Report of the Minnesota Supreme Court
Rules of Evidence Advisory Committee

On October 1, 2018, the Rules of Evidence Advisory Committee filed a Report on Eyewitness Identification which examines the reliability and fallibility of eyewitness-identifications. The report focuses on identification procedures, the standards for admitting identification evidence, the use of eyewitness-identification experts, jury instructions, and the standards of review applied by appellate courts.

> "Eyewitness identification is complex. Improving and maximizing the accuracy of eyewitness identification evidence requires a clear understanding of the circumstances surrounding a crime and the identification procedure and how both can affect the reliability of the evidence."

In a December 17, 2018 order, the Supreme Court directed the State Court Administrator develop and provide training for Minnesota judicial officers on the science behind eyewitness identifications, focused on assisting courts in making legally sound and just decisions on the admissibility of eyewitness identification evidence. The court observed that the Committee's other recommendations fell outside the court's judicial authority or should be addressed by other justice partners. As a result, the order directed the State Court Administrator to distribute the Rules of Evidence Advisory Committee report to: the Minnesota Bureau of Criminal Apprehension, the Minnesota Sheriff's Association, the Minnesota Police and Peace Officers Association, the Minnesota Board of Peace Officer Standards and Training, the Innocence Project of Minnesota, the Minnesota State Bar Association Criminal Law Section, the Minnesota County Attorneys Association, the Office of the State Public Defender, the Office of the Minnesota Appellate Public Defender, the Minnesota District Judges Association, the Office of the Governor, and the leadership of the 2019 State House of Representatives and State Senate. The report has been distributed in accordance with the December 17 order and is also available on the Minnesota Judicial Branch website Publications & Reports page.

Section 1

- The Committee examines police identification procedures and recommends that Minnesota adopt a state-wide policy that follows the National Academies of Science best practices for police when **Gathering Witness Identification Evidence**.

Section 2

- The Committee examines the **Admissibility Standards for Witness Identification Evidence** and recommends that all Minnesota judicial officers be given training on the science behind identifications to assist the court in making sound decisions on the admissibility of identification evidence.

Section 3

- The Committee examines **Expert Testimony Regarding Eyewitness Identifications** and identifies areas of the law that require clarification.

Section 4

- The Committee examines the **Jury Instruction on Eyewitness-Identification Evidence** and recommends that the instruction be updated and modernized.

Section 5

- The Committee examines the standard applied by appellate courts when reviewing the admission of **Eyewitness Identification Evidence** and is divided on the issue of whether Minnesota should adopt a "mixed question of law and fact" standard.

REPORT OF THE MINNESOTA SUPREME COURT RULES OF EVIDENCE ADVISORY COMMITTEE

ADM10-8047

October 1, 2018

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INTRODUCTION

Accurate eyewitness identification can be critical evidence in an investigation and successful criminal prosecution. Erroneous or tainted eyewitness identification can result in wrongful convictions and create a danger to public safety when the true perpetrator goes free. Eyewitness identification is complex. Improving and maximizing the accuracy of eyewitness identification evidence requires a clear understanding of the circumstances surrounding a crime and the identification procedure and how both can affect the reliability of the evidence. A body of scholarly social science has developed in recent years focusing on issues of lineup composition, police administrator feedback, the passage of time and witness memory, witness attention and weapons focus, and the challenges of cross-racial identification.[1] Police, courts, and state legislatures have responded to these scientific developments in a wide variety of ways.

On July 14, 2017, the Minnesota Supreme Court issued an Order recognizing the evolution of the social science and unique challenges presented by eyewitness identification evidence.[2] The Court directed the Rules of Evidence Advisory Committee ("the Committee") to "review and evaluate, based on such evidence, studies, or expert resources that the committee deems relevant, the issues regarding the reliability and fallibility of eyewitness-identification testimony."[3] The Court specifically noted that recommendations for the improvements related to eyewitness-identification evidence "need not be limited to proposed amendments to the Minnesota Rules of Evidence."[4]

The Committee has reviewed scholarly research and reports concerning eyewitness identification. The Committee has also consulted with a leading eyewitness identification expert and representatives from the law enforcement community, prosecution offices, the criminal defense bar, the Innocence Project of Minnesota, and judges in an effort to fully explore possible recommendations to the Supreme Court.[5] This report examines and makes recommendations related to police practices in identification procedures, admissibility standards for identification evidence, the use of eyewitness identification experts, jury instructions, and appellate standards of review for identification evidence.

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[1] For good summaries of the basic concepts related to eyewitness identification and recent scientific developments see N. Steblay, *Scientific Advances in Eyewitness Identification Evidence*, 41 Wm Mitchell L. Rev.1090 (2015); G. Wells and E. Olson, *Eyewitness Testimony,* Annu. Rev. Psych. Vol. 54 277-95 (2003); *see also* Appendix A at the end of this Report.

[2] Order, ADM10-8047.

[3] *Id.*

[4] *Id.*

[5] The bulk of the Committee's work was performed by a subcommittee, which consisted of Jean Burdorf (chair), Hon. Jana Austad, Hon. Fred Karasov, Shane Baker, Jevon Bindman, and Ben Butler.

SECTION 1: GATHERING WITNESS IDENTIFICATION EVIDENCE

Police in the United States investigate millions of crimes each year. Although data on the number of identification procedures is not systematically or uniformly collected, experts agree that "[o]nly a small percentage of the police-investigated crimes involve the use of police-arranged identification procedures.[6] At the same time, the effects of misidentification are grave and police identification procedures have been subject to significant and appropriate scrutiny.[7]

Police use witness identifications to further investigations, develop probable cause for search warrants, and for use in court to identify the accused perpetrator of a crime. In Minnesota, police employ two primary methods to identify suspects: the photographic array/lineup and showup identifications.[8] A photo array is a procedure where a series of photographs is displayed to a witness to determine if the witness can identify the perpetrator(s) involved in a crime.[9] A showup occurs when police display a single suspect to a victim or witness and generally occurs in the field shortly after a crime has been committed.

A. *Social Science and Best Police Practices*

In the 1960s, the United States Supreme Court recognized the dangers of witness misidentifications and established an exclusionary remedy for defendants convicted based on identifications procedures "so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification."[10] The Court ruled that "reliability" was the "linchpin" to admissibility of identification evidence but did not consider how police procedure might affect that determination.[11] At the same time, social scientists began studying the reliability of traditional witness identification procedures and how human memory can affect identifications.

In 1999, the U.S. Department of Justice published the first national recommendations for eyewitness identification procedures. *See* The National Institute of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* ("*NIJ Guide*"). The *NIJ Guide* recommended that

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[6] National Academies of Science, *Identify the Culprit: Assessing Eyewitness Identification* ("Identifying the Culprit"), The National Academies Press (2014) at 21-22.

[7] *Id.*

[8] A live lineup is a third identification procedure. Minnesota practitioners report that live lineups are very rarely used. Because live lineups and photographic arrays involve similar features, the recommendations for proper lineups track those for photographic displays.

[9] Today, most police departments assemble photo arrays using computer image databases like the Minnesota Repository of Arrest Photos (MRAP). Police officers enter physical characteristics of the suspect (like gender, race, hair color, etc.) and the system randomly retrieves photographs of people who meet the identified criteria.

[10] *Simmons v. United States*, 390 U.S. 377, 384 (1968).

[11] *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

eyewitnesses be given neutral lineup instructions (e.g. "the perpetrator may or may not be in this lineup"), that lineups be constructed fairly (e.g., fillers must match perpetrator description and there should be at least six photos per lineup), and that police must document the procedure used and the witness's responses.[12] The *NIJ Guide* also recommended that further study be done on the benefits of blinds administration of lineups and the use of sequential lineups.[13]

Additional research established that "relatively simple changes in lineup procedures can lead to stronger eyewitness identifications."[14] In 2014, the National Academies of Science (NAS) published *Identifying the Culprit*, a comprehensive look at the relevant science related to eyewitness identification. The NAS's best practices recommendations for police lineups are:

1. Double-blind or Blinded Administration. Police should employ a double-blind or blinded procedure during the identification process to avoid improper confirmation feedback from law enforcement.

2. Appropriate type and number of fillers: Police should construct photo arrays to include at least six photographs of other persons that meet the general description of the crime suspect and do not single out any particular photograph or photographs for identification.

3. Neutral Instructions. The police should advise the witness that the suspect may or may not be in the lineup. The instruction given should make it clear to the witness that s/he does not have to make an identification.

4. Confidence Statement. Police should obtain a confidence statement (i.e., a statement in the victim's or witness's own words) of his or her level of certainty in an identification immediately after the identification has been made.

5. Recording: Video recording of the identification process and the victim's or witness's response to a photographic array should become standard practice.[15]

[12] *NIJ Guide* at 29, 31, 35, 38.
[13] *NIJ Guide* at 9.
[14] A. Klobuchar, H. Caliguiri, N. Steblay, *Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project* ("Improving Eyewitness Identifications"), 4 Cardozo Pub. Law, Policy & Ethics J. 381, 382-83 (2006).
[15] *Identifying the Culprit* at 5. The NAS executive summary does not include a specific recommendation regarding the composition of police lineups but the text of the report makes it clear that best practices include proper composition of a lineup. *Id.* at 23.

The NAS also recommended that "all law enforcement" be trained on the best practices for eyewitness identification procedures. The NAS did not find sufficient scientific consensus on the benefits of sequential versus simultaneous lineups to make a recommendation.[16]

In contrast to photo arrays, there is less data available about the reliability of showup identifications. Even so, experts have recommended some of these practices – including neutral instructions, separating witnesses, obtaining confidence statements, and documenting the identification – may also be appropriate for police showup procedures.[17] Experts also recommend, when feasible, transporting a witness to the location where the suspect is being detained and minimizing the impact of the suspect's detention (e.g., no handcuffs and removing suspect from squad car) during the showup.[18]

B. *Identification Procedures in Other Jurisdictions*

There is no uniform standard for police identification procedures in the United States.[19] Beyond the constitutional standards established by the United States Supreme Court, police identification practices are left to states and local municipalities.

As states have become increasingly concerned with the dangers of witness misidentification, legislatures have acted. Reforms have largely centered on the five best practices identified by the 2014 NAS report.

