Bloomberg BNA

Criminal Law Reporter™

IDENTIFICATION

Attacking Eyewitness Identification Testimony

BY ALAIN LEIBMAN AND JANA C. VOLANTE

Courts have long acknowledged the dangers inherent in eyewitness identification testimony. ''It is widely accepted by courts, psychologists and commentators that '[t]he identification of strangers is proverbially untrustworthy.' ''[1] ''[T]he single most important factor leading to wrongful conviction in the United States . . . is eyewitness misidentification.''[2] Academicians concur, noting that jurors often find eyewitness identification testimony convincing and assume that it is reliable,[3] making eyewitness misidentification the leading cause of wrongful convictions in the United States.[4] As many as half of all wrongful convictions result from false identifications.[5]

Defense attorneys instinctively understand that, other than evidence of a confession, eyewitness identification testimony is often the most damning proof faced by their clients at trial. Because it may be so difficult to shake an eyewitness through cross-examination alone, counsel need to consider the full panoply of remedies available. Exclusion of that testimony, of course, is the optimal strategy. Recently, however, the U.S. Supreme Court raised the bar for the suppression of eyewitness testimony on due process grounds. In *Perry v. New Hampshire*,[6] the court held that the trial judge is not obligated to make a preliminary determination of the reliability of the identification unless the defense first establishes that governmental misconduct brought about the suggestive identification of the defendant.

The *Perry* decision is unfortunate, seeming to freeze the development on the federal level of ameliorative measures appropriate to the growing body of scientific and academic studies of the undependability of eyewit-

Alain Leibman is a principal member of the White Collar Compliance and Defense group at Fox Rothschild LLP, based in its Princeton, N.J., office, where he also practices commercial litigation. Leibman was an Assistant U.S. Attorney in the U.S. Attorney's Office for the District of New Jersey from 1988-2004, where he served as a deputy chief and senior litigation counsel. He writes about criminal, evidentiary, and trial-related issues on his blog for Fox Rothschild at http://whitecollarcrime.foxrothschild.com.

Jana C. Volante is a litigation associate at Fox Rothschild LLP, based in its Pittsburgh office. Volante specializes in white collar criminal defense and commercial litigation. She contributes to Fox Rothschild's White Collar Defense & Compliance blog at http://whitecollarcrime.foxrothschild.com.

[1] *United States v. Brownlee*, 454 F.3d 131, 141 (3d Cir. 2006) (citing Felix Frankfurter, *The Case of Sacco and Vanzetti: A Critical Analysis for Lawyers and Laymen* 30 (Universal Library ed., Grosset & Dunlap 1962) (1927)).

[2] Id. (*citing* C. Ronald Huff et al., *Guilty Until Proven Innocent: Wrongful Conviction and Public Policy*, 32 CRIME & DELINQ. 518, 524 (1986)).

[3] L. Tallent, *Through the Lens of Federal Evidence Rule 403: An Examination of Eyewitness Identification Expert Testimony Admissibility in the Federal Circuit Courts*, 68 WASH. & LEE L. REV. 765, 767 (2011)

[4] Id. at 769.

[5] Id. at 767.

[6] 132 S. Ct. 716 (2012).

 ISSN 0011-1341

ness identifications. But first reads, like eyewitness identifications, may be unreliable and in this instance too pessimistic. In light of *Perry* we consider here a range of remedies and approaches available to defense counsel to limit or blunt the impact of eyewitness identification evidence, including a promising analysis put forth recently by the New Jersey Supreme Court.

The Starting Point—Suppression

The Due Process Clause protects against a conviction based on evidence of such questionable reliability that its admission violates fundamental concepts of justice.[7] Federal courts use a ''totality of the circumstances'' standard to determine whether a confrontation between an eyewitness and a suspect is so unnecessarily suggestive or conducive to an irreparably mistaken identification that it violates due process of law and warrants suppression of the resulting eyewitness identification testimony. *Stovall v. Denno,* 388 U.S. 293, 302 (1967). Suppression may be ordered, however, only if a defendant establishes both that the procedure used was unnecessarily suggestive and that the resulting identification was unreliable. *United States v. Brownlee*, 454 F.3d 131, 138-39 (3d Cir. 2006).

