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A Model for Fixing Identification Evidence after Perry v. New Hampshire

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COMMENT

A MODEL FOR FIXING IDENTIFICATION EVIDENCE AFTER *PERRY V. NEW HAMPSHIRE*

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Mistaken eyewitness identifications are the leading cause of wrongful convictions. In 1977, a time when the problems with eyewitness identifications had been acknowledged but were not yet completely understood, the Supreme Court announced a test designed to exclude unreliable eyewitness evidence. This standard has proven inadequate to protect against mistaken identifications. Despite voluminous scientific studies on the failings of eyewitness identification evidence and the growing number of DNA exonerations, the Supreme Court's outdated reliability test remains in place today. In 2012, in Perry v. New Hampshire, *the Supreme Court commented on its standard for evaluating eyewitness evidence for the first time in thirty-five years and ultimately declined to modify the outdated reliability framework. This Comment analyzes* Perry *in light of innovations by states to improve eyewitness evidence procedures. While the* Perry *decision failed to address critical problems with the reliability test, the Court indirectly pointed to ways in which the old standard must be fixed.*

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INTRODUCTION

On July 29, 1984, an intruder broke into a North Carolina home and sexually assaulted a college student named Jennifer Thompson.[1] Thompson

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1. State v. Cotton, 394 S.E.2d 456, 457 (N.C. Ct. App. 1990). For a description of the Ronald Cotton Story, see Mike Celizic, *She Sent Him to Jail for Rape; Now They're Friends*, TODAY NEWS (Mar. 10, 2009), http://www.today.com/id/29613178/site/todayshow/ns/today-today_news/t/she-sent-him-jail-rape-now-theyre-friends/#.UR53iaWTwd5.

was determined to survive the attack and wanted to make sure her assailant went to prison. She studied her assailant intently—making sure to memorize his voice, face, and demeanor. Thompson would later identify Ronald Cotton from a police lineup and consistently maintain that she was 100 percent certain of her identification.

Cotton was later convicted of the crime, largely due to the strength of Thompson's identification. While Cotton sat in prison, Thompson remained sure of her identification. Years later, a man named Bobby Poole confessed to the crime. Cotton was granted a retrial where Thompson viewed him side by side with Poole. With Cotton's face firmly entrenched in her mind, Thompson again identified him as her rapist and Cotton remained behind bars. In 1995, DNA testing showed that Poole was indeed the perpetrator. Cotton had spent a decade in prison for a crime he had not committed.[2] Unfortunately, cases like Cotton's are not uncommon, as DNA testing has proven that many wrongful convictions were based on mistaken eyewitness identifications.

In 1977, the Supreme Court in *Manson v. Brathwaite* created a test for determining whether eyewitness evidence obtained through suggestive circumstances could nevertheless be admitted into evidence.[3] Under the *Manson* test, if an identification was unnecessarily suggestive, a court must weigh certain reliability factors against the corrupting influence of the suggestive procedures to determine whether the identification is reliable and therefore admissible.[4] In the thirty-five years since this decision, scientific studies and DNA-based exonerations have shown eyewitness identification to be even less reliable than the Court suspected. The Court returned to the issue of the reliability of eyewitness identifications in a 2012 case, *Perry v. New Hampshire*, for the first time since 1977.[5] But the Court avoided pressing questions concerning the continued vitality of its outdated reliability standard, and left unresolved the issue of how to adequately handle eyewitness evidence.

This Comment argues that, given the decision in *Perry*, the onus is on the states, and in particular state supreme courts, to implement improved safeguards ensuring the reliability of eyewitness identification evidence. Part I describes the Supreme Court's 1977 decision in *Manson v. Brathwaite* and provides a brief look at the scientific developments that changed experts' understanding of eyewitness evidence. Part II addresses the Court's decision in *Perry* and asserts that the Court avoided a critique of the *Manson* standard. Part III suggests that the Supreme Court's unwillingness to address the issue in *Perry* indicates that change must come from the states. The New

2. Thompson and Cotton became friends and have written a book together about their experience. They both advocate for changing the ways in which eyewitness evidence is collected and used. JENNIFER THOMPSON-CANNINO & RONALD COTTON WITH ERIN TORNEO, PICKING COTTON (2009).

3. 432 U.S. 98 (1977).

4. *Id.* at 114.

5. 132 S. Ct. 716 (2012).

