

NEW YORK UNIVERSITY
LAW REVIEW

VOLUME 87

NOVEMBER 2012

NUMBER 5

BRENNAN LECTURE

EVALUATING EYEWITNESS
IDENTIFICATION
EVIDENCE IN THE 21ST CENTURY

THE HONORABLE STUART RABNER*

In the Eighteenth Annual Justice William J. Brennan, Jr. Lecture on State Courts and Social Justice, Stuart Rabner, Chief Justice of the New Jersey Supreme Court, discusses the court's recent decision in State v. Henderson. In Henderson, the court revised the longstanding legal framework for testing the reliability of eyewitness identifications. Justice Rabner discusses the case law underlying the traditional framework, the social science that prompted the court's decision, and the revised framework now in place. He concludes by emphasizing the importance of eyewitness identification in our criminal justice system and calling for continued judicial attention to accepted scientific evidence on eyewitness reliability.

INTRODUCTION	1251
I. EARLY TREATMENT OF EYEWITNESS IDENTIFICATION AND THE <i>MANSON/MADISON</i> TEST	1251
A. <i>Pre-1977</i>	1251
B. <i>The Manson/Madison Test</i>	1253
II. SOCIAL SCIENCE DEVELOPMENTS AND EFFECTS ON LAW AND POLICY	1254

* Copyright © 2012 by Chief Justice Stuart Rabner, New Jersey Supreme Court. Chief Justice Rabner was sworn into office in June 2007 after being nominated by Governor Jon S. Corzine and confirmed by the New Jersey Senate. He served as New Jersey's Attorney General from September 2006 until his nomination to the New Jersey Supreme Court. He was named Chief Counsel to the Governor in January 2006. From 1986 to 2005, he served as an assistant U.S. attorney in the District of New Jersey and held a number of positions including first assistant U.S. attorney. The author gratefully acknowledges Joshua Haber's extraordinary assistance in preparing this article.

A.	<i>Social Scientific Landscape</i>	1254
B.	<i>Law Meets Science: Incremental Changes</i>	1256
C.	<i>Policy Meets Science</i>	1257
III.	REEVALUATING EYEWITNESS IDENTIFICATION	1259
A.	<i>Limitations of the Manson/Madison Test</i>	1259
B.	<i>Creating a Record: Special Masters</i>	1261
C.	<i>The Henderson Record</i>	1263
1.	<i>System Variables</i>	1264
2.	<i>Estimator Variables</i>	1266
3.	<i>The Role of the Jury</i>	1267
IV.	NEW JERSEY'S NEW FRAMEWORK	1268
A.	<i>Epilogue: The Next Thirty Years and Beyond</i>	1271
	CONCLUSION	1272

Thank you for inviting me to deliver the Eighteenth Annual Justice William J. Brennan, Jr. Lecture on State Courts and Social Justice.

This evening, I would like to discuss eyewitness identification evidence and a recent decision by the New Jersey Supreme Court on this important topic: *State v. Henderson*.¹ In that case, the court unanimously concluded that the legal framework for analyzing the reliability of eyewitness identifications—which had been in place for decades—needed to be revised.² The court acted after reviewing hundreds of scientific studies and testimony by numerous experts, which cast doubt on well-settled law.

We found that “memory is malleable” and that “an array of variables can affect and dilute memory and lead to misidentifications.”³ Some of those factors are within the control of law enforcement; others are not.

We concluded that the legal test to measure eyewitness identifications did not provide a sufficient measure for reliability, did not deter misconduct, and overstated the jury’s innate ability to evaluate the reliability of eyewitness testimony.⁴ To remedy those problems, *Henderson* announced two principal changes to New Jersey state law: (1) when defendants can show some evidence of suggestive behavior by the police, judges are to explore a broader array of factors at pretrial hearings to decide if the identification evidence is admissible; and (2) to help jurors weigh identification evidence that is

¹ 27 A.3d 872 (N.J. 2011).

² *Id.* at 918–19.

³ *Id.* at 895.

⁴ *Id.* at 918.

admitted, the court system must use enhanced jury charges tailored to the facts of the case.⁵

Let's explore how we reached that point, why we made those changes, and what lies ahead.

INTRODUCTION

For the past four decades, New Jersey case law has addressed various concerns that arise from eyewitness identifications.⁶ In those cases, courts evaluated a variety of identification techniques: traditional lineup procedures that place a suspect among look-alike "fillers," photo arrays that mimic live lineups, showups that require witnesses to make an identification by looking at only one suspect, and other similar variations.

The fundamental aim of those identification procedures is clear: to find the guilty and protect the innocent. For example, lineups containing one suspect and five look-alikes force witnesses to probe their memories of the incident in question in search of a match. If the eyewitness's memory is accurate and the lineup is effective, the eyewitness should be able to determine whether the suspect is the actual perpetrator.

In practice, of course, things are far more complicated. Memories not only fade, but also are malleable. Therefore, since the late 1960s, the U.S. Supreme Court has recognized that certain police practices are so suggestive, and so potentially manipulative of witnesses and their memories, that they violate the Due Process Clause of the Federal Constitution.⁷ Leading up to *Henderson*, New Jersey courts attempted to evaluate eyewitness identification cases within the parameters set forth by the U.S. Supreme Court.

I

EARLY TREATMENT OF EYEWITNESS IDENTIFICATION AND THE *MANSON/MADISON* TEST

A. *Pre-1977*

In *Simmons v. United States*, decided in 1968, the U.S. Supreme Court explained that identification procedures violate due process if they are "so impermissibly suggestive as to give rise to a very

⁵ *Id.* at 919.

⁶ *See, e.g.*, *State v. Adams*, 943 A.2d 851, 860 (N.J. 2008); *State v. Cromedy*, 727 A.2d 457, 467 (N.J. 1999); *State v. Earle*, 292 A.2d 2, 4 (N.J. 1972).

⁷ *See infra* note 8 and accompanying text (reviewing the Supreme Court's decision in *Simmons v. United States*).

substantial likelihood of irreparable misidentification.”⁸ The Court did not detail what procedures might be so impermissibly suggestive as to be unconstitutional.

Three years later, the New Jersey Supreme Court had the opportunity to interpret *Simmons* in *State v. Earle*.⁹ In *Earle*, a railroad patrolman named Joseph Lancellotti was severely beaten by four men in Newark’s railroad yard.¹⁰ The attack occurred at night, and the area was partially illuminated.¹¹ The victim briefly saw two of his attackers before another “struck [him] from behind with a hard object.”¹² The assailants were not immediately apprehended, and over the course of about seven months, Lancellotti reviewed approximately 200 photos and saw fifteen live suspects but did not make an identification.¹³

Seven months after the attack, a different railroad security guard arrested a man named Emanuel Earle for trespassing. The worker described the trespasser to Lancellotti, who went to the precinct and identified Earle as one of his attackers. The identification took place while Earle was in a jail cell with two men who looked nothing like him.¹⁴

Based entirely on Lancellotti’s trial testimony, the jury convicted Earle of “atrocious assault and battery.”¹⁵ The Appellate Division vacated the conviction. It found that “the victim had little alternative but to select the defendant” out of the three men, and that “[o]nce a witness misidentifies a suspect the probability is great that he will not retreat from that position.”¹⁶ The Appellate Division concluded that the identification evidence admitted at trial “did not measure up to the standards of fundamental fairness” and resulted “in a denial of due process to defendant.”¹⁷

The New Jersey Supreme Court reversed. In a per curiam decision, it rejected the notion that “due process is offended whenever a description of a suspect is given to the victim in advance of the identification.”¹⁸ At the same time, the court recognized the need to scrutinize eyewitness identification evidence. It therefore directed law

⁸ 390 U.S. 377, 384 (1968).

