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## THE LAW AND SCIENCE OF EYEWITNESS EVIDENCE<sup>†</sup>

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### ABSTRACT

*Eyewitness evidence crucially depends on visual perception and memory, which are quite fallible. The potential inaccuracy of eyewitness memory has been long demonstrated in cases of wrongful conviction. Today, decades of scientific research on visual perception and memory have identified key causes of error and methods for improving eyewitness performance. Eyewitness evidence, where identification procedures themselves involve experiments, lends itself to scientific research as do few other areas in law. As a result, eyewitness evidence has become a testing ground for the use of science to inform the law. This Article examines how legal actors—state and federal courts, state lawmakers, and police agencies—have responded to this body of research. While Supreme Court rulings have set a constitutional floor, we find that it largely does not inform eyewitness evidence law. State courts have increasingly incorporated eyewitness memory science to decrease misidentifications, as we describe in a detailed fifty-state survey of rulings. Second, we explore how state lawmakers have done still more, in an analysis of twenty-four state statutes regulating eyewitness identification procedures. Third, policing agencies have embraced revised identification practices, including through model policy adopted in twenty-nine states.*

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*Based on these findings, we call into question top-down, stare decisis-bound, and federal court-centric accounts that dominate constitutional criminal procedure. Further, we describe how research continues to progress; a new generation of research promises to further improve the accuracy of eyewitness procedures. While constitutional criminal procedure changes slowly, we expect local actors will continue to harness research developments. We conclude by asking why, in the eyewitness area, criminal investigation and procedure have been so receptive to research. We suggest rather than adopting a precedent-based system, police practices, courts, and statutes employ a scientific framework that can incorporate new discoveries. This account points towards a dynamic framework for the use of science in the legal system.*

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## INTRODUCTION

Imagine the following scenario. You are a juror in a lengthy criminal trial, and you are listening to the prosecution recount horrific events. While walking to a friend's house, a sixteen-year-old student was abruptly abducted, dragged into roadside bushes, and sexually assaulted by an unknown man.<sup>1</sup> After repeatedly punching the attacker in the face, the victim managed to break free and run away.<sup>2</sup> A passerby in his car saw the attacker's face.<sup>3</sup>

Later, during the trial, you intently listen to the victim's and passerby's testimony. When asked if the victim was confident that the defendant sitting in the courtroom was the culprit, the victim replies, "Yes, I'm sure. . . . I will never forget what he looks like."<sup>4</sup> The witness who drove by confirms the identification.<sup>5</sup> As a juror, your instinct is to believe the two witnesses who observed the crime. How could you not? One saw—and courageously punched—the assailant face-to-face, and the other saw the assailant just moments afterwards. How could either be wrong about the attacker's identity?

The situation just described is not hypothetical—it is the case of a sixteen-year-old high school student in San Diego, California.<sup>6</sup> The victim was completely sure of the identification by the time of the criminal trial.<sup>7</sup> When she viewed a photo array, however, she was tentative, telling police that the defendant's photo was the "most similar," but that she was "[n]ot sure" and had a confidence level of 60%.<sup>8</sup> Her confidence at the trial was inflated. The defendant, Uriah Courtney, was sentenced to life in prison.<sup>9</sup> After serving eight years, Courtney was released in 2013 after retesting of the victim's shirt and skirt excluded Courtney's DNA.<sup>10</sup> Additionally, the DNA evidence was linked, through a hit in the Combined DNA Index System database, to a man who lived close to the scene.<sup>11</sup>

Uriah Courtney's wrongful conviction is but one on a lengthy and growing list. Of the over 370 individuals in the United States who have been exonerated due to DNA evidence to date, approximately 70% involved eyewitness

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<sup>1</sup> Thomas D. Albright, *Why Eyewitnesses Fail*, 114 PROC. NAT'L ACAD. SCIS. 7758, 7761 (2017) (describing such assault).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 7762.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 7761.

<sup>7</sup> *Id.* at 7762.

<sup>8</sup> See *Uriah Courtney*, CAL. INNOCENCE PROJECT, <https://californiainnocenceproject.org/read-their-stories/uriah-courtney/> [<https://perma.cc/2LM2-WTAN>] (last visited Jan. 24, 2022).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

misidentifications.<sup>12</sup> Not only do wrongful convictions undermine and erode trust in the criminal justice system and destroy the lives of the wrongfully convicted, but they also threaten public safety by allowing the true perpetrators to remain free and to continue to commit violent crimes.<sup>13</sup> Despite these growing concerns regarding the reliability of eyewitness identifications, eyewitness evidence remains a staple of criminal investigations.<sup>14</sup> We do not know how often eyewitness identifications are conducted, but according to one estimate, they may be used in tens of thousands of cases per year.<sup>15</sup> We emphasize the important racial justice implications—just as in Courtney’s case, eyewitness misidentifications have been disproportionately documented in cross-racial identifications, reflecting the greater difficulty people have in identifying persons of a different race.<sup>16</sup>

This Article is the first to comprehensively examine how scientific research has changed our understanding of the fallibility of eyewitness memory and how the law and police practices have been reshaped in response.<sup>17</sup> We survey

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<sup>12</sup> *DNA Exonerations in the United States*, INNOCENCE PROJECT, <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/> [https://perma.cc/83CZ-PXZA] (last visited Jan. 24, 2022); see also Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 78 (2008) (explaining that convictions of 79% of first 200 people exonerated by post-conviction DNA testing involved eyewitness testimony); BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 48-50 (2011) (“Data suggest that in actual police lineups, witnesses choose known innocent ‘fillers’ an average of 30% of the time.”); *Exonerations*, CONVICTING THE INNOCENT: DNA EXONERATIONS DATABASE, <https://www.convictingtheinnocent.com> [https://perma.cc/3BR4-YPZ7] (last visited Feb., 12, 2022) (detailing first 350 DNA exonerations in United States).

<sup>13</sup> Jee Park, *Eyewitness Identification and Innocence*, 64 LOY. L. REV. 669, 670 (2018) (“Of the 158 [exonerations] where the true perpetrators were identified by DNA, these actual perpetrators went on to commit 150 additional violent crimes” (citing *DNA Exonerations in the United States*, *supra* note 12)).

<sup>14</sup> See *id.*

<sup>15</sup> NAT’L RSCH. COUNCIL, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 11 (2014) [hereinafter IDENTIFYING THE CULPRIT] (referring to 1989 survey of prosecutors and concluding that “at least 80,000 eyewitnesses make identifications of suspects in criminal investigations each year” (citing Alvin G. Goldstein, June E. Chance & Gregory R. Schneller, *Frequency of Eyewitness Identification in Criminal Cases: A Survey of Prosecutors*, 27 BULL. PSYCHONOMIC SOC’Y 71, 73 (1989))); GARRETT, *supra* note 12, at 50 (estimating 75,000 suspects are identified per year by eyewitnesses).

<sup>16</sup> Garrett, *supra* note 12, at 79 (describing cross-racial misidentifications among DNA exonerations and research on subject).

<sup>17</sup> For the prior effort to comprehensively address the subject in the 2014 National Academy of Sciences Report, see generally IDENTIFYING THE CULPRIT, *supra* note 15. We note that both authors served on the Committee that produced that report and one author co-chaired the Committee. The views expressed in this Article are our own. The focus of that report was not the law; one chapter briefly summarized legal developments but did not

scientific developments and present fifty-state and federal surveys of legal and practical developments concerning eyewitness evidence. We provide five detailed Appendices that create a national resource regarding the law of eyewitness evidence, comprehensively digesting across all fifty states and the federal government: (A) statutes on eyewitness procedure, (B) state court rulings on admissibility of eyewitness evidence, (C) state court rulings on admissibility of expert testimony on eyewitness evidence, (D) jury instructions on eyewitness evidence, and (E) model policies for law enforcement eyewitness identification procedures.<sup>18</sup>

In Part I, we introduce the basic types of police lineup procedures, the large body of scientific research on eyewitness memory, and the recommendations flowing from that research. Simply put, human facial recognition poses real challenges for individuals.<sup>19</sup> Scientific research has documented how, even under optimal viewing conditions, eyewitnesses can have great difficulty identifying strangers (and even nonstrangers).<sup>20</sup> As the National Research Council explained in a landmark 2014 report summarizing research in the area of human visual perception and memory, “it is well known that eyewitnesses make mistakes and that their memories can be affected by various factors including the very law enforcement procedures designed to test their memories.”<sup>21</sup>

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conduct a comprehensive survey or analysis of the law. Further, both the scientific research and law and practice have changed a great deal in the seven years since that report was released. A recent American Psychology and Law Society White Paper provides more updated analysis of research and policy recommendations but none directed towards judges or lawyers. *See generally* Gary L. Wells, Margaret Bull Kovera, Amy Bradfield Douglass, Neil Brewer, Christian A. Meissner & John T. Wixted, *Am. Psych. Ass’n & Am. Psych.-L. Soc’y, Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence*, 44 *LAW & HUM. BEHAV.* 3 (2020). For a discussion of implications of research on eyewitness evidence, see DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS* 51 (2012). For older overviews of then-current research and law, see BRIAN L. CUTLER & STEVEN D. PENROD, *MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW* 101-14 (1995). For a legal treatise, see ELIZABETH F. LOFTUS, JAMES M. DOYLE, JENNIFER E. DYSART & KAREN A. NEWIRTH, *EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL* 9-10 (6th ed. 2019) (explaining changes made to traditional police practices in light of scientific research).

<sup>18</sup> *See infra* apps. A-E; *see also* Barry Scheck, *Four Reforms for the Twenty-First Century*, 96 *JUDICATURE* 323, 334 (2013) (describing “landmark” New Jersey and Oregon Supreme Court decisions “provid[ing] a blueprint for state courts to re-evaluate and revise their legal architecture for the assessment and regulation of eyewitness testimony”).

<sup>19</sup> IDENTIFYING THE CULPRIT, *supra* note 15, at 2 (“Unknown to the individual, memories are forgotten, reconstructed, updated, and distorted. Therefore, caution must be exercised when utilizing eyewitness procedures and when relying on eyewitness identifications in a judicial context.”).

<sup>20</sup> *See, e.g., id.* at 1-2.

<sup>21</sup> *Id.* at 1.

The potential unreliability of the human factors that underlie eyewitness reports—visual perception and memory—has long been known through anecdotal examples of misidentifications<sup>22</sup> and early application of the discipline of experimental psychology to problems of decision-making in law.<sup>23</sup> Making the problem more urgent for the legal system, as we have noted, the vast majority of DNA exoneration cases involved eyewitness misidentification.<sup>24</sup> Decades of scientific research have uncovered both sources of inaccuracy and methods for improving eyewitness identification performance.<sup>25</sup> Indeed, because police lineups are experiments designed to test memory,<sup>26</sup> they lend themselves well to scientific research.<sup>27</sup> Thousands of studies have been conducted regarding how people perceive and memorize faces and the factors that can undermine accurate vision and memory.<sup>28</sup>

In Part II, we describe the legal system's response to this body of scientific evidence. The account is the reverse of many constitutional criminal procedure narratives, in which the Supreme Court is the most influential player. The Court, largely a sideline character, has not changed the due process rule for evaluating eyewitness evidence since its 1976 ruling in *Manson v. Brathwaite*,<sup>29</sup> which set out a series of "reliability" factors compiled from prior decisions, none based on

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<sup>22</sup> See generally, e.g., EDWIN M. BORCHARD, CONVICTING THE INNOCENT: SIXTY-FIVE ACTUAL ERRORS OF CRIMINAL JUSTICE (1932) (citing examples of eyewitness errors); *United States v. Wade*, 388 U.S. 218, 228 (1967) ("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.").

<sup>23</sup> See HUGO MÜNSTERBERG, ON THE WITNESS STAND: ESSAYS ON PSYCHOLOGY AND CRIME 44-45 (1908) (explaining flaws in human memory in context of "modern" psychology).

<sup>24</sup> See IDENTIFYING THE CULPRIT, *supra* note 15, at 11 ("Recently, post-conviction DNA exonerations of innocent persons have dramatically highlighted the problems with eyewitness identifications."); see also GARRETT, *supra* note 12, at 80 ("Observers have called eyewitness misidentifications the 'leading cause' of wrongful convictions.").

<sup>25</sup> IDENTIFYING THE CULPRIT, *supra* note 15, at 1, 104.

<sup>26</sup> See Gary L. Wells & C.A. Elizabeth Luus, *Police Lineups as Experiments: Social Methodology as a Framework for Properly Conducted Lineups*, 16 PERSONALITY & SOC. PSYCH. BULL. 106, 109-10 (1990) (describing process of police lineups and how they resemble experiments).

<sup>27</sup> *Id.* at 108-09; see also *Tegoseak v. State*, 221 P.3d 345, 360 (Alaska Ct. App. 2009) ("The changing attitude of the legal system is attributable to the fact that 'the development of forensic DNA testing in the 1990s [uncovered] definitive cases of the conviction of innocent people in the United States', [sic] and that '[e]yewitness-identification error was at the heart of the evidence used to convict the vast majority of these innocent people.'" (alterations in original) (quoting Gary L. Wells, Amina Memon & Steven D. Penrod, *Eyewitness Evidence: Improving Its Probative Value*, 7 PSYCH. SCI. PUB. INT. 45, 48 (2006))).

<sup>28</sup> Wells & Luus, *supra* note 26, at 109-10; see also *Tegoseak*, 221 P.3d at 357-58 (explaining that factors, such as removal of actual culprit's photo from lineup, can impact human memory).

<sup>29</sup> 432 U.S. 98 (1977).

research.<sup>30</sup> That due process standard increasingly does not inform eyewitness evidence because it is so unscientific and out-of-date, given four decades of subsequent visual perception and eyewitness memory science.<sup>31</sup>

In contrast, state judges have done more to respond to the science.<sup>32</sup> A series of courts have concluded, for example, “as a matter of state constitutional law, that it is appropriate to modify [due process standards] to conform to recent developments in social science and the law.”<sup>33</sup> Courts increasingly recognize that vision is limited by expectation and bias, where “research further reveals that an array of variables can affect and dilute memory and lead to misidentifications.”<sup>34</sup> State courts have adopted new jury instructions for eyewitness evidence, new standards for in-court identifications, and new admissibility standards, as well as required that pretrial reliability hearings be conducted.<sup>35</sup> The majority of state courts now permit expert evidence on eyewitness perception and memory.<sup>36</sup> That said, only a few state courts have made comprehensive changes;<sup>37</sup> others have made more selective changes, such

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<sup>30</sup> *Id.* at 107-08; *see also infra* Section II.A (explaining court’s emphasis on reliability being the “the linchpin in determining the admissibility of identification testimony”).

<sup>31</sup> *See infra* Section II.A.

<sup>32</sup> *See infra* Section II.B; *see, e.g.*, Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin’s New Governance Experiment*, 2006 WIS. L. REV. 645, 647 (describing Wisconsin’s 2005 criminal justice reform bill mandating changes for eyewitnesses); Amy D. Trenary, Note, *State v. Henderson: A Model for Admitting Eyewitness Identification Testimony*, 84 U. COLO. L. REV. 1257, 1288-89 (2013) (describing New Jersey’s new identification procedures); Steven J. Joffe, Comment, *Long Overdue: Utah’s Incomplete Approach to Eyewitness Identification and Suggestions for Reform*, 2010 UTAH L. REV. 443, 446 (arguing for Utah to adopt new best practices meant to lower inaccuracies in eyewitness testimony); Anne E. Whitehead, Note, *State v. Ramirez: Strengthening Utah’s Standard for Admitting Eyewitness Identification Evidence*, 1992 UTAH L. REV. 647, 649 (explaining changes made to Utah’s laws on admissibility of eyewitness testimony following *State v. Ramirez*); *see also* PRINCIPLES OF THE L. OF POLICING § 11.02 (AM. L. INST., Tentative Draft No. 2, 2019) (summarizing changes in state law approaches).

<sup>33</sup> *State v. Harris*, 191 A.3d 119, 134 (Conn. 2018).

<sup>34</sup> *State v. Henderson*, 27 A.3d 872, 895 (N.J. 2011).

<sup>35</sup> *See infra* Section II.B.

<sup>36</sup> *See infra* Section II.B (listing several states and their new policies on eyewitness evidence).

<sup>37</sup> *See Young v. State*, 374 P.3d 395, 413 (Alaska 2016) (concluding *Manson* test does not adequately protect due process under Alaska Constitution and adopting new approach for deciding admissibility of eyewitness identification evidence); *Commonwealth v. Gomes*, 22 N.E.3d 897, 900 (Mass. 2015) (holding that “scientific principles” should be crafted in jury instructions on eyewitness evidence); *Henderson*, 27 A.3d at 895 (concluding *Manson* test does not meet stated goal, revising framework to allow all relevant variables to be explored at pretrial hearings if there is evidence of suggestiveness, and ordering development of jury instructions regarding eyewitness evidence); *State v. Lawson*, 291 P.3d 673, 688 (Or. 2012)

as rejecting eyewitness confidence as a factor<sup>38</sup> or requiring additional jury instructions.<sup>39</sup> Going still further, lawmakers in almost half of the states have required adoption of best practices for eyewitness evidence. State legislation has required the study of eyewitness procedures, development of model policies, or increasingly, outright adoption of police eyewitness identification practices.<sup>40</sup> Policing organizations have been receptive to scientific research and have incorporated it into lineup policies and training.<sup>41</sup> Thus, while constitutional procedure remains unchanged, policing has experienced a sea change.

Part III explores how to build upon more recent scientific research. The first generation of eyewitness research was applied research. In the second generation of research, earlier insights are complemented by a body of basic research that examines how humans perceive images and form visual memories. This research has resulted in a growing body of knowledge concerning how to test visual perception and memory accurately, and it has expanded the best practices the legal system can adopt to safeguard eyewitness evidence. We discuss the importance, for example, of videotaping identification procedures and describe new methods for conducting procedures that technology and research make possible.

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(en banc) (holding test inadequate to ensure unreliable eyewitness identification evidence was excluded and directing courts to adopt approach informed by general reliability provisions of Oregon Evidence Code); *see also infra* app. B.

<sup>38</sup> *Harris*, 191 A.3d at 134 (expanding protections for suggestiveness of eyewitness identification procedure); *Brodes v. State*, 614 S.E.2d 766, 771 & n.8 (Ga. 2005) (departing from federal due process test by refusing to allow jury instructions on eyewitness certainty as factor regarding reliability); *State v. Almaraz*, 301 P.3d 242, 253 (Idaho 2013) (naming estimator and system variables to be considered in applying *Manson* test); *People v. Adams*, 423 N.E.2d 379, 383-84 (N.Y. 1981) (concluding where witness makes identification under influence of suggestive procedure and there is no independent source that suggests defendant is perpetrator, court must exclude evidence); *State v. Ramirez*, 817 P.2d 774, 781 (Utah 1991) (modifying due process test to remove level of certainty as factor), *abrogated by State v. Lujan*, 2020 UT 5, 459 P.3d 992; *State v. Hunt*, 69 P.3d 571, 572 (Kan. 2003) (refining *Neil v. Biggers*, 409 U.S. 188 (1972), approach by adding factors from *Ramirez*); *State v. Discola*, 2018 VT 7, ¶¶ 27, 30, 207 Vt. 216, 184 A.3d 1177 (rejecting witness certainty as factor in assessing reliability).

<sup>39</sup> *State v. Kaneaiakala*, 450 P.3d 761, 777 (Haw. 2019) (holding when identification has been procured through suggestive procedure or when central to case, jury must be instructed to consider potential impact of suggestive procedures on reliability of identification).

<sup>40</sup> *See infra* Section II.C (explaining different procedures and practices each state has adopted).

<sup>41</sup> These efforts began in the late 1990s with the National Institute of Justice's Technical Working Group for Eyewitness Evidence. *See generally* U.S. DOJ, OFF. OF JUST. PROGRAMS & NAT'L INST. OF JUST., EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999) [hereinafter EYEWITNESS EVIDENCE], [www.ncjrs.gov/pdffiles1/nij/178240.pdf](http://www.ncjrs.gov/pdffiles1/nij/178240.pdf) [https://perma.cc/U5TQ-CPBM] (putting forth recommendations to improve procedures for collection and preservation of eyewitness evidence within criminal justice system).

In Part IV, we develop a new ground-up view of the intersection of science and law. The bottom-up dissemination of research in law is (at least on the surface) incompatible with *stare decisis*. In science, doctrine is to be challenged. In law, doctrine sturdily resists alteration and the bar to revisit precedent is high. To effectively adopt scientific principles, the decider needs to look to truth (or the closest approximation to truth) rather than precedent. Yet, law is not as resistant to science as is commonly supposed. Law enforcement has discretion to build upon the constitutional law floor and has responded far more rapidly than the courts. Further, in the area of evidence law, which is largely not constitutionalized and provides for judicial discretion, state courts have been far more responsive when incorporating science.<sup>42</sup> Part IV concludes by describing the implications for police reform and future scientific contributions to our criminal system.

### I. THE SCIENCE OF EYEWITNESS IDENTIFICATION PROCEDURES

Eyewitness identification represents a “gold standard” in the application of relevant scientific research to a legal question.<sup>43</sup> Scientists have long been studying precisely the question that the legal community cares about: How do visual perception and memory translate to accurate identification of criminal suspects? Over the past three decades, as science has advanced in its understanding of those visual and memory processes, so have the recommendations for police practices. First, this Part provides an introduction to the types of police eyewitness identification procedures. Second, it provides an overview of research on eyewitness vision and memory. Third, it connects the two by exploring how research on vision and memory has informed police identification procedures.

#### A. *Introduction to Police Identification Procedures*

In *Uriah Courtney’s* case, the police showed a traditional “six-pack” photo array, in which the suspect’s photo is grouped with five photos of innocent “fillers,” to the two eyewitnesses.<sup>44</sup> The eyewitnesses described the culprit as White, in his mid-twenties, with brown hair and a goatee.<sup>45</sup> Only two of the five fillers in this lineup had any facial hair at all—and Courtney’s goatee was the most conspicuous.<sup>46</sup> This lineup configuration, in conjunction with the

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<sup>42</sup> See *infra* Section II.B.

<sup>43</sup> Karen A. Newirth & Barry C. Scheck, *Eyewitness Identification Evidence*, in *ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE* 1518, 1523 (Gerben Bruinsma & David Weisburd eds., 2014).

<sup>44</sup> Albright, *supra* note 1, at 7761.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

witnesses' descriptions, led to a high likelihood of picking Courtney, which of course, both eyewitnesses did.<sup>47</sup>

Nor was the lineup procedure blind; the officers knew which photo was that of the suspect, "open[ing] the possibility that the administrator may have covertly conveyed information—through eye movements, body posture, facial expressions, verbal responses—that could have been unconsciously received by a witness bedeviled by uncertainty, and thus influenced judgments of identity."<sup>48</sup>

Courtney's case is not unique in these respects. In a study of the first 250 such DNA exonerations in the United States, many eyewitnesses misidentified innocent people based on similarly suggestive police identification procedures.<sup>49</sup> In 78%, or 125, of the 161 cases that involved eyewitness evidence, there was evidence at trial that the identification procedures used were suggestive.<sup>50</sup> For example, in 34%, or 55, of the 161 cases, it was apparent from trial records that biased lineups were used, as in Courtney's case.<sup>51</sup> In some cases, only one person in the lineup matched the description or wore clothes like the culprit; in other cases, the innocent suspect's photo was the only color photo or it was marked to highlight it.<sup>52</sup> Most of these DNA exoneration cases involved single eyewitnesses, often the victims of the crime,<sup>53</sup> but in some cases, more than one eyewitness misidentified an innocent person because they viewed the same suggestive lineup in which one person stood out or most resembled the actual culprit.<sup>54</sup>

In additional cases, not only was the lineup itself unfair, but police used suggestive instructions or made suggestive remarks that may have further biased the witness.<sup>55</sup> In some cases, officers told the eyewitnesses that the suspect was present in the lineup.<sup>56</sup> Police used blind administration or blinded procedures in only one of the 161 cases.<sup>57</sup> The study was based on what was reported by witnesses at trial and additional suggestion may have occurred that was never documented or reported at trial.<sup>58</sup>

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<sup>47</sup> *Id.* at 7762.

<sup>48</sup> *Id.*

<sup>49</sup> GARRETT, *supra* note 12, at 48.

<sup>50</sup> *Id.* at 49.

<sup>51</sup> *Id.* at 55.

<sup>52</sup> *Id.* at 58-59.

<sup>53</sup> *Id.* at 50 (noting that among 290 eyewitnesses who misidentified 190 of the first 250 DNA exonerees, 73% of those eyewitnesses were victims).

<sup>54</sup> *Id.* at 50-51 (explaining that 36% of exonerees were misidentified by multiple witnesses, with errors likely caused by suggestive police procedures).

<sup>55</sup> *Id.* at 59.

<sup>56</sup> *Id.* at 60.

<sup>57</sup> *Id.* at 81.

<sup>58</sup> *Id.* at 48 (explaining that some records of identification procedures are not recorded by police and thus not mentioned in court).

Thus, eyewitness identification procedures can and have gone wrong in a range of ways. This Section provides an introduction to what those police procedures are and how they work. Police officers use a variety of different procedures to ask an eyewitness to identify a culprit. Three basic procedures are used when police have a suspect and seek to test the memory of an eyewitness: (1) showups, (2) photo arrays, and (3) live lineups.<sup>59</sup> We also describe several additional procedures, such as use of mug shots and composite drawings. This Article refers to these various procedures generally as eyewitness identification procedures but also refers to specific procedures when necessary.

### 1. Showup Procedures

In many criminal investigations, a perpetrator is caught in the act or is known to the offender. In such situations, there may be no need to identify the offender, although the eyewitness may still be a crucial witness to describe what occurred.<sup>60</sup> Police arrange eyewitness identification procedures of different types, depending on the case, and often based on the timing of the investigation.<sup>61</sup>

In a showup, which usually occurs at or near the crime location, officers present a single live suspect to a witness.<sup>62</sup> Showup procedures are only permitted shortly after the crime because they are so suggestive: they present a witness with just a single choice.<sup>63</sup> Research confirms showups pose special risks concerning accuracy.<sup>64</sup> Showups are not nearly as strong a memory test: there are no memory foils, or “fillers,” present and the choice is a simple “yes” or “no.” Without any fillers present, a showup is highly suggestive; thus, such procedures have been “widely condemned.”<sup>65</sup> The suspect’s clothing may also be highly suggestive because the suspect is often selected when wearing clothing

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<sup>59</sup> See Nancy Steblay, Jennifer Dysart, Solomon Fulero & R.C.L. Lindsay, *Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison*, 27 *LAW & HUM. BEHAV.* 523, 523-24 (2003) (describing most common types of police procedures for eyewitness identifications and research findings on each).

<sup>60</sup> See *IDENTIFYING THE CULPRIT*, *supra* note 15, at 21 (describing types of crimes, such as domestic violence, where victim knows culprit).

<sup>61</sup> *Id.* at 22 (describing how sometimes police will interview eyewitness immediately after crime, while in other circumstances, identification request will come later).

<sup>62</sup> *Id.* at 14 (describing three mainstream procedures used to identify perpetrator).

<sup>63</sup> See, e.g., Steblay et al., *supra* note 59, at 525, 538 (“The fact that the showup generally occurs shortly after the crime may further convince witnesses that the suspect is unlikely to be innocent.”).

<sup>64</sup> See *id.* (describing accuracy implications of eyewitness believing that showup is one-time opportunity to identify culprit); A. Daniel Yarmey, Meagan J. Yarmey & A. Linda Yarmey, *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 *LAW & HUM. BEHAV.* 459, 465 (1996) (describing differences in success rates of showups and lineups).

<sup>65</sup> *Stovall v. Denno*, 388 U.S. 293, 302 (1967).

similar to what the eyewitness described.<sup>66</sup> If a showup is conducted, sound policy counsels against doing so in a manner that adds additional suggestion beyond that inherent in the procedure.<sup>67</sup>

## 2. Photo Arrays

When there is no exigency and officers do not need to quickly rule out or identify a potential suspect shortly after a crime, they can construct an eyewitness identification that consists of a memory test, using either photographs or live witnesses. Photo arrays are the most commonly used police eyewitness identification procedure.<sup>68</sup> It is standard practice for officers to present the eyewitness with six to nine photographs, only one of which should be a suspect, with the other “fillers,” or known nonsuspects.<sup>69</sup> Officers typically display photos in a “six pack” “simultaneous” presentation, in which photos appear together in a two by three arrangement, or they display photos one at a time, in a “sequential” presentation.<sup>70</sup> The filler photos are selected to fairly resemble the suspect, often based on the eyewitnesses’ description and the appearance of the suspect in the photo used.<sup>71</sup> More police departments today draw on image databases to locate filler photos.<sup>72</sup>

## 3. Live Lineups

Also used are live lineups, in which the suspect and fillers are presented in-person to an eyewitness.<sup>73</sup> Live lineups are far less common today, likely because police may need probable cause to place a nonconsenting person in such

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<sup>66</sup> See Steblay et al., *supra* note 59, at 537-38.

<sup>67</sup> See IDENTIFYING THE CULPRIT, *supra* note 15, at 5-6 (proposing eleven recommendations to reduce eyewitness identification errors).

<sup>68</sup> POLICE EXEC. RSCH. F., A NATIONAL SURVEY OF EYEWITNESS IDENTIFICATION PROCEDURES IN LAW ENFORCEMENT AGENCIES 48 (2013) [hereinafter EYEWITNESS IDENTIFICATION SURVEY] (stating that photo lineups are “[b]y far the most commonly used eyewitness identification strategy”).

<sup>69</sup> For a troubling example of a situation where police “violated the first rule of lineups” by showing the victim twelve photos, all of suspects, see Andy Mannix, *Minnesota Cops Weak on Photo Lineup Procedures, Critics Say*, STAR TRIB. (Minneapolis) (June 10, 2017, 11:17 PM), <https://www.startribune.com/minnesota-cops-weak-on-photo-lineup-procedures-critics-say/427682743/>.

<sup>70</sup> IDENTIFYING THE CULPRIT, *supra* note 15, at 23. Some states enacted legislation requiring sequential presentation of photographs. See *infra* Section II.C.

<sup>71</sup> See IDENTIFYING THE CULPRIT, *supra* note 15, at 23.

<sup>72</sup> See *id.*

<sup>73</sup> See *id.* at 25.

a lineup, presence of counsel may be required at a live procedure, and it can be quite difficult to find suitable live fillers who resemble the suspect.<sup>74</sup>

#### 4. Additional Procedures

A range of additional, and quite problematic, procedures may be used in situations in which officers do not have a suspect. Officers may show mug books or sets of photographs to see if the eyewitness can identify a suspect<sup>75</sup> or they may ask the eyewitness to help prepare a composite image or drawing of a culprit.<sup>76</sup> They may display a “confirmatory” photograph to a witness to confirm the identity of a person that the witness already knows.<sup>77</sup> Police may sometimes take a witness to view people in the field, perhaps at a location the culprit is known to frequent.<sup>78</sup> Finally, eyewitnesses may try to make identifications not arranged by police, in person or on social media, offender registries, or other online image collections.<sup>79</sup> All of these situations should be avoided and discouraged by police.

More broadly, police need to understand that eyewitness evidence is fallible, the subject of the next Section. There is a risk of error when conducting an eyewitness identification procedure. Police should not conduct such a procedure unless there is a strong basis to suspect the person being placed in a lineup. Further, cognitive bias can affect police just like it can affect other decision makers.<sup>80</sup> An eyewitness identification, just like other types of evidence, can bias the investigation and influence how police interpret other evidence in the case.<sup>81</sup> That type of cross-contamination should also be avoided; police should continue to investigate other possible and contrary evidence, even if an

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<sup>74</sup> See *id.* at 25-26 (listing reasons why live lineups are less preferable); EYEWITNESS IDENTIFICATION SURVEY, *supra* note 68, at 48 (listing live lineups as least commonly used strategy).

<sup>75</sup> See IDENTIFYING THE CULPRIT, *supra* note 15, at 28.

<sup>76</sup> See EYEWITNESS EVIDENCE, *supra* note 41, at 18-20.

<sup>77</sup> See *id.* (adding that confirmatory photograph method is usually limited to situations where witness knows or is acquainted with perpetrator).

<sup>78</sup> See *id.* (noting examples of “field view” method).

<sup>79</sup> See, e.g., *id.* at 29 (explaining how proliferation of social media has impacted identification methods). For a case in which a victim made an identification first from online images, see *State v. Chen*, 27 A.3d 930, 934 (N.J. 2011).

<sup>80</sup> See Steve Charman, Amy Bradfield Douglass & Alexis Mook, *Cognitive Bias in Legal Decision Making*, in *PSYCHOLOGICAL SCIENCE AND THE LAW* 30, 32 (Neil Brewer & Amy Bradfield Douglass eds., 2019) (discussing existence of cognitive bias in many different actors throughout criminal justice process, including police officers).

<sup>81</sup> See *id.* at 35. See generally Steve D. Charman, Melissa Kavetski & Dana Hirn Mueller, *Cognitive Bias in the Legal System: Police Officers Evaluate Ambiguous Evidence in a Belief-Consistent Manner*, 6 J. APPLIED RSCH. MEMORY & COGNITION 193 (2017) (discussing whether officers experience cognitive bias in evaluating pieces of evidence such as eyewitness testimony).

eyewitness makes an identification. We turn next to the research on eyewitness vision and memory that can start to answer why eyewitness misidentifications occur.

B. *Research on Eyewitness Vision and Memory*

Why did the two eyewitnesses in Uriah Courtney's case gravitate to an image of a suspect, who, although he shared a goatee in common with the culprit, was an innocent man? When detectives presented the photo array at the police station, the victim stated that she was, "Not sure, but the most similar is number 4," which was Courtney's photo, and rated "her confidence level at 60%."<sup>82</sup> The second witness was Latinx, while Courtney and the photos shown in the array were non-Latinx White. There is a well-documented phenomenon known as the own-race bias, in which people have greater difficulty discriminating among faces of a different race than their own.<sup>83</sup> Evidence suggests that this type of bias occurs when people are predominantly exposed to individuals of their own race. There is thus a possibility that the Latinx witness in the Courtney case "had an experience-dependent predisposition that could have severely limited his ability to perceive, memorize, recall, and discriminate among faces similar to that of the culprit."<sup>84</sup>

Yet both witnesses testified confidently at the San Diego Superior Court that Courtney was the person who committed the assault. The prosecutor asked the victim, "Are you sure the defendant is the person that attacked you?" and she responded, "Yes, I'm sure."<sup>85</sup> She added, "I will never forget what he looks like."<sup>86</sup> The second witness, when asked if he had "any doubt that the defendant was the one," responded, "Not at all."<sup>87</sup>

The Courtney case was not unusual in that respect. It is not uncommon in such misidentification cases that the witnesses become confident at trial, despite having earlier been uncertain. A review of DNA exoneration cases revealed the following:

In 57% of the trials with eyewitness testimony (91 of 161 trials), the witnesses had earlier not been certain at all, a glaring sign that the identification was not reliable. In 40% of the trials with eyewitness testimony (64), the trial transcripts revealed how an eyewitness did not initially identify the defendant, but rather a filler, another suspect, or no

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<sup>82</sup> See *Uriah Courtney*, *supra* note 8.