Eight states – Connecticut, Florida, Illinois, Kansas, North Carolina, Ohio, Vermont, and West Virginia – have adopted legislation requiring police to follow specific identification procedures when administering photographic lineups.[20] Kansas, Ohio, and North Carolina adopted all five NAS best practices. Connecticut and Illinois require all the NAS practices, except witness confidence statements. Florida requires only blinded administration and cautionary instructions. West Virginia's statute calls for cautionary instructions and documentation of the identification process, including witness confidence statements. Only North Carolina mandates police use a sequential lineup procedure.[21]

Seven state legislatures – in Colorado, Maryland, Nebraska, Nevada, Texas, and Wisconsin – limited their statutes to the requirement that police departments have a witness

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[16] *Id.* at 7 ("The committee further recommends that caution and care be used when considering changes to any existing lineup procedure, until such time as there is clear evidence for the advantage of doing so.").
[17] *NIJ Guide* at 27.
[18] *NIJ Guide* at 27.
[19] National Institute of Justice, *A National Survey of Eyewitness Identification Procedures in Law Enforcement Agencies* (2013) at 1-2.
[20] *See* Conn. Gen. Stat. §54-1p; Fla. Stat. §92.70; Ill. Stat. §107A-2; Kan. Stat. §22-4619; N.C. Stat. §15A-284.52; Ohio Rev. Code §2933.83; Ver. Stat. §5581; W.V. Code §62-1E-1.
[21] *Id.*

identification policy, without mandating particular procedures.[22] Colorado, Nebraska, Nevada, Texas, and Wisconsin have model policies that include the NAS best practices recommendations. Maryland's policy requires only that procedure avoid undue suggestion and be documented. Nevada has no statewide model policy. The model policy is mandated only in Wisconsin.[23]

The federal government, New York, Massachusetts, Michigan, and Montana have voluntarily adopted procedural requirements for eyewitness identification. All of the policies follow the NAS best practices relating to blind or blinded administration, witness instructions, composition of the lineup, and documentation. The federal government, Massachusetts, Michigan, and Montana require police to ask witnesses for confidence statements; New York does not.[24]

There are also a number of large cities in the U.S. that have also adopted eyewitness identification procedures.[25]

Most recently, police in a small number of jurisdictions have begun using automated computer software programs that administer photographic arrays (both sequentially and simultaneously) to the witness and document, through recording, the identification process.[26]

C. *Identification Practices in Minnesota*

In 2016, the Innocence Project of Minnesota asked the Minnesota Legislature to consider adopting its "core four" best practices for police identification procedures. The core four practices are: blind administration, neutral and appropriate lineup fillers, cautionary instructions, and obtaining immediate confidence statements.[27] The proposal did not result in legislation and the Minnesota Legislature has not adopted a statute addressing the issue of eyewitness identification in the intervening years.

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[22] *See* Colo. Rev. Code §16-1-109; Md. Code §3-506; Neb. Rev. Stat. §81-1455; Nev. Rev. Stat. §171.1237; Tex. Code Crim. P. §38.20; Wis. Stat. §175.50.

[23] *See* (Colorado) http://www.louisvilleco.gov/home/showdocument?id=9125**;**
(Maryland) http://mdle.net/pdf/mopoman07.pdf**;**
(Nebraska) http://nletc.nebraska.gov/pdfs/EyewitnessToolkit.pdf**;**
(Texas) http://www.lemitonline.org/resources/documents/ewid_final.pdf;
(Wisconsin) https://www.doj.state.wi.us/sites/default/files/2009-news/eyewitness-public-20091105.pdf**.**

[24] *See* US Government; New York; Massachusetts; Michigan; Montana.

[25] A good example is found in Seattle, Washington, *see* http://www.seattle.gov/police-manual/title-15---primary-investigation/15170---conducting-identification-procedures.

[26] A map of jurisdictions using the most common software "ELineup" is available at: https://www.google.com/maps/d/viewer?mid=1twQJzRyFdzQ6DCZrSIg4Km_DF20&ll=38.852881439756054%2C-94.40541294576184&z=4.

[27] *See* https://www.ipmn.org/ewid/.

There are, however, many agencies in Minnesota that have voluntarily modified police practices or provided training in light of the emerging social science on eyewitness identification.

In 2003, the Hennepin County Attorney's Office started a year-long pilot project to test the use of blinded sequential photographic lineups. The pilot involved four police departments of various sizes. Police followed many best practices including:

- Blind administration, when possible
- Neutral cautionary instruction to witnesses
- Six-person lineup, using a suspect photo and five filler photos that fit the general description of the suspect.
- Sequential presentation of the photographs
- An immediate confidence statement from the witness if an identification was made.
- Documentation of the identification process.[28]

Results of the pilot showed no measureable decrease in the rate of positive witness identification and a markedly decreased rate of misidentification (i.e., selection of a filler).[29] Given the success of the pilot, the blinded sequential lineup process has been implemented throughout Hennepin County and is now the general practice.

The police departments for Minnesota's three largest cities – Minneapolis, St. Paul, and Duluth – have adopted eyewitness identification policies that track the NAS best practices. All three policies call for sequential lineups. The Minnesota Bureau of Criminal Apprehension (BCA) also has a policy that follows NAS best practices. Duluth and the BCA have exceptions for blind or blinded administration of lineups when it is not feasible. Duluth and the BCA also have policies for the conduct of showup identifications. The policies include time limitations and require officers to give cautionary instructions, to avoid any unnecessary suggestiveness in the display of the suspect, and to document/record the showup, when possible.

Prosecutors in the metro counties also report that, while they have no uniform "county" policy, many of the police departments they work with follow identified best practices**.**

Beginning in 2016, Minnesota's Police Officer Standards and Training Board (POST) began mandatory training for new officers on issues related to eyewitness identification. The same year, the BCA, in conjunction with the Innocence Project, provided voluntary training on best practices for police identification procedures to police officers throughout Minnesota. Continued education for experienced police officers is available but continues to be elective.

[28] Improving Eyewitness Identifications, at 393.
[29] *Id*. at 397, 411.

COMMITTEE RECOMMENDATIONS:

The committee believes that open and honest communication between Executive Branch agencies, such as law enforcement, and the Judicial Branch will help encourage law enforcement to follow best practices in this area and make out-of-court identifications more accurate. Accordingly, the committee recommends that the Court authorize representatives of the Judicial Branch and/or Court committees to connect with law enforcement organizations and agencies to advocate for the adoption of best practices by departments and to help departments develop appropriate policies and practices.

SECTION 2: ADMISSIBILITY STANDARDS FOR WITNESS IDENTIFICATION EVIDENCE

Prior to trial, the trial court may be called upon to determine whether an identification meets the legal requirements to be used against a criminal defendant. This determination typically arises during omnibus proceedings in response to a motion to suppress evidence.[30]

The United States Supreme Court's current constitutional standard for the legal admissibility of eyewitness testimony in a criminal trial was developed in the 1970s. The Court held that the Due Process Clause of the federal constitution prohibits the use of identifications that result from government practices that create a "substantial likelihood of irreparable misidentification."[31] Reliability of eyewitness identification evidence "is the linchpin" in determining the admissibility of this type of evidence.[32] In *Manson v. Brathwaite*, the Court created a two-step process to determine whether or not identification testimony can be admitted consistent with due process. First, a judge must determine whether the identification procedure used was "unnecessarily suggestive." Second, the judge must determine whether or not the identification was sufficiently reliable. An identification is admissible unless the process used by law enforcement creates "a very substantial likelihood of irreparable misidentification."[33]

The first prong of the *Brathwaite* test – the suggestiveness inquiry – focuses on whether the police procedure "*unfairly* singled out" the defendant for identification.[34] If the procedure is unnecessarily suggestive, a court then considers the second prong of *Brathwaite* – the reliability inquiry. *Brathwaite* identified five factors lower courts should use to assess reliability: (1) the opportunity of the witness to view the suspect at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the suspect; (4) the witness's level of certainty during the identification; and (5) the time between the crime and the identification procedure.[35] If the "totality of the circumstances" shows a witness's identification has an adequate independent origin, it is considered to be reliable and admissible despite the suggestive procedure.[36] If the techniques used by police tainted the process and

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[30] *See* Minn. R. Crim. P. 11.02.
[31] *Neil v. Biggers,* 409 U.S. 188, 198 (1972).
[32] *Manson v. Brathwaite,* 432 U.S. 98, 114 (1977).
[33] *Brathwaite,* 432 U.S. at 116. Minn. R. Evid. 801(d)(1)(C) excludes a witness's prior identification from the definition of hearsay as long as the witness testifies at trial, is subject to cross-examination and "the circumstances of the prior identification demonstrate [its] reliability." Based on case law and commentary, it appears that the rule is intended to apply to police-administered identification procedures and its reliability requirement is co-extensive with the reliability criteria for the constitutional admission of identification evidence. *See State v. Robinson,* 718 N.W.2d 400, 407 (Minn. 2006); Minn. R. Evid. Committee Comments 1989.
[34] *Simmons v. United States,* 390 U.S. 377, 383 (1968).
[35] *Braithwaite,* 432 U.S. at 114.
[36] *Id.* at 116.

created a substantial likelihood of irreparable misidentification, the evidence cannot be admitted at trial.[37] Most jurisdictions, including Minnesota, use the *Brathwaite* test.[38]

A judge's pretrial role is to determine if an identification satisfies this legal threshold. The judge acts as a gatekeeper to withhold identification testimony from the jury – as a matter of law – but only for the "most unreliable identifications."[39] Factual conclusions about the credibility, accuracy, and weight of a legally-admissible identification are left to the jury. The United States Supreme Court explained the roles of the judge and jury this way:

> Short of that point [at which a very substantial likelihood of misidentification exists], such identification evidence is for the jury to weigh. . . . . Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable features.[40]

Commentators have questioned the continued validity of the *Brathwaite* standard in light of the developments in social science research.[41] In recent years, courts and legislatures in other jurisdictions have adopted standards for the admission of eyewitness identifications that differ from *Brathwaite*. These modifications are described in the following paragraphs.

