

**IMPERMISSIBLE INSTRUCTIONS: *STATE V. HENDERSON* AND
THE EBBING UTILITY OF EYEWITNESS EVIDENCE**

*Evan C. Miller**

I. INTRODUCTION	803
II. BACKGROUND.....	806
A. The Jury and What We Should Expect	806
B. Jury Instructions	810
C. Eyewitness Identification Testimony	816
III. <i>STATE V. HENDERSON'S</i> NEW FRAMEWORK AND REVISED JURY CHARGES.....	821
A. 'The Vagaries of Eyewitness Identification'	821
1. System Variables	823
2. Estimator Variables.....	825
B. The New Framework	828
C. The Revised Jury Charges	832
IV. THE PORTENT OF <i>HENDERSON'S</i> PROFFERED CORRECTIONS	835
V. CONCLUSION	839

I. INTRODUCTION

Eyewitness identification evidence is an integral part of the United States justice system.¹ Solving crimes often depends on an eyewitness's account of events.² Someone testifying precisely to what he or she observed can send an influential message to a jury during trial.³ Hence, in criminal trials, "[e]yewitness identification can be

* Editor-in-Chief, *Rutgers Law Review*. J.D., Rutgers School of Law—Newark, 2014; B.A., English, Montclair State University, 2009. This Note is dedicated to my family, and especially to my loving, patient, and brilliant wife. I owe many thanks to the entire staff of Volume 66 of *Rutgers Law Review* for their tireless work, not only on this Note, but on each article, note, essay, and speech. Also, I want to thank Professor Louis Raveson for his guidance and encouragement.

1. See Bennett L. Gershman, *The Eyewitness Conundrum*, 81 N.Y. St. B.J., Jan. 2009, at 24, 24.

2. See *id.*

3. See ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 19 (Harvard Univ. Press 1979) (“[T]here is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says ‘That’s the one!’”). Loftus’s comprehensive analysis of eyewitness testimony uses psychological data and statistics to argue that eyewitness testimony is extremely influential despite being hazardous. See generally *id.*

the most powerful evidence presented.”⁴ Furthermore, the drama of the courtroom coupled with the seeming infallibility of what someone saw with their own eyes presents a picture that can be manipulated by an attorney to signify virtual certainty as to the accuracy of the identification.

It is also frequently the sole evidence available in criminal trials, and when procedures are properly followed, it bears a likelihood of reliability.⁵ But, in light of a 1987 study that revealed that every year roughly 80,000 criminal trials in the United States use eyewitness testimony as the “sole or primary evidence against the defendant,”⁶ the margin of error for properly handling eyewitness identification evidence is necessarily slim.

Particularly salient when considering the ubiquitous presence of eyewitness identification testimony is that jurors consistently regard it as persuasive.⁷ This is potentially problematic because the average juror is likely unschooled as to the complicated cognitive processes involved in recalling specific information from memory.⁸ Indeed, studies now show that, in general, people struggle to understand relevant scientific data concerning memory.⁹ Furthermore, “potential jurors—and many law enforcement officials and judges—do not regard eyewitness identification with . . . skepticism.”¹⁰

They should. Unreliable eyewitness testimony has been shown to be responsible for numerous wrongful convictions.¹¹ It is now clear that wrongful convictions, no matter what their cause, are extremely prevalent.¹² One study estimates that *at a minimum* 5,000 people are

4. *State v. Delgado*, 902 A.2d 888, 895 (N.J. 2006) (citing *United States v. Langford*, 802 F.2d 1176, 1182 (9th Cir. 1986)).

5. Richard A. Wise, Kirsten A. Dauphinais & Martin A. Safer, *A Tripartite Solution to Eyewitness Error*, 97 J. CRIM. L. & CRIMINOLOGY 807, 808 (2007).

6. *Id.* at 810-11.

7. See John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 LAW & HUM. BEHAV. 19, 19 (1983).

8. See *Kampshoff v. Smith*, 698 F.2d 581, 585 (2d Cir. 1983).

9. See *State v. Henderson*, 27 A.3d 872, 910-11 (N.J. 2011).

10. Felice J. Levine & June Louin Tapp, *The Psychology of Criminal Identification: The Gap from Wade to Kirby*, 121 U. PA. L. REV. 1079, 1081 (1973).

11. *DNA Exonerations Nationwide*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php (last visited Mar. 2, 2014); see also *United States v. Wade*, 388 U.S. 218, 228 (1967) (“The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.”); SAMUEL R. GROSS & MICHAEL SHAFFER, NAT’L REGISTRY OF EXONERATIONS, EXONERATIONS IN THE UNITED STATES, 1989-2012, at 40 (2012) [hereinafter EXONERATIONS REPORT], available at http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf.

12. See EXONERATIONS REPORT, *supra* note 11, at 3. Gross and Shaffer’s study notes that of the 873 known exonerations from the period specified, eighty-three

wrongly convicted in the United States *every year*.¹³ Another study estimates that 87,000 wrongful convictions occurred between 1989 and 2003.¹⁴ There have been 1,313 exonerations—cases where someone has been wrongly convicted and subsequently cleared of the charges—since 1989 in the United States.¹⁵ There have been sixteen exonerations in New Jersey alone since 1989.¹⁶

The greatest cause of this breathtaking number of wrongful convictions is erroneous eyewitness identification testimony.¹⁷ In *State v. Henderson*, the New Jersey Supreme Court sought to remedy the problem in New Jersey by revising the framework for assessing the reliability of eyewitness identification evidence, and recommending that new jury instructions be drafted to address the jury's understanding of the reliability of eyewitness testimony.¹⁸ The recommendations were taken and the new instructions went into effect on September 4th, 2012.¹⁹ Importantly, the instructions place a particular emphasis on the imperfect nature of human memory.²⁰

While the instructions and the new framework are certain to remedy some of the deleterious effects of unreliable eyewitness

percent were in cases of homicide or rape, which together account for two percent of felony convictions. *Id.* The full breadth of the problem may not be quantifiable, as “‘lesser’ felonies, and certainly misdemeanors, may lack the record and interested advocates to investigate and pursue exonerations.” Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 834 (2010).

13. Marvin Zalman, *Qualitatively Estimating the Incidence of Wrongful Convictions*, 48 CRIM. L. BULL. 221, 277 (2012).

14. Diane Jennings, *Number of Wrongful Convictions Estimated at Almost 87,000*, DALLASNEWS (Jan. 6, 2009, 10:15 AM), <http://crimeblog.dallasnews.com/2009/01/number-of-wrongful-convictions.html/>.

15. *About the Exoneration Registry*, THE NATIONAL REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Mar. 2, 2014).

16. *Browse the National Registry of Exonerations*, THE NATIONAL REGISTRY OF EXONERATIONS, [http://www.law.umich.edu/special/exoneration/Pages/browse.aspx?VVie={B8342AE7-6520-4A32-8A06-4B326208BAF8}&FilterField1=State&FilterValue1=New Jersey](http://www.law.umich.edu/special/exoneration/Pages/browse.aspx?VVie={B8342AE7-6520-4A32-8A06-4B326208BAF8}&FilterField1=State&FilterValue1=New%20Jersey) (last visited Mar. 2, 2014).

17. See ROB WARDEN, NW. UNIV. SCH. OF LAW, HOW MISTAKEN AND PERJURED EYEWITNESS IDENTIFICATION TESTIMONY PUT 46 INNOCENT AMERICANS ON DEATH ROW 1-2 (2001), available at <http://www.deathpenaltyinfo.org/StudyCWC2001.pdf>; *Understand the Causes: Eyewitness Misidentification*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited Mar. 2, 2014).

18. See *State v. Henderson*, 27 A.3d 872, 919-22, 925-26 (N.J. 2011).

19. MaryAnn Spoto, *N.J. Supreme Court Imposing Sweeping Changes in Crime Witness Testimony*, NJ.COM (Jul. 23, 2012, 11:55 AM), http://www.nj.com/news/index.ssf/2012/07/nj_supreme_court_imposing_swee.html.

20. See MODEL JURY CHARGE (CRIMINAL): IDENTIFICATION: IN-COURT IDENTIFICATION ONLY (2012), available at <http://www.judiciary.state.nj.us/criminal/charges/idinct.pdf>; see also *infra* Parts IV-V.

testimony, this note argues that, for myriad reasons, the framework and instructions go too far.²¹ The language of the instructions is such that, given the unpredictability of how such instructions are perceived by juries,²² and the unpredictability of juror decision making,²³ they could produce aberrant results. Moreover, the new framework, through its extremely focused approach, could cause the suppression of perfectly reliable eyewitness identification evidence.²⁴

Part II of this note gives relevant background information on the nature of the jury and how it tends to be unpredictable, and also on jury instructions and eyewitness identification testimony. Part III discusses the problems of eyewitness identification testimony and then examines *Henderson's* attempts at rectifying the problem of eyewitness identification through a new standard for admissibility and new jury instructions. Part III also analyzes the new jury instructions in detail. Part IV discusses the likely effect of *Henderson's* changes, as well as other methods that can be used to rectify the problems with eyewitness identification testimony. Specifically, this note argues for a standard that both builds on and alters the changes the *Henderson* framework introduced, and recommends that certain portions of the new jury charges be removed.²⁵

II. BACKGROUND

A. *The Jury and What We Should Expect*

The jury system, one of the “greatest liberties embodied in our

21. See *infra* Part IV.

22. See generally John P. Cronan, *Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 AM. CRIM. L. REV. 1187, 1203-08 (2002) (discussing extensive evidence of juror confusion stemming from jury instructions).

23. See, e.g., Kwangbai Park, *Estimating Juror Accuracy, Juror Ability, and the Relationship Between Them*, 35 LAW & HUM. BEHAV. 288, 303 (2011) (“The obvious fact that ability [to give the correct verdict] is variable among people has been largely ignored in empirical research on jury/juror decisionmaking.”); Sarah L. Desmarais & J. Don Read, *After 30 Years, What Do We Know About What Jurors Know? A Meta-Analytic Review of Lay Knowledge Regarding Eyewitness Factors*, 35 LAW & HUM. BEHAV. 200, 209 (2011) (noting that, in terms of eyewitness evidence, there are several factors for which “lay knowledge” is inadequate, and that even when there is knowledge of some of the problems with eyewitness identification, jurors do not necessarily take it into account when making their decision); see also Tamara F. Lawson, *Before the Verdict and Beyond the Verdict: The CSI Infection Within Modern Criminal Jury Trials*, 41 LOY. U. CHI. L.J. 119, 121 (2009) (discussing the effects of a phenomenon known as “the CSI effect,” where jurors’ actual decision-making acumen is affected by viewing fictional television shows dealing with crime investigation).

24. See *infra* Part IV.

25. See *infra* Part IV.

country's system of justice,"²⁶ is a method of ensuring citizens' liberties in the face of a powerful government.²⁷ The right to a trial by jury was deemed fundamental by the Framers; they included the concept in several areas of the Constitution and the Bill of Rights.²⁸ Further, the one right common to all state constitutions written between 1776 and 1787 was that of the criminal jury trial.²⁹ Reflecting the Framers' chief concerns,³⁰ the inclusion of a jury trial right in the Constitution "was clearly intended to protect the accused from oppression by the Government."³¹

In addition to protecting the accused, the jury trial right has been described as a "collective right"—one that benefits the community by (1) meting out punishment collectively decided upon and (2) subsequently restoring the social membership of a lawbreaker.³² A person accused of committing a crime faces consequences as an individual and as a member of his or her community; thus, the consequences are necessarily important to the accused's community.³³ The jury, then, as a representative of the community, is necessarily tethered to the "lawful imposition of the penalty"³⁴—its decision in a criminal case is critically important to

26. Megan Healy McClung, *A Brief History of the Jury*, 19 CHI. B. ASS'N REC. 35, 35 (2005).

27. *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 349-50 (Cooley ed. 1899)).

