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Volume 62

Issue 4 *The 2012 Randolph W. Throver Symposium – Innovation for the Modern Era: Law, Policy, and Legal Practice in a Changing World*

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2013

## Drawing on Daubert: Bringing Reliability to the Forefront in the Admissibility of Eyewitness Identification Testimony

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### Recommended Citation

Suedabeh Walker, *Drawing on Daubert: Bringing Reliability to the Forefront in the Admissibility of Eyewitness Identification Testimony*, 62 Emory L. J. 1205 (2013).

Available at: <https://scholarlycommons.law.emory.edu/elj/vol62/iss4/12>

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## **DRAWING ON DAUBERT: BRINGING RELIABILITY TO THE FOREFRONT IN THE ADMISSIBILITY OF EYEWITNESS IDENTIFICATION TESTIMONY**

### ABSTRACT

*Eyewitness identification evidence has long been recognized for its tendency toward unreliability and its susceptibility to suggestion. At the core of eyewitness identification is the ability to recognize unfamiliar faces—a memory process that can be distorted by factors intrinsic to the nature of memory, as well as by extrinsic suggestive identification procedures, such as lineups. Because the guilt or innocence of a criminal defendant is often at stake in cases where eyewitness identification is at issue, this potential for distortion is particularly worrisome. In fact, this concern is borne out in statistical data about wrongful convictions in the United States, showing that mistaken identifications are the leading cause of wrongful convictions in the country.*

*Eyewitness identification evidence possesses a unique combination of factors that distinguishes it from other types of evidence: not only is it prone to unreliability, but it also has a strong influence on the jury. Further, it is not susceptible to the traditional protections of the adversarial system, such as confrontation and cross-examination. These features set eyewitness identification testimony apart from other types of evidence, warranting special attention by courts. The United States Supreme Court has long recognized the particularly sensitive nature of eyewitness identification testimony in a line of cases in which it found that an identification procedure has the potential to be so unnecessarily suggestive, and thus unreliable, that it violates a defendant's due process rights. However, the current rule only affords protection to cases in which law enforcement officers orchestrated an unnecessarily suggestive procedure, disregarding the equally strong potential for unreliable identifications stemming from situations without any improper police behavior or any suggestive behavior at all.*

*This Comment argues that the Court's current framework for approaching the problem of eyewitness identification testimony is too narrow and under-inclusive. This Comment proposes that courts should look to *Daubert v. Merrell Dow Pharmaceuticals's* heightened evidentiary standard for admitting*

*expert scientific evidence, with its focus on reliability, as a guide for admitting eyewitness identification testimony. Then, this Comment proposes a new framework for admitting eyewitness identification testimony, which, like the Daubert standard, would be centered on a reliability assessment that is based on factors known to affect the accuracy of eyewitness identification.*

## INTRODUCTION

Human memory, while remarkable in many ways, does not operate like a video camera. On the contrary, what people remember is greatly influenced—and often distorted—by interactions between the mind and its surroundings. Nowhere is the potential fallibility inherent in human memory more glaring than in the courtroom, where eyewitnesses regularly testify to the identity of a criminal defendant based on their memory of a culprit's face.

Through efforts such as the Innocence Project,<sup>1</sup> the potential for mistaken eyewitness identification has become evident.<sup>2</sup> In fact, the leading cause of wrongful convictions in the United States is mistaken eyewitness identification;<sup>3</sup> staggeringly, more than 75% of innocent prisoners exonerated by DNA evidence were found guilty at least in part on the basis of mistaken eyewitness identifications.<sup>4</sup> This statistic highlights the miscarriage of justice that can occur if an eyewitness makes a mistaken identification: not only is an innocent person imprisoned, but the true perpetrator of the crime also escapes justice.

As efforts such as the Innocence Project suggest, mistaken eyewitness identifications frustrate the truth-seeking goals of the justice system. Courts have attempted to improve identification procedures, such as lineups, to

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<sup>1</sup> *Mission Statement*, INNOCENCE PROJECT, <http://www.innocenceproject.org/about/Mission-Statement.php> (last visited May 14, 2013). The Innocence Project is an organization whose mission is to “assist prisoners who could be proven innocent through DNA testing,” many of whom were convicted based in part on a mistaken eyewitness identification. *Id.*; *accord Eyewitness Misidentification*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited May 14, 2013).

<sup>2</sup> *Eyewitness Misidentification*, *supra* note 1; see Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 78 (2008); Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 530–31 (2005); Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUD. 395, 396 (1987).

<sup>3</sup> See, e.g., *State v. Henderson*, 27 A.3d 872, 878 (N.J. 2011); Garrett, *supra* note 2.

<sup>4</sup> See Garrett, *supra* note 2, at 78 (stating that in one study “[t]he overwhelming number of convictions of the innocent involved eyewitness identification—158 of 200 cases (79%)”); Gross et al., *supra* note 2, at 544 (finding mistaken identifications in 88% of exonerations in rape cases and in 50% of exonerations in murder cases); *Eyewitness Misidentification*, *supra* note 1 (finding mistaken identification played a role in nearly 75% of overturned convictions).

prevent mistaken identifications; however, courts must also address eyewitness identification mistakes that arise not only from procedural problems in control of the justice system, but also from the imperfect nature of memory itself.

This Comment argues that the current framework for evaluating the admissibility of eyewitness identification evidence does not adequately filter unreliable identifications that stem from both procedural problems and from the inherent fallibility of memory. Therefore, this Comment proposes that *Daubert*'s heightened evidentiary standard, which emphasizes the reliability of evidence as the main factor in its admissibility, should act as a recommendation for how trial courts should approach the admissibility of eyewitness identification evidence.<sup>5</sup> Like *Daubert*, the proposed framework would emphasize the reliability of the eyewitness identification evidence as essential to its admissibility. Part I of this Comment reviews the psychological literature on possible forms of memory distortion that can affect the reliability of eyewitness recall of a culprit's face, thus leading to mistaken eyewitness identifications. Part I also discusses some ways in which courts have attempted to address these problems and how such measures have largely proven insufficient. Part II then argues that eyewitness identification testimony is distinguishable from other types of eyewitness evidence due to its unique combination of characteristics, warranting a higher evidentiary standard. Part III summarizes the *Daubert* framework and the rationale for the heightened evidentiary standard it introduces. Finally, Part IV suggests a novel framework for eyewitness identification testimony in which *Daubert*—with its heightened evidentiary standard based on a reliability assessment—is used to inform decision makers about the importance of reliability in the admissibility of all eyewitness identification evidence.<sup>6</sup>

## I. EYEWITNESS IDENTIFICATIONS

The potential for unreliability in eyewitness identification testimony may ultimately lie with the very nature of memory itself. Although many imagine memory as akin to a video recorder, capturing a stable and accurate account of a particular event, memory is in fact vulnerable to bias, intervening events, and

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<sup>5</sup> In *Daubert v. Merrell Dow Pharmaceuticals*, the Court established a gatekeeping role for trial judges in which the admissibility of expert evidence is conditioned upon a finding of reliability. 509 U.S. 579, 592 (1993).

<sup>6</sup> This framework would apply to all eyewitness identifications, whether yielded from suggestive procedures or not, based on criteria that focus on the reliability of the particular eyewitness evidence.

failures in perception.<sup>7</sup> Memory is a reconstructive process, with the brain filling in gaps missing from memory.<sup>8</sup> Thus, at any point between the initial perception and recall of a face, an eyewitness's memory of that face is susceptible to distortion.<sup>9</sup> The following sections discuss the variables that may affect the accuracy of eyewitness identifications as well as the safeguards that are currently in place to protect against these variables.

### A. *Psychological Research on Variables Affecting Eyewitness Evidence*

Variables that may affect whether eyewitness identification memory is altered or distorted may either be “estimator variables” or “system variables.” Estimator variables are factors that stem from the inherently unreliable nature of memory and over which the justice system has no control, while system variables are factors that stem from identification procedures under the control of the justice system.<sup>10</sup>

#### 1. *Estimator Variables*

Distortions in memory that lead to mistaken identifications may arise from estimator variables—problems that are inherent in the nature of memory itself.<sup>11</sup> Such estimator variables are out of the control of the legal system and thus are particularly problematic because there is no way to prevent the eyewitness from being influenced by them.<sup>12</sup> Estimator variables that commonly affect eyewitness identification include lighting, distance from the suspect, and race of the suspect; these variables can act during the initial perception of an event, or during encoding, storage, or retrieval of a memory.<sup>13</sup>

Estimator variables may impact an eyewitness's memory of a perpetrator's face during the perception of the face and the encoding of the face into

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<sup>7</sup> ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY (1979).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* Thus, memory of faces can be affected during the encoding of the memory, during retrieval or recall of the memory, or in the intermediate time between encoding and retrieval when the memory is in storage. *Id.* Distortions that occur during encoding tend to be due to variables beyond the control of the justice system (estimator variables), while distortions that occur during retrieval tend to be due to variables within the control of the justice system (system variables). *Id.*

<sup>10</sup> See Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANN. REV. PSYCHOL. 277, 279 (2003).

<sup>11</sup> See *id.*

<sup>12</sup> See Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969, 970 (1977).

<sup>13</sup> See *id.* at 976–89.

memory.<sup>14</sup> For example, the viewing conditions under which the eyewitness is exposed to the face of the perpetrator, such as proximity to the perpetrator and lighting, impact whether the eyewitness ever accurately perceives the perpetrator's face.<sup>15</sup> Without adequate conditions for the eyewitness to view the perpetrator, the eyewitness's memory of the perpetrator will be incomplete.<sup>16</sup>

Further, characteristics of the perpetrator, such as the perpetrator's race, may affect the eyewitness's accuracy in recognizing the perpetrator.<sup>17</sup> Specifically, studies have shown that eyewitnesses who make cross-race identifications of a perpetrator are less likely to make an accurate identification than they would for a perpetrator of their own race.<sup>18</sup>

Additionally, situations in which an eyewitness encounters a perpetrator are usually highly stressful, particularly if the eyewitness is the victim of the crime.<sup>19</sup> High levels of eyewitness stress during perception and encoding are associated with lower rates of accurate identifications than situations with a moderate level of stress.<sup>20</sup> Similarly, if a weapon is present during the commission of the crime to which the eyewitness is testifying, studies have

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<sup>14</sup> See Wells & Olson, *supra* note 10, at 281–82.

<sup>15</sup> See Note, *supra* note 12, at 978.

<sup>16</sup> See *id.*

<sup>17</sup> See Wells & Olson, *supra* note 10, at 280–81.

<sup>18</sup> 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, 5 (2001) (suggesting that around 80% of samples reviewed show a statistically significant own-race bias for memory for faces); Wells & Olson, *supra* note 10, at 280–81; Gary L. Wells & Elizabeth A. Olson, *The Other-Race Effect in Eyewitness Identification: What Do We Do About It?*, 7 PSYCHOL. PUB. POL'Y & L. 230, 231 (2001) (noting that white witnesses were more likely to make a mistaken identification of a black suspect (35% of mistaken identifications) than of a white suspect (28% of mistaken identifications)).

<sup>19</sup> See Wells & Olson, *supra* note 10, at 282.

