FRESH EYES: *YOUNG V. STATE*'S NEW EYEWITNESS IDENTIFICATION TEST AND PROSPECTS FOR ALASKA AND BEYOND

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This Note evaluates recent developments in Alaska's eyewitness identification admissibility doctrine under the 2016 case Young v. Alaska. *For the past four decades, federal and most state courts have relied on the Supreme Court's 1977 ruling in* Manson v. Brathwaite, *which identified five admissibility factors – known as the "*Biggers *factors" – for establishing the reliability of eyewitness identifications made under the influence of unnecessarily suggestive police procedures ("systemic variables"). In recent decades, however, social and psychological science has demonstrated the flaws in the five* Biggers *factors as reliability indicators and the impact of non-suggestive circumstantial (or "estimator") variables on eyewitness identification reliability. In* Young, *Alaska joined New Jersey and Oregon as the third state to break from* Brathwaite, *employing a new and evolving admissibility test with scientific support, consideration of both systemic and estimator variables, and a call for corresponding jury instructions.*

In 2016, the Alaska Supreme Court broke step with nearly forty years of established criminal procedure through its decision in *Young v. Alaska*,[1] adopting a new test for the admission of eyewitness identifications. In *Young*, Alaska opened pre-trial hearings on the reliability of eyewitness identifications to evidence and consideration of both systematic and circumstantial flaws that may affect those identifications.[2] Until recently, both federal and state courts, following the

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1. 374 P.3d 395 (Alaska 2016).
2. *Id.* at 427.

United States Supreme Court's 1977 decision in *Manson v. Brathwaite*,[3] have employed a narrow definition what constitutes a suggestive procedure and set aside concerns about reliability even when faced with clearly manipulated identifications.[4] *Young* looks squarely at the unreliability of eyewitness identifications and suggests new and greatly improved mechanisms for assessing it. In doing so, Alaska aligns itself with other states that have drawn on recent social science to update the court's treatment of problematic eyewitness identifications.[5]

Young carefully confronts and—where appropriate—uproots longstanding conceptions about the reliability of eyewitness identifications, accounting for modern scientific insights about the malleability of such identifications. For example, careful study has helped identify the difference between system variables—suggestive influences manufactured by the state—and estimator variables—circumstantial factors which internally influence eyewitnesses and may also lead to flawed identifications.[6] Following the lead of other state courts that have departed from *Brathwaite*, *Young* incorporates numerous psychological and sociological studies in creating additional procedural steps that address system variables, while calling for further development of guidelines that can combat estimator flaws.[7] For instance, *Young* created

3. 432 U.S. 98, 114 (1977) (declaring that reliability is the "linchpin in determining the admissibility of identification testimony" and providing five factors to test reliability).

4. *See, e.g.*, Perry v. New Hampshire, 565 U.S. 228, 241 (2012) (limiting review for admissibility of eyewitness identifications to suggestive conduct arranged by police, such as "improper lineups, showups, and photo arrays"); *Brathwaite*, 432 U.S at 114 (addressing only five factors which may be manipulated by suggestive policing procedures); Holden v. State, 602 P.2d 452, 456 (Alaska 1979) (stating that an accusation of a suspect by means of a single photograph is improper, yet that its admission is not necessarily reversible error because it may still be reliable, "as weighed against the corrupting effect of the suggestive identification itself").

5. *See, e.g.*, State v. Henderson, 27 A.3d 872, 919–22 (N.J. 2011) (devising a new reliability test based on a wide range of non-exclusive factors to determine admissibility of eyewitness identifications); State v. Lawson, 291 P.3d 673, 696–97 (Or. 2012) (creating an eyewitness identification admissibility test based on the Oregon Evidence Code's admissibility rules, including those on personal knowledge and unfair prejudice, with a presumption of unreliability and unfair prejudice arising from suggestive police procedures).

6. *See Young*, 374 P.3d. at 417–26 (identifying system and estimator variables and describing their psychological impact on witnesses through a thorough review of peer-reviewed literature).

7. *See, e.g.*, State v. Henderson, 27 A.3d 872, 919–22 (N.J. 2011) (citing peer-reviewed studies). *Young* bases much of its analysis on other studies, including Roy S. Malpass et al., *The Need for Expert Psychological Testimony on Eyewitness Identification*, *in* EXPERT TESTIMONY ON THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION 3, 14 (Brian L. Cutler ed. 2009) (recognizing the rigor of testing and peer-reviewed quality control required for principles to gain general acceptance

an additional procedural step that uses evidentiary hearings to address system and estimator variables.[8] While this step does not altogether eliminate the various dangers that eyewitness identification flaws create,[9] it does effectively shift the focus from a myopic procedural view of the benefits of eyewitness identifications to a broader appreciation of the positive *and* negative impacts of such evidence on criminal trials.[10] Although Alaska is not the first state to depart from the *Brathwaite* doctrine and adopt such a test,[11] this Note looks at *Young*'s innovation in Alaskan criminal procedure and suggests that other states should consider if such a break from historical doctrine could also serve their criminal justice systems well and more closely align with their state constitutional guarantees of due process.

The Alaska Supreme Court's decision in *Young* builds on the decisions of other state courts that have broken with federal jurisprudence. While the federal courts have focused on a narrow concern with police suggestiveness, as reinforced in 2012 by the Supreme Court in *Perry v. New Hampshire*,[12] *Young* broadens the focus in Alaska by taking into account recent trends in other states, advanced social science on suggestiveness and circumstantial reliability factors, and the often weighty impact of flawed eyewitness identifications in wrongful convictions.[13] Basing its holding on these doctrines and scientific progress, the Alaska Supreme Court has created a flexible, adaptable method for protecting criminal proceedings from many of the corrupting effects of unreliable eyewitness identifications. *Young* not only forges a path forward for Alaska but also serves as a beacon of progress for states

in the scientific community); ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 21 (Harvard Univ. Press 1996) (detailing the three steps in the process of memory and dispelling the notion that memory operates like a recording). There are also a multitude of studies on the effects of state-induced and circumstantial variables that impact reliability summarized in REPORT OF THE SPECIAL MASTER, State v. Henderson, A-8-08, at 79 (N.J. June 18, 2010).

8. *See Young*, 374 P.3d at 427.

9. *Henderson*, 27 A.3d at 922 ("[w]e recognize that scientific research relating to the reliability of eyewitness evidence is dynamic; the field is very different today than it was in 1977, and it will likely be quite different thirty years from now").

10. *See generally Young*, 374 P.3d at 416–26 (broadening admissibility considerations far beyond a five-factor reliability test and balancing the need for eyewitness identifications with the risks they present).

11. *See Henderson*, 27 A.3d at 919–22 (detailing New Jersey's eyewitness admissibility test on which *Young* is substantially based).

12. 565 U.S. 228, 241 (2012) (holding that a due process remedy will only be considered for an "*unnecessarily suggestive identification procedure*" and that *Brathwaite* "comes into play only after the defendant establishes improper police conduct").

