Supreme Court of New Jersey

Docket No. 084999

STATE OF NEW JERSEY,	:	Criminal Action
Plaintiff-Respondent,	:	On Certification from a Judgment of the Superior Court of New Jersey, Appellate Division
v.	:	Sat Below:
QUINTIN D. WATSON,	:	Honorable Richard Geiger, J.A.D.
Defendant-Appellant,	:	Honorable, Julius Hoffman J.A.D.
Defendant-Petitioner	:	Honorable Ronald Susswein, J.A.D.

BRIEF OF PROPOSED *AMICUS CURIAE*
THE INNOCENCE PROJECT

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Innocence Project is a legal organization dedicated to providing *pro bono* legal and investigative services to prisoners for whom evidence discovered post-conviction can provide conclusive proof of innocence. To date, the work of Amicus and its affiliated organizations has resulted in the exoneration of 375, whose post-conviction DNA testing has demonstrated a wrongful conviction. Amicus is also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. For example, drawing on the lessons learned from cases in which the system convicted innocent persons, the Innocence Project advocates reforms designed to enhance the truth-seeking functions of the criminal justice system and, thereby, prevent future wrongful convictions. Through its experience exonerating innocent individuals and examining the causes of wrongful convictions, the Innocence Project has developed unique insight into the role mistaken identification plays as a contributing factor. Mistaken identification is the leading cause of wrongful convictions. Thus, Amicus has a compelling interest in urging courts to perform their gatekeeping role by excluding unreliable eyewitness identification evidence.

This case involves a grossly suggestive, first-time in-court identification in which the eyewitness, after failing to identify Appellant Quintin Watson prior to trial, first positively identified him from the witness stand during trial, while Mr.

Watson was seated at the defense table. Before trial, this eyewitness failed to identify Mr. Watson in a photo array and, in fact, identified another person after first not choosing anyone "because they all looked alike." *State v. Watson*, 472 N.J. Super. 381, 477 (App. Div. 2022). Mr. Watson was convicted based on exactly the kind of unreliable eyewitness identification evidence that has led to the wrongful conviction and unjust imprisonment of hundreds of innocent people across the nation. Amicus has a strong interest in the outcome of this case and in advocating for the adoption of a legal framework that guards against the admission of unreliable eyewitness testimony. Specifically, a rule excluding identification evidence that is not developed through non-suggestive identification procedures and instead made for the first time by an eyewitness during trial.

Moreover, scientific research establishes that memory does not improve, but eyewitness confidence in the accuracy of their identifications can be artificially inflated in courtroom settings. Therefore, assuming a fair pretrial identification procedure, eyewitnesses should be precluded from testifying to statements of certainty of their identification that were not recorded at the time the out-of-court identification was made, as such statements are only diagnostic of accuracy if they are made contemporaneous to the identification procedure.

PRELIMINARY STATEMENT

In the landmark case *State v. Henderson*, this Court acknowledged that "[w]ithout persuasive extrinsic evidence, one cannot know for certain which [eyewitnesses] identifications are accurate and which are false—which are the product of reliable memories and which are distorted by one of a number of factors." 208 N.J. 208, 235 (2011). In order to ensure that out-of-court witness identifications are reliable, this Court pored over the science of memory and the factors that influence eyewitness identifications, setting forth rigorous standards and procedures for the admission of out-of-court eyewitness identifications. *See generally id.*[1]

While the *Henderson* Court set forth significant safeguards and constitutional protections for criminal defendants in out-of-court eyewitness identifications, it did not address the equally significant issue of the reliability of first-time, in-court identifications, which are uniquely suggestive. Because their reliability cannot be verified by the *Henderson* protections, first-time, in-court identifications ("FITIC ID") are vulnerable to the same science of memory and factors that influence out-of-court identifications and can result in mistaken identifications and wrongful

[1] Thus, in order to pass constitutional muster, *Henderson* requires that an out-of-court witness identification must be, among other things, conducted with one or more of the following safeguards, by being: administered in a blind or double-blind manner; preceded by appropriate instructions; inclusive of an appropriate array of potential culprits, and; uninfluenced by confirmatory social feedback. *Henderson*, 208 N.J. at 283-99.

conviction. Further, although courts have likened FITIC IDs to showups, FITIC IDs are uniquely pernicious and cannot be justified. Unlike showups, which are generally disfavored in light of the inherent suggestiveness, but can sometimes be justified because they occur in a dynamic investigative setting, close in time to the crime before memory has faded, FITIC IDs often occur years after the crime took place. FITIC IDs are also made in a uniquely suggestive environment where the suspect is seated at the defense table and the witness knows that the police and prosecutor—after an investigation—believe the defendant to be guilty.

This Court now has an opportunity to fill this void in constitutional protections and answer the question of whether a first-time, in-court identification can ever satisfy the due process clauses of the United States and New Jersey Constitutions, when it has not withstood the *Henderson* protections. Extending the reasoning and science underpinning *Henderson* to this question, the answer is no.

This Court also has the chance to answer a second significant, related issue that has yet to be addressed regarding in-court witness identifications: whether an eyewitness who has made an out-of-court identification with a statement of a particular degree of confidence should be permitted to testify at trial that they are more confident at the time of trial of the identification than they were out-of-court. Based upon the analysis in *Henderson*, the answer is no.

