Boston College Law Review

Volume 60 | Issue 6 Article 8

6-28-2019

Bare Necessity: Simplifying the Standard for Admitting Showup Identifications

J.P. Christian Milde

Boston College Law School, christian.milde@bc.edu

BARE NECESSITY: SIMPLIFYING THE STANDARD FOR ADMITTING SHOWUP IDENTIFICATIONS

Abstract: In 1967, the Supreme Court held that admitting the results of an unnecessarily suggestive police identification procedure could violate a defendant's right to due process. Over the next decade, several rulings narrowed and clarified the standard into the *Brathwaite* test, which remains in use today. This test allows the admission of identifications obtained through unnecessarily suggestive procedures if a court finds the identification to nonetheless be reliable. Applying the test requires courts to rule on a procedure's necessity, its suggestiveness, and the resulting identification's reliability. Making these determinations forces courts to grapple with intertwined questions of law and fact—questions whose answers have changed with advances in the scientific understanding of memory. The most commonly used type of suggestive procedure, known as a showup, involves a witness viewing a single suspect for identification. Although showup procedures can be useful when a lineup or photo array is not feasible, showups significantly increase misidentifications because the procedure implicitly tells a witness who the police believe is guilty, rendering the technique inherently suggestive. Further, because showups do not test a witness's memory, they cannot safeguard against a mistaken witness, like a lineup can. To help courts avoid the difficult task of analyzing showup identifications for reliability, this Note proposes a simplified test for admitting them, arguing that courts may look to a showup's necessity as the sole determining factor of admissibility. By considering the interplay of increased scientific understanding with existing law, this Note demonstrates that the proposed simplification is not only sound policy but is also permissible and advisable under current Supreme Court doctrine.

INTRODUCTION

On a June night in 1986, Gene Bibbins found a radio with a broken handle lying on the ground in his apartment complex in Baton Rouge, Louisiana.[1] He picked it up and carried it with him until he was stopped by police several blocks away.[2] The officers were looking for the perpetrator of a rape in the complex, and Bibbins resembled portions of the victim's description of her

[1] Bibbins v. City of Baton Rouge, 489 F. Supp. 2d 562, 566 (M.D. La. 2007); *Gene Bibbins*, INNOCENCE PROJECT, https://www.innocenceproject.org/cases/gene-bibbins [https://perma.cc/NT4C-LXEZ].

[2] *Gene Bibbins*, *supra* note 1.

attacker.[3] Worse yet, the radio that Bibbins held had been stolen from the victim's bedroom by her rapist.[4]

The police detained Bibbins and drove him to the victim's apartment for her to identify, where she viewed him as he sat handcuffed in the back of a police car, illuminated with a flashlight.[5] When police asked whether Bibbins was her attacker, she said yes.[6] The time elapsed between the assault and her identification of Bibbins was less than fifteen minutes.[7] The police arrested him and sought no further evidence.[8] Although Bibbins maintained his innocence, a jury convicted him at trial, and he was sentenced to life in prison.[9] Gene Bibbins served sixteen years before finally being exonerated by DNA evidence in 2003, when he was in his forties.[10]

Courts have long known that witnesses mistakenly identify innocent people because of suggestive procedures.[11] Half a century ago, the Supreme Court

---

[3] *Bibbins*, 489 F. Supp. 2d at 566.

[4] *Id.*

[5] *Id.* at 566, 580. This method of showing a single suspect to a witness is called a showup identification procedure. *Showup*, BLACK'S LAW DICTIONARY (10th ed. 2014). The police likely chose to conduct a showup rather than a lineup or photo array because the crime was recent and a showup can quickly exclude a suspect or identify a perpetrator who would otherwise remain at large. *See* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 55 (2012) [hereinafter CONVICTING THE INNOCENT] (noting reasons that police might perform a showup, and discussing Bibbins's case). Professor Garrett's book examining the causes of wrongful convictions should not be confused with its apparent namesake, published by Professor Edwin M. Borchard in 1932. *See* Charles P. Howland, *Convicting the Innocent*, 45 HARV. L. REV. 1430, 1430 (1932) (reviewing EDWIN M. BORCHARD, CONVICTING THE INNOCENT: SIXTY-FIVE ACTUAL ERRORS OF CRIMINAL JUSTICE (1932)).

[6] *Bibbins*, 489 F. Supp. 2d at 566. The victim, Kenya Canty, saw the stolen radio in an officer's hand directly before being asked to identify Bibbins, and she identified the radio instantly, before seeing him. *Id.* at 565–66. It remains unclear whether the police intended for her to view the radio or simply failed to realize the suggestiveness of the radio's presence and did not think to conceal it. *See id.* at 566, 579 (noting agreement that Canty saw the radio before seeing Bibbins and observing that there was some evidence that the officers showed her the radio, despite their testimony that they did not intentionally display it to her). The point at which Canty first saw the radio is significant because seeing an officer holding the stolen radio would have suggested to her that the police had found the person who stole it. *Id.* at 570. Such suggestion often causes witnesses to believe that the suspect in custody is the perpetrator. *Id.* The effects of suggestion can be so powerful as to permanently alter a witness's memory. *Id.* As of 2007—several years after Bibbins's DNA exoneration—Canty still believed that he had raped her. *Id.* at 567, 570.

[7] CONVICTING THE INNOCENT, *supra* note 5, at 55 (noting that the time between the assault and the identification was between five and fifteen minutes).

[8] *Bibbins*, 489 F. Supp. 2d at 566–67. Following the identification, a rape examination of the victim was conducted at a local hospital, but police stopped searching for the knife used in the attack, never examined Bibbins's person for evidence that he had committed the rape, and never searched his apartment. *Id.*

[9] *Bibbins*, 489 F. Supp. 2d at 567; *Gene Bibbins*, *supra* note 1.

[10] *Bibbins*, 489 F. Supp. 2d at 567.

[11] *See* United States v. Wade, 388 U.S. 218, 229 (1967) (expressing concern about the influence of suggestive procedures on witnesses). A suggestive procedure conveys to witnesses—consciously or not—who they "should" believe to be the perpetrator or what they "should" have seen, which can alter

repeated the observation that suggestiveness during identifications is the leading cause of wrongful convictions and may even cause the majority of such failures.[12] The introduction of DNA evidence in the late 1980s began a surge of exonerations that continues to build, suggesting that concerns over wrongful convictions are well founded.[13]

Subsequent research supports the Court's understanding: wrongful convictions often involve incorrect eyewitness identifications induced by suggestive police procedures.[14] Out of the first 250 wrongfully convicted defendants

---

their memory of who and what they actually saw. Ofer Raban, *On Suggestive and Necessary Identification Procedures*, 37 AM. J. CRIM. L. 53, 66 (2009) (defining suggestive procedures); *see* NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 1–2, 17 (2014) [hereinafter IDENTIFYING THE CULPRIT] (explaining that eyewitness identifications must be used cautiously because memories can be distorted—not just during encoding—but while stored and during retrieval, and further explaining that suggestion may alter stored memories). Each stage of a witness's perception, memory, and recall is affected by the witness's expectations, biases, emotions, past experiences, and beliefs. IDENTIFYING THE CULPRIT, *supra*, at 15. What eyewitnesses see, what is encoded by their memories, and what they recall are all altered by what they expected to see and, when recalling the event, what they may come to believe that they saw. *Id.* Memories degrade and are "updated" over time, with the mind unconsciously replacing missing information with best guesses. *Id.* at 1–2, 15. This process makes memory mutable and modifiable by later input. *Id.* at 2. Notably, when an eyewitness incorrectly identifies an innocent suspect as the perpetrator, the witness's memory of the crime conforms to include that person, meaning that the witness will "recall" the misidentified suspect as the perpetrator during future identification procedures. Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW & HUM. BEHAV. 1, 9 (2008).

[12] *Wade*, 388 U.S. at 228–29 ("A commentator has observed that '[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined.'" (alteration in original) (quoting PATRICK M. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 26 (1965))).

[13] *See* Brandon L. Garrett, *Contaminated Confessions Revisited*, 101 VA. L. REV. 395, 395 & n.1, 404 & n.34 (2015). Professor Garrett points to concerns about the use of evidence previously viewed as reliable—confessions in the context of his article—and observes that the incontrovertible nature of DNA exonerations has caused courts and others to begin reexamining assumptions about what evidence can be relied upon, and with what weight. *Id.* at 395. The total number of exonerations is also growing at a startling pace, with over 2,400 exonerations reported nationally since 1989, and forty-five reported in just the first three months of 2019. *See* NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/browse.aspx [https://perma.cc/6WWA-T6L8] (listing exonerations since 1989); *Clifford Williams Jr.*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5533 [https://perma.cc/ZY5B-FBR6] (documenting that Williams's exoneration occurred in the first three months of 2019, despite being posted in April of 2019); *Hubert Meyers*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5534 [https://perma.cc/5CFE-RCTS] (documenting the same regarding Meyers's exoneration); *Melissa Morales*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5532 [https://perma.cc/7GZL-TKLZ] (documenting the same regarding Morales's exoneration).

[14] CONVICTING THE INNOCENT, *supra* note 5, at 48–49. A suggestive identification procedure is any procedure that suggests the witness should identify a particular person. Raban, *supra* note 11, at 54. Suggestion may be inherent in the structure of a procedure, such as displaying only a single suspect, or it may be present in contextual or verbal clues, such as asking a witness to look more closely

exonerated using DNA, seventy-six percent were falsely identified by a witness, and seventy-eight percent of the false identifications that could be studied involved improper police procedures or suggestion.[15]

Displaying a photo array to a witness is cited as the most common identification procedure, but showups—wherein police display a single suspect to a witness—may be equally or even more common.[16] Unlike lineups,[17] showups are inherently suggestive and are criticized by scholars and courts because displaying a single person to a witness both suggests to the witness that the person is guilty and fails to test whether the witness can independently identify the person.[18] Despite their suggestiveness, showups continue to be used be-

---

at one person in a lineup, or showing a series of group photos which contain no person more than once, except the suspect. *Id.*

[15] CONVICTING THE INNOCENT, *supra* note 5, at 48–49. One hundred and ninety, or 76%, of the 250 cases studied involved eyewitness misidentifications. *Id.* Professor Garrett was able to obtain trial transcripts for 161 of those 190 cases, and 78% of those transcripts revealed evidence of suggestiveness caused by police. *Id.*

[16] *Showup*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see* IDENTIFYING THE CULPRIT, *supra* note 11, at 23 (noting that U.S. police use photo arrays more often than any other identification procedure); Jennifer E. Dysart et al., *Show-ups: The Critical Issue of Clothing Bias*, 20 APPLIED COGNITIVE PSYCHOL. 1009, 1010–11 (2006) (citing several studies in different areas of the United States finding that showups compose anywhere from 30% to 77% of identification procedures); Sandra Guerra Thompson, *What Price Justice? The Importance of Costs to Eyewitness Identification Reform*, 41 TEX. TECH L. REV. 33, 41 (2008) (asserting that showups are the most commonly used identification procedure).

[17] *See Lineup*, BLACK'S LAW DICTIONARY (10th ed. 2014). Showups are distinct from lineups, which are similar to photo arrays in that police present a witness with a set of people containing one suspect and a number of decoys. *See id.* Some sources distinguish live lineups from photo arrays, but both methods are preferable to showups because properly conducted lineups and arrays meaningfully test a witness's memory, whereas even a person who did not witness the crime could positively "identify" the single suspect presented in a showup. *See* IDENTIFYING THE CULPRIT, *supra* note 11, at 21–28 (describing various types of identification procedures and their typical uses); Dan Yarmey, *Showups*, *in* 2 ENCYCLOPEDIA OF PSYCHOLOGY AND LAW 746, 746 (Brian L. Cutler ed., 2008) (noting the unreliability of showups as compared to lineups). Although courts sometimes distinguish in-person showups and lineups from similar photographic procedures, a procedure may properly be called a showup when it involves a lone suspect being displayed for identification, regardless of whether the suspect is physically present or depicted in a photograph. *See* Perry v. New Hampshire, 565 U.S. 228, 233 (2012) (listing showups, lineups, and photo arrays as types of identification procedures); Manson v. Brathwaite, 432 U.S. 98, 132 (1977) (Marshall, J., dissenting) (referring to the single-photo identification of the defendant as a "photographic showup"); R.C.L. Lindsay et al., *Simultaneous Lineups, Sequential Lineups, and Showups: Eyewitness Identification Decisions of Adults and Children*, 21 LAW & HUM. BEHAV. 391, 393 (1997) (referring to showups as procedures wherein police show a single person or photo to a witness).

[18] *See, e.g.*, United States v. Newman, 144 F.3d 531, 535 (7th Cir. 1998) (holding showups to be "inherently suggestive" and limiting their use to exceptional situations); United States v. Hadley, 671 F.2d 1112, 1115 (8th Cir. 1982) (holding showups to be "inherently suggestive"); Allen v. Estelle, 568 F.2d 1108, 1112 (5th Cir. 1978) (holding a showup procedure to have been "inherently suggestive"); CONVICTING THE INNOCENT, *supra* note 5, at 55 (noting and explaining the suggestive nature of showups); Yarmey, *supra* note 17, at 746 (explaining that showups are suggestive by nature).

cause they may allow for the rapid identification of a dangerous perpetrator or quickly exonerate an innocent suspect.[19]

In an attempt to balance the utility and the dangers of suggestive identification procedures, the Supreme Court allows courts to admit an identification obtained through an unnecessarily suggestive police procedure but requires the exclusion of such an identification if a court finds it to be unreliable (defined as when the procedure created a "substantial likelihood of misidentification").[20] This narrowly defined exclusion requirement stems from the Due Process Clause, and the Court has declined to require the exclusion of all identifications made under suggestive circumstances, or even all identifications likely to be incorrect.[21] Courts normally characterize this inquiry as having two steps: (1) determining if a police procedure was unnecessarily suggestive and, if so,

---

[19] CONVICTING THE INNOCENT, *supra* note 5, at 55; John Turtle, *Identification Tests, Best Practices in*, *in* 1 ENCYCLOPEDIA OF PSYCHOLOGY AND LAW 365, 365 (Brian L. Cutler ed., 2008).

[20] *Perry*, 565 U.S. at 232, 239 (quoting Neil v. Biggers, 409 U.S. 188, 201 (1972)). To decide whether a procedure was *unnecessarily* suggestive, courts typically examine the facts and determine whether police had good reason to use the suggestive procedure. *See, e.g.*, United States v. Brownlee, 454 F.3d 131, 138 (3d Cir. 2006) (holding a showup to have been unnecessarily suggestive because, among other reasons, nothing prevented the police from using a less suggestive procedure). State courts use standards of varying specificity when evaluating a procedure's necessity. *See infra* notes 159–162, 175–176, 181–183 and accompanying text (discussing how the Massachusetts, Wisconsin, and New York courts, respectively, evaluate an identification procedure's necessity). Wisconsin, for example, will find that a showup was necessary only if a lineup or photo array was impossible because of an emergency or a legal inability to arrest the suspect. State v. Dubose, 2005 WI 126, ¶ 33, 285 Wis. 2d 143, 699 N.W.2d 582. New York will routinely allow the admission of a showup identification only when police conducted the showup soon after a crime and near the scene or when exigency required the showup. People v. Ortiz, 686 N.E.2d 1337, 1339 (N.Y. 1997).

[21] *See* U.S. CONST. amend. XIV, § 1 (containing the Due Process Clause); *Perry*, 565 U.S. at 232–33 (noting that courts are not required to screen identifications for reliability when police did not orchestrate the suggestive identification procedure). Writing for the majority in *Perry*, Justice Ruth Bader Ginsburg noted the protections afforded to a defendant by the adversarial system, particularly the Sixth Amendment right to counsel, the ability to subpoena witnesses, the ability to cross-examine witnesses, the rules of evidence, and the reasonable-doubt standard. 565 U.S. at 231–33. The Court held the recited protections to be adequate defenses against misidentifications unless the identification procedure was improperly arranged by state actors. *Id.* at 232–33. Thus, under *Perry*, a court may admit even a likely false identification made under highly suggestive circumstances, so long as the circumstances were not arranged by police. *Id.* at 254 (Sotomayor, J., dissenting). A court is required to examine an identification's reliability and *consider* exclusion only if the police arranged the suggestive circumstances and did so unnecessarily. *Id.* at 232–33, 232 n.1 (majority opinion). Regarding the remedy of exclusion, the Supreme Court generally mandates that evidence obtained in violation of the Constitution must be excluded at trial to disincentivize police from collecting evidence unconstitutionally. *See* Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1894 (2014) (observing that recent Supreme Court decisions and academic commentators are largely in agreement that the exclusionary rule's purpose is to deter police misconduct); Thomas K. Clancy, *The Fourth Amendment's Exclusionary Rule as a Constitutional Right*, 10 OHIO ST. J. CRIM. L. 357, 367–68 (2013) (observing that the Supreme Court no longer considers the exclusionary rule to inhere in the Constitution, but views it solely as a sanction against police misconduct).

(2) progressing to an assessment of the identification's reliability.[22] To facilitate analysis, this Note further divides the Supreme Court's rule into its four most elementary units; thus, in order for an identification to be excluded, the procedure used must have (1) been conducted by police, (2) been suggestive in nature, (3) been unnecessary, and (4) created a substantial likelihood that the defendant was misidentified.[23] Adding to the complexity, the Court has provided a set of five reliability factors for judges to weigh when determining whether a procedure was substantially likely to result in misidentification.[24] Unfortunately, research demonstrates that only two of the factors chosen by the Court are actually related to a witness's accuracy in identifying the perpetrator.[25]

This test for exclusion forces courts to decide case by case whether the specific circumstances were suggestive and increased the likelihood of misidentification.[26] Questions about human suggestibility, perception, and memory are better the province of social scientists and psychologists than judges, but the current law unfairly drives courts into this unfamiliar territory.[27] More problematic is the scientific finding that basic assumptions about memory and perception that courts might intuitively rely upon are demonstrably false.[28]

---

[22] *See, e.g.*, *Perry*, 565 U.S. at 253–54 (Sotomayor, J., dissenting) (explaining that the test consists first of the defendant showing that the identification procedure was impermissibly suggestive and second of an inquiry into the identification's reliability).

[23] *Id.* at 238–39, 248 (majority opinion). The division of the Court's rule into four elements is a convention adopted by this Note to facilitate analysis and is not an enumeration typically used by the courts, which usually characterize the rule as having two parts. *See, e.g.*, *id.* at 253–54 (Sotomayor, J., dissenting) (explaining the Court's "two-step inquiry").

[24] *Biggers*, 409 U.S. at 199–200. The reliability factors given in *Biggers* are (1) how well the witness was able to view the perpetrator, (2) how carefully the witness observed the perpetrator, (3) how accurately the witness was able to describe the perpetrator before the identification procedure, (4) how certain the witness was about the identification, and (5) how much time elapsed between the crime and the identification. *Id.*

[25] Yarmey, *supra* note 17, at 746. Only the first and fifth factors—being (1) how well the witness was able to view the perpetrator and (5) the length of time between the initial observation and the identification procedure—have any relation to an identification's accuracy. *Id.*

[26] *See Perry*, 565 U.S. at 238–39 (explaining that courts must consider the facts of each case to determine whether an unnecessarily suggestive police procedure created a substantial likelihood of misidentification).

[27] *See* Richard A. Wise & Martin A. Safer, *What US Judges Know and Believe About Eyewitness Testimony*, 18 APPLIED COGNITIVE PSYCHOL. 427, 432–33 (2004) (detailing the results of a survey posing questions about eyewitness perception and memory to 160 judges, and observing that less than half of the judges were able to answer a majority of the questions correctly); Saul M. Kassin et al., *On the "General Acceptance" of Eyewitness Testimony Research: A New Survey of the Experts*, 56 AM. PSYCHOLOGIST 405, 406 (2001) (noting that, unlike experts in psychology, judges have neither the experience nor the training to evaluate the methods or results of psychological studies, or even to know which peer-reviewed journals are authoritative).

[28] *See* THE JUSTICE PROJECT, EYEWITNESS IDENTIFICATION: A POLICY REVIEW 5 (2007) (contradicting the natural assumption that a more certain eyewitness is more likely to be correct). Not only is a witness's certainty a poor indicator of accuracy, but a witness's memory and level of confidence are malleable, and witnesses may unwittingly embellish their memory if given apparent confirmation of their identifications. *Id.* For example, witnesses who are erroneously told that they correctly identi-

Although a minority of state high courts have responded to these issues by seeking the counsel of scientific experts and crafting state-level protections against false identifications, most states continue to observe the current federal standard.[29] This divide is possible because state courts are free to interpret their state constitutions to require greater protection of individual liberties than the Federal Constitution requires.[30] Thus, state courts may create new standards based on state constitutional protections, provided that those state standards meet or exceed the requirements of the Federal Constitution.[31]

This Note considers the current federal rule as it applies specifically to showup identification procedures and proposes a simplified standard for evaluating the admissibility of identifications obtained through showups.[32] In short,

---

fied the perpetrator may later falsely recall that they were able to view the perpetrator for longer during the crime, that they had a better vantage point when viewing the crime, and that they were more confident in their initial identification than they truly were. *Id.* The first court to comment at length on the lack of correlation between confidence and accuracy was the Utah Supreme Court in *State v. Long*, 721 P.2d 483, 490 (Utah 1986). State v. Mitchell, 275 P.3d 905, 912 (Kan. 2012) (noting *Long*'s early judicial commentary on the independence of witness confidence and accuracy). *Long* cites numerous studies showing that confidence and accuracy are unrelated or may even be inversely related. 721 P.2d at 490. *Long* also notes that jurors are unaware of this finding and are likely to place significant emphasis on eyewitness testimony, even when cross-examination entirely discredits it. *Id.*

[29] *See* cases cited *infra* notes 97, 210 (listing the state high court decisions that have departed from the federal standard); *see, e.g.*, Long v. United States, 156 A.3d 698, 707 (D.C. 2017) (explaining and applying the federal standard); Commonwealth v. Parker, 409 S.W.3d 350, 352–53 (Ky. 2013) (applying the federal standard to uphold a trial court's finding that a showup identification was reliable); Taylor v. State, 371 P.3d 1036, 1044–45 (Nev. 2016) (describing and applying the federal standard to find that a showup identification was unreliable).

[30] Arizona v. Evans, 514 U.S. 1, 8 (1995) (reiterating that state high courts may interpret their state constitutions as being more protective than the Federal Constitution).

[31] *See, e.g.*, State v. Ramirez, 817 P.2d 774, 780 (Utah 1991) (holding that the Utah Constitution requires a broader standard than the federal standard for analyzing an identification's reliability, and noting that Utah's new framework remains at least as rigorous as the federal standard); State v. Discola, 2018 VT 7, ¶¶ 30–31, 184 A.3d 1177 (holding that Vermont courts will no longer use the witness-certainty factor, one of the Supreme Court's five factors for evaluating an identification's reliability, because new scientific understanding shows that a witness's certainty and accuracy are not linked). Justice William J. Brennan Jr. observed that, beginning in the 1970s, greater numbers of state courts began adopting protections that exceeded federal constitutional protections. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977). Given that a state court's interpretation of its state constitution is not reviewable by the Supreme Court, some scholars suggest that the state courts are well situated to reform eyewitness-identification law through state constitutional interpretation. *See* Sandra Guerra Thompson, *Eyewitness Identifications and State Courts as Guardians Against Wrongful Conviction*, 7 OHIO ST. J. CRIM. L. 603, 622, 633 (2010) (noting the multiple sources of authority for state courts to create new protections—including supervisory authority, common law principles of fairness, state rules of evidence, and state constitutions—and advocating for courts to actively encourage the development of more protective identification procedures); Dana Walsh, Note, *The Dangers of Eyewitness Identification: A Call for Greater State Involvement to Ensure Fundamental Fairness*, 54 B.C. L. REV. 1415, 1446–47 (2013) (arguing that state courts should more actively seek to reform the law surrounding eyewitness identification).

