitness testimony remains the leading cause of wrongful conviction; indeed, there is “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. Souders, 449 U.S. 341, 352, 101 S. Ct. 654, 661, 66 L. Ed. 2d 549, 558-59 (1982) (Brennan, J., dissenting).

59. Professor Hugo Munsterberg’s astute observation a century ago still rings true today: “Justice would less often miscarry if all who are to weigh evidence were more conscious of the treachery of human memory.” IP124 at 36. Without an understanding of key factors affecting the reliability of eyewitness identifications, jurors are, indeed, at the mercy of their own misconceived assumptions. Juror sensitization is especially critical in light of jurors’ proven difficulties in accurately assessing eyewitness testimony. See Proposed Science Findings, supra, pt. IV. Jurors have been found to be overly impressed with witness certainty and often approach identification evidence as a question of whether the witness is “telling the truth,” as opposed to assessing factors relevant to memory contamination and reliability or evaluating whether the witness is honestly mistaken. IP124 at 36 (“The confidence in the reliability of memory is so general that the suspicions of memory illusions evidently plays a small role in the mind of the juryman, ... [instead] dominated by the idea that a false statement is the product of an intentional falsehood.”).

60. As the Third Circuit stated:

“Jurors seldom enter a courtroom with the knowledge that eyewitness identifications are unreliable.” [citation omitted] Thus, while science has firmly established the “inherent unreliability of human perception and memory [citation omitted], this reality is outside ‘the jury’s common knowledge,’ and often contradicts jurors’ ‘commonsense’ understandings” [citation omitted].

[United States v. Brownlee, 454 F.3d 131, 142 (3d Cir. 2006)(remanded for a new trial on grounds that it “wrong to exclude expert testimony regarding the reliability of the very eyewitness identification evidence on which [defendant] was convicted”).]

61. As put forth in our amicus brief, if jury instructions are the “lamp to guide the jury’s feet in journeying through the testimony in search of a legal verdict,” then it is time for courts to start illuminating the jurors’ path towards more reliable assessments of identification evidence. See State v. Cromedy, 158 N.J. 112, 128 (1999) (“It is well-established in this State that when identification is a critical issue in the case, the trial court is obligated to give the jury a discrete and specific instruction that provides appropriate guidelines to focus the jury’s attention on how to analyze and consider the trustworthiness of eyewitness identification.” (citations omitted)); see also Romero, supra, 191 N.J. at 74-75 (“[W]hen we perceive . . . that more might be done to advance the reliability of our criminal justice system, our supervisory authority over the criminal courts enables us constitutionally to act.”). Our system of justice should only continue to rely upon the “good sense and judgment” of juries to assess the reliability of eyewitness identification if judges provide them with the necessary

guidance to “measure intelligently” the weight of identification evidence that is the product of suggestive procedures proven to increase identification error. “At a minimum, additional judicial guidance to the jury in evaluating [eyewitness identification] testimony is warranted,” since “to convict a defendant on such [flawed] evidence without advising the jury of the factors that should be considered in evaluating it could well deny the defendant due process of law.” Long, supra, 721 P.2d at 492-93 (holding that “a proper instruction should sensitize the jury to the factors that empirical research has shown to be of importance in determining the accuracy of eyewitness identifications”). Simply put, “when identification is an essential issue at trial, appropriate guidelines focusing the jury’s attention on how to analyze and consider the factual issues with regard to the reliability of a witness’s identification of a defendant as the perpetrator are critical.” Brodes, supra, 614 S.E.2d at 771 (reversing conviction due to jury instruction incorrectly citing witness confidence as indicator of reliability).

62. In order for jury instructions to effectively provide context to the jury, two common shortcomings must be eradicated. The first is that jury instructions are often poorly worded, insufficiently illuminating, and beyond the comprehension of the average juror. A jury cannot be guided by instructions it does not understand. Thus, jury instructions must convey in comprehensible language our modern-day knowledge of various identification error-increasing phenomena.