INTRODUCTION

In *Henderson*, this Court aptly recognized that, "eyewitness '[m]isidentification is widely recognized as the single greatest cause of wrongful convictions in this country.'" *Henderson*, 208 N.J. at 231 (quoting *State v. Delgado*, 188 N.J. 48, 60 (2006)). This is because "[e]yewitness identifications are often 'considered direct evidence of guilt' and accorded great importance by juries." *State v. Romero*, 191 N.J. 59, 75 (2007) (quoting Otto H. MacLin & Roy S. Malpass, *The Other–Race Effect and Contemporary Criminal Justice: Eyewitness Identification and Jury Decision Making*, 7 PSYCH. PUB. POL'Y & L. 98, 98 (2001)). In-court identification is particularly potent because "'[t]here is almost *nothing more convincing* [to a jury] than a live human being who takes the stand, points a finger at the defendant, and says "That's the one!"'" *Henderson*, 208 N.J. at 237 (2011) (quoting *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (quoting Elizabeth Loftus, *Eyewitness Testimony* 19 (1979)) (emphasis in original).

The importance of ensuring reliability in eyewitness identifications cannot be overstated. As of the date of filing, the National Registry of Exonerations lists 3,373 exonerations nationwide, with 883 cases involving at least one witness who mistakenly identified the exoneree as the person the witness saw commit the crime. The National Registry of Exonerations, available at https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited

February 8, 2023). Of the 570 individuals exonerated by DNA testing, 320 were originally convicted based, in part, on one witness mistakenly identifying the exoneree as a person the witness saw commit the crime. *Id.* Misidentification results in more wrongful convictions than all other causes combined. Sarah Anne Mourer, *Reforming Eyewitness Identification Procedures Under the Fourth Amendment*, 3 DUKE J. CONST. L. & PUB. POL'Y 49, 54 (2008); *see also* Daniel S. Medwed, *Anatomy of A Wrongful Conviction: Theoretical Implications and Practical Solutions*, 51 VILL. L. REV. 337, 358 (2006) ("Virtually all of the pertinent studies since 1932 have pinpointed eyewitness misidentification as the single most pervasive factor in the conviction of the innocent.")

Decades of peer-reviewed scientific literature previously relied upon by this Court in *Henderson* establishes the various factors that can negatively impact the reliability of an eyewitness identification, including how memory works, system variables, estimator variables, and the effect of an in-court identification on jurors. *Henderson*, 208 N.J. at 241-76, 281-86. A FITIC ID is an in-court identification that is not preceded by a successful identification in a nonsuggestive identification procedure. FITIC IDs are vulnerable to all the same challenges to reliability as those made outside of court, but the *Henderson* protections do not apply to FITIC IDs because those safeguards are and can only be directed to out-of-court identifications. Thus, FITIC IDs have not been exposed to or withstood the scrutiny of the

gatekeeping tests of the accuracy or reliability of an eyewitness's memory under the pretrial identification procedures set forth in *Henderson*. Cross-examination, expert testimony, and jury instructions are insufficient safeguards for the reasons discussed below.

Further, a FITIC ID is uniquely susceptible to additional circumstances that make such identifications particularly unreliable. For example, FITIC IDs are vulnerable to the inherent suggestiveness of the courtroom. By the time the alleged eyewitness is called upon in court to identify the defendant, the defendant has already been identified by the state as the suspect and is seated at the defense table having been charged with the crime. The fact that the witness is aware that the police and the prosecution believe the defendant is guilty is powerfully suggestive to the witness. Aliza B. Kaplan & Janis C. Puracal, *Who Could It Be Now? Challenging the Reliability of First Time in-Court Identifications After State v. Henderson and State v. Lawson*, 105 J. CRIM. L. & CRIMINOLOGY 947, 968 (2015). Further, given that FITIC IDs regularly occur months or years after the witness has observed a potential crime, the reliability of the identification is impaired by the erosion of memory, particularly when compounded by the suggestiveness of the circumstances of a courtroom. *See* Kenneth A. Deffenbacher et. al., *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation*, 14 J. EXPERIMENTAL PSYCH.: APPLIED 139, 142 (2008).

Here, an eyewitness was presented with a photo array out-of-court one and a half years after the bank robbery. At first, he did not select a photo identifying the robber "because they all looked alike." *Watson*, 472 N.J. Super. at 477. When he finally did select a photo, he did not pick Mr. Watson as the robber, instead choosing a "filler" photograph of a different person. *Id.* at 475. At the trial, the eyewitness testified that, at the time he reviewed the photo array, he was not 100 percent certain that the person he picked was the bank robber, but that he was 75 to 90 percent certain, and on redirect he testified that he was 85 percent certain. *Id.* at 477. The prosecutor asked him if the man who robbed the bank was in the courtroom, and the eyewitness testified he was 80 percent certain that Mr. Watson robbed the bank. *Id.*

On appeal, Mr. Watson had argued that the trial court erred by allowing the eyewitness to make a FITIC ID. *Id.* at 475. The Appellate Division observed that the New Jersey Supreme Court "has never held—or even been asked to hold...—that in-court identifications are prohibited unless the witness had previously made a positive out-of-court identification." *Id.* at 485. In rendering its decision, the Appellate Division addressed *Henderson* and concluded that:

> [t]he gravamen of defendant's core argument is that in-court identifications are highly suggestive, much like one-on-one showup identifications. We find the comparison of in-court identifications to out-of-court showup identifications to be persuasive and well-supported by both social science and case law. The conclusion that these two types of identification events share common characteristics, however, does not necessarily support

> defendant's contention that first-time in-court identifications should be banned. After all, out-of-court show up identifications are not categorically excluded. Rather, such evidence is generally admissible with appropriate jury instructions.