<sup>83</sup> See Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 *PSYCH. PUB. POL'Y & L.* 3, 21 (2001) (reviewing own-race bias phenomenon and finding that people remember faces of their own race better than those of another, less familiar race).

<sup>84</sup> Albright, *supra* note 1, at 7762.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

one at all. In 21% of the trials with eyewitness testimony (34), an eyewitness admitted initial uncertainty about the identification. In 9% of the trials with eyewitness testimony (15), an eyewitness reported not having seen the culprit's face at all.<sup>88</sup>

Some cases involved more than one type.<sup>89</sup> Importantly, these data reflected what was said at trials; witnesses may not have later recalled or reported earlier uncertainty or problems with identifications when testifying on the stand.<sup>90</sup> However, with few exceptions, these witnesses, just like the witnesses in Courtney's case, testified with great certainty.<sup>91</sup> Thus, witnesses who get it wrong can nevertheless be quite certain at trial.

Wrongful convictions like the Courtney case have generated public alarm and propelled new scientific research.<sup>92</sup> What explains the seemingly confident manner in which an eyewitness can misidentify an innocent person? This Section turns to the body of research developed over the past three decades on eyewitness vision and memory. It begins with the basic task eyewitnesses are confronted with in a criminal investigation by defining the relevant concepts and explaining the underlying processes of visual perception and memory. Next, this Section describes the factors that can impact the accuracy of eyewitness identifications and testimony.

### 1. Defining the Problem

Why do eyewitnesses make mistakes? In the simplest terms, an eyewitness is an observer who sees an object. The observer is later pressed to identify the same object in another context that includes similar objects. Indeed, aside from the fact that the stakes are very high, the general task is nearly identical to many recognition problems ubiquitous in human experience, like trying to find one's car in the parking lot, one's luggage on the airport carousel, or one's dog in the

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<sup>88</sup> GARRETT, *supra* note 12, at 64.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 67 ("Unless the witness happens to mention doing so at trial, we may not know if the witness had previously picked out the wrong person or had been uncertain, since police do not typically document how certain eyewitnesses are when they first make an identification.").

<sup>91</sup> *Id.* at 68 ("In only four cases were the eyewitnesses *not* sure at trial that they had identified the right person.").

<sup>92</sup> These failures have been revealed, in part, due to the use of post-conviction DNA testing. To date, over 370 cases have been overturned by the discovery that crime scene DNA excluded the DNA of the person convicted. *See DNA Exonerations in the United States*, *supra* note 12. In 76% of the first 250 of such cases, eyewitness misidentification was significant evidence leading to conviction. *See GARRETT*, *supra* note 12, at 48.

pack at a dog run.<sup>93</sup> All of these tasks rely on the decider's ability to accurately sense, perceive, and remember a stimulus.<sup>94</sup> In all cases a decision is rendered in the form of a categorical "yes" or "no" response ("That's the guy!" "There's my bag, *finally*."). Sometimes we are correct and sometimes not. The root scientific question here is what sensory and memory processes inform accurate decisions?<sup>95</sup>

In the past, research began with that starting point, observing the likelihood of making the right choice as correlated with a collection of factors, such as specific viewing conditions, and with a variety of practices for conducting a lineup.<sup>96</sup> The factors that affect the likelihood that an eyewitness will make a correct identification have been classified as "estimator" and "system" variables.<sup>97</sup> Estimator variables characterize the viewing conditions and perceptual/cognitive state of the witness at the time of the crime.<sup>98</sup> These variables (e.g., lighting, viewing distance, stress, and fear) should be considered when assessing eyewitness testimony.<sup>99</sup> These are factors, however, that cannot be controlled after the fact by law enforcement.<sup>100</sup>

By contrast, system variables (e.g., the manner in which a lineup is conducted) influence identification accuracy after the crime has occurred and can be controlled by police.<sup>101</sup> This approach to eyewitness performance has long dominated the field, leading to valuable scientific advances—and controversies—and it has surely helped improve the likelihood of correct identification.<sup>102</sup>

By the mid-1990s, researchers had conducted hundreds of studies using lab-based experiments to highlight factors that correlated with less accurate eyewitness identifications.<sup>103</sup> In the late 1990s, those recommendations

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<sup>93</sup> See Albright, *supra* note 1, at 7762 (likening issues arising in eyewitness identification to "general class of problems in which humans must make decisions about things they've seen before").

<sup>94</sup> See *id.* (adding that problems of "uncertainty, bias, and confidence" arise in these cases).

<sup>95</sup> *Id.* at 7760 ("Broadly speaking, eyewitness misidentifications can be characterized as failures of visual perception or memory, the former being seeing things inaccurately, the latter being loss of accuracy or precision in the storage, maintenance, and recall of what was seen.").

<sup>96</sup> See *id.* at 7759.

<sup>97</sup> See Gary L. Wells, *Applied Eyewitness-Testimony Research: System Variables and Estimator Variables*, 36 J. PERSONALITY & SOC. PSYCH. 1546, 1548 (1978) (coining these terms).

<sup>98</sup> *Id.* at 1555.

<sup>99</sup> See *id.* at 1547-48.

<sup>100</sup> See *id.* at 1548 ("[A]lthough these variables may be manipulable in research, they cannot be controlled in actual criminal cases.").

<sup>101</sup> See *id.*

<sup>102</sup> See Albright, *supra* note 1, at 7759.

<sup>103</sup> See Wells et al., *supra* note 17, at 4.

coalesced in a scientific review paper by the American Psychology and Law Society that influenced Department of Justice model policy and many policing agencies.<sup>104</sup> The factors identified in early research remain important today, such as the influence of estimator variables, including stress, weapons focus, and difficulty of witnesses in recognizing a person of another race, and the influence of system variables, including lineup fairness, instructions, and biasing cues, when the administrator knows which lineup participant is the suspect.<sup>105</sup> Further, “experimental laboratory studies have grown immensely in number and breadth over the last 20 years.”<sup>106</sup>

This research, while still largely reliant on visual memory tests conducted in a lab, has taken advantage of a wealth of science regarding mechanisms of vision and memory that underlie object recognition. This gold mine of basic scientific discoveries had been largely overlooked in the long tradition of applied eyewitness identification.<sup>107</sup> Researchers increasingly apply and develop approaches towards eyewitness memory grounded in cognitive and neuroscience research to focus on how we process visual memory information.<sup>108</sup> This effort seeks to identify the mechanistic principles that underlie how human brains process what we see and remember to make identification decisions.

## 2. How the Human Brain Decides

While it may seem odd to think of people as instruments, an eyewitness observer is an instrument for information measurement, classification, and storage. As with any such instrument, human performance is tied to the operating characteristics of the instrument—sensitivity, storage capacity, and susceptibility to interference or bias.<sup>109</sup> These characteristics have been studied extensively by psychology and neuroscience research communities for decades. At the most basic level, three factors bear on performance of human observers engaged in an object recognition task, such as eyewitness identification: (1) uncertainty, (2) bias, and (3) overconfidence.<sup>110</sup>

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<sup>104</sup> *See id.* (“[T]he 1998 scientific review paper played an important role in subsequent developments. For example, it was the model on which the U.S. Department of Justice made its recommendations in its 1999 guide for law enforcement on collecting and preserving eyewitness evidence. . . . [It was also] a model on which the New Jersey Department of Justice created the first statewide guidelines on eyewitness identification that law enforcement were required to follow.”).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *See* Albright, *supra* note 1, at 7763 (noting that “the legal standard for use of eyewitness evidence in the courtroom remains rooted in . . . *Manson*”).

<sup>108</sup> *See id.* at 7762-63.

<sup>109</sup> *Id.* at 7762.

<sup>110</sup> *See id.* at 7760.

First, *uncertainty* results from “noise,” or unpredictable perturbation of otherwise meaningful signals.<sup>111</sup> Noise is ever present in our sensory and mnemonic worlds and constrains the information that can be acquired by an observer.<sup>112</sup> Such constraints reduce the accuracy and utility of observations and thus, to the extent uncertainty can be quantified, place useful upper bounds on the probability that an identification is correct.

Second, unbeknownst to the observer, *bias* quietly fills informational gaps left by uncertainty—we see what we expect to see and are none the wiser.<sup>113</sup>

Third, *overconfidence* is a special form of bias in which the observer implicitly rates the certainty of the experience as greater than it warrants.<sup>114</sup> This is commonly the result of external forces, such as other evidence or opinions, which drive the observer’s certainty in line with a larger story.<sup>115</sup> Overconfidence may be the most pernicious problem with eyewitness testimony, since even very poor-quality information can influence decisions if communicated to others with certainty.

We can begin to understand how uncertainty, bias, and overconfidence affect eyewitness performance by adopting a quantitative perspective on decision-making. Human decisions depend upon two quantifiable elements. The first of these is the *strength of the underlying sensory or memory information* (“signal strength”) that the decision relies upon, which in the case of eyewitness identification is the fidelity and accessibility of memories from the crime scene.<sup>116</sup> Uncertainty and bias can affect the fidelity of information visually perceived and initially stored in memory by an eyewitness, as well as the ability to access those memories in the future.

The second element that underlies human decisions is the *criterion applied* to make a decision (“decision criterion”), which is the signal strength required by a given eyewitness to make an identification.<sup>117</sup> Various biases, including overconfidence, can drive the decision criterion along a scale from nonspecific (liberal—i.e., it takes only a weak signal for the observer to say “yes”) to highly

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.* (“The presence of such noise leads to uncertainty about what we’re actually looking at . . .”).

<sup>113</sup> *See id.*

<sup>114</sup> *See id.*

<sup>115</sup> DANIEL KAHNEMAN, THINKING, FAST AND SLOW 262 (2011) (stating that overconfidence primarily indicates that person has constructed a “coherent story” in his mind that may not be true).

<sup>116</sup> *See* Albright, *supra* note 1, at 7760.

<sup>117</sup> *See id.* at 7762 (analyzing how “situational and cognitive factors” factor into identification decisions).

specific (conservative—i.e., a “yes” decision requires a very strong signal).<sup>118</sup> The value in thinking of eyewitness decision-making in these quantitative terms is that it enables one to understand the causes, and thus the significance, of an identification.

In particular, an identification that results from a strong signal and a conservative decision criterion is far more likely to be accurate than an identification born from a weak signal and a very liberal criterion, but both are traditionally manifested by the same assertion of “that’s the guy.”

### 3. Lineups in the Laboratory

Laboratory experiments that simulate the real-world conditions of eyewitness identification have become a proving ground for evaluating procedures in the context of human decision-making.<sup>119</sup> These are studies in which the truth is known to the experimenter, which is the only way in which identification decisions can be classified as correct versus incorrect.<sup>120</sup> They are also necessarily based on performance measures obtained from large groups of subjects. The logic is that factors that improve performance under laboratory conditions, such as the way a lineup is presented, are also likely to improve performance in real casework.

In a typical laboratory study, human subjects (acting as witnesses) are exposed to a mock crime and then presented with a photographic lineup.<sup>121</sup> They are asked to identify the person they thought was the culprit or to respond “*not present*.”<sup>122</sup> Subjects are assigned to one of two experimental conditions: target-present and target-absent.<sup>123</sup> The target-present condition consists of a lineup that includes an image of the culprit (target) and images of at least five “fillers” (people known to be innocent) chosen to match the description of the culprit.<sup>124</sup> The target-absent lineup condition is identical, except the target is removed and

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<sup>118</sup> See *id.* at 7760 (discussing how overconfidence plays into identification issues); see also Laura Mickes, Travis M. Seale-Carlisle, Stacy A. Wetmore, Scott D. Gronlund, Steven E. Clark, Curt A. Carlson, Charles A. Goodsell, Dawn Weatherford & John T. Wixted, *ROCs in Eyewitness Identification: Instructions Versus Confidence Ratings*, 31 APPLIED COGNITIVE PSYCH. 467, 468-69 (2017).

<sup>119</sup> See Albright, *supra* note 1, at 7759.

<sup>120</sup> See *id.*

<sup>121</sup> See *id.*

<sup>122</sup> See IDENTIFYING THE CULPRIT, *supra* note 15, at 90.

<sup>123</sup> *Id.* (noting that research has focused not only on witnesses’ abilities to correctly identify suspect who is present but also on witnesses’ abilities to correctly discern when suspect is absent); see also Kenneth A. Deffenbacher, Brian H. Bornstein, Steven D. Penrod & E. Kiernan McGorty, *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 LAW & HUM. BEHAV. 687, 694-99 (2004) (comparing results between different experimental conditions).

<sup>124</sup> See IDENTIFYING THE CULPRIT, *supra* note 15, at 25.

replaced with another image matching the description of the culprit.<sup>125</sup> Based on subject responses, target-present and target-absent conditions serve to estimate, respectively, the probability of correctly identifying the culprit and the probability of incorrectly identifying an innocent suspect.<sup>126</sup> Improvements in eyewitness performance are commonly evinced by increases in the ratio of correct to incorrect identifications.<sup>127</sup>

There are several ways one might further evaluate and interpret data obtained from laboratory lineup studies.<sup>128</sup> One of the most promising comes from sensory science, which provides a framework for dissecting and exposing the elements that underlie an identification. That framework, known as Signal Detection Theory, enables one to independently quantify (1) discriminability of the culprit based on the strength of an eyewitness's recognition memory and (2) the decision criterion used by the eyewitness to make an identification.<sup>129</sup>

In lineup identifications, the decision criterion can range from conservative (requiring strong recognition memory) to liberal (requiring weaker recognition memory), and is influenced by a variety of factors, including witness confidence and verbal instructions.<sup>130</sup> The decision criterion bears a complex relationship to eyewitness performance. While use of a conservative decision criterion can limit the likelihood of identifying an innocent suspect—an outcome that is highly valued in civil society—this same conservatism also limits the likelihood of identifying anyone in the lineup, including the culprit.<sup>131</sup> Memory strength, by contrast, is expected to be directly correlated with discriminability of the culprit from innocent suspects.<sup>132</sup> It follows that any factor that improves a witness's ability to access memories from the crime scene should increase accuracy of identification. The larger conceptual message here is that the significance of any identification decision is ambiguous unless one is capable of dissecting relative contributions of memory strength and decision criterion.

Finally, it is important to recognize that laboratory experiments and analysis tools only reveal tendencies evident from average behavior of subjects.<sup>133</sup> These

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<sup>125</sup> John T. Wixted, Laura Mickes, John C. Dunn, Steven E. Clark & William Wells, *Estimating the Reliability of Eyewitness Identifications from Police Lineups*, 113 *PROC. NAT'L ACAD. SCI.* 304, 304 (2016).

<sup>126</sup> *See, e.g., id.* (using these probabilities to create algebraic estimate of suspect identification accuracy).

<sup>127</sup> *See IDENTIFYING THE CULPRIT, supra* note 15, at 78-79 (discussing how diagnosticity ratio is critical piece of information in efforts to evaluate eyewitness performance).

<sup>128</sup> *See id.* at 90-91 (recommending that additional methods be used to evaluate accuracy of human classification decisions).

<sup>129</sup> *Id.* at 47-51, 80-82.

<sup>130</sup> *Id.* at 84-85.

<sup>131</sup> *Id.* at 85 (illustrating approach).

<sup>132</sup> *Id.* at 60.

<sup>133</sup> *Id.* at 13.

tendencies offer potentially valuable evidence for the development of policies for the conduct of lineups.<sup>134</sup> Furthermore, knowledge gained from experiments about the effectiveness of certain lineup conditions can rightly be weighed in legal decisions about the value of identifications based on those conditions.<sup>135</sup> That knowledge reveals nothing absolute, however, about the correctness of any specific eyewitness identification in the real world.

#### 4. Uncertainty, Bias, and Confidence in the Real World

The eyewitnesses in Uriah Courtney's case were well-intentioned and trying to make a correct identification. They did not know Courtney and were not intentionally biased towards him. Their choices, however, may have been affected by various sources of uncertainty and unconscious biases that crept in to fill narrative gaps at several points in the process: from sensing and perceiving the crime, to storing those events in memory, to interpreting faces in a lineup, and, finally, to the theatrical role of fingering the culprit in court.<sup>136</sup>

The statements by witnesses in DNA exonerations suggest they did fill in gaps along the road towards misidentifying innocent people. To provide one example, a witness recalled changing her mind about the exoneree's eye color after seeing his photo: "I originally said brown eyes . . . When I picked out his photo in my hospital room as I handed it to the Sheriff I commented, 'He's got blue eyes, I was mistaken.'"<sup>137</sup> In the well-known DNA exoneration case of Ronald Cotton, the victim later recounted that comments by police powerfully affected her: "When I picked him out in the physical lineup and I walked out of the room, they looked at me and said, 'That's the same guy,' I mean, 'That's the one you picked out in the photo.' For me that was a huge amount of relief."<sup>138</sup>

In general, human sensations are riddled with uncertainty introduced by weak sensory signals and various sources of sensory "noise," including refractive error, dim lighting, occluding objects, or distracting features of a visual scene.<sup>139</sup> Perception is a constructive process intended to overcome sensory uncertainty by filling in the blanks with other sources of information, such as things previously learned from experience and known to be true about the world.<sup>140</sup> Sensory uncertainty experienced while witnessing a crime thus provides fertile ground for biases to grow and influence the perceptual narrative.<sup>141</sup> For example,

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<sup>134</sup> *Id.* at 3.

<sup>135</sup> *Id.* at 3, 13-14 (describing relevance of scientific research to lineup design).

<sup>136</sup> See Albright, *supra* note 1, at 7762.

<sup>137</sup> GARRETT, *supra* note 12, at 69 (alteration in original).

<sup>138</sup> *Id.* at 62.

<sup>139</sup> Albright, *supra* note 1, at 7760; see also IDENTIFYING THE CULPRIT, *supra* note 15, at 15.

<sup>140</sup> See IDENTIFYING THE CULPRIT, *supra* note 15, at 15.

<sup>141</sup> See *id.* at 14-16 (describing visual and cognitive processes that affect witness recollection).

memory-based expectations may cause an eyewitness to perceive a weapon when there is none.<sup>142</sup> In this way, uncertainty and bias can markedly influence eyewitness identification.

Uncertainty and bias may also be introduced while viewing a lineup. In the Courtney case, the eyewitnesses viewed a lineup in which Courtney was the only person with a prominent goatee, which was a distinguishing feature reported by the eyewitnesses and used by law enforcement in the pursuit of suspects.<sup>143</sup> Unfair composition of the lineup caused by varying the similarity of fillers to the reported description of the culprit can easily bias choices made by an eyewitness. The eyewitnesses in the Courtney case may also have been biased by other people in the room: for example, the administrator of the lineup, a police officer who knew which person was the suspect, may have unintentionally provided cues to the eyewitnesses in the form of verbal commentary, eye movements, or posture. Such cues may highlight one lineup participant over another, leading to incorrect identification.<sup>144</sup> Unlike factors that may bias what is perceived and remembered from the crime scene, biasing factors associated with the lineup process itself can be mitigated by law enforcement. More objective methods for selecting lineup fillers and the use of blind or “double-blinded” methods for lineup administration, where the officer does not know which person is the suspect, are obvious targets to reduce bias associated with the lineup process.<sup>145</sup>

In Uriah Courtney’s case, the two witnesses were highly confident at trial, yet they were wrong. For many years, studies revealed little correlation between confidence and accuracy in recognition memory tasks.<sup>146</sup> Yet legal standards for eyewitness identification did not follow that scientific foundation; the confidence of an eyewitness was used as evidence of reliability, even when procedures used were suggestive and could have been expected to generate false

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<sup>142</sup> See *id.* at 66 (describing “intrusion errors,” where “information known to be commonly associated with events of a general type becomes incorporated into the retrieved content of a specific memory”).

<sup>143</sup> Albright, *supra* note 1, at 7761-62.

<sup>144</sup> See Steve D. Charman & Vanessa Quiroz, *Blind Sequential Lineup Administration Reduces Both False Identifications and Confidence in Those False Identifications*, 40 LAW & HUM. BEHAV. 477, 482-83 (2016) (finding that unblinded lineup administrators tend to engage in behaviors such as smiling when witnesses made identification more than blind administrators, resulting in more false identifications).

<sup>145</sup> See, e.g., *id.* at 477; IDENTIFYING THE CULPRIT, *supra* note 15, at 106.

<sup>146</sup> E.g., Brian R. Clifford & Jane Scott, *Individual and Situational Factors in Eyewitness Testimony*, 63 J. APPLIED PSYCH. 352, 352 (1978) (finding “[n]o relationship” between confidence in correctness and objective accuracy); Siegfried Ludwig Sporer, Steven Penrod, Don Read & Brian Cutler, *Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence–Accuracy Relation in Eyewitness Identification Studies*, 118 PSYCH. BULL. 315, 315 (1995) (noting agreement among researchers that there is weak correlation between identification accuracy and confidence in identification judgments).

confidence.<sup>147</sup> Moreover, courts have traditionally allowed courtroom identifications and expressions of confidence.<sup>148</sup> Courtney's case illustrates why one should be skeptical of confidence in the courtroom. Suggestive lineups and suggestively corroborating information—such as the fact that the same identification was made by another eyewitness—could easily have caused the Courtney eyewitnesses, one of whom had trouble making an identification at the lineup, to be completely confident in court. As the National Research Council Report put it, “confidence levels expressed at later times [(in court, for example)] are subject to recall bias, enhancements stemming from opinions voiced by law enforcement, counsel and the press, and to a host of other factors that render confidence statements less reliable.”<sup>149</sup>

Nevertheless, the confidence of an eyewitness expressed at the time of the initial lineup identification procedure can provide important information about the accuracy of the identification.<sup>150</sup> In Courtney's case, the victim was uncertain at the lineup—an important red flag indicating the identification may be incorrect.<sup>151</sup> If a lineup is not accompanied by suggestive or biasing procedures, however, the confidence of an eyewitness expressed at that time can offer useful information. Indeed, recent laboratory studies have found that, under pristine circumstances in which opportunities for bias are limited, highly confident witnesses are, on average, highly accurate.<sup>152</sup> (There are also highly confident but inaccurate witnesses, and more research is needed to better identify them.)<sup>153</sup> The reason is two-fold: (1) on average, confident witnesses are more likely to be selective and identify faces that meet a conservative decision criterion and (2) as witnesses become more conservative in their decision criterion—selecting a face only when absolutely certain—they are expected to become more accurate.<sup>154</sup>

On the other hand, the pristine conditions that can be achieved easily in laboratory studies are less common in real cases handled by police. Expressions of confidence made at the time of the initial lineup identification do not provide useful information about accuracy if they are obtained under conditions that are suggestive or include unsound practices. More work needs to be done to improve

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<sup>147</sup> See John T. Wixted & Gary L. Wells, *The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis*, 18 PSYCH. SCI. PUB. INT. 10, 10-11 (2017).

<sup>148</sup> For a detailed exploration of this problem, see Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND. L. REV. 451, 452, 497 (2012).

<sup>149</sup> See IDENTIFYING THE CULPRIT, *supra* note 15, at 108.

<sup>150</sup> *Id.*

<sup>151</sup> Albright, *supra* note 1, at 7763.

<sup>152</sup> See, e.g., Wixted & Wells, *supra* note 147, at 49-50 (“Under pristine testing conditions, a high-confidence suspect ID appears to be highly probative of guilt.”).

<sup>153</sup> See Mickes et al., *supra* note 118, at 468.

<sup>154</sup> See IDENTIFYING THE CULPRIT, *supra* note 15, at 82 (“[S]imply by inducing a witness to adopt a more conservative bias, it is possible to increase the likelihood that an identified person is actually guilty.”).

police practices because in real-life police settings, bias and suggestion can create the very type of *false* confidence that misled the jurors who convicted Uriah Courtney.

C. *Recommendations for Lineup Practices*

As we have described, while inaccurate identifications are sometimes caused by factors unrelated to police practices, subpar police practices can contribute to misidentifications and make it hard to assess the validity of an identification. Such practices may have played a role in Uriah Courtney's case. At the time of Courtney's conviction in 2006, many law enforcement agencies did not carefully regulate how lineups were handled.<sup>155</sup> His lineup photo stood out, the lineup was not conducted blind, and, absent a recording, we cannot be sure exactly how the lineup was actually administered to the two eyewitnesses in the case.

In response to the concern that lineups have been commonly conducted using poorly regulated and unreliable methods, the National Research Council made five recommendations for law enforcement: (1) training all law enforcement officers on variables that can affect eyewitness identifications, (2) adopting blind lineup and photo array procedures, (3) providing officers who administer procedures with standardized witness instructions, (4) documenting witnesses' stated level of confidence at the time of an identification, and (5) videotaping the witness identification process.<sup>156</sup> We discuss each in turn in light of the scientific research discussed in Section I.B.

1. Police Training and Policy

Traditionally, eyewitness identification procedures were not governed by police policies with any detailed guidance. Rather, this was the type of task that officers would informally learn on the job.<sup>157</sup> Agencies did not have standardized instructions or procedure.<sup>158</sup> This problem remains pressing as some still do not have written policies.<sup>159</sup> The procedures for conducting an eyewitness

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<sup>155</sup> *See id.* at 105 (identifying, in 2014, "a number of areas where eyewitness identification procedures could be strengthened").

<sup>156</sup> *See id.* at 105-09.

<sup>157</sup> EYEWITNESS IDENTIFICATION SURVEY, *supra* note 68, at 91.

<sup>158</sup> *Id.*

<sup>159</sup> IDENTIFYING THE CULPRIT, *supra* note 15, at 29-30 (concluding that local, state, and federal efforts to address the issue of misidentification of witnesses are not uniform or systematic); PRINCIPLES OF THE L. OF POLICING § 10.01 (AM. L. INST., Tentative Draft No. 2, 2019) ("Unfortunately, there is wide variability among agencies on the subject of eyewitness evidence. Many agencies have policies that are decades out of date, or they have no written policies at all."); EYEWITNESS IDENTIFICATION SURVEY, *supra* note 68, at 91 ("Many agencies do not have written eyewitness identification policies, do not provide training to lineup administrators, and do not provide all recommended instructions to witnesses. Moreover,

identification should be clear and easily understood by witnesses. Standard procedures ensure uniformity and avoid any misunderstanding by, or suggestion to, the eyewitness, even if inadvertent.

The modern approach—treating eyewitness identifications as an experiment and a test of human memory—depends upon standard protocols and procedures.<sup>160</sup> State statutes described in Appendix A provide useful models.<sup>161</sup> In addition, police should make routine accommodations in policy and in practice for non-English speakers or others requiring accommodations due to hearing or linguistic impairment, or other disability.<sup>162</sup> Instructions should inform the eyewitness that a culprit may or may not be present in the lineup.<sup>163</sup> That instruction is crucial because eyewitnesses otherwise may expect that the culprit will be present and that there is a correct choice that should be made. As with all areas of agency policy, written policy must be implemented through sound training and supervision.<sup>164</sup>

Another area in which police training and policy is critical concerns the selection of lineup participants. In addition to the suspect, a lineup includes facial photos of a set of individuals—lineup “fillers”—who are known to be innocent.<sup>165</sup> Fillers serve as lures to challenge recognition memory—the guiding principle is that fillers should be chosen to match the physical description of the suspect; they should be perceptually similar to the suspect but not too much so.<sup>166</sup> Fillers should also be perceptually similar to one another. The choice of

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there is a lack of uniformity among law enforcement agencies with respect to eyewitness identification procedures.”).

<sup>160</sup> See IDENTIFYING THE CULPRIT, *supra* note 15, at 107 (recommending law enforcement develop standardized set of easily understood instructions to use when engaging in witness identification procedure).

<sup>161</sup> See, e.g., N.C. GEN. STAT. § 15A-284.52 (2021) (describing North Carolina’s use of double-blind and blinded procedures); OHIO REV. CODE ANN. § 2933.83 (West 2021) (describing Ohio’s witness instructions which state suspect may or may not be in lineup); CALEA L. ENF’T AGENCY STANDARDS § 42.2.11 (COMM’N ON ACCREDITATION FOR L. ENF’T 2010) (stating in absence of controlling authority, written directive detailing eyewitness identification procedures should include composition of line-up, audio or video recording, and more); MODEL POL’Y ON EYEWITNESS IDENTIFICATION 1-11 (VA. DEP’T OF CRIM. JUST. SERVS. 2014) (describing Virginia’s policy for preparation and presentment of photographic and in-person lineups).

<sup>162</sup> See IDENTIFYING THE CULPRIT, *supra* note 15, at 107 (“Accommodations should be made when questioning non-English speakers or those with restricted linguistic ability.”).

<sup>163</sup> *Id.*

<sup>164</sup> Supervision and training is important not just for officers who routinely conduct lineups but for all officers who conduct investigations. For example, an officer’s field interview with an eyewitness, designed to elicit a description of a possible suspect, can play a crucial role in any subsequent identification procedures. PRINCIPLES OF THE L. OF POLICING § 11.02.

<sup>165</sup> See IDENTIFYING THE CULPRIT, *supra* note 15, at 14.

<sup>166</sup> *Id.* at 25.

fillers has long been known to markedly influence eyewitness performance.<sup>167</sup> An unfair or biased lineup, in which the suspect stands out among the fillers, can lead to errors.<sup>168</sup> The reasons why this is true can be understood by considering eyewitness identification as a process of statistical inference. People recognize faces probabilistically based on the degree to which they elicit a memory signal corresponding to a particular face previously seen.<sup>169</sup> It naturally follows that similar faces are more likely to elicit the same memory signal and thus have higher likelihoods of being recognized as the culprit.

Lineups composed of fillers that are all of roughly the same degree of physical or perceived similarity to the suspect are termed “fair.”<sup>170</sup> Conversely, lineups composed of fillers that possess differing degrees of similarity to the suspect are termed “unfair” or “biased.”<sup>171</sup> An unfair lineup, in which one filler is closer in similarity to the perpetrator, reduces some uncertainty by lessening the number of sensible choices and simplifies the problem of statistical inference. The eyewitness is essentially dealing with a two-choice problem rather than a six-choice problem, which has the effect of simultaneously increasing the likelihood of identifying the culprit and the likelihood of misidentifying someone who looks like the culprit—thereby decreasing both discriminability and accuracy.<sup>172</sup>

For all of these reasons, greater attention should be paid to the procedures by which fillers are chosen for a given lineup. Standard rules on identification procedures should clearly set out how to select fillers to achieve a fair lineup.<sup>173</sup> Police, after obtaining a description from the eyewitness, should select fillers who each fairly reflect the eyewitness’s description of the suspect.<sup>174</sup> The fillers

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<sup>167</sup> See, e.g., Roy S. Malpass, Colin G. Tredoux & Dawn McQuiston-Surrett, *Lineup Construction and Lineup Fairness*, in 2 HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR PEOPLE 155, 156 (Rod C.L. Lindsay, David F. Ross, J. Don Read & Michael P. Toglia eds., 2007) (“Decades of empirical research suggest that mistaken eyewitness identifications are more likely to occur when the suspect stands out in a lineup.”).

<sup>168</sup> See, e.g., *id.*; Gary L. Wells & Amy L. Bradfield, *Measuring the Goodness of Lineups: Parameter Estimation, Question Effects, and Limits to the Mock Witness Paradigm*, 13 APPLIED COGNITIVE PSYCH. S27, S30 (1999) (“Simply stated, rather than recognizing the suspect as being the perpetrator, the eyewitness might have selected the suspect because he or she ‘stood out’, [sic] which is an inference process rather than a memory process.”).

<sup>169</sup> See *id.* at S28 (“[E]yewitnesses tend to select the person who most closely resembles their memory of the perpetrator relative to the other lineup members.”).

<sup>170</sup> See Malpass et al., *supra* note 167, at 155-59.

<sup>171</sup> See *id.* at 157-58.

<sup>172</sup> See, e.g., *id.* at 156 (relating story of lineup containing one Black suspect and five White fillers).

<sup>173</sup> See, e.g., Wells et al., *supra* note 17, at 8 (recommending that “there should be only one suspect per lineup and the suspect should not stand out from the fillers based on the witness’s description of the culprit or other factors that would draw attention to the suspect”).

<sup>174</sup> *Id.* at 17 (describing “match-to-description” method of constructing a lineup, where law enforcement officers select fillers based on victim’s verbal description of suspect).

should not make the suspect stand out in a manner that is suggestive.<sup>175</sup> Only a single suspect should be present in any given lineup procedure.<sup>176</sup> Resources should be made available to agencies so that they have access to a sufficiently wide selection of photographs for use in photo arrays. In addition, policies should discourage the use of multiple viewings, which can raise the risk of error by implanting new memories of the previously viewed lineup faces.<sup>177</sup> We discuss in Part III ways to further improve the process of lineup construction so that lineups do not depend on officers' varying judgment regarding what constitutes fairness.

## 2. Blind Lineup Administration or Blinded Procedures

By asking an eyewitness to participate in an identification procedure, officers create an expectation that a suspect will be present and presented to the eyewitness. In an effort to be helpful, an eyewitness will naturally look to the officer for guidance, reinforcement, and feedback.<sup>178</sup> However, if a lineup is viewed as a scientific experiment designed to identify the culprit, it naturally follows that established scientific methods should apply.<sup>179</sup> Good scientific experiments use blind or blinded procedures, in which the individuals involved in measuring the outcome are kept unaware of the experimental conditions.<sup>180</sup> The rationale is that such knowledge may implicitly or explicitly bias measurements.<sup>181</sup> In a lineup, this means the person administering the lineup should not have knowledge of the status—suspect or filler—of any participant. This type of blinding eliminates the possibility of reinforcement or feedback, which could otherwise influence the eyewitness's decision, even

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<sup>175</sup> *Id.* (stating high-similarity lineup fillers reduce chance of false identification of innocent person).

