Time To Blow Up the Showup: Who Are Witnesses Really Identifying?

"[I]t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial."[1]

I. INTRODUCTION

Despite recognizing the pitfalls of relying on suggestive pretrial eyewitness identifications, the United States Supreme Court in *United States v. Wade*[2] upheld the admissibility of such identifications at trial, and issued a broad ruling that requires only some independent basis for the subsequent identification.[3] Although all pretrial identifications raise an issue as to suggestibility and reliability, show-up procedures have indisputably been acknowledged as the most vulnerable to false-suspect identification.[4] A showup is an identification procedure where an officer presents the witness with a single suspect and asks him or her whether that suspect is the perpetrator of the crime at issue.[5] Praised as a quick and easy method of confirming or negating police investigation leads, such advantages come at a heavy cost.[6] Preferably, showups are administered just moments after the commission of a crime, when the image of the perpetrator is presumably fresh in the witness's mind.[7] Despite this ideal, showups are permitted at any point during an

1. United States v. Wade, 388 U.S. 218, 229 (1967) (citation omitted).

2. 388 U.S. 218 (1967).

3. *See id*. at 240 (holding in-court identifications admissible with independent origin other than pretrial identification).

4. *See* Stovall v. Denno, 388 U.S. 293, 302 (1967) (describing single-person showups as "widely condemned"); JULES EPSTEIN, 1-2 CRIMINAL DEFENSE TECHNIQUES § 2.03(5)(c) (2013) (noting high risk of suggestive identification due to police control and elevated emotions); Michael D. Cicchini & Joseph G. Easton, *Reforming the Law on Show-Up Identifications*, 100 J. CRIM. L. & CRIMINOLOGY 381, 389 (2010) (arguing showups "grossly suggestive," making already poor eyewitness identification even worse).

5. *See* Cicchini & Easton, *supra* note 4, at 388 (defining showups). Other pretrial eyewitness identification procedures include lineups, in which a set of closely resembled persons are presented to the witness all together, and photo arrays, in which photographs of similarly resembled people are displayed to the witness. *See* W. VA. CODE ANN. § 62-1E-1 (8)-(10) (West 2013) (defining lineups and photo arrays).

6. *See* State v. Delgado, 902 A.2d 888, 895 (N.J. 2006) ("Eyewitness identification can be the most powerful evidence . . . at trial, but [also] the most dangerous."); Cicchini & Easton, *supra* note 4, at 388-89 (recognizing showups as convenient tool for quick and easy resolutions of police investigations).

7. *See* People v. Veal, 482 N.Y.S.2d 341, 341 (N.Y. App. Div. 1984) (praising prompt or instantaneous showup as indicative of good police work); State v. Lawson, 291 P.3d 673, 686 (Or. 2012) (recognizing

investigation when, under the totality of the circumstances, the identification is deemed sufficiently reliable.[8]

Unfortunately, even when showups are deemed unreliable and thus inadmissible, witnesses are often permitted to make an in-court identification of the suspect.[9] Despite any good intentions of a witness, common sense reality remains: witnesses may not be identifying the perpetrator, but rather the innocent defendant forced to participate in an unduly suggestive show-up procedure.[10] Witnesses rarely comprehend the impact of a suggestive showup on their ability to make an accurate in-court identification.[11] For this reason, in-court identifications are inescapably tainted by pretrial showup procedures.[12]

Regardless of efforts to "purge the primary taint" created by suggestive

suggestive showups most reliable when immediately after crime because benefit of fresh memory); TRACY BATEMAN FARRELL & JOHN A. GEBAUER, 35 CARMODY-WAIT 2D *Showup Identification, Generally* § 194:219, Westlaw (database updated June 2015) (stressing relevance of geographical and temporal proximity to where crime occurred).

8. *See* Neil v. Biggers, 409 U.S. 188, 199 (1972) (declaring five factors for consideration in totality of circumstances for reliability of identifications). The five factors announced in *Biggers* include:

> the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Id. at 199-200; *see also* Manson v. Brathwaite, 432 U.S. 98, 114 (1977) (concluding "reliability is the linchpin in determining the admissibility of identification testimony"). The first step in challenging an identification is to argue that the procedure was unduly suggestive. *See* Wallace W. Sherwood, *The Erosion of Constitutional Safeguards in the Area of Eyewitness Identification*, 30 HOW. L.J. 731, 748 (1987) (indicating if procedure not suggestive, inquiry stops and identification stands). Even where the sitting judge agrees the identification procedure was suggestive, the Supreme Court has recognized exigencies making the suggestive procedure necessary, or at the very least excusable. *See* Stovall v. Denno, 388 U.S. 293, 302 (1967) (calling immediate hospital showup "imperative" despite obvious suggestibility). Only after recognizing the identification procedure was unduly suggestive and not subject to an exception, do courts apply the *Biggers* factors to determine reliability, irrespective of other obvious downfalls. *See* Sherwood, *supra*, at 749 (outlining standard for admissibility of show-up identification procedures).

9. *See* United States v. Wade, 388 U.S. 218, 240 (1967) (recognizing underlying identification as unreliable, permitting in-court identification with independent source). An in-court identification has an independent source when the witness's identification is based on something other than the illegal show-up procedure. *See* Major Francis Gilligan, Comment, *Eyewitness Identification*, 58 MIL. L. REV. 183, 204 (1972) (explaining how to distinguish illegal in-court identifications from those with independent source).

10. *See Wade*, 388 U.S. at 229 (acknowledging once witness has picked accused once, unlikely he will change his mind later); Unites States v. Rogers, 126 F.3d 655, 659 (5th Cir. 1997). "Even the best intentioned among us cannot be sure that our recollection is not influenced by the fact that we are looking at a person we know the Government has charged with a crime." *Id. See also* Sherwood, *supra* note 8, at 756 (attributing false identifications to victim's hope to believe police apprehended suspect).

11. *See* NATHAN R. SOBEL ET AL., EYEWITNESS IDENTIFICATION: LEGAL & PRACTICAL PROBLEMS, SUGGESTIVE IDENTIFICATION § 1:3 (2d ed. 2013) (explaining psychological process by which showup can substitute for true image of perpetrator).

12. *See* Jessica Lee, Note, *No Exigency, No Consent: Protecting Innocent Suspects from the Consequences of Non-Exigent Show-Ups*, 36 COLUM. HUM. RTS. L. REV. 755, 797 (2005) (arguing suggestive showup permanently prejudiced subsequent trial).

show-up procedures, eighty percent of the first 100 post conviction DNA exonerations were based primarily on false eyewitness identifications.[13] Jurors naively equate witness confidence with reliability of the evidence, despite studies that say this has little, if any, correlation.[14] Several circuits, in recognizing this reality, have ruled that evidence of a defendant's general guilt may not be used to corroborate and substantiate otherwise unreliable eyewitness testimony.[15] Notwithstanding this trend toward more cautious admittance of faulty eyewitness identifications, the Supreme Court's result-oriented test remains the authority in most states.[16]

Part II.A of this Note will begin with an overview of eyewitness identification and its persuasive effect on juries.[17] Part II.B.1 will describe the advantages and disadvantages of eyewitness-identification procedures as recognized by the courts over the past several decades.[18] Part II.B.2 will discuss the Supreme Court of the United States' decision in *Wade* and cases have since sprouted from the decision, expanding on the concept of independent-source test.[19] Part II.B.3 will acknowledge some courts' more cautious attempts in screening tainted in-court identifications.[20]

Part III.A of this Note will then argue that the *Biggers* factors are a poor method of measuring the reliability of eyewitness identifications.[21] Next, Part III.B will suggest that the *Wade* independent-source test excuses suggestibility and permits in-court identifications irrespective of whether a pretrial identification has tainted the identification.[22] Part III.C.1 will go on to analyze police reforms that could better safeguard against misidentification at the investigatory level.[23] Finally, Part III.C.2 will argue for court reforms welcoming expert testimony and specialized jury instructions to best impart the danger of eyewitness testimony to the jury for deliberation in hopes that

13. *See* JOHN M. MAGUIRE, EVIDENCE OF GUILT 221 (1958) (raising question of whether evidence ever "purged of the primary taint"); Cicchini & Easton, *supra* note 4, at 385-86 (citing statistics regarding unreliability of eyewitness identification).

14. *See* PATRICK M. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 19 (1965) (explaining jurors "unduly receptive to identification evidence and are not sufficiently aware of its dangers"); Cicchini & Easton, *supra* note 4, at 387 (noting level of witness's confidence highest predictor of guilty verdicts).

15. *See* Rudolf Koch, Note, *Process v. Outcome: The Proper Role of Corroborative Evidence in Due Process Analysis of Eyewitness Identification Testimony*, 88 CORNELL L. REV. 1097, 1100-01 (2003) (reporting stricter independent source test in Second, Third, and Fifth Circuits). In these circuits, corroborative evidence is only that evidence which supports the accuracy of the identification itself. *See id.*

16. *See* EPSTEIN, *supra* note 4, § 5(a) (noting *Biggers* Court shifted focus away from necessity to reliability of procedure).

17. *See infra* Part II.A (indicating powerful effect of eyewitness identification testimony).

18. *See infra* Part II.B.1 (chronicling case law pertaining to reliability of showups).

19. *See infra* Part II.B.2 (explaining *Wade*).

20. *See infra* Part II.B.3 (exploring some courts' attempts to minimize faulty identifications).

