NEW YORK ON EYEWITNESS IDENTIFICATIONS: PROGRESSIVE OR REGRESSIVE?

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INTRODUCTION

In the middle of a dream, she was awakened to the sound of shuffling feet. Through her sleepy eyes, she saw a man's silhouette crouched next to her. Confused and afraid, she thought to herself, "Am I still dreaming?" Suddenly, there was a knife to her throat. "Shut up or I'll cut you." Her worst nightmare was happening to her. As she was being raped, she made two decisions: I will live, and I will remember his face. Jennifer Thompson was a twenty-two-year-old college student when her life changed forever. After being face-to-face with her attacker for forty-five minutes, she promised herself she would remember him. While trying to stay alive, she studied his face with one mission: I will make him pay for this.[1]

Instead, Jennifer Thompson made an innocent man pay. Jennifer Thompson identified the wrong man: in a photo array; in a lineup; and in a courtroom, twice.[2] Ronald Cotton was in prison for a rape he did not commit for fourteen years, paying the price for Jennifer's words: "[I]t was him."[3] Now, Jennifer has a new mission, and that mission is to

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1. JENNIFER THOMPSON-CANNINO & RONALD COTTON, PICKING COTTON 11–19 (2009).

2. David A. Sonenshein & Robin Nilon, *Eyewitness Errors and Wrongful Convictions: Let's Give Science a Chance*, 89 OR. L. REV. 263, 264 (2010).

3. *Id.*

change the criminal justice system and the role of eyewitness identifications in the courtroom.[4]

Eyewitness misidentification is the leading cause of wrongful convictions in the United States.[5] Starting in the early 1900s, sociologists, psychologists, and researchers have conducted extensive studies and research on eyewitness identifications. They all have come to the same conclusion: eyewitness identifications are not reliable.[6] Yet as knowledge on the subject progresses, the Supreme Court has not implemented any new safeguards, and has in effect left the problem to the states to find solutions.[7]

Of all the fifty states, New York State has the most wrongful convictions from eyewitness misidentifications.[8] Despite this fact, in June 2016, when the highest court of New York addressed the issue of eyewitness identification in *People v. McCullough*, it did nothing to change precedent or implement new safeguards.[9] In fact, while many states are addressing the issue and implementing greater protections, New York took a step back from its own precedent, granting even less protection than its own precedent called for.

The goal of this Note is to demonstrate that what New York is doing is not working. New York needs to implement greater safeguards to protect from wrongful convictions based on eyewitness identifications. Part I of this Note will discuss the problem of eyewitness identifications and why they are unreliable, as well as briefly overview cases demonstrating how easily this could happen to anyone in the wrong place at the wrong time. Part II of this Note will discuss current approaches taken by the United States Supreme Court and select states throughout the nation on the admissibility of eyewitness evidence. The select states discussed will demonstrate the range of current approaches that are being utilized. Part III of this Note will discuss New York's approach taken in

4. *Id.* at 264–65.

5. INNOCENCE PROJECT, REEVALUATING LINEUPS: WHY WITNESSES MAKE MISTAKES AND HOW TO REDUCE THE CHANCE OF A MISIDENTIFICATION 3 (2009) [hereinafter REEVALUATING LINEUPS], https://www.innocenceproject.org/wp-content/uploads/2016/05/eyewitness_id_report-5.pdf.

6. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 50 (2011).

7. *See* Nicholas A. Kahn-Fogel, *The Promises and Pitfalls of State Eyewitness Identification Reforms*, 104 KY. L.J. 99, 100 (2015–16).

8. Press Release, Innocence Project, New York Leads Most States in Number of Wrongful Convictions, Must Enact Reforms to Prevent Them, Innocence Project Report Finds (June 8, 2009) (providing the statistics on the problem of wrongful convictions from eyewitness misidentifications in New York State).

9. 58 N.E.3d 386, 388 (N.Y. 2016).

its most recent case, *People v. McCullough*, and will prove why New York needs to be more progressive on the issue. Finally, Part IV will briefly discuss possible solutions that New York could implement in order to afford its citizens greater protection in the leading state in the nation for wrongful convictions based on eyewitness evidence.

I. THE PROBLEM

"[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!'"[10] Juries place an enormous amount of trust in eyewitnesses. That is because human beings have a strong assumption that human memory is a precise recorder of events; that our memories are preserved and untouched, not easily forgotten.[11] Juries also trust in the notion that human minds are like a computer that "stamp the facts of experiences on a permanent, nonerasable tape . . . ."[12] Unfortunately, this trust is unfounded. Decades of scientific research into eyewitness identification has shown that recollections are "as taintable as any crime scene—and are often not as meticulously preserved."[13]

The Innocence Project, a nonprofit organization founded in 1992, is an organization dedicated to exonerating innocent people spending time in prison and on death row for crimes they did not commit.[14] As of today, there have been 353 people convicted for crimes they did not commit, and then exonerated through DNA evidence.[15] Eyewitness misidentification was a contributing factor to 248 (seventy percent) of them.[16]

As of 2009, there were approximately 250 exonerations through DNA evidence, each defendant having spent an average of twelve years

10. Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting).

11. ELIZABETH LOFTUS & KATHERINE KETCHAM, WITNESS FOR THE DEFENSE: THE ACCUSED, THE EYEWITNESS, AND THE EXPERT WHO PUTS MEMORY ON TRIAL 16 (1st ed. 1991).

12. *Id.* at 21.

13. Erika Hayasaki, *The End of Eyewitness Testimonies*, NEWSWEEK (Nov. 19, 2014, 10:41 AM), http://www.newsweek.com/2014/11/28/end-eyewitness-testimonies-285414.html.

14. *See* REEVALUATING LINEUPS, *supra* note 5, at 44.

15. *DNA Exonerations in the United States*, INNOCENCE PROJECT, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited Jan. 19, 2018); *see The Cases*, INNOCENCE PROJECT, https://www.innocenceproject.org/all-cases/#eyewitness-misidentification,exonerated-by-dna (last visited Jan. 19, 2018) (providing the individual profiles of the most current wrongful conviction cases).

16. *The Cases*, *supra* note 15.

in prison.[17] Of those 250 exonerations, 190 of those convictions (seventy-six percent) were based in whole or in part on eyewitness identification.[18] In fifty percent of those 190 convictions, "eyewitness testimony was the central evidence used against the defendant . . ," meaning there was no other corroborating evidence connecting the defendant to the crime.[19] Thirty-eight percent of those 190 cases involved multiple eyewitnesses identifying the same innocent person.[20] In those 190 convictions combined, approximately 250 witnesses misidentified innocent suspects.[21]

Although overwhelming, these statistics are neither whole nor new. Hardly lucky, these defendants all had one thing in common: they were convicted of a crime that left DNA evidence, which made a future exoneration possible.[22] Unfortunately, only an estimated five to ten percent of crimes leave DNA evidence, leaving the possibility of a future exoneration almost impossible for ninety to ninety-five percent of criminal defendants.[23] This means that there are likely countless more innocent people imprisoned for a crime they did not commit with no possibility of exoneration.

Although only recently acknowledged as a problem in the criminal justice field, research and consensus on the unreliability of eyewitness identifications began in the early 1900s.[24] This research has shown that there are two categories of variables that play a role in the unreliability of eyewitness evidence: estimator variables and system variables.[25] Estimator variables are factors independent of the criminal justice system.[26] System variables are variables that the criminal justice system has control over, such as identification procedures and police practices.[27]

17. REEVALUATING LINEUPS, *supra* note 5, at 3. Statistics are based on data from 2009 due to it being the most recent, thorough analysis of wrongful conviction statistics.