Jersey Supreme Court's decision in *State v. Henderson* is a model for this type of change.[6]

I. *MANSON V. BRATHWAITE*: AN UNRELIABLE FRAMEWORK

This Part describes the *Manson* reliability standard as developed by the Supreme Court, as well as the subsequent scientific developments that have drawn this approach into question. The *Manson* Court held that a finding of unnecessarily suggestive identification procedures does not mandate exclusion.[7] The key phrase from *Manson* involves the reliability of the eyewitness's identification of the defendant: "[R]eliability is the linchpin in determining the admissibility of identification testimony."[8] The Court made clear that the trial judge should use a totality of the circumstances test, weighing "the corrupting effect of the suggestive identification" against the perceived reliability of the identification.[9]

The application of the *Manson* rule has essentially led courts to use a two-step process. First, a trial court decides whether the eyewitness identification was obtained through unnecessarily suggestive circumstances. Second, the court must consider whether the suggestive circumstances render the resulting identification unreliable by weighing the corrupting influence of the suggestiveness against five reliability factors.[10] A defendant must be successful at both steps in order to exclude the identification evidence.

While the *Manson* Court identified suggestiveness and reliability as the principal concerns in eyewitness identification cases, its analysis only scratched the surface of the many problems surrounding the evidentiary reliability of eyewitness evidence. Since *Manson*, scientific studies and developments in DNA testing have shed further light on the failings of eyewitness evidence, and have revealed that the Court did not anticipate just how unreliable such evidence can be.

A number of scientific studies in the 1970s and 1980s raised serious concerns about the ability of juries to assess the probative value of eyewitness evidence, providing much more information than was available when

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6. 27 A.3d 872 (N.J. 2011).

7. *Manson*, 432 U.S. at 106 ("The admission of testimony concerning a suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability.").

8. *Id.* at 114.

9. *Id.*

10. These five reliability factors include "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself." *Id.* (citing Neil v. Biggers, 409 U.S. 188, 199–200 (1972)).

the Court decided *Manson*.[11] Examples of the findings of these studies include determinations that juries were not able to distinguish between accurate and inaccurate witnesses,[12] that the confidence of a witness in her identification did not correspond to the accuracy of that identification,[13] and that law-enforcement agencies often did not have clear and consistent procedures to ensure a "fair" identification.[14] A thorough review of the empirical research during this time period is beyond the focus of this Comment. However, the key findings from these studies are that eyewitness evidence presented to juries was often unreliable and that juries were unable to give proper weight to such evidence.

The development of DNA testing in the mid-1980s confirmed that unreliable eyewitness evidence played a large role in sending innocent people to jail. A 2005 University of Michigan study analyzed 340 exonerations from 1989 through 2003 and found that "[t]he most common cause of wrongful convictions is eyewitness misidentification."[15] The report also concluded that the problem was widespread and systematic, as known wrongful convictions were certainly outnumbered by unknown wrongful convictions.[16] Similarly, a 2006 article stated that misidentification accounts for more wrongful convictions than all other causes combined.[17]

DNA-based exonerations have thus confirmed that the *Manson* test is an inadequate means of excluding unreliable and mistaken eyewitness identifications. The most obvious problem with the *Manson* standard is that it was developed based on a limited understanding of the unreliability of eyewitness evidence. As a result, the *Manson* Court's method of exclusion falls short in two ways. First, the reliability factors set out in *Manson* have proven inadequate in determining whether a trial court should exclude eyewitness evidence. Scientific studies have proven that the factors do not

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11. *See* Gary L. Wells et al., *Effects of Expert Psychological Advice on Human Performance in Judging the Validity of Eyewitness Testimony*, 4 LAW & HUM. BEHAV. 275, 276 (1980) ("Fortunately, we now have some answers that did not exist as recently as 1978 . . . .").

12. *See* Gary L. Wells et al., *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification*, 64 J. APPLIED PSYCHOL. 440 (1979) (finding that jurors were unable to detect differences between accurate eyewitness identifications and mistaken eyewitness identifications).

13. *See* Michael R. Leippe, *Effects of Integrative Memorial and Cognitive Processes on the Correspondence of Eyewitness Accuracy and Confidence*, 4 LAW & HUM. BEHAV. 261, 262 (1980) ("[I]n light of current research, instances of judges and jurors discounting the accurate but uncertain witness or, worse, being firmly persuaded by the confident but inaccurate witness, are probably common courtroom happenings.").