[32] *See infra* notes 245–302 and accompanying text (explaining and arguing for the proposed simplification).

this Note proposes that, because showups are always police arranged, suggestive, and likely to cause misidentification, showup identifications inherently meet three of the four requirements for exclusion, so the admissibility inquiry may be reduced to determining a showup's necessity.[33] This Note further argues that this proposed simplification is an application of the Supreme Court's current rule informed by a modern scientific understanding and thus may be adopted without action from the Court.[34]

To demonstrate the validity of this approach, Part I discusses the history of the modern rule and the shifting concerns of the Court over the last fifty years.[35] Part II, in combination with the Appendix, outlines the approaches of all fifty state high courts to the admission of identifications obtained through showups, with a focus on the twelve states that depart appreciably from the federal standard.[36] Finally, Part III considers how the facts of eyewitness psychology interact with the current rule to allow the proposed simplification.[37]

I. THE DUE PROCESS TEST TO ADMIT IDENTIFICATIONS OBTAINED USING SUGGESTIVE PROCEDURES

Several Supreme Court opinions have noted the potential for showups to cause misidentifications.[38] In 2012, in *Perry v. New Hampshire*, however, the

---

[33] *See infra* notes 245–302 and accompanying text (arguing for the proposed standard).

[34] *See infra* notes 271–284 and accompanying text (arguing that courts are free to alter their doctrine regarding showups); *cf.* State v. Dubose, 2005 WI 126, ¶ 33, 285 Wis. 2d 143, 699 N.W.2d 582 (returning to an admissibility test that excludes all identifications obtained through unnecessarily suggestive showup procedures and holding that, because showups are definitionally suggestive, a showup identification is admissible only if the procedure was necessary). By reasoning that showups will always meet the suggestiveness prong of Wisconsin's two-pronged test for admitting identifications, the *Dubose* court eliminated the suggestiveness inquiry and now considers only necessity when testing the admissibility of a showup identification. *See* 2005 WI 126, ¶ 33 (adopting a test based on *Stovall v. Denno*, 388 U.S. 293 (1967), that considers only if a procedure was unnecessarily suggestive; holding showups to be inherently suggestive; and concluding that showup identifications may be admitted only when the procedure was necessary). Like the Wisconsin Supreme Court, other courts may use modern science to understand the unchanging properties of showup identifications and may reason from those properties to simplify the standard for admitting such identifications. *Cf.* Benjamin Wiener, Comment, *Revisiting the* Manson *Test: Social Science as a Source of Constitutional Interpretation*, 16 U. PA. J. CONST. L. 861, 877 (2014) (suggesting that the factual findings of social science must inform constitutional interpretation, especially where the scientific conclusion is strong and undisputed).

[35] *See infra* notes 38–90 and accompanying text (constituting Part I).

[36] *See infra* notes 91–244, 303–359 and accompanying text (constituting Part II and the Appendix, respectively).

[37] *See infra* notes 245–302 and accompanying text (constituting Part III).

[38] *See* Perry v. New Hampshire, 565 U.S. 228, 234–35, 240, 243–44 (2012) (characterizing the identification of the defendant as equivalent to a showup, later referring to the circumstances of the identification as suggestive, and finally characterizing suggestion as a factor affecting the likelihood of misidentification); Manson v. Brathwaite, 432 U.S. 98, 133 (1977) (Marshall, J., dissenting) (noting that identification procedures that involve only the suspect, such as showups, are broadly criticized because they do not demonstrate that the witness is able to independently identify the suspect). In

Court reiterated previous doctrine, holding that the potential unreliability of identifications from showups and other suggestive procedures neither requires courts to examine all such identifications for reliability, nor requires the categorical exclusion of such identifications at trial.[39] The following three Sections provide an overview of Supreme Court doctrine on admitting identifications made during suggestive identification procedures, with a focus on decisions germane to showups.[40]

A. The Wade *Trilogy*

In 1967, the Supreme Court broke with precedent that had favored admitting all results of suggestive pretrial identification procedures.[41] Adopting a more flexible approach to excluding such results, the Court began to clarify what circumstances cause an identification procedure to be "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to violate a defendant's right to due process.[42] The changes were announced in the *Wade* trilogy, a set of three decisions released together that all voiced concerns about the reliability of eyewitness identifications.[43] Two of the cases, *United States v.*

Brathwaite, Justice Thurgood Marshall further highlighted the danger that a witness who takes part in a suggestive identification procedure may subsequently remember the suspect from that procedure, rather than correctly recalling the perpetrator from the time of the crime. 432 U.S. at 133 (Marshall, J., dissenting). Subsequent experiments have demonstrated that Justice Marshall's concern is scientifically supported. *See* Bruce W. Behrman & Lance T. Vayder, *The Biasing Influence of a Police Showup: Does the Observation of a Single Suspect Taint Later Identification?*, 79 PERCEPTUAL & MOTOR SKILLS 1239, 1241–43 (1994) (documenting the finding that conducting a showup with a photo of an innocent person "suspected" of a simulated crime increased a witness's chance of incorrectly identifying the innocent suspect as the perpetrator in a subsequent lineup).

[39] *See Perry*, 565 U.S. at 248 (holding that the Due Process Clause does not require courts to weigh the reliability of an identification before admitting it when the procedure was not both unnecessarily suggestive and conducted by police). The Supreme Court has most recently reinforced the holding of *Perry* in *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2559 (2018), wherein the Court reiterated the admissibility test clarified by *Perry*.

[40] *See infra* notes 41–81 and accompanying text (constituting Sections A, B, and C).

[41] *See* Simmons v. United States, 390 U.S. 377, 382 (1968) (noting that in *United States v. Wade*, 388 U.S. 218 (1967), and *Gilbert v. California*, 388 U.S. 263 (1967), the Court abandoned its previous stance that identifications from suggestive procedures should be admitted and factfinders allowed to determine the weight of the testimony).

[42] *See* Stovall v. Denno, 388 U.S. 293, 301–02 (1967) (holding that suggestive identification procedures can violate a defendant's right to due process, but finding that the showup at issue was not a violation because of the procedure's necessity).

[43] State v. Dubose, 2005 WI 126, ¶ 19, 285 Wis. 2d 143, 699 N.W.2d 582 (mentioning the release of the decisions as a trilogy and commenting on their theme of concern regarding eyewitness reliability). The companion cases of the *Wade* trilogy are *Wade*, *Gilbert*, and *Stovall*. *Wade*, 388 U.S. at 253 n.3 (White, J., dissenting in part and concurring in part) (characterizing the three cases as companion cases); *see* Charles A. Pulaski, Neil v. Biggers*: The Supreme Court Dismantles the* Wade *Trilogy's Due Process Protection*, 26 STAN. L. REV. 1097, 1097–98 (1974) (referring to the three cases as "the *Wade* trilogy").

Wade and *Gilbert v. California*, considered lineup procedures, whereas *Stovall v. Denno* examined a showup identification procedure.[44]

In *Stovall*, the Court considered a showup in which the police brought a handcuffed suspect to a gravely injured witness's hospital room for her to identify.[45] The Court held that admitting the identification did not violate due process because the showup was the only means of quickly identifying the suspect—a necessity given the witness's uncertain survival.[46] More generally, the Court held that admitting an identification obtained through a suggestive procedure could violate due process only if the totality of the circumstances showed that the procedure was *unnecessarily* suggestive and promoted misidentification.[47]

The following year, in *Simmons v. United States*, the Court considered whether a set of in-court identifications violated a defendant's right to due process when the witnesses had previously identified the suspect in a series of group photographs.[48] The Court held that admitting an in-court identification violates due process only when the out-of-court identification procedure was impermissibly suggestive enough to cause a "very substantial likelihood of irreparable misidentification."[49] As in *Stovall*, the Court then examined the

---

[44] *See Stovall*, 388 U.S. at 295 (describing the showup procedure that implicated Stovall as the perpetrator); *Gilbert*, 388 U.S. 269–71 (1967) (describing a pretrial lineup at which Gilbert was identified by some of the same witnesses who subsequently identified him in court); *Wade*, 388 U.S. at 220 (describing the pretrial but postindictment lineup procedure that the Federal Bureau of Investigation arranged without the knowledge of Wade's attorney). Out of the three decisions of the *Wade* trilogy, only *Wade* uses the term "showup," and only does so in passing, erroneously listing the word as a synonym for "lineup." *See Wade*, 388 U.S. at 230 (characterizing "showup" as a synonym for "lineup"); *Showup*, BLACK'S LAW DICTIONARY (10th ed. 2014) (distinguishing showups from lineups).

[45] 388 U.S. at 295. Theodore Stovall was arrested for the murder of Paul Behrendt and the stabbing of Mrs. Behrendt in the couple's home. *Id.* Slightly less than twenty-four hours later, and before Stovall retained counsel, five police officers and two staffers from the District Attorney's office transported Stovall to the hospital to be identified by Mrs. Behrendt before she went into surgery. *Id.* When asked whether he "was the man," Mrs. Behrendt identified Stovall, the only black man in the hospital room, as her attacker. *Id.*

[46] *Id.* at 301–02. The Court reiterates the standard that an identification violates a suspect's right to due process when it is "unnecessarily suggestive and conducive to irreparable mistaken identification." *Id.* In explaining the necessity of the procedure, the Court focuses on Mrs. Behrendt's precarious condition and her unique knowledge, stating that her response could have exonerated Stovall as easily as it inculpated him. *Id.* at 302.

[47] *Id.* at 301–02.

[48] Simmons v. United States, 390 U.S. 377, 382 (1968). Most or all of the photos that the police showed to the witnesses contained the defendant and one other man along with varied groups of other people. *Id.*

[49] *Id.* at 384. The quoted standard applies to the exclusion of in-court identifications stemming from previous suggestive identifications made outside of court. Neil v. Biggers, 409 U.S. 188, 198 (1972); *see Simmons*, 390 U.S. at 384 (setting forth the standard). In *Biggers*, the Court clarifies that the standard for excluding testimony about out-of-court identifications is identical, except for the deletion of the word "irreparable." 409 U.S. at 198. The standard for excluding the results of out-of-

necessity of the identification procedure, this time focusing on the need to quickly and correctly allocate law enforcement resources to capture dangerous felons.[50] The Court also considered the likelihood of misidentification in the specific case, noting several reasons that the five witnesses' identifications were probably correct.[51] By separately considering the procedure's necessity and the likelihood of misidentification, the *Simmons* Court foreshadowed how later courts have separately analyzed the first and second words of the "unnecessarily suggestive" or "impermissibly suggestive" standard,[52] performing individual examinations of necessity and suggestiveness.[53]

B. The Biggers *Factors and* Brathwaite*'s Clarification*

In 1972, the Court decided *Neil v. Biggers*, providing what it later characterized as a blending of *Stovall*, *Simmons*, and two intermediate cases involv-

---

court identifications is thus that a procedure warrants exclusion if it was impermissibly suggestive enough to cause a very substantial likelihood of misidentification. *See id.*

[50] *Simmons*, 390 U.S. at 384–85.

[51] *Id.* at 385 (noting that the bank was well-lit during the robbery, that there were multiple witnesses, that the witnesses were able to view the robbers for several minutes, that the robbers did not wear masks, that the identifications based on the photographs took place the day after the robbery, and that the investigators made no suggestions to the witnesses).

[52] The Court's articulation of the standard appears interchangeable: the *Stovall* Court uses the term "unnecessarily suggestive," whereas the *Simmons* Court uses "impermissibly suggestive" in the same context. *See Simmons*, 390 U.S. at 384–85 (contemplating "impermissibly suggestive" procedures); *Stovall*, 388 U.S. at 302 (contemplating "unnecessarily suggestive" procedures). The Court does not appear to be drawing an intentional distinction, and the *Simmons* Court cites *Stovall* (which uses the phrase "unnecessarily suggestive") to support the holding that "impermissibly suggestive" is the standard. *See Simmons*, 390 U.S. at 384 (using the term "impermissibly suggestive" as part of the standard and noting that the articulated standard is congruent with the holding in *Stovall*); *Stovall*, 388 U.S. at 302; *see also* State v. Cruz, 307 P.3d 199, 208–09 (Kan. 2013) (discussing at length the interchangeable use of the terms "unnecessarily suggestive," "impermissibly suggestive," and "unduly suggestive" by Kansas courts, noting that the Supreme Court has used the terms interchangeably, and endorsing "unnecessarily suggestive" as the literally correct term). *But see* State v. Dubose, 2005 WI 126, ¶ 22, 285 Wis. 2d 143, 699 N.W.2d 582 (endorsing the view that the alternative wording in *Simmons* created a higher threshold for defendants seeking to exclude identifications); Jules Epstein, *Irreparable Misidentifications and Reliability: Reassessing the Threshold for Admissibility of Eyewitness Identification*, 58 VILL. L. REV. 69, 75 (2013) (commenting that *Simmons*'s change in language represents a higher bar than the standard articulated in *Stovall*). In her dissent in *Perry*, Justice Sonia Sotomayor commented directly on the variable wording and seemingly dismissed it, noting that all the phrases "reinforce [the Court's] focus not on the act of suggestion, but on whether the suggestiveness rises to such a level that it undermines reliability." Perry v. New Hampshire, 565 U.S. 228, 254 n.3 (2012) (Sotomayor, J., dissenting).

[53] *See Perry*, 565 U.S. at 238–39 (majority opinion) (noting that in *Biggers* and *Brathwaite*, the Court stressed that due process is a concern only when police identify a suspect using a procedure "that is *both* suggestive and unnecessary" (emphasis added)); *Simmons*, 390 U.S. at 384–85 (considering the necessity of the identification procedure and the likelihood of misidentification); *Stovall*, 388 U.S. at 301–02 (holding that a defendant may bring a due process claim when an identification procedure was unnecessarily suggestive and tended to cause misidentification).

ing suggestive identification procedures.[54] The *Biggers* Court clarified that admitting an identification from a suggestive procedure violates a defendant's right to due process because of the elevated likelihood of misidentification, rather than simply because police used a suggestive procedure.[55] Under *Biggers*, showups—although suggestive—are not per se violations of due process.[56] The Court opined that a strict prohibition on admitting identifications obtained through unnecessarily suggestive procedures might improperly exceed what the Due Process Clause requires.[57] The Court made no definitive ruling on the question of such a prohibition, however, because both the identification procedure and Biggers's trial occurred prior to *Stovall*, so the Court declined to consider the procedure's necessity.[58]

After avoiding *Stovall*'s necessity requirement and acknowledging the procedure's suggestiveness, the *Biggers* Court analyzed the identification's reliability using a newly articulated set of factors.[59] The Court held that an identification's likelihood of being a misidentification shall be judged based on (1) how well the witness was able to view the perpetrator, (2) how carefully the witness observed the perpetrator, (3) how accurately the witness was able to describe the perpetrator before the identification procedure, (4) how certain the witness was about the identification, and (5) how much time elapsed between the crime and the identification.[60] Based on an application of these factors, the Court held the identification to be reliable and thus admissible, despite its suggestive nature.[61] Perhaps unintentionally, *Biggers* left an open question in its

---

[54] Manson v. Brathwaite, 432 U.S. 98, 107 n.9 (1977) (referring to *Biggers* as a "synthesis" of past cases, with reference to *Simmons*, *Stovall*, *Coleman v. Alabama*, 399 U.S. 1 (1970), and *Foster v. California*, 394 U.S. 440 (1969)).

[55] *See* Neil v. Biggers, 409 U.S. 188, 198–99 (1972) (holding that the increased probability of a misidentification that accompanies a suggestive procedure violates due process, but that police use of an unnecessarily suggestive procedure does not mandate an identification's exclusion). Some scholars see this as a refocusing of the Court's attention from the police's conduct to the accuracy of the identification. *See, e.g.*, Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUD. 395, 403 (1987) (commenting that *Biggers* and *Brathwaite* abandon the consideration of whether police acted appropriately and substitute a consideration of the identification's accuracy). Indeed, Justice Marshall's lengthy dissent in *Brathwaite* accuses the majority of "importing the question of guilt" into a trial court's preliminary inspection of potentially unconstitutional procedures, thus stripping the defendant of due process protections. 432 U.S. at 128 (Marshall, J., dissenting).

[56] 409 U.S. at 198.

[57] *See id.* at 199 (holding that an inflexible prohibition on the admission of identifications from unnecessarily suggestive procedures would serve as a deterrent to suggestive identification practices, but is not required for due process).

[58] *Id.*

[59] *See id.* at 199–200 (considering the reliability of the identification procedure at issue and listing the factors to be used in such considerations).

[60] *Id.* The five factors articulated in *Biggers* are commonly called the *Biggers* factors, and this Note also uses that nomenclature. *See, e.g.*, Brisco v. Ercole, 565 F.3d 80, 91–94 (2d Cir. 2009) (discussing and applying the "*Biggers* factors").

[61] *Biggers*, 409 U.S. at 201.

wake: should identifications be excluded when the identification procedure was unnecessary and suggestive, or only when the procedure was unnecessary and suggestive *and* there was a substantial likelihood that the defendant had been misidentified?[62]

In the uncertainty following *Biggers*, multiple approaches developed among the circuits.[63] Some held that any identification obtained through unnecessarily suggestive procedures must be excluded,[64] whereas others admitted such identifications if they were judged reliable.[65] Five years later, the Supreme Court ended the ambiguity with its decision in *Manson v. Brathwaite*, holding that reliability is the deciding factor in admitting identifications gained through suggestive procedures, and the *Biggers* factors should be used to adjudicate that reliability.[66] The Court held that trial courts must allow juries to weigh identification evidence from an unnecessarily suggestive procedure unless the procedure had created a substantial likelihood of misidentification.[67]

The Court did acknowledge that almost all scholars believed that justice demanded the adoption of the alternative approach, being the per se exclusion of identifications obtained through unnecessarily suggestive procedures.[68] To

---

[62] *See* Manson v. Brathwaite, 432 U.S. 98, 110 (1977) (noting and describing the two primary approaches used by the circuit courts to admit or exclude identifications following *Biggers*); *Biggers*, 409 U.S. at 198–99 (declining to rule on whether an identification must be excluded based purely on unnecessary suggestiveness). The *Biggers* Court suggested that due process did not require the exclusion of identifications based solely on unnecessary suggestiveness, but the Court made no definitive rule because the identification and trial at issue in *Biggers* took place before the *Stovall* decision. *Biggers*, 409 U.S. at 198–99.

[63] *Brathwaite*, 432 U.S. at 110.

[64] *See id.* (describing the divergent approaches to exclusion used by the circuit courts between the *Biggers* and *Brathwaite* rulings). The *Brathwaite* Court described the first approach as the "per se approach," which required the categorical exclusion of any identifications obtained through unnecessarily suggestive procedures. *Id.* The Court did note a partial exception to that approach, which the Second Circuit had explained in its opinion below: following an identification from an unnecessarily suggestive out-of-court procedure, "a subsequent identification, including an in-court identification," could be admitted if a court found the later identification to be reliable. *Id.* at 110 n.10 (noting the exception and citing the circuit decision below); *see* Brathwaite v. Manson, 527 F.2d 363, 367 (2d Cir. 1975) (describing the exception), *rev'd*, 432 U.S. 98 (1977).

[65] *Brathwaite*, 432 U.S. at 110 (characterizing the second approach as an "ad hoc" approach). The Court held that the ad hoc approach is more flexible, noting that it allows courts to admit identifications from unnecessarily suggestive procedures if they are nonetheless judged relevant and reliable. *Id.*

[66] *Id.* at 114. In what may be the most famous phrase in the *Brathwaite* decision, the Court held that "reliability is the linchpin" of admissibility determinations. *Id.* having thus endorsed an ad hoc approach based on "the totality of the circumstances," the Court reiterated the five *Biggers* factors as the criteria by which an identification's reliability must be examined. *Id.* at 113–14 (quoting Stovall v. Denno, 388 U.S. 293, 302 (1967)).

[67] *See id.* at 109, 116 (holding that juries are sufficiently intelligent to correctly evaluate the weight of testimony that is based on a suggestive identification procedure).

[68] *Id.* at 111. The Court appeared to praise the per se approach before eventually rejecting it, quoting a Seventh Circuit decision written by Judge (later Justice) John Paul Stevens, wherein he noted that prominent judges and almost all scholars endorsed the per se approach and considered it neces-

justify its rejection of the "per se approach," the Court discussed how three important factors would be influenced by its preferred "ad hoc" or "totality approach," versus the per se rule.[69] In order, the Court considered each potential rule's (1) effect on the reliability of identifications, (2) deterrent effect on police who might unnecessarily use suggestive procedures, and (3) "effect on the administration of justice."[70] Considering reliability, the Court held that both rules would ensure that only reliable identifications reached the jury.[71] Regarding deterrence, the Court opined that the totality rule would have adequate deterrent effect on police because officers would know that suggestive procedures could still cause exclusion if a procedure yielded an unreliable identification.[72] Contemplating the third factor, the Court held that the per se approach was too strong and might prevent the conviction of guilty parties or result in unnecessarily reversed convictions.[73] In sum, *Brathwaite* characterized reliability as the focus of the *Wade* trilogy and held that an identification produced by an unnecessarily suggestive procedure is admissible unless a court finds the identification to be unreliable based on the five *Biggers* factors.[74]

C. The Current Rule for Exclusion, as Narrowed by Perry

The series of cases from *Wade* to *Brathwaite* developed the current doctrine that an identification resulting from a police procedure must be excluded only if the procedure was suggestive, unnecessary, *and* created a substantial likelihood of misidentification as judged using the *Biggers* factors.[75] The clari-

---

sary. *Id.*; *see* United States *ex rel.* Kirby v. Sturges, 510 F.2d 397, 405–06 (7th Cir. 1975) ("There is surprising unanimity among scholars in regarding such a [per se] rule as essential to avoid serious risk of miscarriage of justice.").

[69] *See Brathwaite*, 432 U.S. at 111–13 (enumerating and considering the three factors).

[70] *See id.*

[71] *Id.* at 112. The Court further commented that the per se rule would force the exclusion of potentially reliable identifications obtained through suggestive means because trial courts would have no flexibility to deem such identifications reliable and admit them. *Id.*

[72] *Id.*

[73] *Id.* at 112–13. The Court worried that excluding identifications that are reliable, despite their suggestive origins, would prevent the consideration of evidence that could help convict a guilty defendant. *Id.* at 112. The Court also noted that the rigidity of the per se approach could increase errors by trial courts and lead to reversals, which the Court characterized as a disproportionate penalty for the improper admission of reliable evidence. *Id.* at 112–13.

[74] *Brathwaite*, 432 U.S. at 114, 117.

[75] *See* Perry v. New Hampshire, 565 U.S. 228, 238–39 (2012) (holding that due process must be considered only if police use a suggestive and unnecessary identification procedure); *Brathwaite*, 432 U.S. at 114, 117 (holding that, following *Stovall*, the *Biggers* factors must be used to determine an identification's reliability and thus its admissibility). *Perry* makes clear that suggestiveness and necessity are independent properties of a procedure. 565 U.S. at 238–39 (referring to procedures that are "*both* suggestive and unnecessary" (emphasis added)). There seems to be no conflict between understanding suggestiveness and necessity as independent inquiries and the common use of the compound

fications of *Brathwaite* forestalled further additions to the *Wade* line of cases for thirty-five years, until *Perry* addressed the admissibility of identifications obtained under suggestive circumstances that were *not* arranged by police.[76] In *Perry*, the Supreme Court held that courts need not consider the reliability of such identifications before admitting them.[77] Phrased differently, due process requires courts to look for a substantial likelihood that a defendant was misidentified only when the suggestive identification procedure was conducted by a state actor.[78]

Perry remains the most recent Supreme Court decision discussing showups, although the Court has since considered other types of suggestive procedures.[79] Many cases in the *Wade* line consider showups, but the rule clarified in *Brathwaite* and reiterated in *Perry* is not limited to showups in its ap-

---

phrases "unnecessary suggestiveness" or "impermissible suggestiveness" in discussing the doctrine. *See id.* at 238–40 (using the phrase "unnecessarily suggestive" shortly after discussing procedures that are "both suggestive and unnecessary"). Although explanations of the doctrine are not always subdivided in the same way, nothing suggests that this semantic difference implies a substantive disagreement about the nature of this first part (or two parts) of the test. *See, e.g.*, *id.* at 253–54 (Sotomayor, J., dissenting) (explaining *Brathwaite*'s test as a two-part analysis consisting first of the defendant showing that the identification procedure was impermissibly suggestive, and second of an inquiry into the identification's reliability using the *Biggers* factors). S*ee generally id.* (containing no reference in the majority opinion or the dissent to disagreement about how to evaluate unnecessary suggestiveness).

