COURT OF APPEALS STANDING COMMITTEE

ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Rooms UL 4 & 5 of the Judiciary College and Education Conference Center, 2011-D Commerce Park Drive, Annapolis, Maryland on Friday, October 18, 2019.

Members present:

Hon. Alan M. Wilner, Chair

H. Kenneth Armstrong, Esq.
Julia Doyle Bernhardt, Esq.
Hon. Yvette M. Bryant
Sen. Robert G. Cassilly
Hon. John P. Davey
Del. Kathleen Dumais
Hon. Angela M. Eaves
Pamela Q. Harris, State Court Administrator
Irwin R. Kramer, Esq.
Victor H. Laws, III, Esq.
Dawne D. Lindsey, Clerk
Bruce L. Marcus, Esq.
Donna Ellen McBride, Esq.
Stephen S. McCloskey, Esq.
Hon. Danielle M. Mosley
Hon. Douglas R. M. Nazarian
Hon. Paula A. Price
Scott D. Shellenberger, Esq.
Hon. Dorothy J. Wilson

In attendance:

Sandra F. Haines, Esq., Reporter
Colby L. Schmidt, Esq., Deputy Reporter
Derek Bayne, Esq., Staff Attorney, Commission on Judicial Disabilities
Tanya Bernstein, Esq., Director, Commission on Judicial Disabilities
H. Scott Curtis, Esq., Office of the Attorney General
Tamara Dowd, Esq., Staff Attorney, Commission on Judicial Disabilities
Christopher S. Flohr, Esq., Maryland Criminal Defense Attorneys Association
Timothy Haven, Coordinator of Commissioner Activity, DCHQ Commissioner's Office
Del. Shaneka Henson
Virginia S. Hovermill, Esq., Office of the Attorney General, Criminal Appeals Division

Kendra Randall Jolivet, Esq., Executive Secretary, Commission on Judicial Disabilities
Kim Klein, Esq., Office of Case Management, Circuit Court for Anne Arundel County
Hon. John P. Morrissey, Chief Judge, District Court of Maryland
Kelley O'Connor, Assistant State Court Administrator, Government Relations & Public Affairs
Suzanne D. Pelz, Esq., Senior Government Relations and Public Affairs Officer
Hon. Michael W. Reed
Michael Schatzow, Esq., Chief Deputy State's Attorney, Office of the State's Attorney for Baltimore City
Mr. Carl Snowden
Thomas Stahl, Esq.
Karen M. Thomas, Esq., Grants & Services Analyst, Juvenile & Family Services
Bishop Larry Lee Thomas
Hon. Pamela J. White
Brian Zavin, Esq., Deputy Chief Attorney, Office of the Public Defender, Appellate Division

The Chair convened the meeting. Ms. Haines said that the comment period for the 201st report ended and there were two comments. The Chair said that the Court of Appeals will hold a hearing on the report at its conference on November 19th.

Agenda Item 1. Consideration of proposed amendments to Rule 18-437 (Proceedings in Court of Appeals).

The Chair explained that Items 1 and 2, amendments to Rule 18-437 and Rule 18-442, as well as Item 3, were supposed to be presented by Mr. Frederick, but he had to be out of state with a client. The amendments to the Judicial Disabilities Rules are clarifying and fill in gaps exposed in the case *In the Matter of Judge Devy Patterson Russell*, 464 Md. 390 (2019).

The Chair presented Rule 18-437, Proceedings in Court of Appeals, for consideration.

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 5. FILING OF CHARGES; PROCEEDINGS BEFORE COMMISSION

AMEND Rule 18-437 by adding language to subsection (f)(1)(A) authorizing certain discipline to be imposed upon a judge, by adding to the required contents of an order of suspension a statement of the duration of the suspension and whether the suspension is subject to any conditions precedent to reinstatement, by substituting the word "compensation" for the word "pay" in subsection (f)(2), by providing that the procedures set forth in Rule 18-438 apply in monitoring compliance with any directives contained in an order of suspension, by adding a Committee note following subsection (f)(2), and by making stylistic changes; as follows:

RULE 18-437. PROCEEDINGS IN COURT OF APPEALS

(a) Expedited Consideration

Upon receiving the hearing record file pursuant to Rule 18-435, the Clerk of the Court of Appeals shall docket the case for expedited consideration.

(b) Exceptions

The judge may except to the findings, conclusions, or recommendation of the

Commission by filing exceptions with the Court of Appeals within 30 days after service of the notice of filing of the record and in accordance with Rule 20-405. The exceptions shall set forth with particularity all errors allegedly committed by the Commission and the disposition sought. A copy of the exceptions shall be served on the Commission in accordance with Rules 1-321 and 1-323.

(c) Response

The Commission shall file a response within 15 days after service of the exceptions in accordance with Rule 20-405. The Commission shall be represented in the Court of Appeals by its Executive Secretary or such other attorney as the Commission may appoint. A copy of the response shall be served on the judge in accordance with Rules 1-321 and 1-323.

(d) Memoranda

If exceptions are timely filed, upon the filing of a response or, if no response is filed, upon the expiration of the time for filing it, the Court may set a schedule for filing memoranda in support of or in opposition to the exceptions and any response and shall set a date for a hearing.

(e) Hearing

The hearing on exceptions shall be conducted in accordance with Rule 8-522. If no exceptions are timely filed or if the judge files with the Court a written waiver of the judge's right to a hearing, the Court may decide the matter without a hearing.

(f) Disposition

(1) The Court of Appeals may (A) impose the disposition recommended by the Commission or any other disposition permitted by law, <u>including an order</u>

directing the judge to undergo specified evaluations, participate meaningfully in specified therapeutic, educational, or behavior modification programs, and to make a written apology to specified persons or groups of persons harmed by the judge's misconduct; (B) dismiss the proceeding; or (C) remand for further proceedings as specified in the order of remand.

(2) If the disposition includes a suspension of the judge from his or her judicial duties, the order imposing the suspension shall state the duration of the suspension, which may be indefinite or for a fixed period, and whether the suspension (A) is to be with or without ~~pay~~ compensation, (B) is to be served on consecutive dates, ~~and~~ (C) prohibits the judge from conducting any official business during the period of suspension and may establish parameters or conditions governing the judge's presence in any courthouse location, and (D) is subject to any conditions precedent to reinstatement.

Cross reference: For rights and privileges of the judge after disposition, see Md. Const., Art. IV, § 4B (b).

Committee note: A judge who has been suspended from the performance of judicial duties does not cease to be a judge by reason of the suspension and remains subject to the Code of Judicial Conduct. Compliance with that Code during the period of suspension is a condition to any reinstatement following termination of the suspension, whether or not stated in the order of suspension.

(g) Order

The decision shall be evidenced by an order of the Court of Appeals, which shall be certified under the seal of the Court by the Clerk. An opinion shall accompany the order or be filed at a later date. Unless

the case is remanded to the Commission, the record shall be retained by the Clerk of the Court of Appeals.

(h) Compliance with Conditions

If, pursuant to subsection (f)(1) of this Rule, the Court directs the judge to take certain actions, whether as a condition to reinstatement following a suspension or otherwise, the procedures for monitoring compliance with those directives shall be as set forth in Rule 18-438.

~~(h)~~(i) Confidentiality

All proceedings in the Court of Appeals related to charges of disability or impairment shall be confidential and remain under seal unless otherwise ordered by the Court of Appeals.

(i)(j) Public Inspection

Subject to section (h) or any other shielding of confidential material by the Court of Appeals, the Court shall permit public inspection of the record filed with it.

Source: This Rule is derived in part from former Rule 18-408 (2018) and is in part new.

Rule 18-437 was accompanied by the following Reporter's note:

Several amendments to Rule 18-437 are recommended by the Attorneys and Judges Subcommittee.

Proposed amendments to subsection (f)(1)(A) clarify that discipline may include a requirement that the judge perform specific actions, such as undergoing evaluations, attending counseling or educational sessions, or tendering a written

apology to individuals found to have been harmed by the judge's misconduct.

In subsection (f)(2), the word "pay" is replaced with the word "compensation." Additional amendments to subsection (f)(2) require that an order imposing a suspension state the duration of the suspension and whether the suspension is subject to any conditions precedent to reinstatement.

New section (h) provides that the procedures in Rule 18-438 apply in monitoring compliance with any directives contained in an order imposing suspension on a judge pursuant to subsection (f)(1) of this Rule.

Stylistic changes also are made.

The Chair said that the clarifying amendment is to Rule 18-437 (f)(1). The Maryland Constitution and the current Rule provide that upon a finding of sanctionable conduct and a recommended censure, suspension, or removal by the Commission on Judicial Disabilities, the Court can make "any disposition allowed by law." The Court previously limited itself to censure, suspension, removal, or dismissal of the proceeding, but in *Russell*, in addition to a suspension, the Court ordered the judge to undergo an evaluation and seek counseling and education. The Chair noted that he does not believe the Court has ever done that before when issuing a suspension. The Court assumed that those were allowable dispositions, but they are not mentioned in the Rule and the Subcommittee thought that it would

be helpful for clarification to add them. The Chair explained that the proposed amendment clarifies that those are authorized dispositions and section (h) provides for the monitoring of compliance with those kinds of conditions pursuant to Rule 18-438.

The Chair added that another matter came up while the Committee was considering these Rules. Unlike the procedure in the Attorney Grievance Commission Rules for lawyers who have been suspended, the Judicial Disabilities Rules do not provide for a judge to file a petition for reinstatement. If a judge is suspended, when the suspension ends, the judge can return and has remained a judge even during the period of suspension. If the judge has done something bad while on suspension, new charges can be filed, and that misconduct becomes a new matter. Unless new charges are filed and brought to the Court's attention, the judge resumes performance of his or her judicial duties when the suspension ends.

The Chair suggested that it would be helpful to add a Committee note to Rule 18-437 (f)(2) to make it clear that while a judge is on suspension, the judge must continue to comply with the relevant provisions of the Code of Judicial Conduct. He directed the Committee's attention to the document marked "hand-out" for Agenda Item 2 for consideration. The proposed

Committee note was not presented to the Subcommittee and would require a motion to approve.

Judge Bryant commented that she is concerned with the use of the phrase "condition to any reinstatement" because it sounds like an additional condition is being imposed. She asked if a warning that such conduct would subject the judge to new charges would be another way to address the issue. The Chair responded that the phrase was included because the Committee assumed that, though there is no requirement that the judge file a petition to be reinstated, the Court can impose conditions before the judge can come back. If the Court, as in the *Russell* case, orders the judge to do certain things, presumably they were conditions to reinstatement, though the Court did not say so in the Order.

Judge Bryant pointed out a potential due process issue. She said that built into the Committee note is the presumption that a judge is guilty of an additional breach of the Code during suspension. She explained that a judge would not have the due process to dispute the accusation of misconduct while suspended. She said that the judge would have to prove his or her innocence before being reinstated. The Chair responded that it would be a due process issue if the judge is not able to challenge the new accusation.

Mr. Kramer commented that if a suspension is indefinite, there is no mechanism for reinstatement if there is no petition.

The Chair responded that there has never been a Judicial Disabilities Rule requiring a petition for reinstatement. Judge Bryant observed that there is an employer/employee relationship for judges that does not exist for members of the Bar. The relationship does not cease to exist because of the suspension. The Chair said that the judge would have to request to come back. Judge Bryant said that if the suspension is indefinite, there is likely something attached to the suspension that would allow for reentry into the workforce and the Commission would likely handle it. The Chair said that reinstatement could be handled by the Court. Indefinitely suspending a judge puts a condition for reentry which would be included in the court's Order. The Rules could require something like that.

Judge Bryant commented that the Committee note itself says a judge who has violated the Code again cannot be reinstated, but the judge has not had a hearing or been charged. Ms. Bernhardt suggested removing the second sentence of the note, or, if the word "reinstatement" is the problem, the Committee can substitute language such as "the judge's resumption of judicial duties" which does not imply that there must be an application for reinstatement. The Chair asked if removing the second sentence of the Committee note would solve the problem. Judge Bryant responded that it would. The Chair asked for a consensus to remove the sentence. He noted that removing the

sentence does not address Mr. Kramer's question of returning from an indefinite suspension. Judge Bryant suggested that the Rules include a requirement that the Court define the manner by which the judge resumes working. The Chair replied that the Rule partly includes this because the issue was raised as a gap by the Commission when the Rules were last updated.

Ms. Bernstein said that the changes to Rule 18-437 (f)(2) address a disposition that includes a suspension and what the Court can indicate in terms of duration, whether it is with or without pay, and subsection (D) discusses whether the reinstatement is subject to any other conditions. She said that the Rule generally covers reinstatement from suspension. Mr. Kramer pointed out that the Rule does not require that there be a finding of fact. He said that there is nothing in the Rule that prevents a judge from being indefinitely suspended and there is no requirement that the Court provide conditions. There is no definitive route back without a reinstatement proceeding. The Chair noted that subsection (f)(2)(D) says that the Court's Order shall state if the suspension is subject to any conditions precedent to reinstatement. Judge Bryant said that in the Order, the Court can say what the judge has to do to be reinstated. Judge Mosley commented that when dealing with a judge, she does not think the Court of Appeals would not state a condition because otherwise it would be like impeaching a judge,

which the Court of Appeals cannot do. The Chair replied that there is not a lot of history of judges being suspended. He said that the Court can do what it did in *Russell* and order certain things in addition to the suspension or it could indefinitely suspend a judge and impose conditions for reinstatement. Mr. Kramer explained that the first judge to be indefinitely suspended with no defined conditions is going to have a due process problem. The Chair said that he assumes the Court is smart enough to include conditions for reinstatement if it indefinitely suspends a judge.

The Chair asked for a suggested amendment. Mr. Kramer suggested that the Order should set forth in an indefinite suspension what the conditions precedent to reinstatement are. The Chair questioned whether subsection (D) already does this and Mr. Kramer said that (D) allows the Court to be silent on conditions precedent. Chief Judge Morrissey noted that it will be rare for the Court to decide to indefinitely suspend a judge, because that keeps a judge's seat open and punishes the local court by putting it down a judge for an indefinite period. He said that he cannot imagine the Court doing that but if it wants to, he would not take away that power. The Chair said that if misconduct is bad enough for an indefinite suspension, it will be a removal. Judge Bryant commented that the issue is covered in subsection (D) because within the Order, the Court can say

what a judge must do to be reinstated. She added that it is not the same as a lawyer petitioning to practice again. She said that she is satisfied with the Rule.

Judge Bryant said that regarding the Committee note, she still believes that it might be helpful to remind judges that "a violation of the Code during a period of suspension may subject them to additional charges." The Chair asked for a motion. Judge Bryant moved to amend the Committee note to Rule 18-437. The Chair called for a vote on the motion to amend the Committee note, and it passed on a majority vote. The Committee approved the Rule as amended.

Agenda Item 2. Consideration of proposed amendments to Rule 18-442 (Interim Suspension; Administrative Leave).

The Chair presented Rule 18-442, Interim Suspension; Administrative Leave, for consideration.

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

DIVISION 6. SPECIAL PROCEEDINGS

AMEND Rule 18-442, by changing the title of the Rule; by providing that, under certain circumstances, an order of interim

suspension may be entered against a judge who has willfully failed to take remedial action ordered by the Court of Appeals; by adding a Committee note after section (b) concerning the payment of compensation to a judge during an interim suspension; by clarifying that administrative leave pursuant to section (c) is with compensation; by adding to section (c) certain circumstances under which a judge may be placed on administrative leave; by requiring written notice by the Commission before an order is entered under section (b) or (c); and by making stylistic changes, as follows:

Rule 18-442. INTERIM SUSPENSION; OR ADMINISTRATIVE LEAVE ~~UPON INDICTMENT~~

(a) Definition

In this Rule, "serious crime" means a crime (A) that constitutes a felony, (B) that reflects adversely on the judge's honesty, trustworthiness, or fitness as a judge, or (C) as determined by its statutory or common law elements, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, or an attempt or conspiracy to commit such a crime.

(b) Interim Suspension

~~Upon notice by the Commission that a judge has been indicted for a serious crime and a recommendation by the Commission, the~~ The Court of Appeals may immediately place ~~the~~ a judge on interim suspension pending further order of the Court upon written notice by the Commission that (1) the judge has been indicted for a serious crime, or (2) as a result of a disciplinary proceeding or a finding of impairment, the judge was ordered by the Court to take certain remedial action or to refrain from certain action or conduct and, after a hearing or

the opportunity for a hearing, the Commission found that the judge willfully violated that order. An order of interim suspension under this section does not preclude other proceedings or sanctions against the judge.

Committee note: An interim suspension under section (b) of this Rule may be with or without compensation, as directed by the Court of Appeals.

(c) Administrative Leave

The Court of Appeals may place a judge on interim administrative leave with compensation pending further order of the Court ~~Upon~~ upon written notice by the Commission that ~~a~~ (1) after the filing of charges against the judge and a hearing or the opportunity for a hearing, the Commission has found that (A) the judge has a disability or is impaired and, at least temporarily, is unable to perform properly the duties of judicial office, or (B) the judge has committed sanctionable conduct warranting a suspension or removal from office, or (2) the judge has been charged by indictment or criminal information with ~~other~~ criminal misconduct for which incarceration is a permissible penalty and poses a substantial threat of serious harm to the public, to any person, or to the administration of justice~~, the Court of Appeals may place the judge on interim administrative leave pending further order of the Court~~.

(d) Reconsideration

A judge placed on interim suspension or administrative leave may move for reconsideration.

Source: This Rule is new.

Rule 18-442 was accompanied by the following Reporter's note:

> The Attorneys and Judges Subcommittee recommends several amendments to Rule 18-442 pertaining to interim suspension and interim administrative leave.
>
> In Section (b), language is added that permits a judge to be placed on interim suspension when the judge has willfully failed to take remedial action ordered by the Court of Appeals.
>
> A Committee note following section (b) notes that the Court of Appeals may direct that an interim suspension be served with or without compensation.
>
> Amendments to Section (c) expand the list of circumstances under which a judge may be placed on administrative leave and clarify that administrative leave pursuant to the section is with compensation.
>
> Clarifying amendments to sections (b) and (c) require that notices given by the Commission to the Court of Appeals under those sections must be in writing.
>
> Stylistic changes are also made.

The Chair said that the amendments to Rule 18-422 deal with a separate but related matter. The current Rule permits the Court to place a judge on interim suspension upon written notice by the Commission that the judge has been indicted for a serious crime, which is a defined term, and to place a judge on interim administrative leave upon being charged with any other criminal misconduct for which incarceration is a permissible penalty and

which poses a threat of serious harm. The proposed amendment to section (b) adds the ability of the Court to order an interim suspension when, as part of a disciplinary disposition or finding of impairment, the judge was ordered to take certain remedial action or refrain from certain conduct and, after an opportunity for a hearing, the Commission finds willful noncompliance. The interim suspension may be with or without compensation. The proposed amendment to section (c) permits the Court to place the judge on administrative leave with compensation upon a finding by the Commission that the judge is impaired and unable to perform his or her duties or that the judge has committed sanctionable conduct warranting suspension or dismissal. The Chair noted that this concept is not new in judicial discipline and the American Bar Association Model Rules for Judicial Disciplinary Enforcement permit interim suspension and interim administrative leave.

The Chair invited Del. Henson to address the Committee. Del. Henson thanked the Committee and said that she represents District 30A in Annapolis. She explained that the part of the Rule that allows for an interim suspension of a judge was brought to her attention in Judge Russell's case. She described the case of Tyrique Hudson, a man who appeared before Judge Russell at a peace order hearing and, after the order was denied, was later killed by the neighbor who was the subject of

his petition. Judge Russell was sitting in Anne Arundel County after the Commission recommended her suspension but prior to the Court of Appeals taking final action. Del. Henson said that she listened to the CD recording of the hearing and did not feel that Mr. Hudson had a full opportunity to be heard and put relevant facts on the record. Del. Henson said that the community rallied in support after Mr. Hudson's death and representatives from the United Black Clergy and the Caucus of African American Leaders were present to represent the interests of the community. She expressed her support for the Rule change to allow a judge to be placed on interim suspension.

The Chair thanked Del. Henson and invited other members of the public who signed up to speak to come forward. Bishop Thomas told the Committee that he came at the invitation of the Delegate to let the Committee know that his organization supports the Delegate's statements and wants to make sure the community has a chance to be heard. He explained that it is important for the citizens to be assured there is action being taken.

Mr. Snowden told the Committee that the decisions it makes affect judges and judges make decisions every day that can mean life and death for individuals. He acknowledged that the Committee cannot change what happened but said that he is concerned with the future and another young person that may walk

into a courtroom. He said that he hopes the Committee will come up with a process that is fair to a judge accused of misconduct but at the same time considers individuals like Mr. Hudson who need judges who are compassionate, empathetic, and willing to make sure they made decisions to preserve life.

Sen. Cassilly thanked the speakers for coming in and reminding the Committee of its responsibility. He said it was good for them to be reminded that the Rules are more than pieces of paper and thanked them for humanizing the issue.

There being no motion to amend or reject the proposed Rule, it was approved as presented.

Agenda Item 3. Consideration of proposed amendments to Rule 18-203.11 (Financial, Business, or Remunerative Activities).

The Chair presented Rule 18-203.11, Financial, Business, or Remunerative Activities, for consideration.

MARYLAND RULES OF PROCEDURE

TITLE 18 - JUDGES AND JUDICIAL APPOINTEES

CHAPTER 200 - MARYLAND CODE OF CONDUCT FOR JUDICIAL APPOINTEES

AMEND Rule 18-203.11 by adding new subsection (b)(2) to permit District Court Commissioners to engage in certain outside employment under certain circumstances and by making stylistic changes, as follows:

Rule 18-203.11. FINANCIAL, BUSINESS, OR REMUNERATIVE ACTIVITIES

(a) A judicial appointee may hold and manage investments of the judicial appointee and members of the judicial appointee's family.

(b) Except as permitted by Rule 18-203.7, a full-time judicial appointee shall not serve as an officer, director, manager, general partner, advisor, or employee of any business entity except that

(1) a judicial appointee may manage or participate in:

~~(1)~~(A) a business closely held by the judicial appointee or members of the judicial appointee's family; or

~~(2)~~(B) a business entity primarily engaged in investment of the financial resources of the judicial appointee or members of the judicial appointee's family~~.~~; and

(2) a District Court Commissioner may serve as a part-time employee of a business entity if (A) upon full and accurate disclosure by the Commissioner of the nature of the employment, including the time expected to be devoted to it and the expected compensation to be received, the employment is approved by the Chief Judge of the District Court; and (B) the employment is not in conflict with section (c) of this Rule. Approval of part-time employment pursuant to this subject may be revoked by the Chief Judge at any time for good cause.

(c) A judicial appointee shall not engage in financial activities permitted under sections (a) or (b) of this Rule if they will:

(1) interfere with the proper performance of the judicial appointee's official duties;

(2) lead to frequent disqualification of the judicial appointee;

(3) involve the judicial appointee in frequent transactions or continuing business relationships with attorneys or other persons likely to come before the appointing court; or

(4) result in violation of other provisions of this Code.

COMMENT

[1] Judicial appointees are generally permitted to engage in financial activities, including managing real estate and other investments for themselves or for members of their families. Participation in these activities, like participation in other extra-official activities, is subject to the requirements of this Code. For example, it would be improper for a judicial appointee to spend so much time on business activities that it interferes with the performance of the judicial appointee's official duties. See Rule 18-202.1. Similarly, it would be improper for a judicial appointee to use his or her official title or conduct his or her business or financial affairs in such a way that disqualification is frequently required. See Rules 18-201.3 and 18-202.11.

