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SUGGESTIVE IDENTIFICATIONS: THE SUPREME COURT'S DUE PROCESS TEST FAILS TO MEET ITS OWN CRITERIA

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There are perhaps few procedures in our system of criminal justice more inexact than eyewitness identification of criminal suspects. This is due in large measure to the many subtle psychological influences that affect any person's ability to observe, retain, and recollect events, particularly when stress is present. The author discusses the current constitutional standard for the admissibility of eyewitness identifications and examines whether this test serves the interests it purports to uphold. After discussing the impact of psychological factors and suggestive police practices, the author offers some guidelines for more consistent application of the existing test.

I. INTRODUCTION

Ever since the United States Supreme Court announced in *Stovall v. Denno*[1] that identification procedures conducted in criminal cases could be violative of due process, courts have wrestled with cases involving suggestive conduct in both corporeal and photographic identifications. In the most recent Supreme Court cases involving due process challenges to identification testimony, the focus of concern has shifted from the suggestive behavior itself to the effect that this suggestiveness has upon the reliability of the identification.[2] Thus, even if the police engage in conduct that indicates to the witness that they believe a certain suspect guilty, the court may nonetheless deem the identification to be reliable after examining the totality of the circumstances. If deemed reliable, neither the out-of-court identification proceeding[3] nor the in-court identification[4] will be beyond the proper inquiry of the prosecutor.

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1. 388 U.S. 293 (1967).
2. *See* Manson v. Brathwaite, 432 U.S. 98 (1977); Neil v. Biggers, 409 U.S. 188 (1972).
3. Manson v. Brathwaite, 432 U.S. 98, 113-14 (1977); Neil v. Biggers, 409 U.S. 188, 198-99 (1972).
4. Simmons v. United States, 390 U.S. 377, 384 (1968). Following the decision in *Manson*, most courts have used the same totality of circumstances approach to determine the admissibility of both out-of-court and in-court identifications. N. SOBEL, EYEWITNESS IDENTIFICATION: LEGAL AND PRACTICAL PROBLEMS § 37, at 60-61 (Supp. 1981) [hereinafter cited as SOBEL].

In a series of cases culminating with *Manson v. Brathwaite*,[5] the Supreme Court established a test for determining whether an identification proceeding violated a defendant's due process rights. The Court articulated three societal interests it deemed relevant in fashioning a proper standard by which to evaluate the constitutionality of suggestive identification evidence: (1) deterring improper police identification procedures; (2) furthering the administration of justice; and (3) keeping unreliable evidence from the jury's consideration.[6] This article analyzes whether these societal interests are, in fact, well served by application of the totality of circumstances test in its present form to eyewitness identifications. It then suggests measures that may be employed by courts in order to serve these interests.

II. HISTORY

The Supreme Court first focused on the constitutional implications of eyewitness testimony in a trilogy of cases decided in 1967. Although *United States v. Wade*[7] relied on the sixth amendment in providing the right to counsel at pretrial identification procedures, it contained within it a discussion of the effect certain types of suggestive conduct can have on eyewitness identifications.[8] Through *Wade* and *Gilbert v. California*,[9] the Supreme Court made clear that "critical stage" pretrial identifications would be suppressed if the defendant was not afforded the right to counsel at the display and that this suppression would occur regardless of whether suggestion contributed to the identification.[10] The prosecution was still afforded the opportunity to obtain from the witness a positive in-court identification of the defendant if it could be demonstrated that this identification derived from a source other than the uncounselled display.[11]

On the same day that *Wade* and *Gilbert* were decided, the Supreme Court held in *Stovall* that certain pretrial identification procedures were "so unnecessarily suggestive and conducive to irreparable mistaken identification" that they could constitute a violation of due process.[12] Unlike the right to counsel, the due

5. 432 U.S. 98 (1977).
6. *Id.* at 111-13.
7. 388 U.S. 218 (1967).
8. *Id.* at 228-35.
9. 388 U.S. 263 (1967).
10. The Court subsequently held that the right to counsel does not attach until the defendant has been formally charged, Kirby v. Illinois, 406 U.S. 682 (1972), and that no right to counsel exists at photographic identifications. United States v. Ash, 413 U.S. 300 (1973).
11. United States v. Wade, 388 U.S. 218, 240 (1967).
12. 388 U.S. 293, 302 (1967).

process protection embodied in the fifth and fourteenth amendments attached regardless of when the challenged identification proceeding occurred.[13] The victim in *Stovall* had been stabbed eleven times by the same man who had murdered her husband and at the time of the identification was hospitalized and believed near death.[14] Due to the need to establish immediately whether in fact Stovall was the assailant, the Court, looking to "the totality of the circumstances," upheld the admission of the pretrial confrontation.[15] Although viewing with disfavor one-on-one confrontations, the Court ruled that the totality of the circumstances could, as here, justify such suggestive procedures.[16] Unfortunately, the Court in *Stovall* never defined "totality of the circumstances" nor explained to what circumstances the concept would be limited. Clearly those circumstances governing the identification proceeding itself would be germane, but what of those factors which relate to the ability of the witness to see his assailant at the time of the commission of the crime? If factors outside the identification proceeding are relevant, some commentators have argued, due process becomes a concept primarily concerned with accuracy rather than fairness.[17]

One year after its decision in *Stovall,* the Supreme Court added to its definition of what constitutes a due process violation. In *Simmons v. United States,*[18] the Court held that, with respect to photographic identifications, "only if the photographic identification procedure was so impermissibly suggestive as to give rise to a *very substantial likelihood* of irreparable misidentification,"[19] would an in-court identification be prohibited. In determining the likelihood of misidentification, the Court included an evaluation of the opportunity the witness had to observe the criminal during the commission of the crime.[20] Although the Supreme Court in *Stovall* never directly referred to due process factors external to the identification proceeding itself, the Court in *Simmons* construed the witness' observation of the criminal act to be part of the totality of the circumstances. As the evidence challenged in *Simmons* was the in-court identification only, it was not yet clear whether such external factors would be considered when the evi-

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13. Stovall himself could claim no sixth amendment violation as the Court held *Wade* and *Gilbert* not to be retroactive. *Id.* at 300.
14. *Id.* at 302.
15. *Id.*
16. *Id.*
17. SOBEL, *supra* note 4, § 37 at 66 (1972); Pulaski, Neil v. Biggers: *The Supreme Court Dismantles the* Wade *Trilogy's Due Process Protection,* 26 STAN. L. REV. 1097, 1112–13 (1974) [hereinafter cited as Pulaski].
18. 390 U.S. 377 (1968).
19. *Id.* at 384 (emphasis added).
20. *Id.* at 385.

dence at issue was the pretrial identification proceeding. The subsequent Supreme Court opinions in *Foster v. California*[21] and *Coleman v. Alabama*,[22] although involving due process challenges to eyewitness identifications, left this issue unresolved.[23]

With its decision in *Neil v. Biggers*,[24] the Supreme Court addressed directly the question of whether factors pertaining to a witness' perception of the perpetrator at the time of the crime could play a role in determining the admissibility of evidence concerning a pretrial identification proceeding. In *Biggers*, the Court deemed admissible the testimony of a rape victim relating to a one-on-one corporeal identification conducted seven months after the commission of the crime. Whereas *Stovall* held that the presence of improper suggestion does not automatically result in suppression of evidence relating to a pretrial identification display, *Biggers* concluded that even unnecessary suggestion does not compel exclusion of such evidence.[25] The Supreme Court reasoned in *Biggers* that it is the unreliability that may stem from suggestive procedures and not the procedures themselves that violates due process. To determine whether an eyewitness identification was reliable, the Court looked to

> the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.[26]

Clearly, factors quite apart from the conduct of the pretrial identification proceeding would hereafter play a role in determining the admissibility of evidence pertaining to the identification confrontation itself.

In apparently finding some significance to the fact that the confrontation in *Biggers* occurred before the holding in *Stovall*, the Court seemed to leave open the question of whether the *Biggers* reliability factors were applicable to identification proceed-

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21. 394 U.S. 440 (1969).
22. 399 U.S. 1 (1970).
23. In *Foster*, the only Supreme Court case in which a due process challenge to identification testimony was successful, the Court held that the suggestive elements present in the lineup and subsequent one-on-one confrontation were so egregious that the reliability of the identification was undermined. 394 U.S. 440, 443 (1969). Although referring to reliability, the Court never discussed any factors relating to the witness' original observation of the criminal. *Coleman*, like *Simmons*, concerned the prosecution's use at trial of evidence relating to the in-court identification only.
24. 409 U.S. 188 (1972).
25. *Id.* at 199.
26. *Id.*

ings taking place after the decision in *Stovall* or whether a strict per se exclusion of suggestive identifications should be applied.[27] With its holding in *Manson v. Brathwaite*,[28] the Supreme Court left no doubt that post-*Stovall* due process challenges to eyewitness testimony also would be decided by the totality of circumstances test and that this test included all of the reliability factors articulated in *Biggers*.

In *Manson*, the Court was confronted with the admission of testimony concerning the identification by a police officer of the one photograph left on his desk for the officer to view. Conceding that *Biggers* left some question as to whether its formulation of a totality of circumstances test was applicable to post-*Stovall* identification proceedings,[29] as opposed to a more strict test, the Supreme Court examined the effectiveness of the two competing due process approaches to identification testimony. The first of these approaches, the per se test, mandates the automatic suppression of any evidence concerning an unnecessarily suggestive identification procedure. The other, more lenient approach is the totality of circumstances test, essentially as outlined in *Biggers*, which focuses on the reliability of the identification and not merely the suggestion employed in the identification confrontation.[30] In making a choice between these approaches, the Court compared the two to determine which test would better satisfy the societal interests behind judicial exclusion of eyewitness testimony. Concluding that the totality approach served society better, the Court in *Manson* applied the *Biggers* reliability factors.[31] Reasoning that the officer witness had ample opportunity to view the criminal, paid scrupulous attention to him at the time of the crime, submitted an accurate description, was certain as to his identification, that the time between the crime and the confrontation was only two days, and that there was no pressure upon the witness to make an identification, the Court found the eyewitness' testimony reliable.[32]

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27. In discussing the deterrent effect of a rule barring all testimony concerning suggestive pretrial identifications, the Court in *Biggers* wrote, "[S]uch a rule would have no place in the present case, since both the confrontation and the trial preceded *Stovall v. Denno*, when we first gave notice that the suggestiveness of confrontation procedures was anything other than a matter to be argued to the jury." 409 U.S. 188, 199 (1972) (citation omitted). Thus, by implication, once *Stovall* served such notice, there may be a place for such a strict rule.
28. 432 U.S. 98 (1977).
29. *Id.* at 109.
30. *Id.* at 110.
31. *Id.* at 114. The *Manson* Court added to the *Biggers* process the requirement of weighing the corrupting effect of the suggestive identification against the reliability factors. *Id.*
32. *Id.* at 114-16.