63. The second impediment has been the timing of jury instructions. Usually courts provide eyewitness identification instructions at the conclusion of trial, embedded within numerous other instructions, and well after the identification witnesses have testified. It is difficult for jurors to apply the instructions retroactively to the testimony, particularly when they may have already processed it through their lay understanding and misconceptions of memory and eyewitness identification evidence. Therefore, in addition to the providing instructions at the conclusion of trial, courts should give the jury with preliminary instructions prior to the witness's testimony. This primacy-recency approach will increase jurors' real-time understanding of the identification evidence, particularly regarding previously unfamiliar concepts, as well as during deliberations.

64. Jurors should receive contextual instructions, when relevant and at a minimum, on the following factors:<sup>7</sup>

- (1) Witness Warnings: whether the witness was warned that the perpetrator may not be in the identification procedure. Studies indicate that jurors do not necessarily know about witness warnings and their possible effects, 26T 50:2-10, and thus, as Dr. Malpass testified to, it is very important for jurors to know whether warnings were given and the effects of giving biased/unbiased instructions. 26T 49:22-50:1; see State v. King, 390 N.J. Super. 344, 361-63

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<sup>7</sup> See Proposed Eyewitness Identification Instructions infra pp. 66-78.

(App. Div. 2007) (holding that a more detailed jury charge regarding the suggestiveness of the identification procedures was warranted, and specifically finding that the trial court should have given the jury a Ledbetter charge for law enforcement's failure to warn the witness that the perpetrator may not be in the lineup) (citing Herrera, *supra*, 187 N.J. at 509-10); *see also* Ledbetter, *supra*, 881 A.2d at 316; Santoli, *supra*, 680 N.E.2d at 1121.

- (2) Filler Selection and Lineup Fairness. While the rationale for selecting fillers in a specific manner might be too technical for a jury, jurors should be informed that there is a best practice for selecting fillers based on minimizing bias towards the defendant and instructed on whether that practice was followed. 26T 59:24-60:5. If an effective size analysis has been introduced into evidence, jurors should be instructed on that as well. 26T 59:18-23.
- (3) Blind Administration. In one juror survey, 45% of respondents did not understand the importance of double-blind administration of lineups: 27% either thought it made no difference or were unsure whether it mattered that the lineup was done double-blind or non-blind; while 18% thought that double-blind administration would actually render the identification less reliable. D103 at 203-04, 210.§

- (4) Confidence-Accuracy and Certainty Statements. Despite the meaninglessness of a witness's inflated confidence in her identification on the witness stand, jurors perceive such witnesses to be more accurate, while perceiving witnesses with suppressed confidence as less accurate. 17T 92:16-20; D4 at 153. But since most eyewitnesses who testify at trial are highly confident in their identifications, irrespective of accuracy, witness confidence is mostly a meaningless tool for helping jurors distinguish accurate from inaccurate witnesses. 20T 9:18-20, 10:1-8. Therefore, if jurors are going to be allowed to consider the eyewitness's confidence – even if the confidence statement was taken at the time of identification – courts must instruct jurors that confidence is not a good predictor of accuracy. 26T 39:5-19.
- (5) Co-witness Contamination. In cases involving multiple eyewitnesses, jurors should be told of the risks of co-witness contamination, 26T 77:19-24, the importance of separating witnesses, and to consider the contact between witnesses before, during, and after the identification.
- (6) Composites. Jurors should be informed about the dangers and low utility of facial composites. 26T 72:10-14.
- (7) Mugshot Commitment. When jurors are evaluating an identification made by a witness who participated in multiple identification procedures involving the

defendant, jurors should be instructed on the mug shot commitment effect.  
26T 67:20-68:1.

- (8) Own-Race Bias. Jurors tend to underestimate the effect of own-race bias, and thus should be informed about its effect in appropriate cases involving cross-racial identifications. 26T 81:7-14, 83:11-13; see also Cromedy, supra, 158 N.J. 112 (1999).
- (9) Weapon-Focus Effect. Jurors should be informed about the potential decrease in the accuracy of an identification caused by the presence of a weapon. (26T 87:10-15)
- (10) High Levels of Stress. Jurors should be informed about the potential decrease in the accuracy of an identification caused by a highly stressful event. 26T 87:10-15.
- (11) Disguise. Jurors should know and consider scientific research on the effects of disguise on accuracy when evaluating the reliability of eyewitness identification evidence. 26T 101:12-19.
- (12) Duration of the Event. Jurors should also be informed that eyewitnesses frequently overestimate event durations. 26T 105:13-23.

