SYLLABUS

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State of New Jersey in the Interest of A.A. (A-50-18) (081793)

Argued October 23, 2019 -- Decided January 15, 2020

RABNER, C.J., writing for the Court.

In State v. Presha, 163 N.J. 304, 316 (2000), the Court directed law enforcement officers to "use their best efforts to locate a parent or legal guardian" before starting to interrogate a juvenile in custody. In an otherwise intimidating setting, parents can help juveniles understand they have the right not to incriminate themselves and the right to have an attorney present -- and can help juveniles decide whether to waive their rights. Parents essentially serve "as a buffer" between juveniles and the police. Id. at 315.

In this appeal, the Court considers whether incriminating statements a fifteen-year-old made to his mother at a police station can be used against him.

On July 7, 2016, Officer Joseph Labarbera saw three black males on bicycles head east on Wilkinson Avenue in Jersey City. About fifteen seconds later, he and his partner heard eight to ten gunshots from the east. They transmitted over the radio what they had heard along with a description of the three men on bicycles. Soon after, two victims were found in front of 135 Wilkinson Avenue, in the direction the cyclists were seen riding.

A.A. was stopped nearby and, based on Labarbera's identification, was taken into custody, brought to a juvenile facility, and placed in a holding cell. In accordance with Presha, the police contacted his mother, who was taken to an interview room where Detective Joseph Chidichimo and another officer told her why A.A. was under arrest. A.A.'s mother was visibly emotional and asked to speak with her son; the officers took her to where A.A. was detained. The police allowed A.A. and his mother to speak through the gate of the holding cell. Five officers were in the room within ten to fifteen feet of A.A.

Chidichimo testified at a pretrial hearing that he overheard the conversation between A.A. and his mother. According to the detective, A.A.'s mother asked if he had been on Wilkinson Avenue, and he confirmed that he had. When she asked why, A.A. responded, "because they jumped us last week." At that point, A.A.'s mother began to cry and left the room.

A.A.'s mother testified at the hearing. She explained that the police told her A.A. had "shot somebody" and that she asked to speak with her son. She said she was crying and spoke in a loud voice, and that she and her son could see multiple officers in the room at the time. She testified that A.A. denied "do[ing] that" and said nothing about "being jumped."

A.A. was charged with two counts of attempted murder as well as weapons offenses. At the delinquency hearing, the State introduced A.A.'s statements to his mother, which the Family Part judge had found admissible; testimony from Labarbera, Chidichimo, and another officer; photos and physical evidence from the shooting; and video surveillance. The video was not clear enough to identify any of the cyclists. And none of the physical evidence directly connected A.A. to the shooting.

The judge adjudicated A.A. delinquent on two counts of aggravated assault and all weapons charges, relying heavily on Officer Labarbera's testimony that he observed A.A. riding a bicycle on Wilkinson Avenue just before the shooting; the surveillance video; and Detective Chidichimo's account of A.A.'s statement to his mother. The Appellate Division reversed and remanded for a new hearing. 455 N.J. Super. 492, 506-07 (App. Div. 2018). The Court granted certification. 236 N.J. 602 (2019).

HELD: The actions of the police amounted to the functional equivalent of interrogation. As a result, A.A. should have been advised of his Miranda rights in the presence of his mother. To hold otherwise would turn Presha and the safeguards it envisioned on their head. To address the special concerns presented when a juvenile is brought into custody, police officers should advise juveniles of their Miranda rights in the presence of a parent or guardian before the police question, or a parent speaks with, the juvenile. Officers should then let the parent and child consult in private. That approach would afford parents a meaningful opportunity to help juveniles understand their rights and decide whether to waive them. Because A.A.'s inadmissible statements comprised a substantial part of the proofs against him, a new hearing is necessary.

1. Federal and state law provide protections against self-incrimination. Suspects can waive their rights and make incriminating statements to law enforcement. To be admissible at trial, the State must demonstrate beyond a reasonable doubt that a suspect's waiver was knowing, intelligent, and voluntary. Courts look to the totality of the circumstances to assess the voluntariness of a statement. (pp. 11-12)

2. In Rhode Island v. Innis, officers arrested the defendant for robbery with a sawed-off shotgun. 446 U.S. 291, 293-94 (1980). Innis received three sets of Miranda warnings but declined to waive his rights. Id. at 294. While Innis was being transported to the central police station, two officers discussed the risk that students who attended a nearby school for "handicapped children" "might find a weapon" and "hurt themselves." Id. at 294-95. Innis interrupted the conversation and told the officers to "turn the car around so he could

show them where the gun was located." Id. at 295. The United States Supreme Court held that Miranda's safeguards applied not only to express interrogation of a suspect in custody but also to "its functional equivalent." Id. at 300-01. (pp. 12-15)

3. The New Jersey Supreme Court has interpreted N.J.S.A. 2A:84A-19 and N.J.R.E. 503 to grant broader protection than the federal privilege against self-incrimination. The Court has adopted the Innis standard and embraced the view that interrogation includes not only direct questioning but also any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response. (pp. 15-16)

4. Juveniles receive heightened protections when it comes to custodial interrogations for obvious reasons. Without guidance from an adult relative, friend, or lawyer, juveniles are on an unequal footing with their interrogators and are not able to know, let alone assert, their constitutional rights. In State in Interest of S.H., the Court "emphasize[d that] whenever possible and especially in the case of young children no child should be interviewed except in the presence of his parents or guardian." 61 N.J. 108, 114-15 (1972). (pp. 16-17)

5. The Court built on S.H. in Presha, 163 N.J. at 314. Noting that "[p]arents are in a position to assist juveniles in understanding their rights, acting intelligently in waiving those rights, and otherwise remaining calm in the face of an interrogation," id. at 315, the Court imposed a bright-line rule for juveniles under the age of fourteen that statements made "when a parent or legal guardian is absent from" the interrogation are not admissible "unless the adult was unwilling to be present or truly unavailable," ibid. For all juveniles, the Court instructed that "police officers must use their best efforts to locate a parent or legal guardian before" an interrogation begins. Id. at 316. (pp. 18-19)

6. The Court's recent ruling in State in Interest of A.S., 203 N.J. 131 (2010), underscored the supportive role parents have in the context of a custodial interrogation. In A.S., the police enlisted the mother of a fourteen-year-old girl, A.S., to help during the interrogation process. They asked the mother to recite the Miranda warnings and did not correct her misstatements. Id. at 136. A.S.'s mother repeatedly badgered her into answering the officer's questions. The Court concluded that A.S.'s confession was involuntary and confirmed that a parent's "presence alone" is not what Presha contemplated. Id. at 148, 152. To serve as a buffer between the police and the juvenile, a parent must act "with the interests of the juvenile in mind." Id. at 148. The Court affirmed that the purpose of Presha -- to have a parent present during interrogation -- "was to assist the child in the exercise of his or her constitutional rights; it was not to provide the police with an assistant." Id. at 137. (pp. 19-20)

7. Here, the police contacted A.A.'s mother and summoned her to the police station. The reason to summon A.A.'s mother was for her to help her son understand his rights and act intelligently in deciding whether to waive them. See Presha, 163 N.J. at 315. But before

mother and son began to speak, the police did not advise A.A. of his rights in his mother's presence. Neither A.A. nor his mother had been made aware that anything A.A. might say could be used against him, among other important rights. A.A. made critical admissions to his mother that the Family Part judge later relied on. He was subjected to the "functional equivalent" of express questioning while in custody, and his statements, obtained without the benefit of Miranda warnings, are thus inadmissible. What took place here upended the Presha model. Instead of serving as a buffer to help a juvenile understand his rights, the child's mother unwittingly assisted the police and helped gather incriminating evidence. The Court bases its ruling on state law. (pp. 20-22)

8. The protections outlined in Presha remain good law. The Court adds the following guidance. The police should advise juveniles in custody of their Miranda rights -- in the presence of a parent or legal guardian -- before the police question, or a parent speaks with, the juvenile. Officers should then give parents or guardians a meaningful opportunity to consult with the juvenile in private about those rights. That approach would enable parents to help children understand their rights and decide whether to waive them -- as contemplated in Presha. If law enforcement officers do not allow a parent and juvenile to consult in private, absent a compelling reason, that fact should weigh heavily in the totality of the circumstances to determine whether the juvenile's waiver and statements were voluntary. See ibid. If legitimate security concerns require the police to observe a private consultation, the police can monitor the interaction without listening to the words spoken between parent and child. (pp. 22-23)

9. The Court agrees with the Appellate Division that a new hearing is required. 455 N.J. Super. at 506. The Family Part judge pointedly relied on A.A.'s statements to establish his whereabouts at the time of the offense as well as his motive. The pivotal admissions were "clearly capable of producing an unjust result." R. 2:10-2. (p. 24)

The judgment of the Appellate Division is AFFIRMED and the matter is REMANDED for a new hearing.

JUSTICES LaVECCHIA, ALBIN, PATTERSON, FERNANDEZ-VINA, SOLOMON and TIMPONE join in CHIEF JUSTICE RABNER's opinion.

SUPREME COURT OF NEW JERSEY

A-50 September Term 2018

081793

State of New Jersey
in the Interest of A.A.,
Juvenile.

On certification to the Superior Court,
Appellate Division, whose opinion is reported at
455 N.J. Super. 492 (App. Div. 2018).

Argued	Decided
October 23, 2019	January 15, 2020

Frank Muroski, Deputy Attorney General, argued the cause for appellant State of New Jersey (Gurbir S. Grewal, Attorney General, attorney; Frank Muroski, of counsel and on the briefs).

Alyssa Aiello, Assistant Deputy Public Defender, argued the cause for respondent A.A. (Joseph E. Krakora, Public Defender, attorney; Alyssa Aiello, of counsel and on the briefs).

William J. Munoz argued the cause for amicus curiae Association of Criminal Defense Lawyers of New Jersey (Whipple Azzarello, attorneys; William J. Munoz, on the brief).

Laura Cohen argued the cause for amicus curiae American Civil Liberties Union of New Jersey (American Civil Liberties Union of New Jersey Foundation and Rutgers Criminal and Youth Justice Clinic, attorneys; Alexander Shalom and Jeanne LoCicero, of counsel and on the brief, and Laura Cohen, on the brief).

CHIEF JUSTICE RABNER delivered the opinion of the Court.

In State v. Presha, 163 N.J. 304, 316 (2000), the Court directed law enforcement officers to "use their best efforts to locate a parent or legal guardian" before starting to interrogate a juvenile in custody. In an otherwise intimidating setting, parents can help juveniles understand they have the right not to incriminate themselves and the right to have an attorney present -- and can help juveniles decide whether to waive their rights. Parents essentially serve "as a buffer" between juveniles and the police. Id. at 315.

In this appeal, we consider whether incriminating statements a fifteen-year-old made to his mother at a police station can be used against him. The police arrested the juvenile, A.A., in connection with a shooting incident, and summoned his mother to the police station in compliance with Presha. They advised her of the charges her son faced and then brought her to see him at her request.

Officers listened to the conversation between mother and son -- which took place on opposite sides of the gate of a holding cell -- and the State later presented the comments at trial. At no point did the police advise A.A. of his rights. Nor did they question him after he made admissions to his mother.

Like the Appellate Division, we find that the actions of the police amounted to the functional equivalent of interrogation. As a result, A.A. should have been advised of his rights under Miranda v. Arizona, 384 U.S. 436 (1966), in the presence of his mother. To hold otherwise would turn Presha and the safeguards it envisioned on their head.

To address the special concerns presented when a juvenile is brought into custody, police officers should advise juveniles of their Miranda rights in the presence of a parent or guardian before the police question, or a parent speaks with, the juvenile. Officers should then let the parent and child consult in private. That approach would afford parents a meaningful opportunity to help juveniles understand their rights and decide whether to waive them.

Because A.A.'s inadmissible statements comprised a substantial part of the proofs against him, we affirm the judgment of the Appellate Division and remand for a new hearing.

I.

This case involves a shooting that took place on July 7, 2016, at about 9:15 p.m., in front of a home on Wilkinson Avenue in Jersey City. We draw the following facts from testimony at a pretrial hearing and the delinquency proceeding.

Officer Joseph Labarbera of the Jersey City Police Department was on duty at the time and saw three black males on bicycles head east on Wilkinson Avenue. He also noticed how they were dressed. About fifteen seconds later, he and his partner heard eight to ten gunshots fired east of where they were located. As they drove on Wilkinson Avenue toward the gunfire, they transmitted over the radio what they had heard along with a description of the three men on bicycles. Soon after, two victims -- each with a gunshot wound to the leg -- were found in front of 135 Wilkinson Avenue, in the direction the cyclists were seen riding.

Detective Teddy Roque responded to the report of gunfire and drove around the general area. He spotted and later stopped two black males on one bicycle. Labarbera headed to the area and identified both individuals as the same people he had seen minutes earlier. One of them was A.A., who Labarbera also recognized from prior encounters that involved curfew violations.

The police found no weapons, ammunition, or gunpowder residue on the two individuals. Fourteen shell casings and one projectile were recovered at the crime scene.

The police took A.A. into custody, brought him to a juvenile facility, and placed him in a holding cell. No one else was taken into custody. In

accordance with Presha, the police contacted A.A.'s mother, who arrived about thirty minutes later along with A.A.'s aunt. Both women were taken to an interview room where Detective Joseph Chidichimo and another officer told them about the incident and why A.A. was under arrest. A.A.'s mother was visibly emotional and asked to speak with her son; the officers then took her to the holding cell on the other side of the building where A.A. was detained. There were two cells in the area -- a space about twenty by thirty feet that also had a fingerprinting station, computers, printers, and two bathrooms.

The police allowed A.A. and his mother to speak through the gate of the holding cell. While they talked, five officers including Chidichimo were in the room within ten to fifteen feet of A.A. Chidichimo explained that he monitored A.A. and his mother as a safety precaution, consistent with police protocol.

Chidichimo testified at a pretrial hearing that he overheard the conversation between A.A. and his mother. According to the detective, A.A.'s mother asked if he had been on Wilkinson Avenue, and he confirmed that he had. When she asked why, A.A. responded, "because they jumped us last week." At that point, A.A.'s mother began to cry and left the room. The detective noted that he could hear the conversation because A.A.'s mother,

who was "visibly upset" and "in an emotional state," raised her voice while she spoke, and A.A. responded in a "normal speaking tone."

The detective testified that he had intended to question A.A. if his mother consented. When she walked out of the room, though, he told her A.A. would be transferred to the juvenile detention facility and she was "free to leave." The police did not attempt to question A.A. or give him Miranda warnings at any point.

A.A.'s mother testified at the hearing. She explained that the police told her A.A. had "shot somebody" and that she asked to speak with her son. She said she was crying and spoke in a loud voice, and that she and her son could see multiple officers in the room at the time. She testified that A.A. denied "do[ing] that" and said nothing about "being jumped."

A.A. was charged with two counts of attempted murder, N.J.S.A. 2C:11-3 and 2C:5-1; possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a); unlawful possession of a weapon, N.J.S.A. 2C:39-5(b); and possession of a firearm by a minor, N.J.S.A. 2C:58-6.1.

Prior to trial, the State moved to admit A.A.'s statements to his mother. After a hearing under Rule 104(c), at which Detective Chidichimo and A.A.'s mother testified, the Family Part judge concluded the statements were admissible. The court first credited the detective's testimony about what A.A.

said to his mother. Next, the court determined that because A.A. was not subjected to a police interrogation or its functional equivalent, he was not entitled to Miranda warnings. The judge also found no evidence that the police exerted any pressure on A.A. or used any "invasive means to listen in on the conversation."

Among other evidence at the delinquency hearing, the State introduced A.A.'s statements; testimony from Labarbera, Roque, and Chidichimo; photos and physical evidence from the shooting, including shell casings, a projectile, and a pair of pants a victim wore; and video surveillance. Two weeks after the incident, the police obtained footage from a surveillance camera near the shooting. It showed three individuals riding bicycles side-by-side and then in a single line. The last cyclist appeared to draw a gun from his waist and fire with his left hand. The video was not clear enough to identify any of the cyclists. And none of the physical evidence directly connected A.A. to the shooting.

A.A.'s mother testified at the delinquency hearing and recounted her version of the conversation at the juvenile facility once again. She also testified that A.A. was right-handed.

The Family Part judge adjudicated A.A. delinquent on two counts of second-degree aggravated assault -- lesser-included offenses of attempted

murder -- and all three weapons charges. In an oral statement of reasons, the court relied heavily on three pieces of evidence: Officer Labarbera's testimony that he observed A.A. riding a bicycle on Wilkinson Avenue just before the shooting; the surveillance video, which revealed the three cyclists acted in concert; and Detective Chidichimo's account of A.A.'s statement to his mother. The court specifically found that the statement demonstrated that A.A. "was on Wilkinson Avenue" and disclosed "the reason . . . he was there": "to retaliate for . . . himself and others being jumped last week." The judge sentenced A.A. to two years in custody at a juvenile detention center.

The Appellate Division reversed and remanded for a new hearing. State in Interest of A.A., 455 N.J. Super. 492, 506-07 (App. Div. 2018). The court found that even though the officers did not question A.A. directly, their actions subjected him to the functional equivalent of police interrogation. Id. at 502-04 (citing Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980)). The Appellate Division observed that a "process that employs a parent as [a] surrogate in" a way that is "reasonably likely to elicit an incriminatory statement, does not scrupulously honor a juvenile's rights." Id. at 503.

Because the police failed to provide Miranda warnings to A.A. under the circumstances, the court concluded his statements should have been suppressed. Id. at 505. In view of the "significant role" the statements played

in the outcome, the court ordered a new hearing. Id. at 506. The Appellate Division also "note[d] with disfavor the lack of privacy afforded to" parents and children in this setting. Id. at 505.

We granted the State's petition for certification. 236 N.J. 602 (2019). We also granted the American Civil Liberties Union of New Jersey (ACLU) and the Association of Criminal Defense Lawyers of New Jersey (ACDL) leave to appear as amici curiae.

II.

The State, represented by the Attorney General, contends that the Appellate Division mistakenly equated a mother's conversation with her son with a police interrogation. Because the police inadvertently overheard the conversation while standing nearby in full view, the State argues the Appellate Division's ruling should be reversed.

According to the State, the conversation was not the functional equivalent of an interrogation; it was "more akin to a blurt-out." A detective monitored the interaction for safety reasons, the State submits, and officers did not exert any pressure on the juvenile or his mother or use any invasive means to overhear the audible conversation. Under the circumstances, the State maintains the police were not required to give Miranda warnings, and A.A.'s adjudication of delinquency should stand.

A.A. argues that his unwarned statements were the product of police interrogation and should not have been admitted as evidence against him. He contends the statements resulted from the functional equivalent of a police interrogation in which his mother unwittingly played a role. He claims he was therefore entitled to receive Miranda warnings even in the absence of coercion or express questioning by the police. A.A. maintains that the totality of the circumstances rendered his statements involuntary.

In A.A.'s view, this appeal also shows the need for the Court to fortify the heightened protections afforded juveniles under Presha. A.A. insists that a parent's presence alone does not satisfy Presha.

The ACLU agrees with A.A. that the police conducted a custodial interrogation by using his mother as an unwitting agent. As a result, the ACLU argues, A.A.'s statements should be suppressed. The ACLU also submits that children require more robust protections than adults during custodial interrogations and that this Court should accordingly strengthen the protections Presha provides. In particular, the ACLU urges the Court to require consultation with counsel before a juvenile may waive the right against self-incrimination.

The ACDL contends that A.A.'s custodial statement was the result of police action and should have been suppressed. Like A.A. and the ACLU, the

ACDL submits that the policies underlying Presha call for parents and juveniles to have a meaningful opportunity to consult in private before a juvenile is asked to waive his or her Miranda rights. If it is too burdensome for the police to accommodate a private conversation, the ACDL submits that any statements the police overhear should be presumed inadmissible.

III.

A.

Federal and state law provide protections against self-incrimination. The Fifth Amendment guarantees the well-known privilege: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; see also Malloy v. Hogan, 378 U.S. 1, 8 (1964) (noting the right against self-incrimination applies to the States through the Fourteenth Amendment).

Although the State Constitution does not refer to the privilege, it is nonetheless "firmly established as part of the common law of New Jersey." State v. Hartley, 103 N.J. 252, 260 (1986) (quoting In re Martin, 90 N.J. 295, 331 (1982)); accord State v. O'Neill, 193 N.J. 148, 175-76 (2007). The privilege has also been codified by statute and incorporated into the Rules of Evidence. N.J.S.A. 2A:84A-19; N.J.R.E. 503.

Suspects can of course waive their rights and make incriminating statements to law enforcement. To be admissible at trial, the State must demonstrate beyond a reasonable doubt that a suspect's waiver was knowing, intelligent, and voluntary. O'Neill, 193 N.J. at 168 n.12. The same standard applies to a confession by a juvenile. State in Interest of A.S., 203 N.J. 131, 146 (2010); Presha, 163 N.J. at 313.

Courts look to the totality of the circumstances to assess the voluntariness of a statement. A.S., 203 N.J. at 148; Presha, 163 N.J. at 313.

> [T]he factors relevant when making that determination include the child's age, education and intelligence, advice as to constitutional rights, length of detention, whether the questioning was repeated and prolonged in nature and whether physical punishment or mental exhaustion was involved, prior experience with the legal system, and the "highly significant factor" of parental involvement.
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> [A.S., 203 N.J. at 148.]

B.

To enforce the privilege and dispel the pressures of a custodial setting, the United States Supreme Court established certain procedural safeguards in Miranda, 384 U.S. at 444. Before the police can question a suspect in custody, they must inform the person of the now familiar warnings. Id. at 467-68. The suspect must be told

> that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.
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> [Id. at 479.]

The United States Supreme Court held in Rhode Island v. Innis that Miranda warnings are required when a person in custody is subject to either "express questioning" or the "functional equivalent" of interrogation. Innis, 446 U.S. at 300-01. The Court also clarified the meaning of those terms.

In Innis, officers arrested the defendant, Innis, for robbery with a sawed-off shotgun. Id. at 293-94. Innis received three sets of Miranda warnings but declined to waive his rights because he "wanted to speak with a lawyer." Id. at 294. Several officers then transported him to the central police station. Ibid. While en route, two of the officers discussed the risk that students who attended a nearby school for "handicapped children" "might find a weapon" and "hurt themselves." Id. at 294-95. Innis interrupted the conversation and told the officers to "turn the car around so he could show them where the gun was located." Id. at 295. When the police again advised him of his rights, he replied that he "wanted to get the gun out of the way because of the kids in the area in the school." Ibid. Innis then led the officers to the shotgun. Ibid.

The United States Supreme Court explored the meaning of "interrogation" in that context. The Court held that Miranda's safeguards applied not only to express interrogation of a suspect in custody but also to "its functional equivalent." Id. at 300-01. As to the latter category, the Court explained that interrogation refers to "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Id. at 301.

The Court divided over the application of the standard. By a vote of 6 to 3, the majority found that, although Innis was subjected to "subtle compulsion," the above standard had not been met. Id. at 303.

The Court applied the Innis standard again in Arizona v. Mauro, 481 U.S. 520 (1987). Once again, a divided Court concluded that the defendant, Mauro, had not been interrogated by the police. Id. at 527. Mauro admitted to the police that he had killed his son. Id. at 521. He directed them to the child's body but declined to make additional statements without a lawyer. Id. at 522. Meanwhile, Mauro's wife asked the police if she could speak with her husband. Ibid. An officer took her to Mauro and remained in the room; the officer visibly recorded the conversation, which the prosecution later played at trial. Id. at 522-23.

Five justices concluded the circumstances "were far less questionable than the 'subtle compulsion'" that was not found to be an interrogation in Innis. Id. at 529. The majority added that "Mauro was not subjected to compelling influences, psychological ploys, or direct questioning. Thus, his volunteered statements cannot properly be considered the result of police interrogation." Ibid. Four justices critiqued the majority's application of the Innis standard in dissent. See id. at 530 (Stevens, J., dissenting). In their judgment, "the police knew or should have known that Mrs. Mauro's encounter with [her husband] was reasonably likely to produce an incriminating response." Id. at 535.

C.

New Jersey's privilege against self-incrimination guarantees that "every natural person has a right to refuse to disclose in an action or to a police officer or other official any matter that will incriminate him or expose him to a penalty or a forfeiture of his estate." N.J.S.A. 2A:84A-19; N.J.R.E. 503. Differences between the text of the Fifth Amendment and the state privilege have led to different interpretations. O'Neill, 193 N.J. at 176. Indeed, we have interpreted the state privilege to grant "broader protection than its . . . federal counterpart." Id. at 176-77; see also State v. Maltese, 222 N.J. 525,

544 (2015); O'Neill, 193 N.J. at 177-79 (discussing examples from the case law).

This Court has adopted the Innis standard and embraced the view that interrogation includes not only direct questioning but also "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response." State v. Hubbard, 222 N.J. 249, 267 (2015) (quoting Innis, 446 U.S. at 301); State v. Bey, 112 N.J. 45, 68 n.13 (1988). We continue to apply the Innis test in accordance with its plain meaning.

IV.

Juveniles receive heightened protections when it comes to custodial interrogations for obvious reasons. Common sense tells us that juveniles -- teenagers and children alike -- are typically less mature, often lack judgment, and are generally more vulnerable to pressure than adults. See J.D.B. v. North Carolina, 564 U.S. 261, 272-73 (2011). For those and other reasons, "the greatest care must be taken to assure that" a juvenile's admission is "voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair." In re Gault, 387 U.S. 1, 55 (1967).

Parents and other adults play a key role in that regard. As the United States Supreme Court acknowledged long ago, a juvenile in custody who faces questioning needs "support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, may not crush him." Haley v. Ohio, 332 U.S. 596, 600 (1948). Without guidance from an adult relative, friend, or lawyer, juveniles are simply on an "unequal footing with [their] interrogators" and are not "able to know, let alone assert, [their] constitutional rights." Gallegos v. Colorado, 370 U.S. 49, 54-55 (1962). In the intimidating setting of a police station, parents can serve as advisors and offer support and assistance. See id. at 54.

This Court has stressed the critical role parents have when juveniles are interrogated. In State in Interest of S.H., decided nearly a half-century ago, the Court observed that "[p]lacing a young boy in the 'frightening atmosphere' of a police station without the presence of his parents or someone to whom the boy can turn for support is likely to have harmful effects on his mind and will." 61 N.J. 108, 114 (1972). The Court therefore "emphasize[d that] whenever possible and especially in the case of young children no child should be interviewed except in the presence of his parents or guardian." Id. at 114-15.

The Court built on S.H. in its decision in Presha, which is central to this appeal. Presha took note of the State's shift primarily from rehabilitation of juvenile offenders to an "increased focus on . . . apprehension and prosecution." 163 N.J. at 314. As a result, "the parent's role in an interrogation setting takes on new significance." Id. at 314-15. In particular,

> [w]hen younger offenders are in custody, the parent serves as a buffer between the juvenile, who is entitled to certain protections, and the police, whose investigative function brings the officers necessarily in conflict with the juvenile's legal interests. Parents are in a position to assist juveniles in understanding their rights, acting intelligently in waiving those rights, and otherwise remaining calm in the face of an interrogation.
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> [Id. at 315 (citing Gallegos, 370 U.S. at 54) (emphasis added).]

The Court therefore concluded that an adult's absence from the interrogation room should be considered "a highly significant factor" that is entitled to "added weight when balance[ed] . . . against" the other relevant factors. Ibid. For juveniles under the age of fourteen, the Court imposed a bright-line rule that statements made "when a parent or legal guardian is absent from" the interrogation are not admissible "unless the adult was unwilling to be present or truly unavailable." Ibid.

For all juveniles, the Court instructed that "police officers must use their best efforts to locate a parent or legal guardian before" an interrogation begins.

Id. at 316. If "an adult is unavailable or declines to accompany the juvenile, the police must conduct the interrogation with 'the utmost fairness and in accordance with the highest standards of due process and fundamental fairness.'" Id. at 317 (quoting S.H., 61 N.J. at 115).

The Court's recent ruling in A.S. underscored the supportive role parents have in the context of a custodial interrogation. In A.S., the police enlisted the mother of a fourteen-year-old girl, A.S., to help during the interrogation process. They asked the mother to recite the Miranda warnings and did not correct her misstatements. A.S., 203 N.J. at 136. When A.S., for example, asked whether she had to talk if she had a lawyer, her mother replied, "You . . . have to talk"; "[Y]ou have to answer." Id. at 139-40. Although a parent can advise a child to cooperate with the police and even to confess, see id. at 148; State in Interest of Q.N., 179 N.J. 165, 177 (2004), A.S.'s mother repeatedly badgered her into answering the officer's questions despite her "imperfect, child-like efforts to assert her right to" remain silent, A.S., 203 N.J. at 136, 141.

The Court concluded that A.S.'s confession was involuntary and confirmed that a parent's "presence alone" is not what Presha contemplated. Id. at 148, 152. To serve as a buffer between the police and the juvenile, a parent must act "with the interests of the juvenile in mind." Id. at 148. In

short, the Court reaffirmed that the purpose of Presha -- to have a parent present during interrogation -- "was to assist the child in the exercise of his or her constitutional rights; it was not to provide the police with an assistant." Id. at 137.

V.

We evaluate A.A.'s statements to his mother while in police custody against that backdrop.

The police contacted A.A.'s mother -- in compliance with Presha -- and summoned her to the police station where A.A. was in custody. When she arrived, the police escorted her to an interview room and told her about the shooting incident and why A.A. was under arrest. She was understandably upset and asked to speak with her son. Rather than bring A.A. to the interview room, the police accompanied his mother to the holding cell and allowed mother and son to speak to one another on opposite sides of the cell's gate in an otherwise open area.

The reason to summon A.A.'s mother was for her to help her son understand his rights and act intelligently in deciding whether to waive them. See Presha, 163 N.J. at 315. But before mother and son began to speak, the police did not advise A.A. of his rights in his mother's presence. Neither A.A. nor his mother had been made aware that anything A.A. might say could be

used against him, among other important rights. In that setting, A.A. made critical admissions to his mother that the Family Part judge later relied on. The police did not question A.A. afterward.

Under the circumstances, it was hardly a surprise that A.A. and his mother spoke about the crime for which A.A. had been arrested. The police should have known it was reasonably likely that A.A.'s mother would elicit incriminating responses from him. See Innis, 446 U.S. at 301. Although we find no evidence of bad faith on the part of the police, their words and actions set in motion A.A.'s incriminating statements to his mother. Under Innis, therefore, A.A. was subjected to the "functional equivalent" of express questioning while in custody. Id. at 300-01. His statements, obtained without the benefit of any Miranda warnings, are thus inadmissible.

What took place here upended the model envisioned in Presha. Instead of serving as a buffer to help a juvenile understand his rights, the child's mother unwittingly assisted the police and helped gather incriminating evidence. That runs counter to principles in our jurisprudence set forth in S.H., Presha, and A.S. We base our ruling on state law, which provides more expansive protections against self-incrimination than the Fifth Amendment. See Maltese, 222 N.J. at 544; O'Neill, 193 N.J. at 176-77.

The Appellate Division's decision in State in Interest of Stasilowicz, 105 N.J. Super. 151 (App. Div. 1968), does not alter our conclusion. In that case, an attendant at a youth detention facility overheard admissions a juvenile made to his stepfather. Id. at 154. Nothing in the reported decision suggests the admissions stemmed from words or actions of the police in the context of a police interrogation or its equivalent.

VI.

The protections outlined in Presha remain good law. To reinforce them and avoid what took place here, we add the following guidance. The police should advise juveniles in custody of their Miranda rights -- in the presence of a parent or legal guardian -- before the police question, or a parent speaks with, the juvenile. Officers should then give parents or guardians a meaningful opportunity to consult with the juvenile in private about those rights. See Q.N., 179 N.J. at 182 (Wallace, J., dissenting); A.A., 455 N.J. Super. at 505; see also D.M. v. State, 949 N.E.2d 327, 335 (Ind. 2011); Commonwealth v. Roane, 329 A.2d 286, 289 (Pa. 1974); In re E.T.C., 449 A.2d 937, 940 (Vt. 1982). That approach would enable parents to help children understand their rights and decide whether to waive them -- as contemplated in Presha. If law enforcement officers do not allow a parent and juvenile to consult in private, absent a compelling reason, that fact should weigh heavily in the totality of the

circumstances to determine whether the juvenile's waiver and statements were voluntary. See Presha, 163 N.J. at 315.

If legitimate security concerns require the police to observe a private consultation, the police can monitor the interaction without listening to the words spoken between parent and child. See La. Admin. Code tit. 67, Pt V, § 7519(H)(2) (requiring that interview and visiting rooms at juvenile detention facilities "shall allow privacy, yet permit visual supervision by staff"). We note, of course, that law enforcement officers already do not sit in on private meetings between defendants and their lawyers. Cf. N.Y. Comp. Codes R. & Regs. tit. 22, § 34.0, Guideline VIII.5 ("The interview rooms [in court facilities] should provide for visual surveillance by security personnel and should be so constructed that the conversation between the attorney and his client is private.").[1]

[1] We decline to address the ACLU's argument that juveniles must be allowed to consult with counsel before they can waive their Miranda rights. A.A. did not advance that claim and, as a general rule, the Court "does not consider arguments that have not been asserted by a party, and are raised for the first time by an amicus curiae." State v. J.R., 227 N.J. 393, 421 (2017) (citing Bethlehem Twp. Bd. of Educ. v. Bethlehem Twp. Educ. Ass'n, 91 N.J. 38, 48-49 (1982)).

VII.

Finally, we agree with the Appellate Division that a new hearing is required. A.A., 455 N.J. Super. at 506. The State's case relied on three principal strands of evidence: Officer Labarbera's identification of two men he saw on bicycles shortly before the shooting; video surveillance that depicted three black males riding bicycles near the crime scene; and A.A.'s admissions. The Family Part judge pointedly relied on A.A.'s statements to establish his whereabouts at the time of the offense as well as his motive. Because the pivotal admissions were "clearly capable of producing an unjust result," R. 2:10-2, we reverse the adjudication of delinquency and remand for a new hearing.

VIII.

For the reasons outlined above, we affirm the judgment of the Appellate Division and remand to the Family Part for further proceedings.

JUSTICES LaVECCHIA, ALBIN, PATTERSON, FERNANDEZ-VINA, SOLOMON and TIMPONE join in CHIEF JUSTICE RABNER's opinion.

Supreme Court of New Jersey.

State v. Henderson

208 N.J. 208 (N.J. 2011) · 27 A.3d 872
Decided Aug 24, 2011

2011-08-24

STATE of New Jersey, Plaintiff–Appellant,v.Larry R. HENDERSON, Defendant–Respondent.

Deborah C. Bartolomey, Deputy Attorney General, argued the cause for appellant (Paula T. Dow, Attorney General of New Jersey, attorney).Joshua D. Sanders and Joseph E. Krakora, Assistant Deputy Public Defenders, argued the cause for respondent (Yvonne Smith Segars, Public Defender, attorney).Alison S. Perrone argued the cause for amicus curiae Association of Criminal Defense Lawyers of New Jersey.Barry C. Scheck, a member of the New York bar, argued the cause for amicus curiae Innocence Project, Inc. (Gibbons, attorneys; Mr. Scheck, Lawrence S. Lustberg, Newark, and Ellen P. Lubensky, on the briefs).

Chief Justice RABNER delivered the opinion of the Court.

876 *876 Deborah C. Bartolomey, Deputy Attorney General, argued the cause for appellant (Paula T. Dow, Attorney General of New Jersey, attorney).Joshua D. Sanders and Joseph E. Krakora, Assistant Deputy Public Defenders, argued the cause for respondent (Yvonne Smith Segars, Public Defender, attorney).Alison S. Perrone argued the cause for amicus curiae Association of Criminal Defense Lawyers of New Jersey.Barry C. Scheck, a member of the New York bar, argued the cause for amicus curiae Innocence Project, Inc. (Gibbons, attorneys; Mr. Scheck, Lawrence S. Lustberg, Newark, and Ellen P. Lubensky, on the briefs).

Chief Justice RABNER delivered the opinion of the Court.

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217 *877 *217 ## I. Introduction

In the thirty-four years since the United States Supreme Court announced a test for the admission of eyewitness identification evidence, which New Jersey adopted soon after, a vast body of scientific research about human memory has emerged. That body of work casts doubt on some commonly held views relating to memory. It also calls into question the vitality of the current legal framework for analyzing the reliability of eyewitness identifications. *See Manson v. Brathwaite,* 432 *U.S.* 98, 97 *S.Ct.* 2243, 53 *L.Ed.*2d 140 (1977); *State v. Madison,* 109 *N.J.* 223, 536 *A.*2d 254 (1988).

In this case, defendant claims that an eyewitness mistakenly identified him as an accomplice to a murder. Defendant argues that the identification was not reliable because the officers investigating the case intervened during the identification process and unduly influenced the eyewitness. After a pretrial hearing, the trial court found that the officers' behavior was not impermissibly suggestive and admitted the evidence. The Appellate Division reversed. It held that the officers' actions were presumptively suggestive because they violated guidelines issued by the Attorney General in 2001 for conducting identification procedures.

After granting certification and hearing oral argument, we remanded the case and appointed a Special Master to evaluate scientific and other evidence about eyewitness identifications. The Special Master presided over a
218 hearing that probed testimony by seven experts and produced more than 2,000 pages of transcripts *218 along with hundreds of scientific studies. He later issued an extensive and very fine report, much of which we adopt.

We find that the scientific evidence considered at the remand hearing is reliable. That evidence offers convincing proof that the current test for evaluating the trustworthiness of eyewitness identifications should be revised. Study after study revealed a troubling lack of reliability in eyewitness identifications. From social science research to the review of actual

878 *878 police lineups, from laboratory experiments to DNA exonerations, the record proves that the possibility of mistaken identification is real. Indeed, it is now widely known that eyewitness misidentification is the leading cause of wrongful convictions across the country.

We are convinced from the scientific evidence in the record that memory is malleable, and that an array of variables can affect and dilute memory and lead to misidentifications. Those factors include system variables like lineup procedures, which are within the control of the criminal justice system, and estimator variables like

lighting conditions or the presence of a weapon, over which the legal system has no control. To its credit, the Attorney General's Office incorporated scientific research on system variables into the guidelines it issued in 2001 to improve eyewitness identification procedures. We now review both sets of variables in detail to evaluate the current *Manson/ Madison* test.

In the end, we conclude that the current standard for assessing eyewitness identification evidence does not fully meet its goals. It does not offer an adequate measure for reliability or sufficiently deter inappropriate police conduct. It also overstates the jury's inherent ability to evaluate evidence offered by eyewitnesses who honestly believe their testimony is accurate.

Two principal steps are needed to remedy those concerns. First, when defendants can show some evidence of suggestiveness, all relevant system and estimator variables should be explored at pretrial hearings. A trial court can end the hearing at any time, however, if the court concludes from the testimony that defendant's threshold
219 allegation of suggestiveness is groundless. Otherwise,*219 the trial judge should weigh both sets of variables to decide if the evidence is admissible.

Up until now, courts have only considered estimator variables if there was a finding of impermissibly suggestive police conduct. In adopting this broader approach, we decline to order pretrial hearings in every case, as opposed to cases in which there is some evidence of suggestiveness. We also reject a bright-line rule that would require suppression of reliable evidence any time a law enforcement officer missteps.

Second, the court system should develop enhanced jury charges on eyewitness identification for trial judges to use. We anticipate that identification evidence will continue to be admitted in the vast majority of cases. To help jurors weigh that evidence, they must be told about relevant factors and their effect on reliability. To that end, we have asked the Criminal Practice Committee and the Committee on Model Criminal Jury Charges to draft proposed revisions to the current model charge on eyewitness identification and address various system and estimator variables. With the use of more focused jury charges on those issues, there will be less need to call expert witnesses at trial. Trial courts will still have discretion to admit expert testimony when warranted.

The factors that both judges and juries will consider are not etched in stone. We expect that the scientific research underlying them will continue to evolve, as it has in the more than thirty years since *Manson.* For the same reason, police departments are not prevented from improving their practices as we learn more about variables that affect memory. New approaches, though, must be based on reliable scientific evidence that experts generally accept.

The changes outlined in this decision are significant because eyewitness identifications

879 *879 bear directly on guilt or innocence. At stake is the very integrity of the criminal justice system and the courts' ability to conduct fair trials. Ultimately, we believe that the framework described below will both protect
220 the rights of *220 defendants, by minimizing the risk of misidentification, and enable the State to introduce vital evidence.

The revised principles in this decision will apply purely prospectively except for defendant Larry Henderson and defendant Cecilia Chen, the subject of a companion case also decided today. *See State v. Chen,* 207 *N.J.* 404, 25 *A.*3d 256 (2011). We remand defendant Henderson's case for a new pretrial hearing consistent with this opinion to determine the admissibility of the eyewitness evidence introduced at his trial.

II. Facts and Procedural History

A. Facts

In the early morning hours of January 1, 2003, Rodney Harper was shot to death in an apartment in Camden. James Womble witnessed the murder but did not speak with the police until they approached him ten days later.

Womble and Harper were acquaintances who occasionally socialized at the apartment of Womble's girlfriend, Vivian Williams. On the night of the murder, Womble and Williams brought in the New Year in Williams' apartment by drinking wine and champagne and smoking crack cocaine. Harper had started the evening with them but left at around 10:15 p.m. Williams also left roughly three hours later, leaving Womble alone in the apartment until Harper rejoined him at 2:00 to 2:30 a.m.

Soon after Harper returned, two men forcefully entered the apartment. Womble knew one of them, co-defendant George Clark, who had come to collect $160 from Harper. The other man was a stranger to Womble.

While Harper and Clark went to a different room, the stranger pointed a gun at Womble and told him, “Don't move, stay right here, you're not involved in this.” He remained with the stranger in a small, narrow, dark hallway. Womble testified that he “got a look at” the stranger, but not “a real good look.” Womble also described the gun pointed at his torso as a dark semiautomatic.

221 *221 Meanwhile, Womble overheard Clark and Harper argue over money in the other room. At one point, Harper said, “do what you got to do,” after which Womble heard a gunshot. Womble then walked into the room, saw Clark holding a handgun, offered to get Clark the $160, and urged him not to shoot Harper again. As Clark left, he warned Womble, “Don't rat me out, I know where you live.”

Harper died from the gunshot wound to his chest on January 10, 2003. Camden County Detective Luis Ruiz and Investigator Randall MacNair were assigned to investigate the homicide, and they interviewed Womble the next day. Initially, Womble told the police that he was in the apartment when he heard two gunshots outside, that he left to look for Harper, and that he found Harper slumped over in his car in a nearby parking lot, where Harper said he had been shot by two men he did not know.

The next day, the officers confronted Womble about inconsistencies in his story. Womble claimed that they also threatened to charge him in connection with the murder. Womble then decided to “come clean.” He admitted that he lied at first because he did not want to “rat” out anyone and “didn't want to get involved” out of fear of retaliation against his elderly father. Womble led the investigators to

880 *880 Clark, who eventually gave a statement about his involvement and identified the person who accompanied him as defendant Larry Henderson.

The officers had Womble view a photographic array on January 14, 2003. That event lies at the heart of this decision and is discussed in greater detail below. Ultimately, Womble identified defendant from the array, and Investigator MacNair prepared a warrant for his arrest. Upon arrest, defendant admitted to the police that he had accompanied Clark to the apartment where Harper was killed, and heard a gunshot while waiting in the hallway. But defendant denied witnessing or participating in the shooting.