⁹ 292 A.2d 2 (N.J. 1972).

¹⁰ *State v. Earle*, 271 A.2d 911, 911 (N.J. Super. Ct. App. Div. 1970), *rev’d*, 292 A.2d 2 (N.J. 1972).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 912.

¹⁴ *Id.*

¹⁵ *Id.* at 911.

¹⁶ *Id.* at 914.

¹⁷ *Id.*

¹⁸ *State v. Earle*, 292 A.2d 2, 4 (N.J. 1972).

enforcement officers to “make a complete record of an identification procedure if it is feasible to do so.”¹⁹

Though the decision is brief, it offers insight into the competing interests the court was grappling with. The court recognized the need to guarantee the reliability of identifications by mandating that the police record identification procedures. But the court also resisted excluding key testimony that it considered believable. As the court noted, “Lancellotti said he made the identification on the basis of his own recollection. That testimony was credible.”²⁰ In short, the victim testified at trial, and the jury believed him. Absent the most egregious circumstances, the court seemed reluctant to prevent the jury from doing its job: evaluating the credibility of relevant evidence and making the ultimate decision about its reliability.

B. *The Manson/Madison Test*

In 1977, in *Manson v. Brathwaite*, the U.S. Supreme Court clarified the now well-known two-part test for evaluating eyewitness identification evidence.²¹ New Jersey, like other states, adopted that test in the case of *State v. Madison*.²²

Under the *Manson* framework, courts first determine “whether the procedure in question was in fact impermissibly suggestive.” If so, courts then decide whether there is a “very substantial likelihood of irreparable misidentification. In carrying out the second part of the analysis, . . . court[s] . . . focus on the reliability of the identification.”²³

To assess reliability, courts must consider the following five factors:

- (1) the “opportunity of the witness to view the criminal at the time of the crime”;
- (2) “the witness’ degree of attention”;
- (3) “the accuracy of his prior description of the criminal”;
- (4) “the level of certainty demonstrated at [the time of] the confrontation”;
- and
- (5) “the time between the crime and the confrontation.”²⁴

¹⁹ *Id.* at 3.

²⁰ *Id.* at 4.

²¹ 432 U.S. 98 (1977).

²² 536 A.2d 254, 259 (N.J. 1988).

²³ *Id.* at 258–59 (citations omitted) (internal quotation marks omitted).

²⁴ *Manson*, 432 U.S. at 114 (citing *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972)). The Court did not provide a basis for choosing these five factors.

The Court explained that these factors had to be weighed against “the corrupting effect of the suggestive identification itself” in order to determine whether the identification was admissible.²⁵

Writing for the Court, Justice Blackmun stated that the balancing test would address three interests: reliability, deterrence, and the effect on the administration of justice.²⁶ He wrote that “reliability is the linchpin in determining the admissibility of identification testimony.”²⁷ Deterrence, in turn, would derive from police officers “fear[ing] that their actions will lead to the exclusion of identifications as unreliable.”²⁸ Although Justice Blackmun recognized that a *per se* rule of exclusion would have a “more significant deterrent effect,” he noted that it might deprive jurors of reliable evidence and frustrate the aims of justice.²⁹

Underlying those aims, the Court relied on an important assumption: that jurors are able to discount untrustworthy eyewitness testimony.³⁰ As Justice Blackmun wrote, “[w]e are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill.”³¹

II

SOCIAL SCIENCE DEVELOPMENTS AND EFFECTS ON LAW AND POLICY

A. *Social Scientific Landscape*

Up to this point, I have described the evolving legal landscape. Equally important to this story is the development of social science.

In 1980, an accomplished New Jersey jurist wrote that “there is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says ‘That’s the one!’”³² That jurist was Associate Justice William Brennan. Although Justice Brennan’s language is often cited in eyewitness identification case law and literature, its true attribution—which he provided—is not.

²⁵ *Manson*, 432 U.S. at 114.

²⁶ *Id.* at 111–13.

²⁷ *Id.* at 114.

²⁸ *Id.* at 112.

²⁹ *Id.* at 112–13.

³⁰ *Id.* at 116.

³¹ *Id.*

³² *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (internal quotation marks omitted).

The esteemed Justice was quoting directly from a 1979 book by psychologist Elizabeth Loftus titled *Eyewitness Testimony*.³³ In the 1970s, Loftus, among others, performed pioneering experiments on human memory. Some of those experiments focused on how memories can be distorted.

In one study, subjects were shown film clips of auto accidents and then asked to estimate the speed at which the cars traveled.³⁴ The way in which the experimenters phrased that question substantially altered the subjects' answers. Some subjects were asked, "About how fast were the cars going when they *smashed* into each other?"³⁵ Others were asked how fast the cars were going when they "*contacted*" each other.³⁶ The first group—that heard the word "smashed"—estimated a median speed of 40.8 miles per hour; the second group—that heard the word "contacted"—estimated an average speed of 31.8 miles per hour.³⁷ Changing one word drastically affected how people remembered an event.

Loftus published the results of a similar study the following year.³⁸ College students were again shown a film of an accident. Afterward, one group was asked to estimate how fast the car was going "along the country road." Another was asked to estimate the car's speed when it "passed the barn" along the country road.³⁹ A week later, all the students were asked if they had seen a barn in the film clip. About 17% of the students who had been asked the "passed the barn" question reported seeing a barn. Only 3% of the other group recalled a barn.⁴⁰ Yet there was no barn in the film.⁴¹ Again, a simple suggestion had a strong effect on memory and led to faulty recollections.

Despite such experiments, none of the case law discussed so far engaged scientific findings in any meaningful way. Courts can only

³³ See ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY* 19 (1979) (using the language quoted by Justice Brennan). In a footnote, Justice Brennan explained, "Professor Loftus exhaustively canvassed statistical and psychological evidence which persuasively supports her conclusion that eyewitness identification evidence is 'overwhelmingly influential.'" *Watkins*, 449 U.S. at 352 n.4 (quoting LOFTUS, *supra*, at 9).

³⁴ Elizabeth F. Loftus & John C. Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 J. VERBAL LEARNING & VERBAL BEHAV. 585, 586 (1974).

³⁵ *Id.* (emphasis added) (internal quotation marks omitted).

³⁶ *Id.* (emphasis added).

³⁷ *Id.*

³⁸ Elizabeth F. Loftus, *Leading Questions and the Eyewitness Report*, 7 COGNITIVE PSYCHOL. 560 (1975).