Thus, the crucial task for courts after *Manson* is to weigh the impact that a particular suggestive police practice has upon the reliability of the identification made by the witness. Although the Supreme Court offers some guidance as to what factors should be considered in evaluating the reliability of an identification, neither *Biggers* nor *Manson* provide criteria for determining the degree of suggestion present in particular identification proceedings. This omission is particularly glaring in *Manson*, since the Supreme Court there, after adopting the *Biggers* reliability factors, declared, "Against these factors is to be weighed the corrupting effect of the suggestive identification itself."[33] As a result of the Supreme Court's failure to articulate what constitutes suggestion and, equally important in a balancing process, what particular suggestive practices are worse than others, lower courts tend to regard suggestion as devoid of gradations. Thus, in measuring specific factors of reliability against an amorphous, unstratified concept of suggestion, many courts have suppressed only the most egregious identification displays and even these are often condoned when the witness is deemed to have substantially satisfied the reliability criteria of *Biggers*.[34]

III. DETERRENCE OF IMPROPER POLICE PROCEDURES

Of the three societal interests to be considered in fashioning a due process standard for the admission of identification evidence, only with respect to the issue of deterrence did the Supreme Court find the per se approach to be superior to the totality of circumstances test. Despite this concession, the Court nevertheless maintained that the continued possibility of judicial suppression would serve as an adequate deterrent to unnecessarily suggestive police identification procedures.[35] Reaffirming what it held in *Biggers*, the Court in *Manson* ruled that due process is violated not by unnecessary suggestion alone but by suggestive practices that lead to a very substantial likelihood of misidentification.[36] Clearly, then, it is the reliability or accuracy of the identification and not the conduct of the police that ultimately determines whether identification evidence will be excluded.

In assessing reliability, courts look to the *Biggers* factors, the first of which is the opportunity of the witness to observe his assailant during the commission of the crime.[37] This opportunity to observe is completely beyond the control of the police. The other

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33. *Id.* at 114.
34. *See* cases cited note 47 *infra*.
35. Manson v. Brathwaite, 432 U.S. 98, 112 (1977).
36. *Id.* at 116.
37. *See* United States v. Poe, 462 F.2d 195, 198 (5th Cir. 1972) (opportunity to observe is prime among the *Biggers* factors).

Biggers reliability factors of certainty of the identification, attention paid to the assailant during the crime, accuracy of the witness' description, and to a certain extent the time period between the crime and the display[38] are also independent of any police conduct. Therefore, focusing on reliability as the "linchpin" upon which the admissibility of identification testimony hinges communicates to the police that factors beyond their control can result in the proper introduction into evidence of suggestive identification proceedings. Continuing this reasoning, even intentional or flagrant suggestive conduct might produce no negative consequences for the police under the totality of circumstances approach.[39] In sum, a reasonable police officer could read *Manson* as conveying the message that when external factors of reliability are present, courts will tolerate some affirmative suggestive conduct. The United States Court of Appeals for the Ninth Circuit leaves little doubt as to what it perceives *Manson's* impact to be on the deterrence of improper police behavior:

> To be sure, deterrence of improper police conduct is a worthy goal. But when improper police conduct, directed only at a witness, does not taint the reliability of that witness' identification evidence, the defendant has nothing of which to complain. Probative evidence should not be kept from a jury at the behest of a defendant whose rights are unaffected by the police conduct. The Supreme Court has determined that deterrence of such improper conduct may be fully effectuated by appellate review that focuses on the reliability of identification evidence. Thus we need not consider the reprehensibility of police conduct in these cases except as it bears upon the reliability of the challenged identification.[40]

The uniformly condemned procedures of displaying a suspect standing alone to a witness, commonly called a show-up,[41] and the

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38. While the police arrange the display, when they do so depends often on the existence of other evidence allowing them to focus their investigation upon one of several suspects.

39. *See* Pulaski, *supra* note 17, at 1114. In commenting on the totality test, the author stated:

> Because it considers such external factors as the witness' initial opportunity to observe the offender and because it requires defendants to demonstrate a substantial likelihood of prejudice at trial, the permissive due process test provides no real incentive to the police to avoid suggestive procedures. On the contrary, it provides a means by which the prosecution may successfully introduce at trial identification evidence obtained as the result of grossly unfair pretrial proceedings.

Id.

40. United States v. Field, 625 F.2d 862, 868 (9th Cir. 1980) (citations omitted).

41. Stovall v. Denno, 388 U.S. 293, 302 (1967). *See also* Gonzalez v. Hammock, 477 F. Supp. 730, 734 (S.D.N.Y. 1979) ("[I]ts use [a showup], especially in a police station when less suggestive methods are available, has generally been condemned as the least reliable form of eyewitness identification.").

non-corporeal equivalent of showing the witness only one photograph[42] are flourishing under the totality of circumstances approach.[43] Rather than deterring such conduct, the effect of *Biggers* and *Manson* has been to provide the police with a fairly clear signal that absent extremely aggravating circumstances, the one-on-one presentation of suspects to witnesses will result in no suppression.[44] The use, therefore, of the preferable techniques of the lineup or photographic array is left to the discretion of the investigating police officer, and their use can almost be considered a gratuitous act.[45]

Both state and federal appellate courts have shown, for the most part, little reluctance to follow the Supreme Court's lead in countenancing admittedly suggestive police procedures.[46] Even where police tactics involve flagrant misconduct that focuses the attention of the witness squarely on the suspect, courts have

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42. Manson v. Brathwaite, 432 U.S. 98, 116 (1977); Simmons v. United States, 390 U.S. 377, 383 (1968); Hudson v. Blackburn, 601 F.2d 785, 788 (5th Cir. 1979); Bloodworth v. Hopper, 539 F.2d 1382, 1383 (5th Cir. 1976).
43. SOBEL, *supra* note 4, §§ 37, 46; Pulaski, *supra* note 17, at 1119-20.
44. *See* S. SALTZBURG, AMERICAN CRIMINAL PROCEDURE 546 (1980). As this author explained:

> There is considerable evidence that law enforcement officers are correctly reading the signals that are emitted from the Supreme Court and generally echoed by lower courts. Those signals are that few identification procedures will be struck down by the judges and that the judges will strain to keep government's "costs" associated with a bad lineup as low as possible.

Id. See also SOBEL, *supra* note 4, § 37 at 61-62.
45. *See* State v. LeClair, 118 N.H. 214, 385 A.2d 831 (1978). In commenting on the effect of the totality of the circumstances test, the court noted: "All things considered, the consequences of misidentification are so great and the risks so high that it is questionable if a totality of circumstances test provides either a sufficient deterrent against the unnecessary use of one-man showups or a sufficient protection against misidentifications which may result therefrom." *Id.* at 218, 385 A.2d at 833.
46. *See, e.g.*, Hudson v. Blackburn, 601 F.2d 785 (5th Cir. 1979) (six months after robbery-murder, witness shown two pictures of defendant alone on eve of trial); United States *ex rel.* Pierce v. Cannon, 508 F.2d 197 (7th Cir. 1974) (defendant, the only person in lineup wearing three-quarter length black leather coat fitting description of coat worn by robber, identified by two victims viewing lineup together); United States *ex rel.* Lucas v. Regan, 503 F.2d 1 (2d Cir. 1974) (after selecting a different man as robber, witness "corrects" herself and identifies defendant when shown his photograph alone); *In re* L.W., 390 A.2d 435 (D.C. 1978) (defendant substantially shorter and younger than other lineup participants); Clempson v. State, 144 Ga. App. 625, 241 S.E.2d 495 (1978) (five alleged robbers standing together, illuminated by headlights of police car, identified by witness sitting in rear of car); State v. Lee, 340 So. 2d 1339 (La. 1976) (twenty minutes after robbery-assault, bringing back suspects and saying "we think we caught them"), *cert. denied*, 431 U.S. 941 (1977); State v. Heald, 120 N.H. 319, 414 A.2d 1288 (1980) (witness described suspect as a man 40-45 years of age; defendant's photograph was the only one in the array of a man in his forties).

found elements of reliability present sufficient to uphold the use of challenged eyewitness testimony.[47] One such case is a 1978 decision of the Supreme Judicial Court of Maine, *State v. St. Onge.*[48]

The victim in *St. Onge* was robbed by a man holding a rifle and wearing a bandana across his face. The description of the assailant given to the police by the victim was of a "teenager, 5'6"-5'10" tall, very heavyset, having dark hair and dark eyes, and who spoke with a soft, or low, stuttering voice."[49] One or two days after the crime, the victim was shown a "mug shot" photograph of the defendant with a card held over the nose and mouth of the face in the picture and informed "that the subject of the photograph had previously been imprisoned on burglary charges, had a speech impediment and was a good suspect."[50] The victim indicated that there was physical similarity between the defendant and the perpetrator, but without an opportunity to hear the defendant's voice, he could not be certain that the two were the same man.[51] Later that same week, the victim was brought to the sheriff's office and told he would be hearing, from behind a partition, the voice of the man whose picture he had previously seen. Upon hearing the defendant's voice and observing the defendant after he emerged from behind the partition, the victim made an identification.[52]

After condemning the suggestive techniques employed by the police both in the photographic identification accompanied by the objectionable comments and in the subsequent voice identification, the court in *St. Onge* looked to the necessity of using these procedures.[53] The court concluded that there was in fact no need to show the victim only one picture nor any reason to limit the number of voices heard to just one.[54] Examining next the presence of the reliability factors listed in *Biggers,* the court found the inci-

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47. *See, e.g.,* Frank v. Blackburn, 605 F.2d 910 (5th Cir. 1979); Washington v. Cupp, 586 F.2d 134 (9th Cir. 1978); Landry v. Alabama, 579 F.2d 353 (5th Cir. 1978); People v. Dortch, 64 Ill. App. 3d 894, 381 N.E.2d 1193 (1978) (witness, who was aware of the name of the perpetrator, shown photo of defendant with his name written on photograph); State v. Washington, 257 N.W.2d 890 (Iowa 1977) (defendant brought before witness by police officer; at the time, defendant was carrying purple jacket over his arm matching the description of coat worn by perpetrator), *cert. denied,* 435 U.S. 1008 (1978); State v. Dickerson, 568 S.W.2d 559 (Mo. 1978) (one hour after his car was forcibly stolen, witness asked to identify defendant after being told defendant was found in his car and seeing defendant alone handcuffed in jail cell).
48. 392 A.2d 47 (Me. 1978).
49. *Id.* at 49.
50. *Id.* at 50.
51. *Id.*
52. *Id.*
53. *Id.* at 50-51. In *Stovall v. Denno,* the Supreme Court ruled that the necessity to obtain an immediate identification could serve as justification for the police officer's use of suggestive identification procedures. 388 U.S. 293, 302 (1967).
54. 392 A.2d 47, 51 (Me. 1978).

dent entailed a two-to-three minute observation, under minimal light, of a man who was wearing a mask. Still, the court added, the witness was able to describe the assailant as short, stout, and possessing a distinctive speech impediment. The reluctance of the witness to make an identification both at the photographic showing and later at the in-person confrontation indicated to the court that the identification was free of suggestion.[55] The court drew this conclusion notwithstanding its concession that uncertainty is one of the criteria enunciated in *Biggers* indicative of a lack of reliability in the identification.[56] The court gave credit to the witness' description despite its generality and the fact that the defendant, rather than being a teenager, was thirty-three years old. Weighing the admittedly and expressly disapproved suggestive police confrontation against the factors of reliability, the court, although acknowledging this to be a "close case," found no error in the admission of testimony relating to both the pretrial and in-court identifications.[57]

It is reasonable to question the deterrent value of any due process approach permitting the use of such overt police actions that focus the attention of the witness so clearly upon one suspect. Additionally, the reliability deemed by the court sufficient to overcome such blatant suggestion is far from convincing. The only factor of any import in establishing the identity of the assailant was his distinctive voice impediment, but the manner in which that voice impediment was identified as belonging to the defendant was so replete with suggestion as to be virtually valueless. The witness in *St. Onge* identified the one voice presented to him after being informed that it belonged to the person whose photograph he had tentatively identified following grossly incriminating police comments. Although apparently feeling somewhat constrained by *Manson*, the court in *St. Onge* was not unaware of the extremely limited degree of deterrence of improper police behavior that results from the totality of circumstances approach: "[W]e have hitherto been reluctant to hold that a particular kind of pretrial identification procedure is per se impermissibly suggestive. Nevertheless, should unnecessarily suggestive identification

55. *Id.*
56. *Id.* at 51 n.3.
57. *Id.* at 52.

procedures continue, we may be required to reassess our current position."[58]

IV. ADMINISTRATION OF JUSTICE

The societal interest that argues most strongly for adoption of the totality of circumstances approach, according to the Supreme Court, is the furtherance of the administration of justice.[59] Among the concerns expressed by the Supreme Court, with regard to the effect of the competing per se approach upon the administration of justice, is the possibility of the guilty going free, the likelihood of error by the trial judge due to the inflexibility of per se exclusion, and the "Draconian sanction" whereby the admission of reliable but suggestive identification evidence would result in reversal.[60] Equally relevant, although unmentioned by the Court, should be the somewhat converse considerations of the extent to which eyewitness identifications involve the possibility of the innocent being convicted and the likelihood of condoning the use of evidence that subjects the finding of truth to the vast discretion judges retain under the totality approach.