28. U.S. CONST. art. III, § 2, cl. 3 (guarantee of trial by jury); U.S. CONST. amend. V (grand jury trial); U.S. CONST. amend. VI (criminal jury trial); U.S. CONST. amend. VII (civil jury trial); *see also* McClung, *supra* note 26, at 35 ("Thomas Jefferson called the jury system 'the only anchor yet imagined by man by which a government can be held to the principles of its constitution.'").

29. LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 227 (1985).

30. *See* THE FEDERALIST NO. 51, at 257 (James Madison) (Lawrence Goldman ed., 2008) ("In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."); THE FEDERALIST NO. 47, at 239 (James Madison) (Lawrence Goldman ed., 2008) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed [sic], or elective, may justly be pronounced the very definition of tyranny."); Thomas Jefferson, *Query XIV: Laws, in* THE PORTABLE THOMAS JEFFERSON 177 (Merrill D. Petersen ed., 1977) ("[T]he common sense of twelve honest men gives still a better chance of just decision, than the hazard of cross and pile.").

31. *Singer v. United States*, 380 U.S. 24, 31 (1965). *But see* Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 398 (2009) (arguing that the original intention of Article Three, Section 2, Clause 3 was to afford a jury trial right that benefitted the people collectively rather than to provide individual protection).

32. *See* Appleman, *supra* note 31, at 398.

33. Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 681 (1996).

34. *See* *Blakely v. Washington*, 542 U.S. 296, 309 (2004).

the community's functionality, at least to the extent of the community's reaction to crime.

Indeed, the jury trial process is integral to our system of justice and to our system of government.³⁵ It has a "key role in dispensing . . . the law to the community" and in "maintaining the community's centrality to politics and the polity."³⁶ It is the voice with which the community admonishes those who fail to conform their conduct to acceptable standards.³⁷ In effect, the jury trial indicates what will or will not be tolerated in a society.³⁸ Although this indication is explicit in a system where a representative body passes laws, the jury is the layman's declaration of how those laws should or should not shape the contours of everyday life—a sort of free-market system of voting on the acceptability of certain behavior.³⁹

To that end, the jury itself functions as a means of legitimizing criminal-justice process and procedure.⁴⁰ Thomas Jefferson argued that the permanency of judgeships lends itself to bias or to judges being tempted by bribery.⁴¹ The jury remediates such a problem—and the view of the criminal justice system that such a problem could engender—by acting as a check on the power of the judge, similar to the jury's ability to monitor witness credibility and expose a witness's untruthfulness.⁴²

Serving on the jury is not only an obligation,⁴³ but one of the greater civic duties of American citizens,⁴⁴ and provides the opportunity to self-govern.⁴⁵ Jurors shoulder the "ultimate

35. Appleman, *supra* note 31, at 415.

36. *Id.*

37. *See id.* at 405.

38. In criminal trials, the existence of just one juror who believes that the law—either in general or as applied to a particular case—is unfair or that punishment is unwarranted, can produce a result that is at odds with a judge's instructions or that is against the weight of the evidence. *See* Mary Claire Mulligan, *Jury Nullification: Its History and Practice*, 33 COLO. LAW., Dec. 2004, at 71, 71. Although courts disfavor the doctrine, jury nullification is still a phenomenon that allows jurors to essentially decide the particular force that a particular law has. *Id.* at 74.

39. *See* Andrew J. Parmenter, *Nullifying the Jury: "The Judicial Oligarchy" Declares War on Jury Nullification*, 46 WASHBURN L.J. 379, 400-402 (2007).

40. Amar, *supra* note 33, at 681.

41. Letter from Thomas Jefferson to L'Abbe Arnoux (July 19, 1789), in 14 THE PAPERS OF THOMAS JEFFERSON, 1788-89, at 282-83 (Julian Boyd, ed. 1958).

42. Amar, *supra* note 33, at 683-84. *See* Blakely v. Washington, 542 U.S. 296, 306 (2004) ("Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.").

43. 28 U.S.C. § 1861 (2006).

44. *See, e.g.,* Dyer v. Calderon, 151 F.3d 970, 982 (9th Cir. 1998) ("Jury service is a civic duty that citizens are expected to perform willingly when called upon to do so.").

45. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1187 (1991) ("Through the jury, Citizens . . . learn self-government by doing self-

responsibility for determining guilt or innocence.”⁴⁶ This is a great weight indeed; depriving freedoms and rendering decisions that could tarnish one’s reputation are portentous consequences in a society that prides itself on liberty, equality, and justice.⁴⁷

It is axiomatic that punishing one citizen for the crimes committed by another should not be tolerated, even if such punishment is by mistake.⁴⁸ Despite this basic truth, a great body of research details the existence and breadth of the wrongful-conviction problem.⁴⁹

And yet, “[y]ou do not need any knowledge of the legal system to be a juror.”⁵⁰ Can society expect jurors to reach reliable conclusions drawn from the evidence presented without bringing some knowledge of the law to the trial process? It is not clear that the average United States citizen is capable of making well-reasoned legal decisions on their own.⁵¹ Given the persistence of jury nullification,⁵² there is some evidence that jurors sometimes disregard the law and decide an

government.”). See *Powers v. Ohio*, 499 U.S. 400, 407 (1991) (“[F]or most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.”).

46. *State v. Simon*, 398 A.2d 861, 865 (1979) (citing *United Bhd. of Carpenters & Joiners v. United States*, 330 U.S. 395, 408-09 (1946)).

47. See U.S. CONST. pmbl.; Guyora Binder, *Punishment Theory: Moral or Political?*, 5 BUFF. CRIM. L. REV. 321, 328 (2002) (arguing that punishment, although authorized by political institutions, is morally wrong); MICHELLE ALEXANDER, *THE NEW JIM CROW* 158 (2010) (“When someone is convicted of a crime today, their ‘debt to society’ is never paid.”).

48. *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (“[I]t is far worse to convict an innocent man than to let a guilty man go free.”). See Sanford H. Kadish, *Why Substantive Criminal Law – A Dialogue*, 29 CLEV. ST. L. REV. 1, 10 (1980) (“[P]unishment entails blame and . . . , therefore, punishment may not justly be imposed where the person is not blameworthy.”).

49. See *Understand the Causes*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/understand> (last visited Feb. 11, 2014); *DNA Exonerations Nationwide*, *supra* note 11.

50. *Jury Information*, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF TEXAS, <http://www.txed.uscourts.gov/page1.shtml?location=jury> (last visited Feb. 11, 2014); *Juror Information*, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF INDIANA, <http://www.insd.uscourts.gov/juror-information> (last visited Feb. 11, 2014).

51. See Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 492-93 (1997) (“[J]urors have been criticized as incompetent in their role as factfinders as well as in their ability to understand the law that they must apply to the facts of the case. This is troubling because the justice of a decision inherently depends on the rationality of the decisionmaker, and a decisionmaker that does not understand the grounds for its decision is incapable of rationally coming to such a decision.”). *But see* Norman J. Finkel, *Commonsense Justice, Culpability, and Punishment*, 28 HOFSTRA L. REV. 669, 704-06 (2000) (arguing that jurors’ approaches to justice and fairness are more complex and perhaps more appropriate to particular cases than the approach of the law).

52. See Mulligan, *supra* note 38, at 74.

issue based on personal beliefs.⁵³ The jury, without guidance, would likely render decisions based purely on emotional appeal⁵⁴ or the quality and effectiveness of counsel's presentation.⁵⁵

Of course, there is guidance, which comes in the form of jury instructions.⁵⁶

B. Jury Instructions

Jury instructions "define with substantial particularity the factual issues, and clearly . . . instruct the jurors as to the principles of law which they are to apply in deciding the factual issues involved in the case before them."⁵⁷ Fundamentally, the function of a jury instruction is to lay out exactly "what the jury must believe from the evidence in order to return a verdict in favor of the party bearing the burden of proof."⁵⁸ The Supreme Court has made clear that judges at the trial level are to provide the jury with instructions which correctly and precisely direct how to apply the law.⁵⁹

The judge can and will instruct the jury at several different points during a trial.⁶⁰ Informational instructions are given at the beginning of the trial that serve to give jurors a general sense of their duties and how the trial will proceed.⁶¹ These instructions can also define certain legal terms, warn jurors of the influence of sympathy and prejudice, and direct them not to pay attention to media regarding the trial or "talk with witnesses or other jurors during the . . . trial."⁶²

Instructions on the substantive law are usually given at the end of the trial and discuss the elements of the specific crime charged

53. See Parmenter, *supra* note 39, at 400-02. See also Peter Aronson, David E. Rovella & Bob Van Voris, Jurors: A Biased, Independent Lot; An NLJ-Decision Quest Poll Finds Potential Jurors Will Ignore a Judge and Don't Like Big Business.; '98 Juror Outlook Survey, NAT'L L.J., Nov. 1998, at 7, 7 ("[M]ore than 75 percent of the 1,012 people questioned said that as jurors, they would do what they believed was right regardless of what a judge says that the law requires.").

54. See Monica K. Miller et al., *How Emotion Affects the Trial Process*, 92 JUDICATURE 56, 63 (2008) (noting the various effects emotion has on juries).

55. See Victor Gold, *Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom*, 65 N.C. L. REV. 481, 484-91 (1987), for a discussion of how an attorney's courtroom style can influence juries.

56. See discussion *infra* Part II.B.

57. *United States v. Hill*, 417 F.2d 279, 281 (5th Cir. 1969). See generally 75A AM. JUR. 2D *Trial* § 920 (2007).

58. *Hilsmeier v. Chapman*, 192 S.W.3d 340, 344 (Ky. 2006).

59. *Sparf v. United States*, 156 U.S. 51, 92 (1895).

60. Cronan, *supra* note 22, at 1193.

61. William H. Erickson, *Criminal Jury Instructions*, 1993 U. ILL. L. REV. 285, 287 (1993).

62. *Id.*

along with descriptions of defenses and lesser-included offenses.⁶³ At this time the judge also discusses both the prosecution's and defense's respective theories of the case.⁶⁴ These instructions are given after both attorneys have had a chance to submit proposed jury instructions.⁶⁵

Evidentiary instructions usually come at the end of the trial and serve to provide jurors with standards by which to consider certain types of evidence.⁶⁶ The instructions usually include instructions on credibility, expert witnesses, and burdens of proof, as well as cautions about the limitations on using particular kinds of evidence.⁶⁷

Trial judges face a certain level of tension "between giving jury instructions that are understandable to an average juror and minimizing the risk of reversal on appeal by retaining technical legal language that may be incomprehensible to a lay person."⁶⁸ Unfortunately, jurors are frequently confused by the charges given by the judge.⁶⁹ A tiny sample of such confusion reveals that jurors have mistakenly conflated deliberate misconduct with murder,⁷⁰ been confused regarding the meaning of the phrase "serious bodily injury,"⁷¹ and returned an inconsistent verdict after being given instructions twice on negligence and contributory negligence.⁷² Jury instructions discussing the science of eyewitness identification can also be incomprehensible, and thus confusing to jurors.⁷³

63. *Id.* at 287-88.

64. *Id.* at 288.

65. *Id.* at 287.

66. *Id.* at 288.

67. *Id.*

68. *Id.* at 285.

69. *Id.* at 290. *See* Cronan, *supra* note 22, at 1258; Park, *supra* note 23, at 303; Desmarais & Read, *supra* note 23, at 209.

70. *See* Whited v. Powell, 285 S.W.2d 364, 365-66 (Tex. 1956). The court seemed to be aware of confusion among the jurors, noting that "it would be most unrealistic to expect that all members of the jury as ordinary laymen would thoroughly understand every portion of a complicated charge." *Id.* at 367.

71. *See* Zeledon v. United States, 770 A.2d 972, 974-75 (D.C. 2001).