14. *See* Gary L. Wells et al., *Guidelines for Empirically Assessing the Fairness of a Lineup*, 3 LAW & HUM. BEHAV. 285, 291 (1979).

15. Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 542 (2005).

16. *Id.* at 531 ("[T]he false convictions that come to light are the tip of an iceberg. Beneath the surface there are other undetected miscarriages of justice . . . without testable DNA . . . .").

17. Gary L. Wells, *Eyewitness Identification: Systematic Reforms*, 2006 WIS. L. REV. 615, 623.

provide an accurate gauge for assessing reliability and that the list of factors is substantially incomplete.[18] Indeed, some state courts have refined their versions of the *Manson* test to use reliability factors with a firmer grounding in social science.[19] Second, the *Manson* factors have, in practice, become a checklist that is used to admit eyewitness evidence if a trial court finds certain criteria.[20] Instead of engaging in a fact-specific inquiry, lower courts often mechanically apply the outdated *Manson* factors and admit evidence that still raises serious reliability concerns.

II. *PERRY V. NEW HAMPSHIRE*: THE SUPREME COURT'S UNWILLINGNESS TO RECONSIDER *MANSON*

In January of 2012, the Supreme Court decided *Perry v. New Hampshire*, addressing the issue of eyewitness identifications for the first time in thirty-five years.[21] The mounting body of evidence that eyewitness identifications were unreliable heightened the degree of interest in the case. Many hoped that the Court would reconsider the *Manson* reliability framework.[22]

Despite the need to reconsider *Manson*, *Perry* proved to be the wrong case for this undertaking from the beginning. The issue in *Perry* was narrow, namely, whether suggestive circumstances that are not created by the police can satisfy the first prong of the *Manson* test.[23] Perry was convicted of stealing car-stereo speakers out of a vehicle in a parking lot.[24] The eyewitness identified Perry on her own while Perry stood next to a police officer at the scene of the crime.[25] Perry was the only suspect the witness saw, but the suggestive circumstances were unintentional.

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18. Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW & HUM. BEHAV. 1, 16 (2009) ("[N]one of the five criteria are unequivocally related to the accuracy of identifications."); *see also* Suzannah B. Gambell, Comment, *The Need to Revisit the* Neil v. Biggers *Factors: Suppressing Unreliable Eyewitness Identifications*, 6 WYO. L. REV. 189, 196–202, 217–20 (2006).

19. *See, e.g.*, State v. Hunt, 69 P.3d 571, 576–77 (Kan. 2003); State v. Ramirez, 817 P.2d 774, 780–81 (Utah 1991).

20. Timothy P. O'Toole & Giovanna Shay, Manson v. Brathwaite *Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 VAL. U. L. REV. 109, 113 (2006).

21. 132 S. Ct. 716 (2012).

22. For example, Jennifer Thompson, the victim in the case where Ronald Cotton was wrongfully convicted, *see supra* notes 1–2 and accompanying text, signed onto an amicus brief in *Perry* urging the Court to provide a more rigorous analysis of reliability "in order to prevent sincere but mistaken identifications from leading juries astray in their determination of the truth." Brief of Amici Curiae Wilton Dedge et al. in Support of Petitioner at 5, *Perry*, 132 S. Ct. 716 (No. 10-8974), 2011 WL 3584756, at *5.

23. 132 S. Ct. at 723–24.

24. *Id.* at 722.

25. *Id.* ("[The officer] asked [the eyewitness] for a more specific description of the man. [The eyewitness] pointed to her kitchen window and said the person she saw breaking into [the] car was standing in the parking lot, next to the police officer.").

The narrow issue concerning the source of the suggestive circumstances did not provide an opportunity for a direct review of *Manson*. Nor did the Court show any interest in reviewing the *Manson* standard's continued viability. The Court ruled against Perry based on the first step of the *Manson* test, finding that due process concerns were not implicated when an "identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement."[26] Having found that the identification was not obtained by means of suggestive police conduct, the Court did not analyze the reliability of the identification under the second *Manson* step.