<sup>176</sup> *Id.* at 19 (comparing lineup with all suspects and no fillers to multiple-choice test in which there are no wrong answers).

<sup>177</sup> *State v. Henderson*, 27 A.3d 872, 900-01 (N.J. 2011) (“[L]aw enforcement officials should attempt to shield witnesses from viewing suspects or fillers more than once.”).

<sup>178</sup> *See id.* at 900 (finding feedback from law enforcement officers “affects the reliability of [witness] identification in that it can distort memory, create a false sense of confidence, and alter a witness’ report of how he or she viewed an event”).

<sup>179</sup> *See IDENTIFYING THE CULPRIT*, *supra* note 15, at 106 (proposing that blind lineup procedures minimize risk that law enforcement officers, acting as experimenters when lineups are treated as scientific experiments, might inadvertently bias results of identification procedure).

<sup>180</sup> *See id.* (stating that in witness identification context, law enforcement officers should not know who suspect is).

<sup>181</sup> *Id.* (“Double-blinding is central to the scientific method because it minimizes the risk that experimenters might inadvertently bias the outcome of their research, finding only what they expected to find.”).

unintentionally.<sup>182</sup> A blinded officer cannot provide any such cues, even inadvertently, that direct the eyewitness to any particular lineup participant.<sup>183</sup> Furthermore, instructing an eyewitness that the officer administering the procedure does not know which participant is the suspect makes clear that there cannot be any meaningful guidance, reinforcement, or feedback about the suspect's identity.

As the National Research Council Report put it, "The 'blinded' procedure minimizes the possibility of either intentional or inadvertent suggestiveness and thus enhances the fairness of the criminal justice system."<sup>184</sup> Scientists have long recommended that such procedures be used as an essential feature of the experimental method.<sup>185</sup> Blinding "is central to the scientific method because it minimizes the risk that experimenters might inadvertently bias the outcome of their research, finding only what they expected to find."<sup>186</sup>

For smaller agencies, it may be impractical to obtain a second officer unfamiliar with an investigation.<sup>187</sup> To address this practical staffing concern, an eyewitness identification can be procedurally "blinded."<sup>188</sup> One less expensive way to accomplish blinding is to place the images in folders and shuffle them, so that the eyewitness can examine the images in folders without the administrator being able to see which images are being viewed.<sup>189</sup> A number of jurisdictions and model policies incorporate this "folder shuffle" method.<sup>190</sup> Using computerized presentation of images also can remove the administrator

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<sup>182</sup> 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) ("[P]olice officers may leak their hypotheses by consciously or unconsciously communicating to witnesses which lineup member is the suspect."); Ryann M. Haw & Ronald P. Fisher, *Effects of Administrator-Witness Contact on Eyewitness Identification Accuracy*, 89 J. APPLIED PSYCH. 1106, 1110 (2004) (finding it troubling that administrators can influence results of witness identification procedures, as procedures are supposed to be pure test of witness memory).

<sup>183</sup> See IDENTIFYING THE CULPRIT, *supra* note 15, at 106-07 ("Even when lineup administrators scrupulously avoid comments that could identify which person is the suspect, unintended body gestures, facial expressions, or other nonverbal cues have the potential to inform the witness of his or her location in the lineup or photo array.").

<sup>184</sup> *Id.* at 107.

<sup>185</sup> See Robert Rosenthal & Donald B. Rubin, *Interpersonal Expectancy Effects: The First 345 Studies*, 3 BEHAV. & BRAIN SCIS. 377, 377 (1978) ("The overall probability that there is no such thing as interpersonal expectancy effects is near zero.").

<sup>186</sup> IDENTIFYING THE CULPRIT, *supra* note 15, at 106.

<sup>187</sup> *Id.* ("Some in the law enforcement community have responded to calls for double-blind lineup administration with concern, citing the potential for increased financial costs and human resource demands.").

<sup>188</sup> *Id.* at 106-07.

<sup>189</sup> *Id.* at 107.

<sup>190</sup> *Id.*

from the process of presenting images to the eyewitness.<sup>191</sup> Blind procedures will not necessarily prevent suggestion in the form of reinforcement or feedback that occurred before or after that procedure, however, and such feedback, even well-intentioned, can have dramatic effects on an eyewitness's confidence, as we discuss next.<sup>192</sup>

### 3. Documenting Confidence

At trial, a confident eyewitness can be extremely powerful to jurors.<sup>193</sup> However, that confidence may not correspond to reliability.<sup>194</sup> As Justice Sonia Sotomayor explained in dissent in *Perry v. New Hampshire*<sup>195</sup>: “At trial, an eyewitness’ artificially inflated confidence in an identification’s accuracy complicates the jury’s task of assessing witness credibility and reliability.”<sup>196</sup> That is why it is also important to document an eyewitness’s confidence at the time of an initial lineup. An eyewitness’s confidence is comparatively more predictable of accuracy at the time of initial identification relative to later time points, including in court.<sup>197</sup> Eyewitness memory does not improve over time; instead, confidence can be inflated by biasing information.<sup>198</sup> Absent documentation of confidence at the time of initial suspect identification, there may be no record that confidence has been enhanced over time.<sup>199</sup>

Nevertheless, courts have long treated the confidence of an eyewitness as a marker of accuracy in a manner not supported by scientific research. For example, in *Manson*, the Supreme Court emphasized eyewitness certainty as a factor that should be considered when evaluating the validity of an eyewitness’s

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<sup>191</sup> *Id.*

<sup>192</sup> Gary L. Wells & Amy L. Bradfield, “Good, You Identified the Suspect”: Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, 83 J. APPLIED PSYCH. 360, 372-74 (1998) (describing wide ranging effects of feedback).

<sup>193</sup> *Id.* at 361.

<sup>194</sup> *Id.* (summarizing empirical evidence that suggests eyewitness confidence is only modestly related to identification accuracy).

<sup>195</sup> 565 U.S. 228 (2012).

<sup>196</sup> *Id.* at 252 (Sotomayor, J., dissenting).

<sup>197</sup> See IDENTIFYING THE CULPRIT, *supra* note 15, at 108.

<sup>198</sup> See *id.* (“Expressions of confidence in the courtroom often deviate substantially from a witness’ initial confidence judgment, and confidence levels reported long after the initial identification can be inflated by factors other than the memory of the suspect.”); Carl Martin Allwood, Jens Knutsson & Pär Anders Granhag, *Eyewitnesses Under Influence: How Feedback Affects the Realism in Confidence Judgements*, 12 PSYCH. CRIME & L. 25, 36 (2006) (describing study results showing confirmatory feedback inflates confidence).

<sup>199</sup> See IDENTIFYING THE CULPRIT, *supra* note 15, at 108-09 (describing importance of documenting, possibly through video recording, witness’s level of confidence when they first identify suspect, before they are subject to external influences).

identification once it has been determined that there was undue suggestion.<sup>200</sup> Yet confidence at an initial identification procedure is not a good indicator of accuracy if officers have engaged in suggestion.<sup>201</sup>

Leading scientific groups have recommended that the confidence of an eyewitness be carefully documented. Although a numerical confidence score might be more objective, agencies have favored asking witnesses to characterize their levels of confidence in their own words, due to a concern that quantitative scores might be misunderstood in the courtroom.<sup>202</sup> More research, discussed in Part III, may improve methods for assessing eyewitness accuracy and confidence.<sup>203</sup>

#### 4. Sequential or Simultaneous Procedures

In the past, agencies presented photos simultaneously (all at the same time), and in recent years, more agencies have done so sequentially (one at a time).<sup>204</sup> The argument for moving to a sequential format is that it would limit identification errors that result from relative comparisons of lineup faces.<sup>205</sup> Initial results suggested this procedure indeed improves the ratio of correct to incorrect identifications, but this effect appears to partly reflect adoption of a

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<sup>200</sup> 432 U.S. 98, 114 (1977) (describing factors to be considered when determining reliability of identification testimony, which weigh against “corrupting effect” of any suggestive identification).

<sup>201</sup> Suggestion, including signaling or bias in the lineup; reinforcement; or feedback can increase confidence of an eyewitness in predictable ways. Such false confidence is not to be credited. And yet, the Supreme Court’s “reliability” test in *Manson* does exactly that: it excuses undue suggestion by allowing a judge to point to an eyewitness’s resulting confidence. For that reason, scientists have condemned the test. See IDENTIFYING THE CULPRIT, *supra* note 15, at 6 (“[T]he test treats factors such as the confidence of a witness as independent markers of reliability when, in fact, it is now well established that confidence judgments may vary over time and can be powerfully swayed by many factors.”); see also Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court’s Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW & HUM. BEHAV. 1, 16 (2009) (condemning federal courts’ application of *Manson* test to find that identifications were reliable even when surrounding procedures were “highly suggestive”).

<sup>202</sup> See IDENTIFYING THE CULPRIT, *supra* note 15, at 108 (“[T]he administrator should obtain level of confidence by witness’ self-report (this report should be given in the witness’ own words) and document this confidence statement verbatim.”).

<sup>203</sup> See *infra* Part III; see also IDENTIFYING THE CULPRIT, *supra* note 15, at 79-80 (describing such research’s past and current impact on policies and procedures).

<sup>204</sup> IDENTIFYING THE CULPRIT, *supra* note 15, at 23-24.

<sup>205</sup> See R.C.L. Lindsay & Gary L. Wells, *Improving Eyewitness Identifications from Lineups: Simultaneous Versus Sequential Lineup Presentation*, 70 J. APPLIED PSYCH. 556, 562 (1985) (explaining that study showed sequential presentations force witnesses away from relative-judgements).

more conservative decision criterion by the eyewitness, not necessarily an improvement in memory-based discriminability of lineup faces.<sup>206</sup> More recent research has called into question whether one lineup type is clearly preferable to the other.<sup>207</sup> As a result, differences between the procedures may turn out to consist of small effects.<sup>208</sup> Agencies making decisions as to which method of presentation is preferable may be able to adapt their policies more quickly using new technology: computerized presentations of images to eyewitnesses, which can readily be changed to adjust presentation methods.<sup>209</sup>

##### 5. Limiting Showups

Showup procedures, in which a single image or live person is presented to an eyewitness, are inherently suggestive.<sup>210</sup> By definition, they involve a lone subject rather than a lineup with fillers that can challenge recognition memory.<sup>211</sup> As such, showups should be used rarely and only within a very short window of time after an incident.<sup>212</sup> Yet showups are commonly used: in one survey, approximately 62% of agencies reported they use showups (which does not tell us how often they use them or how often they lead to misidentifications).<sup>213</sup> In the DNA exoneration cases, showups were used in fifty-three of the 161 exonerees studied that had eyewitness identifications (among the first 250 DNA exonerations).<sup>214</sup> Procedures regarding permissibility and conduct of showups were traditionally lacking.<sup>215</sup> There is also troubling

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<sup>206</sup> See *id.* at 563 (“The results indicate that the sequential-lineup procedure has beneficial effects on diagnosticity above and beyond merely cautioning witnesses that the perpetrator may not be in the lineup.”).

<sup>207</sup> See discussion *infra* Part III; see also IDENTIFYING THE CULPRIT, *supra* note 15, at 117-19 (explaining that outcomes of different lineups depend on application and evaluation).

<sup>208</sup> See, e.g., IDENTIFYING THE CULPRIT, *supra* note 15, at 117-19 (stating that research comparing line-up procedures shows there is “not enough evidence for the advantage of one procedure over another”); Laura Mickes, Heather D. Flowe & John T. Wixted, *Receiver Operating Characteristic Analysis of Eyewitness Memory: Comparing the Diagnostic Accuracy of Simultaneous Versus Sequential Lineups*, 18 J. EXPERIMENTAL PSYCH. 361, 374-75 (2012) (“It is somewhat sobering to realize that it is currently unknown whether the recommended procedures, no matter how sensible they might seem, are diagnostically inferior, diagnostically equivalent, or diagnostically superior to the alternative lineup procedures they would replace.”).

<sup>209</sup> For a discussion of new possibilities for presentation methods, see *infra* Part III.

<sup>210</sup> See IDENTIFYING THE CULPRIT, *supra* note 15, at 27-28.

<sup>211</sup> *Id.* at 27.

<sup>212</sup> See *id.* at 27-28.

<sup>213</sup> EYEWITNESS IDENTIFICATION SURVEY, *supra* note 68, at 48.

<sup>214</sup> GARRETT, *supra* note 12, at 48, 52.

<sup>215</sup> See IDENTIFYING THE CULPRIT, *supra* note 15, at 28 (“While some law enforcement agencies use a standard procedure with written instructions when conducting a showup, there is no indication that such procedures are used uniformly.”).

evidence that showups, already inherently suggestive, can be conducted even more suggestively than necessary.<sup>216</sup> For example, officers may place the suspect with proceeds of the crime or in restraints or make suggestive remarks to the eyewitness.<sup>217</sup> There are reports of officers showing single photographs of suspects to an eyewitness, which is completely unnecessary because at that point, officers can use a photo array.<sup>218</sup>

Agencies should adopt clear rules, as the National Research Council has recommended, to govern when showup identifications are permitted.<sup>219</sup> Several courts have further regulated showup procedures<sup>220</sup> and we recommend state courts and lawmakers further regulate showups to impose consistent rules across jurisdictions. Agencies should seek out technology, such as software with image archives, that could permit the quick creation of photo arrays, in order to present those images to witnesses in the field, rather than resort to using a showup.<sup>221</sup>

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All of the procedures outlined in this Part are cumulative: the confidence statement made by an eyewitness is only reliable evidence if the procedure itself was blind or blinded, conducted properly, and without any suggestion that would otherwise affect the confidence of the eyewitness. Ideally, a video recording should document the entire eyewitness identification procedure.<sup>222</sup> Doing so can document any departures from proper procedure and document a witness's confidence.<sup>223</sup>

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<sup>216</sup> See, e.g., GARRETT, *supra* note 12, at 55.

<sup>217</sup> See *id.* at 55-56 (discussing case where showup was made more suggestive when police showed victim her stolen radio in suspect's apartment and placed suspect in squad car for victim to view).

<sup>218</sup> See *id.* at 56.

<sup>219</sup> See IDENTIFYING THE CULPRIT, *supra* note 15, at 107.

<sup>220</sup> See, e.g., *State v. Dubose*, 2005 WI 126, ¶ 33, 285 Wis. 2d 143, 165-66, 699 N.W.2d 582, 593-94 ("We conclude that evidence obtained from an out-of-court showup is inherently suggestive and will not be admissible unless, based on the totality of the circumstances, the procedure was necessary."), *overruled by State v. Roberson*, 2019 WI 102, 389 Wis. 2d 190, 935 N.W.2d 813; see also *Commonwealth v. Johnson*, 650 N.E.2d 1257, 1259, 1261 (Mass. 1995) (holding that although showups are not per se excludable, "they are disfavored because of their inherently suggestive nature"); *People v. Adams*, 423 N.E.2d 379, 383-84 (N.Y. 1981) (holding that unnecessarily suggestive showups can taint in-court identification of defendants).

<sup>221</sup> See IDENTIFYING THE CULPRIT, *supra* note 15, at 116-17 (recommending further research on computerized photo arrays which may increase reliability of identification).

<sup>222</sup> See *id.* 108-09.

<sup>223</sup> See *id.* at 109.

## II. THE CHANGING LAW OF EYEWITNESS EVIDENCE

When Uriah Courtney was arrested in 2005, the law in place at the time of his trial reflected Supreme Court rulings in its leading cases regarding eyewitness evidence dating back to the 1960s and 1970s.<sup>224</sup> At that time, little was known about what impacted the validity of eyewitness identifications.<sup>225</sup> By the time of Courtney's trial, a large body of scientific research had already called into question the validity of many of the so-called "reliability" factors that the Supreme Court's *Manson* test set out.<sup>226</sup> Using those factors, the trial judge would be unlikely to find Courtney's unfair lineup an example of egregious police suggestion. Although the lighting and viewing conditions at the crime scene were poor, the eyewitnesses were confident in their identifications and a judge would be highly likely to allow the witnesses to take the stand.<sup>227</sup> At the time, California did not have in place any state law protections that would have further regulated eyewitness identification procedures or courtroom process. In that respect, Courtney's trial was unexceptional.

Yet in the years since his arrest and trial, the law has changed dramatically. In 2020, California adopted a statute requiring police to adopt written eyewitness identification procedures and that lineups be conducted blind or blinded.<sup>228</sup> The California courts have adopted jury instructions on eyewitness evidence as well.<sup>229</sup> California is one of the most recent states to adopt these reforms. Scientific evidence concerning human perception, vision, and memory provides a framework that should and increasingly does inform collection and use—both pretrial and at trial—of eyewitness evidence, including through jury instructions and presentations by expert witnesses.<sup>230</sup> As the National Research Council put it, "The best guidance for legal regulation of eyewitness identification evidence comes not from constitutional rulings, but from the careful use and

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<sup>224</sup> See *Uriah Courtney*, *supra* note 8 (describing Courtney's case history).

<sup>225</sup> See, e.g., 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, 112-13 (2006) (describing due process rulings as outdated, particularly based on recent decades of research).

<sup>226</sup> See, e.g., Wells & Quinlivan, *supra* note 201, at 16 (criticizing fact that, under *Manson*, federal courts have applied reliability test to dismiss profoundly suggestive identifications); O'Toole & Shay, *supra* note 225, at 112 ("The most obvious problem with the *Manson* rule is that the factors it sets out have proven not to be good indicators of reliability."); Suzannah B. Gambell, Comment, *The Need to Revisit the Neil v. Biggers Factors: Suppressing Unreliable Eyewitness Identifications*, 6 WYO. L. REV. 189, 217 (2006) (arguing that reliability factors are "under-inclusive and outdated").

<sup>227</sup> See *Uriah Courtney*, *supra* note 8 (describing eyewitness confidence testimony).

<sup>228</sup> See app. A (citing CAL. PENAL CODE § 859.7 (West 2021)).

<sup>229</sup> See REVISED JUD. COUNCIL OF CALIFORNIA CRIM. JURY INSTRUCTIONS § 315 (ADVISORY COMM. ON CRIM. JURY INSTRUCTIONS 2021); see also *infra* app. D.

<sup>230</sup> See IDENTIFYING THE CULPRIT, *supra* note 15, at 30.

understanding of scientific evidence to guide fact-finders and decision-makers.”<sup>231</sup>

This Part begins with eyewitness evidence in the courts. Section II.A describes the Supreme Court’s now-outdated due process rulings. Next, Section II.B describes state court rulings slightly modifying and also, increasingly, fundamentally reconsidering that framework for admissibility of eyewitness evidence. That Section develops state court rulings concerning expert evidence and state jury instructions on eyewitness evidence. Section II.C turns to the legislative branch, describing legislation enacted in almost half of the states regarding eyewitness procedures. Finally, this Part discusses model policies for law enforcement and resulting changes in police practices.

#### A. *Supreme Court Rulings on Eyewitness Evidence*

Eyewitness misidentifications are not a new problem. As the Supreme Court put it, “The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.”<sup>232</sup> The Court first ruled on eyewitness identifications in a trilogy of cases decided in 1967. In *Gilbert v. California*<sup>233</sup> and *United States v. Wade*,<sup>234</sup> the Court held that, once indicted, a person has a right under the Sixth Amendment to have a lawyer present at an in-person live lineup.<sup>235</sup> That right to counsel does not extend to photo array procedures, which, today, police use far more than live or in-person lineups.<sup>236</sup> Further, in *Wade*, the Court held that failure to provide counsel at a post-indictment lineup does not result in suppression of the evidence if the witness had an “independent source” for the identification, based on factors including the opportunity to observe the culprit at the crime scene, any discrepancies in witness descriptions, any prior identifications or failure to identify the person, and the lapse of time between the act and the lineup.<sup>237</sup>

In the third case in the trilogy, *Stovall v. Denno*,<sup>238</sup> the Supreme Court held that the Due Process Clause also regulates eyewitness identification procedures, stating that certain procedures may be “so unnecessarily suggestive” that the

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<sup>231</sup> *Id.* at 5; see also FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 23 (2015), [https://permanent.fdlp.gov/gpo64136/taskforce\\_finalreport.pdf](https://permanent.fdlp.gov/gpo64136/taskforce_finalreport.pdf) [<https://perma.cc/EW9W-4B3Q>] (recommending “procedures that implement scientifically supported practices that eliminate or minimize presenter bias or influence”).

<sup>232</sup> *United States v. Wade*, 388 U.S. 218, 228 (1967).

<sup>233</sup> 388 U.S. 263 (1967).

<sup>234</sup> *Wade*, 388 U.S. 218.

<sup>235</sup> *Id.* at 236-38; *Gilbert*, 388 U.S. at 272.

<sup>236</sup> *United States v. Ash*, 413 U.S. 300, 321 (1973); Wells & Quinlivan, *supra* note 201, at 16 (“[A] large percentage of jurisdictions in the U.S. use only photographs and never use live lineups . . .”).

<sup>237</sup> *Wade*, 388 U.S. at 241-42.

<sup>238</sup> 388 U.S. 293 (1967), *abrogated by* *United States v. Johnson*, 457 U.S. 537 (1982).

identification evidence must be suppressed.<sup>239</sup> However, the Court rejected any per se rule against the use of showup identifications.<sup>240</sup> Further, in its 1968 ruling in *Simmons v. United States*,<sup>241</sup> the Court emphasized the overall reliability of the eyewitness's identification in finding no grounds for suppressing the identification under the due process theory announced in *Stovall*.<sup>242</sup> In 1972, in *Neil v. Biggers*,<sup>243</sup> the Court found, in a case involving a trial that occurred pre-*Stovall*, that even if an identification was conducted in an unnecessarily suggestive manner, a court should consider five factors in examining whether there was a "likelihood of misidentification" and a due process remedy warranted:

the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' 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.<sup>244</sup>

In 1977, in *Manson*, the Supreme Court adopted this *Biggers* test for all cases as the general due process rule regulating eyewitness identification evidence.<sup>245</sup> The Court emphasized that "reliability is the linchpin in determining the admissibility of identification testimony."<sup>246</sup> Although the Court's due process rule asks whether police used suggestive identification procedures, any such suggestiveness can be excused based on a set of "reliability" factors.<sup>247</sup> The "reliability" factors adopted in *Manson*, and drawn from the prior *Biggers* ruling, ask that the judge examine: (1) the eyewitness's opportunity to view the defendant at the time of the crime, (2) the eyewitness's degree of attention, (3) the accuracy of the description that the eyewitness gave of the criminal, (4) the eyewitness's level of certainty at the time of the identification procedure, and (5) the length of time that had elapsed between the crime and the identification procedure.<sup>248</sup> The Court did not assign any particular weight to any of these factors.<sup>249</sup>

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<sup>239</sup> *Id.* at 301-02.

<sup>240</sup> *Id.* at 302 ("[A] claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it . . .").

<sup>241</sup> 390 U.S. 377 (1968).

<sup>242</sup> *Id.* at 378, 384-86.

<sup>243</sup> 409 U.S. 188 (1972).

<sup>244</sup> *Id.* at 199-200.

<sup>245</sup> 432 U.S. 98, 114 (1977) (holding *Biggers* factors should be used to assess reliability).

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* 114-16.

<sup>249</sup> *See id.* at 116 (stating only that *Biggers* factors are "for the jury to weigh").

The Supreme Court more recently held that when eyewitness misidentifications are not due to intentional police action, the Due Process Clause does not apply.<sup>250</sup> In *Perry*, the Justices noted they “do not doubt either the importance or the fallibility of eyewitness identifications” but held state evidence law and safeguards such as expert testimony and jury instructions should be relied on to ensure accurate presentation of evidence.<sup>251</sup> In that case, the suspect was detained near the crime scene and the eyewitness looked out of her apartment, saw him there, and made an identification.<sup>252</sup> Officers can take measures to avert such unintended viewing, including by avoiding unnecessarily detaining a suspect within view of possible eyewitnesses.

B. *State Court Rulings on Eyewitness Evidence*

Several state courts have departed from the federal due process rule, relying on the research that has developed in the intervening decades. Some state courts have adopted different factors in a “refinement” of the *Manson* and *Biggers* factors.<sup>253</sup> Other states have rules regarding the need for jury instructions on eyewitness evidence.<sup>254</sup> Several state courts, however, have rejected the *Manson* test entirely based on scientific research.<sup>255</sup> Still additional states have adopted changes to jury instructions and expert evidence regarding eyewitnesses.

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<sup>250</sup> *Perry v. New Hampshire*, 565 U.S. 228, 245 (2012) (“The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness.”).

<sup>251</sup> *Id.* at 245 (“The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness.”).

<sup>252</sup> *Id.* at 228.

<sup>253</sup> *See, e.g.*, *State v. Ramirez*, 817 P.2d 774, 780-81 (Utah 1991) (altering three “reliability” factors to focus on effects of suggestion), *abrogated by* *State v. Lujan*, 2020 UT 5, 459 P.3d 992; *State v. Marquez*, 967 A.2d 56, 69-71 (Conn. 2009) (adopting detailed criteria for assessing suggestion); *Brodes v. State*, 614 S.E.2d 766, 771 & n.8 (Ga. 2005) (rejecting use of eyewitness certainty); *State v. Hunt*, 69 P.3d 571, 576 (Kan. 2003) (adopting five factor “refinement” of federal due process test); *State v. Almaraz*, 301 P.3d 242, 253 (Idaho 2013) (“[B]y outlining the system and estimator variables that research has convincingly shown to impact the reliability of eye-witness identification, we hope to provide guidance to lower courts applying the test . . .”).

<sup>254</sup> *See, e.g.*, *State v. Cabagbag*, 277 P.3d 1027, 1035-38 (Haw. 2012) (holding that when identification is central issue, court must, at defendant’s request, give jury instruction about factors affecting reliability). That ruling prompted model jury instructions in Hawai’i. *State v. Kaneaiakala*, 450 P.3d 761, 774 (Haw. 2019) (holding that when applicable, jury must receive instructions to consider impact of suggestive procedures on identification reliability).

<sup>255</sup> *State v. Henderson*, 27 A.3d 872, 877 (N.J. 2011) (finding scientific evidence shows *Manson* test should be revised); *State v. Lawson*, 291 P.3d 673, 678 (Or. 2012) (en banc)

### 1. State Eyewitness Admissibility Rulings

In recent years, the Supreme Courts of Alaska, Connecticut, Hawai‘i, Oregon, Utah, and Wisconsin (until it overruled its earlier ruling in 2019) have relied directly on scientific research in rulings, changing how eyewitness evidence should be regulated.<sup>256</sup> Representative of earlier rulings, in 1991 the Supreme Court of Utah in *State v. Ramirez*<sup>257</sup> rejected the *Biggers* framework as “scientifically unsupported” and adopted under state constitutional law a “more empirically based approach” designed to “allow a court to consider fully ‘the totality of the circumstances’ surrounding the identification.”<sup>258</sup> In so doing, the court amended the *Biggers* factors to focus on the role suggestion can play, as well as the eyewitnesses’ ability to perceive and recall events in question.<sup>259</sup>

In contrast to such incremental changes in the law of eyewitness evidence, perhaps the most prominent exemplar of aggressive judicial action is the ruling

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(revising *Manson* test in light of scientific evidence); *Commonwealth v. Gomes*, 22 N.E.3d 897, 909 (Mass. 2015) (finding scholarly research should inform identification instructions); *Young v. State*, 374 P.3d 395, 427 (Alaska 2016) (urging trial courts to incorporate evolving scientific understanding to supplement test variables).

<sup>256</sup> *Young*, 374 P.3d at 414 (describing how “[t]he past few decades have seen an explosion of additional research that has led to important insights into how vision and memory work, what we see and remember best, and what causes these processes to fail” (alteration in original) (quoting IDENTIFYING THE CULPRIT, *supra* note 15, at 69)); *State v. Guilbert*, 49 A.3d 705, 720-22 (Conn. 2012) (relying on judicial rulings and “[t]he extensive and comprehensive scientific research, as reflected in hundreds of peer reviewed studies and meta-analyses, [which] convincingly demonstrates the fallibility of eyewitness identification testimony and pinpoints an array of variables that are most likely to lead to a mistaken identification” (footnote omitted)); *Cabagbag*, 277 P.3d at 1038 (“Most significantly, the impetus for a change in our approach lies in the empirical research that reveals that people generally do not understand all of the factors that affect the reliability of an eyewitness identification.”); *Lawson*, 291 P.3d at 685 (“Based on our extensive review of the current scientific research and literature, we conclude that the scientific knowledge and empirical research concerning eyewitness perception and memory has progressed sufficiently to warrant taking judicial notice of the data contained in those various sources . . . .”); *State v. Clopten*, 2009 UT 84, ¶ 15, 223 P.3d 1103 (concluding expert testimony on eyewitness identifications should generally be admitted in addition to cautionary instruction, citing to research, but also noting “[t]hat the empirical data is conclusive on these matters is not disputed by either party in this case and has not been questioned by this court in [its] decisions [since 1986]”); *State v. Dubose*, 2005 WI 126, ¶¶ 29, 33, 285 Wis. 2d 143, 166, 699 N.W.2d 582, 591 (finding showups inherently suggestive in light of “extensive studies on the issue of identification evidence, research that is now impossible for us to ignore”), *overruled by* *State v. Roberson*, 2019 WI 102, 389 Wis. 2d 190, 935 N.W.2d 813 (returning to federal reliability factors approach).

<sup>257</sup> *Ramirez*, 817 P.2d 774.

<sup>258</sup> *Id.* at 780 (quoting *Neil v. Biggers*, 409 U.S. 188, 199 (1972)).

<sup>259</sup> *Id.* at 781 (outlining analytical model).

of the New Jersey Supreme Court in *State v. Henderson*,<sup>260</sup> which revised the entire legal framework for reviewing eyewitness evidence.<sup>261</sup> The court-appointed Special Master “evaluate[d] scientific and other evidence about eyewitness identifications[,] . . . presided over a hearing that probed testimony by seven experts and produced more than 2,000 pages of transcripts along with hundreds of scientific studies,” and then issued a detailed report.<sup>262</sup>

The decision set out a framework in which pretrial hearings must examine eyewitness identification evidence to assess its validity.<sup>263</sup> A defendant must show there is evidence of invalidity and the state must counter with evidence of validity.<sup>264</sup> In response, the judge may consider remedies, including jury instructions at trial.<sup>265</sup> The New Jersey Supreme Court released highly detailed jury instructions regarding eyewitness evidence, tailored to particular factors that can arise in eyewitness identifications, together with a very brief overview of human memory processes.<sup>266</sup> Thus, the court adopted a science-informed framework that applies from pretrial hearings through trial and sets out a range of factors that can inform police agencies and lawyers in advance of any case. Moreover, because it is drafted as a set of functional criteria, it can be updated.

Other state courts have adopted different approaches to the incorporation of new scientific knowledge. In 2016, the Alaska Supreme Court revised the *Manson* test and adopted a more detailed framework, asking judges to focus on both estimator and system variables as in the *Henderson* decision and adjudicating these questions pretrial, including with the benefit of expert testimony to explain how those variables may apply to different factual situations.<sup>267</sup> “If the defendant meets this burden, the trial court should suppress the evidence—both the pretrial identification and any subsequent in-court identification by the witness.”<sup>268</sup> If the defendant fails to meet this burden, however, then “the court should admit the evidence and provide the jury with an instruction appropriate to the context of the case.”<sup>269</sup> The approach, thus, resembles the type of functional framework adopted in New Jersey.

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<sup>260</sup> *Henderson*, 27 A.3d 872.

<sup>261</sup> *See id.* at 919-22.

<sup>262</sup> *Id.* at 877.

<sup>263</sup> *Id.* at 919-24.

<sup>264</sup> *Id.* at 920.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at 894-96, 925-26 (noting research shows “that memory is a constructive, dynamic, and selective process”).

<sup>267</sup> *Young v. State*, 374 P.3d 395, 405, 412, 427 (Alaska 2016) (citing *Henderson*, 27 A.3d at 919-22) (concluding *Manson* test does not adequately protect right to due process under Alaska Constitution and adopting new approach to deciding admissibility of eyewitness identification evidence for future cases).

<sup>268</sup> *Id.* at 427.

<sup>269</sup> *Id.*

In 2018, in *State v. Harris*,<sup>270</sup> the Connecticut Supreme Court, which had already highlighted a set of additional estimator variables to consider in eyewitness cases, also adopted a framework much like that in New Jersey (noting the “overlap” with that approach), holding that expert testimony may be valuable and “it may be appropriate for the trial court to craft jury instructions to assist the jury in its consideration of this issue.”<sup>271</sup>

Adopting a slightly different approach, the Hawai‘i Supreme Court ruled in 2019 that “courts must, at minimum, consider any relevant factors set out in the Hawai‘i Pattern Jury Instructions—Criminal . . . governing eyewitness and show-up identification testimony, as may be amended.”<sup>272</sup> Thus, the court did not set out a series of factors, as the New Jersey Supreme Court did, but rather set out jury instructions that may be changed over time, “as well as any other relevant factors that may be set out in binding precedent in addressing whether, under a totality of circumstances, an impermissibly suggestive eyewitness or show-up identification is nonetheless sufficiently reliable to be admissible in evidence.”<sup>273</sup> Tracking the New Jersey focus on system variables, the court also emphasized the importance of suggestion: “[T]rial courts must also consider the effect of the suggestiveness on the reliability of the identification in determining whether it should be admitted into evidence.”<sup>274</sup>

Other courts, without conducting a trial-like process or retaining a special master, have sought out expert assistance, particularly in the past fifteen years.<sup>275</sup> The Massachusetts Supreme Judicial Court convened a “study committee” in 2011 to examine how it could improve model jury instructions for eyewitness evidence.<sup>276</sup> In 2015, the court “review[ed] the scholarly research, analyses by other courts, amici submissions,” and the report by the Massachusetts Supreme Judicial Court Study Group on Eyewitness Evidence.<sup>277</sup> The court recommended judges provide a set of more concise jury instructions on eyewitness

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<sup>270</sup> 191 A.3d 119 (Conn. 2018).

<sup>271</sup> *Id.* at 144-45.

<sup>272</sup> *State v. Kaneaiakala*, 450 P.3d 761, 765 (Haw. 2019) (footnote omitted).