A. *Case Law Departures from Brathwaite*

Some courts have maintained the two-step *Brathwaite* process but have refined or modified the suggestiveness and reliability factors. Utah retained two of the *Brathwaite* factors and replaced three others. In *State v. Ramirez*, the Utah Supreme Court held the reliability of an eyewitness identification depends on: (1) the opportunity of the witness to view the actor during the event, (2) the witness's degree of attention on the actor at the time of the event, (3) the witness's capacity to observe the event, including his or her physical and mental acuity, (4) whether the identification was spontaneous or the product of suggestion, and (5) the nature of the event observed and the likelihood that the witness would perceive, remember, and relate it correctly.[42] The Kansas Supreme Court followed Utah.[43] The Connecticut Supreme Court

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[37] *Id.*

[38] *See, e.g., State v. Jones,* 556 N.W.2d 903 (Minn. 1996); *State v. Ostrem,* 535 N.W.2d 916 (Minn. 1995).

[39] *Perry v. New Hampshire*, 565 U.S. 228, 254 (2012) (citing *Biggers*, 409 U.S. at 198)).

[40] *Brathwaite,* 432 U.S. at 116.

[41] *See, e.g.,* Wells and Quinlivan, "Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later," 33 *Law and Human Behavior* 1 (February 2009); O'Toole and Shay, "*Manson v. Brathwaite* Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures," 41 Valparaiso L. Rev. 109 (2006).

[42] *State v. Ramirez*, 817 P.2d 774, 781 (Utah 1991).

[43] *State v. Hunt*, 69 P.3d 571, 577 (Kan. 2003).

has instructed lower courts, in determining suggestiveness, to focus on both the mechanics of the array *and* the behavior of the officer administering the lineup.[44] In Idaho, the Supreme Court encouraged lower courts to look beyond the *Brathwaite* factors and consider expanded factors identified in recent social science literature (like confirmation feedback) when deciding whether a police procedure was too suggestive and the resulting identification was sufficiently reliable.[45]

Other courts have replaced *Brathwaite*'s two-step analysis. In 1995, the Massachusetts Supreme Court established its new standard for the admission of identification evidence. In Massachusetts, an out-of-court witness identification is not admissible if the defendant proves by a preponderance of the evidence, considering the totality of the circumstances, that the identification is "unnecessarily suggestive" and "conducive to irreparable misidentification."[46] If police procedure is unnecessarily suggestive, the remedy is *per se* exclusion of the identification evidence.[47]

In 2011, the New Jersey Supreme Court created a new three-step process for determining the admissibility of eyewitness testimony in *State v. Henderson*.[48] The court identified a number of "system variables" and "estimator variables" that must be considered by trial courts when identification evidence is at issue. The system variables relate to the identification procedure used by police and include: blind administration of lineups, appropriate pre-identification instructions, lineup construction, confirmation feedback, recording witness confidence level, multiple viewings, and other identifications made by the witness.[49] Estimator variables relate to the circumstances surrounding the crime, the witness and the perpetrator and include: duration of the crime, distance and lighting, opportunity to observe the perpetrator, witness attention during the crime, witness stress, accuracy of any prior description of an assailant, weapons focus, witness characteristics, culprit characteristics, cross-racial identification, witness contamination from private actors, potential memory decay, and confidence level of the identification.[50] First, to trigger an evidentiary hearing, a defendant must produce some evidence that the identification procedure used by police was suggestive. This showing must be based on a system variable (i.e., something the police control) and not estimator variables (i.e., circumstances surrounding the crime).[51] Second, if evidence of suggestiveness is produced, the burden shifts to the prosecution to offer proof that the witness identification is reliable. This step allows consideration of both system variables and estimator variables.[52] Third, the defendant must meet the "ultimate" burden of proving a very substantial likelihood of

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[44] *State v. Marquez,* 967 A.2d 56, 70-71 (Conn. 2009).
[45] *State v. Almaraz,* 301 P.3d 242, 252-53 (Idaho 2013).
[46] *Commonwealth v. Johnson,* 650 N.E.2d 1257, 1261 (1995).
[47] *Id.*
[48] *See State v. Henderson,* 27 A.3d 872 (N.J. 2011).
[49] *Id.* at 896-903.
[50] *Id.* at 904-10.
[51] *Id.* at 920.
[52] *Id.*

irreparable misidentification to warrant suppress of identification evidence.[53] Under *Henderson*, if identification is admitted, trial courts must "provide appropriate, tailored jury instructions" designed to aid a jury in fully understanding the evidence.[54] Alaska has adopted New Jersey's three-step test.[55]

In 2012, the Oregon Supreme Court departed from the *Brathwaite* test in *State v. Lawson.*[56] Like New Jersey, the Oregon Supreme Court's analysis rested on social science related to system variables and estimator variables. The court ruled that admission of identification evidence should be determined by application of Oregon's evidentiary rules.[57] The proponent of identification evidence – typically the prosecution – must establish, by preponderance of evidence that (1) the "witness could make a rational inference of identification from the facts the witness actually perceived," and (2) "the identification was based on a permissible basis rather than an impermissible one, such as suggestive police procedures."[58] The trial court must then weigh the probative value of the identification evidence against the danger of unfair prejudice.[59] Under this balancing approach, courts can admit evidence of an identification while excluding "particularly prejudicial aspects" of a witness's testimony like statements of a witness's confidence level.[60]

B. *Legislative Departures from Brathwaite*

Fifteen (15) state legislatures have addressed eyewitness identification standards.[61] Seven states limited legislation to a requirement that police develop policies for the conduct of eyewitness identification procedures.[62] Four states adopted legislation requiring police to follow particular procedures (like blind administration, mandated advisories, appropriate fillers, and confidence statements) when administering photographic lineups but did not specifically address remedy for a violation of the statutory requirement.[63] Four states mandate particular identification procedures and provide a remedy for police failure to follow the required

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[53] *Id.*
[54] *Id.* For a more complete discussion see Section 4 on jury instructions.
[55] *Young v. State*, 374 P.3d 395, 427(Alaska 2016).
[56] *See State v. Lawson*, 291 P.3d 673 (Ore. 2012).
[57] *Id.* at 691.
[58] *Id.* at 693.
[59] *Id.* at 694-95.
[60] *Id.* at 695.
[61] As noted in Section I, there are jurisdictions, including Massachusetts, Michigan, Montana, and the federal government, that have voluntarily adopted procedural requirements for eyewitness identification. This discussion is limited to requirements imposed by legislation.
[62] States requiring police policies include: Colorado, Maryland, Nebraska, Nevada, Texas, and Wisconsin.
[63] States mandating process without addressing potential remedies include: Connecticut, Kansas, Vermont, and West Virginia.

identification protocols.[64] In these states, courts "shall" consider whether or not police followed statutorily required procedures when deciding whether or not identification evidence is admitted. Evidence of police non-compliance is admissible at trial and the jury is instructed that non-compliance can be considered in determining the reliability of identification evidence.[65]

In February 2016, Minnesota's Legislature convened a work group to hear proposals for legislation that would mandate police use "core four" best practices when conducting photographic lineup identifications.[66] The proposal did not result in legislation.

C. *Other Limits on Showup Identifications*

Minnesota courts apply the *Brathwaite* two-part test to both photographic lineups and police showups. Showups are treated slightly differently, however. Unlike a lineup, courts presume a "one-person showup is by its very nature suggestive."[67] Even if a showup is found to be improperly suggestive, Minnesota courts still admit evidence of the showup and permit a witness to make a subsequent in-court identification if the *Brathwaite* reliability factors are satisfied.[68] According to the United States Supreme Court, a contrary rule (i.e., one requiring automatic exclusion of identification evidence tainted by unfair police techniques) would "g[o] too far," for it would "kee[p] evidence from the jury that is reliable and relevant," and "may result, on occasion, in the guilty going free."[69]

Several jurisdictions deviate from *Brathwaite* when dealing with the admissibility of showup identification evidence. New York and Massachusetts have adopted a *per se* exclusionary rule for showup evidence that is the product of unnecessarily suggestive police procedures.[70] In Wisconsin, courts hold that an out-of-court showup identification is "inherently suggestive and will not be admissible unless, based on the totality of the circumstances, the procedure was necessary."[71] A showup identification is necessary only

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[64] States mandating process and addressing court use of identification evidence include: Florida, Illinois, North Carolina, and Ohio.

[65] *See* Fla. Stat. §92.70; Ill. Code§ 5-107A-2; N.C. Gen. Stat. §15A-284.52; Ohio Rev. Code §2933.83.

[66] The legislation was proposed by the Innocence Project of Minnesota. The "core four" best practices are: blind/blinded administration of lineups, witness instructions that the perpetrator may or may not be present, filler selection based on the eyewitness's description of the perpetrator, and eliciting witness confidence statements immediately after an identification is made.

[67] *State v. Taylor,* 594 N.W.2d 158, 162 (Minn. 1999).

[68] *Id.*

[69] *See Brathwaite,* 432 U.S. at 112 (when an "identification is reliable despite an unnecessarily suggestive [police] identification procedure," automatic exclusion "is a Draconian sanction," one "that may frustrate rather than promote justice").

[70] *See People v. Adams,* 423 N.E.2d 379, 383-84 (N.Y. 1981); *Commonwealth v. Johnson,* 650 N.E.2d 1257, 1261 (Mass. 1995).