A grand jury in Camden County returned an indictment charging Henderson and Clark with the following
222 offenses: first-degree *222 murder, N.J.S.A. 2C:11–3(a)(1) or (2); second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39–4(a); fourth-degree aggravated assault, *N.J.S.A.* 2C:12–1(b)(4); third-degree unlawful possession of a weapon, N.J.S.A. 2C:39–5(b); and possession of a weapon having been convicted of a prior offense, N.J.S.A. 2C:39–7(a) (Henderson) and –7(b) (Clark).

B. Photo Identification and *Wade* Hearing

As noted above, Womble reviewed a photo array at the Prosecutor's Office on January 14, 2003, and identified defendant as his assailant. The trial court conducted a pretrial *Wade* hearing to determine the admissibility of that identification. Investigator MacNair, Detective Ruiz, and Womble all testified at the hearing. Cherry Hill Detective Thomas Weber also testified.

Detective Weber conducted the identification procedure because, consistent with guidelines issued by the Attorney General, he was not a primary investigator in the case. *See* Office of the Attorney Gen., N.J. Dep't of Law and Pub. Safety, *Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures* 1 (2001) (Attorney General Guidelines or Guidelines). According to the Guidelines, discussed in detail below, primary investigators should not administer photo or live lineup identification procedures "to ensure that inadvertent verbal cues or body language do not impact on a witness." *Ibid.*

Ruiz and MacNair gave Weber an array consisting of seven "filler" photos and one photo of defendant Henderson. The eight photos all depicted headshots of African–American men between the ages of twenty-eight and thirty-five, with short hair, goatees, and, according to Weber, similar facial features. At the hearing, Weber was not asked whether he knew which photograph depicted the suspect. (Later at trial, he said he did not know.)

The identification procedure took place in an interview room in the Prosecutor's Office. At first, Weber and
223 Womble were alone *223 in the room. Weber began by reading the following instructions off a standard form:

In a moment, I will show you a number of photographs one at a time. You may take as much time as you need to look at each one of them. You should not conclude that the person who committed the crime is in the group merely because a group of photographs is being shown to you. The person who committed the crime may or may not be in the group, and the mere display of the photographs is not meant to suggest that

881 *881 our office believes the person who committed the crime is in one of the photographs. You are absolutely not required to choose any of the photographs, and you should feel not obligated to choose any one. The photographs will be shown to you in random order. I am not in any way trying to influence your decision by the order of the pictures presented. Tell me immediately if you recognize the person that committed the crime in one of the photographs. All of the photographs will be shown to you even if you select a photograph.

Please keep in mind that hairstyles, beards, and mustaches are easily changed. People gain and lose weight. Also, photographs do not always show the true complexion of a person. It may be lighter or darker than shown in the photograph. If you select a photograph, please do not ask me whether I agree with or support your selection. It is your choice alone that counts. Please do not discuss whether you selected a photograph with any other witness who may be asked to look at these photographs.

To acknowledge that he understood the instructions, Womble signed the form.

Detective Weber pre-numbered the eight photos, shuffled them, and showed them to Womble one at a time. Womble quickly eliminated five of the photos. He then reviewed the remaining three, discounted one more, and said he "wasn't 100 percent sure of the final two pictures." At the *Wade* hearing, Detective Weber recalled that Womble "just shook his head a lot. He seemed indecisive." But he did not express any fear to Weber.

Weber left the room with the photos and informed MacNair and Ruiz that the witness had narrowed the pictures to two but could not make a final identification. MacNair and Ruiz testified at the hearing that they did not know whether defendant's picture was among the remaining two photos.

MacNair and Ruiz entered the interview room to speak with Womble. According to MacNair's testimony at the
224 *Wade* hearing, he and Ruiz believed that Womble was holding back—as he had *224 earlier in the investigation —based on fear. Ruiz said Womble was "nervous, upset about his father."

In an effort to calm Womble, MacNair testified that he "just told him to focus, to calm down, to relax and that any type of protection that [he] would need, any threats against [him] would be put to rest by the Police Department." Ruiz added, "just do what you have to do, and we'll be out of here." In response, according to MacNair, Womble said he "could make [an] identification."

MacNair and Ruiz then left the interview room. Ruiz testified that the entire exchange lasted less than one minute; Weber believed it took about five minutes. When Weber returned to the room, he reshuffled the eight photos and again displayed them to Womble sequentially. This time, when Womble saw defendant's photo, he slammed his hand on the table and exclaimed, "[t]hat's the mother [- - - - - -] there." From start to finish, the entire process took fifteen minutes.

Womble did not recant his identification, but during the *Wade* hearing he testified that he felt as though Detective Weber was "nudging" him to choose defendant's photo, and "that there was pressure" to make a choice.

After hearing the testimony, the trial court applied the two-part *Manson/ Madison* test to evaluate the admissibility of the eyewitness identification. *See Manson, supra,* 432 *U.S.* at 114, 97 *S.Ct.* at 2253, 53 *L.Ed.*2d at 154;

882 *882 *Madison, supra,* 109 *N.J.* at 232–33, 536 *A.*2d 254. The test requires courts to determine first if police identification procedures were impermissibly suggestive; if so, courts then weigh five reliability factors to decide if the identification evidence is nonetheless admissible. *See Manson, supra,* 432 *U.S.* at 114, 97 *S.Ct.* at 2253, 53 *L.Ed.*2d at 154; *Madison, supra,* 109 *N.J.* at 232–33, 536 *A.*2d 254.

The trial court first found that the photo display itself was "a fair makeup." Under the totality of the
225 circumstances, the judge concluded that the photo identification was reliable. The court *225 found that there was "nothing in this case that was improper, and certainly nothing that was so suggestive as to result in a substantial likelihood of misidentification at all." The court also noted that Womble displayed no doubts about identifying defendant Henderson, that he had the opportunity to view defendant at the crime scene, and that Womble fixed his attention on defendant "because he had a gun on him."

C. Trial

The following facts—relevant to Womble's identification of defendant—were adduced at trial after the court determined that the identification was admissible: Womble smoked two bags of crack cocaine with his girlfriend in the hours before the shooting; the two also consumed one bottle of champagne and one bottle of wine; the lighting was "pretty dark" in the hallway where Womble and defendant interacted; defendant shoved Womble during the incident; and Womble remembered looking at the gun pointed at his chest. Womble also admitted smoking about two bags of crack cocaine each day from the time of the shooting until speaking with police ten days later.

At trial, Womble elaborated on his state of mind during the identification procedure. He testified that when he first looked at the photo array, he did not see anyone he recognized. As he explained, "[m]y mind was drawing a blank ... so I just started eliminating photos." To make a final identification, Womble said that he "really had to search deep." He was nonetheless "sure" of the identification.

Womble had no difficulty identifying defendant at trial eighteen months later. From the witness stand, Womble agreed that he had no doubt that defendant—the man in the courtroom wearing "the white dress shirt"—"is the man who held [him] at bay with a gun to [his] chest."

Womble also testified that he discarded a shell casing from the shooting at an intersection five or six blocks
226 from the apartment; he helped the police retrieve the casing ten days later. No guns *226 or other physical evidence were introduced linking defendant to the casing or the crime scene.

Neither Clark nor defendant testified at trial. The primary evidence against defendant, thus, was Womble's identification and Detective MacNair's testimony about defendant's post-arrest statement.[2]

[2] The prosecution played a tape of Clark's statement at trial as well. It placed Henderson at the apartment but largely exculpated him. According to the record, the parties acknowledged that references in the statement to a co-defendant, namely Henderson, would have to be redacted under *Bruton v. United States,* 391 *U.S.* 123, 88 *S.Ct.* 1620, 20 *L.Ed.*2d 476 (1968). Defense counsel did not seek redaction, though, specifically because the court had admitted the photo lineup and because of the tape's exculpatory nature.

At the close of trial on July 20, 2004, the court relied on the existing model jury charge on eyewitness identification and instructed the jury as follows:

[Y]ou should consider the observations and perceptions on which the identification is based, and Womble's ability to

883 *883 make those observations and perceptions. If you determine that his out-of-court identification is not reliable, you may still consider Womble's in-court identification of Gregory Clark and Larry Henderson if you find that to be reliable. However, unless the identification here in court resulted from Womble's observations or perceptions of a perpetrator during the commission of an offense rather than being the product of an impression gained at an out-of-court identification procedure such as a photo lineup, it should be afforded no weight. The ultimate issues of the trustworthiness of both in-court and out-of-court identifications are for you, the jury to decide.

To decide whether the identification testimony is sufficiently reliable evidence ... you may consider the following factors:

First of all, Womble's opportunity to view the person or persons who allegedly committed the offense at the time of the offense; second, Womble's degree of attention on the alleged perpetrator when he allegedly observed the crime being committed; third, the accuracy of any prior description of the perpetrator given [b]y Womble; fourth, you should consider the fact that in Womble's sworn taped statement of January 11th, 2003 to the police ..., Womble did not identify anyone as the person or persons involved in the shooting of Rodney Harper ....

Next, you should consider the degree of certainty, if any, expressed by Womble in making the identification.... [3]

[3] After defendant's conviction, this Court decided *State v. Romero,* 191 *N.J.* 59, 76, 922 *A.*2d 693 (2007), which held that jurors are to be warned that "a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification."

227 *227 You should also consider the length of time between Womble's observation of the alleged offense and his identification .... You should consider any discrepancies or inconsistencies between identifications ....

Next, the circumstances under which any out-of-court identification was made including in this case the evidence that during the showing to him of eight photos by Detective Weber he did not identify Larry Henderson when he first looked at them and later identified Larry Henderson from one of those photos.

.... You may also consider any other factor based on the evidence or lack of evidence in the case which you consider relevant to your determination whether the identification made by Womble is reliable or not.

Defendant did not object to the charge or ask for any additional instructions related to the identification evidence presented at trial.

On July 20, 2004, the jury acquitted defendant of murder and aggravated manslaughter, and convicted him of reckless manslaughter, N.J.S.A. 2C:11–4(b)(1), aggravated assault, and two weapons charges. In a bifurcated trial the next day, the jury convicted defendant of the remaining firearms offense: possession by a previously convicted person. The court sentenced him to an aggregate eleven-year term of imprisonment, with a period of parole ineligibility of almost six years under the No Early Release Act, N.J.S.A. 2C:43–7.2. Defendant appealed his conviction and sentence.

D. Appellate Division

The Appellate Division presumed that the identification procedure in this case was impermissibly suggestive under the first prong of the *Manson/Madison* test.

884 *884 *State v. Henderson,* 397 *N.J.Super.* 398, 414, 937 *A.*2d 988 (App.Div.2008). The court reversed and remanded for a new *Wade* hearing to determine whether the identification was nonetheless reliable under the test's second prong. *Id.* at 400, 414–15, 937 *A.*2d 988.

The panel anchored its finding to what it considered to be a material breach of the Attorney General
228 Guidelines. *Id.* at 412, 937 *A.*2d 988. Among other things, the Guidelines require that *228 " 'whenever practical' the person conducting the photographic identification procedure 'should be someone other than the primary investigator assigned to the case.' " *Id.* at 411, 937 *A.*2d 988 (citing *State v. Herrera,* 187 *N.J.* 493, 516, 902 *A.*2d 177 (2006)). The panel specifically found that the investigating officers, MacNair and Ruiz, "consciously and deliberately intruded into the process for the purpose of assisting or influencing Womble's identification of defendant." *Id.* at 414, 937 *A.*2d 988. The officers' behavior, the court explained, "certainly violate [d] the spirit of the Guidelines." Id. at 412, 937 *A.*2d 988. In such circumstances, the panel "conclude[d] that a presumption of impermissible suggestiveness must be imposed, and a new *Wade* hearing conducted." *Id.* at 400, 937 *A.*2d 988.

E. Certification and Remand Order

We granted the State's petition for certification, 195 *N.J.* 521, 950 *A.*2d 907, 908 (2008), and also granted leave to appear as amicus curiae to the Association of Criminal Defense Lawyers of New Jersey (ACDL) and the Innocence Project (collectively "amici"). In their briefs and at oral argument, the parties and amici raised questions about possible shortcomings in the *Manson/Madison* test in light of recent scientific research.

In an unpublished Order dated February 26, 2009, attached as Appendix A, we "concluded that an inadequate factual record exist[ed] on which [to] test the current validity of our state law standards on the admissibility of eyewitness identification." App. A at *3. We therefore remanded the matter

summarily to the trial court for a plenary hearing to consider and decide whether the assumptions and other factors reflected in the two-part *Manson/ Madison* test, as well as the five factors outlined in those cases to determine reliability, remain valid and appropriate in light of recent scientific and other evidence.

[*Ibid.*]

We appointed the Honorable Geoffrey Gaulkin, P.J.A.D. (retired and temporarily assigned on recall) to preside at the remand hearing as a Special Master.

229 *229 Pursuant to the Order, the following parties participated in the remand hearing: the Attorney General, the Public Defender (representing defendant [4]), and amici.

[4] Defendant was still in prison on September 17, 2009, when the remand proceedings began. Through counsel, he waived his right to appear. Defendant was paroled on November 30, 2009, after which he again waived his appearance.

The parties and amici collectively produced more than 360 exhibits, which included more than 200 published scientific studies on human memory and eyewitness identification. During the ten-day remand hearing, the Special Master heard testimony from seven expert witnesses. Three of them—Drs. Gary Wells, Steven Penrod, and Roy Malpass—testified about the state of scientific research in the field of eyewitness identification.

Dr. Wells, who was called as a witness by the Innocence Project, holds a Ph.D. in Experimental Social Psychology and

885 *885 serves as a Professor of Psychology at Iowa State University. Since 1977, Dr. Wells has published more than 100 articles on eyewitness identification research. He assisted the Attorney General's Office in connection with the formulation of the Attorney General Guidelines.

Dr. Penrod, who was called as a witness by defendant, is a Distinguished Professor of Psychology at John Jay College of Criminal Justice in New York. He holds a degree in law and a Ph.D. in Pyschology. Dr. Penrod has also published extensively in the area of eyewitness identification and has served on the editorial board of numerous psychology journals.

Dr. Malpass, who was called by the State, is also widely published. He holds a Ph.D., and his academic career spans more than four decades. Dr. Malpass is currently a Professor of Psychology and Criminal Justice at the University of Texas, El Paso, where he runs the university's Eyewitness Identification Research Lab.

230 *230 The parties and amici also presented the testimony of three law professors: James Doyle, Jules Epstein, and Dr. John Monahan. The professors discussed the intersection of eyewitness identification research and the legal system.

Dr. Monahan and Professor Doyle were called as witnesses by the Innocence Project. Dr. Monahan has a Ph.D. in Clinical Psychology, is a Distinguished Professor of Law at the University of Virginia, and holds dual appointments in the Departments of Psychology and Psychiatric and Neurobehavioral Sciences. He coauthored the casebook *Social Science in Law* (7th ed. 2010), and has published extensively on that topic. Professor Doyle is Director of the Center for Modern Forensic Practice at John Jay College of Criminal Justice. In 1987, he co-authored a treatise titled *Eyewitness Testimony: Civil and Criminal,* which he regularly updates.

Defendant presented Professor Epstein as a witness. He is an Associate Professor of Law at Widener University School of Law, who has spent more than a decade representing criminal defendants in Philadelphia. He, too, has written extensively on eyewitness identification.

The State also called James Gannon to testify. From 1986 to 2007, he worked with the Morris County Prosecutor's Office, ultimately serving as Deputy Chief of Investigations. During his career, he investigated approximately 120 homicides. He continues to train law enforcement personnel locally and internationally. Gannon testified about practical constraints police officers sometimes face in conducting investigations.

III. Proof of Misidentifications

In this case, the parties heavily dispute the admissibility and reliability of Womble's eyewitness identification of defendant. We therefore begin with some important, general observations about eyewitness identification evidence, which are derived mostly from the remand hearing as well as prior case law.

231 *231 In 2006, this Court observed that eyewitness "[m]isidentification is widely recognized as the single greatest cause of wrongful convictions in this country." *State v. Delgado,* 188 *N.J.* 48, 60, 902 *A.*2d 888 (2006) (citations omitted); *see also Romero, supra,* 191 *N.J.* at 73–74, 922 *A.*2d 693 ("Some have pronounced that mistaken identifications 'present what is conceivably the greatest single threat to the achievement of our ideal that no innocent man shall be punished.' " (citation omitted)). That same year, the International Association of Chiefs of Police published training guidelines in which it concluded that "[o]f all investigative procedures employed by police in criminal

886 *886 cases, probably none is less reliable than the eyewitness identification. Erroneous identifications create more injustice and cause more suffering to innocent persons than perhaps any other aspect of police work." Int'l Ass'n of Chiefs of Police, *Training Key No. 600, Eyewitness Identification* 5 (2006).

Substantial evidence in the record supports those statements. Nationwide, "more than seventy-five percent of convictions overturned due to DNA evidence involved eyewitness misidentification." *Romero, supra,* 191 *N.J.* at 74, 922 *A.*2d 693 (citing Innocence Project report); Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 8–9, 279 (2011) [5] (finding same in 190 of first 250 DNA exoneration cases). In half of the cases, eyewitness testimony was not corroborated by confessions, forensic science, or informants. *See* The Innocence Project, *Understand the Causes: Eyewitness Misidentification*, http:// www. innocence project. org/ understand/ Eyewitness– Misidentifi cation. php (last visited August 16, 2011). Thirty-six percent of the defendants convicted were misidentified by more than one eyewitness. Garrett, *supra,* at 50. As we
232 recognized four years ago, "[i]t has been estimated that *232 approximately 7,500 of every 1.5 million annual convictions for serious offenses may be based on misidentifications." *Romero, supra*, 191 *N.J.* at 74, 922 *A.*2d 693 (citing Brian L. Cutler & Steven D. Penrod, *Mistaken Identification: The Eyewitness, Psychology, and the Law* 7 (1995)).

> 5 This book was published after the remand hearing, and a part was submitted to the Court and addressed by the parties. The book analyzes the first 250 DNA exoneration cases in the United States, and its author reviewed the full trial record in most of those matters. *See* Garrett, *supra,* at 7.

New Jersey is not immune. The parties noted that misidentifications factored into three of the five reported DNA exonerations in our State. In one of those cases, this Court had reversed convictions for rape and robbery because the trial court failed to instruct the jury that people may have greater difficulty in identifying members of a different race. *See State v. Cromedy,* 158 *N.J.* 112, 121–23, 132, 727 *A.*2d 457 (1999) (citing social science studies). After the decision, DNA tests led to Cromedy's exoneration.

But DNA exonerations are rare. To determine whether statistics from such cases reflect system-wide flaws, police departments have allowed social scientists to analyze case files and observe and record data from real-world identification procedures.

Four such studies—two from Sacramento, California and two from London, England—produced data from thousands of actual eyewitness identifications. *See* Bruce W. Behrman & Sherrie L. Davey, *Eyewitness Identification in Actual Criminal Cases: An Archival Analysis,* 25 *Law & Hum. Behav.* 475 (2001) (compiling records from fifty-eight live police lineups from area around Sacramento); Bruce W. Behrman & Regina E. Richards, *Suspect/Foil Identification in Actual Crimes and in the Laboratory: A Reality Monitoring Analysis,* 29 *Law & Hum. Behav.* 279 (2005) (assessing 461 photo and live lineup records from same area); Tim Valentine et al., *Characteristics of Eyewitness Identification that Predict the Outcome of Real Lineups,* 17 *Applied Cognitive Psychol.* 969 (2003) (analyzing 584 lineup records from police stations in and around London); Daniel B. Wright & Anne T. McDaid, *Comparing System and Estimator Variables Using Data from Real Line–Ups,* 10 *Applied Cognitive Psychol.* 75

887 *887 (1996) (evaluating 1,561 records from same area).

233 *233 For the larger London study, 39% of eyewitnesses identified the suspect, 20% identified a filler, and 41% made no identification. *See* Wright & McDaid, *supra,* at 77. Thus, about one-third of eyewitnesses who made an identification (20 of 59) in real police investigations wrongly selected an innocent filler. The results were comparable for the Valentine study. *See* Valentine, *supra,* at 974. Across both Sacramento studies, 51% of eyewitnesses identified the suspect, 16% identified a filler, and 33% identified no one. *See* Behrman & Davey, *supra,* at 482; Behrman & Richards, *supra,* at 285. In other words, nearly 24% of those who made an identification (16 of 67) mistakenly identified an innocent filler.

Although the studies revealed alarming rates at which witnesses chose innocent fillers out of police lineups, the data cannot identify how many of the suspects actually selected were the real culprits. *See* Behrman & Davey, *supra,* at 478. Researchers have conducted field experiments to try to answer that more elusive question: how often are innocent suspects wrongly identified?

Three experiments targeted unassuming convenience store clerks and one focused on bank tellers. *See* John C. Brigham et al., *Accuracy of Eyewitness Identifications in a Field Setting,* 42 *J. Personality & Soc. Psychol.* 673 (1982); Carol Krafka & Steven Penrod, *Reinstatement of Context in a Field Experiment on Eyewitness Identification,* 49 *J. Personality & Soc. Psychol.* 58 (1985); Stephanie J. Platz & Harmon M. Hosch, *Cross–Racial/Ethnic Eyewitness Identification: A Field Study,* 18 *J. Applied Soc. Psychol.* 972 (1988); Melissa A. Pigott et al., *A Field Study on the Relationship Between Quality of Eyewitnesses' Descriptions and Identification Accuracy,* 17 *J. Police Sci. & Admin.* 84 (1990) (bank teller study).

Each study unfolded with different variations of the following approach: a customer walked into a store and tried to buy a can of soda with a $10 traveler's check; he produced two pieces of identification and chatted with the clerk; and the encounter lasted about three minutes. *See, e.g.,* Krafka & Penrod, *supra,* at 62. Two to
234 twenty-four hours later, a different person entered the *234 same store and asked the same clerk to identify the man with the traveler's check; the clerk was told that the suspect might not be among the six photos presented; and no details of the investigation were given. *Ibid.* Only after making a choice was the clerk told that he or she had participated in an experiment. *Id.* at 63.

Across the four experiments, researchers gathered data from more than 500 identifications. Dr. Penrod testified that on average, 42% of clerks made correct identifications, 41% identified photographs of innocent fillers, and 17% chose to identify no one. *See* Brigham et al., *supra,* at 677; Krafka & Penrod, *supra,* at 64–65; Pigott et al., *supra,* at 86–87; Platz & Hosch, *supra,* at 978. Those numbers, like the results from the Sacramento and London studies, reveal high levels of misidentifications.

In two of the studies, researchers showed some clerks target-absent arrays—lineups that purposely excluded the perpetrator and contained only fillers. *See* Krafka & Penrod, *supra,* at 64–65; Pigott et al., *supra,* at 86. In those experiments, Dr. Penrod testified that 64% of eyewitnesses made no identification, but 36% picked a foil. *See* Krafka & Penrod, *supra,* at 64; Pigott et al., *supra,* at 86. Those field experiments suggest that when the true perpetrator is not in the lineup, eyewitnesses may nonetheless select an innocent

888 *888 suspect more than one-third of the time.

Any one of the above studies, standing alone, reveals a troubling lack of reliability in eyewitness identifications.

We accept that eyewitnesses generally act in good faith. Most misidentifications stem from the fact that human memory is malleable; they are not the result of malice. As discussed below, an array of variables can affect and dilute eyewitness memory.

Along with those variables, a concept called relative judgment, which the Special Master and the experts discussed, helps explain how people make identifications and raises concerns about reliability. Under typical lineup conditions, eyewitnesses are asked to identify a suspect from a group of similar-looking people.

235 "[R]elative judgment refers to the fact that the witness seems to be *235 choosing the lineup member who most resembles the witnesses' memory *relative* to other lineup members." Gary L. Wells, *The Psychology of Lineup Identifications,* 14 *J. Applied Soc. Psychol.* 89, 92 (1984) (emphasis in original). As a result, if the actual perpetrator is not in a lineup, people may be inclined to choose the best look-alike. *Id.* at 93. Psychologists have noted that "[t]his is not a surprising proposition." Gary L. Wells, *What Do We Know About Eyewitness Identification?,* 48 *Am. Psychologist* 553, 560 (1993). Also not surprising is that it enhances the risk of misidentification. *Ibid.*

In one relative-judgment experiment, 200 witnesses were shown a staged crime. *Id.* at 561. Half of the witnesses were then shown a lineup that included the perpetrator and five fillers; the other half looked at a lineup with fillers only. *Ibid.* All of the witnesses were warned that the culprit might not be in the array and were given the option to choose no one. *Ibid.* From the first group, 54% made a correct identification and 21% believed, incorrectly, that the perpetrator was not in the array. *Ibid.* If witnesses rely on pure memory instead of relative judgment, the accurate identifications from the first group should have translated roughly into 54% making no choice in the second, target-absent group. Instead, only 32% of witnesses from the second group said that the culprit was not present, while 68% misidentified a filler. *Ibid.* Consistent with the concept of relative judgment, witnesses chose other fillers who looked more like the perpetrator to them, instead of making no identification. *Ibid.*

Relative judgment touches the core of what makes the question of eyewitness identification so challenging. Without persuasive extrinsic evidence, one cannot know for certain which identifications are accurate and which are false—which are the product of reliable memories and which are distorted by one of a number of factors.

Nearly four decades ago, Chief Judge Bazelon remarked skeptically that in the face of such uncertainty, "we

236 have bravely assumed that the jury is capable of evaluating [eyewitness] reliability."*236 *United States v. Brown,* 461 F.2d 134, 145 n. 1 (D.C.Cir.1972) (Bazelon, C.J., concurring & dissenting). Five years later, in *Manson, supra,* the Supreme Court noted that in most cases "[w]e are content to rely upon the good sense and judgment of American juries" because eyewitness identification "evidence with some element of untrustworthiness is customary grist for the jury mill." 432 *U.S.* at 116, 97 *S.Ct.* at 2254, 53 *L.Ed.*2d at 155.

Justice Marshall, in dissent, expressed a contrary view. *See id.* at 120, 97 *S.Ct.* at 2255–56, 53 *L.Ed.*2d at 157 (Marshall, J., dissenting). A "fundamental fact of judicial experience," Justice Marshall wrote, is that jurors "unfortunately

889 *889 are often unduly receptive to [eyewitness identification] evidence." *Ibid.*

We presume that jurors are able to detect liars from truth tellers. But as scholars have cautioned, most eyewitnesses think they are telling the truth even when their testimony is inaccurate, and "[b]ecause the eyewitness is testifying honestly (i.e., sincerely), he or she will not display the demeanor of the dishonest or biased witness." *See* Jules Epstein, *The Great Engine that Couldn't: Science, Mistaken Identity, and the Limits of Cross–Examination,* 36 *Stetson L.Rev.* 727, 772 (2007). Instead, some mistaken eyewitnesses, at least by the time they testify at trial, exude supreme confidence in their identifications.

As discussed below, lab studies have shown that eyewitness confidence can be influenced by factors unrelated to a witness' actual memory of a relevant event. *See* Amy Bradfield Douglass & Nancy Steblay, *Memory Distortion in Eyewitnesses: A Meta–Analysis of the Post-identification Feedback Effect,* 20 *Applied Cognitive Psychol.* 859, 864–65 (2006) (addressing effects of confirmatory feedback on confidence). Indeed, this Court has already acknowledged that accuracy and confidence "may not be related to one another at all." *See Romero, supra,* 191 *N.J.* at 75, 922 *A.*2d 693 (citation omitted).

DNA exoneration cases buttress the lab results. Almost all of the eyewitnesses in those cases testified at trial
237 that they were positive they had identified the right person. *See* Garrett, *237 *supra,* 63–64 (noting also that in 57% of the trials, "the witnesses had earlier not been certain at all").

In the face of those proofs, we are mindful of the observation that "there is almost *nothing more convincing* [to a jury] than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!' " *Watkins v. Sowders,* 449 *U.S.* 341, 352, 101 *S.Ct.* 654, 661, 66 *L.Ed.*2d 549, 558–59 (Brennan, J., dissenting) (quoting Elizabeth Loftus, *Eyewitness Testimony* 19 (1979)) (emphasis in original).

The State challenges the above concepts in various ways: it argues that some studies evaluating real police files and investigations are unreliable because it is unclear whether the witnesses were given proper pre-lineup warnings, *see, e.g.,* Valentine et al., *supra;* that misidentification statistics gleaned from more than 200 nationwide DNA exonerations are insufficient to conclude that a serious problem exists; that the only DNA exonerations relevant to this case are the five cases from New Jersey, which all predated the Attorney General Guidelines; that exculpatory DNA evidence does not necessarily prove a defendant is innocent; and that DNA exonerations only remind us that the criminal justice system is imperfect.

That broad-brush approach, however, glosses over the consistency and importance of the comprehensive scientific research that is discussed in the record. Recent studies—ranging from analyses of actual police lineups, to laboratory experiments, to DNA exonerations—prove that the possibility of mistaken identification is real, and the consequences severe.

IV. Current Legal Framework

The current standards for determining the admissibility of eyewitness identification evidence derive from the principles the United States Supreme Court set forth in *Manson* in 1977. *See Manson, supra,* 432 *U.S.* at 114, 97 *S.Ct.* at 2253, 53 *L.Ed.*2d at 154. New Jersey formally adopted *Manson's* framework in *Madison, supra,* 109 *N.J.* at 232–33, 536 *A.*2d 254.

890 *238 *Madison* succinctly outlined *Manson*'s two-step test as follows: *890

[A] court must first decide whether the procedure in question was in fact impermissibly suggestive. If the court does find the procedure impermissibly suggestive, it must then decide whether the objectionable procedure resulted in a "very substantial likelihood of irreparable misidentification." In carrying out the second part of the analysis, the court will focus on the reliability of the identification. If the court finds that the identification is reliable despite the impermissibly suggestive nature of the procedure, the identification may be admitted into evidence.

[*Madison, supra,* 109 *N.J.* at 232, 536 *A.*2d 254 (citations omitted).]

As the Supreme Court explained, "reliability is the linchpin in determining the admissibility of identification testimony." *Manson, supra,* 432 *U.S.* at 114, 97 *S.Ct.* at 2253, 53 *L.Ed.*2d at 154. To assess reliability, courts must consider five factors adopted from *Neil v. Biggers:* (1) the "opportunity of the witness to view the criminal at the time of the crime"; (2) "the witness's degree of attention"; (3) "the accuracy of his prior description of the criminal"; (4) "the level of certainty demonstrated at the time of the confrontation"; and (5) "the time between the crime and the confrontation." *Madison, supra,* 109 *N.J.* at 239–40, 536 *A.*2d 254 (quoting *Manson, supra,* 432 *U.S.* at 114, 97 *S.Ct.* at 2253, 53 *L.Ed.*2d at 154 (citing *Neil v. Biggers,* 409 *U.S.* 188, 199, 93 *S.Ct.* 375, 382, 34 *L.Ed.*2d 401, 411 (1972))) (internal quotation marks omitted). Those factors are to be weighed against "the corrupting effect of the suggestive identification itself." *Manson, supra,* 432 *U.S.* at 114, 97 *S.Ct.* at 2253, 53 *L.Ed.*2d at 154.

Procedurally, a defendant must first "proffer ... some evidence of impermissible suggestiveness" to be entitled to a *Wade* hearing. *State v. Rodriquez,* 264 *N.J.Super.* 261, 269, 624 *A.*2d 605 (App.Div.1993) (citations omitted), *aff'd o.b.,* 135 *N.J.* 3, 637 *A.*2d 914 (1994); *State v. Ortiz,* 203 *N.J.Super.* 518, 522, 497 *A.*2d 552 (App.Div.1985). At the hearing, if the court decides the procedure "was in fact impermissibly suggestive," it then considers the reliability factors. *See Madison, supra,* 109 *N.J.* at 232, 536 *A.*2d 254. The State then "has the burden of proving by clear and convincing evidence that the identification[ ] ... had a source independent of
239 the police-conducted identification procedures." *239 *Id.* at 245, 536 *A.*2d 254 (citing *Wade, supra,* 388 *U.S.* at 240, 87 *S.Ct.* at 1939, 18 *L.Ed.*2d at 1164) (additional citation omitted). Overall, the reliability determination is to be made from the totality of the circumstances. *Id.* at 233, 87 *S.Ct.* 1926 (citing *Neil v. Biggers, supra,* 409 *U.S.* at 199, 93 *S.Ct.* at 382, 34 *L.Ed.*2d at 411).

Manson, supra, intended to address several concerns: problems with the reliability of eyewitness identification; deterrence; and the effect on the administration of justice. 432 *U.S.* at 111–13, 97 *S.Ct.* at 2251–52, 53 *L.Ed.*2d at 152–53. Underlying *Manson's* approach are certain assumptions: that jurors can detect untrustworthy eyewitnesses, *see id.* at 116, 97 *S.Ct.* at 2254, 53 *L.Ed.*2d at 155; and that the test would deter suggestive police practices, *see id.* at 112, 97 *S.Ct.* at 2252, 53 *L.Ed.*2d at 152. As to the latter point, the Court adopted a totality approach over a per se rule of exclusion to avoid "keep[ing] evidence from the jury that is reliable and relevant." *Ibid.*

Manson and *Madison* provide good examples for how the two-pronged test is applied. In *Manson, supra,* an undercover narcotics officer, Trooper Glover, observed a defendant during a drug buy. 432 *U.S.* at 100–01, 97 *S.Ct.* at 2245–46, 53 *L.Ed.*2d at 145–46. Glover did not know

891 *891 the person and described him to backup officers after the transaction. Based on the description, one of the officers left a photo of the defendant on Glover's desk. Glover later identified the defendant from the single photo. *Id.* at 101, 97 *S.Ct.* at 2246, 53 *L.Ed.*2d at 145–46.

Although the Court recognized that "identifications arising from single-photograph displays may be viewed in general with suspicion," it found that the corrupting effect of the challenged identification did not outweigh Glover's ability to make an accurate identification. *Id.* at 116, 97 *S.Ct.* at 2254, 53 *L.Ed.*2d at 155 (citation omitted). After assessing each of the five reliability factors, the Court concluded that the identification was admissible because it could not "say that under all the circumstances of this case there is 'a very substantial
240 likelihood of irreparable misidentification.'*240 " *Id.* at 116, 97 *S.Ct.* at 2254, 53 *L.Ed.*2d at 155 (citing *Simmons v. United States,* 390 *U.S.* 377, 384, 88 *S.Ct.* 967, 971, 19 *L.Ed.*2d 1247, 1253 (1968)). "Short of that," the Court noted, the "evidence is for the jury to weigh." *Ibid.*

This Court applied the same test in *Madison.* Two months after an armed robbery, a detective administering a photo lineup showed a victim twenty-four black-and-white photographs containing at least one photo of the defendant. *Madison, supra,* 109 *N.J.* at 225, 536 *A.*2d 254. Next, the detective showed the victim an additional thirty-eight color photographs, "thirteen or fourteen of which depicted defendant as the center of attention at a birthday celebration held in his honor." *Id.* at 235, 536 *A.*2d 254.

The Court found the identification procedure "impermissibly suggestive" based on "the sheer repetition of defendant's picture." *Id.* at 234, 536 A.2d 254. It then remanded to the trial court to evaluate, under the second prong, "whether the identification[ ] ... had an independent source" that could outweigh the substantial suggestiveness of the process. *See id.* at 245, 536 *A.*2d 254.

Since *Madison,* this Court, on occasion, has refined the *Manson/ Madison* framework. In *Cromedy, supra,* the Court examined numerous social science studies showing that identifications are less reliable when the witness and perpetrator are of different races. 158 *N.J.* at 121, 727 *A.*2d 457. In response, the Court held that jury instructions on the reliability of cross-racial identifications are necessary when "identification is a critical issue in the case" and there is no independent evidence corroborating the identification. *Id.* at 132, 727 *A.*2d 457.

More recently in *Romero, supra,* the Court recognized that "[j]urors likely will believe eyewitness testimony 'when it is offered with a high level of confidence, even though the accuracy of an eyewitness and the confidence of that witness may not be related to one another at all.' " 191 *N.J.* at 75, 922 A.2d 693 (quoting *Watkins, supra,* 449 *U.S.* at 352, 101 *S.Ct.* at 661, 66 *L.Ed.*2d at 558 (Brennan, J., dissenting)). The Court cited
241 "social science research noting the fallibility of eyewitness identifications" *241 and directed that juries be instructed as follows in eyewitness identification cases:

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. Therefore, when analyzing such testimony, be advised that a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification.

892 [*Id.* at 75–76, 922 *A.*2d 693.] *892

In *Delgado, supra,* the Court directed that "law enforcement officers make a written record detailing [all] out-of-court identification procedure[s], including the place where the procedure was conducted, the dialogue between the witness and the interlocutor, and the results." 188 *N.J.* at 63, 902 *A.*2d 888. *See also Herrera, supra,* 187 *N.J.* at 504, 902 *A.*2d 177 (finding showup identification procedures inherently suggestive).

Despite those important, incremental changes, we have repeatedly used the *Manson/Madison* test to determine the admissibility of eyewitness identification evidence. As we noted in *Herrera,* "[u]ntil we are convinced that a different approach is required after a proper record has been made in the trial court, we continue to follow the [*Manson/Madison*] approach." *Ibid.; see also State v. Adams,* 194 *N.J.* 186, 201, 943 *A.*2d 851 (2008).

That record is now before us. It enables us to consider whether the *Manson/Madison* framework remains valid and appropriate or if a different approach is required. To make that determination, we first look to the scope of the scientific evidence since 1977. We then examine its content.

V. Scope of Scientific Research

Virtually all of the scientific evidence considered on remand emerged after *Manson.* In fact, the earliest study the State submitted is from 1981, and only a handful of the more than 200 scientific articles in the record pre-date 1970.

During the 1970s, when the Supreme Court decided *Manson,* researchers conducted some experiments on the
242 malleability of human memory. But according to expert testimony, that decade *242 produced only four published articles in psychology literature containing the words "eyewitness" and "identity" in their abstracts. By contrast, the Special Master estimated that more than two thousand studies related to eyewitness identification have been published in the past thirty years.

Some recent studies have successfully gathered real-world data from actual police identification procedures. *See, e.g.,* Behrman & Davey, *supra;* Valentine et al., *supra.* But most eyewitness identification research is conducted through controlled lab experiments. Unlike analyses of real-world data, experimental studies allow researchers to control and isolate variables. If an experiment is designed well, scientists can then draw relevant conclusions from different conditions.

There have been two principal methods of conducting eyewitness lab research. In some experiments, eyewitnesses have been shown staged events without knowing they were witnessing something artificial. *See, e.g.,* Krafka & Penrod, *supra.* In other studies, witnesses generally knew they were participating in an experiment from the outset. *See, e.g.,* Lynn Garrioch & C.A. Elizabeth Brimacombe, *Lineup Administrators' Expectations: Their Impact on Eyewitness Confidence,* 25 *Law & Hum. Behav.* 299 (2001). Most experiments manipulate variables, like the witness' and suspect's race, for example, and use target-present and target-absent lineups to test the effect the variable has on accuracy. (The scientific literature often uses the term "lineup" to refer to live lineups and/or photo arrays; we sometimes use the word interchangeably as well.)

Authoritative researchers generally present the results of their experiments in peer-reviewed psychology journals. "The peer review process is a method of quality control that ensures the validity and reliability of experimental research." Roy S. Malpass et al., *The Need for Expert Psychological Testimony on Eyewitness Identification,* in *Expert Testimony on the*

893 *893 *Psychology of Eyewitness Identification* 3, 14 (Brian L. Cutler ed., 2009). The process is designed to
243 ensure that studies "have passed a rigorous *243 test and are generally considered worthy of consideration by the greater scientific community" before they are published. *Ibid.* Of the hundreds of laboratory studies in the record, nearly all have been published in prominent, peer-reviewed journals.

Although one lab experiment can produce intriguing results, its data set may be small. For example, if only twenty people participated in an experiment, it may be difficult to generalize the results beyond the individual study. Meta-analysis aims to solve that problem.

"A meta-analysis is a synthesis of all obtainable data collected in a specified topical area. The benefits of a meta-analysis are that greater statistical power can be obtained by combining data from many studies." *Id.* at 15. The more consistent the conclusions from aggregated data, the greater confidence one can have in those conclusions. More than twenty-five meta-analyses were presented at the hearing.

Despite its volume and breadth, the record developed on remand has its limitations. Results from meta-analysis, for example, still come mostly from controlled experiments. *See State v. Marquez,* 291 *Conn.* 122, 967 *A.*2d 56, 75 (2009) (noting lack of "real-world data" in certain research areas (citation omitted)).[6] To determine whether such experiments reliably predict how people behave in the real world, researchers have tried to compare results across different types of studies.

6 In *Marquez, supra,* the Connecticut Supreme Court concluded that "scientific literature ... with respect to eyewitness identification procedures is far from universal or even well established, and that the research is in great flux." 967 A.2d at 77. *Marquez* considered six scientific articles and reports in reaching that conclusion, *id.* at 72–78, including an Illinois field study that has been strongly criticized, *see id.* at 75 & n. 24; *see also* Daniel L. Schacter et al., *Policy Forum: Studying Eyewitness Investigations in the Field,* 32 *Law & Hum. Behav.* 3 (2008). The more extensive record presented and tested on remand provides a stronger basis for an assessment of eyewitness identification research.

Dr. Penrod presented data from a meta-analysis comparing studies in which witnesses knew they were
244 participating in experiments*244 and those in which witnesses observed what they thought were real crimes and were not told otherwise until after making an identification. *See* Ralph Norman Haber & Lyn Haber, *A Meta–Analysis of Research on Eyewitness Lineup Identification Accuracy,* Paper presented at the Annual Convention of the Psychonomics Society, Orlando, Florida 8–9 (Nov. 16, 2001). The analysis revealed that identification statistics from across the studies were remarkably consistent: in both sets of studies, 24% of witnesses identified fillers. *See id.* at 9 (also finding 34% filler identification rates when witnesses observed slideshows or videos of crimes). Those statistics are similar to data from real cases. As discussed in section III above, in police investigations in Sacramento and London, roughly 20% of eyewitnesses identified fillers. *See* Behrman & Davey, *supra,* at 482; Behrman & Richards, *supra,* at 285; Valentine et al., *supra,* at 974; Wright & McDaid, *supra,* at 77. Thus, although lab and field experiments may be imperfect proxies for real-world conditions, certain data they have produced are relevant and persuasive.

Critics, including the State, point out that most experiments occur on college campuses and use college students as witnesses in a way that does not replicate real life. Expert testimony, though, highlighted

894 *894 that college students are among the best eyewitnesses in light of their general health, visual acuity, recall, and alertness. But real eyewitnesses, the critics contend, act more carefully when they identify real suspects. As the Special Master noted, it is hard to credit that argument in light of archival studies and the exoneration cases. Even with the best of intentions, misidentifications occur in the real world.

A similar criticism suggests that lab experiments cannot replicate the intensity and stress that crime victims experience, which leaves stronger memory traces. But as discussed below, studies have shown consistently that high degrees of stress actually impair the ability to remember. *See, e.g.,* Kenneth A. Deffenbacher et al., *A Meta–Analytic Review of the Effects of High Stress on Eyewitness Memory,* 28 *Law & Hum. Behav.* 687, 687, 699 (2004).

245 *245 Finally, the State argues that lab studies are designed so that about half of the participants will not be able to make an identification; a "base rate" of 50% is commonly used with half of the witnesses viewing a lineup with the suspect and half looking at fillers only. The State argues those results cannot be generalized to the real world, where the actual base rate may be much higher.

