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"A Middle Temperature Between the Two": Exploring Intermediate Remedies for the Failure to Comply With Maryland's Eyewitness Identification Statute

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"A MIDDLE TEMPERATURE BETWEEN THE TWO"[1]: EXPLORING INTERMEDIATE REMEDIES FOR THE FAILURE TO COMPLY WITH MARYLAND'S EYEWITNESS IDENTIFICATION STATUTE

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I. INTRODUCTION

The law has long recognized that "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."[2] It is only in the past five decades, however, that the law has evaluated whether eyewitness identifications may be excluded from use at a criminal trial.[3]

The present constitutional test is grounded in due process and protects a criminal defendant "against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures."[4] This analysis is only "applicable when the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime"[5] and results in the exclusion of the identification unless the prosecution can show that the identification is independently reliable.

In the intervening four decades since this test reached maturity, the advent of DNA analysis and resulting exonerations of innocent individuals have shown that honest, but incorrect, identifications of the accused are the leading cause of wrongful conviction.[6] Contemporaneously, social science has endeavored to understand

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1. Andrew White, *An Account of the Colony of the Lord Baron of Baltimore, 1633*, *in* NARRATIVES OF EARLY MARYLAND 1633-1684, at 7 (Clayton Colman Hall ed., 1910); *see also* Andrew White, *A Briefe Relation of the Voyage unto Maryland, by Father Andrew White, 1634*, *in* NARRATIVES OF EARLY MARYLAND 1633-1684, at 40, 45 (Clayton Colman Hall ed., 1910); ROBERT J. BRUGGER, MARYLAND: A MIDDLE TEMPERAMENT 1634-1980, at 3 (1988).
2. United States v. Wade, 388 U.S. 218, 228 (1967).
3. *See infra* Section II.A.
4. Moore v. Illinois, 434 U.S. 220, 227 (1977).
5. Perry v. New Hampshire, 565 U.S. 228, 232 (2012).
6. *See infra* note 82 and accompanying text.

how eyewitness memories are formed, retained, retrieved, and utilized to make an identification. The dual realization of the prevalence of honest, but incorrect, identifications and the underlying science which can produce more reliable identifications, has motivated several states to spurn the due process approach of the United States Supreme Court and adopt new standards for the admissibility of eyewitness identifications, which synthesize the present scientific understandings of eyewitness memory and identification with the extent legal tests.

The United States Supreme Court and the Maryland Court of Appeals have refused to join this reformational trend and have retained the present due process based analysis. In 2014, however, the Maryland General Assembly legislatively reformed the area of extrajudicial eyewitness identification procedures. Specifically, as of January 1, 2016, Maryland law enforcement agencies are required by statute to adopt several reforms to extrajudicial eyewitness identification procedures, which social science has shown produce more reliable identifications.[7] Thus, in Maryland, the issue is not whether these reforms should be adopted; these procedures are required as a matter of law and as a matter of Maryland public policy. The issue is one of enforcement: the statute requiring these procedures has no exclusionary provision, nor enforcement mechanism, and the failure to adopt or utilize the statutorily required procedures for creating and administering an extrajudicial identification procedure will not result in the suppression of a resulting identification.

This article addresses what remedies should be available to a criminal defendant in Maryland who has been identified in an extrajudicial identification procedure that does not comply with the present statutory requirements. Part II of this article provides an

7. The scope of this article is limited to "extrajudicial" identification procedures (viz., procedures in which an eyewitness is asked to identify a suspect outside of the judicial process and outside of the view of a judge or jury (and usually outside of the view of the defendant or counsel)). The most common of these extrajudicial procedures are photographic arrays and in-person lineups. This reference to "extrajudicial" procedures is essentially coextensive with the present Maryland statutory definition of an "identification procedure." *See* MD. CODE ANN., PUB. SAFETY § 3-506.1(a)(8) (LexisNexis Supp. 2016) (defining an "identification procedure" as a "procedure in which a live lineup is conducted or an array of photographs, including a photograph of a suspect and additional photographs of other persons not suspected of the offense, is displayed to an eyewitness in hard copy form or by computer for the purpose of determining whether the eyewitness identifies the suspect as the perpetrator"). I exclude from the scope of this article identifications that occur under judicial oversight and in the presence of a judge or jury, such as an in-court identification.

overview of the present due process test for evaluating the admissibility of extrajudicial eyewitness identifications, the present Maryland iteration of that test, and alternatives to that approach that have been adopted in other jurisdictions.[8] Part III reviews recent legislative reforms to extrajudicial identification procedures, which are required in Maryland as of January 1, 2016.[9] Section IV.A of this article argues why a criminal defendant who has been identified in an extrajudicial procedure that does not comply with that legislative mandate should be afforded remedies short of suppression as a way to induce compliance with the legislative mandate and to better avoid wrongful conviction and the dire societal harms which occur when the true culprit is left free to re-offend.[10] Section IV.B of this article provides an overview of the remedies a criminal defendant should be entitled to receive if that defendant shows that he or she was identified in an extrajudicial identification procedure that does not comply with the present statutory requirements.[11]

This article suggests that if a criminal defendant shows that law enforcement did not meaningfully comply with a pertinent statutory provision regarding an extrajudicial identification procedure, that defendant may (1) seek to limit the introduction of that identification on evidentiary grounds. The defendant should also be permitted, at trial, to: (2) cross-examine the law enforcement officers concerning the failure to employ the statutorily required procedures; (3) introduce expert testimony to explain how the failure to employ these procedures affect the reliability of the identification; (4) have the court propound a jury instruction concerning the statutory requirements and informing jurors that they may utilize the failure to comply with the statute in evaluating the weight to afford the identification; and (5) argue in closing argument that the failure to comply with the statute impacts the weight jurors should give to the identification.

This article advocates for the provision of limited remedies short of suppression of the identification[12] as a means to both ensure

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8. *See infra* Part II.
9. *See infra* Part III.
10. *See infra* Section IV.A. Given that the statute requires law enforcement agencies to adopt and implement these reforms by January 1, 2016, the remedies suggested in this article apply only if the identification procedure was administered after that date, and should not be available if the identification procedure was administered before January 1, 2016.
11. *See infra* Section IV.B.
12. Although this article suggests that a defendant may seek an in limine ruling to exclude an identification on evidentiary grounds, this article uses the term

enforcement of the legislative mandate regarding extrajudicial identification procedures and to achieve the highest goals of our criminal justice system: to ensure the guilty are identified, convicted, and punished, and to protect the innocent from wrongful conviction. An honest, but incorrect, identification results in two independent transgressions of these values: when an innocent person is wrongly convicted, a guilty person remains free and at risk to re-offend. While a wrongful conviction produces an individualized and ad hoc harm, the fact that a dangerous criminal remains free harms society at large, including anyone who may be later victimized by that criminal.

There will likely never be an adequate test to positively differentiate an accurate identification from an inaccurate identification.[13] Indeed, for a defense attorney, that is often the most vexing issue in examining an eyewitness; the witness truly believes that his or her identification is correct when, in reality, it is not. The issue is not one of veracity, but accuracy. Thus, the best salve for honest, but incorrect, misidentification is to endeavor to improve the accuracy of the procedures that produce those identifications, and to increase the "probabilistic" chances that the identification will be accurate.[14]

The General Assembly has required a series of procedures, which are designed to produce more reliable identifications. A more reliable procedure produces a more reliable result; the utilization of these procedures should result in identifications that better identify the guilty and avoid the identification of the innocent. If law enforcement agencies adopt and implement these procedures, the values of our criminal justice system are served in full. A defendant is entitled to no remedy if law enforcement complies with the statute, and the best way to obviate any of the remedies proposed in this article is to do what law enforcement should be doing: comply with the General Assembly's required procedures regarding extrajudicial

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"suppression" exclusively to refer to the exclusion of an identification on the constitutional due process grounds outlined in Sections II.A. and II.B. *See* discussion *infra* Sections II.A–B.1.

13. Young v. State, 374 P.3d 395, 417 (Alaska 2016) ("[T]he science of eyewitness identifications is 'probabilistic'; it cannot say for certain whether any particular identification is accurate but rather identifies the variables that are relevant to evaluating the risk of a misidentification."); State v. Lawson, 291 P.3d 673, 690 (Or. 2012) ("[A]lthough the scientific studies we have reviewed have identified a number of factors that contribute to the likelihood of mistaken identification, nearly all of those factors are probabilistic in nature—they can indicate only a statistical likelihood of misidentification within a broad population of people studied, not whether any one identification is right or wrong.").

14. *See Young*, 374 P.3d at 417; *Lawson*, 291 P.3d at 690.

identification procedures. However, as previous legislative entries into this area have shown, the law enforcement community does not always comply with these legislative mandates. If law enforcement agencies do not adopt these policies, or individual officers fail to adhere to the required procedures in creating and administering an individual extrajudicial identification procedure, the criminal defendant identified in that procedure should be permitted a series of limited remedies to level the playing field, temper the effect of unreliable identification procedures, and to induce law enforcement compliance with these legislative mandates.

Confession of Potential Bias

The reader will soon learn that, as a matter of federal due process, a criminal defendant is entitled to suppress an extrajudicial identification only if he or she shows that law enforcement arranged an unnecessarily suggestive identification procedure that resulted in an irreparably unreliable identification. Although other jurisdictions have adopted different tests, which allow suppression of an identification based upon other showings, the Maryland Court of Appeals recently rejected adoption of those approaches and retained the present due process approach in *Smiley v. State*.[15]

The author was the attorney who argued for that change in *Smiley*. I lost. While I am proud of my work in that case, I do not seek to re-litigate the case in the article. As a practicing attorney, I took an oath to be faithful to the laws of this State and, as a professional, I have the utmost respect for the highest court of our state. This article does not criticize the decision in *Smiley*; the Court of Appeals held that the Maryland Declaration of Rights does not require any change to the present constitutional standard used to evaluate the suppression of an identification; that decision was eminently reasonable; *causa finita est.*

This article, therefore, is based upon the premise that total suppression of an extrajudicial identification will not occur unless a criminal defendant shows that the identification violates due process principles. Nevertheless, as this article will explain, the Maryland General Assembly has entered the field of extrajudicial identification procedures, and has required—as a matter of law, and as a matter of Maryland public policy—a series of practices that are both based on the best present scientific understandings of eyewitness memory and

15. 111 A.3d 43, 56 (Md. 2015).

identification, which should produce more reliable identifications. This article seeks only to encourage and induce compliance with that legislative mandate. Just as I write in total fidelity to the decisions of the Maryland Court of Appeals, I write to encourage equal fidelity to the requirements established by the legislative branch of our tripartite government.

I also write this article to encourage the exploration of remedies short of the total suppression remedy examined in *Smiley*. Since the creation of the due process standard nearly five decades ago, the evaluation of the admissibility of an eyewitness identification has been viewed in the all-or-nothing prism of suppression. Given that the Court of Appeals has retained the very high standard for constitutional suppression, it is incumbent upon defense attorneys to explore other more limited remedies if they are unable to satisfy that high burden. The time is particularly ripe for this exploration, given that the General Assembly has required very specific procedures that aim to obtain more reliable extrajudicial identifications. The new legislatively required procedures are a necessary fulcrum for every proposal in this article.

This article is therefore written in the very recent milieu of judicial retention of the existing due process standard for suppression of an identification and legislative adoption of particular procedures for obtaining extrajudicial identifications. The author criticizes neither approach; to the contrary, he writes only to encourage executive—law enforcement—compliance with the dictates of both coequal branches of government and to achieve the highest goals of our criminal justice system: the rightful punishment of the truly guilty and rightful acquittal of the truly innocent.

II. THE PRESENT TEST FOR THE ADMISSIBILITY OF EYEWITNESS IDENTIFICATIONS

A. *The United States Supreme Court's Due Process Analysis*

For nearly a half-century, as a matter of federal due process, a criminal defendant has been protected "against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures."[16]

The Supreme Court's first foray into the constitutional implications of an eyewitness identification procedure stressed the importance of the assistance of counsel during the procedure. In *United States v. Wade*, the Supreme Court first recognized that "the confrontation

16. Moore v. Illinois, 434 U.S. 220, 227 (1977).

compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial."[17] In *Wade*, the Court's chief concern was the "manner in which the prosecution present[ed] the suspect to witnesses for pretrial identification,"[18] and the attendant recognition "that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on."[19] Thus, the Court ultimately found that due to the "grave potential for prejudice, intentional or not, in the pretrial lineup,"[20] the accused was entitled to the aid and presence of counsel at a post-indictment, in-person lineup procedure.[21]

In the companion case of *Stovall v. Denno*,[22] the Court also addressed the independent contention that "the confrontation . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law," independent of any right to the presence of counsel at that procedure.[23] Thus, apart from the right to counsel at an in-person lineup, the Court recognized an independent due process protection against an "unnecessarily suggestive" identification procedure.[24]

In this wellspring, however, the Court rejected the per se exclusion of an identification obtained in violation of either the right to counsel or due process. Rather, the Court fashioned a test which allowed the prosecution to adduce evidence of an in-court identification if, after consideration of a variety of factors,[25] the ultimate in-court

17. 388 U.S. 218, 228 (1967).
18. *Id.* at 228–29 ("A commentator has observed that '[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined.'") (alteration in original) (quoting PATRICK M. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 26 (1965)).
19. *Id.* at 229.
20. *Id.* at 236.
21. *Id.* at 236–37.
22. 388 U.S. 293 (1967).
23. *Id.* at 301–02.
24. *Id.*
25. *Wade*, 388 U.S. at 241 ("Application of this test in the present context requires consideration of various factors; for example, the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification. It is also relevant to consider those facts

identifications were based on the witness' observations, and not the unnecessarily suggestive lineup.[26]

In these initial cases, the Supreme Court noted that "[a] conviction which rests on a mistaken identification is a gross miscarriage of justice,"[27] and therefore, the rules it announced were "aimed at minimizing that possibility by preventing the unfairness at the pretrial confrontation that experience has proved can occur . . . ."[28] Within a few years, it spurned both this consideration of the "unfairness" of the proceeding and focus upon the presence of counsel.[29]

The next term, the Court elucidated upon the due process approach espoused in *Stovall*,[30] and disallowed an identification that occurred after a procedure where "[i]n effect, the police repeatedly said to the witness, 'This is the man,'"[31] and "the pretrial confrontations clearly were so arranged as to make the resulting identifications virtually inevitable."[32] The Court also extended these principles beyond the in-person lineup that term. In *Simmons v. United States*, the Court recognized both the utility of, and the potential dangers in, photographic identification procedures[33] and held "that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside . . . only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[34] Thus, in *Simmons*, the Court recognized that only the due process check on suggestive

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which, despite the absence of counsel, are disclosed concerning the conduct of the lineup.").

26. *Id.* at 240. In the companion case of *Gilbert v. California*, the Supreme Court also afforded the petitioner a remand to the lower court for it to discern whether the in-trial identifications of Gilbert had an independent source other than the pretrial lineup which was conducted without counsel. 388 U.S. 263, 272–73 (1967). The *Gilbert* Court did conclude that testimony about the lineup procedure—conducted without counsel—was the direct fruit of that procedure and should be suppressed. *Id.* at 273.
27. *Stovall*, 388 U.S. at 297.
28. *Id.* at 297–98 ("[T]he Wade and Gilbert rules also are aimed at avoiding unfairness at the trial by enhancing the reliability of the fact-finding process in the area of identification evidence . . . .").
29. Foster v. California, 394 U.S. 440, 442–43 (1969).
30. *Id.* at 442. The Court again recognized that the conduct of identification procedures may be "'so unnecessarily suggestive and conducive to irreparable mistaken identification' as to be a denial of due process of law." *Id.*
31. *Id.* at 443.
32. *Id.*
33. 390 U.S. 377, 383–84 (1968).
34. *Id.* at 384.

identification procedures recognized in *Stovall* applied to an extrajudicial photographic array.