Watson, 472 N.J. Super. at 493-94.

FITIC IDs cannot be justified by comparing them to "showups."[2] Showups, are "[b]y their nature... 'inherently suggestive'", *Henderson*, 208 N.J. at 259 (quoting *State v. Herrera*, 187 N.J. 493, 504 (2006)). This Court has "permitted on or near-the-scene identifications because '[t]hey are likely to be accurate, taking place, as they do, before memory has faded[ ] [and because] [t]hey facilitate and enhance fast and effective police action and they tend to avoid or minimize inconvenience and embarrassment to the innocent.'" *Herrera*, 187 N.J. at 504 (quoting *State v. Wilkerson*, 60 N.J. 452 (1972)). However, this Court also observed that because showups are fundamentally suggestive, "only a little more is required in a showup to tip the scale toward impermissibly suggestive." *Id.*

Unlike showups, which occur close in time to the crime, FITIC IDs occur many months to years later. While showups are inherently suggestive because a single suspect is presented to the witness, FITIC IDs are immeasurably more suggestive because they are made with a single person who is not just a suspect but

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[2] "Showups are essentially single-person lineups: a single suspect is presented to a witness to make an identification. Showups often occur at the scene of a crime soon after its commission." *Henderson*, 208 N.J. at 259.

a defendant who has been charged as a result of the criminal investigation, whom the State is portraying as the person who committed the crime.

Further, juries are incapable of evaluating the reliability of FITIC IDs, even with specific jury instructions. Indeed, "[t]he problem with first time, in-court identifications is that no one—not the jury, not the court, and not the parties themselves—can tell whether the in-court identification is a product of the courtroom setting (where the defendant is seated at the defense table and the witness is aware that the state believes him to be guilty) or is an independent memory that has not been tainted." Kaplan & Puracal, *supra* at 964-65.

As set forth below, based upon the science, there are no circumstances in which a FITIC ID can be deemed sufficiently reliable to satisfy due process. While this Court disfavors *per se* rules, FITIC IDs are so imbued with unreliability that cannot be adequately addressed by cross-examination or by jury instructions, a bright-line rule is necessary to protect the due process rights of defendants. This Court should not only limit the use of FITIC IDs but also take the reasonable step of prohibiting them altogether.[3]

[3] Should this Court decline to adopt a *per se* rule, it should, at the very least, create a presumption against the admissibility of a FITIC ID that can only be surmounted when the FITIC ID was not preceded by an out-of-court identification because the witness knew the perpetrator and identified them after the crime occurred, e.g., such as where a victim testified to a crime of domestic violence. This Court should also require the prosecutor to provide pre-trial notice to defense counsel of its intent to

The Court should also address and resolve the related and similarly problematic issue of whether eyewitnesses, who have made out-of-court identifications with a statement of a particular degree of confidence, should be permitted to testify at trial that they are more confident at the time of trial of the identification than they were out-of-court. Based on the same factors that influence FITIC IDs, this Court should preclude an eyewitness from testifying at trial that they are more confident the defendant committed the crime than they were when they made the out-of-court identification.

ARGUMENT

I. FITIC IDs Implicate Due Process Protections Under the United States and New Jersey Constitutions.

Like the United States Supreme Court, this Court has not yet addressed the question of whether FITIC IDs fall in the category of unnecessarily suggestive procedures that trigger due process protections. However, this Court in *Henderson* relied on notions of due process to suppress impermissibly suggestive police-controlled identifications. *Henderson*, 208 N.J. at 285. The same logic applies and should hold true for FITIC IDs.

Indeed, the gravamen of whether an identification procedure violates due process is "the likelihood of misidentification." *Neil v. Biggers*, 409 U.S. 188, 198

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utilize a FITIC ID at trial, so that the defendant can challenge the use of the procedure if the "prior knowledge" standard has not been satisfied.

(1972); *see also United States v. Emanuele*, 51 F.3d 1123, 1128 (3d Cir. 1995) ("A government identification procedure violates due process when it is 'unnecessarily suggestive' and creates a 'substantial risk of misidentification.'") (quoting *Government of Virgin Islands v. Riley*, 973 F.2d 224, 226 (3d Cir. 1992)).[4] The Supreme Court of Connecticut held that "FITIC IDs, like in-court identifications that are tainted by an unduly suggestive out-of-court identification, implicate due process protections" because a prosecutor's conduct eliciting a first-time identification in court constitutes state action. *State v. Dickson*, 141 A.3d 810, 824 (2016) ("the rationale for the rule excluding identifications that are the result of unnecessarily suggestive procedures—deterrence of improper conduct by a state actor—applies equally to prosecutors").

Here, too, all FITIC ID procedures implicate due process protections because they: necessarily involve state action by prosecutors; are inherently unreliable; are not subject to the necessary *Henderson* protections; and are subject to suggestive courtroom proceedings.

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[4] On this logic, many federal courts have held that in-court identifications implicate the due process rights of defendants. *See, e.g., United States v. Greene*, 704 F.3d 298 (4th Cir. 2013); *United States v. Rogers*, 126 F.3d 655 (5th Cir. 1997); *United States v. Rundell*, 858 F.2d 425 (8th Cir. 1988); *United States v. Archibald*, 734 F.2d 938 (2d Cir. 1984).