As Dr. Wells testified, statistical analysis permits researchers to estimate the results under any base rate. That said, in reality, we simply cannot know how often the suspect in an array is the actual perpetrator. But not knowing real-world base rates does not render experimental studies meaningless.

To be sure, many questions about memory and the psychology of eyewitness identifications remain unanswered. And eyewitness identification research remains probabilistic, meaning that science cannot say whether an identification in an actual case is accurate or not. Instead, science has sought to answer, in the aggregate, which identification procedures and external variables are tied to an increased risk of misidentification.

Mindful of those limitations, we next examine the research on human memory.

VI. How Memory Works

Research contained in the record has refuted the notion that memory is like a video recording, and that a witness need only replay the tape to remember what happened. Human memory is far more complex. The parties agree with the Special Master's finding that memory is a constructive, dynamic, and selective process.

The process of remembering consists of three stages: acquisition—"the perception of the original event"; retention—"the period of time that passes between the event and the eventual recollection of a particular piece of information"; and retrieval—the "stage during which a person recalls stored information." Elizabeth F. Loftus, *Eyewitness Testimony* 21 (2d ed.1996). As the Special Master observed,

246 *246 [a]t each of those stages, the information ultimately offered as "memory" can be distorted, contaminated and even falsely imagined. The witness does not perceive all that a videotape would disclose, but rather "get [s] the gist of things and constructs a "memory" on "bits of information ... and what seems plausible." The witness does not encode all the information that a videotape does; memory rapidly and continuously decays; retained memory can be unknowingly contaminated by post-event information; [and] the witness's retrieval of stored "memory" can be impaired and distorted by a variety of factors, including suggestive interviewing and identification

895 *895 procedures conducted by law enforcement personnel.

[Internal citations omitted.]

Researchers in the 1970s designed a number of experiments to test how and to what extent memories can be distorted. One experiment began by showing subjects film clips of auto accidents. Elizabeth F. Loftus & John C. Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory,* 13 *J. Verbal Learning & Verbal Behav.* 585, 586 (1974). Researchers then asked test subjects to estimate the speed at which the cars traveled, and the answers differed markedly based on the question posed. On average, those asked "how fast were the cars going when they *smashed* into each other?" guessed higher speeds than subjects asked the same question with the word collided, bumped, hit, or contacted. *Ibid.* The first group estimated a median speed of 40.5 miles per hour when the cars "smashed"; the last group guessed the speed at 31.8 miles per hour when the cars "contacted." *Ibid.* Thus, a simple difference in language was able to cause a substantial change in the reconstruction of memory.

A similar study showed college students a film of a car accident and asked some of them to guess how fast the car was going "along the country road"; the rest were asked how fast the car was going when it "passed the barn" along the country road. Elizabeth F. Loftus, *Leading Questions and the Eyewitness Report,* 7 *Cognitive Psychol.* 560, 566 (1975). One week later, the same students were asked if they had seen a barn in the film. Approximately 17% of students who were originally asked the "passed the barn" question said there was a barn, and just under 3% from the other group remembered a barn. *Ibid.* In reality, there was no barn. *Ibid.; see*

247 *also* Elizabeth F. Loftus & Jacqueline*247 E. Pickrell, *The Formation of False Memories,* 25 *Psychiatric Annals* 720 (1995); Elizabeth F. Loftus & Guido Zanni, *Eyewitness Testimony: The Influence of the Wording of a Question,* 5 *Bull. Psychonomic Soc'y* 86 (1975).

Science has proven that memory is malleable. The body of eyewitness identification research further reveals that an array of variables can affect and dilute memory and lead to misidentifications.

Scientific literature divides those variables into two categories: system and estimator variables. System variables are factors like lineup procedures which are within the control of the criminal justice system. Gary L. Wells, *Applied Eyewitness–Testimony Research: System Variables and Estimator Variables,* 36 *J. Personality & Soc. Psychol.* 1546, 1546 (1978). Estimator variables are factors related to the witness, the perpetrator, or the event itself—like distance, lighting, or stress—over which the legal system has no control. *Ibid.*

We review each of those variables in turn. For each, we address relevant scientific evidence, the Special Master's findings, and instances where the State takes issue with those findings.

We summarize findings for each of those variables consistent with the proper standards for reviewing special-master reports and scientific evidence. Courts generally defer to a special master's credibility findings regarding the testimony of expert witnesses. *State v. Chun,* 194 *N.J.* 54, 96, 943 *A.*2d 114 (2008) (citing *State v. Locurto,* 157 *N.J.* 463, 471, 724 *A.*2d 234 (1999)). We evaluate a special master's factual findings

in the same manner as we would the findings and conclusions of a judge sitting as a finder of fact. We therefore accept the fact findings to the extent

896 *896 that they are supported by substantial credible evidence in the record, but we owe no particular deference to the legal conclusions of the Special Master.

[*Id.* at 93, 943 *A.*2d 114 (citations omitted).]

Scientific theories can be accepted as reliable when they are "based on a sound, adequately-founded scientific
248 methodology involving data and information of the type reasonably relied on by *248 experts in the scientific field." *State v. Moore,* 188 *N.J.* 182, 206, 902 *A.*2d 1212 (2006) (quoting *Rubanick v. Witco Chem. Corp.,* 125 *N.J.* 421, 449, 593 *A.*2d 733 (1991)); *see also Hisenaj v. Kuehner,* 194 *N.J.* 6, 17, 942 *A.*2d 769 (2008). In general, proponents can prove the reliability of scientific evidence by offering "(1) the testimony of knowledgeable experts; (2) authoritative scientific literature; [and] (3) persuasive judicial decisions which acknowledge such general acceptance of expert testimony." *Rubanick, supra,* 125 *N.J.* at 432, 593 *A.*2d 733 (internal citation and quotation marks omitted); *see Moore, supra,* 188 *N.J.* at 206, 902 *A.*2d 1212. We also look for general acceptance of scientific evidence within the relevant scientific community. *Chun, supra,* 194 *N.J.* at 91, 943 *A.*2d 114 (citing *State v. Harvey,* 151 *N.J.* 117, 169–70, 699 *A.*2d 596 (1997) (citing *Frye v. United States,* 293 F. 1013, 1014 (D.C.Cir.1923) (remaining citations omitted))).

A. System Variables

We begin with variables within the State's control.

1. Blind Administration

An identification may be unreliable if the lineup procedure is not administered in double-blind or blind fashion. Double-blind administrators do not know who the actual suspect is. Blind administrators are aware of that information but shield themselves from knowing where the suspect is located in the lineup or photo array.

Dr. Wells testified that double-blind lineup administration is "the single most important characteristic that should apply to eyewitness identification" procedures. Its purpose is to prevent an administrator from intentionally or unintentionally influencing a witness' identification decision.

Research has shown that lineup administrators familiar with the suspect may leak that information "by consciously or unconsciously communicating to witnesses which lineup member is the suspect." *See* Sarah M. Greathouse & Margaret Bull Kovera, *Instruction Bias and Lineup Presentation Moderate the Effects of Administrator Knowledge on Eyewitness Identification,* 33 *Law & Hum. Behav.* 70, 71 (2009). Psychologists refer to that phenomenon as the "expectancy effect": "the tendency for experimenters to obtain results they expect ... because they have helped to shape that response." Robert Rosenthal & Donald B. Rubin, *Interpersonal Expectancy Effects: The First 345 Studies,* 3 *Behav. & Brain Sci.* 377, 377 (1978). In a seminal meta-analysis of 345 studies across eight broad categories of behavioral research, researchers found that "[t]he overall probability that there is no such thing as interpersonal expectancy effects is near zero." *Ibid.*

Even seemingly innocuous words and subtle cues—pauses, gestures, hesitations, or smiles—can influence a witness' behavior. Ryann M. Haw & Ronald P. Fisher, *Effects of Administrator–Witness Contact on Eyewitness Identification Accuracy,* 89 *J. Applied Psychol.* 1106, 1107 (2004); *see also* Steven E. Clark et al., *Lineup Administrator Influences on Eyewitness Identification Decisions,* 15 *J. Experimental Psychol.: Applied* 63, 66–73 (2009). Yet the witness is often unaware that any

*897 cues have been given. *See* Clark et al., *supra,* at 72.

The consequences are clear: a non-blind lineup procedure can affect the reliability of a lineup because even the best-intentioned, non-blind administrator can act in a way that inadvertently sways an eyewitness trying to identify a suspect. An ideal lineup administrator, therefore, is someone who is not investigating the particular case and does not know who the suspect is.

The State understandably notes that police departments, no matter their size, have limited resources, and those limits can make it impractical to administer lineups double-blind in all cases. An alternative technique, which Dr. Wells referred to as the "envelope method," helps address that challenge. It relies on single-blind administration: an officer who knows the suspect's identity places single lineup photographs into different envelopes, shuffles them, and presents them to the witness. The officer/administrator then refrains from looking at the envelopes or pictures while the witness makes an identification. This "blinding" technique*250 is cost-effective and can be used when resource constraints make it impractical to perform double-blind administration.

We find that the failure to perform blind lineup procedures can increase the likelihood of misidentification.

2. Pre-identification Instructions

Identification procedures should begin with instructions to the witness that the suspect may or may not be in the lineup or array and that the witness should not feel compelled to make an identification. There is a broad consensus for that conclusion. The Attorney General Guidelines currently include the instruction; the Special Master considers it "uncontroversial"; and the State agrees that "[w]itness instructions are regarded as one of the most useful techniques for enhancing the reliability of identifications" (quoting the Special Master).

Pre-lineup instructions help reduce the relative judgment phenomenon described in section III. Without an appropriate warning, witnesses may misidentify innocent suspects who look more like the perpetrator than other lineup members.

The scientists agree. In two meta-analyses, they found that telling witnesses in advance that the suspect may not be present in the lineup, and that they need not make a choice, led to more reliable identifications in target-absent lineups. *See* Nancy Mehrkens Steblay, *Social Influence in Eyewitness Recall: A Meta–Analytic Review of Lineup Instruction Effects,* 21 *Law & Hum. Behav.* 283, 285–86, 294 (1997); Steven E. Clark, *A Re-examination of the Effects of Biased Lineup Instructions in Eyewitness Identification,* 29 *Law & Hum. Behav.* 395, 418–20 (2005). In one experiment, 45% more people chose innocent fillers in target-absent lineups when administrators failed to warn that the suspect may not be there. *See* Roy S. Malpass & Patricia G. Devine, *Eyewitness Identification: Lineup Instructions and the Absence of the Offender,* 66 *J. Applied Psychol.* 482, 485 (1981).

The failure to give proper pre-lineup instructions can increase the risk of misidentification.

251 *251 ## 3. Lineup Construction

The way that a live or photo lineup is constructed can also affect the reliability of an identification. Properly constructed lineups test a witness' memory and decrease the chance that a witness is simply guessing.

A number of features affect the construction of a fair lineup. First, the Special Master found that "mistaken identifications

898 *898 are more likely to occur when the suspect stands out from other members of a live or photo lineup." *See* Roy S. Malpass et al., *Lineup Construction and Lineup Fairness, in* 2 *The Handbook of Eyewitness Psychology: Memory for People,* at 155, 156 (R.C.L. Lindsay et al. eds., 2007). As a result, a suspect should be included in a lineup comprised of look-alikes. The reason is simple: an array of look-alikes forces witnesses to examine their memory. In addition, a biased lineup may inflate a witness' confidence in the identification because the selection process seemed easy. *See* David F. Ross et al., *When Accurate and Inaccurate Eyewitnesses Look the Same: A Limitation of the 'Pop–Out' Effect and the 10–to 12–Second Rule,* 21 *Applied Cognitive Psychol.* 677, 687 (2007); Gary L. Wells & Amy L. Bradfield, *Measuring the Goodness of Lineups: Parameter Estimation, Question Effects, and Limits to the Mock Witness Paradigm,* 13 *Applied Cognitive Psychol.* S27, S30 (1999).

Second, lineups should include a minimum number of fillers. The greater the number of choices, the more likely the procedure will serve as a reliable test of the witness' ability to distinguish the culprit from an innocent person. As Dr. Wells testified, no magic number exists, but there appears to be general agreement that a minimum of five fillers should be used. *See* Nat'l Inst. of Justice, U.S. Dep't of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* 29 (1999); Attorney General Guidelines, *supra,* at 2.

Third, based on the same reasoning, lineups should not feature more than one suspect. As the Special Master
252 found, "if multiple suspects are in the lineup, the reliability of a positive identification *252 is difficult to assess, for the possibility of 'lucky' guesses is magnified."

The record is unclear as to whether the use of fillers that match a witness' pre-lineup description is more reliable than fillers that resemble an actual suspect (to the extent there is a difference between the two). *Compare* Steven E. Clark & Jennifer L. Tunnicliff, *Selecting Lineup Foils in Eyewitness Identification Experiments: Experimental Control and Real–World Simulation,* 25 *Law & Hum. Behav.* 199, 212 (2001), *and* Gary L. Wells et al., *The Selection of Distractors for Eyewitness Lineups,* 78 J. *Applied Psychol.* 835, 842 (1993), *with* Stephen Darling et al., *Selection of Lineup Foils in Operational Contexts,* 22 *Applied Cognitive Psychol.* 159, 165–67 (2008). Further research may help clarify this issue.

We note that the Attorney General Guidelines require that fillers "generally fit the witness' description" and that "[w]hen there is a limited or inadequate description of the perpetrator provided by the witness, or when the description of the perpetrator differs significantly from the appearance of the suspect, fillers should resemble the suspect in significant features." Attorney General Guidelines, *supra,* at 2–3; *see also* R.C.L. Lindsay et al., *Default Values in Eyewitness Descriptions,* 18 *Law & Hum. Behav.* 527, 528 (1994) ("Innocent suspects may be at risk when the witness provides a limited or vague description of the criminal and the lineup foils, although selected to match the description, are noticeably different from the suspect in appearance.").

Of course, all lineup procedures must be recorded and preserved in accordance with the holding in *Delgado, supra,* 188 *N.J.* at 63, 902 *A.*2d 888, to ensure that parties, courts, and juries can later assess the reliability of the identification.

We find that courts should consider whether a lineup is poorly constructed when evaluating the admissibility of an

899 *899 identification. When appropriate, jurors should be told that poorly constructed or biased lineups can affect the reliability of an identification and enhance a witness' confidence.

253 *253 ## 4. Avoiding Feedback and Recording Confidence

Information received by witnesses both before and after an identification can affect their memory. The earlier discussion of Dr. Loftus' study—in which she asked students how fast a car was going when it passed a non-existent barn—revealed how memories can be altered by pre-identification remarks. Loftus, *Leading Questions and the Eyewitness Report, supra,* at 566.

Confirmatory or post-identification feedback presents the same risks. It occurs when police signal to eyewitnesses that they correctly identified the suspect. That confirmation can reduce doubt and engender a false sense of confidence in a witness. Feedback can also falsely enhance a witness' recollection of the quality of his or her view of an event.

There is substantial research about confirmatory feedback. A meta-analysis of twenty studies encompassing 2,400 identifications found that witnesses who received feedback "expressed significantly more ... confidence in their decision compared with participants who received no feedback." Douglass & Steblay, *supra,* at 863. The analysis also revealed that "those who receive a simple post-identification confirmation regarding the accuracy of their identification significantly inflate their reports to suggest better witnessing conditions at the time of the crime, stronger memory at the time of the lineup, and sharper memory abilities in general." *Id.* at 864–65; *see also* Gary L. Wells & Amy L. Bradfield, " *Good, You Identified the Suspect* ": *Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience,* 83 *J. Applied Psychol.* 360 (1998).

The effects of confirmatory feedback may be the same even when feedback occurs forty-eight hours after an identification. Gary L. Wells et al., *Distorted Retrospective Eyewitness Reports as Functions of Feedback and Delay,* 9 *J. Experimental Psychol.: Applied* 42, 49–50 (2003). And those effects can be lasting. *See* Jeffrey S. Neuschatz et al., *The Effects of Post–Identification Feedback and Age on Retrospective Eyewitness Memory,* 19 *Applied Cognitive Psychol.* 435, 449 (2005).

254 *254 The Court concluded in *Romero, supra,* "that a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification." 191 *N.J.* at 76, 922 *A.*2d 693. The hearing confirmed that observation. The Special Master found that eyewitness confidence is generally an unreliable indicator of accuracy, but he acknowledged research showing that *highly* confident witnesses can make accurate

identifications 90% of the time. The State places great weight on that research. *See, e.g.,* Neil Brewer & Gary L. Wells, *The Confidence–Accuracy Relationship in Eyewitness Identification: Effects of Lineup Instructions, Foil Similarity, and Target–Absent Base Rates,* 12 *J. Experimental Psychol.: Applied* 11, 15 (2006); Siegfried Ludwig Sporer et al., *Choosing, Confidence, and Accuracy: A Meta–Analysis of the Confidence–Accuracy Relation in Eyewitness Identification Studies,* 118 *Psychol. Bull.* 315, 315–19, 322 (1995); *see also* Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony,* 54 *Ann. Rev. Psychol.* 277, 283–84 (2003) (noting
900 complexity of issue).[7] *900

[7] This section focuses only on post-identification confidence. Meta-analysis shows that eyewitness confidence in the ability to make an identification *before* viewing a lineup does not correlate with accuracy. *See* Brian L. Cutler & Steven D. Penrod, *Forensically Relevant Moderators of the Relation Between Eyewitness Identification Accuracy and Confidence,* 74 *J. Applied Psychol.* 650, 652 (1989).

We glean certain principles from this information. Confirmatory feedback can distort memory. As a result, to the extent confidence may be relevant in certain circumstances, it must be recorded in the witness' own words before any possible feedback. To avoid possible distortion, law enforcement officers should make a full record —written or otherwise—of the witness' statement of confidence once an identification is made. Even then, feedback about the individual selected must be avoided.

We rely on our supervisory powers under Article VI, Section 2, Paragraph 3 of the State Constitution in requiring that practice. *See Delgado, supra,* 188 *N.J.* at 63, 902 *A.*2d 888 (requiring written record of identification procedure).

255 *255 To be sure, concerns about feedback are not limited to law enforcement officers. As discussed below, confirmatory feedback from non-State actors can also affect the reliability of identifications and witness confidence. *See infra* at section VI.B.9. *See, e.g.,* C.A. Elizabeth Luus & Gary L. Wells, *The Malleability of Eyewitness Confidence: Co–Witness and Perseverance Effects,* 79 *J. Applied Psychol.* 714, 717–18 (1994).

Our focus at this point, though, is on system variables. To reiterate, we find that feedback affects the reliability of an identification in that it can distort memory, create a false sense of confidence, and alter a witness' report of how he or she viewed an event.

5. Multiple viewings

Viewing a suspect more than once during an investigation can affect the reliability of the later identification. The problem, as the Special Master found, is that successive views of the same person can make it difficult to know whether the later identification stems from a memory of the original event or a memory of the earlier identification procedure.

It is typical for eyewitnesses to look through mugshot books in search of a suspect. Investigations may also involve multiple identification procedures. Based on the record, there is no impact on the reliability of the second identification procedure "when a picture of the suspect was not present in photographs examined earlier." Gunter Koehnken et al., *Forensic Applications of Line–Up Research, in Psychological Issues in Eyewitness Identification* 205, 218 (Siegfried L. Sporer et al. eds., 1996).

Multiple identification procedures that involve more than one viewing of the same suspect, though, can create a risk of "mugshot exposure" and "mugshot commitment." Mugshot exposure is when a witness initially views a set of photos and makes no identification, but then selects someone—who had been depicted in the earlier photos—at a later identification procedure. A meta-analysis of multiple studies revealed that although 15% of witnesses mistakenly identified an innocent person viewed in a lineup *256 for the first time, that percentage

256 increased to 37% if the witness had seen the innocent person in a prior mugshot. Kenneth A. Deffenbacher et al., *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference,* 30 *Law & Hum. Behav.* 287, 299 (2006).

Mugshot commitment occurs when a witness identifies a photo that is then included in a later lineup procedure. Studies

901 *901 have shown that once witnesses identify an innocent person from a mugshot, "a significant number" then "reaffirm[ ] their false identification" in a later lineup—even if the actual target is present. *See* Koehnken et al., *supra,* at 219.

Thus, both mugshot exposure and mugshot commitment can affect the reliability of the witness' ultimate identification and create a greater risk of misidentification. As a result, law enforcement officials should attempt to shield witnesses from viewing suspects or fillers more than once.

6. Simultaneous v. Sequential Lineups

Lineups are presented either simultaneously or sequentially. Traditional, simultaneous lineups present all suspects at the same time, allowing for side-by-side comparisons. In sequential lineups, eyewitnesses view suspects one at a time.

Defendant and amici submit that sequential lineups are preferable because they lead to fewer misidentifications when the culprit is not in the lineup. The Attorney General Guidelines recommend that sequential lineups be utilized when possible, but the State also points to recent studies that have called that preference into doubt. Because the science supporting one procedure over the other remains inconclusive, we are unable to find a preference for either.

The strongest support for sequential lineups comes from a 2001 meta-analysis comparing data from more than 4,000 lineup experiments. *See* Nancy Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous*
257 *Lineup Presentations: A Meta–Analytic Comparison,* 25 *Law & Hum. Behav.* 459 (2001). Across *257 studies, simultaneous procedures produced more of both accurate and inaccurate identifications, and sequential procedures produced fewer misidentifications in target-absent lineups. *Id.* at 466, 468–69. In other words, witnesses were more likely to make selections—accurate and inaccurate—with simultaneous lineups, and they made fewer, but more accurate, identifications with sequential, target-absent lineups.

Some experts believe that the theory of relative judgment helps explain the results; with sequential lineups, witnesses cannot compare photos and choose the lineup member that best matches their memory. *See id.* at 469. Those researchers note that "[t]o the extent any difference ... is due to correct guessing, there is no reason to recommend simultaneous lineups." *Ibid.*

Other experts, including Dr. Malpass, are unconvinced. They believe that researchers have not yet clearly shown that sequential presentation is the "active ingredient" in reducing misidentifications. Roy S. Malpass et al., *Public Policy and Sequential Lineups,* 14 *Legal & Criminological Psychol.* 1, 5–6 (2009); Dawn McQuiston–Surrett et al., *Sequential v. Simultaneous Lineups: A Review of Methods, Data, and Theory,* 12 *Psychol. Pub. Pol'y & L.* 137, 163 (2006) ("[W]e believe that current explanations for why sequential presentation should reduce both mistaken identifications and correct identifications are underdeveloped."); *see also* Scott D. Gronlund et al., *Robustness of the Sequential Lineup Advantage,* 15 *J. Experimental Psychol.: Applied* 140, 149 (2009) ("Based on our study [of more than 2,000 participants], the sequential advantage does
902 not appear to be a robust finding.").[8] *902

8 We do not consider the disputed Illinois field study, *see* Sheri H. Mecklenburg, Ill. Police Dep't, *Report to the Legislature of the State of Illinois: The Illinois Pilot Program on Sequential Double–Blind Identification Procedures* (2006), referred to *supra* at 243 n.5, 27 *A.*3d at 886 n. 5.

As research in this field continues to develop, a clearer answer may emerge. For now, there is insufficient
258 authoritative evidence accepted by scientific experts for a court to make a finding in *258 favor of either procedure. *See Rubanick, supra,* 125 *N.J.* at 432, 449, 593 *A.*2d 733. As a result, we do not limit either one at this time.

7. Composites

When a suspect is unknown, eyewitnesses sometimes work with artists who draw composite sketches. Composites can also be prepared with the aid of computer software or non-computerized "tool kits" that contain picture libraries of facial features. Gary L. Wells & Lisa E. Hasel, *Facial Composite Production by Eyewitnesses,* 16 *Current Directions Psychol. Sci.* 6, 6–7 (2007).

As the Special Master observed, based on the record, "composites produce poor results." In one study, college freshmen used computer software to generate composites of students and teachers from their high schools. Margaret Bull Kovera et al., *Identification of Computer–Generated Facial Composites,* 82 *J. Applied Psychol.* 235, 239 (1997). Different students who had attended the same schools were only able to name 3 of the 500 people depicted in the composites. *Id.* at 241. *But see* Wells & Hasel, *supra,* at 6 (acknowledging rarity of studies comparing sketch artists, whose skills vary widely, to computer systems).

Researchers attribute those results to a mismatch between how composites are made and how memory works. *See* Wells & Hasel, *supra,* at 9. Evidence suggests that people perceive and remember faces "holistically" and not "at the level of individual facial features." *Ibid.* Thus, creating a composite feature-by-feature may not comport with the holistic way that memories for faces "are generally processed, stored, and retrieved." *See ibid.*

It is not clear, though, what effect the process of making a composite has on a witness' memory—that is, whether it contaminates or confuses a witness' memory of what he or she actually saw. *Compare* Gary L. Wells et al., *Building Face Composites Can Harm Lineup Identification Performance,* 11 *J. Experimental Psychol.: Applied* 147, 148, 154 (2005) (finding "that building a composite significantly lowered accuracy for identifying
259 the original face"), *with* Michael A. Mauldin & Kenneth R. Laughery, *259 *Composite Production Effects on Subsequent Facial Recognition,* 66 *J. Applied Psychol.* 351, 355 (1981) (finding "[w]hen subjects produce a[ ] ... composite ... they are more likely to recognize the target face in a subsequent recognition task").

As Dr. Wells acknowledged, "[t]he sparse, underpowered, and inconsistent literature on the effects of composite production on later recognition stands in contrast to the import of the question." Wells et al., *Building Face Composites Can Harm Lineup Identification Performance, supra,* at 148. We also note that researchers "are not yet prepared to argue that the use of composites should be significantly curtailed in criminal investigations." *Id.* at 155.

Without more accepted research, courts cannot make a finding on the effect the process of making a composite has on a witness. *See Rubanick, supra,* 125 *N.J.* at 432, 449, 593 *A.*2d 733. We thus do not limit the use of composites in investigations.

8. Showups

Showups are essentially single-person lineups: a single suspect is presented to a witness to make an identification. Showups often occur at the scene of a crime

903 *903 soon after its commission. The Special Master noted that they are a "useful—and necessary—technique when used in appropriate circumstances," but they carry their "own risks of misidentifications."

By their nature, showups are suggestive and cannot be performed blind or double-blind. Nonetheless, as the Special Master found, "the risk of misidentification is not heightened if a showup is conducted immediately after the witnessed event, ideally within two hours" because "the benefits of a fresh memory seem to balance the risks of undue suggestion."

We have previously found showups to be "inherently suggestive," *see Herrera, supra,* 187 *N.J.* at 504, 902 *A.*2d 177, and other states have limited the admissibility of showup identifications. In Wisconsin, evidence of a
260 showup is inadmissible unless, based on the totality of circumstances, the showup was necessary. *260 *State v. Dubose,* 285 *Wis.*2d 143, 699 *N.W.*2d 582, 584–85 (2005). Courts in Massachusetts require that there be "good reason for the use of a showup." *Commonwealth v. Martin,* 447 *Mass.* 274, 850 *N.E.*2d 555, 562–63 (2006). In New York, showups at police stations are presumptively suggestive and are suppressed "unless exigency warrants otherwise." *State v. Duuvon,* 77 *N.Y.*2d 541, 569 *N.Y.S.*2d 346, 571 *N.E.*2d 654, 656 (1991) (citations omitted).

Studies that have evaluated showup identifications illustrate that the timeframe for their reliability appears relatively small. A Canadian field experiment that analyzed results from more than 500 identifications revealed that photo showups performed within minutes of an encounter were just as accurate as lineups. A. Daniel Yarmey et al., *Accuracy of Eyewitness Identifications in Showups and Lineups,* 20 *Law & Hum. Behav.* 459, 464 (1996). Two hours after the encounter, though, 58% of witnesses failed to reject an "innocent suspect" in a photo showup, as compared to 14% in target-absent photo lineups. *Ibid.*

Researchers have also found that "false identifications are more numerous for showups [compared to lineups] when an innocent suspect resembles the perpetrator." *See* Nancy Steblay et al., *Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta–Analytic Comparison,* 27 *Law & Hum. Behav.* 523, 523 (2003) (conducting meta-analysis). In addition, research reveals that showups increase the risk that witnesses will base identifications more on similar distinctive clothing than on similar facial features. *See* Jennifer E. Dysart et al., *Show-ups: The Critical Issue of Clothing Bias,* 20 *Applied Cognitive Psychol.* 1009, 1019 (2006); *see also* Yarmey et al., *supra,* at 461, 470 (showing greater likelihood of misidentification when culprit and innocent suspect looked alike *and* wore same clothing).

Experts believe the main problem with showups is that—compared to lineups—they fail to provide a safeguard against witnesses with poor memories or those inclined to guess, because every mistaken identification in a showup will point to the suspect. In essence, showups make it easier to make mistakes.

261 *261 Thus, the record casts doubt on the reliability of showups conducted more than two hours after an event, which present a heightened risk of misidentification. As with lineups, showup administrators should instruct witnesses that the person they are about to view may or may not be the culprit and that they should not feel compelled to make an identification. That said, lineups are a preferred identification procedure because we continue to believe that showups, while sometimes necessary, are inherently suggestive. *See Herrera, supra,* 187 *N.J.* at 504, 902 *A.*2d 177.

904 *904 ## B. Estimator variables

Unlike system variables, estimator variables are factors beyond the control of the criminal justice system. *See* Wells, *Applied Eyewitness–Testimony Research: System Variables and Estimator Variables, supra,* at 1546. They can include factors related to the incident, the witness, or the perpetrator. Estimator variables are equally

capable of affecting an eyewitness' ability to perceive and remember an event. Although the factors can be isolated and tested in lab experiments, they occur at random in the real world.

1. Stress

Even under the best viewing conditions, high levels of stress can diminish an eyewitness' ability to recall and make an accurate identification. The Special Master found that "while moderate levels of stress improve cognitive processing and might improve accuracy, an eyewitness under high stress is less likely to make a reliable identification of the perpetrator." The State agrees that high levels of stress are more likely than low levels to impair an identification.

Scientific research affirms that conclusion. A meta-analysis of sixty-three studies showed "considerable support for the hypothesis that high levels of stress negatively impact both accuracy of eyewitness identification as well as accuracy of recall of crime-related details." *See* Deffenbacher et al., *A Meta–Analytic Review of the Effects of High Stress on Eyewitness Memory, supra,* at 687, 699.

262 *262 One field experiment tested the impact of stress on the memories of military personnel. *See* Charles A. Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress,* 27 *Int'l J.L. & Psychiatry* 265 (2004). More than 500 active-duty military personnel, with an average of four years in the service, experienced two types of interrogation after twelve hours of confinement in survival school training: "a high-stress interrogation (with real physical confrontation) and a low-stress interrogation (without physical confrontation)." *Id.* at 267–68. Both interrogations lasted about 40 minutes. *Id.* at 268. Twenty-four hours later, the subjects were shown either a live lineup or a sequential or simultaneous photo array, and asked to identify their interrogators. *Id.* at 269–70.

Across the procedures, subjects performed more poorly when they identified their high-stress interrogators. *Id.* at 272. For example, when viewing live line-ups, 30% of subjects accurately identified high-stress interrogators, but 62% did so for low-stress interrogators. *Ibid.* The study's authors concluded that

> [c]ontrary to the popular conception that most people would never forget the face of a clearly seen individual who had physically confronted them and threatened them for more than 30 min[utes], ... [t]hese data provide robust evidence that eyewitness memory for persons encountered during events that are personally relevant, highly stressful, and realistic in nature may be subject to substantial error.
>
> [*Id.* at 274.]

Although the study was conducted under a rather different setting, all three experts at the hearing considered its findings in the context of eyewitness evidence.

We find that high levels of stress are likely to affect the reliability of eyewitness identifications. There is no precise measure for what constitutes "high" stress, which must be assessed based on the facts presented in individual cases.

2. Weapon Focus

When a visible weapon is used during a crime, it can distract a witness and draw

905 *905 his or her attention away from the culprit. "Weapon focus" can thus impair a witness' ability to make a
263 *263 reliable identification and describe what the culprit looks like if the crime is of short duration.

A meta-analysis of nineteen weapon-focus studies that involved more than 2,000 identifications found a small but significant effect: an average decrease in accuracy of about 10% when a weapon was present. Nancy M. Steblay, *A Meta–Analytic Review of the Weapon Focus Effect,* 16 *Law & Hum. Behav.* 413, 415–17 (1992). In a separate study, half of the witnesses observed a person holding a syringe in a way that was personally threatening to the witness; the other half saw the same person holding a pen. Anne Maass & Gunther Koehnken, *Eyewitness Identification: Simulating the " Weapon Effect"*, 13 *Law & Hum. Behav.* 397, 401–02 (1989). Sixty-four percent of witnesses from the first group misidentified a filler from a target-absent lineup, compared to 33% from the second group. *See id.* at 405; *see also* Kerri L. Pickel, *Remembering and Identifying Menacing Perpetrators: Exposure to Violence and the Weapon Focus Effect, in* 2 *The Handbook of Eyewitness Psychology: Memory for People, supra,* at 339, 353–54 (noting that "unusual items [like weapons] attract attention").

Weapon focus can also affect a witness' ability to describe a perpetrator. A meta-analysis of ten studies showed that "weapon-absent condition[s] generated significantly more accurate descriptions of the perpetrator than did the weapon-present condition." Steblay, *A Meta–Analytic Review of the Weapon Focus Effect, supra,* at 417.

The duration of the crime is also an important consideration. Dr. Steblay concluded that weapon-focus studies speak to real-world "situations in which a witness observes a threatening object ... in an event of short duration." *Id.* at 421. As Dr. Wells testified, the longer the duration, the more time the witness has to adapt to the presence of a weapon and focus on other details.

Thus, when the interaction is brief, the presence of a visible weapon can affect the reliability of an identification and the accuracy of a witness' description of the perpetrator.

264 *264 ### 3. Duration

Not surprisingly, the amount of time an eyewitness has to observe an event may affect the reliability of an identification. The Special Master found that "while there is no minimum time required to make an accurate identification, a brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure." *See* Colin G. Tredoux et al., *Eyewitness Identification, in* 1 *Encyclopedia of Applied Psychology* 875, 877 (Charles Spielberger ed., 2004).

There is no measure to determine exactly how long a view is needed to be able to make a reliable identification. Dr. Malpass testified that very brief but good views can produce accurate identifications, and Dr. Wells suggested that the quality of a witness' memory may have as much to do with the absence of other distractions as with duration.

Whatever the threshold, studies have shown, and the Special Master found, "that witnesses consistently tend to overestimate short durations, particularly where much was going on or the event was particularly stressful." *See, e.g.,* Elizabeth F. Loftus et al., *Time Went by So Slowly: Overestimation of Event Duration by Males and Females,* 1 *Applied Cognitive Psychol.* 3, 10 (1987).

906 *906 ### 4. Distance and Lighting

It is obvious that a person is easier to recognize when close by, and that clarity decreases with distance. We also know that poor lighting makes it harder to see well. Thus, greater distance between a witness and a perpetrator and poor lighting conditions can diminish the reliability of an identification.

Scientists have refined those common-sense notions with further study. *See, e.g.,* R.C.L. Lindsay et al., *How Variations in Distance Affect Eyewitness Reports and Identification Accuracy,* 32 *Law & Hum. Behav.* 526 (2008). Research has also shown that people have difficulty estimating distances. *See, e.g., id.* at 533.

265 *265 ## 5. Witness Characteristics

Characteristics like a witness' age and level of intoxication can affect the reliability of an identification.

The Special Master found that "the effects of alcohol on identification accuracy show that high levels of alcohol promote false identifications" and that "low alcohol intake produces fewer misidentifications than high alcohol intake." *See also* Jennifer E. Dysart et al., *The Intoxicated Witness: Effects of Alcohol on Identification Accuracy from Showups,* 87 *J. Applied Psychol.* 170, 174 (2002). That finding is undisputed.

The Special Master also found that "[a] witness's age ... bears on the reliability of an identification." A meta-analysis has shown that children between the ages of nine and thirteen who view target-absent lineups are more likely to make incorrect identifications than adults. *See* Joanna D. Pozzulo & R.C.L. Lindsay, *Identification Accuracy of Children Versus Adults: A Meta–Analysis,* 22 *Law & Hum. Behav.* 549, 563, 565 (1998). Showups in particular "are significantly more suggestive or leading with children." *See* Jennifer E. Dysart & R.C.L. Lindsay, *Show-up Identifications: Suggestive Technique or Reliable Method?, in* 2 *The Handbook of Eyewitness Psychology: Memory for People* 137, 147 (2007).

Some research also shows that witness accuracy declines with age. Across twelve studies, young witnesses—ranging from nineteen to twenty-four years old—were more accurate when viewing target-absent lineups than older witnesses—ranging from sixty-eight to seventy-four years old. *See* James C. Bartlett & Amina Memon, *Eyewitness Memory in Young and Older Adults, in* 2 *The Handbook of Eyewitness Psychology: Memory for People, supra,* at 309, 317–19. On average, 53% of young witnesses recognized that the target was not in the lineup, compared to only 31% of older witnesses. *Id.* at 318.

But the target's age may matter as well. As Dr. Penrod testified, "there's an own-age bias," meaning that
266 witnesses are *266 "better at recognizing people of [their] own age than ... people of other ages." That effect may appear in studies that use college-age students as targets, for example. *See id.* at 321–23 (concluding that "young adults show better memory for young faces ... than older faces, whereas seniors show either no effect or the opposite effect"); *see also* Melissa Boyce et al., *Belief of Eyewitness Identification Evidence, in* 2 *The Handbook of Eyewitness Psychology: Memory for People, supra,* at 501, 512 ("Perhaps people should only use age as a factor in deciding whether to believe an eyewitness if there is a large age difference between the witness and the suspect.").

Thus, the data about memory and older witnesses is more nuanced, according to the scientific literature. In addition, there was little other testimony at the hearing on the topic. Based on the record before

907 *907 us, we cannot conclude that a standard jury instruction questioning the reliability of identifications by all older eyewitnesses would be appropriate for use in all cases.

6. Characteristics of Perpetrator

Disguises and changes in facial features can affect a witness' ability to remember and identify a perpetrator. The Special Master found that "[d]isguises (e.g., hats, sunglasses, masks) are confounding to witnesses and reduce the accuracy of identifications." According to the State, those findings are "so well-known that criminals employ them in their work."

Disguises as simple as hats have been shown to reduce identification accuracy. *See* Brian L. Cutler et al., *Improving the Reliability of Eyewitness Identification: Putting Context into Context,* 72 *J. Applied Psychol.* 629, 635 (1987).

If facial features are altered between the time of the event and the identification procedure—if, for example, the culprit grows a beard—the accuracy of an identification may decrease. *See* K.E. Patterson & A.D. Baddeley, *When Face Recognition Fails,* 3 *J. Experimental Psychol.: Hum. Learning & Memory* 406, 410, 414 (1977).

267 *267 ## 7. Memory Decay

Memories fade with time. And as the Special Master observed, memory decay "is irreversible"; memories never improve. As a result, delays between the commission of a crime and the time an identification is made can affect reliability. That basic principle is not in dispute.

A meta-analysis of fifty-three "facial memory studies" confirmed "that memory strength will be weaker at longer retention intervals [the amount of time that passes] than at briefer ones." Kenneth A. Deffenbacher et al., *Forgetting the Once–Seen Face: Estimating the Strength of an Eyewitness's Memory Representation,* 14 *J. Experimental Psychol.: Applied* 139, 142 (2008). In other words, the more time that passes, the greater the possibility that a witness' memory of a perpetrator will weaken. *See* Krafka & Penrod, *supra,* at 65 (finding substantial increase in misidentification rate in target-absent arrays from two to twenty-four hours after event). However, researchers cannot pinpoint precisely when a person's recall becomes unreliable.

8. Race-bias

"A cross-racial identification occurs when an eyewitness is asked to identify a person of another race." *Cromedy, supra,* 158 *N.J.* at 120, 727 *A.*2d 457. In *Cromedy,* after citing multiple social science sources, this Court recognized that a witness may have more difficulty making a cross-racial identification. *Id.* at 120–23, 131, 727 *A.*2d 457.

A meta-analysis conducted after *Cromedy,* involving thirty-nine studies and nearly 5,000 identifications, confirmed the Court's prior finding. *See* 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 & Law* 3, 21 (2001).

Cross-racial recognition continues to be a factor that can affect the reliability of an identification. *See also infra* at section X.

268 *268 ## 9. Private Actors

The current Model Jury Charge states that judges should refer to "factors relating to suggestiveness, that are supported by the evidence," including "whether the witness was exposed to opinions, descriptions, or identifications given by other witnesses, to photographs or newspaper accounts, or to any other information or influence that may have affected the independence of his/her identification." *Model Jury Charge (Criminal),* "Identification:

908 *908 In–Court and Out–of–Court Identifications" (2007). The charge was added after this Court in *Herrera* invited the Model Jury Charge Committee to consider including express references to suggestibility. *Herrera, supra,* 187 *N.J.* at 509–10, 902 *A.*2d 177 (citing *State v. Long,* 721 *P.*2d 483 (Utah 1980)). In response, the Committee relied heavily on proposed charging language in *Long.*

The Model Jury Charge properly reflects that private—that is, non-State—actors can affect the reliability of eyewitness identifications, just as the police can. The record on remand supports that conclusion. Studies show that witness memories can be altered when co-eyewitnesses share information about what they observed. Those studies bolster the broader finding "that post-identification feedback does not have to be presented by the experimenter or an authoritative figure (e.g. police officer) in order to affect a witness' subsequent crime-related judgments." *See* Elin M. Skagerberg, *Co–Witness Feedback in Line-ups,* 21 *Applied Cognitive Psychol.* 489, 494 (2007). Feedback and suggestiveness can come from co-witnesses and others not connected to the State.

Co-witness feedback may cause a person to form a false memory of details that he or she never actually observed. In an early study, 200 college students "viewed a film clip, read and evaluated a description of that film ostensibly given by another witness, and wrote out their own description based on their memory of the film." Elizabeth F. Loftus & Edith Greene, *Warning: Even Memory for Faces May Be Contagious,* 4 *Law &*
269 *Hum. Behav.* 323, 328 (1980). The short film depicted a man who parked his *269 car, briefly entered a small grocery store, and upon returning, "got into an argument with a young man who looked as if he were trying to break into the car." *Ibid.*

Some of the students were shown accurate descriptions of the event, and the rest read descriptions that contained false details. *See ibid.* Some students, for example, observed a young man with straight hair but then read testimony that described the hair as wavy. *Id.* at 328–29. "This procedure was intended to simulate the situation where a witness to an event is subsequently exposed, either through conversation or reading a newspaper article, to a version given by another witness." *Id.* at 324. Results showed that one-third (34%) of students included a false detail—like wavy hair—when they later described the target. *Id.* at 329. By contrast, only 5% of the students who read a completely factual narrative made similar mistakes. *Ibid.* In a related experiment, "[i]f the other witness referred to a misleading detail [a nonexistent mustache], [69]% of the subjects later 'recognized' an individual with that feature. Control subjects did so far less often (13%)." *Id.* at 323, 330.

