Revisiting *Manson v. Brathwaite* and Eyewitness Identification

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Introduction

Eyewitness identification is fraught with uncertainties. In *United States v. Wade*, Justice Brennan, writing for the majority of the United States Supreme Court, wrote that "the vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."[1] This essay will analyze the approach to eyewitness identification in *Manson v. Brathwaite*, discuss the criticisms associated with the test, and propose suggestions to combat the pitfalls of eyewitness identification evidence.

I. Approach to Eyewitness Identification Before *Manson v. Brathwaite*

In *United States v. Wade*, the Supreme Court stated that a "major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification."[2] The Supreme Court also stated that there is "grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and . . . presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial."[3] Therefore, the Supreme Court allowed Wade to be entitled to counsel under the Sixth Amendment during the post-indictment lineup to ensure a "meaningful confrontation at trial" and to "avert prejudice."[4]

In 1969, the Supreme Court first held in *Foster v. California* that a lineup procedure was so unfair and suggestive that it violated due process.[5] In *Foster*, the petitioner was the only person in the lineup wearing a leather jacket

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1. United States v. Wade, 388 U.S. 218, 227 (1967).
2. *Id.* at 228.
3. *Id.* at 236.
4. *Id.*
5. Foster v. California, 394 U.S. 440, 442–43 (1969).

similar to the one worn by the perpetrator.[6] Because the witness was unable to make an identification, a one-on-one confrontation between the witness and the petitioner was set up.[7] However, the witness remained unable to make an identification.[8] As such, the police conducted another lineup days later in which the petitioner was the only person present from the original lineup, enabling the witness was able to make a definite identification.[9] The Supreme Court reasoned that "the suggestive elements in this identification procedure made it all but inevitable that [the eyewitness] would identify the petitioner whether or not he was in fact 'the man'" and, therefore, held that the procedure violated the defendant's due process by virtue of being unnecessarily suggestive.[10]

II. The *Manson v. Brathwaite* Test

The Supreme Court in *Manson v. Brathwaite* devised a two-stage test for pre-trial eyewitness identification suppression hearings.[11] The first stage of the test asks whether the police used any unnecessary procedure to suggest that the defendant is the perpetrator.[12] If the police did not use an unnecessary procedure to suggest that the defendant is the perpetrator, the evidence is admissible.[13] If, on the other hand, the police used an unnecessary procedure, the court must move to the second stage of the test.[14] The second stage of the test asks whether the identification is reliable by examining five factors: the witness's opportunity to observe the criminal at the time of the crime; the accuracy of the witness's prior description of the criminal; the witness's degree of attention during the crime; the level of certainty demonstrated by the witness during the confrontation; and the amount of time elapsed between the crime and the confrontation.[15]

6. *Id.* at 443.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 443.

11. Manson v. Brathwaite, 432 U.S. 98 (1977).

12. Ruth Yacona, *Manson v. Brathwaite: The Supreme Court's Misunderstanding of Eyewitness Identification*, 39 J. MARSHALL L. REV. 539, 547 (2006).

13. *Id.*

14. *Id.*

15. *Manson*, 432 U.S. at 114.

III. Criticisms of the *Manson v. Brathwaite* Test

A. Inherent Emotional State of the Witness

One criticism of the *Manson v. Brathwaite* test is that it fails to appreciate the emotional state of the witness as a result of experiencing the crime, which might be a factor in the reliability of eyewitness identification. When a witness is emotionally invested in identification because of prior trauma, such as having been a victim of a crime, the witness becomes incentivized to see the crime solved.[16] Thus, when a witness examines a set of photos, he naturally thinks that the police are presenting the right suspect to him.[17] According to Edwin M. Borchard, a scholar in the area of mistaken eyewitness identification, erroneous convictions demonstrate the fact that "the emotional balance of the victim or eyewitness is so disturbed by his extraordinary experience that his powers of perception become distorted and his identification is frequently most untrustworthy."[18]

B. System Variables

Another criticism of the *Manson v. Brathwaite* test is that it fails to consider system variables that inevitably affect the reliability of eyewitness identifications. According to *State v. Henderson*, "system variables are factors like lineup procedures which are within the control of the criminal justice system."[19] The *Manson v. Brathwaite* test does not safeguard against avoidable system variables. Research shows that witnesses are more likely to choose a suspect if the suspect is the only person in the lineup who looks similar to the witness's description of the perpetrator.[20] In *State v. Henderson*, the New Jersey Supreme Court noted that certain system variables may lead to misidentification and consequently gave suggestions to amend this problem, such as blind administration, multiple viewings, and pre-identification procedures.[21]

C. Defects in Human Memory

Lastly, the *Manson v. Brathwaite* test is criticized for failing to consider human limitations, such as the inaccuracy of human memory after a certain

16. *See* Yacona, *supra* note 12, at 553.