An impermissibly suggestive identification procedure can occur in a number of settings: (1) a photo array; (2) a show-up (when a single individual arguably fitting a witness's description is presented to that witness for identification); (3) a lineup; and (4) in court.[8] Parenthetically, a number of state courts consider show-ups of single suspects to be so inherently suggestive that the show-up identification is not admissible without a showing that the procedure was necessary,[9] or conducted for good reason,[10] or conducted due to exigent circumstances.[11]

An improper pretrial identification process can lead to the suppression of the subsequent trial testimony of that witness.[12] Also, the pretrial identification itself—which can under Fed. R. Evid. 801(d)(1)(C) be admitted as nonhearsay at trial if the eyewitness testifies but falters in attempting an in-court identification—can be suppressed.[13]

As to the first prong of the test for suppression, the *Stovall* decision set a high bar for establishing improper suggestiveness. In *Stovall*, the surviving victim of a murderous home-invasion assault on her and her husband was hospitalized, and police brought their suspect in to be exhibited to her. As described in the opinion, ''Petitioner was handcuffed to one of five police officers who, with two members of the staff of the District Attorney, brought him to the hospital room. Petitioner was the only Negro in the room. Mrs. Behrendt identified him from her hospital bed after being asked by an officer whether he 'was the man' and after petitioner repeated at the direction of an officer a 'few words for voice identification.' . . . [S]he also made an in-court identification of petitioner in the courtroom.''[14] Nevertheless, because a police station lineup was ''out of the question'' due to the survivor's frail condition, the show-up at the hospital was held not to be improperly suggestive.[15]

In the 45 years since *Stovall* was decided, various courts of appeals have identified circumstances qualifying as sufficiently improperly suggestive to meet the first criterion needed for suppression. In *Brownlee*, the suspect in a carjacking was handcuffed and seated in the back seat of a police cruiser when identified by two eyewitnesses and handcuffed and removed from the police car when identified by two others, all at the scene of an accident involving the stolen vehicle.[16] In *O'Brien v. Wainwright*, 738 F.2d 1139 (11th Cir. 1984), a color photo of the defendant was displayed with five other black-and-white mug shots, prompting the judge below to remark that O'Brien's picture stuck out like a ''sore thumb.''[17] In *Oliva v. Hedgpeth*, the Ninth Circuit held that a photographic identification procedure was unnecessarily suggestive because the detectives conducting the procedure failed to inform the eyewitness that the photographic array might not necessarily include a photograph of the perpetrator and they also gave the witness positive feedback when she later chose a photograph—signaling that she had made the ''right choice.''[18] In determining whether the circumstances were unnecessarily suggestive, courts will consider whether there was some good reason for the police failing to resort to less suggestive procedures.[19]

If the defense can manage to establish that the identification procedure was unnecessarily suggestive, only then does the burden of proof shift to the government to show that the identification was nevertheless reliable—i.e., that the identification procedure used did not create a substantial likelihood of misidentification in violation of due process.[20] If the government cannot prove that the identification was reliable, then the eyewitness identification testimony should be suppressed.[21]

Few courts, however, have concluded that an identification was ultimately unreliable, no matter how suggestive the setting in which it was made. Suppression, then, has been infrequently granted by federal courts. In *Brownlee* and *O'Brien*, for example, the courts of appeals still upheld the admission of the identification testimony notwithstanding the improperly suggestive techniques employed. But in *Oliva*, the Ninth Circuit suppressed the identification, holding it to be unreliable because the eyewitness had seen ''the shooter's face from a distance and [only] for a fleeting period of time'' and because the eyewitness's testimony at trial describing the shooter was inconsistent with the description of