18. GARRETT, *supra* note 6, at 48.

19. REEVALUATING LINEUPS, *supra* note 5, at 4.

20. *Id.* at 3.

21. *Id.*

22. *Id.* at 3.

23. *Id.*

24. Dana Walsh, Note, *The Dangers of Eyewitness Identification: A Call for Greater State Involvement to Ensure Fundamental Fairness*, 36 B.C. INT'L & COMP. L. REV. 1415, 1426 (2013).

25. *Id.* at 1422.

26. *Id.* at 1424.

27. *Id.* at 1422.

A. Estimator Variables

Estimator variables are factors that affect the accuracy of eyewitness identifications which cannot be controlled by the criminal justice system. Factors such as the witness herself, the fallibility of the human mind, and the circumstances of the event, have a significant influence on the accuracy of an eyewitness identification, independent of any influence from controllable factors or outside contamination.[28] Significantly, "[s]tudies conducted over the last five years have shown one of every three people ID'ed as a perpetrator from a police photo lineup is an innocent 'filler[,]'" not even a suspect in the crime.[29] In essence, estimator variables can be summed up in two categories: the witness and the event.[30]

For almost a century now, research has consistently proven that the human mind is fallible, but more importantly, it is malleable.[31] Despite common belief, the human memory does not work like a video tape; rather, research has demonstrated that every time a human being reflects on a memory, it has changed, even if slightly.[32] This phenomenon is called memory contamination.[33] In order to reconstruct an event or retrieve a memory, people unknowingly integrate details in order to fill in gaps and replace forgotten information from the event.[34]

The gaps in the witness's memory and the details that fill those gaps depend on the witness herself. Sensory limitations of the witness is what causes those gaps. Often, when witnessing or being subjected to a crime, a witness will experience simultaneous overload—when the senses are overwhelmed with too much information in a short period of time.[35] This simultaneous overload affects both perception and retrieval of the event. When recalling an event, the human mind fills in gaps in order for a memory to be complete. Research has shown that the details filling in those gaps relate to the witness herself. In other words, what she perceives is to a large extent determined by her own cultural bias, expectations,

28. *Id.* at 1424.

29. Charlotte Silver, *When Eyewitness Testimony Goes Horribly Wrong*, VICE (Apr. 1, 2015, 12:00 AM), https://www.vice.com/en_us/article/exq4z7/why-do-eyewitnesses-still-outweigh-a-confession-331.

30. *See id.*

31. Walsh, *supra* note 24, at 1426; *see* GARRETT, *supra* note 6, at 48.

32. *See* Frederick E. Chemay, Comment, *Unreliable Eyewitness Evidence: The Expert Psychologist and the Defense in Criminal Cases*, 45 LA. L. REV. 721, 724 (1985).

33. Dori Lynn Yob, *Mistaken Identifications Cause Wrongful Convictions: New Jersey's Lineup Guidelines Restore Hope, But Are They Enough?*, 43 SANTA CLARA L. REV. 213, 218 (2002).

34. *Id.*

35. Chemay, *supra* note 32, at 726.

prior information, and personal prejudices.[36]

Another factor influenced by the human mind is the phenomenon of "unconscious transference."[37] Unconscious transference is the tendency to confuse a person seen in one situation with another person seen in a different situation.[38] This was the case for psychologist and attorney Donald M. Thomson, who was arrested for rape in 1975.[39] The night that the rape he was arrested for occurred, Thomson was on national television discussing his research on, ironically, the flaws of eyewitness testimony.[40] As the show was being aired, a woman was brutally raped in her apartment, and later that evening, she identified Thomson as her attacker.[41] Thomson, of course, had a solid alibi: he was on live television.[42] This is a classic, though ironic, case of unconscious transference. Right before her assault, the victim had been watching Thomson's interview and had confused her rapist with the man she had seen on television.[43]

Event (or situational) factors also affect the accuracy of eyewitness identifications.[44] Research has shown that factors such as the duration of the event, the nature of the crime, the stress produced by the event, the presence of a weapon, and the race of both the victim and the suspect all have a significant influence on the accuracy of an identification.[45]

Research has shown that, typically, the longer an event lasts, the more complete a memory will be.[46] On the other hand, the shorter the duration of the event, the less complete the recollection will be.[47] Although straightforward, the duration of the event is hardly an indicator of accuracy. In Jennifer Thompson's case, the event lasted between a half hour and forty-five minutes—much longer than the average duration in which an eyewitness identification was involved for the other exoneration

36. *Id.* These expectations and stereotypes cause a witness to see and remember what she would expect to see or remember where there is a gap in her memory, and unknowingly, that expectation is now a part of her actual memory. *Id.*

37. *Id.*

38. *Id.* at 729.

39. Hayasaki, *supra* note 13.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. Chemay, *supra* note 32, at 727.

45. *See id.* at 727–28. Other obvious situational factors that affect eyewitness accuracy may include lighting, degree of attention, and preparation.

46. *Id.* at 727.

47. *Id.*

cases.[48] There, the duration of the event was not an indicator of its accuracy, even when she intently studied and meticulously recalled every detail. In fact, on appeal at Ronald Cotton's second trial, Jennifer Thompson actually came face-to-face with her actual rapist, and did not recognize him at all. Rather, at that same trial, she unknowingly and in good faith still identified Ronald Cotton as her rapist.[49]

The nature of the crime and the stress it produces also have a large influence on memory and perception.[50] Research has indicated that, typically, the more violent the crime, the less accurate the memory will be.[51] Often viewed in connection with the nature of the crime, the presence of a weapon affects the accuracy of eyewitness evidence as well.[52] Research has shown that these factors are counterintuitive; the average person tends to believe that the more stressful an event is—being held at gunpoint, for example—the more a witness or victim would pay attention.[53] The opposite is true. This may be for a variety of reasons, such as attention being focused on the witness's own safety, safety of loved ones, or even survival.

B. System Variables

Variables controllable by the criminal justice system also have a large influence on eyewitness evidence.[54] These factors include, but are not limited to, the procedure used in making the identification, witness instructions and feedback, confidence statements, and composite sketches.[55] Even the most well-intentioned police officer making an unknown mistake can influence a conviction of an innocent person.

The most common procedures used to administer identifications are

48. GARRETT, *supra* note 6, at 71 (discussing how victims most often only had a chance to view their attacker for mere seconds).

49. THOMPSON-CANNINO & COTTON, *supra* note 1, at 110–33. While in prison, Cotton learned through another inmate that the actual perpetrator of the crime might be a man that was staying in the same prison, Bobby Poole. *Id.* at 110. When Cotton brought this information to his attorney, his attorney brought the theory to the court. *Id.* 112–14. The judge allowed Cotton's attorney to voir dire Poole to see if there was enough evidence to bring the theory before the jury. *Id.* 129–31. Although the judge found that there was not enough evidence to bring Poole before the jury or discuss him as a possible suspect, the voir dire happened in front of Jennifer Thompson, and she did not recognize Poole. She later learned that Poole was, in fact, her actual rapist. *Id.* 132–34.

50. Chemay, *supra* note 32, at 727–28.

51. *Id.* at 728; GARRETT, *supra* note 6, at 71.

