



An Eye for the Science: Evolving Judicial Treatment of Eyewitness Identification Evidence[☆]



Karen A. Newirth*

The Innocence Project, Inc., United States

A substantial corpus of social science research has revealed that the *Manson v. Brathwaite*, the U.S. Supreme Court's decision controlling the admission of eyewitness identification evidence, is seriously flawed. Yet courts have historically ignored this research. In recent years several courts' consideration of the research has led to a rejection of *Manson*. These decisions offer hope for scientifically-informed judicial decision making in the area of eyewitness identification.

Keyword: Eyewitness identification

Over the past thirty years, scientists, lawyers, and academics have urged courts to incorporate social science research into judicial decision making about eyewitness identification evidence. Historically, courts have largely ignored these entreaties. This may be for a number of reasons, including courts' discomfort with social science research generally. As Professor David L. Faigman (1989) has explained, “[m]any courts have expressed discomfort at having to review the methodological and, in particular, statistical underpinnings of social science research. Untrained in such exotica, judges fear treading in areas that can only lead to uncomplimentary commentary in the legal literature” (p. 1080). Professor Michael J. Saks (1998) has made a similar observation: “Just as legal training teaches one the intellectual skills to analyze legal problems, scientific training teaches one how to analyze empirical questions and proposed answers. This places judges in a weak position to know what questions need to be asked in order to test an empirical claim or how to evaluate the data offered in an answer” (p. 1136). Recent developments, however, suggest that courts across the country have begun to incorporate social science research into frameworks for decision making about eyewitness identification evidence, offering hope for a future where scientifically-informed decision making is the norm. More broadly, the results of more than three decades of efforts to align judicial treatment of identification evidence with social science research suggest that the central cultural conflict between

science and the law—that “[t]he law’s prestige depends largely on adhering to the traditions of the past, while science’s prestige turns on how swiftly it advances into the future”—may not be dispositive after all (Faigman, 1999, p. 6).

For nearly forty years, eyewitness identification evidence whose admission is challenged as a due-process violation has been governed by a legal framework set forth in a 1977 U.S. Supreme Court decision, *Manson v. Brathwaite*, 432 U.S. 98 (1977). *Manson*’s two-part balancing test directs courts to first determine if a challenged identification procedure was “unduly suggestive” and, if so, to balance the effects of suggestion against certain enumerated, but not exhaustive, reliability factors: (1) the witness’s opportunity to view the perpetrator; (2) the witness’s degree of attention; (3) the accuracy of the witness’s description; (4) the witness’s level of certainty at the time of the confrontation; and (5) the time between the crime and confrontation. While *Manson* declared these factors non-exhaustive, courts implementing the test have mechanically applied only these five factors, ignoring many other factors, such as prior non-identification of the police suspect, that scientific research has identified correlate strongly with reliability. Under *Manson*, challenged identification evidence will be suppressed only if there is a “substantial likelihood of irreparable misidentification.”

In the years after it was decided, the *Manson* balancing test was adopted by nearly every jurisdiction in the country.

Author Note

[☆] Please note that this paper was handled by the current editorial team of JARMAC.

* Correspondence concerning this article should be addressed to Karen A. Newirth, Strategic Litigation Department, United States. Tel.: +1 2123645349. Contact: knewirth@innocenceproject.org

Three states—New York, Massachusetts, and Wisconsin—did not adopt the *Manson* test but instead maintained a test set forth in an earlier U.S. Supreme Court case, *United States v. Wade*, 388 U.S. 218 (1967). Under this test, an out-of-court identification will be suppressed if it is found to be “unduly suggestive,” but an in-court identification will be allowed where the prosecution demonstrates that the witness has an “independent source”—i.e., a source independent of the suggestive identification procedure—for making the in-court identification. In each of these states, the “independent source” is assessed through an analysis of the very same reliability factors set forth in *Manson*. Thus, while the tests differ in certain respects, they are fundamentally the same and suffer the same conflict with the scientific research findings. Other states also apply an “independent source” analysis to determine whether a witness whose out-of-court identification has been suppressed under *Manson* will be permitted to make an in-court identification, on the theory that the in-court identification is the product of a source “independent” of the suggestive procedure. Courts conducting this inquiry generally import *Manson*’s reliability factors (Garrett, 2012).