Along with the narrowness of the issue presented, *Perry* proved to be an inadequate vehicle for reconsidering the *Manson* test because the challenged identification was not the *only* evidence against the defendant—in such cases, eyewitness evidence is of the utmost concern. In Perry's case, there was other evidence linking him to the crime.[27] Further, another unchallenged witness identified Perry as the person he saw walking around the parking lot looking into cars.[28] The challenged identification provided but "one . . . brick in the wall of evidence."[29] Perry's was not a sympathetic case, and the Supreme Court could affirm the decision of the lower court without worrying that an innocent man had been convicted.

The Court made almost no mention of the continued vitality of *Manson* in light of the social science developments of the previous thirty-five years.[30] As described in an amicus brief from the Innocence Network, "[I]n the decades since this Court last addressed the issue, the *Manson* reliability test has not met the objectives the Court set for it."[31] The Supreme Court effectively avoided this issue altogether, passing on an analysis of the *Manson* rule by instead focusing only on the narrow issue of whether the test required the police to have caused the suggestive circumstances. Despite recognizing "the importance [and] the fallibility of eyewitness identifications,"[32] the Court did not revisit the *Manson* framework. As an apparent concession,

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26. *Id.* at 730.

27. Perry was found at the scene of the crime with the stolen stereo speakers in his possession and a tool in his pocket that the victim kept in her vehicle. Brief Amicus Curiae of the Criminal Justice Legal Foundation in Support of Respondent at 26, *Perry*, 132 S. Ct. 716 (No. 10-8974), 2011 WL 4479078, at *26.

28. *Id.* at 27, 2011 WL 4479078, at *27.

29. *Id.*

30. The Court did mention by way of parenthetical "studies showing that eyewitness misidentifications are the leading cause of wrongful convictions." 132 S. Ct. at 728. The only real mention of any of the empirical developments since *Manson* is in Justice Sotomayor's dissent. *Id.* at 738 (Sotomayor, J., dissenting) ("A vast body of scientific literature has reinforced every concern our precedents articulated nearly a half-century ago, though it merits barely a parenthetical mention in the majority opinion.").

31. Brief of Amicus Curiae the Innocence Network in Support of Petitioner, Supporting Reversal at 11, *Perry*, 132 S. Ct. 716 (No. 10-8974), 2011 WL 3439922, at *11.

32. 132 S. Ct. at 728.

however, the Court noted and accepted some safeguards against mistaken eyewitness identifications used by some states.[33]

What conclusions are to be drawn from the *Perry* decision? It certainly was not a victory for those calling for a more careful review of the admissibility standard for eyewitness identifications. Instead, the Court seemed to complicate the reliability analysis by focusing on the source of the suggestive identification.[34] However, the effect of the decision might be muted by the fact that "[t]he vast majority of eyewitness identifications that the State uses in criminal prosecutions are obtained in lineup, showup, and photograph displays arranged by the police."[35] In any event, after thirty-five years of silence, the failure to actually address the hard questions surrounding eyewitness identifications is surely a disappointment and a setback in light of the overwhelming evidence that change needs to be made.

On the other hand, there is more to the story than what appears on the face of the *Perry* opinion. While the majority did not directly mention any of the recent developments in the eyewitness identification field, the Court was certainly aware of them. Amicus briefs were filed by the National Association of Criminal Defense Lawyers,[36] the Innocence Network,[37] and the American Psychological Association,[38] each of which highlighted the problems with *Manson* and the need for greater safeguards pertaining to eyewitness evidence. Most significantly, shortly before the Court heard oral argument in *Perry*, the New Jersey Supreme Court decided a seminal case that directly addressed all of the hard questions that would be left unanswered in *Perry*.[39] The *Perry* Court was aware of the decision.[40] The movement of state courts in addressing the *Manson* problems is certainly relevant in providing context for the Supreme Court's decision in *Perry*.

There is nothing in *Perry* that indicates a willingness by the Court to take on another eyewitness identification case anytime soon. This does not mean, however, that the Court's ruling is the last word on possible

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33. *See id.* at 729 ("In appropriate cases, some States also permit defendants to present expert testimony on the hazards of eyewitness identification evidence.").

34. *See id.* at 725 (noting that if reliability is indeed the "linchpin" of eyewitness identification, "it should make no difference whether law enforcement was responsible for creating the suggestive circumstances that marred the identification").

35. *Id.* at 735 (Sotomayor, J., dissenting).

36. Brief of the National Ass'n of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner, *Perry*, 132 S. Ct. 716 (No. 10-8974), 2011 WL 3511016.