52. Nancy Mehrkens Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 L. & HUM. BEHAV. 413, 414 (1992).

53. State v. Guilbert, 49 A.3d 705, 724 (Conn. 2012).

54. Walsh, *supra* note 24, at 1422–23.

55. REEVALUATING LINEUPS, *supra* note 5, at 10–15.

photo arrays and lineups.[56] A photo array is a procedure in which an administrator gives the witness a piece of paper with (typically five or six) photographs of possible suspects, and then the witness picks who she believes the perpetrator was.[57] A lineup is a process where (again, typically five or six) possible suspects come into the police station and stand in front of the witness for her to make a live identification.[58] In both methods, there are "fillers"—non-suspects that are included in the presentation.[59] A less common identification procedure is a show-up—when the suspect alone is shown to the witness, without any fillers.[60] A show-up is inherently the most suggestive identification procedure, and scientists urge that it should be avoided at all costs.[61]

Research has shown that the best practice for a photo array or lineup is for the presentation to be double-blind.[62] In other words, the administrator of the procedure should not know who the suspect is in order to eliminate the possibility of the administrator making any subconscious cues or inadvertently influencing the witness in any way. As seen in Jennifer Thompson's case, even the most innocent instructions or comments may shape an innocent suspect's future. After Thompson picked Cotton in the first identification procedure (the photo array), Detective Gauldin told Jennifer she had done great, she confirmed his beliefs.[63] Looking back, Jennifer believes this may have been the moment it all went wrong:

> All those years ago, [Officer Gauldin] was doing his job by the book—but when I asked him if I did OK and he told me yes, then I subconsciously tried to pick the same person out of the physical lineup. . . . The standard way eyewitness evidence was collected failed me, and because of that, I'd failed, too.[64]

The composition of the lineup is also very important. Each lineup or array should have at least four fillers, and the fillers should look very similar to the possible suspect.[65] Even in cases involving multiple suspects, there should be only one suspect per array or lineup.[66]

56. *Id.* at 10.
57. *Id.*
58. *Id.* Often, this process is used so the witness can hear the possible suspect's voice, view stature, and look the possible suspect in the eye. *See id.* at 15.
59. REEVALUATING LINEUPS, *supra* note 5, at 10.
60. GARRETT, *supra* note 6, at 52.
61. *Id.* at 52, 55.
62. REEVALUATING LINEUPS, *supra* note 5, at 4.
63. THOMPSON-CANNINO & COTTON, *supra* note 1, at 271.
64. *Id.* at 271–72.
65. REEVALUATING LINEUPS, *supra* note 5, at 10.
66. *Id.* at 5.

Witness instructions are also very important, both before and after the identification. This is because of a phenomenon called "relative judgment." Research has shown that eyewitnesses are more accurate when the actual perpetrator is present in the lineup, but have difficulty not selecting someone when the perpetrator is absent from the lineup.[67] Relative judgment is the theory that when presented with a group of suspects in a lineup, the witness tends to identify the person who looks most like the perpetrator relative to the others in the lineup, regardless of whether the perpetrator is actually present in the lineup.[68] Because a witness has a hard time not choosing someone in an array or lineup, it is imperative that the administrator inform the witness that the perpetrator may not be present, and therefore the witness does not feel pressured to make an identification.[69]

Recording confidence statements from the witness when making the first identification is another way to improve the accuracy of eyewitness identifications. The reason why a witness's apparent confidence is concerning is two-fold. First, although well-intentioned, a witness's confidence is often an illusion to even herself, and bears no correlation with the accuracy of the identification.[70] This increased confidence after an identification has been made often alters the witness's memory of the identification process as well.[71] Often when testifying, the witness does not remember ever hesitating in the identification process, when the record of the process would show she was hesitant and uncertain.[72] In Jennifer's case, in the first identification, she was tentative, and said she *thought* it was Cotton when she pointed to his picture.[73] By time the second trial had come, she was so confident in her choice that she did not even recognize her actual assailant sitting in front of her; the one she had

67. Yob, *supra* note 33, at 217.

68. *Id.* This is in contrast to absolute judgment, which would be the process by which the eyewitness compares each person in the lineup to his or her memory individually, and then decides one at a time whether or not that possible suspect is the perpetrator. *Id.* at 218. Absolute judgment would be ideal, however as science has shown, the human mind is often not ideal when it comes to eyewitness evidence, and tends to operate using relative judgment in this situation. *See id.*

69. *Id.* at 234.

70. GARRETT, *supra* note 6, at 63; REEVALUATING LINEUPS, *supra* note 5, at 13. Of the 179 exoneration cases from the 2009 Innocence Project Report, fifty-seven percent of the witnesses reported that they had not been certain at the time of the earliest identifications, however, in almost every case, the eyewitness had been positive at the time of the trial. *See* GARRETT, *supra* note 6, at 63. This false confidence can come from almost anywhere. As seen above, it could come from words of affirmation, self-convincing, or even hope.

71. REEVALUATING LINEUPS, *supra* note 5, at 13.

72. *Id.*

73. THOMPSON-CANNINO & COTTON, *supra* note 1, at 33.

spent forty-five minutes studying in order to make the right identification.[74] Second, jurors tend to place a great deal of faith on the confidence of the eyewitnesses.[75] In fact, many scholars believe it to be amongst the most powerful testimony that can be presented in a courtroom.[76]

Another process that has been found to influence the accuracy of the eyewitness identification process is the making of a composite sketch.[77] This again is counterintuitive, as many people believe that having a composite sketch and the process of making one aids the investigation and prosecution of a perpetrator. Much like with witness confidence, the problem of a composite sketch is two-fold. First, the act of making a composite sketch has been shown to alter the witness's memory; the witness will replace the fading memory from the often-time short encounter with the composite sketch she created from that memory.[78] This is because over the course of identification process, the face on the composite sketch actually becomes more familiar than the original memory. Second, that composite sketch becomes familiar to the public as well. Again in hindsight, Jennifer Thompson can now see how big of a role the composite sketch had played on her false identification; the sketch resembled Cotton much more than Poole, her actual assailant.[79]

II. CURRENT APPROACHES

In light of growing awareness and scientific consensus on the unreliability of eyewitness evidence, one may be surprised to learn that the United States Supreme Court has not been progressive on the issue.[80] In fact, a review of decisions starting in 1967, and the most recent one having been decided in 2012, will show that after briefly expanding defendants' protections against eyewitness identifications, it has since contracted and affords little protection from the unreliable evidence.[81] With little guidance from the Supreme Court and pressure for change from citizens, many states have taken the issue into its own hands,

74. *Id.* at 126–33.

75. Kevin Murnane, *"I Think This Is The Guy"—The Complicated Confidence of Eyewitness Memory*, ARSTECHNICA (Dec. 21, 2015, 8:00 AM), https://arstechnica.com/science/2015/12/i-think-this-is-the-guy-the-complicated-confidence-of-eyewitness-memory/?comments=1&post=30326853.

76. Elizabeth Loftus, *What Jennifer Saw*, PBS, http://www.pbs.org/wgbh/pages/frontline/shows/dna/interviews/loftus.html (last visited Jan. 19, 2018).

77. REEVALUATING LINEUPS, *supra* note 5, at 15.

78. *See id.*

79. *See* THOMPSON-CANNINO & COTTON, *supra* note 1, at 271–72.

80. *See* Walsh, *supra* note 24, at 1417.

