

**MAY A STREAM BECOME A TORRENT: ALASKA CREATES A  
ROADMAP FOR THE REFORM OF EYEWITNESS  
IDENTIFICATION DUE PROCESS LAW. *YOUNG V. STATE*, 374  
P.3D 395 (ALASKA 2016).**

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## I. INTRODUCTION

In 1967, Justice Brennan wrote:

The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: “What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient criminal procedure.”<sup>1</sup>

This language underscores the long recognition in the United States of the dangers posed by eyewitness identification evidence. Yet, despite the Supreme Court’s recognition of the inherent dangers of misidentification, its current standard for the exclusion of eyewitness identifications—*Manson v. Brathwaite*<sup>2</sup>—has slipped over time into obsolescence. An immense body of scientific research, developed mostly subsequent to *Brathwaite*, has undercut its validity as a standard for assessing the suggestiveness and the reliability of eyewitness identification.<sup>3</sup> Despite this, *Brathwaite* remains to this day the standard for the exclusion of eyewitness identifications under the United States Constitution.

Fortunately, the ground has begun to shift. Recent years have seen a steady stream of state supreme courts questioning the old legal standards surrounding eyewitness identification.<sup>4</sup> In 2016, the Alaska Supreme Court added the most recent push away from *Brathwaite* and the outdated regime of eyewitness identification law. In *Young v. State*,<sup>5</sup> the Alaska Supreme Court, taking notice of decisions by state supreme courts preceding it, chose to shift away from *Brathwaite*. In so doing, it crafted a new test which has great potential to be a simple, workable, and effective replacement for *Brathwaite*.

Perhaps even more promising, in *Young*, the Alaska Supreme Court’s acceptance of the new body of science was resolute where others

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1. United States v. Wade, 388 U.S. 218, 228 (1967) (citation omitted).

2. 432 U.S. 98 (1977).

3. See NAT’L RESEARCH COUNCIL, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 16 (2014) (“The modern era of eyewitness identification research began in the 1970s.”); see *infra* Section III.B.

4. See *infra* Section III.B.

5. 374 P.3d 395, 405 (Alaska 2016).

have been hesitant. Observing its sister courts, the Alaska Supreme Court staked out a strong position that the arguments in favor of moving away from *Brathwaite* had hit critical mass, and that no further time should be wasted testing the validity of the science where others have performed the work before. As a result, *Young* has potential to be a momentum-changer: what was a steady stream of states changing their eyewitness identification law could, as a result of *Young*, become a torrent.

## II. STATEMENT OF THE CASE

Arron Young was convicted on multiple counts of attempted murder arising out of an apparent gang-related shooting in Fairbanks in 2008. The shooting began when a person from inside what was described at different times as a gray, silver, and white SUV, pulled up alongside a car carrying alleged members of the Bloods and started shooting at the car.<sup>6</sup> Several witnesses identified the car as belonging to “Big Nasty,” a nickname which Young went by.<sup>7</sup> Moreover, when police arrested Young, they found keys in his pocket belonging to an SUV matching the description given by witnesses and a gun in Young’s waistband which ballistics evidence indicated was a probable match for shell casings retrieved on the scene.<sup>8</sup>

The State also presented three eyewitnesses who identified Young.<sup>9</sup> The first witness was Jason Gazewood, a criminal defense attorney and former prosecutor.<sup>10</sup> After the shooting, Gazewood contacted the police to report that he had observed part of the shooting.<sup>11</sup> Three days after the shooting, a police officer went to Gazewood’s office to show him a six-person photo array.<sup>12</sup> Gazewood later testified that, prior to being shown the photo array, he told the officer that the person he saw was “of Samoan descent.”<sup>13</sup> Despite this, all of the photographs contained pictures of black men.<sup>14</sup> Gazewood testified that he was choosing between two photographs who looked most like the shooter and that when his finger paused over Young’s, the officer told him to “trust [his] instincts.”<sup>15</sup>

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6. *Id.* at 399.

7. *Id.* at 401.

8. *Id.*

9. *Id.* at 401–02.

10. *Id.* at 399, 401–02.

11. *Id.* at 399.

12. *Id.* at 400.

13. *Id.*

14. *Id.*

15. *Id.*

That comment, according to Gazewood, “ended [his] elimination process.”<sup>16</sup>

The second witness was John Anzalone, who previously failed to identify Young from a photo array while testifying before the grand jury.<sup>17</sup> Afterwards, Anzalone saw Young’s picture on television in connection with the case and informed the prosecutor that he was prepared to identify him at trial.<sup>18</sup> Anzalone identified Young in court as the driver of the SUV but also acknowledged his failure to identify Young before the grand jury.<sup>19</sup>

The third witness was Arles Arauz, a former member of the Bloods who had known Young since high school.<sup>20</sup> Young attempted to impeach Arauz based on his statement right after the shooting in which Arauz told police that he could not identify any of the shooters.<sup>21</sup> At trial, it came out that on the day of the shooting, Arauz identified Young in an off-the-record meeting with a detective.<sup>22</sup> This meeting was not disclosed to the defense, and when Young learned of it, he moved for a mistrial arguing that he might have opted for a justification defense had he known that Arauz identified him on the day of the shooting.<sup>23</sup>

Young appealed his conviction.<sup>24</sup> On appeal, Young challenged Gazewood’s testimony, arguing that it was unreliable under the standard set forth in *Manson v. Brathwaite*<sup>25</sup> and that the trial court erred in not suppressing the evidence.<sup>26</sup> Young also argued that the court erred by permitting Anzalone’s in-court identification.<sup>27</sup> With respect to Arauz, Young challenged the trial court’s denial of his requested mistrial.<sup>28</sup> Finally, Young challenged the trial court’s refusal to give jury instructions, requested by the defense, tailored to the issues raised by eyewitness identifications.<sup>29</sup>

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16. *Id.*

17. *Id.* at 401–02.

18. *Id.*

19. *Id.* at 402.

20. *Id.* In addition to being from a rival gang, Arauz testified that in high school Young “beat [him] up’ in a fight over a romantic interest.” *Id.* (alteration in original).

21. *Id.*

22. *Id.*

23. *Id.* Young instead opted for an alibi defense, with his estranged sister testifying that she was with him at his apartment during the shooting. *Id.* at 403.

