REFORM OF THE EVIDENTIAL RULES FOR EYEWITNESS IDENTIFICATION IN THE UNITED STATES—ADVICE FROM THE ANTIPODES

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OVERVIEW

The Federal Rules of Evidence (FRE) in the United States comprise a number of short provisions that are set out in plain language and are largely free of technical terms. FRE 801 deals with exclusions from hearsay, and subsection (d) deals with

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statements that are not hearsay.[1] FRE 801(d)(1)(C) covers the situation where the declarant testifies about a prior statement, and the statement identifies a person as someone the declarant perceived earlier.[2] Eyewitness identification evidence is notoriously unreliable, so the courts apply the test enumerated in *Manson v. Brathwaite* to determine the reliability of pretrial eyewitness identification.[3]

Under *Manson's* two-part test, courts first consider whether the police employed a procedure that suggested the defendant was the perpetrator.[4] If the procedure is non-suggestive, then the identification evidence is admitted as compliant with due process.[5] In the event the procedure is found to be suggestive, then the second limb applies and the court examines five factors to decide whether the identification is nevertheless admissible on the grounds of reliability.[6] These five factors are: (1) the opportunity to view; (2) the degree of attention; (3) the accuracy of the description; (4) the witness' level of certainty; and (5) the time between the crime and the confrontation.[7]

The *Manson* decision has been criticized[8] and will be further considered here, but the focus of this article is to provide a holistic view of the admissibility of eyewitness identification evidence from voir dire to the judge's summing up to the jury. Assuming that the evidence is admitted under either of the limbs set out in the *Manson* test, the next question is whether the evidence requires a warning to be given by the trial judge to the jury as to the dangers of convicting the defendant where eyewitness identification is the critical fact in issue and the mainstay of the prosecution's case. In this regard, the evidential principles relating to eyewitness identification evidence in Australia (and to

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1. FED. R. EVID. 801(d).
2. *Id.* at 801(d)(1)(C).
3. Manson v. Brathwaite, 432 U.S. 98, 114 (1977).
4. *Id.*
5. *See* Neil v. Biggers, 409 U.S. 188, 198 (1972) (referring to suggestive identification procedures and stating, "the admission of evidence of a showup without more does not violate due process.").
6. *See Manson*, 432 U.S. at 199.
7. *Id.* at 199–200.
8. Ruth Yacona, Manson v. Brathwaite: *The Supreme Court's Misunderstanding of Eyewitness Identification*, 39 J. MARSHALL L. REV. 539, 539 (2006).

a lesser extent in England)[9] will be examined, with a view to making recommendations that the United States should adopt aspects of these principles—particularly the criteria triggering a warning from the trial judge to the jury.

I. AN AUSTRALIAN BENCHMARK FOR IDENTIFICATION EVIDENCE

A. *Pre-Trial Procedures*

Identification evidence is notoriously fraught with danger because even witnesses who are familiar with a person can be honestly mistaken.[10] The common perception is that human memory is an uncomplicated photographic-like process.[11] The reality is that memories are not fixed phenomena but are subconsciously constructed.[12] They are malleable, and are vulnerable even to subtle suggestive influence.[13] The following statement from Justice Mathews in *R v Jamal* explains the gulf between lay appreciation of identification and expert opinion.[14] Her Honour is quoting from testimony given by Dr. Clark, a psychologist at the University of New South Wales:

> Memory is commonly believed to be a picture, like a film and [if] for some reason or other the film is suppressed or repressed or it is inaccessible and it just takes the right technique and the film is there on the screen in all its glory. There is no question that is the wrong view . . . It is first year psychology

9. *See* Christina Begakis, *Eyewitness Misidentification: A Comparative Analysis Between the United States and England*, 15 SANTA CLARA J. INT'L L. 173, 173 (2017).

10. *See* Loretta Re, *Eyewitness Identification: Why So Many Mistakes?* 58 AUSTL. L. J. 509, 513 (1984) (noting that the chances of misidentification increase dramatically if a witness is familiar with the photo of a lineup participant because it causes confusion with the memory of the actual perpetrator).

11. *See* Joyce W. Lacy & Craig E. L. Stark, *The Neuroscience of Memory: Implications for the Courtroom*, 14 NAT'L REV. NEUROSCIENCE 649, 649 (2013); Daniel J. Simons & Christopher F. Chabris, *What People Believe about How Memory Works: A Representative Survey of the U.S. Population*, PLOS ONE, Aug. 2011, at 1, 5–6.

12. *See* Lacy & Stark, *supra* note 11, at 649.

13. Henry Otgaar et al., *The Malleability of Developmental Trends in Neutral and Negative Memory Illusions*, 1 J. EXPERIMENTAL PSYCH.: GEN. 31, 32 (2016).

14. *R v Jamal* (1993) 69 A Crim R 544, 559 (Austl.).

> textbook stuff, memory is a reconstruction. It is not an uncovering of the past, it is a reconstruction. It is an active process.[15]

Memory misperceptions can mean that witnesses often convince themselves wrongly that they can recollect detail accurately. Psychologists have isolated a number of distorting factors that affect the reliability of identification evidence used in court, which include the unconscious impact of a witness's expectations, unconscious transference, the witness's self-centred bias, and weapon focus.[16] "Unconscious transference" or "displacement" arises where a bystander who has been previously (or subsequently) seen by the identifying witness is mistaken for the culprit.[17]

Studies show that identification is more likely to be made if the identification process replicates aspects of the criminal incident.[18] For example, a suspect wearing clothing that is similar to the offender's clothing is more likely to be identified as the offender.[19] The identification may be correct or incorrect, and when the identification is incorrect, it is because contextual similarities have filled in the witness's memory gaps.[20]

Eyewitness misidentification accounts for a very significant proportion of wrongful convictions.[21] The dangers of misidentification stem largely from human frailty (unreliability

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15. *Id.* (quoting Dr. James Clark, Senior Lecturer, Psychology, University of New South Wales).

16. Begakis, *supra* note 9, at 179–180; Yanchi Zhang et al., *Self-Serving Bias in Memories: Selectively Forgetting the Connection Between Negative Information and the Self*, 65 EXPERIMENTAL PSYCH. 236, 242–43 (2018); Luca Campanelli et al., *The Modulatory Effect of Expectations on Memory Retrieval During Sentence Comprehension*, 440 CUNY ACAD. WORKS 1436, 1440 (2018). *See also* Re, *supra* note 10, at 512–14.

17. *See* Re, *supra* note 16, at 512–14.

18. *See, e.g.*, Jennifer Dysart & R. C. L. Lindsay, *Show-Up Identifications: Suggestive Technique or Reliable Method?*, *in* 2 THE HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR PEOPLE 137, 143 (R. C. L. Lindsay et al. eds., 2007) (explaining clothing bias).

19. *Id.*

20. *See id.* (noting the significant increase in false identification when a similar-looking innocent person is presented in similar clothing).

21. Gerald Laporte, *Wrongful Convictions and DNA Exonerations: Understanding the Role of Forensic Science*, 279 NAT'L INST. JUST. J. 1, 2 (2018).

of human perception and memory), and also from human susceptibility to suggestion—whether intentional or not—and to prejudice.[22] Scientific advances (such as DNA analysis) have been of great assistance, both in identifying suspects and exposing misidentifications. This part of the article concerns the pretrial procedures relevant to identification of suspects in the Australian criminal justice system. Some Australian jurisdictions have legislative rules prescribing procedures for eyewitness identification, while for the rest there are rules of practice.[23]

For Queensland, one such legislative rule is contained in s 617 of the *Police Powers and Responsibilities Act 2000* (Qld):

> **Section 617 Identification of suspects**
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> (1) It is lawful for a police officer to use 1 or more of the following procedures to help gather evidence of the identity of a person suspected of having committed an offence—
>
> (a) an identification parade;
>
> (b) a photo board containing at least 12 photos of people of similar appearance, 1 of whom is the person suspected of having committed the offence;
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> (c) videotape;
>
> (d) computer generated images.
>
> (2) The police officer must comply with the procedures in the responsibilities code for identification procedures.
>
> (3) The police officer may ask a person to take part in an identification parade.

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22. *See* Dysart & Lindsay, *supra* note 18, at 143 (explaining instruction bias); Mark L. Howe & Lauren M. Knott, *The Fallibility of Memory in the Judicial Process: Lessons from the Past and Their Modern Consequences*, 23 MEMORY 633, 634 (2015) (explaining that memory is fragmentary and inaccurate); Otgaar, *supra* note 13, at 32 (explaining the negative effect of suggestive pressure on memory).

23. *See e.g.*, N.S.W. POLICE FORCE, CODE OF PRAC. FOR CRIME (CUSTODY, RTS., INVESTIGATION, MGMT. AND EVIDENCE) (2012), https://www.publicdefenders.nsw.gov.au/Documents/Code_CRIME_-_January_2012.pdf.

(4) The person may refuse to take part in the parade.[24]

Under the mandatory language of s 617(2), the police officer must comply with the procedures in the *Police Powers & Responsibilities Act 2000* (Qld) for identification procedures.[25] The operational details for identification procedures in the responsibilities code are found in Divisions 1–3 of Part 6 of Schedule 9 of the *Police Powers and Responsibilities Regulations 2012* (Qld).

Division 1 - General requirements for identification procedures

35 Management of witnesses during identification procedure

Division 2 - Identification parades

36 Application of div 2

37 Recording of identification parade

38 Explanation of procedure

39 Identification parade conditions

40 Conducting the identification parade

41 Use of suitable persons in the identification parade

Division 3 - Identification using photographs

42 General requirements for identification using photographs

43 Conducting a photo board identification[26]

Absent from the above list is the requirement for double-blind identification parades and photographic arrays, where the presiding police officer is unaware as to which person is the suspect, a potentially valuable protection which will be discussed later in the article. Also absent is the requirement for a sequential identification parade or photo array in which a person or

24. *Police Powers and Responsibilities Act 2000* (Qld) ch 19 s 617 (Austl.).

25. *Id.* ch 19 s 617(2).

26. *Police Powers and Responsibilities Regulation 2012* (Qld) sch 9 pt 6 divs 1–3.

photograph is presented to the witness one at a time, rather than simultaneously. The two types of identification processes involve different mental processes from the witness: with sequential identification absolute judgement is involved, whereas for simultaneous identification relative judgement is employed.[27] The research on both methods will be considered further on in the article.

The above procedures are directed at ensuring fairness and preventing any prompting of the witness.[28] Two significant procedures to those ends relating to identification parades are reg 37 (Recording of identification parade) which requires the behaviour and position of each person in an identification parade to be photographed or otherwise electronically recorded,[29] and reg 39 (Identification parade conditions) below:

> **39 Identification parade conditions**
> A police officer conducting an identification parade must, as far as reasonably practicable, replicate the conditions, described by the witness, when the witness saw a person involved in the offence, for example, by—
> (a) changing the lighting in the room; or
> (b) varying the distance from which the witness views the identification parade; or
> (c) concealing aspects of the participants.[30]

For identification using photographs, reg 42 (General requirements for identification using photographs) prevents

27. *Eyewitness Identification: Simultaneous vs. Sequential Lineups*, NAT'L INST. OF JUSTICE (Mar. 2, 2009), https://nij.ojp.gov/topics/articles/eyewitness-identification-simultaneous-vs-sequential-lineups#:~:text=For%20sequential%20lineups%2C%20witnesses%20must,or%20members%20to%20each%20other.

28. *See Police Powers & Responsibilities Act 2000* (Qld.) ch 1 s 5(e) (Austl.) ("The purposes of this Act are as follows . . . to ensure fairness to, and protect the rights of, persons against whom police officers exercise powers under this Act . . . .").

29. *Police Powers and Responsibilities Regulation 2012* (Qld) reg 37 (Austl.).

30. *Id.* reg 39.

anything being marked on the photograph or photo board that directs the attention of the witness to a particular photograph.[31]

South Australia is another jurisdiction with a legislative rule in its evidence regulations. Since the introduction of s 34AB of the *Evidence Act 1929* (SA) in July 2014, the police can arrange for a collection of photographs for identification purposes rather than use an identification parade: s 34AB(1).[32] This has the effect of placing equal evidentiary weight on identification evidence obtained through a photographic array. The likely result is that, in the future, line-ups will be used only rarely. The use of photographs does not require the accused person's consent.[33]

The *Evidence Regulations 2007* (SA) in r 3AA sets out the requirements for an identity parade pursuant to s 34AB(2)(a)(i) of the *Evidence Act 1929* (SA), which states that an audio-visual record of the identity parade is to be made and kept in accordance with the regulations.[34] Rule 3AA of the regulations includes a requirement to make an audio-visual record of the parade in which the witness must be visible at all relevant times; the person identified must be visible at the time the witness gives the indication; and anything said by the witness and any other person present during the conduct of the identity parade must be recorded.[35]

In Western Australia, there is no legislation covering identification procedures. The standard method used is a "digiboard" (photo board).[36] The Court of Appeal discussed the description of a digiboard, its use in photographic identification, and the directions a trial judge should give to a jury on digiboard identifications in *Winmar v Western Australia*:

31. *Id.* reg 42.

32. *Evidence Act 1929* (SA) s 34AB(1) (Austl.) ("In a criminal trial, evidence of the identity of a person alleged to have committed an offence is not inadmissible, and is not to be excluded, merely because it was obtained other than by means of an identity parade involving a physical line-up of persons.").

33. *Crimes Act 1914* (Cth) s 3ZJ(3) (Austl.) (requiring only reasonable grounds for a constable to believe the identification material will identify the person who committed the offense).

34. *Evidence Act 1929* (SA) s 34AB(2) (Austl.).

35. *Evidence Regulations 2007* (SA) reg 3AA(1) (Austl.).

36. *Winmar v Western Australia* [2007] WASCA 244 (9 November 2007) 6 (Austl.).