[7] *Dowling v. United States*, 493 U.S. 342, 352 (1990).
[8] *Brownlee*, 454 F.3d at 137.
[9] *State v. Dubose,* 699 N.W.2d 582 (Wis. 2005).
[10] *Commonwealth v. Martin,* 850 N.E.2d 555 (Mass. 2006).
[11] *State v. Duncan,* 77 N.Y.2d 541 (N.Y. 1991).
[12] *United States v. Mack*, 2011 WL 3510383, at *1 (4th Cir. 2011) (out-of-court photo identification that was unnecessarily suggestive and that made identification unreliable requires that any in-court identification lacking an independent source be inadmissible); *United States v. Harris*, 636 F.3d 1023, 1026 (8th Cir. 2011) (conviction based on in-court identification to be set aside if the out-of-court photographic identification procedure was so unnecessarily suggestive as to give rise to a very substantial likelihood of irreparable misidentification).
[13] *Young v. Conway*, 761 F. Supp. 2d 59, 73-76 (W.D.N.Y. 2011) (suppression of pretrial identification in photo array).
[14] 388 U.S. at 295.
[15] Id. at 302.
[16] 454 F.3d at 138.
[17] Id. at 1140-41.
[18] 375 Fed. App'x 697, 698 (9th Cir. 2010).
[19] *United States v. Gadsden*, 410 Fed. App'x 500, 505 (3d Cir. 2011).
[20] *Brownlee*, 454 F.3d at 139; see also *Harris*, 636 F.3d at 1026.
[21] *Mack*, 2011 WL 3510383, at *1.

  CRL ISSN 0011-1341

the shooter that she had given to the police immediately after the incident.[22] The Ninth Circuit cited the eyewitness's inability to identify anyone in the courtroom as the shooter as further evidence that the photographic identification was unreliable.[23]

Recently, the Supreme Court has made it even more difficult to secure the suppression of testimony resulting from highly suggestive identification techniques, by introducing a further element: proof that the police intentionally brought about the suggestive circumstance. In *Perry*, the court held that due process does not, under most circumstances, require that a trial court judge even screen eyewitness identification evidence for reliability before allowing the jury to assess its creditworthiness.[24] A preliminary judicial inquiry into the reliability of an eyewitness identification is mandated only when the identification was procured under unnecessarily suggestive circumstances *arranged by law enforcement*.[25] Because the eyewitness's identification in *Perry* was not improperly influenced by deliberate police arrangement of the scene, the procedure was not unduly suggestive and unnecessary and the eyewitness testimony was, therefore, properly introduced to the jury, without a preliminary judicial assessment of its reliability.[26]

It is, the *Perry* court held, the ultimate reliability of the identification, not the process used to arrive at an identification, that is key, and reliability is to be determined on a case-by-case basis.[27] The *Perry* court identified its decision in *Neil v. Biggers* as the ''approach appropriately used to determine whether the Due Process Clause requires suppression of an eyewitness identification tainted by police arrangement.''[28] According to *Biggers*, reliability is determined by considering: (1) the opportunity for the witness to view the perpetrator at the time of the crime; (2) the witness's degree of attention when viewing the perpetrator; (3) the accuracy of the witness's prior description of the perpetrator—i.e., whether that description is detailed and seems to describe the suspect; (4) the level of certainty demonstrated by the witness during the identification; and (5) the length of time between the crime and the identification.[29]

Suppression is properly limited to the rare case, the *Perry* court suggested, because of the availability of other devices to test reliability: ''the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.'' 132 S. Ct. at 721. The purpose of the suppression remedy, according to the *Perry* court, is to deter improper behavior by law enforcement so the ''deterrence rationale is inapposite in cases, like Perry's, in which the police engaged in no improper conduct.''[30]

The significantly increased burden on a defendant seeking suppression was amply illustrated in *Perry*, when the court applied its new test to prior decisions in this area. In *Simmons v. United States*, the court had held that if the police arrange an improperly suggestive photo array, such as displaying ''to the witness only the picture of a single individual who generally resembles the person [whom the witness] saw, or [showing] him the pictures of several persons among which the photograph of a single such individual recurs or is in some other way emphasized,'' then the danger that the eyewitness will make an incorrect identification increases.[31] However, as *Perry* noted, the photo array used by FBI agents in *Simmons* was both necessary and unlikely to have led to a mistaken identification, so *Perry* held that the due process claim was properly rejected in *Simmons*.[32]

