

IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY)
INSTRUCTIONS IN)
CRIMINAL CASES)

CASE NO. 11-2517

COMMENTS OF THE INNOCENCE PROJECT OF FLORIDA

The Innocence Project of Florida (“IPF”) submits the following comments on the new Instruction 3.9(f) of the Standard Jury Instruction in Criminal Cases, proposed by the Supreme Court Committee on Standard Jury Instructions in Criminal Cases (“Committee”).

I. Enhanced Jury Instructions That Specifically Address How Jurors Should Evaluate Eyewitness Evidence Are Necessary Because Jurors Do Not Generally Understand How Memory Works and Often Do Not Have the Requisite Knowledge to Properly Evaluate Eyewitness Evidence.

On October 28, 2011, the Committee released a draft of a proposed standard jury instruction related to the jury’s consideration of eyewitness evidence for use when the identification of the defendant is a disputed issue at trial. Then, after considering input from IPF, the Committee released the final version of this proposed instruction on December 29, 2012. The Committee’s effort is likely in response to the work of the Florida Innocence Commission, which spent the better part of a year studying the issue of eyewitness misidentification, the leading cause of wrongful convictions nationally and in the state of Florida. Indeed, courts around the nation have recognized the effect that unreliable eyewitness

identifications have on the accuracy of criminal justice outcomes. Most recently, the New Jersey Supreme Court explained:

Study after study revealed a troubling lack of reliability in eyewitness identifications. From social science research to the review of actual police lineups, from laboratory experiments to DNA exonerations, the record proves that the possibility of mistaken identification is real. Indeed, it is now widely known that eyewitness misidentification is the leading cause of wrongful convictions across the country.

See State of New Jersey v. Henderson, 27 A.3d 872, 877-78 (N.J. 2011). *Accord State of Texas v. Tillman*, 2011 WL 4577675, at *21 (Tex. Ct. Crim. App. Oct. 5, 2011) (recognizing role of eyewitness misidentification in wrongful convictions nationwide and in Texas); *People of the State of New York v. Santiago*, 2011 WL 4972074, at *10 (N.Y. Ct. App. Oct. 20, 2011) (“Because mistaken eyewitness identifications play a significant role in many wrongful convictions, and expert testimony on the subject of eyewitness recognition memory can educate a jury concerning the circumstances in which an eyewitness is more likely to make such mistakes, ‘courts are encouraged . . . in appropriate cases’ to grant defendants’ motions to admit expert testimony on this subject.”).

In *Henderson*, a unanimous New Jersey Supreme Court issued a landmark ruling, in which it became the first court in the country to reject the two-step balancing test set forth by the United States Supreme Court in *Manson v. Braithwaite*, 432 U.S. 98 (1977), for evaluating the admissibility of eyewitness

identification evidence.¹ In rejecting the *Manson* balancing test, the New Jersey Supreme Court reviewed the record of an evidentiary hearing² conducted by a special master appointed by the Supreme Court (which consisted of 10 days of testimony, including that of 7 experts; almost 2,000 pages of transcript; 360 exhibits; and extensive briefing by the parties and *amicus curiae* the Innocence Project and New Jersey Association of Criminal Defense Lawyers). The New Jersey Supreme Court concluded:

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

Henderson, 27 A.3d at 918. In response, the New Jersey Supreme Court adopted a new legal framework for evaluating the reliability and admissibility of eyewitness identifications.³

¹ The *Manson* test requires courts to first determine whether the procedures used to obtain the eyewitness identification were impermissibly suggestive and, if so, to then balance that suggestiveness against certain "reliability factors" to determine whether there exists a "substantial probability of an irreparable misidentification." *See Manson*, 432 U.S. at 106-07. If there does, *Manson* and those state court cases adopting *Manson*, see *Johnson v. State*, 438 So. 2d 774, 777 (Fla. 1983), require that the identification be suppressed. The Supreme Court in *Manson* identified five non-exhaustive reliability factors: the witness' opportunity to view; the degree of attention paid; the witness' confidence or certainty in the identification; the accuracy of the witness' description; and the time between the crime and the confrontation. *See Manson*, 432 U.S. at 114 (citing *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972)). Despite the Supreme Court's admonition that these reliability factors not be treated as exclusive, many courts have treated them as a fixed list in determining the reliability of an identification that was the product of an impermissibly suggestive procedure.

