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# MANSON V. BRATHWAITE: THE SUPREME COURT'S MISUNDERSTANDING OF EYEWITNESS IDENTIFICATION

RUTH YACONA\*

"I had,' said he, 'come to an entirely erroneous conclusion which shows, my dear Watson, how dangerous it always is to reason from insufficient data.'"<sup>1</sup>

A twenty-two-year-old woman is raped. During her ordeal, she studies every single detail of her rapist's face. She looks at the hairline. She looks for scars, tattoos, and for anything else that will help her remember who this man is so she may later identify him. When the assault is over, she knows what this man looked like, and that she is going to make sure that he was put in jail.<sup>2</sup>

Several days later, after working with the police on a composite sketch, she identifies who she thinks is her attacker<sup>3</sup>

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1. ARTHUR CONAN DOYLE, *THE ADVENTURE OF THE SPECKLED BAND* 272 (1892).

2. Michael Headley, Note, *Long on Substance, Short on Process: An Appeal for Process Long Overdue in Eyewitness Lineup Procedures*, 53 HASTINGS L.J. 681, 681 (2002) (citing Jennifer Thompson, Editorial, *I Was Certain, But I Was Wrong*, N.Y. TIMES, June 18, 2000, 4, at 15). Jennifer Thompson's last name has been changed to Cannino, as of 2003. See also PBS.org, Frontline, *What Jennifer Saw, How can Eyewitness Identification Go Wrong?*, <http://www.pbs.org/wgbh/pages/frontline/shows/dna/photos/> (last visited on Nov. 7, 2005) (displaying photos that show the facial differences of Ronald Cotton and Bobby Poole and how Jennifer Thompson morphed the memory of Bobby Poole into the incorrect memory of Ronald Cotton).

3. *State v. Cotton*, 394 S.E.2d 456, 461 (N.C. Ct. App. 1990). Jennifer originally picked two pictures from the six photos, one of which depicted Ronald Cotton. She then examined the two photos for a number of minutes until she told the investigating officer that Ronald Cotton's photo "looks most like him." *Id.* Jennifer made a relative judgment. A relative judgment is made when the eyewitness identifies the person in the lineup or photo array who looks *most* like the perpetrator the eyewitness has in her memory, *relative* to the other members in the lineup. Gary L. Wells & Elizabeth F. Loftus, *Eyewitness Memory for People and Events*, in 11 HANDBOOK OF PSYCHOLOGY, FORENSIC PSYCHOLOGY 149, 157 (Alan M. Goldstein ed., 2003) (citing Wells, G.L., *The Psychology of Lineup Identifications*, JOURNAL OF APPLIED PSYCHOLOGY 14, 89-103 (1984)). The relative judgment process does not present a problem when the real perpetrator is in the lineup. *Id.* In Jennifer's case, if Bobby Poole, the real perpetrator had been in the first lineup, Jennifer

after looking through a series of six photos. She identifies one Ronald Cotton, a black male. She feels completely confident in her decision.<sup>4</sup> She was sure she found the man who attacked her, and now he was going to pay.<sup>5</sup>

At a lineup, she picks the same man, Ronald Cotton, and again feels completely confident.<sup>6</sup> The case then goes to trial. The victim takes the stand, and without a bit of hesitation proceeds to tell the jury that Ronald Cotton was the man who put a knife to her neck and raped her. Based on this primary testimony, Ronald Cotton is sentenced to prison for life.<sup>7</sup>

A year later, the victim learns that another man in prison claims to be her attacker. This man, Bobby Poole, is brought before the victim. The victim is asked if she has ever seen this man. She answers, "I have never seen him in my life. I have no idea who he is."<sup>8</sup>

Eleven years after the first identification of Ronald Cotton, police arrive at the victim's house and ask her to provide a blood sample for DNA tests. She agrees, still completely confident that the tests would come back and confirm what she already knows: that Ronald Cotton is her rapist.<sup>9</sup>

The DNA tests come back and, to the victim's devastation, they reveal that Ronald Cotton is not her rapist. It was Bobby Poole.<sup>10</sup> The man who the victim thought she had never seen in her life was the man who was inches from her throat with a knife to her neck during those horrific moments of her life. Bobby Poole was the man who she studied, but somehow she identified Ronald Cotton as her assailant.<sup>11</sup>

How could this happen? How could the court take away an innocent man's liberty based upon such inaccurate identification evidence?

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might have picked him. Since Bobby Poole was not in the photos or the live lineup, "maybe Jennifer compared the remaining members of the lineup and chose an innocent person as the 'most like' option." JAMES M. DOYLE, TRUE WITNESS; COPS, COURTS, SCIENCE, AND THE BATTLE AGAINST MISIDENTIFICATION 71, 158 (2005).

4. See *infra* section II. B. 2 (describing how the officer's comments made after Jennifer's identification greatly influenced how confident Jennifer felt identifying Ronald Cotton, which led her to convey absolute confidence to the jury).

5. Headley, *supra* note 2, at 681.

6. *Id.*

7. *Id.* at 682.

8. *Id.*

9. *Id.*

10. *Id.*

11. See PBS.org, *supra* note 2 to watch a brief video on how Jennifer Thompson's memory of Bobby Poole's morphed into Ronald Cotton's face.

Jennifer Thompson's and Ronald Cotton's story is not rare.<sup>12</sup> As of January 2005, there have been 154 DNA exonerations.<sup>13</sup> Mistaken eyewitness identification played a major part in over two-thirds of the first 138 post-conviction DNA exonerations.<sup>14</sup> The subsequent DNA testing in these cases proves that the reliability test of *Manson v. Brathwaite*,<sup>15</sup> which has been applied in countless pre-trial suppression hearings over the past thirty years, is inherently flawed, as it gives undue reliance to eyewitness testimony on the mistaken assumption that it is an accurate truth-finding tool.<sup>16</sup>

Part I of this Comment will explain *Manson v. Brathwaite* and the test the Court created to govern pre-trial eyewitness identification suppression hearings. This Comment will demonstrate how the political environment greatly influenced the Court, thereby distracting it from any real understanding of eyewitness identification.<sup>17</sup> Hence, the Court created a rule of law

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12. Approximately 75,000 American prosecutions turn on eyewitness identification evidence. DOYLE, *supra* note 3, at 6 (citing BRIAN L. CUTLER AND STEVEN D. PENROD, *Mistaken Identification: The Eyewitness, Psychology, and the Law* (1995)). DNA exonerations prove that a tragic number of past identifications were wrong and will continue to be wrong in the future because the exact same procedures used to obtain the incorrect eyewitness identifications in the past are the procedures that are still being used in many jurisdictions today.

13. The U.S. Department of Justice, in response to the information obtained regarding malleability of eyewitness identification, published a guide that implemented necessary procedural changes for law enforcement officers to follow during identification procedures. U.S. DEPT OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT, *available at* <http://www.ncjrs.org/pdffiles1/nij/178240.pdf> (last visited Nov. 16, 2005).

14. InnocenceProject.com, The Innocence Project: Mistaken I.D., <http://innocenceproject.com/causes/mistakenid.php> (last visited Nov. 16, 2005). Of the first eighty-two DNA exoneration cases studied, forty-five percent of the mistaken eyewitness identification stemmed from photo-lineup procedures. *Id.* See also U.S. DEPT. OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT, <http://www.ncjrs.org/pdffiles1/nij/178240.pdf> (last visited on Nov. 16, 2005) (illustrating through charts that twenty-four out of the twenty-eight DNA exoneration cases studied involved eyewitness identification).