13. *See generally Young*, 374 P.3d at 413–26.

in the lower forty-eight still in need of comprehensive procedural reform beyond the *Brathwaite* and *Perry* precedents.[14]

I. THE JURISPRUDENTIAL BACKGROUND

A. The *Brathwaite* Doctrine

Modern federal eyewitness identification jurisprudence—which the majority of states still follow—stems from the Supreme Court's 1977 case, *Manson v. Brathwaite*, which considered the issue of excluding suggestive eyewitness out-of-court identifications from criminal trials under the Fourteenth Amendment's Due Process Clause.[15] In that case, Nowell Brathwaite was charged with, and convicted of, possession and sale of heroin in Connecticut state court.[16] The prosecutor tied Brathwaite to the heroin exclusively through an identification made by an undercover state trooper, who had purchased drugs from a man behind an apartment door that had been opened twelve to eighteen inches.[17] After the purchase, the trooper returned to police headquarters and spoke with other officers, where he described the seller's appearance.[18] One of those other officers went to the police's records department and retrieved a photograph of Brathwaite, who he suspected might be seller.[19] The trooper who made the purchase identified Brathwaite based on review of that single photograph, rather than a photo array, and identified Brathwaite in court eight months later.[20]

The district court considered two constitutional issues: whether the police used a suggestive tactic to obtain the out-of-court identification, and if so, whether that suggestive tactic, under the totality of the circumstances, led to a "substantial likelihood of irreparable misidentification."[21] Three eyewitness identification doctrines promulgated by the Supreme Court laid the main foundation for *Brathwaite*'s analysis of the admissibility of the undercover agent's identification and, more broadly, the admission standard still employed

14. *Id.* at 416 ("In the belief that a new approach—based on a better understanding of the factors affecting the reliability of eyewitness identifications—will lead to the exclusion of unreliable evidence and thereby reduce the risk of wrongful convictions, we conclude that breaking away from our long reliance on the *Brathwaite* test will do more good than harm.").
15. Manson v. Brathwaite, 432 U.S. 98, 99 (1977).
16. *Id.* at 101–02.
17. *Id.* at 107.
18. *Id.* at 101.
19. *Id.*
20. *Id.* at 101–02.
21. *Id.* at 107.

in federal courts today: *Stovall v. Denno*,[22] *Simmons v. United States*,[23] and, perhaps most significantly, *Neil v. Biggers*.[24]

The first of these cases, *Stovall,* opened the door to the possibility of exclusion for identifications obtained through police procedures that are unnecessarily suggestive.[25] However, its holding by no means provided for automatic exclusion whenever an identification passed the unnecessarily suggestive threshold.[26] *Stovall* imposed a totality of the circumstances test on eyewitness identifications subject to suggestiveness to determine the permissibility of admission.[27] Before allowing the petitioner in *Stovall*—suspected of stabbling the witness after killing her husband—time to retain counsel, the police escorted him into the witness's hospital room for identification.[28] Although individually presenting a suspect to a witness for identification is and was, at the time *Stovall* arose, a widely-condemned practice, the Court said that the "imperative" nature of the witness's identification, given the circumstances, outweighed the concerns about suggestiveness surrounding the identification.[29] The Supreme Court found the admission of the identification therefore did not violate the petitioner's right to due process,[30] as "a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it," and the necessity of the identification heavily factored into that equation.[31]

Brathwaite also built on the holding of *Neil v. Biggers*, decided five years after *Stovall*, which examined the reliability of an eyewitness identification procured from a show up (where officers bring a suspect back to the crime scene to be identified by witnesses there).[32] The *Biggers*

22. 388 U.S. 293 (1967).
23. 390 U.S. 377 (1968).
24. 409 U.S. 188 (1972).
25. *Stovall*, 388 U.S. at 302.
26. *Brathwaite*, 432 U.S. at 113.
27. *Stovall*, 388 U.S. at 302.
28. *Id.* at 295.
29. *Id.* at 302. In *Stovall*, the Court of Appeals en banc noted that the witness, who identified the defendant in her hospital room, was the only person who could exonerate him. *Id.* Her identification was deemed "imperative," although the defendant was the only black man in the room at the time of the identification, conducted in the presence of police officers. *Id.*
30. *Id.* at 296.
31. *See id.* at 302 (considering the following factors in the "totality of the circumstances": the spouse was the one person who could exonerate the defendant; the hospital was close to the courthouse and jail; the risk that the witness would not live much longer; the witness could not visit the jail; and taking the defendant to the hospital was the only way to conduct an identification, as, under the circumstances, a lineup was not possible).
32. *See* Neil v. Biggers, 409 U.S. 188, 201 (1972) (holding that the admission of

Court inquired whether, "under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive,"[33] and announced five factors to help determine the reliability of an eyewitness identification made under suggestive conditions.[34] The factors were:

> [T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.[35]

By limiting the scope of the inquiry to the relationship between suggestiveness by police and misidentification, *Biggers* concluded that if the identification was reliable under the stated factors, then even a suggestive procedure would not bar its admission on due process grounds.[36]

Following *Biggers*, two approaches regarding the issue of suggestive eyewitness identifications emerged in the circuit courts.[37] The first approach, recognizing the issues raised in *Stovall* and *Biggers* but discontent with their preference for inclusion of still potentially unreliable identifications, called for exclusion of identifications obtained through unnecessarily suggestive procedures, regardless of reliability (commonly referred to as the "per se approach").[38] The second approach, informed by the totality of the circumstances test in *Stovall* and the reliability calculus promulgated in *Biggers*, rejected a per se rule of exclusion in favor of balancing the results of these two factual inquiries.[39] This approach admitted that eyewitness identification may be suggestive, but could nevertheless be admitted because the *Biggers* factors indicated some reliability.[40]

While the *Brathwaite* Court recognized that the exclusion of all identifications procured through unnecessarily suggestive police procedures could create a deterrent effect,[41] the Court adopted a totality

an identification made pursuant to a showup and voice identification of the suspect, where he was accompanied by two detectives walking him past the victim seven months after the rape in question, did not violate due process).

33. *Id.* at 199.
34. *Biggers*, 409 U.S. at 199–200.
35. *Id.*
36. Manson v. Brathwaite, 432 U.S. 98, 106 (1977).
37. *Id.* at 110.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 112.

of the circumstances approach in order to balance the societal benefit of positively influencing police behavior through the exclusionary rule with the cost of excluding relevant and "reliable" evidence from consideration by the trier of fact.[42] In concluding its evaluations of these approaches, *Brathwaite* declared: "reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-*Stovall* confrontations."[43] *Brathwaite* established the *Biggers* factors as the prevailing federal doctrine in determining the admissibility of eyewitness identifications subject to unnecessarily suggestive police procedures.[44] *Brathwaite's* determination of unnecessary suggestiveness, combined with *Biggers'* admissibility determination for identifications deemed unnecessarily suggestive, remains the two-pronged test in federal courts, despite its reliance on outdated psychological conceptions of reliability and the absence of meaningful procedural protections against the many inherent flaws of eyewitness identifications.[45]

B. *Henderson*, *Perry*, and The Federal-State Divide

Thirty-four years after *Brathwaite* announced its admissibility test for eyewitness identifications procured by unnecessarily suggestive police procedures, New Jersey initiated a movement away from the totality of the circumstances test.[46] In 2011, in *State v. Henderson*, the Supreme Court of New Jersey adopted an eyewitness identification admissibility test grounded in scientific reseach.[47] But in 2012, the Supreme Court further entrenched the outdated *Brathwaite* doctrine in the federal courts through its holding in *Perry v. New Hampshire*.[48] These two cases, decided just five months apart, brought to light a deep division between the federal and

42. *See id.* at 110–12 (evaluating the costs and benefits of the per se and totality rules on the factors of reliability, deterrence, and the effect on the administration of justice).

43. *Id.* at 114.

44. *Id.*

45. *See* State v. Henderson, 27 A.3d 872, 919–22 (N.J. 2011). *Henderson*, the first state decision to broaden the scope of due process protections against suggestiveness and estimator variables, incorporated modern social scientific understandings about the effect of police procedure on identifications as well as inaccurate assumptions about the inherent validity of eyewitness identifications. *See generally id.*

46. *See id.* at 877–922 (rejecting many of the principles of *Brathwaite*, explaining modern understandings about eyewitness reliability, and establishing a new admissibility test).