² A copy of the entire record in *Henderson* is attached on CD, as Exhibit A.

³ This revised framework begins with pre-trial hearings whenever a defendant can show "some evidence of suggestiveness that could lead to a mistaken identification." *Henderson*, 27 A.3d at 919. The burden then shifts to the state to "offer proof to show that the proffered eyewitness

Central to the New Jersey Supreme Court’s adoption of this new legal framework is the requirement that jurors receive comprehensive, contextual jury instructions whenever eyewitness identification evidence is admitted. *Id.* at 920, 928-29. As the Court explained:

Two principal changes to the current system are needed . . . first, the revised framework should allow all relevant system *and* estimator variables to be explored and weighed at pretrial hearings when there is some actual evidence of suggestiveness; and second, courts should develop and use enhanced jury charges to help jurors evaluate eyewitness identification evidence.

Id. at 919.

In concluding that “enhanced” jury instructions are necessary, the New Jersey Supreme Court reviewed the scientific research concerning jury knowledge and understanding of eyewitness identification and memory:

Neither juror surveys nor mock-jury studies can offer definitive proof of what jurors know or believe about memory. But they reveal generally that people do not intuitively understand all of the relevant scientific findings. As a result there is a need to promote juror understanding of those issues.

Id. at 911.

This Court has traditionally been reticent to allow commonly used tools, such as expert testimony on memory and the scientific underpinnings of

identification is reliable – accounting for system and estimator variables – subject to the following: the court can end the hearing at any time if it finds from the testimony that defendant’s threshold allegation of suggestiveness is groundless.” *Id.* Finally, the ultimate burden remains on the defendant to prove a very substantial likelihood of irreparable misidentification. *Id.* at 920.

eyewitness evidence, to better prepare jurors to evaluate eyewitness evidence. *See Johnson v. State*, 438 So. 2d 774, 777 (Fla. 1983) (holding that expert testimony in the area of eyewitness evidence is unnecessary because the assessment of eyewitness identification is within the common experience of jurors). Despite the Florida Supreme Court relaxing the standard for admissibility of such expert testimony, *see McMullen v. State*, 714 So. 2d 368 (Fla. 1998), Florida courts rarely have provided any aid to help the jury better understand how to evaluate identifications. *See Simmons v. State*, 934 So. 2d 1100, 1124 (Fla. 2006) (Pariente, C.J., specially concurring). *But see* Anthony Colorossi, *Jurors in robbery trial asked to consider whether to believe eyewitness testimony*, Orlando Sentinel, Feb. 17, 2011 (providing a special cautionary jury instruction on eyewitness identification evidence in Orlando trial).

Yet scientific research clearly demonstrates that most jurors do not understand basic principles relating to eyewitness identification and memory⁴—including that memory is not a videotape; that confidence and accuracy are not well-correlated; that cross-race identifications are more likely wrong than same-race identification; that the presence of a weapon substantially reduces the likelihood of a correct identification. Justice Pariente has recognized the lack of juror understanding in this area:

⁴ Benton et al., *Eyewitness Memory is Still Not Common Sense: Comparing Jurors, Judges, and Law Enforcement to Eyewitness Experts*, 20 Applied Cognitive Psychology 115 (2006).

In the years that have passed since we stated our belief in 1983 that jurors can accurately assess eyewitness identifications without the aid of expert testimony as they do most other evidence, we have learned that quite the opposite is often true. For example, common sense would lead us to believe that greater certainty by an eyewitness in making an identification corresponds to greater accuracy. Yet research shows that a witness's degree of certainty correlates weakly, at best, with the accuracy of the identification. *See* Elizabeth Loftus & James Doyle, *Eyewitness Testimony: Civil and Criminal* § 3–12, at 67 (3d ed. 1997) (“The consensus of the literature that deals with [whether eyewitness confidence is an indication of eyewitness accuracy] seems to indicate that eyewitness confidence is not a very good indicator of eyewitness accuracy.”). In fact, the “certainty an eyewitness expresses in his identification can be a misleading indicator of the identification's accuracy.” Gary L. Wells, *Eyewitness Identifications: Scientific Status*, in *Science In the Law: Social and Behavioral Science Issues* 391, 412 (David L. Faigman et al. eds., 2002). Other features of eyewitness unreliability, such as difficulty identifying persons of another race, have also become well established. *See* Loftus & Doyle, *supra*, § 4–9, at 86; Wells, *supra*, at 404. A 2002 report by the Illinois Governor's Commission on Capital Punishment reflects that “[t]he fallibility of eyewitness testimony has become increasingly well-documented in both academic literature and in courts of law.” Report of the Governor's Commission on Capital Punishment 31 (2002), available at <http://state.il.us/defender/report.pdf>. Similarly, the North Carolina Actual Innocence Commission organized by Chief Justice I. Beverly Lake, Jr., of the North Carolina Supreme Court “chose eyewitness identification as its first topic of study because research has identified misidentification as the leading factor in the wrongful conviction of those exonerated nationally by DNA evidence.” Christine C. Mumma, *The North Carolina Actual Innocence Commission: Uncommon Perspectives Joined by a Common Cause*, 52 *Drake L.Rev.* 647, 652 (2004).