That the Court regards the furtherance of justice as one of those interests which must be considered in choosing between the two competing due process approaches is most appropriate. Analysis of how effectively the totality test furthers this interest, however, should be extended beyond the particular factors noted by the Court. Does the flexibility allowed under the totality approach result in the admission of evidence that contributes to the conviction of possibly innocent defendants? What is the impact of eyewitness testimony upon jurors and are jurors able to discern the effect of suggestion upon such testimony?[61] Is use of the totality

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58. *Id.* at 52 n.4 (citations omitted). *See also* People v. Adams, 70 A.D.2d 825, 417 N.Y.S.2d 868 (1979). In his concurring opinion in *Adams*, Justice Sandler made the following observation about the *Manson* decision: "What troubles me here is an increasing sense that the identification procedures disclosed may reflect a developing tendency, following relaxation of the more rigorous standards previously advanced by the Supreme Court, to lapse back into precisely the kind of objectionable methods that contributed to the earlier more severe approach." *Id.* at 826, 417 N.Y.S.2d at 869 (Sandler, J., concurring). Similarly, in State v. LeClair, 118 N.H. 214, 385 A.2d 831 (1978), the Supreme Court of New Hampshire warned: "Although we do not adopt a per se rule at this time, continued use of unnecessarily suggestive police procedures will cause us to do so, by demonstrating the inadequacies of the deterrent effect of the totality of circumstances rule." *Id.* at 219, 385 A.2d at 833-34.

59. Manson v. Brathwaite, 432 U.S. 98, 112 (1977).

60. *Id.* at 113.

61. In Clemons v. United States, 408 F.2d 1230, 1251 (D.C. Cir.), *cert. denied*, 394 U.S. 964 (1969), *cited with approval in* Manson v. Brathwaite, 432 U.S. 98, 113 n.14 (1977), the court asserted that cross-examination and summation are adequate vehicles for communicating to a jury the effect of suggestion upon accuracy. 408 F.2d at 1251.

of circumstances approach likely to result in the promulgation of rules by police departments or legislatures designed to insure fair and unbiased identification procedures? Each of these questions should be addressed before a conclusion is drawn as to whether the due process approach adopted by the Supreme Court in *Manson* furthers the administration of justice.

In addressing those issues which relate to the furtherance of justice, the difference between the purposes behind the use of the exclusionary rule for identification testimony and its use in conjunction with fourth amendment violations must be understood.[62] When physical evidence is excluded because the governmental action in seizing it involved a violation of the fourth amendment, probative and reliable evidence is kept from the jury. Courts have indicated that suppressing illegally seized evidence serves to deter the police from engaging in conduct violative of the fourth amendment and ensures that the judicial process will not be tainted by the use of improperly obtained evidence.[63] Although both the deterrent and the judicial integrity purposes of the exclusionary rule also would be applicable to the exclusion of suggestive identification evidence, something more fundamental to the administration of justice is involved in determining the admissibility of eyewitness evidence.

Identification evidence that violates due process is suppressed because the unnecessarily suggestive governmental actions are conducive to mistaken identification.[64] Physical evidence, on the other hand, is suppressed for reasons having nothing to do with its intrinsic reliability.[65] Therefore, an incorrect decision to admit into evidence impermissibly seized physical items, while violative of a suspect's constitutional rights, in no way affords the jury the opportunity to use evidence of dubious accuracy in convicting the defendant. Heroin seized from the defendant in violation of the fourth amendment is still heroin that was illegally possessed. Judicial error in permitting the admission of identifica-

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62. The Court in *Manson* noted: "Unlike a warrantless search, a suggestive preindictment procedure does not in itself intrude upon a constitutionally protected interest. Thus, considerations urging the exclusion of evidence deriving from a constitutional violation do not bear on the instant problem." Manson v. Brathwaite, 432 U.S. 98, 112-13 n.13. While this argues for the proposition that police impropriety in due process identification cases does not, as in fourth amendment cases, by itself require suppression, it in no way touches upon whether the administration of justice is furthered by excluding evidence judicially determined to be suggestive but reliable.
63. *See* Mapp v. Ohio, 367 U.S. 643 (1961); Elkins v. United States, 364 U.S. 206 (1960). *But see* Stone v. Powell, 428 U.S. 465 (1976) (suggests that the imperative of judicial integrity has a minimal role as a justification for the exclusionary rule).
64. Stovall v. Denno, 388 U.S. 293, 301-07 (1967).
65. The use of the word "reliable" to refer both to physical evidence and eyewitness identification should not disguise the fact that the "reliability" of an eyewitness identification depends upon a judicial determination. The "reliability" of physical evidence, however, reflects the inherent characteristics of the evidence itself.

tion evidence that violates due process, however, allows the jury to use evidence against the defendant that may result directly in a mistake in the truth-finding process.[66] Therefore, a high degree of scrutiny should be exercised in the decision to admit into evidence identification testimony challenged as violative of the defendant's due process rights. Where a possible error relates directly to the ultimate question of guilt or innocence, the administration of justice should tolerate no less.

Observers of the American system of criminal trials have long been aware of the danger of wrongful convictions because of a witness' misidentification.[67] Edward Borchard, in his 1932 book, *Convicting the Innocent,* detailed numerous cases of people, later shown to be innocent, being tried and convicted of crimes. After analyzing the causes of these mistaken convictions, Borchard concluded that misidentifications by victims were the prime cause of wrongful convictions.[68] Judge Jerome Frank, some years later, undertook a similar investigation and arrived at the same conclusion.[69] Although the possibility of erroneous convictions cannot be prevented, nothing is more fundamental to our system of justice than the need to minimize these tragedies.[70]

To bridge the analytical gap between the misidentification of the defendant by an eyewitness and the ultimate conviction of that defendant by a jury, the impact of identification testimony upon juries must be examined.[71] One commentator asserts that "juries are unduly receptive to identification evidence and are not sufficiently aware of its dangers."[72] In fact, it has been argued

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66. *See* Manson v. Brathwaite, 432 U.S. 98, 127 (1977) (Marshall, J., dissenting).
67. *See* E. BORCHARD, CONVICTING THE INNOCENT at xiii (1932) [hereinafter cited as BORCHARD]. *See also* United States v. Wade, 388 U.S. 218 (1967); F. FRANKFURTER, THE CASE OF SACCO AND VANZETTI 30 (1927), *cited in* United States v. Wade, 388 U.S. at 228.
68. BORCHARD, *supra* note 67, at xiii.
69. J. FRANK & B. FRANK, NOT GUILTY 61 (1971) [hereinafter cited as FRANK & FRANK].
70. *See* United States v. Green, 538 F.2d 437, 441 (D.C. Cir. 1976). The court in *Green* quoted Blackstone's immortal phrase, "[B]etter ten guilty persons should go free than one innocent person be convicted." *Id.*
71. *See* Manson v. Brathwaite, 432 U.S. 98, 116 (1977). The *Manson* Court stated that it had faith in the jury's ability to weigh properly evidence with some elements of untrustworthiness. *Id.*
72. P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 19 (1965) [hereinafter cited as WALL].

that juries are apt to rely more on evidence of identification offered by an eyewitness than on any other form of evidence.[73]

In order to determine the amount of influence eyewitness testimony has upon jury verdicts, psychologist Elizabeth Loftus conducted an experiment using 150 subjects as jurors.[74] Loftus presented her jurors with facts concerning the robbery of a grocer in which $110 was taken by a man who then fired two gunshots, killing the grocer. Evidence presented by the prosecution showed the defendant was arrested in his apartment two and one half hours after the crime. His apartment was located in the building into which the robber was seen to have run after the murder, and in the defendant's room the police found $123 and a pair of shoes containing traces of the same type of ammonia used to clean the victimized grocery store.[75] From the defense the jurors learned that, in taking the witness stand, the defendant testified that he had accumulated the money seized from his room over the two months prior to his arrest and that the ammonia found in his shoes could have come from a variety of places he frequented in his job as a delivery man. The jurors were then divided into three groups of fifty, and the first group was asked to decide whether they believed the defendant to be guilty based on this evidence. The results showed that only eighteen percent of this group voted for conviction.[76]

The second group of fifty jurors, in addition to the aforementioned evidence, was informed that a store clerk present at the time of the crime testified to having observed the defendant commit the robbery-murder. With this one added variable of a single eyewitness identification, seventy-two percent of the jurors in the second group of fifty voted to convict the defendant.[77] It is unclear

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73. *See* Eisenberg & Feustel, *Pretrial Identification: An Attempt to Articulate Constitutional Criteria*, 58 MARQ. L. REV. 659, 659 (1975) [hereinafter cited as Eisenberg & Feustel]. As these authors noted:

> Few pieces of evidence are as meaningful to the average jury as is the identification of the criminal defendant by a witness to the crime. No matter how strong the circumstantial evidence, the statement by the witness that "he is the man" is quite often the most significant evidence to the lay person. Even when a strong alibi case is presented, or when the circumstantial evidence points to the innocence of the accused, the identification of the defendant by a witness to the crime is sufficient evidence to convict.

Id. See also BORCHARD, *supra* note 67, at 103; Comment, *Expert Testimony on Eyewitness Perception*, 82 DICK. L. REV. 465, 465 (1978). In commenting on the mistaken conviction of one Everett Howell, Borchard observed: "Again a jury lent greater weight to the identifications of the overwrought victims and witnesses of a crime of violence than to the testimony of sober-minded and disinterested persons who positively saw the accused at other places and thus established a perfect alibi." BORCHARD, *supra* note 67, at 103.

74. E. LOFTUS, EYEWITNESS TESTIMONY 9-10 (1979) [hereinafter cited as LOFTUS].
75. *Id.* at 10.
76. *Id.*
77. *Id.*

precisely how the eyewitness testimony was presented to the jurors or whether they were instructed as to the legal principles upon which a jury bases its verdict. The result, however, points to the significant impact eyewitness testimony has upon juries.

Somewhat more alarming was the result Loftus obtained from the final group of fifty jurors when she continued the experiment. This last group had the benefit of testimony elicited by the defense attorney during cross-examination of the eyewitness. The jurors were informed that during cross-examination, the eyewitness admitted to not wearing the eyeglasses he needs to properly correct his vision of somewhat poorer than 20/400. Further, in response to a question from the defense attorney, the eyewitness conceded that from where he stood in the grocery store, he was unable to see the face of the gunman. Despite this impeachment evidence, sixty-eight percent of the subject-jurors in the final group believed the defendant to be guilty.[78] Thus, the responses partially discrediting the eyewitness testimony resulted in only two fewer jurors voting for conviction. Crediting arguendo the methodology of the experiment, the obvious implication derived from Loftus' efforts is that even impaired eyewitness testimony has a significant impact upon a jury's verdict.