> [31] A digiboard is a series of photographs, usually 12 in number (the guidelines require a minimum of 12 photographs), in which a photograph of the suspect or accused person appears, together with a number of "fillers".
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> [32] If photographic identification is considered possible, the investigating officer will advise the Forensic Imaging Unit that a digiboard is required, will nominate the suspect or person of interest and, if there is more than one photograph of that person in existence, nominate which is to be used in the digiboard. . . . The Forensic Imaging Unit selects images of similar age, appearance, race, etc, to the suspect. Background colours and lighting conditions are matched. The photographs can be enhanced or altered in order to ensure the greatest possible similarity between the suspect and the fillers, for example, by lightening or darkening of hair or complexion. . . .
>
> [35] The witness is advised that they will be handed a folder with numbered photographs and the witness is asked to look closely at all of them to determine if the witness is able to positively identify any of the persons shown. . . .
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> [37] Wherever practicable, the entire identification procedure is recorded on videotape. . . . It is the usual, but not invariable, practice for the prosecution to play the videotape of the identification at trial and to tender the videotape of the identification process as an exhibit.[37]

With the growing usage of photographs (photo board) in identifying suspects in Australia, it is instructive to review the Commonwealth's operational requirements of identification by means of photographs as set out in s 3ZO(2) of the *Crimes Act 1914* (Cth):

> (2) If a constable investigating an offense shows photographs or pictures to a witness for the

37. *Id.* at 13–15.

purpose of establishing, or obtaining evidence of, the identity of a suspect, whether or not the suspect is in custody, the following rules apply:

(a) the constable must show to the witness photographs or pictures of at least 9 different persons;

(b) each photograph or picture of a person who is not the suspect must be of a person who:

  (i) resembles the suspect in age and general appearance; and

  (ii) does not have features visible in the photograph or picture that are markedly different from those of the suspect as described by the witness before viewing the photographs or pictures;

(ba) the photographs or pictures shown to the witness must not suggest that they are photographs or pictures of persons in police custody;

(c) The constable must not, in doing so, act unfairly towards the suspect or suggest to the witness that a particular photograph or picture is the photograph or picture of the suspect or of a person who is being sought by the police in respect of an offence;

(d) if practicable, the photograph or picture of the suspect must have been taken or made after he or she was arrested or was considered as a suspect;

(e) the witness must be told that a photograph or picture of the suspect may not be amongst those being seen by the witness;

(f) the constable must keep, or cause to be kept, a record identifying each photograph or picture that is shown to the witness;

(g) the constable must notify the suspect or his or her legal representative in writing that a copy of the record is available for the suspect;

(h) the constable must retain the photographs or pictures shown, and must allow the suspect

> or his or her legal representative, upon application, an opportunity to inspect the photographs or pictures.[38]

Given the importance of due process rights under the Fourteenth Amendment of the United States Constitution and the Supreme Court's reliability test, the following provisions are worth noting: (ba) the photographs must not suggest the persons depicted are in police custody; (c) police must not act unfairly towards the suspect; (e) the witness must be told the suspect's photograph may be absent from those being shown to the witness; and (h) the suspect is able to inspect the photographs.[39]

Also of significance is that there must be photographs of at least nine different persons and they must resemble the person in age and general appearance, without features markedly different from the suspect.[40] This reflects the distinction between the functional and objective size of a photographic array, where the objective size refers to the number of photographs and the functional size represents the number who actually resemble the suspect.[41] Ideally, all the photographs should resemble the suspect, which occurs in a digiboard created by a Forensic Imaging Unit.[42]

Telling the witness that the suspect's photograph may not be among the photographs that the witness views is of special significance. This is so because otherwise a witness will likely select the photograph that most resembles the recalled image of the person he or she saw at the time the crime was committed:[43]

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38. *Crimes Act 1914* (Cth) s 3ZO(2)(a)–(h) (Austl.).

39. *Id.* s 3ZO(2)(ba), (c), (e), (h).

40. *Id.* s 3ZO(2)(a)–(b)(ii).

41. *See* Graham M. Davies, *Mistaken Identification: Where Law Meets Psychology Head on*, 35 HOW. J. 232, 238 (1996) (explaining the distinction between functional and objective size in the context of identity parades).

42. *Winmar v Western Australia* [2007] WASCA 244 (9 November 2007) 13 (Austl.) ("The Forensic Imaging Unit selects images of similar age, appearance, race, etc, to the suspect.").

43. *See* Richard Kemp, *Face Identification*, *in* AN INTRODUCTION TO APPLIED COGNITIVE PSYCHOLOGY 61, 72 (1st ed. 2005) (explaining that the witness will always identify someone if they attempt to identify the person most like the perpetrator).

> Imagine for a moment that you were a witness to a crime and that a few weeks later you were asked to attempt to identify the perpetrator from a lineup. What would you attempt to do as you looked down the line of faces? You should compare each face to your memory of the perpetrator, but it appears that many witnesses compare the lineup members to each other in an attempt to find the person who looks most like the perpetrator. This choice of strategy is crucial. If a witness attempts to identify the person most like the perpetrator, they will always identify someone, even on those occasions when the perpetrator is not present in the lineup. This relative judgement process will often therefore lead to a false identification. However, if a witness attempts to compare his or her memory of the perpetrator with each member of the lineup in turn, then this more absolute process should lead to fewer false identifications when the perpetrator is not present.[44]

Kemp continues by asking whether the evidence supports the hypothesis that witnesses do employ a relative judgement strategy.[45] Drawing on studies by Wells,[46] Kemp concludes that participant-witnesses "are picking the person most like the culprit rather than making a positive and absolute identification."[47] This in turn leads to the proposition that a sequential lineup procedure that "encourages more absolute judgements should have the effect of decreasing the number of false identifications in culprit-absent lineups without impacting on the number of correct identifications in culprit-present lineups."[48]

44. *Id.* at 71–72.

45. *Id.* at 72.

46. Gary L. Wells, *What Do We Know About Eyewitness Identification?*, 48 AM. PSYCH. 553, 567 (1993); *see also* Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 614–15 (1998) ("[The majority of participants] who identified the culprit in a culprit-present lineup would simply have identified someone else if the culprit had not been present.").

47. Kemp, *supra* note 43, at 72.

48. *Id.* at 73.

Kemp reviews the results of further studies,[49] and finds that "in real life the sequential lineup does seem to offer the police a 'win–win' solution, with similar levels of correct identification and reduced levels of false identification relative to the traditionally used simultaneous lineup."[50] However, as Kemp acknowledges, another study[51] found that absolute strategies were claimed by participants in both the sequential and simultaneous conditions.[52] As Kneller et al. observe, "the present results would suggest that superiority in accuracy rates associated with the sequential lineups might not have been due solely to the use of absolute strategies *per se*."[53]

Kemp was writing in 2005. More recent studies and reports have been equivocal as to the relative advantages of sequential over simultaneous lineup presentations.[54] For example, the 2014 National Academy of Sciences (NAS) report on eyewitness identification noted that "the relative superiority of competing identification procedures (i.e., simultaneous versus sequential lineups) is unresolved."[55] The NAS report observed "there is no consensus among law enforcement professionals as to whether the sequential presentation procedure is superior to the simultaneous procedure"[56] and concluded "that caution and care be used when considering changes to any existing lineup procedure, until such time as there is clear evidence for the advantages of doing so."[57]

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49. Nancy Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 LAW & HUM. BEHAV. 459, 471 (2001).

50. Kemp, *supra* note 43, at 74.

51. Wendy Kneller et al., *Simultaneous and Sequential Lineups: Decision Processes of Accurate and Inaccurate Eyewitnesses*, 15 APPLIED COGNITIVE PSYCH. 659, 667 (2001).

52. Kemp, *supra* note 43, at 74.

53. Kneller et al., *supra* note 51, at 667.

54. *See* Travis M. Seale-Carlisle et al., *Designing Police Lineups to Maximize Memory Performance*, 25 J. EXPERIMENTAL PSYCH.: APPLIED 410, 424 (2019) (concluding that sequential presentations are more advantageous).

55. COMM. ON SCI. APPROACHES TO UNDERSTANDING AND MAXIMIZING THE VALIDITY AND RELIABILITY OF EYEWITNESS IDENTIFICATION IN L. ENF'T AND THE CTS., IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 104 (Nat'l Acads. Press 2014) (ebook).

56. *Id.* at 24.

57. *Id.* at 118.

However, the NAS report did recommend "blind (double-blind or blinded) administration of both photo arrays and live lineups"[58] in finding that the "use of 'blinded' or 'double-blind' lineup identification procedures is an effective strategy for reducing the likelihood that a witness will be exposed to cues from interactions with law enforcement (such as feedback) that could influence identifications and/or confidence in those identifications."[59] Questions relating to optimum (fairest) identification procedures will be further considered in a later part of the article dealing with lineup procedures in the United States. The following acute observation by the committee overseeing production of the NAS report is of particular interest when a case comes to trial in which the primary evidence against the defendant is identity evidence.

> The "blinded" procedure minimizes the possibility of either intentional or inadvertent suggestiveness and thus enhances the fairness of the criminal justice system. Suggestiveness during an identification procedure can result in suppression of both out-of-court and in-court identifications and thereby seriously impair the prosecutions's [sic] ability to prove its case beyond a reasonable doubt. The use of double-blind procedures will eliminate a line of cross-examination of officers in court.[60]

Suffice it to say at this juncture that Australia uses simultaneous presentations for identity parades and photographic arrays but has not as yet introduced double-blind procedures for administering identity parades and photographic arrays. Instead, Australia relies on a general provision which requires that police must not act unfairly towards the suspect.

Across the Tasman Sea, New Zealand has adopted a strict approach to police being required to adhere to formal procedures for visual identification evidence under s 45(2) of the Evidence Act 2006 (N.Z.).

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58. *Id.* at 5.
59. *Id.* at 92.
60. *Id.* at 107.

> If a formal procedure is not followed by officers of an enforcement agency in obtaining visual identification evidence of a person alleged to have committed an offence and there was no good reason for not following a formal procedure, that evidence is inadmissible in a criminal proceeding unless the prosecution proves beyond reasonable doubt that the circumstances in which the identification was made have produced a reliable identification.[61]

Thus, without a good reason, a breach of a formal procedure will result in the evidence being inadmissible unless the prosecution can meet the high standard of beyond reasonable doubt that the identification was reliable. Arguably, New Zealand is the jurisdiction that has moved the closest to adopting corroboration requirements for cases where identification evidence is the only evidence against the defendant.

B. Admission of Identification Evidence at Trial and Judicial Warnings to the Jury

In all Australian jurisdictions, the dangers of eyewitness identification are dealt with primarily by rules of admissibility and requirements for judicial warnings, which attempt to minimise the risk that misidentification will lead to a miscarriage of justice. It is the evidentiary rules at trial that inform the pretrial processes with respect to eyewitness identification evidence.

Eyewitness identification or visual identification relies on human perception and memory. It can include the following:

- identification of a suspect from a lineup (identification parade);
- identification of a suspect from a crowd of people;
- identification of a suspect from photographs or pictures;
- identification of a suspect from an identikit picture; and

61. Evidence Act 2006, s 45(2) (N.Z.).

- single person identification (a witness is shown a person, including in the courtroom, and is asked to confirm whether or not it is the person involved in the crime).[62]

As previously discussed, the dangers of eyewitness misidentification have long been known, at least among experts and lawyers.[63] The dangers are not so well-known among laypeople.[64] Herein lies part of the problem: eyewitness identification can be very compelling to a jury, and yet, at the same time, it can be highly unreliable. The problem is well stated in the Devlin Committee Report:

> The problem peculiar to identification is that the value of the evidence . . . is exceptionally difficult to assess. The weapon of cross-examination is blunted. A witness says that he recognizes the man, and that is that or almost that. There is no story to be dissected, just a simple assertion to be accepted or rejected. If a witness thinks that he has a good memory for faces when in fact he has a poor one, there is no way of detecting the failing.[65]

The problem is exacerbated by witnesses who are not aware of the frailty of their own perceptions and memory, as Chief Justice Spigelman observed in *R v Marshall*:

> The prejudice often associated with identification evidence is that, although mistaken, it is frequently given with great force and assurance by the person who made the identification. These are matters about which witnesses frequently refuse to admit

62. *See* Re, *supra* note 10, at 512–13, 515.

63. *See id.*, at 516. *See also* Robert J. Hallisey, *Experts on Eyewitness Testimony in Court — A Short Historical Perspective*, 39 HOW. L. J. 237, 256 (1995) (finding a substantial percentage of experts agreed that witnesses are unable to remember details about a stressful event).

64. Hallisey, *supra* note 63, at 246.

65. DELVIN COMMITTEE, REPORT OF THE COMMITTEE ON EVIDENCE OF IDENTIFICATION IN CRIMINAL CASES, 1975–6, HC 338, ¶ 1.24 (UK).

> the possibility that they might have erred and, accordingly, give evidence in a particularly definitive form.[66]

The question of the confidence of the witness in making his or her identification was raised in *R v Smith*, where the complainant had been attacked and robbed in the street in the evening.[67] A few days later at a shopping centre she recognised her attacker, having noticed that the man seemed to be wearing the same clothes worn on the night of the attack.[68] She identified him in a lineup of eleven men.[69] Acting Justice Smart summarised the circumstances of the identification, and then considered whether the presence of a weapon affected the accuracy of the complainant's identification:

> [60] Even though the complainant only saw the robber face on for several seconds and very close to her (less than one metre away) but at night was she able to gain and retain a sufficiently accurate picture of him to identify him with certainty 2 days later. Was she significantly influenced by the similarity of the clothing worn by the robber and the man whom she saw about 38-40 hours later. Much depends on the person identifying the robber. The complainant insisted that she was looking directly at the robber, could see quite clearly and had no difficulty in seeing him. She said that as a journalist she always took the details in and was consciously thinking that she would have to remember what happened. She denied that she identified the robber by the similarity of his clothing on 16 February 1998. She said that "the immediate thing was the way he was standing and his whole presence." She mentioned his physical build, his distinctive stance and physical presence.
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> . . . .

66. *R v Marshall* [2000] NSWCCA 210 (15 May 2000) ¶ 15 (Austl.).
67. *R v Smith* [2000] NSWCCA 388 (6 October 2000) ¶ 6 (Austl.).
68. *Id.* ¶¶ 9, 11.
69. *Id.* ¶ 11.

> [63] I would not leave out of account the experience of the courts which have seen instances of great coolness under stress. . . . The experience of the Courts points to how important it is to look at the particular circumstances and the particular victim. General considerations and research have their value but they do not supplant the particular inquiry and assessment that has to be made in each case. In the present case the complainant insisted that she kept her eyes on the appellant and the knife. She did not feel he would use the knife unless she struggled. She said, that when the incident happened she was "sort of frozen," it was so sudden and that she did not have time to react except by looking. The re-action comes afterwards.[70]

In *R v Smith*, the Court of Criminal Appeal (NSW) dismissed the appeal being satisfied the judge had given cogent general warnings and had stressed the need for special caution when examining the identification evidence because of the possibility that even a completely honest witness may have been mistaken in her identification.[71]

More generally, the Court of Criminal Appeal (NSW) supported the Crown's view that fresh evidence, in the form of extensive psychological research into eyewitness identification, should be excluded under s 135(c) of the *Evidence Act 1995* (NSW) on the grounds "its probative value would be outweighed by the danger that the evidence might cause or result in undue waste of time."[72] In sum, the Court evinced a general reluctance to admit psychological evidence, wary of the danger that the jury would defer to the expert's opinion rather than make up its own mind.[73]

The question of the substitution of lay opinion evidence (as opposed to expert opinion evidence) for the jury's own conclusion in relation to identification was considered a year later in 2001 in

70. *Id.* ¶¶ 60, 63.