Simmons, 934 at 1124.

The *Henderson* Court rightly posed the important (rhetorical) question: “if even only a small number of jurors do not appreciate an important, relevant

concept, why not help them understand it through an appropriate jury charge?” *Henderson*, 27 A.3d at 910. Thus, **enhanced** jury instructions are necessary to ensure that trial courts meet their “obligation to help jurors evaluate evidence critically and objectively to ensure a fair trial.” *Id.* at 924.

II. The Committee’s Proposed Jury Instruction Fails to Reflect Current Scientific Understanding of How to Properly Assess the Reliability of Eyewitness Evidence.

While the Committee’s proposed jury instruction touches on a number of important considerations for a jury evaluating eyewitness evidence, the proposed instruction is inadequate in two principle ways: (1) it is not a cautionary instruction as it doesn’t warn the jury of the dangers inherent in eyewitness evidence, nor (2) does it provide any comprehensive guidance on how jurors should weigh certain factors arising in cases with eyewitness evidence.

IPF would enhance⁵ the Committee’s proposed factors for consideration as follows:

- A. **Committee Proposed Factor #1** - The capacity and opportunity of the eyewitness to observe the offender based upon the length of time for observation and the conditions at the time of observation, including lighting and distance.

Opportunity to observe the offender is an important factor to include in a jury instruction on eyewitness identification. However, as written, this instruction

⁵ The suggested enhancements track the Proposed Eyewitness Identification Instructions prepared by The Innocence Project in New York and submitted to the New Jersey Supreme Court as part of the litigation in *State v. Henderson*. (attached as Exhibit B)

does not give sufficient guidance, based on scientific research, to help jurors appropriately evaluate this factor. For example, from the wording of the factor a jury would receive no guidance on whether longer or shorter duration exposures to the offender lead to more accurate identifications. A juror may apply common sense to conclude that even the most brief exposure could allow the witness to make a mental snap shot of the offender. Yet, scientific study has demonstrated otherwise—that ability of the witness to accurately identify increases with the length of the exposure.⁶ Any instruction should be more specific about how length of exposure affects eyewitness accuracy. Of course, opportunity to observe is not limited to duration of exposure and would include factors such as whether the witness was able to pay attention to the perpetrator or whether the witness was distracted, whether the witness was in the proper condition to view the perpetrator, and whether any obstacles impaired the witness's observations. The proposed instruction makes no mention of these factors.

Conditions at the time of observation obviously affect the accuracy of the identification. The Committee's proposal mentions two obvious conditions—lighting and distance. While a jury may be able to apply common understanding of lighting conditions to properly assess the reliability of an identification, jurors

⁶ See Shapiro & Penrod, *Meta-Analysis of Facial Identification Studies*, 100 *Psychological Bulletin* 139-56 (1968) (finding a systematic relationship between exposure time and identification accuracy); Memon et al., *Exposure Duration: Effects on Eyewitness Accuracy and Confidence*, 94 *British Journal of Psychology* 339-54 (2003).

may need additional guidance, based on scientific research, on the extent to which distance can negatively affect the reliability of an identification.⁷ Additionally, there are other conditions that could have a significant impact on eyewitness accuracy that should be addressed in the adopted instruction so they are available to judges if those conditions arise on a case-specific basis. The following is a nonexhaustive list of the conditions of the identification that affect eyewitness accuracy that are important for consideration:

- Was the offender's face obscured, either by a disguise or some other manner?;⁸
- Was the eyewitness's view of the offender obstructed?;
- Did the offender have a weapon, which scientific study has shown would draw the eyewitness's attention away from the offender's face and onto the weapon?;⁹

⁷ See Loftus & Harley, *Why is it easier to identify someone close than far away?*, 12 *Psychonomic Bulletin & Review* 43 (2005).