<sup>20</sup> See, e.g., *id.* In a meta-analysis of studies of stress and eyewitness identifications, high levels of stress tended to be accompanied by lower accuracy in eyewitness recall of facial features and fewer correct eyewitness identifications. See Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 LAW & HUM. BEHAV. 687, 699–704 (2004). The effect size of the correlation between stress and accuracy in identifications was  $-.31$ , which is a moderate effect size. *Id.* Additionally, in another study, subjects were shown either a violent crime or a nonviolent crime; then subjects were asked to provide details about the crime. Brian R. Clifford & Jane Scott, *Individual and Situational Factors in Eyewitness Testimony*, 63 J. APPLIED PSYCHOL. 352 (1978). Subjects shown the nonviolent crime were significantly more likely to accurately recall the details of the crime than those who viewed the violent crime, suggesting that higher arousal and stress may impede memory. *Id.* at 355–56. In another study, subjects' anxiety levels were monitored with heart rate monitors during exposure to faces; higher levels of anxiety during a stressful situation were associated with a less accurate description of a person's face. 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, 275 (2004).

shown that an eyewitness may be prone to “weapon focus,” in which an eyewitness’s recall for details of the crime—including the perpetrator’s face—is diminished because the eyewitness’s attention is diverted by his focus on the weapon.<sup>21</sup>

Between the time when memory of a face is encoded and retrieved, an eyewitness may experience unconscious transference.<sup>22</sup> Through unconscious transference, an eyewitness may mistakenly come to believe that an innocent bystander that the eyewitness glimpsed around the time of the crime is actually the perpetrator.<sup>23</sup>

## 2. System Variables

In contrast to estimator variables, system variables are factors within the control of the legal system that may affect the memory of faces.<sup>24</sup> System variables include factors in the procedures used by law enforcement to elicit eyewitness identifications—most commonly photo or in-person lineups.<sup>25</sup> Improper lineups and other identification procedures may distort an eyewitness’s recall of the perpetrator’s face, thus impairing identification.<sup>26</sup> In particular, eyewitness identifications become susceptible to mistake following

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<sup>21</sup> See, e.g., Wells & Olson, *supra* note 10, at 282; Kerri L. Pickel, *The Influence of Context on the “Weapon Focus” Effect*, 23 LAW & HUM. BEHAV. 299, 299, 301 (1999) (finding that this effect can be caused by any unusual object, including weapons, present during the commission of a crime). A meta-analysis of twelve studies of weapon focus found a small but statistically significant effect size in which the presence of a weapon decreased an eyewitness’s ability to correctly identify a perpetrator from a lineup, as well as a medium effect size in which the presence of a weapon decreased a witness’s ability to identify individual features of the perpetrator’s appearance. Nancy Mehrkens Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 LAW & HUM. BEHAV. 413, 414, 417 (1992). Similarly, another study found that when subjects were shown a person with a gun, their eye movements centered on the gun; further, subjects were less accurate in identifying a person holding a gun out of a lineup (accurate identification 15% of the time) compared to a person holding a check (accurate identification 35% of the time). Elizabeth F. Loftus, Geoffrey R. Loftus & Jane Messo, *Some Facts About “Weapon Focus,”* 11 LAW & HUM. BEHAV. 55, 60–61 (1987).

<sup>22</sup> See, e.g., Deborah Davis et al., ‘Unconscious Transference’ Can Be an Instance of ‘Change Blindness,’ 22 APPLIED COGNITIVE PSYCHOL. 605, 607 (2008); Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1501–02 (2008).

<sup>23</sup> See, e.g., Davis et al., *supra* note 22, at 611 (finding that an innocent bystander who was present in a video of a theft was frequently mistaken for the perpetrator); Elizabeth F. Loftus, *Unconscious Transference in Eyewitness Identification*, 2 LAW & PSYCHOL. REV. 93, 96 (1976) (finding that while subjects picked the correct perpetrator out of a lineup of five people an average of 84% of the time, if the true perpetrator was absent, subjects picked an innocent bystander to the crime out of a lineup 60% of the time); Thompson, *supra* note 22.

<sup>24</sup> Wells & Olson, *supra* note 10, at 285.

<sup>25</sup> See *id.*

<sup>26</sup> See *id.*

the improper administration of identification procedures, including instructions to the witness, the presentation of the lineup, the lineup administrator's knowledge of the suspect, and the lineup administrator's feedback to the witness.<sup>27</sup> In addition, the accuracy of an eyewitness identification may be influenced by the content of the lineup.<sup>28</sup>

Research has shown that lineup instructions affect the eyewitness's accuracy in picking the correct suspect from the lineup—particularly instructions that give the eyewitness information about whether the culprit is present in the lineup.<sup>29</sup> For example, many biased instructions at a lineup fail to mention that the culprit may or may not be present in the lineup; consequently, eyewitnesses may believe the lineup administrator is implying that the culprit is present in the lineup, forcing them to make a choice.<sup>30</sup> Experiments have suggested that in a culprit-absent lineup, if the eyewitness is given unbiased instructions prior to the lineup—stating that the culprit may or may not be present in the lineup—then the witness is less likely to choose one of the innocent fillers.<sup>31</sup> This instruction may help prevent a witness from succumbing to the tendency to pick the filler that most resembles the actual culprit when the culprit is not present in the lineup.<sup>32</sup>

Additionally, the mode of presentation of lineup members, either sequentially or simultaneously, has also been shown to affect the accuracy of an eyewitness's choice from a lineup in laboratory experiments.<sup>33</sup> Studies suggest that eyewitnesses generally make fewer mistaken identifications if

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<sup>27</sup> See *id.*

<sup>28</sup> *Id.* at 287.

<sup>29</sup> *Id.* at 286.

<sup>30</sup> See Michael R. Leippe et al., *Cueing Confidence in Eyewitness Identifications: Influence of Biased Lineup Instructions and Pre-Identification Memory Feedback Under Varying Lineup Conditions*, 33 LAW & HUM. BEHAV. 194, 196 (2009).

<sup>31</sup> See Wells & Olson, *supra* note 10, at 286–87; Leippe et al., *supra* note 30, at 196 (“Biased instructions [where the administrator fails to inform the eyewitness that the culprit may not be present in the lineup] are known to decrease the rate of lineup rejections and increase the rate of false identifications from lineups in which the culprit is absent.”); Roy S. Malpass & Patricia G. Devine, *Eyewitness Identification: Lineup Instructions and the Absence of the Offender*, 66 J. APPLIED PSYCHOL. 482, 485 (1981) (noting that in culprit-absent lineups with biased instructions, 78% of subjects made a mistaken identification; conversely, in culprit-absent lineups with unbiased instructions, 33% of subjects made a mistaken identification).

<sup>32</sup> See Wells & Olson, *supra* note 10, at 287. A meta-analysis of biased lineup instructions bears out the trend that unbiased instructions lead to lower rates of mistaken identification in culprit-absent lineups. Steven E. Clark, *A Re-Examination of the Effects of Biased Lineup Instructions in Eyewitness Identification*, 29 LAW & HUM. BEHAV. 395, 399 (2005). However, unbiased instructions, which state the culprit may or may not be present in the lineup, may also reduce the rate of correct identifications in culprit-present lineups, likely because the instructions make the eyewitnesses wary of their choice. *Id.*

<sup>33</sup> See Wells & Olson, *supra* note 10, at 288.



lineup members are presented sequentially, or one-by-one, thus allowing the witness to focus exclusively on whether each lineup member is recognizable as the culprit.<sup>34</sup> The traditional simultaneous lineup method, in which all lineup members are presented at once, may encourage witnesses to make a relative judgment by comparing the lineup members to one another.<sup>35</sup> This may cause the eyewitness to choose the member who most closely resembles the culprit, as opposed to comparing his or her memory of the culprit to each individual lineup member.<sup>36</sup>

Another system variable that affects eyewitness identification accuracy is the administrator's belief that one of the lineup members is the culprit.<sup>37</sup> If the lineup administrator knows who the target suspect is, the administrator may consciously or unconsciously, through body language and facial expressions, lead the eyewitness to choose the person whom the administrator believes to be guilty—thus tainting the eyewitness's choice.<sup>38</sup>

Similarly, studies demonstrate that if an administrator offers positive feedback following an eyewitness identification affirming the eyewitness's choice, the eyewitness's view of the identification may be distorted.<sup>39</sup> Specifically, after receiving positive feedback following a choice from the lineup, eyewitnesses retrospectively reported higher confidence in their

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<sup>34</sup> See Neil Brewer & Mathew A. Palmer, *Eyewitness Identification Tests*, 15 LEGAL & CRIMINOLOGICAL PSYCHOL. 77, 85 (2010) (U.K.); Wells & Olson, *supra* note 10, at 288. In a meta-analysis of studies comparing sequential and simultaneous lineups, 72% of eyewitnesses shown a sequential lineup correctly rejected all lineup members in lineups where the culprit was absent; conversely, in a simultaneous lineup with the same culprit-absent condition, only 49% of eyewitnesses correctly recognized that the culprit was not in the lineup. Nancy Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 LAW & HUM. BEHAV. 459, 463 (2001).

<sup>35</sup> Steblay et al., *supra* note 34, at 459.

<sup>36</sup> See Wells & Olson, *supra* note 10, at 288. Though sequential lineups tend to reduce mistaken identifications, particularly when the culprit is absent from the lineup, this identification technique is not without its critics: sequential lineups also tend to reduce the proportion of correct identifications. See Amina Memon & Fiona Gabbert, *Unravelling the Effects of Sequential Presentation in Culprit-Present Lineups*, 17 APPLIED COGNITIVE PSYCHOL. 703, 709 (2003).

<sup>37</sup> Wells & Olson, *supra* note 10, at 289.

<sup>38</sup> See *id.* To remedy the problem of the eyewitness being influenced by the lineup administrator, police could institute double-blind lineup procedures in which the lineup administrator is not aware of which lineup member is the main suspect; in this way, the administrator's biases cannot be picked up by the eyewitness. See Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 23 LAW & HUM. BEHAV. 603, 627 (1998).

<sup>39</sup> See Amy Bradfield Douglass & Nancy Steblay, *Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect*, 20 APPLIED COGNITIVE PSYCHOL. 859, 860 (2006).

identification than those who did not receive positive feedback.<sup>40</sup> This highlights the weak correlation between eyewitness confidence and the accuracy of eyewitness identifications, a finding that has been replicated in several psychological studies.<sup>41</sup>

Another system variable that may distort eyewitness identification accuracy is the content of a lineup.<sup>42</sup> In particular, lineups should consist of suspects who match the general description of the perpetrator.<sup>43</sup> If only one suspect in the lineup matches the eyewitness's initial description of the perpetrator, then that suspect is the obvious choice for the eyewitness.<sup>44</sup>

### B. Existing Safeguards for Reliability

As described above, although the potential for unreliability in eyewitness identifications is increasingly clear, the manner in which courts should respond is less certain. This section addresses the various ways in which the legal system has thus far addressed the problem of the unreliability of eyewitness identifications: a due process test for unnecessarily suggestive eyewitness identifications as well as general procedural safeguards, including jury instructions and expert testimony on the reliability of eyewitness identification. This section argues that these measures are insufficient to guard against the danger of mistaken identifications due to the unique nature of eyewitness identification evidence and its effect on the jury.

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<sup>40</sup> See *id.* In one experiment, researchers gave eyewitnesses either positive feedback, telling the eyewitnesses they fingered the correct suspect, or no feedback following their identification from a lineup; then, the researchers asked the eyewitnesses to rate their confidence in their identification and state how good their view of the perpetrator was. Gary L. Wells & Amy L. Bradfield, "Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, 83 J. APPLIED PSYCHOL. 360, 363 (1998). Importantly, unbeknownst to the eyewitnesses, the lineup was entirely comprised of innocent fillers, and thus any identification made by the eyewitnesses was mistaken. *Id.* Positive feedback from the lineup administrator confirming the eyewitness's identification led to higher confidence ratings by eyewitnesses than the confidence ratings of eyewitnesses who received no feedback. *Id.* Interestingly, positive feedback also caused eyewitnesses to retroactively report that they had a better view of the perpetrator than eyewitnesses who received no feedback—despite both experimental groups being presented with identical views of the perpetrator. *Id.*

<sup>41</sup> See, e.g., Douglass & Steblay, *supra* note 39; Siegfried Ludwig Sporer et al., *Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence–Accuracy Relation in Eyewitness Identification Studies*, 118 PSYCHOL. BULL. 315, 324 (1995).

<sup>42</sup> See Wells et al., *supra* note 38, at 632.

