IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, v. SAMUEL ADAM LAWSON, Defendant-Appellant.	Douglas County Circuit Court Case No. 03CR1469FE Court of Appeals No. A132640 Supreme Court No. S059234

BRIEF OF *AMICUS CURIAE* THE INNOCENCE NETWORK

On Appeal from the Judgment of the Circuit Court for Douglas County
Honorable RONALD POOLE, Judge

Affirmed by Written Opinion: December 15, 2010
Before: Wollheim, P.J., Brewer, C.J. (authored majority opinion), and Sercombe, J. (dissenting)

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INTEREST OF *AMICUS CURIAE*

The Innocence Network (the "Network") is an association of organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered post-conviction can provide conclusive proof of innocence. The sixty-six current members of the Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Australia, Canada, the United Kingdom, and New Zealand.[1] The Innocence Network and its members are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system convicted innocent persons, the Network advocates study and reform designed to enhance the truth-seeking functions of the criminal justice system to ensure that future wrongful convictions are prevented.

The vast majority of individuals exonerated by DNA testing were originally convicted based, at least in part, on the testimony of eyewitnesses who turned out to be mistaken. Many of those misidentifications were made in the context of suggestive behavior by law enforcement or other sources, such as the media. As a result, in order to minimize the risk of wrongful convictions based on eyewitness misidentifications, the Network has a compelling interest

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[1] A list of member organizations is attached hereto as Appendix A.

in the adoption of a legal framework, together with law enforcement procedures, that reduce the risk of a finding of guilt based on misidentification.

In this case, the Innocence Network seeks to present a broad perspective on the issues presented in the hope that the risk of future wrongful convictions will be minimized.

QUESTIONS PRESENTED AND PROPOSED RULE

Questions Presented:

> (1) Did the Court of Appeals err in concluding that the state had met its burden, under *State v. Classen*, 285 Or. 221 (1979), of proving that an eyewitness identification obtained through concededly suggestive procedures was nonetheless independently reliable?
>
> (2) Was the Court of Appeals correct in suggesting that any error in admitting eyewitness testimony in suggestive-identification cases can be cured at trial by cross-examination, expert testimony, closing arguments, and jury instructions?

Proposed Rule:

Amicus urges the Court to prescribe a new standard of admissibility for eyewitness identification testimony incorporating more than thirty years of widely accepted scientific research. Under the proposed legal framework, the prosecution would have the burden of establishing, at a pretrial hearing, reliability of the evidence presented. Further, the new framework would incorporate rules for weighing identification evidence, including placing the greatest weight on variables proven to best indicate reliability. Finally, the

new framework would incorporate detailed findings of fact, "contextual" jury instructions and expert testimony to ensure that jurors accurately understand the reliability of eyewitness identifications, the effects of system and estimator variables as well as suggestive or otherwise contaminating events, and scientifically established indicators of accuracy or inaccuracy.

STATEMENT OF THE CASE

Amicus adopts and incorporates the Statement of the Case as presented by Appellant in his Brief to this Court.

SUMMARY OF ARGUMENT

The United States Supreme Court has long acknowledged that identification procedures can be so "unnecessarily suggestive and conducive to irreparable mistaken identification" that a defendant is denied due process of law when the identification is admitted as evidence in trial. *See, e.g., Stovall v. Denno*, 388 U.S. 293, 301-302 (1967).[2] This Court has gone even further, acknowledging in *Classen* "the widely recognized risk that such identification may often be unreliable at best and at worst may be the psychological product of the identification procedure itself." *State v. Classen*, 285 Or. 221, 227, 590 P.2d 1198, 1200 (1979). This case presents a prototypical example of an

[2] *Overruled on other grounds by Griffith v. Kentucky*, 479 U.S. 314, (1987).

identification that is the product of the very suggestive identification procedures used to obtain the identification.

Eyewitness misidentification is the single greatest cause of wrongful convictions in the United States, playing a role in more than 75% of convictions overturned by DNA testing.[3] Faced with overwhelming evidence of this recurring injustice, long-held assumptions regarding the reliability of eyewitness identifications are being reexamined by stakeholders in the criminal justice system, from law enforcement to prosecutors to courts. Little more than a week ago, the New Jersey Supreme Court issued a landmark ruling, *State v. Henderson* ("*Henderson II*"), which considered the vast body of scientific research relating to eyewitness identification and memory and found, in light of that research, that New Jersey's *Classen*-like framework[4] for admissibility of eyewitness identification evidence "does not fully meet its goals." 2011 WL 3715028, *2 (N.J. Aug. 24, 2011). The New Jersey Supreme Court explained:

> [The current legal framework] does not offer an adequate measure for reliability or sufficiently deter inappropriate police conduct. It also overstates the

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[3] Innocence Project, *Eyewitness Misidentification*, http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php. *See also* Brandon L. Garrett, Convicting The Innocent: Where Criminal Prosecutions Go Wrong 48 (2011) (finding that 190 of the first 250 DNA-based exonerations in the United States involved eyewitness misidentification).

[4] Like Oregon, New Jersey's framework for eyewitness identification was based on *Manson v Braithwaite,* 432 U.S. 98 (1977).

> jury's inherent ability to evaluate evidence offered by eyewitnesses who honestly believe their testimony is accurate.

Id.

The instant case provides this Court with the opportunity to reevaluate its own 30-year-old legal framework for evaluating the admissibility of eyewitness identification evidence (set forth in *Classen*[5]) in light of more than 30 years of extensive, reliable and consistent scientific research concerning eyewitness identification and memory that has been amassed on the subject since *Classen* was decided. The conviction of Samuel Lawson – who has consistently maintained his innocence from the time he began cooperating with law enforcement and who has never been conclusively connected to this crime, except for through the testimony of a single eyewitness – demonstrates that Oregon's current legal framework governing the admissibility of eyewitness identification evidence poses an unacceptable risk of wrongful convictions and inadequately protects the rights of defendants in several critical ways. First, *Classen's* "independent source/reliability" test is confounded because scientific research has proven that the use of suggestive procedures and confirming feedback falsely inflate "reliability factors." Second, the *Classen* test unduly focuses on police misconduct and does not address the numerous other factors

[5] This Court decided *Classen* after the Supreme Court's decision in *Manson v. Brathwaite*, and largely adopted the Supreme Court's framework.

that affect reliability. Third, *Classen* fails to provide jurors with necessary information and guidance to correct misconceptions about eyewitness memory.

For these reasons, *Amicus Curiae* Innocence Network urges the Court not only to reverse Mr. Lawson's conviction but also to prescribe a revised test for admissibility of eyewitness identification that incorporates modern science of eyewitness identification and memory and works to protect against the risk of wrongful convictions based on eyewitness misidentification.

STATEMENT OF FACTS[6]

There is ample reason that Sherl Hilde could identify no one for two years after she had been shot and her husband murdered. The shooting occurred in the dark of night at an Oregon campground, and she was shot from outside of her trailer as she closed a window. *State v. Lawson*, 239 Or. App. 363, 365-6, 244 P.3d 860, 861 (Ct. App. 2010). Her husband called 911, but was shot as he went outside to speak with the operator. Immediately after she and her husband were shot, a man approached the trailer in which she lay injured and demanded the keys to their truck. The man placed a cushion over her face and, accordingly, Ms. Hilde's view of the perpetrator was obstructed. *Id.*

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[6] Amicus adopts the facts as set forth in the Petitioner's brief. We highlight, however, those facts relevant to our discussion.

When the paramedics reached Ms. Hilde she was critically wounded, shot in the chest and had no movement in her legs. *Id.* Her evacuation from the campgrounds was arduous, two ambulances and then a helicopter transported her to the hospital. *Id.* at 368-369. At points, she was rambling and hysterical. Her statements to the first responders, and subsequently to hospital personal, cast grave doubts on whether she had ever seen the shooter. *Id.* at 368-9, 395-6. She told a sheriff shortly after being shot that the shooter said he did not kill her as she had not seen his face. *Id.* at 368. She then repeated to hospital workers that she had not seen the shooter's face so her life had been spared. At one point during her evacuation she even identified the helicopter pilot as the shooter. *Id.* at 368, 395.