37. Brief of Amicus Curiae the Innocence Network in Support of Petitioner, Supporting Reversal, *supra* note 31, 2011 WL 3439922.

38. Brief for Amicus Curiae American Psychological Ass'n in Support of Petitioner, *Perry*, 132 S. Ct. 716 (No. 10-8974), 2011 WL 3488994.

39. State v. Henderson, 27 A.3d 872 (N.J. 2011).

40. Many of the briefs filed in *Perry* discussed the recent New Jersey case. *See, e.g.*, Brief Amicus Curiae of the Criminal Justice Legal Foundation in Support of Respondent, *supra* note 27, at 19–20, 30, 2011 WL 4479078, at *19–20, *30; Brief of Amicus Curiae the Innocence Network in Support of Petitioner, Supporting Reversal, *supra* note 31, at 20, 2011 WL 3439922, at *20.

safeguards for eyewitness testimony. The Court recognized the role of state and lower federal courts in weighing such evidence, and approvingly noted the efforts of lower courts to keep unreliable evidence out.[41] The *Perry* decision by no means foreclosed, and indeed seemed to encourage, a critical analysis of the *Manson* test by lower courts. The Court's deferral on the question of the viability of the *Manson* framework requires lower courts to bear the burden of a critical analysis of current eyewitness evidence practices. Fortunately, the New Jersey Supreme Court has recently provided an ideal example of how lower courts should approach these tough issues.

III. *STATE V. HENDERSON*: A CORRECT MEASURE OF RELIABILITY

This Part analyzes the approach to eyewitness evidence taken by the New Jersey Supreme Court in *State v. Henderson*[42] and describes the court's revised framework as a remedy to the *Perry* Court's failure to revisit *Manson*. It then compares the *Perry* and *Henderson* opinions and concludes that *Perry* indicated where reform must come from, while *Henderson* outlined what reform should look like.

The New Jersey Supreme Court "has long been considered a trailblazer in criminal law."[43] In *Henderson*, the New Jersey Supreme Court answered the hard questions avoided by the U.S. Supreme Court and provided a sharp criticism of the *Manson* framework. The *Henderson* decision shows that scientific research can and should be used in the court system to develop procedures that will provide adequate protection against mistaken identifications. While the decision need not be adopted line-by-line in every jurisdiction, the process of critically analyzing the issue of unreliable identifications and proposing a solution based on science and experience is one that should be emulated in courtrooms and by police agencies across the country.

The New Jersey case arose out of a murder conviction where the eyewitness identified the defendant out of a photo array conducted at the prosecutor's office.[44] The trial court conducted a pretrial hearing to determine the admissibility of the identification.[45] The trial judge relied on a model jury charge allowing the jury to find that the photo identification was reliable, but the Appellate Division reversed.[46] In a unique move, the New

41. 132 S. Ct. at 728.

42. 27 A.3d 872 (N.J. 2011).

43. Benjamin Weiser, *In New Jersey, Sweeping Shifts on Witness IDs*, N.Y. TIMES, Aug. 25, 2011, at A1, http://www.nytimes.com/2011/08/25/nyregion/in-new-jersey-rules-changed-on-witness-ids.html.

44. *Henderson*, 27 A.3d at 880–81.

45. *Id.* at 881–82.

46. *Id.* at 882–84 (noting that the Appellate Division found the identification procedure to be impermissibly suggestive under New Jersey's version of the *Manson* test). The reversal was primarily due to a breach of the Attorney General Guidelines that required the person conducting the identification to be someone other than the primary investigator assigned to the case "whenever practical." *Id.*

Jersey Supreme Court remanded the case "to consider and decide whether the assumptions and other factors reflected in the two-part *Manson*[] test, as well as the five factors outlined in those cases to determine reliability, remain valid and appropriate in light of recent scientific and other evidence."[47]

The New Jersey Supreme Court directed a Special Master to preside at the remand hearing. The Special Master was tasked with making findings of fact on the status of scientific eyewitness evidence studies and providing a recommendation as to whether New Jersey should continue with the *Manson* rule or adopt a new framework for assessing the reliability of eyewitness identifications. The hearing involved an exhaustive review of scientific research on eyewitness identification and included 360 exhibits, 200 published scientific studies, and testimony from 7 expert witnesses.[48]