<sup>273</sup> *Id.* at 777.

<sup>274</sup> *Id.* at 778 (concluding that courts must instruct juries to consider impact of suggestion on reliability of evidence where eyewitness or showup identification is key to case or was obtained through suggestive procedure).

<sup>275</sup> *See Tegoseak v. State*, 221 P.3d 345, 359 (Alaska Ct. App. 2009) (“The year 2005 appears to have been a turning point of sorts in the judicial recognition of the growing body of research into the psychological dynamics of eyewitness identification.”).

<sup>276</sup> *Commonwealth v. Walker*, 953 N.E.2d 195, 208 n.16 (Mass. 2011) (convening study group “to consider how we can best deter unnecessarily suggestive procedures and whether existing model jury instructions provide adequate guidance to juries in evaluating eyewitness testimony”).

<sup>277</sup> *Commonwealth v. Gomes*, 22 N.E.3d 897, 905, 909 (Mass. 2015).

identification evidence.<sup>278</sup> The approach similarly includes a range of research-informed factors, adopting somewhat more concise jury instructions.<sup>279</sup>

In contrast to these approaches, the Oregon Supreme Court has endorsed review of reliability of eyewitness evidence relying on a general Rule 403 analysis under the Oregon Rules of Evidence.<sup>280</sup> That approach departed from both the due process-centered approach and the detailed science-informed framework set out in New Jersey. The Oregon Supreme Court identified two problems with the prior Oregon framework following the federal due process approach: first, the “Threshold Requirement of Suggestiveness Inhibits Courts from Considering Evidentiary Concerns,” and second, the “Inquiry Fails to Account for the Influence of Suggestion on Evidence of Reliability.”<sup>281</sup> Instead, the Oregon Supreme Court required trial judges to examine the “reliability” of an eyewitness identification, where “trial courts have a heightened role as an evidentiary gatekeeper.”<sup>282</sup> If there is evidence of unreliability, the judge may exclude the evidence but may also impose “intermediate remedies,” such as the use of expert testimony and “case-specific jury instructions.”<sup>283</sup> This approach does not set out a body of factors to guide lawyers and judges, or jurors for that matter, at least not explicitly. The Oregon Supreme Court discussed many such factors in its opinion, but its ruling simply instructs a “reliability” review grounded in research.<sup>284</sup> In some respects, that approach is still more adaptable as research improves our understanding of what constitutes reliable evidence.

## 2. Jury Instructions on Eyewitness Evidence

Over the past decade, there has been a sea change in the jury instructions that courts adopt in states. Most federal courts continue to rely on the factors set out in *Manson* in deciding whether to give the jury traditional *United States v.*

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<sup>278</sup> See *id.* at 916-18 (establishing provisional jury instruction based upon five principles regarding eyewitness identification generally accepted within relevant scientific community).

<sup>279</sup> See *id.* at 911-16 (summarizing research regarding five principles informing court’s provisional jury instruction).

<sup>280</sup> See *State v. Lawson*, 291 P.3d 673, 700 (Or. 2012) (en banc) (holding trial court’s admission of witnesses’ identification proper where danger of unfair prejudice did not substantially outweigh probative value of evidence).

<sup>281</sup> *Id.* at 688-89.

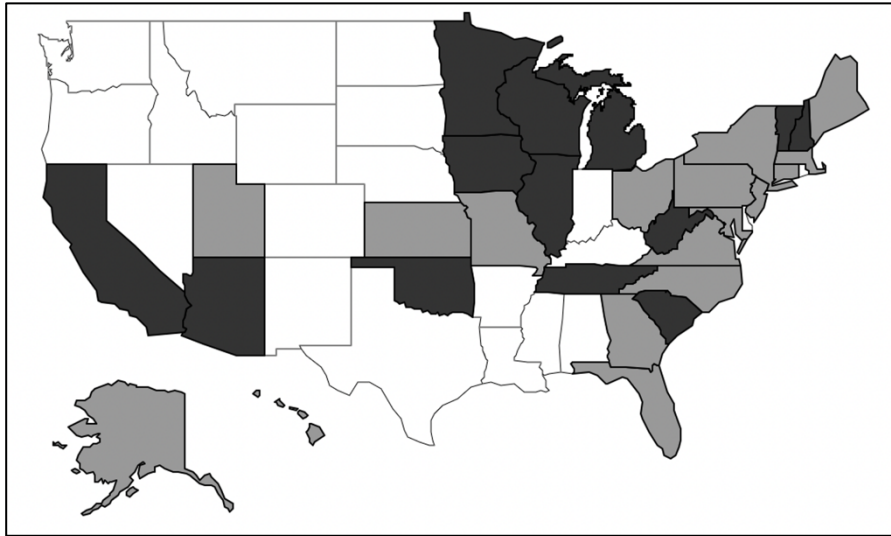
<sup>282</sup> *Id.* at 695.

<sup>283</sup> *Id.* at 694-97 (“[W]e intend the test to be a flexible one that will enable the state to hold offenders accountable and, at the same time, protect a criminal defendant’s right to a fair trial.”).

<sup>284</sup> *Id.* at 685-88, 690.

*Telfaire*<sup>285</sup> jury instructions on eyewitness identification evidence.<sup>286</sup> Many states continue to follow that approach as well. Figure 1 below displays in light gray states that have revised eyewitness jury instructions and in dark gray, the states with traditional eyewitness instructions.

**Figure 1.** States that Have Traditional Eyewitness Jury Instructions vs. States Adopting Revised Eyewitness Jury Instructions.



Having surveyed jury instructions in all fifty states and the District of Columbia, Appendix D sets out how thirteen states and the District of Columbia adopt that traditional approach, some with modifications.<sup>287</sup>

<sup>285</sup> 469 F.2d 552 (D.C. Cir. 1972) (per curiam).

<sup>286</sup> *Id.* at 558-59 (providing model jury special instructions on identification). Some federal courts follow the *Telfaire* approach, while others adopt a “flexible approach” providing district courts with discretion to not employ instructions should they conclude, based on “strong reliability” using the *Biggers/Manson* factors, no such instruction is necessary. *See, e.g., United States v. Luis*, 835 F.2d 37, 41 (2d Cir. 1987) (“We believe this flexible approach remains the better course because it avoids imposing rigid requirements on trial courts under the threat that failure to give the requested charge will later be grounds for automatic reversal.”).

<sup>287</sup> Those states that adopt jury instructions, including specific eyewitness identification instructions following (although not necessarily citing or quoting verbatim) the *Manson* factors are Arizona, California, the District of Columbia, Illinois, Iowa, Michigan, Minnesota, New Hampshire, Oklahoma, South Carolina, Tennessee, Vermont, West Virginia, and Wisconsin. *See infra* app. D. In some states, such as South Carolina and Washington, the

In recent years, more states have revised their jury instructions, departing from that traditional model. Appendix D sets out these seventeen states: Alaska, Connecticut, Florida, Georgia, Hawai‘i, Kansas, Maine, Maryland, Massachusetts, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Utah, and Virginia.<sup>288</sup> As already described, states like Hawai‘i,

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model for the instructions pre-dated *Manson* and reflects the D.C. Circuit’s recommended charges in *Telfaire*, while in Delaware and South Dakota, the model instructions are extremely brief and more limited even than the *Telfaire* charges. *See id.* Alaska former did not require any standard instructions but recommends the *Telfaire* approach. *See* ALASKA CRIM. PATTERN JURY INSTRUCTIONS § 1.24 (CRIM. PATTERN JURY INSTRUCTIONS COMM. 2020) (“Eyewitness identifications should be examined with care.”). However, a recent ruling by the Alaska Supreme Court called for the drafting of revised jury instructions, which were promulgated in 2020. *See Young v. State*, 374 P.3d 395, 399 (Alaska 2016); ALASKA CRIM. PATTERN JURY INSTRUCTIONS § 1.24.

<sup>288</sup> The Florida instructions include whether the witness and offender are of different races or ethnic groups, and do not include confidence as a factor. FLORIDA STANDARD JURY INSTRUCTIONS FOR CRIM. CASES § 3.9(c) (2018) (listing nine factors for jury consideration when evaluating eyewitness identification testimony). The Georgia Supreme Court altered its instructions, which had adopted the *Manson* factors, to no longer emphasize confidence of the eyewitness. *See Brodes v. State*, 614 S.E.2d 766, 771 (Ga. 2005). The Kansas Supreme Court followed that approach and adopted the *Ramirez* test. *See State v. Hunt*, 69 P.3d 571, 576-77 (Kan. 2003). The Utah Supreme Court altered instructions to focus on effects of suggestion, as did the Connecticut Supreme Court. *See State v. Ramirez*, 817 P.2d 774, 780-81 (Utah 1991) (creating factored test for determining reliability), *abrogated by State v. Lujan*, 2020 UT 5, 459 P.3d 992; *State v. Marquez*, 967 A.2d 56, 69-71 (Conn. 2009) (articulating first consideration in determining whether identification procedures violate defendant’s due process rights as “whether the identification procedure was unnecessarily suggestive” (quoting *State v. Theriault*, 182 Conn. 366, 371 (1980))); *see also* CONNECTICUT JUD. BRANCH CRIM. JURY INSTRUCTIONS § 2.6-4 (CRIM. JURY INSTRUCTION COMM. 2021) (revising instruction to address proper procedure regarding in-court identifications pursuant to *State v. Dickson*, 141 A.3d 810 (Conn. 2016)). As noted, New Jersey has adopted revised and detailed jury instructions on the subject, rejecting *Manson* as a model. *See infra* notes 290-93 and accompanying text (discussing development of jury instructions in *Henderson*). Ohio revised its jury instructions in response to a statute requiring adoption of eyewitness identification procedures. *See* OHIO REV. CODE ANN. § 2933.83 (West 2021) (establishing minimum requirements for lineup procedures). Virginia revised its jury instructions to include eyewitness-specific instructions. VIRGINIA MODEL JURY INSTRUCTIONS—CRIM., No. 2.800 (2019) (creating considerations for jury regarding eyewitness evidence). In addition, certain states adopted separate state law tests concerning showup identifications. *See, e.g., State v. Dubose*, 2005 WI 126, ¶ 33, 285 Wis. 2d 143, 165-66, 699 N.W.2d 582, 593-94, *overruled by State v. Roberson*, 2019 WI 102, 389 Wis. 2d 190, 935 N.W.2d 813; *Commonwealth v. Johnson*, 650 N.E.2d 1257, 1261 (Mass. 1995) (finding due process requirements of state constitution mandated per se exclusion of unnecessarily suggestive showup identifications); *People v. Adams*, 423 N.E.2d 379, 383-84 (N.Y. 1981) (“A defendant’s right to due process would be only theoretical if it did not encompass the need to establish rules to accomplish that

Massachusetts, and New Jersey have more substantially revamped their jury instructions, while other states made more modest changes. Seventeen of the remaining states do not provide separate instructions on eyewitness evidence specifically, instead instructing jurors to generally judge witness credibility.<sup>289</sup>

In its 2011 ruling in *Henderson*, the New Jersey Supreme Court called for the development of jury instructions which would set out an expansive series of factors that can impact the reliability of eyewitness identification.<sup>290</sup> These factors included whether the lineup was blind or blinded, the witness was informed that the suspect may or may not be included in the lineup, the police provided suggestive feedback during the identification process, the eyewitness's level of confidence in his or her identification was recorded, the eyewitness was shown the identified person on multiple occasions, and the eyewitness was experiencing high levels of stress during the observation.<sup>291</sup> In adopting such detailed instructions, the court anticipated a decreased need for expert testimony regarding the validity of eyewitness evidence.<sup>292</sup> Furthermore, the court concluded that while the instructions should be delivered at the close of evidence, the judge has discretion to deliver instructions earlier.<sup>293</sup> While the efficacy of New Jersey's expansive jury instructions has been called into question,<sup>294</sup> the instructions served as a model for other states.

Massachusetts developed model jury instructions regarding eyewitness identifications that include both preliminary language, to be read prior to opening statements, and final instructions.<sup>295</sup> The preliminary language advises

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end.”). North Carolina instructs witnesses regarding departures from statutorily mandated lineup practices. NORTH CAROLINA PATTERN JURY INSTRUCTIONS § 105.65 (2010) (“Evidence has been presented concerning compliance or noncompliance with the requirements for administration of a photo lineup to an eyewitness. You may consider what evidence you find to be credible concerning compliance or noncompliance with such requirements in determining the reliability of eyewitness identification.”).

<sup>289</sup> Those states are Alabama, Arkansas, Colorado, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, Rhode Island, Texas, and Wyoming. *See infra* app. D.

<sup>290</sup> *See* State v. Henderson, 27 A.3d 872, 894-912 (N.J. 2011).

<sup>291</sup> *Id.* at 894-910.

<sup>292</sup> *Id.* at 878.

<sup>293</sup> *Id.* at 924 (noting that giving jury instructions during trial may be warranted where evidence of system and estimator variables arises during important testimony).

<sup>294</sup> Athan P. Papailiou, David V. Yokum & Christopher T. Robertson, *The Novel New Jersey Eyewitness Instruction Induces Skepticism but Not Sensitivity*, PUB. LIBR. SCI., Dec. 2015, at 1, 2.

<sup>295</sup> MODEL JURY INSTRUCTIONS ON EYEWITNESS IDENTIFICATION: PRELIMINARY/ CONTEMPORANEOUS INSTRUCTION 2 (MASS. SUPREME JUD. CT. 2015); MODEL JURY INSTRUCTIONS ON EYEWITNESS IDENTIFICATION: MODEL EYEWITNESS IDENTIFICATION INSTRUCTION 2 (establishing jury instruction to be given where jury heard evidence affirmatively identifying defendant and such identification is contested).

the jury that “[t]he mind does not work like a video recorder” and cautions that factors during and after the observed event can alter an individual’s memory of that event.<sup>296</sup> The final instructions are far more detailed, describing the process of remembering as a three-stage process: perception of an event, storage of information about the event in one’s mind, and later recollection of that stored information.<sup>297</sup> The instructions caution that a variety of factors, each of which are listed, may affect accuracy of a memory at any stage of the process.<sup>298</sup> In selecting the factors to be included in its revised jury instructions, Massachusetts relied upon “a near consensus [standard] in the relevant scientific community.”<sup>299</sup> The analysis suggested five such principles (although without referring to visual perception):

- (1) human memory does not operate like a video recording that a person can replay to recall what happened;
- (2) a witness’s level of confidence in an identification may not indicate its accuracy;
- (3) high levels of stress can reduce the likelihood of making an accurate identification;
- (4) information from other witnesses or outside sources can affect the reliability of an identification and inflate an eyewitness’s confidence in the identification;
- and (5) viewing the same person in multiple identification procedures may increase the risk of misidentification.<sup>300</sup>

While New Jersey and Massachusetts exemplify exceptionally detailed jury instructions, briefer instructions have included similar factors. For example, Florida developed a more succinct set of revised instructions to be delivered “if eyewitness identification is a disputed issue and if requested.”<sup>301</sup> Florida’s revised jury instructions include additional language depending on whether an independent administrator facilitated the identification procedures or the process was conducted by a computer program or other randomization process.<sup>302</sup>

Just as a list of factors that could potentially affect the reliability of eyewitness testimony is utilized in many revised jury instructions, so too is a cautionary note

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<sup>296</sup> MODEL JURY INSTRUCTIONS ON EYEWITNESS IDENTIFICATION: PRELIMINARY/ CONTEMPORANEOUS INSTRUCTION 1-2 (explaining that “[g]enerally, memory is most accurate right after the event and begins to fade soon thereafter”).

<sup>297</sup> MODEL JURY INSTRUCTIONS ON EYEWITNESS IDENTIFICATION: MODEL EYEWITNESS IDENTIFICATION INSTRUCTION 2 (highlighting “complicated” nature of memory and perception).

<sup>298</sup> *Id.* at 2-10.

<sup>299</sup> Ralph D. Gants & Erik N. Doughty, *Where Science Conflicts with Common Sense: Eyewitness Identification Reform in Massachusetts*, 79 ALB. L. REV. 1617, 1625 (2017) (quoting *Commonwealth v. Gomes*, 22 N.E.3d 897, 909 (Mass. 2015)).

<sup>300</sup> *Id.* at 1626 (quoting *Gomes*, 22 N.E.3d at 903, 909).

<sup>301</sup> FLORIDA STANDARD JURY INSTRUCTIONS FOR CRIM. CASES § 3.9(c) (2018) (emphasis omitted).

<sup>302</sup> *Id.* (addressing various scenarios that may impact reliability of eyewitness identification testimony).

regarding the accuracy of cross-racial identifications. In 2015, the Massachusetts Supreme Judicial Court acknowledged that the existence of the “cross-race effect” (“CRE”)—“that people are generally less accurate at identifying members of other races than they are at identifying members of their own race”—had reached consensus status.<sup>303</sup> As a result, Massachusetts incorporated information on the CRE into revised eyewitness identification jury instructions.<sup>304</sup> In addition to Massachusetts, of the states with revised jury instructions, courts in Connecticut, Florida, Maine, Missouri, New Jersey, New York, Utah, and Virginia also discussed or adopted similar instructions.<sup>305</sup> In addition, there are “studies that support the conclusion that people are better at recognizing the faces of persons of the same ethnicity than a different ethnicity.”<sup>306</sup> As a result, some states, such as Florida, addressed both cross-racial and cross-ethnic identifications in the list of factors for consideration regarding reliability.<sup>307</sup> Other states, such as Massachusetts, opted to leave cross-ethnic (but not cross-racial) instructions to the discretion of the judge.<sup>308</sup>

To be sure, there is not strong evidence that these jury instructions accomplish their aim to better educate jurors regarding the strengths and weaknesses of eyewitness evidence, particularly given the great weight that jurors place on the courtroom confidence of an eyewitness.<sup>309</sup> Indeed, the most detailed instructions, adopted in New Jersey, have not been found effective in mock jury studies; nor have the shorter Massachusetts instructions.<sup>310</sup> More pointed

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<sup>303</sup> *Commonwealth v. Bastaldo*, 32 N.E.3d 873, 880 (Mass. 2015).

<sup>304</sup> *Id.* at 881, 883 (“If the witness and the person identified appear to be of different races, [the jury] should consider that people may have greater difficulty in accurately identifying someone of a different race than someone of their own race.”).

<sup>305</sup> *State v. Guilbert*, 49 A.3d 705, 722, 732 (Conn. 2012); FLORIDA STANDARD JURY INSTRUCTIONS FOR CRIM. CASES § 3.9(c); *State v. Mahmoud*, 2016 ME 135, ¶¶ 9, 14, 147 A.3d 833, 838-39; MISSOURI APPROVED JURY INSTRUCTIONS (MAI) § 310.02 (2016); *State v. Henderson*, 27 A.3d 872, 907, 917, 921 (N.J. 2011); *People v. Boone*, 91 N.E.3d 1194, 1196, 1198-99 (N.Y. 2017); MODEL UTAH JURY INSTRUCTIONS, SECOND EDITION § CR404 (2014); VIRGINIA MODEL JURY INSTRUCTIONS—CRIM., No. 2.800 (2019) (discussing state court’s treatment of issue of jury instruction regarding eyewitness testimony).

<sup>306</sup> *Bastaldo*, 32 N.E.3d at 884.

<sup>307</sup> FLORIDA STANDARD JURY INSTRUCTIONS FOR CRIM. CASES § 3.9(c) (“[I]n evaluating eyewitness identification testimony, you may also consider . . . [w]hether the eyewitness and the offender are of different races or ethnic groups, and whether this may have affected the accuracy of the identification.”).

<sup>308</sup> *Bastaldo*, 32 N.E.3d at 885.

<sup>309</sup> See generally Brandon L. Garrett, Alice Liu, Karen Kafadar, Joanne Yaffe & Chad S. Dodson, *Factoring the Role of Eyewitness Evidence in the Courtroom*, 17 J. EMPIRICAL LEGAL STUD. 556 (2020) (detailing findings of mock juror survey regarding weight given to confidence of eyewitnesses).

<sup>310</sup> *Id.* at 557, 559-60; see also Brandon L. Garrett, *Judging Eyewitness Evidence*, 104 JUDICATURE 30, 34-35 (2020).

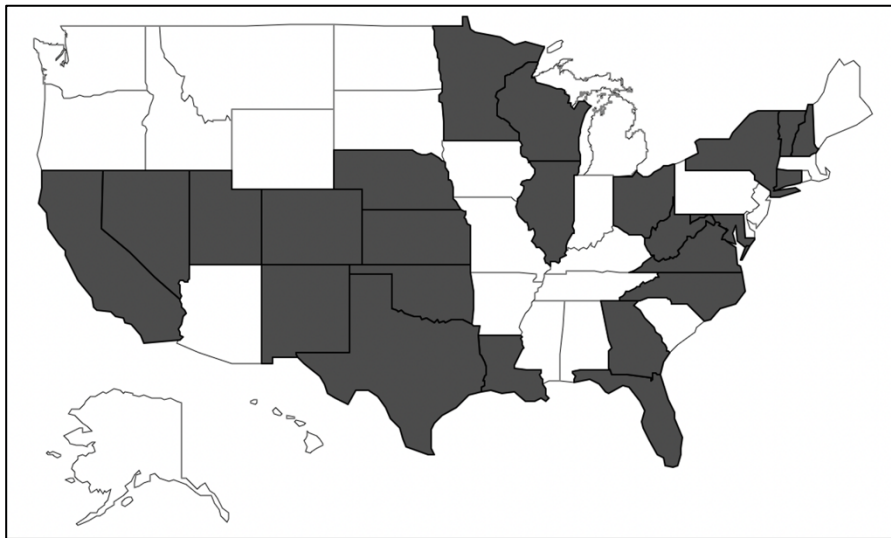
instructions focusing on the reasons why courtroom confidence of eyewitnesses should not be relied upon have been found more effective.<sup>311</sup>

Thus, change in the courts has been accelerated in the areas of expert testimony, jury instructions, and the regulation of the admissibility and use of eyewitness evidence. Each of these rulings, particularly those that ask judges to review whether police followed best practices, has tightened the focus on scientific research regarding vision and memory in the law. Nevertheless, there are reasons to believe that several of these interventions are not effective. They address courtroom procedures, to a degree, and they may inform police agencies and lawyers. State legislation, discussed next, does more: it directly requires change in eyewitness identification procedures.

C. *State Statutes Regulating Eyewitness Evidence*

A sea change has occurred in state law through the enactment of legislation that more directly targets the practices that police agencies use. To date, twenty-four states have adopted legislation regarding eyewitness identification procedures. Figure 2 below displays in gray states that have adopted statutes regarding eyewitness evidence.

**Figure 2.** State Statutes Regarding Eyewitness Evidence.



Of the states, twenty-four (California, Colorado, Connecticut, Florida, Georgia, Illinois, Kansas, Louisiana, Maryland, Minnesota, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oklahoma,

<sup>311</sup> Garrett, *supra* note 310, at 34-35.

Texas, Utah, Vermont, Virginia, West Virginia, and Wisconsin) have enacted statutes directly requiring that law enforcement officials adopt written procedures for eyewitness identifications.<sup>312</sup>

These statutes were often enacted to assure uniformity in adoption of best practices. For example, Minnesota adopted a statute in 2020 after a survey by the Minnesota Chiefs of Police Association and Sheriffs' Associations found that "half of law enforcement agencies did not [even] have written lineup policies."<sup>313</sup>

Most of those states regulate procedures to be used, including blind or blinded lineups, clear written instructions, and documenting the confidence of an eyewitness.<sup>314</sup> For example, eighteen states require blind or blinded administration of lineups.<sup>315</sup> Of the nineteen states that statutorily require the utilization of blind or blinded procedures,<sup>316</sup> there is a spectrum regarding the

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<sup>312</sup> See CAL. PENAL CODE § 859.7 (West 2022); COLO. REV. STAT. § 16-1-109 (2022); CONN. GEN. STAT. § 54-1p (2021); FLA. STAT. § 92.70 (2021); GA. CODE ANN. § 17-20-2 (2021); 725 ILL. COMP. STAT. 5/107A-2 (2021); KAN. STAT. ANN. § 22-4619 (2021); LA. CODE CRIM. PROC. ANN. arts. 251-253 (2021); MD. CODE ANN., PUB. SAFETY § 3-506 (West 2021); MINN. STAT. § 626.8433 (2021); NEB. REV. STAT. § 81-1455 (2021); NEV. REV. STAT. § 171.1237 (2021); N.H. REV. STAT. ANN. § 595-C:2 (2022); N.M. STAT. ANN. § 29-3B-3 (2022); N.Y. CRIM. PROC. LAW § 60.25 (McKinney 2021); N.C. GEN. STAT. § 15A-284.52 (2021); OHIO REV. CODE ANN. § 2933.83 (West 2021); OKLA. STAT. tit. 22, § 21 (2021); TEX. CODE CRIM. PROC. ANN. art. 38.20 (West 2021); UTAH CODE ANN. § 77-8-4 (West 2021); VT. STAT. ANN. tit. 13, § 5581 (2022); VA. CODE ANN. § 19.2-390.02 (2021); W. VA. CODE §§ 62-1E-1 to -2 (2021); WIS. STAT. § 175.50 (2022).

<sup>313</sup> Linh Nguyen, *Minnesota Adopts Eyewitness ID Law to Prevent Wrongful Convictions*, DAVIS VANGUARD (May 26, 2020), <https://www.davisvanguard.org/2020/05/minnesota-adopts-eyewitness-id-law-to-prevent-wrongful-convictions/> [<https://perma.cc/FF66-RULU>].

<sup>314</sup> See *infra* app. A (comparing substance of state statutes regarding procedures for eyewitness identification). One of the states requiring written procedures (Nevada) and two others (Rhode Island and Washington) have passed statutes recommending further study, tasking a group with developing best practices, or requiring some form of written policy; Vermont did so before enacting more prescriptive legislation. See NEV. REV. STAT. ANN. § 171.1237; 12 R.I. GEN. LAWS § 12-1-16 (2021); WASH. REV. CODE § 10.56.010-.020 (2022); H.R. 470, 2010 Gen. Assemb., Reg. Sess. (Vt. 2010) (creating state law enforcement advisory board to develop proposal regarding best practices).

<sup>315</sup> See *infra* app. A.

<sup>316</sup> The five states with statutes addressing eyewitness identification procedures that do not require the use of double-blind or blinded administration are Nebraska, New Hampshire, Nevada, Utah, and Virginia. NEB. REV. STAT. § 81-1455; N.H. REV. STAT. ANN. § 595-C:2; NEV. REV. STAT. ANN. § 171.1237; UTAH CODE ANN. § 77-8-4; VA. CODE ANN. § 19.2-390.02. Nebraska's statute, however, gives authority to the Nebraska Commission on Law Enforcement and Criminal Justice to promulgate a model written policy for eyewitness suspect identification. NEB. REV. STAT. § 81-1455. The Commission approved blinded administration in their model policy. See EYEWITNESS IDENTIFICATION MODEL POL'Y 4 (NEB. COMM'N ON L. ENF'T & CRIM. JUST. 2016).

level of detail used to describe blind or blinded procedures. Six states (Colorado, Kansas, Minnesota, New Mexico, New York, and Wisconsin) require the use of blind or blinded administration to the extent feasible, but do not detail approved or alternative methods.<sup>317</sup> Thirteen states (California, Connecticut, Florida, Georgia, Illinois, Louisiana, Maryland, North Carolina, Ohio, Oklahoma, Texas, Vermont, and West Virginia) are more specific in what protocols are allowed.<sup>318</sup> The permitted procedures vary by jurisdiction but commonly include a folder shuffle method, computer randomization program, or other comparable program.<sup>319</sup> Both California and Ohio demonstrate a strong preference for blind administration by requiring written justification any time blind administration is deemed to be impracticable.<sup>320</sup>

The majority of states with statutes addressing eyewitness identification procedures do not designate the use of one presentation method over another (simultaneous versus sequential) in photo arrays or live lineups. Only five states call for sequential procedures;<sup>321</sup> perhaps this is because, as described, the research does not clearly favor such presentation. The use of simultaneous or sequential presentation is often left to the discretion of the law enforcement agency. For example, Illinois's eyewitness identification statute explicitly specifies that "[w]hether and when to conduct simultaneous lineups or sequential lineups is at the discretion of each law enforcement agency."<sup>322</sup> The Illinois statute goes on to describe, however, specific procedures that should be utilized if a sequential presentation is selected. The additional instructions ensure that the eyewitness may only view a photo or person a second time upon the eyewitness's request and after the eyewitness has viewed all other photos or

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<sup>317</sup> COLO. REV. STAT. § 16-1-109; KAN. STAT. ANN. § 22-4619; MINN. STAT. § 626.8433; N.M. STAT. ANN. § 29-3B-3; N.Y. CRIM. PROC. LAW § 60.25; WIS. STAT. § 175.50.

<sup>318</sup> See CAL. PENAL CODE § 859.7(a)(2), (c) (West 2021); CONN. GEN. STAT. § 54-1p(c)(2) (2021); FLA. STAT. § 92.70(3)(a) (2021); GA. CODE ANN. § 17-20-2(b) (2021); 725 ILL. COMP. STAT. 5/107A-2(a) (2021); LA. CODE CRIM. PROC. ANN. art. 253B(2)(e)-(g) (2021); MD. CODE ANN., PUB. SAFETY § 3-506.1 (West 2021); N.C. GEN. STAT. § 15A-284.52 (2021); OHIO REV. CODE ANN. § 2933.83(B)(1) (West 2021); OKLA. STAT. tit. 22, § 21(B)(1) (2021); TEX. CODE CRIM. PROC. ANN. art. 38.20 § 3(c)(2)(E)-(G) (West 2021); VT. STAT. ANN. tit. 13, § 5581(b)(2) (2022); W. VA. CODE § 62-1E-2(d) (2021).

<sup>319</sup> See, e.g., FLA. STAT. ANN. § 92.70(3)(a) (describing automated computer program and folder shuffle methods).

<sup>320</sup> See CAL. PENAL CODE § 859.7(a)(3) ("The investigator shall state in writing the reason that the presentation of the lineup was not conducted using blind administration . . ."); OHIO REV. CODE ANN. § 2933.83(B)(3) ("When it is impracticable for either a blind or blinded administrator to conduct the live lineup or photo lineup, the administrator shall state in writing the reason for that impracticability.").

<sup>321</sup> See *infra* app. A (counting Connecticut, New Mexico, North Carolina, West Virginia, and Washington as requiring sequential presentation).

<sup>322</sup> 725 ILL. COMP. STAT. 5/107A-2(b).

persons in the sequence.<sup>323</sup> Furthermore, if an identification is made, the eyewitness is still required to view the remaining photos or persons left in the sequence.<sup>324</sup> The North Carolina statute requires the photos or persons be presented “separately, in a previously determined order, and removed . . . before the next individual or photo is presented.”<sup>325</sup> Connecticut,<sup>326</sup> New Mexico,<sup>327</sup> and West Virginia<sup>328</sup> provide slightly less detail, requiring that each photo or person be presented one at a time.

The legislation in both North Carolina and West Virginia also includes sections addressing the development of law enforcement training programs on specific identification procedures. North Carolina tasks the North Carolina Criminal Justice Education and Training Standards Commission and the North Carolina Sheriffs’ Education and Training Standards Commission with creating training materials on how best to conduct lineups and showups in compliance with its requisite eyewitness identification procedures.<sup>329</sup> The statute requires that both commissions work in consultation with the Department of Justice.<sup>330</sup> This requirement resulted in the development of training programs, including courses offered by the Police Law Institute<sup>331</sup> and the North Carolina Justice Academy.<sup>332</sup> Similarly, West Virginia permits the Superintendent of State Police to create educational and training materials on how best to conduct photo arrays and live lineups in compliance with its requisite eyewitness identification procedures.<sup>333</sup> Still additional jurisdictions had legislation introduced on this subject in recent years, suggesting that more states will be adopting statutes in the years to come.<sup>334</sup>

All of these statutes call for written procedures to be adopted for eyewitness identifications. In the past, many agencies did not have written procedures in their patrol guides or had policies that were decades out of date.<sup>335</sup> Before states

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<sup>323</sup> *Id.* 5/107A-2(d)(1).

<sup>324</sup> *Id.* 5/107A-2(d)(2).

<sup>325</sup> N.C. GEN. STAT. § 15A-284.52(b)(2) (2021).

<sup>326</sup> CONN. GEN. STAT. § 54-1p(c)(1) (2021).

<sup>327</sup> N.M. STAT. ANN. § 29-3B-3E(10) (2022).

<sup>328</sup> W. VA. CODE § 62-1E-2(e) (2021).

<sup>329</sup> N.C. GEN. STAT. § 15A-284.53.

<sup>330</sup> *Id.*

<sup>331</sup> *See* POLICE L. INST., <https://www.policelaw.org/> [<https://perma.cc/K8RZ-TNK9>] (last visited Jan. 24, 2022) (offering online police training for law enforcement).

<sup>332</sup> N.C. JUST. ACAD., NORTH CAROLINA JUSTICE ACADEMY COURSE CATALOG (2021-2022), <https://ncdoj.gov/ncja/training-catalog/> [<https://perma.cc/A2E7-L42X>].

<sup>333</sup> W. VA. CODE § 62-1E-3.

<sup>334</sup> *See, e.g.*, MODEL POL’Y ON EYEWITNESS IDENTIFICATION No. 2-39 (VA. DEP’T OF CRIM. JUST. SERVS. 2014) (proposing detailed policy for conducting eyewitness identification procedures).

<sup>335</sup> *See, e.g.*, EYEWITNESS IDENTIFICATION SURVEY, *supra* note 68, at 46-47.

enacted legislation, the lack of oversight left individual agencies with the responsibility of establishing their own policies, often with little guidance.<sup>336</sup> Scholars suggest that written policies are an effective way to communicate the requisite level of detail: “statutes can only go so far; there is inevitably a limit to the specificity and depth of legislation. Written agency policies have no such inherent constraints.”<sup>337</sup> Other entities have recognized the importance of written procedures: for example, the Commission on Accreditation for Law Enforcement (“CALEA”), a nonprofit credentialing authority, does not allow an agency to become accredited without first adopting a written policy on eyewitness procedures.<sup>338</sup>

#### D. *Police Policy and Model Policy*

Over the past two decades, policing agencies have transformed their approach towards eyewitness identifications. At the time that the Department of Justice convened its Technical Working Group for Eyewitness Evidence in 1999, many agencies did not have detailed policies or training on the subject. The Department of Justice report set out a set of national standards for such policies.<sup>339</sup> Subsequent surveys indicated that many agencies still had policies decades out of date or had no written policies.<sup>340</sup> In response, professional policing organizations, such as the International Association of Chiefs of Police (“IACP”), the Major Cities Chiefs Association, and CALEA, have taken an active role in promoting consideration of ways to improve the accuracy of police investigations generally, and have set out model policies on the subject of eyewitness identifications specifically.<sup>341</sup>

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<sup>336</sup> See Brandon L. Garrett, *Self-Policing: Dissemination and Adoption of Police Eyewitness Policies in Virginia*, 105 VA. L. REV. ONLINE 96, 98 (2019).