(13) Retention Interval and the Forgetting Curve. Jurors should understand that most forgetting occurs fairly quickly, such that the difference between one and two weeks is trivial, whereas the difference between one day and two days is more significant. 15T 13:24-14:5.

**8. When findings of suggestion and/or unreliability have undermined a court's confidence in the accuracy of the identification, it should give the jury a strongly worded cautionary instruction that it should treat the identification evidence with great caution and distrust.**

65. In cases in which a court does not deem an identification so contaminated that it created a substantial probability of misidentification, yet where by the conclusion of trial the court doubts the accuracy of the identification evidence (either because of law enforcement's transgression of numerous best practices, or one egregious or particularly reckless violation, or because the reliability of the identification has been otherwise significantly undercut), in addition to providing the jury with the aforementioned specifically-tailored contextual instructions on each existent variable's diminishing affect on accuracy, it should give the jury a strongly-worded cautionary instruction casting doubt on the reliability of the eyewitness identification evidence as a whole.<sup>8</sup>

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<sup>8</sup> Such an instruction is authorized by State v. Romero, *supra*, 191 N.J. at 76, requiring that New Jersey's model jury charge underscore the close scrutiny jurors must give to eyewitness identification evidence in all identification cases. Our instruction would simply be a stronger version of the Romero instruction reserved for cases in which the identification evidence is weak.

66. This cautionary admonition takes heed of an undeniable and understandable reality: that courts are reluctant to keep potentially relevant evidence from the jury, particularly if they believe that at least one juror, if not more, will find the evidence reliable beyond a reasonable doubt. Recognizing this, and yet consistent with the urgent need for judges to devote great attention to reliability assessments and remain alert for factors that increase the rate of identification error, enhanced cautionary instructions in cases in which courts, strikes a balance between admitting evidence of low probative value and guaranteeing that the jury is appropriately warned of the shortcomings of such evidence.<sup>9</sup> Indeed, such an instruction is required under N.J.R.E. 104(b), which states that “the jury shall be instructed to disregard the evidence if the judge subsequently determines that a jury could not reasonably find that the condition was fulfilled.”

67. Examples of more moderate cautionary language can be found in certain jurisdictions’ standard identification instructions, see, e.g., OUI-CR 9-19 Evidence—Eyewitness Identifications (Okla.) (“Eyewitness identifications are to be scrutinized with extreme care.”), or, analogously, in instructions on accomplice testimony, see Accomplice Testimony Instruction in Manual of Model Criminal Jury Instructions, Rule 4.9 (9th Cir. 2005); see also State v. Marra, 610 A.2d 1113, 1123 (Conn. 1992)

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<sup>9</sup> Concerns that such an instruction usurps the role of the ultimate factfinder are misplaced. First, jury instructions, including specific cautionary instructions, are a familiar component to the jury system. See N.J.R.E. 104(b). Second, intermediate instructions, like jury instructions generally, are a far less drastic measure of usurpation than suppressing evidence.

("[T]he jury must look with particular care at the testimony of an accomplice and scrutinize it very carefully before ... accept[ing] it."). Our framework calls for a stronger cautionary instruction in such cases:

Given the suggestive procedures used and/or presence of numerous factors proven to decrease identification accuracy in this case, you must look at the identification evidence with extreme caution and scrutinize it with great care.

Or:

Given the suggestive procedures used and/or presence of numerous factors proven to decrease identification accuracy in this case, you should view the identification with distrust.

**9. Courts should encourage the use of experts at pre-trial hearings.**

68. As we stated in our amicus brief, our proposed renovated framework embraces the use of expert testimony in appropriate cases under New Jersey Rule of Evidence 702, to ensure that both judges and juries become sensitized to the generally accepted and reliable scientific research on factors affecting identification accuracy, about which most jurors, and even many judges, lack common knowledge. See State v. Gunter, 231 N.J. Super. 34, 41-43 (App. Div. 1989) (citing, e.g., State v. Kelly, 97 N.J. 178, 208 (1984)); IP140; People v. Lee, 96 N.Y.2d 157, 162 (2001) ("[I]t cannot be said that psychological studies regarding the accuracy of an identification are within the ken of the typical juror."); Copeland, supra, 226 S.W.3d at 299 (holding that it was an abuse of discretion to exclude expert testimony regarding cross-racial

