



# OLR RESEARCH REPORT

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## **SUMMARY OF NEW JERSEY CASE ON EYEWITNESS IDENTIFICATION**

By: Christopher Reinhart, Chief Attorney

You asked for a summary of the New Jersey Supreme Court's ruling on eyewitness identification in *State v. Henderson* (2011 N.J. Lexis 927, 8/24/11).

### **SUMMARY**

In *State v. Henderson*, the New Jersey Supreme Court considered the legal standard for analyzing the reliability of eyewitness identification. The case involved a witness who identified the defendant as the person who held him at gunpoint in a hallway while a man in another room was shot.

The existing legal standard, based on U.S. and New Jersey Supreme Court rulings, requires courts to (1) determine if an identification procedure was impermissibly suggestive and (2) if so, weigh five reliability factors to decide whether to admit the evidence.

The Court looked at scientific research on eyewitness identification and the findings of a court-appointed special master. The Court reviewed research on two types of variables that affect the reliability of eyewitness identifications: system variables, which are factors like lineup procedures that are within the state's control, and estimator variables, which are factors related to the witness, perpetrator, and event such as distance, lighting, and stress.

The Court found that research widely accepted by the scientific community allowed it to reach conclusions on a number of these factors. It found the existing legal standard did not adequately meet its goals because it (1) does not offer an adequate measure of reliability, (2) does not sufficiently deter inappropriate police conduct, and (3) relies too heavily on the jury's ability to evaluate identification evidence. The Court revised the legal standard to require that all relevant system and estimator variables be explored at pretrial hearings if the defendant shows some evidence of suggestiveness. The Court also ordered new jury charges on eyewitness identification.

In this case, the Court found that suggestive comments by the investigating officers during the identification procedure entitled the defendant to a pretrial hearing, which he received. But the Court remanded the case for a new hearing based on its ruling. Except for the defendant and a companion case, the Court applied its ruling only to future cases beginning 30 days after the Court approves the new jury charges.

## **FACTS AND PROCEDURAL HISTORY**

James Womble was present when two men forcefully entered an apartment seeking money from Rodney Harper. Womble knew one of the men, George Clark. Clark shot Harper (who died nine days later) while the other person held Womble at gunpoint. Womble identified the defendant as the other person from a police photo array 13 days after the crime. The defendant claimed mistaken eyewitness identification.

The trial court held a hearing before admitting the identification and found that (1) a detective who was not the primary investigator presided over the identification procedure, (2) when Womble did not make a final identification the two investigating officers intervened and encouraged him to "do what you have to do and we'll be out of here," (3) Womble identified the defendant, and (4) Womble did not recant but testified that he felt one of the detectives was "nudging" him to choose the defendant and there was pressure to make a choice.

The trial court considered the two-part test based on U.S. and New Jersey Supreme Court precedents and found that nothing was improper or "so suggestive as to result in a substantial likelihood of misidentification at all."

Additional evidence about the identification was presented at trial, including Womble's testimony that he (1) ingested crack cocaine and alcohol on the night of the shooting, (2) interacted with the defendant in

a dark hallway, (3) remembered looking at the gun pointed at his chest, (4) smoked about two bags of crack cocaine each day after the shooting until police approached him on the 10<sup>th</sup> day, (5) did not see anyone he recognized when he first looked at the photo array, (6) “really had to search deep” to make a final identification, and (7) was “sure” of his identification and identified the defendant from the stand.

The jury convicted the defendant on some but not all of the charges. On appeal, the Appellate Division presumed that the identification procedure was impermissibly suggestive under the two-part test because the officers violated guidelines issued by the attorney general and returned the case to the trial court for a hearing to determine whether the evidence was otherwise admissible. The state petitioned the Supreme Court for review. The Supreme Court agreed to hear the case and appointed a special master to evaluate scientific and other evidence about eyewitness identification.

## **EXISTING TEST**

The New Jersey Supreme Court looked at the existing two-step test for admitting eyewitness identification evidence. Under this test, based on the U.S. Supreme Court’s ruling in *Manson v. Braithwaite* (432 U.S. 98 (1977)) as adopted by the New Jersey Supreme Court in *State v. Madison* (109 N.J. 223 (1988)), the court must determine (1) if the identification procedure was impermissibly suggestive and (2) if so, whether the procedure resulted in a “very substantial likelihood of irreparable misidentification.” In the second part of the test, the court considers the (1) witness’ opportunity to view the person at the time of the crime, (2) witness’ degree of attention, (3) accuracy of the witness’ prior description, (4) level of certainty at the time of the confrontation, and (5) time between the crime and confrontation.

## **RESEARCH**

The Supreme Court noted prior cases in which it stated that eyewitness misidentification is widely recognized as the greatest cause of wrongful convictions in the country. It stated that studies reveal “a troubling lack of reliability in eyewitness identifications.”

