SUPREME COURT OF NEW JERSEY
DOCKET NO. 62,218

STATE OF NEW JERSEY, Plaintiff-Petitioner, v. LARRY R. HENDERSON, Defendant-Respondent.	CRIMINAL ACTION ON REVIEW OF REPORT BY SPECIAL MASTER, HONORABLE GEOFFREY A. GAULKIN, P.J.A.D. (RET. & ON RECALL)

BRIEF OF AMICUS CURIAE THE INNOCENCE PROJECT

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I. INTRODUCTION

This Court remanded the instant matter for hearings before a Special Master "to consider and decide whether the assumptions and other factors reflected in the two-part Manson/Madison 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." State v. Henderson, A-8 Sept. Term 2008, 2009 N.J. LEXIS 45 (N.J. Feb. 26, 2009) (citing Manson v. Brathwaite, 432 U.S. 98 (1977); State v. Madison, 109 N.J. 223 (1988)). After several weeks of hearings before the Honorable Geoffrey Gaulkin, during which seven experts testified, over 360 exhibits were submitted, over 2,100 pages of transcripts were generated, four days of argument were conducted, and the respective parties submitted over 400 pages of proposed written findings of law and science, the Special Master answered decisively this Court's query: the Manson/Madison test, as it is currently understood and applied, is inadequate. Report of the Special Master, State v. Henderson, New Jersey Supreme Court, Docket No. A-8-08 (June 18, 2010), at 79 (hereinafter "Report"). More specifically, the Special Master found that although Manson was "designed to make reliability the 'linchpin' of judicial examination of eyewitness testimony, Manson/Madison falls well short of attaining that goal, for it neither recognizes nor systematically accommodates

the full range of influences shown by science to bear on the reliability of such testimony." Id. at 76.

Amicus curiae Innocence Project endorses the Special Master's Report in its entirety. Indeed, the Report largely embraces the new legal architecture that the Innocence Project proposed to the Special Master, who described it as "wide-ranging, multifaceted and highly detailed," finding that "its design is sound: to maintain the Manson/Madison principle that reliability is the linchpin of the inquiry, to expand that inquiry to include all the variables unaddressed by Manson/Madison and to assure that judges and jurors are informed of and use the scientific findings that bear on reliability." Id. at 84.

The Innocence Project now urges this Court to adopt the Special Master's findings and its proposed legal framework, which will minimize the risk of wrongful conviction based on eyewitness error by:

(1) Incorporating robust scientific findings into assessments of eyewitness evidence and providing a pathway for courts to carefully consider updating findings when scientific authority is firmly established. Indeed, the Special Master urged that "this Court take all available steps to assure that judges and juries are informed of and guided by the scientific findings." Id. at 85. Citing Dr. John

Monahan's "social framework" model in which judges and juries use scientific research findings accepted in the scientific community and generalizable to the question at issue to determine specific facts, see infra § IV, and noting New Jersey's familiarity and comfort with this concept, the Special Master recommended that "the judicial system should systematically and explicitly adopt and broadly use the scientific findings: in opinions setting standards and procedures for their use; in deciding admissibility issues; in promulgating jury instructions addressing specific variables; in broadening voir dire questioning; and in allowing appropriate expert testimony in all phases of the litigation." Report at 86.

(2) Substantially improving judicial assessment of the reliability of eyewitness evidence at pretrial hearings by eliminating Manson's confounded balancing test.

(3) Substantially improving information available at pretrial hearings by allocating the burden of going forward to the State to demonstrate the integrity of the eyewitness's memory. This would ordinarily require, whenever possible, the testimony of the eyewitness about a whole range of reliability factors, including the eyewitness's opportunity to observe and attention paid, the differences between the initial description and the characteristics of the

defendant, as well as the witness's condition at the time of viewing, the race of the witness and perpetrator, and any other witness or event variable that affects reliability.

(4) Focusing on the reliability of identification evidence as opposed to finding "fault" with state actors, and in doing so considering all relevant factors that could have distorted eyewitness memory, including, in addition to potentially suggestive actions of law enforcement, all potential sources of suggestion or confirmatory feedback.

(5) Encouraging courts to take testimony from eyewitness identification experts to inform pretrial judicial assessments about factors that could have distorted eyewitness memory and to allow courts to better evaluate whether it would be appropriate or necessary for the jury to hear the expert at trial.

(6) Expanding the remedies available to judges after pretrial judicial assessments beyond all-or-nothing suppression to include carefully tailored but strongly-worded jury instructions and narrow in limine rulings based upon, for example, established scientific principles and upon the Attorney General's Guidelines, so as to provide context and guidance for juries to evaluate the reliability of eyewitness testimony. These remedies will provide

incentives for the police both to use “best practice” identification procedures to reduce the risk of error and to generate more reliable self-reports by eyewitnesses about their memory.

(7) Allowing for suppression of either out-of-court or in-court identification evidence if, based upon all of the data from the pretrial hearing, the defendant establishes by a preponderance of the evidence that there was a substantial likelihood of a misidentification.

(8) In cases where the courts’ confidence in the reliability of the identification has been substantially undermined, allowing courts to provide the jury with a strongly-worded cautionary instruction to treat the identification evidence with great caution and distrust.

II. SCIENTIFIC RESEARCH ON EYEWITNESS IDENTIFICATION IS ROBUST

For a detailed assessment of the breadth and vigor of the scientific research in the eyewitness identification domain, including an examination of the numerous factors empirically proven through meta-analytic reviews to affect identification accuracy, we defer to the Special Master's Report at 19-48 (findings of science), to our proposed findings of science, see IP236, and to the myriad scientific articles submitted in this case, and particularly the meta-analyses provided. See IP223 (list of over 25 meta-analytic reviews, organized by topic, of eyewitness identification research); IP224 (list of scientific articles organized by topic).

To summarize, the Special Master found, on the basis of the unprecedented record in this case, that the scientific evidence accumulated since Manson is "voluminous, comprehensive and consistent" and that its "soundness and reliability … are indisputable." Report at 72. As established through expert testimony at the hearing, the eyewitness identification domain contains the largest and most rigorous body of scientific research of any of the law-related social science fields. 29T 39:25-40:1-5, 49:6-15; see IP73. Thus, the Special Master cited the following testimony of Dr. Monahan:

> Eyewitness identification is the gold standard in terms of the applicability of social science research to the law. 29T 49. … Of all the substantive uses of

> social science in law, none has been more subjected to scientific scrutiny, none has used more valid research methods, none is more directly generalizable, and nowhere is there a larger body of research than in the area of eyewitness identification. 29T 39-40.
>
> [Report at 72.]

In short, the Special Master found that "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." Report at 72-73. Its "soundness" is "powerfully confirm[ed]" through the "wide recognition … by the social scientists, forensic experts, law enforcement agencies, law reform groups, legislatures and courts." Id. at 73 (citations omitted); see IP188 and IP205 (memos summarizing national and courts' responses to the scientific literature). As a result of the "definitive" scientific research, the Special Master declared it "unquestionably fit for use in the courtroom," Report at 73, yet lamented that "only bits and pieces of the science have found their way into the New Jersey courtrooms," id. at 76.

III. THE MANSON TEST AS CURRENTLY CONSTITUTED DOES NOT ACHIEVE ITS GOAL OF USING "RELIABILITY AS A LINCHPIN" TO PROTECT DUE PROCESS AND FAIR TRIAL INTERESTS

Manson arose in an era when the exclusionary rule was invoked by the Supreme Court as a remedy to deter police from violating citizens' constitutional rights. As the Manson court recognized, however, unnecessarily suggestive identification procedures themselves do not violate a suspect's constitutional rights because "[u]nlike a warrantless search, a suggestive preindictment identification procedure does not in itself intrude upon a constitutionally protected interest." Manson, supra, 432 U.S. at 113 n.13. Rather, the constitutionally protected interest at stake in eyewitness identification cases is the due process right to a fair trial. See also United States ex rel. Kirby v. Sturges, 510 F.2d 397, 406 (7th Cir. 1975) ("[T]he due process clause applies only to proceedings which result in a deprivation of life, liberty or property. The due process issue, therefore, does not arise until testimony about the showup – or perhaps obtained as a result of the showup – is offered at the criminal trial."). Therefore, the Manson Court focused on the trustworthiness of identification evidence and declared reliability to be the linchpin of its admissibility. Manson, supra, 432 U.S. at 114.

The Manson Court was by no means refusing to acknowledge the "awful risks of misidentification," id. at 110, or the

dangers posed by unnecessarily suggestive identification procedures, but believed that juries would understand that "[s]uggestive procedures often will vitiate the weight of evidence" and thus could be counted on to appropriately "discount" it. Id. at 112 n.12. By developing what it believed was a flexible "totality of the circumstances" approach that stressed "reliability" and forced trial courts to make detailed, pretrial assessments of evidence, the Manson Court envisioned that its two-part balancing test would improve the "administration of justice" and produce more accurate verdicts. Id. at 112-13.

It is now clear that the Manson test as currently configured – a test mirrored by New Jersey in State v. Madison, 109 N.J. 223 (1988) – does not meet the objectives that the Court set for it. Ironically, Manson was written the very year, 1977, that eyewitness identification research started to advance towards its current status as the "gold standard" for the reliable application of social science to the law. 29T 49:13-15. Put simply, since the Manson decision, "times have changed." See State v. Copeland, 226 S.W.3d 287, 299 (Tenn. 2007) (holding that it was an abuse of discretion to exclude expert testimony regarding cross-racial identifications and confirming feedback and noting that there are now "literally hundreds of articles in scholarly, legal, and scientific

journals" that "detail the extensive amount of behavioral science research" in the eyewitness identification field). We now know much more, based on an impressive and rigorous body of scientific research, about the numerous factors that can contaminate witnesses' memories, pressure witnesses into making identifications, and increase the risk of misidentification. See IP236 §§ IV, V; IP223. Many of the conclusions drawn by the Manson court in 1977 concerning the factors that affect identification accuracy are now confirmed by social scientists to "blink[] psychological reality." Manson, supra, 432 U.S. at 135 (Marshall, J., dissenting).

What has not changed since 1977, however, is the "unusual threat to the truth-seeking process posed by the frequent untrustworthiness of eyewitness identification testimony." Id. at 119-20. Indeed, since 1989, there have been 258 wrongful convictions exposed by DNA testing, 75% of which involved eyewitness misidentifications; of those nearly 40% involved two or more mistaken eyewitnesses in the same case.[1] Thus, not only has science made enormous strides in our understanding of eyewitness identification evidence, but post-conviction DNA testing has confirmed what scholars and judges long knew or

[1] Innocence Project, Eyewitness Identification, http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php (last visited Sept. 23, 2010).

feared: that eyewitness error is a common contributing factor in the conviction of innocent people.[2]

Without the benefit of over three decades of empirical findings, the Manson framework suffers from five serious flaws that increase the chance of wrongful convictions based on eyewitness misidentifications, all of which were identified by the Special Master: (1) its balancing test is skewed by a scientific "confound;" (2) it focuses solely on police misconduct; (3) it limits trial courts to an inflexible, all-or-nothing suppression remedy; (4) it does virtually nothing to deter unnecessarily suggestive identification procedures; and (5) it fails to provide much needed "context" and guidance for jurors on how to evaluate eyewitness identification evidence. See Report at 77-79.

A. Manson's "Balancing" Test is Confounded Because Scientific Research Has Proven that the Use of Suggestive Procedures and Confirming Feedback Falsely Inflate "Reliability Factors."