21. *See infra* Part III.A (analyzing *Biggers* factors).

22. *See infra* Part III.B (arguing *Wade* test fails to achieve intended purpose).

23. *See infra* Part III.C.1 (explaining how police can decrease suggestibility of identification procedures).

implementing such reforms will help to fix our broken system.[24]

II. HISTORY

A. Overview of Eyewitness Identifications: Tolerated by Law and Applied by Juries

Despite the recognized unreliability of eyewitness identifications, courts continue to rely on the distorted perceptions of witnesses to convict criminal defendants.[25] Although some eyewitness misidentifications are attributable to improper or suggestive police procedure, most eye witness identifications are caused by the natural unreliability of human perception and memory.[26] Several environmental factors affect the human brain's ability to perceive, store, and recall information, including poor observation conditions, stress, personal biases, and memory gaps.[27] Although faulty identifications might be the product of fallible perception and memory, by the time a witness is asked to testify at trial, she is confident in her identification.[28] Further, when an

24. *See infra* Part III.C.2 (arguing for broader acceptance of expert testimony and specialized jury instructions on eyewitness misidentification).

25. *See* Manson v. Brathwaite, 432 U.S. 98, 106 (1977) (summarizing *Bigger*'s holding: testimony concerning unnecessarily suggestive procedures admissible if sufficient aspects of reliability met); United States v. Wade, 388 U.S. 218, 228 (1967) ("The vagaries of eyewitness identification are well-known."); Cicchini & Easton, *supra* note 4, at 381 (indicating research shows eyewitness identifications leading cause of wrongful convictions); Bennett L. Gershman, *The Eyewitness Conundrum: How Courts, Police and Attorneys Can Reduce Mistakes by Eyewitnesses*, 81 N.Y. ST. B.J. 24, 24 (2009) (recognizing eyewitness identifications indispensable in criminal investigation and prosecution, despite empirical, anecdotal, and intuitive weaknesses). In *Manson*, the petitioner conceded the identification procedure of showing a single photograph was suggestive and unnecessary, but the Supreme Court admitted the evidence nonetheless. *See* 432 U.S. at 109, 116. The Court applied an illusive, totality of the circumstances approach and held there had not been "a very substantial likelihood of irreparable misidentification." *Id.* at 116 (citing Simmons v. United States, 390 U.S. 377, 384 (1968)).

26. *See* Fredric D. Woocher, Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969, 970 (1977) (noting "human perception and memory . . . [susceptible] to unintentional" and subtle suggestion).

27. *See* State v. Henderson, 27 A.3d 872, 921 (N.J. 2011) (discussing variables affecting identifications: stress, weapon focus, duration, distance, lighting, memory decay, and race bias); Woocher, *supra* note 26, at 976-82 (expounding on environmental factors affecting human perception and memory). Perception is a constructive process whereby people selectively attend to only some environmental stimuli. *See* Woocher, *supra* note 26, at 976 (indicating memories undergo changes with details added and deleted unconsciously). Although a jury may be mesmerized by the victim witness's testimony, through statements like, "I was so frightened that his face is etched in my memory forever," the reality is, stress actually *decreases* perceptual abilities. *See id.* at 979.

28. *See* Brodes v. State, 614 S.E.2d 766, 771 (Ga. 2005) (prohibiting consideration of witness's certainty in identification as reliability factor); *Henderson*, 27 A.3d at 910 (stating many jurors incorrectly believe witnesses in threatening situation "will never forget a face"); Timothy P. O'Toole & Giovanna Shay, *Manson v. Brathwaite Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 VAL. U. L. REV. 109, 120 (2006) (reporting study indicating no correlation between witness confidence at trial and accuracy of identification); Woocher, *supra* note 26, at 985 (noting witnesses become more confident in correctness of identification as time progresses). Confidence is highly malleable, such that "seemingly innocuous confirmatory feedback to the witness from the person conducting

unconscious and innocent mistake causes the misidentification, cross-examination becomes a less useful tool because it only causes the witness to reassert confidence.[29]

This exaggerated witness confidence produces a tendency in jurors to "almost unquestionably accept eyewitness testimony."[30] Studies have revealed, however, that there is little, if any, correlation between witness confidence and accuracy of the eyewitness's identification.[31] Notwithstanding the recognizable faults of eyewitness identifications, courts are satisfied with the ability of jurors to sort through reliable and unreliable identifications.[32] Consequently, eyewitness misidentification has been named the cause in nearly seventy-five percent of wrongful convictions across the country.[33] The Innocence Project website maintains a database categorizing hundreds of DNA exonerations according to the accused crime and contributing causes of the wrongful conviction.[34] It references more than 200 instances of proven wrongful convictions where eyewitness misidentification played a contributing role.[35]

In other types of eyewitness identification procedures, such as line ups and photo arrays, police provide the witness with several suspects displaying

the line-up . . . has been demonstrated to increase confidence." O'Toole & Shay, *supra*, at 120.

29. *See Wade*, 388 U.S. at 235 (recognizing pitfalls of identifications make cross-examination imperfect assurance of accuracy and reliability); Cicchini & Easton, *supra* note 4, at 387 (observing cross-examination not particularly useful when witness simply mistaken rather than lying); Lee, *supra* note 12, at 776 (noting cross-examination useless for detecting witnesses intending to tell truth); O'Toole & Shay, *supra* note 28, at 135 (suggesting when witnesses believe in their misidentification, cross-examination cannot shake them).

30. United States v. Langford, 802 F.2d 1176, 1182 (9th Cir. 1986) (Ferguson, J., dissenting) (stressing little probative value and high prejudicial risk in admitting eyewitness identifications to juries); *see also* Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (indicating juries unlikely to discredit confident eyewitness testimony); Manson v. Brathwaite, 432 U.S. 98, 120 (1977) (Marshall, J., dissenting) (noting juries unduly receptive to eyewitness identification testimony); Lee, *supra* note 12, at 772 (calling persuasiveness of eyewitness testimony principal danger of eyewitness identification procedures). "Nothing is more convincing to jurors than a live witness who takes an oath and confidently proclaims that he saw the defendant commit the crime." Cicchini & Easton, *supra* note 4, at 387 (cautioning jurors against weighing eyewitness testimony too heavily). Jurors are unfamiliar with investigative procedures and cannot be expected to understand that the guilt of an accused might rest solely on the credibility of an eyewitness. *See* Solomon v. Smith, 487 F. Supp. 1134, 1136 (S.D.N.Y. 1980) (noting even witness failed to appreciate impact of investigative suggestiveness leading to misidentification).

31. *See* Cicchini & Easton, *supra* note 4, at 387.

32. *See* Manson v. Brathwaite, 432 U.S. 98, 116 (1977) (justifying reliance on judgment of juries despite untrustworthiness of eyewitness identification testimony). *But see* United States v. Brownlee, 454 F.3d 131, 142 (3d Cir. 2006) (recognizing jurors' common sense tendency to find identifications reliable, contradicts research establishing unreliability of identification). The *Manson* Court reasoned, "[j]uries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." 432 U.S. at 116.

33. *See Eyewitness Misidentification*, INNOCENCE PROJECT, http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php (last visited Mar. 15, 2014), *archived at* http://perma.cc/NM98-RRXH (providing statistics on wrongful convictions due to faulty eyewitness identifications).

34. *See The Cases: DNA Exoneree Profiles*, INNOCENCE PROJECT, http://www.innocenceproject.org/know/Search-Profiles.php (last visited Mar. 15, 2014), *archived at* http://perma.cc/P4GK-Y8HB (offering search database for wrongful convictions by contributing causes, jurisdiction, or crime).

35. *See id.*

similar features, taking care to present the suspects in the least suggestive manner possible.[36] Showups, on the other hand, are rife with suggestiveness as police are usually presenting a single suspect to a witness in the field shortly after the occurrence of a traumatic event.[37] For this reason, courts have regarded showups as the most suggestive and least favorable method of obtaining pretrial eyewitness identifications.[38] Although not required by the Supreme Court, many state courts have prohibited show-up identifications absent some emergency or exigent circumstance that prevented police from engaging in a less suggestive procedure.[39] These courts, however, not only distort the exigency requirement, but also bypass the exigency requirement all together by allowing for a totality of the circumstances approach to determine whether the suggestive procedure nevertheless produced a reliable identification.[40]

36. *See* Cicchini & Easton, *supra* note 4, at 389 (indicating lineups and photo arrays less suggestive than showups).

37. *See id.* at 388-89 (defining showups). Showups are convenient for law enforcement because they make for quick and easy resolutions of investigations. *See id.* (indicating lineups and photo arrays take time, effort, and volunteers). Showups are inherently suggestive because witnesses presume the police would not display a single suspect unless they believed the suspect committed the crime. *See* United States v. Funches, 84 F.3d 249, 254 (7th Cir. 1996) (recognizing unreliability of showups); Cicchini & Easton, *supra* note 4, at 389 (noting commonly held belief police only use showups when certain of guilt).

38. *See* Stovall v. Denno, 388 U.S. 293, 302 (1967) (stating single-person showups "widely condemned"); United States v. Watkins, 741 F.2d 692, 694 (5th Cir. 1984) (indicating purposeful discouragement of show-up identifications). A critical problem with showups is that they fail to provide a safeguard against witnesses inclined to guess when their memory fails them. *See* State v. Henderson, 27 A.3d 872, 903 (N.J. 2011).