[2] As soon as practicable without serious financial detriment, the judicial appointee must divest himself or herself of investments and other financial interests that might require frequent disqualification or otherwise violate this Rule.

Source: This Rule is derived from former Rule 3.11 of Rule 16-814 (2016).

Rule 18-203.11 was accompanied by the following Reporter's note:

> The Attorneys and Judges Subcommittee proposes amending Rule 18-203.11 by adding subsection (b)(2), permitting District Court Commissioners, in certain circumstances and subject to approval by the Chief Judge of the District Court, to engage in outside employment.
>
> A District Court Commissioner is a judicial appointee under Rule 18-200.3 (a)(2).
>
> Except for family businesses and investment activities, judicial appointees, including District Court Commissioners, are prohibited by Rule 18-203.11 (b) from engaging in employment outside the Judiciary.
>
> The Attorneys and Judges Subcommittee has been advised that Commissioners are required to work shift work, that recent changes to the law have resulted in an increased workload without a commensurate increase in salary, and that the inability of the Commissioners to supplement their incomes with jobs not related to their work in the Judiciary has caused issues with retention of experienced Commissioners.
>
> Upon the request of the Director of Commissioners, concurred in by the Chief Judge of the District Court, the Attorneys and Judges Subcommittee proposes amending Rule 18-203.11 by adding new subsection (b)(2), permitting a District Court Commissioner to serve as a part-time employee of a business entity, subject to the approval of the Chief Judge of the District Court, provided that full disclosure of the nature of the employment is made and the employment is not in conflict with section (c) of this Rule.

The Chair said that the Attorneys and Judges Subcommittee recommended a change to the Code of Conduct for Judicial Appointees. The Rule severely limits appointees from engaging in private outside employment. The proposed amendment would allow District Court Commissioners to serve as part-time employees if the employment is approved by the Chief Judge of the District Court after full and accurate disclosure and it does not conflict with section (c). Mr. Haven, director of the commissioners, requested the amendment and it has the support of Chief Judge Morrissey. The Chair explained that such employment used to be permitted until the Judicial Ethics Committee ruled in 2017 that outside employment was not permitted under the Rule. The Ethics Committee recently issued an opinion on October 15th permitting a District Court Commissioner to accept employment as a substitute teacher. The Ethics Committee distinguished the opinion from the 2017 ruling because it does not involve commercial employment but rather employment in a government activity. The Chair noted that the recent opinion, request number 2019-26, was distributed to the Committee via email. He said that his understanding of the basis for the request is that outside employment used to be permitted and the increased workload beginning two years ago when the

Commissioners became responsible for qualifying defendants for public defender representation has increased turnover.

Chief Judge Morrissey commented that there has been and continues to be an organized management structure to review requests from the Commissioners. The requesting Commissioner will need to get the approval of his or her Administrative Commissioner, Administrative Clerk, and then the Administrative Judge. Mr. Haven must approve the request before it is sent to him. He suggested that the Ethics Committee opinions have created a situation where a Commissioner cannot be a Mary Kay cosmetics distributor but can be a part-time public school teacher. Commissioners are not paid well despite being judicial officers and it is difficult to attract the talent the court needs and retain individuals. He said that he would be careful with his ability to approve outside employment, but it would be a benefit to the Commissioners as a retention and hiring tool.

Mr. Kramer said that by adding specific language pertaining to District Court Commissioners, it could imply that regular judges are further restricted. Judges are adjunct professors at the law schools and are paid, which has never been a problem, but some also work for private employers, such as teaching a bar review lecture. He expressed concern that by carving out an exception for Commissioners, it would suggest a judge cannot work for a commercial employer at all. The Chair replied that

the Maryland Constitution covers that issue because it prohibits judges from having outside employment and an Attorney General's opinion has interpreted that to allow judges to teach part time. Judge Bryant proposed that there should be a comma before subsection (B). The Chair said with the assent of the Committee, that change can be made by the Style Subcommittee. By consensus, the Committee approved the Rule as amended.

Agenda Item 4. Consideration of proposed amendments to Rule 7-206.1 (Record - Judicial Review of Decision of the Workers' Compensation Commission).

Judge Nazarian presented Rule 7-206.1, Record - Judicial Review of Decision of the Workers' Compensation Commission, for consideration.

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW IN CIRCUIT COURT

CHAPTER 200 - JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY DECISIONS

AMEND Rule 7-206.1 by adding to subsection (c)(2) a required showing of good cause for the court, on *de novo* review of a Worker's Compensation Commission decision, to order that all or part of the Commission record be prepared and filed, as follows:

Rule 7-206.1. RECORD—JUDICIAL REVIEW OF DECISION OF THE WORKERS' COMPENSATION COMMISSION

(a) Applicability

This Rule applies only in an action for judicial review of a decision of the Workers' Compensation Commission.

(b) If Review Is on the Record

Subject to section (d) of this Rule, Rule 7-206 governs the preparation and filing of the record if judicial review of an issue is on the record of the Commission.

(c) If No Issue Is to Be Reviewed on the Record

If no issue is to be reviewed on the record of the Commission:

(1) a transcript of the proceedings before the Commission shall be prepared in accordance with Rule 7-206(b), included in the Commission's record of the proceeding, and made available to all parties electronically in the same manner as other Commission documents;

(2) the transcript and all other portions of the record of the proceedings before the Commission shall not be transmitted to the circuit court unless the court, on motion of a party or on the court's own initiative, and for good cause shown, enters an order requiring the preparation and filing of all or part of the record in accordance with the provisions of Rule 7-206 and section (d) of this Rule; and

(3) regardless of whether the record or any part of the record is filed with the court, payment for and the timing of the preparation of the transcript shall be in accordance with Rule 7-206(b), (d), and (e).

Committee note: Section (c) of this Rule does not preclude a party from obtaining from the Commission a transcript of testimony or copies of other parts of the record upon payment by the party of the cost of the transcript or record excerpt.

(d) Electronic Transmission

If the Commission is required by section (b) of this Rule or by order of court to transmit all or part of the record to the court, the Commission may file electronically if the court to which the record is transmitted is the circuit court for an "MDEC county" as defined in Rule 20-101 (o).

Cross reference: See Code, Labor and Employment Article, § 9-739.

Source: This Rule is new.

Rule 7-206.1 was accompanied by the following Reporter's note:

At the suggestion of the General Counsel for the Workers' Compensation Commission, the Appellate Subcommittee recommends that Rule 7-206.1 (c)(2) be amended to require a showing of good cause for the court to order that all or part of the Commission record be filed with the circuit court sitting in *de novo* review of a Commission decision.

Judge Nazarian said that the proposed amendment is a small linguistic change to the Rule dealing with records that come from the Workers' Compensation Commission to the circuit courts on judicial review. The Committee previously revised the Rule and the goal was to have control over when the transcripts are

required to be sent to the court from the Commission. He said that the language in subsection (e)(2) says that a transcript and all other portions of the record shall not be transmitted unless the court, on motion of a party or its own initiative, enters an order. In practice, parties have made blanket requests for all records to be sent under all circumstances, which was not the intent of the Rule. The intention was for an individualized decision about records being transmitted and the proposed change adds two commas to the Rule.

Judge Bryant asked if the location of the clause meant "for good cause shown" applies only to judges or to parties and judges. Judge Nazarian replied that it should apply to both, and Judge Bryant suggested moving the clause. Chief Judge Morrissey noted that if the court is going to request a transcript, it will have to make its own finding of good cause. Judge Nazarian clarified that Judge Bryant was suggesting moving the clause up to follow "party" in (e)(2). The Chair said with the assent of the Committee, that change can be made by the Style Subcommittee. By consensus, the Committee approved the Rule as amended.

Agenda Item 5. Consideration of proposed amendments to Rule 1-304 (Form of Affidavit).

The Chair presented Rule 1-304, Form of Affidavit, for consideration.

MARYLAND RULES OF PROCEDURE

TITLE 1 - GENERAL PROVISIONS

CHAPTER 300 - GENERAL PROVISIONS

AMEND Rule 1-304 by deleting the language "foregoing paper" and replacing it with the language "this document" and by expanding the Committee note, as follows:

Rule 1-304. FORM OF AFFIDAVIT

The statement of the affiant may be made before an officer authorized to administer an oath or affirmation, who shall certify in writing to having administered the oath or taken the affirmation, or may be made by signing the statement in one of the following forms:

Generally

"I solemnly affirm under the penalties of perjury that the contents of the ~~foregoing paper~~ this document are true to the best of my knowledge, information, and belief."

Personal Knowledge

"I solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the ~~foregoing paper~~ this document are true."

Committee note: In this Rule, the term "this document" includes a separate document to which an attached affidavit is intended to apply. This Rule is not intended to abrogate the additional requirements for summary judgment set forth in Rule 2-501.

> Source: This Rule is derived from former Rule 5 c.

Rule 1-304 was accompanied by the following Reporter's note:

> The Maryland Judicial Council's Court Access and Community Relations Committee has recommended that the language "foregoing paper" contained in Rule 1-304 be replaced with "this document."
>
> One of the goals of the Court Access and Community Relations Committee and its Self-Represented Litigant Subcommittee is to promote the use of plain language, which will help self-represented litigants. In furtherance of this goal, the General Provisions Subcommittee concurs with and recommends the suggested amendments to Rule 1-304.

The Chair explained that the proposed amendment came from a request by the Judicial Council Court Access and Community Relations Committee as part of a broader effort to simplify language, mostly because of a significant increase in *pro se* litigants coming before the court. The Community Relations Committee is trying to make forms and documents as easy as possible. Judge Price pointed out that the word "the" needs to be deleted from the Rule in two locations. By consensus, the Committee agreed with the deletion and approved the Rule as amended.

Agenda Item 6. Consideration of proposed amendments to: Rule 5-603 (Oath or Affirmation); Rule 1-303 (Form of Oath).

The Chair presented Rule 5-603, Oath or Affirmation; and Rule 1-303, Form of Oath, for consideration.

MARYLAND RULES OF PROCEDURE

TITLE 5 - EVIDENCE

CHAPTER 600 - WITNESSES

AMEND Rule 5-603 by adding a Committee note concerning testimony by an individual where diminished capacity is a concern and by adding to the cross reference following the Rule, as follows:

Rule 5-603. OATH OR AFFIRMATION

Before testifying, a witness shall be required to declare that the witness will testify truthfully. The declaration shall be by oath or affirmation administered either in the form specified by Rule 1-303 or, in special circumstances, in some other form of oath or affirmation calculated to impress upon the witness the duty to tell the truth.

Committee note: In special circumstances where diminished capacity may be a concern, such as when a child or a mentally disabled person is called to testify, the trial court may deviate from the form of oath specified by Rule 1-303. Before administering the oath, the trial court first must find that the individual with diminished capacity is competent to testify, based upon the four essential requirements set forth in *Perry v. State*, 381 Md. 138, 149 (2004): "(1)

capacity for observation; (2) capacity for recollection; (3) capacity for communication, including ability 'to understand questions put and to frame and express intelligent answers;' and, (4) a sense of moral responsibility to tell the truth" (citing 2 Wigmore, Evidence §506 (Chadbourn rev. 1979)).

Cross reference: For the oath made by a court interpreter, see Rule 1-333 (c)(3). For the general rule of competency, see Rule 5-601. For an attorney's responsibilities concerning a client's diminished capacity, see Rule 19-301.14.

Source: This Rule is derived from former F.R.Ev. Rule 603.

Rule 5-603 was accompanied by the following Reporter's note:

In 2017, The Deputy State Court Administrator submitted to the Rules Committee a request that an oath for children be included in the Maryland Rules. Upon review of various legal treatises, rules, and statutes in other states, Maryland statutes (e.g., Code, Courts Article, §9-103), and Maryland case law (e.g., *Perry v. State*, 381 Md. 138 (2004) and *Jones v. State*, 410 Md. 691 (2009)), it became apparent that an attempt to add a one-size-fits-all "child oath" to Rule 1-303 would be futile.

The General Provisions Subcommittee concluded that, in lieu of a "child oath," it would be helpful to provide some guidance to trial judges when making a determination regarding the competency of a child or other individual with diminished capacity who is called to testify as a witness. Proposed amendments to Rules 5-603 and 1-303 are intended to provide that guidance.

MARYLAND RULES OF PROCEDURE

TITLE 1 - GENERAL PROVISIONS

CHAPTER 300 - GENERAL PROVISIONS

AMEND Rule 1-303 by adding a reference to Rule 5-603 and "by other law" to the exception clause at the beginning of the Rule, and by adding to the cross reference following the Rule, as follows:

Rule 1-303. FORM OF OATH

Except as provided in Rule 1-333 (c)(3), in Rule 5-603, or by other law, whenever an oral oath is required by rule or law, the person making oath shall solemnly swear or affirm under the penalties of perjury that the responses given and statements made will be the whole truth and nothing but the truth. A written oath shall be in a form provided in Rule 1-304.

Cross reference: For the oath made by a court interpreter, see Rule 1-333(c)(3). For an oath administered in special circumstances where diminished capacity may be a concern, such as when a child or mentally disabled person is called to testify, see Rule 5-603.

Source: This Rule is derived from former Rules 5 c and 21 and is in part new.

Rule 1-303 was accompanied by the following Reporter's note:

See the Reporter's Note to Rule 5-603.

The Chair said that the Reporter's notes explain the basis for the proposed amendments. The original proposal was to have an oath for children and the Committee and Subcommittee were considering the issue but decided that all children are not the same. The underlying issue is the competence of the witness to testify. The notes explain the procedure for issuing an oath when there are special concerns about capacity, including child witnesses. There being no motion to amend or reject the proposed Rule, it was approved as presented.

Agenda Item 7. Consideration of a Memorandum concerning Eyewitness Identification Evidence in Criminal Cases.

(See Appendix 1).

The Chair explained that the Committee members have copies of the two opinions in the *Small v. State*, 464 Md. 68 (2019) case and a background memorandum. He said that the first question presented pertains to admissibility of eyewitness identification evidence and whether additional system variables should be considered with regard to that issue. The second question is, if the evidence is admitted, what should jurors be told in terms of weighing the credibility of the identification and who should communicate that information to the jury. Information can be communicated by experts, through instructions

from the judge, or both. He said that the Committee has collected other court opinions that were referenced in the concurring opinion in *Small* as well as scholarly articles. If the Committee chooses to proceed on the project, it would focus on the Maryland Evidence and Criminal Procedure Rules rather than a due process analysis, which the Court of Appeals conducted in *Small*. The Attorney General's Office and the Public Defender's Office, among others, have agreed to act as consultants to the Committee if it chooses to proceed. The project will be a research effort and an honest analysis of judicial policy more than a constitutional issue. The desire of three judges of the Court of Appeals is for the Committee to look at the Rules dealing with this subject matter. The concurring opinion also requested the Criminal Pattern Jury Instructions Committee of the MSBA to look at the issue as well. The Chair said that current MSBA President Dana Williams is aware of the request and was informed that the Committee would welcome the association's participation.

Judge Bryant asked the appellate judges if they think guidelines would be helpful. Judge Nazarian replied that there is not a large volume of these cases but that it is an area where science has advanced significantly since the applicable law was first promulgated. He said that the project is worth doing. Mr. Marcus added that there is no harm in exploring the

potential for a Rule change. If the consensus after the process is that the issue can be dealt with through a jury instruction, the worst that can happen is the Committee members satisfied themselves with a determination of whether it was appropriate to make changes to the Rules. He said that it would probably be inappropriate to disregard the concurring opinion in *Small* that the issue is a matter for the Rules Committee.

Mr. Shellenberger commented that cases involving a single eyewitness are less common now than they were 30 years ago and most prosecutors would not want to go to trial with such a case. He said that he agrees that more factors have been recognized by science and the psychology of identification and that those should be addressed. He suggested that the issue is more appropriately handled by jury instructions. He said that it is appropriate for the judge to tell the jury at the end of a case what jurors need to consider, and he is not sure how it fits into a Rule. He noted that the Jury Instruction Committee has already formed a Subcommittee on the issue. He said that there may need to be a Rule that addresses how expert testimony on eyewitness identification can be admitted but he does not see how a Rule can address the concerns raised in the *Small* case. He suggested that once proposed jury instructions are drafted, the Committee will review them to determine if any Rules are needed to address the issue.

The Chair said that *Small* and cases in other States have dealt with admissibility under due process, not what the jury should be told. In New Jersey, the legislature passed a statute requiring law enforcement to adopt written procedures to comply with the Department of Justice's guidelines. Following the New Jersey Supreme Court decision in *State v. Henderson*, 27 A.3d 872 (2011), the Maryland legislature also adopted a statute that requires law enforcement agencies to comply with the "system variables" described in the opinion. Those are two statutes that require police agencies to comply with requirements that are beyond the Supreme Court opinion in *Neil v. Biggers*, 409 U.S. 188 (1972). One issue is whether suggestiveness by law enforcement should be presumed if the procedures are not followed. If a motion to suppress an identification is made in circuit court, it must be dealt with pretrial as a matter of admissibility.

Mr. Shellenberger remarked that many issues related to eyewitness identification have been addressed by the legislature, including blind administration, line-up construction, and pre-trial instructions. Those things can be challenged under the current Rules and an identification can be thrown out. The Chair pointed out that the Court in *Small* said in a footnote that a statute does not affect due process considerations, but state evidence law is by Rule.

Mr. Shellenberger responded that the statutes came from the analysis in Court opinions. He added that he does not deny that the jury needs to know certain information and defense counsel can challenge an identification under the current Rules, bringing up factors raised in the Memorandum on page 5. The issue of eyewitness identification can be litigated right now and the only people that are not always informed are members of the jury. The Chair asked if prosecutors disclose everything required by statute in discovery and Mr. Shellenberger responded that his office does, typically providing a stack of documents including pictures of what was shown to the victim. He said that he would hope his colleagues in other jurisdictions follow the law but there are remedies for a discovery violation. He said that he cannot remember the last time Baltimore County had a lineup, but the police do use photo arrays, though not as frequently as they once did.

Sen. Cassilly questioned whether there were any parallels in the Rules for stops or some other law enforcement action that can be analogized to the identification process. Mr. Shellenberger responded that there were no parallels and noted that in DNA cases, the State submits papers and does not want a lot of experts testifying just because of DNA evidence. Sen. Cassilly asked if the process for determining the constitutionality of a stop or arrest is in the Rules for

comparison. Mr. Marcus said that the general statement in the discovery Rules says that the State must provide information about matters that are a part of mandatory motions, including arrests, line-ups, searches and seizures, and probable cause issues. Sen. Cassilly responded that it seems like the Committee is opening a new chapter in what it is doing with the Rules regarding issues that are usually dealt with in court decisions and statutes. The Chair explained that there are provisions in the Rules of Evidence governing admissibility as well as the Rules of Criminal Procedure but they are not exact parallels. Mr. Shellenberger questioned how to write a Rule that considers factors like stress when determining the reliability of an identification.

Judge Bryant commented that it is helpful to have that information for uniformity of presentation. She explained that right now, there is different information in different cases and the lawyers and judges do not always know the relevant information. She said that it could be helpful to have concrete guidelines to apply in the Rules rather than a compendium of cases to go through to get the right factors. She said that the Fee Request Rule is analogous because judges previously did not have standards for fees, but a framework was provided.

Judge Eaves said that she agrees with Judge Bryant but is unsure if a Rule is needed. She said that she thinks it is

worth exploring the body of jurisprudence available and understanding how the decisions are made in individual cases. The Chair commented that some other states, like New Jersey, have concentrated on jury instructions but also adopted procedural rules for how some things are determined. Mr. Marcus said that if the Committee is going to vote today, he would agree with the Chair's position because he has litigated eyewitness identifications and seen the problems with the old show-ups and line-ups. He added that he is not sure if there is a better way to handle such identifications but the only way to be sure is to conduct a proper inquiry.

Christopher Flohr, from the Maryland Criminal Defense Attorneys Association, commented that line-ups were routine in his practice in New York, but he does not see them in Maryland. He noted that mistaken identification is the number one factor in wrongful convictions, according to the Innocence Project. He said that this issue is critically important and the Committee needs to be educated on the rapidly changing understanding of eyewitness identifications. Jenny Hovermill, of the Attorney General's Office Criminal Appeals Division, said that she argued the *Small* case which did not present some of the issues about expert testimony that the New Jersey case, *Henderson*, did. She said that she agreed with Mr. Shellenberger's comments about the matter being more appropriate for jury instructions than the

Rules, noting that she believes the majority rejected the notions of *Henderson*. The Chair pointed out that given the majority opinion in *Small*, there is no basis in Maryland law for a judge or jury to consider anything outside of the *Neil v. Biggers* factors, and the concern was that those factors are outdated, misleading, incomplete, and sometimes wrong. Ms. Hovermill responded that the majority also said the five factors under *Manson v. Brathwaite*, 432 U.S. 98 (1977), effectively address these issues. She said that anecdotally, from speaking to prosecutors, it is not common for defense attorneys to introduce expert testimony about the memory and reliability.

Ms. Bernhardt commented that she is in favor of the Committee looking at this issue. She represented Kirk Bloodsworth, an innocent man who was the subject of an unreliable eyewitness identification and later exonerated by DNA evidence. She said that anything that can minimize the chance of a misidentification is worth looking at. She also noted that a judge can exclude expert testimony under current law.

Michael Schatzow, Esq., Chief Deputy State's Attorney for Baltimore City, said that he agrees with Mr. Shellenberger that a Rule change may not be the best way to address the issue and he questioned what the perceived problem is. He noted that there are serious concerns about misidentification but added that he is not aware of widespread issues with attorneys not

being able to raise their concerns. He explained that this area of law has been handled by judges and it should continue to be. He added that there is no harm in looking at the issue, which is a very important one in the criminal justice system. He said that cases in Baltimore often involve identification and there will be a practical impact. He said that if the matter is referred to the Criminal Rules Subcommittee, his office will participate in the proceedings. Judge Price said that the issue may be one of education and the Judicial Conference may need to address it. She said that the body of law exists, except for criminal jury instructions.

The Chair asked for a motion. Mr. Marcus moved that the Chair direct further study in the Evidence Subcommittee or the Criminal Procedure Subcommittee. Judge Bryant seconded the motion. There being no further discussion, the Committee approved the motion to refer the matter to the appropriate Subcommittee(s) for further study.

The Chair remarked that he does not expect the project to impact normal Committee procedures. He noted that some states have taken the route of the New Jersey court and made changes judicially. The New Jersey Supreme Court assigned a master to collect information and file a report and the court adopted most of the master's recommendations.

Agenda Item 8. Consideration of proposed new Title 14, Chapter 600 (*In Rem* Foreclosure of Local Government Tax Liens).

Mr. Laws presented Rules in Title 14, Chapter 600, *In Rem* Foreclosure of Local Government Tax Liens (See Appendix 2).

Mr. Laws explained that the proposed Rules implement a law passed by the General Assembly that deals with *in rem* foreclosure of local government tax liens. He said that the law is an enabling statute that allows counties or municipalities to enact procedures to comply with the statute, which applies to a narrow class of properties that have been cited for unsafe, unsanitary, or unfit conditions and those citations are no longer appealable. The taxes giving rise to the lien must be overdue for at least six months and the amount that has accumulated must exceed the property's value, either the State Department of Assessments and Taxation's assessment or a recent appraisal, whichever is less. The local government then files an action in circuit court and the result is an order transferring title to that government entity. The local government can pass legislation allowing it to resell the property, but there is no judicial sale at the end of the process.