⁸ Cutler, Penrod, & Martens, *Improving the Reliability of Eyewitness Identification: Putting Context Into Context*, 72 *Journal of Applied Psychology* 629 (1987) (finding that identification accuracy was appreciably reduced for witnesses in the disguise condition, from 45% accuracy in the no-hat condition to 27% in the disguise condition).

⁹ A meta-analysis of 19 studies with a total sample of 2082 participants indicated that the weapon focus effect was statistically significant and demonstrated impairment of identification accuracy. Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 *Law & Human Behavior* 413 (1992).

- Was the event highly stressful, which scientific study has shown has a negative effect on memory and increase the risk of a mistaken identification?¹⁰

B. **Committee Proposed Factor #2** - Whether the identification was the product of the eyewitness's own recollection or was the result of influence or suggestiveness.

A jury should certainly consider whether influence or suggestiveness affected the identification. As originally proposed by the Committee, the factor limit consideration to influence or suggestiveness that was "improper," which implied an intentional bad act. Yet, scientific research demonstrates that a number of seemingly routine acts can have a profoundly negative affect on eyewitness accuracy or independence:

- Did the eyewitness receive information after the incident or after the identification procedure from police, prosecutors, other witnesses or other third parties (including media reports) that taints, distorts or completely alters the eyewitness's memory of the incident?;¹¹

¹⁰ See Morgan et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 Int'l Journal of Law & Psychiatry 265 (2004). A meta-analysis of stress effect research found that high levels of stress negatively impact eyewitness memory and that stress particularly reduced correct identification rates. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 Law & Human Behavior 687 (2005).

¹¹ A leading study on confirming feedback found that eyewitnesses who received confirming feedback were not only much more confident than the witnesses with no feedback and witnesses with disconfirming feedback—the confirming feedback witnesses distorted their reports of their witnessing conditions by exaggerating how good their view was of the culprit, how much

- Did the eyewitness receive verbal or non-verbal confirmatory feedback from the law enforcement administrator of the identification procedure that the eyewitness has made a “correct” identification (i.e. selected law enforcement’s known suspect)?;¹²
- Was the eyewitness exposed to opinions, descriptions, or identifications given by other witnesses, to photographs or newspaper accounts, or to any other information or influence that may have affected the independence of the eyewitness’s identification, thus altering the eyewitness’s memory of the event?

Based on previous input from the undersigned, the Committee removed the word “improper” from this factor, allowing the jury to consider the affect of **any** influence or suggestiveness regardless of the intent of the individual who has acted to influence or make suggestion before, during or after the identification procedure.

attention they paid to the culprit’s face while observing the event, and so on. Wells & Bradfield (1998) The results of this study have been replicated many times in research labs and also with real witnesses in real ongoing criminal investigations. Wright & Skagerberg, *Postidentification Feedback Affects Real Eyewitnesses*, 18 *Psychological Science* 172 (2007).

¹² See Wells & Seelau, *Eyewitness identification: Psychological Research and Legal Policy on Lineups*, 1 *Psychology, Public Policy, and Law* 765 (1995) (finding police knowledge of which person is the suspect can lead them to say things that focus the eyewitness on the suspect); Kovera & Greathouse, *Instruction Bias and Lineup Presentation Moderate the Effects of Administrator Knowledge on Eyewitness Identification*, 33 *Law & Human Behavior* 70 (2009) (finding that in a non-blind target-absent condition 21% of the witnesses chose the innocent suspect—thus, the administrators were able to subtly steer a large number of witnesses to the suspect).

While we thank the Committee for considering our comments and making this change, we note that jurors should also be instructed that contrary to common belief, memory is not recorded, stored, or played back in the same way as a videotape. Memory is a much more selective, complex process that is subject to contamination at every stage.

The factors identified above are the most common sources of contamination in the eyewitness identification context, yet they are not explicitly contemplated in the Committee's proposed instruction. Moreover, these factors and how they affect eyewitness accuracy are not in the common knowledge of jurors.¹³ Thus, the Committee's proposal should be enhanced to give further guidance on these factors.

C. **Committee Proposed Factor #3** - The circumstances under which the defendant was presented to the eyewitness for identification.