39. *See* United States v. Funches, 84 F.3d 249, 254 (7th Cir. 1996) (stating "show-ups may be appropriate in certain situations"); People v. Riley, 517 N.E.2d 520, 523 (N.Y. 1987) (disfavoring show-up identifications but permitting if exigent circumstances require immediate identification); State v. Dubose, 699 N.W.2d 582, 594 (Wis. 2005) (explaining showups conducted only when necessary); Lee, *supra* note 12, at 757 (noting lower courts may adopt additional safeguards above those offered by Supreme Court). In these jurisdictions, a showup is necessary only when the police lack probable cause to arrest or other exigent circumstances exist that prevent a lineup or photo array. *See Dubose*, 699 N.W.2d at 594 (contending line ups and photo arrays fairer because they distribute risk of misidentification).

40. *See* Commonwealth v. Martin, 850 N.E.2d 555, 563 (Mass. 2006) (requiring only good reason for show-up procedure); People v. Brisco, 788 N.E.2d 611, 611-12 (N.Y. 2003) (allowing showups absent exigent circumstances when conducted in close geographic, proximity to crime); Cicchini & Easton, *supra* note 4, at 398 (suggesting courts expand and distort exigency rule to reach predetermined outcome). In many jurisdictions, exigent circumstances may mean only an unbroken chain of events. *See* People v. Duuvon, 571 N.E.2d 654, 656 (N.Y. 1991) (admitting show-up testimony where identification made within minutes); Cicchini & Easton, *supra* note 4, at 399 (disapproving of showups, especially when less suggestive procedures readily available). Courts rationalize that police have an interest in timely assurance that they have arrested the true perpetrator. *See* Cicchini & Easton, *supra* note 4, at 402 (accusing courts of confusing exigency with police convenience). Courts have distorted the rule by permitting showups where less suggestive measures would have been burdensome or time-consuming to the investigation. *See Martin*, 850 N.E.2d at 561 (indicating failure to pursue alternative procedure does not render showup unduly suggestive); Commonwealth v. Blake, No. BRCR2006-0851, 2007 WL 3104405, at *3 (Mass. Super. Ct. Aug. 10, 2007) (listing need for efficient police investigation as relevant factor in exigency determination).

B. Current State of Show-Up Identification Law

1. Neil v. Biggers

In *Neil v. Biggers*,[41] the Supreme Court issued a test for the admissibility of show-up evidence, declaring the central question to be whether under the totality of the circumstances, the identification is reliable even where the procedure may have been suggestive.[42] This result-oriented test shifts the question from whether the suggestive showup was necessary to whether it was reliable, despite the faults of the procedure.[43] The Court stated that five factors should be considered through the result-oriented test:

> opportunity of the witness to view the criminal at the time of the crime, the witness'[s] degree of attention, the accuracy of the witness'[s] prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.[44]

In most cases, an application of these factors has produced a finding that, even despite grossly suggestive procedures, the end result is generally reliable.[45]

Circuits are split on the issue of how general evidence of guilt can influence the reliability, and thus admissibility, of suggestive identifications.[46] The First, Fourth, Seventh, and Eighth Circuits permit corroborative evidence of the defendant's general guilt.[47] The Second, Third, and Fifth Circuits, on the other hand, limit their consideration to corroborative evidence that supports the

41. 409 U.S. 188 (1972).

42. *See id.* at 199 (applying totality-of-circumstances approach).

43. *See* Manson v. Brathwaite, 432 U.S. 98, 114 (1977) ("[R]eliability is the linchpin in determining the admissibility of identification testimony."); EPSTEIN, *supra* note 4, § 2.03(5)(a) (suggesting *Biggers* shifted focus from necessity to reliability).

44. *Biggers*, 409 U.S. at 199 (declaring five factors for totality-of-circumstances test). *But see* Cicchini & Easton, *supra* note 4, at 392-93 (rebutting each *Biggers* factor, showing failure to measure reliability).

45. *See Manson*, 432 U.S. at 108 (conceding no emergency and use of single photograph suggestive and unnecessary). The *Manson* Court nevertheless held that two to three minutes to view the suspect with light from the apartment and natural light from outside was sufficiently reliable, especially where the eyewitness was a trained on-duty police officer. *See id.* at 114-16.

46. *See* Koch, *supra* note 15, at 1100-01 (examining circuit split on role of corroborative evidence in determining admissibility of eyewitness identification testimony).

47. *See* United States v. Wilkerson, 84 F.3d 692, 695 (4th Cir. 1996) ("Courts may also consider other evidence of the defendant's guilt when assessing the reliability of the in-court identification."); United States v. Rogers, 73 F.3d 774, 778 (8th Cir. 1996) (concluding two other witness's reliable identifications corroborated one witness's deeply tainted identification); Gilday v. Callahan, 59 F.3d 257, 270 (1st Cir. 1995) (noting weaknesses in eyewitness identifications but exclaiming evidence of guilt overwhelming enough to corroborate); United States v. Lau, 828 F.2d 871, 875 (1st Cir. 1987) (finding corroboration in defendant's license to fly plane and presence near Alabama); United States *ex rel.* Kosik v. Napoli, 814 F.2d 1151, 1156 (7th Cir. 1987) (considering defendant's ownership of getaway car as support for corroborating identifications).

accuracy of the identification.[48] The Second Circuit's decision in *Raheem v. Kelly*, which was reversed based on this very distinction, exemplifies how determinative this issue can be on the outcome of a case.[49]

2. United States v. Wade *and Its Progeny*

Even when an improper showup is deemed inadmissible, the witness may still be given the opportunity to make an in-court identification of the suspect.[50] Defendants challenging an in-court identification must request a "*Wade* hearing" to determine whether the suggestive pretrial identification irreparably tainted the subsequent in-court identification.[51] The Supreme Court's jurisprudence recognizes that, regardless of whether police misconduct or mere human fallibility caused the show-up misidentification, for all practical purposes, the initial identification dictates the issue of identity.[52] When the victim or other identifying witness takes the stand, points to the defendant, and

48. *See* Raheem v. Kelly, 257 F.3d 122, 140 (2d Cir. 2001) (distinguishing inquiry into trustworthiness of verdict versus reliability of eyewitness identification); United States v. Rogers, 126 F.3d 655, 659 (5th Cir. 1997) (noting bulk of evidence at trial irrelevant in determination of identification's reliability); United States v. Emanuele, 51 F.3d 1123, 1128 (3d Cir. 1995) ("[I]ndependent evidence of culpability will not cure a tainted identification procedure . . . ."). Even when circuits disallow the use of corroborative evidence of the defendant's general guilt, judges admit the difficulty in truly compartmentalizing the evidence. *See Manson*, 432 U.S. at 116 (mentioning corroborative evidence as afterthought to case holding). The majority in *Manson* wrote that although it played no role in the outcome, the decision to support the identification was "hardly undermined by the facts that respondent was arrested in the very apartment where the sale had taken place, and that he acknowledged his frequent visits to that apartment." *Id.*

49. *See Raheem*, 257 F.3d at 131, 142-43 (overturning lower court's decision by limiting use of corroborative evidence of guilt). The Second Circuit reversed the decision of the district court for having erroneously considered the defendant's possession of a black leather coat fitting the witness's description, his confession, and previous murder convictions that would show a propensity to kill. *See id.* at 132; *see also* Abdur-Raheem v. Kelly, 98 F. Supp. 2d 295, 306-07 (E.D.N.Y. 2000) (announcing proposed rule adding sixth *Biggers* factor of corroborative evidence of guilt). Deciding to exclude corroborative evidence of guilt, the Second Circuit held the identification was unreliable and thus inadmissible, highlighting the relevance of the corroboration theory circuit split. *See Raheem*, 257 F.3d at 142 (reversing decision of district court); Koch, *supra* note 15, at 1101 (using *Raheem* to stress influence corroborative evidence of guilt has on overall case).

50. *See* United States v. Wade, 388 U.S. 218, 240 (1967) (allowing in-court identification with independent basis for identification); People v. Smith, 487 N.Y.S.2d 210, 213 (N.Y. App. Div. 1985) (recognizing impermissibly suggestive showup and tainted lineup but finding independent basis for in-court identification).

51. *See Wade*, 388 U.S. at 242 (remanding case for determination of possible independent source of identification). The Court "vacate[d] the conviction pending a hearing to determine whether the in-court identifications had an independent source, or whether, in any event, the introduction of the evidence was harmless error." *Id.* (introducing what has become known as *Wade* hearing).