15. 432 U.S. 98, 114 (1977).

16. See also Peter J. Neufeld, *Have you no Sense in Decency?*, 84 J. CRIM. L. & CRIMINOLOGY 189, 199 (1993) ("The remarkably high exclusion rates reported by forensic DNA laboratories reveal our criminal justice system to be more fragile and susceptible to producing wrongful convictions than many want to believe.").

17. During Richard Nixon's presidency, vacancies in the United States Supreme Court gave him the opportunity to appoint judges that had views that were politically aligned with his. The new Nixonian majority, and specifically Justice Blackmun in the *Manson* decision, did not want trial judges second-guessing police in their investigative decision as had been done in the days of the Warren Court. DOYLE, *supra* note 3, at 79. The Nixonian majority wanted to remove the handcuffs from the police that the Warren

that greatly underestimated the outcome determinative effect of allowing reliable *enough* eyewitness identification in.<sup>18</sup> Part II of this Comment argues the *Manson* Court did not understand how the human memory works when it created a test that relies upon a person's recollection. The *Manson* Court additionally erred when it greatly underestimated the power that suggestive police procedures have on obtaining a "reliable" identification.<sup>19</sup> Part III concludes that courts should recognize the prejudicial, outcome-determinative nature of the admission of unreliable eyewitness identification evidence, and therefore apply the exclusionary rule to suggestively obtained pre-trial eyewitness identifications in order to ensure each defendant receives the Due Process rights that the Constitution guarantees.<sup>20</sup>

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Court had placed, but "handcuffing trial judges was another matter." *Id.* Now the handcuffs would be placed on those "liberal" trial judges. *Id.*

18. The Court rationalized that the unreliability of evidence would be apparent to the jurors, since eyewitness identification is a matter of common sense. The Court did not think that incorrect identification testimony could "fool" a juror as it might be when a coerced confession was admitted and, therefore, no one's due process rights would be violated. The *Manson* Court did not realize that jurors do not possess the knowledge to adequately determine when an eyewitness is indeed telling the truth. This is due to the fact that most eyewitnesses are so believable when he or she reaches the witness stand because, in fact, it is the truth that they *remember*. The witness honestly, and sincerely believes that what he/she is testifying to *is* the truth. A juror does not know this, because the complexity of memory and its constant morphing capacity are not known to the common juror. See DOYLE *supra* note 3, at 41 ("What the 'jurors' in experiments seemed to look for from eyewitnesses was not consistency, but confidence." (citing N. Brewer and A. Burke, *Effects of Testimonial Inconsistencies and Eyewitness Confidence on Mock-Juror Judgments*, 26 LAW AND HUMAN BEHAVIOR 353 (2002)); G.L. Wells, R.C.L. Lindsay, & T.J. Ferguson, *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification*, 64 J. APPLIED PSYCHOL. 440 (1979).

19. See generally Gary L. Wells, *What is wrong with the Manson v. Brathwaite test of Eyewitness Identification Accuracy?*, <http://www.psychology.iastate.edu/faculty/gwells/Mansonproblem.pdf> (last visited on Jan. 5, 2005) for a thorough analysis of how current psychology refutes the faulty logic that the Supreme Court relied upon at the time of the *Manson* decision.

20. See *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 73-80 (1999) ("Postarrest and postconviction DNA exonerations have invariably involved analysis of sexual assault evidence . . . that proved the existence of mistaken eyewitness identification."). Since there does not seem to be anything inherently distinct about identification in sexual assault cases that would make a witness more prone to misidentification than in other crimes, "where the crucial proof is eyewitness identification, it naturally follows that the rate of mistaken identifications and convictions is similar to DNA exoneration cases." *Id.*

## I. THE *MANSON* DEVELOPMENT

*Manson v. Brathwaite*<sup>21</sup> came before the United States Supreme Court in 1976.<sup>22</sup> In order to understand why the *Manson* Court ruled as it did, it is imperative to understand the political climate during the 1960's and 1970's.

### A. *The Warren Court*

Earl Warren was Chief Justice of the United States Supreme Court from 1953-1969.<sup>23</sup> During this time, the Warren Court "turned the Bill of Rights into a powerful weapon against government officials — from police officers to presidents — who failed to treat people fairly and equally and to respect their human dignity."<sup>24</sup> The Warren Court used the Bill of Rights to place more restrictions upon the state governments through the Fourteenth Amendment Due Process clause. This created outrage among some in the legal community because, in the area of criminal law, it extended Due Process from the courtroom into the police station, and even into the streets.<sup>25</sup> Therefore, due process of law had to be given not only in the courtroom (i.e. judges and prosecutors), but police outside the courtroom were also required to provide it.<sup>26</sup>

The Warren Court determined additionally that the Fourteenth Amendment not only guaranteed certain rights, but it also guaranteed a remedy for any infringement of those rights.<sup>27</sup> This mandatory remedy is the "exclusionary rule,"<sup>28</sup> which holds

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21. 432 U.S. 98.

22. *Manson* was argued before the United States Supreme Court in 1976, but was decided as amended in 1977. *Id.*

23. PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT, THE MEN AND WOMEN WHOSE CASES AND DECISIONS HAVE SHAPED OUR CONSTITUTION 416 (1<sup>st</sup> ed. 1999).

24. *Id.*

25. DOYLE, *supra* note 3, at 71.

26. *Id.* at 71-72.

27. *Id.* at 72.

28. *Id.* The text of the Constitution does not specify a remedy for a victim whose rights have been violated by a governmental actor. Up until the twentieth century, courts allowed the victims to sue the government agents in tort. MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS 335 (2d. ed. 2003). The Warren Court applied the exclusionary rule to the states in *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) through the Fourth and Fourteenth Amendments. The *Mapp* Court stated, "[T]he purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'" *Mapp*, 367 U.S. at 656 (citing *Elkins v. United States*, 364 U.S. 206, 217 (1960)). Justice Clark, in the *Mapp* opinion, remarked on the idea that the exclusionary rule allows the criminal to go free merely because of police misconduct, but rebutted, "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Mapp*, 367 U.S. at 659.

that if evidence is obtained in violation of any rights guaranteed by the Due Process Clause, that evidence must be excluded at trial.<sup>29</sup> The Warren Court “recognized that certain police practices — coerced confessions were one clear example — turned subsequent trials into empty ceremonies.”<sup>30</sup>

Eyewitness identification was soon placed in the same category<sup>31</sup> as coerced confessions because the Court realized how much weight the jury placed upon the testimony of an eyewitness.

### 1. *Stovall v. Denno*<sup>32</sup>

The Warren Court decided *Stovall* in 1967.<sup>33</sup> The issue in *Stovall* was whether the defendant’s Due Process rights were violated when a police officer used a suggestive procedure to obtain an eyewitness identification.<sup>34</sup> *Stovall* involved the murder of a husband.<sup>35</sup> The accused had been arrested the day following the crime and the police took him to a hospital where the wife of the victim, who was also injured in the assault, was a patient. The police brought the accused before the wife and she identified him as the murderer.<sup>36</sup>

*Stovall* held that “a claimed violation of due process of law in the conduct of confrontation depends on the totality of the circumstances surrounding it.”<sup>37</sup> The Court noted that bringing a suspect before the victim is a “widely condemned” police procedure because of its inherently suggestive nature.<sup>38</sup> However, because of the exigent circumstances of that particular case (she was the only

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29. DOYLE, *supra* note 3, at 72.