The first issue is the scientific "confound" that lies at the heart of the Manson "balancing" test. Under Manson, courts must balance the corrupting effects of unduly suggestive identification procedures against "reliability factors" and then decide whether to suppress in-court and out-of-court

[2] As for New Jersey in particular, the Special Master stated that "while … one would hope … that the promulgation of the Attorney General Guidelines in 2001 has resulted in fewer wrongful convictions, nothing in the record suggests that New Jersey has thereby solved, or even substantially alleviated, the problem of mistaken identifications." Report at 76.

identification evidence if they find a "very substantial likelihood of an irreparable misidentification." The problem, of course, with such "balancing" is the undisputed scientific finding that both post-identification feedback and the use of unduly suggestive identification procedures, whether emanating from law enforcement or any other source, tends to artificially inflate the significance of post-identification self-reports from witnesses about key reliability factors – opportunity to observe, the degree of attention paid, certainty, and description. See IP236 § IV.C.

The consequences of this confound are severe; it overstates the apparent reliability of the eyewitness identification both for judges deciding admissibility and for jurors trying to evaluate the real weight of the evidence. This, in turn, brings about an unintended but deeply disturbing result: the improper use of a suggestive procedure tends to make it *more* likely that courts and juries will find the identification reliable, a truly perverse outcome. The Manson Court assumed exactly the opposite – that juries would realize that suggestive procedures "vitiate the weight of the [identification] evidence" and would, accordingly, "discount" it. Manson, supra, 432 U.S. at 112 n.12.

Like the trial court in Henderson, judges have been insensitive to this cause-and-effect relationship between

suggestion and reliability for three decades, applying the two-part test in a bifurcated manner that treats each analysis as two independent inquiries, instead of as symbiotic elements that must be assessed as a whole.[3]

Worse still, given Manson's all-or-nothing suppression remedy, trial courts inevitably tend to take shortcuts. They look at the "reliability" factors first, and if they find them to be adequate (the witness claims he had a good opportunity to observe, is very certain, and paid attention), they give short shrift to any suggestive procedures because they know that the in- and out-of-court identification will ultimately be admitted. As legal scholars have observed, "the Manson factors have become reduced to a checklist to determine reliability, and a checklist is a poor means of making a subtle, fact-intensive, and case specific determination as to whether a given eyewitness identification is reliable, despite the use of suggestive police procedures." D88 at 113. Indeed, such a formulaic, rubberstamping approach is an abdication of the screening function that trial courts must perform in eyewitness cases to make sure that trials are fair and verdicts are accurate. On

[3] As the Appellate Division explained in this case, "the [trial] judge made the [reliability] determination at the same time he declared that the procedure was not impermissibly suggestive. As held in Manson, evidence relating to the reliability of the identification must be weighed against 'the corrupting effect of the suggestion itself.' Because the trial judge did not find or appreciate the impermissible suggestiveness of the process, he never weighed that evidence against the corrupting nature of the process. Defendant is entitled to have the evidence reassessed through application of the proper framework." State v. Henderson, 397 N.J. Super. 398, 414-15 (App. Div. 2008) (citation omitted).

the other hand, the concept of social frameworks proposed by the Innocence Project, see infra § IV, allows trial courts to draw upon a rich body of scientific research, devise remedial cures that put unreliable aspects of the evidence into context, and ensure that the ultimate arbiters – the jury – get a scientifically sound perspective on factors affecting the accuracy of eyewitness identifications.

The confound also provides a perverse incentive to law enforcement who believe a suspect is guilty and hope an eyewitness can provide evidence to support their case – the more suggestive an identification procedure, the more likely a witness will make an identification, the more confirming feedback the witness will receive, and the more likely the witness will be certain about the identification itself, the opportunity to view, and the degree of attention paid. While the Manson Court recognized that its approach would not "significantly" deter the use of suggestive police procedures, it still envisioned that its two-part test would curtail police suggestion to some extent, and the Court certainly did not intend to create an impetus for law enforcement to conduct biased lineups. Manson, supra, 432 U.S. at 112 ("Although the per se approach has the more significant deterrent effect, the totality approach also has an influence on police behavior. The police will guard against unnecessarily suggestive procedures

under the totality rule, as well as the per se one, for fear that their actions will lead to the exclusion of identifications as unreliable.").[4] As the Special Master found, the Manson test does not, in fact, perform as intended.

B. Manson's Focus Is Exclusively on Police Misconduct and Does Not Address Numerous Other Factors that Affect Reliability

The seminal identification cases of the late 1960's and 1970s arose in the context of a contentious Supreme Court jurisprudence focused on the utility of the exclusionary rule as a remedy against misconduct by state actors. See United States v. Ash, 413 U.S. 300 (1973); Neil v. Biggers, 409 U.S. 188 (1972); Simmons v. United States, 390 U.S. 377 (1968); Stovall v. Denno, 388 U.S. 293 (1967); United States v. Wade, 388 U.S. 218 (1967). Accordingly, the Manson Court directed the first prong of its two-part test to whether law enforcement employed unnecessarily suggestive identification procedures. In the decades since, the courts of New Jersey and many other states conduct reliability assessments of identification evidence only when, if at all, there has been unnecessarily suggestive action by the State. However, given our contemporary scientific

[4] Perhaps the Court would have taken a more flexible and targeted approach to deterrence if, in 1977, the Attorney General's Guidelines existed. These generally accepted best practices for conducting identification procedures are based on strong scientific research showing that they minimize the risk of misidentification. By adopting the intermediate remedies proposed by amicus that enforce compliance with the Guidelines and at the same time inform juries accurately about the risks created by Guideline violations, courts can achieve a greater measure of deterrence while also providing much needed guidance to the jury.

knowledge that eyewitness memory is best understood as trace evidence susceptible to contamination from a wide spectrum of sources, it makes no sense to scrutinize identification evidence only through the prism of police misconduct. Unlike the law, science does not differentiate between "necessary" and "unnecessary" suggestion, since the necessity of suggestive police procedures is unrelated to its contaminating effects on memory. See State v. Hibl, 714 N.W.2d 194, 203 (Wis. 2006) (noting that unintentional, non-law enforcement suggestiveness can become a "key factor" in identification errors). Moreover, as the Second Circuit observed, "the linchpin of admissibility … is not whether the identification testimony was procured by law enforcement officers, as contrasted with civilians, but whether the identification is reliable." Dunnigan v. Keane, 137 F.3d 117, 128 (2d Cir.), cert. denied, 525 U.S. 840 (1998).

To be sure, suggestive police procedures can taint the memory of an eyewitness and render any subsequent identification unreliable, but equally pernicious contamination of eyewitness memory is often brought about by sources unconnected to law enforcement – family members, friends, other witnesses to the same event, media reports, or simply the passage of time. Indeed, current New Jersey jury instructions recognize as much, requiring that jurors consider "whether the witness was exposed to opinions, descriptions, or identifications given by other

witnesses, to photographs or newspaper accounts, or to any other information or influence that may have affected the independence of his/her identification." Model Jury Charge (Criminal), Identification: In-Court and Out-of-Court Identifications 5 (2007). It makes little sense for courts to focus pretrial assessments of suggestiveness solely on state action because by doing so they will surely miss non-state factors that can contaminate eyewitness memory and fatally undermine the reliability of the identification evidence.[5]

Moreover, in some cases, suggestion by state or non-state actors may not be relevant at all because estimator variables – i.e., event-related factors, beyond State control, that can impact identification reliability – could be so demonstrably weak that the identification evidence should be suppressed, or at least the jury should be instructed to treat it with great caution and distrust. 23T 65:2-6; see Chen, supra, 402 N.J.

[5] See Dunnigan, supra, 137 F.3d at 128 (since the due process focus, in the identification context, is principally on the fairness of the trial, rather than on the conduct of the police, "[i]t follows that federal courts should scrutinize all suggestive identification procedures, not just those orchestrated by the police, to determine if they would sufficiently taint the trial so as to deprive the defendant of due process" (quoting United States v. Bouthot, 878 F.2d 1506, 1516 (1st Cir. 1989))); United States v. Ballard, 534 F. Supp. 749, 751 (M.D. Ala. 1982) ("[The] likelihood of misidentification arises whenever there has occurred an unnecessarily suggestive confrontation between an eyewitness and a suspect, regardless of whether the confrontation was deliberate or involved actions by the police." (citing Green v. Loggins, 614 F.2d 219, 222 (9th Cir. 1980))); Commonwealth v. Jones, 666 N.E.2d 994, 1000-01 (Mass. 1996) ("It is apparent that neither constitutional considerations nor the presence of State action … are essential preconditions for a determination that certain relevant evidence should be kept from the trier of fact. … Common law principles of fairness dictate that an unreliable identification arising from … especially suggestive circumstances … should not be admitted."); State v. Chen, 402 N.J. Super. 62, 78 (App. Div. 2008), certif. granted, 197 N.J. 477 (2009) ("[T]he due process right to a fair trial requires exclusion of unreliable identification evidence, regardless of the source of the taint, based on the State's attempt to use the evidence at trial.").

Super. at 68 ("The judiciary has a responsibility to ensure that 'evidence admitted at trial is sufficiently reliable' to be of use to the jurors in a criminal trial, and the rules permit courts to exclude evidence that does not meet the threshold of reliability required for admission."); see also Hibl, supra, 714 N.W.2d at 204 ("There may be some conceivable set of circumstances under which the admission of highly unreliable identification evidence could violate a defendant's right to due process, even though a state-constructed identification procedure is absent."). The Special Master posed just such a hypothetical, where an eyewitness is intoxicated, has cataracts, and is 75 feet away from the perpetrator. 18T 74:23-75:5; 19T 7:8-24. Likewise, in cases where the distance between the witness and the perpetrator can be objectively established through testimonial evidence, scientific analysis can produce proof that any claim of identification exceeds the limitations of the human eye.[6]

C. Manson's All-or-Nothing Test Forgoes Helpful Intermediate Remedies, Such as "Contextual" Jury Instructions or Narrow In Limine Rulings, Based on Findings Made at Pre-Trial Judicial Assessments of Reliability

When courts apply Manson, their purpose is usually limited to answering one question: to suppress or not to suppress the

[6] Specifically, a new technique developed by Dr. Geoffrey Loftus provides a relatively simple, inexpensive, and reliable way to perform this analysis, and should be more widely utilized by counsel and courts at pretrial admissibility proceedings. 23T 66:10-17; see IP20.

identification evidence. Once courts decide that issue, they conceive of their mission as complete. The problem is that since it is unusual for courts to suppress identification evidence, they rarely see any purpose in identifying suggestive procedures that increase the risk of error or to make findings about other factors relating to the event or the witness which tend to decrease the reliability of the identification. See Report at 78 (noting that research of court and counsel revealed only one New Jersey appellate decision (unreported) that applied Manson/Madison to suppress an eyewitness identification).

That would dramatically change, however, if it became clear that "contextual" instructions (such as telling the jury that failure to comply with the Attorney General's Guidelines can increase the risk of misidentification) or in limine rulings (such as limiting testimony based on artificially inflated self-reports about certainty) were available as intermediate remedies. With realistically attainable relief at stake, courts conducting pretrial hearings would be compelled to perform comprehensive assessments of reliability, assessments which would require identifying and understanding the key estimator and system variables present in a given case. This comparatively small alteration in the legal architecture will have a qualitatively large effect – creating a "learning environment" that induces the parties and the court to

familiarize themselves with the uniquely rich body of scientific knowledge that exists about eyewitness identification evidence. Concomitantly, to address scientifically relevant reliability issues, trial courts and the parties would be directed toward gathering more data than they would ordinarily seek. As opposed to "all-or-nothing" rulings based on thin data and rote review of checklists, intermediate remedies would generate a more substantive judicial screening process, more reliable evidence, and more accurate verdicts.