[76] *See* 565 U.S. at 237–41 (summarizing the cases from *Stovall* to *Brathwaite* and explaining *Brathwaite*'s proper application to the facts of *Perry*). In *Perry*, a witness to a car break-in was speaking with police in her upstairs apartment while another officer detained Perry, the suspect, in the parking lot where the break-in had occurred. *Id.* at 234–35. When police asked her to verbally describe the thief, the witness pointed out the window at Perry—the only black man in the parking lot—and identified him as the perpetrator. *Id.* One month later, the witness was unable to identify Perry in a photo array. *Id.* at 235. Perry moved to exclude the identification on due process grounds, but the trial court refused because the police had not arranged the identification. *Id.* at 234–35. On appeal, the New Hampshire Supreme Court reiterated the trial court's reasoning and affirmed Perry's conviction. *Id.* at 236.

[77] *Id.* at 245 (holding that, despite eyewitness fallibility, due process does not require trial courts to screen identifications for reliability unless the improperly suggestive identification procedure was conducted by police).

[78] *Id.* Justice Sotomayor, the lone dissenter in *Perry*, expressed strong concerns about the majority's stance that the Due Process Clause protects defendants only against prejudicial government action and does not place a more general due process restriction on admitting identifications that are plainly unreliable. *Id.* at 254–55 (Sotomayor, J., dissenting).

[79] *See* WESTLAW, https://www.westlaw.com (limit the search to Supreme Court cases and search for "adv: showup") (showing that *Perry* is the most recent Supreme Court case containing the term "showup"); *see, e.g.*, Sexton v. Beaudreaux, 138 S. Ct. 2555, 2557 (2018) (considering an identification made using a photo array and a middle-school yearbook). One additional Supreme Court case discussing showups contains a hyphenated variation of the term. *See* Reck v. Pate, 367 U.S. 433, 441 (1961) (making reference to a suspect being exhibited in a "show-up").

plication.[80] This Note's proposed simplification of the rule, however, concerns the application of the *Brathwaite* test exclusively to showups.[81]

D. In-Court Identifications and Independent Source Doctrine

Some courts have recognized the in-court identification—"one of the oldest courtroom gambits in America," as framed by one commentator—as a suggestive procedure resembling a showup.[82] In-court identifications are neither directly implicated nor comprehensively considered by this Note, but their admissibility affects the reasoning and application of some state doctrines, so judicial views on in-court identifications warrant brief mention.[83]

In the relatively few instances in which out-of-court identifications are suppressed as unreliable, a majority of courts may still admit a subsequent courtroom identification under the reasoning that the second identification originates from the "independent source" of the witness's (supposedly static) original memory.[84] The courts in over forty states apply this "independent source doctrine" or a functional equivalent to admit in-court identifications, although researchers have strongly criticized the doctrine, objecting that previous involvement in a suggestive identification procedure taints a witness's memory and calls into doubt any subsequent identifications by the witness.[85]

---

[80] *Perry*, 565 U.S. at 232–33 (giving showups, lineups, and photo arrays as examples of identification procedures governed by *Perry* and related decisions).

[81] *See infra* notes 245–302 and accompanying text (explaining and arguing for a simplified standard). For simplicity, this Note refers to the federal test for exclusion of a police-conducted identification procedure—that it must have been unnecessarily suggestive and carry a substantial likelihood of causing a misidentification—as the *Brathwaite* test or the *Brathwaite* standard. *See* Simmons v. United States, 390 U.S. 377, 384 (1968) (articulating the standard).

[82] Marella Gayla, *When a Witness Confronts the Accused: Is a Courtroom I.D. Fair?*, MARSHALL PROJECT (July 13, 2017, 10:00 PM), https://www.themarshallproject.org/2017/07/13/when-a-witness-confronts-the-accused-is-a-courtroom-i-d-fair [https://perma.cc/EP6V-WZLT] (discussing the long history of in-court identifications and outlining recent challenges to their admissibility); *see, e.g.*, United States v. Archibald, 734 F.2d 938, 941–43 (2d Cir.) (noting that in-court identifications can function as showups and requiring courts to prevent such suggestiveness), *modified*, 756 F.2d 223 (2d Cir. 1984); Commonwealth v. Crayton, 21 N.E.3d 157, 169 (Mass. 2014) (holding that permitting an eyewitness to identify a defendant for the first time as part of an in-court procedure shall be considered an "in-court showup" and may only be admitted with "good reason").

[83] *See, e.g.*, People v. Adams, 423 N.E.2d 379, 384 (N.Y. 1981) (articulating a standard more likely than *Brathwaite*'s test to exclude identifications made using suggestive procedures and reasoning that New York's more rigorous standard does not "deprive the prosecutor of reliable evidence of guilt," because certain in-court identifications remain admissible).

[84] *See* Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND. L. REV. 451, 477–78 (2012) (observing that—owing to the deferential and plastic nature of the *Brathwaite* test—courts rarely exclude identifications, and further explaining the nature and frequency of independent source analyses in judicial decisions).

[85] *Id.* at 477 (noting that the courts in forty-four states apply independent source doctrine or a similarly named doctrine), 485–86 (criticizing the conception of memory as a static source that can remain "independent" and unchanged after a suggestive identification procedure); Wells & Quinlivan, *supra* note 11, at 8–9 (explaining that following a misidentification, the witness's original memory is

Some courts also regard in-court identifications without a prior identification procedure (often referred to as "first-time in-court identifications") as inherently suggestive,[86] but there is disagreement between the circuits over whether *Perry* overruled circuit cases requiring courts to examine in-court identifications for suggestiveness and reliability.[87] Judicial understanding of the suggestiveness of in-court identifications is variable, and state courts' stances on the admissibility of in-court identifications may not be predictive of the courts' approaches to out-of-court identifications.[88] This inconsistency in the treatment of in-court and out-of-court identification procedures suggests that some courts view these procedures as legally distinct.[89] Thus, although in-court identifications may resemble showups, this Note confines its discussion of rulings on in-court identifications to holdings that also relate to showups and does not consider the applicability of its proposed standard to in-court identifications.[90]

---

overwritten by the memory of the misidentified suspect, rendering subsequent identifications subject to the same error); *see* Behrman & Vayder, *supra* note 38, at 1239 (documenting an experimental study showing that a witness who has taken part in a suggestive procedure is more likely to implicate an innocent suspect in a later nonsuggestive procedure); *see also supra* notes 11, 28 and accompanying text (discussing findings that memory is not a static record but is malleable and can be altered by subsequent experiences and suggestion).

[86] *See, e.g.*, United States v. Hill, 967 F.2d 226, 232 (6th Cir. 1992) (holding that courts must use the *Biggers* analysis to admit a first-time in-court identification because such procedures carry the same concerns about suggestiveness, mistake, and violations of due process as impermissibly suggestive out-of-court identification procedures); State v. Dickson, 141 A.3d 810, 822 (Conn. 2016) (holding that courts must examine an identification's accuracy before allowing a witness who has not previously identified the defendant to make an identification in court, because such in-court procedures are inherently suggestive and are no less of a threat to due process protections than unnecessarily suggestive procedures conducted outside of the courtroom); City of Billings v. Nolan, 2016 MT 266, ¶¶ 21–22, 305 Mont. 190, 383 P.3d 219 (holding that a witness is able to understand which person is the defendant in a courtroom, so a first-time in-court identification of a defendant was impermissibly suggestive); Garrett, *supra* note 84, at 490 (concluding that courtroom identifications are inherently suggestive and even less reliable than out-of-court procedures). *But see* Galloway v. State, 2010-DP-01927-SCT (¶ 162) (Miss. 2013) (commenting that a majority of courts do not apply *Biggers* to determine the reliability of in-court identifications because the supervision of the court and the adversarial system are considered adequate defenses against the procedure's suggestiveness).

[87] United States v. Thomas, 849 F.3d 906, 910 (10th Cir.) (noting the circuit disagreement and agreeing with the Eleventh Circuit's interpretation that *Perry* also requires courts to screen in-court identifications for suggestiveness and reliability), *cert. denied*, 138 S. Ct. 315 (2017).

[88] *See, e.g.*, Young v. State, 374 P.3d 395, 411–13 (Alaska 2016) (abandoning the federal *Brathwaite* test and holding it to be inadequately protective of due process rights under the Alaska Constitution, but holding that first-time in-court identifications do not categorically invoke the same due process concerns); Commonwealth v. Crayton, 21 N.E.3d 157, 169 (Mass. 2014) (holding that a first-time in-court identification is an "in-court showup" and may only be admitted with "good reason").

[89] *See, e.g.*, *Young*, 374 P.3d at 411 (holding that first-time in-court identifications do not require the same due process protections as suggestive out-of-court identification procedures).

[90] *See infra* notes 91–359 and accompanying text (discussing state approaches to admitting showup identifications and proposing a simplified standard, but refraining from extensive discussion of in-court identifications).

II. The Varied State Approaches to Admitting Showup Identifications

In *United States v. Wade* and *Gilbert v. California*, the Supreme Court alluded to the superiority of a legislative resolution to some of its concerns about suggestive identification procedures.[91] Despite the Court's hopes, protections against misidentifications of innocent defendants seem to be litigated more often than legislated, and the United States has no national standard for identification procedures.[92] Much of that litigation occurs at the state level, and state high courts have taken a variety of approaches to admitting or excluding eyewitness identifications derived from suggestive procedures.[93] State court rulings often do not implicate federal due process concerns, instead drawing on state law; however, observing where and how state courts diverge from the federal standard is instructive from a policy perspective.[94] To furnish that context, this Part discusses the approaches of the seven states with the most notable departures from the federal doctrine and the five states that have modified the *Brathwaite* test slightly less substantially, focusing specifically on how these twelve states treat showup identifications.[95] The remaining thirty-eight

[91] *See* Gilbert v. California, 388 U.S. 263, 273 (1967) (commenting that, in the absence of legislation to ensure that flawed lineup practices did not prevent fair trials, the Court prioritized deterring improper and unconstitutional procedures over seeking to admit potentially relevant identification evidence); United States v. Wade, 388 U.S. 218, 239 (1967) (noting that a solution to the problem of suggestive identification procedures had not been created legislatively or though federal policy, and commenting that the Court's holding was not intended to place constitutional limits on reforms enacted by other branches of government); *see also* Manson v. Brathwaite, 432 U.S. 98, 111 (1977) (repeating the observation that the legislative solution tacitly suggested in *Wade* and *Gilbert* did not occur).

[92] Identifying the Culprit, *supra* note 11, at 18 (noting that the United States has no uniform rules governing how police perform identification procedures). There is an ever-shifting body of state laws and policies that affect the use of showup procedures, but no current and comprehensive accounting thereof appears to exist in the scholarship. *See, e.g.*, N.C. Gen. Stat. § 15A-284.52 (2017) (establishing requirements for how police should perform lineups and showups and requiring that courts consider violations of the statute when deciding whether to suppress identifications); *see also* David A. Sonenshein & Robin Nilon, *Eyewitness Errors and Wrongful Convictions: Let's Give Science a Chance*, 89 Or. L. Rev. 263, 279–83 (2010) (providing an incomplete list of state executive branch actions and state legislation dictating standards for conducting lineups).

[93] *See, e.g.*, cases cited *infra* note 97 (containing the relevant decisions of the seven state high courts that have significantly diverged from the *Brathwaite* test and the *Biggers* factors).

[94] *See, e.g.*, Commonwealth v. Johnson, 650 N.E.2d 1257, 1261 (Mass. 1995) (rejecting the federal *Brathwaite* test and announcing a rule based in the Massachusetts Constitution that requires the exclusion of identifications from all unnecessarily suggestive procedures); People v. Adams, 423 N.E.2d 379, 383–84 (N.Y. 1981) (holding that identifications from unnecessarily suggestive pretrial identification procedures are never admissible under the New York Constitution's due process guarantees).

[95] *See infra* notes 97–244 and accompanying text (discussing the twelve states that have modified the federal doctrine).

states and the District of Columbia have adhered to the federal standard and are cataloged in the Appendix, accompanied by representative cases.[96]

A. States with Notable Departures from the Standard Reiterated in Brathwaite *and* Perry

Seven state high courts have significantly diverged from the federal doctrine that uses the *Brathwaite* test and the *Biggers* factors.[97] Those courts have recognized the dangers of suggestive identification procedures and have sought to provide defendants with greater protections against misidentification.[98] Two

---

[96] *See infra* notes 303–359 and accompanying text (constituting the Appendix). In states without high-court rulings specific to showups, this Note and its Appendix consider the most applicable ruling or rulings on the general topic of suggestive identification procedures. *See, e.g.*, *infra* note 315 and accompanying text (citing an Illinois Supreme Court case considering several out-of-court identifications made based on photo arrays).

[97] *See* Young v. State, 374 P.3d 395, 426–27 (Alaska 2016) (announcing a new test under which any allegedly suggestive identification procedure may be admitted only if the identification is found to be reliable based on the large and nonexhaustive list of scientifically supported factors provided in *Young*); State v. Harris, 191 A.3d 119, 135–36, 143–44 (Conn. 2018) (holding that *Brathwaite*'s approach is inadequately protective under the state constitution and adopting a model focused on better evaluating reliability using a more complete list of factors); *Johnson*, 650 N.E.2d at 1260–61 (holding that Article 12 of the Massachusetts Constitution's Declaration of Rights requires Massachusetts courts to reject *Brathwaite*'s focus on reliability and to exclude the results of any unnecessarily suggestive out-of-court identification procedure); State v. Henderson, 27 A.3d 872, 918–22 (N.J. 2011) (rejecting the *Brathwaite* test and defining a nonexhaustive list of factors with which to evaluate the accuracy of an identification stemming from an allegedly suggestive procedure); People v. Marte, 912 N.E.2d 37, 38 (N.Y. 2009) (reiterating the holding of *Adams* that any unnecessarily suggestive police identification procedure must be suppressed under the New York Constitution); *Adams*, 423 N.E.2d at 383–84 (holding that the New York Constitution affords greater protection than the Federal Constitution and requiring the exclusion of an identification obtained using an unnecessary showup, but explicitly allowing admission of subsequent in-court identifications if those identifications have an "independent source"); State v. Lawson, 291 P.3d 673, 690 (Or. 2012) (holding, based on new research, that the state's previous test for admitting identifications from suggestive procedures was inadequate, and replacing it with a reliability inquiry that uses scientifically validated factors and is rooted in the Oregon Evidence Code); State v. Dubose, 2005 WI 126, ¶¶ 29–33, 285 Wis. 2d 143, 699 N.W.2d 582 (acknowledging the mass of new research on eyewitness identifications, characterizing eyewitness identifications as often being completely unreliable, and holding showup identifications to be admissible only if the procedure was necessary).

[98] *See Young*, 374 P.3d at 427 (acknowledging the advancing scientific understanding of eyewitness identifications and announcing Alaska's new standard for admitting identifications from suggestive procedures, which the court designed to balance the need to protect defendants from misidentification and the needs of police); *Harris*, 191 A.3d at 143–44 (holding that *Brathwaite*'s approach is inadequately protective of defendants' rights and adopting a standard based on New Jersey's model); *Adams*, 423 N.E.2d at 383 (observing the problem of misidentification and noting that New York's protections for defendants are designed to prevent wrongful convictions and exceed those required by the Supreme Court); *Lawson*, 291 P.3d at 690 (commenting on the issue of misidentifications and revising Oregon's test for admitting eyewitness identifications to protect against unreliable identifications); *Dubose*, 2005 WI 126, ¶¶ 32–33 (holding that the risks of admitting identifications from unnecessarily suggestive procedures are unacceptably high and announcing a new test for the admission of showup identifications in Wisconsin); *see also infra* notes 134–138 and accompanying text (discussing the New Jersey Supreme Court's concerns about the *Brathwaite* test's reliability); *infra* notes

basic approaches to the problem of suggestive procedures have emerged from the courts of these seven states.[99] Some states have sought to improve upon *Manson v. Brathwaite* by building complex doctrines designed to exclude unreliable identifications by requiring courts to evaluate the reliability of identifications using current science.[100] Other courts have simply chosen to exclude all identifications that police obtain using unnecessary suggestive procedures.[101]

Observing how each state has approached the problem of suggestive procedures, and the problem of showups specifically, elucidates both the science underlying the issue and the feasibility of each approach.[102] In *State v. Henderson*, the Supreme Court of New Jersey offered a thorough examination of the science surrounding eyewitness identifications, which has served to inform the rulings of other courts.[103] Because *Henderson* is so instructive, this Note places it first in the discussion of state doctrines that diverge from the federal standard.[104] Thereafter, this Note considers other state high courts' rulings that renounce or modify the federal test.[105] The discussion of these courts' doctrines is grouped by the similarity of their approaches, so this Section presents, in order, the standards of New Jersey, Alaska, Connecticut, Massachusetts, Wisconsin, New York, and Oregon.[106]

163–168 and accompanying text (discussing the Massachusetts Supreme Judicial Court's concerns with the *Brathwaite* test, and noting that the court is more concerned about the possibility of wrongful convictions than about the possibility of guilty parties remaining unidentified).

[99] *See infra* notes 100–101 and accompanying text (providing Oregon and Massachusetts as examples of states with divergent approaches to the issue).

[100] *See, e.g.*, *Lawson*, 291 P.3d at 691–97 (setting forth Oregon's current standard for evaluating the admissibility of eyewitness identifications); *see also infra* notes 199–206 and accompanying text (summarizing Oregon's reliability-focused standard).

[101] *See, e.g.*, Commonwealth. v. Johnson, 45 N.E.3d 83, 88 (Mass. 2016) (holding that an identification obtained by police through an unnecessarily suggestive out-of-court identification procedure is inadmissible under Article 12 of the Massachusetts Declaration of Rights).

[102] *Cf. Young*, 374 P.3d at 427 (crediting the *Henderson* decision with shaping Alaska's approach); *Lawson*, 291 P.3d at 685 n.3 (noting that the Oregon Supreme Court reviewed the scientific evidence compiled by *Henderson* in crafting its own approach).

[103] State v. Henderson, 27 A.3d 872, 885–912 (N.J. 2011) (discussing at great length the science of memory and its relationship to eyewitness identification); *see Young*, 374 P.3d at 427 (noting that the new standard adopted by the Alaska Supreme Court closely follows the standard announced by the New Jersey Supreme Court in *Henderson*); *Lawson*, 291 P.3d at 685 n.3 (acknowledging that the Oregon Supreme Court reviewed the *Henderson* decision while considering *Lawson* and noting that the reliability factors adopted by the court in *Lawson* are similar to those given in *Henderson*).

[104] *See infra* notes 107–143 and accompanying text (discussing the standard applied by New Jersey courts following *Henderson*).

[105] *See infra* notes 144–208 and accompanying text (discussing the standards applied by the courts in Alaska, Connecticut, Massachusetts, Wisconsin, New York, and Oregon).

[106] *See infra* notes 107–208 and accompanying text (discussing the standards applied by the courts in New Jersey, Alaska, Connecticut, Massachusetts, Wisconsin, New York, and Oregon).

1. New Jersey

In *Henderson*, the Supreme Court of New Jersey abandoned its previous adoption of the *Brathwaite* test and the incorporated *Biggers* factors.[107] The court reached its decision aided by an eighty-eight-page special master's report compiled from expert testimony and scientific evidence gathered during a ten-day hearing ordered by the court to determine the scientific validity of the *Brathwaite* test.[108] Based on evidence from seven expert witnesses and over 200 scientific publications, the Report of the Special Master informed the court's lengthy opinion, which held the *Brathwaite* test to be inadequate and announced a significantly revised test for use in New Jersey.[109]

The *Henderson* opinion and the accompanying report constitute one of the most thorough formal judicial commentaries on the current scientific understanding of eyewitness identifications.[110] The opinion and report have served as a basis or catalyst for reforms to the use of eyewitness evidence in several states.[111] The *Henderson* opinion begins with an explicit finding that

---

[107] *See Henderson*, 27 A.3d at 918–19, 919 n.10 (holding that the *Brathwaite* test is inadequate to protect the rights provided to defendants by New Jersey's constitution, and holding that three of the *Biggers* factors do not accurately measure the reliability of an identification). Readers of the *Henderson* decision should note that the *Henderson* court refers to the *Brathwaite* test as the "*Manson*/*Madison* test" in reference to the state party in *Manson v. Brathwaite*, 432 U.S. 98 (1977), and the defendant in *State v. Madison*, 536 A.2d 254 (N.J. 1988), which is the case in which New Jersey clearly adopted the *Brathwaite* test. *See Henderson*, 27 A.3d at 878 (citing to *Brathwaite* and *Madison* and discussing the "*Manson*/*Madison* test"); *Madison*, 536 A.2d at 254, 258–59 (adopting the *Brathwaite* test in considering the case of the defendant, James Madison); *see also Brathwaite*, 432 U.S. at 98, 103 (naming Manson as the appellant correction commissioner opposing Brathwaite's habeas corpus petition).

[108] *See Henderson*, 27 A.3d at 877 (noting that the court appointed the special master to assess the scientific evidence regarding eyewitness identifications); State v. Henderson, 39 A.3d 147, 148 (N.J. 2009) (ordering the hearing); Report of the Special Master at 2–3, *Henderson*, 27 A.3d 872 (No. 62,218) (explaining the format and content of the hearing).

[109] *Henderson*, 27 A.3d at 918–19 (announcing a revised test after holding that the *Brathwaite* test failed to accomplish its goals because it is not an adequate evaluation of reliability, does not deter police from using suggestive procedures, and assumes that juries are much more capable of accurately evaluating eyewitness testimony than they are); Report of the Special Master, *supra* note 108, at 3 (enumerating the evidence surveyed).

[110] *See* Young v. Conway, 698 F.3d 69, 79 (2d Cir. 2012) (accepting the research put forth in *Henderson* as generally accepted science); Monroe v. State, 28 A.3d 418, 433 (Del. 2011) (referring to the New Jersey Supreme Court's analysis as "comprehensive"); State v. Mahmoud, 2016 ME 135, ¶ 14 & n.4, 147 A.3d 833, 838 & n.4 (referring to *Henderson*'s analysis as "comprehensive," and discussing its broad scope). The Supreme Judicial Court of Massachusetts commissioned a study of eyewitness identifications and suggestive procedures in 2011, and the resultant report summarizes the findings from *Henderson*'s report and characterizes them as "extensive and detailed." SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, REPORT AND RECOMMENDATIONS TO THE JUSTICES 1, 15 n.17 (2013). *Mahmoud* specifically mentions both the *Henderson* report and the report to the Massachusetts high court as being authoritative judicial sources regarding the reliability of eyewitness evidence. *Mahmoud*, 147 A.3d at 838.

[111] *See supra* note 103 (citing acknowledgements by the Alaska and Oregon Supreme Courts in *Young* and *Lawson* that the courts were influenced by the *Henderson* decision).

the scientific evidence compiled by the special master is reliable.[112] The court then acknowledged that memory is malleable and subject to alteration by many factors.[113] After reciting the facts and procedural history, the court opined at length that misidentifications undeniably occur, citing studies and cases across three pages to demonstrate that misidentifications take place disturbingly often and cause the convictions of innocent suspects.[114]

The court was careful to note that misidentifications are generally a product of a witness's honest, yet mistaken, belief resulting from the malleability of memory.[115] *Henderson* observed the danger of these earnest-but-mistaken witnesses, noting that *Brathwaite* explicitly relied on the ability of juries to judge the credibility of eyewitness testimony.[116] *Brathwaite*'s reliance on juries is based on the dual flawed assumptions that (1) most witnesses who make a misidentification are doing so intentionally—that is to say, are lying—and that (2) juries can detect liars.[117] *Henderson* explicitly presumes that jurors can discern deception but raises concerns about *Brathwaite*'s assumption that misidentifications must be caused by witnesses lying.[118] *Brathwaite* implicitly endorsed a

---

[112] 27 A.3d at 877.

