

NO. 2012-344
IN THE SUPREME COURT OF THE STATE OF VERMONT

STATE OF VERMONT,
Appellee,
v.
HAROLD D. PORTER, JR.,
Appellant.

Appeal from the Chittenden Superior Court Criminal Division Docket No. 4244-10-09 CNCR

BRIEF OF AMICUS CURIAE THE INNOCENCE PROJECT, INC.
IN SUPPORT OF APPELLANT HAROLD D. PORTER, JR.

Edward A. Brill
Rebecca L. Berkebile
PROSKAUER ROSE LLP
Eleven Times Square
New York, NY 10036
212-969-3000

Bradley S. Stetler
STETLER, ALLEN &
KAMPMANN
95 St. Paul Street
Burlington, VT 05401
802-660-8646

Karen A. Newirth
Barry C. Scheck
M. Christopher Fabricant
INNOCENCE PROJECT, INC.
40 Worth Street, Suite 701
New York, NY 10013
212-364-5340
Attorneys for *Amicus Curiae*
The Innocence Project, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF AMICUS CURIAE 1

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS AND PROCEEDINGS 2

ARGUMENT 4

I. A ROBUST BODY OF SCIENTIFIC RESEARCH CONCERNING EYEWITNESS MEMORY AND PERCEPTION SHOWS THAT THE MANSON BALANCING TEST CANNOT ACHIEVE ITS GOAL OF ENSURING THE RELIABILITY OF EYEWITNESS IDENTIFICATION EVIDENCE.....4

A. There is Scientific Consensus on the Factors That Undermine the Reliability of Eyewitness Identification.....5

B. Traditional Adversarial Tools are Insufficient to Reveal the Weaknesses of Eyewitness Testimony10

C. The Manson/Kasper Test Is Inherently Flawed.....12

D. Other Courts Have Accepted and Applied the Scientific Research On Eyewitness Identification.....13

E. This Court Should Recognize and Apply the Robust Scientific Research and Alter Its Test for Evaluating Eyewitness Evidence.....16

II. WHETHER OR NOT THE COURT ALTERS ITS TEST, IT SHOULD FIND THAT MCCARTY’S IDENTIFICATION SHOULD HAVE BEEN SUPPRESSED18

A. Under Any of the New Approaches, The Court Should Not Have Admitted McCarty’s Identification Testimony.....18

B. Even Under the Current *Manson/Kasper* Balancing Test, The Court Should Not Have Admitted McCarty’s Identification Testimony19

C. Vermont’s Rules of Evidence Also Require Suppression of McCarty’s Identification.....22

III. ADMITTING THE EYEWITNESS TESTIMONY IN THIS CASE WAS NOT HARMLESS ERROR.....23

CONCLUSION..... 24

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Commonwealth v. Martin</i> , 447 Mass. 274, 850 N.E.2d 555 (2006)	10
<i>Commonwealth v. Santoli</i> , 424 Mass. 837, 680 N.E.2d 1116 (Mass. 1997).....	14
<i>Commonwealth v. Silva-Santiago</i> , 453 Mass. 782, 906 N.E.2d 299 (2009)	6
<i>Commonwealth v. Walker</i> , 953 N.E.2d 195 (Mass. 2011)	14
<i>Manson v. Brathwaite</i> , 432 U.S. 98 (1977).....	2, 4, 12
<i>Perry v. New Hampshire</i> , 132 S. Ct. 716 (2012).....	19
<i>State v. Carter</i> , 164 Vt. 545, 674 A.2d 1258 (1996)	24
<i>State v. Chen</i> , 208 N.J. 307, 27 A.3d 930, 936 (2011).....	14, 15
<i>State v. Dubose</i> , 285 Wis.2d 143, 699 N.W.2d 582 (2005).....	10
<i>State v. Guilbert</i> , 306 Conn. 218, 49 A.3d 705 (Conn. 2012).....	14, 13
<i>State v. Henderson</i> , 208 N.J. 208, 282-83, 27 A.3d 872, 916 (2011)	passim
<i>State v. Jewett</i> , 148 Vt. 324, 532 A.2d 958 (1987)	23
<i>State v. Kasper</i> , 137 Vt. 184, 404 A.2d 85 (1979)	12

<i>State v. Lawson</i> , 352 Ore. 739-41, 291 P. 3d 673 (2012)	passim
<i>State v. Longe</i> , 170 Vt. 35, 743 A. 2d 569 (1999).....	22
<i>State v. Lopez-Martinez</i> , 256 P.3d 896, 2010 Kan. App. Unpub. LEXIS *10-11 (Kan. Ct. App. 2010)	24
<i>State v. Mayo</i> , 183 Vt. 113, 945 A. 2d 846 (2008).....	12
<i>State v. Prade</i> , No. CR 1998-02-0463, slip op. (Ohio Com. Pl. Jan. 29, 2013).....	24
<i>State v. Savo</i> , 141 Vt. 203, 446 A.2d 786 (1982).....	12
<i>State v. Shippee</i> , 176 Vt. 542, 839 A.2d 566 (2003).....	22
<i>State v. Smith</i> , 140 Vt. 247, 437 A.2d 1093 (1981).....	20
<i>State v. Unwin</i> , 139 Vt. 186, 424 A.2d 251 (1980).....	12, 20
<i>United States v. Bartlett</i> , 567 F.3d 901 (7th Cir. 2009)	11
<i>United States v. Greene</i> , 704 F.3d 298 (4th Cir. 2013)	5, 20
<i>Young v. Conway</i> , 698 F.3d 69 (2d Cir. 2012).....	13

OTHER AUTHORITIES

A. Daniel Yamey et al., *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 L. & Hum. Behav., 459, 464 (1996)10

Amanda Lee Myers, *Once Key in Some Cases, Bite Mark Evidence Now Derided as Unreliable*, Associated Press (June 17, 2013)24

Brian H. Bornstein et al., *Effects of Exposure Time and Cognitive Operations on Facial Identification Accuracy: A Meta-Analysis of Two Variables Associates with Initial Memory Strength*, 18 Psychol., Crime & Law 473 (2012)8

Brian L. Cutler, *A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy*, 4 Cardozo Pub. L. Pol’y & Ethics J. 327, 332 (2006)7

Brian L. Cutler et al., *The Reliability of Eyewitness Identification: The Role of System and Estimator Variables*, 11 Law & Hum. Behav. 233, 240, 244-45 (1987)7

Brian L. Cutler & Margaret Bull Kovera, *Evaluating Eyewitness Identification* 43 (2010)7

Colin G. Tredoux, et al., *Eyewitness Identification*, in 1 *Encyclopedia of Applied Psychology* 875, 877, Charles Spielberger ed., 2004)8

Elin M. Skagerberg, *Co-Witness Feedback in Line-Ups*, 21 Applied Cognitive Psychol. 489 (2007)9

Forensic Sciences Community, *Strengthening Forensic Science in the United State: A Path Forward*, 173-176 (2009)24

Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court’s Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 Law & Hum. Behav. 1, 9-10 (2009)8, 9, 13

Geoffrey R. Loftus & Erin M. Harley, *Why Is it Easier to Identify Someone Close than Far Away?*, 12 Psychonomic Bull. & Rev. 43, 63 (2005)8

H. David Sheets & Mary A. Bush, *Mathematical Matching of a Dentition to Bitemarks: Use and Evaluation of Affine Methods*, 207 Forensic Sci. Int’l 111-118 (2011)23