<sup>43</sup> See *id.*

<sup>44</sup> *Id.*

1. *Due Process Test for Unnecessarily Suggestive Eyewitness Identifications*

The United States Supreme Court has addressed eyewitness identification problems in the context of due process through a line of cases dealing with suggestive identification procedures.<sup>45</sup> Through these cases, the Court has developed a flexible framework with which to determine whether an eyewitness identification procedure is so suggestive, and thus prone to a mistaken identification, that it violates the Due Process Clause of the Fifth Amendment or Fourteenth Amendment.<sup>46</sup> If a court finds that a suggestive identification procedure violates due process, then the eyewitness identification elicited from the suggestive procedure is not admissible.<sup>47</sup> The following line of cases follows the development of the due process test for eyewitness identifications, which was articulated in its current form in *Manson v. Brathwaite*.

In *Stovall v. Denno*, a murder suspect was brought to the hospital where one of his alleged victims was receiving medical treatment for injuries sustained as a result of the crime in question.<sup>48</sup> Once at the hospital, the suspect was presented to the victim eyewitness in a “show-up” procedure in which the eyewitness was presented with a single suspect and asked to identify whether this suspect was in fact the perpetrator.<sup>49</sup> The Court recognized that an identification procedure may be “so unnecessarily suggestive and conducive to irreparable mistaken identification that [it is a denial of] due process of law.”<sup>50</sup> However, the Court also held that whether a given identification procedure violates due process depends “on the totality of the circumstances surrounding it.”<sup>51</sup> In *Stovall*, because the show-up procedure was crucial given the ill health of the eyewitness and the necessity of the eyewitness’s identification, the

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<sup>45</sup> *Manson v. Brathwaite*, 432 U.S. 98 (1977) (holding that courts must implement a two-pronged procedure for determining whether an identification procedure violates due process); *Neil v. Biggers*, 409 U.S. 188 (1972) (noting that even an unnecessarily suggestive identification procedure can be admissible if it has sufficient aspects of reliability under the totality of the circumstances); *Stovall v. Denno*, 388 U.S. 293, 302 (1967) (explaining that whether a suggestive eyewitness identification procedure violated due process depends on the “totality of the circumstances”); *United States v. Wade*, 388 U.S. 218, 237 (1967) (holding that a defendant is entitled to counsel at a post-indictment lineup).

<sup>46</sup> *See Manson*, 432 U.S. at 109–17; *Biggers*, 409 U.S. at 199.

<sup>47</sup> *See Manson*, 432 U.S. at 114.

<sup>48</sup> *Stovall*, 388 U.S. at 295.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 302.

<sup>51</sup> *Id.*

totality of the circumstances warranted the show-up and thus it was not a violation of due process.<sup>52</sup>

In *Neil v. Biggers*, the Supreme Court reiterated that use of a show-up procedure alone did not violate due process because an identification may be reliable despite the identification procedure's suggestiveness.<sup>53</sup> Thus, *Biggers* focused on the reliability of eyewitness testimony yielded from unnecessarily suggestive identification procedures.<sup>54</sup>

The Supreme Court's current approach to whether a suggestive identification procedure violates due process is summarized in *Manson v. Brathwaite*, in which the Court again emphasized the importance of reliability: the admission of testimony from an unnecessarily suggestive identification procedure "does not violate due process so long as the identification possesses sufficient aspects of reliability."<sup>55</sup> *Manson* established a two-pronged evaluation of the reliability of an eyewitness identification through the "totality of the circumstances."<sup>56</sup>

Under the first prong, a court considers whether the eyewitness identification procedure that elicited the identification was unnecessarily suggestive.<sup>57</sup> If the identification procedure is not unnecessarily suggestive, then the inquiry ends and the eyewitness identification testimony is admissible.<sup>58</sup> If, however, the identification procedure is found to be unnecessarily suggestive, the eyewitness identification may still be admissible.<sup>59</sup> In that case, the court turns to the second prong of the *Manson* test to determine whether the eyewitness identification is nevertheless reliable despite the unnecessarily suggestive procedure.<sup>60</sup> If the court finds that the

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<sup>52</sup> *See id.*

<sup>53</sup> *Neil v. Biggers*, 409 U.S. 188, 199 (1972).

<sup>54</sup> In *Biggers*, the Court found that although the show-up at issue was an unnecessarily suggestive procedure, the identification nevertheless possessed sufficient aspects of reliability under the totality of circumstances: the eyewitness had viewed the perpetrator in both artificial light and moonlight, gave a description to the police that matched the defendant, and expressed certainty about the accuracy of her identification. *Id.* at 200–01. Thus, the Court found that the show-up did not violate due process. *Id.*

<sup>55</sup> *Manson v. Brathwaite*, 432 U.S. 98, 106 (1977).

<sup>56</sup> *Manson*, 432 U.S. 98.

<sup>57</sup> *Id.* at 107.

<sup>58</sup> *See id.* ("On the constitutional issue, the court stated that the first inquiry was whether the police used an impermissibly suggestive procedure in obtaining the out-of-court identification.")

<sup>59</sup> *See id.* at 106.

<sup>60</sup> *See id.*

eyewitness identification is reliable under the totality of the circumstances, the evidence is admissible.<sup>61</sup>

Conversely, if the court finds that the eyewitness identification was unreliable under the totality of the circumstances, then the evidence is inadmissible.<sup>62</sup> The *Manson* Court listed several factors that should be weighed in determining reliability: the eyewitness's view, attention, accuracy of the description, and certainty, as well as the passage of time.<sup>63</sup> State courts have added to these factors, supplementing the reliability factors with emerging psychological evidence.<sup>64</sup>

Importantly, the *Manson* test cannot by itself fully address the problem of mistaken eyewitness identification. Although the *Manson* test considers the reliability of the eyewitness identification, this analysis of reliability is only triggered if courts find an impermissibly suggestive procedure.<sup>65</sup> If there is no impermissibly suggestive procedure, the *Manson* test does not consider the reliability of the eyewitness identification.<sup>66</sup> Because many eyewitness identification errors can occur due to estimator variables, which are factors related to the inherent unreliability of memory, the *Manson* test fails to address reliability of eyewitness identifications that do not stem from suggestive procedures within the justice system's control.

Another critique of the *Manson* test is that, while the reliability prong can only be triggered by a suggestive procedure, the factors considered by the reliability prong are susceptible to distortions caused by the suggestive procedure itself.<sup>67</sup> Several of the factors that the Court noted as important in determining reliability—view, attention, and certainty—depend on retrospective self-reports.<sup>68</sup> Thus, if there was a suggestive identification

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<sup>61</sup> *See id.*

<sup>62</sup> *See id.*

<sup>63</sup> *Id.* at 114.

<sup>64</sup> *See* Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 *LAW & HUM. BEHAV.* 1, 18 (2009). The New Jersey Supreme Court, for example, has included factors such as cross-racial identification and the presence of a weapon during the crime. *See* *State v. Henderson*, 27 A.3d 872 (N.J. 2011).

<sup>65</sup> *See Manson*, 432 U.S. at 106. Many courts have found that show-ups and single-photograph displays are impermissibly suggestive procedures under the first prong of the *Manson* test. *See, e.g., id.* at 106–07; Neil v. Biggers, 409 U.S. 188, 199 (1972). In *Manson* itself, for example, the single-photograph display of the defendant was impermissibly suggestive. *See Manson*, 432 U.S. at 106–07.

<sup>66</sup> *See Manson*, 432 U.S. at 106.

<sup>67</sup> *See* Wells & Quinlivan, *supra* note 64, at 17.

<sup>68</sup> *See id.* at 18.

procedure, as there is in every case which reaches the second reliability prong of the *Manson* test, it is likely that the suggestive procedure distorted the eyewitness's self-report of one or more of these variables.<sup>69</sup> For example, as noted above, studies have shown that if an eyewitness is given positive feedback after making an identification, the eyewitness's retrospective self-report of his confidence in the identification will increase.<sup>70</sup> Thus, if a court found that positive feedback was an unnecessarily suggestive identification procedure—satisfying the first prong of the *Manson* test—then the influence of that suggestive procedure may skew the self-report factors in the second reliability prong of the test, such as eyewitness certainty in the identification.<sup>71</sup> Therefore, the first prong of the *Manson* test is suspect due to its under-inclusiveness; the second prong is suspect due to its reliance on subjective, retroactive self-reports that are influenced by the suggestiveness of the identification procedure.

In January 2012, the Supreme Court decided the latest case regarding eyewitness identification testimony, *Perry v. New Hampshire*.<sup>72</sup> *Perry* raised the question of whether the first prong of the *Manson* test, which requires an unnecessarily suggestive procedure, was meant to only encompass unnecessarily suggestive procedures that occur as a result of police involvement.<sup>73</sup>

In *Perry*, the defendant was accused of breaking into a car.<sup>74</sup> One eyewitness claimed she saw a man breaking into the car; when the police questioned her about the crime, the eyewitness looked out of her apartment window, saw Perry outside, and identified him as the person she had seen committing the crime.<sup>75</sup> At trial, Perry claimed that this identification was made under suggestive circumstances, since he was the only suspect that the witness could choose while making the identification.<sup>76</sup>

The first prong of the *Manson* test that must be met is a finding of unnecessarily suggestive circumstances;<sup>77</sup> however, past applications of this

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<sup>69</sup> *See id.*

<sup>70</sup> *See supra* text accompanying notes 39–41.

<sup>71</sup> *See* Wells & Quinlivan, *supra* note 64, at 18.

<sup>72</sup> 132 S. Ct. 716 (2012).

<sup>73</sup> *See id.* at 720–21.

<sup>74</sup> *Id.* at 721–22.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 722.

<sup>77</sup> *Manson v. Brathwaite*, 432 U.S. 98, 110–13 (1977).

prong have all involved unnecessarily suggestive procedures *administered by police*.<sup>78</sup> In *Perry*, the arguably suggestive circumstances were not a product of a police identification procedure; rather, the eyewitness looked out the window without any inducement by police.<sup>79</sup>

During oral arguments, *Perry* highlighted the underlying rationale of *Manson* and other due process cases, in which the Court found that some eyewitness evidence can be so unnecessarily suggestive—and consequently so unreliable—that its admittance would be a violation of due process.<sup>80</sup> Thus, the defense argued, any unnecessarily suggestive circumstances, whether the result of police orchestration or not, potentially violate due process.<sup>81</sup>

However, in *Perry*, the Court declined to extend the current due process protections of *Stovall*, *Biggers*, and *Manson* to include unnecessarily suggestive procedures that are not caused by police.<sup>82</sup> Rather, the Court found that the due process check on the admissibility of eyewitness identifications only applied when suggestive circumstances were arranged by law enforcement officers.<sup>83</sup> The Court's stated rationale for refusing to extend due process protection to suggestive circumstances not orchestrated by the police rested on both practical and ideological considerations.<sup>84</sup>

First, the *Perry* Court seized on the deterrence rationale raised in *Manson*,<sup>85</sup> in which the *Manson* Court claimed that unnecessarily suggestive identification procedures orchestrated by the police should be subject to exclusion so that the “police will guard against unnecessarily suggestive procedures . . . for fear that their actions will lead to the exclusion of identifications as unreliable.”<sup>86</sup> Without any improper police conduct, the *Perry* Court found the “deterrence rationale [to be] inapposite.”<sup>87</sup>

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<sup>78</sup> See, e.g., *id.* at 100–02 (applying the prong to a police-administered photograph identification procedure).

<sup>79</sup> *Perry*, 132 S. Ct. at 725.

<sup>80</sup> Transcript of Oral Argument at 3, 24–28, *Perry*, 132 S. Ct. 716 (No. 10-8974).

<sup>81</sup> *Id.* at 14.

<sup>82</sup> *Perry*, 132 S. Ct. at 720–21.

<sup>83</sup> *Id.*

<sup>84</sup> See *id.* at 726–27.

<sup>85</sup> *Id.*

<sup>86</sup> *Manson v. Brathwaite*, 432 U.S. 98, 112 (1977).