30. *Id.*

31. *Id.*

32. 388 U.S. 293 (1967). *Stovall* is sometimes considered the third case in trilogy of pre-trial identification cases. *United States v. Wade*, 388 U.S. 218, 234 (1967), and *Gilbert v. California*, 388 U.S. 263 (1967) and *Stovall* were all decided the same day. However, *Stovall* was the first case that decided when a defendant’s Fourteenth Amendment Due Process rights were violated when a police officer used an impermissibly suggestive procedure. The main focus of *Wade* and *Gilbert* was the Sixth Amendment right to counsel.

33. *Stovall*, 388 U.S. 293.

34. *Id.* at 294-95.

35. *Id.* at 295.

36. *Id.* at 296.

37. *Id.* at 302. *But see* *United States ex. rel. Phipps v. Follette*, 428 F.2d 912, 914 (2d Cir. 1970) (“Although at first sight this [*Stovall*] test seems fairly simple and straightforward, it has given rise to difficult problems.”). These problems are discussed in the opinions of Judges McGowan, Leventhal and Wright in *Clemons v. United States*, 408 F.2d 1230 (*en banc*, D.C. Cir. 1968).

38. *Stovall*, 388 U.S. at 302. *See* The Innocence Project, *supra* note 14 (pointing out that show-up identifications should be avoided except in rare circumstances where the suspect is apprehended in the immediate vicinity and within a very short amount of time of the crime); *see also* Wells, *supra* note 19 (emphasizing that a one-person show-up has been proven to inflate the chances that an innocent suspect will be identified).

one who could exonerate the accused, no one knew how long she would live, and “the usual police station line-up . . . was out of the question”<sup>39</sup>), the Court held the admission of the identification did not constitute a denial of Due Process.<sup>40</sup>

### B. *The Burger Court*

Richard Nixon became president in 1968<sup>41</sup> and “turned his guns on the Warren Court, charging it with going ‘too far in weakening the peace forces as against the criminal forces in this country.’”<sup>42</sup> Conservatives criticized the Warren Court for “handcuffing”<sup>43</sup> the police through its pro-defendant decisions. President Nixon wanted to replace Earl Warren with a judge that would oversee the dismantling of the Warren Court’s “liberal edifice.”<sup>44</sup> Warren Burger was a perfect fit for the position because he almost always upheld criminal convictions and he publicly denounced the Warren Court’s *Miranda* decision.<sup>45</sup> Harry Blackmun, who wrote the *Manson* opinion, was nominated to the Court in 1970.<sup>46</sup> He was known for always voting to uphold state laws and siding with the government over individual rights.<sup>47</sup>

*Manson* was decided in 1977.<sup>48</sup> The *Manson* case gave the Supreme Court an opportunity to limit the reach of the Due Process Clause that the Warren Court had stretched. It did this by placing eyewitness identification and police procedure outside the realm of the courts.

#### 1. *Manson v. Brathwaite*

The issue in *Manson* was whether the Due Process Clause of the Fourteenth Amendment compelled the exclusion of “reliable” eyewitness identification evidence when it was obtained through unnecessary and suggestive procedures.<sup>49</sup>

In *Manson*, an undercover police officer, Jimmy, purchased narcotics from the defendant.<sup>50</sup> Following the sale, officer Jimmy gave another police officer a description of the defendant.<sup>51</sup> This second officer then left a single photograph in Jimmy’s office.<sup>52</sup>

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39. *Stovall*, 388 U.S. at 302.

40. *Id.* at 296.

41. IRONS, *supra* note 23 at 423.

42. *Id.*

43. *Id.*

44. *Id.* at 424.

45. *Id.*

46. *Id.* at 437.

47. *Id.*

48. *Manson*, 432 U.S. at 98.

49. *Id.* at 99.

50. *Id.* at 101.

51. *Id.*

52. *Id.*



Jimmy identified the person in the photograph as the defendant. The defendant was subsequently charged and convicted for the possession and sale of heroin.<sup>53</sup> The United States Supreme Court granted certiorari.<sup>54</sup> The Court held the admission of the eyewitness identification did not violate the defendant's due process rights because the unnecessarily suggestive procedure — of showing only one photo to the undercover officer — did not create a "substantial likelihood of misidentification."<sup>55</sup>

In reaching its conclusion, the *Manson* Court had to determine if there was a "relationship between suggestiveness and misidentification."<sup>56</sup> The Court, in determining that the identification could be reliable despite unnecessarily suggestive procedures, held that there was no relationship between the two.<sup>57</sup>

## 2. The *Manson* "reliability" test

The *Manson* Court did not want trial judges second-guessing the police. It therefore created a two-part test that was to be followed at all pre-trial eyewitness identification suppression hearings. This two-part test continues to govern criminal pre-trial suppression hearings to date.<sup>58</sup>

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53. *Id.* at 102.

54. *Manson v. Brathwaite*, 527 F.2d 363 (2d Cir. 1975), *cert. granted*, 425 U.S. 957 (1976). The District Court of Connecticut dismissed respondent's petition for habeas corpus. *Manson*, 432 U.S. at 103. On appeal, the United States Court of Appeals for the Second Circuit reversed with instructions to issue the writ. *Id.* The Court of Appeals reasoned that "evidence as to the photograph should have been excluded, regardless of reliability, because the examination of the single photograph was unnecessary and suggestive." *Id.*

55. *Manson*, 432 U.S. at 116, (citing *Simmons v. United States*, 390 U.S. 377, 384 (1968)).

56. *Id.* at 106.

57. *Id.* at 110. The *Manson* Court relied on *Stovall* to reach its decision. The Court recognized that *Stovall*, a governing precedent, held that pre-trial eyewitness identifications obtained through unnecessarily suggestive procedures should be excluded from evidence. However, the *Stovall* Court allowed the identification evidence into evidence because of the exigent circumstances that existed in that particular case (the only eyewitness who could rule out the suspect was a dying woman). The *Stovall* Court used a "totality of the circumstances" test in order to take these exigent circumstances into account. *Id.* at 113. The *Manson* Court, instead of taking *Stovall* as a fact-specific case, applied it as a detached rule of law that was to be applied in all following cases, despite their dramatically different facts. The eyewitness in *Manson* was an undercover police officer, not a dying woman on a hospital bed, as in *Stovall*. There was plenty of time for a live lineup to be organized. The manipulation of the "totality" rule that *Stovall* employed has given a very large amount of breathing room for investigating police officers to not employ proper eyewitness identification procedures.

58. In recent years state courts continue to apply the same factors *Manson* enunciated to determine the reliability of pre-trial eyewitness identification. *See, e.g.*, *Appleton v. State*, 828 So. 2d 894, 900 (Ala. 2001) (citing the *Manson* totality test to determine the "constitutional adequacy" of pretrial

a. The First Prong of the Test

The first prong of the *Manson* two-part test asks whether the police used an unnecessarily suggestive procedure that suggests the defendant is the perpetrator.<sup>59</sup> If the procedure was not suggestive, the identification evidence is allowed into evidence because no due process obstacle is present.<sup>60</sup> However, if the procedure is suggestive, including if unnecessarily so,<sup>61</sup> then the Court goes on to determine if the identification is reliable despite the suggestive quality of the procedure.

b. The Second Prong of the Test

If the procedure is found to be suggestive, a court looks to five factors to determine if the identification is nonetheless reliable. These five factors are: (1) the witness's opportunity to view the criminal at the time of the crime,<sup>62</sup> (2) the witness's degree of attention during the crime,<sup>63</sup> (3) the accuracy of the witness's prior description of the criminal,<sup>64</sup> (4) the level of certainty that the witness demonstrated at the confrontation,<sup>65</sup> and (5) the amount of time between the crime and the confrontation.<sup>66</sup>

The *Manson* decision is flawed in multiple ways. This Comment focuses on how the Court's ignorance to the power of

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identification procedures) *Id.* at 900; *State of Iowa v. Neal*, 353 N.W.2d 83 (Iowa 1984) (placing burden on defendant to establish that suggestive procedures were substantial enough to lead to a misidentification under the *Manson* totality test).