³⁹ *Id.* at 566.

⁴⁰ *Id.*

⁴¹ *Id.*

consider the record before them. And in the 1970s, other than the Loftus studies, advocates had only a limited body of research to present. According to an expert who testified at a hearing in *Henderson*, there were “only four published articles in psychology literature [from the 1970s] containing the words ‘eyewitness’ and ‘identity’ in their abstracts.”⁴² By comparison, “more than two thousand studies related to eyewitness identification have been published in the past thirty years.”⁴³

As research developed, social scientists continued to improve their understanding of human memory and the factors that increase the potential for misidentification. Scientists also continued to test assumptions embodied in case law.

B. Law Meets Science: Incremental Changes

Despite these scientific developments, state and federal courts continued to use the *Manson/Madison* test to evaluate the admissibility of eyewitness testimony. Twenty years after the publication of *Eyewitness Testimony*, however, New Jersey courts began to make incremental changes to the case law. In *State v. Cromedy*, the New Jersey Supreme Court examined numerous social science studies showing that a witness may have greater difficulty identifying a person of another race.⁴⁴ Because the jurors in *Cromedy* were not instructed on those difficulties, the court vacated the rape and robbery convictions based on a cross-racial eyewitness identification and ordered a new trial.⁴⁵ Moreover, the court mandated special jury instructions to explain cross-racial bias in future cases.⁴⁶ DNA tests later exonerated Cromedy.⁴⁷

In *State v. Romero*, the New Jersey Supreme Court echoed the concern Justice Brennan had expressed more than a quarter century earlier that “[j]urors likely will believe eyewitness testimony ‘when it is offered with a high level of confidence, even though the accuracy of an eyewitness and the confidence of that witness may not be related to one another at all.’”⁴⁸ The court reached its conclusion after citing social science research that detailed “the fallibility of eyewitness

⁴² *State v. Henderson*, 27 A.3d 872, 892 (N.J. 2011).

⁴³ *Id.*

⁴⁴ 727 A.2d 457, 461–62 (N.J. 1999).

⁴⁵ *Id.* at 467.

⁴⁶ *Id.*

⁴⁷ See *Know the Cases: McKinley Cromedy*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/McKinley_Cromedy.php (last visited Sept. 3, 2012) (discussing the case and eventual exoneration of Cromedy).

⁴⁸ 922 A.2d 693, 702 (N.J. 2007) (quoting *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting)).

identifications.”⁴⁹ As a result, the court directed that juries be instructed that an eyewitness’s “level of confidence, standing alone, may not be an indication of the reliability of the identification.”⁵⁰

In another case, the court expanded its earlier mandate requiring police to record all identification procedures.⁵¹ Relying on its supervisory powers under Article VI, Section 2, Paragraph 3 of the state constitution, the court ordered that “as a condition to the admissibility of an out-of-court identification, law enforcement officers [must] make a written record detailing the out-of-court identification procedure, including the place where the procedure was conducted, the dialogue between the witness and the interlocutor, and the results.”⁵² The expansion of the rule flowed from the court’s “understanding of the frailty of human memory and the inherent danger of misidentification.”⁵³

C. Policy Meets Science

As courts began to grapple with the reliability of eyewitness testimony, policy makers and law enforcement officials also acknowledged serious concerns about the dangers of misidentification. In 2006, the International Association of Chiefs of Police issued guidelines and cautioned that “great care must be taken by officers conducting any type of eyewitness identification to avoid any action that might lead to an erroneous identification.”⁵⁴ Those guidelines concluded that “[o]f all investigative procedures employed by police in criminal cases, probably none is less reliable than the eyewitness identification. Erroneous identifications create more injustice and cause more suffering to innocent persons than perhaps any other aspect of police work.”⁵⁵

New Jersey law enforcement had already taken steps to address potential problems with eyewitness testimony. In 2001, New Jersey’s then–Attorney General, John J. Farmer, Jr., adopted guidelines to standardize eyewitness identification practices across the state.⁵⁶ The

⁴⁹ *Id.*

⁵⁰ *Id.* at 703.

⁵¹ *State v. Delgado*, 902 A.2d 888, 896–97 (N.J. 2006).

⁵² *Id.*; *see also* N.J. CONST. art. VI, § 2, ¶ 3 (establishing the supervisory power of the New Jersey Supreme Court).

⁵³ *Delgado*, 902 A.2d at 895.

⁵⁴ INT’L ASS’N OF CHIEFS OF POLICE, INC., TRAINING KEY NO. 600: EYEWITNESS IDENTIFICATION 1 (2006).

⁵⁵ *Id.* at 5.

⁵⁶ Memorandum from Attorney Gen. John J. Farmer, Jr., N.J. Dep’t of Law & Pub. Safety, to All County Prosecutors et al., at 1 (Apr. 18, 2001), *available at* www.state.nj.us/lps/dcj/agguides/photoid.pdf.

guidelines followed recommendations issued by the Department of Justice and incorporated two decades of scientific research.⁵⁷ New Jersey was the first state to adopt those recommendations.⁵⁸

Under the New Jersey Attorney General's Guidelines, lineups and photo arrays should include only one suspect and a minimum of four or five fillers. Police officers should "[a]void reusing fillers . . . when showing [a witness] a new suspect," "[e]nsure that no writings or information concerning previous arrest(s) will be visible to the witness," and "ensure that the suspect does not unduly stand out" from the fillers.⁵⁹ Officers should also "[p]reserve the presentation order of the photo lineup" and the photos themselves.⁶⁰

The guidelines also outlined the following procedure for administering lineups:

(1) To prevent the administrator from inadvertently influencing the eyewitness, the administrator "should be someone other than the primary investigator assigned to the case," and "should be careful to avoid inadvertent signaling to the witness of the 'correct' response";⁶¹

(2) The administrator should instruct the witness that the perpetrator may not be in the lineup, and that the witness "should not feel compelled to make an identification";⁶²

(3) It is preferable to perform lineups sequentially, meaning that witnesses should be shown suspects one at a time, rather than simultaneously;⁶³ and

(4) After an identification, the administrator should ask the witness "how sure he or she is."⁶⁴

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ OFFICE OF THE ATTORNEY GEN., N.J. DEP'T OF LAW AND PUB. SAFETY, ATTORNEY GENERAL GUIDELINES FOR PREPARING AND CONDUCTING PHOTO AND LIVE LINEUP IDENTIFICATION PROCEDURES 2-3 (2001), available at www.state.nj.us/lps/dcj/agguide/photoiid.pdf.

⁶⁰ *Id.* at 2.