47. *See id.* at 919–22 (detailing new admissibility requirements and due process protections).

48. *See* Perry v. New Hampshire, 565 U.S. 228, 245 (2012) (refusing to broaden the domain of due process protections beyond *Brathwaite's* recognition of suggestive procedures and application of the *Biggers* factors).

state courts in answering the question: under the Fifth and Fourteenth Amendment right to due process of law, should courts develop procedures to protect against eyewitness identification flaws that go *beyond* the scope of direct and pre-arranged suggestive police techniques—and if so, what should those be?[49]

The Supreme Court Speaks Again in Perry

Perry highlighted the current federal eyewitness admissibility doctrine's emphasis that reliability inquiries arise *only* where an improper police influence has potentially impacted the identification.[50] In other words, improper influence serves as a threshold for any judicial inquiry into the reliability of an identification, regardless of surrounding circumstances arising outside of police control.[51] The petitioner in *Perry* was convicted on state theft charges.[52] The eyewitness identification in question occurred in response to a police officer asking a witness, who had indicated that she had seen a man breaking into cars in her apartment building's parking lot, to describe what she had seen.[53] When the officer asked her for a more specific description of the man, she pointed out her kitchen window at the petitioner, who was standing in the parking lot with another officer.[54] Perry argued that the admission of this identification at his trial was error, as suggestive circumstances alone "suffice to trigger the court's duty to evaluate the reliability of the resulting identification before allowing presentation of the evidence to the

49. *Compare Henderson*, 27 A.3d at 922–23 (expanding the variables judges in pre-trial admissibility hearings should consider beyond unnecessary suggestion and the *Biggers* factors), *with Perry*, 565 U.S. at 241 (limiting any opportunity for exclusion of an identification to instances of "unnecessarily suggestive" identification procedures).

50. *Perry*, 565 U.S. at 231 (holding that if "indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth").

51. *Id.* at 261–62 (Sotomayor, J., dissenting) (noting that the Court sets "a high bar for suppression[] [and] [t]he vast majority of eyewitnesses proceed to testify before a jury" as a result of the narrowly defined due process protection recognized in federal courts pursuant to eyewitness identifications); *see also* Dunnigan v. Keane, 137 F.3d 117, 128 (2d Cir. 1998); United States v. Bouthot, 878 F.2d 1506, 1516 (1st Cir. 1989); Thigpen v. Cory, 804 F.2d 893, 895 (6th Cir. 1986); Green v. Loggins, 614 F.2d 219, 223 (9th Cir. 1980) (declining in each case to find due process violations on claims of improper police influence).

52. *Perry*, 565 U.S. at 234.

53. *Id.*

54. *Id.*

jury."[55] The Court disagreed with the petitioner's proposed rule to subject any suggestive eyewitness identification to judicial prescreening.[56]

Discussing the reasons for its rejection of the petitioner's requested standard, the Court noted that the reliability "linchpin" announced in *Brathwaite* "comes into play only after the defendant establishes improper police conduct."[57] Without evidence of suggestion, the second prong of *Brathwaite*—determining reliability once a procedure is found to be suggestive—does not apply and cannot result in the exclusion of an identification.[58] This is true even if the conditions surrounding the identification were tainted with indicia of unreliability, such as the effects of stress the witness experienced when making the identification, how long the witness observed the suspect, or biases associated with the race of the witness and the suspect.[59] The Court in *Perry* effectively limited constitutional due process protections against flawed eyewitness identifications to a narrow set of unfair police practices.[60] Even though the Court had long acknowledged that "the annals of criminal law are rife with instances of mistaken identification,"[61] it defined improper influence in a way that placed circumstantial and inherent flaws in identification procedures beyond judicial reach, as such flaws cannot easily be linked to overt suggestion. In the aftermath of *Perry*, courts remain relegated to the suggestiveness framework provided by *Brathwaite*, while factors identified by modern social science as equally likely to cause improper influence go unaddressed.

The Supreme Court's decision in *Perry* further illustrated the federal courts' traditional failure to serve an activist role in improving criminal procedure and their delay in accounting for scientific developments.[62]

55. *Id.* at 236.

56. *Id.* at 240.

57. *Id.* at 241; *see also id.* at 245 ("The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen out such evidence for reliability . . . .").

58. *Id.* at 243–44.

59. *Id.*

60. *See id.* at 232–33 (limiting the definition of such unfair practices to suggestive circumstances arranged by law enforcement officers, such as lineups, showups, and photographic arrays).

61. United States v. Wade, 388 U.S. 218, 228 (1967).

62. *See, e.g.*, BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 63 (2011) (referring to *Brathwaite*'s test as "toothless" in ensuring due process); Michael H. Hoffheimer, *Requiring Jury Instructions on Eyewitness Identification Evidence at Federal Criminal Trials*, 80 J. CRIM. L. & CRIMINOLOGY 585, 586–87 (1989) (explaining federal courts have generally encouraged but not mandated powerful eyewitness identification jury instructions); Robert Couch, *A Model for Fixing Identification Evidence After Perry v. New Hampshire*, 111 MICH. L. REV. 1535, 1536 (2013) (noting *Perry*'s failure to set a post-*Brathwaite* standard exemplifies that real reform must be state-led).

The Supreme Court has taken some steps to identify and correct procedural problems often involved in misidentifications, such as the issue of independent origins of in-court identifications in *United States v. Wade*, where the Court held that a trial court must hold a hearing to determine whether an in-court identification has an independent source where it is unclear whether it originated from a defendant's observations or a police lineup subject to improper influence.[63] However, state courts and legislatures have more frequently and quickly implemented much deeper change. For example, states have diligently worked to develop investigatory committees, new statutes, and procedural remedies to address issues of admissibility of misidentifications, poor jury instructions regarding reliability of eyewitness identifications, false confessions, and other unreliable evidence which often leads to wrongful convictions.[64] Federal courts, in contrast, have largely relegated the search for solutions to the states and adopted few measures to combat common procedural issues in areas such as eyewitness identifications, hearsay, and false confessions.[65] This apathy and lack of urgency within the federal system to account for science is especially dangerous in the context of eyewitness identification procedures because assumptions about eyewitnesses in traditional jurisprudence are not only lagging or incomplete, they are often entirely opposite from the truth.[66]

New Jersey Breaks with Brathwaite

At the state level, the New Jersey Supreme Court has led the way in appreciating how important modern social science should impact courts' review of eyewitness identifications through its decision in *Henderson*. *Henderson* not only identified *Brathwaite* reliability factors that may have a counterintuitive impact on reliability such as confidence, degree of attention, and opportunity to view the crime, but integrated new scientifically-supported reliability factors into its new eyewitness identification admissibility test.[67] The case involved an eyewitness who,

63. *Wade*, 388 U.S. at 242.
64. GARRETT, *supra* note 62, at 241–52.
65. *Id*.
66. REPORT OF THE SPECIAL MASTER, *supra* note 7, at 79 (noting three of five reliability factors utilized by *Brathwaite* test are in fact unreliable, as they are often "strengthened by the suggestive conduct against which they are to be weighed": confidence, degree of attention, and opportunity to view the suspect).
67. State v. Henderson, 27 A.3d 872, 919 (N.J. 2011) (laying new framework for admissibility test which would "consider all relevant factors that affect reliability in deciding whether an identification is admissible; that is not heavily weighted by factors that can be corrupted by suggestiveness; that promotes deterrence in a meaningful way; and that focuses on helping jurors both understand and evaluate the effects that various factors have on memory").