59. Judge Martin, *Decision of Interest*, 230 NEW YORK L.J., July 17, 2003, at 32.

60. *See, e.g., Jarrett v. Headley*, 802 F.2d 34, 42 (2d Cir. 1986) (holding that reliability of an eyewitness identification is not a constitutionally required finding when the procedures used were not impermissibly suggestive). This logic admits that there is a relationship between suggestive procedures and reliability, and this is the same logic the *Manson* Court refutes.

61. *Turner v. State*, 575 S.E.2d 727, 729 (Ga. Ct. App. 2002), provides a clear example of how flexible and lenient courts have become in applying the *Manson* "reliability" test. *Turner* involved an armed robbery and kidnapping of Nazeline Jean. *Id.* Prior to the trial, a newspaper reporter approached Ms. Jean and told her that one of the perpetrators was female. Further, after Ms. Jean's identification at the lineup, the police said "correct" even though Jean only indicated a "3" out of ten when indicating her certainty in the identification. *Id.* at 730. The appellate court affirmed the trial court and held admissible the admission of this pre-trial eyewitness identification obtained through a suggestive photographic lineup. *Id.* at 730. The verbal comment by the police officer allowed Jean to inflate her certainty and confidence in the identification.

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

63. *Id.* at 115.

64. *Id.*

65. *Id.*

66. *Id.*

suggestive police procedures, inherent in the first prong, allows for violations of the Fourteenth Amendment. The second prong of the *Manson* “reliability” test is also flawed and necessitates revision.<sup>67</sup> Briefly stated, the second prong’s five factors are inaccurate determinants of the reliability of eyewitness identification.<sup>68</sup> Four out of the five factors rely on a witness’s subjective assessments.<sup>69</sup> For example, the court can only determine how much attention the witness paid to the criminal by asking the witness herself. These subjective assessments cannot be tested objectively and therefore are notoriously unreliable.<sup>70</sup> Additionally, these subjective assessments are easily altered due to the various stimuli that accompany an altercation.<sup>71</sup> Therefore, the second prong of the *Manson* “reliability” test also denies a defendant due process because it allows admission to the jury unreliable evidence that directly bears on the guilt or innocence of the defendant.

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67. *Id.* Psychological scientists first questioned the second prong of *Manson* in 1983. Wells, *supra* note 19 at 7. Psychologists found it problematic that four out of the five factors of the second prong were self-report variables. *Id.* at 3, 7. The factors of the second prong that call for self-reports cannot be held to indicate reliability, as *Manson* mistakenly held, because the eyewitness, unintentionally, is going to exaggerate or underestimate reality based on the circumstances. *Id.* at 7. In fact, the factors under the second prong lead the fact-finder further away from the truth.

68. Wells, *supra* note 19 at 7.

69. Psychologists call subjective determinations “self-report variables”. *Id.*

70. *Id.* (citing Nisbett, R.E. & Wilson, T.D., *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV., 231-59 (1977)).

71. For example, if an eyewitness was a victim of sexual assault and is asked how long she viewed the assailant, studies show that she will greatly overestimate the time because of the stress, trauma, and anxiety she suffered resulting from the assault. Wells, *supra* note 16 at 7 (citing H.R. Shiffman, *Effects of stimulus complexity on the perception of brief temporal intervals*, 103 J. OF EXPERIMENTAL PSYCHOL., 156-59 (1975)). Likewise, if an eyewitness is asked how long she viewed the defendant without obstruction, she will overestimate the exposure time. Wells, *supra* note 19 at 7. See also Brian L. Cutler, *Overview of Estimator Variables: Findings from Research on the Effects of Witness, Crime and Perpetrator Characteristics on Eyewitness Accuracy*, (unpublished report presented at Benjamin N. Cardozo School of Law, Reforming Eyewitness Identification: Convicting the Guilty, Protecting the Innocent), available at <http://www.naedl.org> (follow “State Legislation” hyperlink; then follow “Eyewitness Identification Procedures” hyperlink; then follow “overview of Estimator Variables, Brian Cutler” hyperlink) (last visited Nov. 6, 2005) (Sept. 12-13, 2004) (explaining that scientifically tested research proves that stress has a negative effect on identification accuracy). “Across all studies the percent of correct identifications was 39% under high stress conditions but 59% under low stress conditions.” *Id.* at 4.

## II. THE *MANSON* "RELIABILITY" TEST FAILS TO GUARANTEE DUE PROCESS

Political philosopher John Rawls,<sup>72</sup> in *A Theory of Justice*,<sup>73</sup> characterized due process as "a process reasonably designed to ascertain the truth."<sup>74</sup> Due process ensures that a criminal trial will result in the "reliable determination of [the] guilt or innocence" of a defendant.<sup>75</sup> The admission of eyewitness identification evidence bears directly on this determination. When a court neglects to prevent the admission of unreliable and prejudicial evidence, it fails to guarantee a fair trial.

The *Manson* Court did not perceive suggestive police procedures as a threat to the reliability of the human memory. The *Manson* Court erroneously assumed that the human memory was a dependable truth-finding tool, accurate enough to withstand even the most suggestive police procedures. The *Manson* Court created a test that failed to guarantee due process because it allows a defendant to be convicted on unreliable, and therefore unconstitutional, evidence.

### A. *The Inaccuracy of Human Memory*

The *Manson* Court created the "reliability" test based on the assumption that memories are preserved intact,<sup>76</sup> and that the

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72. John Rawls was one of the most important political philosophers of the twentieth century. He challenged utilitarian philosophy and developed principles of justice for a liberal society. A directory of John Rawls's contributions to American philosophy can be found at <http://plato.stanford.edu/entries/original-position/#RP> (last visited Nov. 16, 2005).

73. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

74. Headley, *supra* note 2, at 694 (citing RAWLS, *supra* note 73 at 239).

75. John W. Berry, et al., *Outside Counsel; Civil-Arranged Suggestive Identifications*, 231 NEW YORK L.J., Mar. 17, 2004, at 4 (citing *People v. Adams*, 53 N.Y.2d 241, 251 (1981)).