More recent studies have yielded comparable findings. *See* Lorraine Hope et al., " *With a Little Help from My Friends ...": The Role of Co–Witness Relationship in Susceptibility to Misinformation,* 127 *Acta Psychologica* 476, 481 (2008) (noting that all participants "were susceptible to misinformation from their co-witness and, as a consequence, produced less accurate recall accounts than participants who did not interact with another witness"); *see also* Helen M. Paterson & Richard I. Kemp, *Comparing Methods of Encountering Post–Event Information: The Power of Co–Witness Suggestion,* 20 *Applied Cognitive Psychol.* 1083, 1083 (2006) ("Results suggest that co-witness information had a particularly strong influence on eyewitness memory, whether encountered through co-witness discussion or indirectly through a third party."); John S. Shaw, III et al.,

909 *909 *Co–Witness Information Can Have Immediate Effects on Eyewitness Memory Reports,* 21 *Law & Hum.*
270 *Behav.* 503, 503, 516 (1997) ("[W]hen *270 participants received incorrect information about a co-witness's response, they were significantly more likely to give that incorrect response than if they received no co-witness information."); Rachel Zajac & Nicola Henderson, *Don't It Make My Brown Eyes Blue: Co–Witness Misinformation About a Target's Appearance Can Impair Target–Absent Lineup Performance,* 17 *Memory* 266, 275 (2009) ("[P]articipants who were [wrongly] told by the [co-witness] that the accomplice had blue eyes were significantly more likely than control participants to provide this information when asked to give a verbal description.").

One of the experiments evaluated the effect of the nature of the witnesses' relationships with one another and compared co-witnesses who were strangers, friends, and couples. Hope et al., *supra,* at 478. The study found that "witnesses who were previously acquainted with their co-witness (as a friend or romantic partner) were significantly more likely to incorporate information obtained solely from their co-witness into their own accounts." *Id.* at 481.

Private actors can also affect witness confidence. *See* Luus & Wells, *supra,* at 714. In one study, after witnesses made identifications—all of which were incorrect—some witnesses were either told that their co-witness made the same or a different identification. *Id.* at 717. Confidence rose when witnesses were told that their co-witness agreed with them, and fell when co-witnesses disagreed. *See id.* at 717–18; *see also* Skagerberg, *supra,* at 494–95 (showing similar results).

In addition, all three experts, Drs. Malpass, Penrod, and Wells, testified at the remand hearing that co-witnesses can influence memory and recall.

To uncover relevant information about possible feedback from co-witnesses and other sources, we direct that police officers ask witnesses, as part of the identification process, questions designed to elicit (a) whether the witness has spoken with anyone about the identification and, if so, (b) what was discussed. That information
271 should be recorded and disclosed to defendants. We again rely on *271 our supervisory powers under Article VI, Section 2, Paragraph 3 of the State Constitution in requiring those steps. *See Delgado, supra,* 188 *N.J.* at 63, 902 *A.*2d 888.

Based on the record, we find that non-State actors like co-witnesses and other sources of information can affect the independent nature and reliability of identification evidence and inflate witness confidence—in the same way that law enforcement feedback can. As a result, law enforcement officers should instruct witnesses not to discuss the identification process with fellow witnesses or obtain information from other sources.

We address this issue further in *Chen, supra.*

10. Speed of Identification

The Special Master also noted that the speed with which a witness makes an identification can be a reliable indicator of accuracy. The State agrees. (Although the factor is not a pure system or estimator variable, we include it at this point for convenience.)

Laboratory studies offer mixed results. Compare Steven M. Smith et al., Postdictors of Eyewitness Errors: Can False Identifications Be Diagnosed?, 85 J. Applied Psychol. 542, 542 (2000) (noting "[d]ecision time and lineup fairness were the best postdictors of accuracy"), and David Dunning & Scott Perretta, Automaticity and Eyewitness Accuracy: A 10

910 *910 *to 12–Second Rule for Distinguishing Accurate from Inaccurate Positive Identifications,* 87 *J. Applied Psychol.* 951, 959 (2002) (finding across four studies that identifications were nearly 90% accurate when witnesses identified targets within ten to twelve seconds of seeing a lineup), *with* Ross et al., *supra,* at 688 (noting that rapid identifications were only 59%, not 90%, accurate and finding twenty-five seconds to be "time boundary" between accurate and inaccurate identifications).

Because of the lack of consensus in the scientific community, we make no finding on this issue. *See Rubanick,*
272 *supra,* 125 *N.J.* at 432, 449, 593 *A.*2d 733. To the extent speed is relevant in any *272 event, researchers also caution that it may only be considered if the lineup is fair and unbiased. *See* Ross et al., *supra,* at 688–89.

C. Juror Understanding

Some of the findings described above are intuitive. Everyone knows, for instance, that bad lighting conditions make it more difficult to perceive the details of a person's face. Some findings are less obvious. Although many may believe that witnesses to a highly stressful, threatening event will "never forget a face" because of their intense focus at the time, the research suggests that is not necessarily so. *See supra* at section VI.B.1.

Using survey questionnaires and mock-jury studies, experts have attempted to discern what lay people understand, and what information about perception and memory are beyond the ken of the average juror. Based on those studies, the Special Master found "that laypersons are largely unfamiliar" with scientific findings and "often hold beliefs to the contrary." Defendant and amici agree. The State does not. The State argues that the sources the Special Master cited are unreliable, and that jurors generally understand how memory functions and how it can be distorted.

The parties devote much attention to this issue. But the debate relates largely to the need for enhanced jury instructions and the possible use of expert testimony. Left unanswered amidst many objections is this question: if even only a small number of jurors do not appreciate an important, relevant concept, why not help them understand it better with an appropriate jury charge?

Survey questionnaires provide the most direct evidence of what jurors know about memory and eyewitness identifications. Researchers conducting the surveys ask jurors questions about memory and system and estimator variables. The results can then be compared to expert responses in separate surveys.

Survey studies have generated varied results. The Special Master relied on data from a 2006 survey (the
273 "Benton Survey") that asked 111 jurors in Tennessee questions about eyewitness *273 identification and memory. *See* Tanja Rapus Benton et al., *Eyewitness Memory Is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts,* 20 *Applied Cognitive Psychol.* 115, 118 (2006). Juror responses differed from expert responses on 87% of the issues. *Id.* at 119–21. Among other issues, only 41% of jurors agreed with the importance of pre-lineup instructions, and only 38% to 47% agreed with the effects of the accuracy-confidence relationship, weapon focus, and cross-race bias. *Id.* at 120. By comparison, about nine of ten experts agreed on the effects of all of those issues. *Ibid.*

The State disputes the Benton study for various reasons and instead highlights results from Canadian surveys conducted in 2009, which showed a substantially higher level of juror understanding. *See* J. Don Read & Sarah L. Desmarais, *Expert Psychology*

911 *911 *Testimony on Eyewitness Identification: A Matter of Common Sense?, in Expert Testimony on the Psychology of Eyewitness Identification,* at 115, 120–27. The majority of jury-eligible participants in those surveys agreed with experts on the importance of lineup instructions, the accuracy-confidence relationship, cross-race bias, and weapon focus. *See id.* at 121–22. Still, as the survey authors acknowledged, "substantial differences in knowledge and familiarity between experts and laypersons were readily apparent for 50% of the eyewitness topics." *Id.* at 127.

Mock-jury studies provide another method to try to discern what jurors know. The State argues that mock-jury research is unreliable because it is not possible to replicate the atmosphere of a criminal trial in a mock-trial setting. While true, that comment does not justify scuttling the studies entirely. Also, the growing use of mock trials by the private bar undercuts the strength of the assertion. *See generally* Martha Neil, *Practice Makes Perfect: Mock Trials Gain Ground as a Way to Get Inside Track in Real Trial,* 89 *A.B.A. J.* 34 (2003).

The Special Master did cite the studies. In one mock-jury experiment, researchers showed jurors different
274 versions of a videotaped mock trial about an armed robbery of a liquor store. *274 Brian L. Cutler et al., *Juror Sensitivity to Eyewitness Identification Evidence,* 14 *Law & Hum. Behav.* 185, 186–87 (1990). To test how sensitive jurors were to the effect of weapon focus, some heard an eyewitness testify that the defendant pointed a gun at her during the robbery, while others heard that the gun was hidden in the robber's jacket. *Id.* at 188. Similarly, some jurors heard the eyewitness declare that she was 80% confident that she had correctly identified the robber, while others heard that she was 100% confident. *Id.* at 189. Researchers used similar methods to test reactions to eight other system and estimator variables. *See id.* at 188–89.

The study revealed that mock-jurors "were insensitive to the effects of disguise, weapon presence, retention interval, suggestive lineup instructions, and procedures used for constructing and carrying out the lineup" but "gave disproportionate weight to the confidence of the witness." *Id.* at 190. Stated otherwise, eyewitness confidence "was the most powerful predictor of verdicts" regardless of other variables. *Id.* at 185. The authors thus concluded that jurors do "not evaluate eyewitness memory in a manner consistent with psychological theory and findings." *See id.* at 190.

Neither juror surveys nor mock-jury studies can offer definitive proof of what jurors know or believe about memory. But they reveal generally that people do not intuitively understand all of the relevant scientific findings. As a result, there is a need to promote greater juror understanding of those issues.

D. Consensus Among Experts

The Special Master found broad consensus within the scientific community on the relevant scientific issues. Primarily, he found support in a 2001 survey of sixty-four experts, mostly cognitive and social psychologists. *See* Saul M. Kassin et al., *On the "General Acceptance" of Eyewitness Testimony Research: A New Survey of the Experts,* 56 *Am. Psychologist* 405, 407 (2001) (the "Kassin Report"). Ninety-two percent of the
275 participating experts had published articles or books on eyewitness identification, and *275 many in the group had testified as expert witnesses in almost 1,000 court cases, collectively. *Id.* at 409.

Ninety percent or more of the experts found research on the following topics reliable: suggestive wording; lineup instruction

912 *912 bias; confidence malleability; mugshot bias; post-event information; child suggestivity; alcohol intoxication; and own-race bias. *Id.* at 412. Seventy to 87% found the following research reliable: weapon focus; the accuracy-confidence relationship; memory decay; exposure time; sequential presentation; showups; description-matched foils; child-witness accuracy; and lineup fairness. *Ibid.*

The State suggests that some of the experts surveyed in the Kassin Report had motives to overstate the science because they were also forensic consultants who have been paid for testifying at trials. *See id.* 414–15. As a result, the State discounts the results in the Report. The Report's authors recognized this potential for bias and looked for distinctions between answers provided by "forensic consultants" and the 44% of scientists who had never testified in court. *Ibid.* The analysis revealed "no significant difference" between the two groups. *Id.* at 415.

The studies and meta-analyses published in the ten years since the Kassin Report show a growing consensus in certain areas of eyewitness identification research. For example, only 60% of experts in 2001 found research on the relationship between stress and identification accuracy to be reliable. *Id.* at 412. At the remand hearing, all three experts testified that results from the military stress experiment, *see* Morgan III et al., *supra,* and other studies have reinforced views about the relationship between high stress and the reliability of identifications.

Among the experts who testified on remand, there was broad consensus regarding the Special Master's findings. The State's expert, Dr. Malpass, agreed with nearly all of the conclusions offered by Drs. Wells and Penrod. As Dr. Malpass wrote in 2009, "there is general agreement about the scientific findings of the
276 eyewitness community," as evidenced by meta-analytic reviews, *276 primary texts, and surveys of scientific experts, and "[a] review of these areas suggests that it would be very difficult to sustain the position that many of the findings in research on eyewitness memory lack general agreement within the scientific community." Malpass et al., *The Need for Expert Psychological Testimony on Eyewitness Identification, supra,* at 15.

VII. Responses to Scientific Studies

Beyond the scientific community, law enforcement and reform agencies across the nation have taken note of the scientific findings. In turn, they have formed task forces and recommended or implemented new procedures to improve the reliability of eyewitness identifications. *See, e.g.,* Ad Hoc Innocence Comm. to Ensure the Integrity of the Criminal Process, Am. Bar Ass'n, *Achieving Justice: Freeing the Innocent, Convicting the Guilty* (2006); Int'l Ass'n of Chiefs of Police, *supra;* Nat'l Inst. of Justice, U.S. Dep't of Justice, *Eyewitness Evidence: A Guide for Law Enforcement, supra.*

New Jersey has been at the forefront of that effort. In 2001, under the leadership of then-Attorney General John J. Farmer, Jr., New Jersey became "the first state in the Nation to officially adopt the recommendations issued by the Department of Justice" and issue guidelines for preparing and conducting identification procedures. *See* Letter from Attorney General John J. Farmer, Jr., to All County Prosecutors et al., at 1 (Apr. 18, 2001) (AG Farmer Letter), available at http:// www. state. nj. us/ lps/ dcj/ ag guide/ photoid. pdf.

The Attorney General Guidelines "incorporate[d] more than 20 years of scientific research on memory and interview techniques." *Ibid.* The preamble describes the document as a list of "best practices." *See*

913 *913 Attorney General Guidelines, *supra,* at 1. The list is divided into two broad categories: composing photo or live lineups, and conducting identification procedures. Many, but not all, of the practices measure up to
277 current scientific standards. Although we have discussed parts of the Guidelines in the preceding*277 sections, we summarize them as a whole for the sake of completeness.

The Guidelines applied the following "best practices" to live and photo lineups: "Include only one suspect in each identification procedure"; select fillers based on the "witness' description of the perpetrator"; if the description is limited, inadequate, or differs significantly from the suspect's appearance, "fillers should resemble the suspect in significant features"; include a minimum of four or five fillers; consider placing the suspect in different lineup positions when conducting more than one lineup in a case with multiple witnesses; and "[a]void reusing fillers in lineups" when showing the same witness a new suspect. *Id.* at 1–3. When constructing photo lineups, officers should also "[e]nsure that no writings or information concerning previous arrest(s) will be visible to the witness"; "[v]iew the array, once completed, to ensure that the suspect does not unduly stand out"; and "[p]reserve the presentation order of the photo lineup" and the photos themselves. *Id.* at 2.

The Guidelines also set out specific rules for administering lineups. To avoid administrator feedback, "the person conducting the photo or live lineup identification procedure should be someone other than the primary investigator assigned to the case." *Id.* at 1. If that is impractical, the non-blind lineup administrator "should be careful to avoid inadvertent signaling to the witness of the 'correct' response." *Ibid.*

Under the Guidelines, administrators should instruct witnesses "that the perpetrator may not be among those in the photo array or live lineup and, therefore, they should not feel compelled to make an identification." *Ibid.* The Guidelines also state a preference for sequential over simultaneous lineup presentation. *See ibid.*

During the procedure, administrators must "[a]void saying anything to the witness that may influence the witness' selection." *Id.* at 3–6. If the witness makes an identification, officers should "avoid reporting to the
278 witness any information regarding the *278 individual he or she has selected prior to obtaining the witness' statement of certainty." *Ibid.*

Officers must record the results obtained from the witness. *See id.* at 7. As part of that process, officers are to record both the outcome of the identification and "the witness' own words regarding how sure he or she is." *Ibid.* If a witness fails to make an identification, that too should be recorded. *Ibid.* In addition, officers should instruct witnesses not to discuss the procedure or its results with other witnesses. *Id.* at 4–7.

The Attorney General Guidelines are thorough and exacting. We once again commend the Attorney General's Office for responding to important social scientific evidence and promoting the reliability of eyewitness identifications. *See Delgado, supra,* 188 *N.J.* at 62, 902 *A.*2d 888; *see also Romero, supra,* 191 *N.J.* at 74, 922 *A.*2d 693. Since 2001, when the recommended Guidelines went into effect, they may well have prevented wrongful convictions.

However, the Guidelines are a series of recommended best practices. The Attorney General expressly noted that identifications that do not follow the recommended Guidelines should not be deemed "inadmissible or otherwise in error." AG

914 *914 Farmer Letter, *supra,* at 3. Although the State argues that the Court should defer to other branches of government to deal with the evolving social scientific landscape, it remains the Court's obligation to guarantee that constitutional requirements are met, and to ensure the integrity of criminal trials. *See Romero, supra,* 191 *N.J.* at 74–75, 922 *A.*2d 693 (citing court's supervisory authority under *N.J. Const.* art. VI, § 2, ¶ 3); *Delgado, supra,* 188 *N.J.* at 62, 902 *A.*2d 888 (same); *see also State v. Daniels,* 182 *N.J.* 80, 95–96, 861 *A.*2d 808 (2004).

Other state and local authorities have instituted similar changes to their eyewitness identification procedures. In 2005, for example, the Attorney General of Wisconsin issued a set of identification guidelines recommending,
279 among other things, "double-blind, sequential photo arrays and lineups with non-suspect fillers chosen *279 to minimize suggestiveness, non-biased instructions to eyewitnesses, and assessments of confidence immediately after identifications." Office of the Attorney Gen., Wis. Dep't of Justice, *Model Policy and Procedure for Eyewitness Identification* 1 (2005); *see also* Dallas Police Dep't, Dallas Police Department General Order § 304.01 (2009); Denver Police Dep't, *Operations Manual* § 104.44 (2006); Police Chiefs' Ass'n of Santa Clara County, *Line-up Protocol for Law Enforcement* (2002).

North Carolina was among the first states to pass legislation mandating, among other things, pre-lineup instructions and blind and sequential lineup administration. *See N.C. Gen.Stat.* § 15A–284.50 to .53. Illinois, Maryland, Ohio, West Virginia, and Wisconsin have passed similar laws regarding lineup practices. *See* 725 *Ill. Comp. Stat.* 5/107A–5; Md. Code Ann., Pub. Safety § 3–506; *Ohio Rev.Code Ann.* § 2933.83; *W. Va.Code Ann.* § 62–1E–1 to –3; Wis. Stat. § 175.50.

VIII. Parties' Arguments

The parties and amici submitted voluminous briefs of high quality, both before and after the remand hearing. We summarize their positions without repeating arguments already addressed. In short, defendant and amici endorse the Special Master's factual and scientific findings in their entirety. We have already discussed many of the State's responses to those findings. We now outline the parties' and amici's arguments as to the Appellate Division decision and the viability of the *Manson/Madison* framework in light of the record developed on remand.

The State argues vigorously against the Appellate Division's holding that a breach of the Attorney General Guidelines results in a presumption of impermissible suggestiveness. The State contends that such an approach would penalize the Attorney General for adopting Guidelines designed to improve identification practices, and reward defendants who intimidate witnesses. In this case, the State submits, two officers merely tried to reassure a threatened and reluctant witness; they did not attempt to influence the witness' selection of a
280 particular photograph. The *280 State maintains that the Appellate Division's response would hamper this and like prosecutions and hinder policy makers in the future.

As to the current *Manson/Madison* framework, the State argues that there is insufficient evidence to warrant a change in the familiar procedure for evaluating eyewitness identification evidence. First, the State believes that the likelihood of misidentifications is overstated. *See, supra,* at section III.

Second, the State offers various arguments as to why the *Manson/Madison* framework is an adequate construct to

915 *915 evaluate identification evidence before trial: the right to a pretrial *Wade* hearing is already extensive and requires only "some showing" of impermissible suggestiveness; the *Manson/ Madison* test is broad enough to incorporate all system and estimator variables; and the *Manson/Madison* test instructs judges to focus on confidence demonstrated at the time of confrontation, before any post-identification, confirmatory feedback.

Along with *Manson/Madison*, the State identifies other safeguards that protect against wrongful convictions: the Attorney General Guidelines; pretrial, open-file discovery, *see R.* 3:13–3; exclusion of highly prejudicial identifications that result from suggestive conduct or words by a private actor under N.J.R.E. 403; jury *voir dire;* numerous peremptory jury challenges; cross-examination; defense summations; and comprehensive jury instructions.

Because eyewitness identification science is probabilistic—meaning that it cannot determine if a particular identification is accurate—the State also argues that the legal system should continue to rely on jurors to assess the credibility of eyewitnesses. To guide juries, the State favors appropriate, flexible jury instructions. The State maintains that expert testimony is not advisable because the relevant subjects are not beyond the ken of the average juror.

281 *281 Among other things, the State also rejects the use of the analogy that human memory is like trace evidence, which all the other parties advance.

Defendant embraces the decision of the Appellate Division and agrees that a violation of the Attorney General Guidelines should create a presumption of impermissible suggestiveness. With regard to the *Manson/Madison* test, defendant and amici argue that more than thirty years of scientific evidence undercut the assumptions underlying the Supreme Court's decision in *Manson.* They believe that for the following reasons, the *Manson/Madison* framework is insufficient to ensure defendants' due process rights to a fair trial: courts only consider the five reliability factors in *Manson/Madison* after finding suggestiveness, even though some of those factors may themselves be unreliable because of suggestive police behavior; the framework focuses only on

police misconduct despite research that shows estimator variables and feedback from private actors can also affect reliability; its all-or-nothing remedy of suppression is too inflexible; it fails to provide jurors context and guidance; and it does not deter suggestive police procedures.

To correct those flaws, defendant and the ACDL initially proposed two alternative frameworks to replace *Manson/Madison*. Among other arguments, they analogized to *Miranda v. Arizona,* 384 *U.S.* 436, 86 *S.Ct.* 1602, 16 *L.Ed.*2d 694 (1966), and argued that eyewitness evidence should be excluded per se if an identification procedure violated the Attorney General Guidelines or if a judge found other evidence of suggestiveness.

Consistent with the Special Master's report, they now urge this Court to require a reliability hearing in every case in which the State intends to present identification evidence. At the hearing, they submit that a wide range of system and estimator variables would be relevant, and the State should bear the burden of establishing reliability. In addition, they agree with the Special Master that juries should receive expanded instructions that address specific variables and are tailored to the facts of the case.

282 *282 The Innocence Project proposes a different scheme along the following lines: defendants would first have to allege that

916 *916 an identification was unreliable; the burden would then shift to the State to prove, in essence, that neither estimator nor system variables rendered the identification unreliable—to be accomplished through testimony of the eyewitness about the circumstances under which she saw the perpetrator, and proof from law enforcement about the identification procedure used; the burden would next shift back to the defendant to prove by a preponderance of evidence "that there exists a substantial probability of a mistaken identification"; and if the court does not suppress the evidence, defendant could file motions to seek to limit or redact identification testimony and present expert testimony at trial.

Notably, under the Innocence Project's approach, a violation of the Attorney General Guidelines would be a factor for the trial court—and juries—to consider; it would not lead to per se exclusion. At the admissibility hearing, the Innocence Project recommends that trial courts consider both system and estimator variables, and be required to make detailed findings about them; afterward, judges would be in a position before trial to tell the parties which instructions, if any, they plan to give the jury about relevant variables in the case.

Finally, the Innocence Project encourages this Court to adopt comprehensive jury instructions that are easy to understand, so that jurors can evaluate eyewitness evidence appropriately. The Innocence Project maintains that those instructions should be read to the jury both *before* an eyewitness' testimony and at the conclusion of the case. If at the end of trial the court doubts the accuracy of an identification, the Innocence Project argues that the judge should give a cautionary instruction to treat that evidence with great caution and distrust.

The State argues that the Innocent Project's proposal would invite an unnecessary pretrial fishing expedition in every criminal case involving eyewitness evidence. Instead, the State contends that the initial burden should
283 remain on defendants to show some *283 evidence of suggestiveness, which the State claims is not an onerous threshold.

IX. Legal Conclusions

A. Scientific Evidence

We find that the scientific evidence presented is both reliable and useful. *See Moore, supra,* 188 *N.J.* at 206, 902 *A.*2d 1212. Despite arguments to the contrary, we agree with the Special Master that "[t]he science abundantly demonstrates the many vagaries of memory encoding, storage, and retrieval; the malleability of memory; the contaminating effects of extrinsic information; the influence of police interview techniques and identification procedures; and the many other factors that bear on the reliability of eyewitness identifications."

The research presented on remand is not only extensive, but as Dr. Monahan testified, it represents the "gold standard in terms of the applicability of social science research to the law." Experimental methods and findings have been tested and retested, subjected to scientific scrutiny through peer-reviewed journals, evaluated through the lens of meta-analyses, and replicated at times in real-world settings. As reflected above, consensus exists among the experts who testified on remand and within the broader research community. *See Chun, supra,*
917 194 *N.J.* at 91, 943 *A.*2d 114; *see also Frye, supra,* 293 *F.* at 1014. *917

Other courts have accepted eyewitness identification research pertaining to a number of the variables discussed. *See, e.g., United States v. Bartlett,* 567 *F.*3d 901, 906 (7th Cir. 2009) (confidence-accuracy relationship and memory decay), *cert. denied,* —— *U.S.* ——, 130 *S.Ct.* 1137, 175 *L.Ed.*2d 971 (2010); *United States v. Brownlee,* 454 *F.*3d 131, 142–44 (3d Cir. 2006) ("inherent unreliability" of eyewitness identifications and accuracy-confidence relationship); *United States v. Smith,* 621 *F.Supp.*2d 1207, 1215–17 (M.D.Ala. 2009) (cross-racial identifications, impact of high stress, and feedback); *State v. Chapple,* 135 *Ariz.* 281, 660 *P.*2d
284 1208, 1220–22 (1983) (memory decay, stress, feedback, and confidence-accuracy);*284 *People v. McDonald,* 37 *Cal.*3d 351, 208 *Cal.Rptr.* 236, 690 *P.*2d 709, 718 (1984) ("The consistency of the results of [eyewitness identification] studies is impressive, and the courts can no longer remain oblivious to their implications for the administration of justice."), *overruled on other grounds by People v. Mendoza,* 23 *Cal.*4th 896, 98 *Cal.Rptr.*2d 431, 4 *P.*3d 265 (2000); *Benn v. United States,* 978 *A.*2d 1257, 1265–68 (D.C. 2009) (citing expert consensus regarding system and estimator variables); *People v. LeGrand,* 8 *N.Y.*3d 449, 835 *N.Y.S.*2d 523, 867 *N.E.*2d 374, 380 (2007) (confidence-accuracy relationship, feedback, and confidence malleability); *State v. Copeland,* 226 *S.W.*3d 287, 299–300, 302 (Tenn. 2007) (weapons effect, stress, cross-racial identification, age, and opportunity to view); *State v. Clopten,* 223 *P.*3d 1103, 1113 & n.22 (Utah 2009) (citing with approval research on multiple system and estimator variables). *But see Marquez, supra,* 967 *A.*2d at 77 (finding scientific literature "is far from universal or even well established" and that "research is in great flux") (discussed *supra* at 243 n. 6, 27 *A.*3d at 893 n. 6).

This is not our first foray into the realm of eyewitness identification research and its applicability to the law. In *Cromedy,* this Court relied on numerous social scientific studies when we held that special jury instructions were needed in appropriate cases involving cross-racial identifications. *See Cromedy, supra,* 158 *N.J.* at 120–23, 131, 727 *A.*2d 457. We observed that "the empirical data ... provide[d] an appropriate frame of reference for requiring ... jury instructions." *Id.* at 132, 727 *A.*2d 457.

More recently in *Romero, supra,* this Court held that "there [was] insufficient data to support the conclusion that, as a matter of due process, people of the same race but different ethnicity ... require a *Cromedy* instruction whenever they are identified by someone of a different ethnicity." 191 *N.J.* at 71–72, 922 *A.*2d 693. Of the three studies the Court reviewed, one included a small number of participants and two "did not test for the reliability of identifications of Hispanics by non-Hispanics." *Id.* at 70–71, 922 *A.*2d 693. The Court distinguished the
285 dearth of social scientific *285 research in the field of cross-ethnic bias from "the convincing social science data demonstrating the potential unreliability of cross-racial identifications." *See id.* at 69, 922 *A.*2d 693.

When social scientific experiments in the field of eyewitness identification produce "an impressive consistency in results," those results can constitute adequate data on which to base a ruling. *See Cromedy, supra,* 158 *N.J.* at 132, 727 *A.*2d 457. Thus, based on the testimony and ample record developed at the hearing, we recognize that a number of system and estimator variables can affect the reliability of eyewitness identifications. We recount those variables after considering the vitality of the *Manson/Madison* framework, a question we turn to now.

918 *918 B. The *Manson/Madison* Test Needs to Be Revised

When this Court adopted the framework outlined in *Manson,* it recognized that suggestive police procedures may "so irreparably 'taint[ ]' the out-of-court and in-court identifications" that a defendant is denied due process. *Madison, supra,* 109 *N.J.* at 239, 536 *A.*2d 254. To protect due process concerns, the *Manson* Court's two-part test rested on three assumptions: (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. *See Manson, supra,* 432 *U.S.* at 112–16, 97 *S.Ct.* at 2252–54, 53 *L.Ed.*2d at 152–55.

We remanded this case to determine whether those assumptions and other factors reflected in the two-part *Manson/Madison* test are still valid. We conclude from the hearing that they are not.

The hearing revealed that *Manson/Madison* does not adequately meet its stated goals: it does not provide a sufficient measure for reliability, it does not deter, and it overstates the jury's innate ability to evaluate eyewitness testimony.

First, under *Manson/Madison*, defendants must show that police procedures were "impermissibly suggestive" 286 before courts can *286 consider estimator variables that also bear on reliability. *See Madison, supra,* 109 *N.J.* at 232, 536 *A.*2d 254. As a result, although evidence of relevant estimator variables tied to the *Neil v. Biggers* factors is routinely introduced at pretrial hearings, their effect is ignored unless there is a finding of impermissibly suggestive police conduct. In this case, for example, the testimony at the *Wade* hearing related principally to the lineup procedure. Because the court found that the procedure was not "impermissibly suggestive," details about the witness' use of drugs and alcohol, the dark lighting conditions, the presence of a weapon pointed at the witness' chest, and other estimator variables that affect reliability were not considered at the hearing. (They were explored later at trial.)

Second, under *Manson/Madison*, if a court finds that the police used impermissibly suggestive identification procedures, the trial judge then weighs the corrupting effect of the process against five "reliability" factors. *Id.* at 239–40, 536 *A.*2d 254. But three of those factors—the opportunity to view the crime, the witness' degree of attention, and the level of certainty at the time of the identification—rely on self-reporting by eyewitnesses; and research has shown that those reports can be skewed by the suggestive procedures themselves and thus may not be reliable. Self-reporting by eyewitnesses is an essential part of any investigation, but when reports are tainted by a suggestive process, they become poor measures in a balancing test designed to bar unreliable evidence.

Third, rather than act as a deterrent, the *Manson/Madison* test may unintentionally reward suggestive police practices. The irony of the current test is that the more suggestive the procedure, the greater the chance eyewitnesses will seem confident and report better viewing conditions. Courts in turn are encouraged to admit identifications based on criteria that have been tainted by the very suggestive practices the test aims to deter.

Fourth, the *Manson/Madison* test addresses only one option for questionable eyewitness identification 287 evidence: suppression. Yet *287 few judges choose that

919 *919 ultimate sanction.[9] An all-or-nothing approach does not account for the complexities of eyewitness identification evidence.

9 The State correctly notes that there is no way to know the precise number of identifications that may have been suppressed at the trial court level, but even the State conceded at oral argument that suppression "does not happen often." We also note that with the exception of one case reversed on appeal, we have found no reported Appellate Division decision since 1977 that reversed a conviction because the trial court failed to suppress identification evidence. *State v. Ford,* 165 *N.J.Super.* 249, 398 *A.*2d 101 (1978), *rev'd on dissent,* 79 *N.J.* 136, 398 *A.*2d 95 (1979). (The Special Master found one unreported Appellate Division decision, which we do not cite consistent with *Rule* 1:36–3.)

Finally, *Manson/Madison* instructs courts that "the reliability determination is to be made from the totality of the circumstances in the particular case." *Id.* at 239, 536 *A.*2d 254. In practice, trial judges routinely use the test's five reliability factors as a checklist. The State maintains that courts may consider additional estimator variables. Even if that is correct, there is little guidance about which factors to consider, and courts and juries are often left to their own intuition to decide which estimator variables may be important and how they matter.

As a result of those concerns, we now revise the State's framework for evaluating eyewitness identification evidence.[10]

10 We have no authority, of course, to modify *Manson.* The expanded protections stem from the due process rights guaranteed under the State Constitution. *Compare N.J. Const.* art. I, § 1 ("All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."), *with U.S. Const.* amend. XIV, § 1 ("No State shall ... deprive any person of life, liberty, or property, without due process of law."); *see Jamgochian v. N.J. State Parole Bd.,* 196 *N.J.* 222, 239, 952 *A.*2d 1060 (2008) ("[W]e have, from time to time, construed Article 1, Paragraph 1 [of the New Jersey Constitution] to provide more due process protections than those afforded under the United States Constitution."); *see also State v. Reid,* 194 *N.J.* 386, 396–97, 945 *A.*2d 26 (2008) (recognizing greater protection of individual rights under New Jersey Constitution).

288 *288 C. Revised Framework

Remedying the problems with the current *Manson/Madison* test requires an approach that addresses its shortcomings: one that allows judges to 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—because we recognize that most identifications will be admitted in evidence.

Two principal changes to the current system are needed to accomplish that: first, the revised framework should allow all relevant system *and* estimator variables to be explored and weighed at pretrial hearings when there is some actual evidence of suggestiveness; and second, courts should develop and use enhanced jury charges to help jurors evaluate eyewitness identification evidence.

The new framework also needs to be flexible enough to serve twin aims: to guarantee fair trials to defendants, who must have the tools necessary to defend themselves, and to protect the State's interest in presenting critical evidence at trial. With that in mind, we first outline the revised approach for evaluating identification evidence
920 and then explain its details and the reasoning behind it. *920

First, to obtain a pretrial hearing, a defendant has the initial burden of showing some evidence of suggestiveness that could lead to a mistaken identification. *See State v. Rodriquez, supra,* 264 *N.J.Super.* at 269, 624 *A.*2d 605; *State v. Ortiz, supra,* 203 *N.J.Super.* at 522, 497 *A.*2d 552; *cf. State v. Michaels,* 136 *N.J.* 299, 320, 642 *A.*2d 1372 (1994) (using same standard to trigger pretrial hearing to determine if child-victim's statements resulted from suggestive or coercive interview techniques). That evidence, in general, must be tied
289 to a system—and not an *289 estimator—variable. *But see Chen, supra* (extending right to hearing for suggestive conduct by private actors).

Second, the State must then offer proof to show that the proffered eyewitness identification is reliable—accounting for system and estimator variables—subject to the following: the court can end the hearing at any time if it finds from the testimony that defendant's threshold allegation of suggestiveness is groundless. We discuss this further below. *See infra* at 290–91, 27 *A.*3d at 920–21).

Third, the ultimate burden remains on the defendant to prove a very substantial likelihood of irreparable misidentification. *See Manson, supra,* 432 *U.S.* at 116, 97 *S.Ct.* at 2254, 53 *L.Ed.*2d at 155 (citing *Simmons, supra,* 390 *U.S.* at 384, 88 *S.Ct.* at 971, 19 *L.Ed.*2d at 1253); *Madison, supra,* 109 *N.J.* at 239, 536 *A.*2d 254 (same). To do so, a defendant can cross-examine eyewitnesses and police officials and present witnesses and other relevant evidence linked to system and estimator variables.[11]

[11] A defendant, of course, may make a tactical choice *not* to explore an estimator variable pretrial, in order to "save up" cross-examination for trial.

Fourth, if after weighing the evidence presented a court finds from the totality of the circumstances that defendant has demonstrated a very substantial likelihood of irreparable misidentification, the court should suppress the identification evidence. If the evidence is admitted, the court should provide appropriate, tailored jury instructions, as discussed further below.

To evaluate whether there is evidence of suggestiveness to trigger a hearing, courts should consider the following non-exhaustive list of system variables:

1. *Blind Administration.* Was the lineup procedure performed double-blind? If double-blind testing was
290 impractical, did the police use a technique like the "envelope method" described *290 above, to ensure that the administrator had no knowledge of where the suspect appeared in the photo array or lineup?

2. *Pre-identification Instructions.* Did the administrator provide neutral, pre-identification instructions warning that the suspect may not be present in the lineup and that the witness should not feel compelled to make an identification?

3. *Lineup Construction.* Did the array or lineup contain only one suspect embedded among at least five innocent fillers? Did the suspect stand out from other members of the lineup?

4. *Feedback.* Did the witness receive any information or feedback, about the suspect or the crime, before, during, or after the identification procedure?

5. *Recording Confidence.* Did the administrator record the witness' statement of confidence immediately after the identification, before the possibility of any confirmatory feedback?

6. *Multiple Viewings.* Did the witness view the suspect more than once as part of

921 *921 multiple identification procedures? Did police use the same fillers more than once?

7. *Showups.* Did the police perform a showup more than two hours after an event? Did the police warn the witness that the suspect may not be the perpetrator and that the witness should not feel compelled to make an identification?

8. *Private Actors.* Did law enforcement elicit from the eyewitness whether he or she had spoken with anyone about the identification and, if so, what was discussed?

9. *Other Identifications Made.* Did the eyewitness initially make no choice or choose a different suspect or filler?

The court should conduct a *Wade* hearing only if defendant offers some evidence of suggestiveness. If, however, at any time during the hearing the trial court concludes from the testimony that defendant's initial claim of suggestiveness is baseless, and if no other evidence of suggestiveness has been demonstrated by the
291 evidence, the court may exercise its discretion to end the *291 hearing. Under those circumstances, the court need not permit the defendant or require the State to elicit more evidence about estimator variables; that evidence would be reserved for the jury.

By way of example, assume that a defendant claims an administrator confirmed an eyewitness' identification by telling the witness she did a "good job." That proffer would warrant a *Wade* hearing. Assume further that the administrator credibly denied any feedback, and the eyewitness did the same. If the trial court finds that the initial allegation is completely hollow, the judge can end the hearing absent any other evidence of suggestiveness. In other words, if no evidence of suggestiveness is left in the case, there is no need to explore estimator variables at the pretrial hearing. Also, trial courts always have the authority to direct the mode and order of proofs, and they may exercise that discretion to focus pretrial hearings as needed.

If some actual proof of suggestiveness remains, courts should consider the above system variables as well as the following non-exhaustive list of estimator variables to evaluate the overall reliability of an identification and determine its admissibility:

1. *Stress.* Did the event involve a high level of stress?

2. *Weapon focus.* Was a visible weapon used during a crime of short duration?

3. *Duration.* How much time did the witness have to observe the event?

4. *Distance and Lighting.* How close were the witness and perpetrator? What were the lighting conditions at the time?

5. *Witness Characteristics.* Was the witness under the influence of alcohol or drugs? Was age a relevant factor under the circumstances of the case?

6. *Characteristics of Perpetrator.* Was the culprit wearing a disguise? Did the suspect have different facial features at the time of the identification?

292 *292 7. *Memory decay.* How much time elapsed between the crime and the identification?

8. *Race-bias.* Does the case involve a cross-racial identification?

Some of the above estimator variables overlap with the five reliability factors outlined in *Neil v. Biggers, supra,* 409 *U.S.* at 199–200, 93 *S.Ct.* at 382, 34 *L.Ed.*2d at 411, which we nonetheless repeat:

9. *Opportunity to view the criminal at the time of the crime.*

922 10. *Degree of attention.* *922

11. *Accuracy of prior description of the criminal.*

12. *Level of certainty demonstrated at the confrontation.*

Did the witness express high confidence at the time of the identification before receiving any feedback or other information?

13. *The time between the crime and the confrontation.* (Encompassed fully by "memory decay" above.)

The above factors are not exclusive. Nor are they intended to be frozen in time. We 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. By providing the above lists, we do not intend to hamstring police departments or limit them from improving practices. Likewise, we do not limit trial courts from reviewing evolving, substantial, and generally accepted scientific research. But to the extent the police undertake new practices, or courts either consider variables differently or entertain new ones, they must rely on reliable scientific evidence that is generally accepted by experts in the community. *See Chun, supra,* 194 *N.J.* at 91, 943 *A.*2d 114; *Moore, supra,* 188 *N.J.* at 206, 902 *A.*2d 1212; *Rubanick, supra,* 125 *N.J.* at 432, 593 *A.*2d 733.

We adopt this approach over the initial recommendation of defendant and the ACDL that any violation of the
293 Attorney General Guidelines should require per se exclusion of the resulting *293 eyewitness identification. Although that approach might yield greater deterrence, it could also lead to the loss of a substantial amount of reliable evidence. We believe that the more flexible framework outlined above protects defendants' right to a fair trial at the same time it enables the State to meet its responsibility to ensure public safety.

D. Pretrial Hearing

As stated above, to obtain a pretrial hearing, a defendant must present some evidence of suggestiveness. Pretrial discovery, which this opinion has enhanced in certain areas, would reveal, for example, if a line-up did not include enough fillers, if those fillers did not resemble the suspect, or if a private actor spoke with the witness about the identification. Armed with that and similar information, defendants could request and receive a hearing.

The hearing would encompass system and estimator variables upon a showing of some suggestiveness that defendant can support. For various reasons, estimator variables would no longer be ignored in the court's analysis until it found that an identification procedure was impermissibly suggestive. First, broader hearings will provide more meaningful deterrence. To the extent officers wish to avoid a pretrial hearing, they must avoid acting in a suggestive manner. Second, more extensive hearings will address reliability with greater care and better reflect how memory works. Suggestiveness can certainly taint an identification, which justifies examining system variables. The same is true for estimator variables like high stress, weapon-focus, and own-race bias. Because both sets of factors can alter memory and affect eyewitness identifications, both should be explored pretrial in appropriate cases to reflect what *Manson* acknowledged: that "reliability is the linchpin in determining the admissibility of identification testimony." *Manson, supra,* 432 *U.S.* at 114, 97 *S.Ct.* at 2253, 53 *L.Ed.*2d at 154.

But concerns about estimator variables alone cannot trigger a pretrial hearing; only system variables would. This approach differs from the procedure endorsed

294 *923 by the Special Master and *294 proposed by defendant and amici, which would essentially require pretrial hearings in every case involving eyewitness identification evidence. Several reasons favor the approach we outline today.

First, we anticipate that eyewitness identification evidence will likely not be ruled inadmissible at pretrial hearings solely on account of estimator variables. For example, it is difficult to imagine that a trial judge would preclude a witness from testifying because the lighting was "too dark," the witness was "too distracted" by the presence of a weapon, or he or she was under "too much" stress while making an observation. How dark is too dark as a matter of law? How much is too much? What guideposts would a trial judge use in making those judgment calls? In all likelihood, the witness would be allowed to testify before a jury and face cross-examination designed to probe the weaknesses of her identification. Jurors would also have the benefit of enhanced instructions to evaluate that testimony—even when there is no evidence of suggestiveness in the case. As a result, a pretrial hearing triggered by, and focused on, estimator variables would likely not screen out identification evidence and would largely be duplicated at trial.

Second, courts cannot affect estimator variables; by definition, they relate to matters outside the control of law enforcement. More probing pretrial hearings about suggestive police procedures, though, can deter inappropriate police practices.

Third, as demonstrated above, suggestive behavior can distort various other factors that are weighed in assessing reliability. That warrants a greater pretrial focus on system variables.

Fourth, we are mindful of the practical impact of today's ruling. Because defendants will now be free to explore a broader range of estimator variables at pretrial hearings to assess the reliability of an identification, those hearings will become more intricate. They will routinely involve testimony from both the police and eyewitnesses, and that testimony will likely expand as more substantive areas are explored. Also, trial courts will retain discretion to allow expert testimony at pretrial hearings.

295 *295 In 2009, trial courts in New Jersey conducted roughly 200 *Wade* hearings, according to the Administrative Office of the Courts. If estimator variables alone could trigger a hearing, that number might increase to nearly all cases in which eyewitness identification evidence plays a part. We have to measure that outcome in light of the following reality that the Special Master observed: judges rarely suppress eyewitness evidence at pretrial hearings. Therefore, to allow hearings in the majority of identification cases might overwhelm the system with little resulting benefit.

We do not suggest that it is acceptable to sacrifice a defendant's right to a fair trial for the sake of saving court resources, but when the likely outcome of a hearing is a more focused set of jury charges about estimator variables, not suppression, we question the need for hearings initiated only by estimator variables.

Appellate review does remain as a backstop to correct errors that may not be caught at or before trial, and the enhanced framework may provide a greater role in that regard in certain cases. If a reviewing court determines that identification evidence should not have been admitted in accordance with the above standards, it can reverse a conviction.