71. *Id.* ¶ 65.

72. *Id.* ¶ 69.

73. *See id.* ("The research would have to be investigated and evaluated and tests may have to be conducted. Then attention would again have to be directed to the critical question of the reliability of the identification in issue.").

a different case, but with the appellant having the same surname of Smith.[74] Lay opinion evidence may be irrelevant if the opinion is founded on material that is no different from material available to the jury, as the High Court held in *Smith v The Queen.*[75] In this case, the issue at trial was whether the appellant was the person depicted in bank security photographs.[76] Two police officers gave evidence over objection that they recognised the appellant from previous dealings with him.[77] The question was whether this evidence was properly received.[78] Chief Justice Gleeson, as well as Justices Gaudron, Gummow, and Hayne held that the police evidence was irrelevant and should not have been received because it was not evidence that could rationally affect the assessment by the jury of the question: "Is the person standing trial the person who is depicted at the right-hand side of some of the photographs tendered in evidence?"[79]

> The process of reasoning from one fact (the depiction of a man in the security photographs) taken with another fact (the observed appearance of the accused) to the conclusion (that one is the depiction of the other) is neither assisted, nor hindered, by knowing that some other person has, or has not, arrived at that conclusion. Indeed, if the assessment of probability is affected by that knowledge, it is not by any process of reasoning, but by the decision maker permitting substitution of the view of another, for the decision-maker's own conclusion.[80]

The issue of mistaken confidence is intensified by Justice Blokland's acknowledgment that "cross-examination is a tool with limited usefulness in testing a witness's ability to recognise

74. *Smith v The Queen* (2001) 206 CLR 650, 650 (Austl.).
75. *See id.* at 655–56.
76. *Id.* at 653.
77. *Id.*
78. *Id.*
79. *Id.* at 655 (internal quotation marks omitted).
80. *Id.*

faces."[81] Where displacement is a possibility, as Justice Garling pointed out in *R v Smith (No. 3)*,[82] there is a real risk of unconscious substitution of the photographic image for the person actually seen by the witness such that cross-examination will likely lead to mere affirmation of the evidence of identification:

> Discernment
>
> [32] In this case, because Mr Stein had seen a single photograph which identified a person, shortly after the shooting, whom the police were seeking to interview, there is a real risk that Mr Stein has, entirely unconsciously, substituted that image in the photograph for the image in his mind of the face of the person whom he saw in the blue hoodie. After all, he did not see anyone else who could have been the shooter, and Mr Stein also saw the person leaping the fence at the scene.
>
> [33] Accordingly, it is easy to see that, quite unintentionally, Mr Stein may have associated the male in the blue hoodie as being the shooter, and that he has then associated the photograph circulated by the police as being that person.
>
> [34] Because the association caused by the displacement effect is unintentional, it cannot be expected that Mr Stein, if cross-examined about it, would necessarily understand what has occurred. Accordingly, any cross-examination of Mr Stein by counsel for the accused is more likely than not to result in an affirmation of the evidence of identification, rather than anything else.[83]

The same point, this time in relation to *Facebook* identifications, was made by Justice Peek in *Strauss v Police*:

> [36] So called "*Facebook* identifications" have none of the safeguards which accompany a properly

81. *Longmair v Bott* [2010] NTSC 30 (4 June 2010) 9 (Austl.).
82. *R v Smith (No. 3)* [2014] NSWSC 771 (3 June 2014) ¶¶ 30–31 (Austl.).
83. *Id.* ¶¶ 32–34.

> executed formal identification procedure conducted by the police. Purported *Facebook* identifications from group photographs are particularly dangerous in that they present a seductive and deceptive air of being a plausible identification but in fact rarely involve a group of people each having similar features to the accused; they suffer from "foil bias" as discussed above [the required degree of similarity of the persons in a lineup or the photographs in an array]. Consequently, if a suspect with similar features to the real offender is depicted in a photograph of a group whose other members lack those features, the suspect will likely be identified by a witness as the offender in the fervour of the superimposed "*Facebook* chat" and the pressure of the moment. The displacement effect will then later proceed to erase from the memory the subtle differences between the real offender and the person identified.[84]

The reason why proof of identity is "so notoriously delicate" was explained in *Craig v The Queen*[85] by Justices Evatt and McTiernan in dissent, in a case where the appellant was under sentence of death for the murder of a sixteen-year-old girl named Bessie O'Connor after juries in two previous trials had failed to reach an agreement:

> An honest witness who says "The prisoner is the man who drove the car," whilst appearing to affirm a simple, clear and impressive proposition, is really asserting: (1) that he observed the driver, (2) that

84. *Strauss v Police* [2013] SASR 90, ¶ 36 (Austl.). *See also Bayley v The Queen* [2016] VSCA 160 (13 July 2016) ¶¶ 64–65 (Austl.): ("Facebook, and other social media and networking sites have, in recent years, become a ubiquitous aspect of daily life. Potential witnesses are free to peruse photographs on Facebook (and similar sites)—without police oversight or other supervision—before attempting a formal identification process with law enforcement authorities. Accordingly, the risk of the displacement effect will, depending upon the circumstances, be exacerbated. Certainly, none of the safeguards which ordinarily attend photographic identification performed under the supervision of police will be present.").

85. *Craig v the King* (1933) 49 CLR 429, 446 (Austl.) (internal quotation marks omitted).

> the observation became impressed upon his mind, (3) that he still retains the original impression, (4) that such impression has not been affected, altered or replaced, by published portraits of the prisoner, and (5) that the resemblance between the original impression and the prisoner is sufficient to base a judgment, not of resemblance, but of identity.[86]

Craig's death sentence was commuted to life imprisonment.[87]

The Devlin Committee Report concluded that, in cases which depended wholly or mainly on eyewitness evidence of identification, there was a special risk of wrongful conviction.[88] Devlin fell short of increasing the burden of proof by requiring corroboration, but did propose that in ordinary cases prosecutions were not brought on eyewitness evidence only, as it is only in exceptional cases that identification is by itself sufficiently reliable to exclude a reasonable doubt about guilt.[89] Devlin recommended that the trial judge should be required by statute:

> (a) [T]o direct the jury that it is not safe to convict upon eye-witness evidence unless the circumstances of the identification are exceptional or the eye-witness evidence is supported by substantial evidence of another sort; and
> (b) [T]o indicate to the jury the circumstances, if any, which they might regard as exceptional and the evidence, if any, which they might regard as supporting the identification; and
> (c) [I]f he is unable to indicate either such circumstances or such evidence, to direct the jury to return a verdict of not guilty.[90]

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86. *Id.*

87. Raffaella Ciccarelli, *Serial Killer Could Be Behind Vicious Sydney Murders*, 9NEWS (Apr. 27, 2020, 11:05 AM), https://www.9news.com.au/national/australian-crime-serial-killer-could-be-behind-vicious-sydney-murders/07b9a42b-ad2f-40c1-9603-d617cd7b923b.

88. DELVIN COMMITTEE, *supra* note 65, ¶ 8.1.

89. *Id.* ¶¶ 8.3–8.4.

90. *Id.* ¶ 8.4.

The official response to the Devlin Committee report is well summed up by Davies:

> Reaction to Lord Devlin's radical report among government and the judiciary was cautious and some of the most fundamental recommendations were never implemented. The abolition of trial by identification alone was not abandoned. Instead, in a series of judgments (The 'Turnbull' Guidelines) made by Lord Widgery in the Court of Appeal [R v Turnbull; R v Whitby; R v Roberts, 1977],[91] the Court strove to make a distinction between what they termed 'good' and 'poor' quality identifications. 'Good' quality identifications were represented by cases where the witness had a prolonged opportunity to observe the suspect under optimum conditions (a kidnapping where the witness victim was held unblindfolded for some time was offered as an example). Poor quality identification on the other hand was held up as a suspect glimpsed fleetingly at the scene of a bank raid. In future, the Court would expect identification only cases to involve only 'good quality' identifications and the Court would allow appeals based on 'poor quality' evidence. In all cases, judges would be expected to follow Devlin's prescription for summing up on matters of identification.[92]

In *Harrison v The Queen*, Justice Franklyn stressed that the *Turnbull* Guidelines, referred to above by Davies as the judicial response to the Devlin Committee report,[93] were applicable to trials in the State of Western Australia where identification is in issue and the Crown case depends wholly or substantially upon the identification by a person or persons who are strangers to or only casual acquaintances of the person identified.

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91. R v Turnbull and Others [1976] 3 All ER 549 at 550 (Eng.).

92. Davies, *supra* note 41, at 234–35.

93. *Harrison v The Queen* (Unreported, Supreme Court of Western Australia, Franklyn J, 7 October 1987) 8–9 (Austl.).

> (i) The trial Judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications.
>
> (ii) He should instruct the jury as to the reason for the need for such a warning and make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can be mistaken.
>
> (iii) He should direct the jury to closely examine the circumstances in which the identification by each witness came about, including such matters as whether the witness had seen the accused before and discrepancies in appearance between the description given and the accused's actual appearance.
>
> (iv) He should remind the jury of any specific weaknesses in the identification evidence.
>
> (v) He should take care in directing the jury as to the support for an identification which may be derived from the rejection of an alibi.
>
> (vi) He should tell the jury that the absence of the accused from the witness box cannot provide evidence of anything, although they may take into account in assessing the quality of the identification evidence that it was uncontradicted by evidence from the accused himself.[94]

As to the circumstances of the identification referred to in point (iii) above, Lord Widgery's list of relevant questions was as follows:

> How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the

94. *Id.*

> witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?[95]

This list of questions goes to the distinction Lord Widgery was seeking to draw in *Turnbull* between "good" and "poor" quality identifications.[96] As Justice Franklyn noted in *Harrison v The Queen* above, the *Turnbull* guidelines have been incorporated into Australian case law, as well as into statute.[97] The incorporation of the *Turnbull* guidelines into statute is exampled by s 36(3) of the *Jury Directions Act 2015* (Vic), which deals with a direction on identification evidence.

> (3) In giving a direction referred to in subsection (1), the trial judge must—
> (a) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it; and
> (b) inform the jury of the significant matters that the trial judge considers may make the evidence unreliable; and
> (c) inform the jury that—
> (i) a witness may honestly believe that his or her evidence is accurate when the witness is, in fact, mistaken; and
> (ii) the mistaken evidence of a witness may be convincing; and
> (d) if relevant, inform the jury that a number of witnesses may all be mistaken; and

95. *Turnbull and Others*, 3 All ER 549 at 552.
96. *Id.*
97. *Harrison*, at 8–9.

(e) if relevant, inform the jury that mistaken identification evidence has resulted in innocent people being convicted.[98]

Australian judges rely on their accumulated judicial experience to comment to the jury on characteristics which may make an identification unreliable, as discussed in *Festa v The Queen*.[99] The effect of judicial warnings on pretrial procedures is less direct than exclusion of identification at trial.[100] Nevertheless, warnings carrying the weight of judicial authority may cause juries to reject unreliable identification evidence.[101] To that extent they are important for regulating pretrial identification procedures and practice.

The leading Australian authority on identification warnings is *Domican v The Queen*:

> Whatever the defence and however the case is conducted, where evidence as to identification represents any significant part of the proof of guilt of an offence, the judge must warn the jury as to the dangers of convicting on such evidence where its reliability is disputed. The terms of the warning need not follow any particular formula. But it must be cogent and effective. It must be appropriate to the circumstances of the case. Consequently, the jury must be instructed "as to the factors which may affect the consideration of [the identification] evidence in the circumstances of the particular case." A warning in general terms is insufficient. The attention of the jury "should be drawn to any weaknesses in the identification evidence." Reference to counsel's arguments is insufficient.

98. *Jury Directions Act 2015* (Vic) s 36(3)(a)–(e) (Austl.).

99. *See Festa v The Queen* [2001] HCA 72 (13 December 2001) 16 (Austl.).

100. *See generally id.* at 57 (Kirby J, dissenting) (explaining that judges understand the risks of misidentifications and must provide warnings to the jury that articulate aspects of the identification evidence that may be unreliable).

101. *See id.* at 55–56 ("[T]he jury should be given careful guidance as to the circumstances of the particular case, and their attention should be drawn to any weaknesses in the identification of evidence.").

> The jury must have the benefit of a direction which has the authority of the judge's office behind it. It follows that the trial judge should isolate and identify for the benefit of the jury any matter of significance which may reasonably be regarded as undermining the reliability of the identification evidence.
>
> . . . .
>
> [T]he adequacy of a warning in an identification case must be evaluated in the context of the evidence in the case. But its adequacy is evaluated by reference to the identification evidence and not the other evidence in the case. The adequacy of the warning has to be evaluated by reference to the nature of the relationship between the witness and the person identified, the opportunity to observe the person subsequently identified, the length of time between the incident and the identification, and the nature and circumstances of the first identification – not by reference to other evidence which implicates the accused. A trial judge is not absolved from his or her duty to give general and specific warnings concerning the danger of convicting on identification evidence because there is other evidence, which, if accepted, is sufficient to convict the accused. The judge must direct the jury on the assumption that they may decide to convict solely on the basis of the identification evidence.[102]

A *Domican* warning finds expression in s 116 of the *Evidence Act 1995* (Cth) below.

> 116 Directions to jury
>
> (1) If identification evidence has been admitted, the judge is to inform the jury:
>
> (a) that there is a special need for caution before accepting identification evidence; and

102. *Domican v The Queen* (1992) 106 ALR 203, 207, 209–10 (Austl.) (footnotes omitted).

(b) of the reasons for that need for caution, both generally and in the circumstances of the case.

(2) It is not necessary that a particular form of words be used in so informing the jury.[103]

Furthermore, identification evidence is treated as a species of unreliable evidence in Australia, as exampled by s 165(1)(b) of the *Evidence Act 1995* (Cth) below, where other subsections include, *inter alia*, (c) the reliability of evidence which might be affected by age or ill health, (d) evidence given by a co-defendant in a criminal proceeding, and (e) evidence given by a prison informer.

Section 165 Unreliable evidence

(1) This section applies to evidence of a kind that may be unreliable, including the following kinds of evidence . . .

(a) identification evidence . . . .