81. Sonenshein & Nilon, *supra* note 2, at 266–69.

implementing possible solutions for what seems to be an impossible problem to solve.[82]

A. The Supreme Court's Approach

Early Supreme Court decisions reflect that the Court acknowledged risks created by suggestive lineup procedures and how critical the lineup stage is in a criminal proceeding. The earliest decisions on the matter were rendered in a series of cases that became known as the *Wade* Trilogy.[83] In 1967, the Court ruled that after indictment, the defendant has a Sixth Amendment right to counsel during a lineup in order to deter police from improperly influencing the eyewitness, enhance the defendant's ability to recreate the lineup at the suppression hearing, and aid in cross-examining the witness at trial.[84] In the second case of the trilogy, the Court ruled that an out-of-court identification would be excluded at trial unless the prosecution could show beyond a reasonable doubt that the identification was untainted by the fact that the identification was uncounseled.[85] In the third case, the Court ruled that a defendant's due process rights are violated if the identification "was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied the due process of law."[86]

Nine months after the *Stovall* ruling, however, the Supreme Court shifted focus from the identification *procedure* to the overall reliability of the case's identification *evidence*. In *Simmons v. United States*, the Court ruled that an identification would be set aside only if it was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[87] While many scholars praise the *Wade*

82. Kahn-Fogel, *supra* note 7, at 100.

83. David E. Paseltiner, Note, *Twenty-Years of Diminishing Protection: A Proposal to Return to the* Wade *Trilogy's Standards*, 15 HOFSTRA L. REV. 583, 589 (1987).

84. United States v. Wade, 388 U.S. 218, 236–37 (1967) (citing Powell v. Alabama, 287 U.S. 45, 57 (1932)).

85. Gilbert v. California, 388 U.S. 263, 274 (1967) (citing Chapman v. California, 386 U.S. 18, 24 (1967)). The Court reasoned that "[o]nly a per se exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right [to counsel being present at the identification procedure]." *Id.* at 273.

86. Stovall v. Denno, 388 U.S. 293, 302 (1967). When determining if the identification was unnecessarily suggestive, the factfinder must look to the "totality of the circumstances." *Id.* The Court provided no guidance as to what factors should be looked at when looking at the totality of the circumstances. Paseltiner, *supra* note 83, at 588. The Court instead looked to only the factors surrounding the identification, not factors bearing on the crime. *Id.* This indicates that the *Wade* standard was not to be used in applying the totality test. *Id.*

87. 390 U.S. 377, 384 (1968). This standard, though apparently in line with *Stovall*, is a much higher standard for the defendant to meet. Paseltiner, *supra* note 83, at 589–90. By

trilogy for its protection, *Simmons* is noted by many as the beginning of the dismantling of protections against eyewitness identifications.[88]

Four years later, in *Neil v. Biggers*, the Court further narrowed protections by ruling that any suggestiveness in identification alone does not require its exclusion, so long as the identification is nevertheless reliable.[89] Thus, the Court ruled that it is the likelihood of misidentification, rather than the suggestive procedure, that is the violation of the defendant's due process rights.[90]

Known as the completion of the demise of the *Wade* Trilogy, in *Manson v. Brathwaite*, the Court ruled that the admissibility of eyewitness identification evidence is to be determined through a balancing of its reliability (determined using the *Biggers* factors) against the corrupting influence of the suggestive identification.[91] In this test, the prosecution may argue that even if there was suggestion in the identification process, it did not influence the reliability of identification.[92] Again, admissibility is not based on police wrongdoings, but the overall reliability of the identification.[93] In his dissenting opinion, Justice Marshall noted, "[t]oday's decision can come as no surprise to those who have been watching the Court dismantle the protections against mistaken eyewitness testimony erected a decade ago in [the *Wade*

shifting focus from the identification process to the case as a whole, by replacing the word "permissible" with "unnecessarily," and by replacing the phrase "conducive to irreparable mistaken identification" with "a very substantial likelihood of irreparable misidentification," the Court made an in-court identification almost guaranteed. *See id.*

88. Paseltiner, *supra* note 83, at 589–90.

89. 409 U.S. 188, 199 (1972) (citing Clemons v. United States, 408 F.2d 1230, 1248 (D.C. Cir. 1968)). This again was to be determined under the totality of the circumstances, but this time the Court gave five factors to aid in the determination of the reliability: (1) "the opportunity of the witness to view the criminal at the time of the crime," (2) "the witness' degree of attention" during the crime, (3) "the accuracy of the witness's prior description" of the accused compared to his actual appearance, (4) "the level of certainty demonstrated by the witness at the confrontation," and (5) "the length of time between the crime and the confrontation." *Id.* at 199–200. These factors are now the controlling factors to be considered when weighing suggestibility against reliability under the current Supreme Court precedent. Paseltiner, *supra* note 83, at 593. They have received a substantial amount of criticism, and of the few states that choose to follow the *Brathwaite* approach, many have modified these factors to be more conducive to scientific findings and suggestions, as discussed below. *Id.* at 595.

90. *See Biggers*, 409 U.S. at 199 (citing *Clemons*, 408 F.2d at 1248).

91. Manson v. Brathwaite, 432 U.S. 98, 114 (1977) (citing *Biggers*, 409 U.S. at 199–200); *see* Paseltiner, *supra* note 83, at 594. This has come to be known as the Reliability Test. *See* Palestiner, *supra* note 83, at 595. This test is even more of a burden on the defendant; instead of the reliability being weighed against the level of suggestiveness, reliability is now to be weighed against the influence of suggestiveness. *Id.* at 593, 596.

92. Paseltiner, *supra* note 83, at 593.

93. *Id.*

Trilogy]."[94]

The most recent Supreme Court decision regarding eyewitness identifications did not occur until decades later in 2012, in *Perry v. New Hampshire*.[95] In *Perry*, the Court held that the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification if law enforcement did not specifically arrange suggestive circumstances in procuring the identification.[96] The Court also stated that juries, rather than judges, should determine the reliability of the eyewitness identification and that traditional safeguards, such as cross-examination, are enough to prevent juries from placing undue weight on eyewitness evidence.[97]

B. State Approaches

Many states have begun implementing their own tests, safeguards, and strategies for dealing with eyewitness identifications.

1. Expert Testimony

One strategy used is to allow the admission of expert testimony on the subject of eyewitness identification. "Eyewitness identifications experts are prepared to testify in court about the extent to which the research literature explains how a particular factor, considered alone or in combination with others, likely would affect the reliability of an identification."[98] There are four approaches taken on the admissibility of expert testimony regarding eyewitness identifications: the discretionary approach, per se exclusion, limited admissibility,[99] and per se inclusion.

The discretionary approach is used by the majority of jurisdictions today.[100] This approach allows the judge to exercise discretion when determining the admissibility of expert testimony on eyewitness identifications.[101] This discretion belongs to the trial judge and can only be reversed on appeal when an abuse of discretion is found.[102]

94. *Brathwaite*, 432 U.S. at 118 (Marshall, J., dissenting).

95. 565 U.S. 228, 232 (2012).

96. *Id.* at 234. This eliminated any Due Process claims when any suggestiveness was not orchestrated by police conduct. *See id.*

97. *Id.* at 245 (citing Maryland v. Craig, 497 U.S. 836, 845 (1990)).

98. Sean S. Hunt, *The Admissibility of Eyewitness-Identification Expert Testimony in Oklahoma*, 63 OKLA. L. REV. 511, 520 (2011) (quoting Richard A. Schmechel et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS J. 177, 180 (2006)).

99. McMullen v. State, 714 So. 2d 368, 370–71 (Fla. 1998); Hunt, *supra* note 98, at 528.

100. Hunt, *supra* note 98, at 528.

101. *Id.* at 528.

102. *Id.* at 529.