A few terms later, the Court held that the right to counsel at a lineup, as recognized in *Wade* and *Gilbert*, applied only to post-indictment lineups.[35] As to identification procedures which occurred prior to the filing of charges, the only recourse was, again, the due process grounds recognized in *Simmons*.[36] Within a few terms, the Court also rejected the proposition "that the risks inherent in the use of photographic displays are so pernicious that an extraordinary system of safeguards is required,"[37] and held "that the Sixth Amendment does not grant the right to counsel at photographic displays conducted by the Government for the purpose of allowing a witness to attempt an identification of the offender."[38]

Within this series of cases, the Court shifted its primary attention to the due process analysis first recognized in *Stovall*. This approach came to maturity in *Neil v. Biggers*[39] and *Manson v. Brathwaite*.[40] In *Neil v. Biggers*, the Court recognized a "relationship between suggestiveness and misidentification" and observed "that the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification.'"[41] Thus, the Court opined, it is only an impermissibly suggestive procedure that creates a likelihood of misidentification, which violates due process.[42] The Court also iterated that the central issue was "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive."[43] After putting forward a variety of factors to be used in assessing whether the identification was reliable[44] and examining them in the case at hand, the Court

35. Kirby v. Illinois, 406 U.S. 682, 690 (1972).
36. *Id.*
37. United States v. Ash, 413 U.S. 300, 321 (1973).
38. *Id.*
39. 409 U.S. 188, 196–200 (1972).
40. 432 U.S. 98, 109–14 (1977).
41. *Biggers*, 409 U.S. at 198 (quoting Simmons v. United States, 390 U.S. 377, 384 (1968)).
42. *Id.* ("Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.").
43. *Id.* at 199.
44. *Id.* at 199–200 ("As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.").

found that an identification was admissible because there was "no substantial likelihood of misidentification."[45]

In *Manson v. Brathwaite*, the Supreme Court focused upon procedures which were both suggestive and unnecessary.[46] The Court also viewed per se exclusion of the product of suggestive identification procedure as "a Draconian sanction."[47] Rather, the Court "conclude[d] that reliability is the linchpin in determining the admissibility of identification testimony,"[48] and the assessment of the overall reliability of the identification—after considering the factors announced in *Neil v. Biggers*—was to be weighed against the "corrupting effect of the suggestive identification itself."[49]

For the next third of a century, there were no major modifications to these rules. In *Perry v. New Hampshire*,[50] however, the Court placed additional limitations upon the suppression of a pretrial identification. Specifically, the Court opined that its extant due process limitation upon identifications was only "applicable when the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime."[51] After reviewing its prior cases on the issue, the Court iterated that "due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary."[52] Even when such a procedure is employed, the Court noted, due process "requires courts to assess, on a case-by-case basis, whether improper police conduct created a 'substantial likelihood of misidentification.'"[53]

The Court further noted that the "due process check for reliability . . . comes into play only after the defendant establishes improper police conduct."[54] To this end, the Court offered that "[a] primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances . . . is to deter law

45. *Id.* at 201.
46. Manson v. Brathwaite, 432 U.S. 98, 99 (1977).
47. *Id.* at 112–13.
48. *Id.* at 114.
49. *Id.*
50. 565 U.S. 228, 248 (2012).
51. *Id.* at 232.
52. *Id.* at 238–39 (first citing *Brathwaite*, 432 U.S. at 107, 109; and then citing Neil v. Biggers, 409 U.S. 188, 198 (1972)).
53. *Id.* at 239 (first quoting *Biggers*, 409 U.S. at 201; and then citing *Brathwaite*, 432 U.S. at 116)).
54. *Id.* at 241. In dissent, Justice Sotomayor criticized the majority for adding to the due process analysis "a novel and significant limitation on our longstanding rule" requiring "a degree of intentional orchestration or manipulation." *Id.* at 254–55 (Sotomayor, J., dissenting).

enforcement use of improper lineups, showups, and photo arrays in the first place"[55] and thus identified a "deterrence rationale" as a primary motivation for the due process check on impermissibly suggestive identification procedures.[56]

In responding to the more recent research on eyewitness memory, the Court noted it "d[id] not doubt either the importance or the fallibility of eyewitness identifications,"[57] but concluded "that the potential unreliability of a type of evidence does not alone render its introduction at the defendant's trial fundamentally unfair."[58] The Court therefore emphasized reliance upon "other safeguards built into our adversary system that caution juries against placing undue weight on eyewitness testimony of questionable reliability,"[59] including: (1) the right to confront the eyewitness;[60] (2) the right to effective assistance of counsel, and to counsel's ability in cross-examination to "expose the flaws in the eyewitness' testimony during cross-examination";[61] (3) counsel's ability to "focus the jury's attention on the fallibility of such testimony during opening and closing arguments";[62] (4) jury instructions that "warn the jury to take care in appraising identification evidence";[63] (5) the use of expert testimony "on the hazards of eyewitness identification evidence";[64] and (6) reliance upon traditional rules of evidence, which "permit trial judges to exclude relevant evidence if its probative value is substantially outweighed by its prejudicial impact or potential for misleading the jury."[65]

Thus, while the Supreme Court retained the due process test for the exclusion of an identification, it identified the other "safeguards built into our adversary system" as areas in which the defense may challenge unreliable eyewitness identifications.[66]

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55. *Id.* at 241 (majority opinion) (citing *Brathwaite*, 432 U.S. at 112).
56. *Id.* at 241–42.
57. *Id.* at 244–45.
58. *Id.* at 245 (citing Kansas v. Ventris, 556 U.S. 586, 594 n.* (2009)).
59. *Id.*
60. *Id.* (citing Maryland v. Craig, 497 U.S. 836, 845 (1990)).
61. *Id.* at 246.
62. *Id.*
63. *Id.* (citing United States v. Telfaire, 469 F.2d 552, 558–59 (D.C. Cir. 1972) (per curiam)).
64. *Id.* at 247 (citing State v. Clopten, 223 P.3d 1103, 1113 (Utah 2009)).
65. *Id.* (citing FED. R. EVID. 403; N.H. R. EVID. 403).
66. *Id.* at 232, 245.

B. *The Maryland Retention of the Supreme Court's Due Process Analysis*

Maryland has adopted, and retained, the due process approach espoused by the Supreme Court. Specifically, under Maryland law there is a "two-step" inquiry a court must conduct in determining whether to suppress an extrajudicial identification.[67] First, a court must determine if the identification procedure was impermissibly suggestive.[68] In this inquiry, a court should be mindful that "[s]uggestiveness can arise during the presentation of a photo array when the manner itself of presenting the array to the witness or the makeup of the array indicates which photograph the witness should identify."[69] If the defendant makes this showing, the burden shifts to the prosecution to show that,[70] under the totality of the circumstances, the identification is nevertheless reliable.[71] In examining the underlying reliability of the identification, Maryland courts rely upon the factors announced in *Neil v. Biggers*.[72]

In *Smiley v. State*, the Maryland Court of Appeals was presented with, and rejected, a request to adopt some of the approaches adopted in other jurisdictions.[73] The Court of Appeals "decline[d] to do so, because this Court, as well as the Court of Special Appeals, have consistently reaffirmed application of the [two-step]

67. Smiley v. State, 111 A.3d 43, 49–50 (Md. 2015) (citing Jones v. State, 530 A.2d 743, 747 (Md. 1987)).

68. *Id.* at 50 (citing *Jones*, 530 A.2d at 747). The defense has the burden of making this initial showing. Graves v. State, 619 A.2d 123, 139 (Md. Ct. Spec. App. 1993); Loud v. State, 493 A.2d 1092, 1094 (Md. Ct. Spec. App. 1985).

69. *Id.* (first citing *Jones*, 530 A.2d at 747; and then citing Conyers v. State, 691 A.2d 802, 806 (Md. Ct. Spec. App. 1997)). The Court of Special Appeals has also made clear that, in this inquiry, "[t]he sin is to contaminate the test by slipping the answer to the testee." *Conyers*, 691 A.2d at 806.

70. The prosecution has the burden to "prove by clear and convincing evidence the existence of reliability in the identification that outweighs the corrupting effect of the suggestive procedure." *Loud*, 493 A.2d at 1094 (citing Manson v. Brathwaite, 432 U.S. 98 (1977); Godwin v. State, 382 A.2d 596 (Md. Ct. Spec. App. 1977); Smith v. State, 250 A.2d 285 (Md. Ct. Spec. App. 1969)).

71. *Smiley*, 111 A.3d at 50 (citing Jones v. State, 909 A.2d 650, 658 (Md. 2006)).

72. *See Jones*, 530 A.2d at 747; *see also* Thomas v. State, 74 A.3d 746, 763–64 (Md. Ct. Spec. App. 2013); *In re* Matthew S., 23 A.3d 250, 256 (Md. Ct. Spec. App. 2011); Wood v. State, 7 A.3d 1115, 1123–24 (Md. Ct. Spec. App. 2010). Further, "[t]hese factors are to be considered within the totality of the circumstances surrounding the identification." Brockington v. State, 582 A.2d 568, 572 (Md. Ct. Spec. App. 1990) (citing Foster v. State, 323 A.2d 419 (Md. 1974); Green v. State, 558 A.2d 441 (Md. Ct. Spec. App. 1989)).

73. *Smiley*, 111 A.3d at 51–53. Specifically, petitioner proposed adoption of the standard similar to that adopted by the New Jersey Supreme Court in *Henderson*. State v. Henderson, 27 A.3d 872 (N.J. 2011); *see infra* note 84 and accompanying text.

procedure . . . for examining challenges to the admissibility of eyewitness identifications."[74] The Court further iterated "our jurisprudence already provides suitable means to assay an eyewitness identification"[75] and thus hewed to the extant two-step due process test used to assess the admissibility of extrajudicial identifications.

C. *Alternative Approaches Adopted by other Jurisdictions*

While the Supreme Court[76] and Maryland[77] have stood by the existing due process approach used to evaluate the admissibility of extrajudicial identifications, and have rejected invitations to modify this approach, other jurisdictions have experimented with alternative tests. This experimentation finds its basis in two developments, which have occurred since the due process approach obtained maturity in *Manson v. Brathwaite*:[78] (1) the recognition that honest, but erroneous, identifications are the leading cause of wrongful convictions; and (2) the development of a wealth of social science, which has endeavored to understand how eyewitness memories are formed, stored, and retrieved.[79] The jurisdictions that now examine and suppress eyewitness identifications on grounds other than the federal due process approach do so either on state constitutional grounds, or through application of state evidentiary law.[80]

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74. *Smiley*, 111 A.3d at 52. The Court referred to its decision in (Gregory) Jones as its wellspring for this approach. The Court had actually adopted the Supreme Court's due process analysis a year earlier in *Webster v. State*, 474 A.2d 1305, 1314–16 (Md. 1984).

75. *Smiley*, 111 A.3d at 53.

76. Perry v. New Hampshire, 565 U.S. 228, 234, 245 (2012).

77. *Smiley*, 111 A.3d at 49–50.

78. *See* 432 U.S. 98, 113–14 (1977).

79. *See* State v. Copeland, 226 S.W.3d 287, 299–300 (Tenn. 2007).

80. By "different grounds," I mean grounds other than the "two-step" process required under Maryland and Supreme Court case law, which requires an initial showing of impermissible suggestiveness and then assesses whether the resulting identification is independently reliable. *See* discussion *supra* Sections II.A–B. I exclude from this discussion those jurisdictions, such as New York and Massachusetts, who have adopted a "rule of per se exclusion of evidence from unnecessarily suggestive pre-trial identification procedures." Nicholas A. Kahn-Fogel, *The Promises and Pitfalls of State Eyewitness Identification Reforms*, 104 KY. L.J. 99, 122 (2015). Wisconsin has also adopted a rule of per se exclusion which "applies only to unnecessarily suggestive, in-person, pre-trial showups and not to any other kind of identification procedure." *Id.* at 139. Utah and Kansas have abandoned the *Manson* approach "through modification of the reliability factors used to decide whether identification evidence is admissible despite the use of an unnecessarily suggestive procedure." *Id.* at 146. These jurisdictions all require a predicate showing of suggestive pre-trial procedure (i.e., the first step of Maryland's "two-step" approach), and have either eliminated, or modified, the second step of the existing analysis. North Carolina and

1. Reasons for the Adoption of New Standards

The Supreme Court's jurisprudence regarding the due process checks upon extrajudicial eyewitness identification procedures reached maturity when *Manson v. Brathwaite* was decided in 1977.[81] In the intervening four decades there have been two critical developments that have caused other jurisdictions to examine alternative approaches to evaluating the admissibility of extrajudicial identifications. The first is the advent of DNA technology, corresponding exonerations of wrongly convicted individuals, and the recognition that eyewitness misidentification is the leading cause of wrongful conviction.[82] Indeed, "erroneous identifications [a]re responsible for more wrongful convictions than any other single factor."[83] DNA-based exonerations have provided an X-ray examination of the criminal justice system that has exposed latent flaws and a corresponding need for remedy in a system previously thought to be in much better health.

Second, there is a field of social science that has endeavored to understand how eyewitness memories are formed, stored, and retrieved; thus, this helps identify factors that may produce an honest, though incorrect, identification. This "vast body of scientific research about human memory has emerged" in the decades since the Supreme Court adopted the present test and "casts doubt on some commonly held views relating to memory," as well as "the vitality of the current legal framework for analyzing the reliability of eyewitness identifications."[84]

Ohio have adopted a series of statutory requirements for extrajudicial eyewitness identification procedures, and these statutes "require judges to consider noncompliance when adjudicating suppression motions and . . . require judges to instruct juries that they may consider noncompliance in evaluating the reliability of eyewitness evidence." *Id.* at 150. This article is necessitated by the fact that the Maryland statute, unlike the North Carolina or Ohio statutes, provides for no remedy or enforcement mechanism.

81. *See Brathwaite*, 432 U.S. at 113–14.

82. *See* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 8–9 (2011) (documenting that in 190 of the first 250 DNA-based exonerations (76%), the conviction was based on an incorrect eyewitness identification); State v. Lawson, 291 P.3d 673, 690 n.5 (Or. 2012); *Copeland*, 226 S.W.3d at 299.

83. N.Y. STATE BAR ASS'N, FINAL REPORT OF THE NEW YORK STATE BAR ASSOCIATION'S TASK FORCE ON WRONGFUL CONVICTIONS 45 (2009), https://www.nysba.org/wcreport/; *see* Bomas v. State, 987 A.2d 98, 109 (Md. 2010).