Mr. Laws said that Rule 14-601 is a statement of scope that says the Rules in this Chapter govern *in rem* foreclosure

proceedings. Rule 14-602, Definitions, mostly follows the statute. He noted that Mr. Schmidt consulted with Russell (Ronnie) R. Reno, Jr., Esq., a property law expert, who suggested that in subsection (c)(1), the word "property" be substituted for the word "land" in two locations. The definitions are drawn mostly from the statute but in some cases, such as the definition of Municipal Corporation, the definition comes from the Maryland Constitution. Judge Bryant commented that words are missing under subsection (c)(2). Ms. Haines said the suggestion had been made to add "as to which" at the beginning of the subsection; she also said that subsection (c)(1) should read "unsafe or unfit." The Chair said with the assent of the Committee, that change can be made by the Style Subcommittee.

Mr. Laws continued that Rule 14-603 follows the statute and establishes that venue is in the circuit court for the county where the property is located. Rule 14-604 specifies the contents of the complaint. The Chair asked what the address of the county would be under subsection (a)(1). Mr. Laws replied that the address could be the government office building, but the requirement is in the statute. Del. Dumais suggested that it could mean the service address or the address of the County Attorney's Office. Mr. Schmidt noted that, in practice, it will likely be the address of the attorney who files a complaint.

Mr. Laws said that there is a general rule that the address of the party is in every complaint. He said that Mr. Reno also suggested a change in subsection (a)(6) on page 7 to say "and, if applicable, a statement that the address of a particular interested party in the real property is unknown" with a comma on each side. Judge Bryant suggested that (a)(6) say "name and last known address" rather than the plural "names and last known addresses." The Chair said with the assent of the Committee, that change can be made by the Style Subcommittee. Mr. Laws said that the Rule goes on to specify the contents of the complaint and in section (d) specifies the exhibits that need to be filed.

Mr. Laws said that Rule 14-605 is largely out of the statute, but the Subcommittee added section (a), which requires that within five days of the acceptance of the complaint by the court, the government entity must, under section (d), make an ordinary and a certified mailing to interested parties, including the owner and any mortgagees or others shown in a 50-year title search. Section (a) requires posting notice because the Subcommittee was concerned about adequate notice for interested parties where property rights could be terminated. The Rule refers to Rule 2-122 (a)(3) but that Rule cannot be adopted wholesale because it does not completely fit. The proposed Rule will cause some notice that, at minimum, gives

notice of where an *in rem* action is pending, that the action seeks foreclosure, and that information can be obtained from the clerk's office. Rather than having the Sheriff post notice, the Subcommittee decided that the local governments are the only potential plaintiffs and can post notice. Ms. Lindsey asked whether the filing of a complaint would trigger the issuance of a summons. Mr. Laws responded that there is no requirement of personal service and the statute does not require service. He compared the action to a foreclosure order docket entry. The Chair said that he assumes that the Attorney General's Office signed off on the bill before the Governor signed it, but the Court of Appeals previously struck down a statute that wiped out ground rents claiming that it was a taking. This statute transfers title without a sale. Mr. Laws replied that there are similar processes that have been used in Baltimore City. The Chair said that in nuisance cases, a party must go to the government and then the government goes to court to show there is a public nuisance. This law says that if an individual does not pay taxes, the individual loses the property. Mr. Laws said that those concerns led the Subcommittee to include the notice requirement, but if the Committee believes some additional notice is needed, an amendment can be made. Ms. Lindsey noted that without a summons requirement, it will be a gray area. She said that the statute will usually impact properties where the

owner does not care and the property is abandoned while people who live in the county are suffering because of the blighted property. Judge Mosely commented that she is concerned with interested parties who may have no idea, based on the notice, about their potential interest in the property. The Chair responded that there may be a challenge to the statute once it begins to be implemented. Mr. Laws said that a search could reveal those parties and they are supposed to be notified. Ms. Haines said that one of the protections is that the local government entity must aver and the court must find that the value of the property is less than the total amount of the liens. Mr. Laws replied that, hopefully, the statute will impact a small class of properties.

Mr. Laws explained that Rule 14-606 deals with hearing and judgment, which are supposed to be fast-tracked, but the court cannot schedule a hearing sooner than 30 days after the complaint is docketed. There is a right to cure in the statute, which has been incorporated into the Rule, and interested persons can pay the past due taxes. If an interested person attends a hearing, that person has a right to be heard under section (c). The Subcommittee debated whether to require an answer but it is not required by the statute. The court must make a finding using a preponderance of the evidence standard. Sen. Cassilly asked how an interested party knows the day of the

hearing since there is no summons after the complaint is filed. Mr. Laws said that a Committee note could address the concern. Sen. Cassilly responded that the clerk's office would have to prepare something to schedule the hearing and provide notice. He asked how a party who receives notice finds out about the hearing. Mr. Laws said that the notice must contain a statement that the hearing cannot be sooner than 30 days from the filing of the complaint but there is nothing that specifies how notice of a particular hearing is provided. Ms. Lindsey said that there is nothing that triggers the clerk's office to schedule a hearing. Mr. Kramer commented that unlike a foreclosure sale where the auction details might be posted, there is no such notification on the property in this statute. Mr. Laws responded that there are other notices in a foreclosure action as well as multiple publications advertising the sale. He noted that in the case of this statute, the tax bill is going somewhere and being ignored. Mr. Laws said that the Rule could be amended to add to the mailing, posting, or both that a party can contact the clerk's office with questions about the property. Ms. Haines suggested adding to the notice that a party can ask the clerk to send notice of a hearing when it is scheduled. Mr. Laws responded that a clerk's office would likely notify the plaintiff and anyone else who has entered an appearance. Judge Wilson suggested docketing the case for a

hearing 45 days from when the complaint is filed. Mr. Laws added that the notice could then contain a hearing date. Ms. Lindsey pointed out that the clerk's offices would have difficulty sending the notices within five days if the complaint must be docketed and scheduled for a hearing. She said that larger counties might struggle to meet the requirement. Mr. Laws suggested that the notice say that the action has been filed and a hearing will be held along with instructions to contact the local clerk's office to learn the date of the hearing. Ms. Haines said that parties may have to make repeated calls and asked if there is a way for the clerk's office to send notice of the hearing to a party who contacts the court. Ms. Bernhardt said that Rule 14-605 (a)(3) says that further information may be obtained from the clerk's office. Ms. Lindsey suggested that the Rule tell the clerk to docket the case and set it for a hearing. She said that ordinarily, the clerk would have mechanisms in place to issue a summons, get an answer, and send the case to the Assignment Office for scheduling. Del. Dumais suggested that section (a) be amended to say that "notice of the hearing shall be sent to all interested parties."

By consensus, the Committee approved the Rules as amended.

Agenda Item 9. Consideration of proposed amendments to:

Rule 14-102 (Judgment Awarding Possession)
Rule 14-202 (Definitions)

Rule 14-205	(Conditions Precedent to the Filing of an Action)
Rule 14-206	(Petition for Immediate Foreclosure Against Residential Property)
Rule 14-207	(Pleadings; Service of Certain Affidavits, Pleadings, and Papers)
Rule 14-207.1	(Court Screenings)
Rule 14-208.1	(Challenge of Certificate of Vacancy or Certificate of Property Unfit for Human Habitation)
Rule 14-209	(Service in Actions to Foreclose On Residential Property; Notice)
Rule 14-210	(Notice Prior to Sale) and Rule 14-215 (Post-Sale Procedures)

Mr. Laws presented Rules in Title 14 (See Appendix 3).

Mr. Laws explained that the proposed amendments are a series of conforming amendments due to changes made by the General Assembly to add subsections to the statute governing residential property foreclosure. There being no motion to amend or reject the proposed Rules, they were approved as presented.

There being no further business, the Chair adjourned the meeting.

APPENDIX 1

THE COURT OF APPEALS OF MARYLAND
STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Hon. ALAN M. WILNER, Chair
SANDRA F. HAINES, Reporter
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MEMORANDUM

TO : Members of the Rules Committee

FROM : Hon. Alan M. Wilner, Chair

DATE : October 7, 2019

SUBJECT : Eyewitness Identification Evidence in Criminal Cases

In *Small v. State*, 464 Md. 68 (2019), the Court confirmed a continued adherence to the criteria set forth in *Manson v. Brathwaite*, 432 U.S. 98 (1977), *Neil v. Biggers*, 409 U.S. 188 (1972), and *Jones v. State*, 310 Md. 569 (1987) for assessing whether eyewitness identification evidence offered by the State in a criminal case is so unreliable that its admission would violate due process of law.

In a Concurring Opinion, three judges of the Court expressed the view that those criteria were outdated and had been shown by recent studies and case law in other States to be factually inaccurate, misleading, or incomplete. They desired the Rules Committee to craft and propose rules of procedure "that would bring scientific rigor to the assessment of an eyewitness identification challenged as unduly suggestive and unreliable." 464 Md. at 117.

In that regard, the concurring judges suggested that consideration be given to the criteria and procedures adopted by the New Jersey Supreme Court in *State v. Henderson*, 27 A.3d 872 (2011) and subsequently, with some modifications, by the Supreme Courts of Oregon, Hawaii, Massachusetts, Alaska, Connecticut, and New Jersey. See *State v. Lawson*, 291 P.3d 673 (Or. 2012); *State v. Cabagbag*, 277 P.3d 1027 (Haw. 2012); Commonwealth v. Gomes, 22 N.E.3d 897 (Mass. 2015); *Young v. State*, 374 P.3d 395 (Alaska

2016); *State v. Harris*, 191 A.3d 119 (Conn. 2018); *State v. Anthony*, 204 A.3d 229 (N.J. 2019). The concurring judges also asked the MSBA Criminal Pattern Jury Instruction Committee to draft pattern jury instructions for use in appropriate cases to guide jurors. *Small*, 464 Md. at 117.

The Court's focus in *Small* was on the due process implications of relying solely on the *Manson-Biggers* factors. The Court did not appear to address whether other factors shown to affect memory and the reliability of eyewitness identifications should be considered (1) by a court in determining admissibility as a matter of State evidence law, or (2) by the trier of fact in determining whether to credit the identification if the court does admit it. The Court's holding that the *Biggers-Manson* factors sufficed for due process purposes would seem to limit any review by the Rules Committee to a sub-Constitutional analysis, to avoid intruding on the Court's Constitutional holding.

Some of the issues raised in this debate are substantive in nature - what criteria should apply in assessing whether an eyewitness identification was the product of an impermissibly suggestive procedure or is otherwise unreliable, and should those criteria be limited to criminal cases or identifications obtained by law enforcement agencies? Others are procedural - how should a challenge to the identification evidence be handled, whether any additions need to be made to the discovery Rules, what, if any, expert testimony should be allowed with respect to those criteria, and, if allowed, for what purpose should it be allowed? These issues are likely to arise mostly in the Circuit Courts, but they could arise in District Court as well.

If the Committee chooses to proceed with this inquiry, I would refer it to the Criminal Rules Subcommittee, three of whose members (including our legislative members) also serve on the Evidence Subcommittee.

CURRENT PROCEDURE FOR RAISING THE ISSUE

The current procedural construct for raising and resolving challenges to eyewitness identification evidence

is set forth in Rules 4-251 (District Court) and 4-252 (Circuit Court). In District Court, "a motion to suppress evidence or exclude evidence by reason of any objection or defense shall be determined at trial." Rule 4-251 (b)(2). Because there are no juries in District Court, the reliability of a challenged eyewitness identification would be raised at trial and determined by the judge, both as to admissibility and weight. If expert opinion is to be allowed, it would necessarily have to be presented at trial. It does not appear that reliability evidence is offered in District Court very often, if at all.

The Rule for Circuit Courts is different. Under Rule 4-252 (a) and (b), a motion challenging a pretrial identification disclosed in discovery is waived unless filed within five days after discovery is furnished. If timely filed, the motion must be resolved before trial, to the extent practicable. Under Rule 4-252 (h)(2)(A), the court may not reconsider a pretrial ruling suppressing the evidence unless (1) there is newly discovered evidence, (2) the suppression was based on "an error of law," or (3) there has been a change in the law. If, in a pretrial ruling, the court denies the motion to suppress, that ruling is binding at trial unless the court, in its discretion, grants a supplemental hearing or hearing *de novo* and rules otherwise. As a practical matter, the effective decision **as to admissibility** is made pretrial, and it is the record made at the pretrial suppression hearing that is considered on appeal. *Small*, 464 Md. at 88.

Because, if the evidence is admitted, it remains within in the discretion of the trier of fact whether to credit that evidence, the question arises whether the trier of fact also needs to be made aware of the applicable criteria bearing on suggestiveness or reliability and, if so, how that should be done. Should expert testimony be allowed on that issue, explaining what the appropriate criteria are and why they are significant, or, in a jury case, should that be left to instructions from the judge?

FACTORS AFFECTING RELIABILITY

***Biggers-Manson-Small* Factors**

The ultimate test for due process purposes is whether, under the totality of the circumstances, the identification was reliable. *Small*, 464 Md. at 92. Reliability must be weighed in light of the procedure's suggestiveness, but, under current law, an identification may be found reliable because of other factors, even if the procedure was suggestive. *Id.* Under *Small*, the relevant factors to be considered in assessing reliability for due process analysis remain the five approved by the Supreme Court in *Biggers* and *Manson*, namely:

- The opportunity of the witness to view the criminal at the time of the crime;
- The witness's degree of attention;
- The accuracy of the witness's 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.

Biggers and *Manson*, building on the earlier holding in *Foster v. California*, 394 U.S. 440 (1969), were Constitutional holdings. As recognized in *Perry v. New Hampshire*, 565 U.S. 228, 229 (2012), those cases "detail the approach appropriately used to determine **whether due process** requires suppression of an eyewitness identification tainted by police arrangement" (Emphasis added).

Department of Justice Guidelines

In 1999, the Department of Justice issued Guidelines for law enforcement agencies that were intended to "integrate a growing body of psychological knowledge regarding eyewitness evidence with the practical demands of day-to-day law enforcement" and "recommend uniform practices for the collection and handling of eyewitness evidence." *Eyewitness Evidence: A Guide for Law Enforcement*, U.S. Department of Justice (October 1999) at 1. Those Guidelines were updated with respect to photo arrays in 2017. Although the Guidelines themselves were not intended as a "legal mandate" (*id.* at 2), in 2007, the Maryland General Assembly

required each law enforcement agency in the State to adopt written policies relating to eyewitness identification that comply with those Guidelines. *See* Code, Public Safety Article (PS), § 3-506. The DOJ Guidelines are comprehensive and include recommendations dealing with:

- Answering 9-1-1 calls in a non-suggestive manner with respect to identifying the perpetrator (*id.* at 13);
- Investigating the scene (*id.* at 14);
- Obtaining information from witnesses, including instructing witnesses to avoid discussing the incident with other witnesses and exposure to media accounts of the incident (*id.* at 15);
- Preparing mug books (*id.* at 17);
- Developing and using composite images (id. at 18);
- Instructing the witness prior to conducting an identification procedure (*id.* at 19);
- Documenting the procedure (*id.* at 20);
- Pre-interview preparations and procedures (*id.* at 21);
- Initial (pre-interview) contact with witnesses (*id.* at 22);
- Recording witness recollections (*id.* at 23);
- Assessing the accuracy of individual elements of witness statements (*id.* at 24);
- Maintaining contact with witnesses (*id.* at 25);
- Conducting show-ups and recording show-up results (*id.* at 27-28);
- Composing lineups (*id*, at 29-30);
- Instructing witnesses prior to viewing a lineup (*id.* at 31);
- Conducting the identification procedure (*id.* at 33); and
- Recording identification results (*id.* at 38).

In *Small*, the Court recognized the enactment of PS § 3-506 but found "no basis for discerning a legislative intent to dismantle [the Court's] long-standing **due process jurisprudence**" (Emphasis added). 464 Md. at 86, n.18.

***Henderson* and its Progeny**

The *Henderson* case, and its progeny (both judicial and scholastic) also are premised on the conclusion that, since *Biggers* and *Manson* were decided in the 1970s, a vast body of scientific research regarding human memory has emerged that "calls into question the vitality of the current legal

framework for analyzing the reliability of eyewitness identifications." *Henderson*, 27 A.3d at 877. Indeed, the *Henderson* Court concluded that the *Biggers-Manson* standards did "not offer an adequate measure for reliability or sufficiently deter inappropriate police conduct." *Id.* at 872.

The *Henderson* Court took the case to consider whether the actions of the police in conducting an eyewitness identification procedure were presumptively suggestive. After hearing argument, the Court took the unusual step of remanding the case to a special master appointed by the Court to evaluate scientific and other evidence regarding eyewitness identifications and to report his findings to the Court. The Court reviewed the master's report and adopted his findings for prospective application.

The *Henderson* decision, together with appendices, is more than 100 pages in length. It was summarized in Chief Judge Barbera's concurring Opinion in *Small*. In contrast to the five *Manson-Biggers* factors, the *Henderson* Court identified a non-exhaustive list of 22 "variables" bearing on suggestiveness and reliability that fell into two general categories - variables that are within the State's control (**System Variables**) and variables that are beyond the control of the criminal justice system and are more random (**Estimator Variables**).

In 2015, the General Assembly enacted as statutory requirements some of the System Variables identified in *Henderson*. *See* PS, § 3-506.1. That section complements § 3-506.

System Variables

The *Henderson* Court identified nine System Variables, which take the form of criteria in assessing the reliability of an eyewitness identification:

(1) Blind Administration

The Court stated that an identification may be unreliable if a lineup or photo array procedure is not administered in a double-blind or blind fashion. Double blind administrators do not know who the actual suspect is.

Blind administrators are aware of who the suspect is but shield themselves from knowing where the suspect is located in a lineup or photo array. The *Henderson* Court credited research showing that administrators familiar with the suspect may consciously or unconsciously leak that information to the identifying witness. Blind administration is one of the variables required by PS §3-506.1(b).

(2) Pre-identification Instructions

The *Henderson* Court concluded that identification procedures should begin with instructions to the witness that the suspect may or may not be in the lineup or array and that the witness should not feel compelled to make an identification. Without that warning, witnesses may misidentify innocent suspects who look more like the perpetrator than other lineup members. That requirement also appears in PS § 3-506.1(b) and was one of the DOJ recommendations.

(3) Lineup Construction

There are four elements of this, some of which have long been required by caselaw. First, a suspect should be included in a lineup or array of look-alikes. The suspect should not stand out from the rest in his/her physical characteristics. Second, the lineup or array should include a minimum number of fillers; five seems to be a consensus number. Third, the lineup or array should not include more than one suspect; and finally, all lineup procedures must be recorded and preserved.

PS §3-506.1 adds some additional detail. It requires that (1) when an identification is made, the administrator must document in writing all identification statements made by the eyewitness, (2) each filler must resemble the description of the perpetrator given by the eyewitness, (3) at least four fillers must be included in a lineup and at least five must be included in a photo array, and (4) if the eyewitness has previously participated in an identification procedure involving another suspect, the fillers in the

second proceeding must be different from those in the first one.

(4) Confirmatory Feedback

The concern here is that when the police signal to the witness that he or she has correctly identified the suspect, that can reduce doubt in the mind of the witness, engender a false sense of confidence in the identification and a false enhancement in the quality of his or her recollection, and distort memory. The *Henderson* Court recommended that a record be made of the witness's statement of confidence once an identification is made but even then, feedback about the individual selected should be avoided.

PS § 3-506.1(f) separates recording requirements from feedback issues. It requires that the administrator make a written, video, or audio record of the identification procedure that contains the following elements:

- all identification and non-identification results obtained during the identification procedures;
- the signed statement of the eyewitness;
- The names of all persons present at the identification procedure;
- the date and time of the identification procedure;
- any identification of a filler; and
- all photographs used in the identification procedure.

(5) Multiple viewings

The *Henderson* Court concluded that multiple viewings during an investigation can affect the reliability of a later identification by making it difficult to determine whether that identification stems from a memory of the original event or the earlier identification. The Court concluded that law enforcement officials should attempt to shield witnesses from viewing suspects or fillers more than once.

(6) Simultaneous or Sequential Lineups

Simultaneous lineups present all suspects/fillers at the same time, allowing for side-by-side comparisons. In sequential lineups, the witness views suspects one at a time. The *Henderson* Court concluded that there was no unanimous view regarding the superiority of either approach.

(7) Show-ups

The *Henderson* Court concluded that show-ups, particularly if conducted at police stations, can be suggestive because there is only one person displayed but noted a study indicating that show-ups performed within minutes of an encounter were as accurate as lineups. The Court ultimately concluded that show-ups conducted more than two hours after the event present a heightened risk of misidentification.

Estimator Variables

The *Henderson* Court identified 13 Estimator Variables that also may affect the reliability of eyewitness identifications:

(1) Stress

The *Henderson* Court concluded that high levels of stress are likely to affect the reliability of eyewitness identifications but that there was no precise measure for what constitutes high stress. It therefore recommended consideration of whether **the event** involved a high level of stress. [It may be that the identification procedure itself could be stressful to the witness].

(2) Weapon Focus

The *Henderson* Court concluded that, where a weapon is used during a crime, it can distract a witness and draw attention away from the culprit, thereby impairing the witness's ability to make a reliable identification, especially if the crime is of short duration. It therefore recommended consideration of whether a visible weapon was

used during a crime of short duration and how much time the witness had to observe the event.

(3) Distance and Lighting

The *Henderson* Court reached the obvious conclusion that a great distance between the witness and the perpetrator and poor lighting conditions can diminish the reliability of an identification. It therefore recommended consideration of how close the witness was to the perpetrator and what the lighting conditions were.

(4) Witness Characteristics

Although recognizing that accuracy in identifications declines with age, the *Henderson* Court did not recommend a standard jury instruction questioning the reliability of identifications by older witnesses. The Court did acknowledge that level of intoxication can affect reliability. It recommended consideration of whether the witness was under the influence of alcohol or drugs and whether age was a relevant factor under the circumstances of the case.

(5) Perpetrator Characteristics

The *Henderson* Court recognized that disguises and changes in facial features can affect reliability and recommended consideration of whether the culprit was wearing a disguise or had different facial characteristics at the time of the identification.

(6) Memory decay

Recognizing that memories fade with time, the Court recommended consideration of how much time had elapsed between the crime and the identification.

(7) Race Bias

Recognizing, as the Court of Appeals has, that cross-racial recognition is a factor that can affect the

reliability of an identification, the Court recommended consideration of whether the case involved that situation. *See* discussion in *Smith and Mack v. State*, 388 Md. 468 (2005) and *Tucker v. State*, 407 Md. 368 (2009).

(8) Private Actor Feedback

The problem here is when the witness learns that co-witnesses or other non-State persons have made identifications either consistent or inconsistent with the person identified by the subject witness. The *Henderson* Court concluded that that information can affect witness confidence and recommended that law enforcement officers should instruct witnesses not to discuss the identification process with fellow witnesses or obtain information from other sources.

(9) Speed of Identification

The *Henderson* Court made no finding as to whether the speed with which an identification is made has a bearing on the reliability of the identification.

(10) Manson-Biggers Factors

The *Henderson* Court added to the list the five *Manson-Biggers* considerations.

Upon those findings, the New Jersey Court adopted a new Rule 3.11 and a Model Jury Charge dealing with out-of-court eyewitness identifications. The Rule, which deals with keeping a record of the identification procedure, has been subsequently amended. *See State v. Anthony*, 204 A.3d 229 (N.J. 2019).

EXPERT TESTIMONY

The question of whether expert testimony that identifies and explains factors relating to the reliability of eyewitness identifications in criminal cases should be allowed has been before the Court of Appeals on several occasions. *See Bloodsworth v. State*, 307 Md. 164 (1986); *Bomas v. State*, 412 Md. 392 (2010); and *Smiley v. State*, 442 Md. 168 (2015).