(2) If there is a jury and a party so requests, the judge is to:

(a) warn the jury that the evidence may be unreliable; and

(b) inform the jury of matters that may cause it to be unreliable; and

(c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.[104]

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103. See *Evidence Act 1995* (Cth) s 116(1)–(2) (Austl.) for an example of Australia's Uniform Evidence Legislation (UEL). Australia has basically two separate evidence regimes. The first comprises States and Territories that have joined up to what is known as the UEL: Australian Capital Territory, Commonwealth, New South Wales, Northern Territory, Tasmania, and Victoria. As the name implies, there is a high degree of uniformity across these jurisdictions, although there are individual variations. Each jurisdiction has its own Evidence Act but with common numbering of sections. The second regime is broadly described as the common law regime, comprising Queensland, South Australia, and Western Australia. While each of these three jurisdictions have separate Evidence Acts, they share a common law tradition and have eschewed joining the Uniform Evidence Legislation which has a far greater degree of codification of evidence law.

104. *Id.* at s 165(1)(b)–(e), (2)(a)–(c).

Under s 165(2), the defence can request the judge to warn the jury that the identification evidence may be unreliable, as well as warn the jury of the need for caution in deciding whether to accept the evidence.[105]

In addition to embedding the *Turnbull* guidelines into Australian legislation, all Australian jurisdictions have enshrined the *Christie*[106] discretion into statute, as exampled by s 137 of the *Evidence Act 1995* (Cth).

> Section 137 Exclusion of prejudicial evidence in criminal proceedings
>
> In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.[107]

As Chief Justice Gleeson pointed out in *Festa v The Queen*:

> If evidence is of some, albeit slight, probative value, then it is admissible unless some principle of exclusion comes into play to justify withholding it from a jury's consideration. . . . The totality of the evidence may be such as to render a conviction unsafe. But that does not affect admissibility.[108]

An example of a challenge based on s 137 of the *Evidence Act 1995* (NSW) to a photo array can be found in *R v Gordon.*[109] Photographs of 20 people were included in the photo array (presented by way of videotape to the eyewitnesses).[110] Including the appellant, they were all of the same age and complexion, and all had brown hair.[111] No characteristics of the appellant stood

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105. *Id.* at s 165(2)(a)–(c).
106. R v. Christie [1914] AC (HL) 545, 545 (appeal taken from Eng.).
107. *Evidence Act 1995* (Cth) s 137 (Austl.).
108. *Festa v The Queen* [2001] HCA 72 (13 December 2001) 4 (Austl.).
109. *R v Gordon* [2004] NSWCCA 45 (11 May 2004) ¶¶ 21–23 (Austl.).
110. *Id.* ¶ 13.
111. *Id.* ¶ 43.

out.[112] Three of the five eyewitnesses had described the robber as having blonde hair.[113] A police officer had said to one of the witnesses looking at the videotaped array, "Don't pay attention to the blonde hair, people can change their hair colour," to which the witness then said, "Then I think it was [number] eighteen."[114] In response to a question about her certainty, she said, "About 80%, his eyes are the same and lips, but now he has a thinner face and more acne."[115] An appeal submission based on the failure to include people with blonde hair was dismissed, as was an appeal submission that there was an insufficient array of people beyond the appellant with pimples and acne scarring.[116] Two of the five witnesses had mentioned pimples and pimple scars—one with reference to the robber's cheeks.[117] The pictures showed two people with facial pimples, one being the appellant, and neither suffering from particularly prominent acne.[118] Gordon's photograph showed pimples on the chin and forehead.[119] As Justice Bell indicated, this argument depended on an analysis of the pictures, and her Honour's view was that the appellant's skin condition did not make him stand out in the array.[120]

Whether evidence should have been excluded under s 137 of *Evidence Act 2008* (Vic) was considered in *R v Dickman*.[121] The majority in the Victorian Court of Appeal concluded that any probative value that certain identification evidence had was so low as to be outweighed by the risk of unfair prejudice, and having found that s 137 of the Evidence Act required the exclusion of this identification evidence, the majority concluded that its admission had occasioned a substantial miscarriage of justice.[122]

112. *Id.*
113. *Id.* ¶ 12.
114. *Id.* ¶ 14.
115. *Id.*
116. *Id.* ¶ 33.
117. *Id.* ¶ 12.
118. *Id.* ¶¶ 46–47.
119. *Id.* ¶ 44.
120. *Id.* ¶ 47.
121. *R v Dickman* [2017] HCA 24 (21 June 2017) (Austl.).
122. *Id.* at 9, 10.

In a unanimous judgment, the High Court restored the original conviction holding (at ¶ 57) that the danger of the misuse of the identification evidence was minimal, and (at ¶ 63) that there was no miscarriage of justice as given the evidence the respondent's conviction was inevitable:

> [57] The appellant [the Crown] is right to contend that the jury was not required to grapple with "abstract notions as to the dangers of identification evidence", as the limitations of the August 2011 identification were apparent. The trial judge's conclusion that the danger of unfair prejudice was minimal and could be adequately addressed by direction was justified. It follows that the admission of the August 2011 identification did not involve error.
>
> . . . .
>
> [63] In light of the evidence and the issues that were live at the trial, the appellant's submission that the prosecution case was overwhelming should be accepted. The possibility that a person other than the respondent was the "old man" was excluded beyond reasonable doubt. The respondent's conviction was inevitable.[123]

Essentially, the High Court determined that the Victorian Court of Appeal had erroneously narrowed the focus of their analysis under s 137 on the low probative value of the evidence rather than on whether it was outweighed by unfair prejudice.[124] Thus, the *Christie* discretion, which finds expression in s 137's balancing act of weighing probative value against the danger of unfair prejudice in deciding whether the evidence should be excluded, is an additional safeguard for the defence above and

123. *Id.* at 16, 18 (footnote omitted).

124. *Id.* at 12 (citing *Festa v The Queen* [2001] 208 CLR 593 at 598–99 (Gleeson CJ), 614–15 (McHugh J), 644 (Kirby J) (dissenting, but agreeing as to the admissibility of the Hill identification evidence), 658 (Hayne J)).

beyond judicial warnings as to the unreliability of the identification evidence.[125]

However, in *IMM v The Queen*, the High Court was required to decide whether, in assessing probative value for the purposes of s 137 above, a judge should take into account the credibility of a witness or the reliability of the evidence.[126] In a 4-3 decision, the High Court held that when considering probative value a trial judge must proceed on the assumption that a jury will accept the evidence, and therefore neither the credibility of a witness nor the reliability of the evidence in question is relevant to its assessment.[127]

Nevertheless, as Pettit has observed, for circumstance reliability (the degree of reliability or unreliability arising from the circumstances in which an identification was made) and categorical reliability (certain categories of evidence have long been accepted as inherently unreliable such as identification evidence), it is possible to take both types of reliability into account consistently with the majority in *IMM v The Queen*.[128]

> [F]irstly, the external circumstances in which an identification is made in terms of the degree to which it makes an identification 'unconvincing'; and secondly, consistently with [*R v*] *Dickman*, the *inherent* unreliability (or 'limitations') of identification evidence, due to factors like displacement.[129]

Pettit concludes by contending that, given the traditional dangers of identification evidence, the categorisation of types of reliability "will help us to understand how circumstance and

125. *Dupas v The Queen* [2012] VSCA 328 (21 December 2012) 9, 37 (Austl.).

126. *IMM v The Queen* [2016] HCA 14 (14 April 2016) 4 (Austl.).

127. *Id.* at 14.

128. Rory Pettit, *Social Media Identification and* IMM 21–22 (Mar. 30, 2019) (https://criminalcpd.net.au/wp-content/uploads/2019/08/Social-media-and-IMM-Rory-Pettit-March-2019.pdf) (footnote omitted).

129. *Id.*

categorical reliability should continue legitimately to affect the probative value of [identification] evidence."[130]

Before leaving the admission of identification evidence at trial, it is necessary to mention the discretion that resides with the Crown prosecutor, who is required to comply with the Prosecution Policy of the relevant Director of Public Prosecutions in each Australian jurisdiction.[131]

> The *Prosecution Policy* provides a two-stage test that must be satisfied before a prosecution is commenced:
>
> - there must be **sufficient evidence** to prosecute the case; and
> - it must be evident from the facts of the case, and all the surrounding circumstances, that the prosecution would be in the **public interest**.
>
> In determining whether there is sufficient evidence to prosecute a case the CDPP must be satisfied that there is *prima facie* evidence of the elements of the offence and a reasonable prospect of obtaining a conviction. The existence of a *prima facie* case is not sufficient.[132]

Such prosecution policies are used by the courts to hold Crown prosecutors accountable as the case of *Wood v The Queen* demonstrates. In *Wood v The Queen*, the court upheld a ground of appeal that that "[t]he trial miscarried by reason of the prejudice occasioned by the Crown Prosecutor."[133] The case was dealt with in New South Wales, and the court referred to Guideline 2 setting out the "Role and Duties of the Prosecutor" pursuant to s 15(2) of the *Director of Public Prosecutions Act 1986* (NSW).

130. *Id.* at 22.

131. *See Prosecution Policy*, COMMONWEALTH DIR. OF PUB. PROSECUTIONS (2016), https://www.cdpp.gov.au/prosecution-process/prosecution-policy (last visited Mar. 29, 2021).

132. *Id.*

133. *Wood v The Queen* [2012] NSWCCA 21 (24 February 2012) 20 (Austl.).

[577] A prosecutor is a "minister of justice". The prosecutor's principal role is to assist the court to arrive at the truth and to do justice between the community and the accused according to law and the dictates of fairness.

. . . A prosecutor represents the community and not any individual or sectional interest. A prosecutor acts independently, yet in the general public interest.

. . . .

"It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings."

(per Rand J in the Supreme Court of Canada in *Boucher v The Queen* (1954) 110 CCC 263, at 270).

. . . .

"Prosecuting counsel in a criminal trial represents the State. The accused, the court and the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one."

> (per Deane J in *Whitehorn v The Queen* (1983) 152 CLR 657, at 663-664).[134]

Thus, Crown prosecutors are subject to the Prosecution Policy of the relevant Director of Public Prosecutions, which is a public document and is used by the courts to hold Crown prosecutors to account. In a later section of this article, these prosecution policies will be compared with the situation in the United States.

C. Summary of the Law Relating to Identification Evidence in Australia

The law in Australia relating to identification evidence has been examined under two headings: (a) the pretrial procedures, and (b) the admission of identification evidence at trial and judicial warnings to the jury.

Some Australian jurisdictions have legislative rules prescribing procedures for eyewitness identification such as Queensland and South Australia, while others, like New South Wales, have rules of practice.[135] These procedures are directed at ensuring fairness and preventing any prompting of the witness, and include (1) the recording of the identification parade which requires "the behaviour and position of each person in an identification parade to be photographed or otherwise electronically recorded,"[136] and (2) replicating "the conditions, described by the witness, when the witness saw a person involved in the offence."[137]

As regards the visual record of the identity parade, rule 3AA of the *Evidence Regulations 2007* (SA) provides a good example of the standard required such that: (a) the witness must be "visible at all relevant times;" (b) the person identified must be "visible at the time the witness gives the indication; and (c) anything said by

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134. *Id.* at 165–67.

135. *See generally Evidence Regulations 2007* (SA) reg 3AA(1)(a) (Austl.) (stating reasonable steps must be taken to keep the witness identifying the potential suspect visible at all relevant times); *Evidence Act 1995* (NSW) s 114 (Austl.).

136. *Police Powers and Responsibilities Regulation 2012* (Qld) reg 37.

137. *Id.* reg 39.

the witness, and any other person present, during the conduct of the identity parade must be recorded."[138]

Where the preference is for photographic arrays (photo boards), Western Australia sets the standard through its use of the digiboard, as explained by the Court of Appeal in *Winmar v Western Australia.*

> [32] The Forensic Imaging Unit selects images of similar age, appearance, race, etc, to the suspect. Background colours and lighting conditions are matched. The photographs can be enhanced or altered in order to ensure the greatest possible similarity between the suspect and the fillers, for example, by lightening or darkening of hair or complexion.[139]

For the Commonwealth, s 3ZO(2) of the *Crimes Act 1914* (Cth) includes requirements such as: (ba) the photographs must not suggest the persons depicted are in police custody; (c) police must not "act unfairly towards the suspect;" (e) the witness must be told the suspect's photograph may be absent from those being shown to the witness; and (h) the suspect must be able to inspect the photographs.[140] Telling the witness that the suspect's photograph may not be among those photographs being viewed by the witness is of special significance.

While Australia uses simultaneous presentations for identity parades and photographic arrays rather than sequential presentations, and has not as yet introduced double-blind procedures for administering identity parades and photographic arrays, the procedures described above are robust and widely administered. However, Australia could usefully adopt the New Zealand provision contained in s 45(2) of the Evidence Act 2006 (N.Z.), which states that without a good reason, a breach of visual identification procedures will result in the evidence being

138. *Evidence Regulations 2007* (SA) reg 3AA(1)(a)–(c) (Austl.).

139. *Winmar v Western Australia* [2007] WASCA 244 (22 May 2007) 13–14 (Austl.).

140. *Crimes Act 1914* (Cth) s 3ZO(2)(a)-(h).

inadmissible unless the prosecution can meet the high standard of beyond reasonable doubt that the identification was reliable.[141]

Moving on to the admission of identification evidence at trial and judicial warnings to the jury, as Justice Franklyn noted in *Harrison v The Queen*, the *Turnbull* guidelines have been incorporated into both Australian case law and statute, as exampled by s 36(3) of the *Jury Directions Act 2015* (Vic), which deals with a direction on identification evidence.[142] The leading Australian authority on identification warnings is *Domican v The Queen*, which finds expression in s 116 of the *Evidence Act 1995* (Cth).[143] Furthermore, identification evidence is treated as a species of unreliable evidence in Australia, as exampled by s 165(1)(b) of the *Evidence Act 1995* (Cth).[144] In addition to the embedding of the *Turnbull* guidelines into Australian legislation, all Australian jurisdictions have enshrined the *Christie* discretion into statute, as exampled by s 137 of the *Evidence Act 1995* (Cth).[145]

Given the foregoing combination of case law and statute, it can reasonably be concluded that Australian courts and legislatures are alive to the dangers surrounding identification evidence and have taken firm steps to minimise the risk of miscarriages of justice.

For example, courts use the Prosecution Policy of the relevant Director of Public Prosecutions to hold Crown prosecutors accountable.[146]

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141. Evidence Act 2006 s 45(2) (N.Z.).

142. *Compare Harrison v The Queen* (Unreported, Supreme Court of Western Australia, Burt CJ, 4 September 1987) 8–9 (Austl.), *with Jury Directions Act 2015* s 36(3).