84. State v. Henderson, 27 A.3d 872, 877 (N.J. 2011) (first citing *Brathwaite*, 432 U.S. at 114; and then citing State v. Madison, 536 A.2d 254 (N.J.1988)); *see also id.* at

The conflux of these two factors—the realization that honest, but incorrect, identifications are the leading cause of wrongful conviction, and the identification of the factors which can produce (or reduce) those incorrect identifications—have caused other jurisdictions to reevaluate the efficacy of the present due process standard as the sole check on the admissibility of an extrajudicial identification.

2. State Constitutional Limitations on the Admissibility of Eyewitness Identifications

In *State v. Henderson*, the Supreme Court of New Jersey became the first court to utilize a state constitution to make inroads on the federal due process test adopted by the United States Supreme Court.[85] In *Henderson*, after the parties questioned the efficacy of the present standard, the Supreme Court of New Jersey remanded the case for an evidentiary hearing where "[t]he parties and amici collectively produced more than 360 exhibits, which included more than 200 published scientific studies on human memory and eyewitness identification."[86] At this hearing, the prosecution and defense communities both presented an array of social scientists who identified "broad consensus within the scientific community on the relevant scientific issues"[87] and the "gold standard in terms of the applicability of social science research to the law."[88] This social science was vetted through both peer reviews and meta-analysis reviews, which collate and evaluate all available data in a specified topic area.[89] The Supreme Court of New Jersey ultimately adopted

892 ("Virtually all of the scientific evidence . . . emerged after *Manson*."); *Lawson*, 291 P.3d at 678 (noting that in the past three decades, "there have been considerable developments in both the law and the science on which this court previously relied in determining the admissibility of eyewitness identification evidence" and, in light of those developments, "revis[ing] the test" for admissibility).

85. *See Henderson*, 27 A.3d at 919 & n.10.

86. *Id.* at 884.

87. *Id.* at 884–85, 911.

88. *Id.* at 916. The *Henderson* and *Lawson* decisions provide an excellent overview of the scientific research regarding eyewitness memory and identification. *See id.* at 892–912; *Lawson*, 291 P.3d at 700–11. Professor Kahn-Fogel has also provided an excellent précis of the present state of the social science concerning eyewitness memory and identification. *See* Kahn-Fogel, *supra* note 80, at 109–20. This underlying science is beyond the scope of this article, and these decisions and article are commended to the reader who wishes to read more about the social science which has caused several jurisdictions (and the Maryland General Assembly) to reform eyewitness identification procedures.

89. *Henderson*, 27 A.3d at 892–93.

the report issued by the hearing judge and credited this scientific research as "convincing proof that the current test for evaluating the trustworthiness of eyewitness identifications should be revised."[90]

After reviewing the social science concerning eyewitness memory and identification, the *Henderson* court ultimately concluded "that eyewitnesses generally act in good faith" and that "[m]ost misidentifications stem from the fact that human memory is malleable; they are not the result of malice."[91] This is because "memory is a constructive, dynamic, and selective process," which "consists of three stages," —acquisition, retention, and retrieval—and "[a]t each of those stages, the information ultimately offered as 'memory' can be distorted, contaminated and even falsely imagined."[92] Indeed, "an array of variables can affect and dilute [eyewitness] memory and lead to misidentifications."[93] The scientific community and the *Henderson* court divide these variables into two groups: (1) "[s]ystem variables," which "are factors like lineup procedures which are within the control of the criminal justice system";[94] and (2) "[e]stimator variables," which "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."[95]

System variables—which are the factors entirely within the control of the criminal justice system and law enforcement community—include the following factors:

> 1. Blind Administration: Was the lineup procedure performed double-blind? If double-blind testing was impractical, did the police use a technique . . . 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?

90. *Id.* at 877.
91. *Id.* at 888.
92. *Id.* at 894.
93. *Id.* at 895.
94. *Id.*
95. *Id.*

> 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 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?[96]

Estimator variables, which are the factors related to the witness, the perpetrator, or the event, which the legal system cannot control, include factors such as:

> 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?
> 7. Memory [D]ecay: How much time elapsed between the crime and the identification?

96. *Id.* at 920–21. There is an excellent overview of the science animating the adoption of these factors in *Lawson*. State v. Lawson, 291 P.3d 673, 686–87 (Or. 2012).

> 8. Racial Bias: Does the case involve a cross-racial identification?[97]

The list of estimator variables also includes the five factors announced in *Neil v. Biggers*, which are presently used to assess the ultimate reliability of an identification.[98]

After reviewing this science, the Supreme Court of New Jersey ultimately concluded in *Henderson* that the present due process approach "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."[99] Thus, as a matter of state constitutional law,[100] the court rejected the present approach and replaced it with one that "addresses its shortcomings,"[101] "allows judges to consider all relevant factors that affect reliability in deciding whether an identification is admissible,"[102] minimizes "factors that can be corrupted by suggestiveness,"[103] and thus, "promotes deterrence in a meaningful way" and "help[s] jurors both understand and evaluate the effects that various factors have on memory."[104]

Under the approach adopted in *Henderson*, the defendant still has the prima facie burden to demonstrate that an identification procedure was impermissibly suggestive, but may make that showing by establishing the presence of any "system variable."[105] If the defendant shows that the procedure was suggestive by proving the presence of a system variable, the burden shifts to the State to show the reliability of the identification.[106] In evaluating reliability, "courts should consider . . . system variables as well as the . . . non-exhaustive list of estimator variables to evaluate the overall reliability of an identification and determine its admissibility."[107]

To reiterate, this approach does not alter the current regime in which the defendant must first prove that the identification procedure

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97. *Henderson*, 27 A.3d at 921. Again, *Lawson* provides a very comprehensive overview of the science behind the adoption of these factors. *Lawson*, 291 P.3d at 687–88.
98. *Henderson*, 27 A.3d at 921–22 (citing Neil v. Biggers, 409 U.S. 188, 199–200 (1972)).
99. *Id.* at 918.
100. *Id.* at 919 n.10.
101. *Id.* at 919.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 920.
106. *Id.*
107. *Id.* at 921.

was impermissibly suggestive, and if so, the identification is suppressed unless the State can establish that the identification is independently reliable. That remains unchanged. The only alteration is that the evaluation of suggestiveness now considers the presence of any "system variable," such as the factors "within the control of the criminal justice system,"[108] and the assessment of reliability includes both those considerations, as well as any "estimator variables," which "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."[109] That is the only change announced in Henderson.

New Jersey is not the only jurisdiction that has spurned the present due process approach—which is triggered again only upon a showing that "police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime"[110]—in favor of a test which requires the defendant to show only the presence of a "system variable." Idaho has done so, finding that the use of system and estimator variables "dovetail[s] nicely with the two-step analysis this Court applies to determine whether evidence of an out-of-court identification violates due process."[111]

More recently, the Supreme Court of Alaska has held that the due process protections of the Alaska constitution required the court to depart from the federal due process approach.[112] In so doing, the court noted that "[d]evelopments in the science related to the reliability of eyewitness identifications" undermined its confidence in the existing due process test as being sufficiently protective of a defendant's due process rights.[113] In this regard, the *Young* court noted that the current due process approach "does not adequately assess reliability" and fails to consider many of the factors that are now known to affect the reliability of an eyewitness identification.[114] The court ultimately adopted an approach modeled off of the *Henderson* approach, in which the defendant must present "some evidence" of suggestiveness in the procedure that is tied to the presence of a system variable.[115] The court noted that "a defendant

108. *Id.* at 895.
109. *Id.*
110. Perry v. New Hampshire, 565 U.S. 228, 231–32 (2012).
111. State v. Almaraz, 301 P.3d 242, 252 (Idaho 2013).
112. *See* Young v. State, 374 P.3d 395, 412–13 (Alaska 2016).
113. *Id.* at 413.
114. *Id.* at 425.
115. *Id.* at 427.

need not show that a procedure was 'unnecessarily suggestive' in order to get a hearing; that the identification involved a system variable is itself enough to trigger that process."[116] Upon such a showing, the burden shifts to the State to adduce evidence that the identification is nevertheless reliable.[117] A court undertaking this inquiry "should consider all relevant system and estimator variables under the totality of the circumstances" and "should not hesitate to take expert testimony that explains, supplements, or challenges the application of these variables to different fact situations."[118] Ultimately, the defendant bears the burden of showing a "very substantial likelihood of irreparable misidentification."[119] The court also noted that if the defendant fails to make this showing, the court should admit the identification but "provide the jury with an instruction appropriate to the context of the case."[120]

3. State Evidentiary Limitations on the Admissibility of Extrajudicial Identifications

Other jurisdictions have recognized the utility of employing system and estimator variables in assessing the admissibility of eyewitness identifications, but have done so under state evidentiary principles. In *State v. Lawson*,[121] the Supreme Court of Oregon refrained from addressing the continuing viability of the test for the constitutional admissibility of an identification because the test was "inconsistent with modern scientific findings" and "at odds with its own goals and with current Oregon evidence law."[122] Under the approach adopted in *Lawson*, a court presumes that an identification is relevant and admissible if the proponent establishes that the witness "had an adequate opportunity to observe or otherwise personally perceive" the facts relating to the identification, and that the identification is both rationally based on those perceptions and helpful to the fact finder.[123] Once the proponent establishes the prima facie relevance of the identification, the court is tasked with evaluating the relative probity of that identification by assessing its reliability, cognizant that "[t]he more factors—the presence of

116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* The court also tasked the Alaska Criminal Pattern Jury Instructions Committee with drafting a model instruction consistent with the principles reviewed in the court's decision. *Id.* at 428.
121. 291 P.3d 673 (Or. 2012).
122. *Id.* at 688.
123. *See id.* at 692.

system variables alone or in combination with estimator variables—that weigh against reliability of the identification, the less persuasive the identification evidence will be to prove the fact of identification."[124] The relative probity must then be assessed against the potential for unfair prejudice, recognizing that "eyewitness identifications subjected to suggestive police procedures are particularly susceptible to concerns of unfair prejudice" and that "in cases in which an eyewitness has been exposed to suggestive police procedures, trial courts have a heightened role as an evidentiary gatekeeper because 'traditional' methods of testing reliability—like cross-examination—can be ineffective at discrediting unreliable or inaccurate eyewitness identification evidence."[125] The court may then either exclude the identification in toto, or has discretion to exclude particular aspects of the identifications that are especially prejudicial or unreliable.[126]

4. The Primary Distinctions of the Alternative Approaches

The state constitutional approach and the state evidentiary approach share the common denominator of utilizing system and estimator variables to assess the admissibility of an eyewitness identification. In New Jersey, Alaska, and Idaho, those variables are used to assess whether the identification should be suppressed as a constitutional matter. In Oregon, they are relevant in assessing the relative probity of the identification, the potential for unfair prejudice (viz., an erroneous identification), and ultimately, the evidentiary admissibility of the identification. In each jurisdiction these variables, which rely upon and reflect the present "gold standard" of social science research, guide courts in assessing the admissibility of an identification and help ensure that reliable identifications are presented to a jury.

There are additional aspects of these alternative approaches which differentiate them from the present due process approach. First, the courts that have adopted these alternative tests recognize that the system and estimator variables listed in the opinion "are not exclusive. Nor are they intended to be frozen in time."[127] Rather, *Henderson* "recognize[d] that scientific research relating to the reliability of eyewitness evidence is dynamic" and did not "intend to

124. *Id.* at 694.
125. *Id.* at 695.
126. *Id.* at 694–95, 697.
127. *See, e.g.*, State v. Henderson, 27 A.3d 872, 922 (N.J. 2011).

hamstring police departments or limit them from improving practices" or preclude lower courts "from reviewing evolving, substantial, and generally accepted scientific research."[128] Thus, courts may "consider variables differently or entertain new ones" so long as they "rely on reliable scientific evidence that is generally accepted by experts in the community."[129] Likewise, *Lawson* notes that it did not "intend[] to preclude any party in a specific case from validating scientific acceptance of further research or from challenging particular aspects of the research described in this opinion."[130] Thus, these courts recognize that as law confronts emerging science, the solution is dynamic progress, not static entrenchment; this *aggiornamento* ensures that current law reflects current science and ensures that the two develop in harmony.

One distinction of the approach developed in Oregon is that, unlike the due process approach (or the state constitutional approach championed in New Jersey), it does not pertain solely to identification procedures arranged by law enforcement. Because the due process approach is constitutional in nature, it requires a showing of state action (viz., that law enforcement agents are the ones who have arranged the suggestive circumstances).[131] Under the evidentiary approach adopted in *Lawson*, "there is no reason to hinder the analysis of eyewitness reliability with purposeless distinctions between suggestiveness and other sources of unreliability."[132]

The evidentiary approach espoused in *Lawson* relieves the defendant from showing the presence of a *suggestive* identification procedure.[133] Rather, in tying the analysis to rules of evidence, the *Lawson* court requires the proponent—the State, and not the defendant—to show that this evidence has the requisite probity to be submitted to the jury.[134] This approach ultimately focuses on the reliability of the identification and the quality of the evidence submitted at trial, rather than focusing on the conduct of the police officers in trying to impermissibly secure an identification from a suggestive procedure.

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128. *Id.*
129. *Id.* (citing State v. Chun, 943 A.2d 114, 136 (N.J. 2008); State v. Moore, 902 A.2d 1212, 1226 (N.J. 2006); Rubanick v. Wito Chem., 593 A.2d 733, 739 (N.J. 1991)).
130. *Lawson*, 291 P.3d at 686.
131. *See, e.g.*, Perry v. New Hampshire, 565 U.S. 228, 231–32 (2012); Young v. State, 374 P.3d 395, 417 (Alaska 2016) (quoting *Perry*, 565 U.S. at 232).
132. *Lawson*, 291 P.3d at 688–89.
133. *See id.* at 693.
134. *Id.*

III. MARYLAND LEGISLATIVE REFORMS TO EYEWITNESS IDENTIFICATION PROCEDURES

While the Supreme Court and the Maryland Court of Appeals have rejected attempts to modify the due process strictures on extrajudicial identification procedures, the Maryland General Assembly has twice legislatively attempted to reform these procedures in Maryland. Indeed, the General Assembly has now required extrajudicial identification procedures that are fully in keeping with the "estimator" and "system" variables recognized in other jurisdictions such as New Jersey, Alaska, and Oregon. As this article will explore further, the issue is not one of reform—Maryland, by statute, requires extrajudicial identification procedures that are in keeping with the state of the art knowledge of eyewitness memory, recall, and identification. The issue, moving forward, is how to ensure compliance with that reformational legislative mandate.

In 2007, the Maryland General Assembly first entered the field of extrajudicial identification procedures. Specifically, as of December 1, 2007, the General Assembly required "each law enforcement agency in the State" to "adopt written policies relating to eyewitness identification that comply with the United States Department of Justice standards on obtaining accurate eyewitness identification[s]."[135] The General Assembly further required each law enforcement agency in the State to have the written policies on file with the State Police by December 1, 2008[136] and directed the State Police to compile and allow public inspection of each policy.[137]

Thus, as of December 1, 2008, each law enforcement agency in Maryland was required to adopt, and have on file, a policy pertaining to eyewitness identification procedures that complied with the Department of Justice's best practices. These "best practices" emanate from a comprehensive overview, *Eyewitness Evidence, A Guide for Law Enforcement*, published by the Department of Justice in 1999.[138] This guide was authored by a working group comprised

135. MD. CODE ANN., PUB. SAFETY § 3-506(a) (LexisNexis 2011); H.B. 103, 2007 Leg., 423rd Sess. (Md. 2007).

136. PUB. SAFETY § 3-506(b).

137. *Id.* §§ 3-506(c)(1)–(2).