[71] *State v. Dubose,* 699 N.W.2d 582, 593-94 (Wis. 2005).

if (1) police lack probable cause to make an arrest, or (2) a photo lineup was could not be conducted due to other exigent circumstances.[72]

D. *Other Limits on In-Court Identifications*

In *Perry v. New Hampshire*, the United States Supreme Court held that eyewitness identification testimony only implicates a defendant's due process rights when the identification by the witness was arranged by law enforcement under unnecessarily suggestive circumstances. If police do not procure an identification from the witness, the *Brathwaite* analysis is not triggered.[73] Minnesota has followed *Perry*. In *State v. Mosley*, a witness was permitted to identify the defendant as the person she observed near the murder scene for the first time during her trial testimony.[74] The defendant argued that the evidence should have been excluded because a first-time, in-court identification is unreliable and its probative value was substantially outweighed by the danger of unfair prejudice. The Minnesota Supreme Court found no error in admitting the in-court identification evidence and ruled that no pretrial assessment of reliability was required.[75]

At least one jurisdiction has rejected the rationale of *Perry* and *Mosley*. In *State v. Dickson*, the Supreme Court of Connecticut held that (1) the prosecution must get permission from the trial court if it wishes to offer identification testimony for the first time at trial, and (2) the trial court must "prescreen" the potential identification for reliability.[76] The Connecticut Supreme Court also held that, when identification testimony is offered for the first time at trial, the trial court may instruct the jury that such identifications are "inherently suggestive" and create a significant risk of misidentification.[77]

E. *Corroboration of Eyewitness Testimony*

Commentators have also suggested that imposing a corroborative evidence requirement could ameliorate the risk of wrongful conviction in cases involving eyewitness identification.[78] Other commentators have questioned the viability and wisdom of a bright- line corroboration

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[72] *Id.* The *Dubose* Court noted a "lineup or photo array is generally fairer than a showup, because it distributes the probability of identification among the number of persons arrayed, thus reducing the risk of misidentification." *Id.* at 594.
[73] *Perry v. New Hampshire*, 565 U.S. 228, 248 (2012).
[74] *State v. Mosley*, 853 N.W.2d 789, 798 (Minn. 2014).
[75] *Id.*
[76] *State v. Dickson*, 141 A.3d 810, 825 (Conn. 2016).
[77] *Id.*
[78] *See, e.g.*, Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. Davis L. Rev. 1487 (2008) (arguing for a bright line rule in favor of an eyewitness corroboration requirement).

requirement.[79] A bright- line corroboration requirement represents a deviation from the longstanding, common law rule that "the testimony of a single eyewitness is sufficient" to support a criminal conviction."[80]

Minnesota has created an exception to the general rule. The Minnesota Supreme Court has held that if a "single witness identification of a defendant is made after only fleeting or limited observation, corroboration is required if the conviction is to be sustained."[81] Cases successfully invoking Minnesota's exception for eyewitness corroboration are rare.[82]

F. *Potential Changes to the Admissibility of Eyewitness Identification Evidence*

The Court has several options available related to admissibility and evidentiary standards related to eyewitness identification evidence, including:

1. Take no action and retain existing legal standards;
2. Refine, expand, or clarify the *Brathwaite* suggestiveness and reliability factors;
3. Modify the burden of admissibility to follow New Jersey, Massachusetts, Oregon, or Alaska;
4. Require judge training on issues involved in eyewitness identification (including how to apply existing legal standards or modified legal standards);
5. Adopt a prophylactic rule mandating the use of best practices for police identification procedures as a prerequisite to admissibility;[83]
6. Adopt a rule requiring a reliable pretrial identification as a prerequisite for allowing an in-court identification to be made; or

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[79] David Crump, *Eyewitness Corroboration Requirements as Protections Against Wrongful Conviction: The Hidden Questions,* 7 Ohio. St. J. Crim. L. 361 (2009) (discussing the pros and cons of a corroboration requirement and suggesting exceptions to a bright line rule).

[80] *See State v. Walker,* 310 N.W.2d 89, 90 (Minn. 1981) (it is "well established" that the testimony of a single eyewitness can generally support a conviction); *see also United States v. Bamberger,* 456 F.2d 1119, 1127 n. 4 (3d Cir. 1972) ("[I]t is well established at commonlaw . . . that ordinarily the testimony of one eyewitness is sufficient for the purpose of identification of the perpetrator of a crime") (*citing United States v. Johnson,* 412 F.2d 753, 756 (1st Cir. 1969)).

[81] *Walker,* 310 N.W.2d at 90 (citing *State v. Spann,* 287 N.W.2d 406, 407-08 (Minn. 1979)). Research did not reveal any other jurisdictions with a similar corroboration rule similar to Minnesota's. There are jurisdictions that imposed a corroboration requirement where witness identification is equivocal or uncertain. *See, e.g., United States v. Roberts,* 481 F.2d 892, 894 (5th Cir. 1973).

[82] *See State v. Gluff,* 172 N.W.2d 63 (Minn. 1969). A Westlaw citation check of *Walker* shows 43 cases where the sufficiency of identification evidence was challenged. None resulted in a reversal of convictions.

[83] *Compare State v. Scales,* 518 N.W.2d 587 (Minn. 1994) (Minnesota Supreme Court used supervisory powers to create rule requiring all custodial interrogations be electronically recorded where feasible).

7. Expanding the *Spann/Walker* line of case law by requiring corroborative evidence: (a) in all cases involving an eyewitness identification or (b) in cases where there has been some showing of potential unreliability in the identification process.

COMMITTEE RECOMMENDATION

The Committee recommends that the *Brathwaite* gatekeeping/admissibility standard be expanded and clarified to expressly include consideration of relevant and accepted science on witness identification. The Minnesota Supreme Court should authorize district courts to consider scientific knowledge when determining whether an identification procedure is overly suggestive and an identification is otherwise reliable.

Courts should continue to assess both the *suggestiveness* and *reliability* of an identification. The Committee believes this analysis should be done at the omnibus hearing under Minn. R. Crim. P. 11.02 and that the procedural requirements of the omnibus hearing remain the same.[84]

In determining whether an identification procedure is unnecessarily *suggestive*, district courts should consider: (1) whether the procedure was blind or blinded; (2) whether police gave the witness appropriate and neutral lineup instructions; (3) the composition of the identification display and whether the suspect was singled out for identification; (4) whether there was any confirmatory or post-identification feedback that might affect the witness's identification; (5) whether the witness made the identification alone or with others; and (6) the number of times a witness viewed the suspect in an identification procedure.

In determining whether or not an identification was *reliable*, district courts should consider: (1) the witness's opportunity to view the perpetrator, including the duration of the crime, disguises, lighting conditions, and distance from the events witnessed; (2) the witness's degree of attention during the offense, including the witness's focus on the perpetrator and/or weapon, the witness's stress level, stress, and the witness's intoxication; (3) the witness's level of detail and accuracy of description; (4) the witness's level of certainty, particularly if the certainty statement is made close in time to the crime; (5) the effect of cross-racial identification; and (6) the time between the crime and pretrial confrontation.

The committee further recommends that all judicial officers in Minnesota be given specific training on the science behind identifications to aid courts in making legally sound and just decisions on the admissibility of witness identification evidence.

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[84] For example, the defendant has the burden of showing that the eyewitness identification was derived through "impermissibly suggestive" means. *Perry v. New Hampshire*, 565 U.S. 228, 254 (2012). If the defendant meets that burden, courts then consider whether the identification was reliable under the totality of the circumstances. *Id.*

SECTION 3: EXPERT TESTIMONY REGARDING EYEWITNESS IDENTIFICATIONS

As the science has developed, some courts have responded by admitting testimony from scientific experts regarding the factors that affect the validity of a witness identification. There are a number of areas where expert testimony has been proposed on the reliability of eyewitness recognition and includes:

1. *exposure time* (the amount of time available for viewing a perpetrator affects the witness's ability to identify the perpetrator);
2. *cross-racial and cross-ethnic inaccuracy*;
3. *weapon focus*;
4. *lineup fairness and construction* (similarity of fillers to the suspect increases identification accuracy);
5. *lineup instructions* (police instructions indicating that the police believe the perpetrator to be in the lineup increase the likelihood of false identification);
6. *forgetting curve* (the rate of memory loss for an event is greatest right after the event and then levels off over time);
7. *post-event information* (eyewitness testimony about an event often reflects not only what the witness actually saw but also information the witness obtained later);
8. *wording of questions* (eyewitness testimony about an event can be affected by how questions put to the witness during investigation are worded);
9. *unconscious transference* (eyewitnesses sometimes identify as the culprit an individual familiar to them from other situations or contexts);
10. *simultaneous versus sequential lineups* (witnesses are more likely to make mistakes when they view simultaneous lineups than when they view sequential lineups);
11. *eyewitness confidence issues* (an eyewitness's confidence level is not a good predictor of eyewitness accuracy, but eyewitness confidence is the major determinant in whether an identification is believed by jurors), and
12. *confidence malleability* (eyewitnesses' confidence levels can be influenced by factors unrelated to identification accuracy);[85]
13. *multiple viewings;* and
14. *stress*.[86]

There is a split among jurisdictions on the admissibility of eyewitness identification expert testimony.

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[85] List items 1-12 quoted from *People v. Santiago*, 958 N.E.2d 874, 878-79 (N.Y. 2011).

[86] List items 13-14 taken from *State v. Ferguson*, 804 N.W.2d 586, fn. 12-13 (Minn. 2011) (Anderson, P. concurring).

A. *The Majority View: Admission of Expert Testimony is Discretionary*

An overwhelming number of states and federal circuits, including Minnesota, allow the admission of eyewitness identification expert testimony at the discretion of the trial court to aid the factfinder. In *Commonwealth v. Walker*, the Pennsylvania Supreme Court reviewed case law across the nation and determined that 44 states, the District of Columbia, and all federal circuits, with the possible exception of the 11th Circuit, have adopted a discretionary standard.[87]

While the vast majority of US jurisdictions follow a discretionary admissibility rule, these cases are evolving. Increasingly, courts are concerned with how the trial courts exercise that discretion.[88]