Jennifer N. Sigler & James V. Couch, *Eyewitness Testimony and the Jury Verdict*, 4 N. Am. J. Psychol. 143, 146 (2002)11

John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 Law & Hum. Behav. 19, 28 (1983)11

Jules Epstein, <i>The Great Engine that Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination</i> , 36 Stetson L. Rev. 727, 772 (2007).....	11
Kenneth A. Deffenbacher et al., <i>Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation</i> , 14 J. Experimental Psychol.: Applied 139, 139, 143, 148 (2008).....	6
Kenneth A. Deffenbacher et al., <i>A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory</i> , 28 Law & Hum. Behav. 687, 687, 699 (2004)	7
Krafka and Penrod, <i>Reinstatement of Context in a Field Experiment on Eyewitness Identification</i> , 49 J. Personality & Soc. Psychol. 65 (1985).....	6
Mark Page, et al., <i>Expert Interpretation of Bitemark Injuries – A Contemporary Qualitative Study</i> , J. Forensic Sci., 58(3): 664-672 (2013)	23
Mary A. Bush et al., <i>The Response of Skin to Applied Stress: Investigation of Bitemark Distortion in a Cadaver Model</i> , 55 J. Forensic Sci. 71, 73-75 (2009).....	23
Melissa Boyce et al., <i>Belief of Eyewitness Identification Evidence</i> , in 2 Handbook of Eyewitness Psychology: Memory for People 501, 505 (R.C.L. Lindsay et al. eds., 2007)	11
Michael R. Leippe, <i>The Case for Expert Testimony About Eyewitness Memory</i> , 1 Psychol. Pub. Pol'y & L. 909, 921 (1995)	11, 12
Steven Penrod & Brian Bornstein, <i>Generalizing Eyewitness Reliability Research</i> , in 2 Handbook of Eyewitness Psychology: Memory for People 529, 532 (R.C.L. Lindsay et al. eds., 2007)	5
Tanja Rapus Benton et al., <i>Has Eyewitness Testimony Research Penetrated the American Legal System? A Synthesis of Case History, Juror Knowledge and Expert Testimony</i> , in 2 Handbook of Eyewitness Psychology: Memory for People 453, 484 (R.C.L. Lindsay et al. eds. 2007).....	11
Rule 403 of the Vermont Rules of Evidence	22
Rule 701 of the Vermont Rules of Evidence	23, 22

STATEMENT OF INTEREST OF AMICUS CURIAE

The Innocence Project is an organization dedicated to providing pro bono legal and related investigative services to indigent prisoners whose actual innocence may be established through post-conviction DNA evidence. To date, the work of the Innocence Project and affiliated organizations has led to the exoneration of 312 individuals who were wrongly convicted for crimes they did not commit, as proven by post-conviction DNA testing. The Innocence Project has a compelling interest in promoting justice by ensuring that criminal trials reach accurate determinations of guilt.

The Innocence Project also seeks to prevent future wrongful convictions by researching the causes of wrongful convictions and pursuing legislative and administrative reform initiatives designed to enhance the truth-seeking functions of the criminal justice system. Preventing wrongful convictions enables the more accurate identification of those who actually committed the crimes. Indeed, in 48 percent of the wrongful convictions proven by post-conviction DNA testing, our work also helped identify the real perpetrators of those crimes. Because wrongful convictions destroy lives and allow the actual perpetrators to remain free, the Innocence Project's objectives help to ensure a safer and more just society.

Nearly 75 percent 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. Inasmuch as mistaken eyewitness identifications are the principal cause of wrongful convictions, the Innocence Project has a compelling interest in the adoption of a scientifically valid legal framework that reduces the risk of eyewitness misidentifications leading to erroneous convictions.

PRELIMINARY STATEMENT

There is scientific consensus concerning factors that can make eyewitness identification testimony less reliable. Many of these factors – stress, memory decay, disguise, distance, lighting conditions, and the presence of suggestion – undermine the reliability of the eyewitness identification testimony in this case. In light of the powerful scientific research conducted over the last several decades, many state courts have changed their approaches to eyewitness

evidence. This court should follow suit and adopt a new test based on this scientific research to analyze more rigorously the admissibility of eyewitness testimony.

The factors that undermine the reliability of eyewitness identifications, including the highly suggestive circumstances surrounding Scott McCarty's identification of the Defendant, Harold Porter, cast serious doubt on the reliability of the eyewitness testimony in this case. Indeed, the trial court recognized that allowing McCarty to directly identify Porter under these circumstances would violate due process. It sought to remedy the situation by limiting McCarty's testimony to his view that the photograph of the police suspect in the crime he witnessed, identified as Harold Porter, that he saw on a newscast some 40 days after the incident, looked "similar" to the man he saw at the time of the attack. But this approach did not cure the due process violation. It ignored the fact that the permitted testimony was as impermissible as pure identification testimony and should have been excluded entirely. This is so because, in both cases, the witness's testimony was so unreliable as to give rise to a "substantial likelihood of an irreparable misidentification." *Manson v. Brathwaite*, 432 U.S. 98, 107 (1977). The court's attempted cure did not fix the fundamental problems with McCarty's inherently unreliable identification.

The admission of McCarty's flawed identification testimony, even as limited by the court, cannot be deemed harmless error. The evidence against Porter was weak. Indeed, one of the only other pieces of evidence – an alleged bite mark on Porter's finger – cannot be credited. The validity of bite mark analysis has been thoroughly rejected by the National Academy of Sciences (NAS) and is another leading contributing cause of wrongful convictions, playing a role in at least 24 wrongful convictions and indictments.

STATEMENT OF FACTS AND PROCEEDINGS

Amicus incorporates by reference the facts in the defendant-appellant's brief. In addition, we highlight several significant facts that are relevant to the issue of eyewitness identification.

McCarty was an eyewitness to an altercation who testified at Porter's trial about what he saw for a matter of seconds while he was on his porch in the dark. Tr. 220. Immediately following the altercation, McCarty told a police officer that he did not see the perpetrator's face, he could not provide any specific description of the perpetrator, and he would not be able to identify him in a

line-up. Tr. 229-30. Weeks later, McCarty saw a photograph of Porter on the news, identifying him by name as the suspect in the case, after which McCarty claimed he could identify Porter as the perpetrator. Tr. 205. McCarty's identification bears many of the hallmarks of faulty eyewitness testimony seen in wrongful conviction cases which scientific research reveals can undermine accurate identifications. We highlight the most significant facts concerning McCarty's unreliable identification:

- The context in which McCarty made the identification was highly suggestive. Although McCarty could not describe or identify the perpetrator immediately after the altercation, when McCarty saw a photograph of Porter weeks later in a television news program identifying Porter as the suspect, McCarty suddenly reported that he recognized Porter as the man involved in the altercation. Tr. 203-04.
- Approximately 40 days elapsed between when McCarty viewed the altercation (and could not provide a detailed description of the perpetrator) and when he viewed the photograph of Porter on television. Tr. 205.
- McCarty was in a state of "shock" when he viewed the altercation. Tr. 206, 229, 230.
- There were poor viewing conditions during McCarty's observation of the altercation. McCarty told the officer immediately after the altercation, "The light outside our house is out so I really couldn't tell you any more about him" and "it's not well lit along this corridor." Exhibit E – Interview with Officer Kinney and McCarty, pgs. 2 and 6.
- McCarty viewed the altercation from a significant distance – approximately 60 feet away.¹
- McCarty viewed the altercation for a short period of time – under 30 seconds. Tr. 221.
- The perpetrator was wearing a hat, which disguised him. Tr. 221-22.