Jurors may misperceive the mere use of commonly known police identification procedures as an indicator of accuracy of the lineup. However, scientific study has shown that routine, long-standing identification procedures employed by law enforcement present a greater danger of an unreliable identification than certain methods grounded in scientific research. Jurors should be instructed that the type and manner of the eyewitness identification procedure can affect the reliability of any subsequent identification, including the in-court

¹³ Benton, *supra* note 4.

identification. For example, the following issues related to the preparation and administration of identification procedures can negatively affect eyewitness accuracy:

- Was the lineup procedure performed by a double-blind administrator (i.e., one who does not know who the suspect is) or a blinded administrator (i.e., one who is prevented from knowing when the witness views the suspect through the use of approved methods). Non-blind administration of lineups allows the opportunity for inadvertent clues to be conveyed to the witness, which increases the chance that the witness will identify the suspect even if the suspect is innocent;¹⁴
- Was the eyewitness given proper instructions before the identification procedure, including that the perpetrator might not be among the people in the display; that the witness should not feel compelled to make an identification; that the investigation will continue whether and identification was made? Psychological studies have shown that witness instructions that include this information increase the accuracy of identifications.¹⁵

¹⁴ Research has also shown that the effects of post-identification feedback can be reduced significantly if a double-blind lineup administrator is used for the identification procedure. Dysart et al., *Blind Lineup Administration as a Prophylactic Against the Postidentification Feedback Effect*, Law and Human Behavior (2011).

¹⁶ There is broad scientific agreement, supported by controlled studies, that composite renditions of perpetrators, whether generated by hand-drawn sketches or mechanized or computerized systems (such as Identikit, Photo-FIT, FACES, etc.) are often unable to produce a recognizable image of the person being described. See, e.g., Wells & Hasel, *Facial Composite Production by*

- Did the “fillers” in the lineup match the eyewitness’s pre-lineup description of the perpetrator, and/or did the defendant stand out from other lineup members?;
- Did the photo array shown to the witness contain multiple photographs of the defendant?;
- Were there multiple identification procedures, which would allow the witness’s memory of the actual perpetrator to be replaced by the witness’s memory of the innocent person seen in the multiple procedures?;
- Was the eyewitness’s identification based on a generated composite sketch or on personal recollection, as composites generally bear very little resemblance to the actual perpetrator and can contaminate the eyewitness’s memory for the perpetrator and thus decrease an eyewitness’s ability to identify the true perpetrator in a subsequent lineup?;¹⁶

Eyewitnesses, 16 *Current Directions Psychol. Sci.* 6 (2007). “Research has consistently shown that various facial composite systems yield hit rates on the original faces that are barely above chance levels of performance.” Gary L. Wells et al., *Building Face Composites Can Harm Lineup Identification Performance*, 11 *J. Experimental Psychol.: Applied* 147 (2005). Across studies, the percentage of subjects who are able to successfully match a composite with the correct target face ranges from as low as 3 percent to a mere 25%. In one study by Dr. Margaret Kovera, participants prepared composites of fellow students and teachers from local schools; out of 500 composites, only 3 were correctly named by other students from the same schools. Margaret Bull Kovera et al., *Identification of Computer-Generated Facial Composites*, 82 *J. Applied Psychol.* 235 (1997).

¹⁶ There is broad scientific agreement, supported by controlled studies, that composite renditions of perpetrators, whether generated by hand-drawn sketches or mechanized or computerized systems (such as Identikit, Photo-FIT, FACES, etc.) are often unable to produce a recognizable image of the person being described. *See, e.g.*, Wells & Hasel, *Facial Composite Production by Eyewitnesses*, 16 *Current Directions Psychol. Sci.* 6 (2007). “Research has consistently shown

- Were the members of the lineup or photo array presented simultaneously or sequentially? Scientific studies have shown that simultaneously administered lineups allow for relative judgment, which means that the eyewitness will often pick the individual who looks most like the offender in the lineup;¹⁷
- Was the defendant identified in a showup procedure, which this Court has found to be inherently suggestive?¹⁸

These factors are not explicitly contemplated in this proposed factor despite the fact that scientific studies have shown, repeatedly, that the way an identification procedure is prepared and administered can contaminate the witness' memory, affecting the reliability of the identification and any subsequent

that various facial composite systems yield hit rates on the original faces that are barely above chance levels of performance.” Gary L. Wells et al., *Building Face Composites Can Harm Lineup Identification Performance*, 11 J. Experimental Psychol.: Applied 147 (2005). Across studies, the percentage of subjects who are able to successfully match a composite with the correct target face ranges from as low as 3 percent to a mere 25%. In one study by Dr. Margaret Kovera, participants prepared composites of fellow students and teachers from local schools; out of 500 composites, only 3 were correctly named by other students from the same schools. Margaret Bull Kovera et al., *Identification of Computer-Generated Facial Composites*, 82 J. Applied Psychol. 235 (1997).