52. *See* Simmons v. United States, 390 U.S. 377, 383-84 (1968) (describing problem of eyewitness misidentification); *Wade*, 388 U.S. at 229 (noting common sense approach: once witness picks out accused, unlikely to change mind later). Specifically, in describing the initial identification, the Court noted, "the witness thereafter is apt to retain in his memory the image of the photograph rather than [the perpetrator]." *Simmons*, 390 U.S. at 383-84. "The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with . . . the witness the sole jury . . . and with little or no effective appeal from the judgment there rendered by the witness—'that's the man.'" *Wade*, 388 U.S. at 235-36 (acknowledging downside to rule ultimately endorsed).

says, "That's the man!" he rarely is saying, "That's the man who robbed me several months ago;" what he is really saying is: That's the man who I identified after the crime and have seen several times since then in court at the defense counsel table.[53] Nonetheless, the *Wade* Court upheld the admissibility of in-court identifications in circumstances in which it can be shown that the identification had an independent origin despite suppressed identification.[54]

The *Wade* Court announced six factors applicable to an independent origin determination: the witness's prior opportunity to observe the alleged criminal act; the existence of any discrepancy between original descriptions of the perpetrator and the defendant's actual appearance; any previous identification of another person; the identification by picture of the defendant prior to the lineup; failure to identify the defendant on a prior occasion; and the lapse of time between the alleged act and the lineup identification.[55] Determining an independent origin consists of examining the specific facts of each case.[56] The most important *Wade* factor concerns the witness's opportunity to observe the alleged criminal act.[57] Still, lower courts have stretched the definition of an appropriate window of opportunity to view the suspect.[58] In some *Wade* analyses, admission of the in-court identification might be as simple as a witness's affirmation that he based his in-court identification upon the incident rather than subsequent observations of the defendant.[59] In *People v. Smith*, the court allowed an in-court identification of the suspect where the victim testified she had an opportunity to view the perpetrator's face for a couple of minutes in "fair" lighting conditions before she was blindfolded.[60]

3. Lower Courts' Proposed Safeguards

Recognizing that the current safeguards offered by the Supreme Court carry a high risk of eyewitness misidentification, many lower courts have opted to

53. *See* SOBEL ET AL., *supra* note 11 (observing mistaken witness unlikely to express doubt in identification several months later); *see also* State v. Henderson, 27 A.3d 872, 900 (N.J. 2011) (indicating successive views of defendant confuses memory of event with memory of earlier identification).

54. *See Wade*, 388 U.S. at 241-42 (describing six factors pertinent to independent source evaluation).

55. *Id.* at 241 (listing six factors).

56. *See* United States v. Wade, 388 U.S. 218, 242 (1967) (remanding case to determine existence of independent origin based on specific facts of case).

57. *See* Young v. Conway, 698 F.3d 69, 80 (2d Cir. 2012) (illuminating importance of witness's opportunity to perceive suspect in reliable identification).

58. *See* People v. Ferkins, 497 N.Y.S.2d 159, 162 (N.Y. App. Div. 1986) (identifying suspect based on thirteen to twenty second observations, twenty to thirty feet away).

59. *See* United States v. Wilkerson, 84 F.3d 692, 695 (4th Cir. 1996) (stating witnesses positive of their in-court identification, bolstering admissibility); United States v. Mims, 481 F.2d 636, 637 (2d Cir. 1973) (crediting witness's identification at trial based on observations during crime, not suggestive showup). *But see Young*, 698 F.3d at 74, 77 (refusing contention, eight years after incident witness could "completely excise . . . [suggestive] lineup from [her] mind").

60. *See* People v. Smith, 487 N.Y.S.2d 210, 212-13 (N.Y. App. Div. 1985) (finding independent basis for identification despite "impermissibly suggestive" showup and tainted pretrial lineup).

require heightened safeguards.[61] When eyewitness identification is at issue in a case, many courts have recognized the advantages of special jury instructions, while some circuits have even begun the process of making such instructions compulsory.[62] In a parallel effort to keep jurors informed about the challenges with identification testimony, many defense attorneys have unsuccessfully pushed for expert testimony on that very topic.[63] Trial judges often exclude this expert testimony because of the risk of jury confusion.[64]

Since the Court decided *Biggers* over forty years ago, there have been significant developments in science concerning the phenomenon of eyewitness identification.[65] Many lower courts have incorporated these advancements into

61. *See* Woocher, *supra* note 26, at 989-99 (defining and criticizing current Supreme Court safeguards). The broadest safeguard offered by the Supreme Court is that of the right to counsel for post indictment identifications. *See Wade*, 388 U.S. at 237 (recognizing postindictment lineup "critical stage of the prosecution" justifying right to counsel). *But see* Kirby v. Illinois, 406 U.S. 682, 690-91 (1972) (refusing to extend Sixth Amendment protections to pre-indictment identifications); Woocher, *supra* note 26, at 996 (suggesting *Kirby* rendered *Wade* meaningless: defendant needing protection from misidentification implicated solely by eyewitness testimony). Of course, even the broadest Supreme Court safeguard was crafted with a loophole. *See Wade*, 388 U.S. at 241-42 (admitting absence of counsel at postindictment lineup unconstitutional and granting hearing for independent origin determination).

62. *See* United States v. Anderson, 739 F.2d 1254, 1258 (7th Cir. 1984) (holding where witness identification at issue, special instructions mandatory at defendant's request); United States v. Telfaire, 469 F.2d 552, 555 (D.C. Cir. 1972) (preferring special jury instructions emphasizing need to find identification convincing beyond reasonable doubt); United States v. Barber, 442 F.2d 517, 527-28 (3d Cir. 1971) (recognizing "compelling need" for special jury instruction guidelines); Macklin v. United States, 409 F.2d 174, 178 (D.C. Cir. 1969) (asserting "imperative" need for trial courts to include identification instructions). Although *Telfaire* did not make special jury instructions mandatory, it suggested that a failure to use the guidelines could "constitute a risk in future cases." *See Telfaire*, 469 F.2d at 557 (indicating preference for special jury instructions). *But see* United States v. Brooks, 928 F.2d 1403, 1406 (4th Cir. 1991) (limiting *Telfaire* to cases exhibiting "special difficulties" with identification testimony). State courts have also begun favoring special jury instructions. *See* Brodes v. State, 614 S.E.2d 766, 771 (Ga. 2005) (prohibiting instruction allowing jurors to consider witness's certainty in identification as factor in reliability); State v. Henderson, 27 A.3d 872, 926 (N.J. 2011) (compelling jury instructions on identification whenever cross-racial identification at issue); State v. Romero, 922 A.2d 693, 703 (N.J. 2007) (requiring jury instruction on annals of out-of-court eyewitness identifications).

63. *See* Lee, *supra* note 12, at 777-78 (discussing courts' tendency to reject expert witness testimony in identification cases).

64. *See* United States v. Lumpkin, 192 F.3d 280, 289 (2d Cir. 1999) (noting expert testimony on eyewitness reliability would usurp role of jury as trier of fact); United States v. Veal, No. 98-1539, 1999 WL 446783, at *1 (2d Cir. June 16, 1999) (indicating expert testimony properly excluded when it contains conclusions coinciding with common sense). Even when most jurisdictions leave the admittance of expert testimony up to the discretion of the trial judge, most identification cases will not enjoy the support of expert testimony. *See* Lee, *supra* note 12, at 777 (positing expert testimony increases juror sensitivity but trial judges often exclude it); *see also* People v. Santiago, 958 N.E.2d 874, 879, 883-84 (N.Y. 2011) (excluding expert testimony on effects of stress, weapon focus, and irrelevance of confidence); O'Toole & Shay, *supra* note 28, at 133 (stating less than fifty well-qualified identification experts and over 77,000 identifications yearly in United States).

65. *See Henderson*, 27 A.3d at 877-78 (pointing to social science indicating mistaken identity real danger); Gershman, *supra* note 25, at 24 (stating social sciences confirm inherent weaknesses of eyewitness identification).

their own case decisions.[66] Other state courts have gone so far as to explicitly alter the rule set forth in *Biggers* and *Manson* to consider additional factors thought to be more indicative of reliability.[67] These courts suggest the *Biggers* factors are "not etched in stone" and are instead expected to evolve with research.[68] Still, there are lower courts that adamantly insist the *Biggers* factors, despite their faults, are strictly binding as Supreme Court precedent and refuse to alter them.[69]

Some courts have opted for a rule of absolute exclusion for certain categories of eyewitness identifications.[70] Despite these safeguards and suggestions, the Supreme Court has maintained that the comprehensive use of cross-examination is sufficient to assist jurors in distinguishing reliable from unreliable identifications.[71] In 2012, the Court reemphasized its commitment to the *Biggers* rule with its decision in *Perry v. New Hampshire*.[72]

66. *See Brodes*, 614 S.E.2d at 771 (citing scientifically-documented research as reason to disallow instruction on witness's certainty indicating reliability); *Henderson*, 27 A.3d at 928 (modifying framework to address developments in social science); State v. Lawson, 291 P.3d 673, 678 (Or. 2012) (reexamining earlier decisions in light of scientific research and understanding of eyewitness identification).

67. *See* State v. Hunt, 69 P.3d 571, 577 (Kan. 2003) (adopting *Ramirez* factors); State v. Ramirez, 817 P.2d 774, 780 (Utah 1991) (requiring "in-depth appraisal of the identification's reliability" by adding factors for consideration); State v. Long, 721 P.2d 483, 491 (Utah 1986) (arguing several *Biggers* factors based on assumptions are flatly contradicted by well-respected and unchallenged empirical studies). The Supreme Court of Utah sought to propose factors that inject subjective concerns that were absent from the well recognized and highly criticized *Biggers* factors:

> (1) the opportunity of the witness to view the actor during the event; (2) the witness's degree of attention to the actor at the time of the event; (3) the witness's capacity to observe the event, including his or her physical and mental acuity; (4) whether the witness's identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and (5) the nature of the event being observed and the likelihood that the witness would perceive, remember and relate it correctly.

Long, 721 P.2d at 493. The fifth factor would consider whether the event was ordinary for the observer or if it was a cross-racial identification. *See id.*

68. *See* State v. Henderson, 27 A.3d 872, 878 (N.J. 2011).

69. *See* State v. Ledbetter, 881 A.2d 290, 307-08 (Conn. 2005) (determining lower courts lack authority to replace or alter *Biggers* factors).