[113] *Id.* at 878; *see infra* notes 123–133 and accompanying text (discussing some of the variables considered in *Henderson* that can affect eyewitnesses identifications).

[114] *See Henderson*, 27 A.3d at 885–89 (discussing several studies, both observational and experimental, which demonstrate the prevalence of misidentifications). According to several large studies of actual police lineups, roughly one-quarter to one-third of witnesses who make an identification during a lineup (as opposed to a showup) incorrectly identify an innocent filler. *Id.* at 886–87. Experimental studies suggest that, in lineups where the actual perpetrator is not present, witnesses will still choose an innocent filler around one-third of the time. *Id.* at 887–88. This is concerning because showups are even less accurate than lineups in many cases, and a misidentification in a showup will implicate an innocent suspect, whereas most misidentifications in a lineup are demonstrably false. *See* Nancy Steblay et al., *Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison*, 27 LAW & HUM. BEHAV. 523, 525 (2003) (noting that showups place innocent suspects at greater risk than lineups because there are no decoys present for a mistaken witness to choose and because of the suggestiveness inherent in showups); A. Daniel Yarmey et al., *Accuracy of Eyewitness Identifications in Showups and Lineups,* 20 LAW & HUM. BEHAV. 459, 465 (1996) (referencing an experimental study finding that showups and lineups are equally likely to cause false identifications if performed two minutes after the initial encounter but that showups performed two or more hours after the encounter make it over 300% more likely for a witness to falsely identify an innocent suspect); Yarmey, *supra* note 17, at 746 (noting general scientific agreement that showups increase the possibility of false identifications).

[115] *Henderson*, 27 A.3d at 888.

[116] *Id.* at 888–89 (presuming that juries can recognize deception, but noting that a mistaken witness, while wrong, is not lying and so will not exhibit signs of deception and may even exhibit great confidence).

[117] *Id.*; RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM 52–53 (2003) (noting that, while average people tend to be skilled liars, even experienced listeners like police officers and judges are scarcely better than chance at detecting lies, and a person's confidence in his or her ability to detect lies is unrelated to any actual ability).

[118] *Henderson*, 27 A.3d at 888–89 (presuming that jurors are capable of detecting lies, but observing that most mistaken witnesses are not lying and so will not show signs of lying that a jury might detect). Research contradicts the court's presumption. *See* JONAKAIT, *supra* note 117, at 52–53 (not-

liberal evidentiary standard, determining that identifications require exclusion only when they are substantially likely to be wrong, because juries are adequately able to guard against identifications of debatable veracity.[119] *Henderson* points out that, even presuming that juries can sense lies, most mistaken eyewitnesses believe that they are telling the truth, so they may testify incorrectly with great confidence and without any of the behavioral indicators that a jury might associate with deception.[120] The *Henderson* court also emphasized the disproportionate weight that jurors place on a confident eyewitness's testimony.[121]

The court then discussed the scientific evidence assembled in the record and noted that nearly all of it became available after the *Brathwaite* decision.[122] The court explained that science has proven memory to be malleable and that researchers divide the variables that render memories unreliable into system and estimator variables.[123] System variables are factors that the justice system can control, such as the procedures used to administer lineups or the instructions given to a witness before and after a procedure.[124] Estimator variables are factors over which no preemptive control can be exercised, such as the distance between the witness and the perpetrator during the crime, the witness's eyesight, or the witness's level of stress.[125]

---

ing that people are extraordinarily poor at detecting deception, regardless of their training, experience, or faith in their own abilities).

[119] *See* Manson v. Brathwaite, 432 U.S. 98, 116 (1977) (holding that the judgment of juries is adequately protective against false eyewitness identifications to justify the admission of identifications from suggestive procedures under most circumstances).

[120] 27 A.3d at 889. *Henderson* also notes studies showing that a witness who initially makes a hesitant identification may subsequently display falsely increased confidence after repeating their identification or receiving confirmatory feedback. *See id.*; *see also* CONVICTING THE INNOCENT, *supra* note 5, at 49, 64 (documenting the finding that, in a majority of the false-identification cases studied that involved eyewitnesses, the witnesses were initially unsure about their identifications or even unable to identify the suspect; however, many of those witnesses later displayed great certainty in their testimony at trial); Amy Bradfield Douglass & Nancy Steblay, *Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-identification Feedback Effect*, 20 APPLIED COGNITIVE PSYCHOL. 859, 864–65 (2006) (observing that study participants given confirmatory feedback after making an identification would unconsciously develop post hoc justifications for their increased confidence and would unwittingly exaggerate favorable factors, such as their memory skills and the quality of the viewing conditions, in subsequent interviews).

[121] *Henderson*, 27 A.3d at 889 (repeating the words of Elizabeth Loftus as quoted by Justice Brennan in *Watkins v. Sowders*, 449 U.S. 341, 352 (1979) (Brennan, J., dissenting), observing that no form of evidence bears the convincing power of an eyewitness making a confident in-court identification).

[122] *Id.* at 892.

[123] *Id.* at 895.

[124] *Id.*; Brian L. Cutler et al., *The Reliability of Eyewitness Identification: The Role of System and Estimator Variables*, 22 LAW & HUM. BEHAV. 233, 235 (1987); Gary L. Wells, *Applied Eyewitness-Testimony Research: System Variables and Estimator Variables,* 36 J. PERSONALITY & SOC. PSYCHOL. 1546, 1548 (1978) (coining the terms "system variable" and "estimator variable").

[125] *Henderson*, 27 A.3d at 895; Cutler et al., *supra* note 124, at 234.

The court discussed many examples of each type of variable at length, outlining relevant studies, potential best practices, and countervailing state interests.[126] *Henderson* identifies the use of a showup procedure as a system variable and characterizes showups as inherently suggestive, while also acknowledging their utility in limited situations.[127] Although it articulated no specific rule for how long after a crime a showup might remain permissible, the court did note a study finding that showups and lineups are equally accurate immediately after an encounter, but that showups performed two hours after an encounter caused fifty-eight percent of participants to mistakenly identify an "innocent suspect."[128] Echoing the cited experts, the court explained that showups promote mistakes because, lacking the decoys present in a lineup, any mistake or guess by a witness inculpates a potentially innocent suspect.[129]

The court also noted the issue of clothing bias, which makes witnesses more likely to misidentify an innocent suspect if the suspect and the actual perpetrator are wearing similar clothing and share some physical characteristics.[130] Clothing bias is especially dangerous in showups because police searching an area often choose a suspect based on a witness's general description.[131] This can cause a feedback loop wherein police detain a person based on clothing that matches the witness's description and the witness subsequently falsely identifies the person because of that clothing.[132] Prosecutors may also incorrectly believe that the "match" between the suspect's clothing and the witness's description of the perpetrator's clothing is evidence that the suspect is the perpetrator.[133]

---

[126] *Henderson*, 27 A.3d at 896–911.

[127] *Id.* at 902–03.

[128] *Id.* at 903 (noting that showups may become much more likely to cause misidentifications when conducted over two hours after a crime, but not placing a specific time limit on their use); *see* Yarmey et al., *supra* note 114, at 461, 463–64 (detailing the findings of a 565-participant experimental study showing that showups and lineups resulted in similar rates of false identifications when performed two or thirty minutes after a mock crime, but that lineup misidentification rates settled around 14% when measured two hours after the crime, whereas showup misidentification rates rose to 58%).

[129] *Henderson*, 27 A.3d at 903 (holding that the record of the case, which includes the Report of the Special Master, suggests that showups more than two hours after a crime are more likely to be incorrect and should be viewed with suspicion).

[130] *Id.*

[131] Michelle I. Bertrand et al., *Clothing Bias in Identification Procedures*, *in* 1 ENCYCLOPEDIA OF PSYCHOLOGY AND LAW 94, 94 (Brian L. Cutler ed., 2008); Dysart et al., *supra* note 16, at 1011. Around half of all information in witness descriptions regards clothing. Dysart et al., *supra* note 16, at 1011. Police may rely more heavily on clothing information than facial descriptions because officers are unlikely to detain, for example, all young, bearded, white men in an area. *Id.*

[132] Bertrand et al., *supra* note 131, at 94–95. An experimental study conducted in Canada suggests that an innocent suspect wearing clothing similar to that of the actual perpetrator is at significant risk of misidentification. Dysart et al., *supra* note 16, at 1015, 1019.

[133] Bertrand et al., *supra* note 131, at 94. In showups based on clothing descriptions, similar clothing cannot be independent confirmation of a suspect's identity because police selected the suspect based on that very clothing. *Id.*

The *Henderson* court's wide-ranging consideration of eyewitness accuracy led it to revise the *Brathwaite* test because the test does not accurately assess reliability, does not deter police from using suggestive procedures, and overestimates the ability of jurors to evaluate testimony for reliability.[134] The court specifically observed that *Brathwaite*'s test may reward suggestive procedures because such procedures can falsely inflate witness confidence.[135] Because a witness's confidence is among the reliability factors used under *Brathwaite*, suggestive procedures actually increase the likelihood that an identification will be admitted.[136] The court further noted that three of the *Biggers* factors (specifically, the witness's confidence, attention during the encounter, and ability to see the crime) are self-reported factors, and a witness's perception and memory of such factors are known to be altered by suggestive procedures.[137] Thus, using a suggestive procedure can increase the apparent reliability of the resulting identification (as evaluated under *Brathwaite*) by skewing a witness's memory of several *Biggers* factors, causing witnesses to believe, for example, that they were more attentive and better able to view the perpetrator than they truly were.[138]

Henderson ultimately created a framework for admitting or excluding all identifications obtained through unnecessarily suggestive procedures in New Jersey.[139] Under *Henderson*, a defendant may trigger a pretrial hearing by showing evidence that a system variable (i.e., a state-controllable variable) could have caused the identification procedure to be suggestive.[140] Thereafter, the state must show that the identification is reliable based on system and estimator variables, but, if the state succeeds, the defendant retains the burden to show a "very substantial likelihood" of incorrect identification.[141] If, as a result of the pretrial hearing, the court finds a "very substantial likelihood of irreparable misidentification," then the evidence must be excluded.[142] Finally, the *Henderson* court

---

[134] *Henderson*, 27 A.3d at 918.

[135] *Id.*

[136] *Id.*

[137] *Id.*; *see* Douglass & Steblay, *supra* note 120, at 864–65 (finding that witnesses receiving even mild confirmation after an identification procedure will subconsciously explain their increased confidence by unwittingly exaggerating favorable factors such as their memory skills and the favorable nature of the viewing conditions).

[138] Nicholas A. Kahn-Fogel, *The Promises and Pitfalls of State Eyewitness Identification Reforms*, 104 KY. L.J. 99, 115 (2016).

[139] *See Henderson*, 27 A.3d at 919–20 (explaining the steps in New Jersey's new process for determining the admissibility of identifications from suggestive procedures).

[140] *Id.* Where a defendant alleges suggestiveness associated with an estimator variable instead of a system variable, i.e., suggestiveness caused by elements outside the control of the police, the defendant may still be entitled to a hearing on the reliability of the identification, but must first pass a higher bar by showing "some evidence of *highly* suggestive circumstances." State v. Chen, 27 A.3d 930, 942–43 (N.J. 2011).

[141] *Henderson*, 27 A.3d at 920.

[142] *Id.*

encouraged trial courts to consider all appropriate variables during the outlined process, to provide appropriate jury instructions, and to allow relevant expert testimony to educate juries about suggestive identification procedures.[143]

2. Alaska

High courts' reactions to the New Jersey Supreme Court's holdings have been mixed, but several states have adopted *Henderson*'s approach in whole or in part.[144] In *Young v. State*, the Alaska Supreme Court adopted *Henderson*'s standard and procedures nearly verbatim.[145] The *Young* court also mirrored *Henderson* by requesting that the appropriate bodies draft scientifically informed jury instructions regarding eyewitness identification for the court to approve for future use.[146]

3. Connecticut

The Connecticut Supreme Court is the most recent state high court to change its approach to admitting identifications.[147] Overruling *State v. Ledbetter*—a decision from less than fifteen years prior—*State v. Harris* modified the

[143] *Id.* at 920, 924–25. The New Jersey Supreme Court endorses the use of jury instructions to remind jurors of the best ways to interpret testimony and to explain the science of particular issues whose interpretation is nonintuitive. *See id.* at 924–25 (noting that courts provide jurors with rules and guidance for the interpretation of testimony even when those rules might seem obvious, and holding that courts are obligated to provide guidance when less obvious scientific principles are implicated). In *Henderson*, the court notes the potential use of expert testimony to explain the scientific understanding of eyewitness identifications, but suggests that improved jury instructions will reduce the need for expert witnesses. *Id.* at 925. The court then assigns the task of drafting enhanced instructions to the appropriate bodies, emphasizing the importance of basing such instructions on the variables and studies discussed by the court. *Id.* at 925–26.

[144] *See, e.g.*, Perry v. New Hampshire, 565 U.S. 228, 262–65 (2012) (Sotomayor, J., dissenting) (criticizing the majority for adopting a narrow view of when an identification's reliability must be examined, and citing *Henderson* to support continued concern over the high rate of eyewitness misidentification); Young v. State, 374 P.3d 395, 427 (Alaska 2016) (adopting *Henderson*'s standard in Alaska); State v. Almaraz, 301 P.3d 242, 251–53 (Idaho 2013) (maintaining a standard identical to the *Brathwaite* standard, but citing the estimator variables given in *Henderson* as additional considerations to be used alongside the *Biggers* factors in assessing an identification's reliability); Taylor v. State, 371 P.3d 1036, 1044–45 (Nev. 2016) (holding an out-of-court identification to have been unreliable using the same factors as *Biggers* with no mention of *Henderson*).

[145] *Young*, 374 P.3d at 427–28.

[146] *See id.* at 428 (requesting that Alaska's Criminal Pattern Jury Instruction Committee draft a model instruction that complies with the standards annunciated in the decision); *Henderson*, 27 A.3d at 925–26 (requesting that New Jersey's Criminal Practice Committee and Committee on Model Jury Instructions draft changes to the state's jury instructions and present the proposed changes to the court for endorsement).

[147] *See* State v. Harris, 191 A.3d 119, 143 (Conn. 2018) (departing from the *Brathwaite* test in September of 2018); *supra* note 97 (discussing the seven states that have departed from the federal standard, with Connecticut being the most recent); *infra* notes 210, 242–243 and accompanying text (listing the relevant decisions in the five states that have less profoundly altered the federal standard, and noting that Vermont's modification in January of 2018 is the most recent among those states).

Biggers factors and adopted aspects of New Jersey's *Henderson* decision as a matter of state constitutional law.[148] *Ledbetter* had explicitly rejected a defendant's request to hold that the state constitution required a revision of the *Biggers* factors, so *Harris*'s about-face reflects a rapidly developing judicial understanding of eyewitness evidence.[149]

Under *Harris*, which tracks *Henderson*'s framework, a defendant may trigger a pretrial hearing on an identification's reliability by presenting "some evidence" of unreliability caused by a system variable (i.e., a state-controllable variable).[150] If the defendant is successful, the prosecution then bears the burden to show that the identification was nevertheless reliable, taking all system and estimator variables into account.[151] If the prosecution succeeds, then the burden shifts back to the defendant, who must show a "very substantial likelihood of misidentification" in order for the evidence to be excluded.[152] This final showing required of the defendant resembles the final reliability inquiry of the *Brathwaite* test; however, like *Henderson*, *Harris* provides a list of factors for courts to consider in place of the *Biggers* factors.[153]

For its revision of the *Biggers* factors, the *Harris* court drew upon *State v. Guilbert*, wherein the court held that defendants should be allowed to present expert testimony about eyewitness reliability, even in cases where no suggestive procedure occurred.[154] *Guilbert* provided a list of eight facts about eyewit-

---

[148] *Harris*, 191 A.3d at 134, 142–43 (concluding that scientific consensus and changing legal precedent requires a modification of the *Brathwaite* test, and overruling *State v. Ledbetter*, 881 A.2d 290 (Conn. 2005), *overruled by Harris*, 191 A.3d 119); *see Ledbetter*, 881 A.2d at 301–04 (applying the *Brathwaite* test to find a showup necessary and listing the *Biggers* factors in upholding the trial court's finding of reliability).

[149] *Ledbetter*, 881 A.2d at 300–01, 310–11 (declining the defendant's request to alter the *Brathwaite* test on state constitutional grounds and distinguishing decisions by the high courts in Massachusetts, New York, Utah, and Wisconsin, which the defendant had cited as examples of courts departing from *Brathwaite* based on their state constitutions); *see Harris*, 191 A.3d at 135–43 (analyzing changes in precedent from sister states along with other factors to conclude, in contradiction of *Ledbetter*, that the Connecticut Constitution is more protective than the Federal Constitution with regard to evidence from suggestive identification procedures). The Connecticut Supreme Court's rapidly advancing understanding of the risks of suggestive procedures extends to in-court procedures as well. *See* State v. Dickson, 141 A.3d 810, 817, 834–37 (Conn. 2016) (holding that federal due process requires courts to exclude in-court identifications unless the testimony is preceded by an identification made in a nonsuggestive procedure or unless the defendant's identity is undisputed), *cert. denied*, 137 S. Ct. 2263 (2017).

[150] *Harris*, 191 A.3d at 138 n.24, 143.

[151] *Id.* at 143.

[152] *Id.*

[153] *See* Manson v. Brathwaite, 432 U.S. 98, 110, 114 (1977) (adopting a reliability inquiry based on the *Biggers* factors); *Harris*, 191 A.3d at 135–36, 144 (enumerating and adopting eight reliability factors); State v. Henderson, 27 A.3d 872, 920–22 (N.J. 2011) (providing a nonexhaustive list of nine system variables and thirteen estimator variables for courts to consider).

[154] *Harris*, 191 A.3d at 135–36; *see* State v. Guilbert, 49 A.3d 705, 731–32 (Conn. 2012) (providing a list of eight facts about eyewitness reliability that the court found would generally meet the admissibility test for expert testimony).

ness evidence and held that competent expert testimony about those propositions should be generally admissible.[155] *Harris* adopted that list for evaluating the admissibility of identifications, holding that trial courts must consider it instead of the *Biggers* factors when determining an identification's reliability.[156] The court noted that *Guilbert*'s list was neither exclusive nor static and that expert witnesses could be called to explain any new science to trial courts during pretrial evidentiary hearings, opening the door for courts to consider any scientifically valid indicators of an identification's reliability as those factors are discovered.[157]

4. Massachusetts

Massachusetts has maintained an even more protective rule, which the Supreme Judicial Court originally announced in 1995 in *Commonwealth v. Johnson*.[158] Going further than *Henderson*, *Johnson* requires the suppression of identifications from out-of-court identification procedures upon a defendant's showing that the procedure was suggestive and the police lacked a good reason to use the procedure.[159] What constitutes a good reason to use a showup proce-

---

[155] 49 A.3d at 732.

[156] *Harris*, 191 A.3d 135–37. The considerations listed in *Guilbert* are as follows:

> (1) there is at best a weak correlation between a witness'[s] confidence in his or her identification and the identification's accuracy; (2) the reliability of an identification can be diminished by a witness'[s] focus on a weapon; (3) high stress at the time of observation may render a witness less able to retain an accurate perception and memory of the observed events; (4) cross-racial identifications are considerably less accurate than identifications involving the same race; (5) memory diminishes most rapidly in the hours immediately following an event and less dramatically in the days and weeks thereafter; (6) an identification may be less reliable in the absence of a double-blind, sequential identification procedure; (7) witnesses may develop unwarranted confidence in their identifications if they are privy to postevent or postidentification information about the event or the identification; and (8) the accuracy of an eyewitness identification may be undermined by unconscious transference, which occurs when a person seen in one context is confused with a person seen in another.

Id. at 135–36 (quoting *Guilbert*, 49 A.3d at 732).

[157] *Id.* at 144–45, 144 n.31. The court also noted that this list, composed of estimator variables, has significant commonalities with the set of estimator variables discussed in *Henderson*. *Id.* at 144.

[158] *See* Commonwealth. v. Johnson, 45 N.E.3d 83, 88 (Mass. 2016) (reiterating Massachusetts's standard and describing the procedures and burdens of proof required); Commonwealth v. Johnson, 650 N.E.2d 1257, 1261 (Mass. 1995) (rejecting the *Brathwaite* test and announcing the state's adoption of a per se exclusionary approach). The defendants in the two cases, despite their coincidentally shared surname, are separate people. *See Johnson*, 45 N.E.3d at 83 (identifying the defendant as Kyle L. Johnson); *Johnson*, 650 N.E.2d at 1257 (identifying the defendant as Bruce C. Johnson).

[159] *Johnson*, 45 N.E.3d at 88. The Massachusetts "good reason" standard is also used by the state's courts to evaluate the propriety of first-time in-court identifications, which the Supreme Judicial Court has referred to as "in-court showups." *See* Commonwealth v. Crayton, 21 N.E.3d 157, 169–70 (Mass. 2014) (establishing the need for a "good reason" for in-court identifications, such as if the witness is already personally familiar with the defendant and the identification is not being used to

dure in Massachusetts depends on the facts, including the type of crime and resultant public safety concerns, the need to investigate expediently, and how useful immediate confirmation of a suspect's identity would be in advancing or redirecting an investigation.[160] The Massachusetts court has noted, though, that a requirement for necessity does not correlate to a requirement for exigency or unusual circumstances.[161] The need for a prompt but suggestive identification procedure may be justified by the need to investigate quickly, to take advantage of a witness's fresh memory, or to quickly clear an innocent person and allow the police to continue their search.[162]

In deciding on the necessity test in *Johnson*, the court explicitly rejected the *Brathwaite* test and its focus on reliability.[163] The court held it unacceptable under Article 12 of the Massachusetts Constitution's Declaration of Rights for courts to rely upon a jury to properly weigh an identification from an unnecessarily suggestive procedure.[164] *Johnson* also specifically refuted the Supreme Court's holdings regarding the three interests that it considered when announcing the *Brathwaite* test.[165] In doing so, the Massachusetts court commented (1) that eyewitness testimony is often unreliable and *Brathwaite*'s ad hoc test is inadequately protective,[166] (2) that, unlike per se exclusion, the *Brathwaite* test has almost no deterrent effect on police who might use suggestive procedures,[167] and (3) that *Brathwaite*'s ad hoc approach may be more

---

prove identity, but to demonstrate that the person in court is the same person who the witness is referring to when referencing the defendant's name); *Johnson*, 650 N.E.2d at 1261 (holding that the *Brathwaite* standard does not satisfy Article 12 of the Massachusetts Declaration of Rights, and requiring a per se approach to exclusion).

[160] *Johnson*, 45 N.E.3d at 88; Commonwealth v. Austin, 657 N.E.2d 458, 461 (Mass. 1995). Where an appellate court needs to determine whether a reason is good, the question is a question of law, but the upper court is bound by the trial court's findings of fact. *Austin*, 657 N.E.2d at 461.

[161] *Austin*, 657 N.E.2d at 461.

[162] Commonwealth v. Harris, 479 N.E.2d 690, 692 (Mass. 1985). Massachusetts courts may also invoke "common law principles of fairness" to exclude any identification deemed unreliable, regardless of whether the procedure was arranged by police. *Johnson*, 45 N.E.3d at 89 (quoting Commonwealth v. Jones, 666 N.E.2d 994, 1001 (1996)). Once an identification is excluded as unreliable on fairness grounds, any subsequent identifications by that witness, including in-court identifications, are also per se excluded. *Id.* at 92–93.

[163] *Johnson*, 650 N.E.2d at 1261.

[164] *Id.* at 1260–61.

[165] *See* Manson v. Brathwaite, 432 U.S. 98, 111–13 (1977) (considering how the per se and ad hoc approaches to exclusion would each influence (1) the reliability of identifications, (2) the inclination of police to unnecessarily employ suggestive procedures, and (3) "the administration of justice"); *Johnson*, 650 N.E.2d at 1262–63 (addressing the three interests weighed by the Supreme Court in *Brathwaite*).