The details that followed in the coming weeks buttressed her initial assertions that she had not seen the shooter's face. For example, although Ms. Hilde described characteristics like the perpetrator's hat and shirt, she could not identify any of his specific features, such as his skin color, hair color, eye color, scars or tattoos. *Id.* at 397. Further, a hospital worker present during one of Ms. Hilde's police interviews testified that Ms. Hilde had indicated "that it had been dark, that there had been a pillow over her face, and that [Ms. Hilde] was apologetic that she could not see the attacker." *Id*. at 369.

There was additional, powerful exculpatory evidence as to Mr. Lawson. Two days following the shooting, Ms. Hilde was shown a photo array

which contained Mr. Lawson's picture. *Id.* at 396-397. Ms. Hilde did not identify the shooter in that array. A month after the shooting, Ms. Hilde again failed to identify Mr. Lawson from a photographic array and she declined to try to identify the perpetrator in a lineup. *Id.* While it is undisputed that Mr. Lawson had been at Ms. Hilde's campsite that day, her testimony about whether the shooter was the same person who had been at the campsite earlier was inconsistent, and in any event she provided little detail describing the shooter for two years and could not identify Mr. Lawson in fairly implemented identification procedures. *Id.* at 396.

It is against this backdrop that we must look at the identification procedures the state concedes were tainted with suggestion. To do so, we must analyze those procedures – and the corrupting effect they may engender – through the lens of the current science on memory, its fallibility, and its relation to witness identification. It is now axiomatic that memory is not like a video recorder where events are stored and can easily be played back. When one witnesses an event and it is encoded, such events can be distorted and even contaminated by subsequent events. So much so that one's ability to recall the event can become wholly unreliable. The facts here present the paradigmatic example of how such a danger can be realized: there can scarcely be any confidence of what Ms. Hilde actually saw and there is grave danger that her memory was contaminated by patently illegal police procedures.

Two years after the incident, Ms. Hilde could not identify her shooter. Rather than employ a non-suggestive technique – as had been previously done – the police not only informed her that they had apprehended the man responsible for the shooting, but also employed what are widely regarded as the most suggestive identification techniques. First, roughly a month before trial, a detective took Ms. Hilde to a pre-trial hearing to view Mr. Lawson. There, in the courtroom, he showed her a single photograph of Mr. Lawson. *Id.* at 370-71. The same detective then had Ms. Hilde observe Mr. Lawson in the courtroom where he sat as a defendant during a pretrial hearing, charged with shooting Ms. Hilde and murdering her husband. *Id.* Following this observation, Ms. Hilde later that day saw a picture of Mr. Lawson in an officer's notebook as he was going through it in the district attorney's office. Only then, after all of those suggestive events, did Ms. Hilde identify Mr. Lawson as the perpetrator. Ms. Hilde then at trial expressed extraordinary certainty before the juror of Mr. Lawson's identity. *Id.* at 383-84.

Other troubling factors here bear directly on a court's ability to assess the reliability of Ms. Hilde's identification. No contemporaneous account of the tainted procedures was recorded; the police wrote no reports concerning the single photo identification or courtroom identification. (Trial Tr. 53-54, Nov. 9, 2005) There was not even any documentation of the selection from the photo array in the district attorney's office. *Id.* The information

concerning those proceedings was not turned over to the defense, but only revealed by the witness herself during cross-examination. Indeed, the police failed to properly disclose to the defense the two previous identification procedures where Ms. Hilde had failed to identify Mr. Lawson during non-suggestive procedures. (Trial Tr. 131-32, Nov. 8, 2005; Trial Tr. 45-46, Nov. 9, 2005).

The witness's claim of certainty, powerful before jurors, yet inextricably interwoven with taint, gives rise to the issues here. A careful review of the case compels the conclusion that the very framework under which Oregon courts admit eye-witness identification testimony and determine its reliability is at odds with the scientific research in the area. As such, the current framework is one that invariably will lead to unreliable evidence in courtrooms and wrongful convictions. It is that framework that must yield to science to make way for more accurate adjudication of identification issues.

THE SCIENTIFIC RESEARCH ON EYEWITNESS IDENTIFICATION AND MEMORY

Amicus adopts by reference the scientific research findings set forth in the brief of *Amicus Curiae University and College Professors.*

ARGUMENT

1. The *Classen* Framework Does Not Achieve The Goal of Using "Reliability as a Linchpin" to Protect Due Process and Fair Trial Interests

In *State v. Classen,* 285 Or. 221, 232 (1979), this Court set forth a two-part test for determining the admissibility of eyewitness identification testimony. Under that test, the defendant must first show that the process "leading to the offered identification was suggestive or needlessly departed from procedures prescribed to avoid such suggestiveness." *Id.* If so, the "prosecution must satisfy the court that 'the proffered identification has a source independent of the suggestive confrontation' or photographic display, or that other aspects of the identification at the time it was made substantially exclude the risk that it resulted from the suggestive procedure." *Id. Classen* identified a list of non-exclusive factors, identical to *Manson's* "reliability factors," to assist courts in making the second inquiry: (1) the witness's opportunity to view and attention given to the perpetrator's identifying features; (2) the timing and completeness of the witness's description of the perpetrator after the event; (3) "the certainty expressed by the witness" in her description; and (4) "the lapse of time between the original observation and the subsequent identification." *Id.* at 232-33 (citing *Manson v. Brathwaite*, 432 U.S. 98 (1977)).

While the *Classen* court directed that these reliability factors should not be treated as a checklist[7], we submit that Oregon courts have done just that. This is not a problem unique to Oregon: as legal scholars have observed, "[t]he *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." Timothy P. O'Toole, et al., Manson v. Brathwaite Revisited: Towards A New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures, 41 Valparaiso University Law Review 109, 113 (2006).

A. *Classen's* "Independent Source/Reliability" 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 *Classen* two-part test. Under *Classen*, courts must balance the corrupting effects of unduly suggestive identification procedures against "independent source/reliability factors" to determine the "ultimate issue": "whether an identification made in a suggestive procedure has nevertheless been

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[7] The *Classen* court also acknowledged that other factors may be relevant, "such as the age and sensory acuity of the witness, or a special occupational concern with people's appearance or physical features, or the frequency of his or her contacts with individuals sharing the general characteristics of the person identified." *Id.* at 233.

demonstrated to be reliable despite that suggestiveness." *Classen*, 285 Or. at 233.

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. Since a suggestive identification procedure can contaminate a witness's memory of the event, these "self report" variables often do not accurately reflect the actual circumstances at the time of the crime. *See* Donald P. Judges, *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide For Law Enforcement*, 53 Ark. L. Rev. 231, 265 (2000); Benjamin E. Rosenberg, *Rethinking the Right to Due Process in Connection With Pretrial Identification Procedures: An Analysis and a Proposal*, 79 Ky. L.J. 259, 276-79 (1991). *See also Henderson* at *34.

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*, 432 U.S. at 112 n.12. The *Lawson* appellate court made a similar error "in the crucible of the adversary process, a jury is usually in no worse position than a judge acting in a gatekeeper's capacity to determine the effect, if any, of improperly suggestive police techniques on the accuracy of eyewitness identification testimony." *Lawson*, 239 Or. App. at 386.