138. U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999) [hereinafter Eyewitness Evidence], https://www.ncjrs.gov/pdffiles1/nij/178240.pdf. The Fiscal and Policy Note for the statute requiring such policies referred to Eyewitness Evidence directly, noting that it "detail[ed] recommended procedures for obtaining reliable eyewitness evidence

of individuals from law enforcement, prosecution, defense, and scientific research communities,[139] and relied upon the existing research concerning eyewitness memory and identification.[140]

The *Eyewitness Evidence* guide has sections pertaining to the response of initial law enforcement responders,[141] mug books,[142] composite drawings,[143] subsequent interviews with eyewitnesses,[144] show-up identification procedures,[145] and identification procedures, such as an in-person or photographic lineup.[146] With regard to photographic identification procedures, *Eyewitness Evidence* requires:

> (1) the use of only one suspect in each procedure;[147]
> (2) the selection of fillers who fit the description of the perpetrator;[148]
> (3) the use of a minimum of five fillers;[149]
> (4) the avoidance of fillers who closely resemble the suspect;[150]
> (5) the presentation of a consistent appearance between the suspect and the filler;[151]
> (6) the placement of a suspect in a different position in each lineup;[152]
> (7) the use of new fillers in multiple lineups shown to the same witness;[153]
> (8) the avoidance of any information concerning previous arrests;[154]
> (9) the viewing of the array to ensure that the suspect does not stand-out;[155] and

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through line-ups, field identifications, mug shot books, and other methods." MD. GEN. ASSEMBLY, PUBLIC SAFETY – EYEWITNESS WRITTEN POLICIES, H.B. 423-103, at 2 (2007), http://mgaleg.maryland.gov/2007RS/fnotes/bil_0003/hb0103.pdf.

139. EYEWITNESS EVIDENCE, *supra* note 138, at 5.
140. *Id.* at 1–2.
141. *Id.* at 13–16.
142. *Id.* at 17–20.
143. *Id.*
144. *Id.* at 21–25.
145. *Id.* at 27–28.
146. *Id.* at 29–38.
147. *Id.* at 29.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at 29–30.
152. *Id.* at 30.
153. *Id.*
154. *Id.*

> (10) the preservation of the presentation order and photographs used in the procedure.[156]

Eyewitness Evidence requires the use of instructions before the identification procedure,[157] requires police to avoid saying anything to influence a selection or reporting to the witness any information concerning the identification prior to obtaining a statement of certainty,[158] and requires documentation of the procedure, including the date and time of the procedure, as well as the identification of all those present.[159] Finally, police are required to obtain a statement concerning the witness's identification,[160] including any identification or non-identification that results in writing, signed by the witness, including a statement of certainty in the witness's own words.[161]

In 2014, the Maryland General Assembly again entered the area of eyewitness identification procedures.[162] Specifically, as of January 1, 2016,[163] the General Assembly required "each law enforcement agency in the State" to either "adopt the Police Training Commission's Eyewitness Identification Model Policy"[164] or to "adopt and implement a written policy relating to identification procedures that complies with § 3-506.1 of this subtitle."[165] The legislature further required each law enforcement agency to file a copy of the policy with the Maryland State Police,[166] and required the State Police to compile these policies and have them available for inspection by February 1, 2016.[167]

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155. *Id.*
156. *Id.*
157. *Id.* at 31–33.
158. *Id.* at 33.
159. *Id.* at 35.
160. *Id.* at 38.
161. *Id.*
162. MD. GEN. ASSEMBLY, PUBLIC SAFETY – EYEWITNESS IDENTIFICATION – PROCEDURES, H.B. 1200, 434th Sess., at 3 (2014).
163. MD. CODE ANN., PUB. SAFETY § 3-506(d)(1) (LexisNexis Supp. 2016).
164. *Id.* § 3-506(d)(1)(i)(1). The Police Training Commission is a part of the Maryland Department of Public Safety and Correctional Services. *Id.* § 3-202 (LexisNexis 2011). The Police Training Commission is charged with establishing standards and accrediting a variety of training and certifications of law enforcement officers in the state of Maryland. *See id.* § 3-207 (LexisNexis 2011 & Supp. 2016).
165. *Id.* § 3-506(d)(1)(i)(2) (LexisNexis Supp. 2016).
166. *Id.* § 3-506(d)(1)(ii).
167. *Id.* §§ 3-506(d)(2)–(3).

The General Assembly deferred to the model eyewitness identification policy of the Police Training Commission,[168] and legislatively adopted a model eyewitness identification policy,[169] requiring compliance with either policy by January 1, 2016.[170] What is significant about the legislative creation of these required policies is that it (1) responded to the adoption of alternative methods for assessing the admissibility of an extrajudicial identification and the rejection of those methods by the Supreme Court, and (2) was a legislative response to significant non-compliance with the General Assembly's previous mandate.

The statute's legislative history noted that before the statute was proposed, New Jersey had "issued sweeping new rules that make it easier for criminal defendants to challenge eyewitness identification."[171] The legislative history further noted that the Supreme Court held in *Perry* that due process "does not require a judge to conduct a preliminary inquiry into the reliability of an eyewitness's identification when law enforcement did not use unnecessarily suggestive circumstances to procure the identification."[172] The statute's legislative history, therefore, shows that the General Assembly deliberately sought to navigate between the Scylla of the retention of the current due process approach in *Perry* and the Charybdis of the more liberal approach espoused in *Henderson*, and to adopt reforms in Maryland that lie between the two approaches (i.e., "a middle temperature between the two").[173]

The General Assembly also sought to legislatively reform eyewitness identification procedures because of significant law enforcement non-compliance with its prior legislative mandates. As noted, since 2007 each law enforcement agency in Maryland had been required to adopt a written policy which complied with the Department of Justice's best practices (codified in *Eyewitness Evidence*).[174] The Fiscal and Policy Note for the 2014 statute reports that the Mid-Atlantic Innocence Project surveyed and analyzed each written policy submitted pursuant to the prior statute and that

168. *See id.* § 3-506(d)(1)(i)(1).
169. *Id.* §§ 3-506(d)(1)(i)(1)–(2), 3-506.1.
170. *Id.* § 3-506(d)(1).
171. MD. GEN. ASSEMBLY, PUBLIC SAFETY – EYEWITNESS IDENTIFICATION – PROCEDURES, H.B. 1200, 434th Sess., at 3 (2014). The fiscal note further relates that, under *Henderson*, "whenever a defendant presents evidence that a witness's identification of a suspect was influenced in any way, a judge must hold a hearing to consider a range of issues related to the validity of the identification." *Id.*
172. *Id.* (citing Perry v. New Hampshire, 565 U.S. 228, 248 (2012)).
173. BRUGGER, *supra* note 1, at 3.
174. PUB. SAFETY § 3-506(a) (LexisNexis 2011).

seventeen percent of all law enforcement agencies did not have any written policies pertaining to identification procedures; thirty percent of law enforcement agencies had policies that did not comply with *any* of the key recommendations of the Department of Justice; twenty-six percent of law enforcement agencies had a policy that partially complied with the Department of Justice's recommendations; and only twenty-seven percent of law enforcement agencies had adopted a policy that fully complied with each of Department of Justice's key recommendations.[175] Again, it must be repeated: forty-seven percent of law enforcement agencies had not complied with the prior legislative mandate in any meaningful way (by either not adopting a policy or adopting a policy that did not comply with any requisite aspect of *Eyewitness Evidence*), and only twenty-seven percent had fully complied with the prior requirement. The review of the 2014 statute, and the evaluation of whether remedies should be available to induce law enforcement compliance with this statute,[176] should therefore consider that this statute was passed in response to significant law enforcement non-compliance with the prior legislative reforms pertaining to eyewitness identification procedures.

The legislative model policy, codified in Section 3-506.1, is notable for the progressive changes in identification procedures required by the General Assembly (which are well in keeping with the science pertaining to system and estimator variables). The policy requires the use of pre-identification instructions[177] and requires the administrator to "document in writing all identification statements made by the eyewitness."[178] The policy also requires that "[a]n

175. MD. GEN. ASSEMBLY, PUBLIC SAFETY – EYEWITNESS IDENTIFICATION – PROCEDURES, H.B. 1200, 434th Sess., at 3 (2014).

176. *See supra* Parts III–IV.

177. PUB. SAFETY § 3-506.1(b)(3) (LexisNexis Supp. 2016). Specifically, "[b]efore an identification procedure is conducted, an eyewitness shall be instructed, without other eyewitnesses present, that the perpetrator may or may not be among the persons in the identification procedure." *Id.*

178. *Id.* § 3-506.1(b)(4). An "[i]dentification statement" is:

> [A] documented statement that is sought by the administrator when an identification is made: (i) from the eyewitness; (ii) in the own words of the eyewitness, describing the eyewitness's confidence level that the person identified is the perpetrator of the crime; (iii) given at the time of the viewing by the eyewitness during the identification procedure; and (iv) given before the eyewitness is given feedback.

Id. § 3-506.1(a)(9).

identification procedure"[179] must "be conducted by a blind or blinded administrator."[180]

The statue also requires the use of "fillers"[181] and that "each filler shall resemble the description of the perpetrator given by the eyewitness in significant physical features, including any unique or unusual features."[182] Further, if a witness has previously participated in an identification procedure, "the fillers in the identification procedure shall be different from the fillers used in any prior identification procedure."[183] If there are multiple eyewitnesses, the statute requires that each identification procedure be conducted separately for each eyewitness;[184] that the suspect be placed in a different position for each separate identification procedure;[185] and that the eyewitnesses may not communicate with each other until all the procedures have been completed.[186]

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179. The statute defines an "[i]dentification procedure" as:

> [A] "procedure in which a live lineup is conducted or an array of photographs, including a photograph of a suspect and additional photographs of other persons not suspected of the offense, is displayed to an eyewitness in hard copy form or by computer for the purpose of determining whether the eyewitness identifies the suspect as the perpetrator.

Id. § 3-506.1(a)(8).

180. *Id.* § 3-506.1(b)(1). For purposes of the statute, "'[b]lind' means the administrator does not know the identity of the suspect" and "'blinded' means the administrator may know who the suspect is but does not know which lineup member is being viewed by the eyewitness." *Id.* §§ 3-506.1(a)(3)–(4). The statute also provides that "[a]n administrator may be blinded through the use of: (i) an automated computer program that prevents the administrator from seeing which photos the eyewitness is viewing until after the identification procedure is completed; or: (ii) the folder shuffle method." *Id.* §§ 3-506.1(b)(2)(i)–(ii). The "folder shuffle method," which must also comply with the other components of the statute, is "a system for conducting a photo lineup that . . . is conducted by placing photographs in folders, randomly numbering the folders, shuffling the folders, and then presenting the folders sequentially so that the administrator cannot see or track which photograph is being presented to the eyewitness until after the procedure is completed." *Id.* § 3-506.1(a)(7)(ii).

181. A "[f]iller" is "a person or a photograph who is not suspected of an offense and is included in an identification procedure." *Id.* § 3-506.1(a)(6). The statute requires that "at least five fillers, in addition to the suspect, shall be included when an array of photographs is displayed to an eyewitness" and that "at least four fillers, in addition to the suspect, shall be included in a live lineup." *Id.* § 3-506.1(c)(2)–(3).

182. *Id.* § 3-506.1(c)(1).

183. *Id.* § 3-506.1(d).

184. *Id.* § 3-506.1(e)(1).

185. *Id.* § 3-506.1(e)(2).

186. *Id.* § 3-506.1(e)(3).

Finally, the statute requires written documentation of the identification procedure,[187] including: (1) all identification and non-identification results obtained during the procedure;[188] (2) the signed identification statement of the eyewitness;[189] (3) the names of all persons present at the procedure;[190] (4) the date and time of the procedure;[191] (5) whether the witness identified a "filler";[192] and (6) all photographs used in the procedure.[193] Police are excused from documenting these details in writing if a video or audio recording of the procedure captures all of the requisite information.[194]

The model policy of the Maryland Police Training Commission is essentially congruent.[195] The policy requires blind administration[196] and encourages officers to "make an effort to prevent eyewitnesses from comparing their recollections of the offender or the incident" by "promptly separating the witnesses and interviewing each out of the earshot of the others."[197] Like the statutory policy, the model policy commands that "[w]itnesses should not participate in identification procedures together."[198] The model policy, like the statutory policy, requires written documentation of any identification statement.[199]

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187. *Id.* § 3-506.1(f)(1).
188. *Id.* § 3-506.1(f)(1)(i).
189. *Id.* § 3-506.1(f)(1)(ii). Recording the identification (and non-identification) results of the procedure, as well as the identification statement of the eyewitness, is in keeping with an approach that "treat[s] eyewitness memory just as carefully as . . . other forms of trace evidence, like DNA, bloodstains, or fingerprints, the evidentiary value of which can be impaired or destroyed by contamination." *See* State v. Lawson, 291 P.3d 673, 689 (Or. 2012). This approach recognizes "the original memory as the sole source of evidentiary value in eyewitness identifications," and that "[l]ike those forms of evidence, once contaminated, a witness's original memory is very difficult to retrieve." *Id.* The statute codifies this approach and seeks to record the original identification in its original form and preserve that memory like forensic or other evidence which could be corrupted or contaminated.
190. PUB. SAFETY § 3-506.1(f)(1)(iii).
191. *Id.* § 3-506.1(f)(1)(iv).
192. *Id.* § 3-506.1(f)(1)(v).
193. *Id.* § 3-506.1(f)(1)(vi).
194. *Id.* § 3-506.1(f)(2).
195. Md. Police & Corr. Training Comm'ns, *Eyewitness Identification*, MDLE, http://mdle.net/resources.htm (follow "Download Eyewitness ID Maryland"; then follow "Policy and Forms"; and then follow "Eyewitness Identification Policy (2012)") (last visited Apr. 1, 2017) [hereinafter Policy].
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.* ("If practicable, the officer should record the procedure and the witness' statement of certainty. If not, the officer should write down the witness' exact words

Likewise, the model policy is very similar to the statutory policy regarding the administration of a photographic identification procedure. The policy states "[e]yewitnesses will be given specific instructions prior to being shown a suspect"[200] and has a specified set of pre-identification instructions that are to be read prior to a show-up, lineup, or photographic array procedure.[201] The model policy similarly requires at least five fillers in each photographic array[202] and requires that they match the description of the offender,[203] not the suspect.[204] The policy requires that the suspect's photograph should not stand out from the others.[205] The policy also requires (1) "changing the order of the photos" when the array is presented to another witness,[206] (2) that separate arrays must be used for each witness,[207] and (3) when showing an array containing a new suspect, to avoid any fillers from the prior array.[208]

Officers are to record the identification procedure,[209] "[a]llow each witness to view the photographs independently out of the presence . . . of the other witnesses,"[210] and "[n]ever make suggestive statements that may influence the judgment or perception

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and incorporate them into his/her report. The witness should be asked to initial and date the front of the photograph selected."). The Policy also requires:

> A report of every show-up, photo array, line-up or voice identification procedure, whether an identification is made or not, shall be submitted. The report shall include a summary of the procedure, the persons who were present for it, instructions given to the witness by the officer (this should be accomplished by submitting the appropriate witness instruction form), any statement or reaction by the witness, and any comments made by the witness regarding the identification procedure.