[166] *Johnson*, 650 N.E.2d at 1262. Regarding the first interest discussed in *Brathwaite*, the Massachusetts high court echoed the concerns of Justice Marshall's dissent and noted that psychological studies suggest that mistaken identifications are a significant danger that is inadequately mitigated by *Brathwaite*'s holding. *Id.*

[167] *Id.* at 1262–63. Considering the claimed deterrent effect of *Brathwaite*'s standard, the Supreme Judicial Court criticized the standard as weak, observed that *Brathwaite* has not deterred police

harmful to the administration of justice than requiring per se exclusion because of the risks that suggestive procedures pose to innocent suspects.[168] In response to the *Brathwaite* Court's concern that a per se rule would exclude reliable identifications, the Supreme Judicial Court noted that identifications made at procedures conducted after a suggestive procedure may still be admitted if those later identifications are not influenced by the earlier suggestive procedure.[169] In other words, Massachusetts permits subsequent identifications to be admitted under independent source doctrine.[170]

5. Wisconsin

Like Massachusetts, Wisconsin limits the admission of showup identifications to cases in which the procedure was necessary, having announced this doctrine in 2005, in *State v. Dubose*.[171] In renouncing the *Brathwaite* test, the

---

from using suggestive procedures, and pointed to commentary suggesting that nearly any suggestive identification procedure is permissible under *Brathwaite*. *Id.*; *see* David E. Paseltiner, Note, *Twenty-Years of Diminishing Protection: A Proposal to Return to the* Wade *Trilogy's Standards*, 15 HOFSTRA L. REV. 583, 606 (1987) ("Almost any suggestive lineup will still meet reliability standards.").

[168] *Johnson*, 650 N.E.2d at 1263. Addressing the third enumerated interest, the court observed that the *Brathwaite* Court had been exceedingly concerned that guilty parties might go free under a rule mandating the per se exclusion of identifications from unnecessarily suggestive procedures. *Id.* The Massachusetts court opined that the less-protective ad hoc test adopted in *Brathwaite* may actually be more injurious to the interests of justice than a per se rule, given the risk that *Brathwaite* poses to innocent suspects. *See id.* (recalling Justice John Marshall Harlan II's famous concurrence from *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring), in which he wrote that "it is far worse to convict an innocent man than to let a guilty man go free").

[169] *Johnson*, 650 N.E.2d at 1262.

[170] *Id.*; *see also supra* notes 82–90 and accompanying text (discussing independent source doctrine). In 2016, Massachusetts's high court acknowledged that its new understanding of suggestive procedures might require it to eliminate the use of independent source doctrine for the admission of subsequent *in-court* identifications. *See* Commonwealth. v. Johnson, 45 N.E.3d 83, 92 (Mass. 2016) (noting the court's holdings in *Crayton* and *Commonwealth v. Collins*, 21 N.E.3d 528, 534 (Mass. 2014), which together held that in-court identifications are as suggestive as showups and may not be admitted without good reason unless preceded by a confident out-of-court identification). While *Johnson* did not reconsider independent source doctrine, it acknowledged a willingness to do so in the future. *See id.* ("We need not consider in this case whether the reasoning in *Crayton* and *Collins* dictates that we eliminate or revise the independent source doctrine as applied to in-court identifications because the identifications here were not obtained through any fault of the police. We will await an appropriate case to address that issue."). The following year, the court considered the admission of an in-court identification that followed a necessary (and thus admissible) showup identification. Commonwealth v. Dew, 85 N.E.3d 22, 25, 27 (Mass. 2017). In *Dew*, the court held that trial judges have discretion to admit or exclude in-court identifications that follow an admissible and "unequivocal" showup identification. *Id.* at 32. The court did not consider the admission of in-court identifications following *in*admissible showup identifications, so the independent source doctrine's future in Massachusetts remains an open question. *See generally id.* (refraining from mentioning independent source doctrine or discussing in-court identifications that follow inadmissible out-of-court identifications).

[171] State v. Dubose, 2005 WI 126, ¶ 2, 285 Wis. 2d 143, 699 N.W.2d 582 (announcing a new standard specific to the admissibility of showup identifications). The defendant in *Dubose* asked the

Supreme Court of Wisconsin held that *Brathwaite*'s requirement for a judicial inquiry into reliability is not a proper approach because distinguishing between reliable and unreliable identifications is challenging or impossible for a court.[172] The court further held that showups are inherently suggestive.[173] Having rejected *Brathwaite* and its focus on reliability, the court returned to *Stovall v. Denno*'s two-pronged inquiry into necessity and suggestiveness.[174] Building upon its holding that showups are always suggestive, the court fashioned Wisconsin's new rule by reducing the *Stovall* inquiry to the necessity prong alone and announcing that showup identifications are inadmissible unless the showup was necessary.[175]

The Wisconsin court also offered an easily applicable definition of necessity, holding that a showup is necessary only if exigent circumstances or an inability to arrest a suspect for lack of probable cause prevent police from using a lineup or photo array procedure.[176] The *Dubose* court did note that its ruling does not prevent prosecutors from asking a witness who took part in a showup to reidentify the suspect in court.[177] Under independent source doctrine, a Wisconsin court may admit an in-court identification that follows a showup if the prosecution makes a clear and convincing showing that the in-court identification was based on observations untainted by the suggestiveness of the showup procedure.[178]

---

court to require the exclusion of all showup identifications, but the court refused, noting that showups are sometimes necessary to an investigation. *Id.* ¶ 34.

[172] *Id.* ¶ 31. The court further observed that suggestive procedures can alter a witness's memory, rendering it impossible for a court to later determine how accurate an identification might have been if obtained through a nonsuggestive procedure. *Id.* In short, the court recognized that an identification elicited during a suggestive procedure cannot later be objectively analyzed for reliability, because the only available evidence of that reliability may be the witness's memory, which has been tainted by the procedure. *Id.*

[173] *Id.* ¶ 33.

[174] *Id.* ¶¶ 32–33; *see* Stovall v. Denno, 388 U.S. 293, 301–02 (1967) (holding that a procedure that was "unnecessarily suggestive and conducive to irreparable misidentification" raised due process concerns).

[175] *Dubose*, 2005 WI 126, ¶ 33. The court did emphasize that its new rule is "not a per se exclusionary rule"; however, the court appears to mean merely that showups are not banned if a situation warrants their use, not that Wisconsin's rule is somehow different than Massachusetts's rule, which the Massachusetts high court does characterize as a "per se" approach. *See Johnson*, 45 N.E.3d at 88 (referring to Massachusetts's test as "our per se exclusion standard"); *Dubose*, 2005 WI 126, ¶ 34 (holding that showups may still sometimes be required).

[176] *Dubose*, 2005 WI 126, ¶ 33.

[177] *Id.* ¶ 38.

[178] *Id.*; *see supra* notes 82–90 and accompanying text (discussing independent source doctrine and noting scholarly and judicial critiques).

6. New York

The standard articulated by New York's highest court lacks the simplicity of Wisconsin's standard but is similarly focused on necessity.[179] The Court of Appeals of New York has found that showups are inherently suggestive.[180] Based on that finding, the court requires prosecutors to demonstrate that a showup was reasonable before any resultant identification may be introduced.[181] If the state demonstrates that the showup was close to the crime in time and location, or was required by exigent circumstances, then the court will find that the showup was reasonable.[182] After a finding of reasonableness, the prosecution must still show that the procedure was not unduly suggestive by giving evidence about the circumstances of the specific procedure.[183] The courts consider the suggestiveness of a procedure as a mixed question of fact and law, with deference given to the factual findings of the trial court, and a procedure that was unnecessarily suggestive is inadmissible under New York's constitution.[184]

New York's standard on the exclusion of showup identifications was first clearly articulated after *Brathwaite* by the Court of Appeals in *People v. Adams*.[185] In *Adams*, the court held that a showup was unnecessary and suggestive and further held that evidence from unnecessarily suggestive pretrial iden-

---

[179] *See* People v. Ortiz, 686 N.E.2d 1337, 1339 (N.Y. 1997) (reiterating previous holdings that identifications from unnecessarily suggestive procedures require suppression, and explaining the procedural steps and burdens of proof that trial courts must employ to adjudicate unnecessary suggestiveness).

[180] *Id.*

[181] *Id.* The court discusses the requirements to find a suggestive procedure "reasonable," with "reasonable" apparently functioning as New York's term for "necessary" in this context. *Compare* People v. Cedeno, 50 N.E.3d 901, 910 (N.Y. 2016) (noting that a showup is reasonable if "justified by exigency or temporal and spatial proximity"), *with Dubose*, 2005 WI 126, ¶ 33 (holding that a showup is necessary under Wisconsin law only when a lineup or photo array was impossible because of emergency or inability to detain the suspect).

[182] *Cedeno*, 50 N.E.3d at 910 (noting that exigency, as well as proximity to the crime in space and time, are both adequate to show that a showup was reasonable); *Ortiz*, 686 N.E.2d at 1339 (explaining what is required for a showup to be considered reasonable). The Court of Appeals has been explicit that the required closeness in time between the crime and the showup procedure is judged based on the facts of each case, and there is no specific time limit. People v. Brisco, 788 N.E.2d 611, 612 n.* (N.Y. 2003); People v. Johnson, 611 N.E.2d 286, 288 (N.Y. 1993).

[183] *Ortiz*, 686 N.E.2d at 1339.

[184] People v. Marte, 912 N.E.2d 37, 38 (N.Y. 2009) (reiterating the court's ruling from *Adams* that identifications from unnecessarily suggestive police procedures are categorically inadmissible under the New York Constitution); People v. Adams, 423 N.E.2d 379, 384 (N.Y. 1981) (holding that identifications from pretrial identification procedures are never admissible if a procedure was unnecessarily suggestive); *see Brisco*, 788 N.E.2d at 612 (holding that undue suggestiveness is a mixed question).

[185] *Adams*, 423 N.E.2d at 383–84.

tification procedures had long been inadmissible in New York.[186] The court explicitly rejected the prosecutor's *Brathwaite*-based argument that the witnesses' in-court identifications demonstrated that the earlier showup did not cause a risk of irreparable misidentification and that the showup identifications should therefore be admitted.[187] The court explained that New York's constitution confers broader protections than the Federal Constitution and noted that its ruling does not injure the prosecution's ability to present its case, because witnesses can still make in-court identifications under independent source doctrine.[188]

7. Oregon

In 2012, one year after New Jersey's Supreme Court decided *Henderson*, the Supreme Court of Oregon decided *State v. Lawson*.[189] *Lawson* diverged notably from *Brathwaite*, updating Oregon's doctrine with an approach based in state rules of evidence.[190] Prior to *Lawson*, Oregon's courts had admitted identifications from suggestive procedures using the rules laid out in 1979 by the state high court in *State v. Classen*.[191] Those rules resembled the

[186] *Id.* In *Adams*, the defendant and two other men robbed a store, with one of the men being arrested moments after the robbery and the other two, including Adams, being arrested later that day. *Id.* at 380–81. Several hours after the robbery, police brought the three victims into a room at a police station where several officers were physically holding all three suspects. *Id.* at 381. The victims were not sequestered from each other during the identification, and the three suspects were the only people displayed to the victims. *Id.* The victims identified Adams at trial, as did two other witnesses from the robbery. *Id.* The New York Court of Appeals held that the showup had been unnecessarily suggestive. *Id.* at 382–83.

[187] *Id.* at 383. The trial court held, and the Court of Appeals affirmed, that three of the in-court identifications were admissible under the theory that they were based on independent recollections that had not been influenced by the suggestive showup. *Id.* at 384; *see also supra* notes 82–90 and accompanying text (discussing independent source doctrine).

[188] *See Adams*, 423 N.E.2d at 383–84. Adams's conviction was upheld because, of the five witnesses who identified him in court, two had not participated in the prior showup and the other three were permitted offer identification testimony under independent source doctrine. *Id.* at 384. New York continues to use independent source doctrine to admit in-court identifications that follow suggestive pretrial procedures. *See, e.g.*, People v. Wilson, 835 N.E.2d 1220, 1220–21 (N.Y. 2005) (ordering an independent source hearing where the trial court had declined to suppress an in-court identification that followed a suggestive lineup).

[189] State v. Henderson, 27 A.3d 872, 872 (N.J. 2011); State v. Lawson, 291 P.3d 673, 673 (Or. 2012).

[190] *See Lawson*, 291 P.3d at 690–91 (noting that the court had previously looked to the Oregon Evidence Code to determine the admissibility of similar eyewitness evidence, and announcing an admissibility standard based on the Evidence Code for eyewitness identifications).

[191] State v. Classen, 590 P.2d 1198, 1203–04 (Or. 1979) (explaining the test for admitting the results of a suggestive identification and giving the *Biggers* factors, albeit not verbatim or by name); *see also* Neil v. Biggers, 409 U.S. 188, 199–200 (1972) (listing the five *Biggers* factors).

Brathwaite test in form and function, if not wording.[192] *Classen* had prescribed a two-step inquiry wherein courts first determined whether a procedure had been suggestive or had unnecessarily flouted protocols designed to avoid suggestiveness.[193] Although different from the *Brathwaite* test, this first step was similar to *Brathwaite*'s initial inquiry into whether a procedure was unnecessarily suggestive.[194]

When a court using the *Classen* test found that a procedure was actually suggestive or had unnecessarily used a potentially suggestive methodology, the second step required a showing by the prosecution.[195] To avoid exclusion of the identification, the prosecution needed to show that the identification had an independent source (i.e., was based on something other than suggestion from the identification procedure) or that the specific facts of the procedure alleviated the risk that suggestion had caused the identification.[196] This inquiry under *Classen*'s second step paralleled *Brathwaite*'s reliability inquiry and similarly prescribed the *Biggers* factors for determining an identification's reliability and thus admissibility.[197] The Oregon Supreme Court in *Classen* did note, however, that the factors were not a checklist and should be augmented with other relevant factors to aid in determining an identification's reliability.[198]

In *Lawson*, the Oregon high court surveyed available scientific research and held that the *Classen* test and the incorporated *Biggers* factors were inadequate to ensure the exclusion of unreliable identifications, were sometimes contrary to science, and were contrary to some of Oregon's laws of evidence.[199] To replace the *Classen* test, the court announced a set of procedures based on its interpretation of the Oregon Evidence Code (OEC).[200] *Lawson*'s

---

[192] *See Lawson*, 291 P.3d at 680–81 (Or. 2012) (explaining the operation of the *Classen* test and giving the *Biggers* factors as articulated in *Classen*); *Classen*, 590 P.2d at 1203–04 (setting forth the *Classen* test).

[193] 590 P.2d at 1203. The *Classen* court is careful to note that an identification procedure's necessity is not related to its suggestiveness, but that necessity must be determined to apply the federal *Brathwaite* test. *Id.* at 1203 n.7.

[194] *See* Manson v. Brathwaite, 432 U.S. 98, 109, 113–14 (1977) (progressing to a consideration of an identification's reliability only after determining that the identification procedure was unnecessarily suggestive); *Classen*, 590 P.2d at 1203 (holding that courts must consider whether suggestion tainted an identification only after an initial finding that the procedure was suggestive or unnecessarily ignored procedures designed to prevent suggestion).

[195] 590 P.2d at 1203.

[196] *Id.*

[197] *See id.* (listing the *Biggers* factors for use in determining admissibility under the second step of the *Classen* test and citing to *Brathwaite*); *see also* Neil v. Biggers, 409 U.S. 188, 199–200 (1972) (listing the five *Biggers* factors and mandating their use in determining an identification's reliability).

[198] 590 P.2d at 1203–04. The court suggested several examples of additional factors that should be considered when appropriate, such as a witness's age and "sensory acuity," whether a witness's job made the witness pay special attention to a person's features, and how often the witness interacted with individuals having similar features. *Id.*

[199] State v. Lawson, 291 P.3d 673, 688 (Or. 2012).

[200] *Id.* at 691.

procedure requires prosecutors to respond to a challenge to the admissibility of a generally admissible identification by showing that (1) the identification is based on the witness's personal knowledge, as required by OEC 602, and (2) that the identification is "rationally based" on something that the witness actually perceived and would be "helpful to the trier of fact," as required by OEC 701.[201] If the prosecution is successful in these showings (having necessarily already shown that the evidence is generally relevant), then the identification is admissible unless the defendant can show that the evidence is substantially more prejudicial than probative, which would exclude the evidence under OEC 403.[202] Examining the identification for its prejudicial or probative value permits a comprehensive consideration of its accuracy, allowing courts to exclude any unreliable identification, even without the trigger of a suggestive police procedure.[203]

Ultimately, the *Lawson* court gave judges broad discretion to use Oregon's evidentiary rules to exclude or otherwise remedy unreliable identifications.[204] *Lawson* discusses a sizable list of estimator and system variables to inform evidentiary decisions by lower courts but leaves those courts considerable latitude in applying that knowledge and choosing remedies.[205]

Although Oregon's approach is novel in that it derives its authority from the state's rules of evidence, *Lawson*'s focus on evidentiary reliability means that identifications derived from unnecessarily suggestive police procedures

---

[201] State v. Collins, 300 P.3d 238, 243 (Or. App. 2013) (quoting *Lawson*, 291 P.3d at 697) (summarizing the *Lawson* framework); *see* OR. REV. STAT. §§ 40.315, 40.405 (2017) (containing Oregon Evidence Code (OEC) 602 and 701, respectively). *Lawson*'s discussion of what each rule of evidence may require is long, nuanced, and exceeds the scope of this Note. *See* 291 P.3d at 691–95 (explaining how Oregon's rules of evidence interact to form *Lawson*'s framework). For example, the *Lawson* court treats an identification as lay opinion testimony, holding under OEC 701 that a witness's description of an identifying feature such as a tattoo might be admitted while the actual identification is excluded as an inference not helpful to the trier of fact, because the jury could independently infer the identification from the tattoo's description. § 40.405; *Lawson*, 291 P.3d at 692–93.

[202] *Lawson*, 291 P.3d at 694; *see* §§ 40.155, 40.160 (containing OEC 402 and 403, respectively). OEC 402 bars the admission of irrelevant evidence, while OEC 403 permits the exclusion of relevant evidence if it is more prejudicial than probative. §§ 40.155, 40.160.

[203] *Lawson*, 291 P.3d at 688–89 ("[T]here is no reason to hinder the analysis of eyewitness reliability with purposeless distinctions between suggestiveness and other sources of unreliability."); *id.* at 696–97 (summarizing *Lawson*'s procedure without mention of a requirement for improper state action).

[204] *Id.* at 697. Under *Lawson*, courts have the discretion to fashion remedies less severe than exclusion if an identification is eligible for exclusion under OEC 403. *Id.* The *Lawson* court also notes that exclusion is likely to be an uncommon remedy and predicts that defendants will prefer to expose the causes of misidentifications using cross-examination, expert witnesses, and jury instructions, rather than seeking to clear the high bar required for exclusion. *Id.*

[205] *See id.* at 685–88, 697 (listing system and estimator variables and noting the importance of correctly understanding the science of eyewitness identification). The court comments that its specific discussion of system and estimator variables is not intended as immutable law. *Id.* at 685. Rather, the court explains, all parties to the criminal justice system must understand current research on eyewitness identifications. *Id.*

may still be admitted.[206] The high courts of Alaska, Connecticut, and New Jersey similarly permit the admission of identifications from suggestive procedures if courts view the identifications as reliable.[207] In contrast, Massachusetts, New York, and Wisconsin categorically exclude identifications obtained through unnecessary showups.[208]

B. States with Minimal Departures from the Brathwaite *Test*

The majority of state high courts apply the federal standard that the Supreme Court reiterated in *Brathwaite*.[209] Within that majority, five courts have developed additions, modifications, or semantic distinctions that alter the *Brathwaite* test, typically by modifying the *Biggers* factors.[210] In chronological order of adoption, the states using modified versions of the *Brathwaite* doc-

---

[206] *See, e.g.*, *Collins*, 300 P.3d at 244, 246 (holding that a police identification procedure was unnecessarily suggestive, but upholding the admission of the resultant identification after applying the *Lawson* test).

[207] *See* Young v. State, 374 P.3d 395, 427 (Alaska 2016) (adopting a new reliability-focused standard and noting that it closely follows *Henderson*'s standard); State v. Harris, 191 A.3d 119, 143–44 (Conn. 2018) (adopting a reliability-focused standard that is largely based on *Henderson*'s standard); State v. Henderson, 27 A.3d 872, 920 (N.J. 2011) (holding that the defendant must show a misidentification to be substantially likely before an identification will be excluded).

[208] Commonwealth v. Johnson, 650 N.E.2d 1257, 1260–61 (Mass. 1995) (holding that Article 12 of the Massachusetts Declaration of Rights requires the exclusion of evidence from any unnecessarily suggestive identification procedure); People v. Adams, 423 N.E.2d 379, 384 (N.Y. 1981) (holding that identifications from unnecessarily suggestive pretrial identification procedures are never admissible in New York); State v. Dubose, 2005 WI 126, ¶ 33, 285 Wis. 2d 143, 699 N.W.2d 582 (holding showup identifications to be admissible in Wisconsin only if the procedure was necessary).

[209] *See, e.g.*, *Ex parte* Appleton, 828 So. 2d 894, 900, 903 (Ala. 2001) (applying the *Brathwaite* test and *Biggers* factors to find error in the admission of a showup); People v. Kennedy, 115 P.3d 472, 483 (Cal. 2005) (applying the *Brathwaite* test and using the *Biggers* factors, albeit without attributing the factors to *Biggers*), *disapproved on other grounds by* People v. Williams, 233 P.3d 1000 (Cal. 2010); Walton v. State, 208 So. 3d 60, 65–66 (Fla. 2016) (applying the *Brathwaite* test and using the *Biggers* factors); State v. Taft, 506 N.W.2d 757, 762 (Iowa 1993) (hewing to the federal standard and applying the *Biggers* factors without attributing the standard or factors to the Supreme Court).

[210] *See* Bowden v. State, 761 S.W.2d 148, 153–54 (Ark. 1988) (articulating six reliability factors similar to the *Biggers* factors, but omitting the witness's degree of attention as a factor and including as factors any previous failure of the witness to identify the suspect or previous identification of someone other than the suspect); State v. Almaraz, 301 P.3d 242, 252–53 (Idaho 2013) (adhering to the *Brathwaite* test, but requiring courts to consider all relevant system variables when adjudicating a procedure's suggestiveness and all relevant estimator variables along with the *Biggers* factors as part of the reliability inquiry); State v. Hunt, 69 P.3d 571, 576 (Kan. 2003) (adopting Utah's model, which uses the *Brathwaite* test with a refined set of reliability factors); State v. Ramirez, 817 P.2d 774, 780–81 (Utah 1991) (holding that the Utah Constitution requires the use of the reliability factors first articulated in *State v. Long*, 721 P.2d 483 (Utah 1986), and noting that those factors are more rigorous than the *Biggers* factors); State v. Discola, 2018 VT 7, ¶ 30–31, 184 A.3d 1177 (noting that the Supreme Court of Vermont adopted the *Brathwaite* test and the *Biggers* factors in 1979, acknowledging the modern scientific understanding that witness certainty is not linked to accuracy, and removing witness certainty as a factor to be considered under Vermont's version of the *Biggers* factors).

trine are Arkansas, Utah, Kansas, Idaho, and Vermont.[211] This Note discusses these five states in that order.[212] Although beyond the scope of this Note, it bears mention that the U.S. Court of Appeals for the Armed Forces has also added a factor to *Brathwaite* when evaluating showup identifications.[213]

1. Arkansas

Since the 1970s, the Arkansas Supreme Court has provided varied statements of reliability factors that resemble, but do not always precisely track, the *Biggers* factors.[214] Although hardly the first Arkansas case to provide a similar set of factors, *Bowden v. State* evaluated the reliability of an in-court identification using six enumerated factors that are now commonly quoted in Arkansas case law when evaluating both in-court and out-of-court identifications.[215] In *Bowden*, the state high court listed four factors that overlap with the *Biggers* factors but omitted *Biggers*'s second factor, "the witness'[s] degree of attention."[216] *Bowden*'s list also contains two additional factors: whether the witness

---

[211] *See supra* note 210 (citing the state supreme court cases announcing the alterations to the federal doctrine adopted by Arkansas, Idaho, Kansas, Utah, and Vermont).