24. *Id.* at 403 (citing *Young v. State*, 331 P.3d 1276 (Alaska Ct. App. 2014)).

25. 432 U.S. 98 (1977).

26. *Young*, 374 P.3d at 403.

27. *Id.*

28. *Id.* at 404.

29. *Id.*

The Court of Appeals of Alaska affirmed Young's conviction.<sup>30</sup> Young then petitioned the Alaska Supreme Court, urging the court to adopt a different test for the admission of eyewitness identification evidence under the Alaska Constitution, and arguing in the alternative that in the absence of a new test he should have prevailed on the issues raised in his earlier appeal.<sup>31</sup>

### III. BACKGROUND

#### A. *The United States Supreme Court Cases on the Exclusion of Eyewitness Identifications*

In 1967, the United States Supreme Court recognized that the Fifth Amendment's guarantee of due process required the exclusion of certain eyewitness identification evidence in *Stovall v. Denno*.<sup>32</sup> In *Stovall*, police brought the defendant directly to the hospital for a one-on-one identification where the witness had been stabbed several times and was about to undergo surgery.<sup>33</sup> The Court summarily recognized that the Fifth Amendment right to due process could require that eyewitness identification evidence be excluded because of its suggestiveness, and that a violation would be judged under "the totality of the circumstances."<sup>34</sup> The Court held, however, that the police in *Stovall* did not deny the defendant due process because the one-on-one confrontation was "imperative" under the circumstances.<sup>35</sup>

A year later, the Supreme Court again confronted this issue. In *Simmons v. United States*, the Court addressed whether police use of photographs for identification violated due process protections.<sup>36</sup> The Court affirmed *Stovall's* holding that this claim is to be analyzed under the totality of the circumstances.<sup>37</sup> The Court in *Simmons* held that convictions resulting from improper eyewitness identification evidence will be set aside only if "the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."<sup>38</sup> Yet, the Court went further. In

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30. Young v. State, 331 P.3d 1276, 1285 (Alaska Ct. App. 2014), *aff'd*, 374 P.3d 395 (Alaska 2016).

31. Young, 374 P.3d at 404.

32. 388 U.S. 293 (1967).

33. *Id.* at 295.

34. *Id.* at 302.

35. *Id.* at 301–02.

36. 390 U.S. 377, 381–82 (1968).

37. *Id.* at 383 (citing *Stovall*, 388 U.S. at 302).

38. *Id.* at 384.

addition to considering the suggestiveness of the procedure and its necessity, the Court considered the amount of time and the conditions under which the witnesses originally observed the defendants.<sup>39</sup>

Then, in 1972, the Court crafted a new approach for determining whether eyewitness identification evidence must be excluded. In *Neil v. Biggers*, the Court explicitly rejected the possibility that suggestiveness alone would result in exclusion.<sup>40</sup> The Court then listed five factors to be considered in evaluating the likelihood of misidentification. These were: (1) the opportunity of the witness to view the criminal during the incident, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the criminal, (4) the witness's level of certainty at the time of the identification, and (5) the length of time between the crime and the identification.<sup>41</sup>

The United States Supreme Court's current approach is set out in *Manson v. Brathwaite*.<sup>42</sup> In *Brathwaite*, the Court again rejected a per se exclusionary rule for suggestive eyewitness identification evidence, declaring that "reliability is the linchpin in determining the admissibility" of such evidence.<sup>43</sup> In considering the admissibility of a suggestive identification, *Brathwaite* instructs that courts must weigh the *Biggers* factors against the "corrupting effect" of the suggestive procedures.<sup>44</sup> If, despite suggestive procedures, an identification is found reliable, the evidence may be admitted.

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39. *See id.* at 385 (noting that the robbery took place in a well-lit bank, that none of the robbers wore masks, and that the witnesses saw the robbers for periods of time ranging up to five minutes).

40. 409 U.S. 188, 198–99 (1972).

41. *Id.* at 199–200.

42. 432 U.S. 98 (1977).

43. *Id.* at 110–14.

44. *Id.* at 114. The Court repeatedly used the language "suggestive procedures" as opposed to "suggestive circumstances." *See, e.g., id.* at 112. In doing so, it was perhaps signaling the requirement of police action to trigger due process protections. Whether or not this was the case, the Court recently confirmed that due process does not require exclusion of eyewitness identification evidence when no improper police action is involved. *Perry v. New Hampshire*, 565 U.S. 228, 232–33 (2012).

Until *Young v. State*, Alaska had accepted the principles set out in these cases as consistent with the due process clause of the Alaska Constitution.<sup>45</sup>

*B. The Undermining of Manson v. Brathwaite*

The *Biggers* factors were listed by the United States Supreme Court without explanation and were evidently the product of the Court's raw intuition on which factors speak to reliability.<sup>46</sup> When the Court reconsidered the issue in *Brathwaite*, it simply affirmed these factors without commenting on their justification.<sup>47</sup>

Since *Brathwaite*, however, a mountain of research has confirmed that—when it comes to eyewitness identification evidence—raw intuition is a poor substitute for scientific observation.<sup>48</sup> Perhaps the central finding of this research is that memory is not nearly as simple of a process as was once thought. Memory does not function, as is frequently believed, like a videotape on which events are stored to later be safely recalled.<sup>49</sup> Rather, a variety of variables tend to affect the accuracy of memory and, consequently, eyewitness identifications.<sup>50</sup> In analyzing the reliability of identifications, researchers draw a distinction between *system variables* (conditions such as the procedures used to obtain an identification which the criminal justice system can control) and *estimator variables*

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45. See *Young*, 374 P.3d 395, 405–06, 406 n.31 (Alaska 2016) (noting that, although the Alaska Supreme Court has not focused on the comprehensive test, the *Brathwaite* test has been accepted as consistent with the Alaskan due process clause). The due process clause of the Alaskan Constitution reads in relevant part: “No person shall be deprived of life, liberty, or property, without due process of law.” ALASKA CONST. art. I, § 7. This differs from the Fourteenth Amendment which instead commands: “No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .” U.S. CONST. amend. XIV, § 1. Alaska is generally more protective of defendant's rights than the United States Supreme Court. For a full background on Alaska's due process clause, see GERALD A. McBEATH, *THE ALASKA STATE CONSTITUTION: A REFERENCE GUIDE* 37–45 (1997).

46. See *Biggers*, 409 U.S. at 199–200.

47. *Brathwaite*, 432 U.S. at 114.