72. *See* Drum v. Shaul Equip. & Supply Co., 760 A.2d 5, 8 (Pa. Super. Ct. 2000). The court vacated and remanded the verdict, concluding that "[j]ury confusion was apparent almost from the outset of the jury's deliberations." *Id.* at 11. The three examples given here of jury confusion are but a drop in the bucket of the instances in which jurors have been confused to the point where a miscarriage of justice was possible. For more anecdotal evidence of juror confusion, see Cronan, *supra* note 22, 1196-1202.

73. Derek Simmons, Comment, *Teach Your Jurors Well: Using Jury Instructions to Educate Jurors About Factors Affecting the Accuracy of Eyewitness Testimony*, 70 MD. L. REV. 1044, 1085-86 (2011). *But see* Jules Epstein, *The Great Engine That Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 STETSON L. REV. 727, 783 (2007) ("[T]he efficacy of a comprehensive instruction has

As a general matter, “jury instructions are often long and confusing.”⁷⁴ If you add the fact that jurors may be tired, even weary, by the time the judge finishes giving the charge, and that instructions are often provided in a manner reminiscent of a teacher lecturing students,⁷⁵ it is no wonder that “jurors often ignore or misunderstand them.”⁷⁶

Juror confusion arising from the language of instructions is such a problem that several states have introduced so-called “plain-English” jury instructions.⁷⁷ California was one of the first to draft such instructions, pointing to evidence that traditional jury instructions “were not explaining the law in a clear fashion,” and were failing to communicate effectively with most jurors.⁷⁸

Although such “plain-English” jury instructions are likely to help with juror comprehension, another issue with evidentiary instructions with which judges must contend is that “they frequently serve as an improper comment on the evidence and invade the fact-finding function of the jury.”⁷⁹ For example, in New Jersey criminal cases that include the in-court eyewitness testimony, judges will now give an instruction that includes extensive information about the unreliability of human memory as it pertains to eyewitness identification,⁸⁰ which could “single[] out [that] particular witness and tell[] the jurors to apply a different standard of credibility when weighing his testimony.”⁸¹ Considering the judge’s and jury’s distinct

been demonstrated, at least as to introducing caution into juror deliberations, and can significantly inform juror evaluation of eyewitness testimony.” (citation omitted)).

74. Roger B. Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 AM. CRIM. L. REV. 1013, 1061 (1995).

75. See Cronan, *supra* note 22, at 1211 (noting that some charges can last for hours).

76. Simonsen, *supra* note 73, at 1086.

77. *Plain-English Jury Instructions*, AM. JUDICATURE SOC’Y, <https://www.ajs.org/judicial-administration/jury-center/jury-system-overview/jury-improvement-efforts/improving-trials/plain-english-jury-instructions/> (last visited Mar. 2, 2014) (noting six states that have already completed instructions with an emphasis on plain English, and four more that have committees redrafting jury instructions for the express purpose of including more plain English).

78. James D. Ward, *California Adopts “Plain-English” Civil Jury Instructions*, 87 JUDICATURE 300, 300 (2004).

79. Erickson, *supra* note 61, at 288-89.

80. *State v. Henderson*, 27 A.3d 872, 924 (N.J. 2011).

81. Erickson, *supra* note 61, at 289. Admittedly, as will be discussed in Part III of this note below, such an approach to instructing the jury may be necessary to counteract the pervasive and injurious effects of unreliable eyewitness testimony. See *DNA Exonerations Nationwide*, *supra* note 11. Nevertheless, there still remains a tension between the judge’s duty to instruct the jury on how to apply the law and his duty to respect the jury’s fact-finding province when he gives an instruction that cautions jurors on how they should perceive particular types of evidence supplied by particular types of witnesses.

roles as arbiter of law and fact finder, respectively, and that, by extension, the judge should not invade the jury's fact-finding function,⁸² such instructions, depending on the wording, come dangerously close to impermissibility. That is, in theory, magnifying the in-court testimony of an eyewitness through a cautionary lens approaches invading the fact-finding function of the jury because assessing the credibility of a given witness is the jury's job.⁸³

The phrases "invading the fact-finding function of the jury" and "invading the province of the jury" relate most often to situations in which an expert is giving testimony that assists the jury in its functions.⁸⁴ This includes evaluating the credibility of witnesses.⁸⁵ Thus, with regard to jury instructions, especially those newly adopted by New Jersey, there can be quite a fine line between necessary cautioning on factors that affect the reliability of eyewitness testimony and giving an instruction that impermissibly invades the province of the jury. Indeed, the new instructions are comments that summarize scientific findings in areas pertaining to the reliability of eyewitness testimony, effectively turning the judge into a sort of expert witness.⁸⁶

State eyewitness identification instructions are often modeled after a sample jury instruction⁸⁷ found in the appendix of the opinion in *United States v. Telfaire*.⁸⁸ Noting that identification instructions may be necessary in most cases where eyewitness testimony is presented, the *Telfaire* court manifested a concern for safeguarding the promise of the presumption of innocence and guarding against the effects of mistaken identification.⁸⁹

The *Telfaire* sample instructions aim to focus the jury on: (1) the adequacy of the witness's "opportunity to observe the offender"; (2) the witness's capacity "to observe the offender"; (3) whether the identification was a function of the witness's own recollection; (4) whether the witness "failed to make an identification of defendant" on any occasion; and (5) the credibility of any eyewitness giving testimony.⁹⁰ Each of the factors are supplemented with examples and

82. See, e.g., *State v. Ragland*, 519 A.2d 1361, 1370 (N.J. 1986).

83. *State v. Myers*, 382 N.W.2d 91, 97 (Iowa 1986); Brenda G. Hamilton, Note, *Expert Testimony on the Reliability of Eyewitness Identifications: A Critical Analysis of its Admissibility*, 50 MO. L. REV. 733, 745 (1989).

84. Ric Simmons, *Conquering the Province of the Jury: Expert Testimony and the Professionalization of Fact-finding*, 74 U. CIN. L. REV. 1013, 1015 (2006).

85. *Id.*

86. As noted previously, this idea is more fully developed and discussed in Part III and Part IV of this note.

87. Simonsen, *supra* note 73, at 1070-71.

88. 469 F.2d 552, 558 (D.C. Cir. 1972).

89. *Id.* at 555.

90. *Id.* at 558-59.

explanations, such as “how long or short a time was available” to observe the witness, “the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see defendant”—which is aimed at determining how reliable the witness’s memory can be considered—and whether the identification was made by the witness picking the defendant out of a lineup or by having the defendant presented in front of the witness, the former situation tending to indicate greater reliability.⁹¹

With the *Telfaire* instructions as a foundation, states have developed comprehensive jury instructions that utilize social science research to inform jurors of the reality of human perception and memory.⁹² Such instructions serve as a substitute for information that was, instead, traditionally communicated through expert testimony.⁹³ The fact that expert testimony can be extremely costly—and is thus not available to all parties in all cases—coupled with the amount of time expert testimony can consume during trial, make cautionary jury instructions a preferred means of informing jurors of prescient factors relating to eyewitness identification.⁹⁴

Despite the weighty arguments in favor of employing jury instructions rather than expert testimony to mitigate the potential harm of unreliable eyewitness testimony, there still remains the problem of judges instructing the jury on issues of credibility as to particular witnesses, and how the jury will respond to such instructions coming from a judge.

Social science research does not give a clear picture of how the public views judges.⁹⁵ However, public perception of judges and the

91. *Id.* at 558.

92. Simonsen, *supra* note 73, at 1072-73.

93. *Id.* at 1073.

94. *Id.* at 1078-79. *But see* Michael R. Leippe, *The Case for Expert Testimony About Eyewitness Memory*, 1 PSYCHOL. PUB. POL’Y & L. 909, 949 (1995) (“[S]everal considerations suggest that universal reliance on a judge’s instructions would be unsatisfactory. First, instructions to carefully scrutinize the eyewitness testimony may imply to some juror that the judge wants them to discount the testimony. Second, the instructions may not be well-attended to when presented as part of a lengthy, legalistic list of instructions from the bench. Finally, most judges are not sufficiently sophisticated in psychology to present articulate, detailed knowledge about eyewitness memory. Information about eyewitness memory seems best presented as an overview of knowledge rather than instructions about judgments to be made.”). Although the last consideration from Dr. Leippe is moot as it pertains to the cautionary pattern jury instructions in New Jersey, it presents a question worth considering nonetheless: how often should the pattern jury instructions dealing with eyewitness memory and perception be reviewed and revised given the ever-changing findings of social science research?

95. Compare David B. Rottman & Alan J. Tomkins, *Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges*, 36 CT. REV. 24, 24 (1999) (“The public survey revealed people . . . displayed a general if not wholehearted respect for judges.”), and Brian H. Bornstein et al., *Juror Reactions to Jury Duty: Perceptions*

justice system is salient to the functioning of the justice system because “perception is reality.”⁹⁶ Any negative perception of the justice system in general should be viewed with “very great concern,” because public sentiment determines the “overall workability of the system.”⁹⁷

Public perception of the court system, and specifically of judges, is germane to the functioning of the system in another way: members of the public make up the membership of the jury. A question yet to be addressed by social science research is whether jurors’ perceptions of judges, both before serving on the jury and while serving on the jury, have an effect on decision making, specifically when it comes to following judges’ instructions. There is some evidence that jurors will choose not to follow judges’ instructions on the law in some instances,⁹⁸ but whether such decisions might come, at least in part, as a result of negative perceptions of judges remains unanswered.

More important to the subject of this note is whether a particular juror’s favorable or reverent perception of judges—or the particular judge in the case—can have the effect of foreclosing the possibility that that juror will disregard an instruction and make his or her own decision. For example, consider a pattern instruction that reads: “If, based on your consideration of the evidence, in light of the law that applies, you are satisfied that the defendant’s guilt has been proven beyond a reasonable doubt, then you *must* find him/her guilty.”⁹⁹ Jury nullification would occur if the jury returned a verdict that went against this instruction although the evidence was sufficient to prove the defendant’s guilt beyond a reasonable doubt.¹⁰⁰ But can strong language—perhaps not as strong as “must,” but nevertheless expressing a level of certainty about particular evidence—included in eyewitness identification instructions cause jurors to believe that

of the System and Potential Stressors, 23 BEHAV. SCI. & L. 321, 322 (2005) (noting that a study indicating a generally positive view of the legal system included a perception that judges conducted their work honestly and fairly), with Phyllis Williams Kotey, *The Real Costs of Judicial Misconduct: Florida Taking a Step Ahead in the Regulation of Judicial Speech and Conduct to Ensure Independence, Integrity, and Impartiality*, 31 NOVA L. REV. 645, 648 (2007) (“[J]udges cannot escape the overarching negative perception of the legal system that appears to engulf the judiciary.”), and Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 431 (2005) (arguing that rampant judicial misconduct creates a negative impression of judges and of the legal system in general).

96. Steven R. Sorenson, *Perception is Reality*, 71 WIS. LAW. 5, 5 (1998); J. Thomas Greene, *Some Current Causes for Popular Dissatisfaction with the Administration of Justice*, 14 UTAH B.J., May 2001, at 35, 35 (“Reality is what the public *thinks* is real.”).

97. Greene, *supra* note 96, at 35.

98. See *supra* notes 52-53 and accompanying text.

99. B. Michael Dann, “*Must Find the Defendant Guilty*” Jury Instructions Violate the Sixth Amendment, 91 JUDICATURE 12, 12 (2007) (emphasis added).

100. Mulligan, *supra* note 38, at 71.

there is but a singular way to regard eyewitness identification evidence? And if the public—and thus, jurors—do hold judges in high regard, is there a possibility that such a perception of judges will, in conjunction with those admonishing instructions, produce a singular outcome regarding that evidence? These questions relate directly to the new jury instructions on eyewitness identification testimony instituted by New Jersey and will be explored more fully below.¹⁰¹ First, however, an exploration into eyewitness identification testimony as traditionally handled by the courts must be undertaken.