<sup>87</sup> *Perry*, 132 S. Ct. at 726. While the deterrence rationale does not play a role in cases lacking improper police conduct, this should not foreclose courts from extending due process protections to these types of cases. The deterrence rationale would not be rendered ineffective in cases where there is police misconduct; it would just not apply in cases where there was no police misconduct.

The Court also stated that allowing courts to determine the admissibility of identifications resulting from suggestive procedures outside of police control would result in a “vast enlargement of the reach of due process as a constraint on the admission of evidence.”<sup>88</sup> Further, the Court noted that other potentially unreliable evidence, such as jailhouse informant testimony, is admissible.<sup>89</sup>

The Court also raised the concern that extending a trial judge’s role to screening the reliability of identifications would usurp the role of the jury.<sup>90</sup> The jury, and not the judge, traditionally decides the reliability of evidence.<sup>91</sup> According to the Court, safeguards that are part of the adversarial system can aid the jury in making a determination about the reliability of eyewitness identifications.<sup>92</sup> In particular, the defendant has the right to confront and cross-examine eyewitnesses with the intent of unearthing flaws in the eyewitness’s testimony that might shed light on the reliability of the identification.<sup>93</sup> Further, the defendant can request jury instructions that warn about the potential for unreliability in eyewitness identifications.<sup>94</sup> Finally, both state and federal rules of evidence allow the trial judge “to exclude relevant evidence if its probative value is substantially outweighed by its prejudicial impact.”<sup>95</sup>

In her dissent, Justice Sotomayor highlighted the centrality of reliability in the prior eyewitness identification cases.<sup>96</sup> The dissent opined that any eyewitness identification yielded from unnecessarily suggestive circumstances—regardless of whether it was orchestrated by the police—may violate due process if it poses a substantial risk of misidentification.<sup>97</sup> In response to the import the majority placed on the deterrence rationale, the dissent noted that the main concern in the previous eyewitness identification cases was reliability.<sup>98</sup> Justice Sotomayor concluded that the driving force of the previous decisions was not police deterrence;<sup>99</sup> rather, the Court in *Manson* discussed deterrence only to rebut concerns that the totality-of-the-

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<sup>88</sup> *Id.* at 723, 727.

<sup>89</sup> *Id.* at 728.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 728–29.

<sup>95</sup> *Id.* at 729; accord FED. R. EVID. 403.

<sup>96</sup> *Perry*, 132 S. Ct. at 731 (Sotomayor, J., dissenting).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 735–36.

<sup>99</sup> *Id.*



circumstances test would have less of a deterrent effect for law enforcement than a per se exclusion rule of all identifications resulting from a suggestive procedure.<sup>100</sup> Thus, the dissent considered the importance placed on the deterrence rationale—which is secondary to reliability in the *Manson* opinion—to be misplaced.<sup>101</sup>

The dissent also addressed the majority's concerns about usurping the role of the jury—namely, that extending due process protection to identifications made under suggestive circumstances not orchestrated by the police would lead to judges deciding the reliability of eyewitness identification evidence instead of juries. The majority found this problematic because juries traditionally decide the reliability of evidence.<sup>102</sup> The dissent pointed out that the previous eyewitness identification cases operated under the assumption that eyewitness identifications are a necessary exception to the jury's traditional role in determining reliability.<sup>103</sup> In particular, the dissent argued that the Court has long recognized that eyewitness identification evidence resulting from suggestive police procedures must be screened by trial judges for reliability, taking the place of the jury's reliability-assessing role.<sup>104</sup> The majority in those cases acknowledged that reliability of eyewitness identifications may not fall within the province of the jury, perhaps due to the weight jurors tend to place on eyewitness identification evidence or because the jury's ability to assess reliability of an eyewitness's identification is "hindered by a witness'[s] false confidence in the accuracy of his or her identification."<sup>105</sup>

Finally, the dissent addressed the majority's claim that the protections built into the court system are sufficient to ensure the reliability of eyewitness identification evidence, concluding that the majority placed too much faith in these protections.<sup>106</sup> The following section discusses these built-in safeguards and argues that they do not adequately solve the problem of unreliable eyewitness identification evidence.

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<sup>100</sup> *Id.*; *Manson v. Brathwaite*, 432 U.S. 98, 111–12 (1977).

<sup>101</sup> *Perry*, 132 S. Ct. at 735–36 (Sotomayor, J., dissenting).

<sup>102</sup> *Id.* at 737–39.

<sup>103</sup> *See id.*

<sup>104</sup> *Id.* at 737–38.

<sup>105</sup> *Id.* at 737.

<sup>106</sup> *Id.*

## 2. *Other Safeguards*

As the majority in *Perry* noted, the criminal justice system provides safeguards to encourage the general reliability of evidence,<sup>107</sup> including the right to be confronted with opposing witnesses and cross-examination of witnesses.<sup>108</sup> In theory, the right to be confronted with opposing witnesses and the right to cross-examine provide an opportunity to reveal weaknesses and inconsistencies in a witness's testimony and to examine a witness's credibility.<sup>109</sup> Often, courts refer to cross-examination as a protection against unreliable eyewitness identification testimony.<sup>110</sup> In particular, courts claim that during cross-examination, the defense can highlight parts of the eyewitness's identification testimony that undermine the reliability of the identification.<sup>111</sup>

Thus, the Court's current approach is to trust that the built-in vehicle of cross-examination will help the jury determine the reliability of eyewitness identification testimony.<sup>112</sup> However, this particular safeguard is not wholly effective for eyewitness identification: whereas cross-examination developed with a truth-seeking function, eyewitness identification testimony is not plagued by untruthful witnesses but instead by often mistaken, and thus potentially unreliable, ones.<sup>113</sup>

Further, cross-examination is a difficult platform in which to educate the jury about the particular circumstances indicative of unreliability in eyewitness

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<sup>107</sup> *Id.* at 728–29 (majority opinion).

<sup>108</sup> U.S. CONST. amend. VI.

<sup>109</sup> *Alford v. United States*, 282 U.S. 687, 691–92 (1931).

<sup>110</sup> *See, e.g., Manson v. Brathwaite*, 432 U.S. 98, 113 n.14 (1977) (“Counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification—including reference to both any suggestibility in the identification procedure and any countervailing testimony such as alibi.” (quoting *Clemons v. United States*, 408 F.2d 1230, 1251 (D.C. Cir. 1968) (Leventhal, J., concurring)); *see also United States v. Harris*, 995 F.2d 532, 535 (4th Cir. 1993) (“[J]urors using common sense and their faculties of observation can judge the credibility of an eyewitness identification, especially since deficiencies or inconsistencies in an eyewitness’s testimony can be brought out with skillful cross-examination.”).

<sup>111</sup> *See, e.g., Manson*, 432 U.S. at 113 n.14 (noting that cross-examination may spotlight “factors causing doubts” as to the testimony’s accuracy (internal quotation marks omitted)).

<sup>112</sup> *See Perry*, 132 S. Ct. at 728–29 (explaining that traditional tools of the adversarial system help to mitigate bias or suggestibility).

<sup>113</sup> Jules Epstein, *The Great Engine That Couldn’t: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 STETSON L. REV. 727, 766 (2007) (“A tool designed from its inception to root out *liars* is ill-suited for the task of exposing the risk or reality of *mistaken* identification.”). This issue will be explored in greater detail *infra* in Part II.

identification testimony.<sup>114</sup> Jurors do not have an intuitive understanding of the factors that tend to make eyewitness identification testimony reliable or unreliable.<sup>115</sup> Without this basic foundation, jurors may have difficulty grasping the proper significance of the cross-examination as it relates to reliability.<sup>116</sup>

Many courts have instituted additional safeguards specific to eyewitness identification evidence, including jury instructions<sup>117</sup> and expert testimony about the unreliability of eyewitness identification evidence.<sup>118</sup> Each of these methods attempts to address estimator variables<sup>119</sup> outside of the control of the justice system.<sup>120</sup> Jurisdictions that allow jury instructions hope to focus jurors' attention on some problems with the unreliability of eyewitness

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<sup>114</sup> See *id.* (stating that mistaken identification, as opposed to intentional misidentification, may present a unique obstacle for successful cross-examination).

<sup>115</sup> Richard S. Schmechel et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS J. 177, 195 (2006).

<sup>116</sup> Epstein, *supra* note 113, at 772–74. For example, the defense may cross-examine an eyewitness about his or her level of stress while observing a crime. The eyewitness may answer that his or her stress was high. Though psychological studies suggest that eyewitnesses with high stress levels tend to have greater memory impairment than eyewitnesses who experience moderate levels of stress, jurors generally imagine high stress results in better memory. *Id.* at 746, 777–78. Thus, cross-examination can elicit responses that indeed are pertinent to the unreliability of eyewitness testimony, yet these responses are only meaningful to an audience who understands the factors that contribute to unreliable eyewitness identification testimony. See *id.* at 777–78.

<sup>117</sup> Some circuits provide model jury instructions related to eyewitness identification testimony. See COMM. ON MODEL CRIMINAL JURY INSTRUCTIONS WITHIN THE THIRD CIRCUIT, MODEL CRIMINAL JURY INSTRUCTIONS ch. 4.15, at 195–96 (2009) (“The value of the identification depends on the witness’[s] opportunity to observe the person who committed the crime at the time of the offense and the witness’[s] ability to make a reliable identification at a later time based on those observations. You must decide whether you believe the witness’[s] testimony and whether you find beyond a reasonable doubt that the identification is correct. . . . In addition, as you evaluate a witness’[s] identification testimony you should consider the following questions as well as any other questions you believe are important . . . ask whether the witness was able to observe and had an adequate opportunity to observe the person who committed the crime charged. . . . [F]actors affect[ing] whether a witness has an adequate opportunity to observe . . . include the length of time during which the witness observed the person, the distance between the witness and the person, the lighting conditions, . . . [and] whether the witness knew the person from some prior experience . . .”).

<sup>118</sup> See, e.g., *United States v. Downing*, 753 F.2d 1224, 1231 (3d Cir. 1985) (“[U]nder certain narrow circumstances, it will be error for trial courts to exclude qualified expert testimony on eyewitness perception and memory.”); *State v. Clopton*, 2009 UT 84, ¶ 32, 223 P.3d 1103, 1113 (“[I]n cases where eyewitnesses are identifying a stranger and where one or more established factors affecting accuracy are present, the testimony of an eyewitness expert will meet rule 702’s requirement to ‘assist the trier of fact.’” (footnote omitted)). *Contra Johnson v. State*, 519 S.E.2d 221, 229 (Ga. 1999) (excluding expert testimony because it was “information that would [have been] provided by [the] witness” and it was “information that [was] within the knowledge of the jurors and [was] not a proper subject for expert testimony”).

<sup>119</sup> For a discussion of estimator variables, see *supra* text accompanying notes 11–13.

<sup>120</sup> See Margery Malkin Koosed, *Reforming Eyewitness Identification Law and Practices to Protect the Innocent*, 42 CREIGHTON L. REV. 595, 620 (2009).

identification.<sup>121</sup> However, studies suggest that general jury instructions informing jurors of the unreliability of eyewitness identifications are not effective in helping jurors to evaluate the reliability of the identification before them.<sup>122</sup> To make jury instructions more effective in this regard, some advocate for jury instructions tailored to the variables that might distort eyewitness identification in each individual case.<sup>123</sup>

Some jurisdictions allow an expert witness to testify about the unreliability of eyewitness identification testimony if the expert testimony is deemed reliable under the *Daubert* standard, which applies to all expert evidence.<sup>124</sup> However, other courts remain resistant to admitting expert testimony on the unreliability of eyewitness evidence, claiming that eyewitness identification evidence is not beyond the understanding of the jurors.<sup>125</sup> Further, studies suggest that expert testimony on eyewitness identification evidence does not have the intended effect of sensitizing the jury to make more informed decisions about eyewitness identification accuracy; rather, expert testimony in this area tends to make jurors generally skeptical of an eyewitness's identification.<sup>126</sup>

Finally, although these safeguards operate after the eyewitness identification has already occurred,<sup>127</sup> some courts have also created

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<sup>121</sup> See, e.g., *United States v. Telfaire*, 469 F.2d 552, 557 (D.C. Cir. 1972) (per curiam) (discussing *United States v. Barber*, 442 F.2d 517, 528 (3d Cir. 1971)).

