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Who Could it be Now? Challenging the Reliability of First Time In-Court Identifications After State v. Henderson and State v. Lawson

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WHO COULD IT BE NOW? CHALLENGING THE RELIABILITY OF FIRST TIME IN-COURT IDENTIFICATIONS AFTER *STATE V. HENDERSON* AND *STATE V. LAWSON*

ALIZA B. KAPLAN* & JANIS C. PURACAL**

Despite the recent advances in assessing the reliability of eyewitness identifications, the focus to date has largely been identifications made pretrial. Little has been written about identifications made for the first time in the courtroom. While in-court identifications have an extraordinarily powerful effect on juries, all such identifications are potentially vulnerable to post-event memory distortion and decay. Absent an identification procedure that effectively tests the witness's memory, it is impossible to know if the witness's identification of the defendant is a product of his or her original memory or a product of the extraordinarily suggestive circumstances created by the in-court identification procedure. In this article, the authors discuss the science related to memory and perception and how the courts have historically addressed claims of suggestiveness in the context of eyewitness identifications and, specifically, how they have handled first time in-court identifications. They analyze the issue of first time, in-court identifications under the new legal frameworks established by the Oregon Supreme Court in State v. Lawson (2012) and the New Jersey Supreme Court in State v. Henderson (2011), which both recognize 30 years of science proving that memories are malleable and easily influenced by outside forces. They argue that, in all states, first time, in-court identifications should be

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inadmissible, forcing the state to conduct a reliable out-of-court identification, whether pretrial or with leave during trial.

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I. INTRODUCTION

In 1979, a woman identified John Jerome White as the intruder who broke into her home in Georgia and raped and robbed her while she was asleep on the couch.[1] After White served more than twelve years in prison for rape, assault, burglary, and robbery, DNA evidence conclusively proved that the victim identified the wrong man. The DNA proved that, not only was White *not* the rapist, another man, James Parham, was the actual perpetrator. The victim identified White even though Parham, the man who actually

[1] *John Jerome White*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Johncases-false-imprisonment/john-jerome-white (last visited Sept. 30, 2015).

attacked her, was present in the live lineup.

In 1995, four victims identified Patrick Waller as the man who robbed them, tied them up, and sexually assaulted one of them in an abandoned house.[2] All four witnesses identified Waller at trial, and despite alibi testimony, he was convicted and sentenced to life in prison. After serving more than 15 years in prison, DNA evidence conclusively proved that Waller did not commit the crime and another man, Byron Bell, was the real attacker. The Dallas District Attorney's Conviction Integrity Unit reviewed the case and obtained confessions from Bell and his accomplice, Lemondo Simmons. Waller was freed on July 3, 2008, after serving more than 15 years in prison for a crime he did not commit.

Eyewitness misidentification is one of the leading causes of wrongful convictions nationwide, playing a role in about 70% of convictions overturned through DNA testing.[3] More than 30 years of social science research has proven that eyewitness identification is often inaccurate and unreliable.[4] Despite its proven inaccuracy, eyewitness identification is still used to target suspects in nearly 80,000 cases each year.[5]

Much has been written about eyewitness identification and wrongful convictions.[6] This article will focus on in-court identifications—specifically, the use of first time, in-court stranger identifications where there was no pretrial identification (e.g., lineup)[7]—and how the body of social science

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[2] *Patrick Waller,* INNOCENCE PROJECT, http://www.innocenceproject.org/cases-false-imprisonment/patrick-waller (last visited Sept. 30, 2015).

[3] *Eyewitness Misidentification*, INNOCENCE PROJECT, http://www.innocenceproject.org /understand/Eyewitness-Misidentification.php (last visited Sept. 30, 2015); *see also* State v. Henderson, 27 A.3d 872, 885 (N.J. 2011).

[4] *See* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 50 (2011) ("[E]yewitness testimony is among the least reliable forms of evidence and yet persuasive to juries.") (quoting Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 L. & HUM. BEHAV., 603, 605 (1998)).

[5] Henry F. Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*, 2 FED. CTS. L. REV. 1, 4 (2007) (citing Alvin G. Goldstein et al., *Frequency of Eyewitness Identification in Criminal Cases: A Survey of Prosecutors*, 27 BULL. PSYCHONOMIC SOC'Y 71–74 (1989)).

[6] *See, e.g.*, Jules Epstein, *Irreparable Misidentifications and Reliability: Reassessing the Threshold for Admissibility of Eyewitness Identification*, 58 VILL. L. REV. 69 (2013); Dana Walsh, *The Dangers of Eyewitness Identification: A Call for Greater State Involvement to Ensure Fundamental Fairness*, 54 B.C. L. REV. 1415 (2013).

[7] As early as 1996, even without the benefit of the breadth of the scientific evidence available today, Professor Evan Mandery argued for the per se exclusion of suggestive in-court identifications, finding "no basis in law or public policy to differentiate the treatment of

research undermines the reliability of such identifications. In first time, in-court identifications, a witness is identifying the defendant for the first time after he or she has already been identified by the state as the suspect and charged with the crime. The defendant is isolated at the defense table and is often the only person in the courtroom matching the perpetrator's description. As this article demonstrates, the courtroom is an inherently suggestive setting for a stranger identification conducted for the first time, and such an identification is particularly unreliable because the witness's memory inevitably decays or becomes distorted in the time between the incident and the defendant's trial.

We use as an example the case of Jerrin Hickman, an African-American male who was convicted of murder in Oregon after two young white women identified him for the first time in the courtroom at trial.[8] The authors of this article take no position on the merits of Hickman's conviction, but raise the case because the suggestiveness of the identifications casts a shadow of uncertainty on the conviction, leaving the integrity of its resolution open to debate—a result unsatisfying to prosecutors, defendants, and the courts.[9]

Hickman's case began on New Year's Eve 2007 when two young white women (D and N) were present when Christopher Monette was shot during a party in Northeast Portland, Oregon.[10] Police were called to investigate Monette's murder. Within hours of the shooting, D told the investigating officer that "she didn't see the shooting and really couldn't describe much," and, as a result, she "could not give specific descriptions of who was involved."[11] N could tell the officer only that the shooter was an African-American man wearing a "do-rag," who had a stocky build and was in his mid-twenties.[12] During the two years that passed between the night of the shooting and Hickman's trial, the state never conducted a lineup, photo array,

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in-court identifications from pre-trial identifications." Evan J. Mandery, *Due Process Considerations of In-Court Identifications*, 60 ALB. L. REV. 389, 391–92 (1996).

[8] State v. Hickman, 330 P.3d 551, 554–57 (Or. 2014).

[9] *See* Dana Carver Boehm, *The New Prosecutor's Dilemma: Prosecutorial Ethics and the Evaluation of Actual Innocence*, 2014 UTAH L. REV. 613, 669–71 (2014) (discussing how the increased visibility of wrongful convictions has created public pressure on prosecutors to ensure the reliability of criminal convictions); Hon. Jonathan Lippman, *Judiciary Examines Causes of Wrongful Convictions: New York State Task Force Issues Report*, 26 CRIM. JUST., Fall 2011, at 12 ("Every wrongful conviction is a stain on the reputation of the courts, eroding public trust and confidence in the legitimacy of our institutional status and the fairness and accuracy of our decisions.").

[10] *See Hickman*, 330 P.3d at 554–56.

[11] *Id.* at 555.

[12] *Id.* at 556.

or any other pretrial identification procedure to discover whether the two young women could identify Hickman or anyone else as the shooter.[13]

At trial, nearly two years after the shooting, D took the stand, saw Hickman seated at the defense table, and testified that she was "95 percent certain" that Hickman was the shooter.[14] For the very first time, D provided a detailed description of the shooter, which matched Hickman seated before her.[15] Also from the stand, N pointed to Hickman sitting at the defense table and identified him as the shooter.[16] Once again, for the first time in two years, N gave details about the shooter's appearance—all matching Hickman seated in front of her.[17] Hickman was convicted of Monette's murder and sentenced to life in prison based predominantly on these two first time, in-court stranger identifications.[18]

On appeal, the Oregon Supreme Court[19] ruled that the identifications in *Hickman* were properly admitted under *State v. Lawson*,[20] its 2012 landmark decision requiring major changes to evaluating identification evidence.[21] In *Lawson*, the court changed the standard for admissibility of eyewitness identification evidence to reduce the likelihood of wrongful convictions by taking into account more than 30 years of scientific research on eyewitness identification and memory. In doing so, the court rejected the balancing test that had been in place[22] and shifted the burden to the state to establish that

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[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* at 556–57.

[17] *Id.*

[18] The remainder of the state's case included the testimony of one Porter, who was also involved in an argument with the victim the night of the murder and was "for a time a suspect." State v. Hickman, 298 P.3d 619, 620 (Or. Ct. App. 2013). Several other eyewitnesses testified that the perpetrator had a similar physical appearance to Hickman, but were unable to make a positive identification because the perpetrator wore a ski mask. *Hickman*, 330 P.3d at 571. The state also presented a ski mask found at the scene, on which testing revealed the DNA of both Hickman and Porter. *Hickman*, 298 P.3d at 620.

[19] *Hickman*, 330 P.3d 551.

[20] 291 P.3d 673 (Or. 2012).

[21] *See Hickman*, 330 P.3d at 556–59 (describing the framework for evaluating the admissibility under *Lawson*, where the Oregon Supreme Court embraced the body of scientific research focused on the reliability of eyewitness identifications).

[22] The *Lawson* court rejected the test previously articulated in *State v. Classen*, 590 P.2d 1198 (Or. 1979), finding that the test was no longer adequate based on the "considerable developments in both the law and the science [with regard to] eyewitness identification evidence." *Lawson*, 291 P.3d at 678. The *Classen* decision was grounded in Oregon's evidentiary code, but nevertheless adopted the due process analysis set forth in *Manson v.*

eyewitness identification evidence is admissible by assessing its reliability under the Oregon Evidence Code.[23] The *Hickman* court failed to understand how the science discussed and accepted in *Lawson* should apply to all eyewitness identifications, not just those made pretrial.[24]

The Oregon Supreme Court, in *Lawson*, was the second state supreme court to take a thoughtful and comprehensive approach to conforming the law of eyewitness identification to the scientific consensus in order to reduce misidentification,[25] the single greatest cause of wrongful convictions nationwide.[26] The New Jersey Supreme Court was the first state supreme court to institute reform.

The unreliability of eyewitness evidence was set out in stark relief in *State v. Henderson*,[27] where the New Jersey Supreme Court, through a Special Master's Report, examined 30 years of scientific research on the reliability of eyewitness identification and memory.[28] The *Henderson* Report concluded that "[t]he scientific findings . . . are reliable, definitive and

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Brathwaite, 432 U.S. 98 (1977), and *Neil v. Biggers*, 409 U.S. 188 (1972). *Classen*, 590 P.2d at 1199; *see also* discussion of *Manson*/*Biggers* test in Part III.

[23] *Lawson*, 291 P.3d at 697 ("[T]he state, as the proponent of the eyewitness' identification must establish all preliminary facts necessary to establish admissibility of the eyewitness evidence.").

[24] The Oregon Court of Appeals held that the trial court erred in admitting the testimony of D and N, concluding that the variables embraced in *Lawson* "weigh[ed] heavily against reliability," particularly because the first time, in-court identification procedure was "similar to, but significantly more suggestive than, a 'show-up,'" and further, because the witness is "always aware of whom police officers have targeted as a suspect," and it is "obvious that the state's prosecutorial apparatus [confirmed those suspicions]." *Hickman*, 330 P.3d at 624 (citations omitted). The Oregon Supreme Court reversed, distinguishing the in-court procedure from suggestive pretrial procedure, and concluding that because the factfinder "can observe the witness's demeanor . . . *during* the identification process" and the identification is subject to "immediate challenge through cross-examination," assessment of the reliability of that identification is the province of the jury. *Hickman*, 330 P.3d at 564.

[25] *Lawson*, 291 P.3d at 685. ("[W]e believe that it is imperative that law enforcement, the bench, and the bar be informed of the existence of current scientific research and literature regarding the principles of accountability and fairness.").

[26] Out of 316 DNA exonerations to date, mistaken identifications played a role in 75 percent of those wrongful convictions. *Eyewitness Misidentification*, *supra* note 3; *see also* GARRETT, *supra* note 4, at 48 (noting that 76 percent of the first 250 convictions overturned due to DNA evidence since 1989 involved eyewitness misidentification).

[27] 27 A.3d 872 (N.J. 2011).

[28] *Id.* at 916. According to one of the testifying researchers, this report represented the "gold standard in terms of the applicability of social science research to the law."

unquestionably fit for use in the courtroom."[29] Relying on these scientific findings, the New Jersey Supreme Court issued a breakthrough decision requiring major changes in the way its courts evaluate identification evidence at trial and instruct juries.[30] The new framework instructs New Jersey courts to greatly expand the factors that courts and juries should consider in assessing the risk of misidentification, emphasizing, in particular, the ways administrators can influence the outcome of identification procedures,[31] the inherently suggestive quality of "show-ups," [32] how memory becomes decayed and distorted within a short period of time,[33] and the fact that juries often overvalue the credibility of eyewitness testimony regardless of curative instructions.[34]

In addition to the *Lawson* and *Henderson* decisions, the Supreme Judicial Court of Massachusetts recently convened a special committee to study the science and law regarding eyewitness identifications and recommended numerous changes to the law, including taking judicial notice of the 30 years of science reviewed and accepted by the *Henderson* and *Lawson* courts.[35] Even before the landmark decisions in *Henderson* and *Lawson*, other state courts embraced the task of building upon the federal floor and developing enhanced procedures grounded in state constitutions.[36] It is likely that other jurisdictions will follow.