Over a year after the New Jersey Supreme Court issued its remand order, the Special Master released his report from the hearings.[49] The report directly answered the most pressing issue: "The short answer to the Court's question whether the *Manson*[] test and procedures are 'valid and appropriate in light of recent scientific and other evidence' is that they are not."[50] The report found that "scientific findings can and should be used to assist judges and juries in the difficult task of assessing the reliability of eyewitness identifications" and that "the *Manson*[] test does not provide that needed assistance."[51] The report also listed "specific inadequacies" of the *Manson* framework. These flaws included addressing only suggestive procedures that were the result of state action (the issue in *Perry*), allowing suppression of eyewitness identification as the sole remedy, and using reliability factors that "are themselves unreliable."[52]

In addition to pointing out the flaws with *Manson*'s approach, the report also recommended two specific procedural remedies. First, the prosecution should have the initial burden of producing evidence at a pretrial hearing on the reliability of the identification.[53] This requirement of a pretrial hearing and shifting of the burden essentially eliminates *Manson*'s dictate that the reliability of an identification will only be examined after a showing of impermissible suggestion.[54] Second, judges and juries must be informed and guided by scientific findings.[55] The scientific findings should be adopted and used "in deciding admissibility issues; in promulgating jury instructions

47. Order, 39 A.3d 147, 148 (2009), *reprinted in Henderson*, 27 A.3d 872 app. A at 930.

48. *Henderson*, 27 A.3d at 884.

49. Report of the Special Master, *Henderson*, 27 A.3d 872 (No. A-8-08), *available at* http://www.judiciary.state.nj.us/pressrel/HENDERSON%20FINAL%20BRIEF%20.PDF%20(00621142).PDF.

50. *Id.* at 79 (quoting Order, 39 A.3d at 148).

51. *Id.* at 76.

52. *Id.* at 77–79.

53. *Id.* at 84.

54. *Id.*

55. *Id.* at 85.

addressing specific variables; in broadening *voir dire* questioning; and in allowing appropriate expert testimony in all phases of the litigation."[56]

The New Jersey Supreme Court agreed with the Special Master's report, concluding that scientific evidence is "both reliable and useful."[57] The court also concluded that the *Manson* rule "does not adequately meet its stated goals: it does not provide a sufficient measure for reliability, it does not deter, and it overstates the jury's innate ability to evaluate eyewitness testimony."[58]

The *Henderson* court announced a revised framework with two principle changes based on the recommendations of the Special Master's report: "[F]irst, the revised framework should allow all relevant [factors] to be explored and weighed at pretrial hearings when there is some actual evidence of suggestiveness; and second, courts should develop and use enhanced jury charges to help jurors evaluate eyewitness identification evidence."[59] Under the first change, more than a dozen factors may be considered by a judge during the pretrial hearing in evaluating the reliability of an identification.[60] During this pretrial hearing, "trial courts should make factual findings" about the relevant variables "to lay the groundwork for proper jury charges and to facilitate meaningful appellate review."[61] This approach differs greatly from *Manson*. It allows courts to look beyond a short checklist of factors and to engage instead in a comprehensive reliability review. It also allows courts to properly inform juries about the fallibility of eyewitness identifications and encourages jurors to give proper weight to such evidence.

Henderson did not overrule *Manson*—a state court cannot overrule the U.S. Supreme Court on matters of federal law. However, as New Jersey has shown, a state court can guarantee more protection under a state constitution than the Supreme Court is currently providing under the federal due process clause. To be clear, *Henderson* is based on the New Jersey Constitution. Basing additional safeguards on a state constitution is the pathway to follow for other states that wish to provide more protection than *Manson*.

A key point here is that suppression of a potentially unreliable identification is not the preferred remedy. The court made it clear that "[t]he threshold for suppression remains high" and that "in the vast majority of cases, identification evidence will likely be presented to the jury."[62] The remedy, then, is for judges to admit disputed identification evidence, but give the jury detailed instructions about "factors that can lead to misidentifi-

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56. *Id.* at 86.

57. State v. Henderson, 27 A.3d 872, 916 (N.J. 2011).

58. *Id.* at 918.

59. *Id.* at 919.

60. *See id.* at 920–22. These factors include system variables—such as blind administration of lineup procedures, pre-identification instructions, and lineup construction—and estimator variables—such as stress, duration, and race-bias.