<sup>122</sup> Koosed, *supra* note 120.

<sup>123</sup> *Id.* at 620 n.124.

<sup>124</sup> See, e.g., *United States v. Smithers*, 212 F.3d 306, 311–12 (6th Cir. 2000) (supporting “the emerging view that expert testimony may be offered, in certain circumstances, on the subject of the psychological factors which influence the memory process”); *United States v. Harris*, 995 F.2d 532, 535 (4th Cir. 1993) (recognizing that expert psychological testimony about the validity of eyewitness identification has been held admissible if the identification contains problems such as “cross-racial identification, identification after a long delay, identification after observation under stress, and psychological phenomena as the feedback factor and unconscious transference”); *United States v. Moore*, 786 F.2d 1308, 1312 (5th Cir. 1986) (accepting the “modern conclusion” that expert testimony on the reliability of eyewitness identification testimony may be admissible under some circumstances); see also Schmechel et al., *supra* note 115, at 186 n.41 (noting that ten states and one federal circuit allow expert evidence on the reliability of eyewitness identification testimony under some circumstances).

<sup>125</sup> See, e.g., *United States v. Holloway*, 971 F.2d 675, 679 (11th Cir. 1992); *United States v. Purham*, 725 F.2d 450, 454 (8th Cir. 1984); *Commonwealth v. Simmons*, 662 A.2d 621, 631 (Pa. 1995); see also Schmechel et al., *supra* note 115. Despite this belief that eyewitness identification unreliability is within the understanding of jurors, psychological research suggests that jurors actually do not understand specific factors that make eyewitness identification more or less reliable. See *supra* text accompanying note 115.

<sup>126</sup> Jennifer L. Devenport & Brian L. Cutler, Research Report, *Impact of Defense-Only and Opposing Eyewitness Experts on Juror Judgments*, 28 LAW & HUM. BEHAV. 569, 570 (2004).

<sup>127</sup> Wells & Olson, *supra* note 10, at 279–80.

safeguards that operate during the eyewitness identification procedure itself, with the goal of facilitating more reliable identification procedures by reducing system variables within the control of the justice system. For example, New Jersey courts have applied psychological research about how eyewitness memory works to their identification procedures, instituting double-blind administration of lineups,<sup>128</sup> pre-identification instructions that the perpetrator may not be present in a lineup, a choice of lineup fillers who fit the description of the perpetrator, and avoidance of any feedback following the identification.<sup>129</sup> Although these types of reforms begin to bring identification procedures in line with what is known about eyewitness memory, procedural changes can only help alleviate errors in identification caused by system variables.<sup>130</sup>

## II. EYEWITNESS IDENTIFICATION TESTIMONY REQUIRES ADDITIONAL SAFEGUARDS

Although other types of eyewitness evidence can also be unreliable, eyewitness identifications are particularly troublesome, justifying more scrutiny than other eyewitness evidence. Eyewitness identification testimony possesses a “unique confluence of features . . . [that] can undermine the fairness of a trial.”<sup>131</sup> In particular, eyewitness identification evidence is potentially unreliable, has a powerful impact on the jury, and is not subject to the protections typically afforded by the adversarial process.<sup>132</sup>

As noted in Part I, one factor contributing to the uniqueness of eyewitness identification testimony is the danger of unreliability that is characteristic of this type of evidence.<sup>133</sup> Mistaken eyewitness identification evidence is the leading cause of wrongful convictions in the United States.<sup>134</sup> This suggests that eyewitness identifications are not just theoretically unreliable in the controlled experimental settings cited above in Part I, but that eyewitness identifications also have a demonstrated unreliability in practice. The Supreme Court has also readily acknowledged the unreliable nature of eyewitness

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<sup>128</sup> In a double-blind lineup, both the lineup administrator and the eyewitness are unaware of which lineup member is the prime suspect. *State v. Henderson*, 27 A.3d 872, 896 (N.J. 2011). This helps avoid any unconscious or conscious influence on the eyewitness. *Id.*

<sup>129</sup> *Id.* at 897–99.

<sup>130</sup> See Wells & Olson, *supra* note 10, at 279–80.

<sup>131</sup> *Perry v. New Hampshire*, 132 S. Ct. 716, 730–31 (2012) (Sotomayor, J., dissenting).

<sup>132</sup> *Id.*

<sup>133</sup> See *id.*

<sup>134</sup> *Eyewitness Misidentification*, *supra* note 1.

testimony, stating that “the annals of criminal law are rife with instances of mistaken identification.”<sup>135</sup>

Another factor that distinguishes eyewitness identification testimony is its degree of influence on the jury.<sup>136</sup> Despite indications that eyewitness identification is particularly prone to error, eyewitness identification testimony remains a convincing and powerful form of evidence, and jurors often rely heavily on it.<sup>137</sup> One experiment with a mock jury suggested that eyewitness identification testimony dramatically increases jurors’ willingness to find a defendant guilty: the addition of the testimony of an eyewitness identifying a defendant as the perpetrator of a crime increased the jurors’ likelihood of finding the defendant guilty from 18% without eyewitness identification testimony to 72% with eyewitness identification testimony.<sup>138</sup> Outside the laboratory, the enormous influence of eyewitness identification testimony is borne out in statistical analyses of conviction rates in crimes involving eyewitness identification.<sup>139</sup> For example, the Devlin Report—an investigation of criminal convictions based on eyewitness identification—observed that British juries found criminal defendants guilty in 74% of cases in which eyewitness identification testimony was the only evidence against the defendant.<sup>140</sup>

Finally, eyewitness identification evidence is also unique because traditional rationales for admitting other types of unreliable evidence do not apply to eyewitness evidence, for eyewitness evidence is “resistan[t] to the ordinary tests of the adversarial process.”<sup>141</sup> In particular, the adversarial process is meant to help uncover lies and misinformation.<sup>142</sup> Unreliable evidence may be admitted with the knowledge that the jury ultimately decides the credibility and the trustworthiness of the evidence, in part based on the demeanor of a witness.<sup>143</sup> Under this rationale, the jury can conclude that a

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<sup>135</sup> *United States v. Wade*, 388 U.S. 218, 228 (1967); *see also* *Manson v. Brathwaite*, 432 U.S. 98, 112 (1977) (“[A] witness’[s] recollection of the stranger can be distorted easily by the circumstances or by later actions of the police.”); *Stovall v. Denno*, 388 U.S. 293, 298 (1967) (noting that the Court recognizes the “dangers and unfairness inherent in confrontations for identification”).

<sup>136</sup> *Perry*, 132 S. Ct. at 730–31 (Sotomayor, J., dissenting).

<sup>137</sup> *See* LOFTUS, *supra* note 7, at 9 (explaining that “[j]urors have been known to accept eyewitness testimony pointing to guilt even when it is *far* outweighed by evidence of innocence”); *see also id.* at 19.

<sup>138</sup> *Id.* at 9–10.

<sup>139</sup> *Id.* at 8–9.

<sup>140</sup> *Id.*

<sup>141</sup> *Perry*, 132 S. Ct. at 730–31 (Sotomayor, J., dissenting).

<sup>142</sup> Epstein, *supra* note 113.

<sup>143</sup> *Id.* at 772.

witness is untruthful or that a witness is unsure about his or her testimony.<sup>144</sup> However, as noted in Part I, extending this rationale to eyewitness identification testimony is questionable.<sup>145</sup> Generally, inaccurate eyewitness identifications arise not from intentional manipulation or deception by the eyewitness, but instead from eyewitnesses who made a mistake based on problems with perception, memory, or identification procedures.<sup>146</sup> Because eyewitnesses often believe their identifications are correct, the jury is unlikely to glean meaningful information about the reliability of the eyewitnesses' testimony in this way.<sup>147</sup>

The traditional, built-in protections of the adversarial process, especially cross-examination, are also inadequate because jurors do not have an adequate sense of what factors make an eyewitness's identification particularly reliable or unreliable.<sup>148</sup> Studies suggest that jurors are unable to separate reliable eyewitness identification testimony from eyewitness testimony that is unreliable.<sup>149</sup> For example, jurors and other lay people are particularly impressed with eyewitnesses who express confidence in their identification of the perpetrator, tending to believe that higher confidence in the identification is indicative of greater accuracy of the identification.<sup>150</sup> However, as noted above, psychological evidence suggests that the correlation between confidence in an identification and accuracy of the identification—that is, whether the eyewitness identifies the true perpetrator—is not high.<sup>151</sup> Thus, an eyewitness may have an “artificially inflated confidence in an identification[,]” making it difficult for the jury to determine credibility and reliability. In turn, this inability to determine reliability “jeopardizes the defendant's basic right to

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<sup>144</sup> *Id.* at 758–60.

<sup>145</sup> *Id.* at 783–84.

<sup>146</sup> *Id.* at 732.

<sup>147</sup> *Id.* at 766.

<sup>148</sup> Schmechel et al., *supra* note 115. In fact, one study comparing the responses of lay people and experts on eyewitness identification issues suggested that lay people's beliefs about eyewitness identification differed from expert opinion on as many as 87% of the issues examined (including the importance of pre-lineup instructions, cross-race bias, and weapon focus). Tanja Rapus Brenton et al., *Eyewitness Memory Is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts*, 20 APPLIED COGNITIVE PSYCHOL. 115, 118–20 (2006).

<sup>149</sup> Schmechel et al., *supra* note 115, at 195.

<sup>150</sup> *Id.* at 199; *see also* Perry v. New Hampshire, 132 S. Ct. 716, 732 (2012) (Sotomayor, J., dissenting) (“[A]n eyewitness's [s] artificially inflated confidence in an identification's accuracy complicates the jury's task of assessing witness credibility and reliability.”); Lisa Steele, *Trying Identification Cases: An Outline for Raising Eyewitness ID Issues*, CHAMPION, Nov. 2004, at 8, available at LexisNexis, 28 Champion 8 (“Cross-examination tends to focus on the witness's [s] confidence, a very misleading indicator. Wrong, and impeached, a confident witness is still likely to be believed.”).

<sup>151</sup> LOFTUS, *supra* note 7, at 177; Douglass & Steblay, *supra* note 39, at 865.

subject his accuser to meaningful cross-examination.”<sup>152</sup> In addition, surveys of jurors indicate that jurors tend to not understand that memory does not operate in a fashion similar to a video camera, but is largely reconstructive in nature.<sup>153</sup> For these reasons, jurors may have difficulty determining the reliability of an eyewitness’s identification based on the eyewitness’s demeanor or based on the jurors’ intuitive understanding of memory.

The discrepancy between the heavy weight jurors tend to place on eyewitness identification testimony and the potential unreliability of eyewitness identifications makes eyewitness identification testimony a particularly troublesome issue. Although eyewitness identification can be distorted by many factors, it remains a crucial type of evidence used to bring the guilty to justice. Thus, the legal system must balance the need for eyewitness identification testimony with the dangers of its unreliability.

In attempting to reach this balance between the utility of eyewitness identification evidence and the harmful effects of its unreliability, the Supreme Court has treated eyewitness identification testimony differently than other types of eyewitness testimony.<sup>154</sup> The Court recognized the uniqueness of eyewitness identifications, singling out eyewitness identification testimony in *Stovall*, *Biggers*, and *Manson*.<sup>155</sup> In establishing that all identifications yielded from unnecessarily suggestive police procedures should be screened for indicia of reliability,<sup>156</sup> the Court suggests that eyewitness identifications are distinguishable from other types of eyewitness testimony. In *Manson*, the Court stated that the eyewitness identification line of cases “reflect[s] the concern that the jury not hear eyewitness testimony unless that evidence has aspects of reliability.”<sup>157</sup> In the *Manson* line of cases, the Court felt that some types of eyewitness identification evidence were sufficiently unreliable to warrant allowing the judge to screen the evidence for reliability, thus taking

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<sup>152</sup> *Perry*, 132 S. Ct. at 732 (Sotomayor, J., dissenting) (citing *Stovall v. Denno*, 388 U.S. 293, 298 (1967)).