II. FITIC IDs Are Inherently Unreliable.

A. FITIC IDs Cannot Be Subjected to the *Henderson* Protections.

In *Henderson*, this Court emphasized the influence of system variables that have the potential for making witness identifications unreliable, discussed the need for compliance with certain procedures to render an identification reliable, and established a framework of best practice protections to ensure that unreliable identifications are excluded. Because of the unique context in which they arise, FITIC ID cannot benefit from any of these best practices that are necessary to protect the due process rights of the accused.

For example, this Court found that an identification may be unreliable if it is based on a lineup procedure that is not administered in double-blind or blind fashion.[5] *Id.* at 248-50. "[D]ouble-blind lineup administration is 'the single most important characteristic that should apply to eyewitness identification' procedures. Its purpose is to prevent an administrator from intentionally or unintentionally influencing a witness's identification decision." *Id.* at 248 (citing expert testimony of Dr. Gary Wells). This is because research shows that lineup administrators familiar with the suspect (*i.e.*, non-blind administration) may leak that information

[5] "Double-blind administrators do not know who the actual suspect is. Blind administrators are aware of that information but shield themselves from knowing where the suspect is located in the lineup or photo array." *Henderson*, 208 N.J. at 248.

"by consciously or unconsciously communicating to witnesses which lineup member is the suspect." *See* Sarah M. Greathouse & Margaret Bull Kovera, *Instruction Bias and Lineup Presentation Moderate the Effects of Administrator Knowledge on Eyewitness Identification,* 33 LAW & HUM. BEHAV. 70, 71 (2009). "Psychologists refer to this phenomenon as the 'expectancy effect': 'the tendency for experimenters to obtain results they expect ... because they have helped to shape that response.'" *Henderson*, 208 N.J. at 249 (quoting Robert Rosenthal & Donald B. Rubin, *Interpersonal Expectancy Effects: The First 345 Studies,* 3 BEHAV. & BRAIN SCI. 377, 377 (1978)).

With a FITIC ID, there is no opportunity for either a blind or double-blind procedure. Every person in the courtroom knows that the suspect is seated at the defense table and that the police and prosecutor believe the defendant to be guilty. There is no way to prevent the witness from being influenced by these facts. The expectancy effect is, therefore, magnified for a FITIC ID.

A second *Henderson* protection requires that an identification tool must be preceded by proper instructions to the witness, as "[t]he failure to give proper pre-lineup instructions can increase the risk of misidentification." 208 N.J. at 250. Thus:

> [i]dentification procedures should begin with instructions to the witness that the suspect may or may not be in the lineup or array and that the witness should not feel compelled to make an identification.
>
> * * * * * * * * * * *

> Pre-lineup instructions help reduce the relative judgment phenomenon.... Without an appropriate warning, witnesses may misidentify innocent suspects who look more like the perpetrator than other lineup members.

Id.[6]

A FITIC ID can never be preceded by the kind of necessary pre-identification instruction to a witness required by *Henderson* that the perpetrator might not be present. The defendant is always sitting in the court, and the witness knows that the defendant sits there because the prosecutor believes they committed the crime.

A third *Henderson* protection is the best practice requiring that the composition of an array of potential culprits shown to the witness must be reliably constructed. The Court observed that "[t]he way that a live or photo lineup is constructed can also affect the reliability of an identification. Properly constructed lineups test a witness's memory and decrease the chance that a witness is simply guessing." *Henderson*, 208 N.J. at 251. The necessity for appropriately curated lineup arrays is clear and common-sense: an array of look-alikes forces witnesses to examine their memory. As recognized by this Court and others in the context of

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[6] This Court cited two meta-analyses, where scientists found "that telling witnesses in advance that the suspect may not be present in the lineup, and that they need not make a choice, led to more reliable identifications in target-absent lineups." *Henderson*, 208 N.J. at 250 (citing Nancy Mehrkens Steblay, *Social Influence in Eyewitness Recall: A Meta–Analytic Review of Lineup Instruction Effects,* 21 LAW & HUM. BEHAV. 283, 285–86, 294 (1997); Steven E. Clark, *A Re-examination of the Effects of Biased Lineup Instructions in Eyewitness Identification,* 29 LAW & HUM. BEHAV. 395, 418–20 (2005)).

single-person "showup" identification procedures, it is hard to tell if the eyewitness is mistaken, guessing, or unsure, because the witness is not provided with an array of similar looking "fillers" (potential culprits in an array who are known to be innocent). *Henderson*, 208 N.J. at 259-61; *see also State v. Lawson*, 781, 291 P.3d 673, 686, 707-08 (Or. 2012); SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, REPORT AND RECOMMENDATIONS TO THE JUSTICES (2013) at 75-78, available at http://www.mass.gov/courts/docs/sjc/docs/eyewitness-evidence-report-2013.pdf. FITIC ID obviously lacks any properly constructed array of potential suspects present in live or photo lineups to "test" the recollection of the witn+ess, leading to a more reliable identification.