⁶¹ *Id.* at 1.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 7. Other states have since adopted similar guidelines and laws. *E.g.*, OFFICE OF THE ATTORNEY GEN., WIS. DEP'T OF JUSTICE, MODEL POLICY AND PROCEDURE FOR EYEWITNESS IDENTIFICATION (2005); DALLAS POLICE DEP'T, DALLAS POLICE DEPARTMENT GENERAL ORDER § 304.01 (2009); DENVER POLICE DEP'T, OPERATIONS MANUAL § 104.44 (2006); POLICE CHIEFS' ASS'N OF SANTA CLARA CNTY., LINE-UP PROTOCOL FOR LAW ENFORCEMENT (2002). Illinois, Maryland, North Carolina, Ohio, West Virginia, and Wisconsin have also passed laws regarding lineup practices. *See* 725 ILL. COMP. STAT. 5 / 107A-5 (2010); MD. CODE ANN., PUB. SAFETY § 3-506 (LexisNexis 2011); N.C. GEN. STAT. § 15A-284.50 to .53 (2011); OHIO REV. CODE ANN. § 2933.83 (West Supp. 2012); W. VA. CODE ANN. § 62-1E-1 to -3 (LexisNexis 2010); WIS. STAT. ANN. § 175.50 (West 2006).

All of those efforts had the same goals: to reduce the suggestiveness of identification procedures and thus enhance the integrity of evidence presented to juries.

III

REEVALUATING EYEWITNESS IDENTIFICATION

A. *Limitations of the Manson/Madison Test*

While law enforcement worked to improve identification procedures, New Jersey's courts continued to analyze cases that questioned those procedures within the parameters of the *Manson/Madison* test.

In 2008, for example, the New Jersey Supreme Court heard arguments in a case in which two defendants challenged the identification evidence against them.⁶⁵ The defendants were convicted of felony murder, multiple robberies, and various weapons offenses.⁶⁶ The State's evidence included eyewitness identifications by several robbery victims. The defendants moved to suppress those identifications before trial, and the trial judge held a hearing.⁶⁷

At the hearing, a detective testified as follows: He showed three robbery victims three photos—one for each of three suspects. He acknowledged the procedure deviated from standard practice and said that he would have acted differently if he had it to do over.⁶⁸ He showed another victim fifteen to twenty photos but admitted that the fillers were not similar enough to the suspects to be used in a proper array. He explained that he was pressed for time and could not locate more suitable photos.⁶⁹

Before displaying the pictures, the detective told the witness that “the people in [them] may be responsible for the robbery.”⁷⁰ Afterward, the detective discarded all but the three photos that the witness selected.⁷¹

The method the detective used was clearly flawed. Three of the procedures were equivalent to showups: A witness was shown a single picture and asked whether the person depicted was the perpetrator. A fourth procedure involved a photo array that failed to test the witness's memory because the fillers looked nothing like the suspects. In addition, the detective administered the procedures even though he

⁶⁵ State v. Adams, 943 A.2d 851, 860 (N.J. 2008).

⁶⁶ *Id.* at 854.

⁶⁷ *Id.* at 855.

⁶⁸ *Id.* at 856.

⁶⁹ *Id.* at 855.

⁷⁰ *Id.* (internal quotation marks omitted).

⁷¹ *Id.* The Attorney General guidelines discussed earlier were issued later in 2001. See *supra* notes 56–64 and accompanying text (discussing the guidelines).

knew the identity of the suspects. He also not only failed to warn the witnesses that the suspects may not be in the lineup but specifically relayed the opposite when he showed the photo array. Finally, he failed to maintain a record of the identification procedure for later scrutiny.

Not surprisingly, the trial court found the procedures suggestive. The judge then dutifully applied existing law and concluded that the process was not so suggestive that the evidence had to be excluded.⁷² In denying the motion to suppress, the trial court relied on the five familiar factors discussed above: The witnesses “had every opportunity to view the defendants at the time of the crime”; they “were quite certain about the identification[s]”; their prior descriptions were not inconsistent; their attention was “focused on the defendants”; and “the time between the crime and confrontation was . . . relatively short.”⁷³ At trial, the jury heard witnesses identify the defendants and later convicted them.⁷⁴

The defendants appealed. In this and every case, a trial judge’s factual findings are entitled to great weight before an appellate court,⁷⁵ and there was ample credible evidence in the record for the judge to reach the conclusions he did. On appeal, therefore, the New Jersey Supreme Court applied existing precedent—the *Manson/Madison* test—and found that “despite the clear suggestive nature of the identification procedures, the identifications were reliable and did not result in a substantial likelihood of misidentification.”⁷⁶

The ruling was correct. At the same time, it did not squarely address the detective’s mistakes and, as a result, failed to deter similar conduct in future cases. In addition, the court declined the defendants’ requests to alter the standard for admitting identification evidence, noting that defendants had failed to make a record or even argue the issue beforehand. That said, the court specifically encouraged the parties to develop a proper record in the future “to improve our standards for gauging the admissibility of out-of-court identification procedures.”⁷⁷

It was not the first time we had made that recommendation. In *State v. Herrera*, a security guard was beaten unconscious and his car was stolen. Soon after, he described his assailant to the police.⁷⁸ They,

⁷² *Adams*, 943 A.2d at 856.

⁷³ *Id.* at 862 (alteration in original) (internal quotation marks omitted).

⁷⁴ *Id.* at 858.

⁷⁵ *Id.* at 861 (citing *State v. Farrow*, 294 A.2d 873, 882 (N.J. 1972)).

⁷⁶ *Id.* at 863.

⁷⁷ *Id.* at 860.

⁷⁸ 902 A.2d 177, 178–79 (N.J. 2006).

in turn, found the missing car in the defendant's possession.⁷⁹ Instead of performing a lineup or photo array, the police had the victim participate in a showup. Beforehand, the officers told the victim that he was going to confront the person who had been found with the stolen car.⁸⁰ The court found that the procedure was impermissibly suggestive, but because the identification was reliable under the *Manson/Madison* factors, it was admissible.⁸¹

In a supplemental brief to the New Jersey Supreme Court, the defendant for the first time argued that the standards for admitting showup identification evidence should be altered.⁸² The court noted that if the defendant had submitted those arguments and "current research" on eyewitness identifications to the trial court, there would have been a proper record to evaluate.⁸³ Without a record, though, there was no basis to deviate from the U.S. Supreme Court's approach.⁸⁴

In 2009, yet another identification case was argued before the New Jersey Supreme Court. The defendant once again claimed that the police acted suggestively while showing a photo array to a witness. And once again, the defendant asked the court to adopt new standards for admissibility without a record that might support his position. Instead, the briefs simply cited extensive social science research, which appeared to raise serious questions about the standard in place. That case was *State v. Henderson*.⁸⁵

B. *Creating a Record: Special Masters*

To create a more useful record, the court appointed a special master.⁸⁶ That decision was consistent with the approach taken in previous cases when a better understanding and evaluation of scientific evidence was vital to resolve a matter.

In *State v. Moore*, for example, the court was asked to revisit a twenty-five-year-old ruling and determine whether hypnotically-refreshed testimony was admissible at criminal trials.⁸⁷ That type of testimony had been admissible under certain circumstances since

⁷⁹ *Id.* at 179.

⁸⁰ *Id.* at 184.

⁸¹ *Id.* at 184–86.

⁸² *Id.* at 180.

⁸³ *Id.* at 181.