The *Perry* opinion explained that in *Stovall* there was no due process violation even though the defendant was the only person presented to the victim for identification in a show-up in the victim's hospital room and even though the defendant was presented wearing handcuffs, because the suggestive show-up used was necessary; the victim was the only eyewitness and it was not certain that she would survive long enough for the identification to be conducted under less suggestive conditions.[33]

The *Perry* opinion raised the barrier to successful due process-based efforts to obtain suppression, all while acknowledging the legitimacy of concerns that eyewitness identification has a high degree of unreliability.[34] Nonetheless, the admitted fallibility of such evidence was not, in the absence of state misconduct, sufficient justification for a general due process rule requiring screening by the trial court.

While routine due process screening for unreliable identifications will be difficult to obtain after *Perry*, the opinion does offer support for alternative measures that may be taken to place any identification evidence in context for the jury. In explaining why a pre-admission hearing was not routinely compelled by due process concerns over general reliability, the Supreme Court cited what it called ''safeguards built into our adversary system that caution juries against placing undue weight on eyewitness testimony of questionable reliability.'' One such ''safeguard'' is Fed. R. Evid. 403.

It is notable that *Perry* does not preclude trial courts from permissively conducting admissibility hearings, and that *Perry* expresses an openness to alternative approaches to deciding the admissibility question. While suppression will not be granted in every case, there are still successful strategies open for counsel's consideration.

Expert Testimony

The defense should consider introducing expert testimony regarding the factors that can cause eyewitness

[22] 375 Fed. App'x at 699.

[23] Id.; see also *Wray v. Johnson*, 202 F.3d 515, 521 & 530 (2d Cir. 2000) (one-person show-up conducted in a police precinct, where suspect was dressed in clothes similar to those described as worn by a robber; identification was proven unreliable by events at trial, such as the eyewitness testifying that the defendant was not one of the robbers, so evidence of the show-up should have been suppressed).

[24] 132 S. Ct. at 721.

[25] Id. at 728.

[26] Id. at 730.

[27] 132 S. Ct. at 724-25 (citing *Neil v. Biggers*, 409 U.S. 188, 201 (1972)).

[28] 132 S. Ct. at 724.

[29] 409 U.S. at 199-200.

[30] Id. at 726.

[31] 390 U.S. 377, 383 (1968) (cited in *Perry*, 132 S. Ct. at 724).

[32] 132 S. Ct. at 724.

[33] 388 U.S. at 295 & 302 (cited in *Perry*, 132 S. Ct. at 724).

[34] 132 S. Ct. at 728 (''We do not doubt either the importance or the fallibility of eyewitness identifications.'').

testimony to be unreliable. This can be an extremely effective strategy for persuading the jury to question and rely less heavily upon the government's eyewitness identification testimony. The *Perry* decision supports introducing this kind of expert testimony. In listing the systemic safeguards against the introduction of unreliable evidence, the *Perry* opinion noted that ''[i]n appropriate cases'' there may be admitted ''expert testimony on the hazards of [unreliable] eyewitness identification evidence.''[35] The Sixth Circuit has described what it calls a ''jurisprudential movement'' toward admitting expert testimony reporting on psychological studies of unreliable eyewitness identifications.[36]

The Third Circuit has held that a trial court should weigh three *Daubert*-like factors when deciding whether to admit expert testimony regarding eyewitness identifications: (1) the reliability of the scientific principles upon which the expert testimony rests and, therefore, the potential of the expert testimony to aid the jury in reaching an accurate resolution of a disputed issue; (2) the likelihood that introduction of the testimony may in some way overwhelm or mislead the jury; and (3) the fit of the expert testimony—whether the testimony focuses on particular characteristics of the eyewitness identification at issue and discusses how those characteristics call into question the reliability of the identification.[37] In *Brownlee*, the Third Circuit reversed a carjacking conviction because the district court had excluded defense expert testimony on the inherent unreliability of human perception and memory through a psychology professor's testimony, which was intended to demonstrate that the correlation between confidence and accuracy is weak.[38]