Finally, another *Henderson* protection instructs that a reliable identification must be free of confirmatory social feedback because pre-and-post-identification, confirmatory "feedback affects the reliability of an identification in that it can distort memory, create a false sense of confidence, and alter a witness's report of how he or she viewed an event." 208 N.J. at 255.[7] FITIC ID necessarily implicates the problems presented by pre-and-post-identification, confirmatory feedback. That the defendant is present at the defense table and the sole person to whom the eyewitness

[7] A classic example of confirmatory feedback would be something like "good, you identified the actual suspect." *See* G.L. Wells & A.L. Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. OF APPLIED PSYCH. 360 (1998).

is reasonably able to point to is by itself confirmatory feedback before the eyewitness even makes the identification. Further, with a FITIC ID, there can be no pre-identification instructions that the perpetrator might not be present and that the witness should not feel compelled to make an identification. *Henderson*, 208 N.J. at 250 (setting forth appropriate pre-identification instructions).

Because FITIC ID cannot benefit from the *Henderson* protections, such identifications are constitutionally unreliable for the reasons identified by the *Henderson* court.

B. The Courtroom Is an Inherently Suggestive Environment, Rendering FITIC IDs Unreliable.

Compounding the problematic fact that a FITIC ID cannot be deemed reliable under the *Henderson* safeguards is that FITIC IDs are made in a highly suggestive setting that can influence the eyewitnesses' identification testimony. The National Academy of Sciences Committee has explained that the in-court identification procedure is highly suggestive, rendering unreliable identifications: "In the courtroom, the eyewitness can easily see where the defendant is sitting. Thus, in-court identifications do not reliably test an eyewitness's memory." NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION, *Identifying the Culprit: Assessing Eyewitness Identification* 28, 36, n. 28 (2014). As one expert explained, "[t]he courtroom identification is obviously highly suggestive. The defendant is sitting at

the counsel's table, perhaps in prison clothing. There are no fillers and there is no lineup. And the identification may follow emotionally charged testimony by the victim describing a crime—a victim who, in the conclusion of the testimony, points out the culprit to the jury." Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND. L. REV. 451, 460 (2012).

Further, the courtroom's social setting is unduly suggestive because the setting is filled with expectations from the prosecutor, judge, and jury that the eyewitness will identify the defendant, which produces a commitment or expectancy effect. Dakota Kann, *Admissibility of First Time in-Court Eyewitness Identifications: An Argument for Additional Due Process Protections in New York*, 39 CARDOZO L. REV. 1457, 1463–64 (2018). This effect suggests that an eyewitness may feel that failing to identify the defendant will make him or her appear unreliable or unhelpful. The pressure to conform to expectations undermines the reliability of the witness's identification. *Id.* Indeed, the extreme suggestiveness of a defendant sitting at counsel table with defense counsel should, by itself, raise caution flags of the independent reliability of an in-court identification. *See* 2019 Report of the Third Circuit Task Force on Eyewitness Identifications, 92 TEMP. L. REV. 1, 26, 58 (2019).

Because of the inherent suggestive nature involved, it is effectively impossible to conduct a FITIC ID without undue suggestion, and therefore impossible to

conduct FITIC IDs fairly and reliably. As the Connecticut Supreme Court opined in *Dickson*, "we are hard-pressed to imagine how there could be a *more* suggestive identification procedure than placing a witness on the stand in open court, confronting the witness with the person who the state has accused of committing the crime, and then asking the witness if he can identify the person who committed the crime. If this procedure is not suggestive, then *no* procedure is suggestive." 141 A.3d at 822–23 (emphasis in original). The influence of suggestiveness on eyewitnesses is not a concept that juries readily understand, thus a rigorous cross-examination does not cure the ills of the inherent unreliability of FITIC IDs. This Court in *Henderson* recognized that "[a] 'fundamental fact of judicial experience,'... is that jurors 'unfortunately are often unduly receptive to [eyewitness identification] evidence.'" *Henderson*, 208 N.J. at 236 (quoting *Manson v. Brathwaite*, 432 U.S. 98, 120 (1977) (Marshall, J., dissenting)). Juries are not properly equipped to evaluate the reliability of FITIC IDs because eyewitness testimony naturally plays on basic intuitions that lead us to believe eyewitnesses without properly assessing the reliability of their identifications. *See Watkins*, 449 US at 352 (Brennan, J., dissenting). Scientific research confirms that "people believe that witnesses are considerably more likely to be accurate than they actually are." Boyce et al., Belief of Eyewitness Identification Evidence, *Handbook of Eyewitness Psychology: Memory for People* (Jan. 1, 2007) at 508–09. To the jury, such a powerful

identification will outweigh any uncertainty the witness may have expressed before trial, which logically extends to any uncertainty the eyewitness expresses during trial but before the identification is made. *See* Wells, et al., *Eyewitness Evidence: Improving Its Probative Value*, 7 PSYCHOL. SCI. IN PUB. INT. 45, 49-50 (2006) ("An eyewitness who has no motive to lie is a powerful form of evidence for jurors, especially if the eyewitness appears to be highly confident about his or her recollection. In the absence of definitive proof to the contrary, the eyewitness's account is generally accepted by police, prosecutors, judges, and juries.").

Thus, when law enforcement conducts an identification procedure during the investigation of the crime, and the witness fails to identify the defendant (as happened here), the jury is more likely to rely on the in-court testimony.[8] Indeed, "a first time in-court identification procedure amounts to a form of improper vouching." *Dickson*, 141 A.3d at 823. Cross-examination is inadequate to expose mistaken identification and to offset the significant impact of live eyewitness testimony on jurors. *See* Jules Epstein, *The Great Engine that Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination,* 36 STETSON L. REV. 727, 735-47 (2007); Jennifer N. Sigler & James V. Couch, *Eyewitness Testimony and the Jury*

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[8] This is also a basis for Amicus's request in section III, *infra*, that this Court should hold that eyewitnesses may not testify at trial that they are more confident or certain that the defendant committed the crime than they were when they made the out-of-court identification.