⁸⁴ *See id.* at 183 (stating that the court would continue to follow the Supreme Court's approach until "convinced that a different approach is required after a proper record has been made").

⁸⁵ 27 A.3d 872 (N.J. 2011).

⁸⁶ *Id.* at 884.

⁸⁷ 902 A.2d 1212, 1213 (N.J. 2006).

1981, under *State v. Hurd*.⁸⁸ But in the years that followed, scientific evidence emerged that cast doubt on the reliability of such evidence.⁸⁹ In cases preceding *Moore*, though, the court declined to revisit the topic because “the parties had not presented expert testimony on the scientific reliability of post-hypnotic memory.”⁹⁰

After granting certification in *Moore*, the court concluded that the case also lacked an adequate record to test the assumptions underlying a longstanding and important rule of law. It therefore ordered a plenary hearing before the trial court to create a fully developed record of the relevant scientific evidence.⁹¹ The trial court heard testimony from three experts and reviewed the scientific literature presented.⁹² Based on the evidence, it concluded that hypnotically-refreshed testimony should be banned.⁹³ After reargument and a review of the record, the Supreme Court agreed.⁹⁴

Similarly, the court appointed a special master in another case to review the reliability of a new breathalyzer test.⁹⁵ In that matter, twenty defendants challenged the admissibility of the results of the Alcotest device in their respective cases.⁹⁶ The court remanded the case to a special master and appointed a retired Appellate Division judge to assume that role. The court asked the special master to “[c]onduct a plenary hearing on the reliability” of breath test instruments and invited him to entertain supplemental expert testimony, including independent experts he might select, and to allow amici to assist.⁹⁷ After four months of hearings and two reports, the special master concluded that the Alcotest device was generally scientifically reliable.⁹⁸ Based on the record and those reports, the court also found the breathalyzer test generally reliable.⁹⁹

Those cases shared a concern about the adequacy of the record and recognized that resolving a critical issue depended on developing such a record. Against that backdrop, we asked the special master in

⁸⁸ 432 A.2d 86, 88 (N.J. 1981).

⁸⁹ See *Moore*, 902 A.2d at 1224–26 (reviewing the scientific evidence presented to the court).

⁹⁰ *Id.* at 1224; see also *State v. Fertig*, 668 A.2d 1076, 1081 (N.J. 1996) (declining to address concerns raised about the reliability of hypnotically-induced testimony without a more complete record).

⁹¹ *Moore*, 902 A.2d at 1224; *State v. Moore*, 852 A.2d 1073, 1073 (N.J. 2004).

⁹² *Moore*, 902 A.2d at 1224–25.

⁹³ *Id.* at 1225.

⁹⁴ *Id.* at 1227.

⁹⁵ See *State v. Chun*, 943 A.2d 114 (N.J. 2008).

⁹⁶ *Id.* at 121.

⁹⁷ *Id.* at 121–22.

⁹⁸ *Id.* at 123.

⁹⁹ *Id.* at 120.

Henderson to establish a record of the social science evidence pertaining to eyewitness identifications.

C. *The Henderson Record*

We appointed Geoffrey Gaulkin, a distinguished, retired Appellate Division judge, to preside on remand as the special master.¹⁰⁰ The offices of the Attorney General and the Public Defender, representing the respective parties, and two amici, The Innocence Project and the Association of Criminal Defense Lawyers of New Jersey, participated in the hearing.¹⁰¹ The remand hearing spanned ten days and included testimony from seven expert witnesses. The parties created a record of more than 200 scholarly articles and more than 360 exhibits altogether.¹⁰²

Virtually all of the studies surveyed were published after *Manson* was decided in 1977. They consisted of peer-reviewed laboratory experiments, archival and field experiments, and meta-analytic studies.¹⁰³ The meta-analyses combined data from different experiments and provided greater statistical evidence of the factors that can affect memory and eyewitness identifications.

First, the record confirmed that misidentifications are the leading cause of wrongful convictions. Nationwide, around “seventy-five percent of convictions overturned due to DNA evidence involved eyewitness misidentification.”¹⁰⁴ Studies of police case files and field experiments buttressed that statistic. Four studies analyzed data from thousands of actual police records in Sacramento, California and London, England. Together, those studies revealed that up to about one-third of eyewitnesses who made identifications in police investigations wrongly identified a known innocent stand-in.¹⁰⁵ In field

¹⁰⁰ *State v. Henderson*, 27 A.3d 872, 884 (N.J. 2011).

¹⁰¹ *Id.* at 884–85.

¹⁰² *Id.*

¹⁰³ *Id.* at 892–94. Meta-analysis is a statistical method of combining data across multiple studies of the same topic or variable. *Id.* at 893. The approach allows the experimenter to analyze a more robust set of data after correcting for differences in experimental design and methods of reporting. *Id.*

¹⁰⁴ *Id.* at 886 (quoting *State v. Romero*, 922 A.2d 693, 702 (N.J. 2007)) (internal quotation marks omitted) (citing an Innocence Project Report); see also BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 8–9, 279 (2011).

¹⁰⁵ *Henderson*, 27 A.3d at 886–87 (citing Bruce W. Behrman & Sherrie L. Davey, *Eyewitness Identification in Actual Criminal Cases: An Archival Analysis*, 25 LAW & HUM. BEHAV. 475 (2001); Bruce W. Behrman & Regina E. Richards, *Suspect/Foil Identification in Actual Crimes and in the Laboratory: A Reality Monitoring Analysis*, 29 LAW & HUM. BEHAV. 279 (2005); Tim Valentine et al., *Characteristics of Eyewitness Identification that Predict the Outcome of Real Lineups*, 17 APPLIED COGNITIVE PSYCHOL. 969 (2003); Daniel

experiments, researchers asked unassuming convenience store clerks to identify customers who had previously been in the store and had behaved in unique or distinctive ways. Similar to the results from Sacramento and London, those studies showed that even when the target person was not in the lineup, eyewitnesses chose an innocent look-alike more than one-third of the time.¹⁰⁶

Second, the record revealed the extent to which memories are malleable. Memory does not operate like a video recording that can replay an event exactly as it happened. Instead, memory can be influenced and diluted by factors unrelated to a witness's actual recollection of a relevant event. Some of those factors—called system variables—are within the control of the police. Others—called estimator variables—are not.

To be sure, the idea that our memories are imperfect is not new. For decades, case law recognized those imperfections intuitively.¹⁰⁷ But the record produced in *Henderson* allowed the court, for the first time, to evaluate the individual factors that influence eyewitness memory using comprehensive, reliable scientific evidence. The scientific evidence addressed a large number of factors and revealed the following:

1. System Variables

These variables are within the control of the criminal justice system and can affect the reliability of an identification.

Blind Administration. If the person administering the lineup knows who the suspect is, the administrator can increase the

B. Wright & Anne T. McDaid, *Comparing System and Estimator Variables Using Data from Real Line-Ups*, 10 APPLIED COGNITIVE PSYCHOL. 75 (1996)).