C. *Eyewitness Identification Testimony*

Eyewitness identification evidence is among the most common types of evidence used in criminal trials.¹⁰² It is also thought of as extremely effective evidence, and is generally a central part of the judicial process.¹⁰³ Eyewitness identifications take a variety of forms: the eyewitness may be asked to identify the suspect from a group of people presented to him (a “lineup” procedure), the eyewitness may be asked to identify the suspect by being shown several photographs of others (including the suspect) and selecting the suspect from the group (a “photograph array” procedure), or the eyewitness may be presented with the suspect and simply asked whether or not the person presented is the person who committed the crime (a “show-up” procedure).¹⁰⁴ A lineup procedure that is fairly conducted is the best means available for accurately identifying a suspect before trial.¹⁰⁵

*United States v. Wade*¹⁰⁶ marked the beginning of the Supreme Court’s attempt to provide suspects constitutional protection from patently unfair identification procedures.¹⁰⁷ *Wade* addressed whether the Sixth Amendment afforded the accused the right to counsel at a pretrial identification procedure.¹⁰⁸ The Court determined that, during any post-indictment procedure where the suspect is presented to the witness,¹⁰⁹ the Sixth Amendment right to counsel requires that

101. See *infra* Part IV.

102. Jennifer L. Devenport et al., *Eyewitness Identification Evidence: Evaluating Commonsense Evaluations*, 3 PSYCHOL. PUB. POL’Y & L. 338, 338 (1997).

103. See *supra* notes 1-6 and accompanying text.

104. Shirley K. Duffy, *Using an Expert to Evaluate Eyewitness Identification Evidence*, 83 N.Y. ST. B.J., June 2011, at 41, 41-42.

105. NATHAN R. SOBEL & DEE PRIDGEN, EYEWITNESS IDENTIFICATION: LEGAL AND PRACTICAL PROBLEMS § 1:2 (2d ed. 2003).

106. 388 U.S. 218 (1967).

107. Gershman, *supra* note 1, at 24-25.

108. *Wade*, 388 U.S. at 227.

109. This requirement was made clear by the Supreme Court in *United States v. Ash*, which held that “the Sixth Amendment does not grant the right to counsel at photographic displays conducted by the Government for the purpose of allowing a witness to attempt an identification of the offender.” 413 U.S. 300, 321 (1973). As the

the suspect's lawyer be present.¹¹⁰ Indeed, because pretrial presentations are potentially prejudicial and the conditions of the prejudicial presentation "may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial," the presence of counsel at such pretrial presentations is critical.¹¹¹

The *Wade* Court analyzed the fairness of identification procedures through a Sixth Amendment lens, but the Court has most often addressed such procedures under the Due Process Clause of the Fourteenth Amendment, an inquiry turning on whether a pretrial identification procedure is so "impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."¹¹² In *Neil v. Biggers*,¹¹³ the Court noted that it is

Court explained, "the accused himself is not present at the time of the photographic display," and thus there is no danger that the accused's lack of legal sophistication will prejudice him or that he will be "overpowered by his professional adversary," two situations the Court identified as reflecting the "core purpose" of the Sixth Amendment right to counsel. *Id.* at 309, 317.

110. *Wade*, 388 U.S. at 237. Certain language of the opinion suggests that the Court was concerned with *all* pretrial confrontations, not just post-indictment procedures. *See, e.g., id.* at 227 ("[T]he principle of [*Powell v. Alabama*] and succeeding cases requires that we scrutinize *any* pretrial confrontation of the accused to determine whether the presence of counsel is necessary to preserve the defendant's basic right to a fair trial." (emphasis added)); *see also* JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE: VOLUME 1: INVESTIGATION 534 (5th ed. 2010).

However, in *Kirby v. Illinois*, the Supreme Court held that suspects have no right to have counsel present until the "initiation of judicial criminal proceedings." 406 U.S. 682, 689-90 (1972). "[F]ormal charge[s], preliminary hearing[s], indictment[s], information[s], or arraignment[s]" are considered an "initiation of . . . criminal proceedings" because "it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified." *Id.* at 689. This, of course, leaves suspects who are subject to pre-indictment lineup procedures without the right to have counsel present. *See id.* at 689-90. The practical effect of this is to "render the *Wade* right-to-counsel rule largely ineffectual," as law enforcement authorities can simply conduct lineups before filing formal charges. *See* DRESSLER & MICHAELS, *supra*, at 534.

111. *Wade*, 388 U.S. at 236-37.

112. Gershman, *supra* note 1, at 24 (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)) (internal quotation marks omitted). The reason for due process challenges prevailing in number relative to Sixth Amendment challenges is manifold. First—although this is likely not the most substantial reason—unlike due process protection, the Sixth Amendment right to counsel does not cover photo array identifications, as noted above. *See supra* note 109. Second, and more troubling, is the possibility that law enforcement authorities are very much taking advantage of the holding in *Kirby*, and conducting all of their lineups before formal proceedings begin, where the right to counsel does not attach. *See supra* note 110 and accompanying text; *see also Kirby*, 406 U.S. at 689. Third, and more optimistically, it is possible that law enforcement officers are taking seriously the Sixth Amendment right to counsel at post-indictment, pretrial identifications, and are avoiding procedures that would engender a Sixth Amendment challenge.

113. 409 U.S. 188 (1972).

the “likelihood of misidentification which violates . . . due process,” and developed the factors to be considered in determining the likelihood of misidentification, which are

the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.¹¹⁴

In *Manson v. Brathwaite*,¹¹⁵ the Court made clear that “reliability is the linchpin in determining the admissibility of identification testimony” for pretrial confrontations, and that the *Biggers* factors are the factors to be considered in determining reliability.¹¹⁶ In *State v. Madison*, the New Jersey Supreme Court adopted the *Manson* framework for New Jersey matters and offered a clarifying outline of the two-step *Manson* test:

[A] court must first decide whether the procedure in question was in fact impermissibly suggestive. If the court does find the procedure impermissibly suggestive, it must then decide whether the objectionable procedure resulted in a “very substantial likelihood of irreparable misidentification.” In carrying out the second part of the analysis, the court will focus on the reliability of the identification. If the court finds that the identification is reliable despite the impermissibly suggestive nature of the procedure, the identification may be admitted into evidence.¹¹⁷

The reliability of the identification—as determined using the factors laid out in *Biggers*—is thus weighed against “the corrupting effect of the suggestive identification itself” to determine whether the identification evidence is admissible through testimony.¹¹⁸

A defendant wishing to challenge an identification procedure as

114. *Id.* at 198-200.

115. 432 U.S. 98 (1977).

116. *Id.* at 114.

117. 536 A.2d 254, 258-59 (N.J. 1988) (citations omitted).

118. *Manson*, 432 U.S. at 114. In other words, if an identification procedure is so impermissibly suggestive that the identification it produced was manifestly unreliable, making admission of the identification evidence irreparably prejudicial to the defendant, then it will not be admitted. This two-step procedure is not only used to determine the admissibility of pretrial identification evidence; rather, it is also used to assess the admissibility of in-court identifications made by witnesses who originally identified the defendant at impermissibly suggestive pretrial identification procedures, including cases where evidence concerning the offensive procedure itself has already been adjudicated inadmissible. *See Simmons v. United States*, 390 U.S. 377, 384 (1968) (“[C]onvictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.”); *Coleman v. Alabama*, 399 U.S. 1, 5 (1970) (using the *Simmons* approach to determine whether the in-court identification of a defendant stemmed from an impermissibly suggestive lineup).

violating his due process rights at a *Wade* hearing¹¹⁹ must first “proffer . . . some evidence of impermissible suggestiveness.”¹²⁰ If the hearing court decides the identification procedure in question was impermissibly suggestive, “it then considers the reliability factors.”¹²¹ At this point, the burden shifts to the State to prove “by clear and convincing evidence that the identification[] . . . had a source independent of the police-conducted identification procedures” to buttress its claim that the identification should still be considered reliable despite the suggestiveness.¹²² The reliability determination should, of course, be made from the totality of circumstances.¹²³

By contrast, under the Sixth Amendment analysis, when a post-indictment, pretrial identification procedure is conducted without the suspect’s counsel present, in-court testimony concerning the identification must be excluded.¹²⁴ However, when an eyewitness who

119. “*Wade* hearing” refers to the pretrial hearing that takes place to determine whether the identification procedure was impermissibly suggestive.

120. *State v. Rodriguez*, 624 A.2d 605, 609 (N.J. Super. Ct. App. Div. 1993) (citation omitted), *aff’d*, 637 A.2d 914 (N.J. 1994). Suggestive procedures include: lineups where all participants but the suspect are known to the witness; lineups where other participants’ appearances are extremely dissimilar to that of the suspect; pointing out the suspect before or during a lineup; requiring the suspect to wear clothing that the perpetrator allegedly wore; and having lineup participants try on a piece of clothing that only fits the suspect. *United States v. Wade*, 388 U.S. 218, 233 (1967). Show-up procedures where “the witness is told by the police that they have caught the culprit after which the defendant is brought before the witness alone or is viewed in jail” have also been held to be impermissibly suggestive. *Id.* Further, in the case of photographic identification, the witness should be presented with pictures of several individuals without being told who is suspected, and should not be told of any evidence that any of the individuals pictured actually committed the crime in order for the evidence to be admissible. *Simmons*, 390 U.S. at 383-84.

Despite the procedure appearing to be a violation of due process on its face, the show-up, performed in a certain manner, has at times been received less harshly. For example, where a suspect has been apprehended soon after and near the scene of a crime, presenting the suspect to a witness then and there is considered “less impermissibly suggestive than a show-up at the police station where there exists the alternative of utilizing a lineup.” SOBEL & PRIDGEN, *supra* note 105, § 1:2 (citing Catherine A. Rivlin, Note, *Showdown Over the California Showup*, 11 HASTINGS CONST. L.Q. 135 (1983)); *see also* *Stovall v. Denno*, 388 U.S. 293, 302 (1967) (holding that a show-up where the defendant, while handcuffed to a police officer, was presented to an eyewitness in her hospital bed for identification did not violate due process because the procedure was imperative due to the possibility of the eyewitness’s imminent death); *Kirby v. Illinois*, 406 U.S. 682, 688-90 (1972) (holding that counsel is not required at any pre-indictment lineup or show-up at the scene).

121. *State v. Henderson*, 27 A.3d 872, 890 (N.J. 2011).

122. *Madison*, 536 A.2d at 265.

123. *Id.* at 264-65; *Neil v. Biggers*, 409 U.S. 188, 196 (1972).

124. *Gilbert v. California*, 388 U.S. 263, 272-74 (1967). Such evidence is “the direct result of the illegal lineup ‘come at by the exploitation of (the primary) illegality,’” *id.* at 272-73 (quoting *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)), and if law enforcement officers are expected to honor a suspect’s constitutional right to counsel at post-indictment identification procedures, the only effective sanction is *per se*

is present at a procedure offensive to the Sixth Amendment attempts to make an identification of the suspect *in court* at the suspect's trial (but no evidence of the offensive procedure itself is offered against the defendant), whether such an identification will be allowed involves a different analysis.¹²⁵ There, the prosecution must "establish by clear and convincing evidence that the in-court identifications were based upon observations other than the lineup identification."¹²⁶ This "independent source" exception offers the prosecution the chance to prove the reliability of the identification and to override the major sanction against conducting a post-indictment pretrial identification in the absence of the accused's counsel, which is exclusion of the testimony.¹²⁷

The handling of impermissibly suggestive identification procedures through due process challenges has been marked by confusion relative to the somewhat straightforward procedures outlined above for addressing such identification procedures under the Sixth Amendment.¹²⁸ Some of the confusion comes from the similarity of the factors to consider in determining an independent source for right to counsel challenges and, in due process cases, the factors to consider in determining whether the end result is sufficiently reliable to admit testimony concerning suggestive identification procedures.¹²⁹ Under both tests, the witness's opportunity to observe the criminal, the accuracy of the prior description, and the length of time between the crime and the confrontation are

exclusion. *Id.* at 273.