Verdict, 4 N. AM. J. PSYCH. 143, 146 (2002) (noting that the conviction rate by mock juries increased from 49% to 68% with the incorporation of a single, vague eyewitness account). Cross-examination is ineffective, in part, because it works best as a tool to expose witnesses who are lying; misidentification evidence is often offered by witnesses who are genuinely mistaken and believe they are being honest. As this Court noted in *Henderson*:

> We presume that jurors are able to detect liars from truth tellers. But as scholars have cautioned, most eyewitnesses think they are telling the truth even when their testimony is inaccurate, and "[b]ecause the eyewitness is testifying honestly (i.e., sincerely), he or she will not display the demeanor of the dishonest or biased witness."…. Instead, some mistaken eyewitnesses, at least by the time they testify at trial, exude supreme confidence in their identifications.

208 N.J. at 236 (internal citations omitted).

Finally, jury instructions may not be capable of countering a juror's inability to accurately gauge the reliability of FITIC IDs. Although post-*Henderson*, the New Jersey Model Criminal Jury Charges were revised to address why an eyewitness identification may be inaccurate, such as the physiological and psychological factors associated with the memory process, these charges do not sufficiently address the unique reliability concerns with FITIC IDs. Since the *Henderson* decision, "five studies responded by examining the effect of these far more lengthy and detailed instructions. In general, these studies show that the New Jersey instructions induced

a generalized skepticism of both reliable and less reliable eyewitness evidence, but the instructions did not improve the accuracy of jurors' decisions." Brandon L. Garrett, Judging Eyewitness Evidence, 104 JUDICATURE 30, 33 (2020).[9] The crux of the challenge is that "[j]ury instructions are not given until the end of a trial, when most jurors have already made their decisions; therefore, it is unlikely that the instructions would influence many jurors' decisions." Samantha L. Oden, *Limiting First-Time in-Court Eyewitness Identifications: An Analysis of State v. Dickson*, 36 QUINNIPIAC L. REV. 327, 353 (2018) (footnote omitted). Accordingly, because there are no safeguards that can adequately gauge whether a FITIC ID is reliable, no jury instruction can assist a jury to make a reliability determination.

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[9]Available at https://judicature.duke.edu/wp-content/uploads/2020/04/judgingeyewitnessevidence-spring2020.pdf (Citing Marlee K. Dillon, Angela M. Jones, Amanda N. Bergold, Cora Y.T. Hui & Stephen Penrod, *Henderson Instructions: Do They Enhance Evidence Evaluation?*, 17 J. FORENSIC PSYCH. RES. & PRAC. 1 (2017); Angela M. Jones, Amanda N. Bergold, Marlee K. Dillon & Steven D. Penrod, *Comparing the Effectiveness of Henderson Instructions and Expert Testimony: Which Safeguard Improves Jurors' Evaluations of Eyewitness Evidence?*, 13 J. EXPERIMENTAL CRIMINOLOGY 29 (2017); Brandon L. Garrett, Alice Liu, Karen Kafadar, Joanne Yaffe & Chad S. Dodson, *Factoring the Role of Eyewitness Evidence in the Courtroom*, 17 J. OF EMPIRICAL LEGAL STUD. 556 (2020).; C.E. Laub, C.D. Kimbrough & Brian H. Bornstein, *Mock Juror Perceptions of Eyewitnesses versus Earwitnesses: Do Safeguards Help?*, 34 AM. J. FORENSIC PSYC. 33 (2016); A.P. Papailiou, David V. Yokum, & Chris T. Robertson, *The Novel New Jersey Eyewitness Instruction Induces Skepticism but Not Sensitivity*, 10 PLoS ONE (2015), available at http://dx.doi.org/10.1371/journal.pone.0142695).

It is for these and other reasons that the high courts of other states have restricted use of FITIC IDs. *See Commonwealth v. Crayton*, 21 N.E.3d 157, 171 (Mass. 2014) (first time in-court identifications barred, absent a showing of "good reason"); *Dickson*, 141 A.3d at 8235 ("first time in-court identifications, like in-court identifications that are tainted by an unduly suggestive out-of-court identification, implicate due process protections and must be prescreened by the trial court). Here, the Court should take one further, incremental step and prohibit FITIC IDs altogether because there are no circumstances under which their reliability can be sufficiently ascertained consistent with defendants' due process rights. Moreover, such identifications cannot be justified in light of the freshness of the witnesses' memory or by the exigent circumstances of police investigation at the time of the incident. A fair identification procedure pursuant to this Court's instructions in *Henderson*, can always be performed outside of court without prejudicing the State while, at the same time, protecting the due process rights of the criminally accused.

C. FITIC IDs Are Less Reliable Than Showups.

In reaching its decision below, the Appellate Division discussed "show up" identifications, which have been determined to be inherently unreliable. Specifically, the Appellate Division compared FITIC IDs to showups, observing that this Court has not prohibited all showup identifications but that such evidence may be admissible with proper jury instructions. *Watson*, 472 N.J. Super. at 493-95.