The current view, as expressed in *Bomas* and *Smiley* and briefly confirmed in *Small*, 464 Md. at 87, n.20, is that the

allowance of such opinion evidence is governed by the standard set forth in Rule 5-702 - whether the testimony would "be of real appreciable help to the trier of fact in deciding the issue presented." *Smiley*, at 185. The Court rejected a request to "favor" such testimony, noting that "some of the factors of eyewitness identification are not beyond the ken of jurors" and that "their consideration does not depend upon expert testimony." *Bomas*, 412 Md. at 416; *Smiley*, 442 Md. at 185. In both cases, however, the Court opined that "trial courts should recognize these scientific advances in exercising their discretion whether to admit such expert testimony in a particular case." *Smiley* at 185. But in both cases, the Court affirmed the trial court's disallowance of expert testimony.

CONSIDERATIONS FOR THE RULES COMMITTEE

In light of the request by the Concurring judges in *Small*, the Rules Committee may wish to consider, in addition to anything else:

(1) Whether, as a matter of State evidence law, Maryland should give recognition to factors other than, or in addition to, those enunciated in *Biggers*, *Manson*, and *Small* in assessing the reliability of eyewitness identifications and, if so, what those other factors should be.

(2) Whether a violation of the System Variables, at least to the extent set forth in PS § 3-506.1, should make a resulting eyewitness identification presumptively suggestive for purposes of (A) admissibility and (B) weight to be given by the trier of fact.

(3) If additional factors are to be recognized and, in discovery, the State discloses its intent to offer eyewitness identification evidence, whether (A) the State should be required to include in its discovery disclosures all information and records required by PS § 3-506.1; (B) the defense should be required, in any motion to suppress the eyewitness identification, to specify with particularity the grounds for the motion, including any alleged violation of the requirements of PS §§ 3-506 or 3-506.1; (C) if either party intends to offer expert testimony regarding

reliability factors, the party specify which factors will be included in that testimony; and (D) to the extent practicable, in a Circuit Court case, any motion to suppress expert testimony with respect to reliability factors should be made and resolved prior to trial through a motion in *limine*.

(4) (A) Whether a Rule should propose adoption by the Court of Appeals of pattern jury instructions regarding relevant factors that [should] [may] be considered by the jury in determining whether to credit a challenged eyewitness identification or the weight to be given to it, and (B) if such instructions are given, whether the trial court may consider the giving of those instructions in determining whether expert testimony regarding those factors would be of appreciable help to the jury.

AMW:cmp

Malik Small v. State of Maryland, No. 19, September Term, 2018. Opinion by Greene, J.

CRIMINAL LAW – CRIMINAL PROCEDURE – EYEWITNESS IDENTIFICATION – PHOTO ARRAY

The Court of Appeals reviewed the long-standing *Manson-Jones* framework, which is the proper test for assessing the admissibility of evidence of an extrajudicial identification procedure that is challenged on due process grounds. Applying the *Manson-Jones* test to the present case, the Court determined that the second of two photo array identification procedures, through which the victim identified Petitioner in a photo as the perpetrator of the crime, was suggestive. It was suggestive because Petitioner's photo was emphasized during the first photo array, and then Petitioner was the only person from the first array who was repeated in the second array. Nonetheless, the victim's identification had sufficient indicia of reliability, under the totality of the circumstances, to overcome the taint of that suggestion. Therefore, whether or not the identification was reliable was ultimately a question for the jury. Petitioner's motion to suppress evidence of the pretrial identification on due process grounds was properly denied. The Court of Special Appeals' judgment, which affirmed the Circuit Court for Baltimore City's ruling on Petitioner's motion to suppress, is affirmed.

Circuit Court for Baltimore City
Case No. 115191006
Argued: October 10, 2018

IN THE COURT OF APPEALS

OF MARYLAND

No. 19

September Term, 2018

MALIK SMALL

v.

STATE OF MARYLAND

Barbera, C.J.
Greene,
*Adkins,
McDonald,
Watts,
Hotten,
Getty,

JJ.

Opinion by Greene, J.
Barbera, C.J, McDonald, J. and Adkins, J., concur.

Filed: June 24, 2019

*Adkins, J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the MD. Constitution, Article IV, Section 3A, she also participated in the decision and adoption of this opinion.

Ordinarily, the reliability of relevant evidence is a matter committed to the province of the jury. There may, however, be a reliability question concerning evidence of eyewitness identifications challenged on due process grounds. In such cases, the court will review an identification's reliability in the first instance if law enforcement procured the identification utilizing suggestive procedures. The matter before this Court concerns such a due process reliability inquiry.

Petitioner Malik Small ("Petitioner" or "Mr. Small") alleges that evidence of an out-of-court identification procedure, through which the victim of an assault identified Petitioner as the perpetrator of the crime, should have been suppressed because it violated his right to due process of law. We begin by reviewing and reaffirming the well-settled test for assessing the admissibility of evidence of extrajudicial eyewitness identifications. Applying that test to the facts of this case, we conclude that the challenged identification contained sufficient indicia of reliability to overcome the suggestive nature of the pretrial identification procedures. Therefore, we shall affirm the judgment of the Court of Special Appeals.

FACTUAL & PROCEDURAL BACKGROUND

On June 17, 2015, a man tried to rob, and ultimately shot, Ellis Lee ("Mr. Lee") at a bus stop in Baltimore City. Following the incident, the Baltimore City Police Department administered two photo arrays to Mr. Lee, which resulted in his identification of Petitioner Malik Small as the assailant. The State charged Mr. Small with a 10-count indictment in the Circuit Court for Baltimore City. Before the matter proceeded to trial, Mr. Small moved to suppress evidence of the two extrajudicial photographic array identification procedures.

On March 18, 2016, the Circuit Court for Baltimore City held a suppression hearing to assess the admissibility of evidence of the identification procedures.

The Suppression Hearing

At the outset, the suppression court ruled that evidence of the first photo array could not be admitted by the State against Mr. Small at his trial.[1] The State and Mr. Small's counsel were, however, permitted to produce evidence of the first array during the suppression hearing in order to provide context for the second photo array. The hearing proceeded on the question of whether the second photo array would be admissible in evidence at Mr. Small's trial.

During the hearing, Mr. Lee recalled the incident that occurred on June 17, 2015. He testified that, at 2:00 a.m., he was sitting at a bus stop on Northern Parkway in Baltimore City looking at his cell phone when a man approached him. The man stood approximately one foot away from Mr. Lee, pointing a gun at Mr. Lee and covering the bottom portion of his face with a white T-shirt. The man said, "Let me get your money." Mr. Lee emptied his pockets and told the man that he did not have any money. The man said, "Run, bitch," so Mr. Lee ran away. As Mr. Lee fled, the man fired the gun, and one bullet struck the back of Mr. Lee's right leg. Mr. Lee made it to Gittings Avenue where he was met by an ambulance that transported him to the emergency room at Johns Hopkins Hospital.

While describing the incident during the suppression hearing, Mr. Lee testified that

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[1] The court suppressed evidence of the first photo array because Detective Stanley Ottey, the detective who administered the first photo array, was not available to testify at the suppression hearing. The parties do not challenge the suppression court's ruling, suppressing evidence of the first photo array.

he noticed the gun before he saw the face of the man holding it. The assailant, Mr. Lee said, was covering the bottom portion of his face up to his nose with a white T-shirt, but his neck was exposed. Mr. Lee recalled that it was dark outside, but there was a very dark orange street light shining on the man, which made it "kind of easier to see him." His interaction with the assailant, Mr. Lee estimated, lasted "two minutes at most."

At the hospital, Mr. Lee was interviewed by three detectives, including Detective Matthew DiSimone, the lead investigator on the case. Detective DiSimone testified that Mr. Lee described the assailant as "a black male, light skin, believed he had seen him before, a light [T]-shirt, tattoo on the right side of his neck, 5'8", regular sized, a short haircut. He held the bottom of his shirt up over his face, blue jeans, block letter tattoo on neck, had letter 'M' in it." Mr. Lee believed he had seen the assailant twice before the incident at Staples, where Mr. Lee worked, because he recognized the assailant's voice and tattoo. Mr. Lee did not describe their interactions at Staples, and he did not know the assailant by name.

After Mr. Lee was released from the hospital, Detective DiSimone and Mr. Lee revisited the scene of the crime. Then, they drove to the Northern Police District. According to Detective DiSimone, Mr. Lee gave another description of the assailant at the police station. Mr. Lee described the assailant as "a light brown, black male, 5'8", regular sized, with a scraggly beard, a tattoo on his neck." He also described the tattoo "in detail," as being "[b]lock styled cursive script, bold, not dull, containing multiple letters and at least one of them was an 'M.'"

Detective DiSimone used a police database to compile mugshots to be included in

a "photo array identification procedure."[2] To compile the array, he searched for men with light brown complexions and beards, who were between 5'6" and 5'8". He did not look for men with neck tattoos. Ultimately, the first array included six pictures – Petitioner's photo and five filler photos.[3] Detective DiSimone included one front-facing photo of each person in the first array in order to keep the tattoo out of view. "[He] felt that the tattoo was described in so much detail that it would be leading if [he] put the tattoo in the picture." Despite Detective DiSimone's intentions, the "M" tattooed on Petitioner's neck was plainly visible in Petitioner's photograph.[4] Petitioner was the only person depicted in the first array who had a visible neck tattoo.

After compiling the array, Detective DiSimone printed the six photographs and array instructions, which were to be read to Mr. Lee. He gave the photos and instructions to Detective Stanley Ottey, the administrator for the first photo array. A blind procedure[5] was used to administer the first photo array. Detective Ottey was not involved in the

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[2] A photo array identification procedure occurs when "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." Md. Code Ann., Public Safety § 3-506.1(a)(8) (2003, 2018 Repl. Vol.) ("PS").

[3] A filler, in the context of a photo array, is "a photograph of a person who is not suspected of an offense and is included in an identification procedure." PS § 3-506.1(a)(6).

[4] This fact is apparent from viewing the first array, the photographs for which were collectively admitted into evidence during the suppression hearing.

[5] A blind procedure "means the administrator [i.e. the person conducting the procedure] does not know the identity of the suspect." PS § 3-506.1(a)(3).

investigation, and neither Detective Ottey nor Mr. Lee was advised of the identity of the suspect. Detective Ottey administered the first photo array at 8:37 a.m. During the procedure, Detective Ottey made notes about Mr. Lee's statements. In reference to Petitioner's photo, Detective Ottey wrote that Mr. Lee said he "looks like [the assailant], doesn't think it's him."

Mr. Lee testified that during the first array, "[he] picked out one who kind of looked like [the assailant], but [he] wasn't too sure." He remembered seeing "[t]he tattoo on the neck, [he] just related the two . . . it look[ed] pretty much like the same tat[too] [he] saw [during the incident]." Yet, Mr. Lee explained that the assailant was covering his face during the incident, so Mr. Lee said, "I'm not going to give you 100 percent of somebody's life in my control . . . . I gave him in terms of 80 percent sure." The parties stipulated to the fact that Mr. Lee could not make a positive identification during the first array.

After the first array, Mr. Lee gave another statement to Detective DiSimone. Then, Detective DiSimone compiled the second photo array. Detective DiSimone believed that "if a second array was shown containing side profile pictures, which gave a view of the tattoo, it might assist in . . . identification." To compile the second array, Detective DiSimone searched for photos of men with light brown skin and a beard. This time, he also looked for photos of men with a tattoo on their neck. He explained that the database had a small selection of individuals with neck tattoos, so he did not specifically look for tattoos with letters. Ultimately, the second array included twelve pictures – two photos[6]

[6] One photo showed the person facing front, and the other photo showed his right profile.

each of six individuals. Petitioner was included with five new fillers, making Petitioner the only individual from the first array who was repeated in the second array.[7] All of the fillers in the second array had a tattoo on their neck.[8] In addition to Petitioner, at least one filler had a tattoo that contained letters. None of the fillers had a tattoo with the letter "M" in it.

The second array was administered by Sergeant Detective Ethan Newberg using a blind procedure. Sergeant Newberg was not involved in the investigation, and he did not know who the suspect was. Likewise, Mr. Lee was not advised whom law enforcement suspected was the assailant. Sergeant Newberg conducted the procedure at approximately 11:45 a.m. in an office where only he and Mr. Lee were present. Sergeant Newberg explained that he read Mr. Lee a set of array instructions, then he showed Mr. Lee all twelve photographs. During the procedure, Sergeant Newberg made notes of Mr. Lee's statements. In reference to Petitioner's photo, Sergeant Newberg testified that, according to his notes, Mr. Lee said, "That's him. That's who shot me."

Mr. Lee testified that before the second array, he was told that he was being shown more photos "to make sure this was the same person." Additionally, he only remembered

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[7] A different photo of Petitioner was used in the second array than the first array. In both photos, Petitioner is depicted with practically the same facial expression, facial hair, neck tattoo, and skin tone. In the first array, Petitioner was depicted wearing a white T-shirt and looking directly at the camera. In the second array, Petitioner was depicted wearing a black T-shirt overtop of a gray T-shirt and looking slightly downward. Petitioner's hair also appears slightly longer in the second array.

[8] This fact is apparent from viewing the photographs in the second array, which were collectively admitted into evidence during the suppression hearing.

seeing Petitioner's photograph during the second array.[9] Mr. Lee went on to explain that although the assailant was covering his face, "the characters [Mr. Lee] saw on his neck and what [Mr. Lee] saw on the picture . . . matched."

On Petitioner's photo, Mr. Lee wrote, "This is the same tattoo and face I remember robbing me and the man I remember shooting me. I also remember him from coming into my job [at Staples] on two different occasions." Mr. Lee said that when he identified Petitioner as the assailant, he was 100% sure of his identification. Mr. Lee was confident in his identification because when he saw the tattoo, "[i]t was almost like a rush of memory from both Staples and what [he] remembered seeing that night."

Mr. Lee testified that two weeks later, he saw a man on a dirt bike whom he believed was the assailant. Mr. Lee had already been told that Mr. Small was arrested, but he called the police to report the man he saw. In response, Mr. Lee recalled being told, "That can't be true. We already have the guy . . . he's already confessed to it. You're fine."[10]

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[9] We interpret Mr. Lee's testimony to mean that he did not remember seeing the filler photos, not that Mr. Lee was only shown Mr. Small's photo during the second array. When summarizing the facts of this case, neither Mr. Small nor the State posited that Mr. Lee was only shown Mr. Small's photos during the second array. Rather, Mr. Small stated that Mr. Lee "did not recall seeing any other photos in the second photo array, save for the photos of Mr. Small. *However, the second array contained ten other photos.*" (emphasis added). Moreover, we must view the facts in the light most favorable to the State. *McFarlin v. State*, 409 Md. 391, 403, 975 A.2d 862, 869 (2009). Therefore, we proceed with the understanding that Mr. Lee was, in fact, shown all twelve photos of all six individuals during the second photo array, but at the time of the suppression hearing he did not remember seeing the filler photos.

[10] Mr. Small did not confess to the crime. Detective DiSimone and Sergeant Newberg were not aware of anyone from the Baltimore City Police Department telling Mr. Lee that Mr. Small confessed to the crime.

Sometime after June 17, 2015, Mr. Lee spoke with an Assistant State's Attorney about his identification. During that conversation, Mr. Lee indicated that he was 70% sure about his identification. Mr. Lee could not articulate what caused his confidence level to decrease.

At the conclusion of the suppression hearing, the presiding judge ruled that the second photo array was admissible. To reach this conclusion, the judge first considered whether the array was suggestive. She did not find it problematic that the individuals in the second photo array did not share the same tattoo or all have letters in their tattoos. The judge explained that it is not reasonable to expect the police to find similar-looking people who also have similar tattoos. The judge did, however, take issue with the timing of the first and second arrays. She explained:

> My problem is with the timing, with the fact that they showed [Mr. Lee] a picture of [Mr. Small] at 8:30 in the morning . . . [Mr. Lee] says, "I'm not sure that's the guy," and then they show him another photo array . . . approximately three hours later, and the only person that's repeated in the second photo array is [Mr. Small]. That's troubling.

Nevertheless, the judge concluded that the second photo array was admissible because she found it reliable by clear and convincing evidence. She reasoned that "[Mr. Lee] knew who [Mr. Small] was. [Mr. Lee] had already seen him twice before. [Mr. Lee] recognized his voice. It had nothing to do with the photograph." Therefore, the suppression court denied Mr. Small's motion to suppress the second photo array.

The Trial and Verdict

The matter proceeded to trial before a jury in the Circuit Court for Baltimore City.

Ultimately, the jury found Mr. Small guilty of attempted robbery, second-degree assault, and reckless endangerment. Mr. Small was sentenced to eight years of incarceration. Mr. Small noted an appeal to the Court of Special Appeals.

The Court of Special Appeals

On appeal, the Court of Special Appeals reviewed, *inter alia*, the suppression hearing court's ruling, denying Mr. Small's motion to suppress the second photo array. *Small v. State*, 235 Md. App. 648, 668-91, 180 A.3d 163, 174-89 (2018). The intermediate appellate court reviewed Maryland and United States Supreme Court caselaw regarding due process challenges to extrajudicial identifications. *Id.* As to the merits of Petitioner's due process claim, the court first concluded that the second array was suggestive. *Id.* at 680, 180 A.3d at 176-84. Yet, the court determined that the identification had sufficient indicia of reliability to overcome the procedure's suggestiveness. *Id.* at 683-91, 180 A.3d at 184-89. Therefore, the Court of Special Appeals affirmed the suppression hearing court's denial of Mr. Small's motion to suppress evidence of the second photo array. *Id.* at 691, 180 A.3d at 189.

Mr. Small petitioned this Court for a writ of certiorari. We granted the petition on June 1, 2018. *Small v. State*, 459 Md. 399, 187 A.3d 35 (2018). The issue now before this Court is whether the suppression court properly denied Petitioner's motion to suppress.[11]

[11] The question presented, as framed by Petitioner, is: Did the Court of Special Appeals err in holding that the pretrial identification of Petitioner, which the Court determined to be the product of an impermissibly suggestive procedure, was reliable?

PARTIES' ARGUMENTS

Petitioner contends that the suppression hearing court erred in denying his motion to suppress evidence of the second photo array because the identification procedure violated his right to due process of law. Petitioner challenges the Court of Special Appeals' reliability analysis. Petitioner posits that the court erred in concluding that the identification was reliable and admissible.

Respondent, the State of Maryland, argues that the suppression hearing court properly admitted, and the Court of Special Appeals properly affirmed admission of, evidence of Mr. Lee's extrajudicial identification. According to Respondent, both courts properly analyzed the identification's reliability and therefore properly denied Petitioner's motion to suppress.

Also before this Court is the brief submitted by *amici curiae*.[12] *Amici* challenge the framework that Maryland courts apply for assessing due process challenges to pretrial identifications, which was articulated by the United States Supreme Court in *Manson v. Brathwaite*[13] and adopted by this Court in *Jones v. State*.[14] *Amici* contend that this framework does not adequately assess an identification's reliability, and that we should revise this framework as, according to *amici*, many of our sister states have done.

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[12] Before this Court as *amici curiae* are the Innocence Project, Inc. and the University of Baltimore Innocence Project Clinic.

[13] 432 U.S. 98, 97 S. Ct. 2243, 53 L.Ed.2d 140 (1977).

[14] 310 Md. 569, 530 A.2d 743 (1987), *cert. granted, judgment vacated on other grounds*, 486 U.S. 1050-51, 108 S. Ct. 2815, 100 L.Ed.2d 916 (1988), *conviction aff'd, sentence vacated and remanded*, 314 Md. 111, 549 A.2d 17 (1988).

DUE PROCESS CHALLENGES TO EXTRAJUDICIAL IDENTIFICATION PROCEDURES

The right to due process of law is guaranteed by the Fifth Amendment and Fourteenth Amendment to the United States Constitution and Article 24 of the Maryland Declaration of Rights. *Webster v. State*, 299 Md. 581, 599, 474 A.2d 1305, 1314 (1984). "Due process protects the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures." *Jones*, 310 Md. at 577, 530 A.2d at 747 (quoting *Moore v. Illinois*, 434 U.S. 220, 227, 98 S. Ct. 458, 464, 54 L.Ed.2d 424 (1977)). When an accused challenges the admissibility of an extrajudicial identification procedure[15] on due process grounds, Maryland courts assess its admissibility using a two-step inquiry. *Id.* The inquiry, in essence, seeks to determine whether the challenged identification procedure was so suggestive that the identification was unreliable. "[R]eliability is the linchpin[.]" *Manson*, 432 U.S. at 114, 97 S. Ct. at 2252, 53 L.Ed.2d 140.

In step one of the due process inquiry, the suppression court must evaluate whether the identification procedure was suggestive. *Jones*, 310 Md. at 577, 530 A.2d at 747. The defendant bears the burden of making a *prima facie* showing of suggestiveness. *See Smiley v. State*, 442 Md. 168, 180, 111 A.3d 43, 50 (2015).

If the court determines that the extrajudicial identification procedure was not

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[15] An extrajudicial identification procedure is one that is made outside of the courtroom. *Webster v. State*, 299 Md. 581, 589-90, 474 A.2d 1305, 1309 (1984). By contrast, a judicial or in-court identification occurs when the witness identifies the accused inside of the courtroom. *Id.*

suggestive, then the inquiry ends and evidence of the procedure is admissible at trial. *Jones*, 310 Md. at 577, 530 A.2d at 747. If the court determines that the identification procedure was tainted by suggestiveness, then evidence of the identification is not *per se* excluded. *Id.; Perry v. New Hampshire*, 565 U.S. 228, 232, 132 S. Ct. 716, 720, 181 L.Ed.2d 694 (2012) ("An identification infected by improper police influence, our case law holds, is not automatically excluded."). Rather, the suppression court must proceed to the second stage of the due process inquiry. *Jones*, 310 Md. at 577, 530 A.2d at 747.

In step two of the due process inquiry, the suppression court must weigh whether, under the totality of the circumstances, the identification was reliable. *Id.* At this stage, the burden rests with the State to show that the identification was reliable by clear and convincing evidence. *Smiley*, 442 Md. at 180, 111 A.3d at 50. The United States Supreme Court and this Court have previously identified five factors that may be used to assess reliability. The factors include the witness's opportunity to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's description of the criminal, the witness's level of certainty in his or her identification, and the length of time between the crime and the identification. *Jones*, 310 Md. at 577-78, 530 A.2d at 747 (citation omitted); *Neil v. Biggers*, 409 U.S. 188, 199-200, 93 S. Ct. 375, 382, 34 L.Ed.2d 401 (1972). Ultimately, the court must determine whether the identification is admissible by "weigh[ing] the reliability of the identification against the 'corrupting effect' of the suggestiveness." *Jones*, 310 Md. at 578, 530 A.2d at 747 (citation omitted).