We also note that trial courts should make factual findings at pretrial hearings about relevant system and estimator

924 *924 variables to lay the groundwork for proper jury charges and to facilitate meaningful appellate review.

Finally, we do not adopt the analogy between trace evidence and eyewitness identifications. To be sure, like traces of DNA or drops of blood, memories are part of our being. By necessity, though, the criminal justice system collects and evaluates trace evidence and eyewitness identification evidence differently. Unlike vials of blood, memories cannot be stored in evidence lockers. Instead, we must strive to avoid reinforcement and distortion of eyewitness memories from outside effects, and expose those influences when they are present. But
296 we continue to rely on people as the conduits of their own memories, on attorneys to cross-examine*296 them, and on juries to assess the evidence presented. For that reason, we favor enhanced jury charges to help jurors perform that task.

E. Trial

As is true today, juries will continue to hear about all relevant system and estimator variables at trial, through direct and cross-examination and arguments by counsel. In addition, when identification is at issue in a case, trial courts will continue to "provide[ ] appropriate guidelines to focus the jury's attention on how to analyze and consider the trustworthiness of eyewitness identification." *Cromedy, supra,* 158 *N.J.* at 128, 727 *A.*2d 457. Based on the record developed on remand, we direct that enhanced instructions be given to guide juries about the various factors that may affect the reliability of an identification in a particular case.

Those instructions are to be included in the court's comprehensive jury charge at the close of evidence. In addition, instructions may be given during trial if warranted. For example, if evidence of heightened stress emerges during important testimony, a party may ask the court to instruct the jury midtrial about that variable and its effect on memory. Trial courts retain discretion to decide when to offer instructions.

As discussed earlier, the State maintains that many jurors, through their life experiences and intuition, generally understand how memory works. *See supra* at section VI.C. To the extent some jurors do not, the State argues that cross-examination, defense summations, the current jury charge, fellow jurors, and other safeguards can help correct misconceptions.

But we do not rely on jurors to divine rules themselves or glean them from cross-examination or summation. Even with matters that may be considered intuitive, courts provide focused jury instructions. For example, we remind jurors to scrutinize the testimony of a cooperating witness with care. *See Model Jury Charge*
297 *(Criminal),* "Testimony of Cooperating Co–Defendant or *297 Witness" (2006). A simple reason underlies that approach: it is the court's obligation to help jurors evaluate evidence critically and objectively to ensure a fair trial.

Moreover, science reveals that memory and eyewitness identification evidence present certain complicated issues. *See supra* at section VI; *see also Cromedy, supra,* 158 *N.J.* at 120–23, 727 *A.*2d 457. In the past, we have responded by developing jury instructions consistent with accepted scientific findings. *See Cromedy, supra,* 158 *N.J.* at 132–33, 727 *A.*2d 457 (requiring cross-racial identification charge). We acted similarly in response to social science evidence about Battered Women's Syndrome and Child Sexual Abuse Accommodation Syndrome. *See State v. Townsend,* 186 *N.J.* 473, 500, 897 *A.*2d 316 (2006); *State v. P.H.,* 178 *N.J.* 378, 399–400, 840 *A.*2d 808 (2004). Ultimately, as the Special Master found,

925 *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." (*citing P.H., supra,* 178 *N.J.* at 395, 840 *A.*2d 808).

Expert testimony may also be introduced at trial, but only if otherwise appropriate. The *Rules of Evidence* permit expert testimony to "assist the trier of fact to understand the evidence or to determine a fact in issue." N.J.R.E. 702. Expert testimony is admissible if it meets three criteria:

(1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony.

[*State v. Jenewicz,* 193 *N.J.* 440, 454, 940 *A.*2d 269 (2008) (citations omitted).]

Those criteria can be met in some cases by qualified experts seeking to testify about the import and effect of certain variables discussed in section VI. That said, experts may not opine on the credibility of a particular eyewitness. *See State v. Frisby,* 174 *N.J.* 583, 595, 811 *A.*2d 414 (2002); *see also State v. W.B.,* 205 *N.J.* 588, 613, 17 *A.*3d 187 (2011) (precluding "expert testimony about the statistical credibility of victim-witnesses").

298 *298 Other federal and state courts have also recognized the usefulness of expert testimony relating to eyewitness identification. *See, e.g., Bartlett, supra,* 567 *F.*3d at 906; *Brownlee, supra,* 454 *F.*3d at 141–44; *Chapple, supra,* 660 *P.*2d at 1220; *McDonald, supra,* 208 *Cal.Rptr.* 236, 690 *P.*2d at 721; *Benn, supra,* 978 *A.*2d at 1270; *LeGrand, supra,* 835 *N.Y.S.*2d 523, 867 *N.E.*2d at 377–79; *Copeland, supra,* 226 *S.W.*3d at 300; *Clopten, supra,* 223 *P.*3d at 1108.

We anticipate, however, that with enhanced jury instructions, there will be less need for expert testimony. Jury charges offer a number of advantages: they are focused and concise, authoritative (in that juries hear them from the trial judge, not a witness called by one side), and cost-free; they avoid possible confusion to jurors created by dueling experts; and they eliminate the risk of an expert invading the jury's role or opining on an eyewitness' credibility. *See United States v. Hall,* 165 *F.*3d 1095, 1119–20 (7th Cir.) (Easterbrook, J., concurring), *cert. denied,* 527 *U.S.* 1029, 119 *S.Ct.* 2381, 144 *L.Ed.*2d 784 (1999). That said, there will be times when expert testimony will benefit the trier of fact. We leave to the trial court the decision whether to allow expert testimony in an individual case.

Finally, in rare cases, judges may use their discretion to redact parts of identification testimony, consistent with *Rule* 403. For example, if an eyewitness' confidence was not properly recorded soon after an identification procedure, and evidence revealed that the witness received confirmatory feedback from the police or a co-witness, the court can bar potentially distorted and unduly prejudicial statements about the witness' level of confidence from being introduced at trial.

X. Revised Jury Instructions

To help implement this decision, we ask the Criminal Practice Committee and the Committee on Model Criminal Jury Charges to draft proposed revisions to the current charge on eyewitness identification and submit
299 them to this Court for review before they are implemented. Specifically, we ask them to consider all of the *299 system and estimator variables in section

926 *926 VI for which we have found scientific support that is generally accepted by experts, and to modify the current model charge accordingly.

Although we do not adopt the sample charges offered by the Innocence Project, we ask the Committees to examine their format and recommendations with care. We also invite the Attorney General, Public Defender, and ACDL to submit proposed charges and comments to the Committees.

We add a substantive point about the current charge for cross-racial identification. In 1999, the Court in *Cromedy* directed that the charge be given "only when ... identification is a critical issue in the case, and an eyewitness's cross-racial identification is not corroborated by other evidence giving it independent reliability." *Cromedy, supra,* 158 *N.J.* at 132, 727 *A.*2d 457. Since then, the additional research on own-race bias discussed in section VI.B.8, and the more complete record about eyewitness identification in general, justify giving the charge whenever cross-racial identification is in issue at trial.

Because of the widespread use the revised jury instructions will have in upcoming criminal trials, we ask the Committees to present proposed charges to the Court within ninety days.

XI. Application

We return to the facts of this case. After Womble, the eyewitness, informed the lineup administrator that he could not make an identification from the final two photos, the investigating officers intervened. They told Womble to focus and calm down, and assured him that the police would protect him from retaliation. "Just do what you have to do," they instructed. From that exchange, Womble could reasonably infer that there was an identification to be made, and that he would be protected if he made it. The officers conveyed that basic message to him as they encouraged him to make an identification.

The suggestive nature of the officers' comments entitled defendant to a pretrial hearing, and he received one.
300 Applying the *300 *Manson/ Madison* test, the trial judge admitted the evidence. We now remand to the trial court [12] for an expanded hearing consistent with the principles outlined in this decision. Defendant may probe all relevant system and estimator variables at the hearing. In addition to suggestiveness, the trial court should consider Womble's drug and alcohol use immediately before the confrontation, weapon focus, and lighting, among other relevant factors.

12 The Appellate Division directed that the matter be assigned to a different judge on remand. *See Henderson, supra,* 397 *N.J.Super.* at 416, 937 *A.*2d 988. That issue is moot because the original trial judge has retired.

We express no view on the outcome of the hearing. If the trial court finds that the identification should not have been admitted, then the parties should present argument as to whether a new trial is needed. We do not review the record for harmless error only because the parties have not yet argued that issue. If Womble's identification was properly admitted, then defendant's conviction should be affirmed.

XII. Retroactivity Analysis

Today's decision announces a new rule of law. For decades, trial courts have applied the *Manson/Madison* test to determine the admissibility of identification evidence. This opinion "breaks new ground" by modifying that framework. *See State v. Cummings,* 184 *N.J.* 84, 97, 875 *A.*2d 906 (2005) (quoting

927 *927 *State v. Knight,* 145 *N.J.* 233, 250–51, 678 *A.*2d 642 (1996)). Because the holding "is sufficiently novel and unanticipated," we must consider whether the new rule should be applied retroactively. *Knight, supra,* 145 *N.J.* at 251, 678 *A.*2d 642 (citing *State v. Lark,* 117 *N.J.* 331, 339, 567 *A.*2d 197 (1989)).

When a decision sets forth a new rule, three factors are considered to determine whether to apply the rule retroactively: "(1) the purpose of the rule and whether it would be furthered by a retroactive application, (2) the degree of reliance placed on the old rule by those who administered it, and (3) the effect a retroactive
301 application would have on the administration of justice."*301 *Ibid.* (quoting *State v. Nash,* 64 *N.J.* 464, 471, 317 *A.*2d 689 (1974)).

The factors are not of equal weight. The first factor—the purpose of the rule—"is often the pivotal consideration." *Ibid.* (quoting *State v. Burstein,* 85 *N.J.* 394, 406, 427 *A.*2d 525 (1981)). When, as here, "the new rule is designed to enhance the reliability of the factfinding process," courts consider "the likelihood of untrustworthy evidence being admitted under the old rule" and "whether the defendant had alternate ways of contesting the integrity of the evidence being introduced against him." *Burstein, supra,* 85 *N.J.* at 408, 427 *A.*2d 525.

The remaining two factors "come to the forefront" when the rule's purpose alone does not resolve the question of retroactivity. *Knight, supra,* 145 *N.J.* at 252, 678 *A.*2d 642. As to the second factor—the degree of reliance on the prior rule—the central consideration is "whether the old rule was administered in good faith reliance [on] then-prevailing constitutional norms." *State v. Purnell,* 161 *N.J.* 44, 55, 735 *A.*2d 513 (1999) (quotation marks and citations omitted; alteration in original). The third factor—the effect on the administration of justice—"recognizes that courts must not impose unjustified burdens on our criminal justice system." *Knight, supra,* 145 *N.J.* at 252, 678 *A.*2d 642. When the effect is unknown but undoubtedly substantial, that weighs in favor of limited retroactive application. *See State v. Bellamy,* 178 *N.J.* 127, 142–43, 835 *A.*2d 1231 (2003); *Purnell, supra,* 161 *N.J.* at 56, 735 *A.*2d 513; *State v. Czachor,* 82 *N.J.* 392, 409–10, 413 *A.*2d 593 (1980).

The Court can apply a new rule in one of four ways: (1) "purely prospectively ... to cases in which the operative facts arise after the new rule has been announced"; (2) "in future cases and in the case in which the rule is announced, but not in any other litigation that is pending or has reached final judgment at the time the new rule
302 is set forth"; (3) " 'pipeline retroactivity,' rendering it applicable in all future cases, the case in which the *302 rule is announced, and any cases still on direct appeal"; and (4) "complete retroactive effect ... to all cases." *Knight, supra,* 145 *N.J.* at 249, 678 *A.*2d 642 (internal citations omitted).

Applying the relevant factors, we first note that defendants have been able to challenge identification evidence under *Manson* and *Madison* and present arguments both before and at trial. Second, both the State and trial courts have, without question, relied in good faith on settled constitutional principles in applying the *Manson/Madison* test for many years. Last, there is no doubt that applying the new framework retroactively would affect an immense number of cases—far too many to tally—because eyewitness identifications are a staple of criminal trials. To reopen the vast group of cases decided over several decades, which relied not only on settled law but also on eyewitness memories that have long since faded,

928 *928 would "wreak havoc on the administration of justice." *State v. Dock,* 205 *N.J.* 237, 258, 15 *A.*3d 1 (2011).

We therefore apply today's ruling to future cases only, except for defendant Henderson (and defendant Cecilia Chen, the subject of a companion case filed today). As to future cases, today's ruling will take effect thirty days from the date this Court approves new model jury charges on eyewitness identification.

XIII. Conclusion

At the core of our system of criminal justice is the "twofold aim ... that guilt shall not escape or innocence suffer." *Berger v. United States,* 295 *U.S.* 78, 88, 55 *S.Ct.* 629, 633, 79 *L.Ed.* 1314, 1321 (1935). In the context of eyewitness identification evidence, that means that courts must carefully consider identification evidence before it is admitted to weed out unreliable identifications, and that juries must receive thorough instructions tailored to the facts of the case to be able to evaluate the identification evidence they hear.

To be effective, both tasks cannot rely on a dated, analytical framework that has lost some of its vitality. Rather,
303 they must be informed by sound evidence on memory and eyewitness identification,*303 which is generally accepted by the relevant scientific community. Only then can courts fulfill their obligation both to defendants

and the public.

The modified framework to evaluate eyewitness identification evidence in this opinion attempts to meet that challenge. It relies on the developments of the last thirty years of science to promote fair trials and ensure the integrity of the judicial process.

The framework avoids bright-line rules that would lead to suppression of reliable evidence any time a law enforcement officer makes a mistake. Instead, it allows for a more complete exploration of system and estimator variables to preclude sufficiently unreliable identifications from being presented and to aid juries in weighing identification evidence.

We add that enhanced hearings are not meant to be the norm in every case. They will only be held when defendants allege some evidence of suggestiveness, and even then, courts retain the power to end a hearing if the testimony reveals that defendant's claim of suggestiveness is entirely baseless.

We also expect that in the vast majority of cases, identification evidence will likely be presented to the jury. The threshold for suppression remains high. Juries will therefore continue to determine the reliability of eyewitness identification evidence in most instances, with the benefit of cross-examination and appropriate jury instructions.

As a result, we believe that it is essential to educate jurors about factors that can lead to misidentifications, which in and of itself will promote deterrence. To that end, we have reviewed various system and estimator variables in detail, which should assist in the development of enhanced model jury charges. Using those charges in future criminal trials is a critical step in the overall scheme.

We thank Judge Gaulkin, the parties, and amici for their exemplary service in conducting and participating in a
304 thorough, *304 useful remand hearing. They have provided a valuable service to the Court and the public.

XIV. Judgment

For the reasons set forth above, we modify and affirm the judgment of the Appellate Division, and modify the framework for assessing eyewitness identification evidence in criminal cases. We

929 *929 remand to the trial court for further proceedings consistent with this opinion.

For modification and affirmance/remandment—Chief Justice RABNER and Justices LONG, LaVECCHIA, ALBIN, RIVERA–SOTO and HOENS—6.

Opposed—None.

Appendix A: Remand Order

SUPREME COURT OF NEW JERSEY

A–8 September Term 2008

STATE OF NEW JERSEY, Plaintiff–Respondent,

v.

LARRY R. HENDERSON, Defendant–Appellant.

ORDER

This matter having come to the Court on a grant of certification, 195 *N.J.* 521, 950 A.2d 907, 908 (2008), to address whether evidence of eyewitness identification used against defendant was impermissibly suggestive and thus inadmissible under the two-part test applied in *Manson v. Brathwaite,* 432 *U.S.* 98, 97 *S.Ct.* 2243, 53 *L.Ed.*2d 140 (1977), and followed as a state law standard in *State v. Madison,* 109 *N.J.* 223, 232–33, 536 *A.*2d 254 (1988);

And that test requiring inquiry into, first, whether the identification procedure was impermissibly suggestive,
305 and second, whether the procedure was so suggestive as to result in a very *305 substantial likelihood of irreparable misidentification, *Madison, supra,* 109 *N.J.* at 232, 536 *A.*2d 254;

And the second inquiry requiring consideration of five factors: (1) the opportunity of the witness to view the suspect at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the suspect; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation, *id.* at 239–40, 536 *A.*2d 254;

And the Court having granted leave to appear as amicus curiae to the Association of Criminal Defense Lawyers of New Jersey and The Innocence Project;

And the parties and amici having submitted arguments about the reliability of identification evidence and the current framework for evaluating the admissibility of such evidence;

And the Court having noted previously that, based on recent empirical research, "[m]isidentification is widely recognized as the single greatest cause of wrongful convictions in this country," *State v. Delgado,* 188 *N.J.* 48, 60–61 & n.6, 902 *A.*2d 888 (2006);

And the Court having further recognized that in 2001 the New Jersey Attorney General established Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures to reduce suggestive eyewitness identifications in this state, *State v. Herrera,* 187 *N.J.* 493, 502 n.2, 511–20, 902 *A.*2d 177 (2006);

And the parties and amici having raised and argued questions about the possible shortcomings of the *Manson/Madison* test in light of more recent scientific research;

And this Court having determined on prior occasions that when resolution of a critical issue depends on a full and complete record the Court should await, before decision, the development of such a record, *State v. Moore,* 180 *N.J.* 459, 460–61, 852 *A.*2d 1073 (2004); *Am. Trucking Ass'ns v. State,* 164 *N.J.* 183, 183–84, 752 *A.*2d 1286 (2000); *see also Herrera, supra,* 187 *N.J.* at 504, 902 *A.*2d 177;

306 *306 And the Court having heard argument of the parties and having concluded

930 *930 that an inadequate factual record exists on which it can test the current validity of our state law standards on the admissibility of eyewitness identification;

And the Court having concluded that, until such a record is established, the Court should not address the question of the admissibility of the eyewitness identification presented in this case;

And for good cause appearing;

It is ORDERED that the matter is remanded summarily to the trial court for a plenary hearing to consider and decide whether the assumptions and other factors reflected in the two-part *Manson/Madison* test, as well as the five factors outlined in those cases to determine reliability, remain valid and appropriate in light of recent scientific and other evidence; and it is further

ORDERED that, subject to any rulings by the trial court regarding the proofs to be submitted on remand, defendant and the State each shall present before that court testimony and other proof, including expert testimony, in support of their respective positions; and it is further

ORDERED that the Attorney General of New Jersey and the Office of the Public Defender, as well as amici, The Association of Criminal Defense Lawyers of New Jersey and The Innocence Project, shall each participate in developing the aforesaid record; and it is further

ORDERED that on the entry of the trial court's opinion on remand, the parties and amici shall each have twenty-one days within which to file briefs and appendices in this Court and five days thereafter to file any responding briefs; and it is further

ORDERED that on the completion of the briefing, the Court will determine whether additional oral arguments are required; and it is further

ORDERED that jurisdiction is otherwise retained.

307 *307 WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 26th day of February, 2009.

/s/ Stephen W. Townsend

CLERK OF THE SUPREME COURT

Chief Justice RABNER and JusticesLONG,LaVECCHIA,ALBIN,WALLACE, RIVERA–SOTO, andHOENS join in the Court's Order.

FN1. *United States v. Wade,* 388 *U.S.* 218, 87 *S.Ct.* 1926, 18 *L.Ed.*2d 1149 (1967).

2019 WL 7187443
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

STATE of New Jersey, Plaintiff-Respondent,
v.
Kevin BAKER and Sean Washington,
Defendants-Appellants.

DOCKET NOS. A-0716-17T3, A-0719-17T3
|
Argued October 7, 2019
|
Decided December 26, 2019

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Indictment No. 95-08-1950.

Attorneys and Law Firms

Lesley C. Risinger and Lawrence S. Lustberg argued the cause for appellants (Last Resort Exoneration Project Seton Hall University Law School, attorneys for Kevin Baker; Gibbons PC, attorneys for Sean Washington; Lesley C. Risinger, D. Michael Risinger, Lawrence S. Lustberg, and J. David Pollock, on the joint briefs).

Natalie A. Schmid Drummond, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Jill S. Mayer, Acting Camden County Prosecutor, attorney; Natalie A. Schmid Drummond, of counsel and on the briefs).

Frank Muroski, Deputy Attorney General, argued the cause for amicus curiae Office of the Attorney General (Gurbir S. Grewal, Attorney General, attorney; Sarah Lichter, Deputy Attorney General, of counsel and on the brief).

Raymond M. Brown argued the cause for amici curiae Askia Jabir Nash, Rodney Roberts, David Shephard, and Anthony Ways (Greenbaum, Rowe, Smith & Davis, LLP, attorneys; Raymond M. Brown, of counsel and on the brief; Stephanie Reckord and Robert J. Flanagan, III, on the brief).

Linda Mehling argued the cause for amici curiae Innocence Project, Exoneration Initiative, and Innocence Network (Frank R. Krack and Linda Mehling, on the brief).

Before Judges Sabatino, Geiger and Natali.

Opinion

PER CURIAM

***1** After a two-day jury trial in 1996, defendants Kevin Baker and Sean Washington were found guilty of murdering two victims who had been shot to death outside of a Camden housing project. The State's case hinged upon the testimony of a sole eyewitness, a drug addict who claimed she had seen the shooting and saw defendants running from the scene. Defendants' convictions were upheld on direct appeal and in ensuing collateral proceedings.

With the assistance of pro bono counsel and innocence organizations, defendants filed new petitions for post-conviction relief ("PCR"), alleging actual innocence, ineffective assistance of trial counsel, and prosecutorial suppression of material evidence. They also moved for a new trial based upon newly discovered evidence, including forensic expert proof utilizing scientific techniques that did not exist or were not widely available at the time of their trial. After a lengthy evidentiary hearing, the judge who had presided over the trial rejected defendants' petitions and motions.

For reasons detailed in this opinion, we reverse the trial court's denial of relief and grant defendants a new trial. We do so mainly because of the newly discovered forensic evidence that powerfully undermines the sole eyewitness's varying descriptions of the shooting, coupled with non-forensic exculpatory proof of a 9-1-1 recording the defense obtained many years after the trial.

Viewed objectively, that material evidence, if it had been presented, probably would have changed the jury's verdict. The additional proof calls into serious question whether defendants' guilt was established beyond a reasonable doubt. The circumstances were "clearly capable of producing an unjust result." R. 2:10-2. We do not, however, declare defendants to be "actually innocent," but instead provide the State with the option of pursuing a second trial, mindful of the lengthy intervening passage of time.

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I.

(Facts and Procedural History)

Because of the significant issues at stake, we discuss the facts and procedural history in extensive detail.

A. Indictment and Trial

In 1995, a Camden County Grand Jury charged defendants Baker and Washington in Indictment No. 95-08-1950 with the following offenses: conspiracy to commit first-degree murder, N.J.S.A. 2C:5-2 (count one); two counts of first-degree murder, N.J.S.A. 2C:11-3(a) (counts two and three); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count four); third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b) (count five); and second-degree certain persons not to have weapons, N.J.S.A. 2C:39-7 (counts six and seven).

The parties tried the case before a jury in July 1996. Baker was represented by Frederick L. Gumminger from the Office of the Public Defender, and Washington was represented by private counsel, Michael W. Kahn. The State called six witnesses during the two-day trial. Defendants did not call any witnesses.

The prosecutor, in his opening, called it "a one-witness case" and said that the "evidence is going to come from the testimony of Denise Rand principally." After opening statements, the court held a Wade[1] hearing to consider the reliability of Rand's identification of defendants as the perpetrators. She testified at the hearing that she knew Washington "since he was little." She testified she knew Baker for five or six years, although she previously said, in her statement to investigator Harry Glemser of the Camden County Prosecutor's Office a few days after the murders, that she knew Baker for two years, and gave further inconsistent answers in her trial testimony.

The court ruled after the Wade hearing that the State proved by clear and convincing evidence that Rand's in-court identification of defendants was not the result of a suggestive out-of-court identification, because Rand knew both defendants before the murders and there was not a substantial likelihood of misidentification.

At trial, Rand testified that she was at Roosevelt Manor, a housing project in Camden, in the early morning hours of January 28, 1995, and witnessed the murders. She claimed she saw victim Margaret Wilson, who was known as "Murph," and victim Rodney Turner, who was known as "Rock," when they were shot and "they dropped" to the ground. According to Rand, she heard "two or three shots" and had "seen two" shots before defendants ran past her.

Rand claimed she knew that defendants shot Wilson and Turner "because [defendants were the] only two that ran past me." She recalled she saw both Baker's and Washington's faces, and she had no doubt in her identification of them. Rand did not know if defendants saw her that morning, and could not recall what they were wearing.

***3** Rand, who sometimes wore glasses, vacillated on many aspects of her narrative. She first said that she saw one of the defendants with a gun in his hand, but could not remember which one. Later, she testified that she only saw Baker with a gun in his hand, not Washington. The prosecutor attempted to use Rand's police interview with Glemser to refresh her recollection, and after reading a portion of the transcript, Rand initially said that both defendants had guns. She later said that she only saw a gun in Washington's hand and could not recall if Baker had a weapon.

When confronted with the portion of transcript in which Rand told Glemser she was not paying attention to see if defendants had weapons when they ran past her, she responded that she "was standing there" and "just had to be paying attention." She explained that her response to Glemser that she was not paying attention "was the answer at the time." She acknowledged, however, that she "wasn't paying no attention."

Rand could not recall which defendant shot Turner, and which one shot Wilson. She continued reading from the transcript of her police interview that she saw Turner "get shot first" and that "K.B." shot him.[2] Rand stated that the transcript refreshed her recollection, but initially testified that she could not recall seeing "K.B." shoot Turner, before later saying she remembered seeing "K.B." shoot Turner in the head. She testified that Washington shot Wilson. When asked "how close together" the shootings were, Rand responded that "[t]hey lay right next to each other."[3]

After the shooting, Rand went and got Turner's wife, Sandra Turner. By the time Rand returned to the scene the police had arrived.

Rand admitted that she had gone to Roosevelt Manor to buy drugs, that she had smoked "ready rock" crack cocaine approximately two hours before the shootings, and that at the time she smoked crack every two to three hours. Although she admitted being under the influence at the time of the murders, she claimed she was "not to the point where I don't know what I'm seeing."

Rand agreed that the sun had not yet risen at the time of the shootings, before 6:00 a.m. in January 1995, and that it was "still basically nighttime," but also confusingly said "it was dark, but it was light" and "it wasn't that dark." She was standing on the curb of Phillip Street and the shooting occurred in the courtyard halfway between Phillip Street and 8th Street.[4] According to Rand, defendants ran past her and then down Phillip Street towards Ferry Avenue.

When asked who she was with at the time, Rand initially answered that it was "none of your business," before saying that she was accompanied by her cousin, Tyrone Moore. She testified that he was walking a few feet behind her at the time of the shootings. She was confronted, however, with the police interview in which she told Glemser that Moore was walking in front of her. She then confusingly said that Moore was "in front of me, behind me, he was there" and repeated that he was in "[f]ront of me, behind me." After saying she did not remember where Moore was in relation to her, she said, "I turned around, he was gone." She initially was unsure whether that was before or after the shots were fired, but later said she was sure it was after they were fired.

***4** Rand testified that she knew Washington "for a long time" meaning "since he was little." She did not know Baker for "that long," but estimated she knew him for "some years." On cross-examination, Rand admitted telling Glemser that she knew Baker for two years and testifying at the Wade hearing that she knew Baker for five years, before stating that she could not recall how long she knew Baker.

None of the State's other trial witnesses observed the shooting. Detective Fred Jefferson of the City of Camden Police Department testified that he was a patrol officer at the time of the murders and was dispatched to Roosevelt Manor at 5:57 a.m. He arrived approximately three to five minutes later and confirmed that it was still dark and also "very cold" at that time. Jefferson saw two bodies in the courtyard of the complex, one laying "semi-fetal" and the other "flat on their [sic] stomach." He secured the scene and located empty casings from a nine-millimeter (mm) semi-automatic weapon. Jefferson said Turner's father came to the crime scene.

Investigator Michael Corbin of the Camden County Prosecutor's Office received a pager notification at 6:11 a.m. on the morning of the murders, when it was still dark outside. He arrived at Roosevelt Manor at 7:05 a.m. Corbin testified that the distance from Phillip Street, where Rand said she was standing, to Turner's and Wilson's bodies, was approximately ninety feet. At the scene, Corbin collected three cartridge cases with "a head stamp of SB 9 millimeter Luger." He assumed the projectiles within those casings were fired from an automatic weapon. Neither Jefferson nor Corbin were aware of anyone claiming to be an eyewitness while they were at the crime scene.

Sergeant John Jacobs, the unit supervisor of the New Jersey State Police ballistics unit at the time of the murders, was qualified in the State's case as an expert in ballistics and firearms. Jacobs explained that all three of the discharged shells were nine-millimeter caliber and manufactured by "Squires Bighams." [5] He examined the discharged shells and determined that they were all fired from the same firearm, but was unable to determine the particular firearm involved, although it would have been a "9 millimeter Luger caliber type."

Jacobs was unable to determine if the shells were discharged from a revolver or an automatic weapon, although he recognized that an automatic weapon would eject the discharged shells when it was fired, whereas a person would have to manually remove the shells from a revolver. He could not discern the "lands and grooves" on the two bullets recovered from Wilson's clothing due to their "mutilated condition." Thus, he was unable to determine if the bullets were fired from the same gun as the discharged shells, or to say definitively how many guns were used in the murders.

George Hickman from the State Police crime laboratory was presented as an expert in trace evidence analysis. Hickman testified that gun powder and lead were detected in the area around the two bullet holes in Wilson's white knit hat, which indicated "a relatively close shot."

Dr. Robert Segal, the Camden County Medical Examiner, performed the autopsies on Turner and Wilson. Dr. Segal was qualified as an expert witness in forensic pathology and wound ballistics. He opined that Turner died from a bullet fired from within a half-inch of his head, entering behind his left ear, and exiting behind his right ear. Wilson, meanwhile, died from two gunshot wounds to her head and a "relatively minor" gunshot wound to her left arm. Two bullets entered the right side of her head above her ear and exited on the left side of her face, one near the corner of her mouth and the other near the corner of her eye. There was also a "single through and through" bullet wound to her left arm.

***5** Dr. Segal was unable to determine if Wilson was shot two or three times, because the wound to her left arm could have been a continuation wound from one of the bullets that exited the left side of her face. He testified "[t]here is no way to tell whether this bullet passing through the arm was related to either of these two [head] wounds or was a third wound."

At the time of trial, Baker had two prior indictable convictions: a January 1991 fourth-degree aggravated assault for pointing a firearm at another person and a January 1993 possession of cocaine with intent to distribute within 1000 feet of school property. Washington had four prior convictions for third-degree possession of a controlled dangerous substance, two from July 1990, and two from March 1992. The State moved to use defendants' prior convictions to impeach their credibility, if they testified. The court granted the State's motion, but ordered the convictions sanitized to include only the degree of the crime, the date of conviction, and the sentence imposed. Following that ruling, neither defendant testified at trial.

Tyrone Moore, Rand's cousin was with her at the time of the murders and told police that they were blocks away and that Rand could not have seen the shootings. He was listed as a potential defense witness and prepared to testify. So was Baker's girlfriend, Michelle Redden, who maintained that she was with Baker at the time of the shootings. Neither was called to testify, however, as defendants did not offer any evidence on their behalf.

During summations, the court prevented defense counsel from suggesting that Moore may have killed Turner and

Wilson. After their own closing arguments, both defense attorneys moved for a mistrial because the prosecutor repeatedly and loudly interrupted them. The court denied the motions. The following day, before jury instructions, both defense attorneys again moved for a mistrial, arguing, in part, that the court's ruling preventing them from suggesting that Moore might have been the murderer violated defendants' rights. The court also denied those motions. The defense attorneys then moved for a judgment of acquittal, which the court denied.

The court did not instruct the jury on the lesser-included offenses of aggravated manslaughter and manslaughter because "the only evidence as to what allegedly occurred is the testimony of [Rand] who indicated she saw the defendants basically walk up behind the victims, point a gun and shoot the two victims in the head and flee."

B. Verdict and Sentencing

The jury convicted defendants of two counts of first-degree murder, conspiracy to commit murder, and possession of a weapon for an unlawful purpose. It acquitted defendants of unlawful possession of a weapon.

Both defendants moved for judgment notwithstanding the verdict, which the court denied. Defendants were then tried on the certain persons not to have weapons charges, but the jury could not reach a verdict, the court declared a mistrial, and those charges were dismissed on the prosecutor's motion.

On September 20, 1996, after merging the other convictions into the murder convictions, the court sentenced each defendant to two consecutive terms of life imprisonment, each with a thirty-year period of parole ineligibility, for an aggregate sentence of life in prison with a sixty-year parole ineligibility period. At sentencing, the court remarked that both defense attorneys had made tactical decisions not to call any witnesses, including at least one witness who was present in the courthouse, because they apparently thought Rand was not a credible witness and the jury would not believe her.

***6** Defendants filed motions for a new trial, but withdrew those motions after filing their notices of appeal. On November 21, 1996, the court nonetheless issued written findings of fact and conclusions of law regarding defendants' motions pursuant to Rule 2:5-1(b).

C. Washington's Appeal

In March 1999, this court affirmed Washington's convictions and sentence. State v. Washington, No. 3943-96 (App. Div. March 17, 1999). The panel added that "[a]s to [his] alibi contention, ... we express no view as to its merit, leaving it for post-conviction review." The Supreme Court denied Washington's petition for certification. State v. Washington, 161 N.J. 150 (1999).

D. Washington's First PCR Petition

In January 2000, Washington filed a pro se PCR petition, alleging ineffective assistance of counsel for failure to call witnesses, including Moore, Redden, and his nephew, Dwight Collins. In November 2000, after hearing argument from Washington's appointed counsel, John Havrilchak, the trial court denied the petition.

After Washington appealed, we remanded for the trial court to determine whether Washington's trial counsel was ineffective for failing to call Collins as a witness. State v. Washington, No. A-3140-00 (App. Div. June 27, 2002). We specifically directed the trial court to hold an evidentiary hearing and assess Collins's credibility.

On March 25, 2003, the trial court held a hearing in which Collins testified that Washington was cooking chicken at Collins's mother's house on the morning of the murders at approximately 5:00 a.m. According to Collins, around 6:00 a.m., Washington left to make a call from the pay phone near the intersection of Eighth Street and Central Avenue, which was about a one-minute walk from where the bodies were found, because Washington did not want to use the phone in Collins's mother's house. Collins said that Washington may not have wanted to use his mother's phone because he was selling drugs, or, alternatively, because he was calling someone out of the local area and his mother's phone service was supposedly limited to local calls.

Washington returned approximately five to seven minutes later, "very emotional" and "crying." Washington told Collins that he saw two people laying on the ground, and that he thought one of them was Collins's brother Darnell Wheeler (who was also Washington's nephew), because Wheeler had a similar jacket. According to Collins, Washington then called 9-1-1 from Collins's mother's phone.

Collins testified that Baker and Washington knew each other, but were not close friends, and that he had never seen them "hang out together." Collins confirmed that if he had been called at trial, he would have testified on Washington's behalf.

After observing Collins's testimony at the March 2003 evidentiary hearing, the court found he was not credible because was a convicted felon who admitted to using false identification documents.[6] The court also found he was biased because he was Washington's nephew. It further found that Collins's testimony placed Washington close to the location of the shootings at the approximate time they occurred.

***7** The court concluded Collins's testimony would not have affected the outcome of the trial and denied Washington's PCR petition. Washington then moved to reopen the PCR proceedings to present additional evidence, but the court denied the motion.

In November 2005, we affirmed the PCR court's denial of Washington's petition. State v. Washington, A-4730-02 (App. Div. Nov. 9, 2005). In February 2006, the Supreme Court denied his petition for certification. State v. Washington, 186 N.J. 255 (2006). Justice Long and Justice Albin added a separate statement in which they "note[d] that in their view, the Court's [order] does not preclude defendant from bringing a further petition for post-conviction relief in respect of witness-related issues that were not fully considered by the trial court or the Appellate Division on the merit." State v. Washington, 189 N.J. 640 (2006).

E. Washington's Federal Petition for a Writ of Habeas Corpus and Second PCR Petition

Washington thereafter filed a pro se petition for a writ of habeas corpus (habeas petition) in federal district court, but later withdrew it without prejudice so that he could file a second PCR petition in state court. Washington v. Ricci, 631 F. Supp. 2d 511, 515 (D.N.J. 2008). He then filed a pro se PCR petition and motion for a new trial, both of which the trial court denied on November 28, 2007.

Washington reinstated his federal habeas petition, which the federal district judge dismissed with prejudice on September 29, 2008. Ricci, 631 F. Supp. 2d at 513, 528. The district court also denied Washington a certificate of appealability ("COA"). Ibid. On May 13, 2009, the United States Court of Appeals for the Third Circuit denied Washington's application for a COA.

F. Baker's Appeal and First PCR Petition

In February 1998, we affirmed Baker's convictions and sentence on direct appeal. State v. Baker, No. A-1143-96 (App. Div. Feb. 23, 1998). We specifically rejected Baker's claim that his trial counsel was ineffective for failing to obtain expert witnesses to testify about eyewitness identification and the effects of crack-cocaine. We also rejected Baker's argument that prosecutorial misconduct required reversal of his convictions, although we chastised the prosecutor's behavior as "loud, boorish and rude" and referred the matter to the Camden County Prosecutor.

In May 1999, Baker, represented by Edward J. Crisonino, filed a PCR petition alleging ineffective assistance of trial counsel. One of the issues raised in Baker's PCR petition was that his trial attorney Gumminger was ineffective for failing to call several witnesses, including Redden, Moore, and Latasha Langston.[7]

The trial court concluded that Gumminger was not ineffective and that his decision "not to call witnesses was a strategic move based upon the decision at that time that the witness called by the State was not credible and the jury would not believe her."

On October 29, 1999, the trial court held an evidentiary hearing and heard testimony from Baker and Gumminger regarding Baker's contentions that Gumminger did not meet with him enough prior to trial and also incorrectly told him he could not testify because the jury would hear his unsanitized criminal record.

***8** Gumminger clarified at the outset of his PCR testimony that he did not "have [his] file with [him]" and was testifying based solely on his memory. He thought he met with Baker four to six times prior to trial. He advised Baker not to testify, but in the end it was Baker's decision, although Gumminger could not recall if he told Baker that his prior record would have been sanitized at trial.

Gumminger confirmed that Redden was present in the courthouse during the trial and prepared to testify. Gumminger explained he did not call her because, based on her "general demeanor," she "would not have come across as a truthful witness." According to Gumminger, Redden claimed that she was watching a television program featuring Larry Kane[8] with Baker at the time of the murders. He decided not to call her as a witness because the prosecutor was prepared to call witnesses from the television station to "contradict the timing, and maybe even the existence of this television show."

Gumminger said that his primary concern in advising Baker not to testify was not Baker's prior record, but instead that the "phantom television show" created a risk that "the alibi would have blown up and would have caused more problems than it would have helped." Gumminger believed that Redden "was profoundly afflicted with credibility problems."

After hearing Gumminger's PCR testimony, the court denied Baker relief on his claims. The court found that Gumminger met with Baker prior to trial and made a justifiable strategic decision not to call Redden to testify, because he believed she was not credible and the alibi testimony would be contradicted by the State's evidence. The court also found that Baker made the ultimate decision not to testify.

In March 2001, we remanded the matter to the trial court to allow Baker to develop and pursue his claim that trial counsel was ineffective for failing to investigate and present evidence that Washington was the "lone gunman." State v. Baker, No. A-1543-99 (App. Div. March 15, 2001). We instructed that "[o]n remand, the judge may set time limitations and other conditions to assure a fair and expeditious final determination of the merits of [Baker's] claim."

On remand, Baker submitted an affidavit from Langston. Baker also furnished an investigative report recounting an interview with Collins, who alleged that he was with Washington around the time of the murders. The trial court found that Baker failed to prove that his trial counsel was deficient or that there was a reasonable probability that the outcome of his trial would have been different, and denied his PCR petition.

In November 2003, we affirmed the denial of Baker's PCR petition, without prejudice to him filing a subsequent petition arguing that his PCR counsel was ineffective. State v. Baker, No. A-3759-01 (App. Div. Nov. 14, 2003). In February 2004, the Supreme Court denied Baker's petition for certification. State v. Baker, 179 N.J. 312 (2004).

G. Baker's Habeas Petition and Second PCR Petition

In December 2004, Baker filed a habeas petition in federal district court alleging ineffective assistance of counsel. On September 26, 2005, Judge Jerome B. Simandle denied Baker's petition. Judge Simandle noted, however, that Baker had not exhausted his claim that PCR counsel was ineffective and could still raise that issue in a subsequent PCR petition in state court. According to the State's brief, both Judge Simandle and the United States Court of Appeals for the Third Circuit denied Baker's application for a COA, but those orders are not included in the parties' appendices.

***9** In May 2007, Baker, now represented by Louis H. Miron, filed another PCR petition, alleging ineffective assistance of PCR counsel, but later withdrew that petition and did not refile it.

H. Defendants' Current PCR Petitions and Motions for a New Trial

1. Baker's Filing and Litigation Regarding Redden's Deposition

In January 2013, Baker filed the instant PCR petition and motion for a new trial. Before filing his petition and motion, Baker unsuccessfully sought a court order, first in the Civil Part and then in the Criminal Part, that would permit him to take a de bene esse deposition of Redden because she was suffering from stage-four terminal breast cancer. We affirmed both the Civil Part's and Criminal Part's denials of Baker's application, but added that "in light of defendant's additional filings, the criminal court must reconsider defendant's application to compel Ms. Redden's testimony at either a deposition or an evidentiary hearing." In re Petition of Baker, Nos. A-3754-11 and A-4368-11 (App. Div. April 30, 2013). Redden died before she was deposed.

2. Testimony of Forensic Witnesses

The trial court heard testimony from defendants' forensic witnesses in support of Baker's motion for a new trial before deciding whether to grant an evidentiary hearing. [9]

Dr. Michael Baden, who was certified as an expert in forensic pathology, testified on November 12, 2013. Dr. Baden concluded that Turner had been shot once from close range on the left side of his head while his head was positioned upright. He estimated that Turner had been dead for at least fifteen minutes before the emergency medical technicians ("EMTs") arrived based on their observations about blood coagulation and the temperature of the body.

Dr. Baden concluded that only two bullets struck Wilson, based on the following facts: (1) the entry and exit wounds in Wilson's head lined up with the wounds on her arm; (2) the wounds to her arm were superficial perforations that did

not go all the way through her arm or connect to each other; and (3) the bullets were found in her clothing. He further testified that Wilson was shot while lying on the ground with her left arm raised against her head, because the bullet tracts were nearly parallel, which indicated that Wilson was not moving at the time she was shot. In addition, if she had been upright when she was shot, her body would not have fallen in the position it was found, and she would have had blood dripping down her body. On cross-examination, Dr. Baden acknowledged it was possible that Wilson was shot while standing upright, but said it was "so unlikely that I would fault such a diagnosis." On redirect, he stated he was "[m]ore than 95 percent certain" that Wilson was shot while she was lying on the ground.

Dr. Baden particularly disagreed with two of the medical examiner's conclusions from trial. First, he disagreed that the wound to Wilson's arm was a through and through wound from a single bullet, because there were two separate wounds that did not connect. Second, he disagreed with Dr. Segal's conclusion that there was no way to tell if the wounds to Wilson's arm were from a third bullet or a continuation from the two bullets that passed through Wilson's head. According to Dr. Baden, if the wounds in Wilson's arm were from a third bullet, they would "have to line up, one being the entrance, one being the exit, and there being a tract between the two[,]" which was not the case.