143. *Compare Domican v The Queen* (1992) 106 ALR 203, 203 (Austl.) (Mason CJ, Deane, Dawson, Toohey, Gaudron, and McHugh JJ), *with Evidence Act 1995* (Cth) s 116(1)(b).

144. *Evidence Act 1995* (Cth) s 165(1)(b).

145. *Compare R v. Christie* [1914] AC (HL) 545, 555 (appeal taken from Eng.) (stating judge has complete discretion on whether to instruct juries to only consider evidence given by an accomplice if it is corroborated), *with Evidence Act 1995* (Cth) s 137 (allowing courts discretion to weigh prejudice caused by prejudicial evidence to its probative value).

146. *Prosecution Policy*, *supra* note 131.

II. IDENTIFICATION EVIDENCE IN THE UNITED STATES

A. *Pre-Trial Procedures*

As previously mentioned in the Overview, the Federal Rules of Evidence (FRE) in the United States comprise a number of short provisions that are set out in plain language and are largely free of technical terms. FRE 801 deals with exclusions from hearsay, and subsection (d) deals with statements that are not hearsay.[147] FRE 801(d)(1)(C) covers the situation where the declarant testifies about a prior statement, and the statement identifies a person as someone the declarant perceived earlier.[148] Thus, without further clarification in the FRE, potentially all eyewitness identification evidence is admissible regardless of the circumstances surrounding the identification. As eyewitness identification evidence is notoriously unreliable, it has been necessary for the Supreme Court of the United States to identify an appropriate test for lower courts to apply: namely, the test enumerated in *Manson v. Brathwaite* to determine the reliability of pretrial eyewitness identification.[149]

In *Manson*, the Supreme Court noted that there were at least two approaches to the admission of identification evidence: the *per se* approach and the totality of circumstances approach.[150]

> The first, or *per se* approach . . . focuses on the procedures employed and requires exclusion of the out-of-court identification evidence, without regard to reliability, whenever it has been obtained through unnecessarily suggested confrontation procedures. The justifications advanced are the elimination of evidence of uncertain reliability, deterrence of the police and prosecutors, and the stated "fair assurance against the awful risks of misidentification."
>
> The second, or more lenient, approach is one that continues to rely on the totality of the

147. FED. R. EVID. 801.
148. FED. R. EVID. 801(d)(1)(C).
149. *See* Manson v. Brathwaite, 432 U.S. 98, 114 (1977).
150. *Id.* at 110.

> circumstances. It permits the admission of the confrontation evidence if, despite the suggestive aspect, the out-of-court identification possesses certain features of reliability. Its adherents feel that the *per se* approach is not mandated by the Due Process Clause of the Fourteenth Amendment. This second approach, in contrast to the other, is ad hoc and serves to limit the societal costs imposed by a sanction that excludes relevant evidence from consideration and evaluation by the trier of fact.[151]

The *per se* approach has some similarity with s 45(2) of the Evidence Act 2006 (N.Z.) previously discussed in Part II A, which states that without a good reason, a breach of a formal procedure will result in the evidence being inadmissible unless the prosecution can meet the high standard of beyond reasonable doubt that the identification was reliable.[152] However, s 45(2) is less draconian than the *per se* approach as the prosecution can still secure the admission of the eyewitness evidence if it is sufficiently reliable.[153] Reliability could be assessed against the five factors set out in *Manson*: (1) the witness' opportunity to view; (2) "the witness' degree of attention;" (3) the accuracy of the witness' description; (4) the witness' "level of certainty;" and (5) "the time between the crime and the confrontation."[154] Thus, one option would be for jurisdictions in the United States to legislatively adopt a "New Zealand" variation of the *per se* approach.

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151. *Id.* (citations omitted).

152. *Compare id.* (stating per se approach requires exclusion of out-of-court identification evidence whenever it has been obtained outside of accepted procedures), *with* Evidence Act 2006, s 45(2) (N.Z.) (stating breach of formal procedure will result in the inadmissibility of the identification evidence unless prosecutor can show beyond a reasonable doubt that the evidence is reliable and there was good cause for the deviation from accepted procedure).

153. *Compare Manson*, 432 U.S. at 110 (stating per se approach bars admission of evidence obtained from breaches in formal procedure, despite any showing of reliability) *with* Evidence Act 2006, s 45(2) (N.Z.) (stating identification evidence may be admitted if prosecutors demonstrate the reliability is beyond a reasonable doubt).

154. *Manson*, 432 U.S. at 114–15 (citing *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972)).

The Supreme Court explained its preference for the totality of circumstances approach in relation to three matters: (1) "the concern that the jury not hear eyewitness testimony unless that evidence has aspects of reliability;" (2) deterrence; and (3) "the effect on the administration of justice."[155] The Court compared the effects of the *per se* rule and the totality of circumstances approach on these three matters in *Manson*:

> It must be observed that both approaches before us are responsive to this concern [exclusion of eyewitness testimony]. The *per se* rule, however, goes too far since its application automatically and peremptorily, and without consideration of alleviating factors, keeps evidence from the jury that is reliable and relevant.
>
> The second factor is deterrence. Although the *per se* approach has the more significant deterrent effect, the totality approach also has an influence on police behavior. The police will guard against unnecessarily suggestive procedures under the totality rule, as well as the *per se* one, for fear that their actions will lead to the exclusion of identifications as unreliable.
>
> The third factor is the effect on the administration of justice. Here the *per se* approach suffers serious drawbacks. Since it denies the trier reliable evidence, it may result, on occasion, in the guilty going free. Also, because of its rigidity, the *per se* approach may make error by the trial judge more likely than the totality approach.[156]

In preferring the totality of circumstances approach, the Supreme Court observed, somewhat drily, that "inflexible rules of exclusion that may frustrate rather than promote justice have not been viewed recently by this Court with unlimited enthusiasm."[157] Furthermore, the Supreme Court cited with

155. *Manson*, 432 U.S. at 112.

156. *Id.* (footnotes omitted).

157. *Id.* at 113.

approval remarks made by Judge Leventhal in *Clemons v. United States*[158] to the effect that in an adversarial system much untrustworthy evidence is admitted; identification testimony is still only evidence and does not go to the integrity of the adversarial process; and counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification.[159]

As to the latter argument regarding cross-examination, it was pointed out in Part II B that "cross-examination is a tool with limited usefulness in testing a witness's ability to recognise faces,"[160] and where displacement is a possibility, as Justice Garling noted in *R v Smith (No. 3)*, there is a real risk of unconscious substitution of the photographic image for the person actually seen by the witness, such that cross-examination will likely lead to mere affirmation of the evidence of identification.[161] More importantly, counsel for the defence arguing in summation as to factors causing doubts as to the accuracy of the identification does not carry the weighty imprimatur of the trial judge giving a solemn warning to the jury as to the dangers of convicting solely on the basis of the identification evidence. This begs the question as to whether FRE 801(d)(1)(C) should contain a statement relating to the requirement for jury instructions, on the grounds that identification evidence is inherently unreliable. This question will be developed in Part III B.

It follows from the Supreme Court's rejection in *Manson* of the *per se* approach and the endorsement of the totality of circumstances approach that reliability was to become the touchstone[162] of admissibility of eyewitness evidence: "The admission of testimony concerning a suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability."[163]

As Couch has pointed out, the totality of circumstances approach under the *Manson* rule involves a two-part process.

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158. Clemons v. United States, 408 F.2d 1230, 1251 (D.C. Cir. 1968).

159. *Manson*, 432 U.S. at 113–14.

160. *Longmair v Bott* [2010] NTSC 30 (4 June 2010) 9 (Austl.).

161. *R v Smith [No. 3]* [2014] NSWSC 771 (3 June 2014) 8 (Austl.).

162. *Manson*, 432 U.S. at 114 (using the word "linchpin").

163. *Id.* at 106.

> First, a trial court decides whether the eyewitness identification was obtained through unnecessarily suggestive circumstances. Second, the court must consider whether the suggestive circumstances render the resulting identification unreliable by weighing the corrupting influence of the suggestiveness against five reliability factors. A defendant must be successful at both steps in order to exclude the identification evidence.[164]

Thus, if under the first step the procedure was not suggestive or unnecessary, then that is the end of the matter, and the evidence is admitted as there is no infringement of due process.[165] However, if the procedure was suggestive, then the Court engages in a balancing act to determine whether the identification evidence is sufficiently reliable to outweigh the corrupting effect of the suggestive identification itself.[166] In other words, the Court determines whether the probative value of the identification evidence exceeds any taint in the procedure.

Critics of the *Manson* reliability test are thick on the ground,[167] with Yacona taking aim at both steps (or prongs) of the test, essentially supporting the *per se* approach and arguing that the *Manson* test violates due process under the Fourteenth Amendment.

> The Manson decision is flawed in multiple ways. . . . [T]the Court's ignorance to the power of

164. Robert Couch, *A Model for Fixing Identification after* Perry v. New Hampshire, 111 MICH. L. REV. 1535, 1537 (2013) (footnote omitted). *See also Manson,* 432 U.S. at 114 ("The factors to be considered are set out in [*Neil v. Biggers,* 409 U. S. 188, 199–200 (1972)]. These include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.").

165. Yacona, *supra* note 8, at 547.

166. *Id.*

167. See Couch, *supra* note 164, at 1538 nn.11–17 for a list of *Manson* reliability test critics, which includes Gary L. Wells and Michael R. Leippe.

> suggestive police procedures, inherent in the first prong, allows for violations of the Fourteenth Amendment. The second prong of the Manson "reliability" test is also flawed and necessitates revision. Briefly stated, the second prong's five factors are inaccurate determinants of the reliability of eyewitness identification. Four out of the five factors rely on a witness's subjective assessments. For example, the court can only determine how much attention the witness paid to the criminal by asking the witness herself. These subjective assessments cannot be tested objectively and therefore are notoriously unreliable. Additionally, these subjective assessments are easily altered due to the various stimuli that accompany an altercation. Therefore, the second prong of the Manson "reliability" test also denies a defendant due process because it allows admission to the jury of unreliable evidence that directly bears on the guilt or innocence of the defendant.[168]

The *Manson* test was also criticized by the NAS report.

> The test evaluates the "reliability" of eyewitness identifications using factors derived from prior rulings and not from empirically validated sources. It includes factors that are not diagnostic of reliability and 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.[169]

Begakis attacked the five-factor, second prong of the *Manson* test as "unreliable because: (1) two factors require a subjective analysis by the witness that may be affected by estimator

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168. Yacona, *supra* note 8, at 547–48.

169. COMM. ON SCI. APPROACHES TO UNDERSTANDING AND MAXIMIZING THE VALIDITY AND RELIABILITY OF EYEWITNESS IDENTIFICATION IN L. ENF'T AND THE CTS., *supra* note 55, at 44.

variables, and (2) three out of five factors may be heavily influenced by law enforcement and system variables."[170]

The thrust of another attack on the *Manson* test is that it does not account for jurors' inability to accurately process eyewitness data.[171]

> *Manson* fails to adequately prepare a jury to make an informed decision. Because courts rarely exclude a suggestive procedure, most eyewitness evidence is presented to the jury despite its potentially adverse effects in determining whether the identification should be admissible. Unfortunately, the average juror will often believe an eyewitness even if the eyewitness is contradicted by more reliable evidence. Studies suggest that eyewitness evidence is the most compelling to the juror and that jurors are unaware of the implications of extrinsic evidence on the identification. Without jury instructions or expert testimony, jurors do not have the requisite knowledge to make an informed decision.[172]

Manson was decided in 1977, but the Supreme Court was afforded the opportunity to revisit the test thirty-five years later in 2012 in *Perry v. New Hampshire.*[173] During the intervening years, a veritable mountain of research on eyewitness evidence had emerged for the Supreme Court to consider and review.

Notwithstanding the available research, in *Perry*, the Supreme Court reaffirmed the test in *Manson*, holding that "[t]he 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."[174]

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170. Begakis, *supra* note 9, at 190.

171. Jacob L. Zerkle, *I Never Forget a Face: New Jersey Sets the Standard in Eyewitness Identification Reform*, 47 VAL. U. L. REV. 357, 386 (2012).

172. *Id.* (footnotes omitted).

173. Perry v. New Hampshire, 132 S. Ct. 716, 719 (2012).

174. *Id.* at 728.

As Dotson has observed, the Supreme Court "determined that constitutional safeguards during trial, including cross-examination, jury instructions, evidentiary rules, and expert testimony, would adequately protect defendants from questionable eyewitness evidence."[175]

> Our unwillingness to enlarge the domain of due process . . . rests, in large part, on our recognition that the jury, not the judge, traditionally determines the reliability of evidence. We also take account of other safeguards built into our adversary system that caution juries against placing undue weight on eyewitness testimony of questionable reliability. These protections include the defendant's Sixth Amendment[176] right to confront the eyewitness. Another is the defendant's right to the effective assistance of an attorney, who can expose the flaws in the eyewitness' testimony during cross-examination and focus the jury's attention on the fallibility of such testimony during opening and closing arguments. Eyewitness-specific jury instructions, which many federal and state courts have adopted, likewise warn the jury to take care in appraising identification evidence. The constitutional requirement that the government prove the defendant's guilt beyond a reasonable doubt also impedes convictions based on dubious identification evidence.
>
> State and Federal Rules of Evidence, moreover, permit trial judges to exclude relevant evidence if its probative value is substantially outweighed by its prejudicial impact or potential for misleading

175. Jared T. Dotson, *The Lynchpin of Identification Evidence: The Unreliability of Eyewitnesses and the Need for Reform in West Virginia*, 117 W. VA. L. REV. 775, 784 (2014) (citing *Perry*, 132 S. Ct. at 728–29).

176. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.").

> the jury.[177] In appropriate cases, some States also permit defendants to present expert testimony on the hazards of eyewitness identification evidence.[178]

One academic commentator has suggested that *Perry* was not a strong case to argue for a reconsideration of the *Manson* reliability test, as it focused on the first limb (or prong) of the test.

> The issue in Perry was narrow, namely, whether suggestive circumstances that are not created by the police can satisfy the first prong of the Manson test. . . .
>
> . . . .
>
> . . . The Court ruled against Perry based on the first step of the Manson test, finding that due process concerns were not implicated when an "identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement." Having found that the identification was not obtained by means of suggestive police conduct, the Court did not analyze the reliability of the identification under the second Manson step.[179]

While the Supreme Court did acknowledge the Brief for Petitioner regarding "studies showing that eyewitness misidentifications are the leading cause of wrongful convictions,"[180] and cited to the Brief for American Psychological Association as *Amicus Curiae* as "describing research indicating that as many as one in three eyewitness identifications is

177. FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

178. *Perry*, 132 S. Ct. at 728–29 (citations omitted).