Jurisdictions that follow this approach have failed to establish any universal rules or guidelines, thus admissibility of the exact same testimony could vary by jurisdiction.[103] Using this approach, expert testimony is most often found inadmissible and is excluded.[104] The two most cited reasons for its exclusion are because it invades the province of the jury and is not helpful to the jury.[105]

The per se exclusionary rule holds expert testimony regarding eyewitness identifications automatically inadmissible.[106] Although becoming more uncommon, the most cited reason for this approach is the belief that the lay juror has knowledge on the inherent shortcomings of eyewitness identifications.[107]

The limited admissibility approach holds that expert testimony is admissible only when there is no substantial corroborating evidence in the case.[108] California, the first state to adopt this approach, reasoned that the psychological effects on perception are outside the realm of the common experience, and its admission would in fact aid the jury.[109]

Per se inclusion is the newest approach taken on the admissibility of expert testimony. In *State v. Guilbert*, Connecticut ruled that expert testimony is per se admissible upon a determination by the trial court that the expert is qualified and the testimony is relevant and will aid the jury.[110] Acknowledging a "near perfect scientific consensus" on the fallibility of eyewitness evidence, Connecticut found this knowledge to be largely unfamiliar to the average person, and even counterintuitive.[111]

103. *Id.*

104. *Id.*

105. Hunt, *supra* note 98, at 529.

106. *Id.* at 537.

107. *Id.*

108. *Id.* at 538.

109. People v. McDonald, 690 P.2d 709, 715 (Cal. 1984). Conceding that some factors affecting identifications, such as lighting, distance, and duration, might be within the general province of the jury, the appellate court nonetheless found the exclusion of the expert testimony an abuse of discretion due to the identification being the sole evidence linking the defendant to the crime and psychological factors largely unknown to the average juror. *Id.* at 727.

110. 49 A.3d 705, 734 (Conn. 2012).

111. *Id.* at 721–22. Connecticut reasoned that in the very least, the following aspects of eyewitness identifications are beyond the knowledge of the average person and are satisfactorily within what is deemed to be appropriate subject matter on which an expert may testify:

> (1) [T]here is at best a weak correlation between a witness' confidence in his or her identification and [the identification's] accuracy, (2) the reliability of an identification can be diminished by a witness' focus on a weapon, (3) high stress at the time of observation may render a witness less able to retain an accurate perception and

"The science abundantly demonstrates the many vagaries of memory encoding, storage and retrieval; the malleability of memory; the contaminating effects of extrinsic information; the influence of police interview techniques and identification procedures; and the many other factors that bear on the reliability of eyewitness identifications."[112] Further, the court held that expert testimony should be admissible even when there is corroborating evidence in the case.[113]

Disagreeing with the Supreme Court in *Perry*, the *Guilbert* Court reasoned that traditional safeguards, such as cross-examination, closing arguments, and jury instructions, are inadequate safeguards for something as persuasive yet unreliable as eyewitness identifications.[114] "Cross-examination . . . is . . . far better at exposing lies than at countering sincere but mistaken beliefs."[115] Just as in Jennifer Thompson's case, many eyewitnesses sincerely believe that the identification made was accurate. Thus, the credibility issue largely addressed with cross-examination relies on the identifications in general, not the witness. Further, although an attorney has the ability to expose the *existence* of factors that undermine the reliability of eyewitness identifications, not even the best attorney could educate the jury on the psychology of these factors or *why* they undermine the reliability during cross-examination.[116]

The court reasoned that closing arguments are an inadequate substitute for expert testimony because they come without any evidentiary support, so are likely to be viewed "as little more than partisan rhetoric."[117] The court found this to be particularly true when the argument is based on a factor that is counterintuitive.[118]

> memory of the observed events, (4) cross-racial identifications are considerably less accurate than [identifications involving the same race], (5) [memory diminishes most rapidly in the hours immediately following an event and less dramatically in the days and weeks thereafter], (6) [an identification may] be less reliable in the absence of a double-blind, sequential identification procedure, (7) witnesses [may] develop unwarranted confidence in their identifications if they are privy to post event or post identification information about the event or the identification, and (8) the accuracy of an eyewitness identification may be undermined by unconscious transference, which occurs when a person seen in one context is confused with a person seen in another.

Id. at 721–23.

112. *Id.* at 721 (quoting State v. Henderson, 27 A.3d 872, 916 (N.J. 2011)).
113. *Id.* at 738.
114. Guilbert, 49 A.3d at 725.
115. *Id.* (citing State v. Clopten, 223 P.3d 1103, 1110 (Utah 2009)).
116. *Id.* at 726 (citing United States v. Jones, 762 F. Supp. 2d 270, 277 (D. Mass. 2010)).
117. *Id.* (citing Ferensic v. Birkett, 501 F.3d 469, 482 (6th Cir. 2007)).
118. *Id.*

Lastly, the court reasoned that jury instructions tend to be too broad and general to effectively educate the jury on the fallibilities of eyewitness identifications.[119] The court found that expert testimony can do a far better job at educating the jury than a generalized instruction given far too late in what could be a long and enduring trial.[120]

Of all the approaches taken on the admissibility of expert testimony regarding eyewitness identifications, Connecticut's approach of per se inclusion is the approach that serves the greatest protection against unreliable eyewitness evidence.

2. Per Se Exclusion of Unnecessarily Suggestive Pre-Trial Identification Procedures

Another approach that has been taken by states is the adoption of a *Stovall*-like per se exclusionary rule of evidence that came from an unnecessarily suggestive pre-trial identification procedure. Massachusetts, for example, has created a modification of the *Stovall* rule.

In *Commonwealth v. Johnson*, the defendant was identified in a showup.[121] Although the court noted that not all showups are per se excluded, when done unnecessarily (i.e., without dire circumstances forcing the police's hand), they are unnecessarily suggestive and inadmissible.[122]

Although this is a step in the right direction, this approach is insufficient. The problem with a per se exclusionary rule has been demonstrated by *Stovall* and is the reason why the Supreme Court abandoned its own ruling. Without any guidance as to what is unnecessarily suggestive, there is too much discretion left to the court and it is no longer a protection, but rather a gamble.[123]

119. *Guilbert*, 49 A.3d at 726–27 (citing *Clopten*, 223 P.3d at 1110). "[Generalized] instructions given at the end of what might be a long and fatiguing trial, and buried in an overall charge by the court, are unlikely to have much effect on the minds of [the jurors] . . . ." *Id.* at 726 (quoting *Clopten*, 223 P.3d at 1110).

120. *Id.* at 731.

121. Commonwealth v. Johnson, 650 N.E.2d 1257, 1259 (Mass. 1995).

122. *Id.* at 1263 (citing Commonwealth v. Howell, 477 N.E.2d 126, 130 (Mass. 1985)). The *Johnson* court reasoned that the *Manson* Reliability test did nothing to discourage police from using suggestive identification procedures and that showups had flourished under such test. *Id.*

123. Even under this rule, in subsequent cases, Massachusetts has held: that a police officer not telling the witness that the suspect may not be present in the lineup is not unnecessarily suggestive (even though the court's ruling in that case was that "in nearly all circumstances" police officers are expected to instruct the witness that the perpetrators may not be present in the lineup) (Commonwealth v. Silva-Santiago, 906 N.E.2d 299, 311–13 (Mass. 2009)); that a police officer telling the witness the suspect is present in the lineup is not unnecessarily

Further, although a *pre-trial* identification that is found to be unnecessarily suggestive is inadmissible, this rule still allows an *in-trial* identification of the same person, so long as the court finds that the identification did not stem from the first contaminated one.[124] By allowing a witness to make an in-court identification in spite of an unnecessarily suggestive pre-trial identification, it significantly reduces any deterrence this per se exclusionary rule would likely have on law enforcement.[125] If a *Stovall*-like per se exclusionary rule is to serve as protection against wrong eyewitness identifications, it must come with guidelines and strict adherence to the rule.