Like the two lower courts in *Lawson*, courts 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. For example, in this case, in assessing whether Ms. Hilde's identification had an "independent source", the trial court ignored the suggestive procedures it had identified and instead focused on Ms. Hilde's lengthy opportunity to observe the individual who had been at her campground earlier in the day, the fact that after the crime she "saw the defendant's profile from a relatively short distance, observed his attire and heard his voice," and her "*certainty*" that the individual she had seen earlier was the same individual who had shot her. *Id* at 381. This last fact simply ignores the significant body

of scientific research demonstrating that suggestive procedures inflate a witness's certainty while the vast majority of studies have confirmed that little or no correlation exists between a witness's certainty and the accuracy of the identification. The appellate court endorsed the trial court's finding, relying on the eyewitness's testimony that she "*deliberately* and surreptitiously moved her head in order to see the perpetrator" found that:

> her glance at him, although fleeting, was not the sort of casual observation of which the court was dismissive in *Classen*. Thus, although Sherl viewed the perpetrator only briefly, and in circumstances that certainly were not optimal for viewing, we conclude that at least certain aspects of this factor weigh in favor of a conclusion that Sherl's identification was independently reliable.

Id. at 382.

In so finding, the Court of Appeals relied on the eyewitness's self report of the quality of attention without ever considering that the suggestive identification procedures would have likely inflated not only the eyewitness's confidence, but also her memory of the conditions of her observation and the quality of her observation. By treating the analysis of an "independent source" as entirely distinct from the analysis of the suggestive procedures, both lower courts in this case failed to recognize the very effect suggestive procedures have on the self-reporting reliability factors articulated by *Classen*. *See* Gary L. Wells & Amy L. Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J.

Applied Psychol. 360, 374-75 (1998) (Finding that the type of feedback produced strong effects on the witness's retrospective reports of (a) their certainty, (b) the quality of the view they had, and (c) the clarity of their memory. Those witnesses who were merely told "good, you identified the actual suspect" became even more certain of their (false) identification, remembered having had a better view, and became more confident in the strength of their memories.)

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. *Accord Henderson II* at *44 ("rather than act as a deterrent, the *Manson/Madison* test may unintentionally reward suggestive police practices. The irony of the current test is that the more suggestive the procedure, the greater the chance eyewitnesses will seem confident and report better viewing conditions. Courts in turn are encouraged to admit identifications based on criteria that have been tainted by the very suggestive practices the test aims to deter.")

In this case, we cannot know whether law enforcement intentionally used suggestive procedures to first obtain an identification of Mr. Lawson from Ms. Hilde and then solidify her commitment to that identification. Law enforcement's explanation for its use of suggestive procedures – that Ms. Hilde was frightened of the perpetrator – does not explain why suggestive procedures were used, when non-suggestive methods (photo arrays or live lineups) could have been used in ways that did not increase her fear. Ultimately, the state was unable to offer a credible explanation for why law enforcement elected to use suggestive procedures after non-suggestive procedures failed to garner any evidence. We do, however, know that this was the practical effect of law enforcement's repeated use of suggestive identification procedures. Like so many eyewitnesses before her[8], Ms. Hilde went from a witness who was unable to identify Mr. Lawson in two photographic arrays and repeatedly stated that she had not seen the perpetrator and could not identify him, to a witness who "did not have any doubts, [] would never forget his face, and . . . always knew that the shooter was defendant."

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[8] In his exhaustive study of the first 250 DNA-based exonerations, Professor Brandon L. Garrett noted with surprise that in 92 of 161 cases (or 57% of cases) involving a "certain" eyewitness identifying an individual later exonerated by DNA, "witnesses reported they had *not* been certain at the time of the earlier identifications. Witnesses said that they had been unsure when they first identified the defendant, or they had trouble making an identification because they had not seen the culprit's face." Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong at 49 (2011).

Lawson, 239 Or. App. 398. As Justice William Brennan recognized, "[T]here is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'" *Watkins v. Sowders*, 449 U.S. 341, 352 (1981)(Brennan, J., dissenting). Unfortunately, almost all of the eyewitnesses whose identification led to the wrongful conviction of more than 190 exonerated individuals, were certain at the time of their identifications. Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong 49 (2011).[9]

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[9] The impact that suggestive procedures have on not only a witness's certainty but also on memory, is illustrated by the case of the wrongful conviction of Ronald Cotton. Mr. Cotton was convicted of breaking into a woman's apartment and raping her at knifepoint; the basis for the conviction was the eyewitness identification testimony of the rape victim, Jennifer Thompson. *See Jennifer Thompson*, I Was Certain, But I Was Wrong, N. Y. Times, Jun. 18, 2000. Ms. Thompson has described how, during the attack, she tried to observe as much as possible about the man who raped her, to make sure that, if given the opportunity, she would be able to identify him and help convict him. *Id.* at 15. Ms. Thompson did survive the attack and provided a description of her attacker to investigators, subsequently identifying Mr. Cotton in two separate lineup procedures, after which investigators gave her affirming post-identification feedback. *Id.* Ms. Thompson was "completely confident" in her identification: she was "sure" that she had picked the "right guy." *Id.* at 15.

In 1987, during a retrial following an appellate court reversal of Mr. Cotton's conviction, Bobby Poole – later identified through DNA to be the real perpetrator – was brought into court after word surfaced of his admission to the crime. *Id.* at 15. Ms. Thompson told the court that she had never seen Bobby Poole in her entire life and had no idea who he was. *Id.* After Ms. Thompson again identified Mr. Cotton as the perpetrator, Mr. Cotton was convicted a second time. *Id.*

B. *Classen* Overemphasizes Police Misconduct and Does Not Address Numerous Other Factors that Affect Reliability.

While Oregon courts – and, indeed the lower courts in *Lawson* – do consider the suggestive influence of private actors, the structure of the *Classen* framework overemphasizes state-orchestrated suggestion while underemphasizing the important effect suggestion from private actors may have. Given our contemporary scientific knowledge that eyewitness memory is 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. Chen*, 2011 WL 3689387 (N.J. Aug. 24, 2011); *Henderson II* at *1 (focusing on the contaminating effects of co-witness identifications); *State v. Hibl*, 714 N.W.2d 194, 203 (Wis. 2006) (noting that unintentional, non-law enforcement

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In 1995, DNA testing excluded Ronald Cotton for Ms. Thompson's rape, and implicated inculpated Bobby Poole, who ultimately confessed to the crime. James Thorner, Ron Cotton: Freedom: Tenacity Paid Off: Innocent Man Carries Scars from His Decade in Prison, Greensboro News & Record (N.C.), July 10, 1995, at A2. Ms. Thompson now explains that seeing Mr. Cotton in the lineups and in court "meant that his face eventually just replaced the original image of [her] attacker," Dykman, supra, at 7L, to the extent that Mr. Cotton was even the man in her nightmares about the rape. Thompson, *supra*, at 16. The suggestive procedures by which Mr. Cotton was identified not only increased Ms. Thompson's certainty in her identification and but actually altered her memory of the event.

suggestiveness can become a "key factor" in identification errors). Moreover, as the Second Circuit observed, "[t]he 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. 1998), *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.

Moreover, in some cases, suggestion itself may not be dispositive on the issue of reliability 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. *See Henderson II* * 4 ("under *Manson/Madison*, defendants must show that police procedures were 'impermissibly suggestive' before courts can consider estimator variables that also bear on reliability. As a result, although evidence of relevant estimator variables tied to the *Neil v. Biggers* factors is routinely introduced at pretrial hearings, their effect is ignored unless there is a finding of

impermissibly suggestive police conduct.") (internal citations omitted). *See also Hibl*, 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.").