Commentators maintain that expert testimony is necessary because ''jurors are unduly receptive to eyewitness identification and are not sufficiently [skeptical] of it.''[39] Thus, ''expert testimony about eyewitness identification is an important antidote to the overvaluing of eyewitness testimony.''[40] Expert testimony should be admitted in all cases involving eyewitness identification because the results of cognitive scientific research on eyewitness identification are counterintuitive and are, therefore, contrary to the assumptions of the average juror. Thus, expert testimony regarding this scientific research is useful to the jury in every case involving an eyewitness identification.[41] Cognitive scientific research has identified a number of circumstances that make eyewitness identifications less reliable than your average juror would believe. For instance, it has been scientifically well established that an eyewitness is less reliable when attempting to identify a specific individual of a different race.[42] Cognitive scientific research has also established that an eyewitness's degree of certainty about an identification is, at best, weakly correlated with the accuracy of the identification.[43] Expert testimony regarding the lack of a correlation between confidence and accuracy is relevant in any case in which eyewitness identification testimony is introduced and will always be helpful to a jury.[44]

Eyewitness identification experts can also testify about suggestive lineup procedures; the duration of the eyewitness's opportunity to view the perpetrator; weapon focus—i.e., when a witness focuses on the weapon the perpetrator is using rather than on the physical characteristics of the perpetrator; the effect of post-event information on an eyewitness; and the effect of stress on an eyewitness's memory.[45]

The Third Circuit has been among the leading courts of appeals in allowing expert testimony regarding a number of the factors affecting eyewitness identifications.[46]

In *United States v. Sebetich*, a police officer saw the perpetrator during a number of brief intervals, amounting to about 49 seconds total; these sightings occurred while the police officer was pursuing, at speeds of up to 75 miles per hour, a truck in which the perpetrator was the passenger.[47] In addition to the stress involved in a high-speed chase, the police officer was under additional stress because the perpetrator was shooting at him. The Third Circuit held that expert testimony on the effects of stress should have been permitted, stating, ''There is evidence that stress decreases the reliability of eyewitness identifications, contrary to the common understanding.''[48] The Third Circuit also held that expert testimony regarding the lapse of 18 months between the incident and the identification would be potentially useful.

In *United States v. Stevens*, the Third Circuit held that expert testimony regarding the lack of a correlation between the accuracy of an eyewitness identification and the confidence of the eyewitness in his identification should have been admitted because this testimony is contrary to popular belief and because it would have proven helpful to the jury.[49]

Jury Instructions

In *Perry*, the Supreme Court acknowledged that ''jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt'' should be used to test the reliability of eyewitness identification testimony even ''[w]hen no improper law enforcement activity is involved.''[50] Arguably, trial courts should provide en-

[35] 132 S. Ct. at 729 (citing *State v. Clopten*, 223 P.3d 1103, 1113 (Utah 2009)).

[36] *United States v. Smithers*, 212 F.3d 306, 315 (6th Cir. 2000) (reversing the defendant's conviction because his proffered expert testimony was excluded). But see *United States v. Brien*, 59 F.3d 274, 277 (1st Cir. 1995) (defendant goes too far in arguing that ''the expert literature casting doubt on eyewitness evidence is now so well established that the courts should take judicial notice of it'' because eyewitness expert testimony does not embrace a principle so widely accepted as, say, ''whether radar can measure speed'').

[37] *United States v. Stevens*, 935 F.2d 1380, 1397 (3d Cir. 1991).

[38] 454 F.3d at 143-44.

[39] E. Stein, *The Admissibility of Expert Testimony about Cognitive Science Research on Eyewitness Identification*, 2 Law, Probability and Risk 295, 301 (2003).

[40] Id.

[41] Tallent, supra, at 767.

[42] Stein, supra, at 296; see also *Stevens*, 935 F.2d at 1392.

[43] Stein, supra, at 296; see also *Stevens*, 935 F.2d at 1392.

[44] Tallent, supra, at 774.