identifications and confirming feedback, observing that “scientifically tested studies, subject to peer review, have identified legitimate areas of concern” with respect to juror sensitivity to these issues); State v. Clopten, 223 P.3d 1103 (Utah 2009)(expert testimony regarding factors shown to contribute to inaccurate eyewitness identifications should be admitted whenever it meets the evidence rules requirements governing expert admissibility); see also Long, *supra*, 721 P.2d at 490 (“People simply do not accurately understand the deleterious effects that certain variables can have on the accuracy of the memory processes of an honest eyewitness.”); State v. Chapple, 660 P.2d 1208 (Ariz. 1983); People v. McDonald, 690 P.2d 709 (Cal. 1984). In general, jurors give less weight to witness confidence after hearing from an expert, 20T 27:13-18, and are better able to differentiate between good and poor witnessing conditions. 20T 28:22-24, 29:17-19.

69. Experts can educate judges about the meta-analyses that exist in the field of eyewitness identification research, thereby assisting courts in conducting scientifically sound assessments of identification evidence and crafting appropriate remedies. Moreover, hearing from the expert at pre-trial hearings will provide courts with a preview of the expert’s trial testimony and permit better-informed decisions regarding whether to allow the expert to testify at trial. Thus, courts should admit eyewitness expert testimony at hearings and at trial – even on their own initiative – to

fortify their factfinding function and better educate juries on the purpose behind best practices and the increased rate of error when such practices are not observed.

#### **IV. ADVANTAGES OF RENOVATED LEGAL ARCHITECTURE**

70. There are a number of reasons why we are advocating for this “contamination-calls-for-caution” approach.

- (1) It is scientifically robust, supported by decades of peer-reviewed rigorous scientific research.
- (2) It is doctrinally sound, supported by Monahan and Walker’s well-developed concept of social frameworks, and aimed at strengthening a core objective of our criminal justice system: the due process right of a fair trial conducted before impartial, well-guided juries.
- (3) It is realistic, not only because it does not necessitate disturbing Supreme Court precedent, but also because it avoids placing all its eggs in the thorny nest of suppression, instead offering courts appealing intermediate remedies that will allow them to convey to juries their apprehension towards questionable identifications they are nonetheless reluctant to exclude. In this way, it gives courts a more meaningful role in admissibility hearings, requiring findings based on examinations of suggestion and contamination measured in part by compliance with a clear set of bright-line rules, and with findings of

noncompliance and unreliability automatically triggering certain trial-based remedies, including a powerfully-worded cautionary instruction in cases in which courts do not consider the identification evidence strong enough basis, on its own, to sustain a conviction.

- (4) It will reduce mistaken identifications by more effectively curbing suggestive identification procedures. Under our revamped remedy-based application of Manson, governed largely by clear, simple, easily-implemented rules and reasonable remedies required by due process, the articulation of specific safeguards for noncompliance with those rules will discourage – even if not eradicate – poor police practices and, better yet, encourage law enforcement to embrace better procedures. “With clear guidelines, courts are able to clamp down on . . . practices [that violate them], as the Supreme Court did recently in condemning ‘question first’ practices that undermine the effectiveness of the Miranda warning.” D88, supra note 8, at 140. Included in these better procedures is more comprehensive law enforcement documentation of identification procedures (and hence a more meaningful and informative discovery process), specifically thorough and accurate transcription of “primary” evidence, namely complete initial witness descriptions and confidence statements and videotaping lineup procedures.

- (5) It will result in robust trial records, replete with findings, discussions of and citation to scientific research, and more thorough arguments about identification evidence. Setting aside courts' misinterpretation of Manson, appellate judges must often rely on woefully inadequate trial records that disguise the unnecessarily suggestive and unreliable nature of identification evidence. By increasing the likelihood of reliability hearings, carefully-crafted findings of fact, and formulation of (or at the very least deliberation about) appropriate remedies, our litigation model will provide appellate courts with far richer records that will not only better educate them about identification evidence but from which they will also be able to write more informed, constitutionally consistent decisions.
- (6) It will reduce wrongful convictions by providing significantly greater guidance to juries as to the factors that increase identification error. The only way to fulfill the Supreme Court's directive in Manson that identification evidence be heard by intelligent juries is by ensuring that jurors understand how certain variables affect identification evidence and dispelling many of the misguided notions they hold about human memory and eyewitness evidence.