Because the trial court concluded (and the state ultimately conceded) that the procedures used by law enforcement were unduly suggestive,[10] the lower court did not directly consider the conduct of private actors or estimator factors more generally at the first stage of the inquiry. It has, however, been established that in addition to the estimator variables – those variables relating to the witness, the perpetrator, and the event – that reduce the likelihood that Ms. Hilde's identification was accurate, at least one private actor engaged in suggestive identification procedures. (An employee of the rehabilitation facility where Ms. Hilde was recuperating showed her a single picture of Mr. Lawson, attached to a newspaper article identifying him as a suspect in her shooting and the murder of her husband.) The trial court declined to consider this evidence in ruling on the defendant's motion to strike the state's identification evidence, holding that it "was suggestive because there was only one photograph, and it was accompanied by a newspaper article relating to the

[10] The suggestive procedures alone warranted suppression of the in-court and out-of-court identifications by the eyewitness in this case.

case. However, this was not an act of law enforcement, and the State cannot be held accountable as Officer Merrifield had only provided Ms. Hilde the defendant's name to this point." (*State v. Lawson*, App. Br. at 30, App. Ct. NO. A132640,). Despite acknowledging the suggestiveness of the private actor's conduct, the trial court erroneously refused to consider it in its reliability determination. This Court should now take the opportunity to renovate the legal framework so that courts can consider the totality of the circumstances that contribute to the unreliability of an eyewitness identification. As the New Jersey Supreme Court found in *Henderson II*:

> Suggestiveness can certainly taint an identification, which justifies examining system variables. The same is true for estimator variables like high stress, weapon-focus, and own-race bias. Because both sets of factors can alter memory and affect eyewitness identifications, both should be explored pretrial in appropriate cases to reflect what *Manson* acknowledged: that 'reliability is the linchpin in determining the admissibility of identification testimony.'

Henderson II at *48 (internal citation omitted).

C. *Classen* 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, the *Manson* Court was "content to rely upon the good sense and judgment of American juries." *Manson*, 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." *Accord Lawson*, 239 Or. App. at 386.

Unfortunately, longstanding research shows that jurors have great difficulty distinguishing between accurate and inaccurate eyewitnesses. *See* Tanja Rapus Benton et al., *Has Eyewitness Testimony Research Penetrated the American Legal System? A Synthesis of Case History, Juror Knowledge, and Expert Testimony*, in 2 The Handbook of Eyewitness Psychology: Memory for People 453, 475-87 (R.C.L. Lindsay et al. eds., 2007). 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.[11] Even more troubling, research shows jurors have some fundamental misconceptions about eyewitness memory.[12] Jurors tend to believe that memory works like a videotape, generally misunderstand

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[11] 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. Jules Epstein, *The Great Engine That Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 Stetson L. Rev. 727 (2007); Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 Wis. L. Rev. 615 ("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 U.S. v. Wade*, 388 U.S. 235, 235 (1967) ("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.").

[12] *See, e.g.,* Melissa Boyce et al., *Belief of Eyewitness Identification Evidence*, in The Handbook of Eyewitness Psychology: Memory for People 501 (R.C.L. Lindsay et al. eds., 2007); Elizabeth F. Loftus et al., Eyewitness Testimony: Civil and Criminal (4th ed. 2007); John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 Law & Hum. Behav. 19 (1983); Brian L. Cutler et al., *Juror Sensitivity to Eyewitness Identification Evidence*, 14 Law & Hum. Behav. 185-191(1990); Richard S. Schmechel, et al., Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence, 46 Jurimetrics 177 (2006); Tanja Rapus Benton et al., *Eyewitness Memory is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts*, 20 Applied Cognitive Psychol. 115 (2006).

the effect of confirming feedback on the self-reported factors in *Manson*, do not understand the effects of biased witness warnings, 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. 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 accuracy rates, and are not familiar with the principle that memory is susceptible to contamination just like trace evidence. 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.

In this case, the trial court categorically failed in its gatekeeping duty by allowing wholly unreliable eyewitness evidence to reach the jury. Even if we were to presume that the evidence should have been admitted, the jury instructions provided by the court failed to provide the jury with any meaningful guidance for assessing the eyewitness identification evidence in light of the flagrant misconduct by law enforcement in this case. At a minimum, the jury should have been cautioned to carefully scrutinize the eyewitness testimony given the factors indicating unreliability.

2. 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* urges the Oregon Supreme Court to renovate the *Classen* 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/Classen* framework by reflecting the scientific knowledge represented by the scientific research published in the field over the past three decades.

In the *Henderson* case, the New Jersey Supreme Court directed a Special Master to conduct an examination of scientific studies regarding the reliability of eyewitness identification following its determination that the trial records was inadequate to "test the current validity of the [New Jersey] state law standards on the admissibility of eyewitness identification" and directed that a plenary hearing be held

> 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 (*"Henderson I"*), 2009 WL 510409, at *2 (N.J. Feb. 26, 2009).

The hearing focused on a comprehensive consideration of the scientific evidence that has accumulated over more than 30 years on the topic of eyewitness identification, summarized in an 80-page report (the "Report"). The robust hearings lasted over ten days and examined more than 200 published scientific studies, articles, and books. Additionally, over seven expert witnesses offered by defendant-appellant, the State, and *amici*, including the Innocence Project, an affiliate of *Amicus* Innocence Network, testified at the hearings.[13]

The new legal framework proposed herein is the product of the evidence adduced at that hearing, which evidence was endorsed by the New Jersey Supreme Court:

> We find that the scientific evidence considered at the hearing is reliable. That evidence offers convincing proof that the current test for evaluating the trustworthiness of eyewitness identifications should

[13] The following experts participated in the hearings: Gary L. Wells, Distinguished Professor of Liberal Arts and Sciences, Department of Psychology, Iowa State University; James M. Doyle, Director, Center for Modern Forensic Practice, John Jay College of Criminal Justice, CUNY; John Monahan, John S. Shannon Distinguished Professor of Law; Steven Penrod, Distinguished Professor of Psychology, John Jay College of Criminal Justice, CUNY; Jules Epstein, Associate Professor of Law, Widener University School of Law; Roy Malpass, Professor of Psychology, University of Texas, El Paso; and James M. Gannon, former Deputy Chief of Investigations, Office of the Morris County Prosecutor. Report at 3-4. We understand that many of these experts also appear as *Amicus* in this case.

> be revised. Study after study revealed a troubling lack of reliability in eyewitness identifications. From social science research to the review of actual police lineups, from laboratory experiments to DNA exonerations, the record proves that the possibility of mistaken identification is real. Indeed, it is now widely known that eyewitness misidentification is the leading cause of wrongful convictions across the country.
>
> We are convinced from the scientific evidence in the record that memory is malleable, and that an array of variables can affect and dilute memory and lead to misidentifications. Those factors include system variables like lineup procedures, which are within the control of the criminal justice system, and estimator variables like lighting conditions or the presence of a weapon, over which the legal system has no control.

Henderson II at *1.

The Innocence Project, an affiliate of *Amicus* Innocence Network, proposed a similar new legal architecture to the *Henderson* court and Special Master. While the Special Master largely adopted the Innocence Project's proposed legal framework, the New Jersey Supreme Court did not accept it in its entirety, but did accept certain significant portions, including pretrial hearings designed to consider the totality of the evidence and comprehensive jury instructions. We nevertheless submit that the Oregon Supreme Court should follow the lead of the Special Master and adopt the proposed legal framework in its entirety as presented herein.

A. Summary

In *Classen*, this Court recognized that

> Whatever the present state of the law in the [United States Supreme] Court, the fact remains that a wide variety of experienced persons consider and have considered the pre-trial identification as a crucial factor in the fair and accurate determination of guilt or innocence, and a factor as to which certain kinds of error, once committed, are particularly hard to remedy and peculiarly likely to lead to unjust results.

Classen, 285 Or. at 231. *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*, 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.").

Given the view of scientists in the field that eyewitness memory is best understood as trace evidence[14] 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.[15] 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.

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[14] As a result of the groundwork-laying research of Dr. Loftus, along with findings in the field of neurology, *see* Daniel L. Schacter, The Seven Sins of Memory 5 (2001), eyewitness identification experts believe that the most accurate way to conceptualize eyewitness evidence is as trace evidence. Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 Wis. L. Rev. 615, 622; Nat'l Inst. of Justice, U.S. Dep't of Justice, Eyewitness Evidence: A Guide for Law Enforcement (1999); Elizabeth F. Loftus et al., Eyewitness Testimony: Civil and Criminal (4th ed. 2007); James Doyle, True Witness: Cops, Courts, Science, and the Battle Against Misidentification 92-94 (2004); Office of the Attorney Gen., Wis. Dep't of Justice, Model Policy and Procedure for Eyewitness Identification (2005) Trace evidence from a crime scene can be purely physical in nature, such as fingerprints, footprints, fibers, blood, or semen, but can also be memorial, in the form of memory traces. In this way, an eyewitness's stored memory trace is akin to a physical trace left behind by a perpetrator that could help establish the perpetrator's identity.