unable to identify the picture of the defendant in a photographic lineup following the crime, was told by an officer to "just do what you have to do, and we'll be out of here."[68] During a pre-trial hearing to the validity of the identification, the witness testified that he felt he was being nudged into making a certain choice.[69] Subjecting the identification to the *Brathwaite* test—requiring determination of whether the police procedures were unnecessarily suggestive and, if so, whether the identification was admissible nonetheless because it met the *Biggers* factors—the trial court found the identification admissible under the totality of the circumstances.[70] The Appellate Division reversed, however, concluding that the photographic lineup was impermissibly suggestive, and thus required exclusion, because the investigating officers, by their statements to the witness, deliberately intruded in order to influence the witness's choice.[71]

Before the Supreme Court of New Jersey, the parties and amici suggested that *Brathwaite* and New Jersey's own photographic identification test, in *State v. Madison*,[72] were ill-adapted to scientific research relevant to eyewitness identifications.[73] A report produced by the Special Master reviewed over 360 exhibits, including over 200 scientific studies of the influence of human memory on eyewitness identifications.[74] It also considered testimony from seven experts in the fields of psychology, criminal defense, and wrongful convictions during a ten-day remand hearing.[75] In response to the studies and testimony

68. *Id.* at 881.
69. *Id.*
70. *Id.* at 881–82.
71. *Id.* at 884.
72. 536 A.2d 254, 255, 265 (N.J. 1988). *Madison* addressed whether out-of-court, police-conducted photographic identification procedures were so impermissibly suggestive that they gave rise to a substantial likelihood of an irreparable mistaken identification. *Id.* The court, falling in line with *Brathwaite* and *Wade*, held that the defendant had to sufficiently establish undue suggestiveness to receive a reliability hearing, and if so, the burden shifted to the State to prove by clear and convincing evidence that the identification's source was independent. *Id.*
73. *Henderson*, 27 A.3d at 884.
74. *Id.*
75. *Id.* at 884–85. The Innocence Project, amicus curiae, called Dr. Gary L. Wells, Distinguished Professor of Psychology at Iowa State University; Professor James M. Doyle, Director of the Center for Forensic Practice at John Jay College of Criminal Justice; and Dr. John Monahan, Distinguished Professor of Law at the University of Virginia with a Ph.D. in Clinical Psychology. *Id.* The defendant called Dr. Steven Penrod, Distinguished Professor of Psychology at the John Jay College of Criminal Justice; and Professor Jules Epstein, Associate Professor of Law at Widener University School of Law. *Id.* The State called Dr. Roy Malpass, Professor of Psychology at the University of Texas, El Paso. *Id.* Drs. Wells, Penrod, and Malpass testified about scientific research in the eyewitness identification

presented, the Report of the Special Master encompassed a broad range of psychological findings on human memory, a field which had only just begun to receive the attention of researchers during the 1970s, prior to *Brathwaite*.[76] The Report recognized, from the research and testimony presented, that human memory "does not function like a videotape, accurately and thoroughly capturing and reproducing a person or event," but is "a constructive, dynamic and selective process."[77] Instead, human memory functions in three stages: the acquisition stage (where information is perceived and enters the viewer's memory system), the retention stage (the period of time which passes between perception and the viewer's attempt to recall the event), and the retrieval stage (where the viewer attempts to recall the event).[78]

Because many variables can influence the reliability of the information stored at any stage in the memory process, divorcing considerations of suggestiveness from relevant reliability concerns, as the two-pronged *Brathwaite* test does, fails to allow for an evaluation of the true totality of the circumstances .[79] If a witness's self-reported certainty, degree of attention, and opportunity to view the suspect are positively correlated with the level of suggestion provided by the police in making the identification, it makes little sense to uphold the admission of the identification—even if found unnecessary and improperly suggestive—because the circumstances of the identification as self-reported by the witness deem it "reliable."[80]

The factors that can influence memory and, specifically, eyewitness identification accounts fall into two categories: system variables and estimator variables.[81] System variables include circumstances and procedures under the control of law enforcement or, more broadly, the criminal justice system.[82] These factors include—but are not limited to—blind administration (such as in conducting a lineup procedure), pre-identification instructions, lineup construction, avoiding feedback and recording confidence, multiple viewings, simultaneous versus sequential

field. *Id.*

76. REPORT OF THE SPECIAL MASTER, *supra* note 7, at 8–9.

77. *Id.* at 9 (referring to research principles from ELIZABETH E. LOFTUS ET AL., EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL § 2:2 (5th ed. 2014)).

78. LOFTUS ET AL., *supra* note 77.

79. Steven Penrod et al., *The Reliability of Eyewitness Testimony: A Psychological Perspective, in* THE PSYCHOL. OF THE COURT ROOM 119, 122–46 (1982).

80. REPORT OF THE SPECIAL MASTER, *supra* note 7, at 10.

81. Gary L. Wells, *Applied Eyewitness-Testimony Research: System Variables and Estimator Variables*, 36 J. PERSONALITY & SOC. PSYCHOL. 1546, 1546 (1978).

82. *Id.*

lineups, composites, and show ups.[83] The *Brathwaite* factors generally parallel these system factors.

In contrast, estimator variables—which are often highly influential—are largely extraneous to the criminal justice system. They include characteristics of the witness or perpetrator and circumstances surrounding the identification itself.[84] While estimator variables are also capable of negatively impacting the reliability of an eyewitness identification, they are not accounted for in *Brathwaite*'s suggestiveness and reliability test.[85] Estimator variables include—but are not limited to—stress, weapons focus, duration, distance and lighting, witness characteristics (such as age and intoxication), characteristics of the perpetrator (such as changes in facial features and disguises), memory decay, race-bias, private actors (non-State actors who expose the witness to opinions, photographs, descriptions, or other influential information), and the speed of the identification.[86] The factors provided in *Biggers*—opportunity to view the criminal at the time of the crime, degree of attention, accuracy of prior description of the criminal, level of certainty at the time of the confrontation, and the time between the crime and confrontation—while not innately reliable, are also considered estimator variables.[87]

The New Jersey Supreme Court recognized that the *Brathwaite* test rested on three assumptions in order to protect due process: "(1) that it would adequately measure the reliability of eyewitness testimony; (2) that the test's focus on suggestive police procedure would deter improper practices; and (3) that jurors would recognize and discount untrustworthy eyewitness testimony."[88] But the court noted that experience had proven these assumptions to be untrue.[89] Therefore, it

83. State v. Henderson, 27 A.3d 872, 896–903 (N.J. 2011).

84. Wells, *supra* note 81, at 1546.

85. *Henderson*, 27 A.3d at 904; *see also* Perry v. New Hampshire, 565 U.S. 228, 245 (2012) ("The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness.").

86. *Henderson*, 27 A.3d at 904–10.

87. *Id.* at 921–22.

88. *Id.* at 918 (citing Manson v. Brathwaite, 432 U.S. 98, 112–16 (1977)).