¹ See Google Maps, <https://www.google.com/maps/place/311+Colchester+Ave/@44.4836543,-73.1888041,19z/data=!4m2!3m1!1s0x4cca7a69b18f8e19:0x9d9f012792cd2c95>

- McCarty’s attention was focused on a woman running in circles during the altercation rather than on the perpetrator. Tr. 220.
- Three other witnesses – including the victim – were unable to identify Porter when the police showed them his photograph in a properly composed photographic array. Tr. 45. None of these witnesses was able to identify Porter at trial. Tr. 46.

The trial court correctly refused the prosecution’s request that McCarty be allowed to testify that he was “99 percent certain” that the man he saw in the newscast photo, identified as Porter, the police’s only suspect in this crime, was the man that he saw attacking the victim. It recognized that permitting that testimony would be unduly prejudicial and violate Porter’s due process rights, even though the police were not involved in the “unduly suggestive” circumstances of McCarty’s identification. Tr. 201-02, 207-08. The court nevertheless permitted McCarty to testify that the man he saw in the newscast photo “look[ed] similar to the man” he saw on the night of the attack. Tr. 227.

The other evidence against Porter presented at trial was also significantly lacking. This evidence consisted of conflicting testimony about Porter’s vehicle and the one seen near the crime scene and invalid bite mark comparison testimony. Tr. 60 and 138.

ARGUMENT

I. A ROBUST BODY OF SCIENTIFIC RESEARCH CONCERNING EYEWITNESS MEMORY AND PERCEPTION SHOWS THAT THE MANSON BALANCING TEST CANNOT ACHIEVE ITS GOAL OF ENSURING THE RELIABILITY OF EYEWITNESS IDENTIFICATION EVIDENCE

A significant body of scientific research has emerged over the past several decades explaining how memory works and the factors that can undermine the reliability of eyewitness identification evidence. This research reveals that the test for analyzing whether admitting eyewitness evidence violates a defendant’s due process rights, set out in *Manson*, 432 U.S. at 98 and adopted by Vermont courts, is scientifically flawed and unable to meet its goal of ensuring that “reliability is the linchpin” in assessing the admissibility of eyewitness identification. In response to this research, the state supreme courts of New Jersey and Oregon replaced the

Manson balancing test with scientifically valid frameworks for evaluating the admissibility and treatment of challenged eyewitness identification evidence. This court should similarly adopt a new test for evaluating the admissibility and treatment of eyewitness evidence that is in line with the vast scientific research that has emerged after the Supreme Court decided *Manson* in 1977.

A. There is Scientific Consensus on the Factors That Undermine the Reliability of Eyewitness Identification

Over the past several decades, widely-accepted scientific research has revealed common factors whose presence can undermine the reliability of eyewitness identifications.² Social science research concerning the reliability of eyewitness identifications is robust and reliable. This research has been reviewed, replicated, and retested, and it is widely accepted in the research community. *See State v. Henderson*, 208 N.J. 208, 282-83, 27 A.3d 872, 916 (2011), *State v. Lawson*, 352 Ore. 739-41, 291 P. 3d 673, 685-686 (2012). This research has also been tested for external validity, which determines the extent to which a finding can be generalized across different people and settings. Steven Penrod & Brian Bornstein, *Generalizing Eyewitness Reliability Research*, in 2 *Handbook of Eyewitness Psychology: Memory for People* 529, 532 (R.C.L. Lindsay et al. eds., 2007). Following its comprehensive review of the scientific research, the New Jersey Supreme Court described the research as the “gold standard in terms of the applicability of social science research to the law.” *Henderson*, 208 N.J. at 283, 27 A.3d 916 .

Memory is a complex, creative and constructive process that does not function like a videotape. Scientists have identified the three stages of memory: encoding (the process by which an observed event is acquired by the mind), storage (the time between the first and the third stage), and recall (the process by which information is retrieved to the conscious level). While people have the ability to accurately encode information, retain it in storage and then recall it at a later time, these processes depend on a host of conditions – some of which can be controlled for by the criminal justice system (“system variables”) and some of which cannot be controlled because

² Although McCarty’s testimony in this case was “resemblance” testimony – i.e., he testified that the person he saw at the crime scene resembled the person he later saw in the photograph on television – rather than an in-court identification, the same scientific research and legal analyses apply. *See United States v. Greene*, 704 F.3d 298 (4th Cir. 2013). *See* p. 20, below.

they relate to the event, the witness or the perpetrator (“estimator variables”).³ Research teaches that, at each stage, memories can be easily changed or contaminated, that people are often not aware that their memories have been affected by later acquired information, and that it may be impossible to recover the “original” or accurate memory, if it ever existed. See *Lawson*, 352 Ore. at 743-45, 291 P.3d at 687-688. Contamination can come from many sources, including external information, such as media reports or suggestive questioning. *Id.* 352 Ore. at 787-77, 291 P.3d at 709. *Commonwealth v. Silva-Santiago*, 453 Mass. 782, 792, 906 N.E.2d 299, 308 (2009).

Neuroscientists and experimental psychologists who study memory support the view of psychologists who study eyewitness identification that memory is malleable, susceptible to contamination, and can be fairly understood in the legal context, if not as a biological fact, as “trace evidence.” See *Lawson*, 352 Ore. at 747-48, 291 P.3d at 689. Memories exist in the brain as physical traces which can be altered and contaminated if they are not handled properly and according to strict, science-based protocols. *Lawson*, 352 Ore. at 747-48, 291 P.3d at 689. Estimator variables affect the strength and accuracy of the memory created. Numerous estimator variables are at play in this case, diminishing the reliability of McCarty’s identification.

- *Memory Decay*: Memories decay rapidly even over very short periods of time, and memories can easily be contaminated over time. See Kenneth A. Deffenbacher at al., *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness’s Memory Representation*, 14 J. Experimental Psychol.: Applied 139, 139, 143, 148 (2008). Even a delay of just one week can cause the “typical eyewitness viewing a perpetrator’s face that [is] not highly distinctive . . . to have no more than a 50% chance of being correct in his or her lineup identification.” *Id.* at 147; See Krafka and Penrod, *Reinstatement of Context in a Field Experiment on Eyewitness Identification*, 49 J. Personality & Soc. Psychol. 65 (1985) (finding substantial misidentification in target-absent arrays from two to twenty-four hours after event). *Henderson*, 208 N.J.

³ The research on system and estimator variables is extensive. This brief only addresses the factors that are relevant to Porter’s case. For a more complete discussion of system and estimator variables, see the appendix to *Lawson*. See *Lawson*, 352 Ore. 767-70, 291 P. 3d at 700.

at 266-68, 27 A.3d at 907; *Lawson*, 352 Ore. at 777-79, 291 P.3d at 705.

Significantly, memory never improves. *Henderson*, 208 N.J. at 267, 27 A.3d at 907.

Here, on the day of the incident, when his memory was at its best, McCarty told police that he had not seen the perpetrator's face. Then, after a delay of approximately 40 days, McCarty saw the photograph of Porter on the news, identifying him as the police suspect in the incident he witnessed, and McCarty identified him as the perpetrator. Tr. 205. McCarty also significantly elaborated on his description of the perpetrator, who he was initially unable to describe. Since we know as a scientific fact that memory does not improve, it is reasonable to conclude that McCarty's identification was the product of the suggestive circumstances surrounding the viewing of Porter's photograph rather than the discovery of new or improved memory.