***10** Dr. Baden concluded that Wilson was shot twice, and the wounds to her arm were continuation wounds from the two bullets that passed through her head. If she had been shot directly in the arm, the bullet would have gone all the way through. The two bullets found in her clothing were "spent" because they already had passed through the hard bones of her skull twice, which slowed them down "greatly" and prevented them from going through her arm.

Last, Dr. Baden opined that a hypothetical in which a person said he or she saw two people run up to the victims and shoot them in the head while they were standing, and then saw the victims drop to the ground, as Rand had testified, would be "totally inconsistent with the way [Wilson] was shot and the way she was found."

Baker also presented expert testimony from Lucien C. Haag, who was qualified as an expert in ballistics, firearms identification, wound ballistics, and shooting incident reconstruction. Haag agreed with Jacobs's trial testimony that the three shell casings recovered at the scene were fired from the same weapon. He further opined that all three casings were fired from a semi-automatic pistol, which differed from Jacobs's testimony that he could not identify the type of firearm.

Haag explained that nine mm revolvers that fire Luger ammunition were "very rare." He stated he would "have a hard time finding one" because, unlike revolver cartridges, the Luger cartridges had no rim, which made them difficult to remove from a revolver. Additionally, in Haag's forty-seven years of experience, he was only aware of two instances in which shell casings were manually removed from a revolver at the scene of the crime. In both instances, it was done so that the shooter could reload the revolver, leading him to question Jacobs's testimony that it was a possibility in this case.

Haag also disagreed with Dr. Segal's trial testimony that the lack of "lands and grooves" on the two projectiles recovered from Wilson's clothing was due to their degraded condition. He explained that it actually was due to shallow rifling, which is "a signature of very inexpensively made semi-automatic pistols." Haag testified that both bullets were fired from the same firearm, again contradicting Segal's testimony at trial that it could not be determined. Haag opined that the evidence did not support a conclusion that more than one gun was used in the shootings.

Haag examined the projectiles the day before his PCR testimony and discovered mineral grains as well as "abrasive damage ... not from just hitting bone," which indicated that the bullets struck hard-packed soil. He also observed what he called the "bow effect," which occurs when a bullet ricochets off soil and the mineral grains "act just like a sand blasting" and leave "scoring" and "scratching" on the projectile. Crime scene photographs showed that the ground under Wilson's head was a "hard packed bare earth area" that was consistent with the mineral particles embedded in the tips of the bullets. Haag therefore concluded that the bullets struck the ground and ricocheted off at low velocity before they penetrated Wilson's arm. He opined that there was no way that could have occurred if Wilson was shot while she was standing upright and ruled that out as a possibility.

Haag's cross-examination in the PCR hearing did not occur until almost a year later. He acknowledged that Turner died from a through-and-through bullet wound. Because the bullet that killed Turner was not recovered, and the murder weapon was never found, Haag could not rule out that a second firearm

was involved, though he saw no evidence to support that notion.

***11** On re-direct, Haag testified that he first described the bow-effect phenomenon in 1996, and that it started to be disseminated in the "firearms and tool marks community" in 2002. He agreed that the SEM/EDS [10] testing done by the State Police laboratory showed the presence of silica and several other minerals not associated with bone on the bullets. Haag also agreed that very few laboratories would have had a scanning electron microscope at the time of defendants' trial.

The parties stipulated in the PCR hearing to the admissibility of an expert report by Adele Boskey, Ph.D. She concluded that the high levels of silicon on the bullets could only have come from an exogenous source, most likely silicon dioxide in sand or dirt. In addition, Dr. Baden submitted a supplemental report that modified his initial conclusion that the bullets passed through Wilson's skull and then directly into her arm. Incorporating Haag's findings, Dr. Baden concluded that the bullets ricocheted off the ground before hitting Wilson's arm.

Stephen Deady, who worked in the ballistics unit for the State Police and the Ocean County Sheriff's Department, was qualified at the hearing as an expert in firearms identification and ballistics. He agreed with Haag that the two recovered bullets were most consistent with those used in the nine mm Luger caliber casings recovered at the scene, and likely were fired from an "inexpensive, cheaply made firearm," but he could not rule out other cartridges of the same caliber class because no firearm was recovered. He also agreed that the three shell casings were fired from the same firearm, but could not determine the type of firearm, though they were "consistent" with being discharged from a semi-automatic pistol, which was "the most common firearm from which they would be fired."

Deady posited, however, that the three shell casings would have a magazine mark, extractor mark, and ejector mark if they had been loaded into the magazine of a semiautomatic pistol and then extracted and ejected manually before being loaded in, and discharged from, a revolver. Thus, he could not determine what type of firearm discharged the shell casings. He agreed with Jacobs's trial testimony that more than one gun could have been involved in the murders. All Deady could say conclusively was that the three shell casings were discharged from the same firearm, that the two bullets were fired from the same gun, and that he could not tell if the bullets and casings were fired from the same weapon.

Haag then testified in sur-rebuttal that the ejector marks on the shell casings were so deep that they could not have been made by manually ejecting the shells from a semiautomatic weapon. In addition, the combination and spatial orientation of the ejector mark, firing pin impression, and extractor mark, led him to conclude that the shell casings were discharged from a nine mm semi-automatic pistol. The relationship between the three marks was too consistent for them to have been manually ejected from a semiautomatic pistol and then fired from a revolver.

3. Washington's Filings and Motion Practice

Washington filed his own additional PCR petition and motion for a new trial in September 2014. Defendants filed a joint motion to consolidate their PCR petitions and later filed a motion for relief in the nature of summary judgment.

***12** On June 16, 2016, the trial court entered an order and accompanying opinion denying those motions, but granting defendants an evidentiary hearing.

4. Fact Witnesses

a. Washington's Testimony and Supporting Witnesses

Washington testified that he was having dinner and drinks with Beverly Branch in her apartment in Roosevelt Manor between 10:00 p.m. and 1:00 a.m. the night before the murders. He then went to another apartment, also in Roosevelt Manor, where a "bunch of males," including his nephew Wheeler and Raheem Miller, were drinking alcohol, smoking blunts, and listening to music. He asked Raheem to "roll [him] up a joint," but Raheem told him "you don't want none of this" because it was laced with PCP, which Washington previously had told them to stop smoking. Washington got mad and left around 4:30 a.m. [11]

According to Washington, he borrowed Wheeler's car and went back to Branch's apartment, but she could not get something to eat with him because her children were sleeping. He drove back towards the party and saw Moore, who flagged him down and asked if he wanted to buy some boneless chicken breasts. Washington paid him ten dollars for the chicken. Washington testified that this was not unusual

because drug users were "always ... running around selling things late at night."

As recounted by Washington, he dropped the chicken off at his sister's apartment, drove to buy soft drinks, returned to his sister's apartment, and fried the chicken. He accidentally woke his nephew, Collins, and as they were talking and eating the chicken, Washington's pager went off. He admitted that he used the pager to deal drugs.

About twenty minutes later, Washington went to the pay phone near Eighth Street and Central Avenue to make the call, because the area code was not in Camden and his sister's phone was restricted to local calls. He brought fifty-five cents for the call, saying he knew the amount because he had placed the same call many times before, but the call did not go through, so he walked around looking to borrow money from someone. He explained that it was a "drug-infested area" and "people would be out all hours of the morning selling drugs, and people would be out there looking for drugs."

As Washington was walking, he noticed "a pile of something" on the ground, and as he approached and was about six to eight feet away, he realized it was two bodies in a pool of blood. He screamed "oh, my God, they dead, they dead" and people came to their windows to see what was happening. Washington thought one of the bodies was his nephew, Wheeler, because he saw an Army fatigue jacket similar to the jacket Wheeler was wearing earlier that morning. As he ran back to the pay phone to call 9-1-1 he saw Moore, who "yelled [the victims'] names, and then ... took off running."

Washington testified it was his voice in the audio recording of the 9-1-1 call reporting the deaths. After calling 9-1-1, he returned to the scene and remained there for three or four minutes until the police arrived, after which he went back to his sister's apartment and asked Collins about Wheeler. He called Wheeler from the phone in the apartment but could not reach him. Washington thought Wheeler was one of the victims even after Moore said it was "Rock" and "Murph," because he did not trust Moore and he was "traumatized" and upset.

***13** Washington returned to the scene and encountered Patricia Miller on the way, and told her he had just found two dead bodies and thought one of them was his nephew. After staying at the scene for "a while," he went back to Branch's apartment and woke her up, crying, and told her what had happened.

After discovering that he was wanted for murder, Washington left Camden. He went to Newark, and then Trenton. While in Trenton, he learned that a man in Camden had been shot and killed and people thought Washington was the victim because they looked alike. He returned to Camden and was arrested on March 22, 1995.

Washington admitted selling drugs in the area of Roosevelt Manor, and occasionally hearing gunshots. He recognized that it was a dangerous area but said he did not fear for his safety. Washington admitted he was an "enforcer" in the drug trade, but denied ever owning a gun, although other friends and family members carried weapons. Washington claimed he had a fear of guns from the time he was young because his uncle died when a friend accidentally shot him.

Washington acknowledged he was charged with two additional homicides. In one case, a woman named Mary Trusty identified Washington and Wheeler as the individuals who murdered her cousin, but they were acquitted. Trusty was also the first person to identify Washington as a suspect in the murders of Turner and Wilson.

According to Washington, he told his trial counsel Kahn the first time they met that he made the 9-1-1 call, and Kahn said he would get the tape and have the voice analyzed. Washington also asserted he told all of his prior attorneys that he made the 9-1-1 call, but none of them obtained a copy of the recording, and he was not aware that a recording existed until Baker's current counsel obtained a copy in 2013. Washington explained that he had refused to sign an affidavit prepared for one of his PCR hearings because it incorrectly stated that he had called 9-1-1 from his sister's apartment, instead of the pay phone. Washington testified that Collins incorrectly stated that Washington called 9-1-1 from the apartment.

Washington admitted he knew Baker, but stated he did not get along with him and they were not friends. Washington grew up in Roosevelt Manor, but Baker did not move to the neighborhood until he was eleven or twelve. They "didn't associate" because Baker "got into it one time with a gentleman from the neighborhood that [Washington] was cool with" and because Baker previously dated a girl that Washington later dated. Washington was aware that Baker sold drugs.

Washington also knew Turner, and although he "knew of" Wilson, he only knew her name and would not be able to

recognize her. Around 2010 or 2011, Washington learned that Raheem Miller, who was by that point deceased, had told people that he shot Turner and Wilson.

Langston testified at Washington's hearing that two or three "close" gunshots woke her sometime in the morning of January 28, 1995, but she went back to sleep because "it was the norm." She was later awakened by a voice that sounded like Washington. Langston was unsure what time the shooting woke her or how long she fell back asleep before she heard Washington. She thought that Washington was yelling for help and saying, "I'm bleeding," because he had been shot, but her boyfriend clarified that Washington said "they bleeding."

***14** According to Langston, she went to her window and saw Washington walking towards the phone booth on the corner of 8th Street, and assumed he called the police. She remained at her window, and shortly afterwards she saw Washington return to the scene. Her boyfriend went outside and asked Washington what happened, to which Washington responded that there were two dead bodies in the courtyard.

Around that time Moore appeared at the scene, grabbed a stick that he used to lift the victims' hoods to reveal their faces, and said that the dead bodies were "Rock" and "Murph." "Murph" was Langston's cousin. Raheem Miller was her brother. Langston further testified that the voice on the 9-1-1 recording sounded like Washington.

Patricia Miller, Raheem's mother, testified that she heard gunshots that morning and ran to her children's rooms, but Raheem was not home. About fifteen minutes later she went outside, where she encountered Washington, who was "very emotional" and "had tears in his eyes." She asked him what was wrong, and he said that he thought his nephew Wheeler had been shot and was laying on the ground dead. She recognized the voice on the 9-1-1 call as Washington's voice.

Branch, who was romantically involved with Washington at the time of the murders, testified that on the morning of the shootings Washington came to her house "very upset." He kept repeating, "They were dead." She also recognized Washington's voice from the 9-1-1 recording.

Lamont Powell testified that on the night before the murders he was at a party at his cousin's house in Roosevelt Manor "smoking weed and drinking" with Wheeler, Washington, who he called Stump, and Raheem, who he called Lump. Washington left in the early morning hours, and Raheem, who had smoked angel dust, decided that he was going to kill a witness in his brother's unrelated murder trial. Raheem, along with Wheeler, dressed in black and told Powell that they then went to a nearby house and kicked the door in, but the witness escaped. Wheeler left, and Raheem remained behind to wait for the witness to return, but was spotted by two people who said his name, so he shot them. Powell said that he did not "care for" Baker and was not friends with anyone at the apartment except Raheem.

Powell had a lengthy criminal history and had recently been sentenced to thirty-three months in prison for violating community supervision after serving a ten-year federal prison term. At the time of defendants' trial, he would not have helped them unless Raheem gave him permission. Although he was friends with Raheem and said he "loved him," Powell also said that Raheem's death was "one of the best things that probably ever happened in this world" because he was "evil."

Henrietta Washington, Washington's mother, identified her son's voice as the caller in the 9-1-1 recording. Harriet Fleming, Washington's sister, also identified Washington as the caller. Likewise, Collins identified Washington as the caller in the 9-1-1 recording.

John Hamilton, an EMT, also testified at the hearing. Hamilton had been dispatched to the crime scene at 5:56 a.m. and arrived at 6:01 a.m. His report indicated that the two victims had been dead for approximately fifteen minutes. On cross-examination, he admitted that fifteen minutes was "a best guess." Robert Waszazak, who was also an EMT, testified that he might have moved Wilson's body to check her pulse and her pupil responsiveness, but was not sure.

***15** Eric Winch, the director of I.T. projects at Seton Hall Law School, testified about an estimated timeline of events he created based on the 9-1-1 calls, police dispatch communications, and the distances between various locations. On cross-examination Winch acknowledged various assumptions and limitations that influenced his estimates.

Harry Reubel, an investigator in the Camden Region Office of the Public Defender, ("OPD") became involved with Washington's PCR petition in 2002. Reubel testified that the area where the shootings occurred was not visible from 10th Street and Van Hook Street, which was where Moore said he and Rand had been at the time of the incident. [12] He also testified that the only information provided to him by PCR

counsel indicated that the shootings occurred at 5:57 a.m. He interviewed Collins, but could not locate Redden or Rand. He confirmed that Collins told him Washington called the ambulance and the police from a phone in the apartment.

Kahn, who represented Washington at trial, testified at the PCR hearing that he did not consider consulting a forensic pathologist, firearms examiner, or shooting incident reconstruction expert, and that an ordinary criminal defense lawyer in 1996 would not have done so either. From the first time Kahn met his client, Washington maintained that he was cooking chicken that morning and, when he went outside, he discovered the bodies and called 9-1-1.

Kahn admitted that he "did very little" to investigate Washington's claims, but he did send an investigator to interview Collins shortly before trial. Kahn said Washington provided him with the names of other people to corroborate his account, but he did not interview them. Kahn acknowledged he did not try to determine a timeline of events or the physical layout of the surrounding area.

Kahn was not aware that a recording of the 9-1-1 call existed. When it was played for him, he was "absolutely clear" that Washington was the voice on the recording and said that Washington sounded "distraught and upset." Kahn stated that if he had obtained the recording before trial, it "absolutely ... would [have] changed everything" because he would have called Washington to the stand and "introduced that tape to corroborate his testimony."

Kahn admitted that he did not appropriately investigate the case before trial and "made an inappropriate and inaccurate decision ... that this was best thought of as a one witness case." His inaction was based on the State's inability to locate Rand for a period of time prior to trial and his belief that Rand was a "very, very poor witness," who he characterized as "a prostitute, strung out on crack." [13]

b. Baker's Testimony and Supporting Witnesses

Baker testified that he was with Redden at her mother's house in Roosevelt Manor cooking shrimp between midnight and 2:00 a.m. on January 28, 1995. Around 2:30 a.m., a friend, Teddy Hilton, gave them a ride to Redden's apartment in the Fairview section of Camden. [14] They went to sleep around 4:00 a.m., and remained inside the apartment for the rest of the day. He first learned about the murders when Redden's brother came by the apartment and told them what had happened. Baker did not recall watching any news programs about the murder with Redden. His PCR testimony was consistent with what he told the police after he was arrested.

***16** At the time of the shootings, Baker knew who Washington was, but was not friends with him. The State offered Baker a plea deal of eight years in prison if he cooperated against Washington, but he could not give the police any information because he did not know anything about the shootings. Baker claimed that he had pled guilty to one of his prior felony convictions even though he was innocent in return for a favorable plea deal.

Sharay Redden, Michelle Redden's sister, testified that Michelle died of breast cancer in September 2013. [15] Michelle consistently repeated, over almost twenty years, that Baker was at her apartment in the Fairview section of Camden at the time of the shootings and that he was not involved in the murders.

Another witness, Vinson Montgomery, was formerly the polygraph examiner for the OPD and was certified as an expert in the field of polygraphs. In 2008, he performed a polygraph examination of Baker in which Baker denied taking part in the killings of Turner and Wilson. He called Baker's polygraph results "amazing" and said he had a "high degree of confidence that Mr. Baker was telling the truth."

Gumminger, Baker's trial counsel, testified that Baker and Redden maintained that Baker was with Redden in her apartment at the time of the shooting. When he went over Glemser's report with Redden in November 1995, she identified several errors. In particular, Glemser wrote that Redden said her brother woke her and Baker "in the earlier hours of the morning" and informed them that "Murph" had been shot and killed. Redden clarified to Gumminger, however, that she told Glemser her brother woke her and Baker when it was "light out but approaching evening" and informed them that "Murph" and "Rock" had been killed.

More significantly, Glemser wrote that Redden told him that shortly after her brother woke them up, she and Baker watched a television show called "The Bulletin with Larry Kane" in which he discussed the murders. Glemser then reached out to KYW News 3 in Philadelphia, which confirmed that Kane's show did not air the morning of the murders. Redden, however, told Gumminger that what she actually said to Glemser was that she was watching a show

like "The Bulletin with Larry Kane," and it was about the general murder rate in Camden. She saw a news report about the murders later that evening. Those discussions between Gumminger and Redden were reflected in contemporaneous notes in his file, which he reviewed with counsel at the PCR hearing.

Defendants' counsel played for the court a recording from the 11:00 p.m. news, which started with a promotion for "The Bulletin with Larry Kane," included a report on the murders, and featured an interview with a prosecutor about the murder problem in Camden. Several Philadelphia television station reporters were present at the press conference about the murders. Gumminger testified that the recording "confirm[ed]" Redden's recollection and "undermine[d]" Glemser's report. He explained that although it did not prove Baker's whereabouts at the time of the murders, that fact was understandable because Baker and Redden were asleep at the time. He further explained that the video was of "extremely high value" because "it corroborate[d] the truthfulness of [Redden's] testimony and the veracity of it" and "show[ed] that she ha[d] a full, firm grasp on the sequence of events on that given day."

***17** Gumminger admitted he had "adopted as fact" Glemser's report and "mistakenly took Glemser's version of events and misunderstood them to contradict what [Redden] was saying when, in fact, it was not contradicting what she was saying at all," but instead "misrepresenting" Redden's account. He testified that his misunderstanding was the main reason he did not call Redden as a witness at trial and that otherwise he would have called her to testify. Gumminger acknowledged he "could have discovered this information ... and ... undermined Glemser's report, or proceeded with the alibi," which would have been "much stronger." He also said that at Baker's first PCR hearing he was still under the mistaken impression that Glemser's report would undermine Redden's alibi statements. He added that he had never previously seen Glemser's letter to KYW News, or their response to him.

Gumminger did not have access to his case file when he testified as a witness for the State in Baker's first PCR hearing, and he repeated his trial errors because he still mistakenly believed that the State had undercut Redden's alibi testimony.

Gumminger confirmed that he received Moore's polygraph report in discovery. Moore denied murdering "Murph" and "Rock," being present when they were murdered, or knowing who committed the murders. He failed the polygraph test, however, which indicated that he was lying. Rand was not given a polygraph examination, and Gumminger believed that was an intentional tactic by the State to intimidate Moore and undermine his testimony.

Gumminger explained he did not call Moore as a trial witness because he wanted to argue that Moore was the shooter and Rand was protecting him. He did not realize that the court would not permit him to argue Moore was the shooter during his summation without any corroborating evidence, and acknowledged that his "misapprehension of the law" prevented him from calling Moore as a witness. If he had a better understanding of the law, Gumminger said he would have called Moore as a witness to contradict Rand.

At the PCR hearing under review, Gumminger listened to an audio recording of Rand's police interview, and believed that when first asked to identify the shooters, she said the initials "J.D.," not "K.B.," as reflected in the transcript of the interview that was produced to defendants prior to trial. He explained that if he had the recording prior to trial he would have used it to support his argument that Rand did not know Baker "very well and her identification was shaky." Gumminger confirmed that at the time it was not typical for audio recordings to be turned over, only transcripts, and that he did not ask for the recording of Rand's police interview. He also confirmed that there was no one with the initials "J.D." involved in the case, but said that he would have used this information to support an argument that Glemser "put the words K.B. in her mouth."

Gumminger also listened at the hearing to an audio recording of the police interview of Mary Trusty. In the recording, Trusty told police that Rand said she was present when the shootings occurred, but Rand did not tell Trusty whether she witnessed the shooting. Trusty explained that Rand "might as well say it" and that Rand "didn't say who did the shootings, because [Trusty] already had knew." Trusty added that she "knew" because she heard "talk" that Washington was the shooter. Gumminger said that Trusty's failure to name Baker, and her statement that her knowledge about who shot Wilson and Turner was based on second-hand "talk," would have been useful at trial.

Crisonino, Baker's first PCR counsel, said he had pursued a theory that Washington was the lone gunman. Baker initially advanced that theory in the current PCR proceedings, but

abandoned it once the State produced the 9-1-1 recording and his counsel established that Washington was the caller.

***18** Michael Klein, a former manager in the Public Defender's Office, testified that Baker's second PCR counsel never submitted a request for an expert and did not do much work on the case.

5. Other Evidence

On the second-to-last day of the PCR hearing, defendants' counsel indicated to the court that although they served subpoenas on Rand and Moore, the two did not appear at the hearing. Nonetheless, counsel declined to request a bench warrant. Instead, they submitted a certification dated September 19, 2012, from Carla Johnson, who was deceased at the time of the hearing, claiming that Rand said she did not witness the murders. They submitted another certification dated March 14, 2003, from Anna Griffin, who was also deceased at the time of the hearing, stating that she had overheard Rand recant her trial testimony.

I. The PCR Court's Decision

On August 31, 2017, the court entered an order denying defendants' PCR petitions and motions for a new trial. The court explained its reasoning in a 112-page decision that predominantly recounted the testimony set forth above. The court found that Baker, Washington, Kahn, Gumminger, Collins, Langston, Powell, and Winch all were not credible witnesses. It assumed, without deciding, that a freestanding actual innocence claim was cognizable in New Jersey, but held that defendants did not meet their burden to show that they were innocent.

Among other things, the court determined that defendants' ineffective assistance of counsel claims were time-barred. Proceeding nonetheless to the merits of those claims, the court concluded defendants' trial attorneys were not deficient and defendants did not suffer prejudice from their attorneys' failure to call potential witnesses at trial. The court also found the prosecution did not suppress material evidence.

The court further ruled that defendants did not establish that newly discovered evidence entitled them to a new trial, either because the evidence could have been discovered prior to trial through the exercise of reasonable diligence, or because it would not undermine the jury's verdict.

J. Defendants' Appeals

Defendants both appealed, and we listed their appeals back-to-back. We entered an order granting a motion of Askia Jabar Nash, Rodney Roberts, David Shephard, and Anthony Ways to participate as amici curiae (the "exoneree amici") in support of defendants. We also entered orders granting amici status to the Innocence Project, the Exoneration Initiative, and the Innocence Network (innocence organization amici) in support of defendants.

We further granted the Attorney General's motion to file an amicus brief on a self-selected limited basis to address solely the question of whether an "actual innocence" standard should or needs to be adopted under New Jersey law. We permitted all amici parties to participate in oral argument. We have consolidated defendants' appeals, which were calendared together, for purposes of this single opinion. [16]

II.

(Overall Legal Standards)

Defendants contend the PCR court erred by declining to set aside their convictions based on newly discovered evidence and the alleged ineffectiveness of their previous counsel. As part of their arguments, defendants and the amici aligned with them advocate that New Jersey courts adopt more receptive standards for entertaining such claims. They argue wrongfully convicted persons in our state should be permitted to gain relief if they show they are "actually innocent" of the crimes for which they had been found guilty, regardless of customary procedural bars that may disallow such claims.

***19** We need not address these contentions for a change in New Jersey law because, as our analysis will show, defendants are entitled to a new trial under our existing analytical framework governing PCR and claims of newly discovered evidence. Moreover, any ultimate change in the legal framework is more appropriately for the Supreme Court, and not this intermediate appellate court, to consider.

Defendants' claims implicate well-established legal standards for claims of newly discovered evidence and PCR petitions. The standards are somewhat related and overlapping. They consist of the following.

A. PCR

"Post-conviction relief is New Jersey's analogue to the federal writ of habeas corpus." State v. Pierre, 223 N.J. 560, 576 (2015) (quoting State v. Preciose, 129 N.J. 451, 459 (1992)). It serves as a safeguard to ensure that a criminal defendant was not unfairly convicted and is the "last line of defense against a miscarriage of justice." State v. Nash, 212 N.J. 518, 526 (2013).

The grounds for post-conviction relief include, in relevant part:

> (a) Substantial denial in the conviction proceedings of defendant's rights under the Constitution of the United States or the Constitution or laws of the State of New Jersey; [or]
>
> ....
>
> (d) Any ground heretofore available as a basis for collateral attack upon a conviction by habeas corpus or any other common-law or statutory remedy.
>
> [R. 3:22-2.]

The burden is on the defendant to establish his or her right to post-conviction relief "by a preponderance of the credible evidence." Nash, 212 N.J. at 541 (quoting Preciose, 129 N.J. at 459).

If a trial court holds an evidentiary hearing on a motion for a new trial or a PCR petition, an appellate court generally "applies a deferential standard; it 'will uphold the PCR court's findings that are supported by sufficient credible evidence in the record.' " Pierre, 223 N.J. at 576 (quoting Nash, 212 N.J. at 540). Appellate courts do not defer to a trial court's interpretation of the law, which is reviewed de novo. Ibid. When considering mixed questions of law and fact, we will defer to the PCR court's factual findings that are supported by the record, but exercise plenary review over "the lower court's application of any legal rule to such factual findings." Id. at 577. Subject to certain exceptions we will apply, infra, we ordinarily defer to a trial court's credibility determinations because it has the ability to observe the testimony firsthand. Pierre, 223 N.J. at 576.

B. New Trial Motions

Rule 3:20-1 governs motions for a new trial, which in the post-conviction context often are brought in conjunction with a PCR petition. A new trial motion "based on the ground of newly-discovered evidence may be made at any time ...." R. 3:20-2. A court must examine newly discovered evidence "with a certain degree of circumspection to ensure that it is not the product of fabrication[.]" State v. Ways, 180 N.J. 171, 188 (2004). Nonetheless, "[h]owever difficult the process of review, the passage of time must not be a bar to assessing the validity of a verdict that is cast in doubt by evidence suggesting that a defendant may be innocent." Ibid.

Newly discovered evidence is sufficient to warrant a new trial only if it is: "(1) material to the issue and not merely cumulative or impeaching or contradictory; (2) discovered since the trial and not discoverable by reasonable diligence beforehand; and (3) of the sort that would probably change the jury's verdict if a new trial were granted." State v. Carter, 85 N.J. 300, 314 (1981). All three prongs of the Carter test must be satisfied to grant a new trial. Ibid.

***20** Under the first prong of the Carter test, evidence is material if it "would 'have some bearing on the claims being advanced.' " Ways, 180 N.J. at 188 (quoting State v. Henries, 306 N.J. Super. 512, 531 (App. Div. 1997)). To that end, "[c]learly, evidence that supports a defense, such as alibi, third-party guilt, or a general denial of guilt would be material." Ibid.

In order to determine "whether evidence is 'merely cumulative, or impeaching, or contradictory,' and, therefore, insufficient to justify the grant of a new trial requires an evaluation of the probable impact such evidence would have on a jury verdict." Id. at 188-89. "Therefore, the focus properly turns to prong three of the Carter test, whether the evidence is 'of the sort that would probably change the jury's verdict if a new trial were granted.' " Id. at 189 (quoting Carter, 85 N.J. at 314).

Thus, it is clear that the first and third prongs of the Carter test are "inextricably intertwined." Nash, 212 N.J. at 549. Indeed, the "analysis of newly discovered evidence essentially merges the first and third prongs of the Carter test." State v. Behn, 375 N.J. Super. 409, 432 (App. Div. 2005). Under that rubric, "[t]he characterization of evidence as 'merely cumulative, or impeaching, or contradictory' is a judgment that such evidence is not of great significance and would probably not alter the outcome of a verdict." Ways, 180 N.J. at 189. By contrast, evidence "that would have the probable effect of raising a reasonable doubt as to the defendant's guilt

would not be considered merely cumulative, impeaching, or contradictory." Ibid. (emphasis added).

In short, the "power of the newly discovered evidence to alter the verdict is the central issue, not the label to be placed on that evidence." Id. at 191-92. Appellate courts "must engage in a thorough, fact-sensitive analysis to determine whether the newly discovered evidence would probably make a difference to the jury." Id. at 191.

The second prong of the Carter test "recognizes that judgments must be accorded a degree of finality ...." Id. at 192. That prong therefore requires that the "defense ... 'act with reasonable dispatch in searching for evidence before the start of the trial.' " Nash, 212 N.J. at 550 (quoting Ways, 180 N.J. at 192). Under that prong, the evidence must not have been discoverable prior to trial through the exercise of "reasonable diligence" in the context of the specific circumstances of each case. Reasonable diligence does not require "totally exhaustive or superhuman effort." Behn, 375 N.J. Super. at 428.

That said, a defendant "is not entitled to benefit from a strategic decision to withhold evidence." Ways, 180 N.J. at 192. A defendant gains no strategic advantage, however, if her or his attorney "fails to discover or overlooks exculpatory evidence." Ibid. For that reason, the New Jersey Supreme Court has recognized the "important caveat" that evidence " 'clearly capable of altering the outcome of a verdict that could have been discovered by reasonable diligence at the time of trial would almost certainly point to ineffective assistance of counsel.' " Nash, 212 N.J. at 550 (quoting Ways, 180 N.J. at 192).

With respect to newly discovered scientific evidence, Rule 3:20-2 "presents a viable means by which a defendant can seek a new trial if he can now show that recently improved scientific methodology, not available at the time of trial, would probably have changed the result." State v. Halsey, 329 N.J. Super. 553, 559 (App. Div. 2000). Courts recognize that "[s]cience moves inexorably forward and hypotheses or methodologies once considered sacrosanct are modified or discarded." Behn, 375 N.J. Super. at 429. Thus, the "judicial system, with its search for the closest approximation to the 'truth,' must accommodate this ever-changing scientific landscape." Ibid.

***21** When, as here, a defendant presents scientific evidence in support of a motion for a new trial, the court must decide whether, at the time of trial, the science supporting the defense argument was established. For instance, in State v. Peterson, 364 N.J. Super. 387, 398 (App. Div. 2003), the court held that DNA testing qualified as newly discovered evidence even though "early forms of DNA testing were in use at the time of defendant's trial" because it had "become more common and more reliable in the intervening fourteen years." Of course, there can be "no doubt" that scientific evidence "not developed until after defendant's trial" constitutes newly discovered evidence because "no amount of reasonable diligence could have uncovered" evidence that "did not exist previously." Behn, 375 N.J. Super. at 429.

III.

(The Newly Discovered Evidence)

Defendants argue that the newly discovered forensic evidence, as presented by Dr. Baden, Haag, and in Boskey's report contradicts and severely undermines Rand's account of the shootings. They further contend Rand recanted her trial testimony, as reflected in two certifications from deceased witnesses. They also point to several other non-forensic proofs, including the seven identifications of Washington's voice on the 9-1-1 recording, which they contend are strongly exonerative.

A. Forensic Evidence

Defendants argue the forensic testimony was not discoverable with reasonable diligence prior to trial and is material because it probably would change the jury's verdict. The PCR court agreed with defendants that Haag's report and testimony—which showed that the bullets that killed Wilson ricocheted off the ground and therefore that she was lying down when she was shot—could not have been discovered prior to trial through reasonable diligence. We concur.

Defendants' trial was in 1996, the same year Haag first identified the bow-effect phenomenon, which was not widely disseminated throughout the scientific community until 2002. Very few laboratories were equipped with a scanning electron microscope at the time of trial.

We disagree, however, with the trial court's separate conclusion that Haag's findings were not material and probably would not change the jury's verdict if a new trial were granted. The court believed Haag's new evidence would

not contradict Rand's account because she never literally testified that Wilson was standing when she was shot. Therefore the court did not deem the scientific proof material under Carter. The court's decision on this aspect of the Carter test is reviewed de novo because it requires an application of the law to the facts of the case. Behn, 375 N.J. Super. at 433.

The evidence presented by Haag was "clearly not cumulative since no comparable evidence was offered at trial." Behn, 375 N.J. Super. at 431. The evidence would impeach Rand's testimony, so the question becomes whether it would probably change the jury's verdict if the court granted a new trial. Nash, 212 N.J. at 549; Ways, 180 N.J. at 188-89. We believe it would.

Although Rand never explicitly testified that Wilson was standing when she was shot, the gist of her testimony was that both victims were standing, as confirmed by the entirety of the record.

Specifically, the prosecutor asked Rand to describe what she witnessed, and she answered that she saw Turner and Wilson "when they dropped." When asked who was shot first, the transcript indicates that Rand said she saw "them drop first," but the court immediately clarified that Rand said she saw "him" drop first, referring to Turner. Thus, Rand's trial testimony plainly reflects her contention that both victims were standing when they were shot and then dropped to the ground. [17]

***22** Rand also testified that "the whole shooting" lasted a couple of seconds, which was consistent with her police interview, during which she told Glemser that defendants shot the victims "a couple seconds" after they ran up to them and the "whole thing" lasted only a "couple of seconds." She explained to Glemser that defendants "came from around the corner, like out of nowhere[,]" ran up to Wilson and Turner, shot them in the head, and then kept on running. Rand stated she was certain that defendants were running the whole time, and that it was not "an on-going thing." She agreed that defendants "ran up on 'em, shot 'em, and then kept on runnin." Indeed, Rand said that she would not have witnessed the shootings if the incident lasted any longer because she would have fled the scene.

Notably, Glemser understood Rand's account to be that the victims were shot while they were standing. He wrote in his supplemental report that "Rand state[d] that this entire situation only took a couple of seconds and immediately after both victims were shot in the head, they fell to the ground as both suspects identified as Kevin Baker and Sean Washington continue[d] running away from the victims." (Emphasis added).

At trial, the trial judge seemingly understood Rand's testimony to be that defendants shot the victims while they were standing. That is reflected in his reason for not instructing the jury on the lesser-included offenses of aggravated manslaughter and manslaughter. He stated, "[T]he only evidence as to what allegedly occurred is the testimony of [Rand] who indicated she saw the defendants basically walk up behind the victims, point a gun and shoot the two victims in the head and flee."

Rand's account of the killings was, in essence, a "run-by shooting." By contrast, the new forensic evidence shows it likely was an execution-style killing, in which at least one victim was forced to lie on the ground before being shot. Rand's account realistically would not allow time for defendants to approach Turner and Wilson, order them to lay on the ground, and then shoot them.

When examining the impact of newly discovered evidence, it must be "placed in context with the trial evidence ...." Ways, 180 N.J. at 195. An appellate court therefore must consider the State's proofs at trial. See ibid. (characterizing State's proofs as "far from overwhelming"). Here, there is a patent weakness in the State's case against defendants, which another panel of our court previously characterized as "not overwhelming."

Rand's trial testimony was the only eyewitness evidence linking defendants to the murders. At best her account was inconsistent and at times incoherent.

For instance, Rand stated at the time of the murders "it was dark, but it was light." She first testified that she saw one defendant carrying a gun, but could not recall which one. She later testified that she only saw Baker with a gun, not Washington. She then testified that she only saw Washington with a gun, not Baker. In her police interview, however, when asked if she saw anyone holding a gun, Rand said she paid no attention. After being directed to read that portion of her statement while she was on the stand, she testified that she "just had to be paying attention[,]" before admitting that she "wasn't paying no attention." She later said that was "the answer at the time[,]" as if the facts of what she witnessed could change. Rand was also untruthful about her willingness to testify.

At trial, Rand could not remember who was shot first or which defendant shot each victim until she read those critical facts from portions of her police interview. [18] Even after reading her statement, she initially could not recall if she saw Baker shoot Turner.

***23** As we previously noted, Rand's answers about how long she knew Baker varied from not being able to recall because she "kept forgetting" to "not that long" to "some years," to "several years" to "two years" to "five or six" years.

Rand initially testified that Moore was behind her at the time of the shootings, but in her police interview she said he was in front of her, and after being alerted to the discrepancy, said that he was in "[f]ront of me, behind me[,]" before changing her testimony to reflect that Moore was in front of her, and then changing it again to say that she did not remember.

It must be underscored that Rand was a known drug addict who smoked crack cocaine every two to three hours, which she characterized as "not that often[.]" She was admittedly high at the time of the murders. She was approximately ninety feet away when the shooting occurred and it was dark outside. The entire incident took only a "couple of seconds." She also saw a gun, or multiple guns, depending on whether one credits her police interview or trial testimony.

These perception factors all can influence an eyewitness identification. In State v. Henderson, 208 N.J. 208, 261-66 (2011), the Court recognized each of them – intoxication, distance, lighting, duration, and the distraction of a visible weapon – as "estimator variables" that can impede the accuracy and reliability of eyewitness identifications.

Dr. Baden's testimony further supported Haag's conclusion that Wilson was laying on the ground when she was shot. He consistently testified that, based on the trajectory of the two bullets, Wilson was shot twice while lying on the ground with her arm next to her head. After receiving Haag's report, Dr. Baden filed a supplemental report, opining that the bullets ricocheted off the ground before entering Wilson's arm. He asserted that Rand's testimony was "totally inconsistent with the way [Wilson] was shot and the way she was found."

The court found that Dr. Baden essentially was offering a new opinion based on old evidence. The court, however, did not distinguish adequately between the various aspects of Dr. Baden's testimony.

For instance, it is not clear that Dr. Baden's conclusion that Wilson was shot twice and that the bullets entered her arm after passing through her skull–which is the portion of his testimony relevant here–was discoverable prior to trial with reasonable diligence. At trial, the medical examiner testified that "[t]here is no way to tell whether this bullet passing through the arm was related to either of these two [head] wounds or was a third wound." If Dr. Baden's conclusion was discoverable with reasonable diligence prior to trial, then the medical examiner also should have discovered it. See Behn, 375 N.J. Super. at 433 ("Having offered these proofs and argued their significance, the State should not be permitted to now 'walk away' from its evidence and demean its importance.").

Moreover, the pertinent question is not whether the evidence was theoretically discoverable at the time of trial, but whether a reasonably diligent attorney would have discovered it prior to trial. Peterson, 364 N.J. Super. at 398. Kahn and Gumminger were experienced criminal defense attorneys. Notably, Kahn in particular testified that he had not used forensic experts at the time of defendants' trial, that he did not consider retaining a forensic expert, and that a reasonably diligent attorney would not have done so at that time, all of which suggest that a reasonably diligent attorney would not have retained a forensic expert at that time.

***24** The trial court found that Gumminger and Kahn generally were not credible, but made no specific findings with respect to their testimony about retaining a forensic expert. [19] If that testimony was credible, then a reasonably diligent attorney would not have discovered the forensic evidence prior to trial.

If, on the other hand, the attorneys' testimony was not credible, it still must be remembered that evidence " 'clearly capable of altering the outcome of a verdict that could have been discovered by reasonable diligence at the time of trial would almost certainly point to ineffective assistance of counsel.' " Nash, 212 N.J. at 550 (quoting Ways, 180 N.J. at 192). "It hardly bears mentioning that '[w]e would not require a person who is probably innocent to languish in prison because the exculpatory evidence was discoverable and overlooked by a less than reasonably diligent attorney.' " Ibid. (alteration in original) (quoting Ways, 180 N.J. at 192).

Haag also testified that only one gun likely was used in the murders. The trial court, however, found that defendants

"have not proved a second weapon was not involved" to a degree of "practical certainty" and it therefore could not "exclude the existence of two weapons being used, by two shooter[s]." The court was correct that Haag's testimony did not "prove" only one gun was used. But that is not the proper test to apply to newly discovered evidence. The proper test is whether the new evidence "probably" would have changed the outcome of the trial. Behn, 375 N.J. at 432.

Here, the testimony that only one gun was used would have sharply contradicted Rand's account of events. Although Haag could not completely rule out the possibility that a second gun was used, it was very unlikely.[20] Even Deady agreed that Haag's testimony was the most likely explanation, although he recognized that it was not certain or provable because the bullet that killed Turner and the gun were never recovered. The forensic likelihood that only one gun was used in the murders, in combination with the evidence showing that Wilson was laying on the ground when she was murdered, is yet another point that would undercut Rand's shaky testimony.

The forensic evidence contradicting Rand's description of the manner of shooting would materially strengthen a defense argument that her testimony should be disbelieved in its entirety. See State v. Young, 448 N.J. Super. 206, 228 (App. Div. 2017) (finding a "false in one, false in all" inference was justified, in light of "conflicting evidence" about the defendant-witness's statements, and indicia they were not " '[i]nadvertent misstatements or immaterial falsehoods' " (quoting State v. D'Ippolito, 22 N.J. 318, 324 (1956)).

***25** Lastly, in considering the significance of this new and essentially unrefuted forensic evidence, we also bear in mind that the jury acquitted both defendants of the unlawful possession of a weapon charges. Although inconsistent verdicts are generally tolerable, the jury's not-guilty findings on those particular weapons counts provide yet another reason to believe the newly developed scientific proof could have tipped the balance in favor of the defense on the murder counts.

B. Proof of Washington's Identity As the 9-1-1 Caller

We find it appropriate to consider the 9-1-1 audio evidence, which only emerged before the trial court's most recent evidentiary proceedings. The recording had not been considered on direct appeal or in any of defendants' previous collateral proceedings.

The audio evidence was not discovered by trial counsel. Washington consistently maintained that he discovered the bodies and called 9-1-1, which he told his attorney Kahn prior to trial. Kahn, however, did not request a copy of the 9-1-1 tape and contends he was unaware of its existence.

The trial court rejected Washington's claim for relief because it believed that the decision not to play the tape for the jury was "likely ... part of a strategic trial decision." Strategic decisions made after less than complete investigations, however, are not entitled to deference. State v. Savage, 120 N.J. 594, 617-18 (1990). Without knowing about and obtaining the tape to ascertain if Washington made the 9-1-1 call, Kahn was in no position to make a strategic decision whether to present the tape to the jury as part of an alibi defense on Washington's behalf.