61. *Id.* at 923–24.

62. *Id.* at 928.

cations."[63] The court provided a comprehensive review of various reliability factors in order to aid in the development of model jury instructions.[64]

The *Henderson* decision has been praised by those seeking reform in the way eyewitness evidence is handled. Barry Scheck, co-director of the Innocence Project, stated, "The court has recognized the tremendous fallibility of eyewitness identifications, and based on the most thorough review of scientific research undertaken by a court, has set up comprehensive and practical guidelines for how judges and juries should handle this important evidence."[65] *Henderson* certainly represents the most direct and significant repudiation of the outdated *Manson* framework.

Henderson, not *Perry*, is the wave of the future. While *Perry* remained silent on critical issues, *Henderson* attacked directly—creating a modern framework to evaluate eyewitness evidence that is in line with the scientific studies of the past thirty-five years. The Supreme Court's decision in *Perry* should be read as encouraging the type of problem solving engaged in by the *Henderson* court. Already aware of the landmark decision in New Jersey, the *Perry* decision signals the Supreme Court's hesitation to tackle the tough questions and its willingness to allow lower courts to follow New Jersey's lead in replacing the outdated *Manson* test.

The *Henderson* decision should provide a model for other states to follow. Professor Garrett commented that the decision "would provide a model for legislatures and courts around the country that 'have been at a loss for what to do' and need[] 'a structure for how judges should handle identifications in the courtroom.' "[66] Innocence Project Co-Director Scheck also commented that the case is "going to affect the way every state and federal court in the United States assesses eyewitness identification evidence, and what those courts tell juries about the factors that can increase the risk of misidentification."[67]

It is clear that *Henderson* is already creating waves in eyewitness evidence jurisprudence. The Massachusetts Supreme Judicial Court recently discussed the New Jersey decision and noted the formation of a "study committee on eyewitness identification" to consider alternative approaches, including the approach established in *Henderson*.[68] Likewise, the *Henderson* decision was cited heavily by proponents of eyewitness reform before the Supreme Court of Washington.[69] Elsewhere, the Innocence Project of

63. *Id.*

64. *Id.* at 921–22.

65. Paul Cates, *New Jersey Supreme Court Issues Landmark Decision Mandating Major Changes in the Way Courts Handle Identification Procedures*, INNOCENCE PROJECT (Aug. 24, 2011), http://www.innocenceproject.org/Content/New_Jersey_Supreme_Court_Issues_Landmark_Decision_Mandating_Major_Changes_in_the_Way_Courts_Handle_Identification_Procedures.php.

66. Weiser, *supra* note 43, at A1.

67. *Id.*

68. Commonwealth v. Walker, 953 N.E.2d 195, 209–10 (Mass. 2011).

69. Supplemental Brief of Petitioner *passim*, State v. Allen, No. 86119-6, 2013 WL 259383 (Wash. Jan. 24, 2013) (en banc), 2011 WL 7005405 *passim*.

Florida referenced the *Henderson* decision in stating that "[t]his is the result we want to see in Florida if we have coordinated, consistent, high-level advocacy from defenders at all stages of the criminal process."[70] It seems likely that *Henderson* will continue to influence other states as they search for an alternative to the *Manson* approach for handling eyewitness evidence.

Henderson should be viewed as the guidepost that many hoped *Perry* would be. The New Jersey Supreme Court has provided the most thorough analysis of the problems with the *Manson* approach and has created the framework best suited to handle the dangers of eyewitness evidence. State and federal courts should take notice of the shortcomings of *Manson* and turn to *Henderson* for the development of a new approach to eyewitness identification evidence.

CONCLUSION

The *Manson* standard for determining the admissibility of eyewitness identifications is outdated and ineffective in protecting against mistaken identifications. Because the Court refused to revisit the standard in *Perry*, reform must come from the states. The New Jersey Supreme Court provided a model for reforming eyewitness identification procedures by focusing on a more thorough review of reliability at the pretrial stage and using detailed jury instructions to assist jurors in giving proper weight to eyewitness evidence. State courts should heed the *Henderson* example in developing a new framework for eyewitness identification evidence.

70. Seth Miller, *Landmark NJ Case Paves Path Forward on Evaluating Reliability of IDs*, INNOCENCE PROJECT FLA. (August 25, 2011, 5:19 PM), http://floridainnocence.org/content/?p=4633.