- *Stress*: Scientific research reveals that high levels of stress induce a defensive mental state that results in a diminished ability to accurately process and recall events. Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 *Law & Hum. Behav.* 687, 687, 699 (2004). This mental state leads to inaccurate eyewitness identifications. *See id.* at 699. A review of 16 studies involving 1727 participants found that accurate identifications decreased 22.2% under high stress conditions. *Id.* at 692, 694. *Henderson*, 208 N.J. at 261-62, 27 A.3d at 904; *Lawson*, 352 Ore. at 767-72, 291 P.3d at 700-701. McCarty admitted he was in a "state of shock" at the time of the incident, revealing his high level of stress. Tr. 230.
- *Disguise*: Even "subtle disguises can . . . impair identification accuracy." Brian L. Cutler & Margaret Bull Kovera, *Evaluating Eyewitness Identification* 43 (2010). In a scientific experiment, when the "perpetrator" wore a hat, participants only made accurate identifications 27% of the time; when the "perpetrator" did not wear a hat, participants made accurate identifications 45% of the time. Brian L. Cutler et al., *The Reliability of Eyewitness Identification: The Role of System and Estimator Variables*, 11 *Law & Hum. Behav.* 233, 240, 244-45 (1987); Brian L. Cutler, *A Sample of*

Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy, 4 *Cardozo Pub. L. Pol'y & Ethics J.* 327, 332 (2006) (summarizing results of six studies showing that identification accuracy dropped from 57% to 44% when perpetrators' hair and hairline cues were masked). *Henderson*, 208 N.J. at 266-68, 27 A.3d at 907; *Lawson*, 352 Ore. at 774-75, 291 P.3d at 703. In this case, the perpetrator was wearing a hat, decreasing the reliability of McCarty's eyewitness identification.

- *Distance and Lighting*: Scientific research shows that both distance from a crime and poor lighting negatively affect the ability of a person to perceive and recognize stranger faces. Perception and recognition begin to diminish beyond 25 feet. Geoffrey R. Loftus & Erin M. Harley, *Why Is it Easier to Identify Someone Close than Far Away?*, 12 *Psychonomic Bull. & Rev.* 43, 63 (2005); Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 *Law & Hum. Behav.* 1, 9-10 (2009). *Henderson*, 208 N.J. at 264-65, 27 A.3d at 906; *Lawson*, 352 Ore. at 772-73, 291 P.3d at 702. According to Google Maps, McCarty viewed the incident from approximately 60 feet away in poor lighting. McCarty told police that the light outside his house was out and the incident occurred in a corridor that was not well lit. (Ex. E at pgs. 2-3).
- *Duration*: The amount of time an eyewitness has to observe an event may affect the reliability of an identification, such that a brief contact is less likely to produce an accurate identification than a prolonged exposure. Colin G. Tredoux, et al., *Eyewitness Identification*, in 1 *Encyclopedia of Applied Psychology* 875, 877, Charles Spielberger ed., 2004); Brian H. Bornstein et al., *Effects of Exposure Time and Cognitive Operations on Facial Identification Accuracy: A Meta-Analysis of Two Variables Associates with Initial Memory Strength*, 18 *Psychol., Crime & Law* 473 (2012). *Henderson*, 208 N.J. at 262-64, 27 A.3d at 905; *Lawson*, 352 Ore. at 772-73, 291 P.3d at 702. McCarty viewed the incident for less than 30 seconds. Tr. 221.

- *Attention*: A person’s capacity for processing information is finite, so the more attention a person pays to one aspect of an event, the less attention he pays to other aspects. Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court’s Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 *Law & Hum Behav* 1, 10-11 (2009). *Lawson*, 352 Ore. at 770-71, 291 P.3d at 701. McCarty’s attention was focused on the woman running in circles rather than on the perpetrator. Tr. 220.

Based on these numerous estimator variables at play, it is unlikely that McCarty made a strong memory of the perpetrator’s face – if he made any memory of it at all. Thus, it is extremely unlikely that McCarty would have been able to identify the perpetrator – particularly more than five weeks after the incident – based solely on his independent memory formed on the night of the incident.

Scientific research offers another explanation. The research shows that suggestive circumstances – whatever their source⁴ – can alter a witness’s memory for an incident. *Henderson*, 208 N.J. 264-65, 27 A.3d at 909; *Lawson*, 352 Ore. at 787-89, 291 P.3d at 710. Moreover, the research shows that witnesses are often unaware that their memories have been altered by the suggestive circumstances or later acquired information. *Id.* Here, the context of McCarty’s identification – made only after viewing a photograph of a person identified as the police suspect on television – was highly suggestive. The context in which McCarty came to make the identification presents a classic case of memory contamination. See Elin M. Skagerberg, *Co-Witness Feedback in Line-Ups*, 21 *Applied Cognitive Psychol.* 489 (2007). McCarty claimed that his memory improved, and became significantly more detailed, after viewing Porter’s photograph on the news program. Because we know that memory does not improve but rather deteriorates rapidly, McCarty’s claimed memory improvement in fact shows that McCarty’s memory was likely contaminated by viewing Porter’s photograph on television.

⁴ *Lawson*, 352 Ore. at 787-89, 291 P.3d at 710 (“witness memory is equally susceptible to contamination by nonstate actors” as it is to post-event memory contamination by state actors).

The circumstances surrounding McCarty’s identification can be analogized to a police “showup”, where a single suspect is presented to a witness to make an identification. Showup identifications have been widely condemned as inherently suggestive because the witness knows that the person being shown is the police suspect so naturally concludes that he or she must be “the one.” There is also no way to determine if a witness is guessing in a showup because there will never be a false-positive response. *Lawson*, 352 Ore. 781-83, 291 P.3d at 707. *Accord Henderson*, 208 N.J. at 259-260, 27 A.3d at 902-03; *State v. Dubose*, 285 Wis.2d 143, 699 N.W.2d 582 (2005); *Commonwealth v. Martin*, 447 Mass. 274, 850 N.E.2d 555 (2006). While showups can be useful – when, for example, they are conducted within two hours of the incident and the individual matches the witness’s description and is detained in close physical proximity to the crime – showup identifications carry significant risks of misidentification. A field experiment revealed that two hours after an encounter, 58% of witnesses failed to reject an “innocent suspect” in a photo showup. A. Daniel Yamey et al., *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 L. & Hum. Behav., 459, 464 (1996).

Here, McCarty’s viewing of the single photograph identified as that of the police suspect carries all of the dangers and none of the benefits of a traditional showup. The risks associated with unnecessary showups – that the witness will affirm the identity of the police suspect and that his memory will become contaminated in the process – are present here and, together with the many estimator variables that undermine the reliability and strength of McCarty’s original memory, required the suppression of *any* identification testimony from that witness.

B. Traditional Adversarial Tools are Insufficient to Reveal the Weaknesses of Eyewitness Testimony

The trial court opined that cross examination would be a sufficient tool to counter the many issues with McCarty’s identification testimony. Tr. 203-05, 210-12. Although cross examination is typically a suitable tool for counteracting dubious evidence, in the case of eyewitness misidentifications, it is inadequate, as many courts and academics have recognized.

Because eyewitnesses sincerely believe their testimony and are unaware of the factors that may have contaminated their memories, they are more likely to appear as credible witnesses in the

face of cross-examination. See *United States v. Bartlett*, 567 F.3d 901, 906 (7th Cir. 2009) (witnesses “who are credible because they believe every word they utter on the stand – may be mistaken”). Because jurors confound certainty and accuracy, cross-examination is less likely to be effective in discrediting eyewitnesses. *Henderson*, 208 N.J. at 234-38, 27 A.3d at 888-89; Jules Epstein, *The Great Engine that Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 *Stetson L. Rev.* 727, 772 (2007).