76. The *Manson* court held that an identification may be excluded if the suggestive police procedure was so egregious as to cause "a very substantial likelihood of irreparable misidentification." *Manson*, 432 U.S. at 116 (quoting *Simmons*, 390 U.S. at 384). This logic necessarily assumes that the human memory is a dependable truth-finding tool. The Court also states that the suggestive procedure must cause an "irreparable misidentification". *Id.* The Court did not understand that even the slightest suggestive procedure, such as the comment the investigating officer made in Jennifer Thompson's case, can make the original memory "irreparable," and lost forever because of its inherent malleability. See Wells, *supra* note 19 at 6 (citing Bradfield, S.L., et al., *The damaging effect on confirming feedback on the relation between eyewitness certainty and identification accuracy*, 87 J. OF APPLIED PSYCHOL. 112-20 (2002)) (illustrating through a series of experiments that when a group of witnesses are given post-identification feedback (e.g. "Good, you identified the suspect"), the witness became highly certain about their identifications and recalled being certain all along).

human mind is a “precise recorder and storer of events.”<sup>77</sup> Although this view is far from correct, many individuals within the criminal justice system still believe it to be true.<sup>78</sup>

Other individuals question such a belief. Dr. Elizabeth Loftus,<sup>79</sup> a renowned scientist in the area of eyewitness identification, analogizes the memory-storing function of our brain to drawers, both crammed with many different items. These drawers:

are constantly being emptied out, scattered about, and then stuffed back into place . . . As new bits and pieces of information are added into long-term memory, the old memories are removed, replaced, crumbled up, or shoved into corners. Little details are added, confusing or extraneous elements are deleted, and a coherent construction of the facts is gradually created that may bear little resemblance to the original event.<sup>80</sup>

Thus, memories are constantly being changed and reconstructed, rather than being fixed and immutable.<sup>81</sup> Our memories are not objective recorders of facts that can be questioned for truth.<sup>82</sup> Once memorized, what once was an original event becomes a subjective reality.<sup>83</sup> The human mind, and its memory forming function, has enormous power — power “even to make us believe in something that never happened.”<sup>84</sup>

In its holding, the *Manson* Court relied upon and affirmed *Neil v. Biggers*.<sup>85</sup> The *Biggers* Court allowed into evidence an eyewitness identification that was obtained at a lineup that occurred seven months after the crime.<sup>86</sup> In doing so, the Court

77. Elizabeth Loftus, et al., *Magic of the Mind from Witness for the Defense*, in WITNESS FOR THE DEFENSE: THE ACCUSED, THE EYEWITNESS, AND THE EXPERT WHO PUTS MEMORY ON TRIAL (1991), available at [http://www.pbs.org/wgbh/pages/frontline/shows/dna/photos/eye/text\\_06.html](http://www.pbs.org/wgbh/pages/frontline/shows/dna/photos/eye/text_06.html) (last visited Feb. 2, 2005).

78. *Id.*

79. Dr. Elizabeth Loftus has been a public figure for thirty years and has been on Oprah, Larry King, and Court TV for her findings in the area of eyewitness identification. DOYLE, *supra* note 3 at 85-86. James Doyle wrote an excellent biography on Elizabeth Loftus as a person and how her findings have successfully forced some in the legal field to recognize the inherent flaws of the human memory. *Id.*, at 83-99.

80. Loftus, *supra* note 77.

81. *Id.*

82. *Id.*

83. See Robert J. Hallisey, *Experts on Eyewitness Testimony in Court - A Short Historical Perspective*, 39 HOW. L.J. 237, 243 (1995) (stating that “individual experience is not recorded on a clean slate[;]” rather, it is interpreted against the back-round of the observer’s experiences, prejudices, and preconceptions).

84. Loftus, *supra* note 77.

85. *Manson*, 432 U.S. at 99-117.

86. *Biggers*, 409 U.S. at 101-102.

placed an enormous amount of misplaced faith in the long-lasting and unchanging memory of the eyewitness.

At the time *Manson* was decided, there was ample research explaining the flaws of eyewitness identification.<sup>87</sup> Much of the research directly related to the five factors the *Manson* decision instituted and how these factors are not determinants of accuracy.<sup>88</sup> Justice Blackmun, however, in forming the *Manson* opinion, refused to consider this research<sup>89</sup> and created a test for the admission of eyewitness identification evidence that lacked necessary constitutional safeguards.<sup>90</sup>

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87. Felice Levine and June Tapp are two social scientists with the American Bar Foundation that published a law review article investigating eyewitness reliability. F. Levine & J. Tapp, *The Psychology of Criminal Identification: the Gap from Wade to Kirby*, 121 U. PA. L. REV. 1579 (1973). This article was published in 1973, four years before *Manson* was decided. It shows how far psychology had come in the area of eyewitness identification since Munsterburg's time. However, besides a solitary citation in Justice Marshall's dissenting opinion, there is nothing to show that any of the Justices deciding the *Manson* case took any time or energy to address this research. DOYLE, *supra* note 3, at 79.

88. Before *Manson* was decided, there was ample research that refuted the logic the Court relied upon in creating the five-factor test. DOYLE, *supra* note 3, at 80. For example, Munsterberg, a leading scientist in the area of eyewitness identification, had warned that the confidence of a witness in his or her own identification was not an indicator that the witness was accurate. *Id.* However, Justice Blackmun disregarded this knowledge and "enshrined a witness's confidence" as one of the factors that a court must consider in determining the reliability of the identification. *Id.* at 107. By 2001, Saul Kassin, a leading scientist in the area of eyewitness identification, and ninety-seven percent of all experts in this area agreed that a solid body of empirical research justified distrust of witness confidence. *Id.* at 107.

89. *See id.* at 80 (explaining how every one of the factors instituted in the *Manson* decision is an aspect of eyewitness memory that psychologists had researched). However, "Blackmun would have no part of them. The Supreme Court continued its embargo of psychological knowledge". *Id.* at 79.

90. *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."). Collins emphasized Blackmun's error by quoting Justice Holmes in his opinion in *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, (1921). Holmes stressed that "a page of history is worth a volume of logic." *Eisner*, 256 U.S. at 349.

### B. *The Power of Subtle Suggestion*<sup>91</sup>

The *Manson* Court erred when it assumed that the use of police officers' suggestive pre-identification procedures do not directly affect the reliability of an eyewitness's identification. Jennifer Thompson's story provides a clear example of how easily the memory of an individual changes with the slightest suggestion.<sup>92</sup> Jennifer described the step-by-step process of the identification procedure to an interviewer at the Public Broadcasting Station ("PBS").<sup>93</sup> Jennifer described the identification as follows:

After I picked (out the photograph) they looked at me and said, 'We thought this might be the one,' because he had a prior conviction . . . When I picked him out of the physical lineup and I walked out of the room, they looked at me and said, 'That's the same guy,' I mean, 'That's the one you picked out in the photo.' For me that was a huge amount of relief, not that I'd picked the photo, but that I was sure when I looked at the photo, that was him, and when I looked at the physical lineup, I was sure it was him.

The police who obtained Jennifer's identification of Ronald Cotton were not intentionally<sup>94</sup> trying to convict an innocent man. They were merely trying to obtain evidence and did not realize that their words or suggestions<sup>95</sup> permanently destroyed the identification evidence due to the malleability of Jennifer's memory.<sup>96</sup>

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91. See Wells, *supra* note 3 at 8 (citing D.J. Deckle, et al., *Children as Witnesses: A Comparison of Lineup Versus Showup Identification Methods*, 10 APPLIED COGNITIVE PSYCHOL. 1-12 (1996); Gonzales, et al., *Misidentifications and Failures to Identify in Lineups and Showups*, J. PERSONALITY AND SOC. PSYCHOL. (1994); and R. Lindsay, et al., *Simultaneous Lineups, Sequential Lineups, and Showups: Eyewitness Identification Decisions of Adults and Children*, 21 LAW AND HUMAN BEHAVIOR 391, 391-404 (1997)) (explaining that the courts have not clearly defined when a procedure is suggestive).

92. See Gary Wells, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL'Y & L. 765, 771 (1995) (stating that witnesses are easily influenced to suggestive cues and comments before and after the lineup).

93. PBS.org, *supra* note 2 (last visited Nov. 22, 2005).

94. There is documented scientific literature that shows how questioners, without awareness, can affect the answers received because of their own knowledge of the subject and their own desire to establish a case. See Gary L. Wells, et al., *Effects of Postidentification Feedback on Eyewitness Identification and Nonidentification Confidence*, 89 J. OF APPLIED PSYCHOL. 334, 336 (2004) (discussing the process of identification from live lineup to trial, and the artificial confidence of the eyewitness that suggestive police procedures create).