¹⁰⁶ *Id.* at 887–88 (citing John C. Brigham et al., *Accuracy of Eyewitness Identifications in a Field Setting*, 42 J. PERSONALITY & SOC. PSYCHOL. 673 (1982); Carol Krafka & Steven Penrod, *Reinstatement of Context in a Field Experiment on Eyewitness Identification*, 49 J. PERSONALITY & SOC. PSYCHOL. 58 (1985); Melissa A. Pigott et al., *A Field Study on the Relationship Between Quality of Eyewitnesses' Descriptions and Identification Accuracy*, 17 J. POLICE SCI. & ADMIN. 84 (1990)); Stephanie J. Platz & Harmon M. Hosch, *Cross-Racial/Ethnic Eyewitness Identification: A Field Study*, 18 J. APPLIED SOC. PSYCHOL. 972 (1988). The Pigott study involved bank tellers rather than convenience store clerks. See Pigott et al., *supra*, at 85.

¹⁰⁷ See *Manson v. Brathwaite*, 432 U.S. 98, 119 (1977) (Marshall, J., dissenting) (recognizing, without citing social scientific studies, “the faulty perceptions and unreliable memories of witnesses” offering eyewitness identifications); see also *United States v. Wade*, 388 U.S. 218, 228 (1967) (“The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.”); *United States v. Brown*, 461 F.2d 134, 145 n.1 (D.C. Cir. 1972) (Bazelon, J., concurring in part and dissenting in part) (finding that “identifications are often unreliable” and that “we need more information about the reliability of the identification process and about the jury’s ability to cope with its responsibility”).

likelihood of misidentification by communicating information, even subtly and unintentionally, to the witness. This phenomenon is an example of what scientists call the “expectancy effect”—the tendency to get expected results by helping shape the response.¹⁰⁸ A meta-analysis examined 345 behavioral science studies and found that “[t]he overall probability that there is no such thing as interpersonal expectancy effects is near zero.”¹⁰⁹ To avoid the expectancy effect, lineup administrators should have no knowledge of who the suspect is.¹¹⁰ Police departments with limited resources can make use of the “envelope method”—a technique in which an officer who is aware of the suspect’s identity places individual lineup photos into different envelopes, shuffles them, and gives them to the witness. While the witness makes an identification, the officer refrains from looking at the envelopes or photos.¹¹¹

Pre-identification Instructions. Police should instruct witnesses at the outset that they are under no obligation to make an identification and that the suspect may not be in the lineup. One experiment revealed that when witnesses were given no pre-identification instructions, they chose innocent fillers from target-absent lineups 45% more often than witnesses who were warned that the suspect might not be there.¹¹²

Avoiding Confirmatory Feedback. Similarly, if an officer says “good job” after a witness makes an identification, that may artificially enhance the witness’s confidence in the identification.¹¹³ Meta-analysis showed that across twenty studies of 2400 identifications, “witnesses who received feedback ‘expressed significantly more . . . confidence in their decision compared with participants who received

¹⁰⁸ *Henderson*, 27 A.3d at 896 (citing Robert Rosenthal & Donald B. Rubin, *Interpersonal Expectancy Effects: The First 345 Studies*, 3 BEHAV. & BRAIN SCI. 377, 377 (1978)).

¹⁰⁹ *Id.* (quoting Rosenthal & Rubin, *supra* note 108, at 377).

¹¹⁰ In that case, the procedure is “double-blind.” *Id.* at 897.

¹¹¹ *Id.* In that case, the procedure is “single-blind.” *Id.*

¹¹² *Id.* (citing Roy S. Malpass & Patricia G. Devine, *Eyewitness Identification: Lineup Instructions and the Absence of the Offender*, 66 J. APPLIED PSYCHOL. 482, 485 (1981)). Eyewitness identification studies generally use target-absent and target-present lineups to assess the accuracy of a subject’s memory. The “target” is the “suspect” that the subject-witness is asked to identify. In a target-absent lineup, the “suspect” is not included in the lineup; each person present is a filler, and any identification is therefore incorrect. In a target-present lineup, the “suspect” is present and a correct eyewitness identification is possible.

¹¹³ *Id.* at 899.

no feedback.’”¹¹⁴ Witnesses who received feedback also tended to overstate the quality of their view of the events in question.¹¹⁵

Multiple Viewings. Multiple viewings of the same suspects during an investigation can also affect reliability. Meta-analysis “revealed that although 15% of witnesses mistakenly identified an innocent person viewed in a lineup for the first time, that percentage increased to 37% if the witness had seen the innocent person in a prior mugshot.”¹¹⁶

Showups. Showups, which are essentially single-person lineups, are inherently suggestive. Because there are no fillers, any mistaken identification by the witness can only implicate the suspect. A field experiment revealed that showups conducted immediately after an encounter can be as accurate as lineups.¹¹⁷ But after two hours, “58% of witnesses failed to reject an ‘innocent suspect’ in a photo showup, as compared to 14% in target-absent photo lineups.”¹¹⁸

2. *Estimator Variables*

These variables can also affect reliability but are beyond the control of the criminal justice system.

Stress. Factors like stress, which are beyond police control, can substantially affect eyewitness memory. In a compelling study conducted by military researchers, 500 active-duty military personnel were subjected to interrogations that involved a high degree of stress (with real physical confrontation) or a low degree of stress (without physical confrontation).¹¹⁹ They were later asked to identify their interrogators. Only 30% could accurately identify their high-stress interrogators, as compared to 62% who correctly selected their low-stress interrogators.¹²⁰

Weapon Focus. The presence of a weapon can distract a witness and affect the reliability of an identification if the crime is of short duration. In one experiment, half of the witnesses observed a person

¹¹⁴ *Id.* (quoting Amy Bradfield Douglass & Nancy Steblay, *Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-identification Feedback Effect*, 20 APPLIED COGNITIVE PSYCHOL. 859, 863 (2006)).

¹¹⁵ *Id.* at 897 (citing Douglass & Steblay, *supra* note 114, at 864–65).

¹¹⁶ *Id.* at 900 (citing Kenneth A. Deffenbacher et al., *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference*, 30 LAW & HUM. BEHAV. 287, 299 (2006)).

¹¹⁷ *Id.* at 903 (citing A. Daniel Yarmey et al., *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 LAW & HUM. BEHAV. 459, 464 (1996)).

¹¹⁸ *Id.* (citing Yarmey et al., *supra* note 117, at 464).

¹¹⁹ *Id.* at 904 (citing Charles A. Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 INT’L J.L. & PSYCHIATRY 265, 267–70 (2004)).