70. *See* Commonwealth v. Johnson, 650 N.E.2d 1257, 1261 (Mass. 1995) (following per se exclusionary rule for unnecessarily suggestive identifications); People v. Adams, 423 N.E.2d 379, 383 (N.Y. 1981) (explaining rule barring improper pretrial identifications as "bear[ing] directly on guilt or innocence"); O'Toole & Shay, *supra* note 28, at 114-15 (outlining approaches of several state courts to mitigate *Manson* effects).

71. *See* Watkins v. Sowders, 449 U.S. 341, 349 (1981) (calling "time-honored process of cross-examination" best device to determine reliability of identification testimony); Simmons v. United States, 390 U.S. 377, 384 (1968) (maintaining danger of misidentification "substantially lessened" when cross-examination exposes procedure's potential for error); *see also* United States v. Hall, 165 F.3d 1095, 1107 (7th Cir. 1999) (stating weaknesses in identification exposable through careful cross-examination of eyewitness). *But see* United States v. Wade, 388 U.S. 218, 235 (1967) (admitting cross-examination not absolute assurance of accuracy).

72. *See* 132 S. Ct. 716, 729-30 (2012); *see* Jules Epstein, *Irreparable Misidentifications and Reliability: Reassessing the Threshold for Admissibility of Eyewitness Identification*, 58 VILL. L. REV. 69, 76 (2013) (explaining anticipation Court would reexamine *Biggers* with *Perry* decision).

III. ANALYSIS

A. Why Biggers *Factors Fail To Measure Reliability*

Although the *Biggers* factors purport to measure the reliability of eyewitness identifications, they fail to appreciate the range of emotions that flood the victim or witness of a violent crime.[73] Additionally, the victim's ability to efficiently perceive the criminal event is impaired because most crimes that lend themselves to eyewitness identification are categorically brief and fast-moving events.[74] A victim of a violent crime is especially disadvantaged when it comes to making an accurate identification because the natural response is to stare at the perpetrator's weapon, not his features.[75] As the Supreme Court of Utah put it, "[a] careful reading of [the *Biggers* factors] will show that several of the criteria listed by the Court are based on assumptions that are flatly contradicted by well-respected and essentially unchallenged empirical studies."[76]

Jurors often incorrectly believe that the more traumatic the event, the more distinctly the victim will remember the details.[77] This is especially problematic

73. *See supra* note 8 (explaining *Biggers* case and five factors announced in it); *see also Henderson*, 27 A.3d at 894 (pointing to studies showing high stress impairs memory ability); State v. Lawson, 291 P.3d 673, 700 (Or. 2012) (indicating high stress levels significantly impair witness's ability to recognize faces and encode memory); State v. Long, 721 P.2d 483, 488-89 (Utah 1986) (recognizing emotions and stress negatively affect perception); Cicchini & Easton, *supra* note 4, at 393 (noting stress and anxiety decrease reliability of identification); Woocher, *supra* note 26, at 979 (explaining psychological research shows perceptual abilities decrease in fearful or anxiety-provoking situation). Aside from the psychological effects of stress, research indicates there are physiological responses to stress that may cause fixation of the eyes and interfere with visual accuracy. *See* Woocher, *supra* note 26, at 979-80 (indicating stress causes increased heart rate, rapid breathing, excessive perspiration, and fixation of eyes).

74. *See* Woocher, *supra* note 26, at 978 (indicating when crime occurs suddenly, witness unprepared to focus on important aspects of event). "Studies have shown that people tend to judge time by the amount of activity occurring . . . ." *Id.* at 977.

75. *See* Young v. Conway, 698 F.3d 69, 81 (2d Cir. 2012) (referring to weapon studies stating identification accuracy decreases by ten percent with visible weapon); Raheem v. Kelly, 257 F.3d 122, 138 (2d Cir. 2001) (expressing human nature causes witness to focus on gun not person yielding it); State v. Henderson, 27 A.3d 872, 904-05 (N.J. 2011) (explaining weapon focus impairs witness's ability to accurately identify culprit); *Lawson*, 291 P.3d at 701 (discussing how presence of visible weapon distracts from focus on perpetrator's face); Cicchini & Easton, *supra* note 4, at 393 (noting person held at gunpoint likely attentive to gun and less attentive to perpetrator's features); Woocher, *supra* note 26, at 980 (describing how presence of weapon narrows witness's perception).

76. State v. Long, 721 P.2d 483, 491 (Utah 1986) (calling for evolution of *Biggers* rule). The court recognized that law will always lag behind science because of the need for a strong scientific consensus, but as indicated in this case, enough time and research has passed since comprehensive, sufficient research has been thoroughly conducted on issues with showups. *See id.* (indicating in 1986 enough research complete to form solid scientific consensus contradicting *Biggers* factors).

77. *See* Perry v. New Hampshire, 132 S. Ct. 716, 739 (2012) (Sotomayor, J., dissenting) (recognizing "confidence is a poor gauge of accuracy"); United States v. Brownlee, 454 F.3d 131, 144 (3d Cir. 2006) (permitting expert testimony explaining no correlation between witness confidence and witness accuracy); State v. Henderson, 27 A.3d 872, 910 (N.J. 2011) (recognizing jurors unfamiliar with scientific findings suggesting no correlation between witness confidence and reliability); Cicchini & Easton, *supra* note 4, at 387

because three out of five *Biggers* factors rely on the self-reporting of a witness.[78] Even if the witness is unsure during the initial identification, subtle feedback from an officer and the reinforcement of a criminal proceeding will undeniably boost the witness's confidence.[79]

Although the *Biggers* factors do not claim to be an exhaustive list of considerations, the Supreme Court needs to alter the existing factors and state more applicable guidelines to help jurors differentiate reliable from unreliable identifications.[80] Ironically, these factors have been reduced to an arbitrary checklist that fails to properly predict reliability even though the factors were originally provided to assist courts in weighing the reliability of suggestive identifications.[81] Identification issues are fact-intensive and case-specific, thus a more flexible and practical test might better suit the intended goal.[82]

B. Wade *Independent-Source Test Excuses Suggestibility*

Although inherently suggestive, show-up identifications have been praised as a convenient and efficient method of resolving an investigation.[83] The

(commenting even weak eyewitness testimony proves incredibly powerful for jury); Lee, *supra* note 12, at 772 (recognizing jurors giving weight to witness confidence as principal danger of suggestive eyewitness procedures).

78. *See* O'Toole & Shay, *supra* note 28, at 121 (noting self-reports by witnesses "notoriously unreliable"). The witness's opportunity to view the criminal, her degree of attention, and her level of certainty at the confrontation are each self-reported. *See id.* at 121-22. It is not uncommon for witnesses to naturally or purposefully misstate one or more of these self-reported factors. *See Henderson*, 27 A.3d at 918 (suggesting accurate self-reporting potentially skewed by suggestive procedures); Cicchini & Easton, *supra* note 4, at 393 (recognizing witness's degree of attention easily misstated); Woocher, *supra* note 26, at 977-78 (realizing difficulty witnesses have in perceiving time accurately). Time estimates can easily be misleading because even though an encounter may last only ten to fifteen seconds, the witness may perceive the moment as lasting one or two minutes. Woocher, *supra* note 26, at 978.

79. *See Henderson*, 27 A.3d at 899 (explaining feedback confirmation affects witness confidence even days after identification); State v. Lawson, 291 P.3d 673, 687 (Or. 2012) (indicating post-identification confirmation of feedback falsely inflates witness confidence in identification accuracy); Cicchini & Easton, *supra* note 4, at 393 (noting officer feedback after identification artificially increases confidence); O'Toole & Shay, *supra* note 28, at 120 (indicating eyewitness confidence highly malleable and prone to effects of positive officer feedback); Woocher, *supra* note 26, at 985 (commenting on evolution from doubting victim to absolutely certain witness on stand).

80. *See supra* note 67 (detailing additional factors adopted by lower courts); *see also* Cicchini & Easton, *supra* note 4, 393 (calling *Biggers* factors outdated); Lee, *supra* note 12, at 757 (recognizing lower courts may adopt more flexible test with added safeguards). Although several certiorari petitions filed in recent years have asked the Supreme Court to reexamine *Manson*, no changes have been made to the reliability factors. *See* O'Toole & Shay, *supra* note 28, at 116 n.55 (indicating advocates call on Court to overhaul existing reliability test).

81. *See* O'Toole & Shay, *supra* note 28, at 113 (asserting Court's reliability factors reduced to checklist).

82. *See id.* (criticizing *Manson* court's "litmus test"). Due to the fact that a reliability determination is fact-intensive and case-specific, a checklist approach fails to adequately distinguish reliable identifications. *See id.*

83. *See* Cicchini & Easton, *supra* note 4, at 388-89 (recognizing convenience of showups and use for quick and easy resolution of investigation); Lee, *supra* note 12, at 756 (indicating despite well-known risks, police departments support showups for convenience).

criminal justice system maintains its goal is not catching each and every criminal, but rather, its goal is ensuring the greater public that innocent people will not be convicted of crimes they did not commit.[84] Despite an honorable goal, the criminal justice system has noticeably failed when it comes to utilizing eyewitness identifications.[85] After determining whether the identification procedure was suggestive, and then determining it was additionally unreliable based on application of the flawed *Biggers* factors, the now contaminated witness may still be permitted to take the stand in court to identify the perpetrator.[86]

The *Wade* decision recognized that "once a witness has picked out the accused at the [pretrial identification], he is not likely to go back on his word later on."[87] Thus, when a pretrial identification is deemed inadmissible as violative of due process, it is unrealistic to expect the witness to differentiate between the perpetrator and the suspect he originally identified.[88] Several studies have been conducted on this phenomenon, called "mug shot commitment," which causes mistaken witnesses to become overly committed to their original identification.[89] Witnesses are unable to partition their memory to realize they might recognize the suspect from exposure during a showup, rather

84. *See* State v. Long, 721 P.2d 483, 491 (Utah 1986) (explaining Supreme Court's commitment to protecting innocent man). Although protecting the innocent is a "fundamental value of our democratic society," many judges and lawyers are content relying on long-established precedent rather than incorporating the tested research of other disciplines. *See id.* at 491.