<sup>153</sup> Schmechel et al., *supra* note 115, at 191, 195.

<sup>154</sup> See *Perry*, 132 S. Ct. at 720–21 (describing the safeguards for eyewitness identification testimony); *Manson v. Brathwaite*, 432 U.S. 98, 98–99 (1977); *Neil v. Biggers*, 409 U.S. 188, 196–97 (1972); *Stovall*, 388 U.S. at 294.

<sup>155</sup> *Perry*, 132 S. Ct. at 731, 735 (Sotomayor, J., dissenting); *Manson*, 432 U.S. at 98–99; *Biggers*, 409 U.S. at 196–97; *Stovall*, 388 U.S. at 294.

<sup>156</sup> See, e.g., *Perry*, 132 S. Ct. at 720 (“This Court has recognized . . . a due process check on the admission of eyewitness identification, applicable when the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime.”).

<sup>157</sup> *Manson*, 432 U.S. at 112. The Court concluded “that reliability is the linchpin in determining the admissibility of identification testimony.” *Id.* at 114.



this task away from the jury.<sup>158</sup> Though the court in *Perry* limited this screening role to cases in which the police orchestrated suggestive identification procedures,<sup>159</sup> the underlying rationale of promoting reliability in eyewitness identifications is present with or without improper police behavior.<sup>160</sup>

This Comment posits that eyewitness identification testimony—with its numerous potential sources of unreliability, capacity to influence the jury, and resistance to the ordinary tests of the adversarial process—is distinguishable from other types of evidence. Because eyewitness identification testimony is unique in this regard, this Comment proposes that the heightened evidentiary standard for admitting expert testimony—as articulated in *Daubert v. Merrell Dow Pharmaceuticals* and Federal Rule of Evidence 702<sup>161</sup>—should inform courts on whether to admit eyewitness identification testimony. Because *Daubert*'s heightened standard places an emphasis on reliability, which is also the primary concern in admitting eyewitness identification evidence,<sup>162</sup> *Daubert* should serve as an example of the approach courts should take in addressing eyewitness identification evidence, with the goal of reducing the number of mistaken identifications that result in false convictions.

### III. *DAUBERT*'S HEIGHTENED EVIDENTIARY STANDARD

The heightened evidentiary standard for admitting expert evidence can inform courts about how to approach the problem of unreliable eyewitness identification evidence. Part III discusses the heightened standard of reliability for admitting expert evidence under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals*.

#### A. *Daubert Framework*

Courts have long applied heightened evidentiary requirements to scientific evidence and other types of expert evidence.<sup>163</sup> Currently, federal courts adhere to the heightened admissibility standard for scientific evidence articulated in

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<sup>158</sup> *Id.* at 112.

<sup>159</sup> *Perry*, 132 S. Ct. at 720.

<sup>160</sup> *Perry*, 132 S. Ct. at 731 (Sotomayor, J., dissenting).

<sup>161</sup> FED. R. EVID. 702.

<sup>162</sup> *Perry*, 132 S. Ct. at 731 (Sotomayor, J., dissenting).

<sup>163</sup> *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591–92 (1993); *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

*Daubert v. Merrell Dow Pharmaceuticals* and Federal Rule of Evidence 702.<sup>164</sup>

In *Daubert*, the Court noted that to be admissible, all scientific evidence must be not only relevant but also reliable.<sup>165</sup> It required that trial courts serve a gatekeeping function, ensuring that any scientific evidence admitted at the trial meets both the requirements of relevance and reliability.<sup>166</sup> To serve this gatekeeping function, when faced with expert scientific testimony,<sup>167</sup> trial courts must determine at the outset of the trial “whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.”<sup>168</sup> The Court listed several factors for courts to consider in making the determination of whether expert evidence is scientific knowledge that will assist the trier of fact.<sup>169</sup> For example, courts in their gatekeeping role should consider whether the scientific theory or technique has been tested.<sup>170</sup> Additionally, courts should consider whether the scientific theory or technique has been peer reviewed and published.<sup>171</sup> Courts

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<sup>164</sup> FED. R. EVID. 702; *Daubert*, 509 U.S. at 591–92. Rule 702 of the Federal Rules of Evidence (“FRE”) provides: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise . . . .” FED. R. EVID. 702. Though Rule 702 and *Daubert* provide the admissibility standard for expert evidence in federal courts, another standard is applied in several states. Edward K. Cheng & Albert H. Yoon, Essay, *Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards*, 91 VA. L. REV. 471 (2005). This standard was first articulated in *Frye v. United States*, finding that the standard for admitting scientific evidence was a “general acceptance” test in which novel scientific evidence was only admissible if the evidence was generally accepted in the scientific community. *Frye*, 293 F. at 1014. While the majority of state courts later adopted versions of the FRE and thus apply the *Daubert* standard, Cheng & Yoon, *supra*, at 473, some states—including New York and California—continue to adhere to the *Frye* general-acceptance test. See *People v. Leahy*, 882 P.2d 321, 331 (Cal. 1994) (in bank); *People v. Wernick*, 674 N.E.2d 322 (N.Y. 1996) (applying the *Frye* test).

<sup>165</sup> *Daubert*, 509 U.S. at 591–92.

<sup>166</sup> *Id.* at 589. These requirements are often referred to as “fit” and reliability. Note, *Reliable Evaluation of Expert Testimony*, 116 HARV. L. REV. 2142, 2152 & n.50 (2003). “Fit” encompasses how well the expert evidence pertains to the issue in the case. *Id.*

<sup>167</sup> The Court in footnote eleven of the *Daubert* opinion interpreted Rule 702 to apply to all scientific evidence, not just novel scientific evidence. *Daubert*, 509 U.S. at 592 n.11.

<sup>168</sup> *Id.* at 592; see also Linda Sandstrom Simard & William G. Young, *Daubert’s Gatekeeper: The Role of the District Judge in Admitting Expert Testimony*, 68 TUL. L. REV. 1457, 1458 (1994).

<sup>169</sup> *Daubert*, 509 U.S. at 593–94. The Court noted, however, that this list of factors is not a definitive checklist; rather, additional factors may be considered when appropriate. *Id.* at 593. For example, the Ninth Circuit considered whether the expert testimony was prepared exclusively for litigation. *Metabolife Int’l, Inc. v. Wornick*, 264 F.3d 832, 841 (9th Cir. 2001). The Eighth Circuit added a factor relating to whether the expert has eliminated other possible explanations. *Lauzon v. Senco Prods., Inc.*, 270 F.3d 681, 687 (8th Cir. 2001).

<sup>170</sup> *Daubert*, 509 U.S. at 593.

<sup>171</sup> *Id.*

should also consider the rate of error associated with the scientific theory or technique at issue as well as its general acceptance.<sup>172</sup>

After *Daubert* articulated the trial court's gatekeeping role in ensuring the reliability of scientific evidence, two subsequent cases clarified the reach of *Daubert*.<sup>173</sup> In *Kumho Tire Co. v. Carmichael*, the Court extended trial courts' gatekeeping function to the determination of the reliability of all expert evidence, not just expert scientific evidence.<sup>174</sup> Further, in *General Electric Co. v. Joiner*, the Court determined that an abuse-of-discretion standard is appropriate in reviewing a trial court's ruling on the admissibility of expert testimony.<sup>175</sup>

### B. Rationale for Heightened Standard for Expert Evidence

With modern advances in science and technology, scientific and other expert evidence has gained importance in both civil and criminal cases.<sup>176</sup> However, the increased presence of science and technology in the legal system has also caused hesitation about admitting "junk science" and other expert testimony that may contain errors.<sup>177</sup> Further, the introduction of expert testimony also raised concerns about the trust the jury ascribes to experts.<sup>178</sup> Expert testimony is meant to educate jurors, teaching them about the scientific or technical knowledge necessary to understand a case.<sup>179</sup> Thus, by definition, expert testimony consists of matters that are beyond the ken of the jurors, meaning that the jurors have no basis with which to evaluate reliability of the

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<sup>172</sup> *Id.* at 594.

<sup>173</sup> *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147–48 (1999); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 138–39 (1997); see also G. Michael Fenner, *The Daubert Handbook: The Case, Its Essential Dilemma, and Its Progeny*, 29 CREIGHTON L. REV. 939, 942 (1996); Megan Dillhoff, Note, *Science, Law, and Truth: Defining the Scope of the Daubert Trilogy*, 86 NOTRE DAME L. REV. 1289, 1295–99 (2011).

<sup>174</sup> 526 U.S. at 147. Extending the *Daubert* gatekeeping–reliability framework beyond scientific evidence to all expert testimony may necessitate that courts consider different factors than the ones originally listed in *Daubert*: the factors in *Daubert* are most helpful in determining the admissibility of scientific testimony. *Id.* at 150–51. For other types of expert testimony, the Court noted that trial courts have discretion to select factors to be considered in the admissibility determination. *Id.*

<sup>175</sup> *Joiner*, 522 U.S. at 139.

<sup>176</sup> 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5168, at 86 & n.1 (1978).

<sup>177</sup> James E. Starrs, *There's Something About Novel Scientific Evidence*, 28 SW. U. L. REV. 417, 418–19 (1999).

<sup>178</sup> Victor E. Schwartz & Cary Silverman, *The Draining of Daubert and the Recidivism of Junk Science in Federal and State Courts*, 35 HOFSTRA L. REV. 217, 220–21 (2006).

<sup>179</sup> *Id.*

scientific or technical testimony.<sup>180</sup> Due to their lack of scientific and technical knowledge, jurors are reliant on the expert witness to interpret the scientific or technical information, making them likely to put faith in the expert's testimony or even to overestimate the significance of results that the expert reports.<sup>181</sup> In this way, there is the potential for expert testimony to mislead the jury because jurors have no background with which to evaluate the expert testimony for accuracy or reliability.<sup>182</sup>

For this reason, courts have been wary of allowing all expert evidence to be admissible.<sup>183</sup> Federal Rule of Evidence 702 and *Daubert* were formulated to address this danger of unreliable expert testimony through a special, heightened standard for the admission of scientific and expert evidence.<sup>184</sup>

*Daubert* imposes a heightened standard of admissibility for scientific and technical information, with the trial judge acting as the gatekeeper.<sup>185</sup> The paradigm created by *Daubert* is one in which the jury is prevented from exercising its usual role in determining the credibility and reliability of witnesses.<sup>186</sup> However, the Court in *Daubert* found that the reliability concerns of expert scientific and technical testimony were significant enough to justify allowing trial judges to decide what is typically within the province of the jury.<sup>187</sup> By entrusting trial judges with a gatekeeping role, the Court indicated that the dangers of unreliable testimony—in the case of *Daubert*, the danger of the jury being taken in by an aura of expertise—can take precedence over the traditional roles of the judge and jury.<sup>188</sup>

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<sup>180</sup> *Id.* at 220; see Nancy A. Miller, *Daubert and Junk Science: Have Admissibility Standards Changed?*, 61 DEF. COUNS. J. 501, 516 (1994).

<sup>181</sup> See Miller, *supra* note 180, at 503 (explaining that jurors may find an innocent defendant liable based solely upon the “unreliable or spurious scientific reasoning” of expert witnesses). Studies have shown that jurors tend to accept expert evidence, particularly if the expert is qualified, is familiar with the facts of the case, and has good communicative skills. Daniel W. Shuman et al., *Juror Assessments of the Believability of Expert Witnesses: A Literature Review*, 36 JURIMETRICS J. 371, 379–80, 382 (1996).

<sup>182</sup> Schwartz & Silverman, *supra* note 178, at 220.

<sup>183</sup> Starrs, *supra* note 177, at 418–19. As the Court in *Daubert* noted, “Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it.” 509 U.S. 579, 595 (1993) (quoting Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence Is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991)).