FITIC IDs are even less reliable than showups, justifying a categorical exclusion. This Court discussed showups at length in *Henderson.* "Showups are essentially single-person lineups: a single suspect is presented to a witness to make an identification." *Henderson*, 208 N.J. at 259. "By their nature, showups are suggestive and cannot be performed blind or double-blind." *Id.*; *see also, e.g.*, *Crayton,* 21 N.E.3d at 165. Moreover, "[s]tudies that have evaluated showup identifications illustrate that the timeframe for their reliability appears relatively small." *Henderson*, 208 N.J. at 260. "Experts believe the main problem with showups is that—compared to lineups—they fail to provide a safeguard against witnesses with poor memories or those inclined to guess, because every mistaken identification in a showup will point out the suspect. In essence, showups make it easier to make mistakes." *Id.* This Court concluded that "the record casts doubt on the reliability of showups conducted more than two hours after an event, which present a heightened risk of misidentification." *Id.* at 261.

However, this Court in *Herrera* acknowledged that showups are permitted in limited circumstances of on or near-the-scene identifications because their proximity in time to the crime, before memory has faded, makes it more likely that they will be accurate. 187 N.J. at 504. In *Henderson*, this Court established cautionary requirements for showups: "showup administrators should instruct witnesses that the person they are about to view may or may not be the culprit and that they should not

feel compelled to make an identification." 208 N.J. at 261 ("That said, lineups are a preferred identification procedure because we continue to believe that showups, while sometimes necessary, are inherently suggestive.") "To avoid possible distortion" in an out-of-court identification, this Court also required that "law enforcement officers should make a full record—written or otherwise—of the witness' statement of confidence once an identification is made. Even then, feedback about the individual selected must be avoided." *Id.* at 254. [10]

Unlike showups, which occur close in time to the crime, FITIC IDs occur many months to years later. Moreover, while showups are inherently suggestive because a single suspect is presented to the witness, showups require prophylactic instructions in an attempt to limit their suggestive nature. FITIC IDs, to the contrary, are immeasurably more suggestive because they are not amenable to such cautionary instructions as they are made with a single person who is not just a suspect but a defendant who has been charged as a result of the criminal investigation, whom the State believes is the person who committed the crime.

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[10] The New Jersey Division of Criminal Justice created a "Showup Identification Procedures Worksheet", "designed to assist law enforcement officers in documenting the procedures/results of showups that are conducted with eyewitnesses in the course of a criminal investigation." Showup Identification Procedures Worksheet, N.J. Div. of Crim. Just. (rev. Oct. 1, 2012), available at https://www.nj.gov/lps/dcj/agguide/Eye-ID-Showup.pdf. This worksheet, among other things, asks whether law enforcement followed the cautionary instructions.

Further, what distinguishes showups from FITIC IDs is that the suggestion and expectancy effect are enhanced by the fact that the defendant has been arrested and proceeded to a trial and the suggestive courtroom setting (as discussed above in section II.B, *supra*). Other courts and social science studies have reasoned that in-court identification *is much more suggestive than a one-on-one showup.* In *Crayton*, the Massachusetts Supreme Court explicitly compared an in-court identification to a showup but pointed out the differences that lead to in-court identification being even more suggestive, noting other courts that have pointed out the same:

> In fact, in-court identifications may be more suggestive than showups. *See* Mandery, *Due Process Considerations of In-Court Identifications*, 60 ALB. L. REV. 389, 415 (1996) ("If anything, the evidence suggests that in-court identifications merit greater protection" than pretrial identifications). At a showup that occurs within hours of a crime, the eyewitness likely knows that the police suspect the individual, but unless the police say more than they should, the eyewitness is unlikely to know how confident the police are in their suspicion. However, where the prosecutor asks the eyewitness if the person who committed the crime is in the court room, the eyewitness knows that the defendant has been charged and is being tried for that crime. The presence of the defendant in the court room is likely to be understood by the eyewitness as confirmation that the prosecutor, as a result of the criminal investigation, believes that the defendant is the person whom the eyewitness saw commit the crime. Under such circumstances, eyewitnesses may identify the defendant out of reliance on the prosecutor and in conformity with what is expected of them rather than because their memory is reliable. *See id.* at 417-418 ("The pressure of being asked to make an identification in the formal courtroom setting and the lack of anonymity

> ... create conditions under which a witness is most likely to conform his or her recollection to expectations, either by identifying the particular person whom he or she knows the authorities desire identified, or by acting in conformity with the behavior of others they may have seen on television[.]")."

Crayton, 21 N.E.3d at 166-67.

A showup is more suggestive to the witness than a FITIC ID because, in a showup, the witness is not always aware that the person they are being shown is the only suspect. Nor are they aware of how confident law enforcement is that the suspect is the perpetrator. Yet with an in-court identification, the witness knows that the defendant is the only suspect and that he or she has been charged with one or more crimes.

Additionally, unlike a showup, which must take place soon after the crime occurs, FITIC IDs can occur months, if not years, after the crime. In fact, many courts—including this Court—require that a showup occur within a few hours of when the witness first viewed the perpetrator, or will otherwise recognize the decreasing reliability of a showup much later. *Henderson*, 208 N.J. at 261. The passage of time amplifies the risk of misidentification for in-court identifications, unlike showups, because memory degrades over time. Thus, FITIC IDs are far less reliable than showups.

D. The Pretrial Hearing Process Proposed in *Henderson* Is an Insufficient Safeguard Against the Inherent Unreliability of FITIC IDs.

As noted above, this Court did not address the reliability of FITIC IDs in *Henderson*, and the Court should take this occasion to address the serious due process implications of this type of identification. Yet even if this Court were to apply some of the *Henderson* protections to FITIC IDs, rather than adopt a tailored, revised framework, these previously articulated protections are inadequate.