Moreover, scientific research reveals that jurors routinely overbelieve eyewitness testimony. See Jennifer N. Sigler & James V. Couch, *Eyewitness Testimony and the Jury Verdict*, 4 *N. Am. J. Psychol.* 143, 146 (2002) (mock jury conviction rates increased from 49% to 68% when a single, vague eyewitness account was added). Scientific research confirms that identification evidence “has been shown to be comparable to or more impactful than physical evidence . . . and even sometimes confession evidence.” Melissa Boyce et al., *Belief of Eyewitness Identification Evidence*, in 2 *Handbook of Eyewitness Psychology: Memory for People* 501, 505 (R.C.L. Lindsay et al. eds., 2007). One reason for this is that, as research has revealed, many of the factors known through scientific research to affect the reliability of eyewitness identifications are either “unknown to the average juror or contrary to common assumptions.” *Lawson*, 352 *Ore.* at 761-63, 291 *P.3d* at 697.

Jurors also tend to overestimate “the likely accuracy of eyewitness evidence.” See John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 *Law & Hum. Behav.* 19, 28 (1983). Jurors may make this mistake because they “rely heavily on eyewitness factors that are not good indicators of accuracy.” 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 *Handbook of Eyewitness Psychology: Memory for People* 453, 484 (R.C.L. Lindsay et al. eds. 2007). Social scientists theorize that jurors rely heavily on factors that are not correlative of accuracy because many of the scientific principles underlying the reliability of eyewitness testimony are counter-intuitive or do not comport with common sense. See Michael R. Leippe, *The Case for Expert Testimony About Eyewitness Memory*, 1 *Psychol. Pub. Pol’y & L.* 909, 921 (1995). Thus, jurors

cannot accurately discriminate between correct and mistaken eyewitnesses and routinely credit the testimony of mistaken eyewitnesses. *See id.* at 925.

For all of these reasons, cross-examination cannot sufficiently expose the problem of mistaken eyewitnesses. It is not only cross-examination that has been shown to fail to uncover the fallibility of eyewitness identification. Traditional jury instructions have also been criticized for failing to properly educate jurors about the factors that undermine the reliability of eyewitness identifications. *See Henderson*, 208 N.J. at 288, 27 A.3d at 919-20.

C. The Manson/Kasper Test Is Inherently Flawed

The U.S. Supreme Court first articulated the *Manson* test in 1977 – well before the explosion in social science research that has taken place over the last three decades on eyewitness identification. This test was adopted in Vermont in *State v. Kasper*, 137 Vt. 184, 404 A.2d 85 (1979).⁵ Under the *Manson/Kasper* test, courts look at whether an identification was unnecessarily suggestive and whether it was reliable. Even if the identification is found to be unnecessarily suggestive, it may still be admissible if it bears sufficient indicia of reliability. *State v. Mayo*, 183 Vt. 113, 945 A. 2d 846, 852 (2008) (citing *State v. Emerson*, 149 Vt. 171, 174, 541 A.2d 466 (1987)).

To determine whether a pretrial identification was unnecessarily suggestive, the court looks at the totality of the circumstances. *Mayo*, 183 Vt. at 121-23, 945 A.2d at 852. To determine reliability, a court examines five “reliability” factors, which are then weighed against “the corrupting effect of the suggestive identification itself.” *Manson*, 432 U.S. at 114. The five factors are: (1) the witness’s “opportunity to view” the perpetrator; (2) the witness’s “degree of attention” at the time of the crime; (3) the “accuracy” of the witness’s description of the perpetrator; (4) the witness’s level of certainty”; and (5) the “time between the crime and the confrontation.” *Id.*

⁵ *See also State v. Unwin*, 139 Vt. 186, 424 A.2d 251 (1980) and *State v. Savo*, 141 Vt. 203, 446 A.2d 786 (1982).

The *Manson/Kasper* balancing test is inadequate because (1) when an identification occurs in a suggestive context, this tends to falsely inflate the self-reported reliability factors (opportunity to observe, attention paid, and certainty); (2) confirming feedback falsely inflates the self-reported reliability factors and, even with best efforts, some form of confirming feedback is virtually inevitable between the time a witness makes an identification and the time a witness testifies at a trial; (3) there is little support for description accuracy being an accurate measure of reliability; and (4) witness certainty at the time of the identification is the only certainty statement that even weakly correlates with reliability and that certainty statement, not an in-court statement of certainty, is the only certainty statement that should go before a jury.⁶

Of the several flaws in the existing *Manson/Kasper* approach, none is more fundamental than the effect of making an identification in a suggestive context on the reliability factors. As the New Jersey Supreme Court explained in *Henderson*, “when [self-]reports are tainted by a suggestive process, they become poor measures in a balancing test designed to bar unreliable evidence.” *Henderson*, 208 N.J. at 286, 27 A.3d at 286. Thus, despite the fact that making an identification in a suggestive context actually *decreases* reliability, suggestion can increase the likelihood that a court applying *Manson* will find that the identification was reliable. “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.” *Id.*

D. Other Courts Have Accepted and Applied the Scientific Research On Eyewitness Identification

Courts across the country have recognized that the scientific research regarding eyewitness identifications is valid and reliable.⁷ Based on this overwhelming scientific research, numerous courts have changed how they approach eyewitness identification evidence. Some courts have incorporated scientific research findings into their application of the *Manson* balancing test. See, e.g., *Young v. Conway*, 698 F.3d 69 (2d Cir. 2012) while others have eliminated those reliability

⁶ See Wells & Quinlivan, *Law & Hum. Behav.* at 33, 9-10.

⁷ See *Guilbert*, 306 Conn. at 234, 49 A.3d at 720 n.8 (collecting state and federal cases accepting eyewitness identification research).

factors that do not comport with science. *See, e.g., Commonwealth v. Santoli*, 424 Mass. 837, 680 N.E.2d 1116, 1121 (Mass. 1997) (eliminating certainty). Still others have implemented more robust intermediate remedies, such as enhanced jury instructions and expert testimony, to assist jurors in reaching informed decisions about the reliability of identification evidence. *See, e.g., State v. Guilbert*, 306 Conn. 218, 49 A.3d 705 (Conn. 2012). Other courts, like the supreme courts of New Jersey and Oregon have completely altered their framework for evaluating and addressing eyewitness identification evidence.

In New Jersey, the *Manson* balancing test was rejected in favor of a new approach allowing for pretrial hearings when defendants can show evidence of suggestiveness that can lead to mistaken identification, enhanced jury instructions that educate jurors about all aspects of eyewitness identification and memory, and burden shifting upon the state to show that proffered eyewitness identification is reliable. *See Henderson*, 208 N.J. at 288-89, 27 A.3d at 919-20. *See also State v. Chen*, 208 N.J. 307, 316-18, 27 A.3d 930, 936 (2011). In Oregon, the state's evidence code was used to create a new approach that treats eyewitness evidence like trace evidence (putting the burden of production on the proponent) and allows for the possibility of hearings in cases only involving estimator variables. *See Lawson*, 352 Ore. at 747-48, 291 P.3d at 689.