D. Manson Fails to Provide Jurors With "Context" and Guidance to Correct Misconceptions About Eyewitness Memory

After re-focusing the analysis of eyewitness identification evidence on reliability and ensuring that juries would not be deprived of critical, if "flawed" evidence ("evidence with some element of untrustworthiness is customary grist for the jury mill"), the Manson Court was "content to rely upon the good sense and judgment of American juries." Manson, supra, 432 U.S. at 116. The Court felt that "[j]uries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." Ibid.

Unfortunately, longstanding research shows that jurors have great difficulty distinguishing between accurate and inaccurate eyewitnesses. See IP136 at 475-87; Report at 49-50. Mistaken

eyewitnesses are telling what they believe to be the truth, and thus the cognitive faculties jurors usually deploy in making credibility judgments about lying witnesses do not work well in this context.[7] Even more troubling, research shows jurors have some fundamental misconceptions about eyewitness memory. See IP236 § IX.[8] Jurors tend to believe that memory works like a videotape,[9] generally misunderstand the effect of confirming feedback on the self-reported factors in Manson,[10] do not understand the effects of biased witness warnings,[11] and are not inherently sensitive to estimator variables such as weapon focus, violence during the event, retention intervals between the event and the identification procedure, foil bias, disguises, and cross-race identifications.[12] In fact, jurors tend to rely heavily on eyewitness factors that are not good indicators of accuracy (particularly the witness's confidence in her identification), overestimate eyewitness identification

[7] This also explains why cross-examination – the supposed great engine for uncovering truth – often sputters in the face of an honest but mistaken eyewitness. As such, it is insufficient, on its own, to guard against wrongful convictions based on mistaken identifications (as both the DNA exonerations and empirical study show), and serves as an inadequate substitute for expert testimony or jury instructions. D85; IP146 at 6 ("Cross-examination, a marvelous tool for helping jurors discriminate between witnesses who are intentionally deceptive and those who are truthful, is largely useless for detecting witnesses who are trying to be truthful but are genuinely mistaken."); see State v. Clopten, 223 P.3d 1103, 1110 (Utah 2009) (because eyewitnesses may express almost absolute certainty about identifications that are inaccurate, research shows the effectiveness of cross-examination is badly hampered); see Wade, 388 U.S. at 235 ("even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of [an eyewitness's] accuracy and reliability.").

[8] See also IP10; IP51; IP112; IP136; IP137; IP138; D77; D85; D103; D104.

[9] 15T 5:25-6:8; 26T 16:1-6.

[10] 26T 29:1-7.

[11] 26T 50:2-10.

[12] 18T 15:19-18:7; 24T 40:14-45:23; D77.

accuracy rates, and are not familiar with the principle that memory is susceptible to contamination just like trace evidence.[13] It is, therefore, critically important to correct these scientifically incorrect notions and to provide jurors with "context" or guidance about eyewitness testimony that is firmly grounded in sound science.

IV. "SOCIAL FRAMEWORKS": THE PROPER USE OF SOCIAL SCIENCE EVIDENCE IN COURT

Important support for the legal framework proposed by amicus was provided by the testimony of Dr. Monahan. See 29T.[14] In 1987, Dr. Monahan and his colleague Professor Laurens Walker introduced the concept of "social frameworks" for the proper use of social science evidence to improve adjudication, a model that has since gained broad acceptance. IP87 at 5. The proposed legal framework jettisons the confounded Manson balancing test and replaces it with a practical application of Monahan and Walker's "social frameworks."

In a nutshell, Monahan explained his approach as:

> [T]he use of generally applicable [scientific] research to provide a context that a fact finder can use to determine a specific fact in a case. The research would provide a general frame of reference or background to assist the finder of fact in resolving

[13] 26T 18:12-16.

[14] Dr. Monahan is a member of the Institute of Medicine of the National Academy of Sciences and holds joint appointments at the University of Virginia in the departments of Psychology, Psychiatry and the School of Law, where he serves as the John F. Shannon Distinguished Professor of Law. See IP86. With his co-author Professor Laurens Walker, this year Dr. Monahan published the Seventh Edition of Social Science in Law, and he is widely acclaimed to be this nation's leading authority on the subject. See IP53; IP87; IP88; IP163.

> an empirical dispute that had to do with the particular people before the court. Social science research here would be used to inform the jury about things that they might not know or to correct misimpressions that they might have.
>
> [29T 33:17-25–34:1; see IP53; IP87; IP88.]

These scientific findings could be conveyed through jury instructions or expert witnesses, but only if the findings are robust, in that they have survived critical review in the scientific community, are the product of valid research methods, and are generalizable to the legal question at issue. 29T 38:23-39:8. Indeed, Monahan believes that one reason that social frameworks is a particularly good fit for the assessment and regulation of eyewitness testimony is that "of all the substantive uses of social science in law, none has been more subjected to scientific scrutiny, none has used more valid research methods, none is more directly generalizable, and nowhere is there a larger body of research than in the area of eyewitness identification." 29T 39:25-40:5.

Monahan and Walker believe that:

> Social frameworks should be most helpful to the jury where they bring into question jurors' possibly flawed intuitions or inaccurate beliefs about behavior, such as the conditions under which eyewitness testimony tends to be more or less accurate. In these cases, social science research provides a framework for evaluating the reasonableness and credibility of a party's testimony or theory of a case, without the expert offering any case-specific inferences or linkages.
>
> [IP87 at 1741-42 (footnote omitted).]

Further, the introduction of social frameworks is a very conservative approach to the use of science in courtrooms. It holds that neither a court through its instructions nor experts through their testimony can opine about whether a specific eyewitness in a particular case was accurate or inaccurate. Rather, the instructions and experts are limited to educating juries about well-established social science findings, which are probabilistic by nature, regarding variables that can affect the reliability of identification evidence.

Monahan and Walker suggest that courts consider social science research in the same manner in which they consider legislative facts and scientific research for the purposes of interpreting law and establishing broad public policy – through legal briefs and expert testimony presented at pretrial hearings, amicus briefs, or their own judicial research. 29T 35:18-25. A court could then evaluate the admissibility of the research findings by assessing whether it has been generally accepted. See State v. Chun, 194 N.J. 54 (2008), aff'g State v. Harvey, 151 N.J. 117 (1997); Frye v. United States, 293 F. 1013 (D.C. Cir. 1923); 29T 35:25-36:3.[15] These scientific findings would ordinarily evolve much the same way as does case law, moving from trial courts through appellate courts, forming a

[15] Under Daubert, which New Jersey follows under certain circumstances, courts would evaluate the admissibility of the research findings by assessing whether they are scientifically valid. See Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

common law of social frameworks in which certain robust findings would assume the force of legal precedent and thus bind courts in subsequent cases. 29T 48:15-25-49:1-3. Given the need for "general acceptance" under Frye (and, for the record, Daubert), it is very unlikely that with "every new issue of a psychology journal" there would be a need to change findings or jury instructions. 29T 46:10-11. Other mechanisms that could implement a social framework approach include special court committees "composed of lawyers, judges, and social scientists [who could] periodically review [jury] instructions to determine that they were reflective of the latest findings," or hearings before special masters, as this Court has done in the instant case. 29T 46:15-20.

Here, Dr. Monahan avers, a "very, very large number of findings" of eyewitness identification research – which he referred to as "the gold standard in terms of the applicability of social science research to the law," 29T 49:13-15, would be admissible since they are "generally accept[ed]," "scientifically valid," "found in meta-analyses," and "robust." 29T 36:4-10.

In sum, the concept of social frameworks provides a dynamic structure which not only permits but encourages courts and counsel to review the social science literature in order to promote the integration of new robust findings, ensure that

prior empirical conclusions remain valid, and update pattern jury instructions as needed. As Dr. Monahan noted, "science marches on," and while the anticipation is that strongly-supported findings will only gain further support or precision over time, any framework should avoid "ossifying" findings in perpetuity. 29T 46:5-9.

V. A NEW LEGAL FRAMEWORK TO ACCOMMODATE SCIENTIFIC FINDINGS

In light of the explosion of peer-reviewed research in the field of eyewitness identification and the long understood but now irrefutable leading role of eyewitness error in wrongful convictions, amicus the Innocence Project urges the New Jersey Supreme Court to renovate the Manson/Madison test by adopting a dynamic new legal architecture for the assessment, regulation, and presentation of eyewitness testimony. The proposed framework represents not the abrogation but rather the modernization of the Manson framework by reflecting the scientific knowledge represented by the numerous meta-analyses published in the field over the past three decades. See IP223 (list of meta-analytic reviews of eyewitness identification research).

A. Summary

As this Court stated in State v. Michaels, "competent and reliable evidence remains at the foundation of a fair trial, which seeks ultimately to determine the truth about criminal

culpability." State v. Michaels, 136 N.J. 299, 316 (1994). Consequently, courts have "a responsibility to ensure that evidence admitted at trial is sufficiently reliable so that it may be of use to the finder of fact who will draw the ultimate conclusions of guilt or innocence." Id. Like confessions and statements alleging sexual abuse, identification evidence "requires that special care be taken to ensure their reliability." Id. at 306. See also State v. Hubbard, 48 P.3d 953, 963 (Utah 2002) ("Even if law enforcement procedures are appropriate and do not violate due process, eyewitness identification testimony must still pass the gatekeeping function of the trial court and be subject to a preliminary determination – whether the identification is sufficiently reliable to be presented to the jury."); Hibl, supra, 714 N.W.2d at 194 ("There may be some conceivable circumstances under which the admission of highly unreliable identification evidence could violate a defendant's right to due process, even though a state-constructed identification procedure is absent.").

Given the view of scientists in the field, established at the hearing before the Special Master, Report at 10-11, 84, that eyewitness memory is best understood as trace evidence subject to degradation and contamination, and consistent with traditional rules of evidence, once the defendant places the reliability of the eyewitness identification at issue, the

prosecution, as the proponent of the evidence, should bear the burden of going forward. This burden, which is essentially nothing more than establishing the "conditional relevance" of the evidence, is easily met by establishing through the eyewitness a rational basis for her perception and memory and offering proof from the police concerning the out-of-court identification procedures they employed. Making the critical inquiry into the existence and extent of memory trace contamination – regardless of its source – is entirely consistent with Manson's view of reliability as the linchpin for the admissibility of identification evidence. See Hibl, supra, 714 N.W.2d at 205 ("That circuit [i.e., trial] courts serve a limited gate-keeping function, even for constitutionally admissible eyewitness identification evidence, comports with … [Manson's] maxim that 'reliability is the linchpin in determining the admissibility of identification testimony.'").

As opposed to the current all-or-nothing approach of Manson/Madison, under the framework here proposed, gate-keeping responsibilities of trial courts do not end with their decisions regarding admissibility. Rather, trial courts and the parties will have ready access to the most important information underlying the reliability of identification evidence facilitating the formulation of meaningful intermediate remedies. After a pretrial hearing in which basic but critical

information about the reliability of an eyewitness identification is elicited, trial courts will be in a position to inform the parties before the trial starts about what instructions, if any, it will give to the jury concerning important estimator and system variables that have been shown, particularly through meta-analytic reviews, to increase or decrease the probability of identification accuracy. These instructions would also include law enforcement procedures that contravene the Attorney General's Guidelines. Such instructions, when they are given, will assist the jury in assessing the reliability of identification evidence, and, perhaps more importantly, having advance knowledge of such instructions will help the prosecution and defense correspondingly to shape their approach to voir dire, openings, witness examinations, and closing arguments.