48. See NAT'L RESEARCH COUNCIL, *supra* note 3, at 69–70 (“The past few decades have seen an explosion of additional research that has led to important insights into how vision and memory work, what we see and remember best, and what causes these processes to fail.”).

49. *Id.* at 59–60 (“Like vision, memory is also beset by noise. Encoding, storage, and remembering are not passive, static processes that record, retain, and divulge their contents in an informational vacuum, unaffected by outside influences. The contents cannot be treated as a veridical permanent record, like photographs stored in a safe. On the contrary, the fidelity of our memories for real events may be compromised by many factors at all stages of processing, from encoding through storage, to the final stages of retrieval. Without awareness, we regularly encode events in a biased manner and subsequently forget, reconstruct, update, and distort the things we believe to be true.”).

50. *Id.*

(conditions relating to the actual crime like viewing conditions which the justice system cannot control).<sup>51</sup>

In some respects, our intuition concerning which variables affect the reliability of eyewitness identifications is substantially correct. For example, most average Joes and Janes would no doubt correctly guess that lighting conditions could affect the reliability of an identification.<sup>52</sup> The same can be said of the amount of time that the witness had an opportunity to view the suspect.<sup>53</sup> With some of these findings, our common sense may therefore be perfectly adequate. But several of the findings are distinctly not common sense. For example, researchers have identified a “weapon focus” effect, where the presence of a weapon distracts the witness so that their identifications are less reliable.<sup>54</sup> Other findings that might be surprising include stress and fear negatively affecting identifications,<sup>55</sup> identifications tending to be less accurate when the witness is not the same race as the suspect,<sup>56</sup> and that the level of certainty demonstrated by the eyewitness may have no relation to the reliability of his identification.<sup>57</sup>

Significantly, research on eyewitness identifications not only enhances our ability to make judgments on the reliability of identifications already made, but allows us to improve the reliability from the outset by managing system variables. For example, the use of blinded or double-blind procedures in identification procedures has been recommended to improve the reliability of identifications.<sup>58</sup> Similarly, an instruction that the suspect may or may not be present in the lineup reduces the rate of misidentification.<sup>59</sup> And of course, the composition of lineups and photographic arrays, both with respect to the number of

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51. *Id.* at 1.

52. *See id.* at 50 (identifying illumination as a factor affecting the reliability of identifications).

53. *See id.* at 97–98 (“Longer exposures were associated with higher rates of correct identifications and lower false alarm rates.”).

54. *Id.* at 93–94.

55. *Id.* at 94–96. This contradicts the fairly common belief that in such stressful situations the image and memory of the incident will be burnt into one’s mind. *See* John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 L. & HUM. BEHAV. 19, 20 (1983) (“[M]any people believe that memory for stressful events is better than memory for nonstressful events.”).

56. NAT’L RESEARCH COUNCIL, *supra* note 3, at 96–97.

57. *Id.* at 31 (“Research has cast doubt, for instance, on the belief that the apparent certainty displayed in the courtroom by an eyewitness is an indicator of an accurate identification, and has found that a number of factors may enhance the certainty of the eyewitness.”).

58. *See id.* at 106–07.

59. Steven E. Clark, *A Re-examination of the Effects of Biased Lineup Instructions in Eyewitness Identification*, 29 L. & HUM. BEHAV. 395, 395–96 (2005).

suspects present and the similarity of appearance, is an important system variable.<sup>60</sup>

In 2009, the Supreme Court of New Jersey appointed a Special Master to gather the scientific evidence and to consider whether, in light of the evidence, the *Brathwaite* standard should be modified.<sup>61</sup> The Special Master conducted a hearing which examined the state of the science.<sup>62</sup> Over two hundred published scientific studies, articles, and books were considered as evidence and seven expert witnesses testified about the state of the science.<sup>63</sup> Taking note of the Special Master's report, the Supreme Court of New Jersey, in a unanimous opinion, comprehensively surveyed the scientific literature in *State v. Henderson*.<sup>64</sup>

The Supreme Court of New Jersey ultimately modified its standard for the admission of eyewitness evidence. Under New Jersey's revised system, the defendant need only demonstrate some evidence of suggestiveness, generally tied to a system variable, in order to obtain a pretrial hearing.<sup>65</sup> Once the defendant has obtained a hearing, the court must consider all relevant evidence—relating both to estimator and system variables—to assess the reliability of the identification.<sup>66</sup> If found unreliable, the court must suppress the evidence; however, if found reliable, the court may admit the evidence but should provide tailored jury instructions on the problems of eyewitness identifications.<sup>67</sup>

New Jersey, despite being perhaps the most significant reformer, has not been alone. Rather, a steady stream of state supreme courts have shifted away from *Brathwaite* and other defunct legal standards pertaining to eyewitness identifications. In 2011, the Supreme Judicial Court of Massachusetts decided to convene a study group to determine how it could improve its model jury instructions.<sup>68</sup> The report was submitted to the court in 2013.<sup>69</sup> In 2015, the court adopted a new set of model jury instructions relying on the findings in the study group's

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60. Report of the Special Master, at 24, *State v. Henderson*, 27 A.3d 872 (N.J. 2011) (No. A-8-08) (“The scientific literature supports and explains the common-sense understanding that biased lineups reduce the reliability of eyewitness identifications.”).

61. See *Henderson*, 27 A.3d at 877.

62. See Report of the Special Master, *supra* note 60, at 2–4, 8–14.

63. *Id.* at 3–4.

64. 27 A.3d at 892–912.

65. *Id.* at 920.

66. *Id.*

67. *Id.*

68. *Commonwealth v. Walker*, 953 N.E.2d 195, 208 n.16 (Mass. 2011).

69. SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, REPORT AND RECOMMENDATIONS TO THE JUSTICES 1 (2013), <http://www.mass.gov/courts/docs/sjc/docs/eyewitness-evidence-report-2013.pdf>.

report.<sup>70</sup> Likewise, the highest courts of Connecticut,<sup>71</sup> Georgia,<sup>72</sup> Hawai'i,<sup>73</sup> Oregon,<sup>74</sup> Utah,<sup>75</sup> and Wisconsin<sup>76</sup> have relied upon scientific research to justify modifying their standards relating to eyewitness identification evidence. Though prior to *Young*, Alaska had adhered to the *Brathwaite* standard, in 2009 the Court of Appeals of Alaska issued an opinion questioning the soundness of the doctrine in light of the new scientific evidence.<sup>77</sup>

#### IV. THE COURT'S REASONING

In its unanimous opinion, the Alaska Supreme Court initially held that, under *Brathwaite*, it was error to permit Gazewood to testify.<sup>78</sup> First, the court concluded that the police officer's comment to Gazewood that he should "trust [his] instincts," was improperly suggestive.<sup>79</sup> In so holding, it placed emphasis on Gazewood's testimony that the comment stopped his process of deliberation.<sup>80</sup> The court also found that Gazewood's identification was not sufficiently reliable to be admitted notwithstanding the suggestive procedure.<sup>81</sup> Of the *Biggers* factors, the court found that only two—the amount of time between the crime and the identification, and the witness's degree of attention—modestly

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70. See *Commonwealth v. Gomes*, 22 N.E.3d 897, 900–01 (Mass. 2015).

71. *State v. Guilbert*, 49 A.3d 705, 720–27, 731–32 (Conn. 2012) (accepting a broad consensus among scientists of certain factors affecting witness reliability and holding that expert testimony regarding these factors is admissible).

72. *Brodes v. State*, 614 S.E.2d 766, 771 (Ga. 2005) (holding that courts should no longer instruct juries to consider the level of certainty demonstrated by a witness in evaluating their testimony).

73. *State v. Cabagbag*, 277 P.3d 1027, 1035–39 (Haw. 2012) (modifying its jury instructions in light of the large body of science and lack of knowledge among juries concerning the factors affecting the reliability of eyewitness identifications).

74. *State v. Lawson*, 291 P.3d 673, 749–63 (Or. 2012) (en banc) (crafting a test for the admissibility of eyewitness identifications using several provisions of the Oregon Rules of Evidence in light of the "voluminous body of scientific knowledge").

75. *State v. Clopten*, 2009 UT 84, ¶¶ 29–33, 223 P.3d 1103, 1112–13 (concluding that expert testimony regarding eyewitness identifications should be admissible).

76. *State v. Dubose*, 2005 WI 126, ¶¶ 26–33, 699 N.W.2d 582, 591–94 (concluding based on scientific evidence that show ups are "inherently suggestive," and should be inadmissible unless the procedure was necessary).

77. See *Tegoseak v. State*, 221 P.3d 345, 350–63 (Alaska Ct. App. 2009) (criticizing at length the scientific soundness of *Brathwaite*).

78. *Young v. State*, 374 P.3d 395, 406 (Alaska 2016).

79. *Id.* at 406–07.

80. *Id.* at 407.

81. *Id.* at 409.

supported a finding of reliability, with the remaining factors weighing against such a finding.<sup>82</sup>

Although holding that *Brathwaite* would have required excluding the identification, the court concluded that the error was harmless.<sup>83</sup> This, the court explained, was because Gazewood's identification was not the sole evidence relied upon by the State.<sup>84</sup> Instead, the court had two other eyewitnesses, a key tying Young to the SUV alleged to be used in the shooting, and a firearm shown to match bullet casings found at the scene.<sup>85</sup> Additionally, Gazewood's testimony was heavily qualified and demonstrated frustration over the suggestive comment in the photo array.<sup>86</sup> Accordingly, the court noted that "a weak and equivocal identification is more likely to be harmless error than admission of a strong and confident one."<sup>87</sup>

The court next found that it was not error to permit Anzalone, who earlier failed to identify Young at the grand jury, to identify Young after seeing his picture on television news.<sup>88</sup> This finding, the court explained, is because due process protections do not apply in the absence of state action.<sup>89</sup> This has been a recognized aspect of Alaska's due process jurisprudence for decades.<sup>90</sup> The court noted that the Supreme Court of the United States has more recently held that the "due process check on the admission of eyewitness identification [is] applicable *when the police have arranged suggestive circumstances* leading the witness to identify a particular person as the perpetrator of a crime,"<sup>91</sup> and that the Alaska Supreme Court has held, consistent with this, that accidental confrontations between suspects and witnesses do not raise due process concerns.<sup>92</sup>

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82. *Id.* at 407–09.

83. *Id.* at 409–10.

84. *Id.*

85. *Id.*

86. *Id.* at 410.

87. *Id.* (citing among other authorities *Williams v. Stewart*, 441 F.3d 1030, 1039 (9th Cir. 2006)).

88. *Id.* at 410.

89. *Id.* at 410–11.

90. *See Nichols v. Eckert*, 504 P.2d 1359, 1362 (Alaska 1973) ("For [the due process] clause to apply there must be state action and the deprivation of an individual interest of sufficient importance to warrant constitutional protection.").

91. *Young*, 374 P.3d at 410–11 (alteration in original) (quoting *Perry v. New Hampshire*, 565 U.S. 228, 232 (2012)).

92. *Id.* at 411 (citing *Kimble v. State*, 539 P.2d 73, 77 (Alaska 1975)).

Next, the court addressed Young's claim that Anzalone's first-time in-court identification was unnecessarily suggestive.<sup>93</sup> This raised the following question: are the same due process protections that apply to out-of-court identifications applicable to identifications given for the first time in-court? The court's answer was, at least for the time being: no.<sup>94</sup> Though the court did not "foreclose the possibility that a first-time in-court identification could be" so suggestive as to violate due process,<sup>95</sup> the court found that the protections and procedures available in court—for example the ability to cross-examine the witness, the availability of expert witness testimony, and the possibility that the court may permit an in-court lineup—make the identifications in trial sufficiently different to justify not extending the same protections.<sup>96</sup>

Having held that the admission of Gazewood's identification was harmless error and that the admission of Anzalone's identification did not constitute error, the court recognized that Young's case did not require addressing his argument for a change in law.<sup>97</sup> The court noted that it "generally refrain[s] from issuing advisory opinions," but that a departure from this "judicial policy of self-restraint" was warranted here.<sup>98</sup>

The court argued that changed conditions justified replacing *Brathwaite*.<sup>99</sup> The court noted the substantial body of science which has developed since *Brathwaite* was decided,<sup>100</sup> and placed particular importance on the decisions of the supreme courts of other states to adopt

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93. *Id.* Young's argument was that the in-court identification was based upon the facts that "he was the only African-American man in the courtroom and that he was sitting at counsel table with his lawyer." *Id.*

94. *Id.*

95. *Id.* at 412. The court cited as an example a Fourth Circuit case in which an in-court identification was found unnecessarily suggestive when a prosecutor asked leading questions to draw out the identification. *Id.* at 412 n.69 (citing as an example *U.S. v. Greene*, 704 F.3d 298, 307 (4th Cir. 2013)).