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[87] 92 A.3d 766, 782-83 (Pa. 2014). The *Walker* Court cited *Ex parte Williams*, 594 So. 2d 1225 (Ala. 1992); *Skamarocius v. State*, 731 P.2d 63 (Alaska Ct. App. 1987); *State v. Nordstrom*, 25 P.3d 717 (Ariz. 2001) (en banc); *Parker v. State*, 968 S.W.2d 592 (Ark. 1998); *People v. McDonald*, 690 P.2d 709 (Cal. 1984); *Campbell v. People*, 814 P.2d 1 (Colo. 1991) (en banc); *State v. Guilbert*, 49 A.3d 705 (Conn. 2012); *Garden v. State*, 815 A.2d 327 (Del. 2003); *Benn v. United States*, 978 A.2d 1257 (D.C. 2009); *McMullen v. State*, 714 So. 2d 368 (Fla. 1998); *Howard v. State*, 686 S.E.2d 764 (Ga. 2009); *State v. Wright*, 206 P.3d 856 (Idaho Ct. App. 2009); *People v. Allen*, 875 N.E.2d 1221 (Ill. Ct. App. 2007); *Cook v. State*, 734 N.E.2d 563 (Ind. 2000); *State v. Schutz*, 579 N.W.2d 317 (Iowa 1998); *Commonwealth v. Christie*, 98 S.W.3d 485 (Ky. 2002); *State v. Kelly*, 752 A.2d 188 (Me. 2000); *Bomas v. State*, 987 A.2d 98 (Md. 2010); *Commonwealth v. Santoli*, 680 N.E.2d 1116 (Mass. 1997); *People v. Carson*, 553 N.W.2d 1 (Mich. Ct. App. 1996); *State v. Ware*, 326 S.W.3d 512 (Mo. Ct. App. 2010); *State v. DuBray*, 77 P.3d 247 (Mont. 2003); *State v. Trevino*, 432 N.W.2d 503 (Neb. 1988); *White v. State*, 926 P.2d 291 (Nev. 1996); *State v. Henderson*, 27 A.3d 872 (N.J. 2011); *People v. LeGrand*, 867 N.E.2d 374 (N.Y. 2007); *State v. Lee*, 572 S.E.2d 170 (N.C. Ct. App. 2002); *State v. Fontaine*, 382 N.W.2d 374 (N.D. 1986); *State v. Buell*, 489 N.E.2d 795 (Ohio 1986); *Torres v. State*, 962 P.2d 3 (Okla. Crim. App. 1998); *State v. Lawson*, 291 P.3d 673 (Or. 2012) (en banc); *State v. Werner*, 851 A.2d 1093 (R.I. 2004); *State v. Whaley*, 406 S.E.2d 369 (S.C. 1991); *State v. McCord*, 505 N.W.2d 388 (S.D. 1993); *State v. Copeland*, 226 S.W.3d 287 (Tenn. 2007); *Weatherred v. State*, 15 S.W.3d 540 (Tex. Crim. App. 2000); *State v. Clopten*, 223 P.3d 1103 (Utah 2009); *State v. Percy*, 595 A.2d 248 (Vt. 1990); *Currie v. Commonwealth*, 515 S.E.2d 335 (Va. Ct. App. 1999); *State v. Cheatam*, 81 P.3d 830 (Wash. 2003) (en banc); *State v. Taylor*, 490 S.E.2d 748 (W. Va. 1997); *State v. Shomberg*, 709 N.W.2d 370 (Wis. 2006); *Engberg v. Meyer*, 820 P.2d 70 (Wyo. 1991). For federal cases adopting similar approaches, the *Walker* Court cited *United States v. Rodriguez– Berrios*, 573 F.3d 55 (1st Cir. 2009); *United States v. Lumpkin*, 192 F.3d 280 (2d Cir. 1999); *United States v. Brownlee*, 454 F.3d 131 (3d Cir. 2006); *United States v. Harris*, 995 F.2d 532 (4th Cir. 1993); *United States v. Moore*, 786 F.2d 1308 (5th Cir. 1986); *United States v. Smithers*, 212 F.3d 306 (6th Cir. 2000); *United States v. Bartlett*, 567 F.3d 901 (7th Cir. 2009); *United States v. Martin*, 391 F.3d 949 (8th Cir. 2004); *United States v. Rincon*, 28 F.3d 921 (9th Cir. 1994); *United States v. Rodriguez–Felix*, 450 F.3d 1117 (10th Cir. 2006).

[88] *See e.g. Bomas*, 987 A.2d at 115 (considering whether the proffered expert testimony either "(1) lacked adequate citation to studies or data, (2) insufficiently related to the identification at issue,

Some courts have recognized that, despite the discretionary standard, a *de facto* or presumptive inadmissibility rule exists.[89] For example, in *State v. Clopten*, the Utah Supreme Court noted neither it nor the Utah Court of Appeals had "ever reversed a conviction for failure to admit eyewitness expert testimony."[90] The *Clopten* court concluded that this history amounted to "a *de facto* presumption against eyewitness expert testimony."[91]

Other courts have acknowledged that the tone of their opinions have created a perception that expert testimony is disfavored. In *Bomas*, the appellant noted that the Maryland Supreme Court's leading case on eyewitness expert testimony discouraged the admission of this testimony because "the opinion advances all the arguments against the admissibility of expert testimony, and provides no countervailing observations which would educate trial judges as to the circumstances in which expert testimony on eyewitness reliability would be helpful."[92] The *Bomas* court agreed that its prior case "strikes a negative tone with respect to expert testimony on eyewitness identification."[93]

A few courts have tilted in the other direction to create or effectively create a presumption in favor of admitting expert testimony in certain cases. The *Clopten* court held "in cases where eyewitnesses are identifying a stranger and one or more established factors affecting accuracy are present, the testimony of a qualified expert is both reliable and helpful, as required by rule 702. Such eyewitness expert testimony should therefore be routinely admitted."[94] As the dissenting justice noted, this ruling effectively left trial court's with "no discretion" on admitting expert testimony.[95] California's Supreme Court has held that "it will ordinarily be error" to exclude qualified expert eyewitness identification testimony when the eyewitness identification is key to the state's case and is not "substantially corroborated" by independent evidence.[96] Other cases have been cited to endorsing a presumptive admissibility rule.[97]

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and/or (3) addressed concepts that were not beyond the ken of laypersons" in determining whether trial court's discretion was abused); *LeGrand*, 8 N.Y.3d at 456 (a trial court's decision to admit expert testimony should be weighed against factors "such as the centrality of the identification issue and the existence of corroborating evidence").

[89] *See Clopten*, 223 P.3d 1103 (Utah 2009) and *Bomas*, 987 A.2d 98 (Md. 2010).

[90] *Clopten*, 223 P.3d at 1107.

[91] *Id.*

[92] *Bomas*, 987 A.2d at 107-108 (quoting *Bloodsworth v. State*, 307 Md. 164, 181, 512 A.2d 1056, 1064 (Md. 1986).

[93] *Id.*

[94] *Clopten*, 223 P.3d at 1118.

[95] *Id.*

[96] *People v. Jones*, 70 P.3d 359, 388 (Cal. 2003) (*citing People v. McDonald*, 690 P.2d 709, 727 (Cal. 1984)).

[97] *See Johnson v. State*, 526 S.E.2d 549 (Ga. 2000); *United States v. Smithers*, 212 F.3d 306 (6th Cir. 2000); *State v. Copeland*, 226 S.W.3d 287 (Tenn. 2007); *State v. LeGrand*, 8 N.Y.3d 449, 835

B. *Minority View: Eyewitness Expert Testimony is Barred*

The minority view is a *per se* exclusionary rule on admitting eyewitness identification expert testimony. This rule is followed in Kansas and Louisiana.[98] The Louisiana Supreme Court has labeled eyewitness identification expert testimony "junk science" that "presumes a misidentification" and "fosters a disbelief of eyewitnesses by jurors."[99] The minority view holds that expert testimony invades the common knowledge of the layperson and other safeguards such as cross-examination, cautionary instructions, and persuasive argument – safeguards that are better suited to addressing any problems with eyewitness identification.[100]

C. *Minnesota Supreme Court's Jurisprudence on Eyewitness Experts*

Minnesota adheres to the majority view that the decision on whether to admit expert testimony on eyewitness identification is left to the discretion of the trial court. Minnesota first addressed whether expert testimony on the reliability of eyewitness identification was admissible in *State v. Helterbridle*.[101] In *Helterbridle*, the trial court had excluded the proffered eyewitness identification expert testimony. The Supreme Court examined admissibility under Minn. R. Evid. 702 and under an abuse of discretion standard.[102] While holding that the trial court did not abuse its discretion in refusing to admit the evidence, the Court stressed it did "not mean to suggest that we think the broader issue of reliability of eyewitness testimony is unimportant. Rather, we simply believe that requiring trial courts to admit this sort of evidence is not the answer."[103]

The Minnesota Supreme Court examined this issue again 15 years later in *State v. Barlow*.[104] In upholding the trial court's refusal to admit expert testimony, the Court noted that the "proffered testimony did not go to the reliability of any particular witness or the particular circumstances of the identification, and its potential for helpfulness was minimal at best."[105]

Three years later the Minnesota Supreme Court examined the issue again in *State v. Miles*, but merely reiterated and continued points it emphasized previously:

N.Y.S.2d 523, 867 N.E.2d 374 (N.Y. 2007); *State v. Wright*, 206 P.3d 856 (Idaho App. 2009).

[98] *State v. Carr*, 331 P.3d 544 (Kan. 2014); *State v. Young*, 35 So.3d 1042 (La. 2010); *State v. Henry*, 164 So.3d 831 (La. 2015); *State v. Lee*, 169 So.3d 350 (La. 2015).

[99] *Young*, 35 So.3d at 1052; *Lee*, 169 So.3d at 351-352.

[100] *Id.*

[101] 301 N.W.2d 545 (Minn. 1980).

[102] *Id.* at 547.

[103] *Id.*

[104] 541 N.W.2d 309 (Minn. 1995).

[105] *Id.* at 313.

> It is the trial court's responsibility to scrutinize the proffered expert testimony as it would other evidence and exclude it where irrelevant, confusing, or otherwise unhelpful. In the context of expert testimony on eyewitness identification, we have held that it is not an abuse of discretion for a trial court to exclude the testimony when it does not relate to the reliability of a particular witness.
> . . . .
> There is no one answer to the problem, but there are a number of safeguards to prevent convictions of the innocent based on unreliable eyewitness identification. Prosecutors do not have to prosecute if they think the evidence is unreliable. . . . Effective cross-examination and persuasive argument by defense counsel are additional safeguards. Proper instruction of the jury on the factors in evaluating eyewitness identification testimony and on the state's burden of proving identification beyond a reasonable doubt are other safeguards. The requirement of jury unanimity is also a safeguard. Finally, this court has the power to grant relief if it is convinced that the evidence of a convicted defendant's guilt was legally insufficient. [106]

The Court also added extensive voir dire to the list of safeguards that protect against wrongful convictions.[107] Ultimately, the Court found "nothing in the record to suggest that expert testimony on the accuracy of eyewitness identification in general would be particularly helpful to the jury in evaluating the specific eyewitness testimony introduced against appellant."[108]

The Minnesota Supreme Court did not revisit the issue again until it was raised by Justice Paul Anderson in a concurring opinion in *State v. Ferguson*. Justice Anderson wrote separately to emphasize the need for the Court to reconsider *Miles* and *Helterbridle* in light of the recent developments in social science and case law of other jurisdictions.[109]

Two years later, the Minnesota Supreme Court did review the issue again in *State v. Mosley*.[110] But, as it did in *Miles* and *Helterbridle*, the Court reaffirmed that available safeguards of the system were sufficient to compensate for potential frailties in eyewitness identification testimony.