The Court stated that more than 2,000 studies related to eyewitness identification have been published in the last 30 years and research about memory since *Manson* casts doubt on some commonly held views and calls into question the current legal framework.

The special master found a broad consensus within the scientific community on the relevant scientific issues. The Court agreed with him that the science abundantly shows the vagaries of memory encoding, storage, and retrieval; malleability of memory; contaminating effects of extrinsic information; influence of police interview techniques and identification procedures; and other factors that bear on reliability.

### ***System Variables***

The Court considered the research and special master's findings on system variables, which are factors within the states control such as lineup procedures. The court reached the following conclusions.

1. Blind administration: The failure to perform blind lineups, when the administrator does not know who the suspect is (a "double blind" lineup) or knows who the suspect is but shields himself or herself from knowing where the suspect is in the lineup (a "blind lineup"), can increase the likelihood of misidentification.
2. Lineup construction: Courts should consider whether a lineup is poorly constructed when evaluating admissibility and when appropriate should tell jurors that poorly constructed or biased lineups can effect reliability and enhance a witness' confidence. The court should consider factors that can affect a lineup such as whether the suspect stands out, how many fillers are used, and whether there is more than one suspect in the lineup.
3. Avoiding feedback and recording confidence: Feedback confirming a witness' choice can distort memory. A witness' confidence in his or her choice must be recorded in his or her own words before any possible feedback. The court required, using its supervisory powers under the state constitution, police officers to (a) make a full record of the witness' statement of confidence and (b) avoid giving feedback.
4. Multiple viewings: Mugshot exposure occurs when the witness views a set of photos, makes no identification, and then selects someone seen in the earlier lineup in a later identification procedure. Mugshot commitment occurs when the witness identifies a photo that is then used in a later lineup. These practices can affect the reliability of a witness' ultimate identification and create a greater risk of misidentification. Officers should attempt to shield witnesses from viewing suspects or fillers more than once.

5. Simultaneous or sequential lineups: Research continues to develop comparing lineups where witnesses view all the people in the lineup at the same time or one at a time. There is insufficient authoritative evidence accepted by scientific experts to make a finding on these lineup procedures.
6. Composites: More accepted research is needed before making a finding on the effect composites have on a witness.
7. Showups or single person lineups that often occur at the scene of the crime soon after its commission: The record casts doubt on the reliability of showups when they occur more than two hours after an event. Administrators should instruct witnesses that the person they are about to view may or may not be the culprit and they should not feel compelled to make an identification. Lineups are preferable because showups, while sometimes necessary, are inherently suggestive.

### ***Estimator Variables***

The court considered the research and special master's findings on estimator variables, which are factors related to the witness, perpetrator, and event. The court reached the following conclusions.

1. Stress: High levels of stress are likely to affect the reliability of a witness' identification but there is no precise measure of "high stress" and it must be assessed in individual cases.
2. Weapon focus: When an interaction is brief, the presence of a visible weapon can affect the reliability of a witness' identification and the accuracy of his or her description of the perpetrator.
3. Duration: The amount of time an eyewitness observes an event may affect reliability. Witnesses consistently tend to overestimate short durations particularly when much was going on or the event was particularly stressful.
4. Distance and lighting: Greater distance and poor lighting can diminish reliability.
5. Witness characteristics: Characteristics like age and level of intoxication can affect reliability. But, based on the record, a standard jury instruction on the reliability of older eyewitnesses is not appropriate for all cases.

6. Characteristics of the perpetrator: Disguises and changes in facial features can affect a witness' ability to remember and identify someone.
7. Memory decay: Memories fade with time; thus there is a greater possibility that a witness' memory of the perpetrator will weaken as time passes. But researchers cannot pinpoint when a person's recall becomes unreliable.
8. Race-bias: The court previously recognized that a witness may have more difficulty making a cross-racial identification and it continues to be a factor that can affect reliability.
9. Private actors: Based on the record, co-witnesses and others can affect an identification's reliability and the witness' confidence. Using the court's constitutional supervisory powers, the court directs police officers to ask witnesses, as part of the identification process, questions to elicit whether the witness spoke with anyone about the identification and, if so, what was discussed. This information must be recorded and disclosed to defendants. Witnesses must be instructed not to discuss the identification with fellow witnesses or get information from other sources.
10. Speed of identification: There is a lack of consensus in the scientific community on whether the speed of identification is a reliable indicator of accuracy. To the extent it is relevant, researchers caution that it can only be considered if the lineup is fair and unbiased.

## **REVISED LEGAL STANDARD**

The Court stated, "When social scientific experiments in the field of eyewitness identification produce 'an impressive consistency in results,' those results can constitute adequate data on which to base a ruling...we recognize that a number of system and estimator variable can affect the reliability of eyewitness identification."