17. *Id.*

18. EDWIN M. BORCHARD, CONVICTING THE INNOCENT: SIXTY-FIVE ACTUAL ERRORS OF CRIMINAL JUSTICE 367 (Garden City Publ'g Co. 1932).

19. State v. Henderson, 27 A.3d 872, 895 (N.J. 2011).

20. *See* David A. Sonenshein & Robin Nilon, *Eyewitness Errors and Wrongful Convictions: Let's Give Science a Chance*, 89 OR. L. REV. 263, 272 (2010).

21. *Henderson*, 27 A.3d at 896–904.

period of time has passed since the crime. Studies have shown that memories do not remain the same and constantly change.[22] Jurors often have misconceptions regarding the human memory and these misconceptions influence the reliability of eyewitness identification.[23] However, in *Neil v. Biggers*, eyewitness identification obtained in a lineup seven months after the crime was committed was admitted as evidence.[24] Because *Neil v. Biggers* was affirmed in *Manson v. Brathewaite*,[25] the test is criticized because at the time *Manson v. Brathewaite* was decided, there were numerous studies demonstrating the inaccuracies and limits of human memory.[26] Nonetheless, the Court relied upon their own logic rather than social sciences regarding the inaccuracies of eyewitness evidence.[27]

IV. State Approaches to Eyewitness Identification

Having considered the criticisms of the *Manson v. Brathewaite* test, namely the inherent emotional state of the witness, system variables, and defects in human memory, it is necessary to examine the more nuanced state approaches to eyewitness identification, specifically in Wisconsin and New Jersey, given that state-based eyewitness identification reforms have taken place.

A. Wisconsin

In *State v. Dubose*, the Wisconsin Supreme Court held that evidence from a showup (an identification procedure where only one individual is placed in front of the witness for identification purposes[28]) was inadmissible because of the inherent unreliability of eyewitness identifications.[29] The Wisconsin Supreme Court consequently stated that if a showup was necessary, "special care must be taken to minimize potential suggestiveness."[30] For instance,

22. ELIZABETH LOFTUS & KATHERINE KETCHAM, WITNESS FOR THE DEFENSE: THE ACCUSED, THE EYEWITNESS, AND THE EXPERT WHO PUTS MEMORY ON TRIAL 20 (1991).

23. DAVID LAURENCE FAIGMAN ET AL., SCIENCE IN THE LAW: SOCIAL AND BEHAVIORAL SCIENCE ISSUES 370 (W. Grp. 2002).

24. Neil v. Biggers, 409 U.S. 188, 202 (1972).

25. Manson v. Brathwaite, 432 U.S. 98, 114 (1977).

26. *See* Felice J. Levine & June Louin Tapp, *The Psychology of Criminal Identification: The Gap from Wade to Kirby*, 121 U. PA. L. REV. 1079, 1089–96 (1973).

27. *See* Winn S. Collins, *Improving Eyewitness Evidence Collection Procedures in Wisconsin*, 2003 WIS. L. REV. 529, 551 (2003) ("The Court could have used more accurate predictors of accuracy had the Justices reviewed the expansive history of social science literature on the subject, rather than relying solely upon their own logic.").

28. *See* Amy Luria, *Showup Identifications: A Comprehensive Overview of the Problems and a Discussion of Necessary Changes*, 86 NEB. L. REV. 515 (2007).