In 2011, the Massachusetts Supreme Judicial Court created a study committee on eyewitness identification “to consider how we can best deter unnecessarily suggestive procedures and whether existing model jury instructions provide adequate guidance to juries in evaluating eyewitness testimony.” *Commonwealth v. Walker*, 953 N.E.2d 195, 208 n. 16 (Mass. 2011). In 2013, the study group issued its report, the Supreme Judicial Court Study Group on Eyewitness Evidence Report and Recommendations to the Justices (2013) at 71 (hereinafter, “SJC Report”). In the report, the Group took a scientific approach to eyewitness identification, acknowledging that “memory and eyewitness identification has both grown and matured over the past thirty years,” and developed a list of recommendations that courts, counsel, and police can use to deal with eyewitness evidence. *See SJC Report* at 1-2.

(i) *New Jersey*

Based on its extensive review of the scientific research and the role of eyewitness misidentifications in wrongful convictions, the New Jersey Supreme Court took the unprecedented action of rejecting the *Manson* balancing test in favor of a far more robust totality of the circumstances test for evaluating whether admission of eyewitness identification testimony violates due process. This test allows for the consideration of all relevant evidence – whether relating to system or estimator variables – when making a determination about the reliability of eyewitness identification evidence. *Henderson*, 208 N.J. at 288-89, 27 A.3d at 919-20. The new test provides: (1) defendants can obtain a pretrial hearing by showing “some evidence of suggestion that could lead to a mistaken identification”; (2) the State must then offer proof to show that the proffered eyewitness identification is reliable, considering both system and estimator variables; and (3) the ultimate burden is on the defendant to prove a very substantial likelihood of irreparable misidentification. *Id.*

In addition to the opportunity for comprehensive pre-trial hearings, *Henderson* provides for enhanced jury instructions that educate jurors about all aspects of eyewitness identification and memory, and may be given to the jury at the close of evidence as well as during the trial when the witness testifies. *Id.* 208 N.J. at 296, 27 A.3d at 924.

The New Jersey Supreme Court has similarly laid out a framework for analyzing whether eyewitness testimony should be excluded in cases where an eyewitness identification is affected by private actor suggestion. *Chen*, 208 N.J. at 318-19, 27 A.3d at 937. In those circumstances, courts will hold preliminary hearings under New Jersey’s Rule of Evidence 104 to determine, first, that the evidence is relevant and second, that the risk of “undue prejudice, confusion of issues, or misleading the jury” does not substantially outweigh its probative value. *Id.* The evidence will be excluded if either of these prongs is not met. In setting forth the test for cases involving private actor suggestion, the court made one modification to the test set forth in *Henderson*, requiring a higher initial threshold of suggestiveness to trigger a hearing in that a private actor’s behavior must be “highly suggestive” to trigger a hearing. *Id.* 208 N.J. at 325-28, 27 A.3d at 942-43.

(ii) *Oregon*

Oregon courts have adopted a burden-shifting test for evaluating the admissibility of eyewitness testimony under Oregon's rules of evidence. *Lawson*, 352 Ore. at 757, 291 P.3d at 694. The proponent of identification evidence has the burden of demonstrating by a preponderance of the evidence that the witness perceived sufficient facts to support an inference of identification and that the identification was, in fact, based on those perceptions; if the state satisfies its burden that eyewitness evidence is not barred, the burden shifts to the defendant to establish that, although the eyewitness evidence is otherwise admissible, the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence.

(iii) Massachusetts

The Study Group recommended, *inter alia*:

1. The Supreme Judicial Court should “take judicial notice as legislative facts of the modern psychological principles regarding eyewitness memory set out in” *Lawson*. SJC Report at 2.
2. Pretrial judicial inquiry into the reliability of eyewitness evidence and remedies available for admitted evidence should be expanded.
3. Revised, expansive, science-based jury instructions (drafted by the Study Group) should be adopted. Judges and attorneys should be trained to properly implement the revised instructions and the instructions should be periodically reviewed to “reflect changes in the science of eyewitness identification.” *Id.* at 4. A “majority of the Study Group recommends that [the revised instructions] are not a substitute for expert testimony on eyewitness identification.” *Id.*

E. This Court Should Recognize and Apply the Robust Scientific Research and Alter Its Test for Evaluating Eyewitness Evidence.

This case provides an opportunity for Vermont to join sister courts in New Jersey and Oregon that have modified or abandoned the *Manson* test in favor of scientifically supported frameworks for evaluating eyewitness identification evidence. Vermont should follow the lead of these courts and take this opportunity to modify its test for evaluating the admissibility and treatment of eyewitness identification evidence in light of more than thirty years of robust scientific research.

This Court may analyze the admissibility and treatment of eyewitness testimony under either a due process or evidentiary analysis. What is important is that the Court adopt a new approach that is consistent with the scientific research and offers sufficient protection against wrongful conviction based on misidentification.

At a minimum, the court should adopt a new legal framework with the following features:

- i. Eliminate the balancing test set forth by the United States Supreme Court in *Manson* and adopted in *Kasper*;
- ii. Eliminate the *Manson/Kasper* “all or nothing” approach, which offers courts only two choices when evaluating identification evidence: suppress or admit;
- iii. Use intermediate remedies that ensure that jurors have information and context for critical evaluation of eyewitness evidence (instructions, experts, *in limine* rulings);
- iv. Hold pre-trial hearings that allow for the consideration of data and evidence that enhances the capability of the trial court to evaluate the strength of witness memory and the sources of potential memory contamination. This will assist courts in formulating intermediate remedies that counsel from both sides will be aware of before the trial commences. This would involve increased use of experts at pre-trial hearings, more testimony from witnesses about the strength of their recollection, and better evaluation of identification procedures;
- v. In some problematic cases, estimator variables alone can provide a basis for holding pre-trial evidentiary hearings concerning the reliability of identification evidence even if there is no suggestive conduct.
- vi. Use special masters or blue ribbon committees to review scientific data and make recommendations for incorporating new scientific findings (including in jury instructions);
- vii. Suppress either the out-of-court or in-court identifications when there is a substantial probability of misidentification.

II. WHETHER OR NOT THE COURT ALTERS ITS TEST, IT SHOULD FIND THAT MCCARTY'S IDENTIFICATION SHOULD HAVE BEEN SUPPRESSED

McCarty identified Porter in highly suggestive circumstances. The reliability of that identification is in serious doubt not only as a result of the suggestion but also because of the presence of many estimator variables that render McCarty's initial memory highly suspect. The trial court recognized these concerns and refused to allow McCarty to testify directly that the man that he saw on the newscast who had been arrested for the attack (Porter) was the same man that he saw on the night of the incident. Although the court limited McCarty's testimony regarding his identification to a statement that the man in the newscast photo looked "similar" to the man that he saw at the time of the attack, this did not cure the violation of Porter's due process rights. McCarty's resemblance testimony was the functional equivalent of the identification testimony that the court excluded, with all of the same due process concerns. Moreover, this identification testimony should have been excluded based on Vermont's Code of Evidence.

A. Under Any of the New Approaches, The Court Should Not Have Admitted McCarty's Identification Testimony

Under a modified due process approach that takes into consideration the totality of the circumstances, the state would not have been able to meet its burden of showing that the eyewitness testimony was reliable. Porter could obtain a pretrial hearing by showing evidence of suggestion that could lead to a mistaken identification – although the suggestion in this case did not come from a state actor, there is no question that the context in which Porter made his identification was highly suggestive and the State would not be able to offer proof to show that the proffered eyewitness identification was reliable. Nothing in this case points to reliability. Even if the State could make such a showing, the identification should be inadmissible because Porter could prove a very substantial likelihood of irreparable misidentification. Given all of the estimator variables at play in this case, the highly suggestive manner in which McCarty came to identify Porter, and McCarty's admission that he could not identify the perpetrator immediately after the altercation, the likelihood of irreparable misidentification in this case was extremely high. Thus, under a totality of the circumstances due process test, the court should not have admitted McCarty's identification testimony.