85. *See* Perry v. New Hampshire, 132 S. Ct. 716, 738 (2012) (Sotomayor, J., dissenting) (recognizing scientific literature reinforces decades of concern over eyewitness identification). "The research strongly supports the conclusion that eyewitness misidentification is now the single greatest source of wrongful convictions in the United States, and responsible for more wrongful convictions than all other causes combined." State v. Dubose, 699 N.W.2d 582, 592 (Wis. 2005); *see also Perry*, 132 S. Ct. at 738 (quoting *Dubose*). Several courts have cited the words of Judge McGowan accusing mistaken eyewitness identifications as "present[ing] what is conceivably the greatest single threat to the achievement of our ideal that no innocent man shall be punished." State v. Henderson, 27 A.3d 872, 885-86 (N.J. 2011) (embracing studies discussing dangers of suggestive eyewitness identification).

86. *See* Woocher, *supra* note 26, at 993-94 (summarizing effects of Supreme Court decisions regarding eyewitness identifications). When we combine the existing case law on eyewitness identification, precedent suggests that an in-court identification following a pretrial identification will only be excluded if three conditions are met: the pretrial identification procedure must have been unduly suggestive as to violate due process; there must have been no exigent circumstances permitting the suggestive procedure; and the prosecution must be able to show, under the test announced in *Wade*, that the in-court identification originated independently from the suggestive pretrial identification. *See id.* at 993.

87. United States v. Wade, 388 U.S. 218, 229 (1967) (admitting issue of identity largely determined at pretrial identification).

88. *See Henderson*, 27 A.3d at 900 (suggesting multiple suspect viewings decrease reliability); SOBEL ET AL., *supra* note 11 (recognizing initial identification often carries through all future identifications even if mistaken or uncertain). "[S]uccessive views of the same person can make it difficult to know whether the later identification stems from a memory of the original event or a memory of the earlier identification procedure." *Henderson*, 27 A.3d at 900.

89. *See* Young v. Conway, 698 F.3d 69, 82 (2d Cir. 2012) (reporting seventy-two percent of witnesses who made mistaken mug shot identifications repeated identification for lineup); Lee, *supra* note 12, at 771 (discussing mug shot commitment).

than exposure during the actual crime.[90]

Although, the *Wade* court acknowledged the pitfalls of admitting show-up evidence, the Court apparently still believed some in-court identifications could be "purged of the primary taint."[91] Yet, research strikingly contradicts this ideal.[92] It follows that more stringent safeguards should thus be adopted to prevent in-court identifications based on suggestive pretrial identifications because "[t]he identification of strangers is proverbially untrustworthy."[93] It is the justice system's responsibility to impart better safeguards because witnesses and jurors alike, notoriously fail to comprehend the suggestibility of pretrial identifications and their impact on later identifications.[94]

C. Proposed Safeguards

In order to solve the problem of false eyewitness identifications taking place across the United States, a two-tiered solution should be implemented: the first, to focus on police procedure and the second tier is to focus on court procedure.[95] The danger of false identification begins on the street with police.[96] For this reason, numerous false identifications are attributable to police procedures that are either intentionally or unintentionally suggestive.[97] Still, other misidentifications occur regardless of police practice, and those

90. *See Young*, 698 F.3d at 82 (recognizing unconscious transference); People v. Santiago, 958 N.E.2d 874, 881 (N.Y. 2011) (allowing expert testimony on unconscious transference based on general acceptance in scientific community). The Supreme Court has recognized this phenomenon numerous times. *See* Simmons v. United States, 390 U.S. 377, 383-84 (1968) ("Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the [pretrial identification] rather than of the person actually seen, reducing the trustworthiness of . . . courtroom identification."); *Wade*, 388 U.S. at 229 (recognizing mistaken witness unlikely to recant).

91. *Wade*, 388 U.S. at 241 (announcing test to determine whether in-court identification admissible); *see also supra* note 55 and accompanying text (describing *Wade* test and six factors).

92. *See Young*, 698 F.3d at 82 (reporting Innocence Project studies refuting witness's ability to ignore subsequent identification).

93. United States v. Wade, 388 U.S. 218, 228 (1967) (citing words of Justice Frankfurter); *see* Manson v. Brathwaite, 432 U.S. 98, 112 (1977) (noting stranger encounters prone to distortion by circumstances and police actions).

94. *See* Solomon v. Smith, 487 F. Supp. 1134, 1136 (S.D.N.Y. 1980) (indicating jurors not qualified to distinguish suggestive from nonsuggestive police procedure).

95. *See* Epstein, *supra* note 72, at 98 (noting trial is only later stage in two part eyewitness-based prosecution); Woocher, *supra* note 26, at 970 (indicating false convictions attributable to suggestive police procedures *and* ignorance of juries and judges).

96. *See* Gershman, *supra* note 25, at 28 (noting police make initial contact and minimize suggestiveness of identification). There is some concern that waiting to address eyewitness reliability at trial is a remedy that comes "too little, too late" because witnesses are already committed to their identifications after the investigation stage. *See* Epstein, *supra* note 72, at 100 (suggesting best remedy starts when police gather and process identification evidence).

97. *See Wade*, 388 U.S. at 229 (showing police suggestion both intentional and unintentional); SOBEL ET AL., *supra* note 11 (suggesting whether intentional or unintentional, police procedures may unfairly influence eyewitness identifications); Koch, *supra* note 15, at 1102-03 (recognizing misidentifications occur for variety of reasons).

misidentifications are the ones that a change in the court system may best combat.[98] Potential changes include the utilization of expert testimony and the adoption of specialized jury instructions to inform jurors of the difficulties surrounding eyewitness identifications.[99]

1. Police Reform

To reduce false identifications, we must first address the issue at its source, by properly training police officers in the least suggestive and most effective identification procedures.[100] The simple fact that a uniformed police officer is administering the identification procedure affords some degree of suggestiveness.[101] During a showup, in which an eyewitness is presented with a single suspect, that eyewitness reasonably assumes that the police officer considers the suspect to be the perpetrator because otherwise, the officer never would have organized the procedure.[102] Although this problem, called the "relative judgment process," occurs naturally with all identification procedures, including lineups and photo arrays, it is especially problematic with show-up procedures.[103] Although other procedures spread out the error of margin over

98. *See* O'Toole & Shay, *supra* note 28, at 132-33 (recognizing police reform noble, but will take time, making trial reform critical).

99. *See* United States v. Hall, 165 F.3d 1095, 1120 (7th Cir. 1999) (advocating for application of social sciences to improve trial process); *see also infra* Part III.C.2 (analyzing eyewitness expert testimony and specialized jury instructions).

100. *See* Gershman, *supra* note 25, at 28 (recognizing police's role in identification and ability to minimize suggestiveness). Although nationwide reform would be ideal, experts recognize the obvious roadblocks. *See* O'Toole & Shay, *supra* note 28, at 133 (suggesting improvement of police procedure will take time). There are 19,000 autonomous law enforcement agencies in the United States, making uniform reform nearly impossible. *See* Lee, *supra* note 12, at 768 (recognizing police reforms generally state-based by court precedent or legislative action).

101. *See* Cicchini & Easton, *supra* note 4, at 383 (detailing suggestibility of police uniform, handcuffs, and squad car); *see also* People v. Riley, 517 N.E.2d 520, 522-24 (N.Y. 1987) (excluding showup as unnecessary and suggestive where uniformed officers presented handcuffed suspects to eyewitness). *But see* People v. Veal, 482 N.Y.S.2d 341, 342 (N.Y. App. Div. 1984) (finding showup where suspect only non-uniformed person not unnecessarily suggestive).

102. *See* United States v. Funches, 84 F.3d 249, 254 (7th Cir. 1996) (noting show-up eyewitness likely influenced by fact that police seem to believe they have perpetrator); State v. Ledbetter, 881 A.2d 290, 314 (Conn. 2005) (recognizing witness may feel obligated to make identification even if unsure); Gilligan, *supra* note 9, at 184 (indicating witnesses trust police to catch perpetrator and strain memory finding resemblances validating positive identification). "Few people would think that an officer would show a suspect without truly believing that the suspect was, in fact, the criminal." Cicchini & Easton, *supra* note 4, at 389.