29. State v. Dubose, 699 N.W.2d 582, 592–96 (Wis. 2005).

30. *Id.* at 594.

administrators of showups should notify witnesses that the suspect may not be present in the showup.[31] The Wisconsin Supreme Court ruled that the use of showup identification is unnecessary during trial unless police are unable to use more reliable procedures or police lack probable cause for arrest.[32] Unfortunately, Wisconsin courts have since stressed a narrow interpretation of *State v. Dubose*. For example, in *State v. Wuerzberger*, the Wisconsin Court of Appeal stated that the principle in *State v. Dubose* is limited to in-person showups and is not applicable to photo showups.[33]

B. New Jersey

In *State v. Henderson*, the New Jersey Supreme Court stated that the "current standard for assessing eyewitness identification evidence does not fully meet its goals . . . [and] does not offer an adequate measure for reliability or sufficiently deter inappropriate police conduct."[34] Further, it "overstates the jury's inherent ability to evaluate evidence offered by eyewitnesses who honestly believe their testimony is accurate."[35] The New Jersey Supreme Court created a new test to aid in assessing eyewitness identification evidence. According to *State v. Henderson*, the "defendant has the initial burden of showing some evidence of suggestiveness that could lead to a mistaken identification,"[36] and "the State must then offer proof to show that the proffered eyewitness identification is reliable."[37] Under this test, the defendant has the burden of proof to show that there is a "very substantial likelihood of irreparable misidentification."[38] Ultimately, "if after weighing the evidence presented a court finds from the totality of circumstances that [the] defendant has demonstrated a very substantial likelihood of irreparable misidentification, the court should suppress the identification evidence."[39]

V. Looking Forward: Reform Proposals

Although the Supreme Court has not yet reformed the framework set out in *Manson v. Brathwaite*, Justice Sonia Sotomayor addressed the issue in 2012 in her dissent in *Perry v. New Hampshire*, stating:

31. *Id.*

32. *Id.*

33. State v. Wuerzberger, No. 2007AP2085-CR, 2008 WL 4057870, at 3* (Wis. Ct. App. 2008).

34. State v. Henderson, 27 A.3d 872, 878 (2011).

35. *Id.*

36. *Id.* at 288.

37. *Id.* at 299.

38. *Id.*

39. *Id.*

> The empirical evidence demonstrates that eyewitness misidentification is the single greatest cause of wrongful convictions in this country. Researchers have found that a staggering 76% of the first 250 convictions overturned due to DNA evidence since 1989 involved eyewitness misidentification. Study after study demonstrates that eyewitness recollections are highly susceptible to distortion by postevent information or social cues; that jurors place the greatest weight on eyewitness confidence in assessing identifications even though confidence is a poor gauge of accuracy; and that suggestiveness can stem from sources beyond police-orchestrated procedures.[40]

In light of the data and studies mentioned above, it is necessary to analyze proposals for reform.

A. Judge Easterbrook's Proposal

In *United States v. Hall*,[41] Judge Easterbrook's concurrence provides an interesting alternative to expert testimony. According to his proposal, judges should "employ social science to improve the trial process."[42] For instance, in a trial, the judge could "inform jurors of the rapid decrease of accurate recollection, and the problem of suggestibility, without encountering the delays and pitfalls of expert testimony."[43] The rationale behind this approach is that jurors might be more receptive to information received from judges rather than from scholars.[44]

B. Jury Instructions

In *United States v. Rincon*, the Ninth Circuit provided model instructions to the jury to consider the following: the capacity and opportunity of the witness to observe the offense based upon duration and conditions of observation, whether the identification was the product of the eyewitness's memory, whether the identification was prompted by suggestiveness, whether inconsistent identifications were made, whether the testimony was credible, the length of time between the occurrence of the crime, and the eyewitness identification.[45] It is suggested that model jury instructions such as those used in *United States v. Rincon* provide an alternative way to combat the pitfalls of eyewitness identification.

40. Perry v. New Hampshire, 565 U.S. 228, 263–64 (2012).
41. United States v. Hall, 165 F.3d 1095, 1107 (7th Cir. 1999).
42. *Id.* at 1120.
43. *Id.*
44. *Id.*
45. United States v. Rincon, 28 F.3d 921, 925–26 (9th Cir. 1994).

Conclusion

This Article has analyzed the *Mason v. Brathwaite* test for evaluating eyewitness identification evidence, highlighted the test's criticisms, and suggested three solutions to combat the pitfalls of eyewitness identification. Although reforms may be made to the law of eyewitness identification, it is unknown to what extent of reform is necessary to truly combat misidentification.