95. See *id.* (explaining that when given confirming or disconfirming feedback after the identification, eyewitnesses are likely to adjust their confidence level to reflect whether they were accurate or inaccurate in the identification).

96. *Id.*

The *Manson* Court, like the investigating officer in Jennifer's case, did not realize the danger suggestive procedures present to the preservation of reliable identification evidence. When a victim makes an identification and the investigating police officer confirms it, the victim becomes more certain than before and goes into court exuding that confidence, making the identification more believable to the jury despite its falsity.<sup>97</sup> This dangerous process, which the *Manson* Court failed to consider, directly contaminates the truth-finding process that any reading of the Due Process Clause demands.<sup>98</sup>

### 1. *The Emotional State of the Eyewitness*

The *Manson* court failed to consider the increased susceptibility of an eyewitness to suggestive procedures when that eyewitness was the victim of, or witness to, a traumatic crime.<sup>99</sup> When an eyewitness goes into a lineup or looks at a set of photos, the eyewitness naturally thinks that the police have done their job, and that they are presenting to him or her the right suspect.<sup>100</sup> This inherent suggestiveness accompanies all police identification procedures.

However, when an eyewitness has an emotional stake in the identification because they have been raped or been victim to some other traumatic crime, there is an extra incentive to see the crime solved, if only to bring closure and allow him or her move on with their life as soon as possible.<sup>101</sup> If the investigating officer, who also wants the crime solved, communicates to the eyewitness an idea of who the suspect is,<sup>102</sup> the victim may be more susceptible to

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97. PBS.org, *supra* note 2 (last visited Nov. 22, 2005).

98. The Court failed to recognize that the first suggestive procedure used corrupts four of the five *Manson* factors that the Court believed to have immunity from corruption. Collins, *supra* note 90, at 551 (citing Gary L. Wells & Amy Bradfield, "Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, 83 J. APPLIED PSYCHOL. 360, 374 (1998)).

99. The five factors of *Manson*'s second prong do not consider the nature of the crime itself in determining the possible reliability of the eyewitness identification. See text sec. I.B.1.b. for the five factors enunciated in *Manson*.

100. PBS.org, *supra* note 2.

101. Edwin M. Borchard, a legal scholar in the area of mistaken eyewitness identification, analyzed sixty-five cases of wrongful convictions and concluded that twenty-nine of the cases (approximately forty-five percent) were the result of mistaken eyewitness identifications. Loftus, *supra* note 77, (citing EDWIN M. BORCHARD, CONVICTING THE INNOCENT: SIXTY-FIVE ACTUAL ERRORS OF CRIMINAL JUSTICE 367 (1932)). Further, Borchard concluded that these erroneous convictions illustrate how "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." *Id.*

102. This unconscious transference of knowledge on the part of the investigating officer is one reason that many in the psychology and legal field



internalizing that information because of his or her emotional state.<sup>103</sup>

Consider the following story: In 1970, twenty-one-year-old Bobby Joe Leaster was conversing with friends on a street corner.<sup>104</sup> Suddenly, two policeman jumped out of their car, guns drawn, and accused Bobby of murdering a local store owner. Bobby was then arrested, put in the back of the squad car, and brought to a nearby hospital.<sup>105</sup> The murdered man's wife was brought to the police car to peer through the window at the arrested suspect.<sup>106</sup> The officer asked, "What do you think?" The woman began to cry and said, "Yes, this looks like the man who shot my husband . . . I see the mark on this eye."<sup>107</sup> Based solely on this identification, Bobby was sentenced to life without parole.<sup>108</sup>

Sixteen years later, through the hard work of two persistent attorneys, Bobby Joe Leaster was declared innocent after ballistics tests showed that the bullet taken from the murder victim matched a gun used in another crime that occurred two weeks after Bobby Joe was placed in custody.<sup>109</sup>

The police officers performed a one-person showup<sup>110</sup> when

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are now advocating "double blind" lineups.

103. PBS.org, *supra* note 2.

104. Loftus, *supra* note 77, at 6.

105. Commonwealth v. Leaster, 479 N.E.2d 124, 126 (Mass. 1985).

106. *Id.*

107. *Id.*

108. Loftus, *supra* note 77; *see also* Leaster, 479 N.E.2d at 128-29 (citing Commonwealth v. Moon, 405 N.E.2d 947, 951-52 (Mass. 1980)) (finding that the due process rights of the defendant were not violated when the police showed defendant to the victim's wife in a one-on-one showup; further, the identification would be denied admission only if a desire was shown on the part of the police to "stack the deck" against the defendant).

109. Charles Kenney, *Justice for Bobby Joe*, THE BOSTON GLOBE MAG., Feb. 28, 1988, available at [http://www.nodp.org/ma/stacks/b\\_leaster.html](http://www.nodp.org/ma/stacks/b_leaster.html) (last visited Nov. 22, 2005).

110. On page 27, U.S. DEPT OF JUSTICE, *supra* note 13, defines a "showup" as a "prompt display of a single suspect to a witness." *See* Loftus, *supra* note 77 (explaining that showups are dangerously suggestive because the procedure tells the witness, without giving him or her the opportunity to view anyone else (and therefore not test any memory) that the person the police presented is believed to be guilty). The suggestion of guilt can be no stronger than when a suspect is viewed arrested in the back of an officer's car. This problem also presents itself in live lineups where individuals that do not at all resemble the description of the suspect surround the suspect, who matches the description the witness gave the investigating officer.. A "foil" is a person known to be innocent who is put into the lineup with the suspect to test the memory of the witness. If the foils do not match the description of the suspect, there is no test of the witness's memory because only one person will in fact match the memory of the assailant. Gary L. Wells, et al., *Once the Selection of Distractors for Eyewitness Lineups* 78 J. APPLIED PSYCHOL. 835, 844 (demonstrating the disparities in physical attributes between the suspect and

they brought the victim's wife to the police car to witness only Bobby.<sup>111</sup> This dangerously suggestive procedure, coupled with the emotional state of the eyewitness, created in that eyewitness an inaccurate memory that resulted in the conviction of an innocent man, costing him sixteen years of his life.

In *Commonwealth v. Leaster*,<sup>112</sup> the presiding judge emphasized that the eyewitness had viewed the assailant for three minutes while he held her at gunpoint<sup>113</sup> and that the identification occurred within an hour of the crime.<sup>114</sup>

The degree of attention that a witness pays to the assailant and the period of time between the crime and the confrontation are two factors that the *Manson* Court encouraged lower courts to look to in determining the reliability of a pre-trial eyewitness identification. Yet it also mandated that lower courts ignore any suggestive police procedures used in obtaining the identification<sup>115</sup> on the theory that eyewitness identification procedures are best left in the hands of the police.<sup>116</sup> This was the exact rationale the Massachusetts Supreme Court followed when it overlooked the showup procedure used in Bobby's case and allowed the pre-trial eyewitness identification into evidence.

### III. DUE PROCESS DEMANDS EXCLUSION

As of February 5, 2005, 155 people have been exonerated by DNA.<sup>117</sup> These cases provide the tools to determine with certainty

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the fillers through lineup pictures obtained from police records).

111. The United States Supreme Court and the Supreme Court of Alabama have both discussed the inherent unreliability of one-person showups. *Wade*, 388 U.S. at 234; *Appleton*, 828 So. 2d at 899-900.

112. 479 N.E.2d 124.

113. *Id.* at 126.

114. *Id.* at 125.