Amici urge us to abandon this legal framework and endorse a revised approach that is consistent with the New Jersey Supreme Court's decision in *State v. Henderson*, 27 A.3d

872 (N.J. 2011). In *Henderson*, the New Jersey Supreme Court undertook an extensive review of a court-appointed special master's recommendations about the factors that many experts believe impact a witness's ability to identify the perpetrator of a crime. *Id.* Based on these recommendations, the court delineated a list of factors that trial courts may consider when assessing suggestiveness and reliability.[16] *Id.* at 920-21. In addition, the

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[16] The court explained that system variables should be explored when analyzing suggestiveness. *State v. Henderson*, 27 A.3d 872, 920 (N.J. 2011). System variables are factors "which are within the control of the criminal justice system." *Id.* at 895. For instance, the person administering the array should not know the suspect's identity. *Id.* at 896-97, 920. The witness should be instructed that the suspect may or may not be in the array. *Id.* at 897, 920. The array should include at least five fillers who resemble the suspect. *Id.* at 898, 920. The witness should not be given feedback, or shown a suspect or filler multiple times. *Id.* at 899-00, 920. The witness's level of confidence should be recorded promptly, and an inquiry should be made into whether the witness spoke with anyone about the identification. *Id.* at 920-21. The witness may have initially made no identification or a different identification during an identification procedure. *Id.* at 921. *Id.* Lastly, the court cautioned that showups are inherently suggestive. *Id.* at 903.

The court explained that, when analyzing reliability, courts should consider estimator variables. *Id.* at 921. Estimator variables are factors "over which the legal system has no control." *Id.* at 895. For instance, the witness's level of stress may impact reliability. *Id.* at 904, 921. In addition, facts about the encounter may affect reliability, such as the presence of a weapon, lighting, duration, and distance between the witness and the perpetrator. *Id.* at 904-06, 921. Characteristics of the witness and perpetrator may be pertinent, such as the witness's level of intoxication and if the perpetrator was wearing a mask. *Id.* at 906-07, 921. The court said that the amount of time between the crime and the identification may impact reliability. *Id.* at 907, 922. It explained that cross-racial identifications may be less reliable. *Id.* at 907. Finally, the court noted that many estimator variables overlap with the five *Biggers* reliability factors, and it included the five factors in its non-exhaustive list of estimator variables that may be used to evaluate reliability. *Id.* at 921-22.

court revised the *Manson* framework.[17]

The case at bar is not this Court's first opportunity to review Maryland's *Manson-Jones* framework in light of the New Jersey Supreme Court's decision in *Henderson*. *See Smiley*, 442 Md. at 184, 111 A.3d at 52. In *Smiley*, we had the opportunity to adopt New Jersey's framework for assessing the admissibility of eyewitness identifications, but we did not do so. *Id.* "We decline[d] to do so, because this Court, as well as the Court of Special Appeals, have consistently reaffirmed application of the procedure in [] *Jones* for examining challenges to the admissibility of eyewitness identifications." *Id.* Consistent with our decision in *Smiley*, we decline the invitation to abandon the *Manson-Jones*

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[17] Under the revised *Henderson* approach, first the defendant bears the burden of setting forth some evidence, tied to a system variable, that indicates suggestiveness. 27 A.3d 827, 920 (2011). Second, the State must show that the eyewitness identification is reliable, accounting for system and estimator variables. *Id.* Consistent with *Manson*, the ultimate burden "remains on the defendant to prove a very substantial likelihood of irreparable misidentification." *Id.* (citing *Manson*, 432 U.S. at 116, 97 S. Ct. at 2254, 53 L.Ed.2d at 155) (citation omitted). The court should suppress the identification if the totality of the circumstances indicate "a very substantial likelihood of irreparable misidentification[.]" *Id.*

It appears that, under *Henderson*'s revised framework, reliability factors become relevant earlier in the court's inquiry. *See id.* at 919 (explaining that "the revised framework should allow all relevant system *and* estimator variables to be explored and weighed at pretrial hearings when there is some actual evidence of suggestiveness[.]"). Under *Manson*'s framework, the court must conclude that the defendant made a *prima facie* showing of suggestiveness before reliability factors become relevant. *Smiley v. State*, 442 Md. 168, 180, 111 A.3d 43, 50 (2015); *see also Webster v. State*, 299 Md. 581, 620, 474 A.2d 1305, 1325 (1984) (concluding that because the "lineup was not one whit suggestive" reliability was not at issue). Under *Henderson*, as long as the defendant produces some evidence of suggestiveness, then the court explores all relevant indicators of suggestiveness and reliability in order to determine whether there is a very substantial likelihood of irreparable misidentification. 27 A.3d at 919.

framework, which Maryland courts use, and have used for decades, to assess due process challenges to extrajudicial identification procedures.[18] The reliability inquiry remains to be whether, under the totality of the circumstances, the challenged identification was reliable, despite the suggestiveness in the identification procedure.

The focus of the reliability assessment is on the totality of the circumstances, and such an inquiry is necessarily a comprehensive one. Suppression courts can and ought to consider the myriad of facts and circumstances presented by a particular case, which may impact the identification's reliability. *Wood v. State*, 196 Md. App. 146, 162, 7 A.3d 1115, 1124 (2010) ("A reliability appraisal . . . is extremely fact-specific. It is a multi-factored determination that, with the help of guidelines, looks to the totality of the circumstances."). The court's assessment should be guided by the circumstances before it. In addition to the five *Biggers*[19] reliability factors, the suppression court may find that the factors identified

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[18] Additionally, we disagree with *amici*'s contention that the Maryland General Assembly's 2014 amendment to PS § 3-506 counsels in favor of abandoning the *Manson-Jones* framework. Through § 3-506, the Legislature imposed procedural requirements upon law enforcement agencies, applicable when conducting eyewitness identification procedures. *See generally* PS §§ 3-506 and 3-506.1. *See also* Dep't. Legis. Servs., Fiscal and Policy Note Revised, House Bill 1200 (2014 Sess.) (describing the changes as being procedural in nature). The Legislature recognized that the statute affords defendants the ability to challenge identifications on statutory grounds, in addition to due process grounds. *Id.* *Amici* correctly note that in the statute's legislative history, the Legislature referenced the New Jersey Supreme Court's decision in *Henderson*. *Id.* So too, however, did the General Assembly reference the United States Supreme Court's decision in *Perry v. New Hampshire*. *Id.* In *Perry*, the Supreme Court reaffirmed that *Manson* is the appropriate test to apply when assessing due process challenges to eyewitness identifications. 565 U.S. 228, 232, 132 S. Ct. 716, 720, 181 L.Ed.2d 694 (2012). Thus, we find no basis for discerning a legislative intent to dismantle our long-standing due process jurisprudence.

[19] 409 U.S. 188, 93 S. Ct. 375, 34 L.Ed.2d 401 (1972).

in *Henderson*, many of which overlap with the *Biggers* factors, and other factors are relevant to the court's evaluation.[20] *See, e.g.*, *United States v. Greene*, 704 F.3d 298, 308-10 (4th Cir. 2013) (applying the *Henderson* variables in conjunction with the five *Biggers* factors). Therefore, although we do not revise this Court's jurisprudence for assessing the admissibility of eyewitness identifications, we do recognize the breadth that is inherent in an inquiry that hinges upon the totality of the circumstances.[21] Having established the appropriate test for analyzing Petitioner's due process challenge, we now apply the aforementioned principles to the facts of this case.

STANDARD OF REVIEW

Upon reviewing a suppression hearing court's decision to grant or deny a motion to suppress, we limit ourselves to considering the record of the suppression hearing. *McFarlin v. State*, 409 Md. 391, 403, 975 A.2d 862, 868-69 (2009). We accept the

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[20] To the extent that expert testimony is required to explain how a particular circumstance may have impacted the eyewitness's identification, the admissibility of the expert's testimony is governed by Maryland Rule 5-702. *Smiley*, 442 Md. at 184, 111 A.3d at 52-53 (2015) ("[I]f expert testimony regarding an eyewitness identification is offered, its admissibility is governed by Maryland Rule 5-702 and *Bomas v. State*, 412 Md. 392, 987 A.2d 98 (2010)).

[21] To be sure, we are not, as the Concurring Opinion suggests, "dismiss[ing] decades of extensive social science research[.]" *Small v. State*, No. 19, 2018 Term, slip op. at 1 (Concurring Opinion, Barbera, C.J.). Rather, to the extent that there is an ambiguity in Maryland law, we are clarifying that courts analyzing the suggestiveness and reliability of an eyewitness identification should consider any system and estimator variables that are relevant under the circumstances of a particular case. Which variables, if any, are relevant under the circumstances will, of course, depend in all cases upon the evidence that the parties place on the record during the adversarial proceeding. As such, we acknowledge that the *Manson-Jones* framework is sufficiently flexible to account for the current state of, and even future developments in, social science research.

suppression hearing court's factual findings and determinations regarding the credibility of testimony unless they are clearly erroneous. *Id.* at 403, 975 A.2d 869. Findings cannot be clearly erroneous "[i]f there is any competent material evidence to support the factual findings of the trial court[.]" *YIVO Institute for Jewish Research v. Zaleski*, 386 Md. 654, 663, 874 A.2d 411, 416 (2005). The evidence and inferences reasonably drawn therefrom are viewed in the light most favorable to the prevailing party. *McFarlin*, 209 Md. at 403, 975 A.2d at 869. Legal conclusions are reviewed *de novo*. *Id.* We independently apply the law to the facts to determine whether a defendant's constitutional rights have been violated. *Id.*

DISCUSSION

A. Suggestiveness

First, we review whether Petitioner made a *prima facie* showing that the second photo array procedure was suggestive. Before this Court, the parties agree that the procedure was suggestive. Nonetheless, we conduct our own constitutional evaluation of the array in order to provide guidance primarily to Maryland courts and law enforcement.

An identification procedure is properly deemed suggestive when the police "[i]n effect . . . repeatedly sa[y] to the witness, '*This* is the man.'" *Jones*, 310 Md. at 577, 530 A.2d at 747 (citing *Foster v. California*, 394 U.S. 440, 443, 89 S. Ct. 1127, 22 L.Ed.2d 402 (1969)). The impropriety of suggestive police misconduct is in giving the witness a clue about which photograph the police believe the witness should identify as the perpetrator during the procedure. *See Conyers v. State*, 115 Md. App. 114, 121, 691 A.2d 802, 806 (1997), *cert. denied*, 346 Md. 371, 697 A.2d 111 (1997) ("The sin is to contaminate the

test by slipping the answer to the testee." (emphasis omitted)).

In the context of a photographic array, the array's composition may, for instance, signal to the witness which photo to select. *Smiley*, 442 Md. at 180, 111 A.3d at 50 (citations omitted). This Court has said that the composition of a photo array "to be fair need not be composed of clones." *Id.* at 181, 111 A.3d at 50 (citations omitted). Though, the individuals in the array should resemble each other. *Webster*, 299 Md. 581, 620, 474 A.2d 1305, 1325 (1984). Concerns may arise when one individual's photograph is shown to a witness multiple times or somehow stands out from the other photos in the array. *Simmons v. United States*, 390 U.S. 377, 383-94, 88 S. Ct. 967, 971, 19 L.Ed.2d 1247 (1968) (explaining that if a witness sees "the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized . . . the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen[.]").

This Court has not had occasion to address whether depicting an individual's tattoo in a photo array may render the array suggestive. The Court of Special Appeals has, however. *See, e.g., Sallie v. State*, 24 Md. App. 468, 332 A.2d 316 (1975). In *Sallie*, an eyewitness to a robbery described one of the robbers as having a diamond-shaped mark on his right cheek. *Id.* at 470, 332 A.2d at 317. Law enforcement showed the eyewitness a photo array, in which Louis Sallie was depicted with a diamond-shaped mark on his cheek. *Id.* at 471, 332 A.2d at 318. The witness identified Mr. Sallie as the perpetrator, at least in part because of the mark. *Id.* On appeal, Mr. Sallie argued the photo array was suggestive because he was the only person pictured with a diamond-shaped mark on his

right cheek. *Id.* at 472, 332 A.2d at 318. Based on the alleged suggestiveness in the photo array, Mr. Sallie argued that the eyewitness's in-court identification of Mr. Sallie was tainted and, thus, inadmissible. *Id.*

The court reviewed the photo array for suggestiveness. *Id.* Although the court determined that the mark was a unique identifying feature, the court explained:

> Every individual is unique. The mouth, the lips, the teeth, the chin, the cheeks, the nose, the eyes, the forehead, the ears, the hair, or any combination of two or more of those and other features, make every individual unique. They make him different from all others. They are the basis upon which any person is visually distinguished from other persons. The more subtle the distinctions, the more difficult the identification, and the greater potential for error.

Id. at 472, 332 A.2d at 318. The court reasoned that the burglar's distinctive mark could have exonerated Mr. Sallie, but it implicated him because the burglar and Mr. Sallie both had the unique mark. *Id.* The mark, therefore, made the identification not only "inevitable" but also more reliable. *Id.* Ultimately, the Court of Special Appeals concluded that, despite the fact that Mr. Sallie was pictured with his unique identifying mark, the photo array was not suggestive. *Id.* at 472, 332 A.2d at 318.

Additionally, the Court of Special Appeals has reviewed whether repeating an individual's picture may render a photo array suggestive. *See, e.g.*, *Morales v. State*, 219 Md. App. 1, 98 A.3d 1032 (2014). In *Morales*, Luis Morales argued that the identification procedure, through which he was identified as the perpetrator of a crime, was impermissibly suggestive. *Id.* at 17-18, 98 A.3d at 1042. His argument rested upon the fact that he was the only person included in both of the two identification procedures

administered to the witnesses. *Id.* The court determined that there was no reason to believe that the witnesses noticed that Mr. Morales's photo was repeated. *Id.* at 18, 98 A.3d at 1042. The police used a more recent photo of Mr. Morales in the second procedure than the first procedure. *Id.* In addition, nothing that the witnesses said indicated that they chose Mr. Morales's photograph because they had seen it before. *Id.* at 18, 98 A.3d at 1043. Therefore, the court concluded that the identification procedure was not suggestive. *Id.* at 19, 98 A.3d at 1043.

In the present case, Petitioner's photo was emphasized during the first photo array. Petitioner was the only person in the first array who had a tattoo visible on his neck. Petitioner's tattoo was prominently visible, and it clearly depicted a cursive-script "M." Our determination that Petitioner's photo was emphasized is also evidenced by the fact that Detective DiSimone recognized that to depict Petitioner's conspicuous tattoo in the first array would draw attention to his photo. Detective DiSimone testified "that the tattoo was described in so much detail that it would be leading if [he] put the tattoo in the picture" during the first array. Despite the tattoo's presence, unlike in *Sallie*, Mr. Lee was only 80% positive that Petitioner was the assailant after viewing the first array.

After Petitioner's photo was emphasized in the first photo array, his photo recurred in the second array. Unlike in *Morales*, Mr. Lee had reason to notice that Petitioner was repeated in the second array. Petitioner was the only person from the first array with an "M" tattoo, and then the only person from the first array who was repeated in the second array. Although Petitioner was not the only person in the second array with a tattoo on his neck, he was, again, the only person with the letter "M" tattooed on his neck. The implicit

suggestion inherent in repeating Petitioner's photo with his distinct tattoo is also bolstered by the fact that Mr. Lee recalled being told that the second array was "to make sure this was the same person," after Mr. Lee said that Petitioner "looked like" the assailant as depicted in the first array.

Similar to *Morales*, however, law enforcement used a different photo of Petitioner in the second array than in the first array. Additionally, nothing that Mr. Lee said indicated that he chose Petitioner's photograph in the second array because he saw it in the first array. To the contrary, at the suppression hearing, Mr. Lee testified that he identified Petitioner because he recognized Petitioner's tattoo from the incident and Staples, not from the first array. The fact that Mr. Lee may not have been susceptible to the suggestive procedure does not absolve this procedure of its suggestive elements. By emphasizing Petitioner's photo in the first array, and then repeating Petitioner's photo in the second array, law enforcement implicitly suggested to Mr. Lee that he should identify Petitioner as the assailant. *See Simmons*, 390 U.S. at 383, 88 S. Ct. at 971, 19 L.Ed.2d 1247. Therefore, we conclude that the second photo array was unduly suggestive.

B. Reliability

Having concluded that the second photo array was suggestive, we move to the second step of the due process inquiry. At this stage, the suppression court must screen the identification's reliability to determine "[i]f there is 'a very substantial likelihood of irreparable misidentification.'" *Perry v. New Hampshire*, 565 U.S. 228, 232, 132 S. Ct. 716, 720, 181 L.Ed.2d 694 (2012) (citation omitted). The State bears the burden of proving reliability by clear and convincing evidence. *Morales*, 219 Md. App. at 14, 98 A.3d at

1040.

When assessing an identification's reliability, among the factors that the suppression court may consider are:

> (i) the opportunity of the witness to view the criminal at the time of the crime;
> (ii) the witness' degree of attention;
> (iii) the accuracy of the witness' prior description of the criminal;
> (iv) the level of certainty demonstrated by the witness at the confrontation; and
> (v) the length of time between the crime and the confrontation.

Neil v. Biggers, 409 U.S. 188, 199-200, 93 S. Ct. 375, 382, 34 L.Ed.2d 401 (1972). The critical inquiry is "whether under the 'totality of the circumstances' the identification is reliable even though the confrontation procedure was suggestive." *Webster*, 299 Md. at 601, 474 A.2d at 1315 (citing *Biggers*, 409 U.S. at 198, 93 S. Ct. at 382) (citations omitted). As this articulation suggests, the identification's reliability must be weighed in light of the procedure's suggestiveness.

A suppression court assessing an identification's reliability must be mindful of the fact that reliability is not a ground upon which the accused may argue for exclusion. The issue of reliability is "by diametric contrast, a severe limitation on such exclusion." *Conyers*, 115 Md. App. at 120, 691 A.2d at 805. It provides the State with a means to show that the identification has sufficient indicia of reliability to warrant admitting it into evidence for the jury, the ultimate arbiter of reliability, to consider. *See Wood v. State*, 196 Md. App. 146, 162, 7 A.3d 1115, 1124 (2010) ("[R]eliability is quintessentially a jury question and an evidentiary issue," and "it is not a catalyst for suppression but an antidote

thereto."). Thus, where a procedure's suggestiveness creates a very substantial likelihood that the witness misidentified the culprit, evidence of the identification must be suppressed in order to preserve the accused's right to due process of law. *Perry*, 565 U.S. at 239, 132 S. Ct. at 724-25, 181 L.Ed.2d 694. Where, however, "the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth." *Id.* at 232, 132 S. Ct. at 721, 181 L.Ed.2d 694.

In *Manson v. Brathwaite*, the Supreme Court concluded that there was no substantial likelihood that the eyewitness misidentified the culprit, even though the identification was procured by showing the eyewitness one photograph. 432 U.S. 98, 116, 97 S. Ct. 2243, 2254, 53 L.Ed.2d 140 (1977). There, the eyewitness stood at the perpetrator's door for two to three minutes, and the door opened twice. *Id.* The eyewitness spoke to the perpetrator, and it was not dark outside. *Id.* The eyewitness was a trained police officer, not a casual observer. *Id.* He gave a description of the perpetrator within minutes of the incident, which described the perpetrator's race, height, build, hair color and style, high cheek bones, and clothes. *Id.* The eyewitness saw the photograph two days after the confrontation, and he was positive about his identification. *Id.*

In *Biggers*, the Supreme Court concluded that evidence of a victim's identification, which was made at a suggestive showup procedure, was admissible because there was no substantial likelihood of misidentification. 409 U.S. at 201, 93 S. Ct. at 383, 34 L.Ed.2d 401. There, the victim spent thirty minutes with the assailant under artificial light and moonlight. *Id.* at 200, 93 S. Ct. at 382. The victim's description was "more than ordinarily

thorough," as it included the assailant's age, height, weight, complexion, skin texture, build, and voice. *Id.* She was confident in her identification. *Id.* at 201, 93 S. Ct. at 383. Additionally, the witness was the victim of the crime, not a casual observer. *Id.* at 200, 93 S. Ct. at 382-83. Lastly, although the identification was made seven months after the crime, the victim only made one identification during the multiple showups she viewed. *Id.* at 201, 93 S. Ct. at 383.

Under the facts of this case, the suppression court and the Court of Special Appeals concluded that there was clear and convincing evidence that Mr. Lee's identification of Petitioner was reliable. The suppression court reached this conclusion based on Mr. Lee and Petitioner's prior familiarity. The Court of Special Appeals rested its holding on Mr. Lee's prior familiarity with Petitioner. Exercising its independent authority, the court also considered a multitude of other reliability factors. We review the factors that both courts considered to establish reliability.

Prior Familiarity

First, the suppression court found that Mr. Lee had prior familiarity with Petitioner, so the identification "had nothing to do with the photograph [Mr. Lee saw during the first array]." The Court of Special Appeals also determined that their prior familiarity bolstered the identification's reliability.

Based on the record, Mr. Lee told Detective DiSimone at the hospital that he "believed he had seen [the assailant] before." Mr. Lee elaborated that he had seen the assailant at Staples, where Mr. Lee was employed, on two occasions. Mr. Lee did not provide specifics about the nature of these encounters, and he did not know the assailant

by name. Still, immediately after identifying Petitioner as the assailant, Mr. Lee wrote on Petitioner's photo that he "remember[ed] [Petitioner] from coming into my job [at Staples] on two different occasions." Additionally, Mr. Lee testified that he was confident in his identification because when he saw Petitioner's tattoo in the second array, it "was almost like a rush of memory from both Staples and what [he] remembered seeing that night [during the incident]."

Petitioner argues that for prior acquaintanceship to bolster the reliability of an identification, we must require a higher degree of prior familiarity between the eyewitness and the alleged perpetrator. Petitioner's argument invites the imposition of an arbitrary acquaintanceship requirement, which we are not willing to adopt. When a witness claims to recognize an assailant from a prior encounter, the credibility of the witness's statement is a factual matter. In this case, the suppression court chose to credit Mr. Lee's testimony that he recognized the assailant, and that the recognition aided him in making an identification. That Mr. Lee did not know the assailant by name or provide details about the prior encounters may detract from the weight that the jury ultimately assigns Mr. Lee's testimony. It does not render the suppression court's factual finding of prior familiarity clearly erroneous. Therefore, affording due deference to the suppression court's decision to credit Mr. Lee's testimony and finding of prior familiarity, we conclude that the fact that Mr. Lee recognized the assailant from encounters preceding the incident weighs in favor of reliability.

Opportunity to View

Next, we review Mr. Lee's opportunity to view the assailant at the time of the crime. In the case at bar, there is no challenge to the accuracy of Mr. Lee's description of the assailant or the opportunity or ability for Mr. Lee to formulate the description he gave to police. The undisputed facts indicate that Mr. Lee's encounter with the assailant lasted approximately two minutes. During that time, Mr. Lee and the assailant were close together, only separated by about one foot, and Mr. Lee spoke with the assailant. As Petitioner points out, it was dark outside during the incident at 2:00 a.m., and the only lighting was a "dark orange" colored street light. Yet, Mr. Lee testified that the street light was shining directly on the assailant, which made it easier for Mr. Lee to see him. In addition, Petitioner notes that the assailant was covering the bottom portion of his face with a white T-shirt. Despite the partial obstruction, Mr. Lee was still able to see the uncovered portions of the assailant's face, hair, and neck, and describe the assailant's skin tone, beard, hair, and neck tattoo. Viewing these facts in the light most favorable to the State, we conclude, as did the Court of Special Appeals, that Mr. Lee's opportunity to view the assailant weighs in favor of reliability.

Degree of Attention

In addition, we review Mr. Lee's degree of attention during the encounter. Mr. Lee stood approximately one foot away from the assailant. He spoke with the assailant when he explained that he did not have any money. Mr. Lee was the victim of the crime, not a "casual or passing observer." *See Webster*, 299 Md. at 621 (determining that because the witnesses were subjected to threats during the robbery, their degree of attention was

"intense."). Additionally, he was sufficiently attentive to notice and recall the assailant's skin tone, hair, facial hair, and neck tattoo.