¹⁷ Wells, Steblay, & Dysart, *Seventy-Two Tests of the Sequential Lineup Superiority Effect: A Meta-Analysis and Policy Discussion* (meta-analysis concluding that correct rejection rates are significantly higher for sequential than simultaneous lineups and this difference is maintained or increased by greater approximation to real world conditions); Wells, Steblay, & Dysart, *A Test of the Simultaneous vs. Sequential Lineup Methods An Initial Report of the AJS National Eyewitness Identification Field Studies*, Am. Judicature Soc. (2011) (field study of police agencies finding that double-blind sequential lineups – lineups where the administering officer does not know which person is the suspect and the witness views one suspect photograph at a time – produce fewer mistaken identifications than lineup procedures that present all of the suspect photographs simultaneously).

¹⁸ See *Blanco v. State*, 452 So. 2d 520, 524 (Fla. 1984).

identifications and further that this is not within the common knowledge of jurors.¹⁹ Thus, the Committee's proposal should be enhanced to give further guidance on these factors.

D. **Committee Proposed Factor #4** - Any inconsistent identifications made by the eyewitness.

The existence of inconsistent identifications is important evidence for a jury to consider when evaluating the reliability of the ultimate identification. However, jurors must be instructed that in assessing the reliability of the identification evidence, they should assign the greatest weight to the first identification, if the procedure was fair, than to subsequent identifications (including any in-court identification), as that first identification will be the most reliable identification, so long as it wasn't the product of suggestive identification procedures.

Thus, the Committee's proposal should be enhanced to provide guidance to a jury attempting to reconcile inconsistent identifications.

E. **Committee Proposed Factor #5** - Any instance in which the eyewitness did not make an identification when given the opportunity to do so.

When the eyewitness fails to make a pretrial identification and then makes a subsequent pretrial or in-court identification, it is just another form of inconsistent identifications. Like the previous proposed factor, jurors should be instructed that in assessing the reliability of the identification evidence, they should assign more

¹⁹ See Benton, *supra* note 4.

weight to the first identification, if the procedure was fair, than any subsequent identifications, even if the first identification resulted in a lack of an identification of the defendant. If no pretrial lineup was conducted, jurors should be instructed to determine whether the State provided a satisfactory reason why there was no lineup or photo-spread conducted prior to trial.

Thus, the Committee's proposal should be enhanced to provide guidance to a jury attempting to reconcile inconsistent identifications.

F. **Committee Proposed Factor #6** - The witness's familiarity with the subject identified.

This proposed factor is vague because it does not give jurors any guidance on whether the eyewitness's familiarity with the subject identified is a factor that strengthens or reduces the accuracy of the identification. A juror could reasonably infer that if the eyewitness knew the defendant or saw him/her at some time before making the identification, then the eyewitness would be less likely to misidentify. However, scientific study of the issue has demonstrated the contrary.

Witnesses that have viewed a suspect in multiple contexts often erroneously conclude that the person looks familiar only because he is the perpetrator. The concern is two fold: (1) that the eyewitness is making his/her identification not from his/her recollection of the event, but instead from the viewing or knowledge of the defendant in a different context, and (2) that this sense of familiarity on the part of the witness may lead to an increased feeling of confidence in subsequent

identification procedures. This phenomenon is known as “unconscious transference.”²⁰

Thus, the Committee’s proposal on this factor should be enhanced to provide guidance to a jury attempting to determine how previous knowledge of the subject by the eyewitness affects the accuracy of a subsequent identification.

G. **Committee Proposed Factor #7** - Lapses of time between the event and the identification[s].

This proposed factor is vague because it does not give jurors any guidance on what significance to attach to a lapse in time between the event and the identification. Scientific study conducted over the past three decades has confirmed the deleterious effects of delay on identification accuracy.²¹

Thus, the Committee’s proposal on this factor should be enhanced to provide guidance to a jury attempting to determine how a lapse in time between the event and the identification affects its accuracy.