179. Couch, *supra* note 164, at 1539–40 (footnotes omitted) (quoting *Perry*, 132 S. Ct. at 730).

180. *Perry*, 132 S. Ct. at 728.

inaccurate,"[181] the only recognition of the research developments in the field over the previous thirty-five years since *Manson* was decided came in the form of the Court not doubting "either the importance or the fallibility of eyewitness identifications."[182]

Couch has described this outcome as "a disappointment and a setback in light of the overwhelming evidence that change needs to be made,"[183] while taking some comfort that the Court recognized "the role of state and lower federal courts in weighing such evidence, and approvingly noted the efforts of lower courts to keep unreliable evidence out."[184]

Where did the outcome in *Perry* leave reformers who were unhappy with the Supreme Court's unwillingness to reopen *Manson*? In Couch's view, the Supreme Court's "deferral on the question of the viability of the *Manson* framework requires lower courts to bear the burden of a critical analysis of current eyewitness evidence practices."[185]

One such lower court is the Supreme Court of New Jersey, who directly addressed the *Manson* test and the assumptions that underlay the test in *State v. Henderson*:

> To protect due process concerns, the *Manson* Court's two-part test rested on three assumptions: (1) that it would adequately measure the reliability of eyewitness testimony; (2) that the test's focus on suggestive police procedure would deter improper practices; and (3) that jurors would recognize and discount untrustworthy eyewitness testimony.[186]

The court concluded that the *Manson* test "does not adequately meet its stated goals: it does not provide a sufficient measure for reliability, it does not deter, and it overstates the jury's innate ability to evaluate eyewitness testimony."[187]

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181. *Id.*
182. *Id.*
183. Couch, *supra* note 164, at 1541.
184. *See id.* at 1542 (citing *Perry*, 132 S. Ct. at 728).
185. *Id.*
186. State v. Henderson, 27 A.3d 872, 918 (N.J. 2011).
187. *Id.*

The court continued by identifying five reasons for the above conclusion as to the inadequacy of the *Manson* test, which resulted in a revision of the State's framework for evaluating eyewitness identification evidence.

> First, under [Manson], defendants must show that police procedures were "impermissibly suggestive" before courts can consider estimator variables that also bear on reliability. As a result, although evidence of relevant estimator variables tied to the Neil v. Biggers factors is routinely introduced at pretrial hearings, their effect is ignored unless there is a finding of impermissibly suggestive police conduct. . . .
>
> Second, under [Manson], if a court finds that the police used impermissibly suggestive identification procedures, the trial judge then weighs the corrupting effect of the process against five "reliability" factors. But three of those factors—the opportunity to view the crime, the witness' degree of attention, and the level of certainty at the time of the identification—rely on self-reporting by eyewitnesses; and research has shown that those reports can be skewed by the suggestive procedures themselves and thus may not be reliable. Self-reporting by eyewitnesses is an essential part of any investigation, but when reports are tainted by a suggestive process, they become poor measures in a balancing test designed to bar unreliable evidence.
>
> Third, rather than act as a deterrent, the [Manson] test may unintentionally reward suggestive police practices. The irony of the current test is that the more suggestive the procedure, the greater the chance eyewitnesses will seem confident and report better viewing conditions. Courts in turn are encouraged to admit identifications based on criteria that have been tainted by the very suggestive practices the test aims to deter.
>
> Fourth, the [Manson] test addresses only one option for questionable eyewitness identification

> evidence: suppression. Yet few judges choose that ultimate sanction. An all-or-nothing approach does not account for the complexities of eyewitness identification evidence.
>
> Finally, [Manson] instructs courts that "the reliability determination is to be made from the totality of the circumstances in the particular case." In practice, trial judges routinely use the test's five reliability factors as a checklist. The State maintains that courts may consider additional estimator variables. Even if that is correct, there is little guidance about which factors to consider, and courts and juries are often left to their own intuition to decide which estimator variables may be important and how they matter.
>
> As a result of those concerns, we now revise the State's framework for evaluating eyewitness identification evidence.[188]

For present purposes, the fourth point is the most significant reason: that judges are very reluctant to choose the ultimate sanction of suppression or exclusion of the identification evidence. The all-or-nothing approach lies at the heart of the problem with the *Manson* test. To adopt the alternative *per se* approach elevates eyewitness evidence to an especially untrustworthy species of evidence, while on the other hand the *Manson* totality of circumstances approach requires considerable adjustment. The *Manson* Court was concerned with the effect of the *per se* approach on the administration of justice and placed great faith in the robustness of the adversarial system to ensure a fair trial. The obvious solution to the treatment of the admission of eyewitness evidence is to reform both the pretrial procedures and the instructions to the jury at trial. The latter will be addressed in Part III B.

As to reform of the pretrial procedures, the court in *Henderson* stated that "the revised framework should allow all relevant system *and* estimator variables to be explored and weighed at pretrial hearings when there is some actual evidence

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188. *Id.* at 918–19 (citations omitted).

of suggestiveness."[189] The court then set out a series of steps for evaluating identification evidence.

> First, to obtain a pretrial hearing, a defendant has the initial burden of showing some evidence of suggestiveness that could lead to a mistaken identification. . . .
>
> Second, the State must then offer proof to show that the proffered eyewitness identification is reliable—accounting for system and estimator variables . . . .
>
> Third, the ultimate burden remains on the defendant to prove a very substantial likelihood of irreparable misidentification. . . .
>
> Fourth, if after weighing the evidence presented a court finds from the totality of the circumstances that defendant has demonstrated a very substantial likelihood of irreparable misidentification, the court should suppress the identification evidence.[190]

The court continued by identifying the following non-exhaustive list of system variables to evaluate whether there is evidence of suggestiveness to trigger a hearing: blind administration, pre-identification instructions, lineup construction, feedback, recording confidence, multiple viewings, showups, private actors, and other identifications made.[191]

The court's non-exhaustive list of estimator variables to evaluate the overall reliability of an identification and determine its admissibility comprised stress, weapon focus, duration, distance and lighting, witness characteristics, characteristics of perpetrator, memory decay, race-bias, opportunity to view the criminal at the time of the crime, degree of attention, accuracy of prior description of the criminal, level of certainty demonstrated

189. *Id.* at 919.

190. *Id.* at 920 (citations omitted).

191. *Id.* at 920–21.

at the confrontation, and the time between the crime and the confrontation.[192]

Placing these two lists in perspective, the court concluded in the following terms:

> The framework avoids bright-line rules that would lead to suppression of reliable evidence any time a law enforcement officer makes a mistake. Instead, it allows for a more complete exploration of system and estimator variables to preclude sufficiently unreliable identifications from being presented . . . .
>
> We add that enhanced hearings are not meant to be the norm in every case. . . .
>
> We also expect that in the vast majority of cases, identification evidence will likely be presented to the jury. The threshold for suppression remains high.[193]

This in turn leads directly to the importance of jury instructions to be dealt with in Part III B.

Couch considers *Henderson* "the most direct and significant repudiation of the outdated *Manson* framework," noting that *Henderson* represents "the wave of the future."[194]

> [A]s New Jersey has shown, a state court can guarantee more protection under a state constitution than the Supreme Court is currently providing under the federal due process clause. To be clear, *Henderson* is based on the New Jersey Constitution. Basing additional safeguards on a state constitution is the pathway to follow for other states that wish to provide more protection than *Manson*.[195]

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192. *Id.* at 921–22.

193. *Id.* at 928.

194. Couch, *supra* note 164, at 1545.

195. *Id.* at 1544.

However, while *Henderson* is clearly confined to New Jersey and *Manson* is still the benchmark on matters of federal law, there remains the possibility of reform to FRE 801(d)(1)(C) and FRE 403, which will be taken up in Part III B.

As to the reform of pretrial procedures in other jurisdictions, some states have also recognised that the significant potential for eyewitness misidentification requires a remedy, which in West Virginia takes the form of the Eyewitness Identification Act.[196] Dotson has observed that "[t]his statute requires all West Virginia law enforcement agencies that conduct eyewitness identification procedures to create 'specific written procedures for conducting photo lineups, live lineups, and showups' that comply with the statute's recommendations."[197] Dotson continues by giving the example of the recommendation in the statute that police, when conducting a live lineup, should give the eyewitness specific instructions:

> (1) That the perpetrator may or may not be present in the lineup, or, in the case of a showup, may or may not be the person that is presented to the eyewitness; (2) That the eyewitness is not required to make an identification; (3) That it is as important to exclude innocent persons as it is to identify the perpetrator; (4) That the investigation will continue whether or not an identification is made; and (5) That the administrator does not know the identity of the perpetrator.[198]

Another state to take a proactive approach to the adoption of eyewitness procedures is Virginia. As Garrett has documented, the Virginia Department of Criminal Justice Services ("DCJS"), promulgated a detailed model policy on eyewitness procedure in 2011.[199] Initially, those model practices were only haltingly

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196. W. VA. CODE § 62-1E-1 (2014).

197. Dotson, *supra* note 175, at 786.

198. *Id.* at 787 (citing W. VA. CODE § 62-1E-2(b)(1)–(5) (2014)).

199. Brandon L. Garrett, *Self-Policing: Dissemination and Adoption of Police Eyewitness Policies in Virginia,* 105 VA. L. REV. 96, 96 (2019).

adopted.[200] However, by 2018, Garrett was able to report a dramatic improvement:

> By 2018, the vast majority of Virginia residents lived in jurisdictions in which best practices regarding eyewitness identifications had been adopted. The larger agencies, with one exception, have all adopted these best practices. As a result, of the 8.5 million Virginia residents, only 9% or about 740,000 people, lived in jurisdictions that have not adopted these policies. Of the 126 accredited agencies in Virginia, only six very small agencies did not adopt the DCJS model policy in substance.[201]

In seeking an explanation for the turnaround, Garrett suggested a combination of factors were probably at work:

> A combination of efforts by policing organizations, dissemination between agencies, regional training by DCJS, media coverage in response to the 2013 study, and involvement of the Crime Commission, all may have helped to drive this change.[202]

Massachusetts is also a state to be a part of the "wave of the future" as regards eyewitness evidence. Section 1112 Eyewitness Identification of the Massachusetts Guide to Evidence contains subsections on both eyewitness identification procedures and jury instructions (the latter will be considered in Part III B).[203] Some of the significant procedures are as follows:

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200. *Id.* at 99–100 (citing Brandon L. Garrett, *Eyewitness Identifications and Police Practices: A Virginia Case Study*, 2 VA. J. CRIM. L. 1, 7–8 (2014)).

201. Garrett, *supra* note 199, at 110.

202. *Id.* at 110. See Brandon L. Garrett, *Eyewitness Identifications and Police Practices: A Virginia Case Study*, 2 VA. J. CRIM. L. 1 (2014), for full text of the 2013 case study.

203. SUPREME JUD. CT. ADVISORY COMM. ON MASS. EVIDENCE L., MASSACHUSETTS GUIDE TO EVIDENCE § 1112 (2019).

> Section 1112(b)(1)(B)
>
> (B) Suggestive Police Procedures. If the trial judge finds that the police procedures employed in the showing of the photographic array were so unnecessarily suggestive and conducive to mistaken identity as to deny the defendant due process of law, the Commonwealth may offer evidence of the identification only if it establishes by clear and convincing evidence that the proffered identification has a source independent of the suggestive photographic array.
>
> Section 1112(b)(4)
>
> (4) Suggestive Identification Not Resulting from Police Procedures. An identification will be suppressed even in the absence of constitutional concerns or police action if admitting the identification would violate common-law principles of fairness.
>
> Section 1112(e)
>
> (e) Expert Testimony. Expert testimony on the issue of eyewitness identification is admissible at the discretion of the trial judge.[204]

Thus, in Massachusetts, under subsection 1112(b)(1)(B) the use of suggestive procedures by the police goes beyond the second limb of the *Manson* test, and for the identification evidence to be admitted requires the establishment by clear and convincing evidence that the proffered identification has a source independent of the suggestive photographic array.[205] Essentially, this subsection is a halfway house between the *per se* approach and the totality of circumstances approach adopted by the *Manson* court. Subsection 1112(b)(4) takes the *per se* approach if the suggestive identification did not result from police procedures.[206] In recognition of the significant scientific evidence

204. *Id.* § 1112(b)(1)(B), (b)(4), (e).

205. *Id.* § 1112(b)(1)(B).

206. *See id.* § 1112(b)(4).

on identification evidence, subsection 1112(e) allows the admission of expert testimony on the issue of eyewitness identification, at the discretion of the trial judge, in order to aid the jury's understanding of the circumstances of the case in hand.[207]

At the federal level of government, the U.S. Department of Justice issues procedures for conducting eyewitness identification. One such procedure is for conducting photo arrays.[208] The headings employed indicate the scope of the procedures: Location of the Photo Array, Photograph of the Suspect, Selection of Filler Photographs, Method of Presenting Photographs, Administrator's Knowledge of the Suspect, Instructions to Witness, Multiple Witnesses, Administrator Feedback, and Documentation.[209] Examples include:

> Selection of Filler Photographs
>
> 3.1 A photo array should include at least five filler, or non-suspect, photographs.
>
> 3.2 Fillers should generally fit the witness's description of the perpetrator, including such characteristics as gender, race, skin color, facial hair, age, and distinctive physical features. They should be sufficiently similar so that a suspect's photograph does not stand out, but not so similar that a person who knew the suspect would find it difficult to distinguish him or her. When viewed as a whole, the array should not point to or suggest the suspect to the witness.
>
> Administrator's Knowledge of the Suspect
>
> 5.1 The administrator must ensure that he or she does not suggest to the witness – even unintentionally – which photograph contains the image of the suspect. Oftentimes, the best and

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207. *Id.* § 1112(e).

208. *See generally* Memorandum from Sally Q. Yates, Deputy Attorney General, Dep't of Justice, Eyewitness Identification: Procedures for Conducting Photo Arrays (Jan. 6, 2017) (https://www.justice.gov/file/923201/download).

209. *Id.*

simplest way to achieve this is by selecting an administrator who is not involved in the investigation and does not know what the suspect looks like.