Petitioner contends that Mr. Lee's degree of attention cannot weigh in favor of reliability because the assailant had a gun during the encounter. *See Henderson*, 27 A.3d at 904-05 (explaining that the presence of a weapon during a short encounter can impact the reliability of a witness's ability to reliably identify and describe the perpetrator). Indeed, weapon-focus may be a circumstance that suppression courts consider within their reliability assessment. *See, e.g., U.S. v. Greene*, 704 F.3d 298, 308 (4th Cir. 2013) (explaining that the eyewitness had a gun pointed at her, which weighed against the reliability of her testimony). In order to conclude that weapon-focus impaired Mr. Lee's identification and description of the assailant, we would need facts from which we could infer that the weapon distracted Mr. Lee. Mr. Lee testified that "[he] saw the gun first before [he] saw the guy connected." At best, we can discern that Mr. Lee saw the gun first, but in addition to, the person holding it. Viewing the facts in the light most favorable to the State, Mr. Lee's proximity to the crime and the details that he observed about the assailant indicate that he was attentive during the crime. We conclude that Mr. Lee's degree of attention weighs in favor of reliability.

Accuracy of Prior Descriptions

We also review the accuracy of Mr. Lee's prior descriptions of the assailant. At the hospital, Mr. Lee described the assailant as "[a] black male, light skin, believed he had seen him before, a light [T]-shirt, tattoo on the right side of his neck, 5'8", regular sized, a short haircut. He held the bottom of his shirt up over his face, blue jeans, block letter tattoo on

neck, had a letter 'M' in it." Neither party contends that the attributes in this initial description inaccurately describe Petitioner. Notably, Mr. Lee's description includes more than just general qualities that could illustrate the features of an innumerable number of people. In particular, Mr. Lee described the block letter "M" tattoo at the hospital. Accordingly, from the outset, Mr. Lee's description of the assailant described Petitioner with considerable specificity.

Petitioner argues that Mr. Lee's description of the assailant's tattoo changed after he viewed Petitioner's photo in the first array, and that this demonstrates the corrupting impact of the first photo array. Specifically, Petitioner contends that Mr. Lee first described the assailant's tattoo as being in cursive script after the first array, whereas Respondent argues that this detail emerged before the first array. At the suppression hearing, Detective DiSimone was asked what information he had about the assailant's tattoo to rely on when compiling the first array. Detective DiSimone consulted his notes, and he said, "Block styled cursive script, bold, not dull, containing multiple letters and at least one of them was an 'M' was the description that was provided." There was some confusion, however, as to when Detective DiSimone recorded the notes that he consulted. Viewing Detective DiSimone's testimony in the light most favorable to the State, regardless of when the detective made those notes, when he compiled the first array he apparently knew that the assailant's tattoo included a cursive script "M."

Moreover, in the detailed description of the assailant's tattoo, Mr. Lee also said that the assailant's tattoo had "multiple letters" in it. This description is consistent with Petitioner's profile-view photo in the second array, in which the letters "L," "Y," and "M"

are seen tattooed on Petitioner's neck. We also observe that only the letter "M" is visible in the first array. The letters "L" and "Y" cannot be seen, and it is not observable from the first array that Petitioner's tattoo contains additional letters. Therefore, Mr. Lee could not have discerned this detail from the first array. Viewing the facts in the light most favorable to the State, because Detective DiSimone said that the detailed description of the tattoo was provided before the first array, and because the fact that Petitioner's tattoo contained multiple letters is not discernable from the first array, we cannot conclude that the first array corrupted Mr. Lee's description of the assailant. We conclude that Mr. Lee's description of the assailant weighs in favor of reliability.

Level of Certainty

Additionally, we consider Mr. Lee's level of certainty. Mr. Lee's level of certainty undisputedly wavered. During the first photo array, Mr. Lee said that Petitioner's photo looked like the assailant, but he was only 80% sure of his claim. Then, three hours later, Mr. Lee saw Petitioner's photo again, and he identified Petitioner as the assailant. This time, Mr. Lee was 100% sure of his identification. Mr. Lee questioned his identification two weeks later when he thought he saw the assailant on a dirt bike, even though he knew Petitioner had been arrested. Mr. Lee's level of confidence decreased sometime subsequent to June 17, 2015, when Mr. Lee told an Assistant State's Attorney that he was 70% sure of his identification of Petitioner. At the suppression hearing, Mr. Lee could not explain why his confidence level varied. We conclude, as did the Court of Special Appeals,

that Mr. Lee's wavering level of certainty does not weigh in favor of reliability.

Lapse in Time

Next, we must consider the length of time between the crime and the display of the photo array. The attempted robbery occurred at 2:00 a.m. on June 17, 2015. The presentation of the second array occurred at approximately 11:45 a.m. on June 17, 2015. Approximately ten hours lapsed between the crime and the display of the photo array.[22]

Within that time frame, Mr. Lee also viewed the first array. Although Petitioner's photo was emphasized in the first array, and then repeated three hours later in the second array, Mr. Lee never indicated that the first array impacted his identification. To the contrary, Mr. Lee connected his identification to his memory of the incident, ten hours earlier, and his prior encounters with the assailant at Staples. For instance, Mr. Lee wrote on Petitioner's photograph, "This is the same tattoo and face I remember robbing me and the man I remember shooting me. I also remember him from coming into my job [at Staples] on two different occasions." He also explained that he was confident in his identification because seeing Petitioner's tattoo in the second array was "like a rush of

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[22] Petitioner contends that the identification is not reliable because Mr. Lee may have been administered drugs while he was in the hospital. *See Henderson*, 27 A.3d at 906 (explaining that a witness's level of intoxication may affect the reliability of an identification). In appropriate cases, the influence of drugs or alcohol may impact the reliability of an identification. Here, Mr. Lee did not recall being given any drugs at the hospital. Mr. Lee testified, "They gave me . . . saline to re-hydrate myself and I asked for hours can I have something to take care of the pain because it increased and I don't even remember them coming in. The only thing I remember them giving me was just the saline." Petitioner did not introduce any evidence at the suppression hearing indicating that Mr. Lee was under the influence of drugs at the hospital. Therefore, this factor is inapplicable to the present case.

memory from both Staples and what [he] remembered seeing that night." We conclude that the lapse in time between the crime and the confrontation weighs in favor of reliability.

Petitioner's Neck Tattoo[23]

Finally, the Court of Special Appeals reviewed the presence of Petitioner's neck tattoo as an independent factor impacting the identification's reliability. In its discussion, the court explained that the assailant's tattoo was distinctive to Mr. Lee and served as an identifying feature. Channeling the logic from *Sallie*, the court concluded that because the assailant and Petitioner both had the tattoo, Mr. Lee's identification of Petitioner was "inevitable indeed, but also . . . more rather than less reliable." *Small*, 235 Md. App. 648, 691, 180 A.3d 163, 188 (2018) (quoting *Sallie*, 24 Md. App. at 472, 332 A.2d at 318).

We agree with the Court of Special Appeals that, for Mr. Lee, the tattoo was a distinct, identifying feature of the assailant. Following the attempted robbery, Mr. Lee described the assailant's tattoo to law enforcement in detail. Furthermore, Mr. Lee testified that he was confident in his ultimate identification of Petitioner because of "the tattoo

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[23] Petitioner argues that the Court of Special Appeals gave "double weight" to Mr. Lee's prior familiarity with the assailant and "triple weight" to Mr. Lee's description of the tattoo because the court weighed these facts in its analysis for multiple reliability factors. The court mentioned Mr. Lee's prior familiarity with the assailant in its analysis of Mr. Lee's prior description of the assailant, and also as an independent factor favoring reliability. In addition, the court discussed the tattoo in its analysis of Mr. Lee's opportunity to view the assailant, the accuracy of Mr. Lee's description, and as an independent factor favoring reliability. We reject Petitioner's claim that the court gave undue weight to Mr. Lee's prior familiarity with the assailant and description of the tattoo. The court appropriately considered the totality of the circumstances. Clearly, one fact may give rise to multiple inferences. *See Manson*, 432 U.S at 115, 97 S. Ct. at 2253, 53 L.Ed.2d 140 (The Court considered the timing of the eyewitness's description and the identification within the analysis of two separate *Biggers* factors).

specifically."

The Court of Special Appeals, however, viewed the second array in isolation. We do not overlook the fact that part of Petitioner's tattoo was displayed in the first photo array, nor that Mr. Lee was not 100% certain that the person in the photo was the assailant. Nonetheless, we observe that the second array portrayed more information about Petitioner's tattoo than the first array. The first array included one front-facing photo of Petitioner, depicting the "M" in Petitioner's tattoo. In addition to a front-facing photo of Petitioner, the second array included a profile-view photo of Petitioner, depicting Petitioner's full "LYM" tattoo.

We discern from these facts that Mr. Lee was apparently not susceptible to the suggestion inherent in depicting the "M" in Petitioner's neck tattoo in the first array because Mr. Lee did not make a positive identification during the first array. Mr. Lee noted that Petitioner's tattoo "look[ed] pretty much like the same tat[too] he saw [during the incident]." He was, however, only 80% sure about his identification. Mr. Lee made an identification with 100% certainty after he viewed the second array. Petitioner's photo appeared in the first array and in the second array. Yet, Mr. Lee did not indicate that he chose Petitioner's photo because his photo was repeated in the second array. Mr. Lee made an identification and explained his level of confidence because of "the tattoo specifically." Notably, the tattoo appeared in full in the second array. Additionally, Petitioner consistently tied his memories of the tattoo to his encounters with the assailant at Staples and the attempted robbery. Viewing the facts in the light most favorable to the State, we conclude that the tattoo was distinctive to Mr. Lee, and it aided his identification of

Petitioner as the assailant. Thus, this factor weighs in favor of reliability.

CONCLUSION

Having conducted an independent evaluation of the identification made by Mr. Lee in light of Petitioner's right to due process of law, we cannot say that Mr. Lee's identification of the assailant was unreliable. Although there was a risk that, by emphasizing Petitioner in the first array and then repeating Petitioner's photograph in the second array, law enforcement guided Mr. Lee to identify Petitioner as the assailant, that risk is diminished by the identification's indicia of reliability. Specifically, Mr. Lee had previously encountered the assailant at Staples, and had ample opportunity to view the assailant at the time of the attempted robbery. Mr. Lee gave a specific and detailed description of the assailant. He identified his assailant shortly after the crime and was aided in making that identification because the assailant displayed a unique tattoo. Accordingly, we conclude that Respondent presented clear and convincing evidence that Mr. Lee's identification was reliable, even in light of the suggestive extrajudicial procedure.[24]

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[24] Lastly, Petitioner argues that the Court of Special Appeals failed to weigh the identification's reliability against its indicia of suggestiveness, which Petitioner argues is particularly prejudicial in this case because Mr. Lee's identification was the only evidence presented by the State to link Mr. Small to the crime. In *Manson v. Brathwaite*, the Supreme Court declined to consider, in its due process inquiry, extraneous evidence of the defendant's guilt. 432 U.S. 98, 116, 97 S. Ct. 2243, 2254, 53 L.Ed.2d 140 (1977) ("Although it plays no part in our analysis, all this assurance as to the reliability of the identification is hardly undermined by the fact[] that respondent was arrested" where the incident took place and visited there frequently). Furthermore, our review of the present case is limited to the suppression hearing record. *McFarlin v. State*, 409 Md. 391, 403, 975 A.2d 862, 868-69 (2009). We do not review the record of the trial. *Id.* Therefore, any evidence, or lack thereof, of the defendant's guilt that was adduced at trial does not factor into our due process inquiry.

Beyond that, the weight of the identification was a matter for the jury to resolve.

We hold that the *Manson-Jones* framework continues to be the proper test for analyzing the admissibility of evidence of extrajudicial identification procedures. Applying that test to the facts of this case, we conclude that the second photo array procedure was suggestive. The identification, however, had sufficient indicia of reliability to overcome the taint of that suggestiveness. Thus, we hold that the suppression court properly denied Petitioner's motion to suppress evidence of the second photo array.

JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED. COSTS IN THIS COURT TO BE PAID BY PETITIONER.

Circuit Court for Baltimore City
Case No. 115191006
Argued: October 10, 2018

IN THE COURT OF APPEALS

OF MARYLAND

No. 19

September Term, 2018

MALIK SMALL

v.

STATE OF MARYLAND

Barbera, C.J.
Greene,
*Adkins,
McDonald,
Watts,
Hotten,
Getty,

JJ.

Concurring Opinion by Barbera, C.J., which Adkins and McDonald, JJ., join.

Filed: June 24, 2019

*Adkins, J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Md. Constitution, Article IV, Section 3A, she also participated in the decision and adoption of this opinion.

I join the Court's judgment because I am satisfied that the Court properly applied the current framework for reliability of eyewitness identification set forth by the Supreme Court in *Manson v. Brathwaite*, 432 U.S. 98 (1977), and adopted by this Court in *Jones v. State*.[1] I write separately to express my disappointment in the Court's unwillingness to consider seriously, and act upon, the research that currently informs the many "vagaries of eyewitness identification." *United States v. Wade*, 388 U.S. 218, 228 (1967).

With its continued adherence to the test in the present case, the Court has effectively dismissed decades of extensive social science research, summarized not only in the brief of Amici, The Innocence Project, Inc. and the University of Baltimore Innocence Project Clinic, but also in a growing number of state supreme court decisions. My colleagues acknowledge the research and note the attention the New Jersey Supreme Court has paid to eyewitness identification evidence in *State v. Henderson*, 27 A.3d 872 (N.J. 2011). *See Small v. State*, No. 19, 2018 Term, slip op. at 12-13 & nn.16-17. But, in the end, the Court brushes the research aside and retreats to a lock-step application of the *Manson* test, the soundness of which has since been called into serious question.

In doing so, the Court has missed an opportunity to join the growing number of state supreme courts that recognize and are reacting to the serious due process concerns attending eyewitness identifications. We should follow the path blazed by our sister supreme courts and act upon the research. We should *not* persist in wholesale reliance on an archaic test based on seemingly logical assumptions that have since been refuted.

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[1] 310 Md. 569 (1987), *cert. granted, judgment vacated on other grounds*, 486 U.S. 1050 (1988), *conviction aff'd, sentence vacated and remanded*, 314 Md. 111 (1988).

The Supreme Court's formulation of the test for identification reliability

In *Foster v. California*, the Supreme Court held, for the first and only time, that a police procedure was "'so unnecessarily suggestive and conducive to irreparable mistaken identification'" and, consequently, "so undermined the reliability of the eyewitness identification as to violate" the Due Process Clause of the Fourteenth Amendment. 394 U.S. 440, 442, 443 (1969) (citation omitted).

Three years later, in *Neil v. Biggers*, the Supreme Court clarified that when a police procedure is challenged as unduly suggestive—thereby calling into question whether the procedure violated due process—"the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification.'" 409 U.S. 188, 198 (1972) (citation omitted). The *Biggers* Court concluded that even when a police procedure is deemed unduly suggestive, the resultant identification could still be offered into evidence at trial so long as the identification itself was reliable. *Id.* at 201 (reasoning that the witness's "unusual opportunity to observe and identify her assailant" during the crime made the identification reliable).

To assist in determining reliability, the *Biggers* Court identified five factors: "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 . . . at the confrontation, and the . . . time between the crime and the confrontation." *Id.* at 199-200. Then, in *Manson*, emphasizing that "reliability is the linchpin in determining the admissibility of identification testimony," 432 U.S. at 114, the Supreme Court held that the courts should apply the five *Biggers* factors, viewed in light

of the totality of the circumstances, *id.* at 110, 116. For much of the intervening time, state courts across the country, including those in Maryland, have followed the reliability test announced in *Biggers*, refined in *Manson*, and, without alteration, applied by the Supreme Court most recently in *Perry v. New Hampshire*, 565 U.S. 228 (2012).

Social science advances since the 1970s and the New Jersey Supreme Court's landmark decision

Since *Manson* was decided, a substantial body of social science research has challenged the validity of the *Manson* test. I will not attempt to catalog that research, but there is a general consensus that misidentification is the single greatest cause of wrongful convictions in this country. The data shows that, before 2011, "more than seventy-five percent of convictions overturned due to DNA evidence involved eyewitness misidentification," and that "[i]n half of the cases, eyewitness testimony was not corroborated by confessions, forensic science, or informants." *State v. Henderson*, 27 A.3d 872, 886 (N.J. 2011) (citations omitted); *see also* Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 48-49 (2011) (finding that of the first 250 DNA exonerations, 76% of the defendants had been misidentified); *id.* at 50 (finding that witnesses choose fillers, i.e., non-suspects used to fill out lineups, in 30% of all identifications).[2] Further, a 2006 publication by the International Association of Chiefs of

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[2] Later studies confirm the role of mistaken identifications in falsely convicting defendants. *See* Kaitlin Jackson & Samuel Gross, Nat'l Registry of Exonerations, *Tainted Identifications* (Sept. 22, 2016), https://perma.cc/9ZZN-RG6X (finding unintentional misidentifications, i.e., those without witnesses' lying about the perpetrator or even that a crime took place, contributed to 30% (572) of the 1,886 exonerations nationwide); Innocence Project, *Eyewitness Identification Reform*, https://perma.cc/Z2VD-TAPH

(continued . . .)

Police concluded that "[o]f all investigative procedures employed by the police in criminal cases, probably none is less reliable than the eyewitness identification. Erroneous identifications create more injustice and cause more suffering to innocent persons than perhaps any other aspect of police work." *Id.* at 885-86 (quoting Int'l Ass'n of Chiefs of Police, Training Key No. 600, Eyewitness Identification 5 (2006)).

The rapidly expanding body of social science research exposes the frailty of the *Manson* factors for eyewitness identification reliability. In the words of Amici in the present case, the *Manson* test "fails to protect against unreliable eyewitness identifications because it focuses on factors that have a weak or no correlation with reliability while ignoring those that are scientifically proven to impact the reliability of eyewitness identifications." Brief of Innocence Project, Inc., et al. as Amici Curiae Supporting Petitioner at 6.

In large part, the New Jersey Supreme Court, in *Henderson*, led the way in departing from long-held judicial assumptions. After oral argument in 2009, the court "appointed a Special Master to evaluate scientific and other evidence about eyewitness identifications. [He] . . . probed testimony by seven experts and produced more than 2,000 pages of transcripts along with hundreds of scientific studies." *Henderson*, 27 A.3d at 877. The court adopted much of the "extensive and very fine report." *Id.*

The Special Master's research on scientific advances regarding the formation,

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(. . . continued)
(finding approximately 71% of the more than 360 convictions overturned by DNA evidence nationwide involved mistaken identification).

storage, and recall of memory reveals a sea change in the factual underpinnings of eyewitness reliability. We should be dismayed that the assumptions of the Supreme Court justices in 1972, however well-intended, still govern the way we in 2019 decide whether an identification is reliable. For example, as the New Jersey Supreme Court observed in *Henderson*, we now know far more about memory than we did in the 1970s:

> During the 1970s, when the Supreme Court decided *Manson*, researchers conducted some experiments on the malleability[3] of human memory. But according to expert testimony, *that decade produced only four published articles in psychology literature containing the words "eyewitness" and "identity" in their abstracts.* By contrast, the Special Master estimated that *more than two thousand studies related to eyewitness identification have been published in the past thirty years.*

27 A.3d at 892 (emphasis added). Judicial procedures, the Special Master's report stated, must account for the fact that a "witness does not perceive all that a videotape would disclose, but rather 'get[s] the gist of things and constructs a 'memory' on 'bits of information . . . and what seems plausible,'" and that memory can therefore be "distorted, contaminated and even falsely imagined." *Id.* at 894.

The *Henderson* court's framework for addressing identification evidence recognizes a far more comprehensive list of suggestiveness and reliability factors than that devised from whole cloth in the 1970s. Based on the research, these factors fall into one of two categories, system variables and estimator variables. System variables are factors "within the State's control," *id.* at 896, including:

- whether a lineup was "administered in double-blind or blind fashion," *id.*;
- whether pre-identification instructions specified "that the suspect may or may

[3] "Malleability" refers to the extent to which "an array of variables can affect and dilute memory and lead to misidentifications." *State v. Henderson*, 27 A.3d 872, 895 (N.J. 2011).

not be in the lineup or array and that the witness should not feel compelled to make an identification," *id.* at 897;

- whether a lineup or array is properly constructed or makes a suspect stand out, *id.* at 897-98;
- whether post-identification feedback or confirmation "signal[s] to eyewitnesses that they correctly identified the suspect," thus "engender[ing] a false sense of confidence in a witness," *id.* at 899;
- whether a witness had multiple viewings of the same suspect during the investigation and thus the later identification may merely "stem[] from . . . a memory of the earlier identification procedure," *id.* at 900;
- whether lineups are presented simultaneously or sequentially, *id.* at 901; and
- whether unreliable composites or suggestive showups were used, *id.* at 902-03.

Estimator variables are factors "beyond the control of the criminal justice system" and may be "related to the incident, the witness, or the perpetrator." *Id.* at 904. They include:

- the level of stress the eyewitness was under at the time of the events, *id.*;
- whether "weapon focus" may have "distract[ed] a witness and draw[n] his or her attention away from the culprit," *id.* at 904-05;
- the "amount of time an eyewitness has to observe an event," *id.* at 905;
- the distance and lighting conditions between the eyewitness and the perpetrator, *id.* at 906;
- eyewitness characteristics both temporary—like intoxication—or immutable—like age—that can affect reliability, *id.*;
- characteristics of the perpetrator that can affect reliability, such as disguises, masks, or changed facial features, *id.* at 907;
- the passage of time, as memories fade over time and "memory decay 'is irreversible,'" *id.*;
- whether the identification is "cross-racial," as that is generally more difficult, *id.*;
- whether private actors—e.g., other witnesses, newspaper accounts, or photographs—may have altered a witness's memory, *id.* at 907-08;
- the speed with which the witness makes an identification, *id.* at 909-10.

The *Henderson* court adopted a new procedure for evaluating suggestiveness and reliability incorporating these variables:

> First, to obtain a pretrial hearing, a defendant has the initial burden of showing some evidence of suggestiveness that could lead to a mistaken identification. That evidence, in general, must be tied to a system—and not

an estimator—variable.

> Second, the State must then offer proof to show that the proffered eyewitness identification is reliable—accounting for system and estimator variables . . . .
>
> Third, the ultimate burden remains on the defendant to prove a very substantial likelihood of irreparable misidentification. To do so, a defendant can cross-examine eyewitnesses and police officials and present witnesses and other relevant evidence linked to system and estimator variables.
>
> Fourth, if after weighing the evidence presented a court finds from the totality of the circumstances that [the] defendant has demonstrated a very substantial likelihood of irreparable misidentification, the court should suppress the identification evidence. If the evidence is admitted, the court should provide appropriate, tailored jury instructions . . . .

27 A.3d at 920 (footnote and citations omitted). Through the targeted consideration of new variables and its new four-part inquiry, New Jersey has ameliorated two drawbacks to the *Manson* framework: (1) it inadequately accounts for the impact of suggestiveness in the first prong on reliability in the second prong; and (2) it does not incorporate current knowledge about how the human brain functions.

Among the Special Master's findings were insights on jurors' reliance on witness certainty. The Supreme Court included, in *Biggers*, the witness's certainty as a reliability factor, albeit without citing any scientific authorities. 409 U.S. at 199. Research studies virtually unanimously indicate that, despite an eyewitness's belief that his or her identification is accurate, there is no statistically significant correlation between certainty and accuracy. *See* Nat'l Research Council, Nat'l Acads., Identifying the Culprit: Assessing Eyewitness Identification 6 (noting that the *Manson* test "treats factors such as the confidence of a witness as independent markers of reliability when, in fact, it is now well established that confidence judgments may vary over time and can be powerfully swayed by many factors").