Despite the recent advances in assessing the reliability of eyewitness identifications, the focus to date has largely been identifications made pretrial.[37] Little has been written about identifications made for the first time

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[29] SUPREME COURT OF N.J., REPORT OF THE SPECIAL MASTER, STATE V. HENDERSON 73 (2008), *available at* http://www.judiciary.state.nj.us/pressrel/HENDERSON%20FINAL%20BRIEF%20(00621142).PDF.

[30] *See Henderson*, 27 A.3d at 927–29.

[31] *Id.* at 896–902 (discussing blind administration, pre-identification instructions, lineup construction, and other ways that government actors can increase the reliability of an identification).

[32] *Id.* at 902–03. A show-up is a procedure where police officers present an eyewitness with a single suspect for identification.

[33] *Id.* at 907.

[34] *Id.* at 910–12 ("[J]urors do not evaluate eyewitness memory in a manner consistent with psychological theory and findings.") (quoting Brian L. Cutler et al., *Juror Sensitivity to Eyewitness Identification Evidence*, 14 LAW & HUM. BEHAV. 185, 190 (1990)).

[35] SUPREME JUDICIAL COURT STUDY GRP: ON EYEWITNESS EVIDENCE, REPORT AND RECOMMENDATIONS TO THE JUSTICES (2013) at 59, http://www.mass.gov/courts/docs/sjc/docs/eyewitness-evidence-report-2013.pdf.

[36] *See infra* Section III.C.

[37] Both the *Henderson* and *Lawson* methodologies presuppose the performance of a pretrial identification, since otherwise, the defense would likely not have sufficient knowledge

in the courtroom, like those made in the case of Jerrin Hickman described above.

Five months after *Hickman* was decided in Oregon and during the authorship of this article, the Supreme Judicial Court in Massachusetts decided *Commonwealth v. Crayton*,[38] in which the court excluded a similar first time, in-court identification. The *Crayton* court in Massachusetts specifically took issue with the reasoning of the *Hickman* court in Oregon and sharply disagreed with the basis of the *Hickman* ruling.[39]

Earlier in 2014, the National Academy of Sciences ("NAS") published an insightful and much-anticipated report on assessing eyewitness identifications. The NAS properly recommended that "[a]n identification of the kind dealt with in this report typically should not occur for the first time in the courtroom."[40] Neither *Crayton* nor the NAS report, however, discusses in detail the science undermining the reliability of first time, in-court identifications.

As discussed below, a first time, in-court identification is inherently suggestive because the defendant has already been identified by the state as the suspect and charged with the crime. The witness is well aware that the individual seated at the defense table is not only *a* suspect, but is also *the* suspect and the only one on trial. In *Hickman*, the first time, in-court identification also took place more than two years after the incident occurred and involved a cross-racial identification where the defendant was the only black man in the well of the courtroom.[41] The factors in *Hickman* are of concern in any identification.

Unfortunately, the *Hickman* court failed to truly appreciate the suggestiveness of outside factors at play in the first time, in-court identifications. Rather than apply the accepted science,[42] the Oregon Supreme Court mistakenly believed that prejudice from suggestion can be "cured" through cross examination by defense counsel, a jury's presence during the in-court identification, and a trial judge's evaluation.[43] The belief

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of the relevant factors affecting the reliability of the identification needed to challenge its admission. *See Henderson*, 27 A.3d at 919–22; State v. Lawson, 291 P.3d 673, 690–97 (Or. 2012).

[38] 21 N.E.3d 157 (Mass. 2014).

[39] *Id.* at 168–70.

[40] NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATIONS 110 (2014).

[41] State v. Hickman, 330 P.3d 551, 557–58 (Or. 2014).

[42] *See infra* Part II for discussion of the science.

[43] *Hickman*, 330 P.3d at 564.

that suggestion can be "cured" is misplaced based on what we have learned from the more than 500 wrongful convictions around the country involving mistaken eyewitness identifications[44] and the 30 years of science that has dramatically changed our understanding of the human memory.

While in-court identifications have an extraordinarily powerful effect on juries, all such identifications are potentially vulnerable to post-event memory distortion and decay. In fact, the factors that lead psychologists and scholars (and now a few courts) to question the ability of jurors to assess the reliability of pretrial identifications are present in their purest forms in a first time, in-court identification.[45] Absent an identification procedure that effectively tests the witness's memory,[46] it is impossible to know if the witness's identification of the defendant is a product of his or her original memory or a product of the extraordinarily suggestive circumstances created by the in-court identification procedure. In such in-court identifications, the risk of misidentification is heightened by suggestive circumstances that are no different than "show-ups,"[47] (a procedure where police officers present an eyewitness with a single suspect for identification), which have been condemned by science and courts.[48]

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[44] *See* THE NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx# (Last visited May 31, 2015); *see also* Jules Epstein, *The Great Engine That Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 STETSON L. REV. 727, 774–83 (2007) (describing how cross-examination fails to undercut the reliability of an identification, even when addressing factors known to undermine the reliability of an identification, such as cross-racial identifications, the presence of a weapon during the crime, and memory decay).

[45] *See* the discussion regarding the science and factors that affect reliability, *infra* Part II.

[46] *See* State v. Henderson, 27 A.3d 872, 896–98 (N.J. 2011) (discussing means to effectively test an eyewitness's memory, including advising the witness that the suspect may not be present in the lineup, presenting a lineup made up of look-alikes with a minimum number of fillers, and preventing the witness from viewing one suspect in multiple identification procedures).

[47] Show-ups are identification procedures where only one person is presented to the eyewitness "to see if [the witness] will identify that person as the perpetrator." Jessica Lee, Note, *No Exigency, No Consent: Protecting Innocent Suspects from the Consequences of Non-Exigent Show-Ups*, 36 COLUM. HUM. RTS. L. REV. 755, 797 (2005) (arguing that non-exigent show-ups should never be permissible, even with the suspect's consent). *See generally* Amy Luria, *Showup Identifications: A Comprehensive Overview of the Problems and a Discussion of Necessary Changes*, 86 Neb. L. Rev. 515 (2008) (recommending restricting when the police may conduct show-ups, restricting the procedures police officers may use during show-ups, and heightening the admissibility requirements for show-up identifications).

[48] As early as 1967, the Supreme Court acknowledged that the "practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." Stovall v. Denno, 388 U.S. 293, 302 (1967) (citation omitted); *see also Henderson*, 27 A.3d at 903 ("[T]he main problem with showups is that . . . they fail to

In this article, we recognize the possibility that, as more states around the country require more reliable, science-based pretrial identification procedures through case law or policy changes, police and prosecutors may opt for first time, in-court identifications when the witness is equivocal and the courtroom setting inures to the benefit of the state. It is our contention that these identifications should be held inadmissible to encourage police and prosecutors to conduct reliable out-of-court identifications, whether pretrial or with leave during trial. As courts begin to accept the vast amount of science indicating how eyewitness perception and memory truly work, there is no principled basis for limiting the application of the science to pretrial identifications and carving out exceptions for in-court identifications. The same issues of perception and memory are at play in both settings. Now is the time to scrutinize the practice of first time, in-court stranger identifications especially in light of the contrary holdings in *Hickman* and *Crayton*.[49]

In Part II, we set forth the basic science related to memory and perception and how it applies to first time, in-court identifications. In Part III, we discuss how courts have historically addressed claims of suggestiveness in the context of eyewitness identifications and, specifically, how they have handled in-court identifications including first time stranger identifications. And in Part IV, we analyze first time, in-court identifications under the scientific framework as articulated and accepted by the Oregon Supreme Court in *Lawson* and the New Jersey Supreme Court in *Henderson*, both of which recognize 30 years of science that proves that our memories are easily influenced by factors beyond our control and, often, beyond our perception.

II. SCIENCE[50]

While scientists have been studying memory and eyewitness identification for more than 100 years, social and cognitive psychologists began conducting and publishing programmatic memory research in the

provide a safeguard against witnesses with poor memories or those inclined to guess, because every mistaken identification in a showup will point to the suspect."); State v. Lawson, 291 P.3d 673, 686 (Or. 2012) ("Police showups are generally regarded as inherently suggestive . . . because the witness is always aware of whom police officers have targeted as a suspect.").

[49] This article focuses strictly on first time, in-court identifications. For helpful information about in-court identifications following a suggestive pretrial identification, see generally Brandon Garrett, *Eyewitness and Exclusion*, 65 VAND. L. REV. 451 (2012).

[50] This Part provides a brief overview of some of the significant scientific concepts related to eyewitness identification. For further information about the science, see generally EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES (Gary L. Wells & Elizabeth F. Loftus eds., 1984).

1970s.[51] Since then, however, much has been discovered about how memory and perception actually work, and most significantly, research has demonstrated that memory is far more complex than previously thought. Studies have found that memory is inherently unstable and subject to change[52] and that the human mind is not at all like a tape recorder—it neither records nor recalls events exactly as seen.[53]

A. HUMAN MEMORY IS A RECONSTRUCTION

Frederic Bartlett, the first scientist to conduct research on reconstructive memory, found that in order to make sense of an event we go through a process called "effort after meaning."[54] Instead of storing an exact replica of the event, we combine our perceptions with elements of existing knowledge and experience to form a reconstructive memory.[55] That reconstruction (or, initially, construction) can occur in any of the three stages conventionally used to describe the sequence of remembering: A person perceives the event (acquisition stage); then, after time passes, attempts to remember the event/information (retention stage); and finally, tries to recall the event/stored information (the retrieval stage).[56] At each of these three stages, multiple

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[51] *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, 5 (2009) (discussing the development of eyewitness identification science).

[52] Once created, memories are not fixed, contrary to the popular conception that memories are "permanent imprints that might fade but are otherwise stable." MEMORY AND LAW 5 (Lynn Nadel & Walter P. Sinnott-Armstrong eds., 2012). Research has demonstrated that "stable memories can be altered when they are reactivated," and "memory is fundamentally malleable." *Id.* "The most important implication is that when memories are replayed, as when either a victim or a witness is being questioned by investigators, or giving testimony in the courtroom, or even discussing events with others, this process of reactivating and replaying memory inalterably changes it going forward." *Id.*

[53] "The act of remembering, says eminent memory researcher Professor Elizabeth F. Loftus of the University of California, Irvine, is "more akin to putting puzzle pieces together than retrieving a video recording." Hal Arkowitz & Scott O. Lillienfeld, *Do The "Eyes" Have It?*, SCI. AM. MIND Jan./Feb. 2010, at 68–69 (internal quotation marks omitted).

[54] FREDERIC C. BARTLETT, REMEMBERING: A STUDY IN EXPERIMENTAL AND SOCIAL PSYCHOLOGY 44 (2d ed. 1995). Bartlett's study reveals that individuals bring their own "native or acquired temperament, bias and interests" into situations requiring perception and memory, and they utilize those individual tendencies "so as to make [their] reaction the 'easiest,' or the least disagreeable, or the quickest and least obstructed that is at the time possible."

[55] *Id.* at 213 ("Remembering is not the re-excitation of innumerable fixed, lifeless and fragmentary traces. It is an imaginative reconstruction, or construction, built out of the relation of our attitude towards a whole active mass of organized past reactions or experience . . . .").

[56] *See* ELIZABETH F. LOFTUS ET AL., EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL 12–13

factors can impact and alter a person's memory.[57] As a result, information passing through the memory process can be distorted.[58] And all three stages can be affected by personal perception, which is a "highly selective" process dependent upon both psychological factors, including "experience, learning, preferences, biases, and expectations," and physical senses.[59]

Scientists have demonstrated that the manner in which a perceived event is logged in a witness's mind may be influenced by the expectations of that witness.[60] Because the mind can only process a certain amount of incoming information at one time, perception is extremely selective.[61] This means that the mind filters out information that is less focused.[62] For example, in the acquisition stage, factors such as lighting, stress, and duration of the event all come into play.[63] In the retention stage, factors such as normal forgetfulness, the passage of time, and the receipt of new information after the event all influence a person's memory.[64] And finally, in the retrieval stage, questioning used to elicit information has been found to have a serious impact on a person's memory.[65] Using this accepted model and conducting hundreds of studies, social scientists have reached a consensus on certain factors that impact the ability of eyewitnesses to perceive and remember events accurately.[66]

(4th ed. 2007).

[57] *Id.* at 13.

[58] *See* A. DANIEL YARMEY, THE PSYCHOLOGY OF EYEWITNESS TESTIMONY 3 (1979) (citing ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 22 (1979)); Cindy J. O'Hagan, Note, *When Seeing is Not Believing: The Case for Eyewitness Expert Testimony*, 81 GEO. L.J. 741, 745 (1993).

[59] Fradella, *supra* note 5, at 5 (citing Robert Buckhout, *Psychology and Eyewitness Identification*, 2 LAW & PSYCHOL. REV. 75, 76 (1976); Frederick E. Chemay, *Unreliable Eyewitness Evidence: The Expert Psychologist and the Defense in Criminal Cases*, 45 LA. L. REV. 721, 724 (1985) (citation omitted)).