Id.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* Specifically, the policy encourages officer to "[a]void fillers who so closely match the suspect that a person familiar with the suspect would have difficulty distinguishing the filler." *Id.*

205. *Id.* Additionally, officers are encouraged, "[w]ithout altering the photo of the suspect," to "create a consistent appearance between the suspect and the fillers with respect to any unique or unusual feature such as facial scars or severe injuries by adding or covering the feature." *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* ("The photo array should be preserved as evidence in the same configuration as when the identification was made.").

210. *Id.*

of the witness."[211] The model policy also requires double-blind[212] or blinded administration of the photographic array,[213] as well as informing the witness of the fact that the procedure is being conducted in a double-blind manner.[214] Like the statutory policy, the model policy requires an officer to record the witness's degree of confidence.[215]

There are some significant features in the model policy that are not addressed by the statutory procedures. For example, the policy urges officers to "use caution when interviewing eyewitnesses"[216] and to "avoid whenever possible the use of leading questions."[217] The model policy, unlike the statutory policy, addresses "show-up" identifications and notes that such procedures "should only be used soon after a crime has been committed, typically within two hours or under exigent circumstances, such as the near death of the only available witness."[218] The policy states that "show-up" identifications should be confined to emergency situations[219] and should be "as fair and non-suggestive as possible."[220]

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211. *Id.*
212. *Id.* The policy states that "[a] second officer who is unaware of which photograph depicts the suspect should actually show the photographs" and that this technique "is intended to ensure that the witness does not interpret a gesture or facial expression by the officer as an indication as to the identity of the suspect." *Id.*
213. *Id.* The policy also iterates that "[i]f a second officer is not available, the officer showing the array must employ a so-called "blinded' technique so that he/she does not know when the witness is viewing a photograph of the suspect." *Id.*
214. *Id.* ("[O]fficers should explain to the witness that the officer showing the array does not know the identity of the people in the photographs. The investigating officer should leave the room while the array is being shown by the administrator.").
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.* The policy further notes that "[s]how-ups should be conducted live whenever possible and not photographically." *Id.*
219. *Id.* ("When a show-up is arranged in an emergency situation, where either a witness or a victim is in imminent danger of death or in critical condition in a hospital, and the circumstances are such that an immediate confrontation is imperative, the emergency identification procedure shall be conducted in a non-suggestive manner.").
220. *Id.* ("Every show-up must be as fair and non-suggestive as possible. Specifically, if the suspect is handcuffed, he/she should be positioned so that the handcuffs are not visible to the witness. The suspect should not be viewed when he/she is inside a police vehicle, in a cell, or in jail clothing."). The policy further urges that "[p]olice officers must not do or say anything that might convey to the witnesses that they have evidence of the suspect's guilt. Officers should turn down their radios so that the witness they are transporting does not pick up information about the stop of the suspect." *Id.*

With regard to the photographic identification procedure, the model policy requires sequential administration of the photographs.[221] If the witness fails to make an identification when first shown the array, "but asks to view the array a second time," the policy requires the administrator to "ask the witness if he/she was able to make an identification from the original viewing."[222] Only if the witness "feels that it would be helpful to repeat the procedure" is it permissible to show the array a second time.[223] An array may not be shown to the witness more than twice.[224]

The model policy also has provisions on procedures outside the scope of this article, including (1) voice identifications;[225] (2) courtroom identifications;[226] (3) the use of composite sketches;[227] and (4) the use of "mug files" or "mug books."[228]

IV. ENFORCEMENT OF THE MARYLAND LEGISLATIVE REFORMS TO EYEWITNESS IDENTIFICATION PROCEDURES

What is notably lacking from the statute—and what animates the remainder of this article—is the lack of any enforcement mechanism. Although some remedies were proposed in earlier versions of the statute,[229] the enacted statute has no enforcement mechanism or sanction for non-compliance. This is significant because the violation of a statute, standing alone, is not grounds for

221. *Id.* Specifically, "[t]he officer should show the photographs to a witness one at a time. When the witness signals for the next photograph, the officer should move the first photograph so that it is out of sight. This procedure should be repeated until the witness has viewed each photograph." *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. The first reading of the statute provided that evidence of the failure to comply with the statute was to be considered by a court in adjudicating a motion to suppress the identification; that evidence of the failure to comply with the statute was admissible to support a claim of eyewitness misidentification; and that if evidence of non-compliance was presented at trial, the "jury shall be instructed that the jury may consider credible evidence of noncompliance in determining the reliability of an eyewitness identification." MD. GEN. ASSEMBLY, PUBLIC SAFETY – EYEWITNESS IDENTIFICATION – PROCEDURES, H.B. 1200, 434th Sess., at 3 (2014). This provision was stricken from the statute by the Third Reading. MD. GEN. ASSEMBLY, PUBLIC SAFETY – EYEWITNESS IDENTIFICATION – PROCEDURES, H.B. 1200, 434th Sess., at 3 (2014).

suppression.[230] Therefore, while the legislature has required a significant number of procedures that have been shown to produce more reliable eyewitness identifications, litigants must explore how best to enforce, and respond to a violation of, the provisions of this statute.

The remainder of this article explores the remedies and litigation strategies that should be available to a criminal defendant who shows that law enforcement officers failed to comply with the legislatively required procedures for creating and administering an extrajudicial identification procedure. Each remedy explored below is premised upon proof of law enforcement non-compliance of the statute. Every remedy suggested below is short of the remedy of total suppression, which occurs if a defendant can show that the procedure violated the federal due process protections against an unnecessarily suggestive procedure which produced an unreliable identification.

Specifically, this article argues that current Maryland law should permit a defendant who shows that law enforcement officers failed to comply with the statutorily required procedures for an extrajudicial identification: (1) to move in limine to exclude the identification on evidentiary grounds. Current Maryland law should also permit the defendant to: (2) cross-examine law enforcement officers concerning the failure to employ the procedures required by statute; (3) introduce expert testimony informing the jury why the procedures required by statute should be employed and how the failure to employ those procedures may affect the reliability of a resulting identification; (4) request a jury instruction informing the jury that certain procedures are required by law and that the jury may consider the failure to employ those procedures in assessing the weight to give to an identification; and (5) argue to the jury that the

230. Maryland courts have been clear:

> "One may not wish an exclusionary rule into being by waiving a magic wand. It is something that must be deliberately and explicitly created to cover a given type of violation." Accordingly, where the Legislature does not provide explicitly for a suppression remedy, courts generally should not read one into the statute.

King v. State, 76 A.3d 1035, 1047 (Md. 2013) (citation omitted) (quoting Sun Kin Chan v. State, 552 A.2d 1351, 1363 (Md. Ct. Spec. App. 1989)); Upshur v. State, 56 A.3d 620, 629 (Md. Ct. Spec. App. 2012) (noting that a court "will not create a suppression remedy . . . where the legislature did not create one at the time it enacted the statute"). It therefore seems apparent that suppression of an identification is not an available remedy if a law enforcement agency fails to adopt a policy in keeping with the legislative mandate, or if an individual identification procedure fails to comply with an extant or required policy.

failure to employ the procedures required by statute render the identification unreliable.

It must be noted that none of these remedies exist in a vacuum, and none should be considered independently of the others. To the contrary, there is a symbiotic relationship between several of these remedies, and the exploration of one remedy may be necessary to the provision of another. For example, cross-examination of a law enforcement officer and the testimony of an expert witness may be needed to establish the requisite factual basis for a jury instruction and closing argument. A jury instruction may be necessary to lend additional (and needed) gravitas to closing argument. These proposed remedies should not be viewed as individual remedies depending on the nature of the transgression; they should be viewed as a package that works together in harmony.

This article does not suggest that the violation of the statute should result in the total exclusion of the identification (except through an evidentiary motion in limine). Rather, between total suppression and leaving the defendant bereft of a way to respond to law enforcement non-compliance, this article seeks "a middle temperature between the two," viz., specific and focused remedies that respond directly to the failure to comply with the statute, evens the adversarial playing field once law enforcement secures an identification in violation of the statute, and ultimately, induces law enforcement fidelity to the General Assembly's legislative reforms to the area of extrajudicial identification procedures.

A. *Reasons for Providing Remedies for the Failure to Comply with the Statutorily Mandated Procedures*

The ultimate aim of this article is to ensure that the law enforcement community adopts and utilizes the procedures required in Maryland by statute. If an extrajudicial identification procedure complies with the statute, this article is of no use and there is no need for any remedy; if a defendant shows that police failed to adopt or comply with a statutorily required procedure, this article advocates for the provision of appropriate trial remedies. These remedies are not to be seen as a windfall for the defendant or a technicality. These remedies should be provided to ultimately induce the law enforcement community to do what it should: comply with the statute. It is the author's most profound hope that law enforcement will quickly cast this article into obsolescence.

The reasons why the law enforcement should be induced to comply with the statute are manifest. The General Assembly has mandated the use of certain procedures, rooted in the best present scientific understandings of human memory, which increase the

reliability of an eyewitness identification procedure. A more reliable process produces a more accurate result. By ensuring compliance with these mandated procedures, courts will ensure that only the identifications which are the product of a more reliable process are submitted to a jury. Thus, encouraging identifications that have a greater measure of reliability and accuracy increases the overall reliability of the identifications introduced in Maryland. This, ultimately, increases the likelihood that the true culprit will be identified and an innocent individual will not be wrongly identified.

There are many profound interests involved in endeavoring to better secure correct identification of the guilty and avoid the wrongful identification of the innocent. Two tragedies occur when a person is wrongly convicted of a crime he or she did not commit. The first is the obvious individual tragedy for the wrongly convicted individual.[231] There could be no greater miscarriage of justice than to convict the wrong individual of a serious criminal offense and to allow that person to be punished in the true culprit's stead.

There is also a profound public interest in preventing wrongful convictions. When a person is wrongly convicted of a crime, the true culprit remains free to reoffend. There is a profound and compelling public interest—which should be sought equally by the defense, the prosecution, the judiciary, and society at large—in ensuring that the real culprit is swiftly brought to justice. In his

231. Maryland is not immune to the tragic phenomena of wrongful conviction. Indeed, two leading Maryland cases on eyewitness identification issues involved the erroneous identification of a person who was later exonerated. As noted, one of the earliest and most influential Maryland cases adopting the federal due process approach regarding suppression of extrajudicial identifications was *Webster v. State*, 474 A.2d 1305, 1318 (Md. 1984). Bernard Webster, however, was innocent of that crime; he was identified by a rape victim as her assailant; her identification was admitted under the present standard; and he was incarcerated for over twenty years for a crime he did not commit. *See, e.g.*, Stephanie Hanes, *DNA's Secrets Set a Man Free*, BALT. SUN (Mar. 9, 2003), http://www.baltimoresun.com/news/maryland/bal-webster030903-story.html; *Bernard Webster*, INNOCENCE PROJECT, http://www.innocenceproject.org/cases/bernard-webster/ (last visited Apr. 1, 2017). In *Bloodsworth v. State*, 512 A.2d 1056 (Md. 1986), which was decided two years later, the Maryland Court of Appeals rejected the argument that the jury should be allowed to hear expert testimony concerning eyewitness memory, recall, and identification. Bloodsworth was convicted of sexual offenses and murder and sentenced to death based on multiple eyewitness identifications. *Id.* at 1057, 1065. He was exonerated in 1993 based on DNA testing and became the first person in our country to be sentenced to death and proven innocent through DNA testing. *See* Bomas v. State, 987 A.2d 98, 109–10 (Md. 2010); *Kirk Bloodsworth*, INNOCENCE PROJECT, http://www.innocenceproject.org/cases/kirk-bloodsworth/ (last visited Apr. 1, 2017).

landmark study of the first 250 DNA exonerations, Professor Garrett notes that "[i]n 45% of the 250 postconviction DNA exonerations (112 cases), the test results identified the culprit. This most often occurred through a 'cold hit' or a match in growing law enforcement DNA data banks."[232] More importantly:

> Some of these culprits subsequently confessed or pleaded guilty. At least forty of these perpetrators have been convicted of crimes that they committed while innocent persons were behind bars. They were convicted of approximately fifty-six rapes and nineteen murders after innocent people were convicted of their earlier crimes. The perpetrators may have committed many more crimes, but were not caught or were not successfully prosecuted. The DNA testing that eventually was done probably prevented still more crimes. As with [one exoneree], had it not been for the postconviction DNA testing, these people could have continued their crime spree with impunity. Those cases all highlight how important it is for public safety to make sure that the right person is convicted. Wrongful convictions are a serious law enforcement problem.[233]

Likewise, another commentator has noted:

> The individual and social harms spawned by wrongful convictions are undeniable, compound, and severe. The new crimes committed by offenders who have cheated justice, and the brutal devastation of the lives of additional rounds of victims, are paramount among those harms. Everyone loses when criminal justice miscarries; everyone, that is, except the murderers, rapists, burglars, robbers, and other lawbreakers who remain at liberty, often to reoffend, while the innocent are punished in their stead.[234]

Again, the Maryland experience has shown that this is a palpable concern.[235]

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232. GARRETT, *supra* note 82, at 5.

233. *Id.* at 232 (footnote omitted).

234. James R. Acker, *The Flipside Injustice of Wrongful Convictions: When the Guilty Go Free*, 76 ALB. L. REV. 1629, 1709 (2012).

235. For example, Kirk Bloodsworth was not fully exonerated until DNA testing later identified the person who committed the murder and sexual assault for which Bloodsworth had been convicted twice; that man pled guilty to the offenses. *See* Stephanie Hanes, *Guilty Plea Closes '84 Case of Rosedale Girl's Murder*, BALT. SUN (May 21, 2004), http://articles.baltimoresun.com/2004-05-

A wrongful conviction is anathema to our system of justice and, more importantly, when an innocent person is incorrectly identified as the criminal actor the true culprit is left free to reoffend. By encouraging the law enforcement community to adopt procedures that increase the reliability and accuracy of extrajudicial identification procedures and ensuring that identifications with increased reliability are presented to the jury, our system can best promote avoiding an individual wrongful conviction and the profound societal effect of permitting the true culprit to remain free.

B. *Proposed Remedies for the Failure to Utilize Statutorily Required Procedures for Extrajudicial Identification Procedures*

1. Motion in Limine to Exclude Identification

In *Perry*, the Supreme Court refused to modify its extant due process check on the admissibility of extrajudicial identification procedures, noting "other safeguards built into our adversary system that caution juries against placing undue weight on eyewitness testimony of questionable reliability."[236] One of the safeguards noted by the Court was for litigants to rely upon traditional rules of evidence, which "permit trial judges to exclude relevant evidence if its probative value is substantially outweighed by its prejudicial impact or potential for misleading the jury."[237]

This approach was adopted in Oregon in *State v. Lawson*. In *Lawson*, the Oregon Supreme Court noted the "estimator" and "system" variables identified in the scientific literature pertaining to eyewitness memory and identification.[238] The court placed the onus

21/news/0405210277_1_ruffner-dawn-hamilton-bloodsworth; Susan Levine, *Ex-Death Row Inmate Hears Hoped-for Words: We Found Killer*, WASH. POST (Sept. 6, 2003), https://www.washingtonpost.com/archive/politics/2003/09/06/ex-death-row-inmate-hears-hoped-for-words-we-found-killer/830ae600-0599-4e7a-a51b-d461885be769/?utm_term=.f66e19c33432. The culprit was identified after DNA from this offense was matched to his in a database of offenders. The true culprit had been convicted of attempting to rape a woman at knifepoint, which was after the offense for which Bloodsworth had been wrongly convicted. *See* Stephanie Hanes, *'84 Investigation Quick to Overlook the Culprit*, BALT. SUN (May 22, 2004), http://articles.baltimoresun.com/2004-05-22/news/0405220166_1_ruffner-dawn-hamilton-bloodsworth.