96. *Id.* at 411–12.

97. *Id.* at 412.

98. *Id.* at 412–13. While the Supreme Court of the United States recently affirmed *Brathwaite* in *Perry v. New Hampshire*, 565 U.S. 228, 241–42 (2012), the Alaska Supreme Court noted that "federal law does not preclude the Alaska Constitution from providing more rigorous protections for the due process rights of Alaskans." *Young*, 374 P.3d at 413 n.79 (quoting *Doe v. State, Dep't of Pub. Safety*, 92 P.3d 398, 404 (Alaska 2004)).

99. *Young*, 374 P.3d at 413 ("Developments in the science related to the reliability of eyewitness identifications, and courts' responses to those developments, have significantly weakened our confidence in the *Brathwaite* test as a tool for preventing the admission of unreliable evidence at trial, and therefore its capacity for protecting the due process rights afforded by the Alaska Constitution.").

100. *Id.* at 414.

the body of science on eyewitness identifications.<sup>101</sup> Significantly, the court found that re-testing the validity of the science was unnecessary given the extent to which other courts have already done so.<sup>102</sup> Finally, the court concluded that a departure from *Brathwaite* would do “more good than harm.”<sup>103</sup>

The court then surveyed the system and estimator variables relevant to suggestiveness and reliability analyses, citing extensively to scientific research and the findings of other courts who have studied this research.<sup>104</sup> Among the system variables the court noted were blind administration of the lineup or photo array,<sup>105</sup> pre-identification instructions,<sup>106</sup> the composition of lineups and photo arrays,<sup>107</sup> feedback given to the witness,<sup>108</sup> whether the identification procedure was a showup,<sup>109</sup> and whether the witness was exposed to multiple viewings of the suspect.<sup>110</sup>

Among the estimator variables the court identified were the witnesses’ level of stress,<sup>111</sup> the “weapons focus effect,”<sup>112</sup> the duration of

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101. *Id.* at 414–15 (discussing the supreme court decisions of New Jersey, Massachusetts, and others, embracing the science regarding witness identification, and finding “highly significant the extent to which other courts have reviewed” and accepted the evidence).

102. *Id.* at 415.

103. *Id.* at 415–16 (quoting *State v. Carlin*, 249 P.3d 752, 757 (Alaska 2011)).

104. *Id.* at 417–26.

105. *Id.* at 417–18 (noting that researchers have observed “interpersonal expectancy effects” where the administrator of a lineup or photo array gives cues, consciously or not, to the witness and that this can affect the witness’s choices).

106. *Id.* at 418–19 (observing that research has shown that the risk of misidentification is decreased when the witness is instructed that the suspect may not be present in the lineup).

107. *Id.* at 419–20 (noting that a lineup and photo array is less reliable if the suspect “noticeably stands out” from the fillers and recommending a minimum of five fillers per suspect and that each lineup and photo array only contain one suspect).

108. *Id.* at 420 (discussing research which shows that confirmatory feedback results in significantly more confidence by the witness).

109. *Id.* at 420–21 (discussing the problems with showups as an identification procedure).

110. *Id.* at 421 (describing “source confusion,” and “mugshot commitment,” phenomena where witnesses become confused by early exposure to a witness in person or photograph).

111. *Id.* at 422 (noting that the witness’s level of stress can affect the reliability of the identification and that acknowledging this may be necessary to counteract the “common misconception that faces seen in highly stressful situations can be ‘burned into’ a witness’s memory” quoting *State v. Lawson*, 291 P.3d 673, 701 (Or. 2012) (en banc)).

112. *Id.* at 422–23 (observing that the presence of a weapon can affect the witness’s attention and that research has even found that this effect is significant with nonthreatening but incongruous objects like a stalk of celery).

view,<sup>113</sup> the environmental conditions of the view,<sup>114</sup> the characteristics of the witness,<sup>115</sup> perpetrator characteristics,<sup>116</sup> race and ethnicity bias,<sup>117</sup> memory decay,<sup>118</sup> and feedback or interaction with co-witnesses.<sup>119</sup>

In light of these variables, the court concluded that *Brathwaite* “does not adequately assess reliability.”<sup>120</sup> First, the court noted that *Brathwaite* does not consider many of the factors affecting reliability.<sup>121</sup> Second, the court found fault in *Brathwaite*’s reliance on subjective self-reporting, noting that many factors affect the accuracy of self-reporting.<sup>122</sup> The court was particularly troubled by the importance the test places on the witness’s level of certainty since many factors may artificially affect the witness’s level of certainty.<sup>123</sup>

The Alaska Supreme Court then prescribed the new system to replace *Brathwaite*.<sup>124</sup> First, to obtain an evidentiary hearing, the defendant must produce evidence of suggestiveness tied to a system variable.<sup>125</sup> The defendant at this stage, the court emphasized, is not required to demonstrate that the procedure was “unnecessarily suggestive.”<sup>126</sup> Rather, showing that some system variable was implicated is sufficient.<sup>127</sup>

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113. *Id.* at 423.

114. *Id.*

115. *Id.* at 423–24 (noting that physical and mental condition, alcohol impairment, visual acuity, and age are relevant factors affecting the identification).

116. *Id.* at 424.

117. *Id.* (noting that research has convincingly demonstrated that witnesses are “more likely to accurately identify members of their own race or ethnicity”).

118. *Id.* at 424–25 (noting that studies show “memory decay is exponential rather than linear”).

119. *Id.* at 425 (noting that studies have shown that “feedback from other witnesses can influence a witness’s memory” by causing false memories and that indirect feedback from other witnesses “can influence the reliability of an identification”).

120. *Id.*

121. *Id.* In response to the State’s argument that *Brathwaite* does not preclude assessing other factors, the court wrote that it was aware of no decision under *Brathwaite* which relied on other factors. *Id.*

122. *Id.* at 425–26.

123. *Id.* at 426.