The fact that the *Manson* Court limited its discussion of what issues affect the administration of justice is particularly unfortunate because the Court seemed to attach profound significance to the differences between the totality and per se approaches in furthering the administration of justice: Whereas "the per se approach has the more significant deterrent effect" and "both approaches . . . are responsive to [the] concern" of keeping unreliable identification evidence from the jury, only in the area of the administration of justice does "the per se approach suffer serious drawbacks" when compared to the totality of circumstances test.[79] Such a conclusion by the Court is unwarranted without a more complete analysis of those additional issues which have an impact on the furtherance of justice.

The Supreme Court in *Manson* lamented the likelihood of error by the trial judge due to the inflexibility of the per se approach.[80] Certainly the Court was correct in suggesting that the more lenient totality approach affords courts and prosecutors greater opportunity to preserve the convictions of guilty parties identified in suggestive procedures. Furthermore, the per se rule, as the Court maintained, is inflexible in depriving the government

78. *Id.*
79. Manson v. Brathwaite, 432 U.S. 98, 112 (1977).
80. *Id.*

of the use of testimony concerning a suggestive identification proceeding.[81] What the Court failed to discuss, however, is the effect of the more flexible totality approach upon the police and the judiciary. The Court might have inquired whether the administration of justice is actually furthered by providing the police with significantly more discretion in the manner in which they display suspects to witnesses, a logical outgrowth of the totality approach.[82] In addressing this question, it should be understood that no form of police identification procedure, regardless of how flagrantly suggestive, is expressly prohibited by the totality test.[83] The presence of all or some of the reliability factors outlined in *Biggers* can

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81. It should be noted that even the per se rule permits the prosecutor to obtain an in-court identification from the witness if it can be shown that this identification stems from an independent basis, that is, the witness' perception of the criminal incident and not the tainted identification proceeding. Justice Marshall, in his dissent in *Manson*, interpreted *Simmons* as adopting this independent basis test for in-court identification only. Marshall argued that *Simmons* was limited to testimony concerning an in-court identification and, therefore, was not inconsistent with his interpretation of *Stovall* that the admission of evidence concerning the pretrial identification proceeding should be evaluated solely on the issues of suggestiveness and necessity. *Id.* at 121-23 (Marshall, J., dissenting).

    Commentators have argued that the application of the independent basis test to fifth and fourteenth amendment due process suggestivity cases does not afford sufficient protection to suspects even when the prosecutor's use of the test is limited to just the in-court identification. For a discussion of this point, see Note, *Mandatory Exclusion of Identifications Resulting from Suggestive Confrontations: A Conceptual Alternative to the Independent Basis Test*, 53 B.U. L. REV. 433 (1973); Note, *Pre-Trial Identification Procedures*—Wade *to* Gilbert *to* Stovall: *Lower Courts Bobble the Ball*, 55 MINN. L. REV. 779 (1971) [hereinafter cited as *Pre-Trial Identification Procedures*].

82. *See* Grano, Kirby, Biggers, *And* Ash: *Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?*, 72 MICH. L. REV. 717, 780 (1974) [hereinafter cited as Grano]. This author asserts that the totality approach, in permitting broad police discretion as to how an identification proceeding is conducted, affords the innocent little protection from being the victim of impermissible suggestion. *Id.*

83. *See, e.g.*, Campbell v. State, 589 P.2d 358 (Wyo. 1979). In *Campbell*, the defendant was forced to come to a preliminary hearing handcuffed and attired in prison garb. *Id.* at 361. The first presiding justice of the peace suspended the identification at this proceeding, stating that, in light of the defendant's attire, the hearing was a farce. The hearing was later reconvened with a different justice of the peace presiding. *Id.* at 361-62. The defendant was identified as the assailant and subsequently convicted. On appeal, the Wyoming Supreme Court upheld the conviction and stated that notwithstanding any impropriety, the prosecutor still should have had an opportunity to demonstrate reliability. *Id.* at 366. *See also* cases cited note 46 *supra*.

serve to overcome even the most improper identification displays.[84] Police officers, charged with the responsibility of solving crime, are not the proper repository for the vast discretion afforded under the totality approach. It is unreasonable to expect the police, often acting under extreme public pressure to make an arrest, to utilize preferable methods of identification when surer and easier ones are condoned.[85]

In fashioning this admittedly flexible due process standard, leaving much open to judicial interpretation of police actions, the Supreme Court might have chosen also to examine the impact the totality approach would have upon courts charged with applying it. Had the Court analyzed this issue, the words of one commentator, written after *Wade* and *Stovall* but before adoption of the even more flexible *Biggers* and *Manson* approaches, might have proved helpful:

> Lower courts, . . . in the application of *Stovall*, except in outrageous situations, have failed to find a violation of due process. Every method of avoidance has been used by the lower courts. In a substantial majority of cases, the courts have found that the confrontation was not "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to be a violation of due process. If the confrontation was tainted, the courts have easily found an independent source for an in-court identification of the suspect or in the court's opinion any error in the admission of the in-court identification was harmless . . . .
>
> Thus courts have placed their imprimatur upon highly questionable pretrial identifications. The continued case-by-case determination by the courts will do little to remove unnecessary suggestibility in pretrial identifications. If pretrial identification procedures free from unnecessary suggestion are eventually to be achieved, other methods will have to be developed.[86]

The reasons for this tendency of the lower courts to approve the admission of identification evidence derived from questionable procedures is open to speculation.[87] It has been asserted, for exam-

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84. *See* Grano, *supra* note 82, at 747. Commenting on the "substantial likelihood of misidentification" standard used in the totality test, Grano points out that "under this rule . . ., the defendant is not protected against substantial suggestion that does not quite amount to a due process violation." *Id. See also* Eisenberg & Feustel, *supra* note 73, at 680.

85. *See* United States v. Wade, 388 U.S. 218, 235 (1967).

86. *Pre-Trial Identification Procedures*, *supra* note 81, at 818-19.

87. One commentator suggests that, with the Supreme Court's interpretation of the facts in *Biggers* as a guide, judges may conclude that construing the facts concerning identification proceedings for the prosecution involves significantly less likelihood of being reversed on appeal than does a finding for the defendant. Pulaski, *supra* note 17, at 1119.

ple, that significant psychological pressure exists, due to a variety of factors, for lower appellate courts to preserve convictions where possible.[88] Regardless of the reasons, however, the Supreme Court in *Manson*, in the interest of furthering the administration of justice, should have discussed whether in fact trial and appellate courts are inordinately hesitant to apply the due process clause to identification evidence. Additionally, the Court should have considered whether the adoption of the totality test would increase this hesitation.

Due to the fact that the due process challenge to eyewitness evidence relates directly to the truth-finding process, and given the significant impact eyewitness testimony has upon jurors, furthering the interests of justice would seem to require that the courts employ higher standards before admitting questionable identification evidence. In Judge Bazelon's words: "Since mistaken identifications are probably the greatest cause of erroneous convictions, we must require the fairest identification procedures available under the circumstances. With the stakes so high, due process does not permit second best."[89]

Toward this end of achieving the fairest possible identification procedures, there is agreement that those police methods of identification which embody significant elements of suggestiveness should be avoided.[90] Many commentators have urged police departments and legislatures to become involved in the promulgation of rules to ensure the use of the best identification procedures under the circumstances.[91] It is highly questionable whether the "lenient" totality approach will encourage police departments and legislatures to formulate such rules.[92] The Supreme Court, in analyzing the effect of the totality of circumstances approach upon the administration of justice, should have explored whether the totality test would encourage this desirable rule formulation.

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88. Grano, *supra* note 82, at 780.
89. Wright v. United States, 404 F.2d 1256, 1262 (D.C. Cir. 1968) (Bazelon, J., dissenting).
90. Manson v. Brathwaite, 432 U.S. 98, 117 (1977); Neil v. Biggers, 409 U.S. 188, 198-99 (1972); United States v. Wade, 388 U.S. 218, 236-38 (1967).
91. In suggesting that alternatives to providing counsel at lineups are available, the Supreme Court in United States v. Wade, 388 U.S. 218 (1967), wrote: "Legislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as 'critical.' " *Id.* at 239. *See also* Manson v. Brathwaite, 432 U.S. 98, 117-18 (1977) (Stevens, J., concurring); Grano, *supra* note 82, at 784; *Pre-Trial Identification Procedures, supra* note 81, at 818-19. For examples of the types of rules that police and legislative bodies could promulgate to increase the use of proper identification procedures, see WALL, *supra* note 72, at 40-64; Eisenberg & Feustel, *supra* note 73, at 680-81; Sobel, *Assailing the Impermissible Suggestion: Evolving Limitations on the Abuse of Pre-Trial Criminal Identification Methods*, 38 BROOKLYN L. REV. 261, 301-06 (1971).
92. Grano, *supra* note 82, at 780-85.

V. RELIABILITY

The "driving force" behind *Wade* and *Stovall* according to the Supreme Court in *Manson* was the "concern that the jury not hear eyewitness testimony unless that evidence has aspects of reliability."[93] In fashioning what it considers to be the appropriate due process standard for identification testimony, the Court declared reliability to be the "linchpin" in the ultimate determination of admissibility.[94] The significance, then, of the Court's assertion that both the per se and totality approaches are responsive to this concern cannot be overstated. In evaluating the Court's conclusion as to the responsiveness of the totality approach in preventing the submission of unreliable identification evidence to the jury, an examination of those variables which affect the reliability of eyewitness identification will be conducted. After discussing what factors detract from the accuracy of eyewitness identifications in general, attention will be directed to some forms of suggestive police behavior. Finally, the impact of these suggestive identification procedures upon the reliability of an identification and how the courts weigh this impact under the totality test will be explored.

The process by which an individual observes an incident and some time later recounts the details of the event involves several components. Those who have studied perceptual psychology caution against the misconception that the mind acts as a tape recorder, acquiring information concerning an event empirically and, when asked to recall the event, merely replaying the original incident as observed.[95] Psychologists often divide the actual process of acquiring and recounting information into three stages: the perception stage, during which the witness acquires information through his sense organs; the retention stage, which describes that period during which the witness' memory retains the data initially perceived; and the recollection stage, the time when the witness is called upon to retrieve the information that was perceived and stored in his memory.[96] The cause of an inaccurate eyewitness identification can occur during any of these stages.[97] In order to

93. Manson v. Brathwaite, 432 U.S. 98, 112 (1977).
94. *Id.* at 114.
95. *See* LOFTUS, *supra* note 74, at 21; J. MARSHALL, LAW AND PSYCHOLOGY IN CONFLICT 59 (2d ed. 1980) [hereinafter cited as MARSHALL]; Buckhout, *Eyewitness Testimony*, SCIENTIFIC AM., Dec. 1974, at 23, 23 [hereinafter cited as Buckhout].
96. LOFTUS, *supra* note 74, at 20-109; A. YARMEY, THE PSYCHOLOGY OF EYEWITNESS TESTIMONY 36-161 (1979) [hereinafter cited as YARMEY].
97. LOFTUS, *supra* note 74, at 20-109; YARMEY, *supra* note 96, at 36-161; *see* People v. Anderson, 389 Mich. 155, 205 N.W.2d 461 (1973). In analyzing the Supreme Court's position on this matter, the *Anderson* court concluded: "*Wade* and *Simmons* recognize the psychological factors entailed in identifications. Briefly, the causes stem from the universal fallibilities of perception and memory. Even assuming favorable conditions attending both the original perception and the memory period, there is additional possibility for error inherent in the 'recognition process' itself." *Id.* at 202-03, 205 N.W.2d at 485.

realize those factors which are relevant to the reliability of an eyewitness identification, consideration must be paid to the elements that affect each of these three components.