Likewise, under the New Jersey evidentiary approach set out in *Chen*, the court also should not have admitted McCarty's identification testimony. As discussed above, the test in *Chen* modifies the *Henderson* test by requiring an initial threshold of the private actor's behavior being "highly suggestive" to trigger a hearing. Plainly, McCarty viewing Porter's photograph on a newscast that identified him as the suspect in the altercation at issue was "highly suggestive," satisfying the burden set out in *Chen*. Having satisfied this initial threshold, the remainder of the *Chen* analysis is the same as the test set out in *Henderson*. Thus, for the same reasons, the court should have suppressed McCarty's identification testimony under an evidentiary analysis based on that set forth in *Chen*.

McCarty's identification testimony would also be inadmissible under the *Lawson* approach. The state would be unable to demonstrate by a preponderance of the evidence that the witness perceived sufficient facts to support an inference of identification and that the identification was based on those perceptions. There is no evidence that McCarty perceived sufficient facts to make an identification (other than McCarty's self-reports that were likely inflated by the suggestion inherent in the viewing of Porter's photo, offered a full 40 days after he admitted not being able to see the perpetrator's face). Even if the court somehow found that there the state could meet this burden, Porter would then have an opportunity to establish that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice or misleading the jury. In this case, the evidence was not probative or, at best, minimally probative. This would be strongly outweighed by the danger of unfair prejudice and misleading the jury.

B. Even Under the Current *Manson/Kasper* Balancing Test, The Court Should Not Have Admitted McCarty's Identification Testimony

The trial court in this case found that the issue of whether or not to admit McCarty's eyewitness testimony required "a due process analysis." Tr. 208. The trial court was correct in finding that the admission of an unreliable identification testimony should be analyzed under Vermont's due process jurisprudence, even when there is no allegation of police misconduct in procuring the identification. Although the Supreme Court has held that, as a matter of federal law, an identification only implicates due process when it is the result of suggestive state action, state courts are free to apply their own due process analysis, as urged by Justice Sotomayor in her persuasive dissent. *Perry v. New Hampshire*, 132 S. Ct. 716, 731-740 (2012).

In Vermont, a due process claim must be viewed under “the totality of the circumstances surrounding [an identification]” while “keeping in mind that the primary evil to be avoided is a very substantial likelihood of irreparable misidentification.” *State v. Smith*, 140 Vt. 247, 253, 437 A.2d 1093, 1095 (1981) (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)). The Supreme Court of Vermont has recognized that “it is, of course, true that the circumstances surrounding an out-of-court identification may so unnecessarily suggest the guilt of the suspect that the admission of testimony relating to the identification may be prejudicial.” *State v. Unwin*, 139 Vt. 186, 191, 424 A.2d 251, 254 (1980). In this case, the court violated Porter’s due process rights by disallowing direct identification testimony, but allowing his resemblance testimony, which was equally flawed and unreliable.

Resemblance testimony is testimony in which a witness describes the defendant as looking similar to or looking “something like” the perpetrator of a crime. See *United States v. Greene*, 704 F.3d 298, 304-305 (4th Cir. 2013). In *Greene*, the court found that it was plain error to admit a bank teller’s resemblance testimony which was made under highly suggestive circumstances and bolstered by the fact that the perpetrator’s face was hidden by a disguise. The court emphasized that resemblance testimony merits “the full panoply of due process protections” that are given to direct identification testimony. *Id.* at 311. Resemblance testimony can be as prejudicial as direct identification testimony. As a result, whether testimony is “properly classified as resemblance testimony or identification testimony is not relevant to the suggestiveness inquiry.” *Id.* at 307-08. Since resemblance testimony and identification testimony are so similar, it is necessary to consider a defendant’s due process rights before admitting either type of testimony. *Id.*

The trial court correctly found that direct identification testimony by McCarty would be a violation of due process, even though the police were not involved in McCarty’s viewing of Porter’s photo on the newscast. It noted in particular the limited description provided by McCarty when he made a statement to the police, and the period of time that elapsed between the event and the time that he saw the photograph. Recognizing “the concern throughout the case law of unduly suggestive identifications”, the court concluded that it would be unduly prejudicial to allow a direct identification as proffered by the prosecution. Tr. 207-08. In an apparent attempt

to alleviate the prejudice from direct identification testimony, the court limited McCarty to discussing the similarity between the person he saw at the altercation and the police suspect, identified as Porter, whose photo he saw on television weeks later. The court failed to consider the significant prejudicial effect of this testimony, which was just as damaging as the direct identification testimony that the court correctly disallowed.

McCarty's testimony, properly viewed as simply another form of identification testimony, should have been inadmissible based on an examination of the *Manson/Kasper* factors:

(1) *Opportunity to view the perpetrator*: McCarty's opportunity to view the perpetrator was extremely limited. He was far away from the perpetrator in poor lighting, and only saw the altercation for a span of seconds. Tr. 220-21. McCarty acknowledged his inability to view the incident and immediately after the altercation he told a police officer that he did not see the perpetrator's face and could not pick him out of a line up. Tr. 229-30

(2) *Degree of attention*: McCarty's attention was focused on the woman running in circles rather than on the perpetrator. Tr. 220.

(3) *Accuracy of description of perpetrator*: McCarty could not offer a detailed description of the perpetrator to the police (he could only describe him as having a "medium build") and did not see the perpetrator's face. Ex. E at pgs. 2-3.

(4) *Level of certainty*: At the time of the incident, McCarty told a police officer that he could not identify or describe the perpetrator with certainty. Ex. E at pgs. 2-3. Only after more than five weeks passed and he saw a photograph of the suspect on television did McCarty claim he had a high level of certainty regarding his much-delayed identification. Tr. 221. Suggestive circumstances regarding an identification – as were present here – inflate witnesses' certainty ratings, explaining the lack of correlation between witness certainty and accuracy. McCarty's high level of certainty after viewing Porter's photograph on television is evidence that his memory was contaminated by suggestion.

(5) *Time between crime and confrontation*: Perhaps most damning, approximately 40 days passed between the altercation and McCarty's eyewitness identification. Tr. 205.

These same factors that led the court to preclude direct identification testimony by McCarty as unduly prejudicial and a violation of due process should have resulted in the exclusion of his resemblance testimony as well.

C. Vermont's Rules of Evidence Also Require Suppression of McCarty's Identification

The Defendant asked the trial court not to admit McCarty's identification testimony based on the rules of evidence. Tr. 203. Yet, the court failed to conduct a basic evidentiary analysis to determine whether McCarty's eyewitness testimony was more prejudicial than probative under Rule 403. Additionally, the court did not consider that McCarty's eyewitness testimony was not "rationally based on the perception of the witness" or "helpful to a clear understanding of the witness's testimony or the determination of a fact in issue" under Rule 701. The court should have analyzed McCarty's testimony under the rules of evidence and, based on these rules, held his testimony inadmissible.