[60] *See* Fradella, *supra* note 5, at 7.

[61] *Id.* at 5.

[62] *Id.* at 5–6.

[63] LOFTUS ET AL., *supra* note 56, at 13, 16–19, 29.

[64] *Id.* at 53–54, 58–59.

[65] *Id.* at 13, 70–71.

[66] *See* Saul Kassin et al., *On the "General Acceptance" of Eyewitness Testimony Research: A New Survey of the Experts*, 56 AM. PSYCHOLOGIST 405, 413–14 (2001) (revealing a strong consensus among experts regarding the factors that affect the reliability of eyewitness testimony, which include "the wording of questions, lineup instructions, postevent information biases, attitudes and expectations, hypnotic suggestibility, the accuracy-confidence correlation, weapon focus, the forgetting curve, exposure time, and unconscious transference").

According to Professors of Psychology Elizabeth Loftus and Gary Wells, to truly understand eyewitness identification in the criminal justice context and the reconstruction that occurs when a witness recalls a past event, it is important to know that when a witness recalls a past event, specific memory traces are encoded.[67] Memory traces can be likened to other forms of evidence such as physical trace evidence like blood or fingerprints.[68] And "[l]ike physical evidence, memory trace evidence can be contaminated, lost, destroyed, or otherwise made to produce results that can lead to an incorrect reconstruction of the event in question."[69]

B. MEMORY IS LESS RELIABLE OVER TIME

Research has confirmed that testimony can become more unreliable with the passage of time, as the brain attempts to put certainty into a recollection that at times has been uncertain.

The passage of time seems an obvious consideration when reconstructing a memory. What is particularly noteworthy, however, is that memory loss occurs shortly after the initial observation, sometimes even within minutes or hours.[70] Studies indicate that faces are often forgotten only a few hours after an event, and that after one day, the recall of a "strangers' age, hair color, and height [is] usually inaccurate."[71] As a result, the passage of time between the event and the identification can seriously undermine the accuracy of an identification.

It is also important to understand that "[m]emories don't just fade," but

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[67] Elizabeth F. Loftus & Gary L. Wells, *Eyewitness Memory for People and Events*, *in* 11 HANDBOOK OF PSYCHOLOGY 617 (R.K. Otto and & I.B. Weiner eds., 2013) ("[A] criminal event involving an eyewitness leaves a trace in the brain of the eyewitness.").

[68] *Id.*

[69] *See* State v. Lawson, 291 P.3d 673, 688 (Or. 2012) ("Memory generally decays over time. Decay rates are exponential rather than linear, with the greatest proportion of memory loss occurring shortly after an initial observation, then leveling off over time."); *see also* Kenneth A. Deffenbacher et al., *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation*, 14 J. EXPERIMENTAL PSYCHOL.: APPLIED 139, 148 (2008) ("[The r]ate of memory loss for an unfamiliar face is greatest right after the encounter and then levels off over time.").

[70] *Id.*

[71] Lee, *supra* note 47, at 771 (citing A. DANIEL YARMEY, UNDERSTANDING POLICE AND POLICE WORK: PSYCHOSOCIAL ISSUES 299 (1990)). "If the showups were delayed, however, by just two hours, more than half the witnesses mistakenly 'identified' someone in a showup, compared to a rate of only 14% false identification with (target-absent) photo lineups." DANIEL REISBERG, THE SCIENCE OF PERCEPTION AND MEMORY: A PRAGMATIC GUIDE FOR THE JUSTICE SYSTEM 122–23 (2014) (citations omitted).

with time, "they also grow."[72] What actually fades "is the initial perception, the actual experience of the events . . . and with each recollection the memory may be changed—colored by succeeding events, other people's recollections or suggestions, increased understanding, or a new context."[73] Thus, the realities of a past event, "when seen through the filter of our memories, are not objective facts but subjective, interpretive realities," and "[w]e interpret the past, correcting ourselves, adding bits and pieces, deleting uncomplimentary or disturbing recollections, sweeping, dusting, tidying things up."[74]

By the time a memory is reconstructed (at the time of the identification), the witness has often unconsciously filled in his vague recollections with the image of the person in the lineup, in a photograph, or seated at the defense table. For example, research has shown that the high stress that may accompany witnessing a crime may cause the witness to focus on elements that we perceive as posing the greatest risk or danger (e.g., the weapon), causing the witness to divert his attention from other details, such as the identifying characteristics of the perpetrator.[75] If a witness later sees a picture of the accused on television or in the newspaper, the witness may use those details to erroneously fill in details that were missed during the actual encounter.[76] Once that erroneous information is stored in memory, the witness will not be able to distinguish between his actual perceptions and those constructed after the fact.[77] Furthermore, over time, as the witness continues to think about the (erroneous) details, he can become even more confident in his misidentification.[78]

Not only can memories be erroneously distorted in the time after the event, but "memories can [also] be altered when they are reactivated."[79] Professor Loftus's numerous studies (beginning in the 1970s) about how people are affected by post-event misinformation indicate that when misleading information is incorporated into a person's memory after an

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[72] ELIZABETH LOFTUS & KATHERINE KETCHAM, WITNESS FOR THE DEFENSE: THE ACCUSED, THE EYEWITNESS, AND THE EXPERT WHO PUTS MEMORY ON TRIAL 20 (1991).

[73] *Id.*

[74] *Id.*

[75] Memories of crime scene witnesses can focus on the weapon at the expense of peripheral details, such as clothing of an accomplice. Nancy Mehrkens Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 LAW & HUM. BEHAV. 413, 414 (1992).

[76] *See* Fradella, *supra* note 5, at 8.

[77] *Id.* at 8–9.

[78] *Id.* at 21.

[79] NADEL & SINNOTT-ARMSTRONG, *supra* note 52.

event, memory can change and lead to inaccuracies at recall.[80] This phenomenon is called "the misinformation effect."[81] Over the last 30 years, numerous scientific studies have corroborated and extended these findings.[82] Misinformation effects have been demonstrated in people of all ages and after different types of events.[83] Research studies have used diverse methods of delivering the misinformation and assessing memory of the witnessed event.[84]

Research has shown that memory can be altered as it is reactivated and replayed, such as when the victim or a witness is being questioned by investigators, or giving testimony in the courtroom, or even when discussing events with others.[85] For example, when being questioned by law enforcement or in court, whether intentionally or unintentionally, the questioner may give a witness subtle cues as to the correct suspect.[86] In response to these cues, the witness may alter his testimony because fragments

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[80] *See, e.g.*, Bi Zhu, et al., *Individual Differences in False Memory from Misinformation: Cognitive Factors*, 18 MEMORY 543 (2010) (suggesting that people with relatively low intelligence and poor perceptual abilities might be more susceptible to the misinformation effect); Elizabeth F. Loftus, *Make-Believe Memories*, 58 AM. PSYCHOL. 867 (2003) [hereinafter *Make-Believe Memories*] (indicating that postevent suggestion can contaminate what a person remembers); Elizabeth F. Loftus & Hunter G. Hoffman, *Misinformation and Memory: The Creation of New Memories*, 118 J. EXPERIMENTAL PSYCHOL. 100 (1989) (indicating that misleading information presented after an event can lead people to erroneous reports of that misinformation).

[81] *See* Loftus & Hoffman, *supra* note 80, at 100.

[82] *See* Maria S. Zaragoza et al., *Misinformation Effect and the Suggestibility of Eyewitness Memory*, DO JUSTICE AND LET THE SKY FALL 35, 36 (2006), *available at* http://www.personal.kent.edu/~mzaragoz/publications/Zaragoza%20chapter%204%20Garry%20Hayne.pdf.

[83] *See, e.g.*, Uta Jaschinski & Dirk Wentura, *Misleading Postevent Information and Working Memory Capacity: An Individual Differences Approach to Eyewitness Memory*, 16 APPLIED COGNITIVE PSYCHOL. 223 (2002) (examining how individual differences in working memory capacity relate to the effect of misleading postevent information on memory for the original event); Henry Roediger & Lisa Geraci, *Aging and the Misinformation Effect: A Neuropsychological Analysis*, 33 J. EXPERIMENTAL PSYCHOL. 321 (2007) (showing that older adults are more susceptible to the deleterious effect of misinformation than are younger adults and that their increased susceptibility is mediated by their neuropsychological functioning).

[84] *See* Loftus, *Make-Believe Memories*, *supra* note 80 at 546 (discussing the variety of scientific research addressing the "misinformation effect").

[85] NADEL & SINNOTT-ARMSTRONG, *supra* note 52.

[86] *See* State v. Henderson, 27 A.3d, 872, 896 (N.J. 2011) (discussing how a non-blind administrator can sway an eyewitness to identify a suspect with as little as "innocuous words and subtle cues—pauses, gestures, hesitations, or smiles") (citing Ryann M. Haw & Ronald P. Fisher, *Effects of Administrator-Witness Contact on Eyewitness Identification Accuracy*, 89 J. APPLIED PSYCHOL. 1106, 1107 (2004)).

of his memory may unknowingly combine with information provided by the questioner.[87] This leads to inaccurate recall and skewed testimony. Thus, the "retrieval processes are crucial," since witnesses "usually take the traces of experience and weave them together into a more or less coherent description of a remembered event, a description that depends heavily on the cues used during retrieval."[88]

C. WITNESS CONFIDENCE IS HIGHLY MALLEABLE

Not only is an eyewitness's memory of a crime highly malleable and subject to change, but so is an eyewitness's confidence in the accuracy of his memory of the crime.[89] Because so much of the memory process takes place on an unconscious level, by the time an identification occurs, a witness may feel completely confident and truly believe that a mistaken identification is accurate.[90] The lack of a connection between accuracy and confidence in an eyewitness is "one of the most consistent findings in the memory research literature."[91] The majority of studies find a weak or nonexistent link between an eyewitness's subjective level of confidence and the accuracy of his memory.[92] One meta-analysis of thirty-five eyewitness identification studies found that confident eyewitnesses were only "somewhat more accurate" than non-confident eyewitnesses.[93] While there are numerous factors that can

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[87] *See* Henry L. Roediger III et al., *The Curious Complexity Between Confidence and Accuracy in Reports from Memory*, *in* MEMORY AND LAW 91 (Lynn Nadel & Walter P. Sinnott-Armstrong eds., 2012) (describing how "retrieval cues" determine whether or not an event is retrieved from memory).

[88] *Id.*

[89] *See* Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 624 (1998) ("Confidence malleability refers to the tendency for an eyewitness to become more (or less) confident in his or her identification as a function of events that occur after the identification.").

[90] *See* C. A. Elizabeth Luus & Gary L. Wells, *The Malleability of Eyewitness Confidence: Co-Witness and Perseverance Effects*, 79 J. APPLIED PSYCHOL. 714, 720 (1994) (demonstrating how eyewitness confidence "can be dramatically inflated and deflated independently" of "the extent that the identified person seems perceptually familiar or matches the eyewitness's memory particularly well").

[91] Kevin Krug, *The Relationship Between Confidence and Accuracy: Current Thoughts of the Literature and a New Area of Research*, 3 APPLIED PSYCHOL. CRIM. JUST. 7, 31 (2007).

[92] *See id*. *But see* Bruce W. Behrman & Sherrie L. Davey, *Eyewitness Identification in Actual Criminal Cases: An Archival Analysis*, 25 LAW & HUM. BEHAV. 475, 486 (2001) ("The relationship between confidence and suspect/foil identification for the live lineups is a solid one.").

[93] Jennifer L. Devenport et al., *Eyewitness Identification Evidence: Evaluating Commonsense Evaluations*, 3 PSYCHOL. PUB. POL'Y & L. 338, 349 (1997).

increase eyewitness confidence, including confirming feedback from police and prosecutors, they do not in any way improve the accuracy of an eyewitness's identification.[94] Furthermore, an eyewitness is generally unaware that his confidence has been increased by these factors.[95] Professors Michael Leippe and Donna Eisenstadt explain that "confidence statements made following an immediate post-identification confidence judgment will inevitably be hopelessly undiagnostic of memory accuracy. Short of being restricted to a hermetically sealed room until the trial, it is hard to imagine an eyewitness not being subjected to manipulative influences on his or her confidence."[96]

In response to concerns that the psychological research into eyewitness memory was not applicable to the justice system, Professor Gary Wells categorized all the variables that can affect a person's memory of an event into either "estimator" or "system" variables.[97] Estimator variables are those that affect the accuracy of eyewitness identifications, but cannot be controlled by the criminal justice system.[98] These might include such variables as the lighting when the crime took place or the distance of the witness from the perpetrator during the crime.[99] Estimator variables also include more complex factors, including race (identifications have proven to be less accurate when witnesses are identifying perpetrators of a different race), the presence of a weapon during a crime, and the degree of stress or

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[94] *See* Michael R. Leippe & Donna Eisenstadt, *Eyewitness Confidence and the Confidence-Accuracy Relationship in Memory for People*, in 2 HANDBOOK OF EYEWITNESS PSYCHOLOGY, MEMORY FOR PEOPLE 377, 417–18 (Rod C. L. Lindsay et al. eds., 2007).