3. Modification of the Manson Reliability Test

States such as Utah and Kansas have also modeled their approaches off of the Supreme Court, only this time, it is a modification of the *Manson* Reliability Test. The modification Utah took was not in its ruling, but in the factors that the *Biggers* and *Manson* Courts used.[126] Conceding that the factors are "generally comparable to the Biggers factors . . ." the *Ramirez* court praised itself for eliminating the factor of witness certainty and adding the factor of suggestibility.[127]

Although this is certainly a step in the right direction, modifying two factors hardly makes a difference in what has been a highly criticized Reliability Test. Shortcomings that were present in the Supreme Court ruling are still present in Utah: barely any mention of system variables that have been found to have a profound impact on the accuracy of the identification (such as double-blind procedures), comments from law enforcement, or instructions from law enforcement.[128] Hardly comforting, the *Ramirez* court did note that these factors are not exhaustive and has subsequently started to issue general jury instructions warning of additional factors if the evidence was found to be admissible.[129]

suggestive (Commonwealth v. Watson, 915 N.E.2d 1052, 1058 (Mass. 2009)); and that a police officer telling the witness that a suspect matching the witness's description is present in the lineup is not unnecessarily suggestive (Commonwealth v. Meas, 5 N.E.3d 864, 873 (Mass. 2014)).

124. Kahn-Fogel, *supra* note 7, at 123. As long as the witness states that she would have chosen that suspect notwithstanding the suggestive identification procedure, the in-trial identification is admissible. *Id.*

125. *See id.*

126. State v. Ramirez, 817 P.2d 774, 781 (Utah 1991) (citing Neil v. Biggers, 409 U.S. 188, 199 (1972)).

127. *Id.*

128. *See id.*

129. Kahn-Fogel, *supra* note 7, at 148.

4. Shifting the Burden

Perhaps an unconventional approach, Oregon protects from eyewitness misidentifications using its Evidence Code. Using a combination of its evidentiary rules, Oregon has shifted the burden of proving that the eyewitness identification is unreliable from the defendant to the state to prove that the eyewitness identification is reliable.[130] Again, although this is a step in the right direction, even the Oregon Supreme Court admits that this will hardly ever result in the inadmissibility of eyewitness evidence.[131]

In *State v. Lawson*, the defendant was sentenced to life in prison without the possibility of parole based solely on an eyewitness identification, without any other corroborating evidence connecting him to the crime.[132] With almost every aspect of this case being a red flag,[133] the Oregon Supreme Court utilized it as an avenue for change.

The *Lawson* court ruled that at the outset, the prosecution bears the burden of proving that the eyewitness identification is reliable.[134] Further,

130. State v. Lawson, 291 P.3d 673, 692 (Or. 2012); OR. REV. STAT. §§ 40.150, 40.155, 40.160, 40.315, 40.405 (2015).

131. *Lawson*, 291 P.3d at 697.

132. *Id.* at 680; Skye Nickalls, *The Catch-22 of Eyewitness ID*, SLATE (Dec. 18, 2012, 8:21 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/12/oregon_supreme_court_on_eyewitness_ids_they_re_often_unreliable.html. Lawson was convicted of five counts of aggravated murder, three counts of attempted aggravated murder, and two counts of first-degree robbery. *Lawson*, 291 P.3d at 680.

133. This case involved an attack on a husband and wife while camping, in which the husband was murdered. The wife's eyewitness testimony became the sole evidence at Lawson's trial. Nickalls, *supra* note 132. The murder happened when it was dark out and the perpetrator put a pillow over the wife's face so that she could not see. *Id.* Later, while in the hospital, the wife told nurses that she had never seen the shooter, which is how she was able to survive. *Id.* When showed photo arrays after the attack, she failed to pick out the defendant three times. *Id.* In fact, the witness, on multiple occasions, told law enforcement that she did not see her attacker, could not identify him, and did not want to participate in the identification procedure. *Id.* The only reason why investigators focused on Lawson was because in the helicopter ride on the way to the hospital, the wife told the paramedics that it was the man that she had seen earlier in the day that had killed her husband. *Lawson*, 291 P.3d at 678–79. Interestingly, however, in that same helicopter ride, she called the helicopter pilot the shooter, as well, and kept on using the words "they" and "their," implying multiple assailants. *Id.* at 679–80. It was not until after the witness was repeatedly shown pictures of Lawson and told he was in custody that the witness identified him. *Id.* Yet when she identified Lawson at trial, she said that she "always knew it was him." *Id.*

134. *Lawson*, 291 P.3d at 692. In order to satisfy that burden, the prosecutor must satisfy Rule 602—the witness must have sufficient personal knowledge. *Id.* In other words, the witness must have actually perceived sufficient facts to support her identification and must demonstrate that the identification was rationally based on those perceptions. *Id.* In analyzing this personal knowledge, the court stated that facial features are sufficiently distinctive to identify a specific person, but generalizations, such as height, weight, clothing, or hair color, must be limited to only those observations. *Id.* at 693.

part of that burden requires a showing that, if there were any suggestive practices, the probative value of the evidence outweighs its prejudicial effect, meaning its persuasiveness must outweigh any danger to the defendant.[135] In making this determination, the court stated the more variable factors that are present in the identification, whether system or estimator, the less probative the identification is, and the harder the burden to prove.[136] Lastly, the court added that in cases in which the defendant was a victim to suggestive police procedures, the court has a heightened role as "evidentiary gatekeeper."[137]

Although seemingly a high burden for the prosecution to meet on paper, even the *Lawson* court conceded that courts will continue to admit most eyewitness identifications.[138] Thus, the court reasoned, that only when there are system variables are involved, either independently or alongside estimator variables, should there be an inference of unreliability and possible exclusion.[139]

5. New Jersey's Approach

Perhaps the most all-encompassing approach taken by a state is the one taken by New Jersey. In *State v. Henderson*, the Supreme Court of New Jersey indulged in an in-depth analysis into eyewitness identifications.[140] After reviewing over 350 exhibits, 200 published studies, and hearing testimony from seven prominent experts in the field of eyewitness identification, the *Henderson* court found that the *Manson* test does not even meet its own stated goals: "[I]t does not provide a sufficient measure for reliability, it does not deter [inappropriate police conduct], and it overstates the jury's innate ability to evaluate eyewitness testimony."[141]

New Jersey's approach consists of two major changes: First, the revised framework allows all relevant system and estimator variables to

135. *See id.*

136. *Lawson*, 291 P.3d at 694.

137. *Id.* at 695.

138. *Id.* at 697 ("[A]lthough possible, it is doubtful that issues concerning one or more of the estimator variables that we have identified will, without more, be enough to support an inference of unreliability sufficient to justify exclusion of the eyewitness identification.").

139. *Id.* at 697.

140. 27 A.3d 872, 878 (N.J. 2011).

141. *Id.* at 918. In fact, the court found that that this test may unintentionally reward suggestive police practices: "The irony of the current [Supreme Court] test is that the more suggestive the procedure, the greater the chance eyewitnesses will seem confident and report better viewing conditions." *Id.* The court reasoned that in turn, courts "admit identifications based on criteria that have been tainted by the very suggestive practices the test aims to deter." *Id.*

be considered at the pre-trial hearing, not just system variables under the *Manson* approach.[142] Second, New Jersey courts are to develop and use enhanced jury charges, sometimes even during trial, if the situation is appropriate.[143] In practice, these changes will be made through a four-step process.