125. *Wade*, 388 U.S. at 239-40.

126. *Id.* at 239-41. The proper test to be used is the *Wong Sun v. United States* analysis: whether the taint of an illegal procedure has been sufficiently purged by the fact that the evidence obtained therefrom had an independent source. *Id.* at 241 (citing *Wong Sun*, 371 U.S. at 488 (quoting JOHN MACARTHUR MAGUIRE, EVIDENCE OF GUILT: RESTRICTIONS UPON ITS DISCOVERY OR COMPULSORY DISCLOSURE 221 (1959))). The *Wade* Court identified various factors by which the above test could apply to the present context, including

the 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 prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification.

Id.

127. SOBEL & PRIDGEN, *supra* note 105, § 4:1. The independent source inquiry is also limited to cases, as in *Wade*, where the testimony by a witness of his or her observation of the accused at a tainted pretrial identification procedure is elicited through defense counsel's cross-examination. *Id.* § 4:2. Where the prosecution introduces testimony of a pretrial confrontation conducted without defendant's counsel present as direct evidence of identification, however, there is no opportunity to establish an independent source, and admission of such testimony requires reversal of a conviction. *Id.*; see also *Gilbert*, 388 U.S. at 272-74.

128. See SOBEL & PRIDGEN, *supra* note 105, § 4:3.

129. See *id.* § 6:1.

considered relevant. The witness's degree of attention during the crime and level of certainty at the confrontation are factors listed in *Biggers* and *Brathwaite* [due process], but not in *Wade* [Sixth Amendment right to counsel]. Prior identification or misidentification and prior acquaintance are factors mentioned in *Wade*, but not in *Biggers/Brathwaite*.¹³⁰

As the above indicates, traditionally, despite any confusion regarding the factors to be used in determining whether to allow the admission of testimony on out-of-court identifications, there are myriad procedural filters with which courts determine the reliability and admissibility of eyewitness identifications.

III. *STATE V. HENDERSON'S* NEW FRAMEWORK AND REVISED JURY CHARGES

A. *'The Vagaries of Eyewitness Identification'*

The vast majority of wrongful convictions nationwide are attributable to eyewitness misidentification, which plays "a role in nearly 75% of convictions overturned through DNA testing."¹³¹ Scholars, scientists, and some courts maintain that eyewitness identification evidence is inherently unreliable, and thus it "poses one of the most serious problems in the administration of criminal justice."¹³² One study of exonerations during the period between 1989 and 2012 noted that "mistaken eyewitness identification" was a contributing factor in forty-three percent of the exonerations.¹³³

In some cases, wrongful conviction is a matter of life and death: "[e]ighteen people have been proven innocent and exonerated by DNA testing in the United States after serving time on death row. They were convicted in [eleven] states and served a combined 229 years in prison-including 202 years on death row-for crimes they didn't commit."¹³⁴ Of 104 individuals since 1989 who were sentenced

130. *Id.*

131. *Understand the Causes*, *supra* note 17; *State v. Henderson*, 27 A.3d 872, 878 (N.J. 2011) ("[E]yewitness misidentification is the leading cause of wrongful convictions in the country."). *See also supra* notes 11-17 and accompanying text.

132. *See, e.g., Loftus*, *supra* note 3, at 179; *State v. Romero*, 922 A.2d 693, 701 (2007) ("Some have pronounced that mistaken identifications 'present what is conceivably the greatest single threat to the achievement of our ideal that no innocent man shall be punished.'"); *State v. Cromedy*, 727 A.2d 457, 461 (1999) (discussing social science research indicating that eyewitnesses are often unable to accurately identify members of a race other than their own), *abrogated by Henderson*, 27 A.3d at 895.

133. EXONERATIONS REPORT, *supra* note 11, at 40.

134. *The Innocent and the Death Penalty*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/The_Innocent_and_the_Death_Penalty.php (last visited Mar. 2, 2014). The Innocence Project data concerns exonerations derived from DNA testing only, but exonerations in capital punishment cases come by way of other evidence proving the innocence of the death-row inmate. For example, in Illinois

to death and subsequently exonerated, twenty-three were convicted at least partially on the basis of mistaken witness identification.¹³⁵

A great number of factors can contribute to eyewitness misidentification, including the nature of human memory, eyewitness bias, “the misinformation effect,” source monitoring errors, hindsight bias, eyewitness overconfidence in his or her accuracy and memory, eyewitness’ relative judgments, suggestive identification procedures, and the lack of knowledge of memory and eyewitness factors.¹³⁶ In addition, cross-racial and cross-ethnic identifications can contribute to misidentification.¹³⁷

Perhaps the most troubling of these factors with respect to the reliability of all eyewitness identifications is the complex and malleable nature of human memory.¹³⁸ Although the popular belief is that memory works like a video recorder or camera, information which is “perceived and stored in memory is often incomplete or distorted as a result of the individual’s state of mind or the nature of the event observed.”¹³⁹ This distortion may occur at any of the acknowledged stages of the process of remembering: acquisition (“the perception of the original event”), retention (“the period of time that passes between the event and the eventual recollection of a particular piece of information”), and retrieval (the “stage during which a person recalls stored information”).¹⁴⁰

The New Jersey Supreme Court analyzed the scientific research on memory in *Henderson*, and looked at many of the other factors that can contribute to mistaken identifications.¹⁴¹ The court framed these factors as “variables [that] can affect and dilute memory” and noted that they fall into two distinct categories accepted by relevant

in 2000, because of a twenty-five year period in which fourteen death-row inmates were exonerated for various reasons including eyewitness misidentification, Governor George Ryan mandated a moratorium on executions. Steve Chapman, *Your Lyin’ Eyes: What to Do About Eyewitnesses Who Get it Wrong*, SLATE MAGAZINE (May 14, 2002, 4:31 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2002/05/your_lyin_eyes.html.

135. See *Exoneration Detail List*, THE NATIONAL REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> (last visited Mar. 2, 2014).

136. See Richard A. Wise, Clifford S. Fishman & Martin A. Safer, *How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case*, 42 CONN. L. REV. 435, 454-64 (2009).

137. See *Cromedy*, 727 A.2d at 461.

138. See *State v. Henderson*, 27 A.3d 872, 895 (N.J. 2011).

139. John C. Brigham, Adina W. Wasserman & Christian A. Meissner, *Disputed Eyewitness Identification Evidence: Important Legal and Scientific Issues*, 36 CT. REV. 12, 13 (1999).

140. *Henderson*, 27 A.3d at 894 (quoting ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 21 (2d ed. 1996)).

141. See *id.* at 896-910.

scientific literature: system variables and estimator variables.¹⁴² System variables are those factors that are within the criminal justice system's control; estimator variables are "factors related to the witness, the perpetrator, or the event itself . . . over which the legal system has no control."¹⁴³

1. System Variables

Many of the system variables are to blame in instances of impermissibly suggestive identification procedures.¹⁴⁴ Indeed, it is reasonable to assume that if a criminal justice actor does not adhere to established procedures that are designed to enhance reliability, then the information gathered may be tainted.¹⁴⁵ Ideally, law enforcement authorities would follow all of the below procedures as strictly as possible to avoid this problem.

First, a lineup procedure must be administered in a double-blind or blind fashion in order to avoid the possibility of unreliability,¹⁴⁶ which means that administrators of the lineup procedure must be purposely unaware of the identity of the actual suspect (double-blind) or purposely "shield themselves from knowing where the suspect is located in the lineup or photo array" (blind).¹⁴⁷ These types of lineup administration are designed as safeguards against the administrators' influence, whether intentional or unintentional, on a witness's decision, and are imperative for identification procedures to be proper.¹⁴⁸ Because "innocuous words and subtle cues" such as facial expressions, gestures, or hesitations can influence an eyewitness's attempt to identify a suspect, an administrator who knows the identity of the suspect is likely to signal the eyewitness during the procedure.¹⁴⁹ Thus, the administrator of the procedure

142. *Id.* at 895.

143. *Id.* (citing Gary L. Wells, *Applied Eyewitness Testimony Research: System Variables and Estimator Variables*, 36 J. PERSONALITY & SOC. PSYCHOL. 1546, 1546 (1978)).

144. See Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL'Y & L. 765, 765-66 (1995).

145. *Id.* at 769-72.

146. *Henderson*, 27 A.3d at 896.

147. *Id.*

148. *Id.* The New Jersey Attorney General promulgated guidelines for conducting identification procedures, which amplified the importance of double-blind and blind procedures and admonished law enforcement personnel to ensure that the identification procedure is conducted by "someone other than the primary investigator assigned to the case." OFFICE OF THE ATTORNEY GEN., N.J. DEPT OF LAW AND PUB. SAFETY, ATTORNEY GENERAL GUIDELINES FOR PREPARING AND CONDUCTING PHOTO AND LIVE IDENTIFICATION PROCEDURES 1 (2001) (hereinafter ATTORNEY GENERAL GUIDELINES), available at <http://www.psychology.iastate.edu/~glwells/njguidelines.pdf>.

149. *Henderson*, 27 A.3d at 896-97.

should not be aware of the suspect's identity.¹⁵⁰

Second, before the identification procedure begins, the administrator should give instructions to the witness intimating that "the suspect may or may not be in the lineup or [photo] array and that the witness should not feel compelled to make an identification."¹⁵¹ Such instructions serve to reduce the impact of relative judgments and lead to more reliable identifications.¹⁵²

Third, the lineup must be well constructed. Lineup construction was identified by the *Henderson* court as a variable deserving of particular scrutiny when courts determine the admissibility of an identification produced by a lineup.¹⁵³ The non-suspect members of the lineup—the "fillers"—should be plentiful, generally numbering at least five, and come as close as possible to fitting the description given of the suspect by the witness.¹⁵⁴

Fourth, any remarks made before or after an identification procedure can be fatal to the reliability of the procedure for many of the same reasons as the non-verbal cues of non-blind administrators.¹⁵⁵ Research shows that pre-identification remarks can alter memory and post-identification remarks can serve as a signal, giving the witness a misleading sense of confidence or reducing any doubt the witness may have had as to the correctness of the identification.¹⁵⁶ This can "alter a witness' report of how he or she viewed an event," which has troubling implications for the identification's reliability.¹⁵⁷ Taken on its own, a witness's confidence is not dispositive of an identification's reliability,¹⁵⁸ but it may be relevant in certain circumstances,¹⁵⁹ so efforts should be made to record the witness's confidence following an identification.¹⁶⁰

Fifth, viewing a suspect multiple times may affect the reliability

150. *Id.* at 897.

151. *Id.*

152. *Id.* Relative judgments occur when witnesses select a member of a lineup or photo array "who most resembles the eyewitness's memory of the culprit relative to the other members of the lineup." Wells & Seelau, *supra* note 144, at 768. The obvious problem with this phenomenon manifests when the actual culprit is not in the lineup or array, but someone in the lineup or photo array is similar enough in appearance to the eyewitness's memory of the culprit to justify the eyewitness choosing that person. *Id.* at 768-69.

153. *Henderson*, 27 A.3d at 898-99.

154. *Id.* at 898.

155. *Id.* at 899.

156. *Id.*

157. *Id.* at 900.

158. *See* State v. Romero, 922 A.2d 693, 703 (N.J. 2007).

159. The Special Master appointed by the *Henderson* court found that "exceptionally confident witnesses can make accurate identifications 90% of the time." 27 A.3d at 899.