89. *See id.* at 918–19 (explaining that *Brathwaite* fails to meet its goals because courts ignore the effect of estimator variables without a finding of impermissible police action; witnesses' opportunity to view a crime, their degree of attention, and how certain they are at the time they make an identification are determined by self-reporting which is susceptible to influence by suggestive processes—rather than deterring it; suppression is the only option for suggestive evidence and few courts will sanction it; and the reliability factors are, in practice, treated more like a checklist than a totality of the circumstances test).

found that the *Brathwaite* test had burdened due process.[90] It also recognized the significant harm caused by misidentifications in jurisprudential history, relying on the alarming data presented on the connection between such flawed evidence and wrongful conviction rates.[91]

Taking into account such high risk for miscarriage of justice, the New Jersey court formed a new flexible test that addresses system and estimator variables and incorporated the scientific findings provided in the Special Master's report.[92] Accordingly, under New Jersey's *Henderson* test, to secure a pretrial hearing, the defendant must carry the initial burden of showing some evidence of suggestiveness which would result in a misidentification, generally tied to a system variable.[93] Next, the burden shifts to the State to offer proof of reliability, whether in the form of system or estimator variables.[94] The court may at any time end the hearing on grounds that the threshold claim of suggestiveness is baseless.[95] The defendant, who carries the ultimate burden of proving a "very substantial likelihood of irreparable misidentification," can cross-examine eyewitnesses and police officers and present evidence linked to system or estimator variables.[96] Then, based on the totality of the circumstances from the evidence presented, if the court finds a very substantial likelihood of irreparable misidentification, it should suppress the eyewitness identification.[97] If not, upon admitting the identification to the trier of fact, the court should give tailored jury instructions to appropriately guide juries through the system and estimator variables that may have influenced the reliability of a given identification.[98] The instruction may include a list of variables that may disrupt an accurate

90. *See id.* (disapproving the following aspects of the *Brathwaite* test: (1) estimator factors are ignored unless impermissibly suggestive police conduct is shown, and only then may the five estimator factors announced in *Biggers* be considered; (2) three of the five *Biggers* factors may be skewed by suggestive procedures; (3) rather than deterring police suggestiveness, the *Brathwaite* test may reward it because more suggestion is correlated with higher confidence and more favorable reports about the viewing conditions; (4) *Brathwaite* only addresses the option of suppression; and (5) the totality of the circumstances mandate is undermined by the *Biggers* factors, which are often used as a checklist).

91. *Id.* at 929; *see also* GARRETT, *supra* note 62, at 48 (finding eyewitnesses misidentified 76% of the exonerees in a 250-case study of wrongful convictions overturned by DNA evidence).

92. *See Henderson*, 27 A.3d at 917 (acknowledging consistency in scientific experimentation on eyewitness identifications and variables that influence them).

93. *Id.* at 920.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 924.

identification and language to warn jurors of potential flaws in otherwise seemingly correct identifications. For example, a model jury instruction reads: " Although nothing may appear more convincing than a witness's categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken."[99]

The *Henderson* test does two things for litigants of identifications. First, by broadening the factors that a judge in a pre-trial admissibility hearing can consider, it departs from the scientifically-fallible assumptions about the reliability of eyewitness identifications in *Brathwaite* and forces the State to prove a much higher degree of independent reliability from eyewitness identifications before it can be submitted to the trier of fact.[100] Second, it inverts the burden of production in a peculiar way: shifting the responsibility to the defendant to show evidence of variables which detract from the identification's reliability, rather than focusing on the five *Biggers* factors, evidence of which the *State* would carry the burden of providing under *Brathwaite*.[101] Yet this actually works to the benefit of the defendant, as the range of admissible variables is much broader (possessing no definitive limit) and serves to *defeat* the identification's reliability instead of only focusing on the availability of State evidence to support it.[102] As for the judge, the *Henderson* test still affords a measure of discretion on the issue of whether expert testimony on reliability of eyewitness identifications will be beneficial to the jury, as well as discretion to redact portions of an identification in rare cases pursuant to New Jersey's version of the Federal Rule of Evidence 403.[103]

Finally, the last piece to the *Henderson* test takes into account that jurors often "do not evaluate eyewitness memory in a manner consistent with psychological theory and findings."[104] Instead, jurors tend to deprioritize factors such as distance and lighting, while giving disproportionate weight to factors such as the witness's confidence.[105] The

99. COMM. ON MODEL CRIM. JURY CHARGES, NON 2C CHARGES: IDENTIFICATION: IN AND OUT-OF-COURT IDENTIFICATIONS (Sept. 4, 2012), https://www.judiciary.state.nj.us/attorneys/assets/criminalcharges/idinout.pdf.

100. *Henderson*, 27 A.3d at 919.

101. *Id.* at 920–22.

102. *Id.*

103. *See id.* at 925 (explaining that although revised jury instructions should serve to reduce the need for such expert testimony, such discretion is allowed in the rare instance where a redaction accomplishes a balance between the need for relevant evidence and the prejudicial concerns of Rule 403); *see also* OR. REV. STAT. § 40.160 (2017) ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . .").

104. Brian L. Cutler et al., *Juror Sensitivity to Eyewitness Identification Evidence*, 14 LAW & HUM. BEHAV. 185, 190 (1990).

105. *Id.*

Henderson test, given the reality that most eyewitness identifications will be admitted, ensures that jurors receive adequate instructions about the many factors affecting identifications, some of which are not only non-intuitive but counterintuitive.[106] For example, while a juror may consider a witness's confidence highly telling of the identification's accuracy, confidence is a factor easily manipulated by suggestive techniques and may, therefore, be indicative that the identification is actually unreliable.[107] The New Jersey Supreme Court charged the state's Criminal Practice Committee and the Committee on Model Criminal Jury Charges with drafting revised jury instructions incorporating those system and estimator variables, which the court found to be supported by generally accepted scientific principles.[108] Given the significant impact of own-race bias in eyewitness identifications,[109] the court also charged the committees to draft a jury instruction specifically for cases involving cross-racial identification.[110]

C. Gaining Traction: Other States Join the Trend

One year after the New Jersey Supreme Court decided *Henderson*, Oregon followed suit by announcing a similar test in *State v. Lawson*.[111] *Lawson* adopts many of the same scientific rationales as *Henderson*,[112] and closely mirrors its discussion of system and estimator variables.[113] The

106. *Henderson*, 27 A.3d at 925 ("[W]hether the science confirms commonsense views or dispels preconceived but not necessarily valid intuitions, it can properly and usefully be considered by both judges and jurors in making their assessments of eyewitness reliability.").

107. *See* People v. LeGrand, 867 N.E.2d 374, 377 (2007) (citing 1 McCormick, Evidence § 206, at 880 (6th ed. 2006), for the premise that degree of confidence can be influenced by, for example, misleading questions asked after a witness's viewing of a suspect).

108. *Henderson*, 27 A.3d at 925–26; *see also* COMM. ON MODEL CRIM. JURY CHARGES, *supra* note 99.

109. *See, e.g.*, Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB., POL'Y, & L. 3, 21, 27 (2001) (finding, in thirty-nine studies and almost 5000 participants, that cross-racial identifications raise unique difficulties and a significant risk for misidentification).

110. *Henderson*, 27 A.3d at 926 (broadening the *Cromedy* instruction from State v. Cromedy, 727 A.2d 457, 467 (N.J. 1999), on cross-racial identifications beyond only cases where identification is a critical issue in the case).

111. State v. Lawson, 291 P.3d 673 (Or. 2012) (en banc). In *Lawson*, Oregon broke away from the reliability-focused *Brathwaite* doctrine still employed in federal and many state courts. *See id.* at 690 (rejecting Oregon's 1979 *Classen* test for determining admissibility of eyewitness identifications).

112. *Id.* at 685–86 (noting that over 2000 scientific studies on the reliability of eyewitness identifications had been conducted since *Classen* was decided in 1979).

113. *Id.* at 686–88 (listing and defining system and estimator variables).