236. Perry v. New Hampshire, 565 U.S. 228, 245 (2012).

237. *Id.* at 247.

238. *See* State v. Lawson, 291 P.3d 673, 686–88 (Or. 2012) (providing an overview of system and estimator variables). The *Lawson* court identifies "system variables" as: (1) blind administration; (2) pre-identification instructions; (3) lineup construction; (4) simultaneous versus sequential lineups; (5) show-ups; (6) multiple viewings; (7)

on the proponent of the identification[239]—inevitably the prosecution—to make a prima facie showing of "evidence showing both that the witness had an adequate opportunity to observe or otherwise personally perceive the facts to which the witness will testify, and did, in fact, observe or perceive them, thereby gaining personal knowledge of the facts."[240] The court ultimately considered an identification to be a lay opinion (viz., "that a defendant on trial is the same person that the witness saw at the scene"[241]) and emphasized that, like any opinion offered into evidence, it must have a sufficient factual basis.[242] Under the *Lawson* approach, "[h]uman facial features will ordinarily be sufficiently distinctive to serve as a rational basis for an inference of identification," but "nonfacial features like race, height, weight, clothing, or hair color, generally lack the level of distinction necessary to permit the witness to identify a specific person as the person whom the witness saw."[243] The court also acknowledged that when the witness's personal knowledge is derived from an impermissible source, such as a suggestive police procedure, the proponent of the identification must show that the identification is based upon a permissible source (i.e., the witness's observations at the scene), rather than the impermissible source of knowledge.[244] Finally, the proponent must establish that the identification is helpful.[245]

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suggestive questioning, co-witness contamination, and other sources of memory contamination; and (8) suggestive feedback and recording confidence. *Id.* at 686–87. The court also identifies "estimator variables" as: (1) stress; (2) witness attention; (3) duration of exposure; (4) environmental viewing conditions; (5) witness characteristics and condition; (6) description; (7) perpetrator characteristics; (8) speed of identification; (9) level of certainty; and (10) memory decay. *Id.* at 687–88.

239. *Id.* at 689.

240. *Id.* at 692.

241. *Id.*

242. *See id.* at 693 (requiring a reviewing court to "initially consider what the witness actually perceived . . . and then determine whether the witness's identification of the defendant was 'rationally based' on those perceptions").

243. *Id.*

244. *Id.*

245. *Id.* The court "anticipate[d] that that burden will be easily satisfied in nearly all cases," but noted at least a hypothetical example of when the opinion might not help the jury in its task. *Id.* at 693–94 ("Consider, for example, the witness who observes a masked perpetrator with prominently scarred or tattooed hands. Although those features could be distinctive enough to provide a rational basis for an inference of identification, a jury may be equally capable of making the same inference by comparing the witness's description of those markings to objective evidence of the actual markings on the defendant. In such cases, the witness's opinion that defendant is the perpetrator provides the jury with little, if any, additional useful information.").

Once the proponent shows that the identification is based upon a sufficient and permissible factual basis, the *Lawson* approach requires a court to review the probity of the identification against its relative dangers. In the first step of the analysis, the court observed that "[t]he persuasive force of eyewitness identification testimony is directly linked to its reliability. . . . Conversely, the less reliable a witness's testimony, the less persuasive it will be."[246] This approach requires a court to "examine the relative reliability of evidence produced by the parties to determine the probative value of the identification," recognizing that "[t]he more factors—the presence of system variables alone or in combination with estimator variables—that weigh against reliability of the identification, the less persuasive the identification evidence will be to prove the fact of identification, and correspondingly, the less probative value that identification will have."[247] In this initial step, all the proponent must show is that the identification has probative value, and the court recognized there is a wide range of probity and "many identifications possessing relatively low probative value may still pass that initial test."[248]

Once a reviewing court assesses the probity of the identification, "[it] must then determine whether the evidence might unfairly prejudice the defendant."[249] The court should be cognizant that "in cases in which an eyewitness has been exposed to suggestive police procedures, trial courts have a heightened role as an evidentiary gatekeeper because 'traditional' methods of testing reliability—like cross-examination—can be ineffective at discrediting unreliable or inaccurate eyewitness identification evidence."[250] The court may exclude the identification in toto and may also "exclude particularly prejudicial aspects of a witness's testimony without excluding the identification itself" or exclude certain prejudicial aspects of the testimony without excluding the testimony completely.[251]

Oregon seems to be the only jurisdiction that has utilized state law to fashion a test for excluding an identification on evidentiary grounds. Maryland practitioners should, therefore, know they sail uncharted waters in filing a motion in limine to exclude an eyewitness identification under the *Lawson* approach. In undertaking this voyage, however, practitioners should note the

246. *Id.* at 694.
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.* at 695.
251. *Id.*

similarities between Maryland and Oregon evidentiary principles. Maryland, like Oregon, requires a showing that the witness's testimony is based on personal knowledge[252] and requires a showing that there is a sufficient factual basis for any opinion testimony.[253] *Lawson* ultimately rests upon an assessment of the relative probative value of the identification weighed against the potential prejudice in admitting the testimony. In this evaluation, the same rules that allowed the *Lawson* court to undertake this analysis are identical to the Maryland Rules that guide a Maryland court in undertaking an analysis of whether the identification should be admitted into evidence.[254]

252. *See* MD. RULE 5-602 (noting "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter").

253. In Maryland, the proponent of opinion testimony must demonstrate a sufficient factual basis for the opinion. Without a factual basis, the opinion is nothing more than inadmissible conjecture and speculation. Uhlik v. Kopec, 314 A.2d 732, 737 (Md. Ct. Spec. App. 1974). This issue usually arises with regard to expert opinions, and in that regard,"[a]n expert's judgment has no probative force unless there is a sufficient basis upon which to support his [or her] conclusions." Worthington Constr. Corp. v. Moore, 291 A.2d 466, 470–71 (Md. 1972); Surkovich v. Doub, 265 A.2d 447, 451 (Md. 1970) (noting "an expert's opinion is of no greater probative value than the soundness of his reasons given therefore will warrant"); *see also* State Health Dep't v. Walker, 209 A.2d 555, 559 (Md. 1965) (explaining how the record "must disclose that the expert is sufficiently familiar with the subject matter under investigation to elevate his opinion above the realm of conjecture and speculation, for no matter how highly qualified the expert may be in his field, his opinion has no probative force unless a sufficient factual basis to support a rational conclusion is shown"); 6 LYNN MCCLAIN, MARYLAND EVIDENCE § 705.1 (2015) (requiring "the opinion [to] ha[ve] a sufficient basis for it to be considered by the fact-finder").

254. The definition of relevance which guides the court's assessment of probity is the same in Oregon and Maryland. *Compare* OR. REV. STAT. § 40.150 (2015) ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."), *with* MD. RULE 5-401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). Once the court determines the probative value of the identification, the assessment of probity versus prejudice is likewise identical in both states (except that, in Maryland, evidence may be excluded if it is a "waste of time"). *Compare* OR. R. EVID. 403 (codified at OR. REV. STAT. § 40.160 (2015)) ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence."), *with* MD. RULE 5-403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

Thus, Maryland law would seem to support filing a motion in limine, raising the arguments identified in *Lawson*, to exclude an identification on evidentiary grounds. Indeed, this appears to be the best way to engraft "system" and "estimator" variables into Maryland law. Under this approach, the focus is not on the suggestiveness, but on the overall reliability of the procedure and resulting identification. Counsel should note that, of all the remedies suggested in this article, this approach has the least likelihood of success, mostly because (to the author's knowledge) this approach has never been tried in Maryland. Nevertheless, should an identification raise legitimate concerns as to its reliability, and present pertinent system and estimator variables, counsel should endeavor to have the identification excluded on evidentiary grounds.

2. Cross-Examination of the Law Enforcement Officers Who Created and Administered the Procedure.

The most immediate form of defense is to permit cross-examination of law enforcement officers concerning the failure to comply with the legislatively mandated procedures for conducting an extrajudicial identification procedure. The defendant should also be allowed to examine the officers who created and administered the extrajudicial identification procedure to establish a necessary factual basis for the other remedies suggested by this article.

In Maryland, unless it is otherwise excluded, "all relevant evidence is admissible."[255] Relevant evidence is "any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[256] The fact that a person identified the defendant in an extrajudicial identification procedure is evidence that the person is the person who committed the offense. If police failed to utilize more reliable procedures that produce more reliable identifications, the resulting identification is—or, could be found by the jury to be—less reliable. This, therefore, makes the failure to utilize the statutory procedures relevant because it affects the relative weight the jury should afford to an identification that was procured in an extrajudicial identification procedure that did not comply with the statutory requirements. Given that this evidence would impact the relative weight of the State's case, vis-à-vis criminal agency, it is a proper area to explore in cross-examination.

255. MD. RULE 5-402.
256. MD. RULE 5-401.

The practitioner should note that this should be an area of exploration in cross-examining a law enforcement officer who conducted an extrajudicial identification procedure because several other remedies, such as jury instructions and argument, require a factual basis, and this is likely the best area to obtain the facts necessary for an argument or instruction. Proper cross-examination should go towards showing that the officer did not comply with relevant and specific aspects of the statutory requirements.[257] Counsel should also inquire as to whether the officer's agency has a written policy concerning extrajudicial identification procedures, whether the terms of that policy comply with the statutory mandates and, if so, why the officer did not comply with that policy.[258]

3. Expert Testimony Concerning the Relative Reliability of the Identification

In *Perry*, the Supreme Court refused to depart from the present due process check upon eyewitness identification testimony, noting that jurors may be educated concerning the reliability of those identifications via expert testimony "on the hazards of eyewitness identification evidence."[259] While expert testimony on eyewitness memory and identification is now admissible in most jurisdictions—including Maryland—the need for such testimony in a Maryland trial is even stronger, given that an expert may educate the jury as to: (a) why the legislature would require certain procedures in the composition and administration of an extrajudicial identification procedure; and (b) how the failure to utilize those procedures in a

257. For example, the statute requires an identification procedure to be conducted by a "blind" or "blinded" administrator, (i.e., an administrator who "does not know the identity of the suspect" or an administrator who "may know who the suspect is but does not know which lineup member is being viewed by the eyewitness"). MD. CODE ANN., PUB. SAFETY §§ 3-506.1(a)(3)–(4), (b)(1) (LexisNexis Supp. 2016). A relevant line of inquiry would be: "Officer, when you administered the photographic array, you knew that Mr. Defendant was the suspect, correct? And you knew that he was in position four in the array, correct?"

258. Admittedly, the latter lines of questioning may be less relevant than questioning establishing compliance *vel non* with the statutorily required procedures. However, at some point, the jury will need to know the relative importance of the failure to undertake certain procedures, such as blind or blinded administration of the array. The importance, of course, is that law enforcement agencies are required by statute to adopt these procedures because they produce more reliable identifications. Adequately informing the jury of these requirements and their importance—via a jury instruction or in some other meaningful way—may obviate the need for these questions in cross-examination, as long as the jury is ultimately informed that Maryland law requires law enforcement agencies to adopt, and employ, these required procedures.

259. Perry v. New Hampshire, 565 U.S. 228, 247 (2012).

particular array affects the relative reliability of the resulting identification. Where law enforcement agencies or individual officers fail to comply with the legislatively required procedures, a defendant should be allowed to adduce expert testimony informing the jury how the failure to comply with those policies affects the weight of the identification.

In *Bomas v. State*, the Maryland Court of Appeals "recognize[d] that scientific advances . . . may assist juries in evaluating eyewitness testimony" and "appreciate[d] that scientific advances have revealed (and may continue to reveal) a novel or greater understanding of the mechanics of memory that may not be intuitive to a layperson."[260] The Court also "ma[d]e clear that trial courts should recognize these scientific advances in exercising their discretion whether to admit such expert testimony in a particular case."[261] In so doing, the Court embraced "a flexible standard that can properly gauge the state of the scientific art in relation to the specific facts of the case."[262] Ultimately, the Court reiterated that the proper test for the admissibility of expert testimony is the discretionary consideration of "whether [the expert's] testimony will be of real appreciable help to the trier of fact in deciding the issue

260. 987 A.2d 98, 112 (Md. 2010). The Court also noted that *Bloodsworth v. State*, 512 A.2d 1056 (Md. 1986)—its only prior consideration of the propriety of expert testimony on eyewitness memory and identification—"strikes a negative tone with respect to expert testimony on eyewitness identification." *Id.* at 108. In *Bloodsworth*, the Maryland Court of Appeals had noted that, as of that time, "[t]he vast majority of courts have rejected" expert testimony on eyewitness identification, 512 A.2d at 1064, and emphasized "[o]ur legal system places primary reliance for the ascertainments of truth on the test of cross-examination," and "[i]t is the responsibility of counsel during cross-examination to inquire into whether the witness' opportunity for observation, his capacity for observation, his attention and interest and his distraction or division of attention." *Id.* at 1065 (quoting United States v. Amaral, 488 F.2d 1148, 1153 (9th Cir. 1973)). The *Bloodsworth* Court also noted such testimony "would effectively invade the province of the jury" and "open a floodgate whereby experts would testify on every conceivable aspect of a witness' credibility." *Id.* (quoting State v. Porraro, 404 A.2d 465, 471 (R.I. 1979)). While the *Bomas* Court did not change the test for the admissibility of such testimony, it retracted the Court's prior negative attitude towards the admission of this testimony.

261. *Bomas*, 987 A.2d at 112. The Court also noted the prevalence of wrongful convictions based on incorrect eyewitness identification, *id.* at 109, and that it was "sensitive to the perils of such testimony" and concluded by "reiterat[ing] that trial courts, in considering the admission of expert testimony regarding eyewitness observation and memory, should recognize scientific advances that have led to a greater understanding of the mechanics of memory that may not be intuitive to a layperson." *Id.* at 116.

262. *Id.* at 112.

presented."[263] While noting that other remedies may be available to the defendant,[264] the Court iterated that "the probative value of expert testimony on eyewitness identification and how much such testimony can actually help the jury in the case before it must be carefully weighed by the court on a case-by-case basis."[265]

The Court also observed that "[a] trial judge must have the ability to determine whether proffered testimony has a credible foundation and is relevant to the facts of a given case"[266] and must evaluate whether the proffered expert testimony is relevant to the case at hand.[267] In *Bomas*, the Court ultimately affirmed the exclusion of expert testimony, which was general, vague, and lacked a sufficient factual basis.[268]

Consistent with *Bomas*' "flexible standard that can properly gauge the state of the scientific art in relation to the specific facts of the case,"[269] when the defendant shows that law enforcement officers who administered an extrajudicial identification procedure failed to comply with a certain component of the statutorily required procedures, the defendant should be permitted to adduce expert testimony educating the jury as to how that particular procedure increases the reliability of an identification, and thus, how the failure to employ that required procedure affects the identification at hand. For example, if a defendant shows that the officer who administered the procedure was neither blind nor blinded, the defendant should be able to introduce the testimony of an expert who can educate jurors as to why a procedure should be conducted in a blind or blinded manner and the impact that non-blinded administration has upon the ultimate reliability of the identification.