124. *Id.* at 426–28. As the court notes, the system “closely follows the framework set out by the Supreme Court of New Jersey.” *Id.* at 427 (citing *State v. Henderson*, 27 A.3d 872, 919–22 (N.J. 2011)).

125. *Id.* at 427 (quoting *Henderson*, 27 A.3d at 920). The court rejected Young’s contention that there should be a per se exclusionary rule for eyewitness evidence affected by system variables. *Id.* at 426–27. Though the court agreed that such a rule would maximize deterrence, it felt that it went too far and would result in the exclusion of much reliable evidence. *Id.* at 427.

126. *Id.* at 427.

127. *Id.*

At the evidentiary hearing, the State must proffer evidence that the identification is nevertheless reliable.<sup>128</sup> In its analysis, the trial court should consider all system and estimator variables.<sup>129</sup> The trial court's analysis need not be limited to the variables listed in the opinion since, the court wrote, future development of the science is likely.<sup>130</sup> Accordingly, the trial court should not hesitate to accept expert testimony that expands upon or challenges the variables listed.<sup>131</sup> At the hearing, "the defendant retains the burden of proving . . . 'a very substantial likelihood of irreparable misidentification.'"<sup>132</sup> If the defendant satisfies this burden, the trial court should suppress the pretrial identification as well as any subsequent in-court identification made by the witness.<sup>133</sup>

If the identification is found to be reliable, the court wrote, the trial court should admit the evidence but provide the jury with an instruction tailored to the case.<sup>134</sup> The reason for requiring jury instructions on eyewitness identification evidence tailored to the case was that "the reliability of eyewitness identifications frequently is not a matter within the knowledge of an average juror."<sup>135</sup> The court referred the task of creating model instructions appropriate for use in future cases to the State's Criminal Pattern Jury Instructions Committee.<sup>136</sup>

Accordingly, the court found that it was error for the lower court to refuse tailored jury instructions in Young's trial.<sup>137</sup> However, the court found the error was harmless for several reasons. First, the State's case was not based solely on one witness but relied upon three witnesses with no apparent connection. Second, Young's attorneys raised and emphasized many of the issues surrounding eyewitness identification evidence throughout the proceeding. Third, there was circumstantial evidence other than witness testimony tying Young to the crime.<sup>138</sup>

The court also rejected Young's argument that the lower court erred by denying a mistrial after it came to light that the police failed to disclose a prior conversation with the witness, Arauz.<sup>139</sup> The court concluded that Young could not establish that the discovery violation prejudiced him. Specifically, the court found that Young's claim—that,

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128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* (quoting *State v. Henderson*, 27 A.3d 872, 920 (N.J. 2011)).

133. *Id.*

134. *Id.*

135. *Id.* at 428 (quoting *State v. Guilbert*, 49 A.3d 705, 731 (Conn. 2012)).

136. *Id.*

137. *Id.*

138. *Id.* at 429–30.

139. *Id.* at 430.

had he learned of the information, he might have opted for a justification defense rather than an alibi defense—was successfully rebutted by the State.<sup>140</sup>

Young's conviction was accordingly affirmed.<sup>141</sup>

## V. AUTHOR'S ANALYSIS

### A. *The Promising Aspects of Young*

*Young* presents a very promising roadmap for states to follow for moving beyond *Brathwaite*. The opinion, like that of several states before it, takes notice of a considerable body of science which has developed in the decades since *Brathwaite*. By integrating all we have learned from research into this body of law, there is great potential that the criminal justice system might avoid a lot of the inaccuracy of the past. This is to be lauded. As the Alaska Supreme Court reaffirmed in *Young*, “[i]t is indisputable that a primary goal, perhaps the paramount goal, of the criminal justice system is to protect the innocent accused against an erroneous conviction.”<sup>142</sup> *Young* takes a step towards achieving this ideal.

Further, while *Young* is not the first state pioneer to embrace the science of eyewitness testimony in changing its law, this unanimous decision has the potential to change the game in an important way. By expressly proclaiming that enough states have accepted the science for Alaska to move forward without subjecting it to formal inquiry,<sup>143</sup> the stage is set for other states to follow suit. By contrast New Jersey, before moving away from *Brathwaite*, found it necessary to have seven expert witnesses testify, to generate two thousand pages of testimony, and to place hundreds of studies on the record.<sup>144</sup> Similarly, Massachusetts, prior to altering its jury instructions, established a “Study Group” and produced a 175-page report containing its findings.<sup>145</sup> Of course, Alaska is not the only state to adopt new law in light of this scientific evidence without such a procedure.<sup>146</sup> But until *Young*, no state has said quite so

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140. *Id.* at 431–32.

141. *Id.* at 432.

142. *Id.* at 415–16 (quoting *Shaw v. State, Dep't of Admin.*, 861 P.2d 566, 570 (Alaska 1993)).

143. *Id.* at 414–15.

144. *State v. Henderson*, 27 A.3d 872, 877 (N.J. 2011).

145. See SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 69, at 6.

146. Connecticut, for example, held that expert testimony on eyewitness identifications was admissible without first commissioning a body to study the issue. *State v. Guilbert*, 49 A.3d 705, 720–23, 731–32 (Conn. 2012); see also *State v. Lawson*, 291 P.3d 673, 739–46 (Or. 2012) (en banc) (accepting the body of eyewitness testimony science).

clearly that the science is ready, and that it need not be subjected to additional vetting in order to be embraced, as when the Alaska Supreme Court wrote:

We consider it unnecessary to retest the validity of the scientific evidence on which these other high courts rely. We are not relying on disputed scientific evidence to disturb or affirm the verdict in this case, but rather identifying factors for trial courts' future use—factors other courts have found highly relevant to their constitutional guarantees of due process. We adopted the *Brathwaite* test of reliability in 1979 without reference to whether its assumptions were scientifically valid. . . . As our sister courts find reason to be dissatisfied with *Brathwaite* and the *Biggers* factors, it is appropriate that we take note of their concerns and use their reasoning to inform our own constitutional analysis. We find highly significant the extent to which other courts have reviewed the evidence, accepted it as valid, and filtered it through their own constitutional analyses.<sup>147</sup>

Thus, if other states are willing to follow Alaska's lead, it is now possible to make a full change without delay. The imperative has been clear for long.<sup>148</sup> After *Young*, so too is the means to change. The steady stream of reform may convert into a full-on torrent.