Lawson test consists of two prongs. First, if the defendant moves for a pre-trial hearing, the State must show that the identification at issue meets Oregon's evidentiary admissibility rules, which parallel requirements of the Federal Rules of Evidence.[114] Next, the defendant must present evidence that the identification's relevance is substantially outweighed by the risk of unfair prejudice, confusion of the issues, misleading the jury, and undue delay or cumulative evidence.[115] Evidence of a suggestive variable can "give rise to an inference of unreliability that is sufficient to undermine the perceived accuracy and truthfulness of an eyewitness identification—[and] only then may a trial court exclude [it] . . . ."[116] If the court admits the identification, a defendant may present expert testimony on reliability issues with eyewitness identifications or request a jury instruction tailored to the reliability factors relevant to the case.[117]

Massachusetts, in *Commonwealth v. Gomes*,[118] took yet another route in its rejection of the *Brathwaite* framework. The court reformed its prior jury instructions on the reliability of eyewitness identifications to include additional generally accepted principles.[119] The Massachusetts Supreme Court reasoned that five scientific principles had reached the "near consensus in the relevant scientific community" sufficient to mandate inclusion in jury instructions, not as a replacement for but as a more robust counterpart to expert testimony on reliability.[120] These factors include: (1) that memory consists of three processing stages, (2) that certainty alone does not indicate accuracy, (3) that high levels of stress may reduce ability to make an accurate identification, (4) that information unrelated to the actual viewing of the event received before or after making an identification can affect later recollection of the memory or the identification, and (5) that a viewing of a suspect in an identification procedure may negatively affect the reliability of a subsequent identification showing the same suspect.[121]

Several states have, since *Brathwaite*, fashioned procedures for ensuring greater protections when the State in a criminal case seeks to introduce an eyewitness identification.[122] However, New Jersey, Oregon,

114. *Id.* at 696–97.
115. *Id.* at 697 (citing OR. REV. STAT. § 40.160 (2017)).
116. *Id.*
117. *Id.*
118. Commonwealth v. Gomes, 22 N.E.3d 897 (Mass. 2015).
119. *Id.* at 911 (applying the scientific findings cumulated in ROBERT J. KANE ET AL., SUPREME JUDICIAL COURT STUDY GROUP ON EYEWITNESS EVIDENCE: REPORT AND RECOMMENDATIONS TO THE JUSTICES (2013), http://mass.gov/courts/docs/sjc/docs/eyewitness-evidence-report-2013.pdf).
120. *Id.* at 911–16.
121. *Id.*
122. *See, e.g.*, Commonwealth v. Johnson, 45 N.E.3d 83, 92 (Mass. 2016)

and Massachusetts stand out as the three states who have subverted traditional assumptions about the reliability of such identifications and have reevaluated the right to stronger due process protections in light of their pitfalls.[123] Alaska joined the fold in 2016, announcing an eyewitness identification admissibility test in *Young v. State* and serving as yet another beacon for states—as well as federal courts—to join eyewitness identification reform.[124]

II. THE *YOUNG* TEST: ALASKA'S MODEL FOR CHANGE

A. Alaska Before *Young*

Prior to *Young*, Alaska's controlling case law on the admissibility of eyewitness identifications, *Holden v. State*,[125] followed the *Brathwaite* doctrine without questioning its scientific validity.[126] Much of Alaska's case law—flowing from *Brathwaite, Stovall*, and *Biggers*—focused on merely applying the reliability elements to the facts of the case rather than providing any comprehensive explanation of the *Holden* test or any

("Where the suggestiveness does not arise from police conduct, a suggestive identification may be found inadmissible only where the judge concludes that it is so unreliable that it should not be considered by the jury. In such a case, a subsequent in-court identification cannot be more reliable than the earlier out-of-court identification, given the inherent suggestiveness of in-court identifications and the passage of time."); State v. Guilbert, 49 A.3d 705, 731 (Conn. 2012) (finding expert testimony on reliability appropriate because many factors influencing identifications are not naturally within the jury's province); State v. Cabagbag, 277 P.3d 1027, 1040 (Haw. 2012) (exercising court's supervisory power to ensure that a special jury instruction is given on potential factors influencing an identification's reliability upon defendant's request); State v. Marquez, 967 A.2d 56, 69–71 (Conn. 2009) (specifying detailed criteria for the assessment of suggestive behavior); State v. Clopten, 223 P.3d 1103, 1110, 1118 (Utah 2009) (finding broad cautionary instructions do not effectively assist juries in spotting misidentifications and calling for routine admission of expert testimony on reliability); Brodes v. State, 614 S.E.2d 766, 771, 771 n.8 (Ga. 2005) (rejecting certainty as a reliability factor); State v. Dubose, 699 N.W.2d 582, 591–92 (Wis. 2005) (declaring showups to be inherently suggestive and revisiting *Brathwaite* and *Biggers* in light of recent scientific evidence which is "now impossible . . . to ignore"); State v. Hunt, 69 P.3d 571, 576 (Kan. 2003) (announcing a "refinement" of the federal due process test using five factors adopted in *Ramirez*); State v. Ramirez, 817 P.2d 774, 780–81 (Utah 1991) (modifying three reliability factors to focus directly on impacts of suggestion).

123. *See generally Gomes*, 22 N.E.3d. at 897 (Mass. 2015) (asserting new tests for admitting eyewitness identifications); State v. Lawson, 291 P.3d 673 (Or. 2012) (en banc); State v. Henderson, 27 A.3d 872 (N.J. 2011).

124. Young v. State, 374 P.3d 395, 427 (Alaska 2016).

125. Holden v. State, 602 P.2d 452 (Alaska 1979), *overruled by Young*, 374 P.3d 395.

126. *See id.* at 456 (applying the admissibility test, including the "totality of the circumstances" language and *Biggers* factors, adopted in *Brathwaite*).

analysis of precisely how it corresponded with Alaska's constitutional due process requirement.[127] In *Buchanan v. State*,[128] the court rejected the defendant's request for an instruction focusing on possible inadequacies of an eyewitness identification at issue.[129] While *Buchanan* was decided three months prior to *Brathwaite*, its holding regarding the necessity of jury instructions on the issue was not abrogated until 2016 by *Young v. State*.[130]

In 2009, the court of appeals' decision in *Tegoseak v. State*[131] provided an impetus for reform. Before the grand jury that indicted Frank Tegoseak for driving under the influence and driving with a suspended license and at his subsequent trial, an eyewitness testified as to his impaired driving.[132] The eyewitness had chosen Tegoseak out of a photographic lineup as the person he had seen driving in an impaired manner.[133] Despite flaws in the lineup procedure,[134] the superior court, employing

127. *See Young*, 374 P.3d at 406 n.31 (reviewing cases decided under the *Brathwaite* test and finding that, while such cases accepted the test as consistent with Alaska's Constitution, explicit analysis of an unnecessary suggestiveness test was lacking); *see, e.g.*, Viveros v. State, 606 P.2d 790, 792, 792 n.1 (Alaska 1980) (declining to adopt a *per se* rule of exclusion in evaluating a photographic lineup for police suggestiveness and reliability); Klockenbrink v. State, 472 P.2d 958, 961–62 (Alaska 1970) (discussing the *Stovall* component of *Brathwaite*); Anderson v. State, 123 P.3d 1110, 1116 (Alaska Ct. App. 2005) (asserting that "the test in Alaska is the same one announced by the United States Supreme Court" as Alaska had never expressly rejected *Brathwaite* or *Stovall*).

128. Buchanan v. State, 561 P.2d 1197 (Alaska 1977), *abrogated by Young*, 374 P.3d 395.

129. *Id.* at 1207.

130. *Young*, 374 P.3d at 429.

131. Tegoseak v. State, 221 P.3d 345 (Alaska Ct. App. 2009).

132. *Id.* at 346.