103. *See* Gershman, *supra* note 25, at 28 (explaining why eyewitnesses feel obligated to choose suspect during identification procedure). Witnesses fear they will appear foolish if they cannot make a positive identification, which is why witnesses sometimes resort to choosing the person in a group who looks most like the perpetrator relative to the other members of the group. *See Ledbetter*, 881 A.2d at 314-15 (indicating relative judgment process as hurdle to accurate identification); Gershman, *supra* note 25, at 28 (explaining relative judgment process); Woocher, *supra* note 26, at 988 (suggesting eyewitnesses motivated by "desire to be correct and avoid looking foolish"). In one study, 200 witnesses were shown a staged crime and then split into two groups. *See* State v. Henderson, 27 A.3d 872, 888 (N.J. 2011) (relating results from relative judgment experiment). The first group was presented with a five-person lineup that contained the perpetrator, and only

six or more suspects, a showup provides no safeguard against witnesses inclined to guess when they are unsure of an identification.[104] During a lineup or photo array, an officer can counteract the effects of the relative judgment process by clearly informing eyewitnesses that the suspect may or may not be present.[105]

Although showups have been recognized as inherently suggestive, there are methods as mentioned to lessen this risk.[106] First, police should only conduct a showup when it is objectively necessary.[107] Second, showups should only be conducted within two hours of the crime.[108] Third, showups should be conducted in the least suggestive manner and in the least suggestive location.[109]

fifty-four percent made a correct identification with twenty-one percent believing incorrectly that the perpetrator was not present. *See id.* The second group was presented with all fillers, and only thirty-two percent recognized the perpetrator was not present, with sixty-eight percent misidentifying a filler. *See id.*

104. *See Henderson*, 27 A.3d at 903 (explaining showups fail to offer safeguard against eyewitnesses inclined to guess); State v. Lawson, 291 P.3d 673, 707-08 (Or. 2012) (indicating show-up targets lone suspect so every guess affords positive identification); Gilligan, *supra* note 9, at 194-95 (recognizing single person showup especially problematic because eyewitness concludes police caught perpetrator); Lee, *supra* note 12, at 759-60 (noting show-up suspect bears entire risk of false identification).

105. *See Henderson*, 27 A.3d at 897 (reporting scientists found telling witnesses suspect may not be present leads to more reliable identifications); *Lawson*, 291 P.3d at 686 (indicating pre-identification instructions significantly decrease likelihood of misidentification); State v. Dubose, 699 N.W.2d 582, 594 (Wis. 2005) (recognizing accuracy of identification depends on method of questioning and pre-identification instructions); Gershman, *supra* note 25, at 28 (referencing National Institute of Justice guidelines favoring instructions indicating criminal may not be present); Koch, *supra* note 15, at 1104-05 (reporting study finding misidentifications dropped forty-five percent when witnesses warned perpetrator not necessarily present). *But see Ledbetter*, 881 A.2d at 313-14 (refusing to hold failure to give pre-identification warnings renders identification unnecessarily suggestive). Police should also inform the witness that regardless of whether or not they make a positive identification at that time, the investigation will continue and police will continue to search for the real perpetrator. *See Dubose*, 699 N.W.2d at 594 (describing proper pre-identification instructions).

106. *See Lawson*, 291 P.3d at 686 (indicating showups as good as lineups when conducted properly); *Dubose*, 699 N.W.2d at 594 (recognizing advantages of showups with proper administration).

107. *See Dubose*, 699 N.W.2d at 594 (determining state constitution compels exclusion of showup unless necessary under totality of circumstances); Lee, *supra* note 12, at 757 (arguing non-exigent showups increase misidentifications). *But see* Commonwealth v. Martin, 850 N.E.2d 555, 562 (Mass. 2006) (rejecting requirement showups take place only when necessary). A showup might be objectively necessary when an officer lacks probable cause to arrest a suspect and compel a lineup but nonetheless, reasonably believes the individual may be the perpetrator. *See Dubose*, 699 N.W.2d at 594 n.11 (suggesting showup necessary when frisk does not dispel reasonable suspicion). The Supreme Court recognized an additional exigency in *Stovall v. Denno*, which allowed a showup when the victim or witness was dying. *See* 388 U.S. 293, 302 (1967) (stating hospital confrontation imperative given victim's impending death).

108. *See* State v. Henderson, 27 A.3d 872, 903 (N.J. 2011); *Lawson*, 291 P.3d at 708 (reporting Special Master's findings indicating showups most reliable within two hours of crime). The court indicated the likelihood of misidentification increases dramatically after two hours. *See id.*; *see also* Manson v. Brathwaite, 432 U.S. 98, 131 (1977) (Marshall, J., dissenting) (stating reliability decreases exponentially when time gap greater than few hours); FARRELL & GEBAUER, *supra* note 7 (stressing relevance of temporal proximity).

109. *See Dubose*, 699 N.W.2d at 594 (noting location and manner should not convey guilt of suspect). Police station showups and squad car showups should be discouraged as they implicitly connote a suspect's guilt. *See id.*; *see also* People v. Riley, 517 N.E.2d 520, 523 (N.Y. 1987) (condemning station-house showups as infected by extreme unreliability). *But see* Neil v. Biggers, 409 U.S. 188, 201 (1972) (upholding station-house showup seven months after rape as reliable). Likewise, suspects should not be displayed with handcuffs

Finally, departments must train investigators to understand the subtleties of eyewitness perception and memory.[110] It is important to note that a lineup or photo array is always preferable to a showup.[111]

When a lineup or photo array is available, there are several procedures that should be followed to reduce suggestibility, including effective note taking, sequential lineups, and double-blind lineups.[112] When officers administer any type of identification procedure, it is important to record every detail.[113] Additionally, police should utilize sequential lineups, lineups that show the persons of the group one at a time as opposed to simultaneously.[114] Sequential lineups neutralize relative judgment process by taking away the eyewitness's ability to compare and contrast people in the group.[115] Experts have also advocated for the use of double-blind administration whenever practical.[116] In double-blind administrations, the administering officer has no knowledge of any of the case's pertinent facts or whether the suspect is present in the lineup in an effort to ensure that the officer cannot unintentionally suggest clues to the witness.[117]

or while severely outnumbered by police officers. *See Dubose*, 699 N.W.2d at 594 (indicating handcuffs imply guilt); Cicchini & Easton, *supra* note 4, at 383 (illustrating problems arising from suggestive showup); Lee, *supra* note 12, at 761 (recognizing jail clothes or handcuffs strongly suggest suspect's guilt).

110. *See Dubose*, 699 N.W.2d at 594 (indicating investigators must realize fragility of witness's memory and impact of their questioning); Gershman, *supra* note 25, at 28 (recognizing police can minimize suggestiveness when aware of problems).

111. *See Stovall*, 388 U.S. at 302 (recognizing wide acceptance of lineups over showups); United States v. Watkins, 741 F.2d 692, 694 (5th Cir. 1984) ("One-on-one showups are inherently more suggestive than lineups and we have purposely not encouraged their use."); *Henderson*, 27 A.3d at 903 (favoring lineups); Lee, *supra* note 12, at 763 (arguing for lineups if not unreasonably expensive or time-consuming).

112. *See infra* notes 113-117 and accompanying text (analyzing regularly accepted methods to increase identification reliability).

113. *See* State v. Delgado, 902 A.2d 888, 895 (N.J. 2006) (addressing importance of recording details of out-of-court identification); Gershman, *supra* note 25, at 28 (indicating all dialogue between officer and witness potentially critical to understanding witness confidence and reliability). In *State v. Delgado*, the Supreme Court of New Jersey exercised its supervisory authority, requiring all law enforcement officers to create a written record detailing each out-of-court identification procedure. *See Delgado*, 902 A.2d at 896-97 (mandating officers preserve all dialogue between officers and eyewitnesses).

114. *See, e.g.*, State v. Lawson, 291 P.3d 673, 686 (Or. 2012) (explaining sequential lineups); Gershman, *supra* note 25, at 28 (defining sequential lineups); O'Toole & Shay, *supra* note 28, at 119 (describing sequential lineups).

115. *See Lawson*, 291 P.3d at 686 (recognizing simultaneous lineups encourage witness to choose closest resemblance); O'Toole & Shay, *supra* note 28, at 119 (suggesting sequential lineups favored). *But see* State v. Henderson, 27 A.3d 872, 901-02 (N.J. 2011) (indicating insufficient scientific authority favoring or disfavoring sequential lineups to merit mandate); Gershman, *supra* note 25, at 28 (noting sequential lineups may reduce both false and correct identifications).

116. *See* Gershman, *supra* note 25, at 28 (recognizing double-blind administration as universally accepted methodology); O'Toole & Shay, *supra* note 28, at 119-20 (reporting psychologists advocate for double-blind procedures).