Similarly, the Innocence Project framework allows trial courts to make sound decisions regarding in limine motions. For example, when certainty statements have not been taken from a witness at the time of an out-of-court identification, as required by the Attorney General's Guidelines, see Guidelines § II.E.1, courts might decide to preclude the witness from making any statement about her level of certainty at the time of the trial. See infra § V.I (on motions in limine).

This proposed framework would also provide an incentive for either the defense or prosecution to present expert testimony at pretrial hearings, as experts might be able to provide trial courts with useful analysis not only regarding the ultimate issue of admissibility, but also about appropriate jury instructions. In turn, hearing from experts at the pretrial hearing will generally assist trial courts in their evaluation and circumscription of expert testimony, allowing them to make well-informed decisions about whether to permit such testimony at trial, and if so, to set clear limits about what the expert can and cannot say.

In sum, this framework will result in more informed admissibility determinations, the promulgation of appropriate trial-based mechanisms to enhance juries' assessment of such evidence, and more accurate verdicts.[16]

B. As the Proponent of Trace Evidence, the Prosecution Has the Burden of Going Forward to Offer Proof that a Reasonable Jury Could, on the Evidence Presented, Make the Requisite Factual Determination that the Identification Evidence Is Reliable.

In light of the uncontested empirical research, it is imperative that courts understand eyewitness memory as a form of trace evidence which is "from the first moments of an

[16] It is worth noting that while, at first glance, it might seem that requiring eyewitnesses testimony at pre-trial hearings burdens the prosecution and the witnesses themselves, if such testimony bears strong indicia of reliability, it will often result in guilty pleas in cases that would otherwise go to trial, thereby obviating the need for the eyewitnesses to testify at trial, and otherwise saving the State valuable pecuniary and prosecutorial resources.

eyewitness's interaction with the criminal justice system … under assault from the questions, suggestions, and assertions of … cops, lawyers, and bystanders." IP52 at 92; see IP236 § III.B.iii (explaining trace evidence). Indeed, scientific research has proven that there are many factors that could increase the risk of identification error that would not be revealed through the minimal available pre-hearing discovery.[17] See IP236 §§ IV, V (explaining system and estimator variables). As the Special Master observed, "New Jersey law has long placed on the proponent of physical trace evidence and scientific evidence at least the initial burden to produce evidence in support of its reliability. Application of those accepted evidentiary rules to eyewitness testimony would be scientifically proper and procedurally wise." Report at 84-85 (citations omitted).

Yet under State v. Ortiz, 203 N.J. Super. 518 (App. Div. 1985), for example, a defendant, based solely on assertions of law enforcement, with little discovery, and without an opportunity to cross-examine a single witness, must make a threshold showing that "some evidence" of suggestiveness existed in the identification procedures in order to prompt a Wade

[17] As Dr. Penrod, an expert called by the Public Defender, noted, the State and the police department control identification evidence, from investigation to trial, and the defense often has no mechanism other than pretrial hearings for gaining access to critical information surrounding the event, the police investigation, the lineup procedures (from the vantage point of both law enforcement and the witness), and post-event and post-identification contamination to which the witness has been exposed. 20T 50:6-52:15.

hearing. Consequently, since under Ortiz the defendant bears the initial burden of establishing the existence of unnecessary suggestion by state actors, reliability hearings are conducted in a very limited number of cases, and identification evidence that could be rife with contamination and generated through suggestive procedures is admitted into evidence without scrutiny and without sufficient trial-based safeguards. Moreover, as a result of the exclusive focus of the caselaw on state misconduct, even if a defendant is able to meet his burden of showing that suggestive procedures were used, at the pretrial hearing the prosecution is obligated only to call police witnesses to establish the reliability of the evidence.

Instead, courts should review eyewitness evidence in the same fashion in which they assess the collection and analyses of other types of trace evidence, see IP236 Findings # 14-15, and apply with equal force the legal standards that govern the admissibility of such evidence, see 23T 94:21-95:13; IP236 Findings # 16-17. In the words of the Special Master:

> [I]t would be both appropriate and useful for the courts to handle eyewitness identifications in the same manner they handle physical trace evidence and scientific evidence, by placing at least an initial burden on the prosecution to produce, at a pretrial hearing, evidence of the reliability of the evidence. Such a procedure would broaden the reliability inquiry beyond police misconduct to evaluate memory as fragile, difficult to verify and subject to contamination from initial encoding to ultimate reporting. That would effectively set at naught both

> the Manson/Madison rule that reliability is to be examined only upon a prior showing of impermissible suggestion on the part of state actors and the Ortiz rule, 203 N.J. Super. at 522, that requires the defendant to make, and the prosecution to overcome, an initial showing of such suggestion.
>
> [Report at 84-85.]

Amicus agrees with the Special Master: State v. Ortiz should be overruled, and the burden of production should be placed on the prosecution. More specifically, under the framework proposed by the Innocence Project, the defendant bears the burden of placing the reliability of the identification evidence at issue, which he can do by alleging, via motion or affidavit, that the eyewitness's identification was in error (i.e., either that he was not present at the scene of the crime, and thus could not have committed it, or that while he may have been present at the crime scene and/or seen by the eyewitness, he was not the person who committed the crime). By challenging the accuracy of the eyewitness's identification, the defendant places the reliability of such evidence at issue.

The prosecutor's burden of proof in making its threshold reliability showing is appropriately low, in that it need only establish conditional relevance – that a reasonable jury could make the requisite factual determination that the identification evidence is reliable based on the evidence before it. See N.J.R.E. 104(b); see also Hubbard, supra, 48 P.3d at 965

("Courts must simply decide whether the testimony was sufficiently reliable so as not to offend defendant's right to due process by permitting clearly unreliable identification testimony before the jury."). While this burden is minimal compared to the burden that the defendant shoulders when seeking to suppress the identification evidence, it can be met only if the prosecution produces evidence with respect to two necessary elements: the reliability of the perception and memory of the eyewitness and the specific identification procedures used to obtain the identification.

1. Eyewitness Must Testify

As an evidentiary matter, eyewitness testimony is a form of lay opinion testimony and thus should be governed in part by N.J.R.E. 701. Under Rule 701, a lay witness must have actual knowledge, acquired through the senses, of the matter about which he or she is about to testify and must help the trier of fact to understand either the witness's testimony or determine a fact in issue. State v. LaBrutto, 114 N.J. 187, 197-98 (1989). As stated in Chen, "rules governing admissibility of testimony and opinion evidence also serve to ensure reliability. Witnesses, other than experts, cannot testify unless they have 'personal knowledge' of the matter, N.J.R.E. 602, and 'opinions and inferences' offered by a lay witness must be excluded if not 'rationally based on the perception of the witness.'" Chen,

supra, 402 N.J. Super. at 79. See also Hubbard, supra, 48 P.3d at 964 (one of the five enumerated factors trial courts must analyze to determine whether an eyewitness identification is sufficiently reliable to be presented to the jury is "the nature of the event being observed and the likelihood that the witness would perceive, remember and relate it correctly").

In addition, since the focus at pretrial hearings should be on the reliability of the evidence, including memory contamination from *all* possible sources, the best way to evaluate such contamination is by hearing directly from the source of the trace evidence – the eyewitness.[18] Just as coffee spilled on a blood stain at a crime scene contaminates the evidence whether spilled by a police officer, prosecutor, or a civilian, so too the source of contamination of an eyewitness's memory is of no import when measuring its impact on reliability. Any determination of whether such evidence has been tainted must begin by testing the blood as opposed to relying only on the testimony of the police officer who may have compromised the evidence. See Chen, supra, 402 N.J. Super. at 82-83 ("[I]n the proper discharge of their gate-keeping function pursuant to N.J.R.E. 403 and N.J.R.E. 104, trial courts should grant a request for a preliminary hearing when the reliability of the

[18] The perceptions and recollections of the eyewitness are also relevant regarding what occurred at an identification procedure, because they may differ markedly from the perceptions and recollections of the police officer who conducted it.

State's identification evidence is called into question by evidence of highly suggestive words or conduct by *private actors* that pose a significant risk of misidentification." (footnote omitted) (emphasis added)). Most elusive are both the pre-identification contamination to which the witness may have been exposed through contact with co-witnesses, family, friends, the media, the Internet, prosecutors, and law enforcement, and the post-identification confirming feedback that the witness may have received from these same sources which could affect the witness's self-reports regarding both the circumstances under which he observed the perpetrator and his confidence in the accuracy of the identification. See IP236 § IV.C (explaining post-identification feedback and inflation of self-reports). To assess potential contamination and overall reliability, courts should have as much information as possible regarding contact between witnesses, or between the witness and other actors, both after the incident and after the identification procedures, and only testimony from the eyewitness can adequately address this issue. 26T 75:15-23, 76:11-24, 77:15-19.[19]

[19] See also Chen, supra, 402 N.J. Super. at 68 ("Even when law enforcement agents are not involved, evidence that an identification was made under highly suggestive circumstances that pose a significant risk of misidentification calls the reliability of the initial and subsequent identifications into question. Upon a request supported by such evidence, a trial court should conduct a hearing to assess whether the evidence is sufficiently reliable or whether its reliability is so diminished by the suggestive circumstances that the probative value is substantially outweighed by the risk of prejudice and misleading the jury." (citations omitted)).

For eyewitness identification evidence to be admissible, then, the prosecution must establish that, based on the facts and circumstances under which the eyewitness made her observations (i.e., estimator variables), and in light of the information to which the eyewitness has been exposed following the observation (from the various sources discussed above), the lay opinion evidence is rationally based on the eyewitness's perception and memory. To make this "rational basis" showing, the prosecution must produce the eyewitness to testify as to the circumstances under which he saw the perpetrator and permit an inquiry into post-event information to which he has been exposed.

2. Police Must Testify Regarding the Identification Procedures Used

The second element that the prosecution must establish to meet its burden going forward would derive from the testimony of police witnesses concerning the out-of-court identification procedures utilized (i.e., system variables), including whether or not law enforcement complied with the Attorney General's Guidelines. See Letter from Attorney General John J. Farmer, Jr. to All County Prosecutors et al. (Apr. 18 2001) (accompanying Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures) [hereinafter "Guidelines"]. However, the prosecution need not

establish compliance with the Guidelines as a prerequisite to meeting its burden going forward; merely adducing evidence from law enforcement regarding the procedures that were used, whatever those procedures might have been, is sufficient.

C. Placing the Burden on the Prosecution Is Consistent with Traditional Rules of Evidence

This burden shift, endorsed by the Special Master, is not revolutionary; to the contrary, traditional rules of evidence normally require that the party seeking admission of evidence bear the burden of establishing its evidentiary foundation. In New Jersey, the judiciary has long performed the gate-keeping function of determining the reliability of evidence for the purposes of admission. See N.J.R.E. 104, 403, 803(a)(3); Chen, supra, 402 N.J. Super. at 68 ("The rules also permit courts to exclude evidence that is of such questionable reliability that its probative value is substantially outweighed by the risk of prejudice and misleading the jury." (citations omitted)); see also Hibl, supra, 714 N.W.2d at 201 ("Although most ['accidental' confrontations resulting in 'spontaneous'] identifications will be for the jury to assess, the circuit court still has a limited gate-keeping function. It may exclude such evidence under [Wis. Stat.] § 904.03 if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."). As this

Court stated in Michaels, "we have also recognized that when an identification is crucial to the prosecution of a criminal case, its reliability, and ultimate admissibility, must be strictly tested through a searching pretrial hearing." Michaels, supra, 136 N.J. at 319.