133. *Id.*

134. Tegoseak was in the passenger seat of the vehicle when it was stopped by police, but the dispatcher had been informed that the passenger and the driver had switched places. *Id.* at 347. Thus, it was suspected that Tegoeseak had been the driver who may have been intoxicated. *Id.* To account for there having been multiple men in the car, police showed the eyewitness two photo arrays. *Id.* at 348. Tegoseak was included in the second one, but not the first. *Id.* Upon being shown the first photo array, the witness selected two photos that could have been one of the passengers, one of which was correct, and also incorrectly identified Tegoseak. *Id.* Knowing that the identification had been incorrect, the officer conducting the photo lineup told the eyewitness to look at the second photo array and reminded the witness that he had identified one of two men as the person who had been in the driver's seat, therefore suggesting that he should look carefully for the person who had been in the passenger's seat—that is, Tegoseak—in the second one. *See id.*; *see also id.* at 361. When the eyewitness viewed the second photo array, he indicated that picture number five, which was indeed Tegoseak, could have been the person he had observed, as could the picture he had identified in the first photo array. *Id* at 348.

Brathwaite, held that the identification was reliable and permitted admission of the evidence at trial.[135]

Even before the New Jersey Supreme Court's innovative discussion in *Henderson*, the Alaska court of appeals in *Tegoseak* endeavored to underscore the generally accepted scientific principles of human memory, its effect on eyewitness identifications, and the failure of the *Brathwaite* doctrine to consider these issues.[136] In reviewing some of the then-current research on eyewitness identification reliability, the court stated that its goal was:

> [T]o acknowledge that psychological research into eyewitness identification has furnished new insights into the potential suggestiveness of identification procedures, and to point out that this research has illuminated the related problem that a suggestive identification procedure can work an after-the-fact alteration of a witness's memory of a criminal episode.[137]

B. Answering *Tegoseak*'s Call in *Young*

Seven years after *Tegoseak*, the Alaska Supreme Court took up the challenge to depart from *Brathwaite* in *Young v. State*.[138] On August 15th, 2008, following a string of violent incidents between the Bloods and the Crips gangs in Fairbanks, an SUV—inconsistently described as gray, silver, or white—approached two cars carrying Bloods gang-members.[139] Occupants of the SUV then began shooting at one of the cars, which led to a high-speed shootout for approximately two miles.[140]

Arron Young was arrested in connection with the shooting later that evening.[141] The key to a silver SUV was found in his pocket and a gun was recovered from his waistband.[142] Young was indicted by a grand jury for attempted murder in the first degree as well as misconduct involving a weapon in the first degree.[143] During the grand jury proceedings, the State presented three eyewitnesses to identify Young.[144] The first witness, Jason

135. *Id.* at 346.
136. *See id.* at 353–60 (highlighting the weaknesses of the *Biggers* factors and assumptions inherent to the *Brathwaite* doctrine about the reliability of eyewitness identifications, as well as the changing attitude in the legal system toward such evidence following the implementation of DNA testing).
137. *Tegoseak*, 221 P.3d at 363.
138. *See Young*, 374 P.3d at 426–27 (announcing the replacement of Alaska's adopted *Brathwaite* test).
139. *Id.* at 399.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 399–400.
144. *Id.* at 399.

Gazewood, had contacted the police and reported that he had witnessed the shooting.[145] The police interviewed him at his office and showed him a photographic lineup featuring six photographs.[146] Gazewood identified Young's photograph as most closely resembling the man he saw driving the SUV involved in the shooting.[147] Before the grand jury, the second witness, Arles Arauz, identified Young as the driver of the SUV from a photographic lineup, even though he had informed police immediately following the shooting that he could not identify any of the assailants.[148] The third witness, John Anzalone, failed to select Young's photograph when testifying before the grand jury.[149]

Young moved to suppress the Gazewood pre-trial and in-court identifications on grounds that they were unnecessarily suggestive.[150] The superior court held an evidentiary hearing on the motion, during which Gazewood testified that a detective had come to his office three days after the shooting, showed him six photographs without instructions, and, after Gazewood narrowed the photographs down to two choices and placed his finger hesitatingly on Young's photograph, the detective told him to "trust your instincts."[151] Gazewood testified that he interpreted the comment to mean, "that's the guy we want you to pick."[152] The superior court denied the motion pursuant to a *Brathwaite* analysis, finding that the photographic lineup was not unnecessarily suggestive because it had contained nothing to distinguish Young's photograph from the others.[153] Further, the superior court determined that the detective's comment was not suggestive and that it did not influence Gazewood's identification.[154]

The State disclosed to Young on the first day of his trial that Anzalone, despite failing to identify Young's photograph before the grand jury, would identify Young at trial, as he had seen a photograph of Young on television a week before trial, recognized him, and identified him.[155] Young argued that the in-court identification would be improperly suggestive because he would be the only African-American man sitting with the defense and the previous identification (which was

145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 400.
151. *Id.*
152. *Id.*
153. *Id.* at 400–01.
154. *Id.* at 401 (stating also that "even if the procedure was unnecessarily suggestive, Gazewood's identification of Young was still reliable under the totality of the circumstances and therefore admissible").
155. *Id.*

unreliable due to the pretrial publicity) could not overcome the problem of racially-biased suggestiveness.[156] The court ruled that Anzalone could not testify about his pre-trial identification, but that an in-court identification was permissible.[157] The court also denied Young's request for jury instructions identifying factors which may influence the reliability of eyewitness identifications or a set of instructions approved in *United States v. Telfaire*.[158]

Lastly, Young filed for a mistrial because the court admitted an identification of Young by Arauz, which he had made the night of the shooting after initially denying his ability to recognize the assailants.[159] Arauz was formerly associated with the Bloods and knew Young, as the two had been involved in a fight during high school.[160] The State did not disclose the Arauz identification to Young until mid-trial.[161] Again, Young was denied relief.[162]

Young was convicted, and argued on appeal that the admission of the Gazewood and Anzalone identifications constituted error under *Brathwaite*.[163] He also challenged the superior court's rejection of his proposed jury instructions and refusal to grant him a mistrial.[164] The court of appeals affirmed the conviction, and Young petitioned the Alaska Supreme Court, urging it to abandon *Brathwaite*, adopt a new eyewitness identification admission test pursuant to the Alaska Constitution's due process clause, and reverse his conviction.[165]

Young's petition presented a ripe opportunity for the Alaska Supreme Court to craft a new test, one which would, like *Tegoseak*, take a "close look at the scientific evidence related to eyewitness identifications and . . . change the standards for determining their admissibility and the instructions that inform juries about how to assess their weight."[166] Applying *Brathwaite* to the facts of *Young*, the court found that the admission of the Gazewood identification was harmless error and that the due process protections against unnecessarily suggestive identifications did not apply to Anzalone's in-court identification.[167] However, the court

156. *Id.*
157. *Id.*
158. *Id.* at 403; *see also* United States v. Telfaire, 469 F.2d 552, 558–59 (D.C. Cir. 1972) (detailing a widely-recognized cautionary instruction for juries considering eyewitness testimony).
159. *Young*, 374 P.3d at 402.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* at 404.
165. *Id.*
166. *Id.* at 405.
167. *Id.*

then declared that changed circumstances justified replacing *Brathwaite* moving forward.[168]

These "changed circumstances" related to scientific developments on the reliability of eyewitness identifications and courts' responses, which had weakened the Alaska Supreme Court's confidence that *Brathwaite* afforded due process protections under the Alaska Constitution.[169] While studies on eyewitness reliability began prior to *Brathwaite*, a much higher rate of research into the processes and fallibility of memory took place in the decades to follow.[170] Because New Jersey incorporated much of this scientific research into the opinion and Special Report of *Henderson*, the *Young* court reviewed and adopted those findings, as well as findings by other state courts and committees concerning eyewitness identifications.[171]

Closely adhering to the framework of *Henderson*,[172] *Young* required a criminal defendant to present evidence of suggestiveness in the form of system variables, not estimator variables, capable of resulting in a misidentification to receive an evidentiary hearing.[173] *Young*'s non-exclusive list of system variables includes blind administration, pre-identification instructions, compositions of lineups and photographic arrays, feedback from law enforcement and recording confidence at the time of identification, showups (which become less reliable within two hours of the event witnessed), and multiple viewings (as initial viewings may decrease the reliability of subsequent viewings).[174] The estimator variables illustrated by *Young*—which come into play later in the test—also are not exclusive.[175] They include the witness's stress, weapons focus, duration of the viewing, environmental conditions of the viewing,

168. *Id.*

169. *Id.* at 413.