[95] *See* 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, 373 (1998).

[96] *See* Leippe & Eisenstadt, *supra* note 94, at 417–18.

[97] Gary L. Wells, *Applied Eyewitness Testimony Research: System Variables and Estimator Variables*, 36 J. PERSONALITY & SOC. PSYCHOL. 1546, 1548 (1978) (describing the "criminal justice implications" of memory science); *see also* State v. Henderson, 27 A.3d, 872, 895–96 (N.J. 2011) (discussing the difference between system and estimator variables); State v. Lawson, 291 P.3d 673, 685–88 (Or. 2012) (same). Professor Wells also framed his research by stating, "[T]he goal of applied eyewitness testimony research is to generate scientific knowledge that will maximize the chances that a guilty defendant will be justly convicted while minimizing the chances that an innocent defendant will be mistakenly convicted." Wells, *supra*, at 1546.

[98] Wells, *supra* note 97, at 1548 (explaining that estimator variables are so characterized because "in actual crimes, one can at best only *estimate* the role of such factors") (emphasis added).

[99] *Lawson*, 291 P.3d at 687.

trauma a witness experienced when seeing the perpetrator.[100] System variables are those variables that the criminal justice system can control and tend to come into play during the retrieval process.[101] System variables can have a strong impact on the probative value of eyewitness testimony, whether the procedure used is a lineup, photo array, witness interview, or other identification process.[102]

In light of the scientific community's consolidation of the variables that affect eyewitness memory, the U.S. Department of Justice incorporated these variables into a manual for law enforcement with recommendations for collecting eyewitness evidence.[103] These recommendations describe safeguards that law enforcement can implement to protect memory evidence and increase the likelihood of an accurate identification.[104] As discussed above, the highest courts of New Jersey and Oregon have embraced the usefulness of system and estimator variables in assessing the reliability of eyewitness evidence. Despite the increased acceptance of memory science within the criminal justice system, most courts continue to cling to the idea that in-court identifications are different. These courts maintain that the reliability of a first time, in-court identification is effectively tested through cross-examination and jury assessment, relying on outdated understandings of juror comprehension and ignoring the inherently suggestive atmosphere of the courtroom.

III. STATE OF THE LAW: IN-COURT EYEWITNESS IDENTIFICATIONS

The problem with first time, in-court identifications is that no one—not the jury, not the court, and not the parties themselves—can tell whether the

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[100] Gary L. Wells et al., *Eyewitness Evidence: Improving Its Probative Value*, 7 PSYCHOL. SCI. PUB. INT. 45, 52–53 (2006).

[101] *Id.* at 47–48.

[102] *Id.* at 46.

[103] *See* U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NCJ 178240, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999) [hereinafter GUIDE], https://www.ncjrs.gov/pdffiles1/nij/178240.pdf; U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NCJ 188678, EYEWITNESS EVIDENCE: A TRAINER'S MANUAL FOR LAW ENFORCEMENT (2003), *available at* https://www.ncjrs.gov/nij/eyewitness/188678.pdf. Researchers involved in the working group that produced these guides also published an academic paper that describes the theoretical basis for these recommendations. *See* Wells et al., *supra* note 4, at 9–10.

[104] The Technical Working Group for Eyewitness Evidence, in developing these guides, describes its objectives as including "[h]eighten[ing] the validity/accuracy of eyewitness evidence as police, prosecutors, and other criminal justice professionals work with witnesses to identify suspects," and "[i]mprov[ing] the criminal justice system's ability to evaluate the strength and accuracy of eyewitness evidence." GUIDE, *supra* note 103, at 4.

in-court identification is a product of the courtroom setting (where the defendant is seated at the defense table and the witness is aware that the state believes him to be guilty) or is an independent memory that has not been tainted.

The U.S. Supreme Court has long struggled with the admission of identification testimony when that testimony may be contaminated by outside factors.[105] The Court first raised serious concerns about eyewitness identification evidence in the late 1960s, and, in response, created a per se exclusionary rule to prevent the admission of identifications that take place after the start of formal proceedings if the defendant is physically present and denied the right to counsel.[106] That test became largely immaterial as the police and prosecutors moved toward identification procedures that do not require the presence of the defendant, like photographic arrays.

The Court later opened the door for defendants to challenge an identification under due process if it is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[107] That test, however, was later diluted to the point that even identifications contaminated by suggestion may be deemed nonetheless reliable.[108]

Thirty years of social science has since undermined the Supreme Court's standard, but the Court has refused to take the reins on bringing the law on eyewitness identification in line with the prevailing scientific research

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[105] *See* United States v. Wade, 388 U.S. 218, 228 (1967) ("[T]he confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: 'What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials.'").

[106] *Id.* at 235–40.

[107] Simmons v. United States, 390 U.S. 377, 384 (1968); *see* Foster v. California, 394 U.S. 440, 442–43 (1969) (holding that, within the totality of the circumstances, the identification procedure was "so unnecessarily suggestive and conducive to irreparable mistaken identification as to be a denial of due process of law") (quoting Stovall v. Denno, 388 U.S. 293, 302 (1967)).

[108] *See, e.g.*, Neil v. Biggers, 409 U.S. 188, 201 (1972) (upholding the admission of eyewitness testimony subjected to suggestive procedures even where seven months passed between the crime and confrontation, with the Court finding "no substantial likelihood of misidentification"); Perry v. New Hampshire, 132 S. Ct. 716, 728 (2012) (holding that the admission of unreliable eyewitness evidence does not offend due process, so long as the identification lacks the "taint of improper state conduct").

findings. Instead, it has left the task up to the state courts.[109] A select few states have risen to the challenge, rejecting the Supreme Court's inadequate test and opting for a standard guided by the real experts, the scientists.[110] Today, these states that have led the way to reform eyewitness identification procedures are in prime position to keep moving the ball forward by addressing first time, in-court identifications. The discussion below explores the state of the law and the reasons why the current standard for eyewitness identification evidence is inadequate, especially in assessing first time, in-court identifications.

A. THE U.S. SUPREME COURT RECOGNIZED CONCERNS ABOUT EYEWITNESS IDENTIFICATIONS IN CREATING A SHORT-LIVED, PER SE EXCLUSIONARY RULE

Until 1967, courts throughout the United States took the position that suggestiveness in pretrial identification procedures affects only the weight and not the admissibility of a subsequent in-court identification.[111] The Court departed from that rule in 1967 when it decided *United States v. Wade* and *Gilbert v. California* on the same day.[112] In *Wade* and *Gilbert*, the Court ruled, for the first time, that eyewitness evidence could be categorically excluded.[113] In both of the cases, the witnesses had identified the defendants at post-indictment lineups conducted without notice to, and in the absence of,

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[109] *Perry*, 132 S. Ct. at 728–29 (expressing "unwillingness to enlarge the domain of due process," while pointing to the presence of safeguards outside of the Constitution, such as enhanced eyewitness jury instructions adopted by states, state rules regarding the admissibility of evidence, and the presentation of expert testimony as permitted under state law).

[110] State v. Henderson, 27 A.3d 872, 878 (N.J. 2011) ("[The federal test] does not offer an adequate measure for reliability or sufficiently deter inappropriate police conduct. It also overstates the jury's inherent ability to evaluate evidence offered by eyewitnesses who honestly believe their testimony is accurate."); State v. Lawson, 291 P.3d 673, 688 (Or. 2012) (describing the reliability factors embraced in previous state precedent, which are grounded in the Supreme Court's factor test, as "both incomplete and, at times, inconsistent with modern scientific findings").

[111] *Simmons*, 390 U.S. at 382–83 (1968); *see e.g.*, People v. Crenshaw, 155 N.E.2d 599, 604 (Ill. 1959) ("[T]he circumstances [surrounding the identification procedure] would not completely impair and destroy the evidence of identification, but would only affect its weight and credibility.").

[112] United States v. Wade, 388 U.S. 218, 241 (1967); Gilbert v. California, 388 U.S. 263, 272 (1967).

[113] In both cases, the Court held eyewitness testimony that is the product of a constitutional violation must be categorically excluded in order to properly deter official misconduct and preserve a defendant's right to a fair trial. *Wade*, 388 U.S. at 235–40; *Gilbert*, 388 U.S. at 272–75.

the defendants' counsel.[114] The Court ruled that the defendants were entitled to counsel at the pretrial lineups to prevent unfairness in the lineups and assure effective cross-examination at trial.[115] Because the defendants were denied their absolute right to counsel at the lineups, those lineups were deemed improper and the results excluded.[116]

The Court also recognized that the unlawful pretrial identification can potentially affect the admissibility of the later in-court identification.[117] The Court stated that in-court identifications after the illegal lineup were admissible only if "the in-court identifications were based upon observations of the suspect other than the lineup identification."[118] That is, the in-court identification must have an "independent origin."[119] The test involved consideration of the witness's prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification of another person prior to lineup, the identification by picture of the defendant prior to lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification.[120]

The *Wade* Court's recognition that "[s]uggestion can be created intentionally or unintentionally in many subtle ways,"[121] is striking for its time. *Wade* was decided long before the development (and acceptance) of social scientists' recognition of the impact of suggestion on eyewitness testimony. Yet, the *Wade* Court remarked that "the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined."[122] The Court recognized as "suggestive" a number of procedures, including where "the witness is told by the police that they have caught the culprit after which the

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[114] *Wade*, 388 U.S. at 219–20; *Gilbert*, 388 U.S. at 269–70.

[115] *Wade*, 388 U.S. at 230–31.

[116] *Id.* at 237; *Gilbert*, 388 U.S. at 272.

[117] In *Wade*, the court refused to adopt a per se rule of exclusion of an in-court identification following an unconstitutional identification procedure, but recognized that the exclusion of only the testimony regarding the lineup itself would "render the right to counsel an empty one," since a pretrial identification serves to "crystallize" a witness's identification and cause his testimony to appear "unequivocal." *Wade*, 388 U.S. at 240–42.

[118] *Id.* at 240.

[119] *Id.* at 242.

[120] *Id.* at 241.

[121] *Id.* at 229.

[122] *Id.* at 218 (citing PATRICK M. WALL & C. C. THOMAS, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 26 (1965)).

defendant is brought before the witness alone or is viewed in jail[.]"[123] The Court noted, "It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police."[124]

This situation, found suggestive by the Supreme Court, is remarkably similar to the first time, in-court identification procedure—when the witness is told by the prosecutor that the police have caught the culprit and then sees the defendant for the first time inside the courtroom, seated at the defense table having been charged with the crime. The witness is acutely aware that the police and the prosecution believe the one presented is guilty. The *Wade* Court was clear in its opinion that, in the pretrial context, the likelihood is high that the witness's identification will be influenced by the suggestion of guilt.[125]

The *Wade*/*Gilbert* per se exclusionary rule indicates that the Court was on the right track and understood, even without scientific support, that identifications may be tainted by suggestion to such a degree as to preclude admissibility. The *Wade* Court's per se exclusionary rule prevents the admission of identifications made without counsel in order to prevent unnecessary and suggestive procedures. Meanwhile, the "independent origin" test focuses on the ways in which the witness's memory was tested before the illegal pretrial identification tainted his memory. That is, the "independent origin" test recognizes that an in-court identification may have been contaminated by outside forces.[126] If there is the possibility of contamination by an unreliable pretrial identification, the court must ask: Was the witness's memory tested before the illegal pretrial identification such that the in-court identification can be proved to be reliable by comparison?[127]

Although the Court acknowledged the effect that a suggestive pretrial identification may have on a subsequent in-court identification, the Court did not address the suggestiveness that inherently exists inside the courtroom.

The *Wade*/*Gilbert* rulings were eventually limited to their facts. In

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[123] *Id*. at 233.

[124] *Id.* at 234.

[125] *Id.*

[126] *Id.* at 240 ("A rule limited solely to the exclusion of testimony concerning identification at the lineup itself, without regard to admissibility of the courtroom identification, would render the right to counsel an empty one. The lineup is most often used, as in the present case, to crystallize the witnesses' identification of the defendant for future reference. We have already noted that the lineup identification will have that effect.").

[127] *See id.* at 241.