In fact, amicus's proposal is similar to, though it requires a much lower burden of proof than, the framework adopted by the New Jersey Supreme Court in State v. Hurd for the assessment of hypnotically-induced testimony: the party seeking to introduce hypnotically refreshed testimony has the burden of establishing admissibility by clear and convincing evidence. State v. Hurd, 86 N.J. 525, 546 (1981), abrogated by State v. Moore, 188 N.J. 182, 185 (2006) (holding that the only effective way to control for the harmful effects of hypnosis on the justice system's truth-seeking function is to deem hypnotically-refreshed testimony generally inadmissible). See also State v. Armstrong, 329 N.W.2d 386, 394-95 (Wis. 1983), vacated on other grounds, 700 N.W.2d 98 (2005) ("[T]he burden should be on the proponent to demonstrate that the hypnotic session was not affected by impermissible suggestiveness such as to render the subsequent testimony inadmissible.").]

Indeed, some jurisdictions already require that the prosecution bear the burden of going forward with regard to eyewitness identification evidence. See State v. Walden, 905

P.2d 974, 985 (Ariz. 1995) ("The state has the burden of proving by clear and convincing evidence that the pretrial identification procedures were not unduly suggestive."); Jones v. State, 909 A.2d 650, 661 (Md. 2006) ("It is not reasonable to require specific factual allegations of suggestivity before a defendant may call a witness in a suppression motion."); People v. Chipp, 552 N.E.2d 608, 613, cert. denied, 498 U.S. 833 (N.Y. 1990) ("The People have the initial burden of going forward to establish the reasonableness of the police conduct and the lack of any undue suggestiveness in a pretrial identification procedure."); Commonwealth v. Johnson, 668 A.2d 97, 103 (Pa. 1995) ("The burden is on the Commonwealth to establish that the identification procedure was not suggestive."); State v. Lufkins, 309 N.W.2d 331, 335 (S.D. 1981) (noting that, by statute, South Dakota mandates that "defendant is entitled to a preliminary hearing").

This customary "proponent-based" burden of proving reliability is also consistent with other types of scientific evidence for which the prosecution seeks admissibility. As the Appellate Division stated in State v. Chen:

> Requiring a preliminary hearing to assess the impact of suggestive conduct by private actors is consistent with the approach our Supreme Court took in addressing the problem of evidence suggested by hypnosis in Hurd and by 'coercive and suggestive' interrogation techniques in Michaels. It also is consistent with the Court's efforts to limit the potential for

> wrongful conviction based on unreliable identification evidence. … We require this preliminary hearing in recognition of the potential that the use of such highly suggestive techniques may undermine the reliability, and a fortiori the probative value, of the identification evidence; the enhanced risk of misidentification attributable to suggestiveness at the time of the initial identification; and the risk of prejudice and misleading the jury that is so likely to result in wrongful conviction based on misidentification.
>
> [Chen, supra, 402 N.J. Super. at 82.][20]

D. If the Prosecution Meets its Burden of Going Forward, the Burden Shifts to the Defendant to Prove that There Is a Substantial Likelihood of a Mistaken Identification.

Once the prosecution has established the conditional relevance of the identification evidence, the burden shifts back to the defendant to prove, by a preponderance of the evidence, that the identification is nonetheless unreliable and hence should be suppressed. Specifically, the defendant must show that there exists a substantial likelihood of a mistaken identification. The defendant can make this showing either through cross-examination of the State's witnesses, by

[20] It should also be noted that under N.J.R.E. 803(a)(3), a witness's trial testimony regarding a prior identification is not hearsay only if it has been "made in circumstances precluding unfairness or unreliability." Although this language exists, in part, because the New Jersey rules, unlike their federal counterpart, do not require that the declarant testify or be available for cross-examination in order to admit the prior identification, it also confirms New Jersey's emphasis on assessing the reliability of identification evidence as a precursor to its evaluation by the jury. Thus, before a court can admit such testimony pursuant to an exception to the hearsay rules, the State must make a threshold showing of reliability. See State v. Chen, 402 N.J. Super. at 83, n.8 ("This standard [for when courts must hold a preliminary hearing regarding the use of suggestive procedures by a private actor] assumes that the State has made the threshold showing of reliability by N.J.R.E. 803.").

introducing his own evidence, or both. If the defendant meets this burden, both the out-of-court and prospective in-court identification evidence must be suppressed. If the defendant is unable to meet this burden, the evidence should be admitted.

E. Courts Must Establish and Follow Rules for Weighing Identification Evidence, Including Placing the Greatest, if Not Exclusive, Weight on Primary Evidence.

In light of scientific research proving the contaminating effect of post-event information on witnesses' memories, it is indisputable that not every piece of identification evidence is equally reliable. Identification evidence is often a combination of multiple identifications, descriptions, eyewitnesses' interactions with potential sources of contamination (friends, family, other witnesses, media reports, etc.), and witnesses' self-reports of the event, occurring at different points between the incident and trial. Research has revealed that these various temporal evidentiary components can also be markers of the artificial enhancement, degradation, and contamination of such evidence. See IP236 § IV.C (explaining inflation of self-reports). For example, research has demonstrated that because of the corrupting effect of post-event information, "primary" identification evidence – the witness's initial description of the perpetrator, event, opportunity to view, and degree of attention, and the event's duration, as well

as the first identification procedure, the witness's initial identification (or non-identification), and the witness's contemporaneous confidence in an initial identification – is more reliable than the witness's subsequent self-reports or identifications. Nonetheless, it is very common for trial and appellate judges to rely on a witness's confidence statements, descriptions or self-reports at the time of the hearing or trial, rather than at the time of the identification. 18T 41:14-17. But by the time a witness testifies, it is very likely that his confidence in these self-reports has been inflated in multiple ways. 18T 40:24-41:1.

Therefore, as a general rule, when assessing an identification's reliability for both admissibility purposes and in order to fashion appropriate intermediate remedies should the evidence be admitted, courts ought to place much greater, if not exclusive, weight on the "primary" evidence detailed above (the witness's initial description of the perpetrator, of her opportunity to view, degree of attention, the witness's first identification, etc.). To the extent that courts are to consider the witness's certainty at all, such consideration should be limited to the initial confidence statement taken at the time of the identification rather than at a later period (during the investigation or at a pretrial hearing). 18T 40:20-24, 42:2-10; 26T 34:24-35:11. As science advances, courts

should establish similar reliability markers for other components of identification evidence.

F. To Determine Both the Admissibility of the Evidence as Well as Whether the Jury Will Need Guidance in Evaluating It, Courts Must Make Detailed Findings During Reliability Hearings Concerning the Presence of Estimator and System Variables Proven Through Robust Scientific Research to Increase or Decrease Identification Reliability, Including Law Enforcement's Noncompliance with the Attorney General's Guidelines and/or the Use of Other Suggestive Identification Procedures.

Pretrial hearing testimony from eyewitnesses and police will enable courts to investigate the presence of all variables that have been rigorously studied by science, particularly those shown through meta-analytic reviews (i.e., studies that combine the data from a number of published studies addressing the same question to ascertain a mean or meta- effect size) to increase or decrease identification accuracy, and make specific findings regarding each. 21 19T 6:18-7:3. As the Special Master stated, "judges and juries [should] use accepted scientific research findings … to determine specific facts." Report at 85.

These findings will enhance the treatment of admitted identification of evidence in a number of ways: first, such findings will result in more informed admissibility decisions; second, courts will be in a better position to determine the

[21] See State v. Greene, 2007 WL 1223906, at *1 (N.J. Super. Ct. App. Div. 2007) (unpublished) ("because … the judge did not resolve a number of important factual disputes generated during the hearing, and because the judge also did not make findings regarding the suggestive events that preceded the Wade hearing, we decline to defer to his findings and reverse and remand for a new Wade hearing.").

appropriateness of expert testimony to educate the jury about the empirical research regarding the variables that affect identification accuracy; third, findings will form the basis for narrowly-tailored jury instructions to ensure that juries are properly guided in their assessments of the evidence; and fourth, findings will serve as trial guideposts for the defense and prosecution during voir dire, opening statements, witness examinations, and closing arguments.

A useful reference guide for courts scrutinizing the system variables in a given case are the Attorney General's Guidelines governing identification procedures throughout the state. Recognizing, as experts have, that "[a] scientific approach to the collection and evaluation of eyewitness evidence is far more likely to result in improved effectiveness," IP111 at 8, the Guidelines sought to unite science and practice to reduce the risk of wrongful conviction. Embracing the lineup-as-scientific experiment analogy, see IP21; IP22 at 12, the Guidelines relied on science to offer "a powerful set of tools" to law enforcement agencies in the design and conduct of eyewitness identification procedures, 14T 52:15-19, arming them as well with a set of recommended safeguards. 14T 61:7-13.

According to Dr. Malpass and Dr. Wells, experts called by the State and the Innocence Project, respectively, as well as

the National Institute of Justice[22] and the Wisconsin Department of Justice,[23] because eyewitness identification evidence is a form of trace evidence, handling it like DNA evidence – by professionals trained in eyewitness identification science and conducted using procedures based on the scientific method – enhances its reliability. See 26T 20:24-21:12; IP146 at 622-23.

The Guidelines include numerous best practices proven by robust scientific research, including in many instances meta-analyses, to decrease the risk of mistaken identification, and which law enforcement should follow in every case. As Justice Albin stated in dissent in State v. Herrera, 187 N.J. 493, 528 (2006), "to a person whose fate depends on the accuracy of an identification, it is fundamentally unfair for the police to unnecessarily employ a technique that maximizes the potential for error." Since every provision of the Guidelines was designed to prevent a specific harm to the reliability of identification evidence, when courts assess the overall reliability of such evidence for admissibility purposes, they should make specific findings as to whether law enforcement complied with each provision of the Guidelines, with noncompliance providing a basis for either preclusion of the evidence or intermediate

[22] See IP23 at 2 ("[Our Guide] sets out rigorous criteria for handling eyewitness evidence that are as demanding as those governing the handling of physical trace evidence.").
[23] See IP75a at 2 ("[L]ike trace evidence, [eyewitness evidence] is susceptible to contamination if not handled properly. The result can be failure to identify the true perpetrator or erroneous identification of an innocent person.").

remedies, including narrowly-tailored jury instructions explaining the purpose of the Guideline provision and the risk created by the state's noncompliance with it. See Guidelines § III.C.6; IP237 at 66-78 (Proposed Eyewitness Identification Instructions).

G. Based on Findings at Pretrial Hearings, Courts Must Provide Juries with Proper Guidance and "Context" so That They Can Evaluate the Eyewitness Evidence Appropriately.

A central pillar upon which Manson rests is its faith that jurors can differentiate between accurate and inaccurate identifications. However, the "fundamental fact of judicial experience" is that juries "unfortunately are often unduly receptive to [eyewitness identification] evidence," Manson, supra, 432 U.S. at 120 (Marshall, J., dissenting). See IP236 § IX. Mistaken eyewitness testimony remains the leading cause of wrongful conviction; indeed, there is "nothing more convincing [to a jury] than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'" Watkins v. Souders, 449 U.S. 341, 352 (1982) (Brennan, J., dissenting). The Special Master's finding that "the scientific findings can and should be used to assist judges and juries in the difficult task of assessing the reliability of eyewitness identifications," Report at 76, would go a long way toward addressing Professor Hugo Munsterberg's astute observation over

one century ago: "Justice would less often miscarry if all who are to weigh evidence were more conscious of the treachery of human memory," IP124 at 36. Without an understanding of key factors affecting the reliability of eyewitness identifications, jurors are, indeed, at the mercy of their own misconceived assumptions. As the Special Master observed, under the current system, "judges and juries alike are commonly left to make their reliability judgments with insufficient and often incorrect information and intuitions." Report at 77.