Administrator Feedback

8.1 The administrator must avoid any words, sounds, expressions, actions or behaviors that suggest who the suspect is. Before, during, or after conducting the photo array, the administrator should not:

8.1.1 Volunteer information about the suspect or the case;

8.1.2 Indicate that the administrator knows who the suspect is;

8.1.3 Indicate to the witness that he or she has picked the "right" or "wrong" photograph; or

8.1.4 Tell the witness that any other witness has made an identification.

Documentation

9.1 The witness's identification of a photo, if any, and the corresponding statement of confidence should be clearly documented by:

9.1.1 Video- or audio-recording the photo array; or

9.1.2 The administrator immediately writing down as close to verbatim as possible the witness's identification and statement of confidence, as well as any relevant gestures or non-gverbal reactions. The witness should confirm the accuracy of the statement.[210]

Importantly, the above federal procedures require a double-blind photo array to be conducted.[211] On the question of

210. *Id.* §§ 3.1–3.2, 5.1, 8.1, 9.1.

211. *See id.* §§ 5.1–5.2.

sequential versus simultaneous identification methods, the "document does not take a position on which procedure should be used."[212]

The above examples of jurisdictions in the United States that have adopted model procedures and jury instructions for eyewitness evidence begs the question: how widespread are these procedures and instructions across the United States? Judged by Garrett's study in Virginia[213] and academic commentators who have lauded progressive states such as New Jersey and Massachusetts as being at the forefront of reform,[214] the answer would appear to be patchy but improving. Some support for this contention can be found in a study on police recording of custodial interrogations.[215]

Bang et al., writing in 2018, found:

> [S]ome 25 states (49%) in the United States currently, legally, mandate police officers record custodial interrogations under certain conditions. Additionally, two states—Rhode Island and Hawaii—have implemented statewide recording of some custodial interrogations without being required to do so by either statute or court ruling. This brings the total number of states that either legally or voluntarily record custodial interrogations statewide, under certain conditions, to 27 (53%). This is a fairly significant growth in the number of states requiring recording. However, the legal route to the implementation of the law, the offense criteria under which the law applies, and the possible remedy that is utilized if the police violate the law varies considerably by state.[216]

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212. *Id.* app. at 8.

213. Garrett, *supra* note 199, at 111.

214. *See generally* Couch, *supra* note 164; Dotson, *supra* note 175.

215. Brandon L. Bang, Duane Stanton, Craig Hemmens & Mary K. Stohr, *Police Recording of Custodial Interrogations: A State-by-State Inquiry*, 20(1) INT'L J. POLICE SCI. AND MGMT. 1, 3 (2018).

216. *Id.* at 10.

Given that the defendant pleads guilty in approximately 95% of criminal cases in the United States,[217] it might be expected that the United States would have followed the example set in the United Kingdom, Canada, New Zealand, and Australia of having recording requirements for all serious felonies.[218]

Bang et al. conclude that the time has come for all states in the United States to mandate the recording of custodial interrogations:

> Since 2003, the number of states that require police officers to record custodial interrogations has increased significantly from 2 to 25, and law enforcement agencies in two additional states have implemented statewide recording without a legal requirement. Additionally, in 2014 the Department of Justice, after harsh criticisms, finally instituted mandatory recording requirements for a number of its law enforcement agencies. The trend towards recording of custodial interrogations is clear. In our technological age it is time for all states in the United States to mandate the recording of custodial interrogations. The technology to do so exists and is relatively inexpensive; research on how to implement recording in a fair, non-prejudicial manner exists; and there is substantial evidence that false and coerced confessions occur.[219]

It would appear fair to conclude this Part with the same sentiment for eyewitness identification in the United States.

B. *Admission of Identification Evidence at Trial and Judicial Warnings to the Jury*

As previously mentioned in Part III A, there is no impediment to a jurisdiction adopting both pretrial procedures and jury

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217. Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-based Ceilings*, 82 TUL. L. REV 1237, 1238 (2008).

218. THOMAS P. SULLIVAN, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS 19 n.15 (2004).

219. *Id.* (citation omitted).

instructions in relation to eyewitness identification. Massachusetts is one such jurisdiction.[220] The jury instructions are contained in section 1112(f):

> (f) Jury Instruction.
>
> (1) Positive Eyewitness Identification. Where the jury heard eyewitness evidence that positively identified the defendant and the identification of the defendant as the person who committed or participated in the alleged crime is contested, the judge should give the Model Eyewitness Identification Instruction.
>
> (2) Partial Eyewitness Identification. Upon request, where an eyewitness partially identified the defendant, the judge should give some variation of the Model Eyewitness Identification Instruction that includes information about the risk of an honest but mistaken observation.
>
> (3) Cross-Racial Identification. The judge should omit the cross-racial component of the Model Eyewitness Identification Instruction only if all parties agree that there was no cross-racial identification. Where the instruction is given, the judge has discretion to add references to ethnicity.
>
> (4) Failure to Identify or Inconsistent Identification. The judge should instruct the jury to consider whether a witness ever failed to identify the defendant or made an identification that was inconsistent with the identification that the witness made at the trial.
>
> (5) Preliminary/Contemporaneous Instruction. Upon request, before opening statements or immediately before or after the testimony of an identifying witness, the judge must give the Preliminary/Contemporaneous Instruction.[221]

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220. SUPREME JUD. CT. ADVISORY COMM. ON MASS. EVIDENCE L., MASSACHUSETTS GUIDE TO EVIDENCE § 1112(b)–(f) (2019).

221. *Id.* § 1112(f).

Under section 1112(f) above, there is reference to the Model Eyewitness Identification Instruction.[222] Closer examination of the Massachusetts Supreme Court website shows there are actually several different model jury instructions depending on whether it is the model preliminary/contemporaneous jury instruction given before opening statements or immediately before or after the testimony of an identifying witness, or the model full jury instruction to be given at a later time during the trial.[223]

The preliminary/contemporaneous jury instruction reads as follows:

> You may hear testimony from a witness who has identified the defendant as the person who committed [or participated in] the alleged crime[s]. Where a witness has identified the defendant as the person who committed [or participated in] the alleged crime[s], you should examine the identification with care. As with any witness, you must determine the credibility of the witness, that is, do you believe the witness is being honest? Even if you are convinced that the witness believes his or her identification is correct, you still must consider the possibility that the witness made a mistake in the identification. A witness may honestly believe he or she saw a person, but perceive or remember the event inaccurately. You must decide whether the witness's identification is not only truthful, but accurate.
>
> People have the ability to recognize others they have seen and to accurately identify them at a later time, but research and experience have shown that people sometimes make mistakes in identification. The mind does not work like a video recorder. A person cannot just replay a mental recording to remember what happened. Memory and perception

222. *Id.* § 1112(f)(1)–(3).

223. *Model Jury Instructions on Eyewitness Identification*, MASS. SUPREME JUD. CT. (Nov. 16, 2015), https://www.mass.gov/law-library/model-jury-instructions-on-eyewitness-identification.

> are much more complicated. Generally, memory is most accurate right after the event and begins to fade soon thereafter. Many factors occurring while the witness is observing the event may affect a witness's ability to make an accurate identification. Other factors occurring after observing the event also may affect a witness's memory of that event, and may alter that memory without the witness realizing that his or her memory has been affected. Later in the trial, I will discuss in more detail the factors that you should consider in determining whether a witness's identification is accurate. Ultimately, you must determine whether or not the Commonwealth has proved the charge[s], including the identity of the person who committed [or participated in] the alleged crime[s], beyond a reasonable doubt.[224]

The model full jury instruction lists up to nine factors that the jury should consider in determining whether identification testimony is accurate: opportunity to view the event, characteristics of the witness, cross-racial identification, passage of time, expressed certainty, exposure to outside information, identification procedures, failure to identify or inconsistent identification, and totality of the evidence.[225] The following three examples give an indication of the nature of the model jury instructions:

> 5. Expressed certainty. You may consider a witness's identification even where the witness is not free from doubt regarding its accuracy. But you also should consider that a witness's expressed certainty in an identification, standing alone, may not be a reliable indicator of the accuracy of the identification, especially where the witness did not describe that level of

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224. *Statement of the Supreme Judicial Court: Model Jury Instructions on Eyewitness Identification*, MASS. SUPREME JUD. CT., at 1–2 (2015), https://www.mass.gov/doc/model-jury-instructions-on-eyewitness-identification-november-16-2015/download.

225. *Id.* at 2–10.

> certainty when the witness first made the identification.
>
> . . . .
>
> 8. Failure to identify or inconsistent identification. You should consider whether a witness ever failed to identify the defendant, or made an identification that was inconsistent with the identification that the witness made at the trial.
> 9. Totality of the evidence. In evaluating the accuracy of a witness's identification, you should consider all of the relevant factors that I have discussed, in the context of the totality of the evidence in this case. Specifically, you should consider whether there was other evidence in the case that tends to support or to cast doubt upon the accuracy of an identification. If you are not convinced beyond a reasonable doubt that the defendant is the person who committed [or participated in] the alleged crime[s], you must find the defendant not guilty.[226]

Also worthy of mention is the factor dealing with the identification procedures, in that the model jury instruction takes the jury through the relevant issues depending on whether the identification was through a photographic array or a lineup or a showup, as well as whether there was evidence of multiple viewings of the defendant by the same witness.[227] For the latter, the model jury instruction states:

> When a witness views the same person in more than one identification procedure or event, it may be difficult to know whether a later identification comes from the witness's memory of the original event, or from the witness's observation of the person at an earlier identification procedure or event.[228]

226. *Id.* at 5, 9–10.
227. *Id.* at 9.
228. *Id.*

Thus, even if the identification evidence is admitted due to the procedures not being unnecessarily suggestive, the actual procedures adopted in the case are still subject to judicial instruction to the jury.

An alternative approach to New Jersey's focus on due process, and to the extended *Manson* test supplemented by jury instructions preferred by Massachusetts, is the approach taken by Oregon in *State v. Lawson.*[229] Oregon's approach is to rely on the Oregon Evidence Code (OEC):

> [T]his court has already concluded that the admissibility of eyewitness identification evidence offered by the defense, arising from suggestive defense procedures, is appropriately determined under the OEC.
>
> . . . .
>
> Although none of the OEC's provisions pertain specifically to eyewitness identification evidence, as the court observed in *Johanesen*, those rules nevertheless articulate minimum standards of reliability intended to apply broadly to many types of evidence. With additional guidance regarding the proper application of those general rules, we conclude that the OEC-based procedures set out below will address the majority of concerns that might arise at trial regarding the reliability of eyewitness identification evidence, particularly in those cases involving suggestive pretrial police procedures.[230]

It can be seen that Oregon was reluctant to make eyewitness identification evidence a special category of unreliable evidence,

229. State v. Lawson, 291 P.3d 673, 678, 688–90 (Or. 2012).

230. *Id.* at 690–91 (footnote omitted) (referring to State v. Johanesen, 873 P.2d 1065, 1069 (Or. 1994)). For a discussion of OEC's application to eyewitness identification, see *id.* at 691 n.6 ("OEC 801(4)(a)(C), however, exempts from the definition of hearsay, statements 'of identification of a person after perceiving that person,' as long as the declarant testifies at trial and is subject to cross-examination concerning the statement.").

whilst also framing additional guidance within OEC-based procedures.

The Supreme Court of Oregon usefully summarized its approach by setting out its flexible three-part test governing the admission of eyewitness testimony:

> Under this revised test governing the admission of eyewitness testimony, when a criminal defendant files a pretrial motion to exclude eyewitness identification evidence, the state as the proponent of the eyewitness identification must establish all preliminary facts necessary to establish admissibility of the eyewitness evidence. *See* OEC 104;[231] OEC 307.[232] When an issue raised in a pretrial challenge to eyewitness identification evidence specifically implicates OEC 602[233] or OEC 701,[234] those preliminary facts must include, at minimum, proof under OEC 602 that the proffered eyewitness has personal knowledge of the matters to which the witness will testify, and proof under OEC 701 that any identification is both rationally based on the witness's first-hand perceptions and helpful to the trier of fact.
>
> If the state satisfies its burden that eyewitness evidence is not barred by OEC 402,[235] the burden shifts to the defendant to establish under OEC 403[236] that, although the eyewitness evidence is otherwise admissible, the probative value of the evidence is substantially outweighed by the danger

231. *See* OR. REV. STAT. ANN. § 40.030 (West 2020) (stating that OEC 104 deals with preliminary questions such as the qualification of a person to be a witness, and the relevancy of evidence depending upon the fulfilment of a condition of fact).

232. *See id.* § 40.115 (stating that OEC 307 deals with the burden of producing evidence).

233. *See id.* § 40.315 (stating that OEC 602 deals with lack of personal knowledge).

234. *See id.* § 40.405 (stating that OEC 701 deals with opinion evidence by lay witnesses).

235. *See id.* § 40.155 (stating that OEC 402 deals with relevant evidence generally admissible).

236. *See id.* § 40.160 (stating that OEC 403 deals with exclusion of relevant evidence on the grounds of prejudice, confusion or undue delay).

> of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence. If the trial court concludes that the defendant opposing the evidence has succeeded in making that showing, the trial court can either exclude the identification, or fashion an appropriate intermediate remedy short of exclusion to cure the unfair prejudice or other dangers attending the use of that evidence. The decision whether to admit, exclude, or fashion an appropriate intermediate remedy short of exclusion is committed to the sound exercise of the trial court's discretion.[237]

Oregon has thus adopted a three-part test. First, the state has to establish the qualifications of the witness, the relevancy of the evidence, the personal knowledge of the witness, and the lay opinion evidence being rationally based on the perception of the witness.[238] Second, once the state has satisfied the first part of the test, namely, that OEC 402 (relevant evidence) does not bar the admission of the evidence, then the burden shifts to the defendant to establish under OEC 403 that the "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence."[239] Third, if the court concludes the defendant has succeeded in showing the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, then the court has the option of either excluding the evidence or "fashion[ing] a[] . . . remedy short of exclusion," such as "permitting the witness to testify to the identification (*i.e.*, 'defendant is the man that I saw rob the bank'), but prohibit testimony regarding the witness's level of certainty."[240]

237. State v. Lawson, 291 P.3d 673, 696–97 (Or. 2012) (citation omitted).

238. OR. REV. STAT. ANN. § 40.030 (West 2020).

239. *Id.* § 40.160.

240. *Lawson*, 291 P.3d at 695.