160. *Id.* at 900.

of a witness's identification.¹⁶¹ “[S]uccessive views of the same person can make it difficult to know whether the later identification stems from a memory of the original event or a memory of the earlier identification procedure.”¹⁶² Therefore, the witness should be shielded from viewing any suspect or filler more than once.¹⁶³

Sixth, show-up procedures, especially those conducted more than two hours after an event, heighten the likelihood of misidentification.¹⁶⁴ In order to lower the risk of misidentification, “[show-up] administrators should instruct witnesses that the person they are about to view may or may not be the culprit and that they should not feel compelled to make an identification.”¹⁶⁵ Doing so may help in terms of the reliability of a show-up identification, but show-up procedures are inherently suggestive and should be abandoned in favor of lineups whenever possible.¹⁶⁶

2. Estimator Variables

Estimator variables are factors that are not within the criminal justice system's control and are instead “associated with the eyewitness, the perpetrator, or the witnessed event.”¹⁶⁷ Like system variables, these factors may contribute to the reliability (or lack thereof) of eyewitness identifications.¹⁶⁸ Unlike system variables, estimator variables “occur at random in the real world,”¹⁶⁹ and thus cannot be controlled. Nevertheless, because they are “equally capable of affecting an eyewitness' ability to perceive and remember an event,” they must be considered in any eyewitness identification.¹⁷⁰

First, the level of stress under which an eyewitness views an incident is particularly important. Indeed, even under optimal viewing conditions, a high level of stress can inhibit recall ability and diminish an eyewitness's capacity to make an accurate identification.¹⁷¹ Because “high” stress is an amorphous concept, any measure of a witness's stress level must be made using the factual evidence of individual cases.¹⁷²

161. *Id.*

162. *Id.*

163. *Id.* at 901.

164. *Id.* at 903.

165. *Id.*

166. *Id.*

167. Brian L. Cutler, *A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 327, 327-28 (2006).

168. *Id.*

169. *Henderson*, 27 A.3d at 904.

170. *Id.*

171. *Id.*

172. *Id.*

Second, the presence of a weapon during an incident has the ability to negatively affect an identification because “it can distract a witness and draw his or her attention away from the culprit.”¹⁷³ This is especially true where the incident lasts only briefly.¹⁷⁴

The duration of the incident is an important variable in its own right because a crime lasting only briefly is not as likely to supply an accurate identification as one which persists over a longer period.¹⁷⁵ It is necessary to consider the duration of the incident in light of other estimator variables, such as the quality of the viewing conditions, the absence of distractions, and the witness’s qualitative memory, because these factors may limit the problematic aspects of the brevity of the witness’s encounter with the suspect.¹⁷⁶

The quality of the conditions under which the witness viewed the suspect has obvious implications for the reliability of the identification because “a person is easier to recognize when close by, . . . clarity decreases with distance, [and] poor lighting makes it harder to see well.”¹⁷⁷

The characteristics of both the witness and the perpetrator are variables that may affect the reliability of an identification.¹⁷⁸ If the witness was intoxicated during the encounter, it is likely that he or she will provide a false identification.¹⁷⁹ A witness’s age can also bear heavily on reliability.¹⁸⁰ Research has shown that children between the ages of nine and thirteen will make erroneous identifications more often than adults.¹⁸¹ Additionally, there is scientific evidence indicating that as people age, their ability to make accurate identifications declines.¹⁸² However, because the “data about memory and older witnesses is more nuanced,” the court in *Henderson* held that standard instructions which question the reliability of older eyewitnesses are not appropriate in every case.¹⁸³

As for perpetrators’ characteristics, wrongdoers who wear masks and disguises effectively subvert witness’ identification accuracy.¹⁸⁴ A

173. *Id.* at 904-905.

174. *Id.* at 905.

175. *Id.*

176. *Id.*

177. *Id.* at 906.

178. *Id.* at 906-907.

179. *Id.* at 906.

180. *Id.*

181. See Joanna D. Pozzulo & R.C.L. Lindsay, *Identification Accuracy of Children Versus Adults: A Meta-Analysis*, 22 L. & HUM. BEHAV. 549, 563, 565 (1998).

182. See James C. Bartlett & Amina Memon, *Eyewitness Memory in Young and Older Adults*, in 2 THE HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR PEOPLE 309, 317-19 (2007).

183. *Henderson*, 27 A.3d at 906-07.

184. *Id.* at 907.

perpetrator merely wearing a hat can be fatal to the accuracy of an identification.¹⁸⁵ Also, if the perpetrator makes changes to his or her facial features such as growing a beard or cutting longer hair short, the witness may have trouble making an accurate identification.¹⁸⁶

Because human memory fades over time, the time between the occurrence of a crime and the identification may reduce reliability.¹⁸⁷ This variable, a phenomenon called “memory decay,” is substantial in terms of assessing reliability because “the more time that passes, the greater the possibility that a witness’ memory of the perpetrator will weaken.”¹⁸⁸

A witness being asked to identify someone of another race—a “cross-racial identification”—may have a difficult time doing so.¹⁸⁹ The New Jersey Supreme Court recognized in *State v. Cromedy* that cross-racial identifications are a factor that can affect identification reliability.¹⁹⁰

Another estimator variable that can affect perceived memory—and thus the reliability of a witness’s identification—is the actions of private persons.¹⁹¹ For example, if a co-witness volunteers information about what he or she observed, it can alter an eyewitness’s memory.¹⁹² This essentially means that in addition to concerns about post-identification feedback from state actors,¹⁹³ courts must analyze the extent that private actors had contact with and influenced a witness’s identification.¹⁹⁴ In *Henderson*, the court ordered that police officers, during the identification process, must question witnesses in order to elicit information about any conversations the witness may have had regarding the identification

185. See Brian L. Cutler et al., *Improving the Reliability of Eyewitness Identification: Putting Context into Context*, 72 J. APPLIED PSYCHOL. 629, 635 (1987).

186. See K.E. Patterson & A.D. Baddeley, *When Face Recognition Fails*, 3 J. EXPERIMENTAL PSYCHOL.: HUM. LEARNING & MEMORY 406, 410, 414 (1977).

187. *Henderson*, 27 A.3d at 907.

188. *Id.* (citing Carol Krafka & Steven Penrod, *Reinstatement of Context in a Field Experiment on Eyewitness Identification*, 49 J. PERSONALITY & SOC. PSYCHOL. 58, 65 (1985)). Presumably, this factor should be treated with the same level of caution as the witness being older, at least with respect to whether or not a standard jury instruction should be given in all cases where there was a significant amount of time between the crime and the identification. Indeed, as the *Henderson* court noted, “researchers cannot pinpoint precisely when a person’s recall becomes unreliable.” *Id.* For example, a rule stating that three months between the crime and the identification is too long to deem the identification reliable would be arbitrary and without a basis in scientific evidence.

189. *Id.*

190. 727 A.2d 457, 461-63, 466-67 (N.J. 2011), *abrogated by Henderson*, 27 A.3d at 895.

191. *Henderson*, 27 A.3d at 907-08.

192. *Id.* at 908, 909.

193. See *supra* notes 155-57 and accompanying text.

194. *Henderson*, 27 A.3d at 909.

and exactly what was discussed.¹⁹⁵ Additionally, any such information “should be recorded and disclosed to defendants.”¹⁹⁶ Police officers should also “instruct witnesses not to discuss the identification process with fellow witnesses or obtain information from other sources.”¹⁹⁷

B. The New Framework

The *Henderson* court addressed what it perceived to be the flaws with the *Manson/Madison* test by instituting a new framework for handling eyewitness identification evidence.¹⁹⁸ Specifically, the court noted that the new approach

allows judges to consider all relevant factors that affect reliability in deciding whether an identification is admissible; . . . is not heavily weighted by factors that can be corrupted by suggestiveness; . . . promotes deterrence in a meaningful way; and . . . focuses on helping jurors both understand and evaluate the effects that various factors have on memory.¹⁹⁹

The court also found that two immediate changes were necessary—and perhaps even imperative—to effectively correcting the problems with the *Manson/Madison* test. First, both system and estimator variables should be analyzed and weighed at a pretrial hearing whenever the defendant produces some evidence of suggestiveness.²⁰⁰ Second, enhanced jury instructions should be developed to aid jurors in assessing identification evidence.²⁰¹ A relevant consideration in instituting the new test was balancing defendants’ constitutional right to a fair trial against the State’s legitimate interest in presenting critical evidence during trial.²⁰²

Thus, the first step in the new framework involves the defendant satisfying his or her burden of producing “some evidence of suggestiveness that could lead to a mistaken identification” in order to obtain a pretrial *Wade* hearing on the admissibility of identification evidence.²⁰³ The new framework eases the standard for obtaining such a hearing; triggering a pretrial hearing under the old

195. *Id.*

196. *Id.*

197. *Id.*; see also *State v. Chen*, 27 A.3d 930, 941-44 (N.J. 2011) (discussing how other states handle suggestive conduct by private actors and holding that in cases where there is no police action, to trigger a hearing on admissibility of the identification evidence, proof must be offered that highly suggestive circumstances were present during the identification procedure).

198. *Henderson*, 27 A.3d at 919.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 920.

standard depended on a showing of *impermissible* suggestiveness.²⁰⁴ The evidence of suggestiveness “must be tied to a system—and not an estimator—variable.”²⁰⁵

The next step shifts the burden of production to the State, which must offer proof at the hearing that the identification evidence is reliable.²⁰⁶ The determination of reliability focuses on both system and estimator variables and is subject to the hearing judge’s authority to immediately end the hearing if testimony shows “that defendant’s threshold allegation of suggestiveness is groundless.”²⁰⁷

204. See *id.* at 918-22; Recent Case, *Evidence—Eyewitness Identifications—New Jersey Supreme Court Uses Psychological Research to Update Admissibility Standards for Out-of-Court Identifications*—State v. Henderson, 27 A.3d 872 (N.J. 2011), 125 HARV. L. REV. 1514, 1516-17 (2012). With this new standard in place, it is clear that any show-up identification procedure will result in a *Wade* hearing, as the Henderson court reiterated that show-ups are inherently suggestive. 27 A.3d at 903.

The removal of the word “impermissible” from the standard is no small issue. As Justice Sotomayor pointed out in her dissent in *Perry v. New Hampshire*, Supreme Court “precedents refer to ‘impermissibly,’ ‘unnecessarily,’ and ‘unduly’ suggestive circumstances interchangeably.” 132 S. Ct. 716, 733 n.3 (2012). The word “unnecessarily” came from the Court’s landmark statement of the proper test for admissibility of identification evidence under a due process challenge, *Stovall v. Denno*. 388 U.S. 293, 301-02 (1967). Essentially, the Court in *Stovall* focused on the suggestive procedure the police employed by analyzing whether they had any other choice but to use such a procedure. See *id.* The Court determined that the police did not have another choice and that, because the eyewitness was seriously injured, an immediate presentation of the defendant to the eyewitness while she was in her hospital bed “was imperative.” *Id.* at 302. Thus, although the procedure was certainly suggestive, the necessity of the procedure excused the suggestiveness. Considering that “impermissibly” has been used interchangeably with “unnecessary” in the case law, *Perry*, 132 S. Ct. at 733 n.3 (Sotomayor, J., dissenting), the Henderson court significantly altered the inquiry used when a defendant seeks to trigger a *Wade* hearing. Before Henderson, a defendant would carry the burden of producing some evidence that the identification procedure the police employed was *not necessary*, see, e.g., State v. Rodriguez, 624 A.2d 605, 609 (N.J. Super. Ct. App. Div. 1993), *aff’d*, 637 A.2d 914 (N.J. 1994); this is not an insignificant task, especially relative to the new standard, which requires only some evidence of suggestiveness. Henderson, 27 A.3d at 918-22.

205. Henderson, 27 A.3d at 920. The court here again listed system variables that should be considered, noting that they were non-exhaustive. *Id.* at 920-21. The court also recognized that determinations of suggestiveness are not *always* tied to system variables. *Id.* at 920. Indeed, private actors’ highly suggestive behavior is sufficient to trigger a pretrial hearing on the admissibility of eyewitness identification evidence. State v. Chen, 27 A.3d 930, 943 (N.J. 2011).