The use of expert testimony in this arena may ultimately synthesize several pertinent considerations. Maryland law recognizes the scientific advances concerning eyewitness memory

263. *Id.* at 106 (alteration in original) (quoting *Bloodsworth*, 512 A.2d at 1066).

264. The Court noted that "[e]xpert testimony is not the only means to educate juries about the vagaries of eyewitness testimonies and safeguard against wrongful convictions based on misidentifications." *Id.* The Court observed "other trial components such as cross-examination, closing arguments, and jury instructions, can provide the jury with sufficient information to evaluate the reliability of eyewitness identifications." *Id.* To this end, the Court iterated that it may be appropriate for the Maryland Criminal Pattern Jury Instruction Committee "to evaluate whether its current rule on witnesses . . . should be modified in light of the studies about eyewitness testimony, and the scientific advances in this area." *Id.*

265. *Id.* at 114.

266. *Id.* at 113.

267. *Id.* at 112–13.

268. *Id.* at 114.

269. *Id.* at 112.

and identification in the past several decades and supports the admission of expert testimony on that topic, provided that the testimony is helpful to the jury and pertinent to the facts at hand.[270] The Maryland General Assembly, based upon that increased scientific understanding, has required a series of procedures that will help produce more reliable extrajudicial identifications.[271] When the defendant shows that law enforcement failed to comply with those required procedures, an expert can provide the necessary understanding as to why those procedures are required and why the failure to employ those procedures impacts the weight the jury should give to the resulting identification. This approach will thus bring harmony between the admission of expert testimony concerning a relevant aspect of the identification at issue and the General Assembly's requirement of specific procedures in creating and administering an extrajudicial identification procedure.

Additionally, the testimony of an expert may provide the necessary factual basis for a jury instruction concerning the required procedures and the weight the jury should give to an identification where the procedure does not comply with those procedures, as well as any closing argument to that effect. Again, should law enforcement comply with the statutorily required procedures and employ these more reliable methods for creating and administering extrajudicial identification procedures, expert testimony on the need for such procedures would be unwarranted and not helpful to the jury. Conversely, should law enforcement officers fail to employ those procedures, expert testimony is an excellent way to educate jurors as to the importance of those procedures in assessing the evidence in the case. Thus, if law enforcement fails to comply with the statutorily mandated procedures, a defendant should be permitted to introduce expert testimony concerning the need for the procedures that law enforcement did not employ and the weight to afford to a non-compliant identification.

4. Jury Instructions

In *Perry*, the Supreme Court noted that unreliable identifications may be countered by the "existing safeguards" in the trial process, including jury instructions that "warn the jury to take care in

270. *Id.* at 112, 116.
271. MD. CODE ANN., PUB. SAFETY §§ 3-506.1(b)–(f) (LexisNexis Supp. 2016).

appraising identification evidence."[272] The Maryland Court of Appeals has likewise noted that it may be appropriate for the Maryland Criminal Pattern Jury Instruction Committee "to evaluate whether its current rule on witnesses . . . should be modified in light of the studies about eyewitness testimony, and the scientific advances in this area."[273] Several states have recently adopted pattern jury instructions reflecting present scientific understandings of memory and identification,[274] or tasked various committees with adopting pattern jury instructions on that topic.[275] Indeed, jury instructions appear to be one of the core areas of eyewitness reform, and commentators have argued that comprehensive jury instructions on the science of eyewitness memory and identification may be the "most effective" way to educate jurors as to the dangers of eyewitness testimony.[276]

The need for, and efficacy of, pattern instructions on general issues concerning eyewitness memory and identification is outside the scope of this article. This article concerns potential defenses that can be asserted once a criminal defendant shows that he or she was identified in an extrajudicial identification procedure that did not comply with the procedures required by statute. Should the defendant show that law enforcement officers failed to comply with the statute, the defendant should be entitled to a focused instruction informing jurors as to what procedures are required by Maryland law and that the failure to comply with the statute may be considered in evaluating the weight of the resulting identification.

In Maryland, a jury instruction is appropriate if: it is a correct statement of the law; it is applicable to the facts of the case; and it relates to content not "fairly covered" elsewhere in the instructions.[277] While a trial judge has discretion in formulating an appropriate instruction and in deciding whether to give an instruction, the Court of Appeals will reverse the trial court's

272. Perry v. New Hampshire, 565 U.S. 228, 246 (2012) (citing United States v. Telfaire, 469 F.2d 552, 558–59 (D.C. Cir. 1972) (per curiam)).
273. *Bomas*, 987 A.2d at 113.
274. *See, e.g.*, Commonwealth v. Gomes, 22 N.E.3d 897, 918 (Mass. 2015).
275. *See, e.g.*, Young v. State, 374 P.3d 395, 427 (Alaska 2016); State v. Cabagbag, 277 P.3d 1027, 1039 (Haw. 2012).
276. *See* Derek Simmonsen, *Teach Your Jurors Well: Using Jury Instructions to Educate Jurors About Factors Affecting the Accuracy of Eyewitness Testimony*, 70 MD. L. REV. 1044, 1047 (2011).
277. *See* Cost v. State, 10 A.3d 184, 189–90 (Md. 2010); Dickey v. State, 946 A.2d 444, 450 (Md. 2008) (quoting MD. RULE 4-325).

decision not to propound an instruction if it finds that the defendant's rights were not adequately protected.[278]

Maryland appellate courts have, on several occasions, indicated that instructions on eyewitness identification issues may be appropriate. In *Gunning v. State*,[279] which considered two consolidated cases that had been tried separately before the same judge, counsel for each defendant requested the court to propound the pattern instruction concerning eyewitness identification, and in both trials, the judge refused to propound the requested instruction.[280] The Maryland Court of Appeals held that a court has discretion to consider whether to propound an instruction on eyewitness testimony,[281] and in exercising this discretion, the court should analyze whether the evidence at trial gives rise to a need for such an instruction by considering "such factors as any equivocation associated with the identification, the extent to which mistaken identification is reasonably at issue and the existence of, or lack of corroboration of the eyewitness identification."[282] The Court also rejected the contention that an instruction on the manner in which the jury should evaluate an eyewitness identification went beyond the court's duty to instruct the jury as to the law and that it did not constitute an impermissible comment upon the evidence.[283] Finally, the Court indicated that an instruction on eyewitness testimony might assist the jury in its task by "pointing out the specific factors that may affect eyewitness identification," which might not be generally known by jurors.[284] Thus, the Court required a trial court to give "careful consideration" to a request for a jury instruction on eyewitness testimony when uncorroborated eyewitness testimony was a critical aspect of the State's case.[285]

In *Janey v. State*, the Maryland Court of Special Appeals reaffirmed this discretionary approach in considering whether the trial court erred in failing to propound an instruction concerning cross-racial identification.[286] After reviewing *Gunning* and discussing existing law, which stated that a trial court need not

278. *See Cost*, 10 A.3d at 189 (citing General v. State, 789 A.2d 102, 111 (Md. 2002)).
279. Gunning v. State, 701 A.2d 374 (Md. 1997).
280. *Id.* at 375–77.
281. *Id.* at 380–81.
282. *Id.* at 382.
283. *Id.* at 381.
284. *Id.* at 383.
285. *Id.* at 384–85.
286. 891 A.2d 355, 356 (Md. Ct. Spec. App. 2006).

instruct the jury on factual (versus legal) inferences,[287] the court concluded "[i]t is clear . . . that an instruction that cautions the jury about pertinent factors that can affect the reliability of eyewitness identifications in general may be appropriate."[288] The court ultimately held that there was no reversible error in refusing to propound the instruction in that case because, under the facts of the case, the requested instruction would not have significantly influenced the outcome of the case.[289] However, the court indicated that it did not intend to foreclose such an instruction in a more appropriate case.[290]

Outside of the eyewitness arena, Maryland law holds that it is sometimes appropriate to instruct the jury as to factual inferences that may arise from law enforcement missteps in the investigation of a case. For example, in *Cost v. State*, the defendant was accused of assaulting another inmate at a correctional institution and, at trial, established that although the scene of the attack had initially been preserved, the contents of the cell in question had been destroyed before the scene could be appropriately investigated.[291] The defendant requested that the jury be instructed that the destruction of this evidence could lead to an inference that the evidence was favorable to the defendant.[292] The Court ultimately agreed, noting that the case presented an unusual circumstance in which "[t]he evidence destroyed while in State custody was highly relevant to [the] case," and that evidence went "to the heart of the case."[293] In those circumstances, the Court iterated that an instruction "which would permit but not demand that the jury draw an inference that the missing evidence would be unfavorable to the State, should have been given."[294] The Court also noted that, although Cost could have argued for the jury to draw the same inference, an instruction was warranted because "argument by counsel to the jury will naturally be imbued with a greater gravitas when it is supported by a[n] instruction on the same point issued from the bench."[295] Last, the

287. *See id.* at 361–62 (discussing Patterson v. State, 741 A.2d 1119, 1124–25 (Md. 1999)).
288. *Id.* at 362.
289. *Id.* at 367–68.
290. *Id.*
291. 10 A.3d 184, 187–88 (Md. 2010).
292. *Id.* at 188.
293. *Id.* at 196.
294. *Id.*
295. *Id.* The Court further iterated, "As we have previously said, 'a statement or instruction by the trial judge carries with it the imprimatur of a judge learned in the

Court observed that "[f]or the judicial system to function fairly, one party in a case cannot be permitted to gain an unfair advantage through destruction of evidence," and thus, a jury instruction on the jury's ability to draw an inference would "help ensure that the interests of justice are protected."[296]

Cost involved the situation where an instruction was necessary to level the playing field and preclude one party from gaining a litigation advantage by destroying relevant evidence. Conversely, the Maryland Court of Appeals has held that there is generally no obligation to instruct the jury as to the situations in which law enforcement has no duty to undertake certain actions during a criminal investigation. In a series of cases addressing the so-called "CSI-effect,"[297] the Court of Appeals has cautioned judges to tread carefully in propounding jury instructions concerning the absence of a legal duty of police to undertake certain steps in investigating a criminal case. In *Atkins v. State*,[298] the Court held that a trial judge abused her discretion in instructing a jury that "there is no legal requirement that the State utilize any specific investigative technique or scientific test to prove its case"[299] because this instruction "resulted in a non-neutral commentary on the evidence, or the absence of evidence, actually admitted, and invaded the province of the jury, thus violating Atkins's constitutional rights to due process and a fair trial."[300] In *Stabb v. State*,[301] the Court again held that such an instruction was improper and indicated that such instructions should only be given when "it responds to correction of a pre-existing overreaching by the defense, i.e., a curative instruction."[302] A criminal defendant does not generate such a curative instruction when he or she argues that the State has failed to employ "a well-known, readily available, and superior method of proof," such as fingerprint

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law, and therefore usually has more force and effect than if merely presented by counsel.'" *Id.* at 196–97 (quoting Hardison v. State, 172 A.2d 407, 411 (Md. 1961)).

296. *Id.* at 197.

297. *See, e.g.*, Robinson v. State, 84 A.3d 69, 80 (Md. 2014) (expressing an "avowed skepticism regarding the appropriate use of an 'anti-CSI effect' instruction"); Stabb v. State, 31 A.3d 922, 930 (Md. 2011) ("The 'CSI effect' refers generally to various theories that assert that exposure to courtroom or criminal investigative fictional media may influence jurors' objective evaluation of an actual trial.").

298. Atkins v. State, 26 A.3d 979 (Md. 2011).

299. *Id.* at 983.

300. *Id.* at 980.

301. *Stabb*, 31 A.3d at 922.

302. *Id.* at 933.

analysis, to connect the defendant to the crime.[303] Thus, Maryland law does not allow the court to instruct jurors as to what law enforcement officers are *not* required to do, absent an improper defense insinuation that law enforcement failed to perform a requisite element of the investigation.

Maryland law also recognizes there is no duty for a judge to instruct a jury on an "evidentiary inference" that "is not based on a legal standard but on individual facts from which inferences can be drawn."[304] While there is no requirement for the court to instruct the jury on basic evidentiary inferences, there are myriad instances in which the jury is instructed as to the requirements of Maryland law and permitted to let specific legal considerations conveyed in the instruction guide their fact-finding. For example, Maryland is one of a few remaining jurisdictions that permits a person to resist an unlawful warrantless arrest.[305] Where the defendant is charged with resisting arrest and the evidence in a case generates a factual issue as to whether police had probable cause to arrest that person, the court must propound an instruction concerning the right to resist the arrest or, at minimum, concerning the legal requirements for a lawful arrest.[306] There are numerous instances in which a jury may be instructed on issues as diverse as whether the defendant's destruction of evidence[307] or bribery of a witness[308] shows a consciousness of guilt. In Maryland, a jury is permitted to decide whether a defendant's statement to police is voluntary and is instructed to

303. Robinson v. State, 84 A.3d 69, 81 (Md. 2014); *see, e.g.*, Sample v. State, 550 A.2d 661, 663 (Md. 1988); Eley v. State, 419 A.2d 384, 386–87 (Md. 1980); *see infra* note 330 and accompanying text.

304. Patterson v. State, 741 A.2d 1119, 1123 (Md. 1999).

305. Maryland has long recognized "that one illegally arrested may use any reasonable means to effect his escape, even to the extent of using such force as is reasonably necessary." Sugarman v. State, 195 A. 324, 326 (Md. 1937); *see also* State v. Wiegmann, 714 A.2d 841, 851 (Md. 1998) (declining "to abolish the long-standing common law privilege permitting persons to resist an unlawful warrantless arrest"); Rodgers v. State, 373 A.2d 944, 947–48 (Md. 1977) (discussing the historical underpinnings of the common law right to resist an arrest). A person may therefore offer reasonable resistance to repel an unlawful warrantless arrest. Dennis v. State, 674 A.2d 928, 936 (Md. 1996).

306. *See* Arthur v. State, 24 A.3d 667, 677 (Md. 2011) (noting that "because the evidence presented at trial generated the issue of whether [police] had probable cause to arrest Arthur . . . the only way for Arthur to have a fair trial is for the jury to understand the law concerning his right to resist an unlawful arrest").

307. *See* MD. STATE BAR STANDING COMM., MARYLAND CRIMINAL PATTERN JURY INSTRUCTIONS § 3:26 (2d ed. Supp. 2016).

308. *Id.* § 3:28.