First, in order to obtain a pre-trial hearing, the defendant has the burden of showing some evidence of suggestiveness that could lead to misidentification.[144] Like the *Manson* standard, this suggestiveness must be from a system variable, not an estimator variable.[145] Unlike the *Manson* standard, however, this suggestiveness does not have to arise from police conduct, but rather, any suggestiveness, even from a private actor, is sufficient.[146] Also unlike the *Manson* standard, once the pre-trial hearing is found to be warranted, both system and estimator variables are to be considered at this hearing, not just system variables.[147]

Second, the burden is then on the state to show that the proffered eyewitness identification is reliable, again, accounting for both system and estimator variables.[148]

Third, the ultimate burden of showing there is a substantial likelihood of irreparable misidentification will remain on the defendant.[149]

142. *Id.* at 878.

143. *Henderson*, 27 A.3d at 878.

144. *Id.* at 920 (citing State v. Rodriguez, 624 A.2d 605, 609 (N.J. 1993)). This is an easy burden to meet; evidence of an administrator saying "good job" after an identification has been made would be sufficient proof that a pre-trial hearing is warranted. *Id.* at 921.

145. *Id.* at 920–21. System variables to be considered in deciding whether a pre-trial hearing is warranted includes, but is not limited to: blind administration, pre-identification instructions, lineup construction, feedback, recording confidence, multiple viewings, showups, private actors, and other identifications made. *Id.*

146. *Henderson*, 27 A.3d at 918–20.

147. *Id.* at 920. Estimator variables to be considered during the pre-trial hearing include, but are not limited to: stress, weapon focus, duration, distance and lighting, witness characteristics (i.e., under the influence of drugs or alcohol), characteristic of perpetrator, memory decay, race-bias, opportunity to view the criminal at the time of the trial, degree of attention, accuracy of proper description of the criminal, level of certainty demonstrated at the confrontation, and time between the crime and the confrontation. *Id.* at 921–22. In this case, the eyewitness had smoked two bags of crack cocaine the night of the crime, and had smoked crack cocaine in the two weeks before making his identification. *Id.* at 882. Further, the incident happened at three in the morning, and the witness had been under high stress due to being held at gunpoint. *Id.* at 879. None of these estimator variables were able to be considered in the pre-trial hearing under the then-current *Manson* approach. *Id.* at 881–82.

148. *Henderson*, 27 A.3d at 920. Subject to judicial discretion, this hearing may end at any time the court finds that the proffered evidence by the state is sufficient and that the defendant's claim of suggestiveness is unfounded. *Id.*

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

Finally, the court is to evaluate the evidence presented by the defendant from the totality of the circumstances and decide whether there is indeed a very substantial likelihood of irreparable misidentification.[150] If it is decided that there is, the court should suppress the evidence.[151] If however, the evidence is not suppressed, the court should provide appropriate and comprehensive jury instructions.[152]

Further, the *Henderson* court noted that along with these extensive changes, it remains within the sound discretion of the judge to decide whether expert testimony is admissible, though the court predicts that with the new enhanced jury instructions, expert testimony should be less necessary.[153] It is also up to the judge to decide if parts of in-court eyewitness testimony should be redacted or withheld from the jury.[154]

In addition to these judicial changes, New Jersey was also the first state to adopt the recommendations issued by the Department of Justice in preparing and conducting identification procedures.[155] These recommendations are comprised of "best practices" for police officers and investigators to use when conducting identification procedures in order to prevent any suggestiveness.[156] If not followed properly, the identification is not per se inadmissible, but grounds for a pre-trial hearing.[157]

To date, New Jersey has been recognized by many as the most comprehensive and progressive approach on eyewitness identification evidence.[158] The *Henderson* court has been commended on its recognition of eyewitness evidence being a dynamic field and needing a flexible standard because of likely future evolvement.[159] Like other approaches discussed, however, the New Jersey Supreme Court concedes that although it uses a higher standard than *Manson*, the threshold of

150. *Id.*

151. *Id.*

152. *Id.* at 926. The court asked the relevant committees to come up with proposed changes to the current jury instructions within ninety days of the decision. *Id.* at 925–26. The instructions are to include discussion of all the above mentioned variables and other relevant aspects of scientific findings on the fallibility of eyewitness identifications. *Id.*

153. *Henderson*, 27 A.3d at 925–26.

154. *Id.* at 925.

155. *Id.* at 912.

156. *Id.* at 913. These recommendations include, but are not limited to, someone other than the primary investigator on the case conducting all identification procedures, only one suspect in each identification procedure, fillers to resemble the suspect, instructing the witness the perpetrator may not be present, and ensuring that no suspect unduly stands out in the lineup or photo array. *Id.*

157. *Id.* at 913.

158. *See* Walsh, *supra* note 24, at 1449–53.

159. *Id.* at 1453.

suppression remains high and eyewitness identifications and testimony will most often be held admissible.[160] Thus, the real progress is made by deterring inappropriate police conduct and extensive education to both the court and the jury on the impact of system and estimator variables on the role of eyewitness identifications.

III. NEW YORK'S APPROACH

In 1981, the highest court of New York, the New York Court of Appeals, decided that the *Manson* approach was inadequate and that additional protections were needed under the state constitution.[161] Similar to Massachusetts, in *People v. Adams*, New York adopted a *Stovall*-like per se exclusionary rule for unnecessarily suggestive pre-trial identification procedures.[162] Finding the determination of guilt or innocence the essence of a criminal trial, the court reasoned that "[a] defendant's right to due process would be only theoretical if it did not encompass the need to establish rules to accomplish that end."[163] Much like Massachusetts, however, this rule has had its shortcomings, such as allowing in-court identifications despite the pre-trial one being unduly suggestive.[164] As evidenced by the discussion above, this *Stovall*-like rule is inadequate.

Although it seems that New York has tried to be progressive on the subject of eyewitness identifications in 1981, its most recent decision in 2016 shows that it is actually retracting its protections. In light of New York being the leading state in the nation of wrongful convictions based on eyewitness identifications, one would be surprised to learn that New York has had an opportunity to implement further safeguards, yet refused.[165]

In June 2016, the New York Court of Appeals was faced with a case in which a defendant was convicted of murder in the second degree,

160. *Henderson*, 27 A.3d at 928.

161. People v. Adams, 423 N.E.2d 379, 383 (N.Y. 1981).

162. *See id.* at 384.

163. *Id.* at 383.

164. *Id.* at 384.

165. In fact, although praise-worthy and certainly important, one would be surprised to learn that New York State has been more progressive on the issue of False Confessions—another cause of wrongful convictions attributing to twenty-five percent of nationwide exonerations. *False Confessions or Admissions*, INNOCENCE PROJECT, https://www.innocenceproject.org/causes/false-confessions-admissions/ (last visited Jan. 19, 2018). *See generally* John Eligon, *State Court Allows False-Confession Experts, But Bar is High*, N.Y. TIMES (Mar. 29, 2012), http://www.nytimes.com/2012/03/30/nyregion/new-yorks-highest-court-acknowledges-issue-of-false-confessions.html (explaining that New York's highest court is now going to allow expert testimony about false confessions in certain circumstances).

robbery in first degree, and attempted robbery in the first degree, solely by eyewitness evidence.[166]

A. People v. McCullough

The crime took place in a barber shop on Dewey Avenue in Rochester, New York.[167] The primary eyewitness, J.J., was sitting in a chair waiting to get his hair cut when three men walked in demanding weed and money.[168] J.J. was ordered to the ground and pistol-whipped while the owner of the shop was fatally shot.[169] Before leaving, the shooter aimed his gun at J.J., who closed his eyes as the gun misfired.[170] He had never seen the men before. After they had left, J.J. called 911. When describing the three men to the police, J.J. said that the first man to enter was the one who had fatally shot Dotson.[171] He described the first and second men to enter as dark-skinned, and he described the third man as light-skinned. All of the men got away except for the driver of the getaway car, Harvey, who had been waiting outside.[172]

Several weeks after the shooting, J.J. was asked to make an identification of the shooter. He could not make a positive identification. Rather, he stated that one of the people in the photo array "looked like" the shooter.[173] He picked out the defendant in a lineup two months later.[174] The defendant was the only person that was present in both the photo array and the lineup.[175] This time, however, J.J. said that the defendant shooter was the last person to enter the barbershop, contradicting his previous statement to the police.[176]

Both system and estimator variables were present in this case: the presence of a weapon, a misfire being the only reason of survival, being pistol-whipped, inability to make an identification, the defendant being the only one present in both identification procedures, the perpetrator being a stranger, and the identification being made months after the crime. These circumstances alone should give rise to suspicion of the

166. People v. McCullough, 58 N.E.3d 386, at 386–88 (N.Y. 2016). The eyewitness that identified McCullough was a suspect and had multiple indications of unreliability. *Id.* at 389 (Rivera, J., dissenting).