In 1983, just six years after *Manson* was decided, Wells and Murray (1983) published the first scientific paper concluding that the *Manson* reliability factors were not generally supported by scientific research findings. This article laid the foundation for what would eventually become a comprehensive scientific critique of *Manson*: (1) the majority of the reliability factors either bear a poor relationship to identification accuracy or rely on witnesses’ subjective self-reports; (2) courts do not apply non-enumerated reliability factors that do have a good relationship with accuracy; (3) the use of a suggestive identification procedure, in and of itself, tends to falsely inflate reliability factors; (4) the contaminating effect of suggestion on memory cannot be undone; (5) confirming feedback—some form of which is inevitable in a criminal case—also tends to falsely inflate reliability factors and alter witnesses’ memories of the events and their experience of the identification procedure; and (6) witness certainty, the single most powerful factor in determining whether a witness is believed by fact finders, is highly malleable and can be inflated by events before, during, and after identification procedures without the witness being aware of that inflation (Wells & Murray, 1983).

Wells and Murray (1983) urged the Supreme Court to incorporate social science research in refining the *Manson* test and encouraged researchers to “continue to research features of eyewitness testimony that can yield results that are useful to the true needs of police investigators and courts” (p. 359). This call to action was embraced wholeheartedly by researchers and echoed by legal scholars, yet largely ignored by courts.

Between 1983 and 2000, when Bradfield and Wells (2000) published the next major scientific critique of *Manson*, and again between 2000 and 2009, when Wells and Quinlivan (2009) published a third major science-based critique of *Manson*, a substantial body of peer-reviewed research examined a host of issues relevant to the judicial treatment of eyewitness identification evidence, including the effects of suggestion on memory, the five *Manson* reliability factors, other system and estimator variables,

fact-finder understanding of eyewitness memory and perception, and the effects of expert testimony and jury instructions. The research directly supported the conclusion that the *Manson* balancing test is incapable of achieving its goal of ensuring that, as the *Manson* Court put it, “reliability is the linchpin in determining the admissibility of identification testimony.”

In contrast, during the same two periods of prolific research (1983 to 2000 and 2000 to 2009), a small number of state supreme courts—those of Arizona, California, Massachusetts, New Jersey and Utah—took direct notice of and applied the relevant social science research on eyewitness identification issues. From 2000 to 2009, the same number of state supreme courts—those of Connecticut, Georgia, Kansas, Massachusetts, and Wisconsin—explicitly considered scientific research in eyewitness identification cases. During both periods, the number of cases remained remarkably small compared to the prevalence of identification evidence in criminal trials and the volume of relevant research, and the vast majority of cases affirmed the holding and rationale of *Manson*, rejected the incorporation of scientific research into jury instructions, and strictly limited the availability of eyewitness expert testimony.

Despite the proliferation of scientific papers and law review articles critiquing the *Manson* test, it would be another 28 years before any court would fully revise the *Manson* test in light of the scientific research. In 2011, the New Jersey Supreme Court decided *State v. Henderson*, 27 A.3d 872 (N.J. 2011). In that case, having considered the relevant scientific literature, the New Jersey Supreme Court rejected its version of the *Manson* test on state due process grounds. In 2012, the Oregon Supreme Court, having also considered the scientific research, rejected Oregon’s interpretation of the *Manson* balancing test on state evidentiary grounds when it decided *State v. Lawson*, 291 P.3d 673 (Or. 2012). The report of a study group created by the Massachusetts Supreme Judicial Court to evaluate the treatment of eyewitness identification evidence by courts and law enforcement recommended a revision of that state’s independent source test that shares features of both *Henderson* and *Lawson*. The Massachusetts Supreme Judicial Court has yet to rule on this particular recommendation of the study group’s report.

Henderson and *Lawson*, the Massachusetts study group report, and the decisions of the Massachusetts Supreme Judicial Court issued in the wake of that report are landmark developments for a number of reasons. Most obviously, they demonstrate that courts, or judicially-created bodies, will reject legal precedent based on social science research findings that undermine the validity of that precedent and will use social science research findings to craft new rules of law. Second, they demonstrate that courts, or judicially-created bodies, have the ability to thoroughly and critically consider and apply relevant scientific research. Indeed, these decisions and the study group report have, in some ways, gone further than academics have urged in incorporating social science research in decision making concerning eyewitness identification evidence. Specifically, Monahan and Walker (2011) have proposed that social science research be used in three principle ways by courts, of which two are relevant here: as social authority (having to do with “the use of social science research in the creation and modification of

Download English Version:

<https://daneshyari.com/en/article/5034049>

Download Persian Version:

<https://daneshyari.com/article/5034049>

[Daneshyari.com](https://daneshyari.com)