United States v. Ash, the Court ruled that *Wade*/*Gilbert* applies only to the defendant's challenge of an in-court identification when the defendant has been denied counsel at a prior post-indictment lineup.[128] Despite the *Wade* Court's concerns that the defendant be assured the presence of counsel at a post-indictment lineup, there is no right to the presence of counsel at identification procedures that do not require or include the presence of the accused (e.g., photospreads).[129] Thus, the *Wade*/*Gilbert* rule rarely applies today as the majority of pretrial identifications are now done through some form of photo array or before formal charges when the Sixth Amendment right to counsel does not apply.[130]

On the same day it decided *Wade*/*Gilbert*, the Supreme Court also decided *Stovall v. Denno*, in which the Court, for the first time, analyzed identification evidence under a due process analysis.[131] In *Stovall*, police officers presented the defendant Stovall in handcuffs to the victim two days after the crime, while she was recovering in the hospital.[132] There was no notice given to Stovall's attorney.[133] Stovall was the only suspect presented to the victim and the only black man in the room at the time of the identification.[134] Police officers repeatedly asked the victim if Stovall "was the man."[135] Stovall was convicted based on the identification and sentenced to death.[136] The Court held that such a "show up" may be challenged under a due process analysis that "depends on the totality of the circumstances surrounding it[.]"[137] The Court recognized that "[t]he practice of showing suspects singly to persons for the purpose of identifying the suspect, and not as part of a lineup, has been widely condemned."[138] The Court, however, held the identification admissible because the victim might not have survived and she was the only witness capable of exonerating the suspect, making the show-up "imperative."[139] The Court put the recognized suggestiveness aside

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128 United States v. Ash, 413 U.S. 300, 321 (1973).
129 *Id.*
130 Garrett, *supra* note 4, at 50 (citing Wells, *supra* note 4, at 608).
131 388 U.S. 293, 301–02 (1967).
132 *Id.* at 295.
133 *Id.*
134 *Id.*
135 *Id.*
136 *Id.*
137 *Id.* at 302.
138 *Id.*
139 *Id.*

and instead focused on the need for evidence that would otherwise be lost.[140]

The Court's condemnation for show-ups, however, was clear. That condemnation should apply with just as much force to first time, in-court identifications where the defendant is singled out in the courtroom and is already on trial for the crime. It is rarely, if ever, necessary to conduct a first time, in-court identification, making the *Stovall* Court's "need for the evidence" analysis inapposite.

Only a few times in its history has the Court found an identification procedure sufficiently suggestive to violate due process. For example, in *Foster v. California*, the Court found a due process violation on suggestiveness grounds where there were three different identification procedures.[141] During the first procedure, a suggestive lineup, the witness failed to identify the suspect.[142] During the second, a one man "show-up," the witness could only make a tentative identification.[143] Undeterred, the police arranged another lineup at which the witness finally was able to identify the suspect.[144] The Court found that the procedure "made it all but inevitable that [the witness] would identify [the defendant] whether or not he was in fact 'the man.'"[145] That is, "[i]n effect, the police repeatedly said to the witness, 'This is the man.'"[146]

While the Supreme Court itself has never addressed the issue of first time, in-court identifications directly, its past recognition of "suggestiveness" in *Wade, Stovall,* and *Foster* makes it difficult to comprehend how such identifications have withstood challenge. The explanation, it seems, is that the Court has diluted its standard over time to create a test under which even suggestive identifications are deemed reliable and admissible because they do not rise to the Court's level of being "unnecessarily suggestive," as discussed below.[147] Furthermore, the Court erroneously maintains that cross-examination is an effective tool for undermining an unreliable eyewitness identification and overestimates the ability of jurors to distinguish between confidence that is the product of suggestive circumstances and confidence that actually signifies accuracy.[148]

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[140] *Id.*

[141] 394 U.S. 440, 443 (1969).

[142] *Id.* at 441.

[143] *Id.*

[144] *Id.* at 441–42.

[145] *Id.* at 443.

[146] *Id.*

[147] *See infra* Section III.B.

[148] *See* Perry v. New Hampshire, 132 S. Ct. 716, 732 (2012) (Sotomayor, J., dissenting)

B. JUST FIVE YEARS AFTER WADE/GILBERT, THE SUPREME COURT DILUTED ITS OWN STANDARD BY MOVING TO A "TOTALITY OF THE CIRCUMSTANCES" TEST THAT IS WOEFULLY INADEQUATE

Any door that *Stovall* opened to challenge an identification under due process has since been effectively closed. Furthermore, over the years, the Court has whittled away at due process so that even a suggestive identification procedure can be found reliable.[149] The first major dilution of the ruling was in 1972 in *Neil v. Biggers*, when the U.S. Supreme Court created a five-factor test to determine whether identification evidence violates due process under the "totality of the circumstances."[150] Five years later, in *Manson v. Brathwaite*, the Court found that, under the *Biggers* test, "[t]he admission of testimony concerning a suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability."[151] That is, the Court held that even suggestive and unnecessary identification procedures may be reliable. *Biggers* and *Manson* eroded due process protection against suggestive pretrial identifications so substantially that it arguably ceased to exist. It could be said that the *Manson* Court brought the analysis to where it began before *Wade*—as a challenge to the weight, and not the admissibility, of the evidence:

> [W]e cannot say that under all the circumstances of this case there is 'a very substantial likelihood of irreparable misidentification.' Short of that point, such evidence is for the jury to weigh. We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.[152]

("At trial, an eyewitness' artificially inflated confidence in an identification's accuracy [based on suggestive circumstances] complicates the jury's task of assessing witness credibility and reliability. It also impairs the defendant's ability to attack the eyewitness' credibility.").

[149] *See* Simmons v. United States, 390 U.S. 377, 384–86 (1968) (showing the witness six photographs in which the defendant appeared several times was not a violation of due process "even though the identification procedure employed may have in some respects fallen short of the ideal"); *see also* Neil v. Biggers, 409 U.S. 188, 198–200 (1972) ("It is the likelihood of misidentification which violates a defendant's right to due process[.] . . . But as *Stovall* makes clear, the admission of evidence of a showup without more does not violate due process."); *cf.* Manson v. Brathwaite, 432 U.S. 98, 106, 116 (1977) (affirming the statement in *Biggers* that "[t]he admission of testimony concerning a suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability.").

[150] *Biggers*, 409 U.S. at 199–200.

[151] *Manson*, 432 U.S. at 106.

[152] *Id.* at 116 (citing *Simmons*, 390 U.S. at 384 (1968)).

Social science has since proved the *Manson* Court wrong and its test woefully inadequate.[153] Yet, the *Manson* due process analysis of the 1970s is alive and well, and, today, is the leading framework used for assessing eyewitness identification procedures in federal and state courts.[154]

To be clear, under the *Manson* framework, the burden rests on the defendant to show why the identification was unduly suggestive.[155] Even if he is successful in meeting this burden, the court must still consider the "totality of the circumstances" to determine whether the identification is nonetheless reliable, despite its suggestiveness.[156] To evaluate the totality of circumstances and whether the identification is reliable, the court considers the five *Biggers* factors: (1) the witness's opportunity to view the criminal at the time of the crime; (2) the witness's degree of attention at the time of the crime; (3) the accuracy of the witness's prior description of the defendant; (4) the witness's level of certainty when identifying the suspect at the confrontation; and (5) the length of time that has elapsed between the crime and the confrontation.[157]

The *Manson* analysis has failed to meet the Court's goals of promoting fairness and reliability to avoid misidentifications. The *Biggers* factors have proven to be poor indicators of reliability, largely because the focus is based strictly on information reported by a witness who may feel certain in his memory, instead of on an examination of objective factors. If a suggestive identification procedure takes place and the identification is excluded, the court still asks the witness about his recollection of the crime. Yet, it is not possible for the witness to distinguish between observations at the scene and the subsequent suggestive identification because his mind will attempt to make sense out of the entire event by making the two compatible.[158] There is

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[153] *See infra* Part IV.

[154] *See e.g.*, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT 67 (2010) (instructing jurors to evaluate eyewitness testimony based on the witness's credibility and on the following factors: "(1) the capacity and opportunity of the eyewitness to observe the offender based upon the length of time for observation and the conditions at the time of observation, including lighting and distance; (2) whether the identification was the product of the eyewitness's own recollection or was the result of subsequent influence or suggestiveness; (3) any inconsistent identifications made by the eyewitness; (4) the witness's familiarity with the subject identified; (5) the strength of earlier and later identifications; (6) lapses of time between the event and the identification[s]; and (7) the totality of circumstances surrounding the eyewitness's identification").

[155] *Manson*, 432 U.S. at 117.

[156] *Id.* at 110–14.

[157] *Id.* at 114 (citing *Biggers*, 409 U.S. at 199–200).

[158] *See* BARTLETT, *supra* note 54, at 14-15.

no way to cleanse the memory of suggestion.[159]

Moreover, the *Manson* analysis does not take into account the results of the last 30 years of social science research. As described above in Part II, scientific studies have shown that the *Manson* approach uses an incomplete list of factors, some of which can be skewed by faulty police practices. In fact, an abundance of social science research indicates that eyewitnesses are vulnerable to suggestion,[160] and that in most criminal cases, the eyewitness's confidence has little or no correlation with accuracy.[161] In addition, eyewitness confidence is extremely malleable, and, thus, easily enhanced when an identification is confirmed by another witness or by the police.[162]

Although it seems that courts generally recognize that eyewitness identifications may be unreliable,[163] the Supreme Court is unlikely to revisit its faulty due process analysis anytime soon. In January 2012, in *Perry v. New Hampshire*, the Supreme Court addressed the issue of eyewitness identification for the first time since 1977.[164] It was clear to some observers during oral arguments that "this case [was] not only the wrong vehicle for solving the problem of mistaken eyewitness identifications, but that the Supreme Court believe[d] itself the wrong institution to fix it."[165] The Court ultimately ruled that the Due Process Clause does not require an inquiry into

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[159] *See supra* note 53. "The act of remembering, says eminent memory researcher Professor Elizabeth F. Loftus of the University of California, Irvine, is more akin to putting puzzle pieces together than retrieving a video recording." Hal Arkowitz & Scott O. Lillienfeld, *Do the "Eyes" Have It?* Sci. Am, Mind Jan./Feb. 2010, at 68, 69 (internal quotation marks omitted).

[160] *See* Bill Nettles et al., *Eyewitness Identification: "I Notice You Paused on Number Three,"* 20 CHAMPION 10, 11 (1996).

[161] Brian L. Cutler & Steven D. Penrod, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 PSYCHOL. PUB. POL'Y. & L. 817 (1995) (suggesting that eyewitness' confidence is "a dubious indicator" of eyewitness accuracy.)

[162] *See generally* Elin M. Skagerberg, *Co-Witness Feedback in Line-Ups*, 21 APPLIED COGNITIVE PSYCHOL. 489 (2007).

[163] As Justice Elena Kagan put it, new research "should lead us all to wonder about the reliability of eyewitness testimony." Transcript of Oral Argument at 26, Perry v. New Hampshire, 132 S. Ct. 716 (2012) (No. 10–8974), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-8974.pdf; Adam Liptak, *Often Wrong but Rarely in Doubt: Eyewitness IDs Will Get a Fresh Look*, N.Y. TIMES, Aug. 23, 2011, at A14 ("[T]here is no area in which social science research has done more to illuminate a legal issue. More than 2,000 studies on the topic have been published in professional journals in the past 30 years.").

[164] 132 S. Ct. 716, 724 (2012).

[165] Dahlia Lithwick, *See No Evil*, SLATE (Nov. 2, 2011), http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2011/11/perry_v_new_ hampshire_the_supreme_court_looks_at_eyewitness_evid.html.

the reliability of an eyewitness identification when the identification is not obtained under "unnecessarily suggestive" circumstances created by law enforcement.[166]

In *Perry*, the defendant was convicted of unauthorized removal of private property.[167] The police questioned a witness who had called the police to check on a "tall black man" allegedly breaking into cars in her apartment building's parking lot in the early morning hours.[168] She then went to the kitchen window of her apartment, looked out, and identified a suspect in the parking lot—the only black person standing next to a police officer who had come to investigate.[169] About a month later, that witness could not pick out the same person from a photo array.[170]

At trial, the witness was permitted to testify to her out-of-court identification of the defendant over defense counsel's objection that the identification at the scene was the result of the suggestive circumstances.[171] In rejecting the defendant's due process challenge, the Supreme Court explained that the purpose of the Court's precedents going back to 1967 was to deter police from arranging identifications that were so suggestive that the witness had no option but to pick out the suspect on which the police were focusing.[172] In *Perry*, the Court found that such deterrence was not at issue because the police had not arranged the identification in a suggestive way.[173] Despite a nod to "the importance [and] fallibility of eyewitness identification,"[174] the Court made no attempt to discuss the relevance of the *Manson* analysis or indicate any willingness to revisit it. The Court did, however, recognize the role of state courts in addressing and weighing eyewitness evidence.[175]

And it has been the state courts that have led the way toward significant change.

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[166] *Perry*, 132 S. Ct. at 728.
[167] *Id.* at 722.
[168] *Id.* at 721.
[169] *Id.* at 722.
[170] *Id.*
[171] *Id.*
[172] *Id.* at 724.
[173] *Id.* at 728.
[174] *Id.* at 727.
[175] *Id.* at 729 ("State and federal rules of evidence, moreover, permit trial judges to exclude relevant evidence if its probative value is substantially outweighed by its prejudicial impact or potential for misleading the jury.") (citations omitted).

C. RULINGS BY STATE COURTS ARE BEGINNING TO FORCE THE LAW TO CATCH UP WITH THE SCIENCE ON EYEWITNESS IDENTIFICATIONS

Before addressing in-court identifications specifically, it is important to point out that, even prior to the groundbreaking state supreme court rulings in New Jersey in 2011 and Oregon in 2012, a handful of other state courts had rejected, departed from, or made adjustments to the *Manson* analysis in an attempt to bring their tests for determining the reliability of identification evidence more in line with scientific research. Each of these states has come up with its own way of trying to distinguish a reliable identification from an unreliable identification, although all of them agree that a pure *Manson* analysis is insufficient.