A. Perception

The act of perception is in no way analogous to the operation of a camera that objectively records all that is seen. Perception instead is both selective[98] and subjective.[99] Much of what occurs in our presence is neither seen nor heard.[100] For example, if an event has little relevance to us at the time we observe it, the chances are remote that we will perceive a significant amount of what actually transpired.[101] Fundamental to understanding perception is the awareness that what we perceive depends to a large extent upon who we are, where we have been, and what we have done before we ever came in contact with the perceived event. Perception is an active process that involves decision making, albeit unconscious decision making, by the perceiver.[102] Into this decision-making process enter our preconceptions, attitudes, motives, and environment.[103] Thus, different people perceive the same event in different ways and when asked ultimately to report the event, varied, often incorrect versions result.[104]

A number of specific variables contribute to the inaccuracies that occur during the perception stage. The emotion produced when we observe, or worse, are the victim of a criminal attack can have a severe impact upon our perception.[105] Feelings of anxiety and excitement, for instance, can affect our ability to observe accurately what transpires within the range of our senses.[106] Stress,

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98. FRANK & FRANK, *supra* note 69, at 202; Buckhout, *supra* note 95, at 24.
99. MARSHALL, *supra* note 95, at 1, 10; Buckhout, *supra* note 95, at 24.
100. LOFTUS, *supra* note 74, at 21.
101. MARSHALL, *supra* note 95, at 52; Buckhout, *supra* note 95, at 24; *see* Neil v. Biggers, 409 U.S. 188, 199 (1972). *Biggers* indicated that a high degree of witness attention to the perpetrator at the time of the crime is a factor demonstrating reliability of the identification. *Id.*
102. LOFTUS, *supra* note 74, at 21; Buckhout, *supra* note 95, at 24; Comment, *Expert Testimony on Eyewitness Perception*, 82 DICK. L. REV. 465, 475-76 (1978).
103. Buckhout, *supra* note 95, at 24. *See also* MARSHALL, *supra* note 95, at 10. Marshall makes the following observation about the manner in which psychology views perception:

> It treats perception itself as the individual's awareness of a "thing" or "happening" conditioned by his similar experiences in the past and designed to direct his behavior in the future to be consistent with what he already knows. To these "things" or "happenings" one assigns out of his arsenal of experience significances, meanings, and values.

Id.
104. *See* MARSHALL, *supra* note 95, at 1.
105. A. ANASTASIA, FIELDS OF APPLIED PSYCHOLOGY 548 (1964).
106. Levine & Tapp, *Psychology of Criminal Identification*, 121 U. PA. L. REV. 1079, 1091 (1973) [hereinafter cited as Levine & Tapp]; *see* State v. LeClair, 118 N.H. 214, 385 A.2d 831 (1978). In *LeClair*, the court considered the shock and excitement of the witness to have a negative impact on the opportunity to observe. *Id.* at 220, 385 A.2d at 834.

in particular, causes the "loss of ability in intellectual function and visual coordination."[107] Most psychologists agree that while a mild level of arousal results in an observer's being more attentive, markedly stressful situations have as their consequence the loss of perception.[108] More specifically, high stress is said to result in the witness' paying disproportionate attention to certain features at the cost of seeing less of the entire incident.[109] This in turn produces incorrect estimates of time, distance, and sequence.[110] Related to this notion that high stress situations enhance the likelihood of misperception is the concept of weapon focus. Psychologist Elizabeth Loftus maintains that the presence of a weapon during the commission of a crime so fixes the witness' attention that the other details of the incident are either not perceived or done so inaccurately.[111]

That which we perceive is a product not only of what is transmitted through our sense organs but also of our past experiences and the expectations caused by those experiences.[112] Dr. Loftus divides those expectations which affect perception into four categories: cultural expectations like stereotyping; expectations from past experiences; personal prejudices; and temporary biases caused by specific situations.[113] The classic experiment performed by Allport and Postman in 1947 is an excellent example of the most common of cultural stereotypes, racial bias.[114] The two psychologists showed their subjects a drawing of a group of people on a subway train, all but two of whom were seated. Standing up were a black man wearing a suit and tie and a white man with a razor blade in his left hand. A short time later, when asked to discuss the picture they had seen, one-half of the subjects reported seeing the razor in the possession of the black man.[115]

An individual can more comfortably absorb stimuli from an event if he can place the stimuli within a known context. The danger of this principle is that in putting what we perceive in a context with which we are familiar, we tend to conform the current incident to the past experience.[116] The likelihood that misperception

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107. Comment, *Expert Testimony on Eyewitness Perception*, 82 DICK. L. REV. 465, 475 (1978).
108. LOFTUS, *supra* note 74, at 33.
109. *Id.* at 35.
110. MARSHALL, *supra* note 95, at 17. As to the element of time specifically, the great danger is one of overestimation. Loftus relates one experiment in which a student suddenly attacked his professor in front of the entire class. When the students were asked to estimate the length of the 34 second incident, the average time reported was 81 seconds. LOFTUS, *supra* note 74, at 30.
111. LOFTUS, *supra* note 74, at 35-36.
112. MARSHALL, *supra* note 95, at 10.
113. LOFTUS, *supra* note 74, at 37-40.
114. *See* MARSHALL, *supra* note 95, at 56; Buckhout, *supra* note 95, at 26.
115. MARSHALL, *supra* note 95, at 56.
116. LOFTUS, *supra* note 74, at 37-40.

due to expectations from past experience will occur is enhanced when the initial perception is incomplete or contains ambiguous information.[117] Psychologists refer to this phenomenon as gap filling and suggest that these expectations serve as vehicles for making sensible and complete our less than perfect observations.[118] In Judge Jerome Frank's words: "We 'interpolate,' with unconscious imagination, things we did not observe. We fill in what really is but bare outline, so as to meet what our past experience leads us to expect."[119] This process of filling in the gaps combines with the human psychological need to achieve a predictable and secure environment and, toward this end, perception alters observation.[120]

B. Retention

As with perception, the process by which we remember what has been perceived is constructive rather than reproductive.[121] It is said that "memory does not 'mirror' the past; memory creates the past."[122] As with perception, memory is selective in what it retains and varies to a great extent with the individual witness.[123] Expectations and the filling in of details both have much the same effect upon memory as they do on perception.[124] We tend to remember more easily those items which confirm our preconceived notions than those which conflict with them.[125] An Allport experiment serves as an example of the effect that the passage of time and the tendency to fill in details can have upon our original perception. After viewing a picture of an incomplete triangle, subjects were asked to make their own drawing, recreating what they had just seen. The drawings by the subjects were close in appearance to the original incomplete triangle. Thirty days later, however, when asked again to draw the triangle they had seen a month before, the majority of subjects drew a triangle with all the lines filled in.[126] The need to have a memory of the triangle that was both logical and complete overcame the sense impression originally gained by the witnesses.

In addition to being affected by some of those factors which also influence perception, inaccuracies during the retention stage can be caused by factors that particularly affect the memory proc-

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117. *See, e.g.*, Levine & Tapp, *supra* note 106, at 1108. When the stimulus situation is ambiguous, the individual is more likely to be influenced by past experiences, needs, and expectations than by the stimuli themselves. *Id.*
118. MARSHALL, *supra* note 95, at 20.
119. FRANK & FRANK, *supra* note 69, at 201.
120. *See* MARSHALL, *supra* note 95, at 10.
121. Buckhout, *supra* note 95, at 221; Levine & Tapp, *supra* note 106, at 1105.
122. FRANK & FRANK, *supra* note 69, at 208.
123. MARSHALL, *supra* note 95, at 29; Buckhout, *supra* note 95, at 24.
124. People v. Anderson, 389 Mich. 155, 212-13, 205 N.W.2d 461, 490 (1973).
125. MARSHALL, *supra* note 95, at 29.
126. *See* Buckhout, *supra* note 95, at 27.

ess. Psychological research indicates that between the time something enters our memory and the moment we are asked to recall it, new information acquired in the interim can alter the original event as we remember it. This concept is called retroactive inhibition.[127] Experiments have demonstrated that "[p]ostevent information can not only enhance existing memories but also can change a witness' memory and even cause non-existent details to become incorporated into a previously acquired memory."[128] Moreover, if the new piece of information conflicts with the existing memory, the prevailing human need is to compromise the two to achieve harmony.[129] Once again, the accuracy of the original memory suffers.

In looking to the reliability of the testimony of eyewitnesses to criminal incidents, courts should be especially wary of the possible effects created when information concerning a crime is supplied to the witnesses after the incident. Loftus tells of an event staged before witnesses, unaware of being used as subjects in an experiment, that demonstrates the danger of postevent information. In the view of these witnesses, a man picked up a pocketbook, supposedly forgotten by a woman, and pretended to remove something from inside. Shortly thereafter, the "victim" returned and vociferously bemoaned the theft of her tape recorder.[130] One week later, when asked to recount their observations, the majority of the witnesses indicated that they saw the tape recorder and most of them were able to describe it in detail.[131] Similarly, an interview of witnesses conducted by the police during a criminal investigation can be an occasion for imparting as well as obtaining information.[132] As with the aforementioned experiment, information, even unconsciously imparted by the police, can become part of the witness' memory of the crime and be a source of inaccuracy.[133]

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127. Levine & Tapp, *supra* note 106, at 1100.
128. LOFTUS, *supra* note 74, at 55. *See also id.* at 55-56 (experiments on effects of inaccurate newspaper report and altering the information supplied in the question upon the accuracies of memory).
129. *Id.* at 56-58.
130. *Id.* at 62.
131. *Id.*
132. The danger of the police officer's imparting information during his interview of the witness is especially significant when the officer has already formed impressions about how the crime was committed or the identity of the perpetrator. *See id.* at 75-76.
133. *See* United States v. Russell, 532 F.2d 1063 (6th Cir. 1976). The *Russell* court observed: "[T]he construction of memory is greatly influenced by post experience suggestion. Suggestions compatible with the witness' internalized stereotype are likely to become part of the witness' memory, not because they are in fact similar to the actual experience, but because they fit the preconceived stereotype." *Id.* at 1066.

C. Recollection

Some of the forces that influence the recollection stage have similar effects on perception and memory, while the problems caused by other factors are unique to recognition and recall. In looking to the potential for unreliability created during the recollection stage, attention will be paid first to internal psychological factors that can impair accuracy even in the absence of third party suggestion. Thereafter, the impact that suggestive police conduct can have on the reliability of an identification will be examined.

Recall can be defined as the process of retrieving information from our memory without the use of explicit cues to facilitate this retrieval; recognition, on the other hand, involves the retrieval of information with the assistance of certain memory cues to assist in the process.[134] Asking a witness to describe a suspect is an attempt at recall, while displaying suspects in a lineup, showup, or photographic array are examples of recognition processes. It is to this recognition process that the police invariably and necessarily turn in their efforts to identify the perpetrators of crimes. When a witness recognizes someone, he is actually saying that the person identified has certain characteristics similar to the individual originally perceived.[135] Because we perceive only a part of what we see[136] and we retain only a portion of what we perceive,[137] it is quite possible that a positive identification may result even though there exists only a limited commonality of traits between the criminal observed and the suspect displayed.[138] Dean Wigmore illustrates this by referring to two people, one of whom, the criminal, has perceivable characteristics bcd efg; the other, the person presented for identification, has traits bcd mnp. If all or part of traits bcd of the criminal were perceived and retained, and some or all of traits efg were forgotten or not perceived by the witness, the person presented at the identification proceeding possessing those overlapping traits will likely be identified.[139] The influence of overt suggestion in this recognition process will be explored below but, even absent such impropriety, the possibility for an unreliable identification stemming from the recognition process alone is real.