<sup>184</sup> See Starrs, *supra* note 177, at 418; see also *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) (explaining the rule of admissibility for scientific expert testimony before *Daubert*).

<sup>185</sup> *Daubert*, 509 U.S. at 592.

<sup>186</sup> Schwartz & Silverman, *supra* note 178, at 224–26.

<sup>187</sup> See *Daubert*, 509 U.S. at 592.

<sup>188</sup> See *id.* at 589, 593, 596–97.

The next Part argues that the rationale underlying the adoption of a gatekeeping standard for scientific and technical evidence—the danger of unreliability due to the distinctive features of the evidence and the persuasiveness of the witness that is testifying—is similar to the danger of unreliability in eyewitness identification testimony. Thus, it proposes that *Daubert*'s heightened admissibility standard should inform courts about how to approach the problem of unreliability in eyewitness identification testimony.

#### IV. APPLYING A HEIGHTENED STANDARD OF ADMISSIBILITY TO EYEWITNESS IDENTIFICATION TESTIMONY

As described above, eyewitness identification evidence is often unreliable,<sup>189</sup> highly persuasive to juries,<sup>190</sup> and at least partially resistant to the built-in protections of the adversarial system.<sup>191</sup> Because of this distinctive combination of characteristics, eyewitness identification evidence poses a particularly worrisome danger of leading to a miscarriage of justice—which distinguishes it from eyewitness evidence more generally.<sup>192</sup>

Accordingly, eyewitness identification evidence warrants additional judicial scrutiny that differs from the typical standard for other types of eyewitness evidence. This Part sets out a novel framework to address this need for added safeguards for eyewitness identification information. Section A draws parallels between the rationales for the heightened admissibility standard for expert scientific evidence in *Daubert* and this Comment's proposed recommendation for additional judicial attention for eyewitness identification evidence. Section B then advocates for a novel framework in which *Daubert*'s heightened standard for admitting expert scientific evidence—based on a reliability assessment—informs trial courts about how to approach the admissibility of eyewitness identification evidence by similarly assessing the evidence for its reliability. Under this proposed framework, trial courts would consider both system and estimator variables in determining the reliability of eyewitness identification evidence.

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<sup>189</sup> See *supra* text accompanying notes 131–33.

<sup>190</sup> See *supra* text accompanying notes 131–38.

<sup>191</sup> *Perry v. New Hampshire*, 132 S. Ct. 716, 730–31 (2012) (Sotomayor, J., dissenting).

<sup>192</sup> See *id.*

### A. *Eyewitness Identification Evidence Compared to Expert Evidence*

A driving force behind the heightened standard for expert scientific and technical evidence was the fear of inaccurate, unreliable science being admitted into evidence.<sup>193</sup> A similar rationale exists with eyewitness identification evidence: courts have long recognized the potential inaccuracy and unreliability of eyewitness identifications.<sup>194</sup>

Further, for expert scientific and technical evidence, the potential unreliability of the evidence was not the only factor that led the Court to impose a heightened admissibility standard.<sup>195</sup> Rather, the inability of jurors to evaluate the reliability of expert scientific and technical evidence served as another important consideration.<sup>196</sup> Scientific and technical information is beyond the understanding of a typical juror, and thus the jury has no body of knowledge with which to evaluate the accuracy or reliability of the expert evidence.<sup>197</sup> As a result, the jury is reliant on the expert's testimony.<sup>198</sup> Similarly, for eyewitness identification evidence, jurors are also unable to evaluate the reliability of eyewitness identification testimony because jurors have little conception about how factors such as confidence and stress level affect the reliability of an identification.<sup>199</sup> Additionally, the jury is impeded in evaluating the reliability of eyewitness identification testimony because unreliable testimony in this area may arise from a mistaken identification, not an intentionally misleading one.<sup>200</sup> Therefore, typical safeguards based on the veracity of the witness do not help the jury when the eyewitness is genuinely mistaken.<sup>201</sup>

Thus, just as with expert evidence, eyewitness identification evidence suffers from the danger of unreliability coupled with the jury's inability to evaluate the level of reliability of the evidence presented.<sup>202</sup> In *Daubert*, the Court found this combination of factors to be compelling enough to impose a heightened standard of admissibility for expert evidence, dependent on the trial

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<sup>193</sup> See Schwartz & Silverman, *supra* note 178, at 224–26.

<sup>194</sup> *Manson v. Brathwaite*, 432 U.S. 98, 111–12 (1977).

<sup>195</sup> Schwartz & Silverman, *supra* note 178, at 219–20, 224–26.

<sup>196</sup> *Id.* at 219–20.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> Schmechel et al., *supra* note 115, at 194.

<sup>200</sup> See Epstein, *supra* note 113 (referring to the limits of cross-examination in confronting truthful, but mistaken, witnesses).

<sup>201</sup> *Id.*; Wells et al., *supra* note 38, at 609.

<sup>202</sup> See Epstein, *supra* note 113; Wells et al., *supra* note 38, at 609.

judge's finding of reliability.<sup>203</sup> In doing so, the Court departed from the traditional role of the jury—to assess a witness's credibility and reliability—and instead redistributed this role to trial courts through Federal Rule of Evidence 702.<sup>204</sup>

Similarly, courts should consider the rationale behind the heightened standard of admissibility for expert scientific evidence, rooted in a trial judge's reliability assessment, when considering the admissibility of eyewitness identification evidence. Although recommending that courts consider the principles underlying *Daubert* in admitting eyewitness identification evidence may invade the traditional province of the jury to determine reliability, this intrusion is justifiable. First, as with expert evidence, a combination of factors makes eyewitness identification evidence a uniquely troublesome area that a judge may be more suited to decide.<sup>205</sup> Second, the consequences of unreliable evidence in eyewitness identification testimony could be as grave as the consequences of unreliable expert testimony in criminal cases because both inaccurate expert testimony and mistaken eyewitness identification can result in wrongful convictions.

*B. Proposal for Daubert Serving as a Model for Admissibility Assessments in Eyewitness Identification Evidence*

To address the problem of unreliable eyewitness identification evidence, this Comment proposes that trial courts should look to *Daubert* as a loose model when making an admissibility decision for this type of evidence, drawing on *Daubert*'s emphasis on the reliability of the evidence as the key to its admissibility. Under this proposed approach, the trial judge, similar to judges following the *Daubert* framework, would evaluate the reliability of eyewitness identification evidence as a factor in its admissibility. The proposed framework would depart from the *Manson* due process test<sup>206</sup> in several ways.

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<sup>203</sup> See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595 (1993).

<sup>204</sup> Schwartz & Silverman, *supra* note 178, at 218, 224–26.

<sup>205</sup> See *Perry v. New Hampshire*, 132 S. Ct. 716, 730–31 (2012) (Sotomayor, J., dissenting).

<sup>206</sup> Under the *Manson* due process test for evaluating the admissibility of eyewitness identification evidence, courts first determine if the identification was yielded from an impermissibly suggestive identification procedure. *Manson v. Brathwaite*, 432 U.S. 98, 110 (1977). As *Perry* clarified, this step only applies to police-orchestrated suggestive procedures. *Perry*, 132 S. Ct. at 730. Then, if the procedure was found to be impermissibly suggestive, the court looks to the “totality of the circumstances” to determine if the identification is nevertheless reliable. *Manson*, 432 U.S. at 106. Factors to be considered under the totality of the circumstances include view, attention, certainty, time between the crime and the identification, and accuracy of the description. *Id.* at 114–16.

First, it would not be based on due process, but instead on an evidentiary reliability rationale. Second, the proposed framework differs from the current approach because it would apply more broadly to all eyewitness identification evidence, not just evidence resulting from suggestive circumstances. Finally, the proposed framework would consider a range of both estimator and system variables under the totality of the circumstances.

### 1. *A Shift from a Due Process Rationale to an Evidentiary One*

The suggested framework outlined below does not argue for an extension of due process protection to eyewitness identifications made under any suggestive circumstances, as the majority in *Perry* contemplated and rejected.<sup>207</sup> In *Perry*, the Court was concerned that extending due process protections to non-police-orchestrated suggested procedures would result in “vast enlargement of the reach of due process as a constraint on the admission of evidence.”<sup>208</sup> The proposed framework does not raise the same concern, for the suggested framework does not rest on a due process basis at all. Instead, this Comment contemplates a framework that would be based on evidentiary concerns about the reliability of eyewitness identification testimony. Further, its adoption would be discretionary upon the states.

While this Comment does not advocate for enlarging the reach of due process, the centrality of reliability in the due process cases highlights how crucial reliability determinations are to eyewitness identifications. The Court in *Perry* rightly noted that the potential for unreliability of a type of evidence does not alone cause its admission to be unfair; specifically, it stated that jailhouse informant testimony is also notoriously unreliable yet is routinely admissible without any reliability prescreening by a trial court.<sup>209</sup> However, in making this comparison, the Court overlooked the elements of eyewitness identification evidence that make its unchecked admittance more unfair than admittance of other types of unreliable evidence. As the dissent in *Perry* noted, jailhouse informant testimony is viewed with skepticism by the jury.<sup>210</sup> Thus, this type of unreliable testimony is distinguishable because it is likely to be scrutinized by the jury, whereas eyewitness identification testimony is typically highly influential with the jury and imminently believable.<sup>211</sup>

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<sup>207</sup> See *supra* text accompanying notes 82–84.

<sup>208</sup> *Perry*, 132 S. Ct. at 727.

<sup>209</sup> *Id.* at 728.

<sup>210</sup> *Id.* at 738 (Sotomayor, J., dissenting).

<sup>211</sup> *Id.*



Other types of evidence raise similar reliability concerns and are subject to special evidentiary treatment outside of due process protections; for example, both hypnotically refreshed testimony and polygraph evidence have limited admissibility or are not admissible, based on concerns that are mirrored in eyewitness identification testimony.<sup>212</sup> In particular, research has shown that hypnotically refreshed testimony has the potential to be unreliable and yet instill a high sense of false confidence in an eyewitness.<sup>213</sup> Many courts have responded to this unreliability by limiting the admissibility of hypnotically refreshed testimony.<sup>214</sup> The concern about the unreliability of hypnotically refreshed testimony is analogous to the problem of unreliable eyewitness identification testimony, for eyewitness identification evidence has similar problems of unreliability, which may be coupled with a false sense of confidence. Thus, limiting admissibility of eyewitness identification evidence under the proposed revision of the totality-of-the-circumstances framework is consistent with courts' treatment of other unreliable types of evidence.

Further, Federal Rule of Evidence 702 and *Daubert*'s heightened standard of admissibility for expert scientific evidence is another area that conditions admissibility upon reliability concerns, not due process.<sup>215</sup> As noted above, the problem of unchecked, unreliable expert evidence was the driving force behind *Daubert* as well.<sup>216</sup> As the treatment of hypnotically refreshed testimony and expert evidence suggests, a reliability-based evidentiary standard for eyewitness identification evidence could find support in other reliability-based evidentiary doctrines.

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<sup>212</sup> See, e.g., *United States v. Scheffer*, 523 U.S. 303, 312 (1998) (finding that "excluding polygraph evidence in all military trials . . . is a rational and proportional means of advancing the legitimate interest in barring unreliable evidence"); *People v. Shirley*, 723 P.2d 1354, 1366 (Cal. 1982) (in bank) (adopting several procedural requirements that must be met before a party may introduce hypnotically refreshed testimony); *State v. Moore*, 902 A.2d 1212, 1213 (N.J. 2006) (noting that because it is unclear "whether post-hypnotic testimony can ever be as reliable as testimony that is based on ordinary recall . . . hypnotically refreshed testimony of a witness in a criminal trial is generally inadmissible").