For example, Massachusetts flatly rejected *Manson* and, instead, held tightly to the rule from *Wade*/*Gilbert*/*Stovall*, requiring per se exclusion of unnecessarily suggestive identifications while permitting subsequent identifications if based on an independent source.[176] In 1995, the Massachusetts Supreme Judicial Court found that the *Manson* "'reliability test' is unacceptable because it provides little or no protection from unnecessarily suggestive identification procedures, from mistaken identifications and, ultimately, from wrongful convictions."[177] Although the *Manson* Court "discussed the public interest in deterring police from using identification procedures which are unnecessarily suggestive," the Massachusetts Supreme Judicial Court found that, in fact, "the reliability test does little or nothing" to accomplish this goal.[178] Instead, "the show-up has flourished" under *Manson* and "[a]lmost any suggestive lineup will still meet reliability standards."[179] The Massachusetts court refused the prosecution's invitation to abandon the per se exclusionary rule, which, it believed, is the only option to "ensure the continued protection against the danger of mistaken identification and wrongful convictions."[180]

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[176] Commonwealth v. Johnson, 650 N.E.2d 1257, 1264 (Mass. 1995) ("The [*Manson*] reliability test hinders, rather than aids, the fair and just administration of justice by permitting largely unreliable evidence to be admitted directly on the issue of the defendant's guilt or innocence."). Note that as discussed in the Introduction above and below in Part IV, in 2014, Massachusetts convened a special committee to study the science and law regarding eyewitness identification and recommended numerous changes to the law, including taking judicial notice of the 30 years of science reviewed and accepted by the *Henderson* and *Lawson* courts. *See supra* note 35.

[177] *Id.* at 1262.

[178] *Id.* at 1262–63.

[179] *Id.* at 1263.

[180] *Id.* at 1265.

Other states have raised concerns about the federal standard for eyewitness evidence. Even before Massachusetts rejected the federal reliability test, the Court of Appeals of New York concluded that additional protections above the federal standard were required under its state constitution.[181] In addition, the New York court condemned the use of a show-up at the police station when the suspects were viewed in custody, which the court dubbed the "ideal of suggestibility."[182] And the Wisconsin Supreme Court, in 2005, adopted a per se exclusionary rule for unnecessary show-up identifications.[183]

The Utah Supreme Court has recognized that the *Biggers*/*Manson* factors fail primarily because they were created by lawyers and judges rather than those with a real working knowledge of the human mind—the scientists.[184] The Utah court observed that, "courts and lawyers tend to 'ignore the teachings of other disciplines, especially when they contradict long-accepted legal notions,'" leading to a "lag between the assumptions embodied in the law and the findings of other disciplines[.]"[185] The Utah court attempted to bring the law more in line with science by changing the factors to be considered.[186] The factor tests in whatever form, however, continue to mistakenly focus on self-reported information from a witness who firmly believes in his or her own memory and is unaware of how outside factors may have impacted that memory.

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[181] People v. Adams, 423 N.E.2d 379, 383–84 (N.Y. 1981).

[182] *Id.* at 383 ("Long before the Supreme Court entered the field this court expressed concern for, and devised evidentiary rules to minimize the risk of misidentification. After the Supreme Court condemned the practice of police arranged showups and established minimum standards for pretrial identifications this court found that additional protections were needed under the State Constitution.") (citations omitted).

[183] State v. Dubose, 699 N.W.2d 582, 593–94 (Wis. 2005) ("We conclude that evidence obtained from an out-of-court showup is inherently suggestive and will not be admissible unless, based on the totality of the circumstances, the procedure was necessary. A showup will not be necessary, however, unless the police lacked probable cause to make an arrest or, as a result of other exigent circumstances, could not have conducted a lineup or photo array.").

[184] State v. Ramirez, 817 P.2d 774, 780 (Utah 1991).

[185] *Id.* (citation omitted).

[186] *Id.* at 781 (citing the relevant factors as: "(1) [T]he opportunity of the witness to view the actor during the event; (2) the witness's degree of attention to the actor at the time of the event; (3) the witness's capacity to observe the event, including his or her physical and mental acuity; (4) whether the witness's identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and (5) the nature of the event being observed and the likelihood that the witness would perceive, remember and relate it correctly. This last area includes such factors as whether the event was an ordinary one in the mind of the observer during the time it was observed, and whether the race of the actor was the same as the observer's") (citing State v. Long, 721 P.2d 483, 493 (Utah 1986)).

The per se exclusionary rule has historically been the driving force behind progress toward deterring unnecessarily suggestive eyewitness identifications. According to Professor Sandra Guerra Thompson, "[o]ver time, a per se exclusionary rule for unnecessarily suggestive identification practices tends to create, through a case-by-case method, a set of best practices," which leads to further rulings defining suggestive procedures.[187] States are beginning to implement best practices as a result. For example, New Jersey, North Carolina, and Connecticut, as well as the cities of Dallas, Minneapolis, Boston, Philadelphia, San Diego, San Francisco, Tucson, Denver, and Northampton, have implemented more reliable procedures for lineups.[188] And in Georgia, Oregon, Virginia, Texas, Wisconsin, and Rhode Island, law enforcement trainings have recommended or promulgated voluntary guidelines for more reliable lineups.[189] More recently, in 2013, the International Association of Chiefs of Police called for changes in conducting investigations, including modifying eyewitness identification procedures.[190]

As the number of cities and states instituting more stringent requirements for pretrial identifications grows, police and prosecutors will inevitably opt for first time, in-court identifications when the witness gives only a general description after the crime, like the witnesses in *Hickman*.[191] Accordingly, prosecutors may choose to forego the stringent pretrial identification procedures altogether, and, instead, take advantage of the in-court identification where the witness will see the defendant seated at the defense table having been charged with the crime. In order to prevent a shift toward this less reliable procedure in the wake of increasingly stringent state standards for the admissibility of eyewitness testimony subjected to a pretrial procedure, a per se exclusionary approach to first time, in-court identifications is needed. This approach should encourage the use of reliable out-of-court procedures, pretrial or with leave during trial.

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[187] Sandra Guerra Thompson, *Eyewitness Identifications and State Courts as Guardians Against Wrongful Conviction*, 7 OHIO ST. J. CRIM. L. 603, 614–15 (2010).

[188] *Eyewitness Identification Reform*, INNOCENCEPROJECT.ORG, http://www.innocenceproject.org/Content/Eyewitness_Identification_Reform.php (last accessed on Oct. 9, 2014).

[189] *Id.*

[190] Spencer S. Hsu, *Police Chiefs Lead Effort to Prevent Wrongful Convictions by Altering Investigative Practices*, WASH. POST (Dec. 2, 2013), http://www.washingtonpost.com/local/crime/police-chiefs-urge-changes-to-photo-lineups-other-tools-to-prevent-wrongful-convictions/2013/12/02/5d8e9af2-5b69-11e3-bf7e-f567ee61ae21_story.html; *see* Int'l Chiefs of Police, Model Policy: Showups, Photographic Identifications, and Lineups (Jun. 2006), http://dpa.ky.gov/nr/rdonlyres/be390c82-e7dd-4a1e-8a3a-4702c5110cd1/0/internationalassocofchiefsofpolice.pdf.

[191] *See* discussion, *supra* note 18.

IV. APPLYING THE SCIENCE TO FIRST TIME IN-COURT IDENTIFICATIONS

A. COURTS THAT HAVE ADDRESSED FIRST TIME, IN-COURT IDENTIFICATIONS IN THE PAST DID NOT HAVE THE BENEFIT OF RECENT SCIENTIFIC DEVELOPMENTS AND FAILED TO UNDERSTAND THE SCOPE OF THE SUGGESTION

To date, the U.S. Supreme Court has not addressed a claim of suggestiveness resulting from a first time, in-court identification. Lower federal and state courts have taken different approaches as to how such claims should be analyzed.[192] The Oregon Supreme Court was the first court to tackle the issue in a jurisdiction that accepts the advances in eyewitness science discussed above, but, unfortunately, fell back on the mistaken analysis applied in past cases, all of which were decided without the benefit of the science.[193]

The Massachusetts Supreme Judicial Court, in its recent decision in *Crayton*, was the first state supreme court to exclude a first time, in-court identification. The court did so by analogizing the identification to a "show-up," which was already deemed "unnecessarily suggestive" under Massachusetts law.[194] The *Crayton* court, therefore, did not discuss in detail the additional scientific bases for finding a first time, in-court identification unreliable.[195] Other courts around the country, however, do not have the

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[192] *See* United States v. Hill, 967 F.2d 226 (6th Cir. 1992) (adopting *Biggers* totality of circumstances test to first time, in-court identifications); United States v. Rundell, 858 F.2d 425 (8th Cir. 1988) (adopting a two-step test under *Biggers* totality of circumstances test to determine the admissibility of in-court identification); United States v. Archibald, 734 F.2d 938 (2d Cir. 1984) (deciding that in-court identification was impermissibly suggestive where defendant was the only black person in the courtroom and was seated next to defense counsel). The Supreme Court, however, has not decided whether *Manson* applies to first time, in-court identifications. *See, e.g.*, United States v. Domina, 784 F.2d 1361, 1369 (9th Cir. 1986) ("The Supreme Court has not extended its exclusionary rule to in-court identification procedures that are suggestive because of the trial setting.").

[193] *See* discussion, *supra* note 22.

[194] Commonwealth v. Crayton, 21 N.E.3d 157, 165 (Mass. 2014) (citing Commonwealth v. Phillips, 897 N.E.2d 31, 42 (Mass. 2008)); Commonwealth v. Martin, 850 N.E.2d 555, 560–61 (Mass. 2006).

[195] *Crayton*, 21 N.E.3d at 166. The court also held that a first time, in-court identification may be admissible where there is "good reason." *Id.* at 170–72. "Good reason" may exist, the court held, where the eyewitness was familiar with the defendant before the commission of the crime, such as in domestic violence cases. *Id.* at 160. "Good reason" may also exist the witness is an arresting officer who was also a witness to the commission of the crime and who is testifying that the defendant is, in fact, the person who was arrested for the crime. *Id.* In both circumstances, the *Crayton* court recognized, "the in-court showup is understood by the jury as confirmation that the defendant sitting in the court room is the person whose conduct is at

benefit of such established precedent or an understanding of the science.

Before *Crayton*, the majority of courts had concluded that the suggestion does not arise in the first place because "the judge is present and can adequately address relevant problems; the jury is physically present to witness the identification, rather than merely hearing testimony about it; and cross-examination offers defendants an adequate safeguard or remedy against suggestive examinations." [196] Some courts have held that, although suggestive, first time, in-court identifications are nonetheless reliable under the *Biggers* factors and a totality of the circumstances test.[197]

The Ninth Circuit, in *United States v. Domina*, discussed at length the suggestiveness inherent in first time, in-court identifications, but still refused to institute a rule requiring a non-suggestive identification.[198] As the court explained, "When the witness is asked [for the first time in court] if he or she can identify the defendant as the perpetrator of the crime, this is surely equivalent to the 'show-up' pretrial situation. Only slightly less suggestive is the procedure whereby the witness is asked if he or she can identify the perpetrator of the crime from among those present in the courtroom when the defendant is sitting at the defense counsel table."[199] The court went on to describe the problem: "When asked to point to the robber, an identification witness—particularly if he has some familiarity with courtroom

issue rather than as identification evidence." *Id.* Because the "good reason" exception is reserved for contexts outside of a pure stranger identification, we do not discuss it here.

[196] State v. Lewis, 609 S.E.2d 515, 518 (S.C. 2005); *see also* United States v. Bush, 749 F.2d 1227, 1231 (7th Cir. 1984) ("[D]eference shown the jury in weighing the reliability of potentially suggestive out-of-court identification would seem even more appropriate for in-court identifications where the jury is present and able to see first-hand the circumstances which may influence a witness[.]"); Byrd v. State, 25 A.3d 761, 767 (Del. 2011) (citing *Bush*, 749 F.2d 1227); People v. Medina, 208 A.D.2d 771, 772 (N.Y. App. Div. 1994); People v. Medina, 617 N.Y.S.2d 491 (N.Y. App. Div. 1994) ("[W]here there has not been a pretrial identification and defendant is identified in court for first time, defendant is not deprived of fair trial because defendant is able to explore weaknesses and suggestiveness of identification in front of the jury[.]"); State v. Smith, 512 A.2d 189 (Conn. 1986) ("The defendant's protection against the obvious suggestiveness in any courtroom identification confrontation is his right to cross-examination."); People v. Rodriguez, 134 Ill. App. 3d 582, 589 (1985) ("Where a witness first identifies the defendant at trial, defense counsel may test perceptions, memory, and bias of the witness, contemporaneously exposing weaknesses and adding perspective to lessen hazards of undue weight or mistake."); Ralston v. State, 309 S.E.2d 135, 136 (Ga. 1983).

[197] *See, e.g.*, *Rundell*, 858 F.2d at 426; *Hill*, 967 F.2d at 232; Code v. Montgomery, 725 F.2d 1316, 1319–20 (11th Cir. 1984).

[198] 784 F.2d 1361, 1368 (9th Cir. 1986).