[212] *See infra* notes 214–244 and accompanying text (discussing the modified *Brathwaite* tests used in Arkansas, Utah, Kansas, Idaho, and Vermont).

[213] *See* United States v. Rhodes, 42 M.J. 287, 291 (C.A.A.F. 1995) (using the *Biggers* factors to evaluate the reliability of a showup identification, but adding as a sixth factor the "likelihood of other individuals in the area at the time of the offense matching the description given by the victim"); United States v. Coleman, No. ACM 39021, 2017 WL 4004130, at *6 (A.F. Ct. Crim. App. Aug. 15, 2017), *review denied*, 77 M.J. 134 (C.A.A.F. 2017) (noting *Rhodes*'s addition of the sixth factor). *But see* United States v. Criswell, 78 M.J. 136, 145–46 (C.A.A.F. 2018) (finding no error where a military judge's consideration of the sixth factor was not explicit). The Military Rules of Evidence also partially codify *Brathwaite*'s doctrine. *Rhodes*, 42 M.J. at 290 & n.5.

[214] *See, e.g.*, Mayes v. State, 571 S.W.2d 420, 423 (Ark. 1978) ("Many factors are to be considered in determining whether an in-court identification is tainted by pretrial occurrences. Among them are: the opportunity of the witness to observe the criminal act and the perpetrator of it at the time; the existence of discrepancies in pre-confrontation descriptions and the accused's actual description; any pretrial misidentification; lapse of time between the alleged criminal act and any lineup or 'show-up' identification; the facts disclosed concerning a 'show-up' or lineup, and the certainty of the identification of the accused by the witness."). *But see, e.g.*, Maulding v. State, 757 S.W.2d 916, 918 (Ark. 1988) (providing the *Biggers* factors without modification); McCraw v. State, 561 S.W.2d 71, 72 (Ark. 1978) (quoting the *Biggers* factors directly from *Brathwaite*).

[215] *Bowden*, 761 S.W. 2d at 153–54 (providing six factors by which to judge an in-court identification); *see Mayes*, 571 S.W.2d at 423 (providing a set of factors resembling those later enumerated in *Bowden*); *see, e.g.*, Fields v. State, 76 S.W.3d 868, 871–72 (Ark. 2002) (citing *Bowden*'s factors as applicable to out-of-court identifications); Van Pelt v. State, 816 S.W.2d 607, 610–11 (Ark. 1991) (applying the factors from *Bowden* to find an in-court identification reliable).

[216] *See* Neil v. Biggers, 409 U.S. 188, 199–200 (1972) (listing the five *Biggers* factors); *Bowden*, 761 S.W. 2d at 153–54 (listing six reliability factors). The *Biggers* factors are (1) the witness's chance to see the perpetrator, (2) the witness's "degree of attention," (3) the accuracy of any description the witness gave before the identification, (4) the witness's certainty, and (5) the time elapsed between the witness seeing the perpetrator and the identification procedure. 409 U.S. at 199–200. The factors given in *Bowden* are (1) the witness's chance to see the crime, (2) the accuracy of any description the witness gave before the identification, (3) whether the witness identified anyone else as the perpetrator

was previously unable to identify the defendant and whether the witness previously identified a different person as the perpetrator.[217] As applied to pretrial identifications, Arkansas's inquiry appears functionally similar to the *Brathwaite* test, but it is phrased differently and articulates no requirement that a suggestive procedure have been unnecessary in order to warrant exclusion.[218] When an Arkansas court finds that an out-of-court identification procedure was suggestive, it uses the reliability evaluation discussed in *Bowden* to determine the identification's admissibility.[219]

2. Utah

Utah's Supreme Court first revised the *Biggers* factors in 1986 in *State v. Long*, as part of an appeal that routinized the use of cautionary jury instructions about eyewitness identifications.[220] Like *Biggers*, *Long* considers the witness's opportunity to view the perpetrator and attention during the crime but discards *Biggers*'s last three factors (the accuracy of a witness's pre-identification descriptions, the witness's certainty, and the time between the crime and the identification), instead focusing on the witness's sensory and mental faculties, the consistency of the witness's identification and the possible role of suggestion, and how the nature of the observed event would affect a witness's account.[221] Five years after *Long*, in *State v. Ramirez*, the court ap-

---

before identifying the defendant, (4) the witness's certainty, (5) whether the witness was ever previously unable to identify the defendant, and (6) the time between the crime and the identification procedure. 761 S.W. 2d at 153–54.

[217] *See Biggers*, 409 U.S. at 199–200 (listing the *Biggers* factors); *Bowden*, 761 S.W. 2d at 153–54 (listing six reliability factors, including two that do not match the *Biggers* factors). There is no clear evolution or explicit alteration of the *Biggers* factors in Arkansas case law. *See, e.g.*, *Bowden*, 761 S.W. 2d at 153–54 (listing six reliability factors without further comment but with citations to *Manson v. Brathwaite*, 432 U.S. 98 (1977), *United States v. Wade*, 388 U.S. 218 (1967), *Maulding*, and *Banks v. State*, 676 S.W.2d 459 (Ark. 1984)); *cf. Brathwaite*, 432 U.S. at 114 (listing only the *Biggers* factors); *Wade*, 388 U.S. at 241 (providing examples of factors by which to judge if a lineup conducted outside the presence of counsel tainted a subsequent in-court identification, thus forming a nonexhaustive list similar but not identical to the list later provided in *Bowden*); *Maulding*, 757 S.W.2d at 918 (providing the *Biggers* factors without modification or addition); *Banks*, 676 S.W.2d at 460 (listing the *Biggers* factors with the omission of the witness's degree of attention as a factor).

[218] *See Fields*, 76 S.W.3d at 871 (holding that an identification procedure violates due process when it is so suggestive that it would be impossible for the witness to identify anyone other than the presented suspect as the perpetrator).

[219] *Id.* at 871–72 (explaining the reliability inquiry and providing the factors from *Bowden*); *see Bowden*, 761 S.W. 2d at 153–54 (listing six factors).

[220] *See* State v. Long, 721 P.2d 483, 491–93 (Utah 1986) (criticizing the *Biggers* factors as contradicted by scientific consensus and providing a new set of reliability factors to be addressed by jury instructions on eyewitness reliability).

[221] *See Biggers*, 409 U.S. at 199–200 (listing the *Biggers* factors); *Long*, 721 P.2d at 493 (providing the *Long* factors). The *Long* factors are (1) the witness's chance to see the perpetrator during the crime, (2) how much attention the witness paid to the perpetrator, (3) the witness's ability to observe, considering both mental and physical faculties, (4) if the witness identified the suspect without delay

plied its new factors to determine the reliability of a showup identification.[222] The *Ramirez* court characterized the *Long* factors as similar to the *Biggers* factors but noted two distinctions.[223] First, the court called attention to the omission of witness certainty from the *Long* factors and restated *Long*'s criticism of witness certainty as being unrelated to reliability.[224] Second, the court noted that the factors instruct courts to specifically look for the effects of suggestion.[225] Interestingly, the *Long* factors omit the amount of time between the crime and the identification, which is one of the more scientifically sound *Biggers* factors.[226]

Ramirez applied the *Long* factors to determine the reliability of a showup, holding that admitting an unreliable identification would violate the Utah Constitution's due process guarantee.[227] Absent from *Ramirez* is a discussion of the necessity of the showup.[228] Utah's Supreme Court does not appear to include a procedure's necessity in state due process inquiries.[229] Instead, the court divides its analysis, first considering necessity and suggestiveness as part of a federal due process inquiry, and then considering reliability under the *Long* factors as part of a state due process test.[230] The court has held that the *Long*

---

and was unwavering in the identification or if the identification resulted from suggestion, and (5) the type of crime observed and if the witness was likely to accurately observe, recall, and report it. 721 P.2d at 493. The court also notes that the fifth factor is intended to include the elements of how extraordinary the witness found the event while it was happening and if the witness and the perpetrator were of the same race. *Id.*

[222] *See* State v. Ramirez, 817 P.2d 774, 781–84 (Utah 1991) (quoting the factors from *Long* and then applying each factor in turn to the facts at issue).

[223] *Id.* at 781.

[224] *Id.*

[225] *Id.*

[226] *See Biggers*, 409 U.S. at 199–200 (listing the *Biggers* factors); *Ramirez*, 817 P.2d at 781 (listing the *Long* factors); Douglass & Steblay, *supra* note 120, at 867 (criticizing three of the *Biggers* factors as subject to distortion by feedback given to witnesses after an identification, but not criticizing *Biggers*'s inclusion of the time between the crime and the identification as a factor); Gary L. Wells & Donna M. Murray, *What Can Psychology Say About the* Neil v. Biggers *Criteria for Judging Eyewitness Accuracy?* 68 J. APPLIED PSYCHOL. 347, 356 (1983) (concluding that there is nothing inherently incorrect about using time between the crime and the identification as a reliability factor, but noting that the factor could be refined to reflect intervening stimuli that can accelerate memory decay). Experts note that the length of time between the crime and the procedure is important but matters less than the effect of suggestive influences encountered during that period. Wells & Murray, *supra*, at 356.

[227] *See Ramirez*, 817 P.2d at 781–84 (applying the *Long* factors and holding that admitting a showup identification did not violate the Utah Constitution because the trial court's factual findings supported a holding that the identification was reliable).

[228] *See id.* at 784 (containing the only instance of the phrase "unnecessarily suggestive" in the opinion, but discussing only the suggestiveness of the procedure at issue and making no further mention of its necessity). *See generally id.* (making only one reference to an identification procedure's necessity, and never using any variant of the term "permissible" to discuss the procedure at issue).

[229] *See id.* at 784 (considering a procedure's suggestiveness without considering its necessity).

[230] *See, e.g.*, State v. Hubbard, 2002 UT 45, ¶¶ 22–28, 48 P.3d 953 (dividing the court's inquiry into two separate sections for federal and state due process, with the former section looking for im-

factors improve upon the *Biggers* factors, so Utah's reliability inquiry exceeds federal requirements and may replace the reliability portion of the *Brathwaite* test.[231]

3. Kansas

In 2003, the Supreme Court of Kansas decided *State v. Hunt*, adopting the *Long* factors from *Ramirez* and declining to adopt the per se exclusionary tests of Massachusetts and New York.[232] The court was clear that its adoption of Utah's factors should be viewed as an improvement upon *Biggers*, rather than a renunciation of the federal doctrine.[233] This distinction became central the following year in *State v. Trammell*, wherein the court held that its adoption of the factors from *Ramirez* did not include *Ramirez*'s rejection of witness certainty as a factor.[234] In *Trammell*, the court added witness certainty back to the factors and renumbered some of *Hunt*'s commentary, yielding a set of eight factors.[235] The *Hunt* factors, as *Trammell* calls them, are a verbatim recitation of the five *Biggers* factors supplemented with three additional factors, being (6) the witness's physical and mental ability to observe the crime, (7) whether the identification was immediate and unwavering or resulted from suggestion,

---

permissible suggestiveness and the latter applying the *Long* factors); State v. Lopez, 886 P.2d 1105, 1111–13 (Utah 1994) (considering a photo array's federal due process implications by inspecting for impermissible suggestiveness and then considering a parallel state due process claim by applying the *Long* factors to determine the identification's reliability).

[231] *Ramirez*, 817 P.2d at 780.

[232] State v. Hunt, 69 P.3d 571, 576 (Kan. 2003) (rejecting the defendant's request that the court adopt a per se exclusionary model and instead adopting the factors from *Ramirez*).

[233] *Id.*

[234] *See* State v. Trammell, 92 P.3d 1101, 1107 (Kan. 2004) (holding that *Hunt* did not reject *Biggers*, so the defendant was incorrect to suggest that the new "*Hunt* factors" invalidated a jury instruction that included a witness-certainty factor); *see also* State v. Mitchell, 275 P.3d 905, 911 (Kan. 2012) (holding that witness certainty remains one of the eight *Hunt* factors that must be used to determine the reliability of eyewitness identifications).

[235] *Trammell*, 92 P.3d at 1108. As enumerated in *Trammell*, the *Hunt* factors are (1) the witness's chance to see the perpetrator during the crime, (2) how much attention the witness paid, (3) how accurately the witness described the suspect before the identification procedure, (4) the witness's certainty, (5) how much time elapsed between the crime and the identification, (6) the witness's ability to observe, considering both mental and physical faculties, (7) if the witness identified the suspect without delay and was unwavering in the identification or if the identification resulted from suggestion, and (8) the nature of the event observed and if the witness was likely to accurately observe, recall, and report it. *Id. Hunt* originally enumerated the factors from *Ramirez* as (1) the witness's chance to see the perpetrator during the crime, (2) how much attention the witness paid to the perpetrator, (3) the witness's ability to observe, considering both mental and physical faculties, (4) if the witness identified the suspect without delay and was unwavering in the identification or if the identification resulted from suggestion, and (5) the nature of the event observed and if the witness was likely to accurately observe, recall, and report it. *Hunt*, 69 P.3d at 576. Mirroring the Utah Supreme Court in *Long* and *Ramirez*, Kansas's Supreme Court in *Hunt* also notes that the fifth factor must include how extraordinary the witness found the incident when it occurred and if the witness and the perpetrator were of the same race. *Id.*; *Ramirez*, 817 P.2d at 781; State v. Long, 721 P.2d 483, 493 (Utah 1986).

and (8) whether the type of event witnessed might influence the accurate perception, recall, and description of the event.[236] The combined effect of recent rulings is that Kansas courts apply the unaltered first part of the federal test by looking for unnecessary suggestiveness, but, if they reach the question of reliability, they consider it using the *Biggers* factors augmented with the three novel *Hunt* factors.[237]

4. Idaho

Idaho's Supreme Court has also added to the *Brathwaite* standard, but it has not changed or augmented the language of the *Biggers* factors.[238] In *State v. Almaraz*, the court noted recent research on eyewitness reliability and held that courts should consider system variables when determining whether a procedure was overly suggestive and should consider estimator variables as part of applying the *Biggers* factors.[239] In making this ruling, the court explicitly refrained from altering the existing test, instead providing general guidance to lower courts by discussing the current scientific understanding of eyewitness identification.[240] In practice, the court has continued to apply the *Brathwaite* test and the *Biggers* factors without much mention of underlying system and estimator variables, although it is difficult to gauge the effects of *Almaraz* without data on how many identifications are now excluded.[241]

---

[236] *See* Neil v. Biggers, 409 U.S. 188, 199–200 (1972) (listing the five *Biggers* factors); *Trammell*, 92 P.3d at 1108 (listing the eight *Hunt* factors); *see also supra* note 235 (listing the *Hunt* factors).

[237] State v. Corbett, 130 P.3d 1179, 1190 (Kan. 2006) (explaining how Kansas courts determine if an identification warrants exclusion).

[238] State v. Almaraz, 301 P.3d 242, 252–53 (Idaho 2013).

[239] *Id.*

[240] *Id.* at 253 (holding that the court is not changing the federal standard that it adopted in *State v. Hoisington*, 657 P.2d 17, 25–26 (Idaho 1983), but is providing a discussion of system and estimator variables as context to assist trial courts in applying the existing standard). Idaho used the *Brathwaite* test shortly after it was announced in 1978 to evaluate the admission of an in-court identification subsequent to a suggestive out-of-court procedure, but *Hoisington* explicitly adopted the test for the admission of identifications from suggestive out-of-court procedures. *See Hoisington*, 657 P.2d at 25–26 (adopting the federal standard to evaluate the admissibility of out-of-court identifications from suggestive procedures); State v. Crawford, 577 P.2d 1135, 1151–52 (Idaho 1978) (citing *Brathwaite*'s rearticulation of the federal standard to uphold the admission of an in-court identification made after a suggestive out-of-court procedure).

[241] *See, e.g.*, Wurdemann v. State, 390 P.3d 439, 444–46 (Idaho 2017) (using the typical *Brathwaite* test with the *Biggers* factors to find a showup identification inadmissible, but making no explicit consideration of system or estimator variables).

5. Vermont

Vermont is the second-most-recent state to alter its approach to *Brathwaite* and *Biggers*.[242] In January of 2018, Vermont's Supreme Court reexamined the *Biggers* factors in *State v. Discola* and explicitly removed witness confidence as a factor.[243] The court left undisturbed the other aspects of the *Brathwaite* test, which it had adopted in 1979 in *State v. Kasper*.[244]

III. IDENTIFICATIONS FROM UNNECESSARY SHOWUPS MAY AND SHOULD BE CATEGORICALLY EXCLUDED

The current *Brathwaite* test will exclude a pretrial identification only if the procedure (1) was conducted by police, (2) was suggestive in nature, (3) was unnecessary, and (4) created a substantial likelihood of misidentification (i.e., was unreliable).[245] This Part demonstrates that current jurisprudence and factual scientific understanding integrate to establish that showups, by their nature, meet all but the third criterion of the *Brathwaite* test.[246] Thus, the test for admitting a showup identification may be reduced to a simple inquiry into the procedure's necessity without altering the underlying doctrine.[247]

---

[242] *See* State v. Discola, 2018 VT 7, ¶¶ 30–31, 184 A.3d 1177 (noting the scientific evidence demonstrating that witness confidence is a poor indicator of reliability and discarding witness certainty as a factor); *supra* notes 97, 210 (discussing the seven states that have abandoned the federal test and the five states that have modified it, respectively, with Connecticut being the most recent state to alter the federal standard, followed by Vermont).

[243] *Discola*, 2018 VT 7, ¶¶ 30–31.

[244] *See id.* ¶¶ 27, 30–31 (articulating and applying the *Brathwaite* test and the *Biggers* factors with the explicit omission of witness confidence, and mentioning *State v. Kasper*, 404 A.2d 85 (Vt. 1979), as the case in which Vermont had adopted the *Brathwaite* test); *Kasper*, 404 A.2d at 90 (adopting and applying the *Brathwaite* test, including the *Biggers* factors), *overruled by Discola*, 2018 VT 7.

[245] *See* Perry v. New Hampshire, 565 U.S. 228, 238–39 (2012) (restating the *Brathwaite* test and clarifying that a suggestive and unnecessary identification procedure raises due process concerns only when conducted by police). It should be noted that courts most commonly refer to the *Brathwaite* test as a two-part process. *See, e.g.*, *id.* at 253–54 (Sotomayor, J., dissenting) (referring to a "two-step inquiry" consisting first of the defendant showing that the identification procedure was impermissibly suggestive, and second of an inquiry into the identification's reliability using the *Biggers* factors). This Note divides the test into four criteria for analysis and clarity, not out of adherence to any court's enumeration of the test's elements. *See supra* notes 22–23 and accompanying text (introducing this Note's division of the *Brathwaite* test into four elements).

[246] *See infra* notes 248–270 and accompanying text (explaining that showups are always police conducted, suggestive, and substantially likely to cause misidentifications).

[247] *See supra* notes 171–178 and accompanying text (discussing Wisconsin's approach, which reduces the state's inquiry to a strict consideration of necessity, in part by holding that showups inherently fulfill the *Brathwaite* test's suggestiveness requirement).

A. Showups Are Definitionally Police Conducted and Are Inherently Suggestive

Showups are an investigative technique specific to law enforcement and thus meet the first requirement of the *Brathwaite* test as clarified in *Perry v. New Hampshire*: that the procedure at issue must be conducted by the state.[248] Although instances of civilians identifying a suspect on the street do occur—and such identifications may well share showups' dismal record for accuracy—such incidents do not fall under the definition of a showup and so are not part of the simplification proposed by this Note.[249]

With regard to suggestiveness—the second criterion for exclusion under *Manson v. Brathwaite*—at least ten circuits consider showups to be inherently suggestive.[250] There is similarly broad agreement among researchers that the

---

[248] *Perry*, 565 U.S. at 232–33 (requiring state action—specifically law enforcement activity—to trigger an application of the *Brathwaite* test). *Showup*, BLACK'S LAW DICTIONARY (10th ed. 2014) (identifying showups as a police procedures).

[249] *Showup*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see* CONVICTING THE INNOCENT, *supra* note 5, at 54–55 (noting how often false convictions involve identifications obtained through showups); Amy D. Trenary, Note, State v. Henderson*: A Model for Admitting Eyewitness Identification Testimony*, 84 U. COLO. L. REV. 1257, 1259 (2013) (discussing the case of McKinley Cromedy, who was falsely convicted of rape after the victim saw him on the street eight months after the attack and mistakenly identified him as her rapist); *see, e.g.*, *Perry*, 565 U.S. at 234 (describing a witness's identification of Perry outside the context of a police identification procedure). Showups are inarguably inaccurate: out of a sample of 161 false convictions, approximately one-third involved showup identifications. CONVICTING THE INNOCENT, *supra* note 5, at 54–55; *see infra* note 270 and accompanying text (noting studies suggesting that roughly one-quarter to one-half of showups cause misidentifications).

[250] *See Perry*, 565 U.S. at 238–39 (restating the *Brathwaite* test); United States v. Winfrey, 403 F. App'x 432, 435 (11th Cir. 2010) (holding showups to be inherently suggestive); United States v. De Leon-Quinones, 588 F.3d 748, 754 (1st Cir. 2009) (referring to showups as "classically suggestive" procedures); Brisco v. Ercole, 565 F.3d 80, 88 (2d Cir. 2009) (holding showups to be inherently suggestive); United States v. Gaines, 200 F. App'x 707, 711 (9th Cir. 2006) (holding that showups are inherently suggestive but are permissible if the identification is not likely to cause a mistaken identification); United States v. Brownlee, 454 F.3d 131, 138 & n.4 (3d Cir. 2006) (holding showups to be inherently suggestive and suggesting that in *Stovall v. Denno*, 388 U.S. 293 (1967), the Supreme Court held a showup to be inherently suggestive); United States v. Hadley, 671 F.2d 1112, 1115 (8th Cir. 1982) (holding showups to be inherently suggestive); Summitt v. Bordenkircher, 608 F.2d 247, 252 (6th Cir. 1979) (holding showups to be inherently suggestive), *aff'd sub nom.* Watkins v. Sowders, 449 U.S. 341 (1981); Allen v. Estelle, 568 F.2d 1108, 1110, 1112 & n.7 (5th Cir. 1978) (holding that a showup was inherently suggestive and citing other circuits' holdings that showups are suggestive); United States *ex rel.* Kirby v. Sturges, 510 F.2d 397, 403 (7th Cir. 1975) (holding showups to be inherently suggestive); United States v. Crawford, 478 F.2d 670, 670 (D.C. Cir. 1973) (referring to showups as inherently suggestive). *But see* United States v. Porter, 338 F. App'x 300, 304–05 (4th Cir. 2009) (holding that showup identifications may be suggestive but "are not per se suggestive"). The Tenth Circuit has not explicitly held that showups are inherently suggestive, but there is some evidence that the court may understand that they are. *See* United States v. Thompson, 524 F.3d 1126, 1136 (10th Cir. 2008) (noting the suggestiveness of an in-court identification procedure where the defendant was the only black man present, but holding that the procedure was constitutionally permissible); United States v. Bredy, 209 F.3d 1193, 1195 (10th Cir. 2000) (referring to a showup as suggestive without explaining why, but expressing doubt that the showup was unnecessari-

procedure has a profound prejudicial effect.[251] The Supreme Court has never explicitly characterized showups as inherently suggestive, but over fifty years ago in *Stovall v. Denno*, the Court was already aware that showups were "widely condemned."[252] The significant number of state and circuit courts that have held showups to be per se suggestive and the agreement of the scientific community demonstrate that showups are scientifically and legally understood to be inherently suggestive.[253] Given that showups are also definitionally police conducted, all showups satisfy the first two criteria for exclusion under *Brathwaite*.[254]

B. Evaluating Reliability: Showups Always Carry a Substantial Likelihood of Misidentification

Even in jurisdictions that hold showups to be inherently suggestive, courts often punctuate applications of the *Brathwaite* test by holding that admitting a showup identification does not violate due process so long as the identification is judged reliable.[255] Decisions frequently quote this proposition directly from *Brathwaite*.[256] In the same paragraph as that oft-quoted passage, the *Brathwaite* Court clarified the meaning of reliability, equating it with there being "no substantial likelihood of misidentification."[257] This Section consid-

---

ly suggestive). The Federal Circuit has not opined on showups, as its limited subject-matter jurisdiction does not include criminal appeals. *See* 28 U.S.C. § 1295 (2012) (defining the jurisdiction of the Federal Circuit).