The problem is compounded by many jurors' "*belief* that eyewitness confidence correlates with accurate identifications," Brief of Am. Psychol. Ass'n as Amicus Curiae Supporting Petitioner at 19 n.14, *Perry*, 565 U.S. 228 (No. 10-8974) ("APA Brief") (emphasis added). Also troubling are jury surveys and mock jury studies disclosing that jurors do not intuitively understand the science of memory and, unless informed on the subject, are inclined to accept the eyewitness's level of "certainty." *See State v. Guilbert*, 49 A.3d 705, 720-21 (Conn. 2012) (stating there is "near perfect scientific consensus" that "eyewitness identifications are potentially unreliable in a variety of ways unknown to the average jury").

The New Jersey Supreme Court sought to inform jurors about the potential pitfalls of seemingly certain eyewitness identifications. Noting the research, *Henderson*, 27 A.3d at 917, the court held that "jurors should be told that poorly constructed or biased lineups can affect the reliability of an identification and enhance a witness' confidence," *id.* at 899. The court thus asked New Jersey's Criminal Practice and Model Criminal Jury Charges Committees "to draft proposed revisions to the current charge on eyewitness identification" that reflect "all of the system and estimator variables . . . for which we have found scientific support that is generally accepted by experts." *Id.* at 925-26.

The *Henderson* court also permitted expert testimony "by qualified experts seeking to testify about the import and effect of certain variables" but not to "opine on the credibility of a particular eyewitness." *Id.* at 925. The court "anticipate[d], however, that with enhanced jury instructions, there will be less need for expert testimony" because jury instructions "are focused and concise, authoritative (in that juries hear them from the trial

judge, not a witness called by one side), and cost-free; they avoid possible confusion to jurors created by dueling experts; and they eliminate the risk of an expert invading the jury's role or opining on an eyewitness' credibility." *Id.* In the end, the court left "to the trial court the decision whether to allow expert testimony in an individual case." *Id.*

In *Perry*, the Supreme Court's latest foray into this subject, the American Psychological Association ("APA"), with both parties' consent, submitted an amicus brief urging the Supreme Court to revisit *Manson* and correct the assumptions made in that case:

> [M]ost of [the *Biggers*] factors are indeed relevant to probable accuracy—with the notable exception of witness certainty. But given that notable exception, and given the plethora of other accuracy-related factors that researchers have identified since *Biggers* and *Manson*, APA urges the Court, in an appropriate case, to revisit the *Manson* framework so as to bring it in line with current scientific knowledge.

APA Brief at 13 n.8 (citations omitted). Justice Sotomayor put an even finer point on the matter in her dissent:

> The empirical evidence demonstrates that eyewitness misidentification is "the single greatest cause of wrongful convictions in this country." Researchers have found that a staggering 76% of the first 250 convictions overturned due to DNA evidence since 1989 involved eyewitness misidentification. Study after study demonstrates that eyewitness recollections are highly susceptible to distortion by postevent information or social cues; that jurors routinely overestimate the accuracy of eyewitness identifications; that jurors place the greatest weight on eyewitness confidence in assessing identifications even though confidence is a poor gauge of accuracy; and that suggestiveness can stem from sources beyond police-orchestrated procedures.

565 U.S. at 263-64 (Sotomayor, J., dissenting) (footnotes omitted).

Additional states' recognition of the research

The New Jersey Supreme Court does not stand alone in recognizing the need to

progress beyond the five-factor *Manson* test, particularly the factor associated with witness certainty. Indeed, some states preceded New Jersey. *E.g.*, *State v. Long*, 721 P.2d 483, 491 (Utah 1986) ("A careful reading of [the *Biggers* factors] will show that several of the criteria listed by the Court are based on assumptions that are flatly contradicted by well-respected and essentially unchallenged empirical studies."); *Brodes v. State*, 614 S.E.2d 766, 770 (Ga. 2005) (agreeing with the *Long* decision and elaborating that "'[t]he scientific validity of the studies confirming the many weaknesses of eyewitness identification cannot be seriously questioned at this point'" and research "'ha[s] taught us much about the fallibility of eyewitness identification'"). The *Brodes* Court concluded that, given "the critical importance of accurate jury instructions as 'the lamp to guide the jury's feet in journeying through the testimony in search of a legal verdict,' we can no longer endorse an instruction authorizing jurors to consider the witness's certainty in his/her identification as a factor to be used in deciding the reliability of that identification." 614 S.E.2d at 771.

After *Henderson*, the Oregon Supreme Court conducted its own review of the research. *State v. Lawson*, 291 P.3d 673, 685-88 (Or. 2012). That court acknowledged that the "factors affecting the reliability of eyewitness identifications that we discuss are similar to those described in *Henderson*," *id.* at 685 n.3, before creating its own procedure for adjudicating suppression motions grounded in the state's evidentiary rules and naming expert testimony and jury instructions as the appropriate remedies, *id.* at 696-97. The Supreme Court of Hawaii also considered *Henderson* and took note, in particular, of New Jersey's "stringent standard" for requiring a cautionary instruction on cross-racial identification. *State v. Cabagbag*, 277 P.3d 1027, 1037 (Haw. 2012). The court held it

"cannot be assumed that juries will necessarily know how to assess the trustworthiness of eyewitness identification evidence"; therefore, "when eyewitness identification is central to the case, circuit courts must give a specific jury instruction upon the request of the defendant to focus the jury's attention on the trustworthiness of the identification." *Id.* at 1038-39. The court lamented that factfinders "continue to place great weight on the confidence expressed by the witness in assessing reliability." *Id.* at 1036.

Although in 2015, as the Court has recounted in the case at bar, we declined to adopt the New Jersey Supreme Court's findings and procedural overhaul, *Smiley v. State*, 442 Md. 168 (2015), three states have since done so. The Supreme Judicial Court of Massachusetts established its own Study Group on Eyewitness Evidence, *Commonwealth v. Gomes*, 22 N.E.3d 897, 900 n.3 (Mass. 2015), whose report often quoted from or overlapped with the *Henderson* findings. *See id.* at 911-16. The report convinced the court that some scientific principles "are 'so generally accepted'[4] that it is appropriate in the future to instruct juries" to help jurors apply those principles. *Id.* at 900. The court appended to its opinion a "provisional instruction" modeled on New Jersey's, *see id.* at 918-27 (citing *Henderson* in footnotes), to be given "until a model instruction is issued." *Id.* at 900-01. The Alaska Supreme Court conducted its own review of the research but borrowed much from *Henderson*, *Young v. State*, 374 P.3d 395, 417-25 (Alaska 2016), on its way toward requiring a procedure for trial courts that "closely follows the framework

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[4] The Massachusetts court explained at some length that whether "a principle of eyewitness identification is 'so generally accepted' that it is appropriate to incorporate into a model instruction" is determined by "the instruction's underlying purpose and the concerns it is intended to alleviate." *Commonwealth v. Gomes*, 22 N.E.3d 897, 908 (Mass. 2015).

set out by the Supreme Court of New Jersey in *State v. Henderson*," *id.* at 427. The court also asked the state's jury instructions committee to draft a model instruction consistent with the research. *Id.* at 428. The Connecticut Supreme Court discussed the estimator and system variables listed in *Henderson*, *State v. Harris*, 191 A.3d 119, 138-40 (Conn. 2018), along with the "persuasive precedents of other state courts," *id.* at 138, before "conclud[ing] that the most appropriate framework [for trial courts to evaluate the reliability of an identification] is that adopted by the New Jersey Supreme Court in *State v. Henderson*," *id.* at 143. Other state supreme courts have taken smaller steps.[5]

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[5] *See, e.g.*, *Minor v. United States*, 57 A.3d 406, 413-14 (D.C. 2012) (citations omitted) (reiterating a prior holding that expert testimony about eyewitness reliability is permissible because the court had "learned much to cause us to reexamine our view that average lay persons serving as jurors are well equipped to call upon their common sense" to assess the credibility of eyewitness identification testimony); *State v. Almaraz*, 301 P.3d 242, 252-53, 258 (Idaho 2013) (reiterating the *Manson* two-step but adopting *Henderson* in instructing that system variables should be considered in the suggestiveness prong and that estimator variables "serve to elaborate on this Court's five-factor test for reliability," and allowing for expert testimony to address suggestive police practices); *State v. Reid*, 186 P.3d 713, 729 (Kan. 2008) (confirming the court's "refinement" of the *Biggers* model by its use of eight factors for excluding an eyewitness identification); *State v. Mahmoud*, 147 A.3d 833, 839 (Me. 2016) ("In light of the voluminous body of scientific research that has emerged regarding the reliability of eyewitness identification, and the subsequent evolving trend among both state and federal courts to instruct juries on this matter, we conclude that it is permissible, where relevant, to instruct jurors on the reliability of eyewitness identification."); *People v. Marshall*, 45 N.E.3d 954, 960 (N.Y. 2015) (requiring *per se* suppression of a pretrial identification if procedure is unduly suggestive); *People v. Boone*, 91 N.E.3d 1194 (N.Y. 2017) (requiring an instruction, in relevant cases, on cross-racial identification reliability); *Commonwealth v. Walker*, 92 A.3d 766, 789 (Pa. 2014) ("Thus, we observe that the potential fallibility of eyewitness identification is 'beyond [the knowledge] possessed by the average layperson,' indeed, may be counterintuitive, and so conclude that expert testimony on that subject could potentially assist the trier of fact to understand . . . the factors which potentially impact eyewitness testimony."); *State v. Copeland*, 226 S.W.3d 287, 300-01 (Tenn. 2007) (same); *State v. Ramirez*, 817 P.2d 774, 781 (Utah 1991) (confirming the factors announced in *State v. Long*, 721 P.2d 483 (Utah

(continued . . .)

The current body of research makes a strong case for this Court not simply to break free from reliance on the *Manson* test, but also to develop a more rigorous protocol for assessing eyewitness identification reliability in Maryland courts.

This Court's rejection of the substantial body of research

Though paying lip service to the growing body of social science research, the Court refuses to consider seriously the scientific knowledge that the research has produced. The Court dismisses Amici's invitation to reverse this Court's endorsement of the *Manson* test in favor of the alternative trend in which the neuropsychological underpinnings of memory are considered as guides of reliability. Four years ago, we declined a similar invitation to adopt the *Henderson* "theories and methodologies" because "we [were] satisfied with the two-part test set out in [*Jones*] for determining the admissibility of an extrajudicial eyewitness identification." *Smiley v. State*, 442 Md. 168, 179-80 (2015) (citing *Jones v. State*, 310 Md. 569, 577 (1987)).[6]

Today, the Court "reaffirm[s] the well-settled [*Manson*] test," slip op. at 1, and the *Smiley* rejection of *Henderson*:

> In *Smiley*, we had the opportunity to adopt New Jersey's framework for assessing the admissibility of eyewitness identifications, but we did not do so. . . . Consistent with our decision in *Smiley*, we decline the invitation to abandon the *Manson-Jones* framework, which Maryland courts use, and have

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(. . . continued)
1986), that "more precisely define the focus of the relevant inquiry" than *Biggers*); *State v. Discola*, 2018 VT 7, ¶¶ 30-31, 184 A.3d 1177, 1188-89 (Vt. 2018) (abandoning witness certainty as a factor for evaluating reliability).

[6] I joined the unanimous opinion of the Court in *Smiley*. That does not mean, though, that I owe continued allegiance to the reasoning and holding of that case in the face of all that we now understand about the frailty of the *Manson* test.

> used for decades, to assess due process challenges to extrajudicial identification procedures. The reliability inquiry remains to be whether, under the totality of the circumstances, the challenged identification was reliable, despite the suggestiveness in the identification procedure.

Id. at 14-15 (footnote and citations omitted). The Court, again, too hastily dismisses the research that New Jersey and other courts have used to facilitate much needed procedural improvements in applying identification law.

Departing from stare decisis?

To be clear, I do *not* argue here that the Court adopt and apply to the present case a new test for determining the reliability of an eyewitness identification. What I do propose is that the Court, going forward, forgo its continued adherence to the *Manson-Jones* "framework[] which Maryland courts . . . have used for decades." *Id.* Such reliance is no reason to ignore science.

It is of little surprise that the presence of one or more of the system variables listed in *Henderson* can significantly influence the outcome of a motion to suppress an eyewitness identification. The good news, as noted in *Henderson*, is that system variables are "within the State's control." *Henderson*, 27 A.3d at 896. With diligence by legislatures and courts, procedures are being implemented to "take[] fully into account the scientific research on memory, perception, and the impact of system and estimator variables to continue to promote the due process concerns that originally animated this Court's adoption of the *Manson/Jones* test," Brief of Innocence Project at 24.

It could be argued—and, indeed, the Court holds, slip op. at 15-16—that Maryland judges, acting individually, could consider many of the system and estimator variables

under the umbrella of the *Biggers* factors or that nothing *prohibits* a trial court's consideration of additional factors. However, given that the Court today "do[es] not revise this Court's jurisprudence for assessing the admissibility of eyewitness identifications," slip op. at 15, there remains no *requirement* for a trial court to consider any factors other than the traditional five, flawed as they are. Moreover, no additional prophylactic procedure, like the *Henderson* four-step, has been implemented.

Enough of our sister states still retain the *Manson-Jones* framework that it cannot seriously be labeled a "remnant of [an] abandoned doctrine," *Houghton v. Forrest*, 412 Md. 578, 587 (2010) (alteration in original). However, some states' jurisprudence indicates that "the state of the law as a whole has evolved," *id.*, or is fast evolving. We ought not be bound by precedent where it incorporates disproven assumptions or premises about the reliability of memory.

Conclusion

> "[T]he law will always lag behind the sciences to some degree because of the need for solid scientific consensus before the law incorporates its teachings. . . ." Appellate courts have a responsibility to look forward, and a legal concept's longevity should not be extended when it is established that it is no longer appropriate.

Brodes, 614 S.E.2d at 771 (alterations in original) (citations omitted).

There is no reason Maryland cannot commit to a new framework. A variety of solutions could help Maryland courts, in ruling on a suppression motion, avoid the "primary evil" of "'a very substantial likelihood of irreparable misidentification,'" *Biggers*, 409 U.S. at 198, and help jurors better determine the weight to be accorded to an identification offered at trial. For those purposes, I suggest that this Court direct the Rules

Committee to craft and propose rules of procedure that bring scientific rigor to the assessment of an eyewitness identification that a defendant has challenged as unduly suggestive and, ultimately, unreliable. To that end, worthy of consideration is the *Henderson* court's new four-part procedure for evaluating suggestiveness and reliability. *See* 27 A.3d at 920, *supra*. I also endorse the concept of leaving "to the trial court the decision whether to allow expert testimony in an individual case." *Id.* at 925. Likewise, I suggest that this Court ask the Criminal Subcommittee of the Standing Committee on Maryland Pattern Jury Instructions to create a pattern jury instruction for use in the appropriate case, to better guide jurors. I await the day—which cannot come too soon—when this Court, prompted by the research on potential fallibility of eyewitness identification evidence, takes meaningful steps to improve Maryland's pretrial and trial-related procedures, so as to mitigate, if not eliminate, the present concerns that attend the admission of, and weight given to, such evidence in future cases.

Judge Adkins and Judge McDonald have authorized me to state that they join this opinion.

APPENDIX 2

MARYLAND RULE OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 600 - IN REM FORECLOSURE OF LOCAL GOVERNMENT TAX LIENS

TABLE OF CONTENTS

MARYLAND RULE OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 600 - IN REM FORECLOSURE OF LOCAL GOVERNMENT TAX LIENS

ADD new Rule 14-601, as follows:

Rule 14-601. APPLICABILITY

The Rules in this Chapter govern in rem foreclosure actions filed by a county or municipal corporation to satisfy delinquent taxes pursuant to Code, Tax-Property Article, §§ 14-873 - 14-876.

Source: This Rule is new.

REPORTER'S NOTE

Proposed new Title 14, Chapter 600 establishes procedures implementing in rem foreclosures for local government tax liens, a new cause of action established by Chapter 276, 2019 Laws of Maryland (SB 509). Rule 14-601 sets forth the applicability of the Chapter.

MARYLAND RULE OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 600 - IN REM FORECLOSURE OF LOCAL GOVERNMENT TAX LIENS

ADD new Rule 14-602, as follows:

Rule 14-602. DEFINITIONS

In the Rules in this Chapter, the following definitions apply except as expressly otherwise provided or as necessary implication requires:

(a) Interested Party

"Interested Party" means

(1) The person who last appears as owner of the real property on the collector's tax roll,

(2) A mortgagee of the property or an assignee of a mortgage of record,

(3) A holder of a beneficial interest in a deed of trust recorded against the real property,

(4) A taxing agency that has the authority to collect tax on the real property, or

(5) Any person having an interest in the real property whose identity and address are (A) reasonably ascertainable from the county land records or (B) revealed by a full title search consisting of at least 50 years.

Cross reference: See Code, Tax-Property Article, § 14-873.

(b) Municipal Corporation

"Municipal Corporation" means an entity that is subject to Article XI-E of the Maryland Constitution.

Cross reference: See Code, Tax-Property Article, § 1-101.

(c) Real Property

"Real Property" means any land that

(1) consists of a vacant lot or improved property cited as vacant and unsafe or fit for habitation or other authorized use on a housing or building violation notice, and

(2) the total amount of liens for unpaid taxes on the land exceeds the lesser of the total value of the property as determined by (A) the State Department of Assessments and Taxation or (B) an appraisal report prepared by a State licensed real estate appraiser not more than six months prior to the filing of a complaint under Rule 14-604.

Cross reference: See Code, Tax-Property Article, § 14-874 (a).

(d) Tax

"Tax" means any tax, or charge of any kind due to the State or any of its political subdivisions, or to any other taxing agency that by law is a lien against the real property on which it is imposed or assessed. "Tax" includes interest, penalties, and service charges.

Cross reference: See Code, Tax-Property Article, § 14-801(d), and for the definition of "other taxing agency," see Code, Tax-Property Article, § 14-801(b).

Source: This Rule is new.

REPORTER'S NOTE

The definitions in proposed new Rule 14-602 are taken almost verbatim from Code, Tax-Property Article, §§ 1-101, 14-801, 14-873, and 14-874(a).

MARYLAND RULE OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 600 - IN REM FORECLOSURE OF LOCAL GOVERNMENT TAX LIENS

ADD new Rule 14-603, as follows:

Rule 14-603. VENUE

A complaint for in rem foreclosure shall be commenced in the circuit court for the county in which the real property is located.

Source: This Rule is new.

REPORTER'S NOTE

Proposed new Rule 14-603 is derived from Code, Tax-Property Article, § 14-875 (d)(1).

MARYLAND RULE OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 600 - IN REM FORECLOSURE OF LOCAL GOVERNMENT TAX LIENS

ADD new Rule 14-604, as follows:

Rule 14-604. IN REM FORECLOSURE OF LOCAL GOVERNMENT TAX LIENS - COMPLAINT

(a) Contents

In an in rem foreclosure, the complaint, in addition to complying with Rules 2-303 through 2-305, shall set forth

(1) the identity of the county or municipal corporation seeking foreclosure, including its address,

(2) a description of the real property as it appears in the county land records,

(3) the tax identification number of the real property,

(4) an averment that the taxes are at least six months delinquent at the time of filing,

(5) the amount of taxes that are delinquent as of the date of filing,

Committee note: A complaint may be amended to include any taxes that become delinquent after commencement of the in rem foreclosure action. See Code, Tax-Property Article, § 14-875(f).

(6) the names and last known addresses of each interested party,

(7) an averment that the real property is either

(A) a vacant lot, or

(B) improved property cited as

(i) vacant and unsafe, or

(ii) unfit for human habitation or other authorized use,

(8) an averment that the value of the real property as determined in accordance with Code, Tax-Property Article, § 14-874(a)(2) is less than the total amount of liens for unpaid taxes,

(9) a request that the circuit court not schedule a hearing on the complaint until at least 30 days after the date the complaint is accepted for filing by the clerk, and

(10) a request for judgment

(A) foreclosing the existing interest of all interested parties in the real property and

(B) ordering the transfer of ownership of the real property to the county or municipal corporation.

Cross reference: See Code, Tax-Property Article, §§ 14-874(a), 14-875(e).

(b) Exhibits to be Filed

The complaint shall be accompanied by:

(1) a certificate of the collector showing the total amount of tax due with all penalties and interest;

Cross reference: See Code, Tax-Property Article, §§ 1-101(e) and 14-869 (b).

(2) a copy of a document establishing the value of the real property in compliance with Code, Tax-Property Article, § 14-874(a)(2); and

(3) if applicable, a copy of each violation notice pertaining to an averment in the complaint that is referenced in subsection (a)(7)(B) of this Rule.

Cross reference: See Code, Tax-Property Article, § 14-875(e)(9).

REPORTER'S NOTE

Proposed new Rule 14-604 is based upon Code, Tax-Property Article §§ 1-101(e), 14-869(b), 14-874(a), and 14-875(e)-(f), with stylistic changes.

MARYLAND RULE OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 600 - IN REM FORECLOSURE OF LOCAL GOVERNMENT TAX LIENS

ADD new Rule 14-605, as follows:

Rule 14-605. PROCESS

Within five days after the complaint is accepted by the clerk for filing, the county or municipal corporation shall (a) in compliance with Rule 2-122 (a)(3), cause notice to be posted in a conspicuous place on the real property subject to the in rem foreclosure that at a minimum sets forth (1) the name of the court in which the in rem foreclosure action has been filed and the case number of the action, (2) that the property is subject to an action seeking foreclosure, and (3) that further information about the foreclosure action may be obtained from the clerk's office, and (b) send notice and a copy of the complaint to each interested party by first-class mail and certified mail, postage prepaid, return receipt requested, bearing a postmark from the United States Postal Service.

Cross reference: See Code, Tax-Property Article, § 14-875(d)(2).

Source: This Rule is new.

REPORTER'S NOTE

Proposed new Rule 14-605 is derived in part from Code, Tax-Property Article, § 14-875(d)(2) and Rule 2-122 (a)(3).

MARYLAND RULE OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 600 - IN REM FORECLOSURE OF LOCAL GOVERNMENT TAX LIENS

ADD new Rule 14-606, as follows:

Rule 14-606. HEARING

(a) Timing

The circuit court shall schedule a hearing no earlier than 30 days after the date the complaint is accepted for filing by the clerk.

Cross reference: Code, Tax-Property Article, § 14-876.

(b) Right to Cure

Until a judgment foreclosing the tax lien is entered in favor of the county or municipal corporation, any interested party may cure the tax lien by paying all past due taxes, including penalties and interest.

Cross reference: See Code, Tax-Property Article, § 14-804 (unpaid taxes on real property are tax liens) and Code, Tax-Property Article, § 14-875(g).

(c) Conduct of Hearing

Any interested party shall have the right to be heard, to contest the delinquency of the taxes, and to contest the adequacy of the proceedings.

Cross reference: See Code, Tax-Property Article, § 14-876(b).

(d) Finding

If the court finds by a preponderance of the evidence that (1) notice has been provided to all interested parties pursuant to Rule 14-605 and (2) the information set forth in the complaint is accurate and in compliance with Rule 14-604, the court shall enter a judgment in favor of the county or municipal corporation.

Cross reference: See Code, Tax-Property Article, § 14-876(c).

(e) Judgment

The judgment shall:

(1) state that notice has been provided to all interested parties;

(2) state that the real property is a vacant lot or an improved property cited as vacant and unsafe or unfit for human habitation or other authorized use and that the value of the real property is shown to be less than the amount of the unpaid taxes; and

(3) order that ownership of the real property be transferred to the county or municipal corporation on behalf of which the complaint was filed.