> We reasoned that there are a number of safeguards available to prevent convictions of the innocent based on unreliable eyewitness identification, and that these safeguards alleviate the need to *require* district courts to admit expert testimony on the issue. The available safeguards include effective cross-

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[106] 585 N.W.2d 368, 371-372 (Minn. 1998) (citation and footnotes omitted).
[107] *Id*. at 372.
[108] *Id*. at 372.
[109] *State v. Ferguson*, 804 N.W.2d 586, 604-610 (Minn. 2001) (J. Anderson, concurring).
[110] 853 N.W.2d 789 (Minn. 2014).

> examination, persuasive closing arguments, and jury instructions on the factors relevant to evaluating eyewitness identification testimony.[111]

The Court affirmed the trial court's exclusion of expert testimony because the proffered testimony on memory and unreliability was generic and did not relate to the particular circumstances of Mosley's case.[112]

COMMITTEE RECOMMENDATIONS:

The Committee recommends that the Minnesota Supreme Court clarify the parameters and criteria that should guide a district court's discretion in admitting expert testimony. In doing so, the Court should emphasize three things. First, district courts should evaluate the admissibility of expert testimony on eyewitness identification, like all expert testimony, under the requirements of Minn. R. Evid. 702 and case law interpreting that rule.[113] Second, the Court should make plain that any interpretation of cases like *Helterbridle* or *Miles* as discouraging the admission of expert testimony on eyewitness identifications is incorrect. The Court should clarify that the admissibility of expert testimony on eyewitness identifications should be decided on a case-by-case basis.[114] Finally, the Court should clarify that the "safeguards" listed in cases like *Helterbridle* and *Miles* are not substitutes for expert testimony on eyewitness identifications, presuming such testimony is admissible under Rule 702. In other words, the availability of things like cross-examination and persuasive argument by counsel do not render expert testimony which meets the requirements of Rule 702 inadmissible. In particular, the Court should clarify that the availability of the *Helterbridle*/*Miles* "safeguards" does not render expert testimony on eyewitness identifications categorically unhelpful.

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[111] *Id*. at 799 (citing *Helterbridle*, 301 N.W.2d at 547).
[112] *Id.* at 800.
[113] *See, e.g., Doe v. Archdiocese of St. Paul and Minneapolis*, 817 N.W.2d 150 (Minn. 2012); *State v. Obeta*, 796 N.W.2d 282, 293-94 (Minn. 2011). The Committee's recommendations on expert testimony apply to actual testimony from an expert witness, not information provided by scientific or scholarly studies, treatises, or other written documents.
[114] *Compare Obeta*, 796 N.W.2d at 290 (rejecting "broad reading" of prior case law as encouraging exclusion of expert testimony).

SECTION 4: JURY INSTRUCTION ON EYEWITNESS-IDENTIFICATION EVIDENCE.

The committee considered whether the Minnesota Supreme Court should allow, recommend, or require district courts to instruct juries on existing or modified factors to consider when evaluating the reliability of eyewitness-identification testimony. This section details the current state of Minnesota law, summarizes legal developments in other states, and provides the Court with options for proposed instructions.

A. *Minnesota Law and Jury Instructions on Eyewitness-Identification Evidence*

In 1969, in *State v. Burch*, the Minnesota Supreme Court wrote that, "where requested by defendant's counsel, we think the court should instruct on the factors the jury should consider in evaluating an identification and caution against automatic acceptance of such evidence."[115]

> The factors involved would include the opportunity of the witness to see the defendant at the time the crime was committed, the length of time the person committing the crime was in the witness' view, the stress the witness was under at the time, the lapse of time between the crime and the identification, and the effect of the procedures followed by the police as either testing the identification or simply reinforcing the witness' initial determination that the defendant is the one who committed the crime.[116]

The advice from *Burch* is contained in the current pattern cautionary jury instruction on eyewitness-identification evidence:

> Testimony has been introduced tending to identify the defendant as the person observed at the time of the alleged offense. You should carefully evaluate this testimony. In doing so, you should consider such factors as the opportunity of the witness to see the person at the time of the alleged offense, the length of time the person was in the witness's view, the circumstances of that view, including light conditions and the distance involved, the stress the witness was under at the time, and the lapse of time between the alleged offense and the identification. (If the witness has seen and identified the person before trial and after the alleged offense, you should also consider the circumstances of that earlier identification, and you should consider whether in this trial the witness's memory is affected by that earlier identification.)[117]

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[115] 170 N.W.2d 543, 553 (Minn. 1969).
[116] *Id.* at 553-554.
[117] 10 Minn. Prac. Series, CRIM JIG 3.19 (6th Ed. 2017).

The factors for evaluating the reliability of eyewitness-identification evidence have not changed, and seemingly have not been addressed by the Supreme Court, since *Burch*.

B. *Eyewitness instructions in other jurisdictions*

At least 25 states have pattern jury instructions regarding the evaluation of eyewitness-identification evidence. Most such instructions are similar to Minnesota's current instruction. They direct juries to consider certain factors, identified either by common sense, case law such as *Brathwaite* or *Telfaire*,[118] or both, when determining whether an eyewitness identification might or might not be reliable.[119] The United States Court of Appeals for the Eighth Circuit uses a similar instruction.[120]

Some states' pattern instructions import to the jury the importance of carefully scrutinizing eyewitness-identification testimony. Oklahoma's pattern instruction, for example, instructs jurors that, "Eyewitness identifications are to be scrutinized with extreme care. Testimony as to identity is a statement of a belief by a witness. The possibility of human error or mistake and the probable likeness or similarity of objects and persons are circumstances that you must consider in weighing identification testimony." Utah's pattern instruction reminds the jury that eyewitness-identification testimony is simply "the witness's expression of (his) (her) belief or impression. You don't have to believe that the identification witness was lying or not sincere to find the defendant not guilty. It is enough that you conclude that the witness was mistaken in (his) (her) belief or impression." The pattern instructions in Massachusetts and New Jersey contain long preambles with similar themes.[121]

In Pennsylvania, the instruction given depends upon whether the trial judge determines that the eyewitness identification is or is not "in doubt."[122] If the Pennsylvania trial judge determines that accuracy is in doubt, the judge instructs the jury to receive the testimony with "caution," and gives several factors for consideration as to why that might be. If the judge

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[118] *See United States v. Telfaire,* 469 F.2d 552 (D.C. Cir. 1972)

[119] *See, e.g.,* Revised Arizona Jury Instruction – Criminal No. 39 (*Brathwaite*) and S.C. Request to Charge – Criminal §6.1 (*Telfaire*) both available on Westlaw.

[120] Model Criminal Jury Instruction §4.08; available at http://juryinstructions.ca8.uscourts.gov/Criminal-Jury-Instructions-2017.pdf.

[121] One study has raised concerns about the instructions given in New Jersey. The study concludes the eyewitness identification instructions resulted in jurors being distrustful of all eyewitness evidence, even where it is generally reliable. *See* A. Papiliou, D. Yokum, C. Robertson, *The Novel New Jersey Eyewitness Instruction Induces Skepticism but Not Sensitivity,* PloS ONE 10 (12); e0142695. Doi:10.1371/journal.pone.0142695. The study did not attempt to determine which portion of the instruction caused this result. Critics of the study contend that the conclusions are debatable because of the small sample size of cases included in the study.

[122] *See* PA-JICRIME 4.07A ("Identification Testimony – Accuracy Not in Doubt"); PA-JICRIM 4.07B ("Identification Testimony – Accuracy in Doubt").

determines that no factors present call the accuracy of the identification into doubt, the judge should instruct the jury on a list of factors to consider when evaluating the evidence.

Several states have, in recent years, amended their respective pattern instructions in response to social science developments. Those states have evenly split on the degree of detail provided to jurors about how to evaluate the factors. Hawaii, California, and Florida have expanded the list of factors to consider in the reliability determination. Washington has done the same regarding evidence of cross-racial identifications. Massachusetts and New Jersey have expanded the factors to consider and have also included what courts in those states describe as the results of social-science research into those factors. New York and Utah have done the same for evidence of cross-racial identifications.

The Massachusetts Supreme Judicial Court's opinion in *Commonwealth v. Gomes* is instructive on this point.[123] The Massachusetts court intends jury instructions "to provide the jury with the guidance they need to capably evaluate the accuracy of an eyewitness identification."[124] The Massachusetts court concluded "that there are various principles regarding eyewitness identification for which there is a near consensus in the relevant scientific community and that it is appropriate to . . . include them [in jury instructions]."[125] The New Jersey Supreme Court and the New York Court of Appeals (at least with regard to cross-racial identification evidence) have done the same, for the same reasons.[126]

The Committee did not locate any jurisdiction that premised jury instructions regarding reliability factors, or explaining how or why those factors might affect the accuracy of a purported identification, on the admission of expert testimony. Courts in New York, New Jersey, and Massachusetts have rejected that requirement.[127]

C. *Options for Possible Action by the Minnesota Supreme Court*

The Committee recommends that, given existing science, the Minnesota Supreme Court update and modernize the factors juries should consider when evaluating the reliability of eyewitness-identification evidence.[128] The Committee considered a number of possible

[123] 22 N.E.2d 897 (Mass. 2015).
[124] *Id.* at 908.
[125] *Id.* at 909-910.
[126] *State v. Henderson*, 27 A.3d 872, 925- 26 (N.J. 2011); *People v. Boone*, 91 N.E.3d 1194, 1198-99 (N.Y. 2017)
[127] *See Gomes*, 22 N.E.3d at 908-09; *Henderson*, 27 A.3d at 925; *Boone*, 91 N.E.3d at 1199-1200.
[128] The Minnesota Supreme Court often leaves the crafting of jury instructions to the district court's sound discretion. On occasion, however, the Court has directed that specific instructions be, or not be, used. *See, e.g., State v. Hare*, 575 N.W.2d 828, 832-33 (Minn. 1998) (directing that a particular pattern jury instruction be given in certain self-defense cases). On at least one prior occasion, the Court used an order to direct that certain instructions be given or not given. *See State v. Marquardt*, 496 N.W.2d 806 (Minn. 1993) (order denying petition for review).

instructions and weighed and debated the pros and cons of various proposals. The committee was not able to reach consensus on which type of instruction would be more appropriate. The committee decided that a divided vote would be so splintered amongst various options as to be unhelpful in determining the committee's collective opinion.