Rule 403 of the Vermont Rules of Evidence states that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *Id.* Vt. R. Evid. 403. Evidence is prejudicial if it has "an undue tendency to suggest decision on an improper basis." See *State v. Longe*, 170 Vt. 35, 743 A. 2d 569 (1999). The prejudicial nature of admitting an unreliable eyewitness identification far exceeds its probative value. Specifically, "[t]he more factors—the presence of system variables alone or in combination with estimator variables—that weigh against reliability of the identification, the less persuasive the identification evidence will be to prove the fact of identification, and correspondingly, the less probative value that identification will have." See *Lawson*, 352 Ore. at 756-58, 291 P.3d at 694.

While the trial court is not required to specify the precise weight it accords each factor in the balancing test, there must be some indication, especially in cases where the potential for unfair prejudice is high, that the court actually engaged in the balancing test and exercised its discretion under Vt. R. Evid. 403. See *State v. Shippee*, 176 Vt. 542, 545, 839 A.2d 566, 570-71 (2003).

In this case, the court failed to weigh the probative value of McCarty's eyewitness testimony against the prejudicial harm that was likely to occur from its admission. By failing to engage in

the balancing test, the court did not provide the proper evidentiary analysis that is required under the Vermont Rules of Evidence. If the court had conducted a balancing test, it would have determined that McCarty's testimony was prejudicial because it had a tendency to suggest a conclusion on an improper basis – in this case McCarty's failure to see the perpetrator's face and his reliance on a suggestive photograph from television.

Furthermore, Rule 701 of the Vermont Rules of Evidence limits eyewitnesses to offering opinion testimony that is “rationally based on the perception of the witness” and “helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.” See *State v. Jewett*, 148 Vt. 324, 330-32, 532 A.2d 958, 962 (1987). In this case, McCarty's opinion testimony was not rationally related to his perception because he never had a chance to perceive the perpetrator's face (Tr. 228), and his testimony was not helpful in forming a clear understanding of the determination of a fact in issue. Rather, his testimony obfuscated the facts and misled the jury.

III. ADMITTING THE EYEWITNESS TESTIMONY IN THIS CASE WAS NOT HARMLESS ERROR

Other than McCarty's testimony identifying Porter, the evidence in this trial was extremely weak. The other eyewitnesses could not make an identification. There were inconsistencies concerning whether Porter's truck matched the perpetrator's truck. And, the bite mark evidence was so lacking in probative value that it should never have been admitted in this case. See Mark Page, et al., *Expert Interpretation of Bitemark Injuries – A Contemporary Qualitative Study*, J. Forensic Sci., 58(3): 664-672 (2013) (“there is considerable variation among odontologists in even the most elementary aspects of the forensic diagnostic sieve and that of deciding whether the injury was indeed a bitemark or not”).⁸ Indeed, the NAS concluded that, due to the “inherent

⁸ Here, Dr. Averill suggested that certain peer-reviewed bite mark research supported his claim that one would not necessarily expect a bite mark on both sides of a bitten finger. The research is, in fact, inapposite. This research strongly suggests what is intuitive: even assuming the uniqueness of human dentition (the biting surface of teeth), skin is not capable of capturing that uniqueness with sufficient fidelity to identify the perpetrator, i.e., “the biter.” See Mary A. Bush et al., *The Response of Skin to Applied Stress: Investigation of Bitemark Distortion in a Cadaver Model*, 55 J. Forensic Sci. 71, 73-75 (2009) (no two bite marks created by the same dentition were measurably identical; shorter teeth created indentations smaller than their actual width, some as much as 25% smaller); H. David Sheets & Mary A.

weaknesses” and “basic problems inherent in bite mark analysis,” there is “considerable dispute” in the scientific community “about the value and reliability” of bite mark evidence. National Research Council, Committee on Identifying the Needs of the Forensic Sciences Community, *Strengthening Forensic Science in the United State: A Path Forward*, 173-176 (2009) (“NAS Report”). Since the publication of the NAS Report, courts have begun to question the use of the evidence in criminal trials. *See State v. Prade*, No. CR 1998-02-0463, slip op. at 13-14 (Ohio Com. Pl. Jan. 29, 2013); *State v. Lopez-Martinez*, 256 P.3d 896, 2010 Kan. App. Unpub. LEXIS *10-11 (Kan. Ct. App. 2010) (Leben, J., concurring) (per curiam) (citing the NAS Report and noting that “[r]econsideration of the admissibility of bite mark testimony seems appropriate”). Moreover, bite mark evidence has been responsible for at least 24 wrongful convictions and indictments. Amanda Lee Myers, *Once Key in Some Cases, Bite Mark Evidence Now Derided as Unreliable*, Associated Press (June 17, 2013). In light of the lack of other evidence connecting Porter to the crime and the highly prejudicial effect of eyewitness identification evidence on juries, the admission of McCarty’s testimony – whether found to be a constitutional or non-constitutional error – cannot be held to have been harmless. *See State v. Carter*, 164 Vt. 545, 553, 674 A.2d 1258, 1264 (1996) (error in admitting evidence could not be harmless if “there is a reasonable possibility that the evidence complained of might have contributed to the conviction”).

CONCLUSION

The Innocence Project respectfully requests that this Court adopt a new framework for the admission and treatment of eyewitness identification testimony, consistent with the powerful scientific consensus concerning variables that affect the accuracy and reliability of such testimony. Whether or not the court adopts such a new framework, the identification testimony in this case should not have been admitted and the judgment of conviction should be reversed.

Bush, *Mathematical Matching of a Dentition to Bitemarks: Use and Evaluation of Affine Methods*, 207 Forensic Sci. Int’l 111-118 (2011) (matching of dentition to the bite marks created was not possible within limits of repeatable measurements).

Dated: February 28, 2014

Respectfully Submitted,

/s/Edward A. Brill
Edward A. Brill
Rebecca L. Berkebile
PROSKAUER ROSE LLP
Eleven Times Square
New York, NY 10036
212-969-3000

/s/Bradley S. Stetler
Bradley S. Stetler
STETLER, ALLEN &
KAMPMANN
95 St. Paul Street
Burlington, VT 05401
802-660-8646

Karen A. Newirth
Barry C. Scheck
M. Christopher Fabricant
INNOCENCE PROJECT, INC.
40 Worth Street, Suite 701
New York, NY 10013
212-364-5340
Attorneys for *Amicus Curiae*
The Innocence Project, Inc.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(A)

I hereby certify, pursuant to Vermont Rules of Appellate Procedure 32(a)(7)(A), that the foregoing brief complies with the type-volume limitation set forth in Vermont Rules of Appellate Procedure 32(a)(7)(A)(i), specifically, that the foregoing brief contain no more than 9,000 words.

Using Microsoft Word 2010, I performed a word count on the foregoing brief, which totaled 8,762 words. Pursuant to Vermont Rules of Appellate Procedure 32(a)(7)(B), this count excludes the statement of issues, table of contents, table of authorities, signature blocks, certificate of compliance, and any addendum containing statutes, rules or regulations.

Dated: February 28, 2014

/s/Edward. A. Brill

Edward A. Brill

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of February 2014, true and complete copies of the BRIEF OF AMICUS CURIAE THE INNOCENCE PROJECT, INC. IN SUPPORT OF APPELLANT HAROLD D. PORTER, JR., was served by overnight mail on the following:

William A. Nelson, Esq.
52 High Street
Middlebury, VT 05753

Pamela Hall Johnson, Esq.
Deputy State's Attorney
Chittenden County State's Attorney's Office
32 Cherry Street
Suite 305
Burlington, VT 05401

/s/Edward. A. Brill

Edward A. Brill