<sup>337</sup> See Keith A. Findley, *Implementing the Lessons from Wrongful Convictions: An Empirical Analysis of Eyewitness Identification Reform Strategies*, 81 MO. L. REV. 377, 417 (2016).

<sup>338</sup> See Neal S. McNabb, Brian R. Farrell & Carlee R. Brown, *Voluntary Adoption of Evidence-Based Practices by Local Law Enforcement: Eyewitness Identification Procedures in Arkansas, Iowa, Kansas, Missouri, and Nebraska*, 20 J. GENDER RACE & JUST. 509, 530 (2017).

<sup>339</sup> See EYEWITNESS EVIDENCE, *supra* note 41, at 11-38.

<sup>340</sup> See EYEWITNESS IDENTIFICATION SURVEY, *supra* note 68, at 46-47.

<sup>341</sup> See U.S. DOJ, INT’L ASS’N OF CHIEFS OF POLICE, NATIONAL SUMMIT ON WRONGFUL CONVICTIONS: BUILDING A SYSTEMIC APPROACH TO PREVENT WRONGFUL CONVICTIONS 13-14 (2013); CALEA L. ENF’T AGENCY STANDARDS § 42.2.11 (COMM’N ON ACCREDITATION FOR L. ENF’T 2010); MODEL POL’Y: EYEWITNESS IDENTIFICATION 1-4 (INT’L ASS’N OF CHIEFS OF POLICE POL’Y CTR. 2016).



(“DCJS”) promulgated a detailed model policy on eyewitness procedure.<sup>345</sup> Nevertheless, as reported in a 2013 study, the model practices were only haltingly adopted; many agencies did not use blind administration or blinded procedures.<sup>346</sup> In 2018, the vast majority of law enforcement agencies in Virginia with policies on this subject demonstrated that their policies had been updated with widespread adoption of the DCJS model policy.<sup>347</sup> A combination of a well-designed model policy, successful dissemination by DCJS and the Virginia Association of Chiefs of Police, as well as media coverage, helped ensure widespread adoption.<sup>348</sup>

While the level of detail varies by jurisdiction, eyewitness instructions found in model policies frequently use very similar language. For example, of the thirty model policies reviewed, nearly every model policy includes instructions that the individual the eyewitness observed may or may not be included in the photo array or lineup.<sup>349</sup> Examples of commonly used language in these types of eyewitness instructions include the following:

- It is equally as important to clear innocent persons from suspicion as to identify guilty persons.
- Persons may not appear exactly as they did at the time they were initially observed, due to changes in head or facial hair, clothing, etc.
- Photographs do not always depict the true complexion of a person.
- Do not feel obliged to make an identification.
- Do not assume that the administrator knows who the suspect is in the photo array/lineup.
- If you make an identification, the administrator will ask you to describe your level of certainty.
- If an identification is made, please do not ask the administrator or investigator questions regarding your identification.

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<sup>345</sup> See MODEL POL’Y ON EYEWITNESS IDENTIFICATION (VA. DEP’T OF CRIM. JUST. SERVS. 2014).

<sup>346</sup> See Brandon L. Garrett, *Eyewitness Identifications and Police Practices: A Virginia Case Study*, 2 VA. J. CRIM. L. 1, 15-18 (2014).

<sup>347</sup> Garrett, *supra* note 336, at 100.

<sup>348</sup> See *id.* at 110.

<sup>349</sup> See *infra* app. E. The states that did not use some form of this language were Maryland, New Mexico, Nebraska, and Nevada. See *id.* Maryland did not adopt jurisdiction-specific instructions but rather directed law enforcement agencies to use the DOJ’s report as a guide. See MODEL POLICIES FOR L. ENF’T IN MARYLAND 74 (MD. POLICE & CORR. TRAINING COMM’NS 2007) (citing EYEWITNESS EVIDENCE, *supra* note 41).

- Regardless of whether or not an identification is made, the investigation will continue.<sup>350</sup>

Consistent across model policies is a desire to limit any intentional or unintentional influence of the administrator on the eyewitness. Each requires the use of blind administration or blinded procedures. For example, Delaware's model policy instructs that "[a]n officer who is unaware of the identity of the suspect, acting as an independent administrator, should present the photos. No one who is aware of the suspect's identity should be present during the administration of the photo array."<sup>351</sup> Similarly, Maine's model policy provides, "[w]henever possible, a blind presentation shall be utilized."<sup>352</sup> When blind administration is not practicable, the model policies provide examples of acceptable blinded procedures, typically the folder shuffle method.<sup>353</sup>

The majority of model policies require an administrator to record the eyewitness's degree of confidence as soon as an identification is made, in the eyewitness's own words. Montana's model policy, for example, uses typical language: "[D]ocument in the witness's own words the level of certainty expressed by the witness and any comment made by the witness during the entire lineup process."<sup>354</sup> Model policies emphasize the importance of a verbal description of level of confidence, rather than a numerical scale.<sup>355</sup> Florida's model policy requires: "[a]ny comment made by the witness during the entire process shall be carefully documented word-for-word. Any non-verbal communication or action of the witness shall also be noted in the administrator's notes."<sup>356</sup> Colorado is the outlier: rather than requiring that law enforcement ask eyewitnesses to describe certainty in their own words, it instead requires that

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<sup>350</sup> See, e.g., GA. PUB. SAFETY TRAINING CTR., PHOTO LINE-UP ADVISORY STATEMENT 1 (2009) (giving many of these instructions in advisory statements provided to eyewitnesses before identification).

<sup>351</sup> EYEWITNESS IDENTIFICATION—MODEL POL'Y § IV.B(2)(a) (DEL. POLICE CHIEFS' COUNCIL 2018).

<sup>352</sup> MODEL POL'Y: EYEWITNESS IDENTIFICATION § IV.B(1) (ME. CHIEFS OF POLICE ASS'N 2018).

<sup>353</sup> See, e.g., *id.* § IV.C(2) (describing folder shuffle method for use if blind administrator not available).

<sup>354</sup> EYEWITNESS IDENTIFICATION MODEL POL'Y § 25.7.2 (MONT. L. ENF'T ACAD. 2016).

<sup>355</sup> See, e.g., IDENTIFICATION PROCS.: PHOTO ARRAYS AND LINE-UPS MODEL POL'Y § III.I (N.Y. STATE MUN. POLICE TRAINING COUNCIL 2015) ("The witness should be asked to provide their level of certainty in their own words as opposed to using a numerical scale.").

<sup>356</sup> FLA. DEP'T OF L. ENF'T, FLA. SHERIFFS ASS'N, FLA. POLICE CHIEFS ASS'N & FLA. PROSECUTING ATT'YS ASS'N, COMMENTARY AND INSTRUCTIONS: INSTRUCTIONAL SUGGESTIONS 5 (2011).

eyewitnesses be asked to describe whether they are confident, somewhat confident, or not confident.<sup>357</sup>

Nearly all model policies suggest recording video or audio of the identification process whenever feasible. A handful of states prioritize video over audio.<sup>358</sup> Maine's policy includes representative language: "Lineup and photo array procedures shall be video and audio recorded, unless doing so is not possible."<sup>359</sup> If audio or video recording is deemed impracticable, many policies suggest alternative options. For example, several states require a written record as well as written justification for why recordings were not created.<sup>360</sup>

### III. SCIENCE-INFORMED EYEWITNESS EVIDENCE

Scientific research has resulted in consensus on a series of best practices which, as described, have increasingly been adopted by police agencies, state courts, and through legislation and model policies. Certain other practices are not currently the subject of scientific consensus and should be considered a matter of policy choice by agencies. Further, scientific research continues to advance and produce insights that can improve eyewitness identifications. The sections that follow describe how new research can inform: (A) the question whether to conduct a lineup at all, (B) courtroom identifications, (C) lineup fairness, (D) videotaping identification procedures and measuring the time that an eyewitness takes to make an identification, and (E) testing the face memory ability of eyewitnesses.

#### A. *The Decision to Conduct an Identification Procedure*

Constitutional rulings do not address the first question that police face: whether to conduct an identification procedure at all. The few lower courts that have considered the issue are divided on whether police must have probable cause under the Fourth Amendment to place an individual in a live (but not a photo array) procedure.<sup>361</sup> The use of mug shot arrays, composite images, or

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<sup>357</sup> MODEL POL'Y AND FORMS FOR EYEWITNESS IDENTIFICATION § II.B(4)(g) (COLO. BEST PRACS. COMM. 2015).

<sup>358</sup> For model policies from Colorado, Michigan, Virginia, and Washington, see *infra* app. E.

<sup>359</sup> MODEL POL'Y: EYEWITNESS IDENTIFICATION § IV.B(1) (ME. CHIEFS OF POLICE ASS'N 2018).

<sup>360</sup> See *infra* app. E (describing model policies from Delaware, Louisiana, and Maine).

<sup>361</sup> Compare *Biehunik v. Felicetta*, 441 F.2d 228, 230 (2d Cir. 1971) (finding that ordering plaintiffs to report to lineup was reasonable even without probable cause), with *Wise v. Murphy*, 275 A.2d 205, 212-16 (D.C. Cir. 1971) (finding that court-ordered lineup was reasonable without probable cause in case of serious felony involving grave personal injury but may require probable cause for less serious offenses), and *State v. Hall*, 461 A.2d 1155, 1160-63 (N.J. 1983) (upholding forced lineup participation on less than probable cause but only in narrow set of circumstances).

photo arrays is not regulated under the Fourth Amendment, since they do not involve a “seizure” of a person but rather the person’s image. The Supreme Court has also held that when police do not intentionally arrange an identification, it is not regulated under the Due Process Clause.<sup>362</sup> In contrast, the New Jersey Supreme Court has ruled that judicial review should occur regardless of whether there was police action.<sup>363</sup>

“The decision to conduct an eyewitness identification procedure should not be undertaken lightly, or without adequate cause and evidentiary support.”<sup>364</sup> The American Law Institute has recommended that police have a “strong basis” to conduct an eyewitness procedure—a mere hunch should not be sufficient.<sup>365</sup> The ALI approach is the most demanding to date and we endorse it. In 2020, the American Psychology-Law Society updated its White Paper regarding eyewitness identification procedures, and recommended that officers have “evidence-based suspicion” in order to conduct a lineup; that standard may be too vague and forgiving.<sup>366</sup> Preferably, officers should have evidence of guilt independent of the eyewitness’s belief that she can make an identification.

In addition, “[o]fficers should not ask an eyewitness who lacks the ability, or who expresses an inability, to recall the appearance of the culprit to make an identification.”<sup>367</sup> Officers “should not conduct eyewitness identification procedures if they do not have a suspect” either.<sup>368</sup> Thus, officers should not engage in “trawling,” the presentation of large sets of images of individuals for whom there is no cause for suspicion.<sup>369</sup> The risks of eyewitness error are too great to justify placing large numbers of individuals at risk of erroneous identification.<sup>370</sup>

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<sup>362</sup> See *Perry v. New Hampshire*, 565 U.S. 228, 248 (2012).

<sup>363</sup> See, e.g., *State v. Chen*, 27 A.3d 930, 937 (N.J. 2011).

<sup>364</sup> See PRINCIPLES OF THE L. OF POLICING § 10.03 cmt. b (AM. L. INST., Tentative Draft No. 2, 2019).

<sup>365</sup> See *id.*

<sup>366</sup> See Wells et al., *supra* note 17, at 8, 11-13 (“There should be evidence-based grounds to suspect that an individual is guilty of the specific crime being investigated before including that individual in an identification procedure and that evidence should be documented in writing prior to the lineup.”).

<sup>367</sup> PRINCIPLES OF THE L. OF POLICING § 10.03 cmt. b.

<sup>368</sup> *Id.* § 10.03 cmt. c.

<sup>369</sup> *Id.*

<sup>370</sup> See Kenneth A. Deffenbacher, Brian H. Bornstein & Steven D. Penrod, *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference*, 30 LAW & HUM. BEHAV. 287, 306 (2006) (discussing possible biasing effects of mug shot exposure to eyewitnesses); *Commonwealth v. Gomes*, 22 N.E.3d 897, 916 (Mass. 2015) (“A prior viewing of a suspect in an identification procedure raises doubts about the reliability of a subsequent identification procedure involving the same suspect.”).

Further, there is a concern that decisions to acquire eyewitness evidence can be biased by other forms of evidence that themselves may not be reliable. Thus, information about a confession can alter eyewitness identification decisions and the decision by police to conduct a lineup procedure.<sup>371</sup> Because such cross-contamination can occur, it is essential for agencies to determine whether an identification procedure is likely reliable. Unfortunately, many crimes occur under suboptimal viewing conditions.<sup>372</sup> In addition, eyewitness identifications often occur after the passage of time. For that reason, officers should not conduct repeat identification procedures with an eyewitness. Officers should carefully inquire into the viewing conditions under which an eyewitness saw the suspect, as well as the passage of time since the viewing occurred.

B. *Limiting Courtroom Identifications*

Judges should not permit courtroom identifications, which are not a test of an eyewitness's memory, and instead should rely on a recounting of the earlier confidence of the eyewitness at the time of the identification procedure. In-court identifications lack fillers and there is no real test of the eyewitness's memory. Yet, courtroom identifications and courtroom expressions of eyewitness confidence have been shown to powerfully influence jurors.<sup>373</sup> Further, as described, an eyewitness may appear highly confident in court, even if highly uncertain during the prior police lineup—a phenomenon termed “confidence inflation.”<sup>374</sup> As a first step, agencies should ensure through policy and practice that an eyewitness is never asked for the first time to make an identification in court.

Judges should not allow courtroom identifications. Several courts have begun to question their use. The Massachusetts Supreme Judicial Court and the Connecticut Supreme Court have ruled no in-court identification is permitted if an out-of-court identification was suppressed as unduly suggestive.<sup>375</sup> An

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<sup>371</sup> See Lisa E. Hasel & Saul M. Kassin, *On the Presumption of Evidentiary Independence: Can Confessions Corrupt Eyewitness Identifications?*, 20 PSYCH. SCI. 122, 126 (2009).

<sup>372</sup> See IDENTIFYING THE CULPRIT, *supra* note 15, at 51 (noting that “under the viewing conditions associated with a typical crime,” many visual factors “may place severe limitations on the ability of the observer to sense key pieces of information”).

<sup>373</sup> See Garrett et al., *supra* note 309, at 556-60 (summarizing literature regarding eyewitness confidence and effect on jurors, and finding courtroom confidence has strongest effect on jurors as compared to other factors).

<sup>374</sup> See Wells et al., *supra* note 17, at 21.

<sup>375</sup> See *Commonwealth v. Johnson*, 45 N.E.3d 83, 92-94 (Mass. 2016) (reasoning that “a subsequent in-court identification cannot be more reliable than the earlier out-of-court identification, given the inherent suggestiveness of in-court identifications and the passage of time”); *State v. Dickson*, 141 A.3d 810, 817 (Conn. 2016) (“[I]n cases in which identity is an issue, in-court identifications that are not preceded by a successful identification in a

additional Massachusetts Supreme Judicial Court ruling limited first-time courtroom identifications<sup>376</sup>: “Where, as here, a prosecutor asks a witness at trial whether he or she can identify the perpetrator of the crime in the court room, and the defendant is sitting at counsel’s table, the in-court identification is comparable in its suggestiveness to a showup identification.”<sup>377</sup> Other courts adopt a burden-shifting approach towards in-court identifications.<sup>378</sup> The right approach is to bar courtroom identifications entirely; instead, an eyewitness should be allowed to describe the prior identification procedure and who was identified at that procedure, without making a new courtroom identification.<sup>379</sup>

### C. *Constructing Fair Lineups*

The iconic image of a police lineup involves several people standing side-by-side, face forward, against a uniform background. Today, lineups are commonly composed of a set of similarly scaled and formatted *en face* photographs. There are several reasons for the move away from live lineups: practical choice of fillers is severely limited with live people, right to counsel normally attaches, suspects may refuse to comply, and uncontrolled actions (postures or facial expressions) of participants may elicit perceptual decision biases of the sort described above.

The move to still photographs, however, introduces a new problem: a significant reduction of visual information available. Under most normal conditions, people recognize objects using a variety of sensory cues, which include the three-dimensional structure of the object, revealed in part by stereoscopic and motion cues for depth. We routinely employ whole-body information such as posture and gait. It has become clear from studies that

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nonsuggestive identification procedure implicate due process principles and, therefore, must be prescreened by the trial court.” (footnote omitted)). For the argument that courts should not use “independent source rules” to permit an in-court identification following suggestive out-of-court identifications, see generally Garrett, *supra* note 148.

<sup>376</sup> See *Commonwealth v. Crayton*, 21 N.E.3d 157, 169 (Mass. 2014) (“Where an eyewitness has not participated before trial in an identification procedure, we shall treat the in-court identification as an in-court showup, and shall admit it in evidence only where there is ‘good reason’ for its admission.”).

<sup>377</sup> *Id.* at 166; see also *United States v. Archibald*, 734 F.2d 938, 941 (2d Cir.) (“Any witness, especially one who has watched trials on television, can determine which of the individuals in the courtroom is the defendant . . .”), *modified*, 756 F.2d 223 (2d Cir. 1984).

<sup>378</sup> See *State v. Hickman*, 330 P.3d 551, 568 (Or. 2014) (en banc) (“Courts considering the admissibility of first-time in-court identifications generally have placed the burden of seeking a prophylactic remedy on the defendant.”); *United States v. Domina*, 784 F.2d 1361, 1369 (9th Cir. 1986) (noting that district court’s denial of request for in-court line-up will only be overturned if in-court identification procedures were so suggestive and conducive to irreparable misidentification as to amount to denial of due process).

<sup>379</sup> See Garrett, *supra* note 310, at 33 (arguing that while prior identification may be probative, in-court identification is “highly prejudicial and rather meaningless”).

eyewitness performance is better if more information-bearing cues are available.<sup>380</sup> Permitting this should, in turn, improve discriminability of the culprit from innocent suspects—and the accuracy of eyewitness identification. It is possible to reintroduce some of these additional sensory cues to lineups while at the same time preserving the convenience afforded by photographs. One approach would be to employ short videos of each lineup participant, in which facial and body movement is used to reveal three-dimensional structure. Some effort has been made along these lines in laboratory studies and, in the United Kingdom, it is standard to use short facial videos in lineups.<sup>381</sup> Another promising approach is to first identify the most informative cues used by human observers for facial recognition, and then develop facial images that make these cues easily available.<sup>382</sup>

Despite well-understood and potentially disastrous consequences of unfair lineups, there have been few serious attempts to systematize the process of “fair” filler selection. Published guidelines for state lineups should be constructed to ensure that “the suspect does not unduly stand out,” and to “[a]void using fillers who so closely resemble the suspect that a person familiar with the suspect might find it difficult to distinguish the suspect from the fillers.”<sup>383</sup> This counsel—that fillers should be similar but not too much so—is open to interpretation and applied by different police agencies in different ways.

#### 1. New Approaches to Face Similarity

To address the problem of unfair lineups, one place to turn is recent studies of face recognition that have focused on metrics of face similarity.<sup>384</sup> As applied to eyewitness identification, the goal is to employ these metrics to create lineups in which fillers are all known to be similar to the suspect. One approach uses physical parameters of the face, such as distance between the eyes, height of the

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<sup>380</sup> See, e.g., Toni P. Saarela & Michael S. Landy, *Integration Trumps Selection in Object Recognition*, 25 *CURRENT BIOLOGY* 920, 920 (2015).

<sup>381</sup> Ryan J. Fitzgerald, Heather L. Price & Tim Valentine, *Eyewitness Identification: Live, Photo, and Video Lineups*, 24 *PSYCH. PUB. POL'Y & L.* 307, 308 (2018).

<sup>382</sup> Jiayu Zhan, Oliver G.B. Garrod, Nicola van Rijsbergen & Philippe G. Schyns, *Modelling Face Memory Reveals Task-Generalizable Representations*, 3 *NATURE HUM. BEHAV.* 817, 817 (2019).

<sup>383</sup> EYEWITNESS EVIDENCE, *supra* note 41, at 29.

<sup>384</sup> See generally W. Zhao, R. Chellappa, P.J. Phillips & A. Rosenfeld, *Face Recognition: A Literature Survey*, 35 *ACM COMPUTING SURVS.* 399 (2003) (surveying literature on face recognition); Tim Valentine, Michael B. Lewis & Peter J. Hills, *Face-Space: A Unifying Concept in Face Recognition Research*, 69 *Q.J. EXPERIMENTAL PSYCH.* 1996 (2016) (reviewing research on “face-space”).

forehead, and width of the mouth, to define similarity.<sup>385</sup> The other approach defines face similarity perceptually, based on human judgments, by asking people to rate face similarity.<sup>386</sup> The desired product is a set of similarity measures for all possible pairs of faces in the library.<sup>387</sup> Drawing from this similarity-indexed face library, it would then be possible to customize filler selection by specifying both the average face similarity distance between suspect and fillers and the variance of face similarity amongst the fillers. The hope is that traditional selection of fillers, based on an officer's judgment about what seems fair, could be replaced with an objective system used to determine parameters of lineup face similarity that yield the best eyewitness performance.

## 2. Sequential Versus Simultaneous Lineups

Many of the law enforcement policies, and some of the statutes discussed in Part II, require that police present lineup images one at a time, rather than at the same time. Earlier research had suggested an accuracy advantage to doing so.

More recent research, however, found that the sequential procedure encourages more conservative eyewitness responses—both correct and incorrect identifications are less likely—but no gains in memory-based discriminability of lineup faces, relative to the simultaneous procedure.<sup>388</sup> The National Research Council felt that a recommendation in support of either simultaneous or sequential procedures was premature.<sup>389</sup> In the years since the National Research Council Report appeared, a surge of studies have evaluated performance as a function of lineup type.<sup>390</sup> Considered together with earlier comparisons cited in the National Research Council Report, these recent analyses indicate that, on average, witnesses are better able to optimize sensitivity to their memories—that is, they manifest better discriminability—when simultaneous lineups are

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<sup>385</sup> Matthew Turk & Alex Pentland, *Eigenfaces for Recognition*, 3 J. COGNITIVE NEUROSCIENCE 71, 72-73 (1991); Colin Tredoux, *A Direct Measure of Facial Similarity and Its Relation to Human Similarity Perceptions*, 8 J. EXPERIMENTAL PSYCH. 180, 180 (2002).

<sup>386</sup> See, e.g., Wells et al., *supra* note 17, at 21-23.

<sup>387</sup> Thomas D. Albright, Sergei Gepshtein, Yurong Wang, Fangchao He & Dinh Diep, *Perceptual Scaling Improves Eyewitness Identification*, 24 ABSTRACTS PSYCHONOMIC SOC'Y 198, 198 (2019); Sergei Gepshtein, Yurong Wang, Fangchao He, Dinh Diep & Thomas D. Albright, *A Perceptual Scaling Approach to Eyewitness Identification*, 11 NATURE COMM'NS 1, 1 (2020).

<sup>388</sup> Laura Mickes, *Receiver Operating Characteristic Analysis and Confidence-Accuracy Characteristic Analysis in Investigations of System Variables and Estimator Variables That Affect Eyewitness Memory*, 4 J. APPLIED RSCH. MEMORY & COGNITION 93, 98 (2015).

<sup>389</sup> Albright, *supra* note 1, at 7759.

<sup>390</sup> See, e.g., Travis M. Seale-Carlisle, Stacy A. Wetmore, Heather D. Flowe & Laura Mickes, *Designing Police Lineups to Maximize Memory Performance*, 25 J. EXPERIMENTAL PSYCH. 410, 410-11 (2019).

used.<sup>391</sup> The differences between the procedures may be further reduced, however, where law enforcement agencies allow more than one “lap” in which an eyewitness can view photos in a sequential procedure.

D. *Videotaping and Timing Eyewitness Identifications*

A recording documents the eyewitness identification procedure, the confidence of a witness who makes an identification, and additional important information, such as the length of time in which the eyewitness made the identification. A recording can also memorialize any officers’ extraneous reinforcing behavior, such as how they present the photographs and their body language, as well as the words the eyewitness used to express confidence in an identification. The National Research Council strongly recommended recording eyewitness identification procedures.<sup>392</sup>

There are few practical obstacles to recording photo array identification procedures. Police body-cameras can make such recordings feasible even in the field. In situations in which the confidentiality of an eyewitness should be safeguarded, masking can be used in the video to protect the witness’s identity.<sup>393</sup>

Judicial review of eyewitness identification evidence can be greatly informed by recordings. A recording can demonstrate that an identification procedure was conducted blind or blinded and in the appropriate manner, and it can show vividly the eyewitness’s confidence level. At the same time, a recording can demonstrate that an identification was not conducted properly or that an eyewitness was uncertain. There should be no judicial presumption of regularity if law enforcement failed to follow a policy requiring video recording of eyewitness identification procedures, and it was feasible to record.

Recordings also provide information about the timing of an identification. New research seeks to identify conditions under which high-confidence errors occur.<sup>394</sup> Recent research suggests the speed with which an eyewitness identifies a suspect at a lineup is associated with accuracy.<sup>395</sup> A fast and confident identification, made within seconds, has been found to be more accurate. While different people may express confidence differently, identification speed can be

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<sup>391</sup> See *id.* at 425 fig.7 (demonstrating relationship between simultaneous procedure and higher discriminability).

<sup>392</sup> See IDENTIFYING THE CULPRIT, *supra* note 15, at 108.

<sup>393</sup> See PRINCIPLES OF THE L. OF POLICING § 11.02 cmt. a (AM. L. INST., Tentative Draft No. 2, 2019).

<sup>394</sup> See Chad S. Dodson, *Distinguishing Between Reliable and Unreliable Eyewitnesses*, 104 JUDICATURE 37, 37-40 (2020) (discussing factors that influence accuracy of eyewitness’s identification).

<sup>395</sup> See, e.g., Chad S. Dodson & David G. Doboily, *Confidence and Eyewitness Identifications: The Cross-Race Effect, Decision Time and Accuracy*, 30 APPLIED COGNITIVE PSYCH. 113, 114 (2016).

objectively measured. Recording identification procedures can make it standard that police document identification speed, providing new and useful information about accuracy.

#### E. *Testing Face Memory*

Not all people are as good at remembering faces as others.<sup>396</sup> While a court might order an eye exam, if there is a question whether a witness had poor eyesight, courts do not ask that people be given face memory tests. One test widely used in experimental settings is the Cambridge Face Memory Test.<sup>397</sup> Recent research shows how an eyewitness's ability to recognize faces affects accuracy. While individuals with excellent facial recognition ability display a strong relationship between confidence and accuracy, this is not so for average or weak facial-recognizers. The weak facial-recognizers who were 100% confident were roughly 60% accurate in their identifications.<sup>398</sup> This research can help law enforcement better identify more accurate eyewitnesses, provided that care is taken to avoid contaminating the witnesses' memories. Police agencies could use a face memory test as a screening tool, to decide whether to conduct an identification procedure.

New research can inform efforts to better construct lineups, present lineups, and assess the face recognition ability of eyewitnesses. The next generation of policy reform in the eyewitness area will hopefully lead to adoption of improvements in law enforcement agencies and in courts. The next Part concludes by developing implications for police, courts, and for our larger understanding of how law incorporates science.

### IV. IMPLICATIONS FOR LAW AND SCIENCE

Part III discussed the application of new scientific research to the eyewitness identification process, including documenting lineups on video, sharply limiting testimony in the courtroom, and moving from the concept of a categorical identification to a probabilistic or quantitative statement. This approach, described in Part I, reflects a new way of thinking about an eyewitness as an

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<sup>396</sup> David White & Richard I. Kemp, *Identifying People from Images*, in *PSYCHOLOGICAL SCIENCE AND THE LAW*, *supra* note 80, at 238, 252 (considering ability of experts to outperform novices in facial identification).

<sup>397</sup> See *Cambridge Face Memory Test*, BIRKBECK UNIV. LONDON, <https://www.bbk.ac.uk/psychology/psychologyexperiments/experiments/facememorytest/sta rtup.php?r=8&p=0&d=1&dn=0&g=0&m=68f7d848edeabd6cc29371b806b3017> [<https://perma.cc/B98S-E59B>] (last visited Jan. 24, 2022).

<sup>398</sup> See Jesse H. Grabman, David G. Dobylyi, Nathan L. Berelovich & Chad S. Dodson, *Predicting High Confidence Errors in Eyewitness Memory: The Role of Face Recognition Ability, Decision-Time, and Justifications*, 8 *J. APPLIED RSCH. MEMORY & COGNITION* 233, 241 (2019).

“instrument” and not as a decider. As described below, this method has implications for police practices and evidence law. We discuss each in turn.

This approach has implications for evidence law generally, where in a range of areas, including in expert and forensic evidence, witnesses have long testified in categorical and not probabilistic terms. The entire movement towards incorporating research into police and judicial practice, so notable in the eyewitness area, has implications for how we conceive of the role of law and science. During a time of urgent calls for police reform, our account suggests that both miscarriages of justice in high profile cases and scientific research that provides police with new approaches, can result in sweeping reform.

To be sure, unlike other policing reforms, eyewitness procedures can be comfortably adopted in a police station. They do not involve fraught, reactive, and discretionary police conduct implicated when police decide, for example, to use force in the field. Police are confronted first-hand with eyewitnesses who choose fillers and commonly experience how eyewitnesses can and do pick out innocent people. Further, in some cases, DNA testing can now be done to avoid the need to rely on eyewitnesses. Further, there is far more research on eyewitness memory than on topics like police use of force.<sup>399</sup> Perhaps for all of those reasons, eyewitness evidence has been amenable to reform.

In this Part, we develop the concept of a scientific framework in which new research is incorporated into law and policy. Such a conception is not consistent with many notions of legal precedent, but it fits the types of frameworks adopted in legislation, state court rulings, jury instructions, and model policies that we have described in this Article. Rather than adopt a fixed “reliability test” like the Supreme Court has done, other actors adopted functional, research-informed approaches that can be modified over time. We describe why that approach is preferable in areas in which law can be productively informed by ongoing scientific research.

#### A. *Beyond Traditional Lineup Identification*

In the eyewitness area, the very concept of an “identification,” with a static yes or no answer, is not scientific. The same basic lineup procedures have been in use for decades. These methods are simple to apply by law enforcement, and outcomes are easy to intuit (perhaps deceptively so) by triers of fact. Yet, there are good scientific reasons to break outside this box and explore new ways to improve eyewitness performance. For example, the method commonly used to evaluate merits of traditional simultaneous and sequential lineups depends on precise and accurate measurements of witness confidence. As we have seen, confidence can veer off the rails when witnesses are exposed to other sources of

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<sup>399</sup> For the view that a research-informed approach can be adopted in the use of force area, see Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 214 (2017).

information.<sup>400</sup> Our approach, in which legal procedures are informed over time by research, should cause us to ask whether traditional lineups might be improved.

The alternative would be an approach that nails down the other key variable: strength of recognition memory. Rather than render a categorical identification, the witness assigns a confidence rating to each lineup participant, reflecting the corresponding strength of recognition memory.<sup>401</sup> One way of doing this involves asking the eyewitness to give a rating to each photo in a lineup.<sup>402</sup> Another method would involve presentation of all possible pairs of a set of lineup faces. Witnesses are asked to make relative—not absolute—judgments: Which face of each pair looks more like the perpetrator? Such approaches would end the categorical identification—and would provide far more detailed information about a witness’s memory. Whether such approaches would be permitted in court remains to be seen.

#### B. *Ending Courtroom Identification*

Second, traditional courtroom identifications are highly problematic from a scientific perspective, even if they are standard fare at criminal trials. We have recommended that they not be used at all. First-time identifications are far more reliable than any subsequent procedure, particularly in court, where it is obvious where the defendant is sitting at counsel’s table. Some evidence suggests jurors can benefit from judicial instructions that they should not place great weight on courtroom confidence.<sup>403</sup> However, it would be simpler to follow the scientific recommendation to bar courtroom identifications by an eyewitness entirely. Doing so eliminates the feature of eyewitness evidence—confidence expressed in court—that most impacts jurors. As a result, jurors may be better able to focus on reliability.

Regardless, eyewitnesses should never be making an identification for the first time in court; they should have their memory tested properly in a police lineup. A related and growing concern is that eyewitnesses may make identifications outside of a well-designed police procedure. Eyewitnesses increasingly seek to conduct identifications on their own, including by searching online or on social media for images of the culprit.<sup>404</sup> As noted in Part II, the Supreme Court held when unreliability in eyewitness identifications is not due

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<sup>400</sup> Nancy K. Steblay, Gary L. Wells & Amy Bradfield Douglass, *The Eyewitness Post Identification Feedback Effect 15 Years Later: Theoretical and Policy Implications*, 20 PSYCH. PUB. POL’Y & L. 1, 3 (2014).

<sup>401</sup> Neil Brewer, Nathan Weber & Nicola Guerin, *Police Lineups of the Future?*, 75 AM. PSYCH. 76, 78 (2020).

<sup>402</sup> Neil Brewer & James Doyle, *Changing the Face of Police Lineups: Delivering More Information from Witnesses*, 10 J. APPLIED RSCH. MEMORY & COGNITION 180, 186 (2021).

<sup>403</sup> See Garrett et al., *supra* note 309, at 560.

<sup>404</sup> See, e.g., *State v. Chen*, 27 A.3d 930, 934 (N.J. 2011).

to intentional police action, it is not regulated under the Due Process Clause. When witnesses search online and on social media, or in physical locations, to try to locate suspects, they may be affected by suggestive circumstances. In these circumstances, police cannot control viewing conditions or aim to prevent misidentifications. For that reason, agencies should strongly caution eyewitnesses not to engage in such trawling activities and question eyewitnesses to ascertain and document whether or how they have engaged in any such trawling. Police agencies should also reconsider making mug shots available to online repositories, which can facilitate eyewitness trawling.