[251] Yarmey et al., *supra* note 114, at 459.

[252] 388 U.S. at 302.

[253] Turtle, *supra* note 19, at 365 (noting that most scientists believe that showups are inherently suggestive); *see supra* note 250 (surveying the strong majority of circuits that have explicitly held showups to be inherently suggestive); *see, e.g.*, Slaton v. State, 510 N.E.2d 1343, 1348 (Ind. 1987) (noting the Indiana Supreme Court's repeated recognition that showups are inherently suggestive); Commonwealth v. Parker, 409 S.W.3d 350, 353 (Ky. 2013) (holding that showups are inherently suggestive); State v. Nigro, 2011 ME 81, ¶ 22, 24 A.3d 1283, 1289 (noting that many courts, including Maine's high court, have found single-photo identifications to be inherently suggestive); Taylor v. State, 371 P.3d 1036, 1044 (Nev. 2016) (holding that showups are inherently suggestive); State v. Griffin, No. 2013-0195, 2014 WL 11641029, at *1 (N.H. Sept. 19, 2014) (holding that showups are inherently suggestive); People v. Ortiz, 686 N.E.2d 1337, 1339 (N.Y. 1997) (holding that showups are inherently suggestive); State v. Addai, 2010 ND 29, ¶ 28, 778 N.W.2d 555, 566 (holding that showups are inherently suggestive).

[254] *See Perry*, 565 U.S. at 238–39 (explaining the *Brathwaite* test); *supra* notes 248–253 and accompanying text (demonstrating that showups are always police conducted and are inherently suggestive).

[255] *See, e.g.*, *Winfrey*, 403 F. App'x at 435 (holding showups to be inherently suggestive and quoting *Brathwaite* for the proposition that admitting a showup identification is not a per se violation of due process); United States v. Hawkins, 499 F.3d 703, 707 (7th Cir. 2007) (holding showups to be inherently suggestive and quoting the same passage from *Brathwaite*).

[256] *See, e.g.*, *supra* note 255 (giving examples of two circuit decisions that quote *Brathwaite* for the proposition that admitting a showup does not necessarily violate due process).

[257] Manson v. Brathwaite, 432 U.S. 98, 106 (1977) (quoting Neil v. Biggers, 409 U.S. 188, 201 (1972)).

ers that definition of *Brathwaite*'s fourth criterion as applied to showups and demonstrates that showup identifications are, by the Supreme Court's definition, categorically unreliable.[258]

Since *Brathwaite*, an ever-growing body of modern science has made it painfully clear that showups cause misidentifications at an alarming rate compared to more scientifically sound procedures.[259] Showups are now understood to cause misidentifications significantly more often than lineups and may be responsible for twice as many false identifications.[260] One study suggests that an innocent suspect subjected to a showup two hours after a crime has a nearly sixty percent chance of being falsely implicated.[261]

Showups pose a greater risk than lineups for a reason that goes beyond the former's high error rate: false positives are not immediately obvious in a showup.[262] If a witness identifies anyone in a lineup that does not contain the perpetrator, the identified person will likely be one of the nonsuspect fillers, in which case the police will know that the witness is wrong.[263] If, however, a witness makes a similar mistake in a showup, the misidentification becomes evidence of guilt against an innocent suspect, and the true perpetrator remains at large.[264] Because showups cannot expose a witness's mistake like a lineup can, a showup's likelihood of causing a misidentification is equal to the rate at which witnesses make mistakes, while a lineup's likelihood is functionally much lower because the majority of errors will be immediately obvious.[265]

---

[258] *See infra* notes 259–270 and accompanying text (demonstrating that showups always carry a substantial likelihood of causing misidentifications).

[259] *See* Report of the Special Master, *supra* note 108, at 29–30 (summarizing the scientific consensus about showups, including several studies from the 1990s and 2000s that document the comparative accuracy of identifications from showups and lineups performed hours after a crime).

[260] *Id.* at 30 (referencing an analysis that looked at several thousand identifications and found that showups cause twice as many false identifications as lineups).

[261] Yarmey et al., *supra* note 114, at 463–64 (describing an experimental study finding that showups and lineups are equally accurate if performed two minutes after the initial encounter, but showups conducted two hours later resulted in 58% of witnesses mistakenly identifying an innocent "suspect").

[262] *See* Michael D. Cicchini & Joseph G. Easton, *Reforming the Law on Show-Up Identifications*, 100 J. CRIM. L. & CRIMINOLOGY 381, 390–91 (2010) (noting that a misidentification caused by a showup will not be evident to investigators); Garrett, *supra* note 84, at 490 (noting that police using a showup procedure cannot detect if the witness is mistaken, thus increasing both the risk of a wrongful conviction and the risk that the true perpetrator will remain free); *see also* Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH L. REV. 133, 134, 137 (2008) (noting that protecting the rights of defendants by focusing on evidentiary accuracy is not at odds with prosecutorial interests, but rather can protect the public by preventing the guilty from avoiding capture and committing further crimes).

[263] Cicchini & Easton, *supra* note 262, at 390–91.

[264] *Id.*

[265] *See supra* notes 262–264 and accompanying text (explaining why mistaken identifications obtained in a showup are likely to become persistent misidentifications, while a majority of the mistakes made in lineups are immediately detected).

Because of both their unreliability and the insidious nature of their errors, showups pose a risk to justice, public confidence in the courts, and public safety.[266] To determine whether the risk inherent in showups is sufficient to categorically define them as unreliable under *Brathwaite*, though, one must look to the ruling's language.[267] The wording of the final exclusion criterion in the *Brathwaite* standard contemplates a "substantial likelihood of misidentification."[268] The Court has not further defined the phrase.[269] Considering the plain meaning of the words, and the grave costs of misidentifications, it is only reasonable to conclude that a showup's likelihood of misidentifying an innocent person, which is between approximately one in four and one in two, is, indeed, substantial.[270]

C. Under the Brathwaite *Test, Courts May—and Should—Exclude Identifications from Unnecessary Showups*

Understanding that showups are always police conducted, suggestive, and substantially likely to cause misidentifications, courts are free to exclude identifications from any showup that was unnecessary.[271] This Section discusses

---

[266] *See In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (opining that "it is far worse to convict an innocent man than to let a guilty man go free"); CONVICTING THE INNOCENT, *supra* note 5, at 51 (commenting on the trauma caused to crime victims upon learning that their misidentifications led to a wrongful conviction and that their attackers remain unknown and at large); Cicchini & Easton, *supra* note 262, at 411–12 (noting that misidentifications harm public safety because a false identification means that the true perpetrator remains at large and can continue offending); *supra* notes 259–265 and accompanying text (summarizing the risk of misidentifications associated with showups).

[267] *See infra* notes 268–270 and accompanying text (discussing the language of the ruling).

[268] Perry v. New Hampshire, 565 U.S. 228, 238–39 (2012) (quoting Neil v. Biggers, 409 U.S. 188, 201 (1972)) (explaining the *Biggers* and *Brathwaite* decisions and noting that the Court requires the exclusion of identifications obtained through unnecessarily suggestive police procedures only when misidentification is likely).

[269] *See id.* at 239 (using the term "substantial likelihood," but providing no further discussion of its meaning). The Court uses the *Biggers* factors to decide whether a substantial likelihood exists based on the circumstances of each case, but the Court does not define that inquiry beyond a qualitative discussion of the specific facts. *See, e.g.*, *Biggers*, 409 U.S. at 199–201 (considering the facts of the case using the listed factors and holding that there was no substantial likelihood of misidentification).

[270] *See Substantial*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "substantial," in part, as meaning that something has importance or value); Report of the Special Master, *supra* note 108, at 29–30 (referencing a finding that 23% of showups cause the identification of an innocent suspect); Yarmey et al., *supra* note 114, at 463–64 (discussing the experimental finding that showups performed two hours after a "crime" yielded a 58% rate of misidentifications).

[271] See *Perry*, 565 U.S. at 238–39 (holding that, for exclusion to be required under *Brathwaite*, an identification must have (1) been police conducted, (2) been suggestive, (3) been unnecessary, and (4) "created a 'substantial likelihood of misidentification'" (quoting *Biggers*, 409 U.S. at 201)); *Showup*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining showups as police identification procedures); Yarmey et al., *supra* note 114, at 459, 463–64 (noting that researchers agree that showups are suggestive and discussing the experimental finding that misidentifications occurred in 58% of showups per-

the latitude that courts have to modernize their understanding of eyewitness reliability and shows that courts may adopt this Note's simplified test as a blanket rule without waiting for the Supreme Court's endorsement.[272]

Some courts adhering to the federal *Brathwaite* standard appear to feel that they are barred from evaluating reliability with any standard except the *Biggers* factors.[273] This approach is not mandated by *Neil v. Biggers*, which held that the factors to consider "include" the *Biggers* factors without either restricting the use of additional factors or providing instruction on how to balance the factors given.[274] Some federal courts have used this opening to go beyond the *Biggers* factors and directly consider evidence of a defendant's guilt when seeking to bolster a holding that an identification was reliable.[275] Conversely, some state courts have used this same reasoning to protect innocent defendants by amending the *Biggers* factors to omit scientifically invalid factors, to include a wider range of system and estimator variables, or both.[276]

Earlier in this Note, Part II discusses several examples of state courts altering the *Biggers* factors, including *State v. Ramirez*, wherein the Utah Supreme Court held that some of the *Biggers* factors are unsupported or even contradicted by science.[277] Citing the due process guarantee of Utah's constitu-

---

formed two hours after a mock crime); *supra* note 250 (listing the significant majority of circuit courts that have held showups to be inherently suggestive); *see supra* notes 248–270 and accompanying text (demonstrating that showups categorically meet the first, second, and fourth criteria for exclusion under *Brathwaite*).

[272] *See infra* notes 273–284 and accompanying text (explaining the flexibility available to courts that wish to modify their approach to admitting identifications).

[273] *See, e.g.*, Harris v. State, 113 A.3d 1067, 1073, 1075 (Del. 2015) (citing and applying the doctrine of *Brathwaite* and *Biggers* to find that admitting a showup identification had not violated due process). *Harris*, like many cases applying the federal doctrine, enumerates the *Biggers* factors and then addresses each one in turn as a checklist, considering only the five factors. *See id.* at 1075–78 (applying the *Biggers* factors to a showup identification and finding no "likelihood of irreparable misidentification").

[274] *Biggers*, 409 U.S. at 199–200.

[275] *See, e.g.*, United States v. Wilkerson, 84 F.3d 692, 695 (4th Cir. 1996) (noting that courts may look to evidence beyond the *Biggers* factors when evaluating reliability and citing opinions from several other circuits that considered evidence of guilt to find an identification reliable); United States v. Weiss, 168 F. Supp. 3d 856, 863 (E.D. Va. 2016) (holding that the *Biggers* factors "are not a mandatory checklist" and may be augmented with other evidence), *aff'd*, 684 F. App'x 328 (4th Cir. 2017). There is a certain illogic to using the strength of one piece of evidence to declare that a different piece of independent evidence is strong, and this type of reasoning seems to "import[] the question of guilt into the initial determination of whether there was a constitutional violation," which was Justice Marshall's criticism of the *Brathwaite* decision. Manson v. Brathwaite, 432 U.S. 98, 128 (1977) (Marshall, J., dissenting).

[276] *See, e.g.*, State v. Ramirez, 817 P.2d 774, 779–81 (Utah 1991) (removing witness certainty as a factor and adding several other factors to create Utah's current reliability test). *See generally supra* notes 220–231 and accompanying text (discussing the evolution of Utah's current reliability factors).

[277] *See Ramirez*, 817 P.2d at 780 (citing the court's holding in *State v. Long*, 721 P.2d 483 (Utah 1986), that some of the *Biggers* factors are demonstrably and inarguably contradictory to science); *Long*, 721 P.2d at 491 ("A careful reading of [the *Biggers* factors] will show that several of the criteria listed by the [Supreme] Court are based on assumptions that are flatly contradicted by well-respected

tion, the *Ramirez* court mandated the use of its own factors, which build upon and focus the *Biggers* factors while also removing witness certainty as a factor.[278] Since *Ramirez*, the Supreme Court of Kansas has taken a similar approach, augmenting the *Biggers* factors to improve the reliability determinations yielded by a state admissibility test that otherwise mirrors the *Brathwaite* standard.[279] Additionally, as shown by examples such as *Ramirez* and the Vermont Supreme Court's holding in *State v. Discola*, courts are also free to subtract from the *Biggers* factors to comply with notions of state due process without running afoul of the Supreme Court's holdings.[280]

These examples are instructive because they show the flexibility inherent in *Biggers*, especially as interpreted by state courts.[281] Nothing in *Biggers* discourages courts from using their best judgment and the best available information to assess the reliability of an identification.[282] Indeed, *Brathwaite* famously held that "reliability is the linchpin in determining the admissibility of identification testimony."[283] If courts wish to simplify their analysis of showups by formally adopting the scientific consensus about showup identifi-

---

and essentially unchallenged empirical studies."); *supra* notes 91–244 and accompanying text (constituting Part II).

[278] *See Ramirez*, 817 P.2d at 780–81 (requiring that Utah courts thoroughly consider the reliability of identifications using the factors first set forth in *Long*). *See generally supra* note 221 (listing the *Long* factors). The *Ramirez* court also noted that the overarching intent of *Biggers* was to determine reliability based on "the totality of the circumstances." *Ramirez*, 817 P.2d at 780 (quoting *Biggers*, 409 U.S. at 199). In light of that mandate, the court held that adding or editing factors based on a modern scientific understanding aligns with the goals of *Biggers*. *Id.* The court opined that using the *Long* factors will yield reliability determinations that equal or surpass the accuracy of those made under the federal standard, thus meeting the federal constitutional requirements explained in *Biggers*. *See id.*

[279] *See* State v. Mitchell, 275 P.3d 905, 910–11 (Kan. 2012) (clarifying the court's addition of three factors to the five *Biggers* factors). *Mitchell* clarifies that Kansas's reliability factors include all five *Biggers* factors as well as (6) the witness's ability to perceive the crime, including the witness's mental and physical faculties, (7) how readily offered and unchanging the witness's identification was, and (8) the character of the event that the witness saw and whether such an event would tend to cause accurate perception, recollection, and testimony. *Id.*

[280] *See Ramirez*, 817 P.2d at 781 (noting that the reliability factors used in Utah intentionally omit witness certainty as a factor); State v. Discola, 2018 VT 7, ¶¶ 30–31, 184 A.3d 1177 (removing witness certainty as a factor to be considered under Vermont's version of the *Biggers* factors); *see also supra* note 221 (listing the factors announced by Utah's Supreme Court in *Long*); *supra* notes 220–231 and accompanying text (discussing Utah's approach to determining an identification's reliability).

[281] *See, e.g.*, *supra* notes 220–231, 242–244, 278–280 and accompanying text (containing examples of the high courts in Utah and Vermont adding to and subtracting from the *Biggers* factors to create tests that more accurately assess an identification's reliability).

[282] *See Biggers*, 409 U.S. 199–200 (holding that reliability must be evaluated under the "totality of the circumstances" and holding that "the factors to be considered . . . *include* [the *Biggers* factors]" (emphasis added) without any suggestion that the list is exclusive).

[283] 432 U.S. at 114.

cation reliability, they may do so on state or federal constitutional grounds without contradicting Supreme Court doctrine.[284]

D. Simplifying Showup Identification Admissibility Is Good Policy

As courts around the country seek to reconcile scientific fact with reliability determinations made under the *Biggers* factors, the need for a simpler standard is amplified.[285] The lengths of court decisions on admitting eyewitness identifications may serve as a crude measurement of the amount of judicial effort expended on the issue, and such a calculation is revealing.[286] Out of the seven states that have chosen to wrestle significantly with the *Brathwaite* doctrine, Massachusetts, New York, and Wisconsin have chosen per se exclusion for unnecessary showup identifications, which aligns with the simplification proposed by this Note.[287] The actual texts of those decisions occupy eight, five, and sixteen pages, respectively.[288] The decisions of the Alaska, Connecti-

---

[284] *See, e.g.*, State v. Dubose, 2005 WI 126, ¶¶ 28–33, 36, 285 Wis. 2d 143, 699 N.W.2d 582 (noting the new scientific consensus about the unreliability of showup identifications and holding that they may be admitted under the Wisconsin Constitution only when the showup was necessary); *cf.* State v. Dickson, 141 A.3d 810, 817–19, 819 n.4, 834–37 (Conn. 2016) (holding that *federal* due process requires the exclusion of in-court identifications unless the testimony is preceded by an identification made in a nonsuggestive procedure or unless the defendant's identity is undisputed), *cert. denied*, 137 S. Ct. 2263 (2017). Although *Dickson* does not consider the admissibility of a showup, it is instructive because it extends a somewhat novel protection using the Federal Constitution without waiting for a favorable ruling from the Supreme Court. *See Dickson*, 141 A.3d at 819 n.6.

[285] *See, e.g.*, State v. Henderson, 39 A.3d 147, 148 (N.J. 2009) (holding that the court needed more information on scientific concerns about eyewitness identifications and ordering the hearing that later yielded the Report of the Special Master). The *Henderson* court went to great lengths to inform lower courts about the current scientific understanding of eyewitness identifications and required lower courts to consider that scientific evidence when evaluating admissibility. *See* State v. Henderson, 27 A.3d 872, 919–22 (N.J. 2011) (explaining New Jersey's new standard for the admission of eyewitness identifications). The factors to be considered under *Henderson*'s new test stretch across several pages, which suggests that *Henderson*'s standard is complex and requires significant study on the part of lower courts—a notable contrast to the simplicity of Wisconsin's necessity-based standard. *Compare id.* (explaining the *Henderson* standard and enumerating a nonexhaustive list of over twenty factors for courts to consider at different points in the admissibility inquiry), *with Dubose*, 2005 WI 126, ¶ 2 (explaining Wisconsin's entire test for admitting showup identifications in two sentences).

[286] *See infra* notes 287–290 and accompanying text (discussing the lengths of the decisions announcing alternative standards to *Brathwaite* in the seven states that have diverged significantly from the federal standard).

[287] *See* Commonwealth v. Johnson, 650 N.E.2d 1257, 1260–61 (Mass. 1995) (holding that an identification must be excluded if the defendant shows by a preponderance of the evidence that the identification procedure was unnecessarily suggestive); People v. Adams, 423 N.E.2d 379, 384 (N.Y. 1981) (holding that identifications from unnecessarily suggestive out-of-court identification procedures are inadmissible); *Dubose*, 2005 WI 126, ¶ 2 (holding that showup identifications are inadmissible unless the procedure was necessary because it was impossible to arrange a less suggestive procedure).

[288] *See Johnson*, 650 N.E.2d at 1258–65 (containing the full length of the majority opinion in eight pages, not including headnotes or similar ancillary text); *Adams*, 423 N.E.2d at 380–84 (containing the entire decision in five pages, not including headnotes or similar ancillary text); *Dubose*, 2005

cut, New Jersey, and Oregon courts, wherein those courts seek to define a new yardstick for reliability, occupy thirty-five, twenty-six, fifty-four, and thirty-four pages, respectively.[289] Although it is admittedly somewhat trite to measure court decisions by length, this disparity does hint at a significant judicial efficiency that could be achieved if necessity were the only factor at issue in admitting a showup identification.[290] The states that base their inquiries on necessity alone can all fully explain their standards in a sentence or two.[291] The single step of considering necessity is clearly easier than the process of considering necessity and suggestiveness and then applying the *Biggers* factors (or a different, longer set of factors) to determine reliability.[292]

Necessity is also much easier to define than reliability.[293] Several states have provided simple lists of situations that may necessitate a showup, and other courts could easily tailor such lists to their needs.[294] Basing the admission of showup identifications on a single, simple question of necessity would

---

WI 126, ¶¶ 1–45 (containing the full length of the majority opinion in sixteen pages, not including headnotes or similar ancillary text).

[289] *See* Young v. State, 374 P.3d 395, 398–432 (Alaska 2016) (containing the full length of the decision in thirty-five pages, not including headnotes or similar ancillary text); State v. Harris, 191 A.3d 119, 122–47 (Conn. 2018) (containing the full length of the decision in slightly over twenty-five pages, not including headnotes or similar ancillary text); *Henderson*, 27 A.3d at 877–930 (containing the full length of the decision in fifty-four pages, not including headnotes or similar ancillary text, but including a two-page appendix); State v. Lawson, 291 P.3d 673, 678–711 (Or. 2012) (containing the full length of the decision in thirty-four pages, not including headnotes or similar ancillary text, but including a twelve-page appendix).

[290] *Cf. Johnson*, 650 N.E.2d at 1260 (explaining, in two sentences, Massachusetts's rule excluding identifications from unnecessarily suggestive procedures); *Adams*, 423 N.E.2d at 384 (explaining, in one sentence, New York's rule excluding identifications from unnecessarily suggestive procedures); *Dubose*, 2005 WI 126, ¶ 2 (explaining Wisconsin's entire test for admitting showup identifications in two sentences).

[291] *See supra* note 290 (noting that the exclusion tests that apply to showups in Massachusetts, New York, and Wisconsin are all one or two sentences long).

[292] *See, e.g.*, Brisco v. Ercole, 565 F.3d 80, 90–95 (2d Cir. 2009) (providing six pages of analysis regarding a showup, with approximately two pages considering suggestiveness and necessity and four pages focusing on reliability).

[293] *Compare* Neil v. Biggers, 409 U.S. 188, 199–201 (1972) (listing the five *Biggers* factors and analyzing them in the full context of the situation, even including consideration of the witness's profession), *with Dubose*, 2005 WI 126, ¶ 2 (holding that a showup is necessary only if the police cannot arrange a less suggestive procedure because of an emergency or a legal inability to arrest the suspect).

[294] *See, e.g.*, Taylor v. State, 371 P.3d 1036, 1044 (Nev. 2016) (holding that a showup may be necessary in Nevada to capture a witness's memory while it is fresh, to quickly clear innocent suspects, or to ensure the rapid arrest of perpetrators); State v. Wyatt, 806 S.E.2d 708, 711 (S.C. 2017) (holding that a showup may be necessary to take advantage of a witness's fresh memory, to prevent perpetrators from having time to hide evidence or change their clothing, to clear innocent suspects, or to help the police know when to stop looking for a suspect); *Dubose*, 2005 WI 126, ¶ 33 (holding that a showup is necessary only when police cannot use a less prejudicial procedure because of an emergency or because they lack probable cause to arrest the suspect).

also increase the stability and predictability of judicial decisions.[295] Basing admission on the current federal test creates a danger of wrongful convictions and a danger that actual perpetrators will remain undiscovered and free to commit further crimes.[296] It also forces courts to make fact-intensive determinations about the likelihood that an identification is correct, which requires significant judicial effort and may lead to inconsistent results.[297] Increasing the rigor of the reliability inquiry is one solution, but doing so requires courts to learn a large body of science that is subject to future development and to apply that knowledge to fact-intensive determinations.[298] Thus, both the *Brathwaite* test and models like *Henderson* are subject to inconsistency, whereas a necessity inquiry is more likely to be an unchanging platform for evidentiary decisions that is simple for police to follow and courts to apply.[299]

Finally, a necessity standard would support the administration of justice and the work of police, because identifications resulting from necessary showups would remain admissible but witnesses' memories would be protected from unnecessary influence.[300] Memory is malleable, so protecting recollections from contamination is as critical to police work as preserving physical

---

[295] *See Johnson*, 650 N.E.2d at 1264 (noting that using a reliability inquiry requires appellate courts to consider the subjective facts of a crime and essentially render a judgment about the defendant's guilt, rather than simply examining the propriety of a police procedure).