There is also much to be admired in *Young's* procedure to replace *Brathwaite*. Perhaps its best attribute is its simplicity. The path the proceeding is to follow—the defendant triggers a hearing by pointing to an implicated system variable, the State presents evidence establishing reliability, and the burden is on the defendant to prove a “very substantial likelihood of irreparable misidentification”<sup>149</sup>—is an easy process to follow. Additionally, there seems nothing too technical in this process which would prohibit judges and juries from applying the new variables with ease. The court in *Young* wrote that the science in eyewitness testimony is “probabilistic.”<sup>150</sup> In other words, “it cannot say for certain whether any particular identification is accurate but rather identifies the variables that are relevant to evaluating the risk of a misidentification.”<sup>151</sup> This understanding shows in the opinion: where the court surveys the scientific literature, it repeatedly uses imprecise phrases like “this variable affects reliability,” that “such result is less

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147. *Young*, 374 P.3d at 415 (footnotes omitted).

148. See *supra* text accompanying note 1.

149. *Young*, 374 P.3d at 427.

150. *Id.* at 417.

151. *Id.* (citing *Henderson*, 27 A.3d at 894; *Lawson*, 291 P.3d at 685).

likely,” or that a certain effect is “significant.”<sup>152</sup> This is a humble choice which will make analysis of the reliability of an identification much easier for judges and juries—no calculator will be necessary—and which recognizes the limitations of our understanding in this complex and constantly evolving area of science.

*B. Will Young v. State Be Effective in Spurring Reform and Excluding Mistaken Eyewitness Identification Evidence?*

Although there is much to laud about *Young v. State*, there is likewise reason to doubt that it will really achieve meaningful safeguards against the use of mistaken eyewitness testimony in criminal proceedings. There are a few problems which could undercut the rule’s effectiveness. First, the doctrine of harmless error might prevent *Young* from having any meaningful deterrent effect. Second, *Young* leaves two kinds of eyewitness identifications—identifications without state action and identifications made for the first time in-court—completely outside of its ambit. The decision not to include these within *Young* will likely result in the admission of unreliable evidence.

1. Harmless Error

It may be that *Young v. State*’s deterrent effect will result in necessary reform in Alaskan police departments and prosecutors’ offices. Indeed, in places across the country these reforms are already being instituted.<sup>153</sup> But change may not be automatic, and if police departments

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152. These imprecise statements are found throughout the court’s review of the variables. See *id.* at 417–25; see, e.g., *id.* at 417 (“When the administrator of an identification procedure knows who the suspect is, the administrator *may* subconsciously affect the reliability of the witness’s identification.” (emphasis added)); *id.* at 418 (“[S]tudies show that misidentification is *less likely* if the witness is informed that the suspect might not be in the lineup.” (emphasis added)); *id.* at 419 (“As a compounding factor, a lineup that suggests a result to the witness *may artificially inflate* the witness’s confidence in the identification because of its apparent ease.” (emphasis added)).

153. For example:

[T]he double-blind lineup . . . is now standard in many major police departments (e.g., Boston, Dallas, Denver, and others), is the law for every police department in some states (e.g., Ohio, North Carolina, Texas, and Connecticut), is the recommendation of numerous important national legal associations (e.g., American Bar Association, International Association of Chiefs of Police) and research societies (e.g., the American Psychology-Law Society), and has been a staple recommendation of almost every state reform commission in the last decade.

Gary L. Wells et al., *Eyewitness Identification Reforms: Are Suggestiveness-Induced Hits and Guesses True Hits?*, 7 PERSP. ON PSYCHOL. SCI. 264, 266 (2012).

and prosecutor offices in Alaska prove intractable, there is a real possibility that *Young* will not force their hands.

The problem lies with the harmless error rule. As the rule is displayed in *Young*, it could substantially swallow the positive effect of the decision. The Alaska Supreme Court's harmless error analysis was often cursory, omitting key facts weighing in *Young*'s favor. For example, upon holding that the admission of Gazewood's identification was error, the court held that the error was harmless in part because two other eyewitnesses placed *Young* at the scene.<sup>154</sup> Arauz, the court wrote, had known *Young* since high school, and identified *Young* as the driver.<sup>155</sup> Missing in the analysis was the fact that Arauz was a member of a rival gang, and that *Young* had beat him up in high school—facts which potentially impugn Arauz's credibility as a witness.<sup>156</sup> The court likewise mentioned Anzalone as an eyewitness,<sup>157</sup> but omitted from the harmless error analysis that Anzalone failed to identify *Young* by photo array and only later came forward as a witness after seeing him on television.<sup>158</sup> Similar observations can be made regarding the court's harmless error analysis upon finding that it was error not to give eyewitness specific jury instructions.<sup>159</sup>

In fairness, the court's failure to address these aspects in its analysis is probably due to the fact that it is fairly clear in *Young* that the State had met its burden of proof. Although the evidentiary problems in his case were manifold, the State's overall case was strong. Multiple witnesses identified the car as belonging to "Big Nasty," a nickname *Young* went by,<sup>160</sup> *Young* was holding a key which matched the car identified,<sup>161</sup> *Young* was carrying a gun which ballistics confirmed was a probable match to shell casings on the scene,<sup>162</sup> and three (albeit far from perfect) witnesses placed *Young* in the car.<sup>163</sup> To combat all of this evidence, *Young* presented a rather implausible alibi: that he was with his sister that day (even though the two were estranged and had not seen each other much in the years leading up to the shooting) and that

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154. *Young*, 374 P.3d at 409–10.

155. *Id.* at 410.

156. *See id.* at 402, 409–10.

157. *Id.* at 410.

158. *Id.* at 401, 410.

159. *Id.* at 430 ("[T]he State's case did not rest on identification by a single witness; the State presented three independent witnesses with different perspectives and no apparent connections to each other, including one who had known *Young* before the crime.").

160. *Id.* at 401.

161. *Id.*

162. *Id.*

163. *Id.* at 401–02.

someone named “Little O” came over that afternoon and gave Young the gun.<sup>164</sup>

In the context of such a case, it is understandable that the court would not feel compelled to reiterate all of the facts in its reach. But if such cursory analysis is transplanted to a case with weaker evidence, the result could be very problematic. *Young* could be read as permitting harmless error analysis which simply describes the *type* of evidence without identifying the facts and circumstances which goes to its weight. If courts are not rigorous about applying the harmless error doctrine, the core holding of *Young* could be largely swallowed by the harmless error exception. The decision, in that case, may not provide the immediate deterrence necessary to spur police and prosecutors to reform their practices.