C. *Science and Justice Implications*

The evolving law of eyewitness evidence shows how accuracy and science can play a role in our legal system. The implications are largely quite positive and suggest reason for optimism. If one focuses on the Supreme Court, one might have the misimpression that our criminal system does not take seriously the insights of decades of scientific research. Constitutional precedent changes slowly; federal courts still follow the 1976 *Manson* ruling.

Nevertheless, we have experienced a paradigm shift at the local level, informed by scientific research and not by judicial precedent. Local police agencies can build upon the constitutional floor and can far more readily take research into account. As described, almost every state, through legislation, model policy, police policy, and state court rulings, has embraced scientific research regarding eyewitness evidence. State court rulings are also illustrative; they have mostly departed from precedent not by modifying constitutional tests but rather by focusing on discretionary areas of state evidence law.<sup>405</sup> The ability of evidence law to adapt to research, just as law enforcement can adapt their policies and training, provides a counterpoint to constitutional procedure.

The framework local and state actors have adopted uses a functional approach. The policies resemble a checklist of features that a sound eyewitness procedure should include.<sup>406</sup> Thus, state court rulings, statutes, and model policies do not hinge on judicial “tests” designed to apply in appellate settings. Instead, they set out a process for conducting a lineup, identify factors to be considered at a pretrial hearing or set out jury instructions. Those lists can be updated and processes modified based on new research. They are not reduced to fixed legal language. They consist of a scientific framework.

In the eyewitness area, the Supreme Court should revisit the *Manson* test and reconsider its hands-off attitude towards evidentiary questions.<sup>407</sup> Courts should generally be receptive to scientific legal frameworks. In the eyewitness area,

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<sup>405</sup> See *supra* Section II.B (discussing state court rulings on eyewitness evidence).

<sup>406</sup> See *supra* Section II.C (discussing state statutes regulating eyewitness evidence).

<sup>407</sup> See Brandon L. Garrett, *Constitutional Law and the Law of Evidence*, 101 CORNELL L. REV. 57, 95-96 (2015).

courts have done this by basing their rulings on scientific research, in a manner that has enabled them to update their rulings as research progresses.<sup>408</sup>

Such approaches could be adopted in other areas in which police reform is urgently needed. Unwarranted uses of force, including deadly force, are too common in the United States, particularly for Black men.<sup>409</sup> Police are under scrutiny as never before in part because of policies and practices regarding racial disparities in arrests, stops, and use of force. There is a growing concern that constitutional standards do not adequately protect the public or ensure accountability due in part to qualified immunity restrictions on relief for violations.<sup>410</sup> Whether it is incorporated in constitutional rules or not, a scientific framework approach can be adopted. New policies that minimize the harm of police interactions can be implemented, and then tested over time, to ensure compliance. Even in the fraught context of police use of force, a best practices approach can be adopted, as policing organizations and the American Law Institute recommend.<sup>411</sup>

That said, evidence-informed reforms have been very slow in coming, even in other police investigation-related areas like forensic evidence, in which the scientific community has sharply and repeatedly weighed in.<sup>412</sup> Whether legislation or courts will ultimately provide a backstop to such efforts, as in the eyewitness area, remains to be seen.

Scientific research continues to progress and greater improvements are needed. Had post-conviction DNA testing not brought errors to light, and scientists not responded to that pressing legal need by bringing their research to bear on this problem, we would not have experienced the dramatic change already seen. The National Research Council Report provided an important capstone to the first generation of law and science research that has informed a remarkable shift in practices. Similar work would benefit other areas in pressing need of reform. The new generation of law and science research awaits.

#### CONCLUSION

Law and science are more compatible than many commonly suppose in both the legal and scientific communities. Some judges have expressed concern, as the Georgia Supreme Court did, that “[t]he law will always lag behind the sciences to some degree because of the need for solid scientific consensus before

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<sup>408</sup> See *supra* Section II.B (discussing response of state courts to scientific research).

<sup>409</sup> Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race–Ethnicity, and Sex*, 116 PROC. NAT’L ACAD. SCIS. 16,793, 16,793 (2019).

<sup>410</sup> Sam Kamin & Justin Marceau, *Double Reasonableness and the Fourth Amendment*, 68 U. MIA. L. REV. 589, 591 (2014).

<sup>411</sup> See Garrett & Stoughton, *supra* note 399, at 213 n.1.

<sup>412</sup> For a book exploring this problem, see generally BRANDON L. GARRETT, *AUTOPSY OF A CRIME LAB: EXPOSING THE FLAWS IN FORENSICS* (2021).

the law incorporates its teachings.”<sup>413</sup> However accurate as a descriptive matter, that lag should not be taken to justify a lack of receptivity to science in the courtroom. To be sure, scientific consensus will sometimes change. The “law incorporating the teachings” of science should not remain static. “The law” need not wait for “finished” science, either. We believe that law should use standards sufficiently flexible to incorporate an evolving scientific understanding of the world in which we live.

Our account is more optimistic about the potential connection between law and science. The developments described embody a concept of law that is receptive to scientific research. Each consists in a set of doctrine and practice that permits more evaluation by police, lawyers, judges, and jurors of the quality of eyewitness evidence. The doctrine consists in a set of best practices that can be adapted, rather than a legal test fixed in precedent. It is a scientific framework. Obviously, not all areas of the law implicate scientific knowledge, and if they do, they have not always displayed a receptivity to scientific findings. It remains to be seen how the next generation of visual memory and perception research will be received by the criminal system, and whether, in other areas in which criminal legal reforms are pressed, evidence-informed solutions will take hold.

The comparative institutional account that we provide supplies important lessons for the broader and urgent effort to build a both just and evidence-informed criminal legal system in the United States and globally.<sup>414</sup> In the eyewitness evidence area, scientific research has been conducted specifically to inform criminal procedure, and that influence has been extraordinarily successful and productive. Over time, that research has become increasingly informed by not only applied research but basic research regarding the processes and underlying mechanisms of human visual perception and memory. Policing agencies and lawmakers have taken far more notice of this research than courts, with state courts more engaged than federal courts.

We can learn from this experience, in order to rethink the relationship between the research, judicial, and law enforcement communities. It should not require large numbers of documented wrongful convictions for criminal procedure and evidence rules to change. It would also be optimal for national solutions to emerge. Given the challenges facing policing agencies, and endemic concerns regarding the quality and fairness of their work, it is hard to be optimistic about the hope for systematic police reform. However, our account of law, science, and eyewitness evidence provides a model for how change in our criminal system can occur from the bottom up. This account provides the reverse of the top-down Supreme Court-centric account that dominates constitutional criminal procedure. Science can inform meaningful legal reform. Stare decisis is a

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<sup>413</sup> *Brodes v. State*, 614 S.E.2d 766, 771 (Ga. 2005) (quoting *State v. Long*, 721 P.2d 483, 491 (Utah 1986)).

<sup>414</sup> For an overview, see generally Brandon L. Garrett, *Evidence-Informed Criminal Justice*, 86 GEO. WASH. L. REV. 1490 (2018).

substantial obstacle but is not always an insurmountable barrier to the careful adoption of scientific research.

The path of eyewitness evidence in law and science provides a powerful lesson: there are far more opportunities than have often been supposed for our constitutional and judicial systems to incorporate scientific research in a legal-scientific framework, in order to improve the fairness and quality of justice.

APPENDIX A.  
STATE STATUTES REGULATING EYEWITNESS IDENTIFICATION PROCEDURES

State	Cite	Blind Administration	Sequential Lineup	Lineup Construction	Witness Instructions	Judicial Remedy
CA	CAL. PENAL CODE § 859.7 (West 2022)	Yes. And if not, written justification required.	No.	Yes. In photo and live lineups, fillers must resemble suspect, only one suspect presented per lineup, and no background information may be provided on any suspect or filler.	Yes. The perpetrator may or may not be in the identification procedure, the eyewitness should not feel compelled to make an identification, and failure to make an identification will not end investigation.	No remedy specified.
CO	COLO. REV. STAT. § 16-1-109 (2022)	Yes. And if circumstances prevent blind administration, a “blinded” administration used, where administrator does not know position of suspect in photo or live lineup.	No.	Yes. The fillers must match original description of alleged perpetrator.	Yes. Alleged perpetrator may or may not be present in photo array or live lineup. Investigation will continue whether or not eyewitness identifies anyone.	Yes. Compliance or failure to comply is considered relevant evidence.
CT	CONN. GEN. STAT. § 54-1p (2021)	Yes. And if it is not possible to conduct a photo	Yes.	Yes. The fillers must resemble the suspect, and	Yes. The photographs, or persons in a live	No remedy specified.

State	Cite	Blind Administration	Sequential Lineup	Lineup Construction	Witness Instructions	Judicial Remedy
		lineup in such a way, a folder shuffle method, computer program, or other comparable method shall be used.		subsequent lineups must include different fillers who also resemble the suspect. There must be at least five fillers in any photo lineup and four fillers in live lineups. No background information on individuals in the lineup shall be visible, and any identifying actions must be performed by all individuals in the lineup. There may be only one suspect in any lineup. In a live lineup, all participants must be out of view at beginning of procedure. Nothing may be said to eyewitness	lineup, shall be presented one at a time; it is as important to exclude innocent persons as to identify perpetrator; persons may not look exactly as they did on the date of the offense; the perpetrator may or not be in the lineup; eyewitness should not feel compelled to make identification; eyewitness should take as much time as needed to make decision; and police will continue to investigate with or without identification.	

State	Cite	Blind Administration	Sequential Lineup	Lineup Construction	Witness Instructions	Judicial Remedy
				that would influence choice.		
FL	FLA. STAT. § 92.70 (2021)	Yes. Lineup must be conducted by an independent administrator, unaware of who suspect is. If it cannot, a randomized process, such as a computer program or folder shuffle procedure, must be used.	No.	No. No procedure specified.	Yes. The perpetrator might or might not be present; administrator does not know suspect identity, except in blinded procedure; eyewitness should not feel compelled to make identification; it is as important to exclude innocent persons as to identify perpetrator; investigation will continue with or without identification.	Yes. Failure to follow the guidelines shall be considered by court in motions to suppress; failure to comply can support misidentification claim; if evidence of non-compliance is presented, jury instructed to consider reliability.
GA	GA. CODE ANN. § 17-20-2 (2021)	Yes. For live lineups, and for photo lineups, if not blind, conducted with randomized	No.	Yes. Fillers must resemble witness's description of the perpetrator; must use minimum of four	Yes. The perpetrator may or may not be present in live or photo lineup.	No remedy specified.

State	Cite	Blind Administration	Sequential Lineup	Lineup Construction	Witness Instructions	Judicial Remedy
		folder shuffle.		fillers in live or photo lineup.		
IL	725 ILL. COMP. STAT. 5/107A-2 (2021)	Yes. The lineup must be conducted by independent administrator if practical. If not, a blinded procedure, such as randomized computer display or folder shuffle method, must be used.	No. This subsection does not establish a preference for whether a law enforcement agency should conduct simultaneous lineups or sequential lineups.	Yes. The suspect should not stand out. Only one suspect shall be included. Photo lineups must contain at least five fillers, and live lineups must contain at least three fillers. If eyewitness has previously viewed a lineup, fillers shall be different from those in prior lineup.	Yes. The perpetrator may or may not be present; administrator does not know who the suspect is; eyewitness should not feel compelled to make identification; it is as important to exclude innocent persons as to identify perpetrator; investigation will continue with or without identification; a recording will take place, if practical, unless eyewitness refuses.	Yes. Failure to comply is factor to be considered in adjudicating motion to suppress identification. When warranted, court shall instruct jury to consider facts and circumstances of noncompliance.
KS	KAN. STAT. ANN. § 22-4619 (2021)	Yes. Blind or blinded procedures should be used.	No.	Yes. Fillers should be reasonably similar to perpetrator and should	Yes. The perpetrator may or may not be present.	No remedy specified.

State	Cite	Blind Administration	Sequential Lineup	Lineup Construction	Witness Instructions	Judicial Remedy
				not make suspect stand out.		
LA	LA. CODE CRIM. PROC. ANN. arts. 251-253 (2021)	Yes. In live lineups, administrator must be blind if practicable. If not, administrator must conduct the photo lineup to avoid influencing the eyewitness. In photo lineups, procedure must be conducted by blind administrator or a "blinded" procedure whereby opportunities to influence the eyewitness are prevented.	No.	Yes. The fillers must be consistent with the eyewitness's description of the perpetrator and must not make the suspect noticeably stand out.	Yes. The perpetrator may or may not be present.	Yes. May be considered in adjudicating motions to suppress. May also be admissible in support of any claim of eyewitness misidentification, as long as the evidence is otherwise admissible.
MD	MD. CODE ANN., PUB. SAFETY § 3-506.1 (West 2021)	Yes. Administrator must be blind, or blinded by either a folder shuffle method or	No.	Yes. Each filler shall resemble description of perpetrator given by eyewitness as to significant	The perpetrator may or may not be present.	No remedy specified.

State	Cite	Blind Administration	Sequential Lineup	Lineup Construction	Witness Instructions	Judicial Remedy
		a computer program that prevents the administrator from seeing the photos while the eyewitness is viewing them.		physical features, including any unique or unusual features; at least five fillers shall be included for photo lineups, and at least four in a live lineup. Where eyewitness has previously participated in a procedure, fillers must be different.		
MN	MINN. STAT. § 626.8433 (2021)	Yes, through a blind administrator, or through procedure where administrator is unaware of where suspect is in the array.	No. No procedure specified.	Yes. Selections of fillers that resemble the suspect and confidence statement from eyewitness.	Yes. Before the procedure, the eyewitness must be instructed that the perpetrator may or may not be present.	No. Nothing in section intended to preclude admissibility or to affect the standards governing admissibility.
NE	NEB. REV. STAT. § 81-1455 (2021)	No. But the statute designates authority to the Nebraska Commission on Law Enforcement and	No. No procedure specified.	Yes, the Commission has approved the use of nonsuspect fillers that generally match the eyewitness's	Yes, the Commission has approved instructions to the eyewitness that the perpetrator may or	No remedy specified.

State	Cite	Blind Administration	Sequential Lineup	Lineup Construction	Witness Instructions	Judicial Remedy
		Criminal Justice ("Commission"), which has approved blinded administration.		description of the perpetrator and do not make the suspect noticeably stand out.	may not be present.	
NV	NEV. REV. STAT. § 171.12 37 (2021)	No.	No. No procedure specified.	No. Each law enforcement agency shall adopt procedures governing the use of lineups, but no specific procedures are required.	No.	No.
NH	N.H. REV. STAT. ANN. § 595-C:1-2 (2022).	No. No procedure specified.	No. No procedure specified.	No. No procedure specified.	No. No procedure specified.	No remedy specified.
NM	N.M. STAT. ANN. § 29-3B-3 (2022)	Yes. A blind or blinded procedure shall be used.	Yes. Lineup members must be presented one at a time.	Yes. Fillers must generally resemble the eyewitness's description; there must be at least four fillers in a live lineup and five fillers in a photo lineup; the filler photos must be	Yes. The perpetrator may or may not be present; the investigation will continue regardless of whether an identification is made; and other instructions minimizing the	No remedy specified.

State	Cite	Blind Administration	Sequential Lineup	Lineup Construction	Witness Instructions	Judicial Remedy
				contemporary; and the fillers must resemble the suspect's appearance at the time of the arrest.	likelihood of inaccurate identification.	
NY	N.Y. CRIM. PROC. LAW § 60.25 (McKinney 2021)	Yes. Through a blind administrator, or through a procedure where the administrator is unaware of where the suspect is in the array.	No. No procedure specified.	No. No procedure specified.	No. No procedure specified.	Yes. The failure to follow procedure shall result in preclusion of testimony regarding identification. It will not otherwise affect admissibility.
NC	N.C. GEN. STAT. § 15A-284.52 (2021)	Yes. For photo lineups, a blinded procedure may be used, such as folder shuffle procedure or a computer program. Nothing suggestive may be said to eyewitness during the procedure.	Yes. Individuals or photos shall be presented to witnesses sequentially, with each presented to the witness separately, in a previously determined order, and removed after it is viewed before next individual	Yes. In a photo lineup, photo of the suspect shall be contemporary and, to extent possible, resemble suspect's appearance at the time of the offense. The fillers should not stand out from the suspect. Five fillers	Yes. The perpetrator may or may not be present; the administrator does not know who the suspect is; the eyewitness should not feel compelled to make identification; it is as important to exclude innocent persons as to	Yes. Failure to comply may be considered by court in adjudicating motion to suppress, and admissible in support of claims. Jury instructed it may consider non-compliance regarding reliability.

State	Cite	Blind Administration	Sequential Lineup	Lineup Construction	Witness Instructions	Judicial Remedy
			or photo is presented.	shall be used in any lineup. If eyewitness previously viewed lineup with suspect, fillers must be different.	identify perpetrator; investigation will continue with or without identification.	
OH	OHIO REV. CODE ANN. § 2933.83 (West 2021)	Yes. If practicable, the administrator shall be blind or use a blinded procedure. If not, the administrator shall write an explanation of why such a procedure was impracticable.	No. No procedure specified.	Yes. The folder system must contain five fillers who match the suspect's description and four blank photographs.	Yes. The suspect may or may not be in the lineup and the administrator does not know who the suspect is.	Yes. Failure to comply may be considered by court in motion to suppress and admissible in claims regarding identification. Jury instructed to consider noncompliance regarding reliability.
OK	OKLA. STAT. tit. 22, § 21 (2021)	Yes. All lineups shall be conducted by a blind administrator, or using a blinded procedure, such as a folder shuffle method.	No. No procedure specified.	Yes. Fillers shall be selected who match the description of the perpetrator provided by the eyewitness and who do not make the suspect noticeably stand out.	Yes. The person who committed the offense may or may not be present.	No remedy specified.

State	Cite	Blind Administration	Sequential Lineup	Lineup Construction	Witness Instructions	Judicial Remedy
TX	TEX. CODE CRIM. PROC. ANN. art. 38.20 (West 2021)	Yes. The lineups must be conducted by a blind administrator, through a blinded procedure, or through an alternative method used to prevent opportunities to influence the eyewitness.	No. No procedure specified.	Yes. The fillers must be consistent in appearance with description of suspect, and must not make suspect stand out.	Yes. The person who committed the offense may or may not be present.	Yes. Non-compliance will not bar admissibility. If an in-court identification is made, prior eyewitness identification only admissible if accompanied with details from prior identification.
UT	UTAH CODE ANN. § 77-8-4 (West 2021)	No. No procedure specified.	No. No procedure specified.	No. No procedure specified.	No. No procedure specified.	No remedy specified.
VT	VT. STAT. ANN. tit. 13, § 5581 (2022)	Yes. All lineups shall be conducted by a blind administrator, or using a blinded procedure, such as a folder shuffle method.	No. No procedure specified.	Yes. At least five fillers must be in photo lineups and at least four in live lineups. Fillers must be consistent in appearance with description of the suspect.	Yes. The person who committed the offense may or may not be present in the procedure.	No remedy specified.
VA	VA. CODE ANN. § 19.2-	No. No procedure specified (but each agency	No. No procedure specified.	No. No procedure specified.	No. No procedure specified.	No remedy specified.

State	Cite	Blind Administration	Sequential Lineup	Lineup Construction	Witness Instructions	Judicial Remedy
	390.02 (2021)	must adopt a written procedure).				
WV	W. VA. CODE ANN. § 62-1E-2 (2021)	Yes, unless it would place an undue burden on law enforcement, in which case the folder shuffle method shall be used.	Yes.	Yes. At least four fillers in all lineups. The fillers shall resemble the description of the suspect as much as practicable and shall not unduly stand out. In a photo lineup, there should be no characteristics of the photos themselves or the background context in which they are placed that will make any of the photos unduly stand out.	Yes. The perpetrator may or may not be present, or presented; eyewitness not required to make identification; it is as important to exclude innocent persons as to identify perpetrator; investigation will continue whether or not identification is made; and administrator must not know identity of perpetrator.	No remedy specified.
WI	Wis. STAT. § 175.50 (2022)	Yes. To the extent feasible.	Yes. To the extent feasible.	No. No procedure specified.	No. No procedure specified.	No remedy specified.

APPENDIX B.  
STATE COURTS THAT REVISED EYEWITNESS EVIDENCE  
ADMISSIBILITY FRAMEWORK

State	Citation	Ruling
AK	Young v. State, 374 P.3d 395, 427-28 (Alaska 2016)	Adopting framework, similar to that adopted by the New Jersey Supreme Court, to regulate eyewitness evidence, asking judges to review estimator and system variables when deciding pretrial whether to admit evidence, and requiring jury instructions when evidence is admitted.
CT	State v. Harris, 191 A.3d 119, 136, 143 (Conn. 2018)	Adopting <i>State v. Guilbert</i> framework and the <i>Henderson</i> test to evaluate the reliability of an eyewitness identification that is the result of an unnecessarily suggestive identification procedure, focusing on eight estimator variables, and noting that jury instructions may be appropriate.
GA	Brodes v. State, 614 S.E.2d 766, 771 (Ga. 2005)	Altering federal <i>Manson/Biggers</i> factors by advising trial courts to refrain from instructing jury on consideration of eyewitness's level of certainty as a factor for eyewitness reliability.
HI	State v. Kaneiakala, 450 P.3d 761, 777-79 (Haw. 2019)	Revising admissibility criteria so that trial courts must consider any relevant factors set out in Hawai'i standard jury instructions and any other relevant factors, and further, that when eyewitness identification has been procured through a suggestive procedure or when eyewitness identification is central to case, jury must be instructed to consider any potential impact of the suggestive procedure on eyewitness identification's reliability.
ID	State v. Almaraz, 301 P.3d 242, 253 (Idaho 2013)	Setting out potentially relevant estimator and system variables based on research and emphasizing the role that suggestion can play in affecting eyewitness confidence, but retaining prior due process framework for examining eyewitness evidence.
KS	State v. Hunt, 69 P.3d 571, 576 (Kan. 2003)	Altering the <i>Manson/Biggers</i> approach to eyewitness admissibility by adopting <i>State v. Ramirez</i> factors.
MA	Commonwealth v. Crayton, 21 N.E.3d 157, 179 (Mass. 2014)	Barring use of first-time eyewitness identifications in courtroom.
NJ	State v. Henderson, 27 A.3d 872, 919-22 (N.J. 2011)	Revising framework to set out nonexhaustive list of twenty-two factors, to allow all relevant system and estimator variables to be explored at pretrial hearings when there is some evidence of suggestiveness, and directing development of jury instructions to assist jurors in evaluating eyewitness identification evidence.
NY	People v. Adams, 423 N.E.2d 379, 383-84 (N.Y. 1981)	Concluding that where witness makes identification under the influence of a suggestive procedure and there is no independent source that suggests that defendant is the perpetrator, the court must exclude evidence.

State	Citation	Ruling
OR	State v. Lawson, 291 P.3d 673, 688 (Or. 2012) (en banc)	Concluding that <i>Manson/Classen</i> test is inadequate in ensuring unreliable eyewitness identification evidence is excluded and revising it based on the generally applicable reliability provisions of the Oregon Evidence Code.
UT	State v. Ramirez, 817 P.2d 774, 780-81 (Utah 1991), <i>abrogated by</i> State v. Lujan, 2020 UT 5, 459 P.3d 992	Modifying factors in <i>Biggers/Manson</i> test, adding focus on degree of attention and ability to perceive; whether identification was spontaneous and remained consistent or was product of suggestion; and nature of event being observed and likelihood witness would perceive, remember, and relate it correctly.
VT	State v. Discola, 2018 VT 7, ¶ 30, 207 Vt. 216, 184 A.3d 1177	Rejecting witness certainty as factor in assessing reliability of witness identification made in suggestive circumstances.

APPENDIX C.  
LEADING STATE RULINGS ON ADMISSIBILITY OF  
EYEWITNESS EXPERT EVIDENCE

State	Citation	Issue (Expert Witness, Hearings, Jury Instructions, Other)	Ruling
AL	<i>Ex parte Williams</i> , 594 So. 2d 1225, 1227 (Ala. 1992)	Expert Witness	Holding that expert testimony regarding reliability of eyewitness identification is admissible in cases turning on eyewitness identification and is subject to trial court's discretion.
AL	<i>Smith v. State</i> , 531 So. 2d 1245, 1251 (Ala. Crim. App. 1987)	Jury Instructions	Concluding that trial court did not err in refusing requested jury instruction regarding eyewitness identification testimony because instruction was confusing and misleading.
AK	<i>Young v. State</i> , 374 P.3d 395, 405 (Alaska 2016)	Expert Witness; Jury Instructions	Acknowledging that jury instructions and expert testimony regarding reliability of eyewitness testimony should be considered by trial courts.
AZ	<i>State v. Chapple</i> , 660 P.2d 1208, 1223-24 (Ariz. 1983), <i>superseded by statute on other grounds</i> , ARIZ. REV. STAT. ANN. § 13-756 (2021), <i>as recognized in State v. Riley</i> , 459 P.3d 66 (Ariz. 2020)	Expert Witness	Holding that trial court abused discretion in precluding admissibility of expert testimony regarding reliability of eyewitness identification.
AZ	<i>State v. Poland</i> , 698 P.2d 183, 194 (Ariz. 1985)	Expert Witness	Distinguishing <i>Chapple</i> on facts and holding that trial court did not abuse discretion in precluding admissibility of expert testimony regarding eyewitness identification where question of guilt did not hinge solely on eyewitness testimony.
AZ	<i>State v. Nottingham</i> , 289 P.3d 949, 954 (Ariz. Ct. App. 2012), <i>overruled in part on other grounds by State v. Bigger</i> ,	Jury Instructions	Concluding that defendants are entitled to cautionary jury instruction when they show suggestive circumstances surrounding pretrial identification that tend to question reliability.

State	Citation	Issue (Expert Witness, Hearings, Jury Instructions, Other)	Ruling
	492 P.3d 1020 (Ariz. 2021)		
AR	Utley v. State, 826 S.W.2d 268, 271 (Ark. 1992)	Expert Witness	Holding that trial court did not abuse its discretion in finding expert testimony on eyewitness identification inadmissible because it was a matter of “common understanding.”
AR	Hopson v. State, 940 S.W.2d 479, 481 (Ark. 1997)	Jury Instructions	Holding that trial court did not err in rejecting defendant’s proffered jury instructions on eyewitness identification.
AR	Conley v. State, 607 S.W.2d 328, 330 (Ark. 1980)	Jury Instructions	Holding that trial court properly rejected defendant’s request for <i>Telfaire</i> instruction because instruction comments on evidence and is not covered by Arkansas Model Jury Instructions.
CA	People v. McDonald, 690 P.2d 709, 727 (Cal. 1984), <i>overruled in part on other grounds</i> by People v. Mendoza, 4 P.3d 265 (Cal. 2000)	Expert Witness	Holding that excluding expert testimony on reliability of eyewitness identifications deprives jurors of crucial information under certain circumstances.
CA	People v. Wright, 755 P.2d 1049, 1066-67 (Cal. 1988)	Jury Instructions	Holding that while lower court erred in refusing to admit jury instruction about eyewitness reliability factors, error was harmless.
CO	People v. Campbell, 847 P.2d 228, 233-35 (Colo. App. 1992)	Expert Witness	Concluding that admissibility of expert testimony regarding reliability of eyewitness testimony is in accordance with Colorado Rules of Evidence and that expert testimony on reliability of eyewitness identifications should have been admitted in this case.
CO	People v. Singley, 2015 COA 78M, ¶¶ 42-44	Jury Instructions	Holding that trial court did not err in refusing to allow four jury instructions on reliability of eyewitness identification.
CT	State v. Guilbert, 49 A.3d 705, 707, 731 (Conn. 2012)	Expert Witness; Jury Instructions	Holding that reliability of eyewitness identification was “frequently . . . not a matter within knowledge of average juror and admission of expert testimony . . . d[id] not invade province of jury” and emphasizing that trial court retains discretion whether jury instructions

State	Citation	Issue (Expert Witness, Hearings, Jury Instructions, Other)	Ruling
			would alone be adequate to aid jury in evaluation of identification at issue.
DE	Garden v. State, 815 A.2d 327, 339 (Del. 2003)	Expert Witness; Jury Instructions	Concluding that exclusion of expert testimony regarding reliability of eyewitness identification was harmless error and trial court was within its discretion in refusing requested jury instruction about cross-racial identification.
D.C.	Minor v. United States, 57 A.3d 406, 409 (D.C. 2012)	Expert Witness	Holding that refusal to admit expert testimony on reliability of eyewitness identification was not harmless error and case should be remanded to allow such expert to testify.
D.C.	Corbin v. United States, 120 A.3d 588, 606 (D.C. 2015)	Jury Instructions	Holding that trial court did not abuse its discretion by rejecting proposed jury instruction regarding eyewitness identification.
FL	McMullen v. State, 714 So. 2d 368, 371 (Fla. 1998)	Expert Witness	Holding that admission of expert testimony regarding reliability of eyewitness testimony is within discretion of trial court.
FL	Bailey v. State, 162 So. 3d 344, 347 (Fla. Dist. Ct. App. 2015)	Jury Instructions	Concluding that trial court did not err in refusing to grant defense's proposed jury instructions on eyewitness identification because standard eyewitness identification jury instruction approved by Supreme Court of Florida in 2012 provided jurors with sufficient guidance.
GA	Frazier v. State, 699 S.E.2d 747, 754 (Ga. Ct. App. 2010)	Expert Witness	Concluding that trial court did not abuse its discretion in rejecting admission of expert witness on eyewitness identification.
GA	Howard v. State, 686 S.E.2d 764, 771 (Ga. 2009)	Expert Witness	Concluding that trial court did not abuse its discretion in excluding expert testimony on reliability of eyewitness identification where identifications were substantially corroborated.
GA	Brodes v. State, 614 S.E.2d 766, 771 (Ga. 2005)	Jury Instructions	Holding that trial court's decision to include "level of certainty" portion of jury instructions on reliability of eyewitness identification was harmful error.
GA	McKenzie v. State, 667 S.E.2d 43, 46-47 (Ga. 2008)	Jury Instructions	Concluding that giving "level of certainty" charge in instructing jury was harmless and did not require reversal.

State	Citation	Issue (Expert Witness, Hearings, Jury Instructions, Other)	Ruling
HI	State v. Cabinatan, 319 P.3d 1071, 1085 (Haw. 2014)	Jury Instructions	Holding that circuit court abused its discretion in refusing to give specific jury instruction on field showup identifications.
HI	State v. Cabagbag, 277 P.3d 1027, 1029 (Haw. 2012)	Jury Instructions	Holding that courts must give jury specific eyewitness identification instruction whenever identification evidence is central issue in case and it is requested by defendant, and adopting model jury instruction.
HI	State v. Kaneiakala, 450 P.3d 761, 764 (Haw. 2019)	Expert Witness	Concluding that courts should consider credible evidence presented on reliability of particular identification based on scientifically supported reliability factors, and citing cases from other state supreme courts on usefulness of expert testimony on eyewitness identification reliability.
ID	State v. Almaraz, 301 P.3d 242, 246 (Idaho 2013)	Expert Witness	Concluding that district court abused its discretion by limiting expert testimony on reliability and suggestiveness of eyewitness testimony.
ID	State v. Wright, 206 P.3d 856, 864 (Idaho Ct. App. 2009)	Expert Witness; Jury Instructions	Concluding that district court did not abuse discretion by excluding expert testimony on reliability of eyewitness identification or by refusing to admit defense's proffered jury instructions on factors that should be considered in assessing accuracy of eyewitness identification and that California Supreme Court's <i>People v. McDonald</i> articulated proper standard regarding expert testimony on reliability of eyewitness identification.
IL	People v. Lerma, 2016 IL 118496, ¶ 32	Expert Witness	Holding that trial court abused its discretion when it denied defendant's motion to allow expert testimony on reliability of eyewitness identifications.
IL	People v. Ortiz, 2017 IL App (1st) 142559, ¶¶ 42-43, 51	Expert Witness; Jury Instructions	Concluding that trial court did not abuse its discretion in denying expert testimony on reliability of eyewitness identification or in rejecting defense's proposed jury instruction on reliability of eyewitness identification.
IN	Cook v. State, 734 N.E.2d 563, 570-71 (Ind. 2000)	Expert Witness	Holding that trial court did not abuse its discretion by refusing to allow

State	Citation	Issue (Expert Witness, Hearings, Jury Instructions, Other)	Ruling
			defendant's expert witness to testify on reliability of eyewitness identification.
IN	Hopkins v. State, 582 N.E.2d 345, 353 (Ind. 1991)	Expert Witness; Jury Instructions	Holding that trial court did not err in denying appellant's request for funds to hire eyewitness identification expert or in denying defendant's proposed jury instruction on eyewitness testimony.
IA	State v. Schutz, 579 N.W.2d 317, 319 (Iowa 1998)	Expert Witness	Holding that admission of expert testimony regarding reliability of eyewitness testimony is at discretion of trial court and appellate court will only reverse exclusion of such expert testimony for abuse of discretion.
IA	State v. Carroll, No. 17-0639, 2018 WL 2722785, at *5 (Iowa Ct. App. June 6, 2018)	Jury Instructions	Declining to find reversible error from absence of eyewitness identification instruction.
KS	State v. Moore, 639 P.2d 458, 460 (Kan. 1982)	Expert Witness	Holding that it is proper to exclude expert testimony on eyewitness identification evidence.
KS	State v. Carr, 331 P.3d 544, 689-90 (Kan. 2014), <i>rev'd on other grounds</i> , 577 U.S. 108 (2016)	Expert Witness	Holding that <i>Gaines</i> automatic rule of exclusion should be replaced with flexible, case-by-case approach to admitting expert testimony on reliability of eyewitness identification when it would be helpful to jury.
KS	State v. Warren, 635 P.2d 1236, 1245 (Kan. 1981)	Jury Instructions	Holding that lower court erred in rejecting requested jury instruction on factors affecting eyewitness identification reliability.
KS	State v. Mitchell, 275 P.3d 905, 907 (Kan. 2012)	Jury Instructions	Affirming need for instruction on eyewitness identification when circumstances warrant, but holding that it is error to instruct jury on degree of certainty factor and discouraging future use of degree of certainty factor.
KY	Commonwealth v. Christie, 98 S.W.3d 485, 492 (Ky. 2002)	Expert Witness	Holding that trial courts have discretion under Kentucky Rule of Evidence 702 to admit expert witness testimony regarding reliability of eyewitness identification.
KY	Goodan v. Commonwealth, No. 2003-SC-0657-MR, 2005 WL	Jury Instructions	Holding that trial court's decision to deny requested jury instruction on eyewitness testimony reliability was proper.