170. NAT'L RESEARCH COUNCIL, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 16 (2014).

171. *See generally* State v. Henderson, 27 A.3d 872, 892 (N.J. 2011); REPORT OF THE SPECIAL MASTER, *supra* note 7, at 8–14; KANE ET AL., *supra* note 119; *see also* Commonwealth v. Gomes, 22 N.E.3d 897, 905, 909–10 (Mass. 2015); State v. Guilbert, 49 A.3d 705, 720–22 (Conn. 2012); State v. Cabagbag, 277 P.3d 1027, 1035–38 (Haw. 2012); State v. Lawson, 291 P.3d 673, 685 (Or. 2012); State v. Clopten, 223 P.3d 1103, 1108 (Utah 2009); and State v. Dubose, 699 N.W.2d 582, 591–92 (Wis. 2005) (laying out relevant scientific data and principles which the *Young* court evaluated along with the rationales and evidence behind the *Henderson* test to determine the test's fit with Alaska's constitutional requirements).

172. *Henderson*, 27 A.3d at 919–22 (announcing its admissibility test and lists of system and estimator variables, which *Young* substantially adopts).

173. *Young*, 374 P.3d at 427.

174. *Id.* at 417–22.

175. *See id.* at 417 (noting that "the science of eyewitness identifications is 'probabilistic'" and seeking to identify "variables that are relevant to evaluating the risk of a misidentification").

witness characteristics (such as physical and mental health, vision, age, and alcohol or drug use), perpetrator characteristics (such as a disguise or change in appearance between the event and the viewing), race and ethnicity bias, memory decay or a long interval between the event and the identification, and the presence of co-witnesses (who may contaminate the independence of an identification).[176] Importantly, the threshold showing to trigger this pretrial hearing need *not* rise to the level of "unnecessarily suggestive."[177] Rather, demonstrating that the identification involved a system variable is sufficient for the defendant to be entitled to an evidentiary hearing.[178]

At that hearing, the State must present evidence of reliability notwithstanding the presence of one or more system variables, and the court's "ensuing analysis of reliability should consider *all* relevant system and estimator variables under the totality of the circumstances."[179] The defendant carries the burden to prove, given all the system and estimator variables at play, that there is a "very substantial likelihood of irreparable misidentification."[180]

Should the defendant fail to meet his or her burden in the evidentiary hearing, the court should admit the identification subject to an appropriate jury instruction which takes into account the *Young* test and the factors which may influence a given identification's reliability.[181] As the New Jersey court did in *Henderson*, the Alaska Supreme Court also charged the Criminal Pattern Jury Instructions Committee with drafting a new set of model instructions consistent with the scientific principles and admissibility test announced in *Young*.[182] As an additional measure, the court encouraged expert testimony that "explains, supplements, or challenges the application of these variables to different fact situations" — especially given the continually changing nature of scientific understandings, which may move beyond those currently recognized.[183]

176. *Id.* at 422–26.
177. *Id.* at 427.
178. *Id.*
179. *Id.* (emphasis added).
180. *Id.* (citing to the standard of proof from State v. Henderson, 27 A.3d 872, 920 (N.J. 2011)).
181. *Id.* at 427–28 (acknowledging that scientifically valid principles are not necessarily within the jury's province of knowledge, and thus, reliability characteristics may contradict commonsense assumptions).
182. *Id.* at 428.
183. *Id.* at 427.

CONCLUSION

Combining these safeguards to prevent the injustice that can occur at the hands of a misidentification, *Young* adopts a model that has the potential to more effectively provide due process of law, where a high misidentification rate and a correspondingly high wrongful conviction rate show that such a model is desperately needed.[184]

The test *Young* announced enhances due process protections for criminal defendants, but it does not solve the issues of jury bias and mistaken assumptions about reliability. The jury instruction mandate given by the *Young* court aims to alleviate these problems by challenging assumptions and putting triers of fact on notice of risks they might not otherwise consider in evaluating testimony.[185] However, due process does not and cannot prevent the introduction of internally-held biases into the criminal justice system any more than it can mandate that juries understand and thoughtfully consider all relevant scientific data in reaching a verdict. For instance, while the court could not invoke the due process clause to prevent admission of John Anzalone's in-court identification in response to seeing a photograph of Arron Young on television,[186] the advancements made by the Alaska Supreme Court through *Young*, as well as in states whose eyewitness identification admissibility doctrines preceded it, illustrate that improvement is possible. In 1977, only five factors were considered relevant enough to the issue of reliability to warrant consideration by a court where extremely influential eyewitness evidence was at issue.[187] Science and law have advanced greatly in the past forty years, but if *Brathwaite* illustrates any point, it is that progress must breed more progress, not entrenchment of currently-accepted principles.[188]

By adopting a test based on up-to-date scientific principles, *Young* did more than provide a comprehensive list of the reliability factors accepted in today's scientific community. The test the Alaska Supreme

184. *See Eyewitness Misidentification*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php (last visited Feb. 12, 2018) (asserting that eyewitness misidentifications are the "greatest contributing factor to wrongful convictions proven by DNA testing," involved in over 70% of convictions nationwide overturned on account of DNA evidence).

185. *Young*, 374 P.3d at 428.

186. *Id.* at 410–11.

187. Manson v. Brathwaite, 432 U.S. 98, 114–16 (1977) (following the factors laid out in Neil v. Biggers, 409 U.S. 188, 199–200 (1972)).

188. *Young*, 374 P.3d at 414–17 (noting the explosion of scientific research since *Brathwaite* and the fact that the *Brathwaite* test no longer serves its purposes in light of those insights).

Court formulated, based on the careful and well-grounded analysis in *Henderson*, achieved two overarching goals. First, *Young* and *Henderson* recognized the intertwined nature of the two prongs of *Brathwaite* which had been previously treated as distinct: suggestive techniques and what are considered "inherent" reliability factors such as a witness's confidence.[189] Second, even current understanding about the risks of misidentifications[190] and the counterintuitive factors influencing reliability[191] are subject to evolution.[192] Exclusive tests not only lead to "checklist" judicial decision-making but also lie in certain danger of becoming obsolete, while due process hangs in the balance. No test can be completely cognizant of the multitude of influences that may affect any given identification, and neither the *Young* test nor its counterparts fully regulate the wide range of estimator variables that may exist.[193] However, even if the protections provided in *Young* and its counterparts are incomplete in their efforts to prevent unreliable eyewitness evidence, they are necessary to achieve compatibility between eyewitness identifications and due process. *Young* brings Alaska considerably closer to that goal.

189. *Id.* at 426 (stating that the "certainty-inflation effect [produced by feedback from law enforcement or other witnesses] is greater for eyewitnesses who make mistaken identifications than it is for those who make accurate identifications").

190. *See* GARRETT, *supra* note 62, at 80–81 (noting that suggestive procedures and misidentifications are part of a larger problem in aligning criminal justice with modern science).

191. *See* Young v. Conway, 698 F.3d 69, 79 (2d Cir. 2012) (noting that reliability factors are "not coterminous with 'common sense'").

192. *Young*, 374 P.3d at 427.

193. *See* Nichols v. Eckert, 504 P.2d 1359, 1362 (Alaska 1973) (holding that the Due Process Clause only regulates state action and requires "deprivation of an individual interest of sufficient importance to warrant constitutional protection").