Instead, the committee presents to the Court two options that encapsulate the types of instructions the committee considered. Below are those two options, with a summary of the advantages and disadvantages of each, as identified by the committee.

Option 1: Add new factors to the current pattern jury instruction.

The Court could order district courts to add new factors to the list of factors in Minnesota's current pattern instruction. Such an instruction might read as follows:

> Testimony has been introduced tending to identify the defendant as the person observed at the time of the alleged offense. You should carefully evaluate this testimony. In doing so, you should consider such factors as
>
> - the opportunity of the witness to see the person at the time of the alleged offense,
> - the length of time the person was in the witness's view, the circumstances of that view, including light conditions and the distance involved,
> - the stress the witness was under at the time, ~~and~~
> - the lapse of time between the alleged offense and the identification,
> - whether the witness saw a weapon during the incident,
> - whether the witness was intoxicated at the time of the identification,
> - whether the alleged perpetrator was wearing a disguise at the time of the identification,
> - whether the alleged perpetrator's facial features were altered between the time of the event and a later identification,
> - the witness's level of confidence in the accuracy of the identification,
> - whether the witness's identification was consistent with any prior description or identification of the alleged perpetrator, and
> - whether there is a difference in race between the alleged perpetrator and the witness.
> - (If the witness has seen and identified the person before trial and after the alleged offense, you should also consider the circumstances of that earlier identification, and you should consider whether in this trial the witness's memory is affected by that earlier identification.)

Option 2: Craft a new instruction combining old and new factors and include information about the social science.

The Court could order district courts to craft instructions that guide jurors on how reliability factors might affect the reliability of an identification. Such an instruction might read as follows:

> Testimony has been introduced tending to identify the defendant as the person observed at the time of the alleged offense. You should carefully evaluate this testimony. In assessing an identification, you should consider:
>
> (1) the witness's capacity and opportunity to observe the perpetrator, including
>
> - the duration of the crime,
> - the lighting conditions,
> - the distance of the witness from the perpetrator,
> - the presence of a mask or other disguise
> - a material change in appearance between the crime and identification, and
> - the amount of time that elapsed between the crime and the identification.
>
> [In general, a witness bases any identification s/he makes on his/her perception through the use of his senses. Usually the witness identifies an offender by the sense of sight – but this is not necessarily so, and he/she may use other senses.]
>
> (2) the witness's prior description of the perpetrator, including whether:
> - the witness's initial description of the perpetrator matched the person later identified,
> - the prior description was detailed or general, and
> - the witness's testimony was consistent with the witness's prior description of the perpetrator.
> - [If appropriate: You may also consider whether the witness identified or failed to identify the defendant at a prior identification procedure.]
>
> (3) The conduct of the identification procedure.
>
> Human memory is not foolproof. A person's memory is complex and is not like a video recording that a witness can simply replay to remember what happened. Eyewitness perception of and memory for the perpetrator of a crime can be limited by other factors. In your assessment of eyewitness testimony, you can also consider whether, individually or in combination, the following factors might have affected this eyewitness's identification and memory of the perpetrator:
>
> a) Stress: Was the witness under a high level of stress, which can make it difficult to form a clear memory of the perpetrator?

b) Weapon Focus: Was there a weapon present during the crime that distracted the witness from the perpetrator's face?
c) Intoxication: Was the witness intoxicated to a degree that inhibited the formation of a clear and detailed memory?
d) Complexity of the crime: Were there multiple perpetrators that divided the witness's attention and limited the witness's ability to focus on a perpetrator(s)?
e) Cross-Race effect: Did a difference in race/ethnicity between the defendant and the witness limit the witness's ability to discern identifying characteristics of the defendant?
f) Confidence statements: Was the witness's confidence statement measured at the time of the identification?

[Witness confidence is more likely to correlate with identification accuracy if confidence is measured immediately at the time of the identification within a proper police identification procedure and before any feedback about that decision from police or other sources. A witness's level of confidence expressed later is not always a reflection of accurate memory.]

Option 3: Craft a new instruction regarding eyewitness identifications made at showups or lineups.

The Court could order district courts to craft an instruction relating directly to out-of-court identification procedures, such as photo lineups or showups. Minnesota does not currently use such an instruction, versions of which are used in New Jersey and Massachusetts. Such an instruction might be similar to the general instruction on factors for consideration when evaluating the reliability of eyewitness-identification evidence. It might read as follows:

Lineup Procedures

Testimony has been introduced indicating that a witness (or witnesses) identified the defendant as the perpetrator during a (identify procedure). You should carefully evaluate this testimony. In doing so, you should consider such factors as

(1) Lineup Composition: If a suspect stands out from other members of the lineup it can, but does not necessarily, suggest that the witness identify the suspect as the perpetrator. Lineups with a number of possible choices for the witness may, but do not necessarily, serve as a more reliable test of the witness's memory.

(2) Double-blind: You may consider whether the lineup administrator knew which person or photo in the lineup was of the suspect and, if so, whether

the administrator consciously or unconsciously used that knowledge to influence the witness's identification.

(3) Multiple Viewings: A witness who views the same person in more than one identification procedure may be, but not necessarily is, more inclined to identify that person in a subsequent procedure. You may consider whether the witness viewed the suspect multiple times during the identification process and, if so, whether that affected the reliability of the identification.

(4) Showups : In determining whether the identification is reliable or the result of an unduly suggestive procedure, you should consider how much time elapsed after the witness last saw the perpetrator, what if any instructions or information were given to the witness, and all other circumstances surrounding the showup.

This approach is consistent with *Telfaire,* which instructs jurors to use "great care" in considering the circumstances surrounding an identification procedure in assigning weight to the evidence.[129]

COMMITTEE RECOMMENDATIONS:

The Committee recommends that the factors juries should consider when evaluating the reliability of eyewitness identification evidence should be updated and modernized. The Committee did not reach consensus on the details of the appropriate jury instruction. There were two general schools of thought.

Some members preferred the approach that simply added updated factors to the existing list of criteria that Minnesota juries currently consider under CRIMJIG 3.19. The advantages of this approach are that: (1) it is consistent with the current format; (2) it does not contain argument or suggestion on how the jury might use the factors and members believe that expert testimony might be a better source of such information; and (3) it is relatively short, which should help to hold jurors' attention. The disadvantages to this approach include: (1) it does not explain the counterintuitive nature of some of the factors; and (2) it would likely increase the need for experts.

Other members preferred an approach that added updated factors to the existing list of criteria and provided some information about the social science. The advantages of this approach include: (1) it gives the jury more information about how certain facts may affect the reliability of an identification; (2) it avoids much of the argumentative language present in the most aggressive pattern instructions, such as New Jersey's; and (3) it may reduce the need for expert-witness testimony. The disadvantages might include: (1) it is arguably

[129] *Telfaire*, 469 F.2d 552, 558-59 (D.C. Cir. 1972).

similar to a permissive inference instruction which is generally disfavored in Minnesota;[130] (2) it could be used as a substitute for expert testimony which might be more nuanced and detailed; and (3) it is longer than Minnesota's current instruction, and might risk losing jurors' attention and being ineffective.

[130] *See generally State v. Litzau*, 650 NW2d 177, 185-86 (Minn. 2002).

SECTION 5: REVIEWING EYEWITNESS IDENTIFICATION EVIDENCE

The committee also considered whether appellate courts could and/or should modify the governing review standards for identification evidence on appeal.

A. *Existing Appellate Standards of Review Related to Eyewitness Testimony*

Two standards of review could potentially affect review of eyewitness testimony at the appellate level. The first is the standard for determining whether the identification procedure complied with the defendant's constitutional due process rights. It appears the Supreme Court has not clearly articulated the standard of review for such determinations. The Court of Appeals has held that the due-process aspects of eyewitness admissibility are reviewed de novo.[131] In some other cases, however, appellate courts have reviewed the constitutionality of identification procedures under an abuse-of-discretion standard.[132] In other cases, the Supreme Court has given de novo review "where the facts are not in dispute and the trial court's decision is a question of law."[133] Still other cases do not state the standard.[134] As a result, the standard is unclear at best, and is potentially disadvantageous toward criminal defendants.[135]

Another standard of review directly related to eyewitness identifications is the standard for sufficiency-of-the-evidence claims. The Supreme Court employs greater scrutiny when reviewing the sufficiency of circumstantial evidence to support a violation of a criminal statute: "Circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt."[136] Direct evidence, like eyewitness testimony, does not receive this heightened scrutiny.[137] The potential result is that, upon appellate review, eyewitness testimony is not scrutinized to the extent of "circumstantial" evidence, regardless of the relative reliability of either.

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[131] *State v. Hooks*, 752 N.W.2d 79, 83–84 (Minn. Ct. App. 2008).
[132] *See, e.g.*, *State v. Booker*, 770 N.W.2d 161, 168 (Minn. Ct. App. 2009); *State v. Roan*, 532 N.W.2d 563, 573 (Minn. 1995); *Caldwell v. State*, 347 N.W.2d 824, 825 (Minn. Ct. App. 1984).
[133] *State v. Taylor*, 594 N.W.2d 158, 161 (Minn. 1999) (reversing suppression of identification); *see State v. Adkins*, 706 N.W.2d 59, 62 (Minn. Ct. App. 2005) (affirming denial of motion to suppress).
[134] *See, e.g.*, *State v. Fox*, 396 N.W.2d 862, 864 (Minn. Ct. App. 1986) (concluding that a photographic lineup was not impermissibly suggestive).
[135] *See* 11 Peter N. Thompson, *Minnesota Practice: Evidence* § 801.08 (4th ed.) ("[T]he standard of review used by appellate courts seems unfairly stacked against the accused.").
[136] *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002).
[137] *See State v. Clark*, 739 N.W.2d 412, 421 n.4 (Minn. 2007) (defining direct evidence as "[e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption").