Another factor, apart from overt suggestion, that can contribute to an inaccurate identification is referred to by psychologists as unconscious transference. If a witness has seen a person prior to the identification proceeding, particularly if that observation

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134. People v. Anderson, 389 Mich. 155, 204, 205 N.W.2d 461, 485-86 (1973); YARMEY, *supra* note 96, at 54.
135. WALL, *supra* note 72, at 9-10.
136. *See* notes 95-120 and accompanying text *supra*.
137. *See* notes 121-33 and accompanying text *supra*.
138. WALL, *supra* note 72, at 10.
139. J. WIGMORE, SCIENCE OF JUDICIAL PROOF §§ 250-251 (1937).

occurred at either a time or place close to the criminal incident, there is an increased likelihood that this previously seen person will be selected.[140] In a 1974 experiment, a group of students who witnessed a staged attack upon their professor were asked some weeks later to select the assailant from among six photographs. Included in the array were the actual assailant and an innocent person present at the time of the attack.[141] Of those witnesses who chose one of the incorrect five photographs, forty percent, or twice as many as statistically indicated, opted for the picture of the innocent person present when the attack occurred.[142]

Those who study human behavior attribute much of the misidentification that occurs at identification proceedings to the needs on the part of witnesses and victims to identify someone.[143] This need or motivation to produce a positive response can be caused by several different factors. Professor Borchard maintained: "Into the identification enter other motives, not necessarily stimulated originally by the accused personally — the desire to requite a crime, to exact vengeance upon the person believed guilty, to find a scapegoat, to support, consciously or unconsciously, an identification already made by another."[144] The anger within him resulting from the often terrifying or degrading criminal incident can produce in a victim the desire to avenge himself upon the most likely target, the suspect.[145] The corresponding

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140. LOFTUS, *supra* note 74, at 142-44; Bonamico, *Case History,* Georgia v. Meece, SOC. ACT. & L., Nov. 1979, at 53. In describing the phenomenon of unconscious transference, Bonamico stated:

> [T]he victim may be identifying a particular person whom she has seen before in the vicinity of the crime, but who may not be the actual assailant. This is similar to the situation wherein we can recognize a face, but we cannot quite place it. Psychological research has shown that if the face of a related, but innocent person appears in a photospread, it is very likely to be identified by a witness.

Id. at 59.

141. LOFTUS, *supra* note 74, at 142.

142. *Id. See also* Simos v. State, 83 Wis. 2d 251, 265 N.W.2d 278 (1978). In *Simos,* the phenomenon of unconscious transference may have contributed to the victim's identification. After being robbed in her house, a 72-year-old woman told the police that she believed the man who had repaired her chimney several months earlier was the robber. Unable to identify the defendant's photograph at the first two displays, the victim, after looking at a third photo display, picked up the photograph of the defendant and said the robber looked like this but was darker. Thereupon the police officer told the victim that the photograph she had referred to was that of the "chimney man." Eight days later, the complainant identified the defendant at a lineup. *Id.* at 253, 265 N.W.2d at 279. In finding both the lineup and in-court identifications to be reliable (although the prosecutor used only the in-court identification at trial), the court indicated that these identifications met the *Biggers* standards. *Id.* at 255-56, 265 N.W.2d at 280.

143. LOFTUS, *supra* note 74, at 109; YARMEY, *supra* note 96, at 155; Buckhout, *supra* note 95, at 27-30; Levine & Tapp, *supra* note 106, at 1108-15.

144. BORCHARD, *supra* note 67, at xiii.

145. Comment, *Expert Testimony on Eyewitness Perception,* 82 DICK. L. REV. 465, 473 (1978); *see* MARSHALL, *supra* note 95, at 39; YARMEY, *supra* note 96, at 155.

need of the nonvictim witness to identify may be the product of a desire to perform one's civic duty and to contribute to the solution of the crime and the punishment of the deserving offender.[146]

In exploring the manner in which human motivations contribute to positive responses at identification proceedings, it should be noted that the proceeding itself tends to be an anxiety-producing event for the witness.[147] The significance of this type of anxiety relates to the principle of cognitive dissonance. If, in his attempt at recollection of an incident, the witness becomes aware of a contradiction within his account itself or between his story and that of another person, a degree of tension will likely result.[148] The common human need to reduce tension may result in a witness' attempting to ensure that his story becomes consistent both in itself and with the other information available concerning the crime.[149] Thus, although the stress inherent in an identification proceeding may reduce accuracy, the need to make some type of identification may in fact be increased.[150]

To comprehend fully the contribution that human motivations make in producing positive identifications, the act of recollection must be viewed within the social context in which it occurs. As Solomon Asch demonstrated in a 1955 experiment, the impact of others in effecting an alteration in our recollection can be most profound. Asch had groups of seven people, six of whom were his collaborators, look at two drawn lines. Later, when asked which of the two lines was longer, the six collaborators, always the first six called upon to respond, answered incorrectly that line A was longer.[151] The remaining subjects, who had heard others report the results incorrectly, were then asked the same question. The majority of subjects answered incorrectly that A was the longer line, apparently unconsciously opting for conformity over accuracy.[152] The significance of this tendency toward conformity

146. MARSHALL, *supra* note 95, at 39. *See also* BORCHARD, *supra* note 67, at 244.
147. Levine & Tapp, *supra* note 106, at 1098.
148. MARSHALL, *supra* note 95, at 39-40.
149. *Id.*
150. This need to make an identification of some kind during the display has been attributed specifically to the human intolerance of ambiguity and the drive for understanding. *See* Levine & Tapp, *supra* note 106, at 1098.
151. Buckhout, *supra* note 95, at 28.
152. *Id.; see* MARSHALL, *supra* note 95, at 40.

is clear when witnesses are permitted to view the identification display together.[153]

In addition to being susceptible to the social need for tension-reducing conformity, the witness may be prompted to make an identification out of an unconscious desire to please the investigating police officer.[154] Some people particularly seek the approval of authority figures and a police officer is often so perceived.[155] Furthermore, most people share the motivation to avoid appearing stupid or unobservant in front of others, a not uncommon emotion after failing to recall something recently seen.[156] All of these motivations suggest that when witnesses to crimes are presented with a suspect or a group of suspects and asked by the police to make an identification, there are psychological reasons militating against a response of "I don't know."[157] When a witness removes "I don't know" from his list of choices, the selection he makes at the lineup or photographic array is not necessarily the person he believes to be the criminal but instead may be the individual among those displayed who most looks like the criminal.[158]

D. Impact of Suggestive Police Practices

While it is essential to understand those factors inherent in the human system of perception, retention, and recollection that influence the reliability of an eyewitness identification, it is the impact of suggestive government conduct upon reliability that is

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153. *See, e.g.*, Gilbert v. California, 388 U.S. 263 (1967) (lineup display conducted before an audience of nearly 100 eyewitnesses); Swicegood v. Alabama, 577 F.2d 1322 (5th Cir. 1978) (opportunity of two eyewitnesses to discuss first lineup prior to identifying defendant at second lineup was contributing factor to reversal of conviction based on due process violation).

    For an example of how courts feel constrained by the totality of circumstances approach, see United States *ex rel.* Pierce v. Cannon, 508 F.2d 197 (7th Cir. 1974). Finding the *Biggers* reliability factors to have been substantially satisfied, the court in *Cannon* affirmed the defendant's conviction despite a joint viewing by two victims. The court noted in passing that "given the potential for error caused by group pressure and the only minimal increased burden created by requiring all identifications to be made separately, there would seem to be no excuse for allowing a procedure which permits two or more witnesses to discuss their identification." *Id.* at 201. Add to this potential for error the fact that individuals tend to be even more likely to act based upon what others do when they find themselves in unusual or threatening situations, and the danger of joint viewings is further exacerbated.

154. Wells, Leippe & Ostroms, *Guidelines for Empirically Assessing the Fairness of a Lineup*, 3 LAW & HUMAN BEHAVIOR 285, 286 (1979) [hereinafter cited as Wells]; *see* Buckhout, *supra* note 95, at 27.

155. LOFTUS, *supra* note 74, at 98; Levine & Tapp, *supra* note 106, at 1115.

156. MARSHALL, *supra* note 95, at 52; Levine & Tapp, *supra* note 106, at 1109.

157. It has been argued that the social pressure inherent in any lineup is likely to encourage a positive response. Buckhout, *supra* note 95, at 30. This pressure for an identification of some kind would likely be increased in a one-on-one presentation where the police investigation has obviously focused on only one suspect.

158. *See* text accompanying notes 136-39 *supra*.

directly at issue in due process challenges under the totality of circumstances approach. Given all the other factors that affect the reliability of eyewitness identifications, the degree of human susceptibility to overt suggestion can be high. Although the *Manson* Supreme Court, in adopting the *Biggers* factors, offered guidelines to determine reliability, it failed to articulate such criteria in evaluating the other side of the scale, suggestiveness. Police and lower courts were not given examples of what types of identification procedures were objectionable and, perhaps more important in a weighing process, what forms of suggestive behavior were more likely than others to result in an unreliable identification. It becomes necessary, then, to examine the various manners in which suggestion is communicated, the impact of each method upon reliability, and the application of the totality approach to these forms of suggestive identification procedures. Only then can it be ascertained if the totality of circumstances test is serving the societal interest, outlined in *Manson,* of preventing unreliable identification evidence from being submitted to the jury.

Psychologists and jurists have long been aware of the detrimental effect suggestiveness has upon the reliability of an identification. In his much cited book, *On the Witness Stand,* Hugo Munsterberg described the power of suggestion as "one factor which, more than anything else, devastates memory and plays havoc with our best intended recollections."[159] Writing for the Court in *Wade,* Justice Brennan referred to the major role suggestion plays in the injustices caused by misidentification.[160] The forms that suggestion takes can be overt or subtle,[161] intentional, or without the knowledge of the party communicating the suggestion.[162] A proceeding by its nature can be somewhat suggestive, such as the viewing by the witness of only one photograph or one live suspect, or it can have the relative fairness of a lineup or a photographic array but be compromised by the manner in which the presentation is conducted. Suggestion can occur through improper statements or nonverbal cues. Moreover, whatever type of suggestion is employed can be severely aggravated, turning a mildly suggestive proceeding into a situation wherein "[i]n effect, the police repeatedly [say] to the witness, 'This is the man.' "[163]

159. H. MUNSTERBERG, ON THE WITNESS STAND 69 (1908) [hereinafter cited as MUNSTERBERG].

160. United States v. Wade, 388 U.S. 218, 228 (1967). In addition, Justice Brennan wrote: "[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." *Id.* at 229 (quoting P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 26 (1965)).

161. United States v. Wade, 388 U.S. 218, 229 (1967).

162. *Id.* at 235. *See also* FRANK & FRANK, *supra* note 69, at 62; Fanselow, *How to Bias an Eyewitness,* SOC. ACT. & L., May 1975, at 3, 3; Levine & Tapp, *supra* note 106, at 1114.

163. Foster v. California, 394 U.S. 440, 443 (1969) (emphasis omitted).

The presentation of a single suspect or a single photograph has been widely condemned as unduly suggestive.[164] One commentator has asserted that the showup "constitutes the most grossly suggestive identification procedure now or ever used by the police."[165] The Supreme Court on several occasions has expressed its explicit disapproval of the use of one-on-one confrontations to achieve eyewitness identifications,[166] as have appellate courts on both the state and federal levels.[167] The grave danger present in any situation where no option is offered to the eyewitness is that he is likely to conclude that the police have determined the subject to be the perpetrator.[168] Particularly disturbing is the presentation of a suspect to a witness in a one-on-one manner after the wit-

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164. *See, e.g.*, Stovall v. Denno, 388 U.S. 293, 302 (1967); YARMEY, *supra* note 96, at 153. Yarmey noted that "the showup has to be the most biased and suggestive procedure for guilt yet devised by the police." *Id.* In regard to displays of single photographs, the psychological factors of such exhibitions favor identification rather than repudiation of identity. BORCHARD, *supra* note 67, at 261.