115. Rather than deterring show-ups and the showing of single photographs, "the effect of *Biggers* and *Manson* has been to provide the police with a fairly clear signal that absent extremely aggravating circumstances, the one-on-one presentation of suspects to witnesses will result in no suppression." Steven Grossman, *Suggestive Identifications: The Supreme Court's Due Process Test Fails to meet Its Own Criteria*, 11 U. BALT. L. REV. 53, 60 (1981). The "totality of circumstances" test, "which places a premium on the probable guilt of the accused, will not serve as a deterrent to police use of suggestive procedures but will have the opposite result." Wallace Sherwood, *The Erosion of Constitutional Safeguards in the Area of Eyewitness Identification*, 30 HOW. L.J. 439, 478 (1987).

116. See DOYLE, *supra* note 3, at 79-80 (discussing how Justice Blackmun laid out the five factor test in *Manson* to deter judges from second guessing police procedures, as was done during the Warren Court era). After *Manson* was decided, the courts could deter unlawful searches and seizures by excluding evidence obtained from them, but could not do anything to prevent unnecessarily suggestive procedures from going to the jury. *Id.*

117. Innocence Project, *supra* note 14.

what factors or events in the investigatory and charging process created incorrect results.<sup>118</sup> Eighty percent of the first one-hundred convictions that DNA technology proved wrongful were based on, to an important extent, sincere and confident, but mistaken, witnesses.<sup>119</sup> These facts prove that the *Manson* “reliability” test is deeply flawed, and that these wrongfully convicted individuals were not tried with due process.

The *Manson* Court held that the exclusionary rule is not a constitutional predicate because “a suggestive preindictment identification procedure does not in itself intrude upon a constitutionally protected interest.”<sup>120</sup> However, the suggestive preindictment identification procedure that the investigating officer used in Jennifer Thompson’s case intruded upon Ronald Cotton’s constitutionally protected interest. Likewise, the suggestive preindictment identification procedure that the investigating officers used in Bobby Joe Leaster’s case intruded upon his constitutionally protected interest. And these are only two highly publicized cases.<sup>121</sup>

When the *Manson* Court held that the exclusionary rule “goes too far”<sup>122</sup> in guarding against the risks of misidentification, it ignored the threat to the truth-seeking process that the following fact presents: that juries are unduly receptive to eyewitness

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118. U.S. DEPT. OF JUSTICE, *supra* note 13, at III.

119. JIM DWYER ET AL., ACTUAL INNOCENCE (2000); see Margery Malkin Koosed, *The Proposed Innocence Protection Act Won't-Unless It also Curbs Mistaken Eyewitness Identifications*, 63 OHIO ST. L.J. 263, 272 (2002) (“The most frequently cited cause for miscarriages of justice is eyewitness misidentification.”); Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 LAW & CONTEMP. PROBS. 125, 136 (1998) (“Eyewitness misidentification is by far the most common cause of convictions of innocent defendants.”).

120. *Manson*, 432 U.S. at 113 n.13.

121. See PBS.org, *supra* note 2 (stating that there is “no question. . . that the number of innocent people who’ve been unjustly convicted probably runs into the thousands.”) This estimation comes from the recent FBI results on DNA exclusions. *Id.* When thinking about the suggestive police procedures used when obtaining eyewitness identifications, it is important to remember that the supervising officers that taught the current police officers how to conduct lineups are the same police officers that conducted the suggestive lineups or photo arrays that led to wrongful convictions. Ken Patenaude, *Improving eyewitness identification*, LAW ENFORCEMENT TECHNOLOGY, Oct. 2003, 178, available at <http://www.officer.com> (last visited Nov. 28, 2004). Peter Neufeld, in his remarks at the Innocence Project conference stated, “If Detective Smith conducted an unduly suggestive procedure in Case One, which resulted in a post-conviction DNA exoneration, there is an excellent chance that, that was part of his practice, and that he may have done it in other cases as well.” Peter J. Neufeld, Remarks at the Innocence Project & Benjamin Cardozo Law School Symposium on Reforming Eyewitness Identification (September 10-11, 2004); For a commentary on Neufeld’s remarks see TARYN SIMON, THE INNOCENTS (1975).

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

identification evidence,<sup>123</sup> especially when it is expressed confidently.<sup>124</sup>

### A. *The Due Process Clause*

It is not the job of the court to control police procedures. Our constitutionally-based checks and balances system does this. But it is the job of the court to safeguard constitutional rights. Due Process rights, given to all citizens under the Fourteenth Amendment, require the court's protection. Due process guarantees, at a minimum, a fair trial.

A trial is not fair when it is no longer adversarial, but only an empty ceremony void of meaningful process. The fairness of a trial vanishes when a prejudicial piece of evidence is admitted to the jury and the jury places gives weight to such evidence. For example, the jury is not going to question the validity of a confession that the defendant signed. The jury will recognize the confession as admittance of guilt, and the case will be closed. The same process occurs when the jury listens to the testimony of a sincere and honest (although mistaken) eyewitness about his or her identification of the defendant.

### B. *The Jury*

"Aside from a smoking pistol, nothing carries as much weight with a jury as the testimony of an actual witness."<sup>125</sup> The jury in the *Cotton/Thompson* case knew that Jennifer had poor eyesight and that she had not been wearing her glasses at any time during the assault.<sup>126</sup> They also knew that Cotton's blood type did not match the semen stains and that Jennifer's first photo identification was given in a tentative manner.<sup>127</sup> Yet they still placed implicit faith in Jennifer's in-court testimony.

The *Manson* Court was "content to rely upon the good sense and judgment of American juries . . . Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature."<sup>128</sup> This contentment with a jury's truth-finding capabilities led the *Manson* Court to create a test that has allowed numerous

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123. *Id.* at 119-20 (Marshall, J., dissenting), (citing P. WALL, *EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES* 19-23 (1965); N. SOBEL, *EYE-WITNESS IDENTIFICATION: LEGAL AND PRACTICAL PROBLEMS*, §§ 3.01, 3.02, 30 (1972), and H.A. Hammelmann & Glenville Williams, *Identification Parades-II*, *CRIM. L. REV.* 545, 550 (1963).

124. PBS.org, *supra* note 2.

125. Loftus, *supra* note 77.

126. DOYLE, *supra* note 3, at 42.

127. *Id.*

128. *Manson*, 432 U.S. at 116.

unreliable and incorrect eyewitness identifications into evidence for the susceptible jury to rely on.

The *Manson* Court held that identification testimony is only evidence, and “is not a factor that goes to the very heart . . . of the adversary process.”<sup>129</sup> However, because of the weight a jury places upon a confident eyewitness’s testimony, the identification testimony is an outcome-determinative piece of evidence. The *Manson* test did not consider the impact that unreliable identification testimony would have on the truth-finding process, as well as society as a whole.<sup>130</sup> When a juror listens to a victim testify that, “I was there, I saw it, that’s the guy, I’ll never forget the face, I’m absolutely positive,” it is very hard to weaken the juror’s belief in the accuracy of that testimony. Cross-examination cannot weaken it because by the time the witness is on the stand, they have told their story multiple times and, most importantly, from a subjective standpoint they are being completely honest.<sup>131</sup>

When the admission of particular evidence would be so prejudicial to a defendant as to deprive the defendant of a fair trial, that evidence should be excluded. The *Manson* Court effectively deemed the improper admission of eyewitness identification testimony as harmless error and perceived the risk of unnecessary exclusion of evidence as being greater than the risk

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129. *Manson*, 432 U.S. at 113.