Juror sensitization is especially critical in light of jurors' proven difficulties in accurately assessing eyewitness testimony. See IP236 § IX. Jurors have been found to be overly impressed with witness certainty and often approach identification evidence as a question of whether the witness is "telling the truth," as opposed to assessing factors relevant to memory contamination and reliability or evaluating whether the witness is honestly mistaken.[24]

As the Third Circuit stated:

> "Jurors seldom enter a courtroom with the knowledge that eyewitness identifications are unreliable." Thus, while science has firmly established the "inherent unreliability of human perception and memory," this reality is outside "the jury's common knowledge," and often contradicts jurors' "commonsense understandings."

[24] As Munsterberg observed in 1908, "The confidence in the reliability of memory is so general that the suspicions of memory illusions evidently plays a small role in the mind of the juryman … [instead] dominated by the idea that a false statement is the product of an intentional falsehood." IP124 at 36.

> [United States v. Brownlee, 454 F.3d 131, 142 (3d Cir. 2006) (citations omitted) (remanded for a new trial on grounds that it "wrong to exclude expert testimony regarding the reliability of the very eyewitness identification evidence on which [defendant] was convicted").]

As is set forth in amicus's initial brief, if jury instructions are the "lamp to guide the jury's feet in journeying through the testimony in search of a legal verdict," then it is time for courts to start illuminating the jurors' path towards more reliable assessments of identification evidence. Brodes v. State, 614 S.E.2d 766, 771 (Ga. 2005) (citing Chase v. State, 592 S.E.2d 656, 659 (Ga. 2004) (reversing conviction due to jury instruction incorrectly citing witness confidence as indicator of reliability). See State v. Cromedy, 158 N.J. 112, 128 (1999) ("It is well-established in this State that when identification is a critical issue in the case, the trial court is obligated to give the jury a discrete and specific instruction that provides appropriate guidelines to focus the jury's attention on how to analyze and consider the trustworthiness of eyewitness identification." (citations omitted)); see also State v. Romero, 191 N.J. 59, 74-75 (2007) ("[W]hen we perceive … that more might be done to advance the reliability of our criminal justice system, our supervisory authority over the criminal courts enables us constitutionally to act.").

Our system of justice should only continue to rely upon the "good sense and judgment" of juries to assess the reliability of eyewitness identification if judges provide them with the necessary guidance to "measure intelligently" the weight of identification evidence, including whether it is the product of suggestive procedures proven to increase identification error and/or is weakened by the circumstances under which the eyewitness viewed the perpetrator. Manson, supra, 432 U.S. at 116. "At a minimum, additional judicial guidance to the jury in evaluating [eyewitness identification] testimony is warranted," since "to convict a defendant on such [flawed] evidence without advising the jury of the factors that should be considered in evaluating it could well deny the defendant due process of law." State v. Long, 721 P.2d 483, 492-93 (Utah 1986) (holding that "a proper instruction should sensitize the jury to the factors that empirical research has shown to be of importance in determining the accuracy of eyewitness identifications"). Simply put, "when identification is an essential issue at trial, appropriate guidelines focusing the jury's attention on how to analyze and consider the factual issues with regard to the reliability of a witness's identification of a defendant as the perpetrator are critical." Brodes, supra, 614 S.E.2d at 771. As the Special Master concluded: "Whether the science confirms commonsense views or dispels preconceived but not necessarily valid

intuitions, it can properly and usefully be considered by both judges and jurors in making their assessments of eyewitness reliability." Report at 75.

In order for jury instructions to effectively provide context to the jury, two common shortcomings must be eradicated. The first is that jury instructions are often poorly worded, insufficiently illuminating, and beyond the comprehension of the average juror. A jury cannot be guided by instructions it does not understand or which offer it little assistance. Thus, jury instructions must convey in comprehensible language our modern-day knowledge of the various factors that can increase eyewitness error. While New Jersey has taken important initial steps towards a better pattern instruction, the Special Master found that "the New Jersey model jury charges are appropriately cautionary but … lacking in specifics," Report at 78, echoing concerns expressed by Dr. Monahan when he stated that New Jersey's model instructions remain "excessively vague and with not nearly the amount of detail or reference to social science research that would be needed to appropriately apprise a jury of the context in which they can make a decision." 29T 66:24-67:10.

The second impediment to the effectiveness of jury instructions has been their timing. Usually courts provide eyewitness identification instructions at the conclusion of trial, along with numerous other instructions, and well after

the identification witnesses have testified. It is difficult for jurors to apply the instructions retroactively to the testimony, particularly when they may have already processed it through their lay understanding and misconceptions of memory and eyewitness identification evidence. Therefore, in addition to providing instructions at the conclusion of trial, courts should give the jury preliminary instructions prior to the eyewitnesses' testimony. This pre-testimony/pre-deliberation approach will better guide jurors by both increasing their real-time understanding of the identification evidence and enhancing their evaluation of the evidence during deliberations, particularly regarding previously unfamiliar concepts. In addition, through increased jury awareness of the impact of various factors on identification reliability, better-timed instructions will be more likely to deter law enforcement from using suggestive procedures.

H. Courts Should Carefully Evaluate and Make Findings Regarding the Following System and Estimator Variables Proven to Impact the Reliability of Identifications, and When Relevant, and at a Minimum, Incorporate Them into Contextual Jury Instructions

3. System Variables

(1) **Appropriate admonitions to witnesses**.[25] Based on the robustness of the scientific findings that proper witness

[25] See Guidelines § I.B ("The witness should be instructed prior to the photo or live lineup identification procedure that the perpetrator may not be among those in the photo array or live lineup and, therefore, they should not feel compelled to make an

warnings, also known as unbiased instructions, lead to fewer false identifications, 25T 20:19-22, courts should consider whether law enforcement in fact gave unbiased instructions when assessing the reliability of eyewitness identification evidence, 25T 86:20-25; 26T 49:16-21. Studies indicate that jurors do not necessarily know about witness warnings and their possible effects, and thus, as the State's expert testified, it is important that jurors know both whether warnings were given and the effects of such biased/unbiased instructions.[26] 26T 49:22-50:10; see also 18T 65:15-20.

(2) **Conducting the identification procedure double-blind.**[27] Double-blind testing, a critical staple of science, enhances the reliability of identification evidence in numerous ways. First, it protects against a robust phenomenon that scientists call the experimenter expectancy effect, where administrators put pressure on or cue

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identification."); see also IP236 § IV.B; D54 (meta-analysis on witness warnings); D92 (White Paper recommending witness warnings).

[26] See State v. King, 390 N.J. Super. 344, 361-63 (App. Div. 2007) (holding that a more detailed jury charge regarding the suggestiveness of the identification procedures was warranted, and specifically finding that the trial court should have given the jury a Ledbetter charge for law enforcement's failure to warn the witness that the perpetrator may not be in the lineup) (citing Herrera, supra, 187 N.J. at 509-10); see also State v. Ledbetter, 881 A.2d 290, 316 (Conn. 2005) (exercising supervisory authority to require an instruction to the jury in those cases where the police fail to provide warnings to witnesses); Commonwealth v. Santoli, 680 N.E.2d 1116, 1121 (Mass. 1997) (holding that eyewitness jury instructions cannot permit jury to consider the strength of the identification in assessing its accuracy).

[27] See Guidelines § I.A ("In order to ensure that inadvertent verbal cues or body language do not impact on a witness, whenever practical,… the person conducting the photo or live lineup identification procedure should be someone other than the primary investigator assigned to the case."); see also IP236 § IV.D; IP30 (meta-analysis on the experimenter expectancy effect).

witness, whether inadvertently or not, to make specific decisions. See IP30 (meta-analysis which analyzed 345 studies and concluded that there is less than one chance in a million that there is no relation between an experimenter's expectations and the behavior of the person being tested). Second, instructing witnesses that the administrator does not know who the suspect is reduces their tendency to look to the administrator for guidance. Third, double-blind testing protects undermining other best practices, such as warning witnesses that the perpetrator may not be in the lineup and selecting fillers in such a way as to avoid bias against the suspect. Fourth, it eliminates the chance that the administrator can provide immediate feedback to the witness confirming the accuracy of her identification. See IP7. Fifth, it protects against administrators tainting witnesses' certainty statements in the course of obtaining such a statement. See IP9. And sixth, since a blind administrator is not aware of who the suspect is, the administrator would not be able to selectively record data depending on its consistency with the hypothesis (i.e., whether or not the witness picked the suspect or a filler). 14T 60:10-16. While the importance of double-blind administration may be well-understood by scientists, it is not within jurors' common knowledge. In

one juror survey, 45% of respondents did not understand the importance of double-blind administration of lineups: 27% either thought it made no difference or were unsure whether it mattered that the lineup was done double-blind or non-blind, while 18% thought that double-blind administration would actually render the identification *less* reliable. D103 at 203-04, 210.

(3) **Obtaining a certainty statement in the words of the witness at the time of the identification, and avoiding any confirming feedback prior to the obtainment of such a statement.**[28] Despite the meaninglessness of a witness's inflated confidence in her identification on the witness stand, jurors perceive such witnesses to be more accurate, while perceiving witnesses with suppressed confidence as less accurate. 17T 92:16-20; D4 at 153. But since most eyewitnesses who testify at trial are highly confident in their identifications, irrespective of their actual accuracy, witness confidence is mostly a useless tool for helping jurors distinguish accurate from inaccurate witnesses. 20T 9:18-20, 10:1-8. If a court finds that a certainty statement was not obtained in the words of the

[28] See Guidelines § II.E.1 ("Record both identification and nonidentification results in writing, including the witness' own words regarding how sure he or she is."); id. §§ II.A.4, II.B.6, II.C.5, II.D.8 ("If an identification is made, avoid reporting to the witness any information regarding the individual he or she has selected prior to obtaining the witness' statement of certainty."); see also IP236 § IV.C.iii; D68/S7 (meta-analysis on confidence-accuracy relationship); IP37/D76 (meta-analysis on post-identification feedback); 14T 59:15-60:4.

witness at the time of the identification, the court should preclude the witness from testifying at trial as to her confidence in her identification. Even if the confidence statement was taken at the time of identification, if jurors are going to be allowed to consider the eyewitness's confidence, courts must instruct jurors that confidence is not a good predictor of accuracy. 26T 39:5-19.[29]

(4) **Ensuring that no information, written or otherwise, is disclosed to the witness about the police suspect during the identification procedure.**[30]

(5) **Recording the identification procedure in its entirety, including recording filler and non-identifications.**[31] It is critical that police document not only identifications of

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[29] Under no circumstances should courts permit such testimony and then simply instruct jurors that they may consider the witness's confidence as a factor tending towards reliability. See Brodes v. State, 614 S.E.2d 766, 769 (Ga. 2005) (refusing to endorse, and advising trial courts to refrain from providing, an instruction authorizing jurors to consider a witness's level of certainty in his/her identification as a factor to be considered in deciding the reliability of that identification) (internal footnote omitted)); Santoli, supra, 680 N.E.2d 1116 (Mass. 1997) (holding that eyewitness jury instructions cannot permit jury to consider the strength of the identification in assessing its accuracy); Romero, supra, 191 N.J. at 76 ("Although nothing may appear more convincing than a witness's categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken. Therefore, when analyzing such testimony, be advised that a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification."); Long, supra, 721 P.2d at 490 ("Research has also undermined the common notion that the confidence with which an individual makes an identification is a valid indicator of the accuracy of the recollection."); State v. Hunt, 69 P.3d 571, 576 (Kan. 2003) (adopting the Utah Supreme Court's refined analysis of the Biggers factors as explained in Long, supra, and State v. Ramirez, 817 P.2d 774 (Utah 1991)).