## V. CONCLUSION

71. As a result of the impressive body of research in the field of eyewitness identification that has emerged since the Manson decision, we know far more today than in 1977 about factors that increase the rate of identification error. Indeed, the robust empirical study on eyewitness identification is unparalleled in both volume and validity in the shared arena of social science and the law. This outpouring of rigorous research, along with confirmation by post-conviction DNA exonerations of both the prevalence and dangers of misidentification, has created an imperative: courts must take affirmative steps to renovate Manson's dilapidated legal structure for handling identification evidence, which fails to protect innocent people from wrongful convictions based on mistaken identifications.

72. Building upon the social framework theory of Monahan and Walker, our dynamic structure enhances the reliability of judicial assessments of identification evidence, and ultimately of verdicts, through the integration of powerful scientific research. As part of our proposed framework, courts must conduct serious reliability hearings to determine whether the identification evidence has been contaminated. These pre-trial examinations include hearing from the eyewitnesses themselves as well as ascertaining whether or not law enforcement complied with the set of court-endorsed, empirically-based best practices for conducting identification procedures promulgated by the New Jersey Attorney General. Courts must then make specific

findings regarding factors proven to inhibit or pollute memory trace evidence. Based on those findings, courts can design a series of intermediate remedies designed to ameliorate the risks posed by tainted identification evidence, including providing appropriate context and guidance for jurors evaluating the reliability of such evidence.

## **PROPOSED EYEWITNESS IDENTIFICATION INSTRUCTIONS**

These model instructions are not a final product. Rather, they represent an ongoing effort by *Amicus* to give appropriate contextual guidance, based on empirical research, to jurors in their assessment of eyewitness identification evidence. We will be revising these instructions in the coming weeks, but even as a work in progress thought it appropriate to include them here in light of their central importance to the renovated legal architecture we have put forth. Limited portions of the instructions are lifted directly from or attempt to modify the existing New Jersey Eyewitness Identification Instruction.

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

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

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

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

## Witness Certainty

Although nothing may appear more convincing than a witness's categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken. Indeed, an eyewitness's confidence in his or her identification is a weak predictor of the accuracy of his or her identification. Witnesses can be highly confident, but mistaken. Therefore, when analyzing such testimony, be advised that a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification.<sup>10</sup>

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

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

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<sup>10</sup> Romero, supra, 191 N.J. at 76.

## Memory Does Not Work Like a Videotape

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

## Post-event Information

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

## Confirming Feedback

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

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

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

### Co-Witness Contamination

Was the witness exposed to opinions, descriptions, or identifications given by other witnesses, to photographs or newspaper accounts, or to any other information or influence that may have affected the independence of his/her identification?<sup>11</sup> There is a danger that a witness will incorporate this information into her memory of the event, thus altering her memory of the event.

### Pre-trial Identifications Generally

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

### Out-of-Court Identification

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

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<sup>11</sup> See Herrera, *supra*, 187 N.J. at 509 (quoting Ramirez, *supra*, 817 P.2d at 781 n. 2 (citing Long, *supra*, 721 P.2d at 494 n.8)).

including everything done or said by law enforcement to the witness before, during, or after the identification process. In making this determination you should consider the following circumstances:

Whether anything was said to the witness prior to viewing a photo array, line-up or showup;<sup>12</sup>

#### Prejudicial Disclosure of Information about Defendant to Witness

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

#### Double-blind

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

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

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<sup>12</sup> See State v. Cherry, 289 N.J. Super. 503 (App. Div. 1995).