[45] Id. at 770-71; see also *Stevens*, 935 F.2d at 1392.

[46] See, e.g., *United States v. Downing*, 753 F.2d 1224, 1229-32 (3d Cir. 1985); *United States v. Sebetich*, 776 F.2d 412, 418-20 (3d Cir. 1985).

[47] Id. at 415-16.

[48] Id. at 419.

[49] 935 F.2d at 1384 (reversing the defendant's conviction and remanding for a new trial at which the defendant's expert would be allowed to testify about the lack of correlation between confidence and accuracy in eyewitness identifications).

[50] 132 S. Ct. at 721.

  CRL ISSN 0011-1341

hanced jury instructions to guide juries regarding the factors that may affect the reliability of an identification in a particular case.[51] Jury instructions involving eyewitness identification testimony should be developed to be consistent with scientific findings on eyewitness identification.[52]

Because eyewitness identification jury instructions are within the trial court's discretion, and are not automatically provided, defense counsel should be sure to request that the court give such instructions.[53] Courts are required to give such instructions only if there is a danger of misidentification due to a lack of corroborating evidence.[54]

For example, defense counsel should request that the trial court instruct the jury that, if there is no evidence corroborating the eyewitness identification, a defendant can be found guilty of an offense only if the witness's identification of the defendant is accurate beyond a reasonable doubt.[55] The court commits an error if it does not instruct the jury that the jury should scrutinize eyewitness testimony with care and caution if the prosecution's case is based upon the uncorroborated and uncontradicted identification testimony of an eyewitness.[56] The generally suspect nature of identification evidence, testimony, or procedures should also be addressed in the jury instructions.[57] This is akin to the standard charge given, when the circumstances suggest its advisability, warning the jury of the potential unreliability of cooperator testimony.

The West Virginia Supreme Court of Appeals has suggested that jury instructions should include the same factors outlined by the Supreme Court in *Biggers* to allow juries to better evaluate eyewitness identification testimony.[58] The Fourth Circuit added to this list in approving jury instructions containing the following factors: (1) the general credibility of the witness; (2) the length of time that the witness observed the defendant, including visibility and distance; (3) the manner in which the defendant was presented to the witness; (4) the witness's prior familiarity with the defendant; and (5) the length of time between the incident and when the witness next identified the defendant.[59] If an eyewitness is unable to identify the defendant in open court as the perpetrator of the crime, then the jury instructions should instruct the jurors to consider and weigh the effect of this failure.[60]

The Fall 2011 edition of the California Jury Instructions similarly lists in the model instruction the factors that the jury should consider: (1) the opportunity of the witness to observe the perpetrator; (2) the stress to which the witness was subjected at the time of the observation; (3) the witness's ability to provide a description of the perpetrator; (4) the extent to which the defendant fits the description given by the witness; (5) the cross-racial nature of the identification; (6) the witness's capacity to make an identification; (7) whether the witness was able to identify the alleged perpetrator in a photographic or a physical lineup; (8) the period of time between the crime and the witness's identification; (9) whether the witness had prior contacts with the alleged perpetrator; (10) the extent to which the witness is certain of the identification; and (11) whether the witness's identification is in fact the product of his or her own recollection. Cal. Jury Instr. Crim. 2.92.

Urge the Court to Follow *Henderson*

In 2011, in *State v. Henderson*, the New Jersey Supreme Court revised the state's approach to the admission of eyewitness identification testimony. On an appeal from a murder conviction, the court remanded the matter for an extended evidentiary hearing held by a special master, involving the testimony and submissions of numerous experts in the field. The court eventually adopted much of the master's report on the efficacy and pitfalls of such testimony.