## 2. The Requirement of State Action and the Exclusion of First Time In-Court Identifications

*Young* also kept intact the doctrine that “state action” is necessary to trigger due process and the right to exclude unreliable eyewitness identifications.<sup>165</sup> In *Young*, this holding permitted the court to retain Anzalone’s dubious identification.<sup>166</sup> The doctrine that due process requires state action to apply is in line with both Alaskan and federal precedent, so the holding is perhaps unsurprising.<sup>167</sup> Still, the requirement is likely to result in the inclusion of much unreliable identification evidence.

Similarly, the Alaska Supreme Court declined to extend the protections laid out in *Young* to first-time, in-court identifications.<sup>168</sup> In *Young*, this decision resulted in the admission of Anzalone’s first-time, in-court identification.<sup>169</sup> This was justified, the court wrote, because

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164. *Id.* at 403.

165. *See id.* at 411–12.

166. *See id.*

167. *See Perry v. New Hampshire*, 565 U.S. 228, 248 (2012); *Nichols v. Eckert*, 504 P.2d 1359, 1362 (Alaska 1973). Although this holding is unsurprising, it is not necessarily inevitable. Indeed, later on in the Comment, I suggest two possible paths for re-evaluation of the state action doctrine. *See infra* note 172.

168. *Young*, 374 P.3d at 412. The Alaska Supreme Court did not totally foreclose the possibility that a first-time, in-court identification could be so suggestive as to violate due process. The court cited a case where a prosecutor improperly coached a witness as an example. *Id.* (citation omitted). Short of such misconduct, however, it is difficult to see how *Young* left the door open.

169. *Id.* at 411–12. When Anzalone identified Young in court, Young “was the only African-American man in the courtroom” and “was sitting at the counsel table with his lawyer.” *Id.* at 411. Had the court held that first-time, in-court identifications were controlled by *Young*, it is difficult to see how this would not be deemed suggestive.

there are added procedural protections in place in a courtroom to protect from suggestiveness.<sup>170</sup> Again, the court's refusal to extend *Young* to these cases will likely result in the admission of many unreliable identifications.

### C. Recommendations

First, courts in other states should heed Alaska's call that it is "unnecessary to retest the validity of the scientific evidence on which . . . other high courts rely."<sup>171</sup> When these states do so, they may look to the framework of *Young v. State* as a simple, workable solution which will help to integrate the mass of knowledge we now have regarding eyewitness identifications. Alaska and these states, however, would do well to consider the potential weakening of the doctrine which harmless error, the requirement of state action, and the exclusion of first time in-court identifications threaten. Harmless error doctrine should be applied rigorously so that the deterrent effect of *Young* is not weakened, and so police departments and prosecutor offices will institute the necessary reforms to improve the accuracy of identifications. The requirement of state action for due process with respect to eyewitness identifications may also be reconsidered,<sup>172</sup> as well as the exclusion from *Young* of first-time, in-court identifications.

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170. *Id.* at 411–12. Some of these protections, like the presence of attorneys, the judge, and the jury, are always present. Others, like expert witnesses, using an in-court lineup, and seating the defendant somewhere other than the counsel table are not always present. *See id.*

171. *See id.* at 415.

172. Such a reevaluation may follow a few tracts. First, at least for Alaska, there may be a textual basis for such a holding. Unlike the Fourteenth Amendment which commands: "No State shall . . . deprive any person of life, liberty, or property, without due process of law," U.S. CONST. amend. XIV, § 1, the due process clause of the Alaska State Constitution requires that "[n]o person shall be deprived of life, liberty, or property, without due process of law." ALASKA CONST. art I, § 7. The difference is potentially significant because the justification of the state action doctrine is that the Fourteenth Amendment is "directed at the States." *See* *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982); *see also* Cornell Law Sch., *State Action Requirement*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/state\\_action\\_requirement](https://www.law.cornell.edu/wex/state_action_requirement) (last visited Feb. 23, 2017) ("The state action requirement stems from the fact that the constitutional amendments which protect individual rights . . . are mostly phrased as prohibitions against government action.").

## VI. CONCLUSION

*Young v. State* stands as a model for other states to follow in reforming their approaches to eyewitness testimony. Particularly promising is *Young's* emphatic assertion that the science of eyewitness identification evidence can be promptly accepted without further vetting by state courts. States which follow this call need not waste time forming study groups,<sup>173</sup> or holding hearings,<sup>174</sup> in order to perform work which has already been done elsewhere. Rather, like Alaska, they may go beyond the protections offered by the U.S. Constitution and immediately integrate all that we have learned into their law. Additionally, though the effectiveness of the procedure set out in *Young* may be limited by its exceptions, it has potential to be a simple, workable, and effective mechanism for addressing the issue of when to exclude eyewitness identifications.

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Second, it is at least plausible to interpret the state action requirement as being satisfied in a case such as *Anzalone's*. While the government did not cause the suggestive circumstances surrounding *Anzalone's* initial identification, it is absolutely the case that the government took advantage of this circumstance by calling him as a witness. *Young*, 374 P.3d at 410–11. At least arguably, it is “state action” to exploit an unreliable identification in order to deprive a person of his liberty. In this sense, the State calling an unreliable witness is somewhat like the State presenting as evidence the results of a polygraph. The latter type of unreliable evidence, it is true, has typically been dealt with under the rules of evidence. *See, e.g., Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 585–87 (1993). However, it seems reasonable to suggest that when a State prosecutes by exploiting unreliable evidence—whether it be a polygraph or an unreliable identification—the State is taking an action against the person; and that in such a case, the process to which that person is entitled is deficient.

It may very well be that upon re-examination, the interpretation of the state action doctrine set out in *Young* should be retained. I do not here suggest otherwise. I only argue that upon close examination, the theoretical underpinnings for the current interpretation may not be fully sound, and that the result reached in *Young* of refusing to exclude or even examine the reliability of an identification like *Anzalone's* on due process grounds may not be inexorable.

173. *See Commonwealth v. Walker*, 953 N.E.2d 195, 208 n.16 (Mass. 2011).

174. *See State v. Henderson*, 27 A.3d 872, 877 (N.J. 2011).