¹²⁰ *Id.* (citing Morgan III et al., *supra* note 119, at 272).

holding a syringe in a manner that was threatening to the witness, and the other half watched a person holding a pen.¹²¹ “Sixty-four percent of witnesses from the first group misidentified a filler from a target-absent lineup, compared to 33% from the second group.”¹²²

Cross-racial Identification. Recent data from “thirty-nine studies and nearly 5,000 identifications” confirmed that it is more difficult for eyewitnesses to identify people of another race.¹²³

Co-witness and Private Actor Feedback. Research has shown that co-witnesses and private actors have the same potential as police officers to affect the reliability of eyewitness identifications. In one experiment, college students were shown a brief film and then read another witness’s description of the events depicted.¹²⁴ Half of the students read narratives that included false details, like a description of someone’s hair as wavy when it was in fact straight.¹²⁵ Thirty-four percent of those students “included a false detail—like wavy hair—when they later described the target. By contrast, only 5% of the students who read a completely factual narrative made similar mistakes.”¹²⁶

Event Factors and Witness Characteristics. The record also supported what we all know to be obvious: Duration, distance, lighting, disguises, memory decay, and a witness’s level of intoxication can all affect the witness’s ability to make an accurate identification.¹²⁷

Relative Judgment. Finally, once a witness is confronted with a lineup, he or she is susceptible to a psychological concept known as relative judgment. Simply put, people often compare faces in a lineup to one another, rather than to their actual memory of the perpetrator. They then choose the subject who most resembles their memory of the perpetrator in comparison to other lineup members. That, too, can lead to misidentifications.¹²⁸

3. *The Role of the Jury*

With those conclusions in mind, we considered the ability of juries to intuit scientific findings. In a survey of actual jurors in 2006,

¹²¹ *Id.* at 905 (citing Anne Maass & Gunther Koehnken, *Eyewitness Identification: Simulating the “Weapon Effect,”* 13 *LAW & HUM. BEHAV.* 397, 401–02 (1989)).

¹²² *Id.* (citing Maass & Koehnken, *supra* note 121, at 405).

¹²³ *Id.* at 907 (citing Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review,* 7 *PSYCHOL., PUB. POL’Y, & L.* 3, 21 (2001)).

¹²⁴ *Id.* at 908 (citing Elizabeth F. Loftus & Edith Greene, *Warning: Even Memory for Faces May Be Contagious,* 4 *LAW & HUM. BEHAV.* 323, 328 (1980)).

¹²⁵ *Id.* (citing Loftus & Greene, *supra* note 124, at 328–29).

¹²⁶ *Id.* (citing Loftus & Greene, *supra* note 124, at 329).

¹²⁷ *See id.* at 905–07 (reviewing studies).

¹²⁸ *Id.* at 888.

fewer than half agreed with the importance of pre-lineup warnings, the effects of weapon focus and cross-race bias, and the accuracy-confidence relationship.¹²⁹ Although the State challenged that survey at the hearing, we gleaned from the available evidence that “people do not intuitively understand all of the relevant scientific findings.”¹³⁰

Of course, cross-examination helps separate liars from truth tellers in many cases. But most eyewitnesses are not lying; they sincerely believe that they are telling the truth even if they have identified the wrong person. Witnesses who testify honestly but falsely are less susceptible to traditional efforts to show deception or bias through cross-examination.¹³¹ Also, by the time eyewitnesses appear at trial, some may have received confirmatory feedback that gives them greater confidence in their identifications. Studies have shown that for juries, confidence appears to be the “[c]most powerful predictor of verdicts’ regardless of other variables.”¹³²

IV

NEW JERSEY’S NEW FRAMEWORK

Other branches of government responded positively to the social science evidence. As discussed above, New Jersey’s Attorney General issued new guidelines incorporating lessons learned from the scientific literature. Law enforcement agencies and state legislatures beyond New Jersey also implemented new procedures to improve the reliability of eyewitness identifications. The prevailing legal standard, however, remained essentially unchanged.

Our task, therefore, was to determine what the body of reliable scientific evidence meant for the *Manson/Madison* test. We ultimately concluded that the test did not meet its goals and did not satisfy due process under the New Jersey Constitution.

First, under the old test, courts did not consider the effect of estimator variables unless police procedures were “impermissibly suggestive.”¹³³ In effect, relevant estimator variables like stress, lighting, and race, which can and do affect reliability, are ignored if an identification procedure was not *impermissibly* suggestive.¹³⁴

¹²⁹ *Id.* at 910–11 (citing Tanja Rapus Benton et al., *Eyewitness Memory Is Still Not Common Sense: Comparing Jurors, Judges, and Law Enforcement to Eyewitness Experts*, 20 APPLIED COGNITIVE PSYCHOL. 115, 118 (2006)).

¹³⁰ *Id.*

¹³¹ *Id.* at 889.

¹³² *Id.* at 911 (quoting Brian L. Cutler et al., *Juror Sensitivity to Eyewitness Identification Evidence*, 14 LAW & HUM. BEHAV. 185, 185 (1990)).

¹³³ See *Manson v. Brathwaite*, 432 U.S. 98, 106 (1976); see also *supra* notes 21–23 and accompanying text (describing *Manson*’s two-part test).

¹³⁴ *Henderson*, 27 A.3d at 918.

Second, three of the five reliability factors can themselves be skewed by suggestive procedures. The three factors—the witness’s opportunity to view the crime, degree of attention, and confidence—rely on self-reporting by witnesses. But suggestive procedures can cause witnesses to be overly confident and to inflate the quality of their viewing conditions.¹³⁵

Third, those factors may actually encourage the very improper procedures they were meant to deter. “[T]he more suggestive the procedure, the greater the chance eyewitnesses will seem confident and report better viewing conditions.”¹³⁶ A more confident report from the witness on viewing conditions, in turn, makes it more likely that his or her testimony will be admitted under the current balancing test.¹³⁷

Fourth, the *Manson/Madison* test provided judges only two options: either suppress or admit eyewitness identification evidence. In practice, few judges choose suppression. An all-or-nothing approach is inadequate in light of the complexity of eyewitness identification evidence.¹³⁸

We therefore adopted two primary changes to address those shortcomings:

First, the court modified the nature of pretrial hearings to assess eyewitness identifications. The court determined that if a defendant could show *some* evidence of suggestiveness that could lead to a mistaken identification, he or she would be entitled to a hearing.¹³⁹ For the most part, that evidence must be tied to a system variable.¹⁴⁰ At the hearing, the parties may explore all relevant system and estimator variables, which the trial judge then evaluates to decide the overall reliability and admissibility of the evidence.¹⁴¹ The opinion lists various factors that courts are to consider as part of that process.¹⁴² In the end, defendants must still prove a very substantial likelihood of irreparable misidentification for evidence to be suppressed.¹⁴³

We rejected a bright-line rule that would require per se exclusion if the police violated certain recommended procedures. Instead, the more flexible framework detailed in *Henderson* tries to strike a vital

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See *supra* notes 23–24 and accompanying text (reciting the *Manson* factors).

¹³⁸ *Henderson*, 27 A.3d at 918–19.

¹³⁹ *Id.* at 920.

¹⁴⁰ *Id.* But see *State v. Chen*, 27 A.2d 930, 932 (2011) (extending the right to a hearing for suggestive conduct by private actors).

¹⁴¹ *Henderson*, 27 A.3d at 919–22.

¹⁴² *Id.* at 920–22.