State	Citation	Issue (Expert Witness, Hearings, Jury Instructions, Other)	Ruling
	1185184, at *1 (Ky. May 19, 2005)		
KY	Evans v. Commonwealth, 702 S.W.2d 424, 424 (Ky. 1986), <i>superse- ded by rule on other grounds</i> , KY. R. CRIM P. 9.45, <i>as noted in</i> Wilson v. Commonwealth, No. 2006-CA-002194- MR, 2008 WL 2852366, at *2 (Ky. Ct. App. July 25, 2008)	Jury Instruc- tions	Concluding that cautionary instruction on eyewitness identification is not required because such instruction gives undue em- phasis to particular aspect of evidence.
LA	State v. Young, 2009-1177, p. 1 (La. 04/05/10); 35 So. 3d 1042, 1043	Expert Wit- ness	Holding that district court erred in allow- ing expert testimony on reliability of eye- witness identification.
LA	State v. Mosley, 51,168, p. 8 (La. App. 2 Cir. 06/21/17); 223 So. 3d 158, 167	Jury Instruc- tions	Holding that trial court did not abuse its discretion in denying jury instructions on eyewitness identification.
ME	State v. Fernald, 397 A.2d 194, 196-97 (Me. 1979)	Expert Wit- ness	Holding that lower court did not err in re- jecting expert testimony on effects of stress on reliability of human perception in this case.
ME	State v. Mahmoud, 2016 ME 135, ¶ 22, 147 A.3d 833, 842	Jury Instruc- tions	Holding that trial court did not commit prejudicial error by failing to give de- fendant's proposed jury instructions on eyewitness identification.
MD	Bloodsworth v. State, 512 A.2d 1056, 1067 (Md. 1986)	Expert Wit- ness	Concluding that trial court did not err in rejecting expert testimony on reliability of eyewitness identification in case of person later exonerated by post-convic- tion DNA testing.
MD	Gunning v. State, 701 A.2d 374, 388-89 (Md. 1997)	Jury Instruc- tions	Holding that trial judge abused his discre- tion in denying requested jury instruction on eyewitness identification.
MA	Commonwealth v. Kent K., 696	Expert Wit- ness	Holding that whether to exclude expert testimony on reliability of eyewitness

State	Citation	Issue (Expert Witness, Hearings, Jury Instructions, Other)	Ruling
	N.E.2d 511, 517-18 (Mass. 1998)		identification is within trial judge's discretion.
MA	Commonwealth v. Bastaldo, 32 N.E.3d 873, 877 (Mass. 2015)	Jury Instructions	Holding that cross-racial eyewitness identification instruction should always be included in eyewitness identification instructions unless parties agree that there is no cross-racial identification and holding that cross-ethnic instruction may be included at judge's discretion.
MI	People v. Kean, No. 292312, 2011 WL 6004070, at *4 (Mich. Ct. App. Dec. 1, 2011)	Expert Witness	Holding that trial court did not abuse its discretion in rejecting expert testimony on reliability of eyewitness identification and emphasizing that there is no per se rule on the issue.
MN	State v. Barlow, 541 N.W.2d 309, 313 (Minn. 1995)	Expert Witness	Holding that trial court did not abuse its discretion in rejecting expert testimony on reliability of eyewitness identification.
MN	State v. Davis, No. A18-0758, 2019 WL 2262225, at *1 (Minn. Ct. App. May 28, 2019)	Jury Instructions	Holding that trial court did not abuse its discretion in denying eyewitness identification jury instruction on cross-racial identifications and presence of weapon.
MS	Corrothers v. State, 2012-DP-00208-SCT (¶ 36) (Miss. 2014)	Expert Witness	Holding that trial court properly excluded expert testimony on eyewitness identification reliability because testimony was unreliable and irrelevant.
MS	Victory v. State, 2010-KA-02073-SCT (¶ 23) (Miss. 2012)	Jury Instructions	Holding that trial court did not err in denying eyewitness identification jury instruction.
MO	State v. Lawhorn, 762 S.W.2d 820, 823 (Mo. 1988) (en banc)	Expert Witness	Holding that trial court did not err in refusing to admit expert testimony on reliability of eyewitness identification.
MO	State v. Edwards, 530 S.W.3d 593, 602-03 (Mo. Ct. App. 2017)	Jury Instructions	Holding that trial court did not err in refusing defendant's eyewitness identification jury instruction.
MO	State v. Carpenter, 605 S.W.3d 355, 369-70 (Mo. 2020) (en banc)	Expert Witness	Holding that trial court erred in refusing to admit expert testimony on reliability of eyewitness identifications.
MT	State v. DuBray, 2003 MT 255,	Expert Witness	Adopting California Supreme Court's limited admissibility rule and

State	Citation	Issue (Expert Witness, Hearings, Jury Instructions, Other)	Ruling
	¶ 43, 317 Mont. 377, 77 P.3d 247		emphasizing that it is abuse of discretion for district court to disallow expert testimony on eyewitness testimony when no substantial corroborating evidence exists.
MT	State v. Zlahn, 2014 MT 224, ¶ 25, 376 Mont. 245, 332 P.3d 247	Jury Instructions	Holding that district court did not err in denying defendant's proposed jury instructions regarding factors affecting reliability of eyewitness identification.
NE	State v. Ammons, 305 N.W.2d 812, 814 (Neb. 1981)	Expert Witness	Holding that trial court did not err in rejecting expert testimony on reliability of eyewitness identification.
NE	State v. George, 645 N.W.2d 777, 789 (Neb. 2002)	Expert Witness; Jury Instructions	Holding that trial court did not err in denying defendant's request for proposed jury instruction on reliability of eyewitness identification and in denying expert testimony on same matter.
NV	White v. State, 926 P.2d 291, 292 (Nev. 1996)	Expert Witness	Holding that trial court did not abuse its discretion in denying expert testimony on reliability of eyewitness identification because three different witnesses identified defendant and distinguishing facts from prior ruling.
NV	Nevius v. State, 699 P.2d 1053, 1060 (Nev. 1985)	Jury Instructions	Holding that district court did not err in refusing to allow defendant's proposed jury instructions on eyewitness identification.
NH	State v. Burke, 448 A.2d 962, 966-67 (N.H. 1982)	Jury Instructions	Holding that trial court's refusal to admit jury instructions that would mention factors to consider in reliability of eyewitness identification was proper.
NH	State v. Martin, 200 A.3d 365, 373-74 (N.H. 2018)	Jury Instructions	Holding that trial court did not err in refusing to instruct jury to consider intoxication when evaluating eyewitness testimony.
NJ	State v. Anthony, 204 A.3d 229, 245 (N.J. 2019)	Jury Instructions; Expert Witness; Pre-trial Reliability Hearings	Concluding that defendants are entitled to pretrial hearing on witness identification admissibility where there is no electronic or contemporaneous written recording of identification procedure and permitting court in its discretion to strike identification evidence without hearing.
NM	State v. Scott, No. 34350, mem. op. at 26-27 (N.M. Ct. App. May 29,	Jury Instructions	Holding that district court did not err in rejecting defendant's jury instructions on eyewitness evidence because they could

State	Citation	Issue (Expert Witness, Hearings, Jury Instructions, Other)	Ruling
	2018) (non-precedential), 2018 WL 2999825		be considered confusing for reasonable juror.
NY	People v. LeGrand, 867 N.E.2d 374, 380 (N.Y. 2007)	Expert Witness	Holding that where case turns on accuracy of eyewitness identifications and there is little to no corroborating evidence connecting defendant to crime, it is abuse of discretion for trial court to exclude expert testimony on reliability of eyewitness identifications.
NY	People v. Boone, 91 N.E.3d 1194, 1199 (N.Y. 2017)	Jury Instructions	Holding that when identification is issue in criminal case and identifying witness and defendant appear to be of different races, party is entitled to jury instruction on cross-racial identification upon request.
NC	State v. Lee, 572 S.E.2d 170, 175-75 (N.C. Ct. App. 2002)	Expert Witness	Holding that trial court did not err in excluding expert testimony on reliability of eyewitness identification because overwhelming evidence of defendant's guilt was sufficient to permit jury to draw inferences without aid of expert testimony and expert testimony was likely to confuse jury.
NC	State v. Watlington, 759 S.E.2d 116, 125-30 (N.C. Ct. App. 2014)	Jury Instructions	Holding that trial court did not err in refusing to give defendant's requested jury instruction on how jury should evaluate credibility of eyewitness identification testimony.
ND	State v. Fontaine, 382 N.W.2d 374, 377-78 (N.D. 1986)	Expert Witness	Holding that lower court's decision to admit expert testimony regarding reliability of eyewitness identification and not to permit expert witness to answer hypothetical question was not abuse of discretion.
OH	State v. Buell, 489 N.E.2d 795, 803-04 (Ohio 1986), <i>superseded by rule on other grounds</i> , Ohio R. Evid. 702, <i>as noted in State v. Riley</i> , 2007-Ohio-879, No. WD-03-	Expert Witness	Holding that expert testimony regarding factors that may affect accuracy of typical eyewitness identification is admissible, but that expert testimony regarding credibility of witness's identification testimony is inadmissible under Ohio Rules of Evidence.

State	Citation	Issue (Expert Witness, Hearings, Jury Instructions, Other)	Ruling
	076, 2007 WL 625898		
OH	State v. Pettiford, 2d Dist. Montgomery, No. 27490, 2019-Ohio-892, at ¶ 3, 2019 WL 1224626	Jury Instructions; Expert Witness	Holding that trial court erred in instructing jury on memory science studies.
OK	Torres v. State, 1998 OK CR 40, ¶¶ 56-57, 962 P.2d 3, 20	Expert Witness	Holding that while expert testimony regarding reliability of eyewitness identification may have been admissible in this case, defendant neglected to show how failure to present such expert evidence prejudiced him and thus he did not receive ineffective trial counsel.
OK	Mason v. State, 2018 OK CR 37, ¶ 35, 433 P.3d 1264, 1274	Jury Instructions	Concluding that trial court did not err in failing to give jury, sua sponte, cautionary instruction about reliability of eyewitness identification.
OR	State v. Lawson, 291 P.3d 673, 695-97 (Or. 2012) (en banc)	Expert Witness; Jury Instructions	Ruling that intermediate remedies like expert testimony and jury instructions should be available even if trial judge concludes that witness identification is admissible.
PA	Commonwealth v. Walker, 92 A.3d 766, 780 (Pa. 2014)	Expert Witness	Holding that admission of expert testimony regarding eyewitness identification was no longer per se impermissible under Pennsylvania Rule of Evidence 702, leaving admissibility of such expert testimony to trial court's discretion.
RI	State v. Werner, 851 A.2d 1093, 1103 (R.I. 2004)	Expert Witness; Jury Instructions	Holding that trial court did not abuse its discretion in denying expert testimony on reliability of eyewitness identification.
RI	State v. Fuentes, 162 A.3d 638, 646 (R.I. 2017)	Jury Instructions	Holding that trial court did not err in denying defendant's request for proposed jury instruction on eyewitness identification.
SC	State v. Whaley, 406 S.E.2d 369, 372 (S.C. 1991)	Expert Witness	Holding that it was abuse of discretion to exclude expert testimony on reliability of eyewitness identification because case's main issue was assailant's identity and only evidence establishing defendant as assailant was testimony of two eyewitnesses.

State	Citation	Issue (Expert Witness, Hearings, Jury Instructions, Other)	Ruling
SC	State v. Green, 770 S.E.2d 424, 431 (S.C. Ct. App. 2015)	Jury Instruction	Holding that trial court did not err in refusing to give defendant's proposed jury instruction in addition to standard identification charge.
SD	State v. Red Star, 467 N.W.2d 769, 771 (S.D. 1991), <i>superseded by rule</i> , S.D. R. Evid. 404(b), <i>as noted in In re Estate of Duebendorfer</i> , 2006 SD 79, 721 N.W.2d 438	Expert Witness	Holding that trial court did not abuse its discretion in denying expert testimony on reliability of eyewitness identification because case's evidence was not beyond understanding of layperson.
TN	State v. Copeland, 226 S.W.3d 287, 299-302 (Tenn. 2007)	Expert Witness	Holding that expert testimony regarding eyewitness identification is allowed where its exclusion is not harmless.
TN	State v. Dyle, 899 S.W.2d 607, 612 (Tenn. 1995)	Jury Instructions	Concluding that pattern identity instruction in Tennessee is inadequate where identity is a material issue and promulgating model instruction that must be given when identification is material issue.
TX	Nations v. State, 944 S.W.2d 795, 802 (Tex. Ct. App. 1997)	Expert Witness	Holding that trial court erred in excluding expert testimony on reliability of eyewitness identification regardless of whether it was excluded because it was not relevant or not reliable.
TX	Arrellano v. State, 555 S.W.3d 647, 655 (Tex. Ct. App. 2018)	Jury Instructions	Holding that trial court properly refused to give proposed jury instruction on eyewitness testimony because instruction impermissibly singled out particular type of evidence and commented on how evidence should be weighed.
UT	State v. Clopten, 2009 UT 84, ¶ 29, 223 P.3d 1103	Expert Witness	Holding that in cases where eyewitnesses are identifying stranger and one or more established factors affecting accuracy are present, testimony of qualified expert is both reliable and helpful.
UT	State v. Long, 721 P.2d 483, 492 (Utah 1986)	Jury Instructions	Abandoning discretionary approach to cautionary jury instructions about eyewitness testimony and holding that courts must give cautionary jury instruction whenever eyewitness identification is a

State	Citation	Issue (Expert Witness, Hearings, Jury Instructions, Other)	Ruling
			central issue and such instruction is requested by defense.
VT	State v. Percy, 595 A.2d 248, 253 (Vt. 1990)	Expert Witness	Holding that trial court did not abuse its discretion in excluding expert testimony on reliability of eyewitness identification because testimony would not have aided jury in deliberations.
VA	Rodriguez v. Commonwealth, 455 S.E.2d 724, 727-28 (Va. Ct. App. 1995)	Expert Witness	Holding that refusal to admit expert testimony on eyewitness identification was within discretion of trial court.
VA	Payne v. Commonwealth, 794 S.E.2d 577, 586 (Va. 2016)	Jury Instructions	Concluding that eyewitness-specific jury instructions are neither required nor prohibited where appropriate in given case.
WA	State v. Cheatam, 81 P.3d 830, 845 (Wash. 2003) (en banc)	Expert Witness	Holding that excluding expert testimony on reliability of eyewitness identification was not abuse of discretion.
WA	State v. Jordan, 564 P.2d 340, 341 (Wash. Ct. App. 1977)	Jury Instructions	Holding that trial judge's refusal to give the "'Telfaire' instruction" was not in error and weaknesses in eyewitness identification should be developed through cross-examination or properly left to closing arguments.
WV	State v. Utter, No. 13-0479, 2014 WL 1673025, at *3 (W. Va. Apr. 25, 2014)	Expert Witness	Holding that circuit court did not abuse its discretion in denying admissibility of expert testimony on reliability of eyewitness identification.
WI	Hampton v. State, 285 N.W.2d 868, 875 (Wis. 1979)	Expert Witness; Jury Instructions	Holding that trial court did not abuse its discretion in limiting expert witness's testimony on reliability of eyewitness identification to factors that affect human perception and memory or in refusing to allow jury instructions regarding reliability of eyewitness identification.
WI	State v. Hamm, 430 N.W.2d 584, 593 (Wis. Ct. App. 1988)	Expert Witness	Holding that admission or exclusion of expert testimony on reliability of eyewitness identification is left to trial court's discretion.

State	Citation	Issue (Expert Witness, Hearings, Jury Instructions, Other)	Ruling
WI	State v. Shomberg, 2006 WI 9, ¶ 17, 288 Wis. 2d 1, 709 N.W.2d 370	Expert Witness	Stating that “[w]ere this case to come before the circuit court today, given the developments that have occurred in the interim, it is highly likely that the judge would have allowed the expert to testify on factors that influence identification and memory.”
WI	State v. Williamson, 267 N.W.2d 337, 347-48 (Wis. 1978)	Jury Instruction	Holding that standard jury instruction on eyewitness identification and credibility of witnesses sufficiently informed jury and that trial court did not err in refusing proposed instructions.
WY	Engberg v. Meyer, 820 P.2d 70, 79-80 (Wyo. 1991)	Expert Witness	Holding that trial court’s refusal to admit expert testimony regarding reliability of eyewitness identification was proper and within its discretion.

APPENDIX D.  
STATE JURY INSTRUCTIONS ON EYEWITNESS EVIDENCE

State	Type of Instruction	Cite and Text Excerpt
AL	No pattern jury instruction on eyewitness identification testimony.	
AK	Revised and detailed pattern jury instruction on eyewitness identification testimony.	In 2016, the Alaska Supreme Court declared a new test for admissibility of eyewitness identification evidence and directed the Criminal Pattern Jury Instruction Committee to draft a model instruction consistent with the ruling and summarizing the state of scientific knowledge. <i>Young v. State</i> , 374 P.3d 395, 428 (Alaska 2016) (holding that trial courts should issue specific jury instruction setting out relevant factors affecting reliability when eyewitness identification is significant issue in case and referring issue to Committee to draft model instruction). The Committee released its new instruction in 2020, describing estimator and system variables in great detail. ALASKA CRIM. PATTERN JURY INSTRUCTIONS § 1.24 (CRIM. PATTERN JURY INSTRUCTIONS COMM. 2020).
AZ	Pattern instruction resembling <i>Biggers</i> factors and <i>Telfaire</i> .	In deciding the facts of this case, you should consider what testimony to accept, and what to reject. You may accept everything a witness says, or part of it, or none of it. In evaluating testimony, you should use the tests for accuracy and truthfulness that people use in determining matters of importance in everyday life, including such factors as: the witness's ability to see or hear or know the things the witness testified to; the quality of the witness's memory; the witness's manner while testifying; whether the witness has any motive, bias, or prejudice; whether the witness is contradicted by anything the witness said or wrote before trial, or by other evidence; and the reasonableness of the witness's testimony when considered in the light of the other evidence. Consider all of the evidence in light of reason, common sense, and experience. PRELIM. ARIZONA JURY INSTRUCTIONS—CRIM. § 10 (5th ed. 2019); <i>see also id.</i> § 45 (brief instruction applying <i>Telfaire</i> ).
AR	No pattern jury instruction on eyewitness identification testimony.	
CA	Pattern instruction	You have heard eyewitness testimony identifying the defendant. As with any other witness, you must decide

State	Type of Instruction	Cite and Text Excerpt
	resembling <i>Biggers</i> factors and <i>Telfaire</i> .	<p>whether an eyewitness gave truthful and accurate testimony.</p> <p>In evaluating identification testimony, consider the following questions:</p> <ul style="list-style-type: none"> <li>• Did the witness know or have contact with the defendant before the event?</li> <li>• How well could the witness see the perpetrator?</li> <li>• What were the circumstances affecting the witness's ability to observe, such as lighting, weather conditions, obstructions, distance, [and] duration of observation, [and any other relevant circumstance]?</li> <li>• How closely was the witness paying attention?</li> <li>• Was the witness under stress when he or she made the observation?</li> <li>• Did the witness give a description and how does that description compare to the defendant?</li> <li>• How much time passed between the event and the time when the witness identified the defendant?</li> <li>• Was the witness asked to pick the perpetrator out of a group?</li> <li>• Did the witness ever fail to identify the defendant?</li> <li>• Did the witness ever change his or her mind about the identification?</li> <li>• How certain was the witness when he or she made an identification?</li> <li>• Are the witness and the defendant of different races?</li> <li>• [Was the witness able to identify other participants in the crime?]</li> <li>• [Was the witness able to identify the defendant in a photographic or physical lineup?]</li> <li>• [Insert other relevant factors raised by the evidence.]</li> <li>• Were there any other circumstances affecting the witness's ability to make an accurate identification?</li> </ul> <p>The People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime. If the People have not met this burden, you must find the defendant not guilty.</p> <p>REVISED JUD. COUNCIL OF CALIFORNIA CRIM. JURY INSTRUCTIONS § 315 (ADVISORY COMM. ON CRIM. JURY INSTRUCTIONS 2021).</p> <p>The court has no sua sponte duty to give an instruction on eyewitness testimony.</p> <p>...</p> <p>The court should give the unbracketed factors, if requested, in every case in which identity is disputed. The bracketed factors should be given if requested and factually appropriate. A blank space has also been provided for the court to</p>

State	Type of Instruction	Cite and Text Excerpt
		include any factual circumstances relevant to eyewitness identification that have not been addressed in the preceding list of factors. <i>Id.</i> § 315, bench note, cmt.
CO	No eyewitness instructions, but general instructions on credibility of witnesses.	COLORADO JURY INSTRUCTIONS CRIM. § E:05 (2018) (“For each witness, consider that person’s knowledge, motive, state of mind, demeanor, and manner while testifying. Consider the witness’s ability to observe, the strength of that person’s memory, and how that person obtained his or her knowledge.”).
CT	Revised pattern instruction.	CONNECTICUT JUD. BRANCH CRIM. JURY INSTRUCTIONS § 2.6-4 (2021) (providing detailed instructions regarding the observation’s circumstances, the identification’s circumstances, and witness’ credibility).
DE	Pattern instruction but with no specific factors.	An issue in this case is the identification of the defendant. To find the defendant guilty, you must be satisfied, beyond a reasonable doubt, that the defendant has been accurately identified, that the wrongful conduct charged in this case actually took place, and that the defendant was in fact the person who committed the act. If there is any reasonable doubt about the identification of the defendant, you must give the defendant the benefit of such doubt and find the defendant not guilty. PATTERN CRIM. JURY INSTRUCTIONS OF THE SUPERIOR CT. OF DELAWARE § 4.9 (4th ed. 2016).
D.C.	Pattern instruction resembling <i>Biggers</i> factors and <i>Telfaire</i> .	A number of factors may affect the accuracy of an identification of [ <i>name of defendant</i> ] by an alleged eyewitness. 1. The witness’s opportunity to observe the criminal acts and the person committing them, including, but not limited to, the length of the encounter, the distance between the various parties, the lighting conditions at the time, and the witness’s state of mind at the time of the offense; 2. Any subsequent identification and the circumstances surrounding that identification, including the length of time that elapsed between the crime and the identification, the witness’s state of mind when making the identification, any suggestive circumstances that may have influenced the witness[, and any statements or actions by law enforcement officers concerning the identification]; [and] [3. Any failure of the witness to identify [ <i>name of defendant</i> ] as the person who committed the offense;] [and] [4. An identification by the witness of another person as the person who committed the offense;] [and] 5. Any other factors that have been brought to your attention by [specialized opinion testimony and] the

State	Type of Instruction	Cite and Text Excerpt
		<p>remaining evidence that you conclude bears upon the accuracy of the witness's in-court or out-of-court identification of the defendant.</p> <p>Based upon any identification(s) by the witness(es) and all additional evidence you have heard, you must be satisfied beyond a reasonable doubt that [<i>name of defendant</i>] is the person who committed this offense before you may convict him/her. If the evidence concerning the identification of the defendant is not convincing beyond a reasonable doubt, you must find [<i>name of defendant</i>] not guilty.</p> <p>CRIM. JURY INSTRUCTIONS FOR D.C. § 2.230 (5th ed. 2021).</p>
FL	Revised pattern instruction modifying <i>Biggers</i> factors.	<p><i>Give if eyewitness identification is a disputed issue and if requested.</i></p> <p>You have heard testimony of eyewitness identification. In deciding how much weight to give to this testimony, you may consider the various factors mentioned in these instructions concerning credibility of witnesses. In addition to those factors, in evaluating eyewitness identification testimony, you may also consider:</p> <ol style="list-style-type: none"> <li>1. The capacity and opportunity of the eyewitness to observe the offender based upon the length of time for observation and the conditions at the time of observation, including lighting and distance.</li> <li>2. Whether the identification was the product of the eyewitness's own recollection or was the result of influence or suggestiveness.</li> <li>3. The circumstances under which the defendant was presented to the eyewitness for identification.</li> <li>4. Any inconsistent identifications made by the eyewitness.</li> <li>5. Any instance in which the eyewitness did not make an identification when given the opportunity to do so.</li> <li>6. The witness's familiarity with the subject identified.</li> <li>7. Lapses of time between the event and the identification[s].</li> <li>8. Whether the eyewitness and the offender are of different races or ethnic groups, and whether this may have affected the accuracy of the identification.</li> <li>9. The totality of circumstances surrounding the eyewitness's identification.</li> </ol> <p>FLORIDA STANDARD JURY INSTRUCTIONS FOR CRIM. CASES § 3.9(c) (2021).</p>
GA	Revised pattern instruction modifying <i>Biggers</i> factors.	<p>Identity is a question of fact for you to determine. Your determination of identity is dependent upon the credibility of the witness or witnesses offered for this purpose. You should consider all of the factors previously charged you regarding credibility of witnesses.</p>

State	Type of Instruction	Cite and Text Excerpt
		<p>Some, but not all, of the factors you may consider in assessing reliability of identification are</p> <ol style="list-style-type: none"> <li>1) the opportunity of the witness to view the alleged perpetrator at the time of the alleged incident,</li> <li>2) the witness's degree of attention toward the alleged perpetrator at the time of the alleged incident,</li> <li>3) the possibility of mistaken identity,</li> <li>4) whether the witness's identification may have been influenced by factors other than the view that the witness claimed to have,</li> <li>5) whether the witness on any prior occasion did not identify the defendant in this case as the alleged perpetrator, and</li> <li>6) the length of the time between the crime and the out-of-court identification.</li> </ol> <p><sup>2</sup> GEORGIA SUGGESTED PATTERN JURY INSTRUCTIONS: CRIM. CASES § 1.35.10 (4th ed. 2021) (citations omitted).</p>
HI	Revised pattern instruction modifying <i>Biggers</i> factors.	<p>The burden of proof is on the prosecution with reference to every element of a crime charged, and this burden includes the burden of proving beyond a reasonable doubt the identity of the defendant as the person responsible for the crime charged.</p> <p>You must decide whether an eyewitness gave accurate testimony regarding identification. In evaluating identification testimony, you may consider the following factors:</p> <ul style="list-style-type: none"> <li>The opportunity of the witness to observe the person involved in the alleged criminal act;</li> <li>The stress, if any, to which the witness was subject at the time of the observation;</li> <li>The witness's ability, following the observation, to provide a description of the person;</li> <li>The extent to which the defendant fits or does not fit the description of the person previously given by the witness;</li> <li>The cross-racial or ethnic nature of the identification;</li> <li>The witness's capacity to make an identification;</li> <li>Evidence relating to the witness's ability to identify other participants in the alleged criminal act;</li> <li>Whether the witness was able to identify the person in a photographic or physical lineup;</li> <li>The period of time between the alleged criminal act and the witness's identification;</li> <li>Whether the witness had prior contacts with the person;</li> <li>The extent to which the witness is either certain or uncertain of the identification and whether the witness's</li> </ul>

State	Type of Instruction	Cite and Text Excerpt
		<p>assertions concerning certainty or uncertainty are well-founded;  Whether the witness's identification is in fact the product of his/her own recollection; and  Any other evidence relating to the witness's ability to make an identification.</p> <p>Notes  This instruction is based on the model instruction approved in <i>State v. Cabagbag</i>, 277 P.3d 1027 (Haw. 2012). <i>Cabagbag</i> held that (1) in criminal cases, the circuit courts must give the jury a specific eyewitness identification instruction whenever identification evidence is a central issue in the case, and it is requested by the defendant, [and] (2) a circuit court may, in the exercise of its discretion, give the instruction if it believes the instruction is otherwise warranted in a particular case . . . <i>Id.</i> at 1029.  The court may wish to delete from the instruction those listed factors that do not apply in a given case.  COMPENDIUM OF THE HAWAI'I PATTERN JURY INSTRUCTIONS—CRIM. § 3.19 (2021).</p>
ID	No pattern instruction.	
IL	Pattern instruction resembling <i>Biggers</i> factors.	<p>When you weigh the identification testimony of a witness, you should consider all the facts and circumstances in evidence, including, but not limited to, the following:</p> <ul style="list-style-type: none"> <li>[1] The opportunity the witness had to view the offender at the time of the offense.</li> <li>[2] The witness's degree of attention at the time of the offense.</li> <li>[3] The witness's earlier description of the offender.</li> <li>[4] The level of certainty shown by the witness when confronting the defendant.</li> <li>[5] The length of time between the offense and the identification confrontation.</li> </ul> <p>. . . This new instruction simply lists factors well-established by case law. . . . The Committee believes this instruction would serve the interests of justice by offering guidance in an area that contains complexities and pitfalls not readily apparent to some jurors.  Give this instruction when identification is an issue.  See Instruction 3.15A when the identification evidence involves law-enforcement conducted line-up procedures as set forth in Article 107A of the Code of Criminal Procedure (725 ILCS 5/107A-0.1 <i>et seq.</i>).  ILLINOIS PATTERN JURY INSTRUCTIONS § 3.15 (2017) (citing <i>Manson v. Brathwaite</i>, 432 U.S. 98 (1977); <i>People v. Manion</i>, 367 N.E.2d 1313 (Ill. 1977); <i>People v. Slim</i>, 537 N.E.2d 317 (Ill. 1989)).</p>

State	Type of Instruction	Cite and Text Excerpt
IN	No pattern instruction.	
IA	Pattern instruction resembling <i>Biggers</i> factors and <i>Telfaire</i> .	<p>The reliability of eyewitness identification has been raised as an issue. Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to see the person at the time of the crime and to make a reliable identification later.</p> <p>In evaluating the identification testimony of a witness, you should consider the following:</p> <ol style="list-style-type: none"> <li>1. If the witness had an adequate opportunity to see the person at the time of the crime. You may consider such matters as the length of time the witness had to observe the person, the conditions at that time in terms of visibility and distance, and whether the witness had known or seen the person in the past.</li> <li>2. If an identification was made after the crime, you shall consider whether it was the result of the witness's own recollection. You may consider the way in which the defendant was presented to the witness for identification, and the length of time that passed between the crime and the witness's next opportunity to see the defendant.</li> <li>3. An identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness.</li> <li>4. Any occasion in which the witness failed to identify the defendant or made an inconsistent identification.</li> </ol> <p>IOWA CRIM. JURY INSTRUCTIONS § 200.45 (2019).  <i>Id.</i> (citing <i>State v. Tobin</i>, 338 N.W.2d 879 (Iowa 1983)).</p>
KS	Revised pattern instruction resembling modified <i>Biggers</i> factors and <i>Telfaire</i> .	<p>The law places the burden upon the State to identify the defendant. The law does not require the defendant to prove (he) (she) has been wrongly identified. In weighing the reliability of eyewitness identification testimony, you should determine whether any of the following factors existed and, if so, the extent to which they would affect accuracy of identification by an eyewitness. Factors you may consider are:</p> <ol style="list-style-type: none"> <li>1. The opportunity the witness had to observe. This includes any physical condition which could affect the ability of the witness to observe, the length of the time of observation, and any limitations on observation like an obstruction or poor lighting;</li> <li>2. The emotional state of the witness at the time including that which might be caused by the use of a weapon or a threat of violence;</li> <li>3. Whether the witness had observed the defendant(s) on earlier occasions;</li> </ol>

State	Type of Instruction	Cite and Text Excerpt
		<p>4. Whether a significant amount of time elapsed between the crime charged and any later identification;</p> <p>5. Whether the witness ever failed to identify the defendant(s) or made any inconsistent identification;</p> <p>6. Whether there are any other circumstances that may have affected the accuracy of the eyewitness identification.</p> <p>. . . This instruction should be given whenever the trial judge believes there is any serious question about the reliability of eyewitness identification testimony. . . . However, unless there is evidence which causes the trial court to question the reliability of the eyewitness identification, this instruction should not be given.</p> <p>PATTERN INSTRUCTIONS KANSAS CRIM. § 51.110 (4th ed. 2021) (citing <i>State v. Willis</i>, 731 P.2d 287 (Kan. 1987); <i>State v. Harris</i>, 970 P.2d 519 (Kan. 1998)).</p>
KY	No pattern instruction.	<p>“It is improper to give a reasonable doubt instruction concerning eyewitness identification, since such would give undue emphasis to a particular aspect of the evidence.” KENTUCKY INSTRUCTION TO JURIES – CRIM. § 1.09 (2021).</p>
LA	No pattern instruction.	<p>In evaluating the testimony of a witness, you may consider his [her] ability and opportunity to observe and remember the matter about which he [she] testified, his [her] manner while testifying, any reason he [she] may have for testifying in favor of or against the state or the defendant, and the extent to which the testimony is supported or contradicted by other evidence.</p> <p>. . . The subject of special jury instructions on the credibility and accuracy of eyewitness identification evidence is a continuing subject of discussion in the national jurisprudence and some courts have set forth model instructions which may or must be given under various circumstances.</p> <p>LOUISIANA CIV. L. TREATISE, CRIM. JURY INSTRUCTIONS § 3:4 (3d ed. 2020).</p>
ME	Revised pattern instruction resembling <i>Biggers</i> factors and <i>Telfaire</i> .	<p>Alternative A:</p> <p>Testimony by a witness as to identity must be received with caution and scrutinized with care. The [government’s] [State’s] burden of proof extends to every element of each crime charged, including the burden of proving beyond a reasonable doubt the identity of an alleged perpetrator of an offense.</p> <p>You may consider the following in evaluating the accuracy of an eyewitness identification: [risks of cross-racial identification] [risks of identification under stress] [at best, weak correlation between the witness’s confidence and accuracy of the identification] [the influence of suggestive identification circumstances].</p> <p>Alternative B:</p>