The Court found that under the existing test, (1) defendants must show that police procedures were "impermissibly suggestive" before courts can consider estimator variable that can affect reliability; (2) three of the five reliability factors rely on self-reporting by the eyewitness which may be skewed by suggestive procedures; (3) more suggestive police procedures may not be deterred because they may result in witnesses who appear more confident in their identifications; (4) suppression of the evidence is the only sanction available which does not account for the

complexities of identification evidence; and (5) courts routinely use the five factors as a checklist rather than looking at the totality of the circumstances.

The court ruled it must revise the legal standard for assessing eyewitness identification evidence because it (1) does not offer an adequate measure of reliability, (2) does not sufficiently deter inappropriate police conduct, and (3) relies too heavily on the jury's ability to evaluate identification evidence.

The new standard (1) must allow the court to explore and weigh all relevant system and estimator variables at a pretrial hearing when there is evidence of suggestiveness, (2) cannot be heavily weighted by factors that can be corrupted by suggestiveness, (3) must meaningfully promote deterrence, (4) must help jurors understand and evaluate the effects that various factors have on memory, and (5) must be flexible enough to guarantee fair trials to defendants and protect the state's interest in presenting critical evidence at trial.

Under the new test, the Court placed the initial burden of showing some evidence of suggestiveness that could lead to misidentification on the defendant. This evidence must generally be tied to a system variable. The state must then offer proof that the identification is reliable, accounting for system and estimator variables. The court can end the hearing any time it finds the allegation of suggestiveness is groundless. The court can suppress the identification evidence if, after weighing the evidence and looking at the totality of the circumstances, the defendant shows a very substantial likelihood of irreparable misidentification. If the evidence is admitted, the court must provide an appropriate, tailored jury instruction.

In evaluating evidence of suggestiveness to trigger a hearing, courts must consider the following non-exhaustive list of system variables.

1. Blind administration: Was a double-blind lineup used and if doing so was impractical, was a method used so the administrator did not know where the suspect appeared?
2. Pre-identification instructions: Did the administrator provide neutral pre-identification instructions that the suspect may not be in the lineup and the witness should not feel compelled to make an identification?
3. Lineup construction: Did the lineup contain only one suspect and at least five fillers? Did the suspect stand out from others?

4. Feedback: Did the witness receive any information or feedback about the suspect or crime before, during, or after the procedure?
5. Recording confidence: Did the administrator record the witness' statement of confidence immediately after the identification and before the possibility of confirmatory feedback?
6. Multiple viewings: Did the witness view the suspect more than once as part of multiple identification procedures? Did police use the same fillers more than once?
7. Showups: Did the police perform a showup more than two hours after an event? Did the police warn the witness that the suspect may not be the perpetrator and that the witness should not feel compelled to make an identification?
8. Private actors: Did law enforcement elicit from the eyewitness whether he or she had spoken with anyone about the identification and, if so, what was discussed?
9. Other identifications made: Did the eyewitness initially make no choice or choose a different suspect or filler?

If proof of suggestiveness remains, courts must consider the above system variables and the following non-exhaustive list of estimator variables to evaluate the identification's overall reliability.

1. Stress: Did the event involve a high level of stress?
2. Weapon focus: Was a visible weapon used during a crime of short duration?
3. Duration: How much time did the witness have to observe the event?
4. Distance and lighting: How close were the witness and perpetrator? What were the lighting conditions at the time?
5. Witness characteristics: Was the witness under the influence of alcohol or drugs? Was age a relevant factor under the circumstances of the case?



6. Perpetrator characteristics: Was the culprit wearing a disguise? Did the suspect have different facial features at the time of the identification?
7. Memory decay: How much time elapsed between the crime and the identification?
8. Race-bias: Does the case involve a cross-racial identification?
9. Opportunity to view the criminal at the time of the crime.
10. Degree of attention.
11. Accuracy of prior description of the criminal.
12. Level of certainty at the confrontation: Did the witness express high confidence at the time of the identification before receiving any feedback or other information?
13. The time between the crime and the confrontation.

The court stated that the factors are not frozen in time and are not intended to prevent police from improving practices or limit trial courts from reviewing scientific research.

## **JURY CHARGES**

The Court stated that some of the findings on the factors affecting eyewitness identifications are intuitive but the special master found that laypeople are largely unfamiliar with the scientific findings and often have contrary beliefs. Juror surveys and mock-jury studies do not offer definitive proof of what jurors know or believe about memory but they generally reveal that people do not intuitively understand all the relevant scientific findings and there is a need to promote greater juror understanding of those issues.

The Court ordered new jury charges to assist jurors in evaluating eyewitness identification evidence. The charges must guide jurors on the factors that affect an identification's reliability in a particular case and be included in the comprehensive jury charge at the close of evidence. The Court also stated that instructions could be given during a trial if warranted and expert testimony may be introduced if otherwise appropriate.

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