206. Henderson, 27 A.3d at 920.

207. *Id.* The court offered an instructive example of how the hearing would operate in practice:

[A]ssume that a defendant claims an administrator confirmed an eyewitness’ identification by telling the witness she did a “good job.” That proffer would warrant a *Wade* hearing. Assume further that the administrator credibly denied any feedback, and the eyewitness did the same. If the trial court finds that the initial allegation is completely hollow, the judge can end the hearing absent any other evidence of suggestiveness. In other words, if no evidence of

If the court did decide to end the hearing, the identification evidence would be admitted.²⁰⁸

When there is proof of suggestiveness that precludes the judge from ending the hearing, the system variables and estimator variables must be considered to determine the overall reliability and admissibility of an identification.²⁰⁹ The court noted that the list of estimator variables is non-exhaustive, and that some of the variables overlap with the *Biggers* reliability factors.²¹⁰

The defendant always shoulders the burden of proving “a very substantial likelihood of irreparable misidentification,”²¹¹ which may involve cross-examining eyewitnesses and administrators and providing other evidence tied to system and estimator variables.²¹² If the defendant meets this burden, which requires the hearing court to assess the totality of the circumstances, the identification evidence should be suppressed.²¹³ If, for any reason, the identification evidence is admitted, “the court should provide appropriate, tailored jury instructions.”²¹⁴

The new framework differs significantly from the *Manson/Madison* test in several respects. First, as noted above, the new framework dispenses with the word “impermissible” in describing the level of suggestiveness necessary to trigger a pretrial *Wade* hearing.²¹⁵ This makes it likely that the frequency of pretrial *Wade* hearings will increase because essentially all that is required of the defendant is *some* evidence of suggestiveness.²¹⁶

Second, under the new framework, the assessment of the reliability of the identification evidence is based on a much larger

suggestiveness is left in the case, there is no need to explore estimator variables at the pretrial hearing.

Id. at 921. Thus, in a case such as that presented in the example, any evidence concerning estimator variables “would be reserved for the jury.” *Id.*

208. *See id.* at 920.

209. *Id.* at 921-22.

210. *Id.* at 921.

211. *Id.* at 920 (citing *Manson v. Brathwaite*, 432 U.S. 98, 116 (1977)).

212. *Id.*

213. *Id.* Although the court did not expressly state so, it is likely that continuing to evaluate the “totality of the circumstances” reflects an intention to weigh the factors against exactly how suggestive the procedure was that triggered the hearing. *See supra* notes 116-18 and accompanying text.

214. *Henderson*, 27 A.3d at 920.

215. *See supra* note 204 and accompanying text.

216. *See Henderson*, 27 A.3d at 921-22. It is not my contention that defendants may trigger a *Wade* hearing *without* having evidence of suggestiveness. The requirement of evidence is clear. What is not clear is how much evidence is required. I read “some evidence” to indicate that a mere scintilla of suggestiveness will suffice to trigger a *Wade* hearing, whence comes the likelihood of an increased frequency of such hearings.

array of factors.²¹⁷

Third, under the *Manson/Madison* framework, after the pretrial hearing was triggered on a showing of impermissible suggestiveness, the hearing judge would first analyze whether the identification procedure “was in fact impermissibly suggestive,” and thereafter determine reliability only if such impermissible suggestiveness was found.²¹⁸ Under the new framework, the hearing judge does not need to find or even question at the outset whether the procedure was “in fact” suggestive.²¹⁹ Rather, the first step at the pretrial hearing is the State’s proffering of proof of reliability.²²⁰ In other words, under the new framework, the hearing judge, while weighing the State’s proof of reliability, has the authority to end the hearing at any time if the “allegation of suggestiveness is groundless,”²²¹ while, under the old framework, such a determination had a gatekeeping function which could end the hearing before any analysis of reliability was made.²²²

Finally, the court articulated that the defendant has the burden of proving “a very substantial likelihood of irreparable misidentification.”²²³ The *Manson/Madison* framework also required an inquiry into whether the identification procedure would result in such a misidentification,²²⁴ but *Henderson* made clear exactly who carries the burden of proof.²²⁵

To aid in its overall goals in revising the *Manson/Madison* framework,²²⁶ the court directed “the Criminal Practice Committee and the Committee on Model Criminal Jury Charges to draft proposed revisions to the current charge on eyewitness identification.”²²⁷ The committees responded and the court accepted the new jury charges, which went into effect on September 4, 2012.²²⁸

217. *Compare* *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) (holding that reliability is assessed by weighing the five factors outlined in *Biggers* against “the corrupting effect of the suggestive identification itself”), *with* *Henderson*, 27 A.3d at 921 (holding that reliability is assessed by considering the non-exhaustive lists of system and estimator variables, of which there are over twenty).

218. *Henderson*, 27 A.3d at 890 (citing *State v. Madison*, 536 A.2d 254, 258 (N.J. 1988)).

219. *See id.* at 920.

220. *Id.*

221. *Id.*

222. *Id.* at 890.

223. *Id.* at 920 (citing *Manson v. Brathwaite*, 432 U.S. 98, 116 (1977)).

224. *State v. Madison*, 536 A.2d 254, 258 (N.J. 1988).

225. *Henderson*, 27 A.3d at 920.

226. *See supra* notes 198-202 and accompanying text.

227. *Henderson*, 27 A.3d at 925.

228. *See* Press Release, New Jersey Courts, Supreme Court Releases Eyewitness Identification Criteria for Criminal Cases (July 19, 2012), *available at* <http://www.judiciary.state.nj.us/pressrel/2012/pr120719a.htm>.

C. *The Revised Jury Charges*

The Committee on Model Jury Charges drafted three sets of model jury charges: in-court identification only charges, out-of-court identification only charges, and charges for cases that involve both in-court and out-of-court identifications.²²⁹ The main difference between the three is that the in-court identification only charges include instructions on weighing only estimator variables; the out-of-court only charge and the charge for cases with in-court and out-of-court identifications are nearly identical, instructing jurors on both estimator and system variables.²³⁰ Despite these differences, all three sets of the new jury instructions add the same important new language:

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

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

Relying on some of the research that has been done, I will instruct you on specific factors you should consider in this case in determining whether the eyewitness identification evidence is reliable.²³¹

229. See SUPREME COURT COMM. ON MODEL CRIMINAL JURY CHARGES, REPORT OF THE SUPREME COURT COMMITTEE ON MODEL CRIMINAL JURY CHARGES ON THE REVISIONS TO THE IDENTIFICATION MODEL CHARGES 56 app. A (2012) [hereinafter REPORT ON MODEL CHARGES], available at <http://www.judiciary.state.nj.us/criminal/ModelCrimJuryChargeCommHENDERSONREPORT.pdf>.

230. See MODEL JURY CHARGE (CRIMINAL): IDENTIFICATION: IN-COURT IDENTIFICATION ONLY (2012) [hereinafter IN-COURT ONLY], available at <http://www.judiciary.state.nj.us/criminal/charges/idinct.pdf>; MODEL JURY CHARGE (CRIMINAL): IDENTIFICATION: OUT-OF-COURT IDENTIFICATION ONLY (2012) [hereinafter OUT-OF-COURT ONLY], available at <http://www.judiciary.state.nj.us/criminal/charges/idoutct.pdf>; MODEL JURY CHARGE (CRIMINAL): IDENTIFICATION: IN-COURT AND OUT-OF-COURT IDENTIFICATIONS (2012) [hereinafter IN-COURT/OUT-OF-COURT], available at <http://www.judiciary.state.nj.us/criminal/charges/idinout.pdf>.

231. See IN-COURT ONLY, *supra* note 230 (internal citations omitted); OUT-OF-COURT

Following this new portion, all three of the model charges continue with language that was included in the former instructions:

In evaluating this identification, you should consider the observations and perceptions on which the identification was based, the witness's ability to make those observation and perceive events, and the circumstances under which the identification was made. Although nothing may appear more convincing than a witness's categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken. Therefore, when analyzing such testimony, be advised that a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification.²³²

At this point, the former instructions for in-court identifications only and out-of-court identifications only note that in considering the eyewitness testimony, jurors may look to the factors set out in *Biggers*.²³³ The instructions make clear that the judge has the discretion to cite factors appropriate to the case.²³⁴ The former instruction for cases involving both in-court and out-of-court identifications included a section admonishing jurors that even if they consider the out-of-court identification to be unreliable, they can still consider an in-court identification as long as they find it reliable.²³⁵ Further, it included some confusing language: "Unless the in-court identification resulted from the witness' observations or perceptions of the perpetrator during the commission of the offense, rather than being the product of an impression gained at the out-of-court identification procedure, it should be afforded no weight."²³⁶ The instructions go on to note that the level of trustworthiness of the in-court and out-of-court identifications is ultimately for the jurors to decide, and that their determination should be made in light of the witness's credibility.²³⁷

All of the former instructions conclude by giving judges the discretion to instruct the jury that they may consider system

ONLY, *supra* note 230 (internal citations omitted); IN-COURT/OUT-OF-COURT, *supra* note 230 (internal citations omitted).

232. See IN-COURT ONLY, *supra* note 230 (internal citations omitted); OUT-OF-COURT ONLY, *supra* note 230 (internal citations omitted); IN-COURT/OUT-OF-COURT, *supra* note 230 (internal citations omitted).

233. 409 U.S. 188, 198-200 (1972). See also *supra* note 113 and accompanying text.

234. See MODEL JURY CHARGE (CRIMINAL): IDENTIFICATION: IN-COURT IDENTIFICATION ONLY, 2007, in REPORT ON MODEL CHARGES, *supra* note 228, at 56 app. B [hereinafter 2007 IN-COURT CHARGE]; MODEL JURY CHARGE (CRIMINAL): IDENTIFICATION: OUT-OF-COURT IDENTIFICATION ONLY, 2007, in REPORT ON MODEL CHARGES, *supra* note 229, at 56 app. B [hereinafter 2007 OUT-OF-COURT CHARGE].

235. See MODEL JURY CHARGE (CRIMINAL): IDENTIFICATION: IN-COURT AND OUT-OF-COURT IDENTIFICATIONS, 2007, in REPORT ON MODEL CHARGES, *supra* note 228, at 56 app. B [hereinafter 2007 IN-COURT/OUT-OF-COURT CHARGE].

236. *Id.*

237. *Id.*

variables which could indicate a suggestive procedure and that the jury may consider any other factor based on evidence or a lack of evidence.²³⁸

In addition to the added language mentioned above,²³⁹ the new instructions differ in several ways. First, all of the new instructions include specific facts about estimator variables in the actual instruction.²⁴⁰ For example, the new instructions' first factor for consideration, "The Witness's Opportunity to View and Degree of Attention," notes that judges should choose to instruct jurors on appropriate factors, including stress, duration, weapon focus, distance, and lighting.²⁴¹ Each of these estimator variables, if appropriate, are identified by the judge and followed by specific language.²⁴² If the judge decided, for instance, that lighting was a factor important to the witness's opportunity to view and degree of attention, he would instruct that "[i]nadequate lighting can reduce the reliability of an identification. You should consider the lighting conditions present at the time of the alleged crime in this case."²⁴³

The former instructions, by contrast, gave the judge the discretion to comment on evidence relevant to any of the *Biggers* factors, and included in footnotes facts on which the judge might want to comment.²⁴⁴ If, as in the example above, lighting was a factor in the witness's opportunity to view the perpetrator, the judge "may" have commented on lighting, but he would not have been required to do so.²⁴⁵ Nor would a judge in a case such as this have had form language to refer to, as a judge would under the new instructions. This change serves to normalize and to enhance the accuracy of the instructions the judges give.

Also different is that the new instructions for out-of-court only identifications and for in-court and out-of-court identification cases perform a similar function for system variables. The former instructions gave a list of examples of instances which could have made a procedure suggestive, for example, "whether anything was said to the witness prior to viewing a photo array, line-up or showup."²⁴⁶ The judge had the discretion in the former instructions to choose which circumstances fit the case at hand.²⁴⁷ By contrast, the

238. See 2007 IN-COURT CHARGE, *supra* note 233; 2007 OUT-OF-COURT CHARGE, *supra* note 233; 2007 IN-COURT/OUT-OF-COURT CHARGE, *supra* note 234.