[199] *Id.* at 1368 (citing United States v. Archibald, 734 F.2d 938, 941–42, *modified*, 756 F.2d 223 (2d Cir. 1984), and United States v. Brown, 699 F.2d 585, 594 (2d Cir. 1983)).

procedures—is quite likely to look immediately at the counsel table, where the defendant is conspicuously seated in relative isolation. Thus the usual physical setting of a trial may itself provide a suggestive setting for an eye-witness identification."[200] The court, nonetheless, shied away from the issue because it believed that "[t]here is no constitutional entitlement to an in-court lineup or other particular methods of lessening the suggestiveness of in-court identification, such as seating the defendant elsewhere in the room."[201]

The Second Circuit, in *United States v. Archibald*, took a step in the right direction and its decision, according to Professor Evan Mandery, "represents the high-water mark of protection afforded to suggestive in-court identifications."[202] There, the defendant in a robbery case argued "that the in-court identifications were tainted by unduly suggestive circumstances, namely, that throughout the trial he was the only black person in the courtroom, except for one day when a black United States Marshal was present, and that he was seated at the defense table."[203] At trial, the defendant requested a corporeal lineup and asked "to be seated with five or six other black men who looked reasonably like him, to ensure that he would not be obviously singled out by an educated witness."[204] The trial court denied his request as "inappropriate" and allowed the in-court identification. On appeal, the Second Circuit hit the nail on the head:

> As is generally the case, the defendant here was seated next to defense counsel during the trial, a circumstance obviously suggestive to witnesses asked to make in-court identifications. Any witness, especially one who has watched trials on television, can determine which of the individuals in the courtroom is the defendant, which is the defense lawyer, and which is the prosecutor.[205]

The appellate court held that while "there was no obligation to stage a lineup, . . . there was, however, an obligation to ensure that the in-court procedure here did not simply amount to a 'show-up.'"[206] The court also insightfully acknowledged the relative ease with which the prejudice could have been prevented: "A fairly short delay of proceedings was all that would have been required to rearrange the seating in the courtroom and to secure the presence of some people of the defendant's approximate age and skin

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[200] *Id.* (quoting United States v. Williams, 436 F.2d 1166, 1168 (9th Cir. 1970)).

[201] *Id.* at 1369.

[202] *See* Mandery, *supra* note 7, at 402.

[203] *Archibald*, 734 F.2d at 940.

[204] *Id.* at 941.

[205] *Id.*

[206] *Id.* (citations and internal quotation marks omitted).

color."[207]

The Second Circuit ultimately ruled that the error in admitting the in-court identifications was harmless in light of other evidence to support the conviction.[208] While the court recognized the inherent suggestiveness of the identification, the holding ultimately disregards the powerful effect that identification evidence has on the jury, which is the reason courts should institute a per se exclusionary approach and require an out-of-court lineup or other non-suggestive procedures.

B. THE SCIENCE APPLIES TO FIRST TIME, IN-COURT IDENTIFICATIONS JUST AS IT DOES TO PRETRIAL IDENTIFICATIONS, AND REQUIRES THE SAME PROTECTIONS AGAINST MISTAKEN IDENTIFICATION EVIDENCE

Just this past year, in Oregon—a jurisdiction that has accepted and altered its approach to admitting eyewitness identification testimony based on the significant body of scientific research about human memory and its impact on eyewitness identification—the state Supreme Court was presented with a prime opportunity to institute a per se exclusionary approach to first time, in-court identifications in *Hickman*, but refused to do so.[209] Advocates for enhanced safeguards against eyewitness misidentification had high hopes for *Hickman* because the facts so strongly cautioned against the admissibility of the first time, in-court identifications. One witness (D) told police on the night of the shooting that she did not see the perpetrator.[210] Yet D was permitted to testify at trial that she was 95 percent certain the shooter was the defendant sitting before her.[211] The other witness (N) gave only a vague description of a stocky black male in his mid-twenties on the night of the shooting.[212] She, too, was allowed to testify at trial that the shooter was

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[207] *Id.* at 942.

[208] *Id.* at 943.

[209] State v. Hickman, 330 P.3d 551 (Or. 2014). We use the *Hickman* case as an example because it is the first case that addresses first time, in-court stranger identifications in a jurisdiction that has accepted the recent advances in social science on human memory and its impact on identifications. The authors of this article, through the Oregon Innocence Project, submitted an amicus brief on this issue to the Oregon Supreme Court in *Hickman*, urging the Court to adopt a bright line rule prohibiting first time, in-court stranger identifications. Brief of Amicus Curiae the Innocence Network and Oregon Innocence Project in Support of Respondent, State v. Hickman, 330 P.3d 551 (Or. 2014), (No. 081235225), 2014 WL 1227589, at *19.

[210] *Id.* at 568.

[211] *Id.* at 556.

[212] *Id*.

Hickman, the black twenty-something male sitting before her.[213]

The *Hickman* court started from the faulty premise that memory contamination will manifest itself in a way that is self-evident to the jury.[214] The court refused to recognize that suggestiveness inside the courtroom may irreparably contaminate a witness's mind to form an unreliable "memory" of the incident, which may be mistaken yet convincing to a jury. Instead, the *Hickman* court relied heavily on the misguided notion that the jury can assess the credibility of a first time, in-court identification because the jury can observe the witness's demeanor, including facial expressions, voice inflection, and body language, during the identification process.[215] The *Hickman* court failed to recognize that a witness's demeanor can only tell us how certain the witness is in her or his own mind. As science has proved time and time again, certainty does not equal reliability.[216] Rather, "most eyewitnesses think they are telling the truth even when their testimony is inaccurate, and '[b]ecause the eyewitness is testifying honestly (i.e., sincerely), he or she will not display the demeanor of the dishonest or biased witness.'"[217] Indeed, even some mistaken eyewitnesses will "exude supreme confidence in their identifications."[218]

Hickman is especially disappointing in light of earlier decisions in *State v. Henderson*,[219] from the New Jersey Supreme Court, and *State v. Lawson*,[220] from the Oregon Supreme Court—two landmark cases leading the way for the application of social science to eyewitness identification evidence.[221] Both *Henderson* and *Lawson* embrace the idea of assessing the reliability of identification evidence based on advances in science that have dramatically improved our understanding of the way in which the mind works.[222] That

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[213] *Id.* at 562.

[214] *Id.* at 569.

[215] *Id.* at 564.

[216] *See supra* Section II.C.

[217] State v. Henderson, 27 A.3d 872, 889 (N.J. 2011) (quoting Epstein, *supra* note 44, at 772).

[218] *Id.*

[219] *Id.* at 894.

[220] 291 P.3d 673, 685 (Or. 2012).

[221] The Massachusetts Supreme Judicial Court's "Study Group on Eyewitness Evidence" also recommended analyzing eyewitness identification evidence using the new advances in memory science to determine admissibility and create a heightened gatekeeping function for trial courts. *See supra* note 35, at 12–13. The Massachusetts court showed a willingness to put some teeth behind that gatekeeping function when it excluded the first time, in-court identification in *Crayton*. Commonwealth v. Crayton, 21 N.E.3d 157, 169 (Mass. 2014).

[222] *Henderson*, 27 A.3d at 894; *Lawson*, 291 P.3d at 684.

body of scientific evidence from which *Henderson* and *Lawson* emerged points to the fallibility of human memory, the inability of the average juror to distinguish credibility from confidence, and the frequency with which laypeople hold beliefs contrary to the weight of scientific evidence.[223] The fact that *Hickman* came out of a jurisdiction that accepts this science-based analysis is troubling—the court should have embraced the same concerns.

The scientific research adopted in *Henderson* and *Lawson* is organized by system variables, those factors within the control of those administrating an identification procedure, and estimator variables, those factors that are beyond the control of the criminal justice system that are "equally capable of affecting an eyewitness' ability to perceive and remember an event."[224] Using this framework to create a more informed understanding of the human memory, the *Henderson* and *Lawson* courts rejected the *Manson* test as inadequate.[225] *Henderson* specifically recognized that the *Manson* test "overstates the jury's inherent ability to evaluate evidence offered by eyewitnesses who honestly believe their testimony is accurate."[226] Courts, like *Hickman*, that continue to rely on the jury to ferret out unreliable identification evidence have failed to fully grasp the science that should inform these decisions.

Memory contamination does not appear on the witness's face like a "tell" in poker.[227] Thus, *Henderson* and *Lawson* hold that the court, rather than the jury, must assess the reliability of identification evidence using certain guideposts for admissibility.[228] Although the courts in those cases focused on suggestiveness resulting from pretrial identification procedures, the concerns underlying those procedures are unmistakable in first time, in-court identifications. The same concerns that compelled the *Henderson* and *Lawson* courts to re-examine the standard for the admissibility of pretrial identifications should compel courts to re-examine the admissibility of first time, in-court identifications. We discuss several of these concerns in turn.

Targeted Suspect: Courts around the country recognize the inherent danger of an identification procedure in which the witness is aware of whom police officers have targeted as a suspect.[229] With that danger in mind, many

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[223] *See supra* Part II.

[224] *Henderson*, 27 A.3d at 904; *see also Lawson*, 291 P.3d at 684.

[225] *Henderson*, 27 A.3d at 889–92; *Lawson*, 291 P.3d at 684.

[226] *Henderson*, 27 A.3d 872, 878.

[227] *See supra* Section II.C.

[228] *Henderson,* 27 A.3d at 919; *Lawson*, 291 P.3d at 690.

[229] *See, e.g.*, State v. Herrera, 902 A.2d 177, 183 (N.J. 2006) ("[O]ne-on-one showups are inherently suggestive . . . because the victim can only choose from one person." (internal

courts, including *Henderson* and *Lawson*, have uniformly denounced the "show-up" as "inherently suggestive."[230] Identification procedures involving a single suspect fail to "provide a safeguard against witnesses with poor memories or those inclined to guess, because every mistaken identification in a showup will point to the suspect."[231] A number of states have limited the admissibility of show-ups.[232] The same construct, however, exists in first time, in-court identifications, which have yet to be ruled inadmissible—the sole exception being the recent (2014) state supreme court ruling in Massachusetts.[233] In a first time, in-court identification, the witness is acutely aware that the individual seated at the defense table has been targeted by the police and the state as the perpetrator. A fact that cannot be ignored is that the state believes so strongly in that individual's guilt that he or she has been called to trial. The first time, in-court identification presents the ultimate "targeted suspect" situation that courts have repeatedly condemned in the pretrial context.

Expectancy Effect: Psychologists define the "expectancy effect" as "the tendency for experimenters to obtain results they expect . . . because they have helped to shape that response."[234] The *Henderson* and *Lawson* courts focused on the expectancy effect in lineups and found that even with the best of intentions, an administrator with knowledge of the suspect's identity may inadvertently sway the witness through language and subtle cues, including "pauses, gestures, hesitations, or smiles."[235] Studies show "that both witnesses and administrators are generally unconscious of the influence that the lineup administrator's behavior has on identification process."[236] *Henderson* and *Lawson*, therefore, recommended double-blind lineup procedures where the administrator "is not investigating the particular case

citation omitted)); State v. Dubose, 699 N.W.2d 582–84 (Wis. 2005) ("[E]vidence obtained from an out-of-court showup is inherently suggestive and will not be admissible unless . . . the procedure was necessary."); People v. Riley, 517 N.E.2d 520, 524 (N.Y. 1987) ("Showup identifications, by their nature suggestive, are strongly disfavored but are permissible if exigent circumstances require immediate identification[.]" (internal citation omitted)).

230 *Henderson*, 27 A.3d at 902–03; *Lawson*, 291 P.3d at 686.

231 *Henderson*, 27 A.3d at 903.

232 *Id.* (citing cases limiting the admissibility of show-ups).

233 Commonwealth v. Crayton, 21 N.E.3d 157, 169 (Mass. 2014).

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

235 *Id.* (internal citation omitted); *see also Lawson*, 291 P.3d at 685–86.

236 *Lawson*, 291 P.3d at 706 (*citing* Ryann M. Haw & Ronald P. Fisher, *Effects of Administrator-Witness Contact on Eyewitness Identification Accuracy*, 89 J. APPLIED PSYCHOL. 1106, 1110 (2004)).

and does not know who the suspect is."[237] At a minimum, the courts urge a blind lineup where the administrator may know who the suspect is, but does not know where he or she is located in the lineup or photo array.[238]

There is no chance for a non-blind procedure in a first time, in-court identification. The prosecutor, the witness, and everyone else in the courtroom are aware that the suspect is the individual seated at the defense table. There is no way to safeguard the witness from influence caused by subtle cues in the prosecutor's questioning or not-so-subtle cues in the courtroom itself. The expectation that the witness identify the defendant is palpable and may have a powerful effect on the reliability of an identification.

Lucky Guesses: "Properly constructed lineups test a witness' memory and decrease the chance that a witness is simply guessing."[239] *Henderson* and *Lawson*, therefore, discussed at length the need for identification procedures, like lineups, that include look-alike "fillers."[240] "The reason is simple: an array of look-alikes forces witnesses to examine their memory."[241] Both courts recognized that "if for any reason a suspect disproportionately stands out from the lineup fillers surrounding him or her, then the identification procedure is suggestive—and the reliability of any resulting identification decreases correspondingly."[242] The suggestion is obvious with a first time, in-court identification. The suspect stands out in the courtroom, sitting at the defense table in near isolation, and there are no look-alikes surrounding him or her to test the eyewitness's memory. The witness is not asked to examine her memory and, instead, is expected to simply point at the defendant who the state has already identified as the perpetrator. The "guess" is not only lucky, it is inevitable.