We are persuaded that the 9-1-1 audio proof provides support for relief under Rule 3:20. The evidence clearly satisfies the first and third prongs of Carter. Carter, 85 N.J. at 314. Moreover, we do not construe the Supreme Court's application of the second prong of the Carter test for newly discovered evidence to be so rigid so as to preclude relief under Rule 3:20 under the circumstances presented here. As the Court noted in Nash, " '[w]e would not require a person who is probably innocent to languish in prison because the exculpatory evidence was discoverable and overlooked by a less than reasonably diligent attorney.' " Nash, 212 N.J. at 550 (alteration in original) (quoting Ways, 180 N.J. at 192). Hence, whether or not trial counsel were ineffective by not obtaining and presenting the 9-1-1 audio, that evidence, along with the forensic proofs, must be fairly considered in determining whether a new trial is warranted.[21]

It is clear from the audio recording that the 9-1-1 caller was distraught. That lends support to the notion that the caller was not the person who just shot Turner and Wilson. Despite seven witnesses who testified at the PCR hearing that the voice on the 9-1-1 tape was Washington's, the court found that "there was no credible evidence ... Washington made the [9-1-1] call from a payphone." Although the court found a few of the witnesses who identified Washington's voice were credible, including Washington's mother and sister, it rejected their identifications because those persons were biased and "motivated to assist" him.

***26** The Supreme Court has cautioned about negative credibility findings that are based "solely on account of [a] familial relationship ...." Ways, 180 N.J. at 196. It is not

at all apparent that anyone except Washington's friends and family could reliably identify his voice. Whether Washington actually is the person who called 9-1-1 is a question for a new jury to make after it "determine[s] each witness's knowledge, bias, consistency, and overall credibility." Nash, 212 N.J. at 553.

The trial court also found that if "Washington placed the call from the payphone, it would have put [him] at the scene of the crime." That is true, but it deserves less weight than the court placed on it. Washington has always asserted that he discovered the bodies and therefore admits he was at the scene, but just not at the time of the murders. He never tried to place himself away from the crime scene. If, in fact, Washington made the initial 9-1-1 call, that evidence had the potential to sway the jury's verdict, particularly after taking into account the weakness of the State's case.

We recognize that even if the jury believed Washington called 9-1-1, the jury could still determine that he shot Turner and Wilson. But "an 'outcome determinative standard' impose[s] too heavy a burden" on a defendant. State v. L.A., 433 N.J. Super. 1, 14 (App. Div. 2013) (quoting Strickland, 466 U.S. 668, 694 (1984)). A defendant need not show that it is "more likely than not" that she or he is innocent. Instead, a defendant must show a reasonable probability that is sufficient to undermine confidence in the outcome of the trial. Ibid. Considering the 9-1-1 evidence in conjunction with the forensic proof that undercuts the account of the sole alleged eyewitness, defendants have established such a reasonable probability here.

C. The Other Non-Forensic Proofs

Aside from this heavily corroborated evidence identifying Washington as the 9-1-1 caller, we rely on none of the other non-forensic proofs defendants have presented. As to those particular proofs, we generally defer to the trial court's assessment that they either lack sufficient probative value to warrant a new trial, or could reasonably have been developed and presented to the court sooner, or both.

IV.

(Impact of the Additional Proofs)

Viewing the totality of the evidence, the "new" evidence – particularly the forensic evidence, in context with the State's weak trial proofs that hinged so vitally upon Rand's account – was material and probably would have changed the jury's verdict.

Rand's identification of defendants as the shooters was the singular "focal issue of the trial and must be considered material." Behn, 375 N.J. Super. at 431 (quoting Henries, 306 N.J. Super. at 531). As we have elaborated, the forensic evidence that Wilson was lying on the ground when she was shot, if it had been available at the time of defendants' trial, would likely have been admissible and would have undercut Rand's account of events. The same is true for Haag's and Dr. Baden's testimony that only one gun was used in the murders. Because Rand was the only witness linking the defendants to the murders, and given the extensive weakness of her testimony, the new evidence would probably have changed the outcome of the trial.

The trial court relied analytically on the fact that the "jury found [Rand's] testimony to be credible." Case law, however, has disapproved of such undue reliance. See L.A., 433 N.J. Super. at 18 ("The court erred by relying on the jury's apparent finding that [the witness] was credible, because it voted to convict."). Applying the proper legal test, we are persuaded that a new trial is warranted.

***27** At such a trial the strong forensic proofs, and the 9-1-1 call evidence, will be presumptively admissible, subject to the State's right of timely objection. [22]

To be sure, courts that set aside verdicts "do not decide where the truth ultimately lies, because that function falls within the exclusive purview of the jury after reviewing all the evidence." Ways, 180 N.J. at 197. In this case, that will be the newly discovered forensic evidence and the proofs concerning Washington's voice on the 9-1-1 recording. A jury is the proper entity to "determine each witness's knowledge, bias, consistency, and overall credibility," and render a verdict. Nash, 212 N.J. at 553. Given the time that has passed since the trial, there will be "difficulties" associated with a retrial at this late date, "[b]ut the passage of time is an insufficient reason not to correct an injustice." Ways, 180 N.J. at 197. Because there is "a probability—not a certainty—that a new jury would find [defendants] not guilty," they are entitled to a new trial. Ibid.

Based on the newly discovered evidence, we therefore reverse the trial court's denial of defendants' motions for a new trial,

and remand to enable the State, if it so chooses, to retry the case.

V.

(Ineffective Counsel Claims)

As a separate theory for relief, defendants argue that the court erred by holding that their ineffective assistance of counsel claims were time-barred. We briefly discuss this procedural issue for sake of completeness.

The trial court found defendants' ineffective assistance of counsel claims "ha[d] been raised before in each of [their] prior [PCR] petitions," It then determined that their claims were time-barred under Rule 3:22-12(a)(2).

As relevant here, under Rule 3:22-4(b), a second or subsequent PCR petition "shall be dismissed" unless:

> (1) it is timely under Rule 3:22-12(a)(2); and
>
> (2) it alleges on its face ...
>
> ....
>
> (B) that the factual predicate for the relief sought could not have been discovered earlier through the exercise of reasonable diligence, and the facts underlying the ground for relief, if proven and viewed in light of the evidence as a whole, would raise a reasonable probability that the relief sought would be granted ....
>
> [R. 3:22-4(b).]

Rule 3:22-12(a)(2), in pertinent part, provides that notwithstanding any other provision of the Rule, no second or subsequent PCR petition shall be filed more than one year after the latest of:

> (B) the date on which the factual predicate for the relief sought was discovered, if that factual predicate could not have been discovered earlier through the exercise of reasonable diligence ....

It further provides that "[t]hese time limitations shall not be relaxed, except as provided herein." R. 3:22-12(b).

Defendants argue their ineffective assistance of counsel allegations were timely because they filed their PCR petitions within one year of discovering the factual predicates for their claims. The exoneree amici similarly argue that Rule 3:22-12(a)(2) allows a defendant to bring an ineffective assistance of counsel claim within a year of the discovery of the factual predicate of his or her claim no matter how many years have passed since the defendant's trial. They further argue the "reasonable diligence" requirement of Rule 3:22-12(a)(2) must be viewed from the perspective of the defendant, not his or her counsel.

***28** Baker identifies the following factual predicates that he "discovered" in the year before he filed his PCR petition: (1) a video recording of KYW-3 Philadelphia news coverage from the night of the murders; (2) a certification from Gumminger stating that he did not review his file prior to testifying in Baker's 1999 PCR proceeding; (3) Miron's file from when he was Baker's PCR counsel; and (4) Haag's and Dr. Baden's forensic reports.

It is not clear what the connection is, if any, between Baker's receipt of Miron's file and his ineffectiveness claim. The information that Baker gleaned from Miron's file that served as a factual predicate to his PCR petition is unstated. Even if the evidence in Miron's file showed Baker's trial counsel was ineffective, then it necessarily also showed that the same evidence could have been discovered earlier than 2012 through the exercise of reasonable diligence.

All of these identified factual predicates were discoverable by Baker earlier through the exercise of reasonable diligence. Baker knew, or should have known, that Gumminger did not review his file and testified solely based on his memory in 1999 because Gumminger admitted it during the evidentiary hearing. The television programs Redden claimed she was watching on the day of the murders had been in dispute since before defendants' trial, so they were aware that the television programming was a key issue. Indeed, in Baker's prior PCR petition he argued that his trial counsel was ineffective for failing to call Redden as an alibi witness and have her testify about watching news coverage of the murders, but the court rejected that argument. We do not disturb that finding.

Washington, meanwhile, argues that his petition was timely because he filed it within one year of the State producing

discovery to Baker, including the audio recordings of the 9-1-1 call he allegedly made. The State counters that the 9-1-1 evidence could have been discovered earlier through the exercise of reasonable diligence. R. 3:22-12(a)(2)(B). The State's position comports with our ruling in State v. Jackson, 454 N.J. Super. 284, 292-94 (App. Div. 2018).

Both defendants argue that the failure to relax the time bar of Rule 3:22-12(a)(2) to permit PCR relief in the exceptional context of this case would result in a "fundamental injustice." In Jackson, 454 N.J. Super. at 292-94, this court held that after the PCR rule amendments in 2009 and 2010 the fundamental injustice exception did not apply to second or subsequent PCR petitions and that the time limits in Rule 3:22-12(a)(2) could not be relaxed.

We need not address here whether, as defendants and their amici advocate, the law of our State should enable our courts, in limited and compelling circumstances, to disregard the time bar as a matter of fundamental fairness or jurisprudential policy, or whether the PCR rules should be prospectively amended in some fashion. We leave such an assessment to the Supreme Court.

Instead, we assume for sake of discussion the time bar under Rule 3:22-12(a)(2) pertains and therefore do not address the substantive issues of ineffectiveness concerning the 9-1-1 audio evidence. In any event, the denial of defendants' PCR ineffectiveness claims under Rule 3:22 does not preclude relief to them under the separate pathway of Rule 3:20 for newly discovered evidence, including the forensic proof and the 9-1-1 identification evidence. See R. 3:20-2 ("A motion for a new trial based on the ground of newly-discovered evidence may be made at any time, but if an appeal is pending the court may grant the motion only on remand of the case."). We therefore rest our analysis and the grant of a new trial upon Rule 3:20, not Rule 3:22.

VI.

(Brady v. Maryland Issues)

***29** Briefly, we reject defendants' claim the State suppressed material evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963). We adopt the trial court's conclusion that no Brady violations occurred. The court found no evidence that Glemser coached Rand, and further found that she consistently stated that "K.B." was one of the shooters. If Rand said "J.D." one time during her police interview, it seems to have been a mistake, perhaps because she was nervous.

The trial court further rejected defendants' claim that errors in the State's transcription of Trusty's police interview obscured the fact that Rand did not tell Trusty that she witnessed the murders. It similarly rejected defendants' arguments that purported errors in the transcript of Langston's police interview undermined Washington's alibi. These particular findings all have ample support and we adopt them.

VII.

(Remaining Points)

All remaining points raised on appeal either lack sufficient merit to warrant discussion, R. 2:11-3(e)(2), or present novel jurisprudential or policy issues that are more appropriate for the Supreme Court or the Attorney General,[23] or both, to consider.

In reaching our determination today, we are very mindful of the passage of time and the serious proof difficulties the State faces if it chooses to proceed with a new trial. That is an unfortunate practical reality. But it cannot overcome the compelling reasons to grant defendants the relief they deserve.

We also recognize the well-respected judge who presided over the trial and the lengthy PCR proceedings lived with and labored over this case for over two decades. His insights are surely important. In fact, we have upheld in this opinion many of the judge's rulings. We appreciate the judge's faithful service and his long-standing feel for this case.[24] Nevertheless, our independent review of the record, in light of the newly discovered evidence, compels us to conclude it would be unjust to allow this verdict to stand.

VIII.

(Conclusion)

Defendants' convictions are consequently vacated for a new jury trial. We stay our decision, sua sponte, and any release

of defendants from custody, for a period of sixty days to enable the State to seek relief from the Supreme Court if it so chooses. If such a filing with the Supreme Court occurs during the sixty-day interval, the stay automatically shall remain in effect unless and until the Supreme Court otherwise directs.

Vacated and remanded for retrial.

All Citations

Not Reported in Atl. Rptr., 2019 WL 7187443

Footnotes

1 United States v. Wade, 388 U.S. 218 (1967).
2 At the evidentiary hearing, Baker acknowledged that people referred to him as “K.B.”
3 In context, the prosecutor's question appears to be asking how much time elapsed between the two shootings, but Rand interpreted it instead as asking about the physical distance separating the two victims.
4 The maps in defendants' appendix referred to the street as both “Phillip” and “Phillips.”
5 The transcript says “Squires Bighams,” but the correct name may be Squires Bingham.
6 Although Collins had a criminal record at the time he testified at Washington's PCR hearing, he did not have one at the time of Washington's trial.
7 Langston's first name is spelled “Latesha” in some transcripts.
8 The transcript incorrectly refers to “Larry King.”
9 The testimony of the forensic witnesses occurred before Washington filed his PCR petition and motion for a new trial. The forensic witnesses did not testify a second time, and the PCR court considered their testimony in connection with both Baker's and Washington's claims.
10 As defined in defendants' brief, SEM/EDS refers to scanning electron microscopy with energy dispersive spectroscopy, which allows for an item to be examined at high magnification and analyzed to determine which chemical elements are present.
11 We use Raheem Miller's first name to avoid confusion because his mother Patricia Miller was a witness at the evidentiary hearing.
12 Van Hook Street has been renamed Carl Miller Boulevard since the time of the murders.
13 That court granted the State several continuances so that it could locate Rand. She eventually was located and held on a material witness warrant.
14 Hilton was deceased at the time of the instant PCR hearing.
15 Her name is spelled both Sharay and Shray in the record.
16 We are most grateful for the helpful written and oral advocacy of the amici.
17 The only portion of Rand's testimony that arguably could be read to suggest that Turner and Wilson were on the ground when they were shot was when she said that “[t]hey lay right next to each other[.]” We interpret that remark to mean that the victims' bodies ended up on the ground next to each other, as shown in the crime scene photographs, not that they were lying down before they were shot.
18 Rand was even uncertain about whether the transcript she read was of her police interview.
19 The court found that Kahn was not credible because he was “trying to help a former client” and the new attorneys “convinced” him that he should have done more at trial. We note, however, that it was apparent at trial and sentencing that Kahn believed that Baker's conviction was unjust. The court gave no reasons for its finding that Gumminger was not credible, and specifically found that he was credible about one thing, that he and Baker discussed the problems with calling Redden as a witness given her lack of credibility. See Ways, 180 N.J. at 196 (“We find it somewhat curious that the PCR court found [the witness] incredible in all respects but this one.”).

20 Rand's testimony that the shootings lasted a couple of seconds also undercuts the State's theory that one of the defendants may have fired a revolver, because it left no time for the shooter to manually remove the three spent rimless casings from the revolver.

21 We further note that a motion for a new trial under Rule 3:20 is not governed by the procedural limitations expressed in Rule 3:22. Rule 3:20-1 provides an independent avenue for relief where "it clearly and convincingly appears that there was a manifest denial of justice under the law."

22 Hence, we do not reach the more expansive question of whether inadmissible evidence could justify granting defendants a new trial. For example, we do not rely in our decision upon the arguably inadmissible social science experiment performed by the defense, which tested what a group of non-jurors thought about what initials for a shooter were uttered by Rand on the audio of her police interview.

23 In April 2019 the Attorney General's created a Statewide Conviction Review Unit and Statewide Cold Case Network, although the Attorney General has not indicated that these two cases are part of that review initiative.

24 The judge recently passed away. Nothing in this opinion or its outcome detracts from the judge's many years of dedicated and illustrious service to the public and the legal profession.

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

STATE of New Jersey, Plaintiff–Appellant,
v.
Eric KELLEY and Ralph Lee,
Defendants–Respondents.

DOCKET NO. A–1266–17T3
|
Argued February 12, 2018
|
Decided March 12, 2018

On appeal from Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 93–10–1183.

Attorneys and Law Firms

Robert J. Wisse, Assistant Prosecutor, argued the cause for appellant (Camelia M. Valdes, Passaic County Prosecutor, attorney; Robert J. Wisse, of counsel and on the briefs).

Vanessa C. Potkin argued the cause for respondent Eric Kelley (The Innocence Project, attorneys; Vanessa C. Potkin, on the briefs).

Paul Casteleiro, Legal Director, argued the cause for respondent Ralph Lee (Centurion Ministries, Inc., attorneys; Paul Casteleiro, on the briefs).

Before Judges Sabatino, Ostrer and Whipple.

Opinion

PER CURIAM

***1** This criminal matter arises out of the 1993 robbery and killing of a store clerk. After separate jury trials in 1996, defendants Eric Kelley and Ralph Lee were each found guilty of felony murder and other offenses arising out of the fatal attack.

One of the key items of evidence moved into evidence and discussed by the State's witnesses at both trials was a baseball cap found at the crime scene. One witness claimed to have seen defendant Lee wearing the cap at the store, although defendant Kelley told the police that he himself owned the cap and that he had been wearing it there. Using technology available at the time, DNA testing excluded Kelley as a contributor to the DNA found on the cap but found Lee could have been a contributor.

Defendants' convictions and sentences were upheld on direct appeal, and their attempts to gain collateral relief in post-conviction petitions through 2010 were unsuccessful.

In 2010, upon a motion by defendants, the trial court ordered DNA testing on the cap be performed again, using improved technology that had developed since 1996. The results of the retesting ruled out both defendants as contributors. The new testing instead matched the DNA on the cap to a third party from the same area, who had been previously convicted of a knife-point robbery and who had been released from prison only three months before the 1993 incident.

Based on the new DNA results, both defendants moved for a new trial. Following nine days of evidentiary hearings, the trial court granted defendants' motions. Both men were subsequently released from prison on bail.

On leave granted, the State appeals the new trial order. The State argues that the trial court abused its discretion in granting defendants' motions. Fundamentally, the State asserts there was ample other evidence at defendants' trials, including their confessions, to support their guilt, and that any error in admitting evidence of the cap at those trials was harmless.

For the reasons that follow, we affirm the order granting defendants' new trials. We agree with the court that the new DNA results provide substantial proof of third-party guilt, thereby justifying new trials at which such exculpatory proof can now be presented by defendants.

I.

Because the proofs presented at defendants' successive trials varied in some respects, we discuss them separately. Although our discussion is not comprehensive, we present the facts in considerable depth, in light of the State's "harmless error" claims.

A.

Facts Developed at Kelley's Trial

On the morning of July 28, 1993, twenty-two-year-old Tito Dante Marino ("Tito" or "the victim")[1] was working as a clerk at Victoria's Video, a video rental store on Union Avenue in Paterson. The store, which also sold VCRs, cameras, car radios, speakers, and video accessories, was owned by Miguel Victoria, Tito's uncle. Victoria was also working at the store that day. The store had a front area open to the public, plus several rooms in the back used for storage and other purposes.

***2** Sometime around noon on July 28, Victoria left to run some errands, leaving Tito alone in the store. Shortly before 1:00 p.m., Victoria's sister, Guillermina Marin, who owned a travel agency next door, walked by the video store. She saw Tito standing on a yellow chair (also described in the record as a stool) working on the store's air conditioner.

At approximately 1:45 p.m., Marin, who was back at work next door, was summoned to the video store. She discovered Tito lying face-down surrounded by blood on the floor of a narrow storage area in one of the back rooms. Victoria and others rushed to the store. The store was in disarray, with videotapes scattered on the floor and the cash register open. Although the family called for help, Tito died before he could be taken to the hospital by emergency personnel.

Following an autopsy on July 29, the medical examiner, Dr. Rudolf Platt, determined that Tito had sustained six stab wounds: five to the upper body, including one that penetrated his heart, and others that perforated major organs. Dr. Platt also noted potentially-lethal blunt force trauma to the right side of Tito's forehead and the top of his head. The two blows to Tito's forehead and the three blows to the top of his head caused not simple cuts, but lacerations.

Dr. Platt also found abrasions on Tito's forehead, shoulders, and elbow. He suggested these could have been caused by the assailants pulling Tito from place to place. There were also superficial cuts and abrasions on Tito's hands and legs, which Dr. Platt thought were likely defensive wounds.

Dr. Platt concluded that Tito died from multiple stab wounds to his chest and abdomen, plus multiple blunt force trauma to the head. He was "partially" persuaded that Tito was stabbed before he was struck in the head. Dr. Platt thought so because there was much less bleeding from Tito's head, his hair was not matted with blood, and a stab wound to the heart would cause blood to immediately start draining from the body. Dr. Platt did not offer an opinion as to why only a limited amount of blood was found behind the counter and down the hallway leading to the back rooms of the video store.

During its investigation, police determined that $150 in cash, a VCR, three car radios, and five watches were missing from the store. An overturned yellow stool with blood on it was discovered in one of the back rooms. A green plaid hat and a bloody facial tissue also were recovered from the scene.

Detective Richard Reyes, an officer who then had eight months of experience in the Detective Bureau of the Paterson Police Department, served as the lead detective on the case. On July 29, Reyes spoke with Carmen Paredes, a customer who had stopped by the video store at approximately 1:20 p.m. on July 28. Paredes related that, upon entering, she nearly bumped into a black man and glanced up at his face. She recalled the man was between twenty-five and thirty years of age; taller than her height of five feet, five inches; and wearing a green sweater, jeans, and a green cap backwards on his head. Paredes confirmed that the green plaid cap found in the store was the one she had seen worn by the man. She looked through a large book of photos, but was unable at that time to identify the man she had seen.

The police also spoke with another customer, Majdi Mousa, who had stopped by the store to return a video at approximately 1:30 p.m. on July 28. Mousa recalled that, upon his arrival at the store, there was no one in the front room. Then, a person Mousa described as a roughly six-foot tall black male in his mid-twenties came out from the back area of the store. The man told Mousa to put his video on the counter and leave. Mousa observed that the man was not wearing a cap; had blood dripping from his ear; had blood and scratches on his right arm; and was mumbling and "acting nervous." Mousa saw no blood on the floor. Although Mousa viewed photos at the police station on July 28, he likewise was unable to identify the man he had seen in the store.

***3** On July 30, Detective Reyes and several other detectives went to a nearby apartment building at the intersection of Union Avenue and Jasper Street, where they found defendant Ralph Lee, a young black man. Lee agreed to accompany the officers to the police station to answer some questions about an "incident" that had occurred.

While waiting outside of the apartment building, Reyes observed an approaching black man who he thought "fitted the description." The man hesitated and crossed the street upon noticing the police presence. Reyes and another officer stopped the man, told him they were investigating a crime, and asked him to come down to the police station. The man identified himself as defendant Eric Kelley (also known to others as E.K.). He stated that he lived nearby, and agreed to go with the officers.

Kelley and Lee were transported to the police station in separate cars. Thereafter, they were each interviewed in separate rooms.

Reyes and another police detective, Michael Finer, first questioned Kelley. Kelley's prior record consisted of one juvenile conviction for assault, four non-violent municipal court convictions, and one out-of-state conviction for possession of cocaine with intent to distribute.

Kelley initially was untruthful to the officers about his whereabouts at the time of the murder. When the officers attempted to corroborate his story by calling his mother, he became depressed. Kelley then admitted that he was not telling the truth. Reyes thereupon placed Kelley under arrest.

After waiving his Miranda[2] rights, Kelley gave a statement that was neither recorded nor videotaped[3] but was typed up by Reyes. In that written statement, Kelley initially stated that he was twenty-eight years old, had graduated from high school, and was not under the influence of either drugs or alcohol. He related that at approximately 1:30 p.m. on July 28, he was with Lee and David Hancock (a white man) and they decided to rob Victoria's Video on Union Avenue. Kelley described in his written statement what thereafter occurred as follows:

> I entered the video store and [Lee] came in behind me, while [Hancock] stayed outside as the look out. The guy [i.e., the victim] was behind the counter and I had the knife out already, so I went to him and stabbed him. [Lee] came behind me and when the guy grabbed me [Lee] started to beat him on the head. The guy wasn't fighting and when he went down we picked him up and put him in the back room. I had blood on my hands and I put the knife in my pocket. Me and [Lee] started to take the radios from the counter and we put it in a bag. We then left the store, to go sell the VCR and the car radio[s].

Kelley later clarified that Hancock did not help him and Lee deposit the body in the back room. He stated the three men stole "$150" from the cash register, some tapes, several car radios, and a VCR. Kelley further stated the victim, whom he did not know, was Hispanic and "about twenty-two years old."

According to Kelley's statement, he and Hancock sold the watches and tapes to "Bob," the owner of nearby Bob's Supermarket. Bob bought everything except the VCR, which Kelley said had "blood all over it." Kelley cleaned the VCR, and the robbers sold it to the owner of a nearby bodega. Kelley stated that they used the money they received in exchange for the stolen goods to buy four bags of drugs. The pair then met up with Lee "at his place" and "sniffed the dope."

***4** According to Kelley, neither he nor the other two participants were injured in the robbery. Kelley told police he did not see any customers enter the video store during the incident. He claimed that he got the victim's blood on his hands and clothes. Kelley gave police permission to retrieve these clothes from a hamper at his home.

Of particular note for the present appeal, Kelley told police that he was wearing a green and purple plaid cap at the time of the robbery. Kelley further claimed the plaid cap police found at the store was his.

According to Detectives Reyes and Finer, Kelley also told them that he discarded the knife used to stab the victim, a folding knife with a black handle, in an alleyway. Police officers thereafter searched for both the stolen items and the knife, without success. The supermarket owner (Bob) and various bodega owners denied purchasing the stolen goods. Police did not recover Kelley's clothes, which Kelley's mother claimed to have washed.

The same day they arrested defendants, the police located and arrested Hancock and brought him down to the station. Detectives Finer and Hancock sat down at Finer's desk, which was about twelve feet away from where Detective Reyes happened to be sitting with Kelley. After Kelley identified

Hancock for Reyes, Reyes heard Hancock say something to Kelley. According to Reyes's testimony, Kelley waved his hand and responded, "Man, just give it up."

On July 31, Mousa returned to the police station and was shown two photo arrays, one which included Kelley and another which included Lee. Again, Mousa was unable to identify from the photos the man he had seen in the video store.

On August 4, Paredes was shown by Reyes two photo arrays, one which included Kelley and another which included Lee. This time, Paredes identified Lee as the man she had seen in the video store wearing the green cap.

Victoria told police that he knew Hancock, who would sometimes come in to rent videos. Victoria also told police he knew Lee, who lived with his father a block from the store. Victoria claimed he had seen both Hancock and Lee outside the video store on July 27.

DNA and Other Forensic Testing

Testing of the trace amounts of DNA on three cuttings from the inside lining of the cap revealed before Kelley's 1996 trial that: (1) Kelley was excluded as a contributor to the DNA on the cap; (2) Lee was excluded as a contributor to the DNA on the cap if the DNA was from only one person; and (3) Lee was not excluded as a contributor to the DNA on the cap if the DNA was from two or more people.

The DNA analyst, FBI agent Harold A. Deadman, testified that, although possible, he would not expect "someone putting a hat on [and] taking it off, to transfer much of any DNA." Agent Deadman further stated that it was not possible to determine when DNA was transferred to, or how long it had been on, a particular object.

Other forensic testing done at the time revealed that there was blood from an unknown human source on the facial tissue recovered at the scene. There was blood, but no skin, on the fingernail clippings from the victim. Latent fingerprints found at the scene did not match either defendant.

Dennis Williams's Observations of Defendants Before and After the Robbery

On August 11, 1993, police spoke with Dennis Williams, another fact witness. Williams stated that, at approximately 1:15 p.m. on July 28, he and William Hanley picked up some free food at St. Mary's Church on Union Avenue, one block away from Victoria's Video. When they came out of the church, they spoke briefly with Kelley, Lee, and Lee's sister Lynn, who were also interested in getting some food. Williams then went off alone and tried unsuccessfully to sell some of the food at Bob's Supermarket.

***5** When Williams rejoined Hanley at approximately 1:50 p.m., Hanley was trying to fix a broken-down van at a Union Avenue intersection four blocks from Victoria's Video. Williams noticed Kelley and Hancock were standing across the street. A few minutes later, Lee, who appeared to be coming from Lynn's house near the intersection, joined Williams and started teasing Hanley. Lee then walked back and forth several times between Lynn's house and the van.

According to Williams, at one point, Kelley and Hancock came over. While the men were "all goofing around the van," they noticed a number of police cars heading towards Victoria's Video with their sirens blaring. They asked some people what was going on, and were told "someone got shot ...."

Williams recalled that Kelley then said, initially to Hanley, and then to both Williams and Hanley, "Why you do that man for? ... Why you do that? ... Why we kill that man? Why we kill that man before for diesel (i.e., drugs)?" Later in his testimony, Williams alternately recalled Kelley's words as: "Why we do that man? Why you all do that? ... Why you did that? Why did we do that? Why did we kill that man over a bag of dope? We shouldn't have shot the man over a bag of dope."

According to Williams, Kelley followed up these comments by stating, "So what, I married an ax murderer." Williams asked Hanley what was wrong with Kelley. Hanley replied that Kelley "is bugging like that sometimes." Shortly thereafter, the group broke up, and Williams, Kelley and Hanley walked down to Victoria's Video and learned that someone had been stabbed. Williams did not see any blood or scratches on Kelley. Nor did Williams see Kelley holding any electrical equipment.

Defense Proofs at Kelley's Trial

Kelley declined to testify at his trial. He did present the testimony of Hanley, who related that between 12:30 and 1:00 p.m. on July 29, he and Williams had stopped at St. Mary's Church and got on line to pick up a free food package. According to Hanley, when they came out of the church at

about 1:10 or 1:15, they ran into Kelley, Lee and Lynn, and Lee's father, who lived next door to the church. Hanley and Williams then tried unsuccessfully to sell the food at Bob's Supermarket.

According to Hanley, on their way home, at about 1:30 p.m., the group saw a man with a disabled van and Hanley offered his help. While Hanley was working on the van, he saw Kelley across the street talking to Williams and then Hancock. Lee showed up a few minutes later. Hancock and Lee then left the scene. At about 2:15 or 2:20 p.m., when Hanley was finished with the van, he saw the police cars heading towards the video store.

Williams, Kelley, and Hanley then walked down to see what was going on. While Kelley and Williams joined the crowd in front of the video store, Hanley spoke with a nearby shop owner, who told him that someone was shot or had his "neck cut." Hanley did not notice any blood on Kelley's clothes or body, or that Kelley had been injured.

The Summations [4]

In his summation, Kelley's trial counsel raised several factual questions bearing upon reasonable doubt. He argued that in light of Paredes's identification of Lee, the man seen by Mousa was not Kelley, but Lee. Counsel emphasized that Paredes had stated Lee was wearing the cap, and, moreover, Lee's DNA was potentially found on the cap. Counsel questioned why, as had been claimed by Williams and Hanley, Kelley would have returned to the video store where he allegedly had just "carved up" the victim. Counsel also wondered why no one saw blood on Kelley, despite the gory scene at the store.

***6** Apart from these factual points, Kelley's attorney argued that Detective Reyes, with his limited experience, should not have been heading this allegedly "botched" investigation. He suggested that, if the police had done further testing, some of the blood at the scene might have belonged to the man seen by Mousa. Counsel noted the blood on the stool had not been tested to see to whom it belonged.

Kelley's counsel challenged the State's contention that Kelley had immediately confessed to police after they threatened to call his mother. He claimed that Reyes "fed" information in the typed confession to Kelley. In this regard, counsel argued it was unlikely that Kelley knew the victim was exactly twenty-two years old, and that exactly $150 had been taken from the store's cash register. Counsel further asserted that police were aware of all of the information in the confession before they questioned Kelley.

In his own summation, the prosecutor argued that the State had amply proved Kelley's guilt by direct and circumstantial evidence. The prosecutor insisted that two killers and one lookout were needed to accomplish these crimes. He emphasized that Paredes saw Lee shortly thereafter at 1:20 p.m. or 1:25 p.m., and that Mousa saw a person who was presumably Lee at 1:30 p.m. with the victim's blood on his head. The prosecutor maintained that it was feasible for the men to have committed the murder, sold the items, purchased drugs, gotten high, and been back out on the streets, all in about twenty-five minutes.

The prosecutor theorized that Kelley's conscience had prompted his confession, which was replete with details. The prosecutor argued it was inconceivable that the police had framed Kelley. He emphasized that the officers would have had to have been morally depraved to do so, and that there would have been no need for them to have followed up on the information in Kelley's statement. The prosecutor pointed out that police had not then known that Lee and Kelley were seen near St. Mary's Church at 1:15 p.m., or that the three also had been seen in the area shortly before 2:00 p.m., as later confirmed by Williams and Hanley. The prosecutor further noted that Parades ultimately had independently and crucially identified Lee. He asserted the police "made efforts" with the cap, but could not really "draw any conclusions" from the DNA results. He also emphasized Kelley's self-incriminating statements made after the robbery, as reported by Williams.

B.

Facts Developed at Lee's Trial

At Lee's trial several months later, the prosecutor called twelve of the same witnesses who had testified for the State at Kelley's trial. Their testimony was largely the same as to the circumstances of the homicide; the victim's cause of death; the police response; the various witness identifications; the DNA evidence; the blood found on the victim's fingernail clippings; the failure to identify latent fingerprints found at the scene; defendants' conduct after the homicide; defendants' eventual arrest; Kelley's statement to Hancock at the police station; and Kelley's confession, which was also admitted into evidence at Lee's trial.

An additional witness for the State, Detective Louis Stell, testified at Lee's trial that he spoke with two other officers on July 30. Stell testified that, as a result of that conversation, he joined other officers at a certain apartment building at the intersection of Union Avenue and Jasper Street.

***7** On July 29, 1993, the police received a phone call from a Paterson resident, Alice Nieves. Nieves reported that she was at a laundromat on Union Avenue when she had overheard three young black women talking about the homicide. According to Nieves, the women said that the victim had been killed by two black men and a white man. Nieves did not know these women, but believed that they lived in a certain nearby apartment building at the corner of Union Avenue and Jasper Street. Police tried without success to locate the women.

On July 30, the police received a tip from a confidential source, who had stated that two black men and a white man had been in front of Victoria's Video on July 28 around the time of the homicide, and that two of the men, one known as "K.C.," and the other who was the son of Mr. Lee, could be found on the second floor of the apartment building at the corner of Union Avenue and Jasper Street.

According to Detective Stell, he went up to the second floor of the building and came upon Lee, who agreed to come down to the station. As Stell recalled it, Lee initially denied any knowledge of the murder. Stell was about to let him leave when Detective Reyes called him out and informed him that Kelley had confessed and implicated Lee.

The officers then arrested Lee and read him his Miranda rights. According to Stell, the officers thereafter started giving Lee "little bits of information" obtained from Kelley, admittedly to convince Lee that the authorities did, in fact, know of his involvement in the homicide. After some further discussion with the officers, Lee provided a confession similar to Kelley's, which was neither recorded nor videotaped but typed.

Lee's Confession

In his own confession, Lee stated that he was thirty years old, completed two years of college, and was not under the influence of either drugs or alcohol. Lee had no prior criminal record.

Lee told the officers that, on July 28, both he and Hancock agreed to participate in Kelley's plan to rob the video store. In his written statement, Lee described what occurred at the store as follows:

> Me and [Kelley] went into the store, and [Hancock] stood outside as the look-out. I then stayed by the door and [Kelley] walked up to the counter. [Kelley] had a few words with the guy [i.e., the victim] behind the counter, then [Kelley] stabbed the guy over the counter. Then he walked over to the other side of the counter and kept stabbing the guy, that's when I ran to help [Kelley]. The guy was still moving and I hit him on the head with a car radio that was on top of the counter. I hit him on the head about three times because he was still trying to get up. He then tried to get up again, and fell hitting his head on a chair. I moved the chair to the back of the store because it had blood on it. Then me and [Kelley] picked up the body and carried it to the back room [leaving it face-down].

Lee later clarified that Kelley had initially stabbed the victim two times "from over the counter." He confirmed that the "chair" the victim hit his head upon was more precisely the bloody yellow stool found at the store.

According to Lee, after depositing the victim's body, Hancock came in and helped Kelley take some radios and a VCR. Meanwhile, Lee grabbed a "rag" that was in the store and attempted to wipe blood off the floor behind the counter. Kelley and Hancock then departed, leaving Lee alone in the store, allegedly searching for anything else to take.

Lee claimed that, while he was in the store alone, a woman, whom he described as "a dark skin Spanish lady about forty years old medium buil[d] about 5′4″" came in asking for the owner. Lee said he told her that "no one was here right now." Thereafter, a man, whom Lee described as "Spanish about 18 or 20 years old slim build about 5′7″," also walked into the store with a videotape to return. Lee told the man to leave the videotape on the counter.

***8** Lee then left the store. While heading to Lynn's nearby apartment, he caught up with Kelley and Hancock, who said that they were going to go sell the stolen items. About an hour later, Lee again met up with Kelley and Hancock, who had four bags of heroin. The three men went to Hancock's house to get high. According to Lee, Kelley and Hancock had not been able to sell all the stolen goods. They left some of the items "in the alle[y]way of the liquor store across the street from [Lee's] sister[']s house."

Lee told police that on the day of the robbery Kelley was wearing a white short-sleeved shirt, while he was wearing brown pants and a beige, green, and blue-striped shirt. Lee did not recall getting any blood on his clothes and said that his clothes were at his father's house.

Additional Testimony

Detective Reyes testified that, after Kelley had identified Hancock in the police station, Hancock said to Kelley, "I told you not to say anything." This is when Kelley allegedly responded by waving his hand and saying, "man, just give it up."

Reyes further stated that the officers who went looking for Kelley's clothes never found them, even without blood, and that Kelley's mother said she had washed the clothes in the hamper.

Reyes stated that he interviewed another man, James Thompson, the day after the homicide. Thompson had been in Victoria's Video on July 28. He told police he saw a black man behind the counter, whom he had never seen before. Thompson looked at police photos, but was unable to make an identification. Reyes did not take a statement from him.

Two days later, on July 31, Thompson returned to the station at Reyes's request and looked at the two photo arrays containing the defendants' photos. Thompson was again unable to identify the person he had seen.

Paredes once again testified for the State at Lee's trial. Notably, during her cross-examination, Paredes claimed that when she returned to the police station a second time on August 4 to look at photos, Detective Reyes told her that a suspect from the robbery had been arrested.

DNA Proof at Lee's Trial

The DNA analyst, Deadman, testified at Lee's trial and related the DNA results. Again, Deadman explained there were many variables as to why one person's DNA and not another's might show up on a cap, such as: (1) the length of time the cap was on the person's head; (2) the activity the person was involved in; (3) whether the person was perspiring; and (4) how frequently the person washed their hair.

Joselito Versoza, a forensic scientist, also testified for the State. She discovered blood, but no skin, on the victim's fingernail clippings. Versoza theorized that the absence of skin on the clippings could indicate the lack of a struggle.

As he had at Kelley's trial, the medical examiner, Dr. Platt, opined that he was reasonably certain that the victim had been stabbed first and then struck in the head. Dr. Platt explained that, although the lacerations were very significant, the victim's hair was not matted with blood. Dr. Platt believed the victim had already bled considerably from the stab wounds such that blood was no longer being pumped effectively to his head.

Lee's Testimony

Lee took the stand in his defense, and denied he had killed the victim. Lee claimed that he confessed to police because he had been threatened by someone the morning after the murder, and that he was afraid of this person and fearful for his life and the lives of his family members. Lee claimed that he had been handcuffed before he was taken to the police station and that the police beat him up at the station.

***9** According to Lee, the police told him the details of the crime, and he merely agreed with what they said. However, at the end of his cross-examination, Lee acknowledged that he volunteered to police that he saw Kelley stab the victim twice over the counter. On redirect, though, he insisted that nothing in his confession about the crime was true.

Lee testified that he was regularly in the area of Victoria's Video, because he lived there. He stated that, shortly after 1:00 p.m. on July 28, he tried to get free food at St. Mary's Church and then went to Lynn's house to watch a soap opera and have lunch. At approximately 1:50 p.m., he left Lynn's house and spoke with Hanley, who was attempting to repair a van.

Lee acknowledged that, in the summer of 1993, both he and Kelley abused heroin. He stated that Kelley had a plate in his head, was "kind of off" and that "[h]is head [wa]s not straight." Lee noted that Kelley had been in an accident

and afterwards Kelley was so changed that "anybody can influence him to say anything."

Other Defense Witnesses and Proofs at Lee's Trial

Several other witnesses testified on Lee's behalf. Reverend Henry Speidell, Lee's sister Lynn, Hanley, and Ralph Lee, Sr., all testified about Lee's activities on July 28 regarding the food distributed at St. Mary's Church and the broken-down van. In particular, Lynn claimed that Lee had been with her at her house from 9:00 or 10:00 a.m. until 1:55 p.m. on July 28. Lynn admitted, though, that she did not inform the police of this at the time of the murder.

Hanley maintained that neither Lee nor Kelley was acting strangely while Hanley was working on the van, and that Lee did not have any blood on him and was not carrying any watches. Hanley recalled that Kelley was wearing a baseball cap. He also remarked that Kelley "always acted strange ...."

Summations at Lee's Trial

In his closing argument, Lee's trial counsel attempted to undermine the State's proofs in many respects. He stressed that the descriptions given by Paredes and Mousa of the man they allegedly saw were inconsistent. He also noted that, contrary to Lee's confession, Paredes never mentioned speaking to a black man in the store. Counsel suggested that Paredes's identification could have been the result of her seeing Lee on another occasion.

Lee's counsel argued that Lee's confession had been constructed by the police and that it was a "patchwork" of information with inexplicable omissions and errors. He noted that Detective Stell had admitted that he "fed" information to Lee. Moreover, the police allegedly had instilled fear in Lee.

Lee's counsel questioned how the murder and its sequelae could have happened in only twenty minutes. He noted how Kelley had not been seen with a bloody shirt during the twelve-block walk to his home. Counsel urged that the DNA evidence linking Lee to the cap did not necessarily mean that Lee had been involved. Finally, counsel stressed that Lee had no prior criminal record or history of violence.

During his own closing argument, the prosecutor [5] insisted that the police had competently investigated the case, and that Lee's guilt had been clearly proven. The prosecutor emphasized that Williams and Hanley were able to place Lee near the video store only minutes before the murder, and again in the area about twenty minutes after the murder. He emphasized that Paredes had identified Lee. He argued that there could have been a second "Spanish" woman who came into the video store, with whom Lee allegedly spoke.

***10** The prosecutor argued that Lee had confessed truthfully because of his guilty conscience. He submitted that the confessions of Lee and Kelley were not inconsistent on the main points. As he had at the Kelley trial, the prosecutor maintained the police would have had to have had "moral depravity" to frame Lee. He also questioned why the police would have continued with the investigation if they were "framing" Lee.

II.

In February 1996, the jury at Kelley's trial found him guilty of felony murder, conspiracy, robbery, and two weapons offenses. The trial court sentenced Kelley to life in prison, with a thirty-year parole disqualifier. This court affirmed his conviction in an unpublished opinion. State v. Kelley, No. A–6192–95 (App. Div. June 5, 1998). The Supreme Court denied certification. 157 N.J. 545 (1998). Subsequent collateral applications by Kelley in both the state and federal courts were unsuccessful.

In April 1996, a separate jury convicted defendant Lee of murder, felony murder, robbery, conspiracy, and two weapons offenses. The trial court [6] sentenced Lee to life in prison, with a thirty-year parole disqualifier, on the murder charge, plus a consecutive sentence of twenty years with a ten-year parole disqualifier on the robbery charge. This court affirmed Lee's conviction in an unpublished opinion. State v. Lee, No. A–5752–96 (App. Div. June 22, 1999). The Supreme Court denied certification. 162 N.J. 487 (1999). Collateral applications by Lee in both the state and federal courts were likewise unsuccessful. [7]

III.