167. *Id.* at 387 (majority opinion).

168. *Id.*

169. *Id.* at 390 (Rivera, J., dissenting).

170. *Id.*

171. *McCullough*, 58 N.E.3d at 390 (Rivera, J., dissenting).

172. *Id.* at 387 (majority opinion).

173. *Id.* at 390 (Rivera, J., dissenting).

174. *Id.*

175. *Id.*

176. *McCullough*, 58 N.E.3d at 390 (Rivera, J., dissenting).

unreliability of the identification.[177] Further, there was no forensic, DNA, or physical evidence connecting the defendant to the crime.[178] However, notwithstanding years of scientific research identifying each of the above facts having an impact on the reliability of an eyewitness identification, the trial court admitted the identification.[179] The admission of the identification was not the basis for appeal, though. The basis for the appeal was that the trial court did not allow an expert to testify on the factors that were present and how they may implicate the reliability of the identification.[180]

In respect to expert testimony, New York follows the limited admissibility approach: expert testimony regarding eyewitness evidence is only admissible when there is insufficient corroborating evidence.[181] The trial court decided that there was substantial corroborating evidence connecting the defendant to the crime such that the expert testimony was inadmissible.[182] The appellate division disagreed and reversed, stating it was an abuse of discretion to not allow in the expert testimony because the corroborating evidence was insufficient and lacking credibility.[183] The dissenting opinion by Judge Ramirez agreed with the appellate court.[184] Both believed there was insufficient corroborating evidence in this case to hold the expert testimony inadmissible.[185]

The corroborating evidence the court relied on was arguably the most alarming aspect of this case: it was more eyewitness testimony that was even more unreliable than the first. The other eyewitness was Harvey, the driver of the getaway car.[186] Harvey's identification of McCullough was hardly an identification, however, and is far from sufficient to justify not affording an innocent-until-proven-guilty defendant the chance to rebut eyewitness testimony that the court and

177. *See id.* at 389–90.

178. *Id.* at 389.

179. *Id.* at 387 (majority opinion).

180. *Id.*

181. *McCullough*, 58 N.E.3d at 388 (citing People v. Lee, 750 N.E.2d 63, 67 (N.Y. 2001)).

182. *Id.*

183. People v. McCullough, 5 N.Y.S.3d 665, 666, 668–69 (App. Div. 2015), *rev'd*, 58 N.E.3d 386 (N.Y. 2016).

184. *McCullough*, 58 N.E.3d at 389 (Riviera, J., dissenting).

185. *See id.* at 395 ("This is exactly the type of uncorroborated, single witness case for which we have explained it is most appropriate that the jury hear expert testimony on factors impacting the accuracy and reliability of witness identification."); *McCullough*, 5 N.Y.S.3d at 668 ("Harvey's testimony was insufficient . . . . [W]e conclude that the proposed [expert] testimony 'satisfies the general criteria for the admissibility of expert proof'" (quoting People v. Muhammad, 959 N.E.2d 532, 546 (N.Y. 2011))).

186. *McCullough*, 58 N.E.3d at 387.

prosecution themselves conceded as lacking credibility.[187] After the crime, when asked to identify the defendant in a photo array, Harvey did not identify the defendant at all, even after implicating his own brother and cousin as taking part in the crime with him.[188] In fact, it was not until after Harvey was offered a plea deal in which instead of being charged with murder with the possibility of life without parole, he could instead plead guilty to one count of robbery and receive only a ten-year sentence, that he identified the defendant.[189] Further, Harvey lied to the police about his involvement in the crime, and then lied on the stand when testifying against the defendant.[190] Harvey also admitted to the defendant being a stranger; someone he had only seen for the first time the day of the crime.[191] Lastly, even if Harvey was not testifying in his own self-interest and was not lying, Harvey was not in the barbershop when the crime occurred, so he was not actually an eyewitness to the crime at all.[192]

In light of the foregoing, the *McCullough* court at the very least should have admitted the expert testimony in order to satisfy its own precedent, which shows that its precedent lacks guidance and allows far too much discretion when a person's liberty is at stake. Following its own precedent, "if the corroborating evidence, or witness, presents reliability issues, a trial court has no basis to assume a jury will not benefit from expert testimony . . . [t]his is especially so when the eyewitness testimony is subject to the type of factors that place its reliability in doubt."[193] Here, there is no question that the reliability of the corroborating evidence was in doubt, let alone the primary eyewitness evidence against the defendant. "Harvey's testimony established that he was a person of dubious credibility, whose identification of [the] defendant was itself unreliable."[194]

This case demonstrates why New York's approach on eyewitness identification is insufficient: the eyewitness identification by its primary witness, J.J., should have at the very least triggered a pre-trial hearing on its admissibility. However, because of the per se exclusionary rule that New York follows, following that rule would have made a trial impossible, seeing as J.J.'s testimony was the primary evidence the state

187. *Id.* at 389 (Riviera, J., dissenting). The People addressed various credibility issues throughout the trial, conceding the identification and motive appeared suspect. *Id.*

188. *Id.*

189. *Id.* at 391.

190. *Id.* at 390–91.

191. *McCullough*, 58 N.E.3d at 389 (Riviera, J., dissenting).

192. *Id.*

193. *Id.* at 392.

194. *Id.* at 391.

had against the defendant.[195] Because it was admissible, the court should have afforded in-trial safeguards, such as the expert testimony or jury instructions. This, however, was able to be avoided through the limited admissibility approach that New York follows on expert testimony. This approach clearly places too much discretion in the hands of the judge, so much so that is not a protection at all, but rather a gamble. If expert testimony was not allowed in this case, one can hardly imagine an occasion where corroborating evidence is more unreliable such that the expert testimony would be held admissible. As Judge Riviera put it in her dissenting opinion, "[t]his is exactly the type of uncorroborated, single witness case for which we have explained it is most appropriate that the jury hear expert testimony on factors impacting the accuracy and reliability of witness identification."[196]

CONCLUSION

Eyewitness identifications are the leading cause of wrongful convictions nationwide and in New York State. With research evolving in the field, New York must evolve with it.

One possible solution would be to implement one of the methods that states mentioned above have implemented, such as the New Jersey approach, which both utilizes jury instructions and places pressure on law enforcement to follow appropriate procedures. Another approach New York may take is to implement a combination of safeguards, such as per se inclusion of expert testimony and guidance to law enforcement. The exact solution to the problem is unclear, however one thing is clear: not doing anything is not working.

195. *Id.* at 394.
196. *McCullough*, 58 N.E.3d at 395 (Riviera, J., dissenting).