[296] *See* Manson v. Brathwaite, 432 U.S. 98, 127 (1977) (Marshall, J., dissenting) (noting that wrongful convictions leave the true perpetrators at large); *Johnson*, 650 N.E.2d at 1264 (holding that a test based on an identification's reliability causes unjust trials by admitting "largely unreliable evidence"); Cicchini & Easton, *supra* note 262, at 411–12 (noting that the inevitable counterpart of a false identification is the continued presence of the actual perpetrator in the community).

[297] *See* Perry v. New Hampshire, 565 U.S. 228, 261 (2012) (Sotomayor, J., dissenting) (noting the majority's concern that expanding the applicability of the *Brathwaite* test beyond police-conducted procedures would create a significant additional burden for courts by forcing the examination of most identifications). With courts unable to agree on what factors are indicative of an identification's reliability, reliability inquiries will inevitably yield inconsistent results. *Compare Biggers*, 409 U.S. at 199–200 (listing the *Biggers* factors), *with* State v. Ramirez, 817 P.2d 774, 781 (Utah 1991) (explicitly removing one of the *Biggers* factors, witness certainty, from the factors used in Utah).

[298] *See, e.g.*, State v. Henderson, 27 A.3d 872, 919–22 (N.J. 2011) (explaining New Jersey's new standard and listing some of the multitude of factual determinations that lower courts must make to apply the standard). Courts may not have the knowledge and understanding necessary to develop accurate tests of witness reliability based on scientific principles. *See supra* note 27 (citing researchers who have found that judges lack adequate understanding of psychological science and are poorly equipped to interpret psychological studies). The problems with asking courts to devise standards based on complex science are not only illustrated by research but are also made evident in court rulings. *See, e.g.*, *supra* notes 223–226 and accompanying text (noting that the Utah Supreme Court's holding in *Long* attempted to improve and expand the *Biggers* factors, but also removed one of the more scientifically sound *Biggers* factors from Utah's new standard).

[299] *See supra* notes 285–298 and accompanying text (noting the simplicity of the necessity inquiry in comparison to a standard that also includes reliability and suggestiveness).

[300] *Cf.* State v. Dubose, 2005 WI 126, ¶¶ 32–35, 285 Wis. 2d 143, 699 N.W.2d 582 (adopting a rule excluding all identifications obtained through unnecessary showups, but noting that identifications from necessary, properly conducted showups remain admissible).

evidence.[301] By unequivocally banning the unnecessary use of showups, courts can mandate the collection of the best available evidence instead of permitting less reliable evidence to be collected in a manner that may degrade superior evidence.[302]

CONCLUSION

The federal *Brathwaite* standard currently governs the admission or exclusion of showup identifications in thirty-eight states. This standard requires courts to revisit difficult, or perhaps unanswerable, questions about suggestiveness and reliability every time that the prosecution seeks to introduce a showup identification at trial. Additionally, some of the *Biggers* factors that courts use to examine reliability are not based in scientific fact, making the *Brathwaite* inquiry difficult to apply, inconsistent, and unreliable. In the case of showups, courts should follow the examples of Massachusetts, New York, and Wisconsin and base admissibility entirely on the necessity of the identification procedure.

Courts may achieve this with no change to current Supreme Court doctrine. *Brathwaite* requires that an identification be excluded when the identification procedure was (1) police conducted, (2) suggestive, (3) unnecessary, and (4) likely to cause misidentification (i.e., yielded unreliable evidence). Instead of ruling on suggestiveness, necessity, and reliability in each case, courts should hold that showups are definitionally police conducted, suggestive, and

---

[301] *See* State v. Henderson, 27 A.3d 872, 895 (N.J. 2011) (discussing studies showing the malleable nature of memory); Gary L. Wells, *Scientific Study of Witness Memory: Implications for Public and Legal Policy*, 1 PSYCHOL. PUB. POL'Y & L. 726, 727–28 (1995) (noting that memory is subject to contamination by incautious police work).

[302] *See Dubose*, 2005 WI 126, ¶ 32 n.8 (noting the issues with admitting identifications from unnecessarily suggestive procedures); IDENTIFYING THE CULPRIT, *supra* note 11, at 2, 15 (explaining that suggestion can distort memories). The *Dubose* court noted commentary explaining that

> Unnecessarily suggestive pretrial identification procedures differ from most other improper law enforcement activities because they do not further any valid law enforcement interest. Although a violation of a suspect's fourth or fifth amendment rights—for example, a warrantless search or an interrogation without a lawyer present—is plainly wrong, it might at least further the valid law enforcement objective of collecting relevant evidence. By contrast, an unnecessarily suggestive identification procedure simply creates unreliable evidence where reliable evidence could have been gathered. It is not a case where good ends justify bad means—the end result of an unnecessarily suggestive procedure is worthless precisely because of the means used.

2005 WI 126, ¶ 32 n.8 (quoting Benjamin E. Rosenberg, *Rethinking the Right to Due Process in Connection with Pretrial Identification Procedures: An Analysis and a Proposal*, 79 KY. L.J. 259, 291 (1991) (footnote omitted)). Justice Marshall voiced similar concerns in his dissent in *Brathwaite*, commenting that identifications from suggestive procedures should be excluded as often as possible, not as a sanction for poor police procedure, but because the jury should be protected from unreliable and irrelevant information. *See* Manson v. Brathwaite, 432 U.S. 98, 127–28 (1977) (Marshall, J., dissenting).

unreliable. This would allow for a streamlined consideration of admissibility based on only the necessity of the showup. The three states that already practice standards approximating this proposal—albeit not under precisely this reasoning—have not reported any negative judicial or societal effects. Such a simplification of the showup admission standard by states, or even at the federal level, would promote judicial economy, create clearer procedures for law enforcement officers, enhance the predictability of judicial outcomes, increase public safety, and reduce the number of wrongful convictions, without robbing police of any necessary investigative flexibility.

J.P. CHRISTIAN MILDE

APPENDIX: STATES FOLLOWING THE FEDERAL STANDARD

This Appendix provides recent case examples demonstrating the approach of the thirty-eight states that, along with the District of Columbia, follow the *Brathwaite* test and apply the *Biggers* factors with little or no divergence.[303] It must be noted that in other matters, such as when considering the content of jury instructions regarding eyewitness identifications, these states may add or subtract significantly from the *Biggers* factors.[304]

Alabama

Ex parte Wimes holds a showup to have been unnecessarily suggestive and evaluates its reliability using the *Biggers* factors.[305]

Arizona

State v. Goudeau outlines the *Brathwaite* test and enumerates the *Biggers* factors.[306]

California

People v. Thomas recites the *Brathwaite* test and *Biggers* factors, albeit without direct citation.[307]

Colorado

Bernal v. People applies the *Brathwaite* test and *Biggers* factors to determine the admissibility of an identification from an out-of-court photo array.[308]

Delaware

Harris v. State applies the doctrine of *Brathwaite* and *Biggers* to analyze the admission of a showup identification.[309]

District of Columbia

Long v. United States explains the *Brathwaite* test and *Biggers* factors as lower courts must apply them.[310]

---

[303] *See infra* notes 305–359 and accompanying text.

[304] *See, e.g.*, Brodes v. State, 614 S.E.2d 766, 771 (Ga. 2005) (holding that juries should no longer be instructed that they may consider a witness's level of certainty about an identification); State v. Cabagbag, 277 P.3d 1027, 1038–40 (Haw. 2012) (creating a model jury instruction with over ten factors for juries to consider, and requiring that an eyewitness identification instruction be given upon a defendant's request in cases that turn on identification evidence).

[305] *See Ex parte* Wimes, 14 So. 3d 131, 138 (Ala. 2009).

[306] *See* State v. Goudeau, 372 P.3d 945, 979 (Ariz. 2016).

[307] *See* People v. Thomas, 281 P.3d 361, 376 (Cal. 2012).

[308] *See* Bernal v. People, 44 P.3d 184, 190–92 (Colo. 2002).

[309] *See* Harris v. State, 113 A.3d 1067, 1073, 1075 (Del. 2015).

[310] *See* Long v. United States, 156 A.3d 698, 707 (D.C. 2017).

Florida

Walton v. State applies the *Brathwaite* test and *Biggers* factors to hold that an identification was improperly admitted.[311] In an interesting case of a showup with an inanimate subject, *Simmons v. State* applies the same federal standard to find no error in the admission of a witness's identification of a car resulting from an unnecessarily suggestive single-photo procedure.[312]

Georgia

Jones v. State analyzes an impermissibly suggestive identification using the *Biggers* factors and holds that the trial court did not err by admitting the identification.[313]

Hawaii

State v. Walton recites the *Brathwaite* test and *Biggers* factors, albeit without naming the standards as such or separately enumerating the factors.[314]

Illinois

People v. Richardson holds that several out-of-court identifications using photo arrays were neither suggestive nor unreliable based on the *Brathwaite* test and *Biggers* factors.[315]

Indiana

Williams v. State recites the *Brathwaite* test and the *Biggers* factors but omits—apparently inadvertently—the fifth factor (the time elapsed between the crime and the identification).[316] *Williams* cites to *James v. State* as a source of the four factors, which in turn cites to *Lyons v. State*, which lists all five *Biggers* factors.[317] It appears that the court intends to adhere to the federal standard but sometimes omits portions of the test.[318] The Indiana Court of Appeals, however, uses all five factors with some consistency.[319]

---

[311] *See* Walton v. State, 208 So. 3d 60, 65, 67 (Fla. 2016).

[312] *See* Simmons v. State, 934 So. 2d 1100, 1118–20 (Fla. 2006).

[313] *See* Jones v. State, 539 S.E.2d 143, 146–47 (Ga. 2000); *see also* Curry v. State, 823 S.E.2d 758, 761–62 (Ga. 2019) (providing the *Biggers* factors and citing *Jones*).

[314] *See* State v. Walton, 324 P.3d 876, 897–98 (Haw. 2014).

[315] *See* People v. Richardson, 528 N.E.2d 612, 621–22 (Ill. 1988).

[316] *See* Williams v. State, 774 N.E.2d 889, 890 (Ind. 2002).

[317] *See id.* (omitting the fifth *Biggers* factor); James v. State, 613 N.E.2d 15, 27 (Ind. 1993) (enumerating only four factors); Lyons v. State, 506 N.E.2d 813, 815 (Ind. 1987) (listing all five *Biggers* factors).

[318] *See, e.g.*, Hubbell v. State, 754 N.E.2d 884, 892 (Ind. 2001) (outlining the *Brathwaite* test by name, holding that a showup was unduly suggestive, and holding that the showup identification should have been excluded, but neither mentioning nor applying the *Biggers* factors).

[319] *See, e.g.*, Rasnick v. State, 2 N.E.3d 17, 23 (Ind. Ct. App. 2013) (listing all five *Biggers* factors); Adkins v. State, 703 N.E.2d 182, 185 (Ind. Ct. App. 1998) (listing all five *Biggers* factors).

Iowa

State v. Taft describes and applies the *Brathwaite* standard and *Biggers* factors, albeit without specifically identifying the federal sources of the doctrine.[320]

Kentucky

Commonwealth v. Parker applies the *Brathwaite* test and uses the *Biggers* factors to reverse the court of appeals and hold that the trial court properly admitted a showup identification.[321]

Louisiana

State v. Taylor restates the *Brathwaite* test and *Biggers* factors but omits the term "unnecessarily" from the typical phrase "unnecessarily suggestive."[322] The omission appears inadvertent, as *Taylor* cites to *Brathwaite* (which uses the phrase "unnecessarily suggestive") and to a chain of state cases that cite to *Brathwaite*.[323]

Maine

State v. Nigro explains and applies the *Brathwaite* test using the *Biggers* factors.[324]

Maryland

Jones v. State articulates the *Brathwaite* test and *Biggers* factors, albeit without characterizing them as such.[325] In 2015, the Maryland high court explicitly refused to adopt any portion of New Jersey's reliability inquiry from *Henderson*, instead reiterating its satisfaction with *Jones*.[326]

Michigan

People v. Kurylczyk articulates the *Brathwaite* test and the *Biggers* factors and applies them to a suggestive photo identification.[327] The decision refers to

---

[320] *See* State v. Taft, 506 N.W.2d 757, 762–63 (Iowa 1993).

[321] *See* Commonwealth v. Parker, 409 S.W.3d 350, 352–53 (Ky. 2013).

[322] *See* State v. Taylor, 2009-2781, pp. 2–4 (La. 3/12/10); 29 So. 3d 481, 482–83.

[323] *See* Manson v. Brathwaite, 432 U.S. 98, 108 (1977) (using the terms "impermissibly suggestive" and "unnecessarily suggestive"); *Taylor*, 29 So. 3d at 482–83 (citing State v. Prudholm, 446 So. 2d 729, 738 (La. 1984); and then citing *Brathwaite*, 432 U.S. 98); *Prudholm*, 446 So. 2d at 738 (citing State v. Chaney, 423 So. 2d 1092, 1098 (La. 1982); and then citing *Brathwaite*, 432 U.S. 98); *Chaney*, 423 So. 2d at 1098 (citing *Brathwaite*, 432 U.S. 98; and then citing State v. Doucet, 380 So. 2d 605 (La. 1979)); *Doucet*, 380 So. 2d at 606 (using the term "impermissibly suggestive" with citation to *Brathwaite*).

[324] *See* State v. Nigro, 2011 ME 81, ¶¶ 21–24, 24 A.3d 1283, 1289–90.

[325] *See* Jones v. State, 530 A.2d 743, 747 (Md. 1987), *vacated on other grounds*, 486 U.S. 1050 (1988).

[326] *See* Smiley v. State, 111 A.3d 43, 52 (Md. 2015) (reinforcing *Jones* as state precedent and refusing to adopt the standard articulated in *State v. Henderson*, 27 A.3d 872 (N.J. 2011)).

[327] *See* People v. Kurylczyk, 505 N.W.2d 528, 534–36 (Mich. 1993).

Biggers as providing "[s]ome of the relevant factors," which could be read to leave open the consideration of additional factors, but *Kurylczyk* does not provide or consider any factors beyond those articulated in *Biggers*.[328]

Minnesota

State v. Ostrem notes Minnesota's use of the *Brathwaite* test and *Biggers* factors and applies the factors to hold that an identification was properly admitted as reliable.[329] Minnesota adopted the *Biggers* factors in *State v. Bellcourt*, and they are sometimes referred to as the *Bellcourt* factors.[330]

Mississippi

Latiker v. State explains and applies the *Brathwaite* test and *Biggers* factors to find an identification reliable.[331]

Missouri

State v. Middleton explains the *Brathwaite* test and *Biggers* factors as the law in Missouri, albeit without direct citation to *Biggers*.[332]

Montana

City of Billings v. Nolan explains the *Brathwaite* test and *Biggers* factors and applies them to hold that a first-time in-court identification was reliable and thus admissible, despite the court's acknowledgment that the procedure amounted to a showup and was unnecessarily suggestive.[333]

Nebraska

State v. Taylor applies the *Brathwaite* test and *Biggers* factors to hold that a showup was not unnecessarily suggestive.[334]

Nevada

Taylor v. State describes and applies the *Brathwaite* test and *Biggers* factors to find that a showup identification was unreliable but holds a subsequent in-court identification reliable.[335]

---

[328] *See id.* at 535–37.

[329] *See* State v. Ostrem, 535 N.W.2d 916, 921–22 (Minn. 1995).

[330] *See id.* (identifying *State v. Bellcourt*, 251 N.W.2d 631 (Minn. 1977), as the case in which the state adopted the *Biggers* factors); *Bellcourt*, 251 N.W.2d at 633 (citing to *Biggers*, but neither listing the factors nor noting their novelty).

[331] *See* Latiker v. State, 2004-KA-00285-SCT (¶ 15) (Miss. 2005).

[332] *See* State v. Middleton, 995 S.W.2d 443, 453 (Mo. 1999).

[333] *See* City of Billings v. Nolan, 2016 MT 266, ¶¶ 18–25, 305 Mont. 190, 383 P.3d 219; *see also* State v. Lally, 2008 MT 452, ¶¶ 15–19, 348 Mont. 59, 199 P.3d 818 (applying the *Brathwaite* test and *Biggers* factors to a suggestive out-of-court identification procedure to conclude that it was proper for the lower court to refuse to exclude the identification).

[334] *See* State v. Taylor, 842 N.W.2d 771, 779–80 (Neb. 2014).

New Hampshire

State v. King describes how New Hampshire applies the *Brathwaite* test and *Biggers* factors to out-of-court identifications.[336]

New Mexico

State v. Baca applies the *Brathwaite* test and *Biggers* factors to a photo identification.[337] The New Mexico Supreme Court has held that showups are suggestive by nature, but the state still follows the federal standard and uses the *Biggers* factors to determine whether identifications from showups are admissible, despite their suggestiveness.[338]

North Carolina

State v. Richardson articulates the *Brathwaite* test and *Biggers* factors to hold a series of showups suggestive, yet reliable.[339]

North Dakota

State v. Addai applies the *Brathwaite* test and *Biggers* factors to hold that a showup, although suggestive, was necessary under the circumstances and resulted in a reliable identification.[340]

Ohio

State v. Broom holds a showup identification admissible under the *Brathwaite* test using the *Biggers* factors.[341]

Oklahoma

Cole v. State applies the *Brathwaite* test and *Biggers* factors, albeit without citation to either, to find an out-of-court showup reliable and thus to hold that the trial court properly admitted a subsequent in-court identification.[342]

Pennsylvania

Commonwealth v. McGaghey describes the *Brathwaite* test and the *Biggers* factors, albeit without citation to the federal cases, and applies the factors as part of an independent source analysis to hold that the trial court improperly admitted an in-court identification that followed a suggestive identification procedure dur-

---

[335] *See* Taylor v. State, 371 P.3d 1036, 1044–45 (Nev. 2016).

[336] *See* State v. King, 934 A.2d 556, 559 (N.H. 2007).

[337] *See* State v. Baca, 1983-NMSC-049, ¶¶ 18–19, 99 N.M. 754, 664 P.2d 360.

[338] *See* Patterson v. LeMaster, 2001-NMSC-013, ¶¶ 20–26, 130 N.M. 179, 21 P.3d 1032 (holding that showup procedures are suggestive and applying the *Biggers* factors to a showup).

[339] *See* State v. Richardson, 402 S.E.2d 401, 404–05 (N.C. 1991).

[340] *See* State v. Addai, 2010 ND 29, ¶¶ 25–33, 778 N.W.2d 555, 565–67.

[341] *See* State v. Broom, 533 N.E.2d 682, 692 (Ohio 1988).

[342] *See* Cole v. State, 766 P.2d 358, 359–60 (Okla. Crim. App. 1988).

ing a preliminary hearing.[343] Pennsylvania's body of case law suggests that seeking to admit a subsequent in-court identification is a much more common trial tactic than seeking to admit a previous out-of-court identification obtained using a suggestive procedure.[344] This apparent preference for in-court identifications also appears in several other jurisdictions, such as South Dakota and Texas.[345]

Rhode Island

State v. Hall explains and applies the *Brathwaite* test and *Biggers* factors to hold that an identification from a single-photo showup was admissible.[346] In 2018, the Supreme Court of Rhode Island explicitly refused to reconsider its adherence to *Brathwaite* with regard to showups.[347]

South Carolina

State v. Wyatt describes the *Brathwaite* test and *Biggers* factors and finds a showup to have been necessary, rendering the resultant identification admissible.[348]

South Dakota

State v. Abdo provides the *Brathwaite* test and the *Biggers* factors as part of an independent source analysis to determine whether an in-court identification was properly admitted following a single-photo showup.[349] South Dakota applies the same standard to determine the reliability of both in-court and out-of-court identifications.[350]

Tennessee

State v. Martin describes the *Brathwaite* test and the *Biggers* factors.[351] Tennessee does apply a notably strict standard to determine whether a showup was

---

[343] *See* Commonwealth v. McGaghey, 507 A.2d 357, 359 (Pa. 1986).

[344] *See, e.g.*, Commonwealth v. Johnson, 139 A.3d 1257, 1278–79 (Pa. 2016) (applying the *Biggers* factors to find an in-court identification reliable, despite the suggestiveness of a previous out-of-court identification procedure).

[345] *See infra* notes 349–350, 353–354 and accompanying text (discussing the approaches of South Dakota and Texas).

[346] *See* State v. Hall, 940 A.2d 645, 653–54 (R.I. 2008).

[347] *See* State v. Washington, 189 A.3d 43, 55–58 (R.I. 2018) (refusing a defendant's request to either adopt a per se exclusionary rule for identifications from unnecessarily suggestive procedures or to revise the *Biggers* factors).

[348] *See* State v. Wyatt, 806 S.E.2d 708, 710, 713 (S.C. 2017).

[349] *See* State v. Abdo, 518 N.W.2d 223, 225–26 (S.D. 1994).

[350] *See* State v. Doap Deng Chuol, 2014 SD 33, ¶¶ 20–22, 28, 849 N.W.2d 255, 261–62 (noting that suggestive photo array identifications and subsequent in-court identifications are both analyzed using the *Brathwaite* test).

[351] *See* State v. Martin, No. W2013-02013-CCA-R3CD, 2015 WL 555470, at *8–9 (Tenn. Crim. App. Feb. 10, 2015), *aff'd*, 505 S.W.3d 492 (Tenn. 2016).

necessary: with only a narrow exception for emergencies, Tennessee courts bar showups once a suspect arrives at a police station.[352]

Texas

Ibarra v. State provides the *Brathwaite* test and *Biggers* factors as part of an independent source analysis.[353] Texas courts tend to proceed directly to the question of whether an in-court identification has been tainted by a suggestive out-of-court procedure, rather than separately considering the admissibility of the out-of-court identification.[354]

Virginia

Delong v. Commonwealth applies the *Brathwaite* test and *Biggers* factors to hold an identification reliable.[355]

Washington

State v. Linares explains the *Brathwaite* test and *Biggers* factors and clarifies that the first portion of the inquiry requires the defendant to show that the procedure was suggestive.[356]

West Virginia

State v. Boykins explicitly holds that the court continues to follow *Biggers* in analyzing due process challenges to eyewitness identifications and applies the *Brathwaite* test and *Biggers* factors.[357]

Wyoming

Green v. State provides the *Brathwaite* test and *Biggers* factors.[358] *Green* elaborates slightly on the descriptions of the *Biggers* factors but appears to be clarifying rather than modifying them.[359]

---

[352] *See* State v. Thomas, 780 S.W.2d 379, 381–82 (Tenn. Crim. App. 1989) (holding that showups may be used only in an emergency or as part of the field investigation immediately following a crime).

[353] *See* Ibarra v. State, 11 S.W.3d 189, 195 (Tex. Crim. App. 1999).

[354] *See, e.g.*, Rogers v. State, 402 S.W.3d 410, 417–18 (Tex. App. 2013) (considering if an out-of-court identification procedure was impermissibly suggestive, but framing the issue as the admissibility of a subsequent in-court identification), *judgment vacated on other grounds*, 426 S.W.3d 105 (Tex. Crim. App. 2014).

[355] *See* Delong v. Commonwealth, 362 S.E.2d 669, 674–75 (Va. 1987); *see also* Winston v. Commonwealth, 604 S.E.2d 21, 37–38 (Va. 2004) (adopting the position that the defendant bears the burden under *Biggers* to show that an out-of-court procedure was impermissibly suggestive).

[356] *See* State v. Linares, 989 P.2d 591, 593 (Wash. Ct. App. 1999).

[357] *See* State v. Boykins, 320 S.E.2d 134, 136–37 (W. Va. 1984).

[358] *See* Green v. State, 776 P.2d 754, 756 (Wyo. 1989).

[359] *See* Majhanovich v. State, 2018 WY 48, ¶ 11, 417 P.3d 152, 155 (Wyo. 2018) (noting that Wyoming follows the U.S. Supreme Court's standard and quoting *Green*'s description of the *Biggers* factors); *Green*, 776 P.2d at 756 (providing extended descriptions of the *Biggers* factors).