### Admonition to Witness

Was the witness informed, prior to viewing the show-up, lineup, or photo-spread, informed that the perpetrator might not be among the people in the display and that the witness should not feel compelled to make an identification?<sup>13</sup>

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

Psychological studies have shown that implying to a witness that a suspect is present in an identification procedure or failing to warn the witness that the perpetrator may or may not be in the procedure increases the likelihood that the witness will select one of the individuals in the procedure, even when the perpetrator is not present. For this reason, the Attorney General Guidelines require that the police warn the witness that the perpetrator may not be in the lineup and that therefore the witness should not feel compelled to make an identification. The failure of the identification procedure administrator to follow this provision of the Guidelines tends to increase the probability of a misidentification.<sup>14</sup>

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

### Filler Selection

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

Were “all in the lineup but the [defendant] known to the identifying witness?”<sup>15</sup>

In a fair lineup all lineup members should match the eyewitness’s pre-lineup description of the perpetrator, and the defendant should not stand out unfairly. For this reason, the Attorney General Guidelines recommend that fillers (non-suspects) generally fit the witness’ description of the perpetrator.” In this case, the police failed to select the lineup fillers to match the descriptive characteristics provided by the

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<sup>13</sup> See S20 at § I.B. (requiring administrator to instruct witness that perpetrator may not be present); Ledbetter, *supra*, 881 A.2d 290 (requiring a jury instruction to that effect).

<sup>14</sup> State v. Ledbetter, 881 A.2d 290, 31819 (Conn. 2005).

<sup>15</sup> Wade, *supra*, 388 U.S. at 233, 87 S.Ct. at 1935, 18 L. Ed. 2d at 1160.

witness [and/or did not select fillers in such a way that avoided the defendant standing out]. Failure to select fillers in this way can cause an innocent suspect to stand out unfairly and thus increases the chance of an erroneous identification. You should take this failure into account when evaluating the reliability of the identification evidence in this case.

Was “only the [defendant] required to wear distinctive clothing which the culprit allegedly wore?”<sup>16</sup>

### Number of Fillers

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

### Multiple Viewings

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

### Filler Identifications and Non-identifications

Was the witness’s identification made spontaneously and remain consistent thereafter?<sup>17</sup>

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

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

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<sup>16</sup> Ibid.

<sup>17</sup> See Herrera, supra, 187 N.J. at 509 (quoting Ramirez, supra, 817 P.2d at 781).

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

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

### Composites

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

### Simultaneous Lineups

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

### Showups

In this case, the defendant was identified at a showup procedure. Showup identification procedures are where the police present the witness with only one choice, as opposed to lineups, where the police present the witness with several choices. Showups produce a higher rate of mistaken identifications than lineups when an innocent suspect resembles the actual perpetrator, but nonetheless may be permissible when necessary and where a lineup is not feasible. You should consider how soon after the incident the showup was conducted. The further in time from the crime a showup is conducted, the greater the chance of a mistaken identification

compared to a lineup. In determining how much weight to give such an identification, you should consider whether the show-up was necessary, when it took place in relation to the crime, and you should further consider all of the facts surrounding the show-up, including whether the suspect was in hand-cuffs or otherwise restrained by the police, what was said to the witness before, during, and after the showup, and whether the police warned the witness that the person in the showup may not be the perpetrator, the witness did not have to make an identification, and the investigation would continue whether or not the witness made an identification.

### No Pre-Trial Identification

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

### In-Court Identification

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

### Opportunity to Observe

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

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

### Duration of Incident

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

### Distance

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

### Disguise

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

### Weapon Focus

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

### Level of Stress

You should consider how stressful the event may have been to the witness. Highly stressful events have a negative effect on memory and increase the risk of a mistaken identification. Whether the event was stressful for the witness, the level of the witness's stress, and whether the stressful nature of the event distracted the witness or

made it harder for him or her to identify the face or other distinguishing features of the perpetrator, is for you to decide.

### Witness's Condition

You should consider the witness's physical and emotional condition at the time of the incident, as they may relate to witness's powers of observation. For example, was the witness intoxicated during his or her observations? Does the witness need prescription eyewear and, if so, was the witness wearing such eyewear during the incident? Whether the witness's condition made it harder for him or her to identify the face or other distinguishing features of the perpetrator, is for you to decide.

### Cross-Race

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

In addition, you should consider:

### Time Between the Incident and the Confrontation

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

### Discrepancies between Identifications, If Any

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

### Child and Elderly Witnesses

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

### Police Witnesses

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

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