¹⁴³ *Id.* at 920.

balance: protecting defendants' rights while enabling the State to meet its responsibility to protect the public.¹⁴⁴

We also refrained from ordering hearings in every case involving eyewitness evidence. As noted above, only system variables can trigger a hearing. In other words, there needs to be some indication that the police acted improperly—and if that assertion proves groundless, the court can end the hearing and admit the eyewitness identification evidence.¹⁴⁵

We focused on system variables in setting the threshold for a hearing for several reasons. First, courts are unlikely to suppress evidence based only on estimator variables. Second, the legal system cannot deter conduct outside the control of law enforcement. Third, from a practical perspective, pretrial hearings under the new framework will be longer and more detailed, and requiring hearings about estimator variables alone would “overwhelm the system with little resulting benefit.”¹⁴⁶

We recognized that even when hearings are held, most identifications will still be presented to juries because of the heavy burden defendants must carry. That recognition led to *Henderson*'s second principal change: Judges will now be required to give enhanced instructions to jurors about particular factors that may affect the reliability of an identification.¹⁴⁷ Those instructions should be tailored to the facts of the case. The goal underlying this approach is straightforward: to educate juries and to help them assess how much weight to give to eyewitness identification evidence.¹⁴⁸

¹⁴⁴ *Id.* at 922.

¹⁴⁵ *Id.* at 921.

¹⁴⁶ *Id.* at 923.

¹⁴⁷ *Id.* at 924–26. At the Supreme Court's request, the Criminal Practice Committee and the Committee on Model Criminal Jury Charges proposed revised jury instructions. Various groups and members of the public submitted comments on the recommendations afterward. On July 19, 2012, the court published revised model jury charges. See NEW JERSEY MODEL CRIMINAL JURY CHARGES ON IN COURT AND OUT OF COURT IDENTIFICATIONS (2012), available at <http://www.judiciary.state.nj.us/criminal/charges/idinout.pdf>; NEW JERSEY MODEL CRIMINAL JURY CHARGES ON IN COURT IDENTIFICATION ONLY (2012), available at <http://www.judiciary.state.nj.us/criminal/charges/idinact.pdf>; NEW JERSEY MODEL CRIMINAL JURY CHARGES ON OUT OF COURT IDENTIFICATION ONLY (2012), available at <http://www.judiciary.state.nj.us/criminal/charges/idoutct.pdf>. The court also adopted new court rules that detail what must be included in the record for all out-of-court identification procedures and what must be disclosed in pretrial discovery. See N.J. Ct. R. 3:11-3, 3:13-3 (2012).

¹⁴⁸ Enhanced jury charges should lead to an additional consequence: There will be less need for expert testimony at trial. See *Henderson*, 27 A.3d at 925.

A. *Epilogue: The Next Thirty Years and Beyond*

Not long after *Henderson* was published, social scientists announced the results of a new study relating to sequential versus simultaneous lineup methods—an area that *Henderson* found needed more attention.¹⁴⁹ Some day soon, a court may be asked to adopt those findings. That court will ask whether others in the scientific community have probed the results, whether knowledgeable experts have reached a consensus, and whether the findings have achieved “an impressive consistency in results.”¹⁵⁰ The parties, in turn, will need to develop and present a thoughtful record for the court to review.

That review process will prevent today’s findings from being frozen in time as new and important scientific findings emerge. It will allow police departments to make improvements to their procedures, and it will permit courts to revise factors used to judge the reliability of eyewitness identifications—to ensure that those factors are consistent with reliable, scientific evidence.

The decision in *Henderson* acknowledges that it does not mark the end of the path.¹⁵¹ *Henderson* notes that our understanding of memory has evolved markedly during the past thirty years. And what we know now may seem rudimentary thirty years from today. As a result, the factors that jurors will use to evaluate eyewitness evidence are not set in stone, but they must be based on reliable, generally accepted scientific evidence.¹⁵²

Earlier this year, the U.S. Supreme Court addressed a different question relating to eyewitness identification in *Perry v. New Hampshire*.¹⁵³ In *Perry*, an eyewitness told police that she saw a man breaking into cars parked in the lot of her apartment building. When an officer asked for a more specific description, she “pointed to her kitchen window and said the person . . . was standing in the parking lot, next to [a] police officer.”¹⁵⁴

The Court held that the Due Process Clause was not implicated because the police did not arrange the unduly suggestive identification procedure. As a result, the Constitution did not require any pretrial

¹⁴⁹ See GARY L. WELLS ET AL., AM. JUDICATURE SOC’Y, A TEST OF THE SIMULTANEOUS VS. SEQUENTIAL LINEUP METHODS: AN INITIAL REPORT OF THE AJS NATIONAL EYEWITNESS IDENTIFICATION FIELD STUDIES viii–x (2011); see also *Henderson*, 27 A.3d at 901–02.

¹⁵⁰ *Henderson*, 27 A.3d at 917 (quoting *State v. Cromedy*, 727 A.2d 457, 467 (N.J. 1999) (internal quotation marks omitted)).

¹⁵¹ See *id.* at 922.

¹⁵² *Id.*

¹⁵³ 132 S. Ct. 716 (2012).

¹⁵⁴ *Id.* at 722.

screening for reliability.¹⁵⁵ In its opinion, the Court identified other safeguards that “caution juries against placing undue weight on eyewitness testimony of questionable reliability.”¹⁵⁶ Among those protections, the Court highlighted “[e]yewitness-specific jury instructions.”¹⁵⁷

Justice Sotomayor, in dissent, noted the involvement of the police in the identification process. She would have extended the Court’s traditional review process to include unintentional as well as intentional suggestive conduct.¹⁵⁸ Justice Sotomayor stressed that the vast body of recent scientific literature reinforced the conclusion that the rule should be extended.¹⁵⁹

Perry, therefore, did not reach the issue that we wrestled with in *Henderson*: the vitality of the *Manson* test, in light of decades of scientific research, when the police have arranged an eyewitness identification. That issue will likely arise in the context of another, future case.

CONCLUSION

Eyewitness identifications relate directly to decisions about guilt or innocence. Their reliability, as we observed in *Henderson*, is central to “the very integrity of the criminal justice system and the courts’ ability to conduct fair trials.”¹⁶⁰

All of the parties interested in this debate—victims and defendants, prosecutors and defense counsel, investigators and judges, not to mention the public—share the same goals: to identify the right person and put that identification to a fair test. That goal is consistent with the core mission of the criminal justice system: to see “that guilt shall not escape or innocence suffer.”¹⁶¹ Hopefully, *Henderson* will help promote that aim.

¹⁵⁵ *See id.* at 728.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ The dissent distinguished the facts in *Perry* from matters that involve no police action. *See id.* at 731 n.1 (Sotomayor, J., dissenting); *see also* *State v. Chen*, 27 A.3d 930 (N.J. 2011) (evaluating suggestive identification procedures in private action cases under state evidence rules and trial court’s gatekeeping function to ensure that unreliable, misleading evidence is not admitted). *Chen* is a companion case to *Henderson*.

¹⁵⁹ *Perry*, 132 S. Ct. at 738–39.

¹⁶⁰ *State v. Henderson*, 27 A.3d 872, 879 (N.J. 2011).

¹⁶¹ *Berger v. United States*, 295 U.S. 78, 88 (1935).