[30] See Guidelines § I.E.7 ("Ensure that no writings or information concerning previous arrest(s) will be visible to the witness.").

[31] See Guidelines § II.E ("When conducting an identification procedure, the lineup administrator or investigator shall preserve the outcome of the procedure by documenting any identification or nonidentification results obtained from the witness."); Guidelines § E.1 ("Record both identification and nonidentification results in writing."); see also State v. Delgado, 188 N.J. 48, 51 (2006) (holding that out-of-court identification evidence must be suppressed if the police fail to make a detailed record of an identification procedure).

suspects, but non-identifications and filler identifications. When evaluating the identification from a scientific point of view, courts should take into consideration when a witness failed to identify the defendant at an initial identification procedure (by identifying a filler or not choosing anyone) before picking the defendant at a second identification procedure.[32] 22T 67:14-68:5. In Wade, the failure of the witness to identify the suspect in the first procedure was explicitly cited by the Supreme Court as a reliability factor in evaluating the admission of eyewitness testimony, although it is not repeated specifically in Manson. Wade, supra, 388 U.S. at 241.

(6) **Avoiding co-witness contamination.**[33] In cases involving multiple eyewitnesses, jurors should be told of the risks of co-witness contamination, 26T 77:19-24, the importance of separating witnesses, and to consider the contact between witnesses before, during, and after the identification.

[32] "[It] is clear that [when evaluating the reliability of an identification] one must consider the response of each eyewitness, not just those who identify the suspect, in order to assess the likely guilt of the suspect. In fact, almost without exception, the probability of guilt associated with an identifying eyewitness is reduced more by the addition of a nonidentifying eyewitness than it is increased by a second identifying eyewitness." IP82 at 420.

[33] See Guidelines § II.A.7, II.B.9, II.C.9, II.D.12 ("Instruct the witness not to discuss the identification procedure or its results with other witnesses involved in the case…."); see also IP236 § IV.A.ii.

(7) **Mugshot commitment.**[34] When jurors are evaluating an identification made by a witness who participated in multiple identification procedures involving the defendant, jurors should be instructed on the mugshot commitment effect. 26T 67:20-68:1.

(8) **Appropriate selection of fillers and unbiased lineups**.[35] It is important for courts to consider lineup bias and effective size,[36] particularly by using effective or functional size tests, when assessing the reliability of eyewitness identification evidence, and to hear from experts before trial on these issues. 26T 56:4-14. While courts often examine lineup factors such as the size, color, or placement of a suspect's photo in a photo array when assessing the degree of the procedure's suggestiveness, they often fail to evaluate these factors within the larger context of lineups as scientific experiments designed, in theory, to test the memory of eyewitnesses. 14T 57:17-24. It is important for courts to

[34] See IP236 § IV.F ("Mugshot commitment can occur when a witness makes an identification and becomes committed to that person as the perpetrator (such that the person tends to become engrained in the witness's memory), making the witness likely to identify the same person again in a subsequent identification procedure, even if the witness is mistaken."); D51 (meta-analysis on mugshot commitment).

[35] See Guidelines §§ I.E.2, I.F.2 (the police should "select fillers (non-suspects) who generally fit the witness' description of the perpetrator"); see also IP236 § IV.E.i; D92 (White Paper recommending match-to-description filler selection).

[36] Since Manson, scientists have developed two different statistical tests to measure whether a lineup is biased against the defendant: functional size, which is the probability that the suspect will be identified, and effective size, which is an evaluation of the number of suitable people in the lineup, or its structural fairness. 22T 12:2-5; 26T 51:2- 52:1; IP129 at 161.

take into account the method by which fillers are selected when assessing the reliability of eyewitness identification evidence, 26T 59:12-17, including whether one or more fillers do not match a significant aspect of the witness's description, or if only the suspect matches the significant aspects of the witness's description. While the rationale for selecting fillers in a specific manner might be too technical for a jury, jurors should be informed that there is a best practice for selecting fillers in order to minimize bias towards the defendant and instructed on whether that practice was followed. 26T 59:24-60:5.[37] If an effective size analysis has been introduced into evidence, jurors should be instructed on that as well. 26T 59:18-23. Additionally, any evaluation of the fairness of a lineup should include the number of fillers (minimum four for live lineups, five for photo lineups).[38]

(9) **Law enforcement's use of composite sketches.**[39] Jurors should be informed about the dangers and low utility of facial composites. 26T 72:1-14.

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[37] To minimize biased lineups, a two-part procedure should be followed: first, fillers should be selected who fit the witness's description of the perpetrator, and second, the fillers must be sufficiently similar to the suspect so that the suspect does not stand out. 22T 8:6-8; 26T 58:6-20; IP22 at 55; IP85. If a suspect's features do not match the witness's description, the fillers should match the suspect regarding those features. 22T 8:15-20.

[38] See Guidelines § I.E.4 ("In composing a photo lineup … [i]nclude a minimum of five fillers (nonsuspects) per identification procedure."); id. § I.F.4 ("In composing a live lineup … [i]nclude a minimum of four fillers (nonsuspects) per identification procedure.").

[39] See IP236 § IV.H.

(10) **Law enforcement's use of showups.**[40] Showups produce a higher rate of mistaken identifications than lineups when an innocent suspect resembles the actual perpetrator, the further in time from the crime it is conducted, and the greater the suggestiveness of the circumstances surrounding it, but nonetheless may be permissible when necessary and where a lineup is not feasible. Judges and jurors should consider the necessity of the showup, how soon after the incident it was conducted, where the showup was conducted, whether the suspect was in handcuffs, what the witness was told before, during, and after the showup, whether the police properly instructed the witness, and any additional relevant circumstances surrounding the showup.

4. Estimator Variables

(1) **Cross-racial identifications.**[41] Jurors tend to underestimate the effect of own-race bias, and thus should be informed about its effect in appropriate cases involving cross-racial identifications. 26T 81:2-14, 83:8-13; see also Cromedy, supra, 158 N.J. 112.

(2) **Weapon focus.**[42] Jurors should be informed about the potential decrease in the accuracy of an identification

[40] SeeIP236 § IV.I; D36 (meta-analysis on showups).
[41] See IP236 § V.A; IP68/D39 (meta-analysis on own-race bias).
[42] See IP236 § V.B; IP69/D41 (meta-analysis on weapon focus).

caused by the presence of a weapon. See 19T 9:1-5; 26T 86:13-19, 87:10-15.

(3) **Level of witness's stress.**[43] Jurors should be informed about the potential decrease in the accuracy of an identification caused by a highly stressful event. See 26T 87:10-15, 91:13-17.

(4) **Distance.**[44] IP20 (by examining with precision how distance translates directly into visual clarity, this study demonstrates the maximum clarity of a particular face at a particular distance, and can be used by courts to assess the impact of the distance factor on eyewitness reliability); see 19T 9:11-12; 23T 61:25-62:2, 66:4-9; 26T 98:4-11. Even with 20/20 vision and excellent lighting conditions, face perception begins to diminish at 25 feet and nears zero at about 110 feet, and faces are essentially unrecognizable at 134 feet. Jurors should be informed that as faces move farther away, people's ability to identify those faces declines.

(5) **Duration of the event.**[45] Jurors should also be informed that eyewitnesses frequently overestimate event durations. 26T 105:7-23.

[43] See IP236 § V.C; D38 (meta-analysis on stress).
[44] See IP236 § V.D; IP20.
[45] See IP236 § V.F.

(6) **Whether the perpetrator was wearing a "disguise".**[46] Jurors should know and consider scientific research on the negative effects of disguise on identification accuracy when evaluating the reliability of eyewitness identification evidence. 26T 101:12-19.

(7) **Amount of time between the incident and the identification (i.e., the extent of the forgetting curve).**[47] Jurors should understand that most forgetting occurs fairly quickly, such that whereas the difference between one and two weeks is trivial, the difference between one day and two days is more significant. 15T 13:24-14:5.

(8) **Condition of the witness**[48] (for instance, whether the witness was intoxicated). See 19T 7:18-24.

I. On the Basis of Findings at Pretrial Hearings, Courts Should Exclude Specific Portions of Identification Evidence Found to Have Been at Particular Risk of Contamination.

In cases where the police fail to obtain a certainty statement in the witness's own words at the time of the out-of-court confrontation, or where there has been confirming feedback, it is impossible for courts or juries to evaluate properly a witness's highly persuasive trial testimony regarding her confidence in the identification, proffered months or even years after the identification. See IP236 § IV.C.iii. As noted

[46] See IP236 § V.I.
[47] See IP236 § V.H.
[48] See IP236 § V.K.

above, the limited correlation between confidence and accuracy is relevant only with regard to the confidence that is measured at the time of the identification, before there has been an opportunity for confirming feedback to intervene and artificially raise the witness's level of confidence.[49] 18T41:1-5. Indeed, the Attorney General's Guidelines recognize the importance of securing a contemporaneous statement of certainty as well as prohibiting positive reinforcement in the identification: "If an identification is made, avoid reporting to the witness any information regarding the individual he or she has selected prior to obtaining the witness' statement of certainty." Guidelines §§ II.A.4., II.B.6, II.C.5, II.D.8.[50] Evidence in cases devoid of contemporaneous confidence statements, or where confirming feedback has occurred, may not raise a substantial likelihood of a mistaken identification, yet the prejudice of permitting the jury to hear such evidence

[49] Even contemporaneous confidence is of limited value, as research has found that witnesses who are highly confident at the time of the identification are inaccurate 10-25% of the time. 20T 11:18-12:2; D4 at 153; 26T 36:14-20. See also D73 at 26 ("[O]ur data reinforce what researchers have known for a long time: Namely, an extremely confident witness can be 'just plain wrong' regardless of the encoding and identification test conditions that shape the patterns of identification responding. In other words, our findings merely reinforce the conclusion stated earlier that confidence can provide a strong pointer for police investigators but certainly cannot be taken as unequivocal evidence of identification accuracy."); IP236 § IV.C.iii (explaining the confidence-accuracy relationship).

[50] See also D73 at 11 ("Although researchers agree that courtroom expressions of confidence are uninformative, our findings indicate that confidence assessments obtained immediately after a positive identification can provide a useful guide for investigators about the likely accuracy of an identification.").

outweighs its probative value.[51] In such cases, even though the court is admitting the identification evidence generally, it should, either sua sponte or upon a defendant's motion in limine, prohibit the witness from testifying at trial (and the prosecution from arguing to the jury) about the witness's confidence in the identification (i.e., that he was or is "100% certain" or "could never forget his face"). 18T 54:16-18.

J. When Findings of Suggestion and/or Unreliability Have Undermined a Court's Confidence in the Accuracy of the Identification, it Should Give the Jury a Strongly Worded Cautionary Instruction that it Should Treat the Identification Evidence with Great Caution and Distrust.