165. WALL, *supra* note 72, at 28.

166. In Simmons v. United States, 390 U.S. 377 (1968), the Court declared that the danger of misidentification "will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw." *Id.* at 383. *See also* Stovall v. Denno, 388 U.S. 293, 302 (1967). Even in *Manson* the Court maintained that such a one-on-one presentation "may be viewed in general with suspicion." Manson v. Brathwaite, 432 U.S. 98, 116 (1977).

167. For federal cases explicitly disapproving the practice, see, for example, Hudson v. Blackburn, 601 F.2d 785, 788 (5th Cir. 1979); Bloodworth v. Hopper, 539 F.2d 1382, 1383 (5th Cir. 1976) ("The display of pictures solely of the subject is one of the most suggestive and hence most objectionable methods of identification."); Gonzalez v. Hammock, 477 F. Supp. 730, 734 (S.D.N.Y. 1979) ("[I]ts use, especially in a police station when less suggestive methods are available, has generally been condemned as the least reliable form of eyewitness identification.")

For state cases, see, for example, Towns v. State, 136 Ga. 467, 221 S.E.2d 631 (1975); Commonwealth v. Moon, 394 N.E.2d 984 (Mass. App. Ct. 1979), *aff'd*, 405 N.E.2d 947 (Mass. 1980); State v. Tuttle, 33 N.C. App. 465, 235 S.E.2d 412 (1977); Bennett v. State, 530 S.W.2d 511 (Tenn. 1975).

168. Before his elevation to the Supreme Court, then Judge John Paul Stevens, speaking for the court in United States *ex rel.* Kirby v. Sturges, 510 F.2d 397 (7th Cir. 1975), articulated the danger of showup identifications: "Without question, almost any one-to-one confrontation between a victim of crime and a person whom the police present to him as a suspect must convey the message that the police have reason to believe him guilty." *Id.* at 403 (footnote omitted); *see* WALL, *supra* note 72, at 28–30.

ness has failed to select the suspect from a lineup or photographic array.[169]

Through its decisions in *Biggers* and *Manson*, the Supreme Court has made clear that, despite the elements of suggestivity present, the one-on-one identification proceeding, whether done corporeally or by photograph, does not by itself violate due process. What is not so clear is what the Court would consider impermissible aggravation of the already suggestive showup procedure.[170] One method of exacerbating the problems inherent in the one-on-one presentation is to display the suspect in a physical setting connoting guilt. Having the witness observe the suspect handcuffed or while locked in a jail cell conveys a less than subtle message to the witness. Although some courts have excluded eyewitness testimony based on such presentations,[171] others, finding aspects of reliability, have affirmed convictions in cases involving this type of aggravated showup situation.[172]

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169. For cases in which an identification of the defendant or his photograph when seen alone was excluded because it was done subsequent to the failure of the witness to choose the defendant from an array or lineup, see State v. Strickland, 113 Ariz. 445, 556 P.2d 320 (1976) (after twice failing to identify defendant at lineup and then at photo array, victim identified defendant, who was wearing jail clothing, at preliminary hearing); State v. Sutfield, 354 So. 2d 1334 (La. 1978); State v. LeClair, 118 N.H. 214, 385 A.2d 831 (1978) (extremely tentative identification of defendant's photograph, followed by police confirming remarks and subsequent display of defendant's photograph and the defendant himself both alone). *Contra*, United States v. Williams, 596 F.2d 44 (2d Cir. 1979) (witness, unable to identify robber from photo array conducted two years after crime, walked into court when trial was in session and observed defendant at counsel table for ten minutes; although identification of defendant was admittedly suggestive and occurred two years and eight months after robbery, court upheld in-court identification, attributing her earlier failure to select defendant's photograph to "precision" and "caution"); United States *ex rel.* Lucas v. Regan, 503 F.2d 1 (2d Cir. 1974) (90 minutes after identifying another party as robber at lineup conducted without defendant and confirming this selection at showup, victim viewed defendant alone and "corrected" herself, implicating defendant; procedure upheld by court based on satisfying *Biggers* factors); Baker v. Hocker, 496 F.2d 615 (9th Cir. 1974) (victim, who selected two of her three assailants at lineup but failed to select defendant, identified defendant at preliminary hearing when he was seated next to the two perpetrators already identified).

170. From the process articulated in *Manson*, of weighing the suggestiveness of the identification proceeding against the reliability determined by the *Biggers* factors, Manson v. Brathwaite, 432 U.S. 98, 114 (1977), apparently the more the reliability factors are satisfied, the greater the degree of suggestion that will be tolerated.

171. *E.g.*, Gonzalez v. Hammock, 477 F. Supp. 730 (S.D.N.Y. 1979); State v. Comeau, 409 A.2d 247 (Me. 1979); State v. Kennedy, 249 S.E.2d 188 (W. Va. 1978).

172. *E.g.*, McGuff v. Alabama, 566 F.2d 939 (5th Cir. 1978) (defendant identified by some witnesses while alone in cell and despite court's extreme dislike of this practice); State v. Dickerson, 568 S.W.2d 559 (Mo. 1978) (identification of defendant outside jail cell while in handcuffs by victim who was informed he was about to view man found in his recently stolen car); State v. Delahunt, 401 A.2d 1261 (R.I. 1979) (identification obtained while defendant illuminated by headlights from police car and while handcuffed and surrounded by police permissible because of danger of escape); Campbell v. State, 589 P.2d 358 (Wyo. 1979) (notwithstanding judge's suspension of preliminary hearing as "farce" because defendant compelled to appear there handcuffed and in prison garb for identification, prosecution should have been given opportunity to show reliability).

Whereas displaying either the suspect or his photograph alone to the eyewitness implicitly communicates that the authorities believe the subject to be the guilty party, quite often the police will be more explicit. Before or during the identification confrontation, the police might, for example, inform the witness that he will be viewing a suspect or the suspect. This form of overt verbal focusing was specifically condemned by the Supreme Court in *Wade*.[173] Once again, although some courts have deemed identifications obtained after such suggestive comments to be violative of due process,[174] others have permitted showup identifications accompanied by objectionable remarks, declaring the conduct to be not that suggestive or finding reliability in the identification.[175] A case decided by the Court of Appeals of Kentucky including such a police statement serves as an example of how the balancing test derived from *Manson* is applied by the courts. The opinion in *Brown v. Commonwealth*[176] relates how forty-five minutes after they had been the victims of a robbery, two people were taken by the police to an area outside a motel where two suspects had been apprehended. Informed by the officer that "they thought they had the guys," the complainants viewed the two defendants who were standing together, handcuffed, illuminated by the headlights of a police car.[177] The court, holding this was not inadmissible on its face,[178] reasoned that whatever suggestivity occurred was outweighed by the fact that the witnesses had viewed the robbers for one minute during the incident in a lit restaurant and that the showup was shortly after the crime.[179] That a one minute observation under obviously stressful conditions can overcome conduct that so obviously conveys to the witnesses that "these are the men" sheds serious doubt upon whether this court fully comprehended the impact suggestion has in producing an identification.

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173. United States v. Wade, 388 U.S. 218, 233 (1967).
174. Cases so holding invariably involve identifications containing additional elements of suggestion. *E.g.*, Commonwealth v. Moon, 394 N.E.2d 984 (Mass. App. Ct. 1979) (in front of witness, one police officer said, "it must be Andrew Moon," shortly before witness identified defendant's picture from a driver's license with the name "Andrew Moon" on it), *aff'd*, 405 N.E.2d 947 (Mass. 1980); People v. Mercado, 63 A.D.2d 720, 405 N.Y.S.2d 129 (1978) (victim informed she was to identify her assailant, then shown both defendants together through one-way mirror); State v. Kennedy, 249 S.E.2d 188 (W. Va. 1978) (witness, who was never closer than 40 feet from robber, told he would see suspect before defendant brought in wearing handcuffs).
175. *E.g.*, State v. Lee, 340 So. 2d 1339 (La. 1976) (witness told "we think we caught them" before showup), *cert. denied*, 431 U.S. 941 (1977); State v. Dickerson, 568 S.W.2d 559 (Mo. 1978) (victim, told he would see suspect found in his recently stolen car, shown defendant handcuffed and in jail cell); Bennett v. State, 530 S.W.2d 511 (Tenn. 1975) (prior to lineup, witness shown defendant's photo and told police had picked up this suspect).
176. 564 S.W.2d 24 (Ky. 1978).
177. *Id.* at 28.
178. The court remanded the case for further fact finding. *Id.* at 29.
179. *Id.*

Regardless of whether the identification proceeding is a lineup or photographic array, or a one-on-one confrontation, police comments indicating that one of the persons being viewed is a suspect will greatly increase the probability of obtaining an identification. The effect of informing a witness that a suspect is included in a lineup was demonstrated in a 1975 experiment. In that experiment, one half of those who observed a staged criminal incident were told that a suspect would be present in the lineup they were about to view; the other half were informed only that one might be present.[180] Although the culprit was not in fact included in the lineup, twenty-eight percent of those told he would be present selected someone in the lineup as the criminal, while only four percent of the second group made inaccurate identifications.[181] Recognizing this danger, the Supreme Court of Indiana concluded:

> A witness may thus be led to feel that he has an obligation to choose one of the participants in the display since the police evidently are satisfied that they have apprehended the criminal. The result may be that the witness strains to pick someone with familiar characteristics or someone who most resembles the actual criminal or the result may be that the witness will choose the one least dissimilar by the process of elimination.[182]

Some courts, on the other hand, have taken the position that anytime a witness is asked to partake in an identification proceeding, he is likely to be aware that the police have placed a suspect in the display. Therefore, they reason, merely informing the witness that a suspect is present contributes little to his motivation to identify someone.[183] This reasoning seems both to discount the effect upon a witness of the overt suggestion by an authority figure[184] and to imply that because some suggestion is inherently present in all

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180. YARMEY, *supra* note 96, at 156-57.
181. *Id.* at 157.
182. Sawyer v. State, 260 Ind. 597, 602, 298 N.E.2d 440, 443 (1973).
183. *See, e.g.*, Forbes v. State, 559 S.W.2d 318 (Tenn. 1977). *See also* United States v. Medina, 552 F.2d 181 (7th Cir. 1977). The victim in *Medina*, while viewing a lineup consisting of three individuals in addition to the defendant, indicated he was afraid he might choose the wrong man. Thereupon a police officer told the victim that "the man is out there" and he should be able to make an identification. *Id.* at 187. The victim then identified the defendant. The United States Court of Appeals for the Seventh Circuit declared that this identification was not violative of due process notwithstanding the additional factor that only two men in the lineup had moustaches as did the perpetrator. In commenting upon the police conduct of informing the victim that the robber was present in the lineup, the court reasoned: "Whenever a witness is asked to view a lineup, an inference may often be present that a definite suspect is among those taking part in the lineup. Thus, the statement by the police did not make the selection of defendant more likely." *Id.* at 190.
184. *See* text accompanying notes 154-55 *supra*.

identification proceedings, further improper conduct that is merely cumulative is not unacceptable.[185]

In understanding the manner in which the totality of circumstances approach has been employed to defeat suppression motions directed at police comments during a lineup, *Landry v. Alabama*,[186] decided by the United States Court of Appeals for the Fifth Circuit, is instructive. One day after the commission of a murder, a witness to the crime was asked to view a lineup consisting of eight men. All five suspects believed by the police to be the murderers were included in the display.[187] During the identification confrontation, the officer conducting the lineup pointed out these five men to the witness.[188] Notwithstanding the lack of testimony concerning the degree of certainty with which the identification was made and the absence of a prior description, the court of appeals refused to find this identification to be a violation of due process because of the "ample opportunity to view" the defendant and the brief interval between the crime and the identification.[189] That the court felt no need to detail this "ample opportunity" is troubling because this conclusion was crucial to its holding. Far more disturbing, however, is the court's seeming lack of concern with the blatant focusing undertaken by the officer conducting the lineup. The potential impact upon the ultimate identification

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185. For other cases permitting identification testimony after a witness is informed of the presence of a suspect in a lineup or photo array, see United States v. Moskowitz, 581 F.2d 14 (2d Cir. 1978) (victim, informed after lineup that she had chosen wrong man and other witnesses had selected the correct person, then selected defendant while looking at photograph of lineup); Wilkens v. Sumner, 475 F. Supp. 495 (E.D. Va. 1979); Kennedy v. State, 44 Md. App. 662, 410 A.2d 1097 (1980); State v. Upham, 418 A.2d 1029 (R.I. 1980).