State	Type of Instruction	Cite and Text Excerpt
		<p>You should carefully consider any testimony relating to eye witness identification. For instance, you should consider the following in determining the accuracy of any eye witness identification[:] whether the accuracy of an eye witness identification may be affected by the fact that the person identified is of a different race, which may make it more difficult to identify an individual, whether the accuracy of an eye witness identification may be affected by the circumstances under which it was made, how much weight, if any, you should give to the amount of certainty expressed by a witness given that there may not be a correlation between the reliability of an eye witness identification and the amount of certainty expressed by the witness in making that identification. It is up to you to consider those issues and evaluate whether those affect any eye witness identification. . . . The representative instruction is presented in two alternatives. Either may be acceptable, depending on the circumstances of the case. . . . The trend toward use of jury instructions addressing credibility issues based on social science research, if there is a trend, bears watching, as other areas for possible instruction on credibility issues based on social science research come to mind.</p> <p>MAINE JURY INSTRUCTION MANUAL § 6-22A (2022).</p>
MD	Revised pattern instruction resembling <i>Biggers</i> factors.	<p>The burden is on the State to prove beyond a reasonable doubt that the offense was committed and that the defendant was the person who committed it. You have heard evidence about the identification of the defendant as the person who committed the crime. In assessing the accuracy and reliability of an identification, you should consider all the circumstances surrounding the identification.</p> <p>Among the circumstances you should consider are:</p> <ol style="list-style-type: none"> <li>(1) The opportunity of the witness to observe the person who committed the crime, including <ol style="list-style-type: none"> <li>(a) the length of time the witness observed the person;</li> <li>(b) the distance between the witness and the person;</li> <li>(c) the extent to which the person's features were visible;</li> <li>(d) the lighting conditions at the time of the observation;</li> <li>(e) whether there were any distractions occurring during the observation; and</li> <li>(f) any other circumstance that affected the witness's opportunity to observe the person committing the crime.</li> </ol> </li> </ol> <p>The ability of the witness to observe the person committing the crime. [In assessing ability to observe, you</p>

State	Type of Instruction	Cite and Text Excerpt
		<p>should also consider whether the witness was affected by:</p> <ul style="list-style-type: none"> <li>(a) stress or fright at the time of the observation;</li> <li>(b) personal motivations, biases or prejudices;</li> <li>(c) uncorrected visual defects;</li> <li>(d) fatigue or injury; and</li> <li>(e) drugs or alcohol.]</li> </ul> <p>(2) Other circumstances surrounding the identification, including:</p> <ul style="list-style-type: none"> <li>(a) the length of time between the crime and the identification;</li> <li>(b) [the manner in which the defendant was presented to the witness.]</li> <li>(c) [whether the identification procedure was suggestive and influenced the witness to identify the defendant.]</li> </ul> <p>(3) The accuracy of the witness's prior description(s) of the person.</p> <p>(4) The witness's degree of certainty. Certainty may or may not be a reliable indicator of accuracy. A person, in good faith, may be confident but mistaken.</p> <p>(5) [Prior identifications. You should consider whether the witness previously identified or failed to identify the defendant. You should also consider whether any prior identification was consistent or inconsistent with the identification that the witness made at trial.]</p> <p>(6) [Prior knowledge of defendant. You should also consider whether the witness knew the defendant or had previous exposure to [him][her].]</p> <p>(7) [The defendant and the witness who identified [him][her] are of different races. Some people have greater difficulty accurately identifying people of a different race than people of their own race. You should consider whether the difference in race between the defendant and the identifying witness affected the accuracy of the witness's identification [taking into account the witness' background and experience]].</p> <p>[The identification of the defendant by a single eyewitness as the person who committed the crime, if believed beyond a reasonable doubt, can be enough evidence to convict the defendant. However, you should examine the identification of the defendant with great care.]</p> <p>Finally, you should consider any other factors affecting the reliability of the witness's identification, including the witness's credibility or lack of credibility. It is for you to determine the reliability of any identification and give it the weight you believe it deserves.</p>

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		MARYLAND CRIM. PATTERN JURY INSTRUCTIONS § 3:30 (2d ed. 2021) (citing <i>Manson v. Brathwaite</i> , 432 U.S. 98 (1977); <i>Neil v. Biggers</i> , 409 U.S. 188 (1972)).
MA	Revised detailed instructions.	MASSACHUSETTS SUPERIOR CT. CRIM. PRACTICE JURY INSTRUCTIONS § 6.2 (3d ed. 2018) (expounding upon <i>Biggers</i> and <i>Telfaire</i> , with greater details about pretrial identification, including lineup procedures, and suggestive effect of showups).
MI	Pattern instruction resembling <i>Biggers</i> factors.	<p>(1) One of the issues in this case is the identification of the defendant as the person who committed the crime. The prosecutor must prove beyond a reasonable doubt that the crime was committed and that the defendant was the person who committed it.</p> <p>(2) In deciding how dependable an identification is, think about such things as how good a chance the witness had to see the offender at the time, how long the witness was watching, whether the witness had seen or known the offender before, how far away the witness was, whether the area was well-lighted, and the witness's state of mind at that time.</p> <p>(3) Also, think about the circumstances at the time of the identification, such as how much time had passed since the crime, how sure the witness was about the identification, and the witness's state of mind during the identification.</p> <p>[(4) You may also consider any times that the witness failed to identify the defendant, or made an identification or gave a description that did not agree with (his / her) identification of the defendant during trial.]</p> <p>(5) You should examine the witness's identification testimony carefully. You may consider whether other evidence supports the identification, because then it may be more reliable. However, you may use the identification testimony alone to convict the defendant, as long as you believe the testimony and you find that it proves beyond a reasonable doubt that the defendant was the person who committed the crime.</p> <p>MICHIGAN MODEL CRIM. JURY INSTRUCTIONS § 7.8 (2021).</p>
MN	Pattern instruction resembling <i>Biggers</i> factors and <i>Telfaire</i> .	Testimony has been introduced tending to identify the defendant as the person observed at the time of the alleged offense. You should carefully evaluate this testimony. In doing so, you should consider such factors as the opportunity of the witness to see the person at the time of the alleged offense, the length of time the person was in the witness's view, the circumstances of that view, including light conditions and the distance involved, the stress the witness was under at the time, and the lapse of time between the alleged offense and the identification. (If the witness has seen and identified the person before trial and after the alleged offense, you should also consider the

State	Type of Instruction	Cite and Text Excerpt
		<p>circumstances of that earlier identification, and you should consider whether in this trial the witness's memory is affected by that earlier identification.)</p> <p>10 MINNESOTA PRAC., JURY INSTRUCTION GUIDES—CRIM. § 3.19 (6th ed. 2021).</p>
MS	No pattern instruction.	
MO	Revised detailed jury instructions.	<p>Eyewitness identification must be evaluated with particular care.</p> <p>In order to determine whether an identification made by a witness is reliable or mistaken, you should consider all of the factors mentioned in Instruction No. 1 concerning your assessment of the credibility of any witness. You should also consider the following factors.</p> <p><i>One</i>, the witness's eyesight;</p> <p><i>Two</i>, the lighting conditions at the time the witness viewed the person in question;</p> <p><i>Three</i>, the visibility at the time the witness viewed the person in question;</p> <p><i>Four</i>, the distance between the witness and the person in question;</p> <p><i>Five</i>, the angle from which the witness viewed the person in question;</p> <p><i>Six</i>, the weather conditions at the time the witness viewed the person in question;</p> <p><i>Seven</i>, whether the witness was familiar with the person identified;</p> <p><i>Eight</i>, any intoxication, fatigue, illness, injury or other impairment of the witness at the time the witness viewed the person in question;</p> <p><i>Nine</i>, whether the witness and the person in question are of different races or ethnicities;</p> <p><i>Ten</i>, whether the witness was affected by any stress or other distraction or event, such as the presence of a weapon, at the time the witness viewed the person in question;</p> <p><i>Eleven</i>, the length of time the witness had to observe the person in question;</p> <p><i>Twelve</i>, the passage of time between the witness's exposure to the person in question and the identification of the defendant;</p> <p><i>Thirteen</i>, the witness's level of certainty of [his] [her] identification, bearing in mind that a person may be certain but mistaken;</p> <p><i>Fourteen</i>, the method by which the witness identified the defendant, including whether it was</p> <p>[i. at the scene of the offense;]</p> <p>[ii. (In a live or photographic lineup.) In determining the reliability of the identification made at the lineup,</p>

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		<p>you may consider such factors as the time elapsed between the witness's opportunity to view the person in question and the lineup, who was in the lineup, the instructions given to the witness during the lineup, and any other circumstances which may affect the reliability of the identification;]</p> <p>[iii (In a live or photographic showup.) A "show-up" is a procedure in which law enforcement presents an eyewitness with a single suspect for identification. In determining the reliability of the identification made at the show-up, you may consider such factors as the time elapsed between the witness's opportunity to view the person in question and the show-up, the instructions given to the witness during the show-up, and any other circumstances which may affect the reliability of the identification;]</p> <p><i>Fifteen</i>, any description provided by the witness after the event and before identifying the defendant;  <i>Sixteen</i>, whether the witness's identification of the defendant was consistent or inconsistent with any earlier identification(s) made by the witness; and  <i>Seventeen</i>, [other factors.] [any other factor which may bear on the reliability of the witness's identification of the defendant.]</p> <p>It is not essential the witness be free from doubt as to the correctness of the identification. However the state has the burden of proving the accuracy of the identification of the defendant to you, the jury, beyond a reasonable doubt before you may find [him] [her] guilty.</p> <p>MISSOURI APPROVED INSTRUCTIONS § 310.02 (2016).</p>
MT	No pattern instruction.	
NE	No pattern instruction.	
NV	No pattern instruction.	
NH	Pattern instruction resembling <i>Biggers</i> factors and <i>Telfaire</i> .	<p>One of the most important issues . . . is the identification of the defendant as the perpetrator of the crime. The State has the burden of proving identity beyond a reasonable doubt. It is not essential that a witness be free from doubt as to the correctness of his or her identification. However, you, the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict [him/her]. If you are not convinced beyond a reasonable doubt that the defendant was the person who committed the crime, you must find the defendant not guilty.</p> <p>The value of identification testimony depends on the opportunity the witness had to observe the person who</p>

State	Type of Instruction	Cite and Text Excerpt
		<p>committed the crime at the time of the crime and to make a reliable identification later. In appraising the identification testimony of a witness, you should consider the following:</p> <ol style="list-style-type: none"> <li>1. Did the witness have the capacity and an adequate opportunity to observe the person in question at the time of the crime? In determining this, you may consider such factors as: <ol style="list-style-type: none"> <li>a. The length of time available for the observation;</li> <li>b. The distance between the witness and the person observed;</li> <li>c. The lighting conditions;</li> <li>d. The witness's degree of attention to the person observed;</li> <li>e. The accuracy of any prior description of the alleged perpetrator;</li> <li>f. Whether the witness had an occasion to see or know the person identified in the past.</li> </ol> </li> </ol> <p>[In general, a witness bases any identification he or she makes on his or her perception through the use of his or her senses. Usually the witness identifies someone by the sense of sight - but this is not necessarily so, and he or she may use other senses].</p> <p>[You may also take into account that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one that results from the presentation of the defendant alone to the witnesses.]</p> <ol style="list-style-type: none"> <li>2. Was the identification made by the witness after the crime the product of his or her own recollection?</li> </ol> <p>[3. You may take into account any occasion in which the witness failed to make an identification of the defendant, or made an identification that was inconsistent with his or her identification at trial.]</p> <p>[3.[4.] Finally, you must consider the credibility of each identification witness in the same way as any other witness, including whether you consider the witness to be truthful and whether the witness had the capacity and opportunity to make a reliable observation on the matter covered in the identification testimony.</p> <p>I again emphasize that the State has the burden of proving identity beyond a reasonable doubt. If, after examining the evidence, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty.</p> <p>NEW HAMPSHIRE CRIM. JURY INSTRUCTIONS 29-31 (Tentative Draft 2010) (citations omitted).</p>

State	Type of Instruction	Cite and Text Excerpt
NJ	Revised detailed pattern instruction.	NEW JERSEY MODEL CRIM. JURY CHARGES (2012) (including instructions for whether identification was in court, out of court, both, or neither).
NM	No pattern instruction.	
NY	Revised pattern instruction.	<p>This charge is be used when identification is in issue and is premised solely on the testimony of one witness identifying the defendant as the person who committed the crime. . . . Further, the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person. Thus, in evaluating the accuracy of identification testimony, you should also consider such factors as:</p> <p>What were the lighting conditions under which the witness made his/her observation?</p> <p>What was the distance between the witness and the perpetrator?</p> <p>Did the witness have an unobstructed view of the perpetrator?</p> <p>Did the witness have an opportunity to see and remember the facial features, body size, hair, skin color, and clothing of the perpetrator?</p> <p>For what period of time did the witness actually observe the perpetrator? During that time, in what direction were the witness and the perpetrator facing, and where was the witness's attention directed?</p> <p>Did the witness have a particular reason to look at and remember the perpetrator?</p> <p>Did the perpetrator have distinctive features that a witness would be likely to notice and remember?</p> <p>Did the witness have an opportunity to give a description of the perpetrator? If so, to what extent did it match or not match the defendant, as you find the defendant's appearance to have been on the day in question?</p> <p>What was the mental, physical, and emotional state of the witness before, during, and after the observation? To what extent, if any, did that condition affect the witness's ability to observe and accurately remember the perpetrator?</p> <p>[NOTE: Add when applicable:</p> <p>Did the witness ever see the person identified prior to the day in question? If so, how many times did the witness see that person and under what circumstances? To what extent, if any, did those prior observations affect the witness's ability to accurately recognize and identify such person as the perpetrator?]</p> <p>When and under what circumstances did the witness identify the defendant? Was the identification of the defendant as the person in question suggested in some</p>

State	Type of Instruction	Cite and Text Excerpt
		<p>way to the witness before the witness identified the defendant, or was the identification free of any suggestion? . . .</p> <p>If, after careful consideration of the evidence, you are not satisfied that the identity of the defendant as the person who committed a charged crime has been proven beyond a reasonable doubt, then you must find the defendant not guilty of that charged crime.</p> <p>NEW YORK CRIM. JURY INSTRUCTIONS IDENTIFICATION – ONE WITNESS (4th ed. 2018) (citations omitted).</p>
NC	Revised pattern instruction with instruction on compliance with statutory lineup practices.	<p>A photo lineup conducted by a local law enforcement agency is required to meet all of the following requirements: . . .</p> <p>(3) Before a lineup, the eyewitness shall be instructed that:</p> <ol style="list-style-type: none"> <li>a. The perpetrator might or might not be presented in the lineup,</li> <li>b. The lineup administrator does not know the suspect's identity,</li> <li>c. The eyewitness should not feel compelled to make an identification,</li> <li>d. It is as important to exclude innocent persons as it is to identify the perpetrator, and</li> <li>e. The investigation will continue whether or not an identification is made.</li> </ol> <p>NORTH CAROLINA PATTERN JURY INSTRUCTIONS CRIM. § 105.65 (2010) (describing lineup requirements for jury).</p>
ND	No pattern instruction.	
OH	Revised pattern instruction modeled after <i>Telfaire</i> but also instruction on compliance with statutory lineup practices.	<p>(A) Some things you may consider in weighing the testimony of an identifying witness are:</p> <ol style="list-style-type: none"> <li>(1) the capacity of the witness, that is, the (<i>describe age of witness</i>) age, (<i>describe level of intelligence of witness</i>) intelligence, (<i>describe defective senses of witness, if any</i>), and the opportunity of the witness to observe;</li> <li>(2) the witness' degree of attention at the time the witness observed the offender;</li> <li>(3) the accuracy of the witness' prior description (or identification, if any);</li> <li>(4) whether the witness had had occasion to observe the defendant in the past;</li> <li>(5) the interval of time between the event and the identification; and</li> <li>(6) all surrounding circumstances under which the witness has identified the defendant (including deficiencies, if any, in lineup, photo display, or one-on-one identification).</li> </ol> <p>(B) If, after examining the testimony of the identifying witness you are not convinced beyond a reasonable</p>

State	Type of Instruction	Cite and Text Excerpt
		<p>doubt the defendant is the offender, you must find the defendant not guilty.</p> <p>OHIO JURY INSTRUCTIONS § 409.05 (2021).</p>
OK	<p>Pattern instruction modeled after <i>Telfaire</i>.</p>	<p>The State must prove the identity of the defendant as the person who committed the crime charged beyond a reasonable doubt. If after examining all of the evidence, you have a reasonable doubt as to whether the defendant was the individual who committed the crime charged, you must find the defendant not guilty.</p> <p>Eyewitness identifications are to be scrutinized with extreme care. Testimony as to identity is a statement of a belief by a witness. The possibility of human error or mistake and the probable likeness or similarity of objects and persons are circumstances that you must consider in weighing identification testimony. You should carefully consider the factors that bear upon the weight that you give to the identification testimony, such as: (1) whether the witness had an adequate opportunity to observe the subject clearly; (2) whether the witness is positive in the identification; (3) whether the witness's identification is weakened by a prior failure to identify the subject; (4) whether the witness's testimony remained positive and unqualified after cross-examination; and (5) whether the witness' prior <i>description/identification</i> of the <i>person/thing</i> was accurate.</p> <p>OKLAHOMA UNIF. JURY INSTRUCTIONS § 9-19 (2016).</p>
OR	<p>No pattern instruction on identification testimony.</p>	<p>OREGON UNIF. CRIM. JURY INSTRUCTIONS § 1006 (2020) (instructing jury that it may consider manner in which witness testifies, nature of that testimony, conflicting evidence, evidence of bias, character evidence, and evidence that witness has been convicted of a previous crime).</p>
PA	<p>Revised detailed pattern instruction.</p>	<p>In evaluating [his] [her] testimony, you should consider the following factors in addition to the other instructions I will have provided to you for judging the testimony of witnesses:</p> <ul style="list-style-type: none"> <li>a. Did the witness have a good opportunity and enough time to observe the perpetrator of the offense?</li> <li>b. Was there enough lighting for [him] [her] to make [his] [her] observations?</li> <li>c. Was [he] [she] close enough to the individual to note [his] [her] facial and other physical characteristics, as well as any clothing [he] [she] was wearing?</li> <li>d. Has [he] [she] made a prior identification of the defendant as the perpetrator of these crimes at any other proceeding?</li> <li>e. Was [his] [her] identification positive or was it qualified by any hedging or inconsistencies?</li> <li>f. Did the witness identify anyone else as the perpetrator during the course of this case?</li> </ul>

State	Type of Instruction	Cite and Text Excerpt
		<p>g. How attentive was the witness during the incident?</p> <p>h. Was the witness's focus affected by a visible weapon?</p> <p>i. Was the witness under high levels of stress during the incident? If so, did this affect the witness's ability to give an accurate identification?</p> <p>j. Was the witness intoxicated at the time of the identification?</p> <p>k. Did the race of the witness and the perpetrator have any bearing on the accuracy of the identification?</p> <p>If you consider the witness's level of certainty in making the identification, you should recognize that the level of certainty can change between the time of the initial identification and the later identification in court. Consider if the level of certainty was recorded by the police at the time of the initial identification, and if that differs from the level of certainty in the later identification in court. You may consider any reasons for any change in the witness's level of certainty between the initial identification and the later identification in court.</p> <p>If the police failed to record the initial level of certainty, you may consider any reason given by the police for their failure to record the witness's level of certainty at the time of the initial identification.</p> <p>Consider also any other evidence on the issue of the level of certainty of the in-court identification.</p> <p>If there was an initial identification by photographic display, you may consider the circumstances surrounding the identification on the question of the reliability of the identification. As previously mentioned, you may consider if the level of certainty was recorded. You may also consider how the photographs were displayed, what instructions were given to the witness, and whether the procedure was conducted by an officer who did not know which picture was the suspect's picture.</p> <p>2. Please consider that a victim or another witness can sometimes make a mistake when trying to identify the criminal. If certain factors are present, the accuracy of identification testimony is so doubtful that you must receive it with caution.</p> <p>Identification testimony must be received with caution  <i>[Use only what was raised by the evidence:]</i>          [if the witness because of bad position, poor lighting, or other reasons did not have a good opportunity to observe the criminal.]          [if the witness in [his] [her] testimony is not positive as to identity.]</p>

State	Type of Instruction	Cite and Text Excerpt
		<p>[if the witness's positive testimony as to identity is weakened [by qualifications, hedging, or inconsistencies in the rest of [his] [her] testimony.]</p> <p>[if [he] [she] did not identify the defendant, or identified someone else, as the criminal [at a lineup] [when shown photographs] <i>[give specifics]</i> before the trial.]</p> <p>[if, before the trial, the defendant's request for a [lineup] <i>[specify request]</i> to test the ability of the witness to make an identification was denied and the witness subsequently made a less reliable identification.][if, <i>[give specifics]</i>.]</p> <p><i>[First Alternative--Court rules as a matter of law that caution is required:]</i></p> <p>3. In this case [there was evidence that <i>[name of witness]</i> could not see the criminal clearly] <i>[give specifics]</i>. Therefore, you must consider with caution [his] [her] testimony identifying the defendant as the person who committed the crime.</p> <p><i>[Second Alternative--When there is a jury issue as to whether caution is required:]</i></p> <p>3. If you believe that [this factor is] [one or more of these factors are] present, then you must consider with caution <i>[name of witness]'s</i> testimony identifying the defendant as the person who committed the crime. If, however, you do not believe that [this factor] [at least one of these factors] is present, then you need not receive the testimony with caution; you may treat it like any other testimony.</p> <p>4. You should consider all evidence relevant to the question of who committed the crime, including the testimony of <i>[name of victim or witness]</i>, [and] [any evidence of facts and circumstances from which identity, or non-identity, of the criminal may be inferred] <i>[give other circumstances]</i>. You cannot find the defendant guilty unless you are satisfied beyond a reasonable doubt by all the evidence, direct and circumstantial, not only that the crime was committed but that it was the defendant who committed it.</p> <p>PENNSYLVANIA SUGGESTED STANDARD CRIM. JURY INSTRUCTIONS § 4.07A (2019).</p>
RI	No pattern instruction.	
SC	Pattern instruction using <i>Telfaire</i> .	<p>An issue in this case is the identification of the defendant as the perpetrator of the crime charged. The State of South Carolina has the burden of proving identity beyond a reasonable doubt. Identification testimony is an expression of belief or impression by a witness. You may consider the opportunity a witness had to observe the alleged offender at the time of the offense and to thereafter make an identification. It is for the jury to determine the</p>

State	Type of Instruction	Cite and Text Excerpt
		<p>accuracy of the identification of the defendant. You must consider the credibility of each identification witness in the same way as any other witness. You can consider his or her truthfulness as well as the capacity, opportunity and circumstances of the observation of the matters about which he or she testified.</p> <p>For information purposes only and for consideration in a special fact scenario, I include the <i>Telfaire</i> charge with exactitude.</p> <p>SOUTH CAROLINA JURY INSTRUCTIONS CRIM. § 6-1 (2d ed. 2007).</p>
SD	Pattern instruction but with no specific factors.	<p>As with any other witness, you must first decide whether the witness has testified honestly and truthfully. But you must do more than that.</p> <p>You must also decide whether the identification is accurate. In deciding those questions you should carefully consider all of the circumstances under which the witness made the observation of, and all of the circumstances under which the witness later identified the defendant as that person.</p> <p><b>South Dakota Criminal Pattern Jury Instructions § 1-15-16 (2019 Edition)</b></p>
TN	Pattern instruction using <i>Biggers</i> and <i>Telfaire</i>	<p>One of the issues in this case is the identification of the defendant as the person who committed the crime. The state has the burden of proving identity beyond a reasonable doubt. Identification testimony is an expression of belief or impression by the witness, and its value may depend upon your consideration of several factors. Some of the factors which you may consider are:</p> <ol style="list-style-type: none"> <li>(1) The witness' capacity and opportunity to observe the offender. This includes, among other things, the length of time available for observation, the distance from which the witness observed, the lighting, and whether the person who committed the crime was a prior acquaintance of the witness;</li> <li>(2) The degree of certainty expressed by the witness regarding the identification and the circumstances under which it was made, including whether it is the product of the witness' own recollection;</li> <li>(3) The occasions, if any, on which the witness failed to make an identification of the defendant, or made an identification that was inconsistent with the identification at trial;</li> <li>(4) The occasions, if any, on which the witness made an identification that was consistent with the identification at trial, and the circumstances surrounding such identifications; and</li> <li>(5) Any other factors fairly raised by the evidence.</li> </ol>

State	Type of Instruction	Cite and Text Excerpt
		<p>Again, the state has the burden of proving every element of the crime charged, and this burden specifically includes the identity of the defendant as the person who committed the crime for which [he] [she] is on trial. If after considering the identification testimony in light of all the proof you have a reasonable doubt that the defendant is the person who committed the crime, you must find the defendant not guilty.</p> <p>TENNESSEE PATTERN JURY INSTRUCTIONS—CRIM. § 42.05 (2022).</p>
TX	No pattern instruction.	
UT	Revised detailed pattern instruction.	CRIM. MODEL UTAH JURY INSTRUCTIONS CR 404 (2d ed. 2021).
VT	Pattern instruction using <i>Biggers</i> and <i>Telfaire</i> .	<p>The identification testimony presented to you in this case is an expression of belief or impression by each witness called on this issue. Its value depends on the ability of the witness to observe the suspect at the time of the alleged offense, and to make a reliable identification later. You may consider both the strength of the identification and the circumstances under which it was made.</p> <p>If you find that the witness's identification of (Def) _____ was influenced by the circumstances under which [he] [she] was asked to identify the suspect, then you should scrutinize the identification with great care. You may also consider the length of time that elapsed between the occurrence of the alleged offense, and the witness's next opportunity to see (Def) _____, as a factor bearing on the reliability of any identification.</p> <p>Finally, you must weigh the testimony of each identification witness in the same way that you would weigh the testimony of any witness. You should consider whether you find the witness to be generally truthful, and whether the witness had both the capacity and opportunity to make reliable observations regarding the identification.</p> <p>VERMONT CRIM. JURY INSTRUCTIONS § 1-5-601 (2003); <i>see also id.</i> § 1-5-605 (instructing the jury that it may consider the circumstances of lineup or photo array).</p>
VA	Revised pattern instruction.	VIRGINIA MODEL JURY INSTRUCTIONS—CRIM. INSTRUCTION § 2.800 (20th ed. 2019).
WA	Revised pattern instruction.	Eyewitness testimony has been received in this trial on the subject of the identity of the perpetrator of the crime charged. In determining the weight to be given to eyewitness identification testimony, in addition to the factors already given you for evaluating any witness's testimony,

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		<p>you may consider other factors that bear on the accuracy of the identification. These may include:</p> <ul style="list-style-type: none"> <li>• The witness’s capacity for observation, recall and identification;</li> <li>• The opportunity of the witness to observe the alleged criminal act and the perpetrator of that act;</li> <li>• The emotional state of the witness at the time of the observation;</li> <li>• The witness’s ability, following the observation, to provide a description of the perpetrator of the act;</li> <li>• [The witness’s familiarity or lack of familiarity with people of the [perceived] race or ethnicity of the perpetrator of the act;]</li> <li>• The period of time between the alleged criminal act and the witness’s identification;</li> <li>• The extent to which any outside influences or circumstances may have affected the witness’s impressions or recollection; and</li> <li>• Any other factor relevant to this question.</li> </ul> <p>WASHINGTON PATTERN JURY INSTRUCTIONS—CRIM. § 6.52 (5th ed. 2021).</p>
WV	Pattern instruction relying on <i>Telfaire/Biggers</i> factors.	WEST VIRGINIA CRIM. JURY INSTRUCTIONS § 5.05 55-56 (6th ed. 2003).
WI	Pattern instruction relying in part on <i>Telfaire</i> factors.	“The identification of the defendant is an issue in this case and you should give it your careful attention. You should consider the reliability of any identification made by a witness, whether made in or out of court.” WISCONSIN CRIM. JURY INSTRUCTIONS—CRIM. § JI-141 (2021) (allowing jury to consider nature and circumstances of observation, time elapsed between observation and identification, and factors which might affect both initial perception and memory).
WY	No pattern instruction.	

APPENDIX E.  
STATE AND FEDERAL MODEL EYEWITNESS IDENTIFICATION POLICIES

State	Citation
AR	IDENTIFICATION PROCESS (ARK. ASS'N OF CHIEFS OF POLICE 2019) (recommending procedures to reduce risk of tainting identification through suggestive conduct for each form of pretrial identification, particularly for photo lineups).
CO	MODEL POL'Y & FORMS FOR EYEWITNESS IDENTIFICATION (COLO. BEST PRACS. COMM. 2015).
CT	REP. TO THE JUD. COMM. OF THE CONN. GEN. ASSEMBLY (CONN. EYEWITNESS IDENTIFICATION TASK FORCE 2012) (reporting task force findings and recommendations for identification best practices).
DE	EYEWITNESS IDENTIFICATION - MODEL POL'Y (DEL. POLICE CHIEFS' COUNCIL & DEL. ATT'Y GEN.'S OFF. 2018).
FL	STANDARDS FOR FLORIDA STATE & LOCAL L. ENF'T AGENCIES IN DEALING WITH PHOTOGRAPHIC OR LIVE LINEUPS IN EYEWITNESS IDENTIFICATION (FLA. DEP'T OF L. ENF'T, FLA. SHERIFFS ASS'N, FLA. POLICE CHIEFS ASS'N & FLA. PROSECUTING ATTY'S ASS'N 2011); <i>see also</i> FLA. DEP'T OF L. ENF'T, FLA. SHERIFFS ASS'N, FLA. POLICE CHIEFS ASS'N & FLA. PROSECUTING ATTY'S ASS'N, COMMENTARY AND INSTRUCTIONS: INSTRUCTIONAL SUGGESTIONS 5 (2011).
GA	<i>Eyewitness Identification Training</i> , GA. PEACE OFFICER STANDARDS & TRAINING COUNCIL, <a href="https://www.gapost.org/eyewitness_training.html">https://www.gapost.org/eyewitness_training.html</a> [ <a href="https://perma.cc/6VX9-EGUV">https://perma.cc/6VX9-EGUV</a> ] (last visited Jan. 25, 2022).
KS	CONTEMP. ISSUES IN CRIM. INVESTIGATION & PROSECUTION WORKING GRP.: EYEWITNESS IDENTIFICATION MODEL POL'Y (KAN. CNTY. & DIST. ATT'YS ASS'N 2016) (outlining general and operational procedures for conducting and documenting eyewitness identifications).
KY	KENTUCKY LEAGUE OF CITIES IDENTIFICATION POL'Y (KY. LEAGUE OF CITIES 2015).
LA	LOUISIANA SHERIFFS' ASS'N SUGGESTED POL'Y ON EYEWITNESS IDENTIFICATION (LA. SHERIFF'S ASS'N 2018).
ME	MODEL POL'Y - EYEWITNESS IDENTIFICATION 63-64 (ME. CHIEFS OF POLICE ASS'N 2020).
MD	MODEL POL'YS FOR L. ENF'T IN MARYLAND 74-76 (MD. POLICE & CORR. TRAINING COMM'NS 2007).
MI	LAW ENF'T & EYEWITNESS IDENTIFICATIONS: A POL'Y WRITING GUIDE (STATE BAR OF MICH. 2015).
MN	MINNESOTA EYEWITNESS IDENTIFICATION STANDARD PROTOCOLS (MINN. BUREAU OF CRIM. APPREHENSION).
MT	EYEWITNESS IDENTIFICATION MODEL POL'Y (MONT. L. ENF'T ACAD. 2016).
NE	EYEWITNESS IDENTIFICATION MODEL POL'Y (NEB. COMM'N ON L. ENF'T & CRIM. JUST. 2016).
NV	<i>Nevada Eyewitness Identification Reform</i> , INNOCENCE PROJECT, <a href="https://www.innocenceproject.org/nevada">https://www.innocenceproject.org/nevada</a> [ <a href="https://perma.cc/A8AA-9DA6">https://perma.cc/A8AA-9DA6</a> ] (last visited Jan. 25, 2022) (describing adoption of identification policies statewide following 2011 legislation); <i>see also</i> CLARK CNTY. PROCEDURAL ORDER: WITNESS IDENTIFICATION (LAS VEGAS METRO. POLICE DEP'T 2014) (providing detailed instructions for conducting each form of eyewitness identification).

State	Citation
NH	MODEL POL'Y ON EYEWITNESS IDENTIFICATION (ATT'Y GEN. OF N.H. 2015).
NJ	ATT'Y GEN. GUIDELINES FOR PREPARING AND CONDUCTING PHOTO AND LIVE LINEUP IDENTIFICATION PROCS. (ATT'Y GEN. OF N.J. 2001).
NM	"In 2019, New Mexico passed a law that requires all agencies that conduct eyewitness identification procedures to adopt written policies for eyewitness identification procedures by January 1, 2020, and to provide their written policies to the Secretary of Public Safety no later than February 1, 2020." <i>New Mexico Eyewitness Identification Reform</i> , INNOCENCE PROJECT, <a href="https://innocenceproject.org/policy/new-mexico/">https://innocenceproject.org/policy/new-mexico/</a> [ <a href="https://perma.cc/6DGG-WTB2">https://perma.cc/6DGG-WTB2</a> ] (last visited Oct. 15, 2021).
NY	IDENTIFICATION PROCS.: PHOTO ARRAYS AND LINE-UPS MODEL POL'Y (N.Y. STATE MUN. POLICE TRAINING COUNCIL 2015).
RI	LINE-UP AND SHOW-UP PROCS. (EYEWITNESS IDENTIFICATION) (R.I. POLICE CHIEFS ASS'N 2011).
UT	UTAH R. EVID. 617 (instructing courts to exclude eyewitness identification evidence if the procedures used were overly suggestive and providing model procedures against which to judge the procedures used in the case).
VT	EYEWITNESS IDENTIFICATION SAMPLE MODEL POL'Y (VT. DEP'T OF PUBLIC SAFETY L. ENF'T ADVISORY Bd. 2015).
VA	MODEL POL'Y ON EYEWITNESS IDENTIFICATION (VA. DEP'T OF CRIM. JUST. SERVS. 2014).
WA	MODEL POL'Y, EYEWITNESS IDENTIFICATION – MINIMUM STANDARDS (WA. ASS'N OF SHERIFFS & POLICE CHIEFS 2015)
WI	MODEL POL'Y AND PROC. FOR EYEWITNESS IDENTIFICATION (ATT'Y GEN. OF Wis. 2010)
Fed.	EYEWITNESS IDENTIFICATION: PROCS. FOR CONDUCTING PHOTO ARRAYS (U.S. DOJ 2017)