H. **Committee Proposed Factor #8** – Whether the eyewitness and the offender are of different races or ethnic groups, and whether this may have affected the accuracy of the identification.

²⁰ See Deffenbacher, Bornstein, & Penrod, *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference*, 30 *Law & Human Behavior* 287 (2006) (finding that those who view an individual in a mugshot are more likely to pick that individual in a subsequent identification procedure).

²¹ See Egan, Pittner, & Goldstein, *Eyewitness Identification*, 1 *Law & Human Behavior* 199 (1977) (finding a significant decrease in correct identifications over a delay of 56 days (93% errors)); Shepherd, *Identification After Long Delays*, *Law & Human Behavior* (1983) (finding a significant decrease in correct identifications over a delay of 11 months).

Scientific study has shown that the eyewitness and the subject being of a different race significantly decreases the accuracy of identifications, when compared with witnesses and perpetrators of the same race?²² This factor was not included in the original Committee proposal and we commend the Committee for considering IPF's suggestion and including the factor of cross-race identification in the final proposal to this Court. However, we fear that given that most jurors are not even aware of the cross-race effect,²³ they will not understand how to properly weigh the existence of a cross-race identification in a given case when assessing reliability and weight of an identification of the Defendant as the perpetrator.

Thus, the Committee's proposal on this factor should be enhanced to provide guidance to a jury informing them that the eyewitness and the subject being of a different race significantly decreases the accuracy of identifications.

I. **Committee Proposed Factor #9** - The totality of circumstances surrounding the eyewitness's identification.

Should the Court promulgate an enhanced standard jury instruction as this Comment suggests, such an instruction will address myriad factors affecting eyewitness accuracy. This catch-all provision will be helpful in allowing considerations not covered by the remainder of the instruction.

²² Meissner & Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces*, 7 *Psychology, Public Policy, and Law* 3 (2001).

²³ See Benton, *supra* note 4.

III. This Court Should Either Refer This Issue Back to the Committee With Instructions to Adopt a More Robust, Enhanced Set of Instructions in light of *Henderson* and the Work of the Florida Innocence Commission or Charge a Special Master to Hear Evidence Regarding these Myriad factors Affecting Eyewitness Evidence who can make Factual Findings to Provide a Basis for Such Enhanced Instructions.

The instruction proposed by the Committee mirrors that used by federal courts in the Ninth Circuit, which was adopted without the benefit of the thorough fact-finding process performed in *Henderson*, which resulted in a call for more enhanced jury instructions. The *Henderson* court asked²⁴ the New Jersey Criminal Practice Committee and the Committee on Model Criminal Jury Charges to draft proposed revised jury instructions, consistent with accepted scientific findings, for that court's consideration. These proposed jury instructions have not yet been released and the Committee could benefit from having those enhanced jury instructions at their disposal when making any proposal.

It is also unclear whether the Committee relied on the work of the Florida Innocence Commission, created by this Court, which studied the issue of eyewitness misidentification for almost a year and created guidelines for law enforcement preparation and administration of identification procedures.

²⁴ While the *Henderson* court recognized that jury instructions have certain benefits (in terms of cost and efficiency) over the testimony of experts, the *Henderson* court also contemplated that expert testimony will be heard together with jury instructions where that testimony is "otherwise appropriate." *Henderson*, at 928. Likewise, recognizing that certain problems have been identified in ensuring efficacy of jury instructions, the *Henderson* court contemplates that jury instructions be provided both before the evidence and again the close of trial. *Id.*

IPF respectfully submits that, given the inadequacy of the proposed instruction in providing the sufficient guidance to jurors for evaluating the reliability of eyewitness evidence and the potential helpfulness of soon-to-be released proposed jury instructions in New Jersey on this very subject, this Court should send this issue back to the Committee for further deliberation and a new, enhanced proposal. Alternatively, this Court could appoint a Special Master, similar to that appointed by the New Jersey Supreme Court in *Henderson*, to hear and consider scientific testimony regarding the various factors affecting the reliability of eyewitness evidence. Such a hearing would allow the Special Master to make factual findings after hearing adversarially-tested evidence. These factual findings could be the basis for enhanced jury instructions adopted by this Court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

We hereby certify that a copy of these comments have been served on The Honorable Jacqueline Hogan Scola, 1351 NW 12th Street, Suite 603, Miami, Florida 33125-1628.

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