Further, because the defendant stands out behind the defense table, similar to a pretrial procedure where the suspect clearly stands out from the rest, a witness may experience increased "confidence in the identification because the selection process seemed easy."[243] The inflated sense of confidence has a powerful effect on the jury, thereby undermining the jury's

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[237] *Henderson*, 27 A.3d at 897; *Lawson*, 291 P.3d at 706.

[238] *Henderson*, 27 A.3d at 897 (suggesting a procedure known as the "envelope method," where a single-blind administrator "who knows the suspect's identity places [photos] into different envelopes, shuffles them, and presents them to the witness" without "looking at the envelopes or pictures while the witness makes an identification").

[239] *Id.*

[240] *Id.* at 887; *Lawson*, 291 P.3d at 706–07.

[241] *Henderson*, 27 A.3d at 898.

[242] *Lawson*, 291 P.3d at 707.

[243] *Henderson*, 27 A.3d at 898 (internal citation omitted).

ability to effectively weigh the credibility of the identification.[244]

Relative Judgment: "Relative judgment refers to the fact that the witness seems to be choosing the lineup member who most resembles the witnesses' memory *relative* to other lineup members."[245] Studies prove that "if the actual perpetrator is not in a lineup, people may be inclined to choose the best look-alike."[246] In fact, "field experiments suggest that when the true perpetrator is not in the lineup, eyewitnesses may nonetheless select an innocent suspect *more than one-third of the time.*"[247] The courts in *Henderson* and *Lawson* advocate for pre-lineup instructions to reduce the possibility of the relative judgment phenomenon.[248] That is, studies conclude "that the likelihood of misidentification is significantly decreased when witnesses are instructed prior to an identification procedure that a suspect may or may not be in the lineup or photo array, and that it is permissible not to identify anyone."[249] Implicit in this conclusion, however, is that the witness must actually believe that the premise of the instruction is true—that the perpetrator may, in fact, be absent from the lineup. With a first time, in-court identification, this premise is hardly plausible, as the witness knows that the state firmly believes that the perpetrator is sitting at the defense table. Telling a witness that the perpetrator may or may not be in the courtroom is a glaring pretense. Relative judgment is likely to influence the identification when the witness knows that the state believes the individual at the defense table to be guilty.

Suggestive Feedback: Feedback from police or prosecutors after an identification "affects the reliability of an identification in that it can distort memory, create a false sense of confidence, and alter a witness's report of how he or she viewed an event."[250] For example, "those who receive a simple post-identification confirmation regarding the accuracy of their identification significantly inflate their reports to suggest better witnessing conditions at the time of the crime, stronger memory at the time of the lineup, and sharper

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[244] *Id.* at 889 ("[W]e are mindful of the observation that 'there is almost *nothing more convincing* [to a jury] than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'" (citing Watkins v. Sowders, 449 U.S. 341, 352 (1979) (Brennan, J., dissenting)).

[245] Gary L. Wells, *The Psychology of Lineup Identifications*, 14 J. APPLIED SOC. PSYCHOL. 89, 92 (1984) (citation omitted).

[246] *Id.* (citation omitted).

[247] *Id.* at 887–88 (emphasis added).

[248] *Id.* at 897; State v. Lawson, 291 P.3d 673, 706 (N.J. 2012).

[249] *Id.*

[250] *Id.* at 900.

memory abilities in general."[251] In others words, confirming feedback in the courtroom can bolster the witness's confidence that he or she has selected the "right" person. The *Lawson* court agreed that "the danger of confirming feedback lies in its tendency to increase the *appearance* of reliability without increasing reliability itself."[252] There is no greater risk of confirming feedback than in the trial setting. Once the witness has identified the defendant as the perpetrator, the prosecution will continue to ask questions designed to elicit details confirming the witness's certitude. The witness's exclusive role is to answer questions and prove how certain she is. The simple act of continuing the questioning tells the witness that he or she was "right," allowing her to respond to cross-examination and other scrutiny with greater confidence borne out of the approbation of the figures of authority in the courtroom. The witness's subsequent account of other details surrounding the event may become distorted or presented with false confidence, increasing the apparent credibility of the identification itself.

Memory Decay: Memory decay is irreversible and occurs at an exponential rather than a linear rate, with the greatest proportion of memory loss occurring shortly after the event and the rate of memory loss leveling off over time.[253] Consequently, the longer the delay between the crime and the identification, the greater the likelihood for misidentification. While researchers cannot pinpoint the exact moment when a witness's recall becomes unreliable, one of the studies relied upon by the *Henderson* court demonstrates a substantial increase in misidentification from two to twenty-four hours after an event.[254] "Scientists generally agree that memory never improves," and the probative value of an identification conducted after a significant event also turns on the quality of the original memory based on the other estimator variables.[255] An identification that happens for the first time in the courtroom will necessarily occur long after the crime itself. The state is asking the witness to identify the perpetrator sometimes years after the event and under the most suggestive of conditions—when the state has already identified the perpetrator and seated him prominently before the witness. That witness is highly susceptible to influence.

The courts in *Henderson* and *Lawson* articulated each of these concerns

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[251] *Id.* at 899 (quoting Amy Bradfield Douglass & Nancy Steblay, *Memory Distortion in Eyewitness: A Meta-Analysis of the Post-identification Feedback Effect*, 20 APPLIED COGNITIVE PSYCHOL. 859, 864–65 (2006) (citation omitted)).

[252] *Lawson*, 291 P.3d at 710.

[253] *Id.* at 688.

[254] *Henderson*, 27 A.3d at 907.

[255] *Lawson*, 291 P.3d at 705 (citing *Henderson*, 72 A.3d at 907).

about influence in identification procedures, but, because the concerns were discussed in the context of pretrial identifications under the facts of those cases, the court in *Hickman* chose not to recognize the parallels to first time, in-court identifications.

Many courts, including *Hickman*, have fallen back on the mistaken (but widely held) belief that suggestiveness, if any, can be "cured" for the jury through cross-examination, expert testimony, or jury instructions.[256] The problem is that the mere recognition of system variables or estimator variables does not make a trier of fact any more adept at being able to distinguish a reliable identification from an identification contaminated by outside forces.[257] Scientists agree that "one cannot know for certain which identifications are accurate and which are false—which are the product of reliable memories and which are distorted by one of a number of factors."[258]

Mistaken eyewitness identifications often stem not from malice, but from the witness's honest belief in the accuracy of his or her own memory. Traditional trial tools are ineffective at exposing an honest, but nevertheless mistaken, witness. Cross-examination, for example, "will often expose a lie or half-truth, but may be far less effective when witnesses, although mistaken, believe that what they say is true."[259] Although acting in good faith, "eyewitnesses are likely to use their 'expectations, personal experience, biases, and prejudices' to fill in the gaps created by imperfect memory. Because it is unlikely that witnesses will be aware that this process has occurred, they may express far more confidence in the identification than is warranted."[260] The *Crayton* court recognized that the jury's ability to view the in-court identification and assess the witness's confidence does not make the jury better able to evaluate the accuracy of the identification because

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[256] State v. Hickman, 330 P.3d 551, 564–65 (Or. 2014).

[257] *Henderson*, 27 A.3d at 911 (discussing a study that revealed not only that mock jurors "were insensitive to the effects of [a suggestive identification procedure, but that they also] gave disproportionate weight to the confidence of the witness, [leading scientists to] conclude[] that jurors do not evaluate eyewitness memory in a manner consistent with psychological theory and findings" (citing Brian L. Cutler et al., *Juror Sensitivity to Eyewitness Identification Evidence*, 14 LAW & HUM. BEHAV. 185, 186–87 (1990)).

[258] *Id.* at 888.

[259] State v. Clopten, 223 P.3d 1103, 1110 (Utah 2009) (citing Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 AM. CRIM. L. REV. 1271, 1277 (2005); Peter J. Cohen, *How Shall they be Known?* Daubert v. Merrell Dow Pharmaceuticals *and Eyewitness Identification*, 16 PACE. L. REV. 237, 273 (1996)).

[260] *Clopten*, 223 P.3d at 1110 (citing Steve D. Charman & Gary L. Wells, *Can Eyewitnesses Correct for External Influences on Their Lineup Identifications? The Actual/Counterfactual Assessment Paradigm*, 14 J. EXPERIMENTAL PSYCHOL. APPLIED 5, 5 (2008) (quoting State v. Long, 721 P.2d 483, 489 (1986)).

confidence does not equate to accuracy.[261] Cross-examination is especially inadequate to reveal weaknesses when the identification happens for the first time in court because the identification was not tested pretrial—without the suggestiveness of the in-court procedure—for comparison.

Jury instructions, too, have also proved ineffective to "cure" the prejudice from a mistaken identification.[262] The *Henderson* and *Lawson* courts recognized that not only are laypersons largely unfamiliar with scientific evidence relating to memory and suggestiveness, but also individuals often hold beliefs that go against the weight of scientific evidence.[263] The use of jury instructions to educate the jury on the reliability of eyewitness identifications has been shown to have little effect on what jurors intuitively believe about memory, with one study relied upon in *Henderson* showing that mock jurors "were insensitive to the effects of [estimator variables], retention interval, suggestive lineup instructions, and procedures used for constructing and carrying out the lineup," but nevertheless "gave disproportionate weight to the confidence of the witness."[264] In fact, experts find that "eyewitness confidence [is] the most powerful predictor of verdicts regardless of other variables."[265]

For the same reasons, expert testimony cannot cure the prejudice from a suggestive identification. Scientists find that, although experts can inform jurors about the factors that may make an identification particularly unreliable, experts cannot help the jury determine whether any particular identification is accurate or not.[266] A first time, in-court identification is, therefore, subject to many of the concerns condemned in pretrial identifications because of the tendency to create suggestiveness in the encounter, which cannot be cured by traditional trial techniques. A few rare courts have recognized that the setting of the courtroom is inherently

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[261] Commonwealth v. Crayton, 21 N.E.3d 157, 167 (Mass. 2014) (citing *Supreme Judicial Court Study Group on Eyewitness Evidence: Report and Recommendations to the Justices* 19 (July 25, 2013)).

[262] *Clopten*, 223 P.3d at 1110 (citing Cohen, *supra* note 259, at 272 (1996); BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY AND THE LAW 264 (1995); Edith Greene, *Eyewitness Testimony and the Use of Cautionary Instructions*, 8 U. BRIDGEPORT L. REV. 15, 20 (1987)).

[263] State v. Lawson, 291 P.3d 673, 703 (N.J. 2012); State v. Henderson, 27 A.3d 872, 910 (N.J. 2011).

[264] *Henderson*, 27 A.3d at 911 (citations omitted).

[265] *Id.* (citation omitted).

[266] Noah Clements, *Flipping a Coin: A Solution for the Inherent Unreliability of Eyewitness Identification Testimony*, 40 IND. L. REV. 271, 286 (2007).

suggestive and encouraged the permissive grant of a pretrial lineup.[267] Many, however, have explicitly stated that a pretrial lineup procedure is not a prerequisite to every in-court identification.[268]

Absent a way to cure the suggestiveness of a first time, in-court identification, courts should encourage out-of-court identification procedures either pretrial or with leave during trial by prohibiting the first time, in-court identification.

V. CONCLUSION

Courts must either accept the science or not. It is disingenuous to accept the science when it comes to analyzing pretrial identifications, while refusing to accept that the same science informs in-court identifications.

For those courts that accept the science proving our memories are exceptionally malleable, the suggestion arising inside the courtroom must be recognized and guarded against. The same concerns courts have articulated in the pretrial context exist in the context of first time, in-court identifications. As courts begin to create more reliable pretrial procedures, the courts must also encourage the use of those procedures by prohibiting first time, in-court identifications, which circumvent all of the precautionary measures designed to prevent misidentifications, such as blind administration, lineups that include look-alike fillers, pre-identification instructions, and non-suggestive questioning. The first time, in-court identification, instead, has all the suggestiveness of a show-up and should be similarly banned.

We propose that courts require prosecutors to disclose witnesses who may be asked to identify the defendant during trial and prohibit the question from being asked of those who have not made a pretrial identification. Prosecutors can avoid witness disqualification with relative ease by attempting a pretrial identification. For the rare situation in which logistics or timing prevent a pretrial identification, courts should permit prosecutors to take leave of trial to attempt a non-suggestive, out-of-court identification. At a minimum, courts should replicate non-suggestive procedures by arranging a reliable lineup inside the courtroom and preventing the witness

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[267] *See* United States v. Domina, 784 F.2d 1361, 1369 (9th Cir. 1986); United States v. Archibald, 734 F.2d 938, 941–42 (2d Cir. 1984); Commonwealth v. Sexton, 400 A.2d 1289, 1293 (Pa. 1979) ("It is important to note the limitations of our holding today. First, we have declined to accept a per se rule that all in-court confrontations are inadmissible. Second, we have also declined to accept a per se rule that a pre-trial, pre-hearing lineup is mandatory in all cases. We are merely saying that where as here the issue of identification is legitimately at issue, a timely request for a pre-trial or pre-hearing identification procedure should be granted.").

[268] Pitts v. State, 747 S.E.2d 699, 702 (Ga. 2013)

from seeing the defendant beforehand.

Preventing misidentifications that lead to wrongful convictions far outweighs the minimal inconvenience to the process and should be, always, our priority.