[15] The New Jersey Supreme Court declined to adopt the analogy between trace evidence and eyewitness identifications. *Henderson II* at *48. Whether or not this Court accepts the analogy, the initial burden should nevertheless be on the state as the party offering the eyewitness evidence to demonstrate its conditional relevance.

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*, 714 N.W.2d at 205 ("That [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.'") (citation omitted).

As opposed to the current all-or-nothing approach of *Manson/Classen*, 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 to increase or decrease the probability of identification accuracy. These instructions would also include law enforcement procedures that do not comport with best practices. 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. In *Henderson II* the New Jersey Supreme Court held that enhanced jury instructions would form an essential part of its new legal framework for eyewitness identification evidence:

> [T]he court system should develop enhanced jury charges on eyewitness identification for trial judges to use. We anticipate that identification evidence will continue to be admitted in the vast majority of cases. To help jurors weigh that evidence, they must be told about relevant factors and their effect on reliability.

Henderson II at *2.

Similarly, the Innocence Network's 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, courts might decide to preclude the witness from making any statement about her level of certainty at the time of the trial. The new legal framework set forth by the New Jersey Supreme Court in *Henderson II* admits the possibility of intermediate remedies and contextual instructions for jurors. With respect to the former, the *Henderson* Court found:

> Finally, in rare cases, judges may use their discretion to redact parts of identification testimony, consistent with Rule 403. For example, if an eyewitness' confidence was not properly recorded soon after an

> identification procedure, and evidence revealed that the witness received confirmatory feedback from the police or a co-witness, the court can bar potentially distorted and unduly prejudicial statements about the witness' level of confidence from being introduced at trial.

Henderson II at *51.

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]

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[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.

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.

Scientific research has identified the many factors that can increase the risk of identification error. The vast majority of these are not revealed through the minimal available pre-hearing discovery that exists under the current framework. Courts should review eyewitness evidence in the same fashion in which they assess the collection and analyses of other types of trace evidence, and apply with equal force the legal standards that govern the admissibility of such evidence. While the New Jersey Supreme Court ultimately disagreed, the Special Master explained in his Report:

> [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, 497 A.2d 552, 554 (N.J. App. Div. 1985), 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: the burden of production should be placed on the prosecution. More specifically, under the framework proposed by the Innocence Network, 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* O.R.S. § 40.030(2). 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.

The instant case illustrates why it is critical that the prosecution bear the burden of going forward. As this Court well knows, evidence of the most egregious type of suggestive identification procedures conducted by law enforcement investigating Mr. Lawson was not turned over to the defendant and was, in fact, only discovered through cross-examination of the witness, in the presence of the jury. *Amicus* submits that, under the proposed framework, all of the suggestive (and non-suggestive) procedures used to try to elicit identifications would have been before the Court and tested by the defendant at the pre-trial stage. Had this happened, it is doubtful that the prosecution would have been able to bear its burden, suppressing the identification at the earliest stage of the proceeding, saving considerable resources for all involved.

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 Oregon Rule of Evidence Rule 701, O.R.S § 40.405. Under Rule 701, a lay witness may only testify to opinions or inferences that are rationally based on the perception of the witness and that are helpful to a clear understanding of testimony of the witness or the determination of a fact in issue.

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.[17] 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. 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.

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

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[17] 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.

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).

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

This burden shift, endorsed by the Special Master in *Henderson*, 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 Oregon, the judiciary has long performed the gate-keeping function of determining the reliability of evidence for the purposes of admission. *See, e.g.,* Oregon Rule of Evidence Rule 104, 403, O.R.S § §§ 40.040, 40.160.40.405.

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, (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.

4. *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 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.

5. *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. 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. But by the time a witness testifies, it is very likely that his confidence in these self-reports has been inflated in multiple ways. *See supra* at 12-13. As discussed *supra*, had the court in this case relied upon the primary evidence – Ms. Hilde's initial, uncertain identifications – the lack of reliability would have been apparent and the identification suppressed. Instead, the court relied upon Ms. Hilde's certain identification, which was nothing more than a product of the post-identification and suggestive procedures used by law enforcement.

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). As science advances, courts should establish similar reliability markers for other components of identification evidence.

6. *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. *See Henderson II* at *45-47 (identifying estimator and system variables that courts should consider under the new framework).

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 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.

7. *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*, 432 U.S. at 120 (Marshall, J., dissenting). 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. 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.[18] As the Third Circuit stated:

> "[J]urors 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."

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").

If jury instructions are the "lamp to guide the jury's feet in journeying through the testimony in search of a legal verdict," then courts must start illuminating the jurors' path towards more reliable assessments of identification evidence. *Brodes v. State*, 614 S.E.2d 766, 769 (Ga. 2005) (citing *Chase v. State*, 592 S.E.2d 656, 659 (Ga. 2004) (reversing conviction due to

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[18] 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." Hugo Munsterberg, On the Witness Stand 36 (Mark Hatala ed., Greentop Academic Press 2009) (1908).

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*, 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, "[w]hen 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*, 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.

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.

In *Henderson II*, the development and use of "enhanced" jury instructions "to help jurors evaluate eyewitness identification evidence" is central to its new legal framework. *Henderson II* at *45.

8. *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.*

In *Henderson II*, the New Jersey Supreme Court identified a non-exhaustive list of system and estimator variables that courts should consider at a

pre-trial hearing. *Amicus* submits that this Court should also direct courts to consider a non-exhaustive list of system and estimator variables to consider when evaluating eyewitness identification evidence, including the following:

System Variables

(1) **Appropriate admonitions to witnesses**. Based on the robustness of the scientific findings that proper witness warnings, also known as unbiased instructions, lead to fewer false identifications, courts should consider whether law enforcement in fact gave unbiased instructions when assessing the reliability of eyewitness identification evidence. Studies indicate that jurors do not necessarily know about witness warnings and their possible effects, and thus, it is important that jurors know both whether warnings were given and the effects of such biased/unbiased instructions. *See Henderson II* at *21,*46.

(2) **Conducting the identification procedure double-blind.** Double-blind testing, a critical staple of science, enhances the reliability of identification evidence in numerous ways. While the importance of double-blind administration may be well-understood by scientists, it is not within jurors' common knowledge. *See* Richard S. Schmechel, et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 Jurimetrics 177, 203-04, 210 (2006). *See Henderson II* at *20-21, *46.

(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.** 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. 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. If a court finds that a certainty statement was not obtained in the words of the 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.[19] *See Henderson II* at *23-24, *46.

[19] 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

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

(5) **Recording the identification procedure in its entirety, including recording filler and non-identifications.** It is critical that police document not only identifications of 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.[20] 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

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identification as a factor to be considered in deciding the reliability of that identification) (internal footnote omitted)).

[20] "[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." Steven E. Clark & Gary L. Wells, On the Diagnosticity of Multiple-Witness Identifications, 32 Law & Hum. Behav. 406, 420 (2008).

eyewitness testimony, although it is not repeated specifically in *Manson*. *Wade*, 388 U.S. at 241. *See Henderson II* at *23, *46.

(6) **Avoiding co-witness contamination.** In cases involving multiple eyewitnesses, jurors should be told of the risks of co-witness contamination, the importance of separating witnesses, and to consider the contact between witnesses before, during, and after the identification. *See Henderson II* at *34, *46.

(7) **Mugshot commitment.** 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. *See Henderson II* at *24-25, *46.