239. See *supra* text accompanying note 229.

240. See, e.g., IN-COURT ONLY, *supra* note 230.

241. See, e.g., *id.*

242. See, e.g., *id.*

243. See, e.g., *id.*

244. See, e.g., 2007 IN-COURT CHARGE, *supra* note 234.

245. See, e.g., *id.*

246. See, e.g., *id.*

247. See, e.g., 2007 IN-COURT CHARGE, *supra* note 233.

new instructions, while still giving the judge discretion to decide which factors are appropriate, list the system variables identified by *Henderson* and include specific language to clarify them.²⁴⁸ For example, if there was an issue as to the fillers used in a lineup procedure, the judge would instruct that “[l]ineups should include a number of possible choices for the witness; . . . [t]he greater the number of choices, the more likely the procedure will serve as a reliable test of the witness’s memory.”²⁴⁹ The former instructions merely listed circumstances that the jurors should consider without explaining why.²⁵⁰

Essentially, the new instructions limit the differences in how judges can instruct jurors on identifications in cases with similar factual circumstances.²⁵¹ Although there will certainly be a different set of facts in most cases, the new instructions make the instructions as to those particular facts more normalized and less prone to judicial error. Of course, the new instructions also clearly define estimator and system variables, seek to apprise the jury of the “vagaries” of eyewitness identifications, and warn the jury of the dangers inherent in human memory as it relates to such identifications.²⁵²

IV. THE PORTENT OF *HENDERSON*’S PROFFERED CORRECTIONS

The new framework for assessing the reliability and admissibility of eyewitness identification evidence established by *Henderson*, and the new jury instructions that were drafted at the behest of the New Jersey Supreme Court, are likely to cut down on false convictions that are based on misidentifications.²⁵³ However, the changes that *Henderson* ushered in are also likely to suppress accurate identification evidence that could aid juries in convicting lawbreakers. Even if the evidence does make it into court, the new jury instructions could lead jurors to believe that there are very few instances where witnesses can accurately identify suspects.

When the *Henderson* court lowered the threshold for triggering a pretrial *Wade* hearing to requiring evidence of mere suggestiveness rather than *impermissible* suggestiveness,²⁵⁴ it virtually guaranteed that most criminal trials where identification is an issue will begin with a *Wade* hearing. Unless identification procedures are conducted

248. See, e.g., IN-COURT ONLY, *supra* note 230.

249. See, e.g., IN-COURT/OUT-OF-COURT, *supra* note 229.

250. See, e.g., 2007 IN-COURT CHARGE, *supra* note 233.

251. See, e.g., IN-COURT ONLY, *supra* note 230.

252. See, e.g., *id.*

253. See Martinis M. Jackson, Note, *Timely Death of the Show-Up Procedure: Why the Supreme Court Should Adopt a Per Se Exclusionary Rule*, 56 HOW. L.J. 329, 358 (2012); Recent Case, *supra* note 203, at 1521.

254. See *supra* notes 203-04, 215-16, and accompanying text.

entirely in step with the system variables *Henderson* identified,²⁵⁵ a hearing will be triggered. Considering that New Jersey has had guidelines for identification procedures in effect since 2001 that were aimed at limiting suggestiveness so that evidence would not be suppressed,²⁵⁶ and considering that the problem of suggestiveness in identification procedures still persists to the extent that the New Jersey Supreme Court felt the need to further address the problem, the new framework is likely to result in even more *Wade* hearings, despite the *Henderson* court's desire to deter improper practices.²⁵⁷ This will certainly slow the judicial process, as will the increased intricacy of the pretrial hearings due to the need for testimony from police, eyewitnesses, and experts.²⁵⁸

The fact that the new framework will slow the judicial process and require more resources is not on its own sufficient to outweigh the benefits of ensuring the reliability of identification evidence. However, considering the problem of judicial gridlock in conjunction with the adverse effect the new framework will have on prosecutors' ability to get integral evidence admitted, the balance begins to shift. Not only must prosecutors contend with the possibility that police procedures will render the identification suggestive—and, thus, trigger a pretrial hearing—but they must also contend with vital evidence being subjected to tests involving multiple factors, and ultimately being evaluated by a judge.

Take, for example, a case where the police followed a lineup procedure perfectly, except that two of the five fillers in the lineup were four inches shorter than the witness's description of the suspect, and one of the five fillers was two inches taller. For the sake of the discussion, assume these fillers were the best the police could find in terms of how closely they resemble the description of the suspect. The witness selects the perpetrator of the crime, who moves for a pretrial hearing because of the difference in height among the fillers. It is more likely than not that a judge would consider the choice effectively to be between two lineup participants rather than five because of the height differential of three participants. Thus, the procedure would be suggestive within the meaning of *Henderson*.²⁵⁹

At the hearing, the State would have to produce evidence that the identification was reliable.²⁶⁰ Even a showing that the procedure itself was almost entirely free of suggestive conduct would be subject to several estimator variables that could weigh in favor of

255. See *supra* Part III.A.1.

256. See Attorney General Guidelines, *supra* note 147, at 1, 3.

257. See *State v. Henderson*, 27 A.3d 872, 918-19 (N.J. 2011).

258. See *id.* at 923.

259. See *supra* notes 153-54 and accompanying text.

260. See *supra* notes 124-25 and accompanying text.

suppressing the identification.²⁶¹ For instance, if the crime happened at night on a dimly lit street, the witness had three drinks, a gun was involved, and the incident lasted only thirty seconds, the judge might find these factors to weigh in favor of suppression. Indeed, even if the witness is entirely confident in his identification because his attention was focused on the crime and he had an opportunity to view the criminal, armed with the scientific evidence regarding the deleterious effects of the other estimator variables in play, a judge could keep this evidence from the jury. Of course, judges have always had the sole authority to decide whether evidence should be admitted,²⁶² but the numerous factors that must now be considered in the totality of circumstances create the possibility that the existence of any one factor that seems particularly important to the judge could lead to the suppression of perfectly good identification evidence.

Even if the prosecutor is lucky enough to get identification evidence into court, he or she must then contend with jury instructions suggesting that human memory is *so* fallible and eyewitness identification *so* unreliable that the jury might begin deliberations presuming the evidence is unreliable. Beginning a jury instruction by admonishing the jury that eyewitness identification is inherently risky and human memory is “not foolproof”²⁶³ establishes an atmosphere of unnecessary caution. This is especially true when the message comes from the “authoritative” voice of the judge²⁶⁴ who sits on high and informs jurors that he is the arbiter of the law. If the judge instructs and rules on the law, and the law says that both memory and identification evidence are imperfect and prone to being unreliable, how can jurors believe that the witness could possibly make an accurate identification? Additionally, considering that many judges refuse to allow the defense to inform the jurors of and argue for jury nullification,²⁶⁵ the jury may not know that they have the right to decide against the weight of the implications of the judge’s instructions.

The best solution to correcting the problem of misidentification is allowing expert testimony in all cases where identification is the issue, rather than having the judge essentially acting as an expert

261. See *supra* Part III.A.2.

262. See generally Edward J. Imwinkeelried, *Trial Judges—Gatekeepers or Usurpers? Can the Trial Judge Critically Assess the Admissibility of Expert Testimony Without Invading the Jury’s Province to Evaluate the Credibility and Weight of the Testimony?*, 84 MARQ. L. REV. 1 (2000) (discussing the historical and current authority of trial judges to determine the admissibility of evidence).

263. See *supra* note 230 and accompanying text.

264. See *Henderson*, 27 A.3d at 925.

265. Roger Roots, *The Rise and Fall of the American Jury*, 8 SETON HALL CIRCUIT REV. 1, 14-16 (2011); see *supra* notes 38-39 and accompanying text.

during the instructions. If juries are supposed to be the finders of fact and credibility, they should be allowed to do so.²⁶⁶ There is always the problem of expense when expert testimony is involved, but experts in the field of human memory and identification science will by definition have the most up to date data concerning those fields,²⁶⁷ and they are properly the sources on which to rely for that information. With the new jury instructions, the judge now becomes the expert, explaining science in language so brief and general that he would be considered a terrible expert if he was on the witness stand.

Some parts of the identification instructions should remain. Indeed, the lists of system and estimator variables should be available to judges in appropriate cases.²⁶⁸ However, any scientific research concerning the effect of specific variables should be left to experts to explain.

Much of the framework instituted by *Henderson* should remain in place, but the standard for triggering a pretrial hearing should remain at "impermissibly suggestive" in order to alleviate the likely occurrence under the *Henderson* framework of a hearing in every case where there is an identification.²⁶⁹ As in the *Manson/Madison* test,²⁷⁰ the judge should determine as a threshold matter whether or not there was evidence of impermissible suggestiveness. This simple measure could end the hearing before either party had to produce any evidence or testimony concerning reliability which would maintain the brevity and simplicity of hearings. A finding of impermissible suggestiveness should be based on a balancing of State interests and the interest in having procedures completely absent of suggestiveness.²⁷¹ The State should prevail if it can show that despite the suggestiveness of the procedure, there was no less suggestive action it could have taken in performing the procedure. This would avoid the suppression of evidence in cases such as in the example above, where, but for the lack of available fillers, a hearing is triggered and the evidence must survive a balancing of twenty-two factors that could feasibly lead to the suppression of entirely reliable evidence.²⁷²

Even if the evidence had some indicia of unreliability, it would still be subject to examination by counsel, if admitted. Expert testimony along with limited jury instructions on relevant system

266. See *supra* notes 82-83 and accompanying text.

267. See *Henderson*, 27 A.3d at 925 (citing *State v. Jenewicz*, 940 A.2d 269 (2008)).

268. See *supra* notes 143-44, 167 and accompanying text; see also *Henderson*, 27 A.3d at 921, for a list of variables.

269. *Henderson*, 27 A.3d at 922-23.

270. See *supra* notes 115-16 and accompanying text.

271. See *Henderson*, 27 A.3d at 919.

272. See *supra* notes 259-60 and accompanying text.

and estimator variables will provide sufficient protection to defendants from the danger of misidentification. This approach will ensure that the inquiry into suggestiveness and reliability, coupled with overly-cautioning jury instructions, does not suppress evidence integral to the State's enforcement of the law.

V. CONCLUSION

The changes instituted by *Henderson* will aid in lowering convictions based on erroneous eyewitness testimony. The new, focused inquiry into identification procedures, and the circumstances surrounding the event that necessitate the procedure, will train a skeptical eye on identification evidence. This is certain to uncover misidentifications that would not have been uncovered under the *Manson/Madison* framework. The new jury instructions will also inform the jury of the many important factors that play into eyewitness identifications. Undoubtedly, this will afford jurors the ability to make a more well-reasoned determination.

However, the portions of the new jury instructions that comment on scientific evidence and the nature of human memory are likely to unfairly prejudice the State. The strong language of the instructions equates to a warning that serves to place any eyewitness identification evidence in a negative light. Furthermore, it is not the judge's place to instruct the jury on scientific findings. That is better left to expert testimony.

The concentrated approach of the new framework for assessing reliability obfuscates the purpose of eyewitness identification evidence, diminishing the utility of an integral prosecutorial tool. The changes make the process of getting eyewitness evidence admitted too precarious, costly, and burdensome on the State. The *Henderson* framework, in focusing judges' attention on one or a small number of specific variables appropriate in a given case, creates the opportunity for suppression on the basis of the one or small amount of variables. It is likely that judges will be suppressing innocuous and vital identification evidence that is not perfectly reliable according to the *Henderson* standard.

Considering that other states may adopt the *Henderson* approach in their attempts to correct the misidentification problem, eyewitness identification evidence could become irrelevant, especially in cases where there is no corroborative evidence. Thus, although the new framework and jury instructions will be helpful and are well-meaning, they individually and collectively swing the pendulum of justice too far in favor of criminal defendants.