In cases in which a court does not deem an identification so contaminated that it created a substantial likelihood of misidentification, yet where by the conclusion of trial the court doubts the accuracy of the identification evidence (either because of law enforcement's transgression of best practices, or an egregious or particularly reckless violation, or because the reliability of the identification has been otherwise significantly undercut), in addition to providing the jury with specifically-tailored contextual instructions on each variable's effect on accuracy,[52] it should give the jury a strongly-worded

[51] See N.J.R.E. 403 ("[R]elevant evidence may be excluded if its probative value is substantially outweighed by the risk of … undue prejudice, confusion of issues, or misleading the jury").
[52] See IP237 at 66-78 (Proposed Eyewitness Identification Instructions).

cautionary instruction regarding the reliability of the eyewitness identification evidence as a whole.[53]

This strong cautionary admonition takes heed of an undeniable and understandable reality: courts are understandably reluctant to keep potentially relevant eyewitness evidence from the jury, especially if it is an identification made by a crime victim, and if the trial judge believes that at least one juror could find the evidence reliable beyond a reasonable doubt. Recognizing this reality, but consistent with the urgent need for judges to devote great attention to reliability assessments and remain alert for factors that increase the rate of identification error, enhanced cautionary instructions in cases in which courts' confidence in the accuracy of the identification has been substantially undermined strikes a balance, admitting evidence of low probative value but guaranteeing that the jury is appropriately warned of the shortcomings of such evidence.[54]

[53] Such an instruction is authorized by Romero, supra, 191 N.J. at 76, requiring that New Jersey's model jury charge underscore the close scrutiny jurors must give to eyewitness identification evidence in all identification cases. Amicus's proposed instruction would simply be a stronger version of the Romero instruction reserved for cases in which the identification evidence is particularly weak or has been seriously compromised.

[54] Concerns that such an instruction usurps the role of the ultimate factfinder are misplaced. First, jury instructions, including specific cautionary instructions, are a familiar component to the jury system. See, e.g., N.J.R.E. 104(b). Second, a strong cautionary instruction, like jury instructions generally (and other intermediate remedies), are a far less drastic measure of usurpation than suppressing evidence.

Examples of more moderate cautionary language can be found in certain jurisdictions' standard identification instructions,[55] or, analogously, in instructions on accomplice testimony.[56] The framework here proposed, by contrast, calls for a stronger cautionary instruction in these very problematic cases, such as:

> Given the suggestive procedures used and/or presence of numerous factors proven to decrease identification accuracy in this case, you must look at the identification evidence with extreme caution and scrutinize it with great care.
>
> Or:
>
> Given the suggestive procedures used and/or presence of numerous factors proven to decrease identification accuracy in this case, you should view the identification with distrust.

K. Courts Should Encourage the Use of Experts at Pretrial Hearings.

As stated in amicus's earlier brief to this Court, the proposed renovated framework embraces the use of expert testimony in appropriate cases under New Jersey Rules of Evidence 702to ensure that both judges and juries become sensitized to the generally accepted and reliable scientific research on factors affecting identification accuracy, about which most jurors, and even many judges, lack common knowledge.[57]

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[55] See, e.g., OUJI-CR 9-19 Evidence—Eyewitness Identifications (Okla.) ("Eyewitness identifications are to be scrutinized with extreme care.")

[56] See Accomplice Testimony Instruction in Manual of Model Criminal Jury Instructions, Rule 4.9 (9th Cir. 2005); see also State v. Marra, 610 A.2d 1113, 1123 (Conn. 1992) ("[T]he jury must look with particular care at the testimony of an accomplice and scrutinize it very carefully before … accept[ing] it.").

[57] See State v. Gunter, 231 N.J. Super. 34, 41-43 (App. Div. 1989); State v. Kelly, 97 N.J. 178, 208 (1984); People v. Lee, 750 N.E.2d 63, 66 (N.Y. 2001) ("[I]t cannot be said that psychological studies regarding the accuracy of an identification are within the ken of the typical juror."); Copeland, supra, 226 S.W.3d at 299 (holding that it

In general, jurors give less weight to witness confidence after hearing from an expert, 20T 27:13-18, and are better able to differentiate between good and poor witnessing conditions. 20T 28:22-24, 29:17-19.

Experts can also educate judges about the meta-analyses that exist in the field of eyewitness identification research, thereby assisting courts in conducting scientifically sound assessments of identification evidence and crafting appropriate remedies. Moreover, hearing from experts at pretrial hearings will provide courts with a preview of the expert's trial testimony and permit better-informed decisions regarding whether to allow the expert to testify at trial. Thus, courts should admit eyewitness expert testimony at hearings and at trial – even on their own initiative – to fortify their factfinding function and better educate juries on the purpose behind best practices and the increased rate of error when such practices are not observed.

VI. CONCLUSION

As a result of the impressive body of research in the field of eyewitness identification that has emerged since the Manson

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was an abuse of discretion to exclude expert testimony regarding cross-racial identifications and confirming feedback, observing that "scientifically tested studies, subject to peer review, have identified legitimate areas of concern" with respect to juror sensitivity to these issues); Clopten, supra, 223 P.3d at 1112 (expert testimony regarding factors shown to contribute to inaccurate eyewitness identifications should be admitted whenever it meets the evidence rules requirements governing expert admissibility); Long, supra, 721 P.2d at 490 ("People simply do not accurately understand the deleterious effects that certain variables can have on the accuracy of the memory processes of an honest eyewitness."); State v. Chapple, 660 P.2d 1208 (Ariz. 1983); People v. McDonald, 690 P.2d 709 (Cal. 1984); IP140.

decision, we know far more today than we did in 1977 about factors that affect the rate of identification error. Indeed, the robust empirical study of eyewitness identification is unparalleled, both in its volume and validity, compared to any other field in the arena of social science and the law. This outpouring of rigorous research, along with confirmation by post-conviction DNA exonerations of both the prevalence and dangers of misidentification, has created an imperative: courts must take affirmative steps to renovate Manson's dilapidated legal structure for handling identification evidence, which fails to protect the innocent from wrongful convictions based on mistaken identifications and undermines the best efforts of law enforcement to apprehend and convict the guilty. As noted by the Special Master, "there is no sound reason or policy why the judicial branch should disregard the scientific evidence, continue to focus exclusively on police suggestiveness, ignore other factors bearing on witness reliability, and seek no innovative means to inform judges and juries about the vagaries of eyewitness memory and identification." Report at 82.

Building upon the social framework theory of Monahan and Walker, the legal architecture proposed here strives to create a dynamic structure that enhances the reliability of judicial assessments of identification evidence, and ultimately verdicts, through the integration of powerful scientific research. The

Special Master stressed the "critical importance" of two core elements of amicus's proposal that will "appropriately expand and improve the assessment of eyewitness reliability by judges and jurors alike" and remedy Manson/Madison's flaws: mandatory pretrial hearings at which the prosecution bears the burden of going forward to produce indicia of reliability, as it does with other forms of trace and scientific evidence, and informed pre-trial assessments of eyewitness evidence that ensures that judges and juries are educated about and guided by scientific findings in this area. Report at 86.

These pretrial proceedings must include hearing from the eyewitnesses themselves as well as ascertaining whether or not law enforcement complied with the set of court-endorsed, empirically-based best practices for conducting identification procedures promulgated by the New Jersey Attorney General. In determining whether the identification evidence has been contaminated, courts must make specific findings at pretrial hearings regarding factors proven to inhibit or pollute memory trace evidence. Based on those findings, courts can design a series of intermediate remedies designed to ameliorate the risks posed by tainted identification evidence by providing appropriate context and guidance for jurors to evaluate its reliability.

There are numerous advantages to this proposed framework. First, it is scientifically robust, supported by decades of peer-reviewed rigorous scientific research. Second, it is doctrinally sound, supported by Monahan and Walker's well-developed concept of social frameworks, and aimed at strengthening a core objective of our criminal justice system: the due process right of a fair trial conducted before impartial, well-guided juries. Third, it is realistic, not only because it does not necessitate abrogating the ultimate standard for allowing eyewitness identification evidence to be presented to the jury, as established by Supreme Court precedent, but also because it avoids placing all its eggs in the thorny nest of suppression, instead offering courts appealing intermediate remedies that will allow them to convey to juries appropriate caution about objectively problematical but admissible identifications. This framework provides courts with much more information and a more meaningful role in admissibility hearings, requiring findings based on examinations of suggestion (measured in part by compliance with a clear set of bright-line rules), contamination, and unreliability, which automatically trigger certain trial-based remedies, including powerfully-worded cautionary instructions in appropriate cases.

Fourth, it will reduce mistaken identifications by more effectively curbing suggestive identification procedures. Under

a revamped reliability- and remedy-based application of Manson, governed largely by clear, simple, easily-implemented rules and reasonable remedies, the articulation of specific safeguards for noncompliance with those rules will discourage – and perhaps eradicate – improper police practices and encourage law enforcement to embrace even better procedures. "With clear guidelines, courts are able to clamp down on … practices [that violate them], as the Supreme Court did recently in condemning 'question first' practices that undermine the effectiveness of the Miranda warning." D88 at 140. Among the better procedures law enforcement might consider is more comprehensive documentation and accurate transcription of "primary" evidence, such as initial witness descriptions and contemporaneous confidence statements, and videotaping lineup procedures.

Fifth, it will result in robust trial records, replete with findings, discussions of and citation to scientific research, and more thorough arguments about identification evidence. In reviewing Manson/Madison rulings, appellate judges must often rely on woefully uninformative trial records from which it is very difficult to assess the relevant scientific and legal issues that relate to whether identification procedures were suggestive or the identification was reliable. By increasing the likelihood of reliability hearings, carefully-crafted findings of fact, and formulation of (or at the very

least deliberation about) appropriate remedies, this litigation model will provide appellate courts with far richer records that will not only better inform them about identification evidence but from which they can successfully integrate robust scientific findings into clear and consistent precedent.

Lastly, it will reduce wrongful convictions by providing significantly greater guidance to juries as to the factors that increase identification error. The best way to fulfill the Supreme Court's expectation in Manson that identification evidence will be heard by juries with "good sense and judgment" is by ensuring that jurors understand how certain variables affect identification evidence and dispelling many of the misguided notions they hold about human memory and eyewitness evidence. Manson, supra, 432 U.S. at 116.

Notably, Manson in no way prohibits the central tenets of our design. Encouraging courts to be conversant with scientific findings that are generally accepted in the field of the eyewitness identification research, structuring pretrial hearings so that courts elicit better data, and providing jurors with scientifically sound context for their assessment of eyewitness testimony, is entirely consistent with the Manson Court's objective that "reliability" is the "linchpin" for judicial analysis. Nor can there be any doubt that the remedial legal architecture proposed here can be implemented by the

exercise of supervisory powers, through state constitutional due process guarantees, or through familiar state evidentiary rules.[58]

In sum, adoption of the Special Master's Report in its entirety, and implementation of the legal framework proposed here, will enhance the reliability of verdicts, minimize the risk of wrongful conviction based on mistaken identification, and affirm this Court's leadership as a nationwide trailblazer in the quest to improve the criminal justice system.

Respectfully submitted,

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Date: September 27, 2010

[58] See Romero, supra 191 N.J. at 74-75 (when "more might be done to advance the reliability of our criminal justice system, our supervisory authority over the criminal courts enables us constitutionally to act"); see also Ledbetter, supra, 881 A.2d at 316 (exercising supervisory authority to require an instruction to the jury in those cases where the police fail to provide warnings to witnesses); Commonwealth v. Johnson, 650 N.E.2d 1257, 1260 (Mass. 1995) (Manson does not satisfy article 12 of the Declaration of Rights of the Massachusetts Constitution); People v. Adams, 423 N.E.2d 379, 383-440 (N.Y. 1981) (state constitution affords additional protections above the bare minimum mandated by federal law); State v. Dubose, 699 N.W.2d 582, 596-97 (Wis. 2005) (relying on the Due Process Clause of the Wisconsin Constitution).