(8) **Appropriate selection of fillers and unbiased lineups**. It is important for courts to consider lineup bias and effective size, 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. It is important for courts to take into account the method by which fillers are selected when assessing the reliability of eyewitness identification evidence, 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. *See Henderson II* at *22-23, *46.

(9) **Law enforcement's use of composite sketches.** Jurors should be informed about the dangers and low utility of facial composites. *See Henderson II* at *27 (no finding).

(10) **Law enforcement's use of showups.** 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. *See Henderson II* at *27-28, *46.

Estimator Variables

(1) **Cross-racial identifications.** 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. *See Henderson II* at *32, *47, *51-52.

(2) **Weapon focus.** Jurors should be informed about the potential decrease in the accuracy of an identification caused by the presence of a weapon. *See Henderson II* at *29-30, *47.

(3) **Level of witness's stress.** Jurors should be informed about the potential decrease in the accuracy of an identification caused by a highly stressful event. *See Henderson II* at *28-29, *47.

(4) **Distance.** Jurors should be informed that as faces move farther away, people's ability to identify those faces declines. *See Henderson II* at *30, *47.

(5) **Duration of the event.** Jurors should also be informed that eyewitnesses frequently overestimate event durations. *See Henderson II* at *30, *47.

(6) **Whether the perpetrator was wearing a "disguise".** Jurors should know and consider scientific research on the negative effects of disguise on identification accuracy when evaluating the reliability of eyewitness identification evidence. *See Henderson II* at *30-32, *47.

(7) **Amount of time between the incident and the identification (*i.e.*, the extent of the forgetting curve).** 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. *See Henderson II* at *32, *47.

(8) **Condition of the witness** (for instance, whether the witness was intoxicated). *See Henderson II* at *30-31, *47.

9. *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 (as in this case). As noted 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. 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 outweighs its probative value. 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").

10. *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 use of suggestive 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,[21] it should give the jury a strongly-worded cautionary instruction regarding the reliability of the eyewitness identification evidence as a whole.

This strong cautionary admonition takes heed of an undeniable and understandable reality: courts are 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

[21] *Amicus* submits Proposed Model Eyewitness Identification Jury Instructions, attached hereto as Appendix B.

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.[22]

Examples of more moderate cautionary language can be found in certain jurisdictions' standard identification instructions,[23] or, analogously, in instructions on accomplice testimony.[24] The framework here proposed, by contrast, calls for a stronger cautionary instruction in these very problematic cases, such as:

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[22] Concerns that such an instruction usurps the role of the ultimate fact-finder are misplaced. First, jury instructions, including specific cautionary instructions, are a familiar component to the jury system. *See, e.g.*, O.R.S. § 40.085. Second, a strong cautionary instruction, like jury instructions generally (and other intermediate remedies), are a far less drastic measure of usurpation than suppressing evidence.

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

[24] *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.").

> 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.

11. *Courts Should Encourage the Use of Experts at Pretrial Hearings.*

The proposed renovated framework embraces the use of expert testimony in appropriate cases under Oregon Rules of Evidence 702 to 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. In general, jurors give less weight to witness confidence after hearing from an expert, and are better able to differentiate between good and poor witnessing conditions.

Experts can also educate judges about the scientific research 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 fact-finding function and better educate juries on the purpose behind best practices and the increased rate of error when such practices are not observed. *See Henderson II* at *49-50 (expert testimony recognized under the new framework where otherwise admissible).

CONCLUSION

As a result of the impressive body of research in the field of eyewitness identification that has emerged since the *Classen* decision, we know far more today than we did in 1979 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.

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. 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, 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. 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/Classen* 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*, 432 U.S. at 116.

Notably, neither *Manson nor Classen* prohibits in any way 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.

Amicus urges the Court to reverse and remand Mr. Lawson's case and to adopt the standard for the admissibility of eyewitness identification testimony described herein, taking into account the extensive scientific study of factors affecting reliability of eyewitness identifications, and emphasizing

reliability over suggestive police procedures as the linchpin for the admissibility of eyewitness identification evidence.

Respectfully submitted,

s/ Matthew G. McHenry

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APPENDIX A

The Innocent Network's member organizations include:

Alaska Innocence Project
Association in Defence of the Wrongly Convicted (Canada)
California Innocence Project
Center on Wrongful Convictions
Connecticut Innocence Project
Downstate Illinois Innocence Project
Duke Center for Criminal Justice and Professional Responsibility
The Exoneration Initiative
Georgia Innocence Project
Hawaii Innocence Project
Idaho Innocence Project
Innocence Network UK
Innocence Project
Innocence Project Arkansas
Innocence Project at UVA School of Law
Innocence Project New Orleans
Innocence Project New Zealand
Innocence Project Northwest Clinic
Innocence Project of Florida
Innocence Project of Iowa
Innocence Project of Minnesota
Innocence Project of South Dakota
Justice Project, Inc.
Kentucky Innocence Project
Maryland Innocence Project
Medill Innocence Project
Michigan Innocence Clinic
Mid-Atlantic Innocence Project
Midwestern Innocence Project
Mississippi Innocence Project

Montana Innocence Project
Nebraska Innocence Project
New England Innocence Project
Northern Arizona Justice Project
Northern California Innocence Project
Office of the Public Defender (State of Delaware)
Office of the Ohio Public Defender
Wrongful Conviction Project
Ohio Innocence Project
Osgoode Hall Innocence Project (Canada)
Pace Post-Conviction Project
Palmetto Innocence Project
Pennsylvania Innocence Project
Reinvestigation Project (Office of the Appellate Defender)
Rocky Mountain Innocence Center
Sellenger Centre Criminal Justice Review Project (Australia)
Texas Innocence Network
Thomas M. Cooley Law School Innocence Project
Thurgood Marshall School of Law Innocence Project
University of British Columbia Law Innocence Project (Canada)
Wake Forest University Law School Innocence and Justice Clinic
Wesleyan Innocence Project
Wisconsin Innocence Project
Wrongful Conviction Clinic

APPENDIX B

Proposed Model Eyewitness Identification Jury Instruction

These model instructions are not a final product. Rather, they represent an ongoing effort by *Amicus* to give appropriate contextual guidance, based on empirical research, to jurors in their assessment of eyewitness identification evidence.

[Preliminary guideline: This Instruction will need to be tailored to fit the facts of the case with respect to the issues of identification.]

One of the most important issues in this case is the identification of the accused as the perpetrator of the crime.

[(Defendant) as part of [his/her] general denial of guilt contends that the State has not presented sufficient reliable evidence to establish beyond a reasonable doubt that [he/she] is the person who committed the alleged offense. The State has the burden of proving the identity of the person who committed the crime perpetrator beyond a reasonable doubt. For you to find this defendant guilty, the State must prove beyond a reasonable doubt that this defendant is the person who committed the crime. The defendant has neither the burden nor the duty to show that the crime, if committed, was committed by someone else, or to prove the identity of that other person. You must determine, therefore, not only whether the State has proved each and every element of the offense charged beyond a reasonable doubt, but also whether the State has proved beyond a reasonable doubt that this defendant is the person who committed it.]

[The State has presented the testimony of [insert name of witness who identified defendant]. You will recall that this witness identified the defendant in court as the person who committed [insert the offense(s) charged]. The State also presented testimony that on a prior occasion before this trial, this witness identified the defendant as the person who committed this offense [these offenses]. According to the witness, [his/her] identification of the defendant was based upon the observations and perceptions that [he/she] made of the perpetrator at the time the offense was being committed. When a witness makes an identification, that witness is expressing an opinion that may be accurate or that may be inaccurate: that the person identified is the person who committed a crime. Eyewitnesses can be truthful, but mistaken. Eyewitness mistakes have long been – and continue to be – the leading cause of wrongful convictions. Even where a witness believes that her testimony is accurate, it is your function to determine whether the witness's identification of the defendant is reliable, or whether it is based on a mistake or for any reason is not worthy of belief.