Cross reference: See Code, Tax-Property Article, §§ 14-876(c)(1)-(2).

Source: This Rule is new.

REPORTER'S NOTE

In proposed new Rule 14-606, section (a) is based on the language in Code, Tax-Property Article, § 14-876, which states that "[a] circuit court may not set a hearing for an in rem foreclosure until 30 days after the complaint for an in rem foreclosure is filed." The difference in section (a) is that the time runs from after the clerk accepts the filing, rather than when the complaint is filed. The purpose of this difference is to minimize any disputes that may arise as to timing in the event that a complaint is not accepted through MDEC in the same day it is filed or is rejected for a deficiency that is subsequently corrected. The date the complaint is accepted for filing serves a bright-line rule that all parties involved in these matters can easily understand, and that does not result in less time being provided than was contemplated in the statute.

Section (b) is derived from Code, Tax-Property Article, § 14-875(g), and relies on the tax lien authority present in Code, Tax-Property Article § 14-804(a), which provides that unpaid taxes on real property are a lien on the subject real property effective from the date they were due and payable.

Section (c) is based on Code, Tax-Property Article, § 14-876(b).

Section (d) closely follows Code, Tax-Property Article, § 14-875(c). The main difference is that section (d) includes a "preponderance of the evidence" burden of proof. The statute is silent on this issue.

Section (e) incorporates the language used in Code, Tax-Property Article, §§ 14-876(c)(1)-(2) and requires a finding in the judgment that the subject real property meets the statutory requirements to qualify for an in rem foreclosure set forth in Code, Tax-Property Article, § 14-874(a).

APPENDIX 3

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 100 - GENERAL PROVISIONS

AMEND Rule 14-102 by updating statutory references, as follows:

Rule 14-102. JUDGMENT AWARDING POSSESSION

(a) Motion

(1) If the purchaser of an interest in real property at a sale conducted pursuant to the Rules in this Title is entitled to possession and the person in actual possession fails or refuses to deliver possession, the purchaser or a successor in interest who claims the right of immediate possession may file a motion for judgment awarding possession of the property.

(2) The motion shall state the legal and factual basis for the movant's claim of entitlement to possession.

(3) If the movant's right to possession arises from a foreclosure sale of a dwelling or residential property, the motion shall include averments, based on a reasonable inquiry into the occupancy status of the property and made to the best of the movant's knowledge, information, and belief, establishing either that the person in actual possession is not a bona fide tenant having rights under Code, Real Property Article, § ~~7-~~

~~105.6~~ 7-105.8 or, if the person in possession is such a bona fide tenant, that the notice required under these laws has been given and that the tenant has no further right to possession. If a notice pursuant to Code, Real Property Article, § ~~7-105.6~~ 7-105.8 is required, the movant shall state the date the notice was given and attach a copy of the notice as an exhibit to the motion.

Committee note: Unless the purchaser is a foreclosing lender or there is waste or other circumstance that requires prompt remediation, the purchaser ordinarily is not entitled to possession until the sale has been ratified and the purchaser has paid the full purchase price and received a deed to the property. See Legacy Funding v. Cohn, 396 Md. 511 (2007) and Empire v. Hardy, 386 Md. 628 (2005).

. . .

(d) Service and Response

(1) On Whom

The motion and all accompanying documents shall be served on the person in actual possession and on any other person affected by the motion.

(2) Party to Action or Instrument

(A) If the person to be served was a party to the action that resulted in the sale or to the instrument that authorized the sale, the motion shall be served in accordance with Rule 1-321.

(B) Any response shall be filed within the time set forth

in Rule 2-311.

(3) Not a Party to Action or Instrument

(A) If the person to be served was not a party to the action that resulted in the sale or a party to the instrument that authorized the sale, the motion shall be served:

(i) by personal delivery to the person or to a resident of suitable age and discretion at the dwelling house or usual place of abode of the person, or

(ii) if on at least two different days a good faith effort was made to serve the person under subsection (d)(3)(A)(i) of this Rule but the service was not successful, by (a) mailing a copy of the motion by certified and first-class mail to the person at the address of the property and (b) posting in a conspicuous place on the property a copy of the motion, with the date of posting conspicuously written on the copy.

(B) Any response shall be filed within the time prescribed by sections (a) and (b) of Rule 2-321 for answering a complaint. If the person asserts that the motion should be denied because the person is a bona fide tenant having a right of possession under Code, Real Property Article, § ~~7-105.6~~ 7-105.8, the response shall (i) state the legal and factual basis for the assertion and (ii) be accompanied by a copy of any bona fide lease or documents establishing the existence of such a lease or

state why the lease or documents are not attached.

(4) Judgment of Possession

If a timely response to the motion is not filed and the court finds that the motion complies with the requirements of sections (a) and (b) of this Rule, the court may enter a judgment awarding possession. If a timely response to the motion is filed and the response asserts sufficient grounds for denial of a judgment awarding possession, the court shall hold a hearing, if requested.

Cross reference: See Rule 2-311 (f), providing that the court may not render a decision that is dispositive of a claim or defense without a hearing if a hearing was requested as provided in that section.

(e) Residential Property; Notice and Affidavit

After entry of a judgment awarding possession of residential property as defined in Rule 14-202 (q), but before executing on the judgment, the purchaser shall:

(1) send by first-class mail the notice required by Code, Real Property Article, § ~~7-105.9 (d)~~ 7-105.11 (d) addressed to "All Occupants" at the address of the property; and

(2) file an affidavit that the notice was sent.

Cross reference: Rule 2-647 (Enforcement of Judgment Awarding Possession).

Source: This Rule is derived in part from the 2008 version of former Rule 14-102 and is in part new.

REPORTER'S NOTE

Subsections (a)(3) and (d)(3)(B) of Rule 14-102 are proposed to be amended to conform to the renumbering of Code, Real Property Article, § 7-105.6 as § 7-105.8 as set forth in Chapter 93, 2019 Laws of Maryland (HB 107).

Subsection (e)(1) of Rule 14-102 is proposed to be amended to conform to the renumbering of Code, Real Property Article, § 7-105.9 as § 7-105.11 as set forth in Chapter 93, 2019 Laws of Maryland (HB 107).

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-202 by deleting references to repealed statutory provisions, by updating statutory references, and by revising a Committee note following section (t), as follows:

Rule 14-202. DEFINITIONS

. . .

(b) Borrower

"Borrower" means:

(1) a mortgagor;

(2) a grantor of a deed of trust;

(3) any person liable for the debt secured by the lien;

(4) a maker of a note secured by an indemnity deed of trust;

(5) a purchaser under a land installment contract; and

(6) a person whose property is subject to a lien under Code, Real Property Article, Title 14, Subtitle 2 (Maryland Contract Lien Act)~~; and~~.

~~(7) a leasehold tenant under a ground lease, as defined in Code, Real Property Article, § 8-402.3 (a)(6).~~

. . .

(g) Foreclosure Mediation

(1) Generally

"Foreclosure mediation" means a conference at which the parties in a foreclosure action, their attorneys, additional representatives of the parties, or a combination of those persons appear before an impartial individual to discuss the positions of the parties in an attempt to reach agreement on a loss mitigation program for the mortgagor or grantor.

Committee note: This is the definition stated in Code, Real Property Article, § 7-105.1 (a)~~(3)~~(4). Code, Real Property Article, §§ 7-105.1 (d), (k), (l), (m), and (n) require that the foreclosure mediation be conducted by the Office of Administrative Hearings.

(2) Prefile Mediation

"Prefile mediation" means foreclosure mediation that occurs in accordance with Code, Real Property Article, § 7-105.1 (d) before the date on which the order to docket or complaint to foreclose is filed.

(3) Postfile Mediation

"Postfile mediation" means foreclosure mediation that occurs in accordance with Code, Real Property Article, § 7-105.1(j) after the date on which the order to docket or complaint to foreclose is filed.

. . .

(i) Lien Instrument

"Lien instrument" means any instrument creating or authorizing the creation of a lien on property, including:

(1) a mortgage;

(2) a deed of trust;

(3) a land installment contract, as defined in Code, Real Property Article, § ~~10-101(b)~~ 10-101 (c);

(4) a contract creating a lien pursuant to Code, Real Property Article, Title 14, Subtitle 2;

(5) a deed or other instrument reserving a vendor's lien; or

(6) an instrument creating or authorizing the creation of a lien in favor of a homeowners' association, a condominium council of unit owners, a property owners' association, or a community association.

. . .

(s) Secured Party

"Secured party" means any person who has an interest in property secured by a lien or any assignee or successor in interest to that person. The term includes:

(1) a mortgagee;

(2) the holder of a note secured by a deed of trust or indemnity deed of trust;

(3) a vendor under a land installment contract or holding a vendor's lien;

(4) a person holding a lien under Code, Real Property

Article, Title 14, Subtitle 2;

(5) a condominium council of unit owners;

(6) a homeowners' association; and

(7) a property owners' or community association~~; and~~.

~~(8) a ground lease holder, as defined in Code, Real Property Article, § 8-402.3 (a)(3).~~

The term does not include a secured party under Code, Commercial Law Article, § 9-102 (a)~~(3)~~(74).

(t) Statutory Lien

"Statutory lien" means a lien on property created by a statute providing for foreclosure in the manner specified for the foreclosure of mortgages~~, including a lien created pursuant to Code, Real Property Article, § 8-402.3 (d)~~.

Committee note: Liens created pursuant to Code, Real Property Article, Title 14, Subtitle 2 (Maryland Contract Lien Act) are to be foreclosed "in the same manner, and subject to the same requirements, as the foreclosure of mortgages or deeds of trust." See Code, Real Property Article, § 14-204 (a). ~~A lien for ground rent in arrears created pursuant to Code, Real Property Article, § 8-402.3 (d) is to be foreclosed "in the same manner and subject to the same requirements, as the foreclosure of a mortgage or deed of trust containing neither a power of sale not an assent to decree." See Code, Real Property Article, § 8-402.3 (n).~~

Source: This Rule is derived in part from the 2008 version of former Rule 14-201 (b) and is in part new.

REPORTER'S NOTE

Subsection (b)(7), subsection (s)(8), and the last clause in section (t) are proposed to be deleted from Rule 14-202 because Code Real Property Article, § 8-402.3, relating to the

foreclosure of ground rents, was repealed by Chapter 428, 2015 Laws of Maryland (HB 511).

The Committee note following Section (g) is amended to correct the citation to the definition of "foreclosure mediation" set forth in Code, Real Property Article, § 7-105.1 (a)(4).

Subsection (i)(3) is amended to correct the citation to the definition of "land installment contract" set forth in Code, Real Property Article, § 10-101 (c).

The last sentence in section (s) is amended to correct the citation to the definition of "secured party" set forth in Code, Commercial Law Article, § 9-102(a)(74).

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-205, by updating a statutory reference in the cross reference following section (c), as follows:

Rule 14-205. CONDITIONS PRECEDENT TO THE FILING OF AN ACTION

. . .

(c) Land Installment Contract

(1) Notice

An action to foreclose a land installment contract on property other than residential property may not be filed until at least 30 days after the secured party has served written notice on the borrower, the record owner of the property, and, if different, the person in possession at the address of the property. The notice shall describe the default with particularity and state that foreclosure proceedings will be filed on or after a designated day, not less than 30 days after service of the notice, unless the default is cured prior to that day.

(2) Method of Service

The secured party shall serve the notice required by subsection (1) of this section by (A) certified and first-class

mail to the last known address of the person or (B) personal delivery to the person or to a resident of suitable age and discretion at the dwelling house or usual place of abode of the person.

Cross reference: For the definition of "land installment contract," see Code, Real Property Article, § ~~10-101(b)~~ 10-101 (c).

Source: This Rule is derived in part from the 2008 version of Rule 14-203(a) and is in part new.

REPORTER'S NOTE

The cross reference following subsection (c)(2) is proposed to be amended to correct the citation to the definition of "land installment contract" set forth in Code, Real Property Article, § 10-101 (c).

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-206 by updating statutory references and by revising a Committee note following section (a), as follows:

Rule 14-206. PETITION FOR IMMEDIATE FORECLOSURE AGAINST RESIDENTIAL PROPERTY

(a) Right to File

A secured party may file a petition to be excused from the time and notice requirements of Code, Real Property Article, § 7-105.1 (b) and (c) and Rule 14-205 (b) and for leave to file an action for immediate foreclosure of a lien against residential property if:

(1) the debt secured by the lien instrument was obtained by fraud or deception;

(2) no payments have ever been made on the debt;

(3) the property subject to the lien has been destroyed;

(4) the default occurred after all stays have been lifted in a bankruptcy proceeding; or

(5) the property subject to the mortgage or deed of trust is property that is vacant and abandoned as provided under Code, Real Property Article, § ~~7-105.14~~ 7-105.18.

Committee note: Notice and hearing procedures for filing a petition for leave to immediately commence an action for foreclosure of a lien against vacant and abandoned property are different than the procedures for filing a petition for other expedited foreclosure proceedings. See Code, Real Property Article, § ~~7-105.14 (b)~~ 7-105.18 (b) for the notice and hearing procedures pertaining to vacant and abandoned property and (c) for the criteria required to make a finding that a property is vacant and abandoned.

. . .

Source: This Rule is new.

REPORTER'S NOTE

Subsection (a)(5) of Rule 14-206 and the Committee note following that subsection are proposed to be amended to conform to the renumbering of Code, Real Property Article, § 7-105.14 as § 7-105.18 as set forth in Chapter 93, 2019 Laws of Maryland (HB 107).

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-207 by updating the statutory reference in the cross reference following section (c), as follows:

Rule 14-207. PLEADINGS; SERVICE OF CERTAIN AFFIDAVITS, PLEADINGS, AND PAPERS

. . .

(c) When a Certificate of Vacancy or a Certificate of Property Unfit for Human Habitation Has Been Filed

If the property is residential property and the order to docket or complaint to foreclose is based on a certificate of vacancy or a certificate of property unfit for human habitation, the order to docket or complaint to foreclose shall be accompanied by a copy of the certificate and by the exhibits required by subsections (b)(1) through (b)(5) of this Rule.

Cross reference:

Cross reference: See Code, Real Property Article, § ~~7-105.11~~ 7-105.13.

. . .

Source: This Rule is derived in part from the 2008 version of former Rule 14-204(a) and (c) and is in part new.

REPORTER'S NOTE

The cross reference following s`ection (c) of Rule 14-207 is proposed to be amended to conform to the renumbering of Code, Real Property Article, § 7-105.11 as § 7-105.13 as set forth in Chapter 93, 2019 Laws of Maryland (HB 107).

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-207.1 to update references in section (c) from Rules 2-541 (i) and 2-542 (i) to Rules 16-807 (b) and 16-808 (b), respectively, as follows:

Rule 14-207.1. COURT SCREENING

. . .

(c) Special Magistrates or Examiners

The court may designate one or more qualified Maryland lawyers to serve as a part-time special magistrate or examiner to screen pleadings and papers under section (a) of this Rule, conduct proceedings under section (b) of this Rule, and make appropriate recommendations to the court. Subject to section (d) of this Rule, the costs and expenses of the special magistrate or examiner may be assessed against one or more of the parties pursuant to Code, Courts Article, § 2-102(c), ~~Rule 2-541(i), or Rule 2-542(i)~~ Rule 16-807 (b), or Rule 16-808 (b). With his or her consent, the special magistrate or examiner may serve on a pro bono basis.

. . .

Source: This Rule is new.

REPORTER'S NOTE

The Property Subcommittee proposes amending Rule 14-207.1 (c) to correct references to the Rules that pertain to assessing costs and expenses related to the appointment of a special magistrate or special examiner to a party in litigation as costs.

Section (c) of Rule 14-207.1 currently references Rule 2-541 (i) and Rule 2-542 (i) for the ability to assess costs incurred by retaining a special magistrate or examiner, respectively. These references are obsolete. Provisions relating to assessing special magistrate or special examiner expenses as costs of litigation against a party currently are set forth in Rules 16-807 (b) and 16-808 (b), respectively. Therefore, the Property Subcommittee recommends amending the references in section (c) of this Rule from Rule 2-541 (i) and Rule 2-542 (i) to Rule 16-807 (b) and Rule 16-808 (b), respectively.

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-208.1 by updating the statutory reference in section (a), as follows:

Rule 14-208.1. CHALLENGE OF CERTIFICATE OF VACANCY OR CERTIFICATE OF PROPERTY UNFIT FOR HUMAN HABITATION

(a) Right to Challenge

If the record owner or occupant has been served with an order to docket or complaint to foreclose that does not comply with the requirements of Code, Real Property Article, § 7-105.1, and a certificate of vacancy or certificate of property unfit for human habitation issued to a secured party pursuant to Code, Real Property Article, ~~§ 7-105.11~~ 7-105.13 is relied upon by the secured party to excuse compliance with those requirements, the record owner or occupant of a property may challenge the certificate in accordance with this Rule.

. . .

Source: This Rule is new.

REPORTER'S NOTE

Section (a) of Rule 14-207 is proposed to be amended to conform to the renumbering of Code, Real Property Article, § 7-105.11 as § 7-105.13 as set forth in Chapter 93, 2019 Laws of Maryland (HB 107).

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-209 by updating the statutory references in sections (a), (c), and (d), as follows:

Rule 14-209. SERVICE IN ACTIONS TO FORECLOSE ON RESIDENTIAL PROPERTY; NOTICE

(a) Service on Borrower and Record Owner by Personal Delivery

When an action to foreclose a lien on residential property is filed, the plaintiff shall serve on the borrower and the record owner a copy of all papers filed to commence the action, accompanied (1) by the documents required by Code, Real Property Article, § 7-105.1 (h) and (2) if the action to foreclose is based on a certificate of vacancy or a certificate of property unfit for human habitation issued pursuant to Code, Real Property Article, § ~~7-105.11~~ 7-105.13, by a copy of the certificate and a description of the procedure to challenge the certificate. Except as otherwise provided by section (b) of this Rule, service shall be by personal delivery of the papers or by leaving the papers with a resident of suitable age and discretion at the dwelling house or usual place of abode of each person served.

Cross reference: For the required form and sequence of documents, see Code, Real Property Article, § 7-105.1 (h)(1) and COMAR 09.03.12.01 et seq.

. . .

(c) Notice to All Occupants by First-Class Mail

When an action to foreclose on residential property is filed, the plaintiff shall send by first-class mail addressed to "All Occupants" at the address of the property the notice required by Code, Real Property Article, § ~~7-105.9~~ 7-105.11 (b).

(d) If Notice Required by Local Law

When an action to foreclose on residential property is filed with respect to a property located within a county or a municipal corporation that, under the authority of Code, Real Property Article, ~~former~~ § ~~14-126~~ 7-105.3 (c), has enacted a local law that was in effect as of October 1, 2012 requiring notice of the commencement of a foreclosure action, the plaintiff shall give the notice in the form and manner required by the local law. If the local law does not provide for the manner of giving notice, the notice shall be sent by first-class mail.

. . .

Source: This Rule is derived in part from the 2008 version of former Rule 14-204 (b) and is in part new.

REPORTER'S NOTE

Chapter 93, 2019 Laws of Maryland (HB 107) renumbered many provisions in Code, Real Property Article, §§ 7-105 and 14-126. The Property Subcommittee proposes the following conforming amendments to sections (a), (c), and (d) of Rule 14-209.

Section (a) is amended to conform to the renumbering of Code, Real Property Article, § 7-105.11 as § 7-105.13.

Section (c) is amended to conform to the renumbering of Code, Real Property Article, § 7-105.9 as § 7-105.11.

Section (d) is amended to conform to the renumbering of Code, Real Property Article, § 14-126 as § 7-105.3.

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-210 by updating the statutory reference in section (b), as follows:

Rule 14-210. NOTICE PRIOR TO SALE

. . .

(b) By Certified and First-class Mail

Before selling the property subject to the lien, the individual authorized to make the sale shall also send notice of the time, place, and terms of sale (1) by certified mail and by first-class mail to (A) the borrower, (B) the record owner of the property, (C) the holder of any subordinate interest in the property subject to the lien, and (D) a condominium or homeowners association that, at least 30 days before the date of the proposed sale, has recorded a statement of lien against the property under the Maryland Contract Lien Act and (2) by first-class mail to "All Occupants" at the address of the property. The notice to "All Occupants" shall be in the form and contain the information required by Code, Real Property Article, § ~~7-105.9~~ 7-105.11 (c). Except for the notice to "All Occupants," the mailings shall be sent to the last known address of all such

persons, including to the last address reasonably ascertainable from a document recorded, indexed, and available for public inspection 30 days before the date of the sale. The mailings shall be sent not more than 30 days and not less than ten days before the date of the sale.

. . .

Source: This Rule is derived in part from the 2008 version of former Rule 14-206 (b) and is in part new.

REPORTER'S NOTE

Rule 14-210 (b) is proposed to be amended to conform to the renumbering of Code, Real Property Article, § 7-105.9 as § 7-105.11 as set forth in Chapter 93, 2019 Laws of Maryland (HB 107).

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-215 by updating statutory references and changing the name of the "Department of Labor, Licensing, and Regulation" to the "Commissioner of Financial Regulation" in the cross reference following section (c), as follows:

Rule 14-215. POST-SALE PROCEDURES

. . .

(c) Conveyance to Purchaser

(1) When Made

After the court has finally ratified a sale and the purchase money has been paid, the individual making the sale shall convey the property to the purchaser or the purchaser's assignee. If the conveyance is to the purchaser's assignee, the purchaser shall join in the deed.

(2) Under Power of Sale--When Vendor and Purchaser Are the Same

If the individual making a sale and the purchaser at a sale made pursuant to a power of sale are the same person, the court shall appoint in the order of ratification a trustee to convey the property to the purchaser after payment of the purchase money. The trustee need not furnish a bond unless the

court so provides in its order.

(3) To Substituted Purchaser

At any time after the sale and before a conveyance, the court, upon ex parte application and consent of the purchaser, substituted purchaser, and individual making the sale, may authorize the conveyance to be made to a substituted purchaser.

Cross reference: For a purchaser's obligation to notify the supervisor of assessments for the county in which the residential property is located of the ratification of the foreclosure sale, see Code, Real Property Article, § ~~7-105.12~~ 7-105.16. For requirements relating to registration by foreclosure purchasers with the Foreclosed Property Registry of the ~~Department of Labor, Licensing, and Regulation~~ Commissioner of Financial Regulation, see Code, Real Property Article, § ~~14-126.1~~ 7-105.14. For an alternate method to take possession of residential real property when the person claiming a right to possession of the property by the terms of a foreclosure sale or court order does not have a court-ordered writ of possession executed by a sheriff or constable, see Code, Real Property Article, § 7-113 ~~(c)(1)~~(b)(2)(ii).

Source: This Rule is derived from the 2008 version of former Rule 14-207 (d), (e), and (f).

REPORTER'S NOTE

The cross reference following section (c) of Rule 14-215 is proposed to be amended to: (1) conform to the renumbering of Code, Real Property Article, § 7-105.12 as § 7-105.16 and Code, Real Property Article, § 14-126.1 as § 7-105.14 as set forth in Chapter 93, 2019 Laws of Maryland (HB 107); (2) change the reference to the "Department of Labor, Licensing, and Regulation" to the "Commissioner of Financial Regulation" as set forth in Chapter 93, 2019 Laws of Maryland (HB 107); and (3) correct the citation to the statutory authority for a person seeking possession of property without a court-ordered writ from Code, Real Property Article, § 7-113 (c)(1) to § 7-113(b)(2)(ii).