Oregon's solution was criticized by the Massachusetts Study Group on Eyewitness Evidence for the reason that "the *Lawson* approach, by treating all sources of reliability alike—both police suggestiveness and estimator variable problems—runs the risk of weakening a defendant's due process rights concerning police conduct."[241] With respect, this argument seems rather weak, and appears more grounded in "it was not within its [the subcommittee's] Charter to recommend so drastic a change in Massachusetts law . . . . Some members of the subcommittee were also concerned about the toll that a *Lawson*-type approach would exact on our already overburdened criminal justice system."[242]

The real question is not whether the defendant's due process rights are weakened, but whether the well-known unreliability of eyewitness identification is better addressed through the *Lawson* three-part test of admissibility. Perversely, the objection by some members of the Massachusetts Study Group to the alleged toll that a *Lawson*-type approach is said to place on the criminal justice system may actually (1) point to a higher threshold for the admission of eyewitness identification evidence, and (2) be better targeted to the issue of reliability given the court's capacity to fashion an appropriate intermediate remedy short of exclusion to cure the unfair prejudice.[243] Noteworthy in this respect is the fact that OCE 403 mirrors FRE 403, which in turn finds its origins in the *Christie* discretion discussed in Part II B.[244]

Notwithstanding Oregon's reluctance to treat identification evidence as a species of unreliable evidence, unlike the situation in Australia with the example of s 165(1)(b) of the *Evidence Act 1995* (Cth) previously discussed in Part II B, there is no reason why identification evidence could not be added to the list of categories in FRE 403 and OCE 403. This would have the effect

241. HON. ROBERT J. KANE ET AL., SUPREME JUDICIAL COURT STUDY GROUP ON EYEWITNESS EVIDENCE: REPORT AND RECOMMENDATIONS TO THE JUSTICES 46 (July 25, 2013), https://www.mass.gov/files/documents/2016/08/ql/eyewitness-evidence-report-2013.pdf.

242. *Id.*

243. *Id.* at 43–44.

244. *Compare* R v. Christie [1914] AC (HL) 545, 555 (appeal taken from Eng.), *with* OR. REV. STAT. ANN. § 40.160 (West 2020), *and* FED. R. EVID. 403.

of statutorily incorporating the third step in *Lawson* into OCE 403 and expanding the meaning of "unfair prejudice."

As Gold has observed, the policy behind FRE 403 is to provide a counterweight to modern evidence law favoring admissibility.

> Rule 403 is intended to provide protection against the danger that the enlarged scope of admissibility under the Federal Rules will place before the trier of fact evidence which may lead to an improper decision. Because of its importance as a device to control the flow of evidence in a system otherwise biased in favor of increasing the flow, Rule 403 has been termed 'the cornerstone' of the Federal Rules.[245]

Gold continued by describing the purpose of Rule 403 as "to advance accuracy and fairness through judicial flexibility,"[246] and argued "the goals of Rule 403 suggest that evidence is unfairly prejudicial to the extent it has a tendency to cause the trier of fact to commit inferential error."[247] Gold developed this theme by stressing the need for the law to embrace psychology and singled out identification evidence in particular.

> The law of evidence exists because there are at least two gaps between the "truth" and the legal judgment which seeks to reflect that truth. Both gaps are primarily mental. The first gap is created when a human agent intervenes between the occurrence of a fact or event and the courtroom. That human agent is the witness. Witnesses create this gap because their testimony sometimes does not accurately relate what occurred. The second gap is created when another human or group of humans, the trier of fact, becomes involved. Judges and juries create a gap between the truth and the judgment because the inferences they draw even

245. Victor J. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 497 (1983) (footnotes omitted).

246. *Id.* at 499.

247. *Id.* at 503.

> from accurate testimony are sometimes in error. The science of psychology offers the law of evidence the tantalizing prospect of closing these gaps. . . .
>
> Notwithstanding the possible rewards, evidence law has historically been distrustful of psychology. . . . A principal focus of the scientist is now the unreliability of eyewitness testimony. Many courts still reject research in this area as unscientific.[248]

This article was written in 1983 and courts are now more fully aware of the dangers of eyewitness evidence, but the issue here is whether identification evidence should be added to FRE 403 as a separate category to "unfair prejudice." The other categories of "confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence"[249] are more mundane and can be grouped together, being designed to conserve court resources rather than to protect the integrity of the evidence being presented. As Justice Holmes observed: "so far as the introduction of collateral issues goes, that objection is a purely practical one,—a concession to the shortness of life."[250]

Thus, as previously mentioned, a separate category for identification evidence in FRE 403 would have the effect of statutorily incorporating the third step in *Lawson* into FRE 403, and expand the meaning of "unfair prejudice." Such an insertion would also bolster the test in *Manson* at a federal level.

Finally, in Part II B, mention was made of the discretion that resides in the Crown prosecutor in Australia who is required to comply with the Prosecution Policy of the relevant Director of Public Prosecutions in the relevant Australian jurisdiction. The case of *Wood v The Queen* was discussed, and the court referred to Guideline 2 setting out the "Role and Duties of the Prosecutor" pursuant to s 15(2) of the *Director of Public Prosecutions Act 1986*

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248. Gold, *supra* note 245, at 531–32 (footnotes omitted) (discussing courts' rejection of research in the area of eyewitness testimony). *See also, e.g.*, People v. Johnson, 423 N.E.2d 1206, 1216 (Ill. App. Ct. 1981) (affirming trial court's exclusion of expert testimony regarding accuracy of identification).

249. FED. R. EVID. 403.

250. Reeve v. Dennett, 11 N.E. 938, 943–44 (Mass. 1887).

(NSW).[251] As is standard practice in Australia, these guidelines are public documents.[252] The court also described the Crown prosecutor as a "minister of justice."[253]

The situation is very different in the United States. In the first place, most state and local prosecutors are elected officials who have a vested interest in the outcome of a case.[254] Secondly, a prosecutor's decisions are largely made in secret and reviewed by no one.[255] Thirdly, notwithstanding the Supreme Court's powerful statement that the United States Attorney's interest in a criminal prosecution is not that he "shall win a case, but that justice shall be done."[256] The Court's statement is reflected in the American Bar Association's Model Code of Professional Responsibility,[257] but Davis explains that "the vagueness of this standard and the prosecutor's unfettered discretion permit her to define justice as she sees fit, and many equate justice with convictions and incarceration, regardless of the circumstances of the case."[258]

LaFave has explained the nature of the American prosecutor's discretion.

> One of the most striking features of the American system of criminal justice is the broad range of largely uncontrolled discretion exercised by the prosecutor. Particularly noteworthy are these kinds of discretionary decisions: (1) the decision not

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251. *Wood v The Queen* [2012] NSWCCA 21 (24 February 2012) 165–66 (Austl.).

252. *Director of Public Prosecutions Act 1986* (NSW) (Austl.). *See Director of Public Prosecutions Act 1986 No 207*, Status Information, NSW LEGIS., https://www.legislation.nsw.gov.au/view/html/inforce/current/act-1986-207 (last visited Apr. 4, 2021).

253. *Wood v The Queen* [2012] NSWCCA 21 (24 February 2012) 165 (Austl.).

254. Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 762 (1996).

255. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 207–08 (La. State Univ. Press 1969).

256. Berger v. United States, 295 U.S. 78, 88 (1935).

257. MODEL CODE OF PRO. RESP. EC 7-13 (AM. BAR ASS'N 1980) ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.").

258. Angela J. Davis, *The Power and Discretion of the American Prosecutor*, 49 DROIT ET CULTURES 55, 60 (2005).

> to prosecute an individual notwithstanding sufficient evidence to meet the legal requirements for commencing a prosecution; and (2) the decision to tender concessions to a charged individual on the condition that he plead guilty rather than stand trial.[259]

Davis has commented to similar effect.

> Prosecutors are the most powerful officials in the American criminal justice system. They control the direction and outcome of all criminal cases, particularly through their charging and plea-bargaining decisions. These decisions have greater impact and more serious consequences than those of any other criminal justice official. The prosecutor's charging and plea-bargaining decisions are totally discretionary and virtually unreviewable. Although most American prosecutors are elected officials, the democratic process does not effectively serve as a check on prosecutorial power because the charging and plea-bargaining decisions are made behind closed doors, shielded from public view.[260]

An alternative perspective to the unfettered power of the American prosecutor has been provided by Bellin, who considers the widespread view that American prosecutors rule the criminal justice system to be flawed, because it overlooks other powerful players in the system such as legislators, judges, and police.[261]

> Prosecutors are one of the many important actors who populate the criminal justice ecosystem. Police, legislators, judges, governors, and parole boards are important too. The cacophonic rhetoric

259. Wayne R. LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMPAR. L. 532, 532 (1970).

260. Davis, *supra* note 258, at 55.

261. *See* Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 174–75 (2019).

> of prosecutorial dominance, however, ignores the agency of these other actors, fostering a rhetorically pleasing, but hopelessly flawed understanding of the criminal justice system. This blinkered approach overlooks the powerful forces that can and do constrain prosecutors and diverts attention from the most promising sources of lasting reform, like legislators, judges, and police, to the least.[262]

For present purposes, the most important source of lasting reform is the legislature. While coming from a different angle, Davis has also argued that the prosecution function is in great need of reform.

> By creating more transparency in the charging and plea-bargaining processes, informing their constituents of their practices and policies, and taking steps to eliminate race and class inequities, prosecutors would go a long way towards restoring fairness and the balance of power in the American criminal justice system.[263]

Thus, one clear option would be for the federal and state legislatures in the United States to translate relevant portions of the American Bar Association's Model Code of Professional Responsibility, which deal with the role and duties of prosecutors, into legislation akin to the *Director of Public Prosecutions Act 1986* (NSW), along with associated guidelines that would be public documents and hence more transparent than the present secrecy surrounding prosecutorial discretion.[264]

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262. *Id.* at 212.

263. Davis, *supra* note 258, at 66.

264. *See generally Director of Public Prosecutions Act 1986* (NSW) s 15(1)–(2) (Austl.) (requiring the Director to give the Attorney General a copy of each guideline and mandating that prosecutors are subject to these guidelines).

III. CONCLUSION

As stated in Part I, the focus of this article is to view the admissibility of eyewitness identification evidence holistically from voir dire to the judge's summing up to the jury. To this end, the evidential rules and procedures relating to eyewitness identification evidence in Australia (and to a lesser extent New Zealand) have been examined, with a view to making recommendations that the United States should adopt aspects of these rules and procedures, particularly the criteria triggering a warning from the trial judge to the jury.

While in Australia the evidential rules and procedures relating to eyewitness identification evidence are reasonably similar across jurisdictions, the situation in the United States is far more uneven. Jurisdictions such as New Jersey, Oregon, and Massachusetts have reformed the tests, rules and procedures for the admission of eyewitness evidence, which if adopted across all United States jurisdictions would greatly reduce the well-known dangers surrounding identification evidence. Nevertheless, as this article has sought to demonstrate, there are lessons from the Antipodes that jurisdictions in the United States could usefully incorporate into their respective pretrial procedures and rules of evidence.

For example, as regards the visual record of the identity parade, rule 3AA of the *Evidence Regulations 2007* (SA) sets a benchmark of the standard required such that: (1) the witness must be "visible at all relevant times;" (2) the person identified must be "visible at the time the witness gives the indication;" and (3) "anything said by the witness, and any other person present, during the conduct of the identity parade must be recorded."[265] Where the preference is for photographic arrays (photo boards), as discussed in Part II A, Western Australia sets the standard through its use of the "digiboard," which was explained by the Court of Appeal in *Winmar v Western Australia*.[266]

In another example of legislation covering pretrial procedures, adoption in the United States of a modified version of s 45(2) of the Evidence Act 2006 (N.Z.) previously discussed in

265. *Evidence Regulations 2007* (SA) reg 3AA (Austl.).

266. *Winmar v Western Australia* [2007] WASCA 244 (9 November 2007).

Part II A, which states that without a good reason, a breach of a formal procedure will result in the evidence being inadmissible unless the prosecution can meet the high standard of beyond reasonable doubt that the identification was reliable,[267] would sharpen the focus of law enforcement agencies in the United States to ensure procedures were followed.

The same reasoning applies to a *Domican* warning given by the trial judge to the jury, which finds expression in s 116 of the *Evidence Act 1995* (Cth), discussed in Part II B.[268] Alternatively, the *Turnbull* guidelines have been incorporated into statute, as exampled in Victoria by s 36(3) of the *Jury Directions Act 2015* (Vic), which deals with a direction on identification evidence.[269] For *Domican* type warnings, the trigger is where evidence as to identification represents any significant part of the proof of guilt of an offence, the judge must warn the jury as to the dangers of convicting on such evidence where its reliability is disputed.[270] The jury must be instructed as to the factors which may affect the consideration of the identification evidence in the circumstances of the particular case.[271] A warning in general terms is insufficient. The attention of the jury should be drawn to any weaknesses in the identification evidence. Reference to counsel's arguments is insufficient. The jury must have the benefit of a direction which has the authority of the judge's office behind it. It follows that the trial judge should isolate and identify for the benefit of the jury any matter of significance which may reasonably be regarded as undermining the reliability of the identification evidence.

Alternatively, the jury instructions contained in section 1112(f) and the Model Eyewitness Identification Instructions of the Massachusetts Guide to Evidence previously mentioned in Part III B, would be effective in reducing jury acceptance of misidentifications if widely adopted in the United States.

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267. Evidence Act 2006, s 45(2) (N.Z.).

268. *Compare Evidence Act 1995* (Cth) s 116 (Austl.), *with Domican v The Queen* (1992) 106 ALR 203, 207, 209–10 (Austl.) (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron, and McHugh JJ).

269. *Jury Directions Act 2015* (Vic) s 36 (Austl.).

270. *Domican v The Queen* (1992) 106 ALR 203, 207 (Austl.).

271. *Id.*

Furthermore, identification evidence is treated as a species of unreliable evidence in Australia, as exampled by s 165(1)(b) of the *Evidence Act 1995* (Cth).[272] Similarly, a separate category for identification evidence in FRE 403 would have the effect of statutorily incorporating the third step in *Lawson* into FRE 403 and would expand the meaning of "unfair prejudice." Effectively, the *Christie*[273] discretion would be specifically applied to identification evidence. Such an insertion would also bolster the test in *Manson* at a federal level.

One final piece of advice from the Antipodes would be for the federal and state legislatures in the United States to translate relevant portions of the American Bar Association's Model Code of Professional Responsibility, which deal with the role and duties of prosecutors,[274] into legislation akin to the *Director of Public Prosecutions Act 1986* (NSW), along with associated guidelines that would be public documents and hence more transparent than the present secrecy surrounding prosecutorial discretion.

In summary, it can reasonably be concluded that Australian and New Zealand courts and legislatures are alive to the dangers surrounding identification evidence and have taken firm steps to minimise the risk of miscarriages of justice, which this article has argued provide the basis for advice from the Antipodes for reform of the evidential rules for eyewitness identification in the United States.

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272. *Evidence Act 1995* (Cth) s 165(1)(b) (Austl.).

273. R v. Christie [1914] AC (HL) 545, 555 (appeal taken from Eng.).

274. MODEL CODE OF PRO. RESP. EC 7-13 (AM. BAR ASS'N 1980).