"consider all the circumstances surrounding the statement," including a list of enumerated circumstances.[309] The jury is then left to give the statement "such weight as [it] believe it deserves," if it is voluntary, but told that it "must disregard it," if it finds that the statement was not voluntary.[310]

Thus, although Maryland juries should not be instructed as to pure factual inferences, Maryland juries are routinely informed of the underlying legal principles that will influence their factual findings and instructed to use these legal principles in resolving factual disputes. The key, therefore, in requesting a jury instruction concerning law enforcement officers' failure to comply with the statutory standards for extrajudicial identification procedures is to tie the instruction to the law and to let the legal standards established by law guide the jury in assessing the facts of the case. Under the statute, law enforcement agencies are required to adopt and employ a set of standards in conducting eyewitness identification procedures.[311] Unlike the "no duty" situation confronted in *Atkins*, *Stabb*, and *Robinson*, law enforcement officers are under a legal duty to adopt and implement these procedures. Moreover, as *Cost* noted, "[f]or the judicial system to function fairly, one party in a case cannot be permitted to gain an unfair advantage through the destruction of evidence," and therefore, an instruction concerning the inferences that arise when a party destroys relevant evidence "help[s] ensure that the interests of justice are protected."[312] When a law enforcement agency fails to comply with Maryland law and adopt an eyewitness identification protocol that complies with the statutory mandate, or when individual officers fail to comply with such a protocol, the prosecution has gained an unfair advantage by securing the identification of the accused in a less-reliable manner than required by law. In such a situation, the only way to restore the parties to where they should be is to instruct the jury as to the statutory requirements and permit the jury to use statutory non-compliance as a factor in evaluating the relative weight to afford to the identification.

A jury instruction on this topic would therefore inform the jury as to the statutory requirements and permit the jury to evaluate whether

309. *Id.* § 3:18.
310. *Id.*
311. MD. CODE ANN., PUB. SAFETY §§ 3-506.1(b)–(f) (LexisNexis Supp. 2016).
312. Cost v. State, 10 A.3d 184, 197 (Md. 2010).

non-compliance with the statute affects the weight given to the identification. The author suggests the following annotated instruction as a guide:[313]

> You have heard evidence that the defendant was identified prior to trial from [a lineup] [an array of pictures] shown to a witness. Maryland law requires a certain set of procedures to be followed in any procedure in which a witness is asked to identify a suspect from [a live lineup] [an array of photographs] including [a photograph of] the suspect.[314] You are instructed that:
>
> The officer conducting the procedure may not know the identity of the suspect or, at minimum, if the officer knows the identity of the suspect he or she may not know which lineup member is being viewed by the witness;[315]
>
> The witness must be instructed, prior to the administration of the procedure, that the perpetrator may or may not be among the persons in the procedure;[316]
>
> The officer administering the procedure must document in writing all identification statements made by the eyewitness at the time of the procedure, and prior to any feedback given to the witness, including a statement in the witness's own words describing the witness's confidence level that the person identified is the perpetrator of the crime;[317]
>
> The procedure must include a minimum of [four] [five][318] other individuals who resemble the description of the perpetrator given by the eyewitness in significant physical features, including any unique or unusual features;[319]
>
> The array must contain different "fillers" if the witness has previously participated in an identification procedure;[320]

313. This instruction is modeled on the statutory procedure codified in section 3-506.1 of the Maryland Public Safety Code. An instruction may also be modeled on the complementary model policy of the Eyewitness Identification Policy. Policy, *supra* note 195, at 33.

314. This communicates the essence of the definition of an "identification procedure" in section 3-506.1(a)(8) of the Maryland Public Safety Code.

315. PUB. SAFETY §§ 3-506.1(a)(3)–(4), (b)(1).

316. *Id.* § 3-506.1(b)(3).

317. *Id.* §§ 3-506.1(a)(9), (b)(4).

318. Five "fillers" must be used in a photographic array, and four "fillers" must be used during an in-person lineup procedure. *Id.* §§ 3-506.1(c)(2)–(3).

319. *Id.* § 3-506.1(c)(1).

320. *Id.* § 3-506.1(d).

> If identification procedures are conducted for multiple eyewitnesses, the procedure must be conducted separately for each witness, the suspect must be placed in a different position for each procedure, and the witnesses may not communicate with each other until all procedures have been completed;[321] and
>
> At the end of the procedure, police must document the procedure via an audio or video recording, or document in writing all identification and non-identification results obtained from the procedure; the signed identification statement of the eyewitness; the names of all persons present at the procedure; the date and time of the procedure; whether the witness identified a "filler" other than the suspect; and retain all photographs used in the procedure.[322]
>
> Should you find that the law enforcement officers who administered the identification procedure in this case failed to comply with any of these requirements, you may consider the failure to comply with those requirements in assigning the weight to give to the identification secured by that procedure.

Like any other jury instruction, this instruction would have to be factually generated by the evidence at trial.[323] This, therefore, shows the importance of cross-examining the law enforcement officer who administered the procedure as to what was done, and what was not done, during the procedure.[324] This also shows how expert testimony, concerning the need for such procedures and how the failure to employ these procedures may affect the weight of an identification, can help the jury. This instruction will not be factually generated or necessary if the evidence shows that the law enforcement agency and the individual officers who administered the procedure complied with the statute.

The most important reason of why such an instruction may be warranted is because absent this instruction, jurors will have no way of knowing the pertinent Maryland law concerning the creation and administration of extrajudicial identification procedures. The

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321. *Id.* §§ 3-506.1(e)(1)–(3).
322. *Id.* § 3-506.1(f).
323. *See* Cost v. State, 10 A.3d 184, 189 (Md. 2010); Dickey v. State, 946 A.2d 444, 450 (Md. 2008).
324. *See supra* Section II.B.2.

General Assembly has required these procedures for a reason: to create an increase in the overall reliability of eyewitness identifications at trial. When law enforcement agencies or individual officers fail to abide by these requirements and submit an identification that was not produced by these more reliable procedures, a jury should be informed of that statutory violation and allowed to utilize the failure to comply with the required procedures in evaluating the weight to afford the resulting identification. The provision of such an instruction will therefore induce compliance with the statute and equal the adversarial playing field in the wake of law enforcement dereliction of their statutory duty to secure identifications in the manner proscribed by statute.

5. Closing Argument

Perhaps the most modest of the potential remedies that should be afforded to a defendant who has been identified in a procedure that does not comply with the statutory protocol is to permit robust closing argument on law enforcement's failure to comply with the statute. While this is a modest remedy—and, perhaps, the most non-controversial remedy proposed by this article—the need for robust argument may ultimately highlight the necessity of the other remedies suggested in this article.

In Maryland, "liberal freedom of speech should be allowed"[325] in closing argument and "attorneys are afforded great leeway in presenting closing arguments to the jury."[326] In this vein, Maryland permits the defendant to comment upon the failure to employ a more sophisticated investigation during closing argument. For example, in *Eley v. State*, the trial court did not permit the defendant to note in closing argument that there was no fingerprint evidence connecting him to a vehicle used in a crime.[327] The Maryland Court of Appeals reversed the conviction, noting that "the excluded comments went to the strength of the prosecution's evidence, or more specifically the lack of evidence,"[328] and also to the weight of the evidence because "the State had available to it a better method of identification-fingerprint evidence" but "failed to produce any such evidence and failed to offer any explanation for that failure."[329] Thus, the Court

325. Wilhelm v. State, 326 A.2d 707, 714 (Md. 1974).
326. Degren v. State, 722 A.2d 887, 901 (Md. 1999).
327. 419 A.2d 384, 385 (Md. 1980).
328. *Id.* at 386–87.
329. *Id.* at 387.

concluded, "where a better method of identification may be available and the State offers no explanation whatsoever for its failure to come forward with such evidence, it is not unreasonable to allow the defendant to call attention to its failure to do so."[330]

In *Eley*, the Maryland Court of Appeals noted that the defendant could comment upon the failure to utilize fingerprint evidence even though there was no duty for law enforcement officers to utilize this investigative technique.[331] Unlike the situation in *Eley*, law enforcement officers *are* under a statutory duty to utilize certain procedures in administering an extrajudicial identification procedure.[332] If the defendant in the *Eley*/*Sample* line of cases may comment upon the failure to utilize "a better method of identification" that is "available" to investigators, surely a defendant identified in an identification procedure that does not comply with the statutory guidelines—aimed at increasing the reliability of identifications—should be given similar leeway to comment upon the State's failure to utilize a more reliable form of investigation.[333]

Maryland decisions permit a defendant to focus on weaknesses in eyewitness identifications in closing argument. In *Smith v. State*, a witness identified a person of a different race as the person who tried to rob her at gunpoint.[334] The witness also testified that she was "extremely good with faces," "very, very good with people," and "stud[ied] faces and . . . look[ed] for features on people that make them more distinct."[335] Prior to closing argument, the trial judge informed the parties that "defense counsel will not be able to argue on cross-racial identification . . . [because] there is not evidence in this case to that effect."[336] On appeal, the Maryland Court of Appeals reviewed the scientific literature concerning cross-racial

330. *Id.*; *accord* Sample v. State, 550 A.2d 661, 663 (Md. 1988) (noting that "when the State has failed to utilize a well-known, readily available, and superior method of proof to link the defendant with the criminal activity, the defendant ought to be able to comment on the absence of such evidence").

331. *Eley*, 419 A.2d at 387 (noting "it is not incumbent upon the State to produce fingerprint evidence to prove guilt").

332. MD. CODE ANN., PUB. SAFETY § 3-506 (LexisNexis 2011).

333. *See Eley*, 419 A.2d at 387.

334. 880 A.2d 288, 291 (Md. 2005).

335. *Id.* at 292.

336. *Id.* (first alteration in original). Additionally, the trial judge again informed the parties: "So it is perfectly clear, I'm denying your request, but I would permit you to say that your client is black, victim is white, but I will not let you refer to cross-racial identification." *Id.* at 293.

identification,[337] and ultimately concluded that, within the specific milieu of a cross-racial identification by a witness who claimed to be especially adept at identifying individuals, "[d]efense counsel clearly was entitled to challenge [the] 'educated' identification of the defendants by arguing to the jury that her identification should not be accorded the weight that she credited to her own ability to identify them."[338] The Court came to this conclusion, despite acknowledging that "[a]t this juncture the extent to which own-race bias affects eyewitness identification is unclear based on the available studies addressing this issue, so that we cannot state with certainty that difficulty in cross-racial identification is an established matter of common knowledge."[339] Nevertheless, because "the victim's identification of the defendants was anchored in her enhanced ability to identify faces . . . defense counsel should have been allowed to argue the difficulties of cross-racial identification in closing argument."[340]

If defense counsel is allowed to argue a controversial topic, such as the diminished weight to afford a cross-racial identification without affirmative evidence of the effect of that phenomena, counsel should be able to comment upon the failure to comply with the legal requirements for creating and administering more reliable extrajudicial identification procedures. There can be no debate that every law enforcement agency in Maryland must adopt and implement a series of procedures that make the identification procedure more reliable. When the evidence shows that law enforcement officers failed to comply with these requirements—and certainly if additional evidence, such as expert testimony shows that this violation of the statute affects the reliability of the identification—defense counsel should be allowed to comment upon the statutory violation, and its effect, in closing argument. This modest defense is predicated on law enforcement's failure to comply with the clear statutory guidelines for creating and administering an extrajudicial identification procedure.

337. *Id.* at 294–98. The Court noted that "a cross-racial identification occurs when an eyewitness of one race is asked to identify a particular individual of another race." *Id.* at 294 (citing John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 AM. J. CRIM. L. 207, 211 (2001)).

338. *Id.* at 300.

339. *Id.*

340. *Id.*

The necessity of a robust closing argument, focusing upon the failure to employ the procedures required by statute, highlights the commensurate need for the other remedies proposed in this article. For example, any argument must be based on the facts adduced at trial.[341] To have the facts necessary to make this argument counsel must be allowed to cross-examine the officer or officers who created and administered the procedure to establish what was, and was not, done when the procedure was administered.[342] More importantly, in order for the jury to fully grasp the importance of the failure to employ certain elements of the procedure, expert testimony may be necessary to show how compliance with the statutorily required procedures would increase the reliability of the identification and how the pertinent points of departure from the statutory policy decrease the reliability of the identification.[343]

Finally, a jury instruction may be necessary to put the closing argument in its necessary context. Absent a jury instruction, jurors will have no way of knowing that certain procedures are required under Maryland law when law enforcement officers create and administer an identification procedure. In order to apply the law, jurors must first know the law. Thus, without instructional guidance, jurors will not know that these procedures are not simply recommendations of defense counsel or of a defense expert, but are required by the General Assembly to increase the reliability of extrajudicial identifications in Maryland. Maryland law has long recognized "a statement or instruction by the trial judge carries with it the imprimatur of a judge learned in the law, and therefore usually has more force and effect than if merely presented by counsel."[344] Given that such an instruction is triggered only by law enforcement non-compliance with the statute, an instruction as to the legal requirements for creating and administering an identification

341. *See, e.g.*, Wilhelm v. State, 326 A.2d 707, 714 (Md. 1974) (noting that "counsel has the right to make any comment or argument that is warranted by the evidence proved or inferences therefrom").
342. *See supra* notes 255–58 and accompanying text.
343. *See supra* notes 259–71 and accompanying text.
344. Cost v. State, 10 A.3d 184, 196–97 (Md. 2010) (quoting Hardison v. State, 172 A.2d 407, 411 (Md. 1961)).

procedure may be necessary to provide the proper weight and context for defense closing argument.[345]

Thus, consistent with the traditional leeway provided to counsel in closing argument, counsel should be able to note in argument that law enforcement officers failed to comply with statutorily required protocols for creating and administering an extrajudicial identification procedure, and that the failure to comply with these protocols affected the reliability (and resulting evidentiary weight) of the ensuing identification. Counsel—and courts—should be fully aware that such an argument must be supported by the evidence in the case, and thus, counsel should adduce facts showing non-compliance with the statutorily required protocols. Courts should also be aware that this remedy should not be viewed in isolation, but should be viewed as the culmination of a series of trial remedies resulting from law enforcement non-compliance with the statute.

V. CONCLUSION

The truest goal of our criminal justice system should be to ensure that the guilty are convicted and the innocent remain free. While neither law nor science will likely ever devise an accurate way to assay an eyewitness identification for ultimate accuracy, present science has identified ways in which the creation and administration of extrajudicial identification procedures may produce more reliable results. The Maryland General Assembly has required every law enforcement agency in Maryland to adopt and implement these more reliable procedures. A reliable process produces reliable results. Administration of more reliable identification procedures will ultimately produce identifications that have increased reliability. Therefore, inducing and encouraging adherence to the statutorily required procedures should ultimately promote the legislative goal—hopefully shared by all participants in the criminal justice system—and secure identifications that more often correctly identify the guilty and avoid wrongful identification of the innocent.

For nearly four centuries, Marylanders have been known for their humble middle temperament. This article seeks to move defense counsel away from viewing total suppression of an identification (on constitutional grounds) as the only defense tactic to respond to an

345. *See id.* at 196 (explaining that "argument by counsel to the jury will naturally be imbued with a greater gravitas when it is supported by a[n] instruction on the same point issued from the bench").

identification and to utilize the new statutory reforms to seek intermediate remedies at trial. This approach respects both the judicial retention of the high standard for constitutional suppression of an identification and the legislative adoption of certain procedures that increase the reliability of an extrajudicial identification; like the voyagers upon the Ark and the Dove, it seeks "a middle temperature between the two." This article is written to provide a roadmap as to how counsel for an individual identified in a non-compliant procedure may seek remedies at trial—and under existing Maryland law—in response to law enforcement's non-compliance with the statutorily mandated procedure for creating and administering an extrajudicial identification procedure. The ultimate goal of this article is that the availability of these remedies will encourage law enforcement agencies (and officers) to comply with the statute. Indeed, the author's sincere hope is that these remedies will never be needed because law enforcement has acted in full fidelity to the statute. Should these remedies ever be needed at trial, it is an even greater goal of the author that they will assist a jury in convicting a guilty person or appropriately allowing an innocent person to remain free.