B. *Potential Change to the Admissibility Review Standard*

Other jurisdictions have more specifically defined the standard of review applied to the constitutionality of identification procedures as a "mixed question of law and fact."[138] They apply a de novo review to the legal questions and a more deferential review to factual ones.[139] Federal courts have similarly applied de novo review to analyze compliance with constitutional requirements, while reviewing the factual basis for the district court's decision for clear error.[140]

Articulating a clear standard of review would ensure equivalent admissibility standards regardless of whether the evidence was admitted at trial. The Minnesota Supreme Court already employs the standard of mixed question of law and fact to other evidentiary issues in criminal cases, including ineffective assistance of counsel claims, severance issues, and determining mens rea.[141] A shift to the mixed question standard of review (i.e., de novo review for legal questions and deference to questions of fact), as opposed to abuse of discretion, could have wide-reaching effect on the scrutiny given to the review of identification procedures and the admission of evidence derived therefrom.

C. *Potential Change to the Sufficiency Review Standard*

Minnesota's current approach – differing standards for direct and circumstantial evidence – is the minority among U.S. jurisdictions. In *State v. Harris*, the Supreme Court recently declined to abandon its traditional approach of diverging standards for direct and circumstantial evidence on appellate review.[142] In his dissent, Justice Lillehaug noted that some direct evidence, like eyewitness testimony, is often less reliable than circumstantial evidence.[143]

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[138] *Sumner v. Mata*, 455 U.S. 591, 597 (1982).

[139] *See, e.g., State v. Marquez*, 967 A.2d 56, 67 (Conn. 2009) (citing cases); *State v. Hunt*, 69 P.3d 571, 573 (Kan. 2003) ("This court reviews the factual basis of the district court's decision using a substantial competent evidence standard, but uses a de novo standard to review the legal conclusions drawn from those facts."); *State v. Doap Deng Chuol*, 849 N.W.2d 255, 261 (S.D. 2014) (reviewing findings of fact for clear error and suppression determination de novo); *State v. Hollen*, 44 P.3d 794, 799 (Utah 2002) ("defer[ring] to the trial court's fact-finding role" but "review[ing] for correctness whether the facts are sufficient to demonstrate reliability").

[140] *See, e.g., United States v. Thomas*, 849 F.3d 906, 910 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 315 (2017); *United States v. Jones*, 454 F.3d 642, 648 (7th Cir. 2006); *United States v. Guidry*, 406 F.3d 314, 319 (5th Cir. 2005).

[141] *See, e.g., State v. Nicks*, 831 N.W.2d 493, 503 (Minn. 2013) (claims of ineffective assistance of counsel); *State v. Kendell*, 723 N.W.2d 597, 607 (Minn. 2006) (single- behavioral- incident analysis for motion to sever offenses); *State v. Chambers*, 507 N.W.2d 237, 239 (Minn. 1993) (determination of requisite mens rea). The Court generally reviews mixed questions of law and fact de novo. *Kendell*, 723 N.W.2d at 607.

[142] 895 N.W.2d 592, 601 (Minn. 2017).

[143] *Id.* at 607-08 (Lillehaug, J., dissenting).

Justice Lillehaug would have applied a unitary standard to all evidence and determined sufficiency based on "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[144]

Of course, there is no guarantee that a unitary standard of review will ferret out unreliable eyewitness testimony. If a jury finds a defendant guilty after hearing eyewitness testimony, a new standard of review would not necessarily allow a reviewing court to find the identification unreliable. Moreover, as the majority opinion in *Harris* notes, the disparate treatment of direct and circumstantial evidence is founded on whether an additional, inferential step is required to reach a conclusion, not on the credibility of the evidence itself.[145] Given its recent review of this issue, the Minnesota Supreme Court is unlikely to readdress it, particularly for a tangential reason.

COMMITTEE RECOMMENDATIONS:

The Committee recommends that the Court clarify the appellate standard of review for challenges to the constitutionality of identification procedures.[146] Because the question is one of due process protections, the Committee believes that the mixed question standard (de novo review of legal issue and deference to factual findings), rather than abuse of discretion, is the appropriate standard.

The Committee does not recommend adopting a unitary standard of review for direct and circumstantial evidence, given the Court's recent decision not to do so, and because there is little reason to believe that the unitary standard would affect the reliability of eyewitness testimony that is admitted into evidence.

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[144] *Id.* at 611 (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *see also State v. Derouchie*, 440 A.2d 146, 149 (Vt. 1981) ("The proper focus of judicial review should be the quality and strength of the evidence, whether direct or circumstantial.").

[145] *Id.* at 599 n.4 (majority opinion); *see also People v. Kennedy*, 391 N.E.2d 288, 290–91 (N.Y. 1979) ("[C]ases involving circumstantial evidence must be closely reviewed because they often require the jury to undertake a more complex and problematical reasoning process than do cases based on direct evidence.").

[146] The Committee does not intend this recommendation to affect standards of review for other evidentiary issues related to eyewitness testimony, such as reviewing underlying findings of fact on a motion to suppress or whether eyewitness evidence was sufficient to support a finding of guilt, or whether eyewitness testimony is admissible under Rule 401 or 403.

MINORITY REPORT

I respectfully disagree with Recommendation 5: adopting the mixed-question standard of review (de novo review of legal issues and deference to factual findings) for review of eyewitness testimony, rather than retaining the abuse-of-discretion standard. *See State v. Booker*, 770 N.W.2d 161, 168 (Minn. App. 2009) ("A district court's ruling on the admissibility of identification evidence is subject to an abuse-of-discretion standard of review."). In *Booker*, the district court had determined that the identification procedure was not impermissibly suggestive, i.e., that the defendant had not been singled out for identification. The defendant challenged the determination, raising four factual objections. Three of these were contrary to the evidence: all the photographs were driver's license photographs, all the photo arrays were presented sequentially, and the defendant was not identified as a suspect until after the assigned investigator presented the array and the eyewitness identified him. The last of these also refutes the defendant's fourth objection: that the assigned investigator drew attention to the defendant's photo by placing it second in the array. I am at a loss to see how any of this could be subject to de novo review by those who, unlike the district court, have not been exposed to the defendant, the eyewitness, or the photographs.

If the district court in *Booker* had determined that the procedure was impermissibly suggestive, it would then have addressed the second part of the test: whether the identification was nonetheless reliable considered as part of the totality of the circumstances. *Id.* Again, I do not see why this would be subject to de novo review; the district court is more aware than an appellate court of the totality of the circumstances surrounding an identification.

The Recommendation is based in part on the fact that the mixed-question standard of review is used for ineffective-assistance-of-counsel claims, severance issues, and determining mens rea, all of which obviously involve both legal and factual issues. Whether a defendant was singled out for identification and whether a witness's identification of that defendant was nonetheless reliable are factual, not legal, issues: there is no basis for reviewing them de novo.

The Recommendation also states that, "[i]f a jury finds a defendant guilty after hearing witness testimony, a new standard of review would not necessarily allow a reviewing court to find the identification unreliable." I cannot reconcile this statement with the longstanding view that a reviewing court "must not set the [jury's] verdict aside if it can be sustained on any reasonable theory of the evidence." *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998). In my view, a reviewing court should not be allowed to attribute a jury's guilty verdict to witness testimony, subject that testimony to de novo review, and overturn the verdict.

--*Judge Francis J. Connolly, Appellate Court Representative to and Member of the Rules of Evidence Advisory Committee*

APPENDIX A

Identification Procedure:

Double-blind presentation or lineup means the law enforcement official and witness do not know which photograph or person is the suspect.

Blinded administration is when the officer knows the suspect's identity but cannot tell which suspect is being viewed by the witness at a given time, such as through use of the folder shuffle method.

Sequential presentation is a display of photographs or persons one at a time, where each photograph viewed is removed before the next photograph is presented.

S*imultaneous presentation* is a display of photographs or persons presented at the same time, either manually constructed or computer generated.

Confidence statement is a witness's statement about his or her selection and the confidence with which it is made. The statement should be taken immediately after an identification and should be recorded in the witness's own words.

Array composition should consist of one suspect and at least five other photographs of others with a similar physical appearance to the suspect. The non-suspects are considered "fillers."

Pre-identification instructions should begin with instructions to the witness that the suspect may or may not be in the lineup or array and that the witness should not feel compelled to make an identification.

Social Science:

Administrator feedback. Administrator or confirmation feedback can negatively impact the accuracy of an identification. Improper feedback occurs when police signal to eyewitnesses that they correctly identified the suspect. That confirmation can reduce doubt and engender a false sense of confidence in a witness. Feedback can also falsely enhance a witness's recollection of the quality of his or her view of an event.

Multiple viewings. Viewing a suspect more than once during an investigation can affect the reliability of the later identification. Successive views of the same person can make it difficult to know whether the later identification stems from a memory of the original event or a memory of the earlier identification procedure.

Stress. High levels of stress can diminish an eyewitness's ability to recall and make an accurate identification. Moderate levels of stress, by contrast, can improve cognitive processing and might improve the accuracy of an identification.

Weapons focus. When a visible weapon is used during a crime, it can distract a witness and draw his or her attention away from the culprit. "Weapon focus" can impair a witness's ability to make a reliable identification and describe what the culprit looks like if the crime is of short duration.

Memory. Memories fade with time and generally do not improve with the passage of time. As a result, delays between the commission of a crime and the time an identification is made can affect reliability.

Cross-racial identification. A witness may have more difficulty making a cross-racial identification. The cross-race effect (also referred to as cross-race bias, other-race bias, own-race bias, or ingroup-advantage) is the tendency to more easily recognize faces of the race that one is most familiar with (which is most often one's own race).