117. *See Henderson*, 27 A.3d at 896 (indicating non-blind administrators may consciously or unconsciously reveal suspect); Gershman, *supra* note 25, at 28 (noting practice reduces ability of officer to subconsciously make suggestions). Expectancy effect is the tendency for non-blind administrators to obtain the results they expect because they help to shape the result. *See Henderson*, 27 A.3d at 896 (explaining research

2. Court Reform

To encourage police reform, the court system must also alter evidentiary requirements, understanding that police will adjust their procedures to ensure the admissibility of evidence they collect.[118] Such a change should include the Supreme Court revisiting the *Biggers* and *Manson* rules.[119] Additionally, a comprehensive court reform should include a trend toward acceptance of expert testimony and specialized jury instructions warning jurors of the problems surrounding eyewitness identifications.[120]

Courts increasingly recognize expert testimony as a method to safeguard against eyewitness misidentification.[121] Courts have recognized that "juries almost unquestionably accept eyewitness testimony."[122] Proper expert testimony can explain to a jury the problems inherent in eyewitness identification.[123] Areas an expert may testify on include the diminished accuracy of cross-racial identifications, effects of stress and weapon focus, memory deterioration, relative judgment process, and the weak correlation between witness confidence and accuracy.[124] Expert testimony is best used in conjunction with traditional safeguards like cross-examination, because experts can describe to the jury how an eyewitness can be subjectively truthful and still mistaken.[125] Further, expert testimony is arguably one of the only methods of

favoring double-blind lineups); Koch, *supra* note 15, at 1104 (recognizing subtle cues like raised eyebrows, posture, or voice tone). In smaller police departments where each officer is bound to be familiar with all pending investigations, blind administration can minimize suggestibility. *See Henderson*, 27 A.3d at 897; *Lawson*, 291 P.3d at 686 (calling blind administration ideal). An alternate technique, which can be used when there are limited resources, is the "envelope method," where an officer who knows all facts of the investigation uses mixed up envelopes to present suspects to a witness and then does not look while the witness makes the identification. *See Henderson*, 27 A.3d at 897 (proving single-blind administration always available).

118. *See* Lee, *supra* note 12, at 796 (recognizing police will adjust actions to get evidence admitted). The evidentiary rules currently accepted by the Supreme Court do very little to measure reliability or deter police misconduct. *See Henderson*, 27 A.3d at 878 (noting current evidentiary standard fails to meet intended goals).

119. *See supra* Part III.A (explaining *Biggers* factors fail to measure reliability by relying on witness self-reporting).

120. *See infra* Part III.C.2 (advocating for court reform).

121. *See, e.g.*, United States v. Brownlee, 454 F.3d 131, 144 (3d Cir. 2006) (favoring expert testimony on dangers of eyewitness identification); People v. Santiago, 958 N.E.2d 874, 880 (N.Y. 2011) (noting courts encouraged to grant motions to admit expert testimony on eyewitness recognition memory); State v. Lawson, 291 P.3d 673, 696 (Or. 2012) (indicating use of experts increasingly "vital" with scientific advances).

122. United States v. Langford, 802 F.2d 1176, 1182 (9th Cir. 1986) (Ferguson, J., dissenting); *see also* Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (indicating juries receptive to, and unlikely to reject, confident eyewitness testimony); State v. Delgado, 902 A.2d 888, 895 (N.J. 2006) (maintaining eyewitness identifications as both powerful and dangerous).

123. *See Langford*, 802 F.2d at 1182 (Ferguson, J., dissenting) ("Given the unreliability and pervasive influence of eyewitness testimony, expert testimony is not only more probative than prejudicial, it prevents the eyewitness testimony from having an overly prejudicial effect."); Lee, *supra* note 12, at 777-78 (recognizing expert testimony increases juror sensitivity to factors influencing eyewitness accuracy).

124. *See* Gershman, *supra* note 25, at 26 (offering list of topics experts may testify on).

125. *See* Woocher, *supra* note 26, at 1010-11 (suggesting expert psychological testimony can alert jury to dangers of accepting confidence as accuracy). Cross-examination alone fails to extinguish mistaken identifications, as most false identifications come from witnesses who genuinely believe in their identification.

rebutting the otherwise strong assumption of witness confidence because jurors often equate witness confidence with accuracy.[126] Despite the recognized advantages, some courts remain reluctant to allow expert testimony on the reliability of eye-witness testimony, arguing that its prejudicial effect outweighs its probative value.[127] The concern, however, will surely diminish with the advancement and acceptance of scientific research on the topic to the contrary.[128] Still, as a practical matter, expert psychological testimony cannot be utilized in every identification case, and therefore, there must be additional safeguards against misidentification.[129]

Like expert testimony, specialized jury instructions offer similar advantages by educating jurors on the weaknesses of eyewitness identification.[130] As a result of these recognized advantages, several courts have implemented specialized instructions mandatory for any case in which eyewitness identification is a central issue.[131] After the *Biggers* decision, many courts adopted standard jury instructions educating juries on pertinent factors to

See supra note 29 (recognizing cross-examination only causes eyewitness to reassert confidence). Nonetheless, cross-examination is helpful in pinpointing problematic factors leading to the identification, while expert testimony can explain how those factors affect the reliability of the identification. *See* Woocher, *supra* note 26, at 1010-11 (suggesting expert testimony helpful tool against iron-clad cross-examination).

126. *See Brownlee*, 454 F.3d at 144 (describing expert testimony as only method of rebutting confidence-accuracy correlation to jury). *But see* United States v. Lumpkin, 192 F.3d 280, 289 (2d Cir. 1999) (suggesting expert testimony undermining confidence-accuracy correlation places witness's credibility in jeopardy).

127. *See* United States v. Hall, 165 F.3d 1095, 1104 (7th Cir. 1999) (indicating jurors' general awareness of eyewitness testimony's unreliability thus expert testimony not needed); Lee, *supra* note 12, at 779 (noting courts' concern over "aura of respectability" creating undue prejudice). *But see* United States v. Brownlee, 454 F.3d 131, 142 (3d Cir. 2006) (indicating reality of eyewitness identification problems contradicts jurors' common sense assumptions); Solomon v. Smith, 487 F. Supp. 1134, 1136 (S.D.N.Y. 1980) (describing impact of investigative suggestiveness leading to misidentification as subtle).

128. *See* United States v. Langford, 802 F.2d 1176, 1182 (9th Cir. 1986) (Ferguson, J., dissenting) (indicating majority's failure to consider science's evolvement following case precedent cited by majority); State v. Lawson, 291 P.3d 673, 696 (Or. 2012) (discussing expert testimony in relation to scientific advancement). "[T]he use of experts may prove vital to ensuring that the law keeps pace with advances in scientific knowledge, thus enabling judges and jurors to evaluate eyewitness identification testimony according to relevant and meaningful criteria." *Lawson*, 291 P.3d at 696.

129. *See* O'Toole & Shay, *supra* note 28, at 133 (noting under fifty well-qualified eyewitness identification experts, however over 77,000 such cases occur per year).

130. *See* State v. Long, 721 P.2d 483, 492 (Utah 1986) (relating instructions offer defendant some protection from misidentification and provide jurors with requisite knowledge); Epstein, *supra* note 72, at 93 (indicating specialized jury instructions address deficiencies in human perception and memory). Jury instructions are thought at times to be even more advantageous than expert testimony because they are focused, concise, authoritative, and cost-free. *See* State v. Henderson, 27 A.3d 872, 925 (N.J. 2011). *But see* Lee, *supra* note 12, at 781-82 (indicating jurors fail to carefully consider instructions, making this safeguard alone inadequate); Woocher, *supra* note 26, at 1104-05 (suggesting specialized jury instructions insufficient because dangers not obvious to lay juror).

131. *See, e.g.*, United States v. Anderson, 739 F.2d 1254, 1258 (7th Cir. 1984) (holding specialized jury instructions mandatory at defendant's request when witness identification at issue); *Henderson*, 27 A.3d at 924 (holding enhanced instructions mandatory to guide juries in factors affecting reliability of identifications); *Long*, 721 P.2d at 492 (mandating cautionary instructions in every case where eyewitness identification central issue).

consider, including a witness's level of certainty, when measuring reliability.[132] Today, not only are courts abandoning an instruction advocating for a certainty-reliability correlation, but some courts are also instructing specifically against such correlation.[133] Thus, proper cautionary instructions do no more than give jurors the tools they need to accurately measure eyewitness credibility because lay jurors notoriously fail to appreciate the difficulties with eyewitness identification.[134]

IV. CONCLUSION

Eyewitness show-up identifications are naturally suggestive, unreliable, and largely unnecessary. Extra care must be taken at each step in the eyewitness identification process to reduce suggestibility and increase reliability because our current system relies on eyewitness identifications and their persuasive effect on juries. This careful effort is best initiated with meticulous police procedure, including the adoption of policies mandating double-blind identifications, sequential lineups, and increased police education on the weaknesses of eyewitness identification. To encourage such reform, the Supreme Court must alter its decisions in *Biggers*, *Manson*, and *Wade*. Changes in the lower court standards will not carry weight until the country's highest Court addresses the overwhelming scientific and psychological data that indicate that previous eyewitness identification rulings from 1960s are outdated. Finally, in acknowledging the persuasive effect of eyewitness identification, courts should favor *any* process that affords jurors an increased understanding of the subtleties of eyewitness identification testimony.

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132. *See supra* note 8 (listing *Biggers* factors); *see also supra* note 131 (showing examples of courts implementing jury instructions regarding witness identification).

133. *See* Brodes v. State, 614 S.E.2d 766, 771 (Ga. 2005) (refusing to continue instruction authorizing jurors to consider witness certainty as factor in reliability assessment); State v. Romero, 922 A.2d 693, 703 (N.J. 2007) (announcing standard jury instruction relating level of witness confidence alone not indication of reliability). The New Jersey Supreme Court announced standard jury instructions for all cases in which eyewitness identification is a central issue, stating:

> Although nothing may appear more convincing than a witness's categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken. Therefore, when analyzing such testimony, be advised that a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification.

Romero, 922 A.2d at 703.

134. *See Henderson*, 27 A.3d at 925 (indicating instructions eliminate need for expert to opine eyewitness's credibility); *Long*, 721 P.2d at 492 (suggesting cautionary instruction only pinpoints identification as central issue and highlights factors bearing on reliability).