<sup>213</sup> See, e.g., *Shirley*, 723 P.2d at 1366; *Moore*, 902 A.2d at 1213. The issue of hypnotically refreshed testimony arises when an eyewitness undergoes hypnosis with the aim of helping them to remember a particular event, such as a crime, in greater detail. See, e.g., *Shirley*, 723 P.2d at 1363. Hypnotically refreshed testimony is deemed highly unreliable due to the heightened suggestibility of a hypnotized witness, which may cause the witness to manufacture false statements. *Id.* at 1362-64.

<sup>214</sup> See, e.g., *Shirley*, 723 P.2d at 1366; *Moore*, 902 A.2d at 1213.

<sup>215</sup> See *supra* text accompanying notes 183-84.

<sup>216</sup> See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590-91 (1993).

## 2. A Broader Test for Reliability

The current *Manson* framework has a reliability component, in which the judge must determine whether an unnecessarily suggestive procedure is so unreliable that it violates due process.<sup>217</sup> Importantly, under *Manson*, the court only reaches the issue of reliability if it first finds that law enforcement orchestrated an unnecessarily suggestive procedure.<sup>218</sup> However, the use of suggestive procedures to elicit potentially unreliable eyewitness testimony is damaging to the defendant regardless of whether the suggestive procedures in question were orchestrated by the police.<sup>219</sup> Distinguishing between police-orchestrated and non-police-orchestrated suggestive procedures shifts the focus of the eyewitness identification problem away from unreliability, which is the main concern.<sup>220</sup> In fact, the Court in *Manson* emphasized that “reliability is the linchpin in determining the admissibility of identification testimony”;<sup>221</sup> yet, by limiting the reliability determination to circumstances involving improper police behavior, the Court allowed juries to hear potentially unreliable eyewitness identifications. Further, the Court’s decision in *Perry*—which limited due process protections to suggestive circumstances orchestrated by the police and not to all other suggestive circumstances<sup>222</sup>—glossed over the reality that eyewitness identifications can be equally unreliable under any suggestive circumstances, regardless of the cause.

The suggested approach in this Comment addresses this problem. Instead of drawing distinctions between formal, police-orchestrated suggestive circumstances and informal suggestive circumstances that arise without police involvement, this Comment argues for a broader division—one between eyewitness identifications and all other types of eyewitness evidence. As the psychological literature on eyewitness identifications and memory suggests, eyewitness identification evidence presents a unique problem within the general category of eyewitness evidence—it is particularly unreliable and beyond the understanding of the jury.<sup>223</sup>

In the realm of expert scientific evidence and *Daubert*, these characteristics—unreliability and being beyond the ken of the jury—merit

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<sup>217</sup> See *supra* text accompanying notes 56–64.

<sup>218</sup> *Manson v. Brathwaite*, 432 U.S. 98, 107 (1977).

<sup>219</sup> *Perry v. New Hampshire*, 132 S. Ct. 716, 731 (Sotomayor, J., dissenting).

<sup>220</sup> See *id.*

<sup>221</sup> *Manson*, 432 U.S. at 114.

<sup>222</sup> *Perry*, 132 S. Ct. at 720–21.

<sup>223</sup> See *supra* text accompanying notes 148–53.

judicial screening for reliability of all expert scientific evidence that any party seeks to admit. This feature of *Daubert*, with its emphasis on reliability, would be helpful to trial courts in determining the admissibility of eyewitness identification evidence: trial courts could determine the reliability of all eyewitness identifications as a central component of admissibility.

Thus, all eyewitness identification evidence, regardless of the presence or absence of suggestive circumstances and regardless of police orchestration, should be reviewed for indicia of reliability. This change would shift the court's consideration away from the narrow issue of the involvement of law enforcement—which is tangential to reliability—to an actual reliability evaluation that includes not only system variables, such as suggestive police procedures, but also estimator variables such as cross-race identifications.

### 3. *Consideration of Both System and Estimator Variables in the Totality of the Circumstances*

Currently, the courts use a totality-of-the-circumstances test to evaluate the reliability of eyewitness identifications under *Manson*.<sup>224</sup> The idea underlying this test is commendable—the reliability of an identification is not readily determined, and there are many factors that likely contribute to an unreliable identification.<sup>225</sup> Thus, the proposed framework maintains a totality-of-the-circumstances test for determining the reliability of eyewitness identification evidence, which will in turn help determine the admissibility of the evidence. However, the factors the Court set out in *Manson*—view, attention, accuracy, confidence, and the passing of time<sup>226</sup>—must be adjusted to align with current research on eyewitness identifications. Further, the proposed framework argues that courts should consider both system<sup>227</sup> and estimator variables<sup>228</sup> as part of the analysis under the totality of the circumstances.

Modern psychological research on eyewitness memory draws attention to the need to make some alterations to the current *Manson* factors. Although estimator variables are outside of the control of the justice system, they still affect the reliability of an eyewitness identification and should thus be considered in the totality-of-the-circumstances test.

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<sup>224</sup> *Manson*, 432 U.S. at 110, 112.

<sup>225</sup> See *supra* text accompanying notes 7–9.

<sup>226</sup> *Manson*, 432 U.S. at 114.

<sup>227</sup> For a discussion of system variables, see *supra* Part I.A.2.

<sup>228</sup> For a discussion of estimator variables, see *supra* Part I.A.1.

Estimator variables that should be incorporated in the totality-of-the-circumstances reliability determination include the distance and lighting during observation of the crime as well as the time elapsed between the crime and the identification. Further, social science research has shown that eyewitnesses are less accurate at making cross-race identifications.<sup>229</sup> Thus, when considering the reliability of eyewitness identifications, courts should take into account the added difficulty of identifying persons of different races. Courts should also consider the eyewitness's stress level during the crime because research suggests that eyewitness identification memory is impaired when the eyewitness experiences a high level of stress.<sup>230</sup> The presence or absence of a weapon during the commission of the crime should also be a factor, because research suggests that eyewitnesses are prone to weapon focus, which detracts from their ability to accurately identify the perpetrator of a crime.<sup>231</sup>

Additionally, under the proposed framework, the *Manson* factor of eyewitness confidence would play a limited role in determining the reliability of an eyewitness identification because research has shown that confidence is a poor indicator of the reliability of an eyewitness identification.<sup>232</sup> Thus, when the trial judge considers the totality of the circumstances, the judge should not place significant weight on this factor.

In addition to these estimator variables that should be considered in the totality of the circumstances, the proposed framework also includes system variables in the reliability analysis. In the current *Manson* approach, courts consider system variables in the first prong, which asks whether there are unnecessarily suggestive circumstances orchestrated by the police.<sup>233</sup> However, as discussed above, *Manson*'s first prong creates an artificial distinction that is not grounded in the reliability of the eyewitness identification, and accordingly, courts should conduct a reliability determination for all eyewitness identification evidence. Thus, the proposed framework would necessarily jettison this prong of the *Manson* test, because there would no longer be a need to find suggestive circumstances in order to do a totality-of-the-circumstances reliability determination—the totality-of-the-circumstances

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<sup>229</sup> Note, *supra* note 12, at 976, 982.

<sup>230</sup> See *supra* text accompanying notes 19–21.

<sup>231</sup> See *supra* text accompanying note 21.

<sup>232</sup> Douglass & Steblay, *supra* note 39.

<sup>233</sup> *Manson v. Brathwaite*, 432 U.S. 98, 110 (1977).

determination would be the default for all eyewitness identifications.<sup>234</sup> Within the totality-of-the-circumstances determination, the court should consider the effects of various system variables on reliability.

System variables that courts should consider in this totality-of-the-circumstances test include characteristics of a lineup procedure. For example, courts should address whether the identification was elicited from a double-blind lineup procedure—in which the lineup administrator does not know who the prime suspect is in the lineup—because this procedure helps reduce inaccuracies in identification caused by the lineup administrator’s bias toward a particular lineup member.<sup>235</sup> Further, another factor is whether the eyewitness was given unbiased pre-identification lineup instructions informing the eyewitness that the perpetrator may not be present in the lineup—research suggests that this instruction reduces the number of mistaken identifications in lineups where the perpetrator is absent.<sup>236</sup> Trial courts should also consider whether eyewitnesses were given positive feedback because feedback reinforcing eyewitnesses’ choice from a lineup can inflate their confidence in the identification.<sup>237</sup> Further, courts should address whether the lineup contains a sufficient number and type of fillers and whether the lineup was simultaneous or sequential.<sup>238</sup> If law enforcement did not utilize a formal lineup but instead actively or passively allowed the eyewitness to make an identification based on a show-up, this is a factor to be considered in the totality of the circumstances affecting reliability and thus admissibility.<sup>239</sup>

As outlined above, this framework envisions reliability screening for all eyewitness identification evidence and not just identifications made under police-orchestrated suggestive procedures. Further, it considers both system and estimator variables in the reliability determination. Because of this broadened scope of review, this framework may require increased judicial time and resources compared to the current *Manson* test. However, the goal of this

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<sup>234</sup> In a recent state court opinion on eyewitness testimony, the New Jersey Supreme Court implemented its own revision of the *Manson* test, incorporating many of the additional system and estimator variables that are explored below. *State v. Henderson*, 27 A.3d 872, 920–21 (N.J. 2011). However, the New Jersey Supreme Court preserved *Manson*’s two-step structure: it continues to require a showing of suggestive circumstances in lineup conditions before conducting a full analysis of both system and estimator variables that might affect reliability. *Id.*

<sup>235</sup> See *supra* text accompanying notes 37–38.

<sup>236</sup> See *supra* text accompanying notes 29–32.

<sup>237</sup> See *supra* text accompanying notes 39–41.

<sup>238</sup> See *supra* text accompanying notes 33–36.

<sup>239</sup> *Henderson*, 27 A.3d at 902–03.

framework—to reduce mistaken eyewitness identifications—makes the use of these additional judicial resources worthwhile. Further, having more stringent requirements for eyewitness identification evidence may result in the inadmissibility of accurate eyewitness identifications on occasion. To address this concern, the proposed framework aims to be more sensitive to factors of reliability in eyewitness identification compared to the *Manson* test, considering a wider variety of both system and estimator variables under the totality of the circumstances.

Thus, this Comment argues that *Daubert's* emphasis on the reliability of expert scientific evidence as a condition for admissibility should inform courts about how to approach the admissibility of eyewitness identification evidence because reliability concerns are paramount in eyewitness identification evidence as well. Under the proposed framework, the reliability of eyewitness identification evidence is key. The proposed framework screens all eyewitness identification evidence for reliability due to the unique nature of eyewitness identification testimony that distinguishes it from other types of evidence. The reliability determination of eyewitness identification evidence should be based on a totality-of-the-circumstances assessment in which both system and estimator variables are considered.

#### CONCLUSION

As the Supreme Court has acknowledged, “the annals of criminal law are rife with instances of mistaken identification.”<sup>240</sup> Because eyewitness identification evidence is distinctive in its combination of unreliability, influence on the jury, and resistance to the traditional protections of the adversarial system, it should be scrutinized more closely than other types of eyewitness evidence. In particular, courts should apply a discretionary framework in which they base the admissibility of eyewitness identification evidence upon its reliability, much in the same way that expert scientific evidence is subject to a heightened reliability-based scrutiny under *Daubert*. Under this framework, all eyewitness identifications should be subject to a reliability determination, regardless of suggestive circumstances during the identification procedure, because eyewitness identification reliability can be affected by both procedural system variables as well as intrinsic estimator variables. Thus, in considering the reliability of an eyewitness identification,

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<sup>240</sup> Perry v. New Hampshire, 132 S. Ct. 716, 728 (2012) (quoting United States v. Wade, 388 U.S. 218, 228 (1967)).

courts should look to the totality of the circumstances, considering both estimator variables and system variables as they contribute to a reliability assessment.

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\* Notes and Comments Editor, *Emory Law Journal*; J.D., Emory University School of Law (2013). I would like to thank my advisor, Julie Seaman, for all of her advice and support throughout the writing process. I would also like to thank the editors of the *Emory Law Journal* for their work and attention to detail during revisions. Finally, I would like to thank my parents for all of their support, not only as I was writing this piece but also over the course of the last three years.