First, *Henderson*'s revised framework puts the initial burden on a defendant to show some evidence of suggestiveness, but given the inherent suggestiveness, unreliability, and timing of FITIC IDs, this required showing is neither effective nor practical. *Henderson*, 208 N.J. at 288-95.

Second, *Henderson* allows the State to rebut any evidence of suggestiveness accounting for system and estimator variables. But for the reasons discussed here, FITIC IDs cannot be resolved by properly accounting for system variables because all applicable estimator variables are exacerbated to the point that there is an irreparable likelihood of unreliability. Indeed, a defendant might be able to meet the burdens required under *Henderson* to exclude a FITIC ID, but such a framework would be impractical to implement, given that a defendant would need to make its showing to the court before trial.

Applying the revised framework in *Henderson* to FITIC IDs attempts to provide the solution to one problem (out-of-court identifications or in-court identifications preceded by prior identifications) to another (FITIC IDs), but the problems are simply too different to apply a one-size-fits-all solution. Accordingly, this Court should take the judicious step of prohibiting FITIC IDs altogether. Such identifications are grossly suggestive, inherently unreliable and cannot be justified.[11]

III. An Eyewitnesses Should Only Be Permitted to Testify Up to the Degree of Certainty They Had When They Made Their Out-Of-Court Identification.

Because scientific research establishes that a witness's memory does not improve over time, this Court should also take the opportunity to address an equally concerning aspect of unreliable in-court eyewitness testimony presented here: in-court testimony of heightened confidence, i.e., beyond the level of confidence that was recorded at the time of identification. Such elevated statements of confidence are necessarily the product of factors influencing the witness such as the courtroom setting or exposure to other facts developed by law enforcement before trial and not because the witness's memory has somehow improved over time.

[11] If, however, this Court declines to adopt a *per se* rule, it should, as set forth in footnote 3, *supra*, create a presumption that a FITIC ID is not admissible and that such presumption can only be overcome when the FITIC ID was not preceded by an out-of-court identification because the witness knew the perpetrator and identified after the crime occurred. This Court should also require the prosecutor to provide pre-trial notice to defense counsel of its intent to utilize a FITIC ID at trial.

New Jersey Court Rule 3:11, implemented in response to *Henderson*, entitled "Record of an out-of-court Identification Procedure" requires that the record of an out-of-court identification procedure shall include, among other things, "a witness's statement of confidence, in the witness's own words, once an identification has been made." *R.* 3:11(c)(9). For the reasons set forth here, this Court should hold that eyewitness may not testify at trial that they are more confident the defendant committed the crime than they were when they made the out-of-court identification.

"There is no scientific basis for correlating time-of-trial confidence with accuracy." 2019 Report of the U.S. Court of Appeals for the Third Circuit Task Force on Eyewitness Identifications, 92 TEMP. L. REV. 1, 58 (2019) (footnote omitted); Kann, *supra*, 1463 (in-court variables "can lead a witness to make a confident in-court identification—even though the witness may simply be affected by the suggestiveness of the [trial] proceeding."). "In-court confidence statements may also be less reliable than confidence judgments made at the time of an initial out-of-court identification; as memory fails and/or confidence grows disproportionately. The confidence of an eyewitness may increase by the time of the trial as a result of learning more information about the case, participating in trial preparation, and experiencing the pressures of being placed on the stand." NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION, *supra*, 110; *see Henderson*, 208

N.J. at 267 ("memory decay 'is irreversible'; memories never improve. As a result, delays between the commission of a crime and the time an identification is made can affect reliability. That basic principle is not in dispute."); Deffenbacher, *supra*, 142 (a meta-analysis of fifty-three "facial memory studies" confirmed "that memory strength will be weaker at longer retention intervals [the amount of time that passes] than at briefer ones."). Further, this Court, and other courts, have recognized that post-identification feedback and other post-identification information provided to a witness can inflate witness confidence. *See Henderson*, 208 N.J. at 253-55; *Crayton*, 21 N.E.3d at 168 (citing Supreme Judicial Court Study Group on Eyewitness Evidence: Report and Recommendations to the Justices 19 (July 25, 2013)); *State v. Lawson*, 352 Ore. 724, 777 (2012); *see also* 2019 Report of the Third Circuit Task Force on Eyewitness Identifications, 92 TEMP. L. REV. 1, 59, n.303 (2019) (citing cases).

Procedures should mitigate the influence of in-court variables, given their illegitimate influence on eyewitness confidence and the disproportionate credit jurors give to eyewitness confidence. This Court should hold that that a witness who previously has quantified their certainty as to an accused's identify may only testify to the degree of confidence recorded at the time of the identification. This proposed rule builds on the work this Court has accomplished in *Henderson* and related cases to ensure that the New Jersey law on eyewitness identifications is faithful to due

process. There is no value in offering real-time testimony alleging enhanced "certainty" while due process requires the exclusion of illegitimate influences that affect the integrity of eyewitness identification evidence.

CONCLUSION

For the foregoing reasons, and those that may be offered at oral argument, which Amicus respectfully requests, this Court should find that there are no circumstances in which a FITIC ID can be deemed sufficiently reliable to satisfy due process, and the use of this identification technique should be prohibited. For the same reasons, the Court should also preclude an eyewitness from testifying at trial

that they are more confident the defendant committed the crime than they were when they made a prior out-of-court identification.

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