After a motion by defendants pursuant to N.J.S.A. 2A:84A–32a, the trial court ordered that certain evidence from the 1996 trials be retested for the presence of DNA, using updated technologies. After receiving the results of this retesting, which implicated a third party, both defendants moved for new trials based on newly-discovered evidence.

The trial court presided over a nine-day evidentiary hearing that intermittently spanned from September 2016 to January 2017. During that lengthy hearing, defendants presented extensive testimony from several experts and two fact witnesses. The State called Detective Reyes. The State did not contest the credentials of defendant's expert witnesses, although it did unsuccessfully object to the court's consideration of some of the defense's proffered testimony.

The Retested DNA and Other Forensic Evidence

For the purposes of our present analysis, the most significant witness who testified at the new trial hearing was Charles Alan Keel, an expert in forensic DNA testing and analysis. Keel has worked for over thirty years for various law enforcement agencies and in private laboratories in various states. He has performed DNA and other forensic analysis in over 2,000 cases, and has testified as an expert witness more than seventy times.

Keel testified that, as of 1994 when this murder was investigated, DNA testing from a sample could either eliminate a contributor or include him or her as part of a possible group of contributors. Currently, according to Keel, DNA testing can discriminate individual sources of biological evidence. Unknown DNA profiles can be identified by searching the Combined DNA Index System ("CODIS"), a database of over fifteen million DNA profiles of known criminals and others, for a match.

***11** Keel explained that current technology allows for the recovery of DNA from samples that were merely touched by a person for a brief period of time. In some cases, ten to fifteen seconds is all that was needed. He confirmed that a sample of skin cell DNA can be obtained from dried sweat, where skin cells have accumulated. Keel expected to find biological material from the person who wore the cap, recovered from the video store, during the commission of the crime.

Keel tested seven areas known to be repositories of biology that would be left by the habitual wearer of the cap. This "owner biology" would be DNA imparted by someone who repeatedly wore a particular article of clothing, such as the cap in this case, which was not frequently laundered. Such owner biology would be generally distributed in places where an item was normally handled, or where there was rubbing of skin.

According to Keel, in each of the seven spots on the cap tested in this case, at least 99.9% of the DNA found belonged to one individual. There were two to four other minor contributors on five of the spots, while two spots essentially produced a single-source result.

Notably, the retesting revealed no DNA from either defendant Kelley or Lee found on the cap. Keel searched the CODIS database, and determined that the habitual wearer of the cap was a known criminal named Eric Dixon.

Keel also evaluated the facial tissue from the crime scene that appeared to have blood on it. Testing revealed that the non-stained portion of the tissue solely contained the DNA of a woman who was related to the victim. Keel found no DNA from either defendant on the non-stained portion of the tissue. The blood on the tissue was determined to be from the victim.

Keel also retested the fingernail clippings from the victim, and he confirmed that no DNA foreign to the victim was found on the fingernail specimens.

Attempts to Interview Dixon

Joseph H. Aronstamn, a private investigator called to testify by the defense, was hired in 2015 through the Innocence Project organization to contact Dixon. Aronstamn traveled to Dixon's home in Virginia, where he spoke to him in December 2015. Dixon confirmed to Aronstamn that he had been living in Paterson in July of 1993, but denied that he knew of Victoria's Video or had heard of the murder. Aronstamn showed him a photo of the cap. Dixon insisted that he did not recognize it, that it was not his, and that he did not know to whom it belonged. Aronstamn did not tell Dixon that his DNA was found on the cap.

Aronstamn visited Dixon again two weeks later and asked if he would sign a statement. After leaving the room for ten minutes, Dixon returned and said that his attorney told him not to sign anything.

Blood–Stain Analysis by Palmbach

Another defense expert, Timothy Palmbach, a forensic scientist specializing in crime scene reconstruction and bloodstain analysis, testified at the hearing. Palmbach is a professor and the chair of a college forensic science department. He worked for the Connecticut State Police for twenty-two years and ultimately served as Director of that state's forensic laboratory.

Palmbach was asked to determine whether the evidence in this matter was consistent with the victim being struck and stabbed in the front room of the video store and then carried into the back room. Palmbach concluded that it was not. Palmbach was able to develop a contrary theory that was consistent with the evidence. According to Palmbach, his theory conformed with present-day understanding of blood-stain analysis.

***12** Specifically, Palmbach opined that the victim in this case had been struck in the head behind the counter, ran down the hallway dripping blood from his head, and then was stabbed in the back room where he put up a fight and sustained defensive wounds. Notably, Palmbach believed that the victim was struck with a partially or totally cylindrical object, having a diameter of one and one—half inches.

In support of his theory, Palmbach noted that there was only a minimal amount of blood by the counter and only small scattered droplets of blood in the hallway between the front and back of the store. Because of the distance between the droplets, he believed that they fell from the victim's head as he was moving quickly down the hallway. The evidence showing two lines of blood running down the victim's face also indicated to Palmbach that his head remained upright for a period of time.

Palmbach's opinion that a confrontation and the ultimate stabbing occurred in the back room was supported by several factors. These included the lack of additional blood drip in the front room and hallway; the extensive amount of blood in the middle of the back room; and the bloodstains on the yellow stool indicating that it "changed its orientation during the bloodshedding event." More blood had accumulated in the back room because the victim had now been stabbed, was no longer running, and remained in the back room longer. It appeared to Palmbach that blood fell onto the stool first when it was upright, and then again after the stool had been knocked over. That is because there were stains that were not consistent with the stool in its final position.

Palmbach testified that the height of the bloodstains on the wall in the small area where the victim's body was found supported his conclusion that the victim had staggered into this area and then collapsed face-down onto the floor. Palmbach noted that the area was so small that it was difficult to see how two people could have carried him in.

Palmbach acknowledged that Dr. Platt, the medical examiner, had testified to the contrary that the victim had been stabbed before he was struck. According to Palmbach, the bloodstains supported a different conclusion. Palmbach noted the victim's hair was not matted because there was no impact spatter from the weapon striking a large blood source and projecting the blood outward. According to Palmbach, repeated blows also would not create impact spatter if there was not a lot of bleeding; rather, the repeated blows would create a vertical drip.

Police Interrogation and Investigation Experts

Defendants also presented at the hearing several expert witnesses on issues of police interrogation and investigation.

Dr. O'Connell

The first such expert, Dr. Michael O'Connell, was a forensic psychologist, who has testified as an expert in cases involving false confessions. Dr. O'Connell was asked by defense counsel in this case to determine whether Kelley's personality traits and level of cognitive functioning made it possible for Kelley to have given a false confession in 1993.

Dr. O'Connell found several aspects of Kelley's background to be noteworthy. He first noted Kelley had been diagnosed in 1988 with a traumatic brain injury after being in a serious car accident and thrown from the vehicle. In 1991, Kelley was deemed eligible for Supplemental Security Income ("SSI") after he was diagnosed with organic brain syndrome, i.e., an organic injury that caused a decreased ability to function both cognitively and emotionally, such that he was deemed disabled and unable to work. Further, Kelley's mother was designated as Kelley's representative payee for SSI benefits, because he was found to be incapable of handling his own money.

***13** Dr. O'Connell administered several tests to Kelley, which revealed that Kelley was in the fourth percentile (i.e., the borderline range of cognitive functioning) with ninety-six percent of the population functioning at a higher level. Dr. O'Connell stated that persons who fell below the second percentile are considered intellectually disabled.

In addition, Dr. O'Connell opined that Kelley had difficulties with reasoning, social judgment, working and verbal memory, information processing, and reading recognition. Kelley's test results were consistent with someone who had had a significant brain injury and was suffering from organic brain

syndrome. The expert believed that Kelley had lost twenty IQ points due to his car accident.

Dr. O'Connell had Kelley complete a "suggestibility test" that was specific for interrogation. The expert explained that suggestibility is a risk factor for giving a false confession. Other risk factors include the extent to which the person being interrogated feels: (1) pressured; (2) helpless; (3) that he or she has no control; and (4) that the experience is so unpleasant that the benefit of stopping the interrogation outweighs the long-term consequences of admitting to doing something he or she has not done.

Given that Kelley displayed he was highly suggestible in a non-stressful setting with merely negative feedback, Dr. O'Connell found it was reasonable to conclude that Kelley would be even more suggestible when experiencing the pressure of what the defense contends was an inherently-coercive interrogation. The expert opined that Kelley would have had a marked difficulty making decisions during an interrogation. That difficulty would stem from his cognitive deficits, his limited reasoning ability, as well as his inability to pay close attention to the proceedings, process information quickly, and remember what was going on. According to Dr. O'Connell, Kelley could easily become overstimulated and respond impulsively.

In addition, Dr. O'Connell further noted Kelley stated he was using heroin on the day of his interrogation, and that jail records confirmed that Kelley was experiencing withdrawal symptoms on July 31. According to the expert, drugs and alcohol can affect someone suffering from organic brain syndrome more than a member of the regular population. Kelley's drug use therefore would have further impaired his ability to think clearly during the interrogation.

Dr. O'Connell opined that, if the police officers in this case were "forceful" with Kelley, i.e., confident in their assertions and dismissive of his denials, Kelley would have had a tendency to "fold[.]" In particular, Kelley would have been susceptible to leading or misleading questions, scare tactics, and attempts to lull him into a false sense of security. If the officers provided him with fabricated evidence, he would likely have accepted it as true. According to Dr. O'Connell, Kelley could have said the cap was his because someone else said it was. His memory was "malleable."

On the whole, Dr. O'Connell concluded that, to a reasonable degree of psychological certainty, Kelley was at a heightened risk for making a false confession during his 1993 interrogation.

Interrogation Expert Trainum

Former police detective James L. Trainum, an expert in interrogation techniques, also testified at the hearing as a defense expert. Trainum observed that, for years, the common belief was that people would not confess to a crime that they had not committed unless they were being tortured or they were mentally ill. However, according to Trainum, it has now been documented that false confessions occurred in approximately thirty percent of the cases where there had been DNA exoneration.

***14** Trainum explained that an interrogation did not have to be lengthy for certain suspects to yield to their questions. Coercive interrogation tactics—such as falsely stating there was conclusive evidence of guilt, that a conviction was inevitable, and that a confession offered the only hope of leniency—will have more of a psychological impact on some people versus others. According to Trainum, people who are more susceptible to this type of high-pressure approach could become convinced that there were only two options before them, and that they had to pick the "lesser of the two evils." Those individuals who were at particular risk for making false confessions included juveniles, people with limited social maturity, and people with lower IQs.

According to Trainum, studies of false confession cases have shown that when law enforcement officers obtain false confessions, whether intentionally or inadvertently, they tend to involve these circumstances: (1) erroneously identifying an innocent person as a suspect; (2) using coercive interrogation techniques to convince the suspect that it was a good idea to admit to something he did not do; and (3) unintentionally contaminating the confession by providing the suspect with information, such as details about the crime scene, that he could not know since he was not actually guilty. Trainum further opined that a false confession was more likely if the police failed to test its reliability by verifying and corroborating the information provided.

Trainum believed that police officers often secure false statements or fabricate evidence unintentionally. He suggested that "tunnel vision," i.e., being so convinced of a suspect's guilt that contrary information was disregarded, could play a "very powerful" role. According to Trainum, officers who are so focused on what they think is important

can have a selective memory as to what a suspect actually said.

Trainum questioned the reliability of the confessions in this case in light of the information provided to defendants, the evidence of contamination and the absence of thorough follow-up. He noted in particular: (1) the apparent disregard of Thompson's statement; (2) the new DNA evidence; (3) Paredes's failure to mention a look-out; (4) the odd coincidence of Kelley correctly stating the victim's exact age; (5) the unlikelihood that the victim's head trauma was caused by a car stereo; (6) the leading questions in both statements, such as the police asking Lee whether "anyone wiped up"; (7) the conflict as to where drugs were consumed; (8) Lee's inaccurate inclusion of Paredes in the timeline of events; and (9) Paredes's description of the perpetrator browsing in the store did not match the claimed "blitz" attack on the victim.

Trainum did not believe that the evidence supported defendants' claim that the entire fatal assault occurred behind the store counter. He found it unusual and unlikely that the victim's body was carried face-down and then wedged into the cramped area where it was found. Trainum further questioned the failure of the police to obtain a search warrant to search Bob's Supermarket for the stolen goods and to seize Kelley's hamper to check for residual blood. He also noted that the photo of Lee contained in the photo array stood out, as it had different characteristics than all of the other photos.

Trainum found it "difficult to understand" how defendants would have accomplished everything they said they did in the short window of time between the murder and when they were seen by Williams and Hanley shortly before 2:00 p.m. During this twenty to thirty minute period, defendants claimed to have left the store, avoided being seen with bloody clothes and stolen goods, walked to two different stores to fence the items, hid the murder weapon and unsold items, walked home to change, returned, purchased drugs, used the drugs, and gone back out onto the street.

***15** Lastly, Trainum noted it was unusual that the police were currently doing nothing to investigate Dixon. He believed that this continued disinterest in Dixon further exemplified the "tunnel vision" in this case.

Dixon's rap sheet was admitted into evidence at the hearing, along with his judgment of conviction. Those records revealed that approximately three years before this murder, Dixon had entered a Paterson storefront about a mile from Victoria's Video, pretended to be a customer, pulled out a knife, demanded money and, with the knife at her throat, threatened to kill the owner. Dixon was apprehended and sent to prison for three years. He was twenty-eight years old when he was released. He returned to Paterson a few months before the murder in this case.

Thompson

Thompson was called by defendants at the hearing as a fact witness. He testified that, in 1993, he lived in Paterson and knew the owner of Victoria's Video. Thompson stated that he went into the store around 2:00 or 3:00 p.m. on July 28. A black man was squatting down behind the counter and said "we're closed," so he walked out. Thompson explained that he only saw the man's upper body and head, and could not really describe him, except to say that he appeared somewhat stocky. Thompson claimed to have never seen this man before. He said he was surprised to see a black man working in the store, since the owner, who was Hispanic, typically hired only family members.

The day after the incident, Thompson heard about the murder. He told Victoria that he was willing to speak to the police about the man he had seen in the shop the day before. He said Victoria asked him to do so. Thompson accordingly went down to the police station and looked through a "big book with a lot of photos," but he did not recognize anyone or see the man from the day before.

Two days later, the police called in Thompson again and showed him two "sheets" of photos. He again did not see a photo of the man from the shop, but told police when asked that he did know two of the men pictured, Kelley and Lee. These men were not his friends, but he knew them from the neighborhood. Thompson never heard from the police again.

The State's Rebuttal Testimony from Detective Reyes

As its sole witness at the evidentiary hearing, the State called Detective Reyes, the lead detective. Reyes generally described the investigation undertaken by police. Reyes confirmed that he had destroyed all of his notes pertaining to this case during the two intervening decades, and that his formal report from 1993 was all that was left.

Reyes stated that, on July 29, 1993, he received a phone call from a Paterson resident, Alice Nieves. As we noted earlier in this opinion, Nieves reported that she was at a laundromat on Union Avenue when she had overheard three young black

women talking about the homicide. In particular, the women allegedly said that the victim had been killed by two black men and a white man. Reyes explained that he tried without success to locate the women.

Reyes related that, the next day, July 30, the police received another tip from a confidential source, who had stated that two black men and a white man had been in front of Victoria's Video on July 28 around the time of the homicide, and that two of the men, one known as "K.C.," and the other who was the son of Mr. Lee, could be found on the second floor of the apartment building at the corner of Union Avenue and Jasper Street. Because of this information, the police were able to locate Kelley and Lee and bring them down to the station. Reyes acknowledged that he pursued these two tips, even though none of the eyewitnesses at the video store described seeing more than one black man.

***16** Reyes recalled that Kelley was cooperative during his interrogation and had no difficulty communicating with him. Reyes denied that anyone had threatened Kelley or Lee, told either of them what to say, or carelessly disclosed details to them about the crime scene. According to Reyes, Kelley never said that he was afraid of Lee, or that Lee had forced him to admit to involvement in the murder. Reyes acknowledged that he never asked Kelley how the victim was carried face-down into such a small space. Other than Hancock's name, Reyes could not specify what new evidence he got from Kelley that the police did not already have.

Reyes explained that he had not taken a formal statement from Thompson because he did not make an identification and his information seemed "very basic." Reyes acknowledged that he took statements from everyone else who was in the video store around the time of the homicide, including people who had not seen the perpetrator. Ultimately, Reyes could not say exactly why he did not take Thompson's statement.

Reyes denied asking Thompson if he knew anyone in the two photo arrays. Reyes insisted that, if Thompson had told Reyes he recognized Lee or Kelley, Reyes would have included that information in his report. Reyes also denied that Thompson ever said that he had never previously seen the man behind the counter before. [8]

Reyes denied that he would have told Paredes that a suspect had been arrested before she looked at the photo arrays. He acknowledged that Mousa said the black man he saw was bleeding from his ear and had blood on both his arms and his shirt. Reyes believed that the person who committed this crime did get blood on him, but acknowledged that there was no proof either Kelley or Lee did. Reyes could not recall why Kelley's clothes were not located and taken, even though they had been washed. He did not know whether anyone had asked Kelley's mother if the clothes were bloodstained.

Reyes stated that, to his knowledge, the police had not reopened the investigation or spoken to Dixon since the time his DNA was found on the cap. Reyes insisted, though, that the DNA evidence did not conclusively mean that Dixon had committed the murder, and that he would need to review the case and obtain more information before he would talk to someone about an incident that happened more than twenty years ago.

According to Reyes, if he had known in 1993 that the DNA of Dixon, a black twenty-eight-year-old resident of Paterson who, in 1989, had committed a knife-point robbery in a storefront a few blocks from Victoria's Video, was on the cap, he would not have viewed this proof alone as conclusive evidence and charged Dixon. However, he agreed he would have questioned Dixon as part of the investigation.

Upon being asked what he would do today, whether the case was worth investigating given all the new information, including Dixon's recent denial of ownership of the hat, Reyes responded, "At this point, I still don't have enough information."

IV.

The Trial Court's New Trial Ruling

After considering these proofs from the nine-day evidentiary hearing, and extensive briefing and argument, the trial court issued a lengthy oral decision on September 15, 2017, granting both defendants Kelley and Lee a new trial. Although the court discussed numerous grounds for its decision, its core focus was upon the retested DNA evidence from the baseball cap. The court found that evidence indicative that a third party, i.e., Dixon, had attacked and killed the victim, rather than either defendant.

Among other things, the court found that, given that the identity of the perpetrator was in question here, the DNA on a cap found so close to the victim and identified by an eyewitness was material evidence. The court was persuaded by the "comprehensive" proof that apparently Dixon, and not

Lee, owned the cap. This proof was established through the use of new and enhanced technology and was of a type that would "probably change" the jury verdicts here. In the court's view, this proof was strong evidence that was clearly and convincingly "capable of raising a reasonable doubt as to the guilt of both defendants and [creating] a link between a third party and the crime."

***17** In addition, the court found that the new DNA evidence called into doubt Paredes's identification of Lee as the man she had seen wearing the cap. The strength of this evidence of third-party guilt was magnified by the fact that Dixon had committed a similar crime not far from the video store. Moreover, the court found it significant that as of July 1993, Dixon had been recently released from prison, was then residing in Paterson, and was twenty-eight years of age. The new evidence of Dixon's potential guilt was not merely cumulative, impeaching, or contradictory.

Alluding to Keel's unrebutted expert testimony, the court observed that had either Kelley or Lee been wearing the cap during the crime, they would have left sufficient DNA on the cap for identification purposes, given the sensitivity of current DNA technology. Since the cap only had to have been worn for ten to fifteen seconds for a transfer of DNA to occur, the court reasoned that Paredes's testimony about the length of time she and the man wearing the cap had been together in the store confirmed that the man who wore the cap was identifiable. The court determined that the new DNA evidence thus could lead a jury to conclude that the portion of Kelley's confession, in which he claimed to be the owner of the cap, was false.

The court also found "compelling" certain other arguments made by defense counsel, "in the totality of the circumstances and in the shadow of the new DNA evidence," even though those arguments did not alone meet the criteria for a new trial. In particular, the court was troubled by the way Reyes had presented the photo array to Paredes, which the court noted was inconsistent with current standards under State v. Henderson, 208 N.J. 208 (2011), and highly suggestive.

Additionally, the court was concerned about the police's decision to abandon its theory that one man had committed the crimes—which was based upon the testimony of three eyewitnesses—in favor of a theory that there were three perpetrators, which was premised solely upon "double hearsay" from two informants.

The court also found Trainum's testimony regarding alleged "tunnel vision" and confession "contamination" to be of "great significance." The court was troubled that Reyes had "testified in essence that, even if he had the same quality of evidence regarding the latest DNA of Eric Dixon that was found on a hat described by [Paredes] as being worn by Lee, [Reyes] still would not have considered investigating Mr. Dixon."

The court disagreed with the State that the new evidence of Dixon's DNA and his similar crime would not be admissible before a new jury. It was satisfied that Dixon's judgment of conviction would be admissible under the rules of evidence, and also that the victim or the investigating officers would be able to testify as to the facts of the case that resulted in Dixon's conviction.

The court found that there was other testimony that now had to be considered potentially more significant, in light of the new DNA evidence. In particular, the court noted: (1) the absence of any witnesses who saw the defendants soon after the homicide with blood on their clothes; (2) the apparent inconsistency between the facts set forth in the defendants' confessions and Palmbach's version of events, based upon the bloodstain evidence; (3) the failure to recover Kelley's bloodstained clothes; and (4) the manner in which police had handled the potential testimony of Thompson.

Lastly, the court noted the State's heavy reliance on the defendants' confessions, and greater current awareness in society that false confessions can occur.

***18** For all these reasons, the trial court granted the motions of both defendants for a new trial.

Subsequent Procedural Events

Following the new trial ruling, the State moved for leave to appeal, which we granted. The trial court ordered defendants released on bail, pending the court-ordered new trials. The State filed an emergent application to overturn the bail order, which, after a short interim stay and briefing, this court upheld. The Supreme Court ultimately denied the State's request for emergent relief.

V.

In its brief, the State argues that the trial court's new trial order must be set aside as a "clear abuse of discretion" for numerous reasons. The State generally asserts that the court misunderstood the significance of the DNA retest results, and failed to mention or adequately consider significant other evidence pointing to defendants' guilt.

Specifically, the State contends the court failed to consider properly: (1) the eyewitness testimony of Williams and Hanley placing defendants in the vicinity of the video store on the date of the killing; (2) the expert testimony of the coroner and Joselito Versoza; (3) the inculpatory statements made by Kelley to third parties and the police; (4) the confessions of both Kelley and Lee; and (5) inconsistencies in Lee's trial testimony and that of his alibi witness.

The State further argues the trial court misunderstood Keel's testimony and gave it undue weight. In addition, the State maintains the court did not appropriately consider Reyes's testimony and mischaracterized critical portions of it.

Further, the State argues the court erred in declaring that evidence of Dixon's third-party guilt would be admissible at new trials. It emphasizes that no eyewitnesses had observed Dixon at the video store, and that Dixon's DNA was not found on any other items from the crime scene apart from the cap. In addition, the State notes that defendants both unsuccessfully pursued "third party guilt" theories, albeit without reference to Dixon, at their 1996 trials. The State also faults the trial court for other assorted legal errors.

A.

In order to qualify as newly-discovered evidence entitling a party to a new trial, the new evidence must be: "(1) material to the issue and not merely cumulative or impeaching or contradictory; (2) discovered since the trial and not discoverable by reasonable diligence beforehand; and (3) of the sort that would probably change the jury's verdict if a new trial were granted." State v. Carter, 85 N.J. 300, 314 (1981) (citations omitted); State v. Sullivan, 43 N.J. 209, 233 (1964); State v. Armour, 446 N.J. Super. 295, 312 (App. Div.), certif. denied, 228 N.J. 239 (2016). As to the last element, the test is a probability, not a mere possibility, there will be a contrary result on retrial. Sullivan, 43 N.J. at 233 (citations omitted). All three elements must be met before the evidence can justify a new trial. State v. Ways, 180 N.J. 171, 187 (2004) (citations omitted); Carter, 85 N.J. at 314 (citations omitted).

"[E]vidence that supports a defense, such as alibi, third-party guilt, or a general denial of guilt would be material" under the first prong of the Carter test, where the focal issue at trial is the identity of the perpetrator. Ways, 180 N.J. at 188. In particular, DNA testing showing that another person was the source of the crime scene evidence attributed to defendant would be "material to the issue [of the perpetrator's identity] and not merely cumulative or impeaching or contradictory." State v. Peterson, 364 N.J. Super. 387, 398 (App. Div. 2003) (brackets in original) (citations omitted). DNA test results that "not only tended to exculpate defendant but to implicate someone else" would qualify as proof of the type "that would probably change the jury's verdict if a new trial were granted." Id. at 398–99 (citations omitted); see also State v. DeMarco, 387 N.J. Super. 506, 517 (App. Div. 2006).

***19** As a procedural matter, we are cognizant that defendants, who were convicted in 1996, did not move to have the DNA from the cap retested until 2010 and did not move for new trials until 2016 after the retested DNA results revealed exculpatory information. Generally, under Rule 3:22–12(a)(1), a motion for post-conviction relief must be filed within five years of a defendant's conviction, subject to certain exceptions. One of those exceptions, of great importance here, is where "enforcement of the time bar would result in a fundamental injustice" if there is "a reasonable probability" that a "defendant's factual assertions were found to be true ...." R. 3:22–12(a)(1)(A). Where, as here, the application for post-conviction relief is a second or subsequent petition, such applications must be made no more than a year after the factual predicate was discovered or could have been discovered through reasonable diligence. R. 3:22–12(a)(2)(B).

A recognized basis for excusing these general time bars, is where a defendant offers newly-discovered evidence that raises substantial doubts about his guilt and which could not have been obtained sooner with reasonable diligence. See, e.g., State v. Nash, 212 N.J. 518, 546–49 (2013) (addressing claim of newly-discovered evidence in the context of a PCR application); State v. Armour, 446 N.J. Super. 295, 304 (App. Div. 2016) (where defendant sought new trial based on ineffective assistance of PCR counsel, relying on newly-discovered evidence).

The State also cites Rules 3:22–4 and 3:22–5, intimating that defendants' present arguments for a new trial were either

rejected previously, or could have been raised in previous appeals.

Although the trial court here did not expressly address these alleged procedural bars under Rule 3:22 in its oral ruling, it implicitly treated defendants' motion for relief to be timely. We concur with that approach.

The DNA retesting methods that Keel discussed in his 2017 report did not exist when defendants' cases were tried two decades earlier. Indeed, the DNA testing statute itself, N.J.S.A. 2A:84A–32a, contains no time bar.

The newly-discovered DNA retesting results did not exist within five years of defendants' convictions, nor within the one-year supplemental period for second or subsequent petitions under Rule 3:22–12(a)(2). Defendants moved for an evidentiary hearing and a new trial with reasonable diligence after the retesting indicated Dixon's potential third-party guilt. The new evidence was not a subject of defendants' direct appeals or their prior collateral attacks, nor could it have been. Hence, Rules 3:22–4 and 3:22–5 do not apply.

Absent the DNA retesting results, we are uncertain about whether the additional proofs presented by defendants at the evidentiary hearing (such as the expert testimony concerning alleged false confessions, flawed eyewitness identification, and so on) would have provided a sufficient basis to surmount the procedural bars under Rule 3:22. We need not resolve that question, however, because the DNA retesting results and Keel's unrebutted expert testimony explaining those results, provide an ample basis to qualify as newly-discovered evidence that could not have been discovered sooner. Once that proof was presented, the trial court had the prerogative to consider the testimony of defendants' additional witnesses as relevant to whether the non-DNA evidence in the State's case sufficiently demonstrated their guilt so as to render the DNA evidence insignificant or its omission from the 1996 trials, as the State asserts, harmless. [9] In sum, there are no procedural barriers here to preclude consideration of defendants' new trial motion on its merits.

VI.

***20** We turn now to the substantive heart of the matter: the impact of the DNA retesting results here on the soundness of the verdicts that produced defendants' convictions. In considering the copious record before us, we are mindful of our scope of review.

A motion for a new trial generally " 'is addressed to the sound discretion of the trial judge, and the exercise of that discretion will not be interfered with on appeal unless a clear abuse [of discretion] has been shown.' " State v. Brooks, 366 N.J. Super. 447, 454 (App. Div. 2004) (quoting State v. Russo, 333 N.J. Super. 119, 137 (App. Div. 2000)). Appellate review of such rulings is ordinarily limited to a determination " 'whether the findings made by the trial court could reasonably have been reached on sufficient credible evidence present in the record.' " Ibid.

Here, the situation is a mixed one because the judge who presided over the evidentiary hearing and who granted defendants' new trial motion in 2017 is not the same judge who presided over the jury trials of both defendants in 1996. To the extent the new trial ruling is based on the testimony adduced at the lengthy evidentiary hearings, we accord substantial deference to that judge and his first-hand opportunity to consider the weight of that testimony, particularly Keel's expert forensic testimony. However, insofar as the motion judge's ruling is based upon an evaluation of the records of the 1996 trials, we owe his evaluation no special deference and consider those materials de novo.

Having thoroughly considered the trial court's ruling, in light of these principles and the substantive law, we affirm the order granting both Kelley and Lee new trials. Our affirmance rests fundamentally on the substantial evidence of Dixon's potential third-party guilt that was revealed through the DNA retesting.

A.

A criminal defendant is entitled to introduce evidence that another person committed the crime with which he has been charged, subject to exclusionary considerations under N.J.R.E. 403. State v. Cook, 179 N.J. 533, 566 (2004) (citation omitted). As Keel's expert testimony persuasively explained, the evidence of Dixon's DNA found on the cap and the absence of DNA from either defendant on the cap is—at the very least—substantial evidence of third-party guilt that justifies new trials for both defendants.

The DNA evidence here did not have to conclusively establish Dixon's third-party guilt and totally exonerate Kelley and Lee in order to support a meritorious request for a new trial based upon newly-discovered evidence. Rather, the evidence simply had to show that another person was the source of important crime scene evidence attributed to defendants where, as here, the identity of the perpetrator was a central issue in the case.

Among other things, the relevance of the new DNA evidence was magnified here by: (1) the doubt it cast upon the accuracy of Paredes's identification of Lee, proof which was heavily relied upon by the State at both trials; (2) Kelley's apparently-false statement in his confession that he owned the cap; (3) the testimony of multiple eyewitnesses who saw only a single black man in the video store; (4) Keel's testimony that, with current technology, mere seconds of wear of a cap can transfer sufficient DNA for identification purposes; (5) Thompson's testimony that he told police that he saw someone other than Kelley or Lee; and (6) Dixon's age in 1993, which was consistent with the estimated age of the killer(s), his presence in Paterson around the relevant time, and his prior commission of a similar crime.

***21** As to Kelley, individually, the State stresses he had already been excluded as a contributor of the DNA evidence on the cap at the time of his trial in 1996. But that is not the same as revealing to a jury that the cap belonged to a third party who might well be the real perpetrator. Kelley had already linked himself to the cap through his confession. Kelley's confession that he and Lee committed the crime was echoed by Paredes's (now-questionable) identification of Lee and the then-inconclusive DNA evidence as to Lee.

We agree with the State that the retested DNA evidence does not conclusively establish that Kelley and Lee were not present at the video store and were not guilty of participating in any offenses there. It is conceivable that, at retrial, the State will persuade new jurors that, despite the new DNA results, one or both defendants were guilty beyond a reasonable doubt of one or more of the crimes charged. For instance, the State may now attempt to prove that Dixon, along with one or both defendants, committed the robbery and murder, although that revised theory would clash with certain details within the narratives of the eyewitnesses and defendants' confessions.

We need not forecast here what might occur at any new trials. All we need decide is whether the trial court erred in granting those trials. We discern no such error.

We categorically reject the State's position that the omission of the now-revealed DNA retesting evidence at defendants' 1996 trials was merely "harmless." See State v. Macon, 57 N.J. 325, 340–41 (1971) (regarding harmless error). To the contrary, such exculpatory proof, had it been presented, could easily have engendered reasonable doubt and produced contrary verdicts of acquittal.

DNA evidence concerning the cap was presented in the State's case at both trials, and the cap itself was admitted as a State's exhibit. We recognize that the State did not assert at Kelley's trial that his DNA was found on the cap. But the State did present Kelley's written confession stating that he owned the cap. Moreover, the State maintained at both trials that evidence concerning the cap served to link, directly or indirectly, both defendants to the crime scene. The retesting of the cap now places that evidence in a markedly different light. Indeed, even if no DNA proof had been presented by the State at either 1996 trial, the present DNA results alone would supply an adequate basis for new trials, as critical exculpatory evidence.

The State argues the trial court failed to properly consider the compelling other proofs of defendants' guilt presented at the 1996 trials. For instance, the State maintains that the trial court failed to consider the eyewitness testimony of Williams and Hanley placing Kelley and Lee in "close proximity to the scene of the murder at the relevant times ...." However, the fact that Kelley and Lee had been seen near Victoria's Video was hardly surprising, since both defendants lived in the neighborhood.

Moreover, neither Williams nor Hanley stated that either defendant did anything to suggest that they were about to commit, or had just committed, a crime. Rather, defendants allegedly were initially at St. Mary's Church seeking to receive some free food. When Williams and Hanley saw defendants after the murder had been committed, neither man was bloodied, acting unusually, nor seen in possession of stolen goods.

The State contends the trial court improperly disregarded Williams's testimony about the inculpatory statements made by Kelley shortly after the murder; and Reyes's testimony that he heard Kelley tell Hancock at the police station to "just give it up." However, the significance of Williams's testimony is undercut by the DNA evidence pointing to another possible perpetrator, and also by Dr. O'Connell's testimony as to the magnitude of Kelley's head injury and cognitive decline.

Indeed, Dr. O'Connell's expert opinion bolstered Williams's claim that Kelley was a "strange" person who made odd jokes and was not taken seriously. Likewise, the significance of Reyes's trial testimony was arguably diminished by the new DNA evidence, Dr. O'Connell's testimony, and Trainum's testimony about Kelley's susceptibility to coercive interrogation techniques.

***22** The State further argues that the trial court failed in its ruling to consider the testimony of Dr. Platt and Versoza, which allegedly contradicted Palmbach's reconstruction of the murder. However, Dr. Platt never offered an opinion about why there was not more blood behind the counter and in the hallway. Moreover, Versoza testified at Lee's trial only that the absence of skin on the victim's fingernail clippings reflected a lack of any significant struggle.

The trial court did not definitively conclude that Palmbach was necessarily correct. The court simply recognized that, as noted above, defendants would be able to present at their respective new trials Palmbach's alternate theory of what had occurred at the crime scene.

Next, the State argues that the trial court erred in considering Paredes's identification of Lee in light of the new standards for eyewitness identification announced by the Supreme Court in State v. Henderson, 208 N.J. 208 (2011). As the State correctly notes, the Court in Henderson expressly ruled that its modification of the standards of eyewitness-identification evidence was not to be given retroactive effect. Id. at 220, 302. Even so, we are unpersuaded the trial court here was engaging in an improper retroactive application of Henderson. Rather, the import of the trial court's ruling is that the evidentiary aspects of Henderson (such as the new Model Criminal Jury Instruction [10] on eyewitness identification and the right to present expert testimony on the subject) would apply at any new trials in this case. That is because defendants' original trials would be rendered nullities, and the parties would be required to proceed at the new trials as though there had been no prior trials at all. [11]

The finality of any decision or ruling reached in a trial is negated when a new trial is mandated, such as by a declaration of mistrial. All matters decided at the first trial, such as the admissibility of evidence or the voluntariness of a confession, may be revisited at the second trial. State v. Munoz, 340 N.J. Super. 204, 220 (App. Div. 2001); State v. Hale, 127 N.J. Super. 407, 412–13 (App. Div. 1974). The first trial is deemed a nullity and the parties must proceed as though there had been no trial at all. Hale, 127 N.J. Super. at 412 (citations omitted).

The parties are thus returned to their original positions, and at the new trial, can introduce new evidence and assert new defenses not raised at the first trial. Ibid. (citations omitted). The admissibility of such evidence is generally governed by the law now in effect, and not the rules of admissibility that were in force at the time of the first trials in 1996. See generally N.J.R.E. 101 (regarding the application of the Rules of Evidence).

The State further emphasizes the detailed confessions provided by Kelley and Lee. However, the motion judge was entitled to accept Trainum's testimony that the reliability of the confessions was at least questionable. Kelley's confession may well have been influenced by his diminished mental capabilities. In addition, Lee's confession may have been derivatively tainted by him being advised about Kelley's confession.

We reject the State's argument that the trial court did not appropriately consider Detective Reyes's testimony at the evidentiary hearing. We are mindful that Reyes denied posing leading questions to Kelley, or disclosing information to him, or revealing to Paredes that a suspect had been arrested. Even so, the motion judge had the right as a fact-finder at the hearing to accord Reyes's assertions limited credible weight. State v. Locurto, 157 N.J. 463, 470–71 (1999). The judge apparently found Trainum's competing testimony to be more impressive. Although the State insists that Reyes did not say he would never investigate Dixon, Reyes did display at the hearing a persistent reluctance to acknowledge that Dixon might be a culpable party. [12]

***23** We also reject the State's argument that the trial court did not assign appropriate significance to Lee's inconsistent trial testimony and that of his alibi witness. Even if Lee and his defense witnesses were not believed at trial, that does not require the court to ignore the powerful import of the newly-discovered exculpatory DNA evidence and of Dixon's potential third-party guilt.

In conclusion, we are unpersuaded by the State's arguments that the State's other evidence at the 1996 trials is so unassailable to deprive these defendants a second chance to be tried fairly before juries, now with the benefit of the newly-discovered exculpatory DNA evidence. The trial court did not

abuse its discretion, nor did it misapply the law in ordering new trials.

All other issues raised by the State lack sufficient merit to warrant discussion. R. 2:11–3(e)(2).

VII.

We end our analysis by briefly addressing the State's argument that the trial court mistakenly ruled that proof of Dixon's prior "bad acts" and his 1989 conviction for robbery would be admissible as third-party guilt evidence at defendants' new trials. We disagree with the State's position.

As we have already noted, a defendant may be entitled to introduce evidence that another person committed the crime with which he or she has been charged. Cook, 179 N.J. at 566 (citation omitted). In that context, the standard for introducing defensive "other-crimes" evidence under N.J.R.E. 404(b) is lower than the standard imposed on the State when it seeks to use such evidence to incriminate a defendant. Id. at 566–67 (citation omitted); State v. DeMarco, 387 N.J. Super. 506, 520 (App. Div. 2006). This is because the defendant is offering the proof for an exculpatory purpose and there is no risk to him or her. Cook, 179 N.J. at 567 (citation omitted). As such, the standard of admissibility is simple relevance to guilt or innocence, subject to offsetting exclusionary factors under Rule 403. Ibid.

"[A] defendant may use similar other-crimes evidence defensively if in reason it tends, alone or with other evidence, to negate his guilt of the crime charged against him." State v. Garfole, 76 N.J. 445, 453 (1978) (citations omitted). Importantly, a "lower standard of degree of similarity of offenses may justly be required of a defendant using other-crimes evidence defensively ...." Id. at 452. There must simply be some link or thread between the third party and the victim or crime that bears on the State's case. State v. Forin, 178 N.J. 540, 591 (2004); State v. Koedatich, 112 N.J. 225, 300 (1988). A defendant need only "engender reasonable doubt of his guilt whereas the State must prove guilt beyond a reasonable doubt." Garfole, 76 N.J. at 453.

When a prosecutor attempts to present other-crimes evidence against a defendant, a rigorous four-factor test of admissibility must be satisfied under the criteria of State v. Cofield, 127 N.J. 328, 338 (1992). But as the Supreme Court more recently explained in State v. Weaver, 219 N.J. 131, 150–51 (2014), a "more relaxed" admissibility standard governs so-called "reverse 404(b)" proof of a third-party's prior bad acts. Trial courts need only determine that "the probative value of the evidence is not substantially outweighed by any of the Rule 403 factors," which are "undue prejudice, confusion of issues, or misleading the jury," and "undue delay, waste of time, or needless presentation of cumulative evidence." See Cook, 179 N.J. at 567.

***24** The State maintains that evidence of Dixon's prior conviction would not be admissible at a new trial, because there is allegedly no "factual nexus" tying that conviction to the current crime. We disagree. Dixon's earlier crime of robbery was sufficiently similar in nature to warrant consideration at a new trial. His intervening incarceration made it irrelevant that three years had passed between the two crimes.

Moreover, Dixon's age at the time of the instant murder and the DNA evidence pointing to his presence at the murder scene, warrants a jury's consideration of his criminal background at the new trials. Given the low threshold for the admissibility of third-party guilt evidence, we discern no abuse of discretion in the trial court's prescriptive evidentiary ruling. The parties shall be guided accordingly at any new trials. [13]

VIII.

We conclude this lengthy opinion with some thematic observations. Our system of criminal justice fundamentally depends upon the soundness of the evidence presented to jurors at trial. When, as here, the soundness of that evidence and the resulting verdicts is seriously undermined by newly-obtained DNA evidence of third-party guilt, we cannot turn a blind eye to the revelation and the probability that defendants, who have been incarcerated since 1996, would have been acquitted.

We are very mindful that over two decades have passed since defendants' trials, and that it now will be challenging for the State to locate witnesses and reactivate a stale case, and distressful for the family of the victim. But, despite those challenges, the rule of law justifies such new trials, with new jurors evaluating a more complete and informative record with fresh eyes and the benefit of current scientific technologies. We by no means comment here on the State's

decision about whether to proceed with such new trials, and defer to the prosecutor's sound discretion in that regard.

In sum, we have not decided these men are innocent. We only conclude the trial court did not err in granting them another opportunity, with the insight of new DNA results, to make the State prove their guilt beyond a reasonable doubt. Simple justice requires no more, and no less, than that.

Affirmed.

All Citations

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Footnotes

1 We refer to the victim at times by his first name to distinguish him from his family members. We intend no disrespect in doing so.

2 Miranda v. Arizona, 384 U.S. 436 (1966).

3 At the time of defendants' interrogations in 1993, our State did not yet have policies requiring such interrogations in homicide cases to be recorded.

4 We describe the summations in detail because what counsel stressed to the jurors bears to some extent upon the State's harmless error claim.

5 The same prosecutor had appeared earlier for the State at Kelley's trial.

6 The same judge presided over both trials and sentenced both defendants.

7 A third defendant, Hancock, was also indicted for participating in these offenses. However, apparently the State ultimately dismissed those charges against Hancock and he was released.

8 However, at Lee's trial, Reyes testified that Thompson did say this.

9 Indeed, as defense counsel has pointed out, the DNA testing statute allows the court, when considering whether to grant such a request to consider in its discretion “any evidence whether or not it was introduced at trial ....” N.J.S.A. 2A:84A–32a(d)(5).

10 Model Jury Charges (Criminal), “Identification: In-court and Out-of-court Identifications” (rev. July 19, 2012).

11 We agree with the State that the non-evidentiary aspects of Henderson (such as the new required police practices) would not govern this matter.

12 That said, we do not offer a view on whether or not Reyes or the other police involved in the investigation engaged in “tunnel vision.” That question remains to be evaluated by new juries, if presented by the parties and the evidence.

13 We need not decide here, however, whether any of the “other crime” proof concerning Dixon would need to be restricted or sanitized under N.J.R.E. 403. The precise scope of the evidence is for the judge who presides over any retrials to determine.