Witness Certainty

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. Indeed, an eyewitness's confidence in the accuracy of his or her identification is a weak predictor of the accuracy of his or her identification. Witnesses can be highly confident, but 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.

In evaluating the identifications, you should consider the observations and perceptions on which the identifications were based, and the witness's ability to make those observations and perceptions. If you determine that the out-of-court identification is not reliable, you may still consider whether the witness's in-court identification of the defendant is reliable. If the in-court identification is the product of an impression gained at the out-of-court identification procedure, rather than the result of the witness's observations or perceptions of the perpetrator during the commission of the offense, it should be afforded no weight. Likewise, you should consider the circumstances under which the witness attempted to observe and perceive the perpetrator before deciding how much, if any, weight should be given to the in-court identification. You should bear in mind that in-court identifications are generally less reliable than other identifications. The ultimate issues of the accuracy of both the in-court and out-of-court identifications are for you to decide.

To decide whether the identification testimony is sufficiently reliable evidence upon which to conclude that this defendant is the person who committed the offense[s] charged, you should evaluate the testimony of the witness in light of the factors for considering credibility that I have already explained to you. In addition, you should consider the following:

Memory Does Not Work Like a Videotape

Memory is not recorded, stored, or played back in the same way as a videotape. Memory is much more of a selective process. The process by which people reconstruct memories is not the same as to recalling the event as an accurate whole. People often preserve pieces of information in their memory and fill in any gaps with information they learn after having formed the original memory.

Post-event information

What information did the witness receive about the event, suspect, or perpetrator after the incident? What information did the witness receive about the event, suspect, or perpetrator after the identification procedure? Witnesses' memories for events and facial details, as well as their confidence in their identifications, are easily tainted, distorted, or completely altered by visual and verbal information that the witness receives after the event and/or identification procedure. The source of the information is irrelevant; it can come from the police and prosecutors, but it can also come from other witnesses, family members, and the media. There is a danger that witnesses will incorporate post-event information into their memories even if the information is incorrect. Exposure to incorrect information after an event can lead witnesses to misremember events and people, and thereby increase the risk of mistaken identification.

Confirming Feedback

Providing "confirming feedback" to a witness, such as the police telling a witness that he or she made a correct identification, can make the witness more confident in the accuracy of that identification, even if the witness had identified an innocent person. In addition, telling a witness that he or she made a correct identification can also alter the witness's memory for the event, for instance by making the witness think he or she had a better opportunity to observe the perpetrator, got a better look at the perpetrator's face, and paid more attention to the perpetrator, than he or she actually did. In this way, conveying to a witness that he or she made a correct identification can increase the chance that an innocent person is wrongly convicted. You should take this into account when evaluating the reliability of the identification evidence in this case.

[if the court has not precluded a witness's testimonial statement of certainty despite the failure of law enforcement to record a statement of certainty contemporaneous with the witness's identification:]

Because a witness's confidence in her identification can be falsely inflated by feedback the witness receives after the identification procedure about the alleged accuracy of her identification, the police should record, at the time of the witness's identification and in the witness's own words, the witness's certainty about her identification. In this case, the police failed to document the witness's confidence at the time of the identification. Failure to secure such a certainty statement can mean that subsequent statements of certainty by the witness have been falsely inflated and can increase the chance of a wrongful conviction. Therefore, you should view the witness's testimony regarding her degree of confidence in her identification with great caution.

Co-Witness Contamination

Was 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?

Pre-trial identifications generally

You must determine the "reliability" of the pre-trial identification (the lineup, show-up or photo-spread) You should consider the following:

Out-of-Court Identification

You must consider the "reliability" of the pre-trial identification process involving the witness, as the process that was used might make the courtroom identification which you heard during the trial more or less reliable. In this case, the witness [attended a lineup], [looked at photographs of possible suspects], and/or [was shown a single individual in a "show-up."] You should consider the circumstances of this out-of-court identification, and whether or not it was the product of a suggestive procedure, including everything done or said by law enforcement to the witness before, during, or after the identification process. In making this determination you should consider the following circumstances:

Whether anything was said to the witness prior to viewing a photo array, line-up or showup;

Prejudicial Disclosure of Information about Defendant to Witness

Did the police investigators say or do anything during the photo array, line-up or showup that would "suggest" that the defendant was the perpetrator? During the identification procedure, did the police reveal to the witness information regarding [defendant's] prior arrest? Disclosure of this information during an identification procedure is highly prejudicial and can increase the chance that a suspect will be identified even if the suspect is innocent. You should take the failure of the police to shield the witness from this information into account when evaluating the reliability of the identification evidence in this case.

Double-blind

Did the officer who conducted the lineup or photo-spread know who was the police suspect? [Or: In this case, the person administering the lineup knew who the police suspect was.]

A lineup administrator who knows which lineup member is the police suspect may inadvertently convey this knowledge to the witness, thereby increasing the chance that the witness will identify the suspect even if the suspect is innocent. For this reason, the Attorney General Guidelines require that lineups and photo-spreads should be conducted by an officer who does not know the identity of the suspect to avoid any possibility that the officer will influence the witness to identify that suspect. By using an officer who knew the identity of the suspect, the police increased the chance of an erroneous identification. You should take this into account when evaluating the reliability of the identification evidence in this case.

Admonition to Witness

Was the witness who was shown a suspect in a show-up, lineup, or photo-spread, informed that the perpetrator might not be among the people in the display and that the witness should not feel compelled to make an identification?[1]

[Or: In this case, the police failed to give a warning that perpetrator may or may not be in the lineup and that the witness should not feel compelled to make an identification.]

Psychological studies have shown that indicating to a witness that a suspect is present in an identification procedure or failing to warn the witness that the perpetrator may or may not be in the procedure increases the likelihood that the

[1] *State v. Ledbetter*, 881 A.2d 290, 318-19 (Conn. 2005) (requiring jury instruction to that effect).

witness will select one of the individuals in the procedure, even when the perpetrator is not present. For this reason, the Attorney General Guidelines require that the police warn the witness that the perpetrator may not be in the lineup and that therefore the witness should not feel compelled to make an identification. Thus, such behavior on the part of the procedure administrator tends to increase the probability of a misidentification.[2]

You should take this into account when evaluating the reliability of the identification evidence in this case.

Filler Selection

Did the photo array shown to the witness contain multiple photographs of the defendant?

Were "all in the lineup but the [defendant] were known to the identifying witness?"[3]

In a fair lineup all lineup members should match the eyewitness's pre-lineup description of the perpetrator, and the defendant should not stand out unfairly. For this reason, the Attorney General Guidelines recommend that fillers (non-suspects) generally fit the witness's description of the perpetrator." In this case, the police failed to select the lineup fillers to match the descriptive characteristics provided by the witness [and/or did not select fillers in such a way that avoided the defendant standing out]. Failure to select fillers in this way can cause an innocent suspect to stand out unfairly and thus increases the chance of an erroneous identification. You should take this failure into account when evaluating the reliability of the identification evidence in this case.

Was "only the [defendant] required to wear distinctive clothing which the culprit allegedly wore?"[4]

Number of Fillers

In this case, the police used only X fillers in the lineup procedure. The Attorney General Guidelines call for using a minimum of X for a [photo/live] lineup

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[2] *Ledbetter*, 881 A.2d at 290.

[3] *United States v. Wade*, 388 U.S. 218 (1967).

[4] *Id.*

procedure. Failure to construct a [photo/live] lineup with a minimum of X fillers increases the chance that an innocent suspect will be identified. You should take this into account when evaluating the reliability of the identification evidence in this case.

Multiple Viewings

When a witness views an innocent suspect in multiple identification procedures, the witness's memory of the actual perpetrator can be replaced by the witness's memory of the innocent person seen in the multiple procedures. In other words, the witness's memory trace of the innocent person can become stronger than the witness's memory trace of the actual perpetrator. In this way, when a witness views an innocent suspect in multiple identification procedures, the risk of mistaken identification is increased.