As the *Henderson* court observed at the outset, in the several decades since the U.S. Supreme Court handed down its landmark decisions on eyewitness identification evidence, ''a vast body of scientific research about human memory has emerged [which] casts doubt on some commonly held views relating to memory [and which] calls into question the vitality of the current legal framework for analyzing the reliability of eyewitness identifications.''[61] ''Study after study,'' wrote the court, ''revealed a troubling lack of reliability in eyewitness identifications . . . . Indeed, it is now widely known that eyewitness misidentification is the leading cause of wrongful convictions across the country.''[62] ''At stake is the very integrity of the criminal justice system and the courts' ability to conduct fair trials.''[63]

The advances established by *Henderson* are three: (1) more frequent pretrial hearings—to be held upon ''some'' evidence of suggestiveness not necessarily rising to the level of impermissible suggestiveness; (2) expansion of such hearings to include evaluation of both ''estimator'' and ''system'' variables; and (3) ''enhanced'' jury charges, informing jurors about relevant factors and their effect on reliability, which should lessen the need to call expert witnesses at trial.[64]

''Estimator'' variables include the stress experienced by the eyewitness; his/her focus on a weapon used in the offense; the duration of the observation; the distance and lighting at the scene; the witness's age; the witness's level of intoxication, if any; the perpetrator's characteristics; race bias; the witness's exposure to third-party accounts or opinions; and the rapidity of the identification when made.[65]

''System variables'' include whether the administration of a lineup or photo array was blind; whether there were pre-identification instructions; how the lineup was constructed; whether law enforcement avoided providing feedback to the witness; whether law enforcement simultaneously recorded the witness's confidence in the identification; whether there were multiple viewings;

[51] *State v. Henderson*, 27 A.3d 872, 924 (N.J. 2011).
[52] Id.
[53] *United States v. Jackson*, 347 F.3d 598, 607 (6th Cir. 2003).
[54] Id.
[55] *State v. Payne*, 280 S.E.2d 72, 77 (W. Va. 1981).
[56] Id. at 78.
[57] *United States v. Dove*, 916 F.2d 41, 47 (2d Cir. 1990).
[58] *Payne*, 280 S.E.2d at 79.
[59] *United States v. Brown*, 148 Fed. App'x 163, 165-66 (4th Cir. 2005); see also *Osorio v. Conway*, 496 F. Supp. 2d 285, 298-99 (S.D.N.Y. 2007).
[60] *Dove*, 916 F.2d at 45.
[61] 27 A.3d at 877.
[62] Id. at 877-78.
[63] Id. at 879.
[64] Id. at 878.
[65] Id. at 904-10, 921-22.

and whether composite drawings were shown to the witness.[66]

The *Henderson* opinion criticized the *Biggers* five-part test for determining the reliability of the identification as failing to provide a sufficiently searching measure for reliability.[67] Three of the factors recited in *Biggers*—opportunity to view the crime, the witness's degree of attention, and the witness's degree of certainty—all depend on self-reporting by the witness. ''The irony of the current test is that the more suggestive the procedure, the greater the chance eyewitnesses will seem confident and report better viewing conditions.''[68] Indeed, the *Perry* opinion has elsewhere been characterized as having ''bypassed'' these concerns about the continuing efficacy of the *Biggers* standard for testing reliability.[69]

[66] Id. at 896-902, 920-21.
[67] Id. at 918.
[68] Id.
[69] *Phillips v. Allen,* 2012 WL 414815, *4 (7th Cir., Feb. 10, 2012).

The current federal test also is inadequate because it provides courts only with the remedy of suppression, an ''all-or-nothing approach [that] does not account for the complexities of eyewitness identification evidence.''[70] Judges should ''in rare cases'' also be able to redact parts of identification testimony, selectively excluding particular statements, such as a witness's expression of confidence in his/her identification, consistent with Fed. R. Evid. 403.[71]

Counsel might well consider urging their respective courts to adopt a broader approach to testing the reliability of identification evidence, as outlined in *Henderson*. *Perry* may not require hearings in the absence of police misconduct, but the Supreme Court did not preclude hearings on a lesser showing. Decisions such as *Henderson* from lower courts may prove persuasive in either more readily securing a hearing in the discretion of the trial court or expanding the breadth of the reliability hearing, or at least in allowing defense expert testimony or the provision of tougher jury instructions.

[70] 27 A.3d at 919.
[71] Id. at 925.

  CRL ISSN 0011-1341