130. Consider the “Ford Heights Four” case. Thomas P. Sullivan, *Close Encounters of the first kind: A first-hand look at wrongful convictions, how they occur, and what they cost*, 87 JUDICATURE 166, 167 (2004). The case involved a murder of a young man and woman in a suburb of Chicago, Illinois. *Id.* Four young men were arrested based on the testimony of an eyewitness. The four young men were prosecuted for rape and murder. Two of the four were sentenced to death. The appeal process ended after fifteen or sixteen years. *Id.* A law student, assigned to do some investigative work on the case, discovered a police report that named four other men as the murderers. This report, which had been buried in police reports, led to the exoneration of the four men and a civil law suit that settled for more than thirty million dollars. *Id.*

131. See *Manson*, 432 U.S. at 113 (citing *Clemons v. United States*, 133 U.S. App. D.C. 27, 48, to argue that unreliable eyewitness testimony can be demonstrated to the trier of fact through the adversary process and is therefore not fatal to a fair trial. “Counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification. . . .” *Id.*; see *United States v. Downing*, 753 F.2d 1224, 1230 n.6 (3d Cir. 1985) (arguing that “to the extent that a mistaken witness may retain great confidence in an inaccurate identification, cross-examination can hardly be seen as an effective way to reveal the weakness in [that] witness’s recollection of [the] event”).

*But see* John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 AM. J. CRIM. L. 207, 210 (2001) (explaining how, despite cross-examination that casts doubt on the accuracy on the identification, empirical data indicates that jurors “tend to place great weight on eyewitness identifications and often ignore exculpatory evidence”).

of misidentification.<sup>132</sup> However, jurors' disproportionate reliance on eyewitness testimony refutes such assumed harmlessness, and the number of cases of misidentified defendants casts doubt on such an evaluation of relative risks.

The proposed exclusionary rule for suggestively obtained eyewitness identifications does not focus on deterrence of improper police procedure, although the exclusionary rule would inevitably deter many improper police procedures that take place in many jurisdictions.<sup>133</sup> The exclusionary rule focuses on and advocates the return of due process to the criminal justice system in the area of eyewitness identification. "A defendant's right to due process would be only theoretical if it did not encompass the need to establish rules to accomplish that end."<sup>134</sup> Until the legal system accepts and incorporates the science<sup>135</sup> and scientific research

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132. The *Manson* Court feared the repercussions of allowing a guilty person to go free. *Manson*, 432 U.S. at 110. However, it fails to remember that there is a very strong institutional bias that says "I might have to let some go if that means I'm not going to put an innocent person in prison." David Angel, Remarks at the Innocence Project & Benjamin Cardozo Law School Symposium on Reforming Eyewitness Identification (September 10-11, 2004). Additionally, the *Manson* Court failed to realize that eyewitness testimony should always be circumstantial evidence, and never the sole factor for conviction. Gary Wells stated, "Remember that identification is only one element to your case. If you don't get him on identification, it doesn't mean that he is walking, but it just means you don't have that." Gary Wells, Remarks at the Innocence Project & Benjamin Cardozo Law School Symposium on Reforming Eyewitness Identification (September 10-11, 2004). Accordingly, if the eyewitness testimony is not admitted, it should not be cause for reversal, or "Draconian sanction" because the jury or the trier of fact should not allow the eyewitness testimony to be the determining factor in deciding the outcome of the trial. A conviction should very sparingly be based on one element, and even more so when that one element is the eyewitness identification because of inherent unreliability proved by research and DNA.

133. The *Manson* Court let judges "off the hook" by mandating the employment of the almost mechanical two-part test to follow in pre-trial suppression hearings. DOYLE, *supra* note 3, at 80. But the Court also let police officers off the hook. The *Manson* decision "provided no motivation for reexamining or reshaping everyday routines," because of there was only an improbable chance that the eyewitness identification would not be admitted under the lenient *Manson* standard. *Id.* "[F]rom the police prospective suffering judicial punishment after *Manson* seemed as likely as being struck my lightning." *Id.*

134. *People v. Adams*, 423 N.E.2d 379, 383 (N.Y. 1981).

135. The most common reason judges give when they refuse to admit expert testimony is that eyewitness memory is a matter of common sense, and jurors will apply their own common sense to the case. However, science tells us that jurors do indeed rely on their commonsense when they decide cases, but their common sense is simply wrong. DOYLE, *supra* note 3, at 42. See Cutler, et al., *Juror Sensitivity to Eyewitness Identification Evidence*, 14 LAW AND HUMAN BEHAVIOR, 185 (1990) (demonstrating the lack of accurate knowledge on the part of jurors regarding certain variables that can greatly effect the memory of an eyewitness); PBS.org, *supra* note 2 (explaining that jurors place an

developed in the area of eyewitness identification, *per se* exclusion is the only road that will ensure the enforcement of the Due Process Clause in our courts.<sup>136</sup>

#### CONCLUSION

“When innocence itself is brought to the bar and condemned, especially to die, then, the subject will exclaim, ‘Whether I behave well or ill is of no account; for virtue itself is no security.’ And if such an idea as that takes hold in the mind of the subject, that would be the end of all security whatsoever.”<sup>137</sup>

There are police departments throughout the nation that are making major changes based upon the psychological studies and information regarding memory and suggestibility in police procedures. These police departments are actively trying to prevent misidentifications before they occur. However, there are still approximately 12,500 jurisdictions that still follow the same police procedures that were used in Ronald Cotton’s and Bobby Joe Leaster’s cases.<sup>138</sup> This shows that eyewitness identification reform is just beginning, with much still left to be done. This is where the court comes in. Criminal courts in the United States have an enormous responsibility to the citizens of America. In order for this justice to be more than theoretical, the court must enforce procedures that guarantee that the guilty go to jail and the innocent go free. Currently, the system is not working properly because it is not protecting a citizen’s most precious right: the right to due process.

“The life of the law has not been logic: it has been experience.”<sup>139</sup> Courts have continually dismissed psychological research because the research did not provide them with any

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enormous amount of faith in the memory of an eyewitness because they believe their memories are in fact reliable and unmalleable).

136. See James M. Doyle, *Two Stories of Eyewitness Error*, 27 CHAMPION 24 (2003) (stating that one reason trial judges are wary of expert testimony is because the experts are incapable of determining whether the particular witness on trial is wrong or right). Additionally, judges are worried that the eyewitness experts will raise doubt about all eyewitnesses, taking down the truly reliable witnesses with those that are unreliable. *Id.*

137. DOYLE, *supra* note 3 at 203, (citing *Rex v. Wemms*, in L. WROTH, 3 *Legal Papers of John Adams* 242 (1965)). Justice Brandeis articulated a similar sentiment when he stated: “Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.” *Olmstead v. United States*, 277 U.S. 438, 485 (1928): (J. Brandeis, dissenting).

138. DOYLE, *supra* note 3 at 204.

139. *Id.* at 6, (citing OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881)).0

concrete, experienced-based proof.<sup>140</sup> Eyewitness testimony is the court's oldest form of proof. But if it is experience that will finally push the courts to change, the DNA exonerations provide that experience. The Court must become part of the needed reform in the area of eyewitness identification, and bring back the fundamental security to the criminal justice system: due process.

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140. See DOYLE, *supra* note 3, at 24 (stating that one reason trial judges are wary of expert testimony is because the experts are incapable of determining whether the particular witness on trial is wrong or right). Additionally, judges are worried that the eyewitness experts will raise doubt about all eyewitnesses, taking down the truly reliable witnesses with those that are unreliable. *Id.*