Filler identifications and non-identifications

Was the witness's identification made spontaneously and remain consistent thereafter?

If you find the witness failed to pick out the defendant during an identification procedure, or

If you find the witness picked out a different person than the defendant at an identification procedure, or

If you find the witness was uncertain when identifying the defendant at the lineup, photo-spread or show-up,

Then you should carefully consider whether this factor alone calls into question the reliability of the witness's identification of the defendant at trial.

Composites

Composites generally bear very little resemblance to the actual perpetrator. Thus, you should not place undue weight on the fact that defendant bears some resemblance to the composite. In addition, asking an eyewitness to help put together a composite can contaminate the eyewitness's memory for the perpetrator and thus decrease an eyewitness's ability to identify the true perpetrator in a subsequent lineup. In this way, composites can increase the risk of mistaken identification.

Simultaneous Lineups

People naturally tend to select the person from a lineup who looks most like the perpetrator relative to other members of the lineup, even when the perpetrator is absent from the lineup. This is referred to as using a "relative judgment." The danger of the relative judgment process is that even when the actual perpetrator is not in the lineup, some member of the lineup will always look the most like the perpetrator. People are most likely to use relative judgment when the police use simultaneous lineups, where the witness is shown lineup members all at once, as opposed when the police use sequential lineups, where the witness is shown witnesses one at a time. As a result, an innocent person is at greater risk of being misidentified in a simultaneous lineup than in a sequential lineup.

Showups

In this case, the defendant was identified at a showup procedure. Showup identification procedures are where the police present the witness with only one choice, as opposed to lineups, where the police present the witness with several choices. Showups produce a higher rate of mistaken identifications than lineups, but may be permissible when necessary and where a lineup is not feasible. You should consider how soon after the incident the showup was conducted. The further in time from the crime a showup is conducted, the greater the chance of a mistaken identification compared to a lineup. In determining how much weight to give such an identification, you should consider whether the show-up was necessary, when it took place in relation to the crime, and you should further consider all of the facts surrounding the show-up, including whether the suspect was in hand-cuffs or otherwise restrained by the police, what was said to the witness before, during, and after the showup, and whether the police warned the witness that the person in the showup may not be the perpetrator, the witness did not have to make an identification, and the investigation would continue whether or not the witness made an identification.

No Pre-Trial Identification

Did the police fail to conduct a pre-trial identification procedure where such a procedure could reasonably have been done? An identification at a fair pre-trial identification procedure is generally more reliable than an identification of the defendant in the courtroom. You should determine whether the State provided a satisfactory reason why there was no lineup or photo- spread conducted prior to trial.

In-Court Identification

Identifications made by witnesses at initial identification procedures are more reliable than later identifications. For this reason, in-court identifications are less reliable than previous identifications. In assessing the reliability of the identification evidence in this case, you should assign more weight to the first identification, if the procedure was fair, than to the in-court identification.

Opportunity to Observe

You must take into account whether the witness had an adequate opportunity and ability to observe the perpetrator of the crime. You should consider the length of time of the incident, how much attention the witness actually paid to the perpetrator, the distance between the witness and the perpetrator, the lighting conditions, any obstacles that impaired the witness's observations, the condition of the witness, and whether anything that occurred during the incident may have distracted the witness. You should also bear in mind that while witnesses' self-reports can be extremely reliable, they can also be unreliable, particularly if a witness has been exposed to suggestive identification procedures or post-event information.

Regarding the witness's opportunity to observe, you should consider:

Duration of Incident

How much time did the witness have to view the perpetrator? You should independently examine the event as described by the witness, along with any estimate by the witness or others of how long it took. The shorter the amount of time the witness had to view the perpetrator's face, the less reliable the identification. Time estimates by a witness can be inaccurate, and witnesses have a tendency to think events as lasted longer than they actually did.

Distance

The greater the distance between an eyewitness and a perpetrator, the less reliable the eyewitness's identification.

Disguise

If a perpetrator wears a disguise, covers his or her hairline with a hat, or changes his or her glasses, hairstyle, or facial hair, there is an increased risk of a mistaken

identification. In this case, the perpetrator ___. You should take this into account when evaluating the reliability of the identification evidence in this case.

Weapon Focus

You should consider whether a weapon was visible to the witness during the incident. The presence of a weapon can distract the witness and take the witness's attention away from the perpetrator's face. As a result, the presence of a visible weapon reduces the reliability of a subsequent identification. Whether the visibility of a weapon distracted the witness or made it harder for him or her to identify the face or other distinguishing features of the perpetrator is for you to decide.

Level of Stress

You should consider how stressful the event may have been to the witness. Highly stressful events have a negative effect on memory and increase the risk of a mistaken identification. Whether the event was stressful for the witness, the level of the witness's stress, and whether the stressful nature of the event distracted the witness or made it harder for him or her to identify the face or other distinguishing features of the perpetrator, is for you to decide.

Witness's Condition

You should consider the witness's physical and emotional condition at the time of the incident, as they may relate to witness's powers of observation. For example, was the witness intoxicated during his or her observations? Does the witness need prescription eyewear and, if so, was the witness wearing such eyewear during the incident? Whether the witness's condition made it harder for him or her to identify the face or other distinguishing features of the perpetrator, is for you to decide.

Cross-Race

When evaluating the reliability of the identification evidence in this case, you should take this into account that the eyewitness and the perpetrator were of different races. Eyewitnesses are less accurate at recognizing a perpetrator of a different race than at recognizing a perpetrators of the same race. Even people with no prejudice against other races and substantial contact with persons of other races still experience difficulty in accurately identifying members of a different race. Quite often people do not recognize this difficulty in themselves. Whether the fact that the identifying witness is not of the same race as the perpetrator and/or the defendant, and whether that fact might have had an impact on the witness's

original perception, and/or the accuracy of the subsequent identification, is for you to decide.

In addition, you should consider:

Time Between the Incident and the Confrontation

How soon after the crime or event did the identification take place? Memory can be degraded or lost by the passage of time. Memory for an event can begin to decrease significantly immediately after the event. As time goes by, identifications become less reliable. The sooner after the incident the identification procedure took place, the more reliable the memory of the witness. Therefore, you should consider how much time passed between the incident and the first identification procedure.

Discrepancies between Identifications, if any

Did the witness provide only a general description of the perpetrator? Was there a variation between the description the witness provided and the defendant's appearance? Witnesses should be asked by the police to provide as much detail as possible in their descriptions of the perpetrator. The inability of a witness to provide distinctive details of the perpetrator, where these details might be expected (given the characteristics of the defendant) may call into question the reliability of the witness's identification of the defendant at trial.

Child and Elderly Witnesses

Identifications made by children and the elderly are less reliable than identifications made by adults. You should take this into account when evaluating the reliability of the identification evidence in this case.

Police Witnesses

Police officers are no better than other people at making accurate identifications. You must determine the accuracy of police officials' identifications in the same way and by the same standards as you would determine the accuracy of any other witness. The identification testimony of a police official is not entitled to special or exclusive weight merely because the witness is a police official.

It is entirely up to you whether to accept or reject a witness' identification. The factors I have discussed have been shown to be the best indicators of the reliability

or unreliability of eyewitness identification. In the end, you must determine whether the identification testimony is reliable.

CERTIFICATE OF COMPLIANCE
with ORAP 5.05(2)(d)

I certify that this brief complies with the word-court limitation in ORAP 5.05(2)(b) and the word count of this brief, as described by ORAP 5.5(2)(a), is 13,963 words.

I certify that the size of the type in this brief is not smaller than 14 points for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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PROOF OF SERVICE

I certify that on September 2, 2011, I directed the original BRIEF OF *AMICUS CURIAE* THE INNOCENCE NETWORK to be electronically filed with the Appellate Court Administrator, Appellate Records Section and the following people by using the electronic filing system:

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