186. 579 F.2d 353 (5th Cir. 1978).

187. *Id.* at 354. This procedure of including in the same display more than one person believed to be involved in a crime is, in itself, quite suggestive. There is a grave risk that if the witness recognizes one of the men as the culprit, he might be tempted to assume that others standing with him were also involved in the crime. This risk is even clearer than in a showup situation:

> [T]he joint viewing of several suspects in connection with a crime committed by the equivalent number, presents an even greater danger of misidentification than the classic single person show-up . . . . For if it should be the fact that one or more of those viewed in fact participated in the crime, . . . a witness accurately recognizing one or more participants might be influenced by the fact of the joint showing to identify the innocent person.

People v. Adams, 70 A.D.2d 825, 826, 417 N.Y.S.2d 868, 869 (1979) (Sandler, J., concurring) (citations omitted). For cases permitting identification testimony after the viewing of several suspects jointly, see United States v. Osborne, 630 F.2d 374 (5th Cir. 1980) (witness told two individuals stopped in the area before identifying defendants together); Baker v. Hocker, 496 F.2d 615 (9th Cir. 1974) (defendant identified while seated at counsel table with two other individuals previously identified and notwithstanding witness' previous failure to identify defendant); Clempson v. State, 144 Ga. App. 625, 241 S.E.2d 495 (1978) (five suspects identified together while standing in front of police car); *In re* Mark J., 96 Misc. 2d 733, 412 N.Y.S.2d 549 (1979).

188. 579 F.2d 353, 354 (5th Cir. 1978).

189. *Id.* at 355.

made by a witness to a homicide of specifically singling out five of the eight men displayed is serious enough to warrant far more attention than was paid by the court. Once again, the apparent unawareness of the court to the serious effect such focusing has upon the reliability of an identification undermined the interests behind the totality of circumstances approach.

Among those forms of suggestion the Supreme Court cautioned against in *Wade* was the lineup in which the "look alikes" are grossly dissimilar in appearance to the suspect.[190] Any physical trait that singles out the suspect from the other lineup participants can serve to direct the witness' attention to that individual and produce an "identification thru accentuation."[191] A lineup or photographic array should be comparable to a multiple choice examination where all or at least most of the alternatives are plausible selections.[192] Included among those physical traits which may make a suspect appear different from the other display participants are height, weight, race, age, clothing, and distinguishing characteristics such as limps or scars.[193] Additional focusing features pertaining to photographic arrays include the showing of a "mug shot" of only the suspect, including two photos of the suspect and one of the "look alikes," and the appearance of a different expression on the photograph of the suspect's face.[194]

When the suspect appears different from other participants in a lineup or photographic array, the attention of the witness is initially focused upon him. If, however, the trait that caused the suspect to appear distinctive is also an element of the description of the criminal previously provided by the witness, this suggestion is significantly compounded.[195] For example, a lineup in which the suspect is the only participant wearing a green hat is suggestive. If, however, the witness had previously informed the authorities

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190. United States v. Wade, 388 U.S. 218, 233 (1967). *See also* YARMEY, *supra* note 96, at 156.
191. WALL, *supra* note 72, at 53. *See also* Buckhout, *supra* note 95, at 27.
192. *See* LOFTUS, *supra* note 74, at 145-56; Buckhout, *supra* note 95, at 27.
193. For more detailed lists of the types of distinguishing physical characteristics relevant to identifications, see SOBEL, *supra* note 4, § 56.03 at 104-05 (1972); WALL, *supra* note 72, at 53-56.
194. *See* Buckhout, *supra* note 95, at 28-30.
195. *See* SOBEL, *supra* note 4, § 56.03 at 105 (1972).

that his assailant wore a green hat, the police have come much closer to saying "this is the man."[196] This manner of focusing, *i.e.*, relating the suspect directly to the perpetrator through the use of some physical characteristic or distinguishing object in the witness' original description, can occur when the suspect is presented alone or with others.

A recent case decided by the United States Court of Appeals for the Fifth Circuit provides an illustration both of how the absence of clear suggestivity guidelines can result in questionable judicial conclusions as to what constitutes suggestion and how the *Manson* due process approach is employed to uphold grossly suggestive identification procedures. *Frank v. Blackburn*[197] involved a restaurant robbery, shortly after which the defendant was apprehended nearby and brought back to the victim for an identification. The original description of the robber supplied by the victim was of a black male with a goatee, who wore a coat, knit cap, and sunglasses.[198] After viewing the defendant alone back at the restaurant, the victim was "unable to identify Frank as the perpetrator of the crime."[199] The victim was then removed from the room while the defendant donned the coat, knit cap, and sunglasses in his possession at the time he was apprehended. Upon being asked again to view the defendant, the victim made an identification "with some hesitation and reservation."[200] The court of appeals found this procedure to be neither suggestive nor unreliable. Citing *Stovall*, the court first pointed out the necessity of obtaining either a positive or negative identification as soon as possible. As to the suggestiveness of the procedure, the court merely said, "there were no words or actions by police aggravating the suggestiveness of the confrontation,"[201] despite the fact that the victim initially failed to identify the defendant as the robber and was only able to make an identification when the defendant subse-

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196. *See* Crume v. Beto, 383 F.2d 36 (5th Cir. 1967). In *Crume*, the court made the following observation:

> The fault common to all these practices is that the police single out one person and influence the witness by directing attention to some element known to be connected with the crime—the unique appearance of the suspect, the words spoken in the course of the crime, or clothing similar to the suspect's clothing. The necessary result of this singling out is to suggest to the witness that the suspect so isolated is in fact the one the police think is guilty. It is easy to see how such practices prejudice the reliability of the identification.

Id. at 39.

197. 605 F.2d 910 (5th Cir. 1979).
198. *Id.* at 911-12.
199. *Id.* at 912.
200. *Id.*
201. *Id.* at 913.

quently donned the incriminating clothing. The message conveyed to this witness was clear and overt.[202]

Although finding the conduct employed in this proceeding to be not impermissibly suggestive, the *Frank* court added that the eyewitness testimony here should not be suppressed in any event. Notwithstanding the witness' admitted hesitation and reservation in identifying the defendant, the court found the identification to be reliable based on the presence of the other reliability factors derived from *Biggers* and *Manson.*[203] One of those factors cited by the court was the accuracy of the victim's description of the robber. Other than the reference to the clothing and glasses worn by the robber, this description is limited to a black male with a goatee. What removes this description from being general in nature primarily is the description of the clothing. When, as here, one set of items is of particular importance in a description, the procedure of displaying only one person who happens to be wearing those distinguishing items poses serious danger of misidentification.[204] The United States Court of Appeals for the Seventh Circuit has written:

> Similarly with respect to that clothing, there is no justifiable reason for not allowing the suspected individual to remove highly distinctive clothing or in the alternative to supply similar clothing to others in the lineup. This is especially true in cases where the clothing worn was an integral part of the description given and there exists the likelihood that a misidentification may occur because an identifying witness has his attention focussed exclusively on the clothes worn and thereby distracted from other important physical characteristics.[205]

There is no better means to focus the attention of the witness "exclusively on the clothes worn" than to display the suspect to the witness first absent the incriminating clothing and then, shortly thereafter, to show him wearing the aforementioned articles.

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202. For a discussion concerning the effect of a one-on-one presentation upon a witness, see notes 164-69 and accompanying text *supra.*

203. 605 F.2d 910, 913 (5th Cir. 1979).

204. *See* Palmer v. Peyton, 359 F.2d 199 (4th Cir. 1966), *cited with approval in* Stovall v. Denno, 388 U.S. 293, 299 (1967). Commenting on the danger presented by distinguishing features, the *Palmer* court stated:

> Where the witness bases the identification on only part of the suspect's total personality, such as height alone, or eyes alone, or voice alone, prior suggestions will have most fertile soil in which to grow to conviction. This is especially so when the identifier is presented with no alternative choices; there is then a strong predisposition to overcome doubts and to fasten guilt upon the lone suspect.

359 F.2d at 201.

205. United States *ex rel.* Pierce v. Cannon, 508 F.2d 197, 201 (7th Cir. 1974).

Referring to the clothing and glasses, the *Frank* court made note of the fact that all the defendant was asked to do was to don the very articles with which he was apprehended.[206] However, the fact that the defendant was apprehended in possession of clothing and sunglasses matching the victim's description is relevant only in assessing the reliability factors of *Biggers* and does not justify or mitigate the suggestiveness that accrues from such a display. In analyzing these factors, the accuracy of the description can be buttressed by the awareness that the defendant wore clothing and glasses similar to that of the robber when the defendant was arrested shortly after the crime. Nevertheless, the reason that the suspect should not be shown to the witness wearing the incriminating items is because the focusing effect of the clothing can produce misidentification.[207] Whether or not the police obtained the incriminating items from the defendant in no way alters this effect upon the witness.

Moreover, the fact that the defendant was arrested wearing items or possessing distinguishing characteristics described by the witness after the crime can serve as valuable evidence to the prosecution at trial and need not be used for identification purposes. As with the existence of a confession, other identification testimony, or the possession by the defendant of the fruits of the crime, the clothing worn by the defendant when arrested can be indicative of his culpability and therefore admissible at his trial. As with this other evidence, however, injecting incriminating clothing into the identification procedure is grossly suggestive and without justification.[208]

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206. 605 F.2d 910, 913 (5th Cir. 1979). Some cases have indicated that whatever suggestion accrues from displaying the suspect wearing incriminating clothing is somehow mitigated if the clothing belongs to the suspect. *E.g.*, Willis v. Garrison, 624 F.2d 491, 494-95 (4th Cir. 1980); Young v. United States, 407 F.2d 720, 721 (D.C. Cir.), *cert. denied*, 394 U.S. 1007 (1969).

207. Foster v. California, 394 U.S. 440, 443 (1968).

208. For a recent case demonstrating a court's underestimation of the effect of incriminating clothing upon a witness' identification, see Willis v. Garrison, 624 F.2d 491 (4th Cir. 1980). In *Willis*, a robbery victim initially failed to identify the defendant as he got out of the police cruiser. *Id.* at 493. The victim then asked the officer if the defendant was apprehended while wearing a black jacket and broad-brimmed hat, both of which were contained in his original description. The defendant apparently was told to don the jacket and hat he was wearing when arrested, and the victim made a positive identification. Notwithstanding that the "distance, together with the poor light, prevented [the victim] from discerning any of the facial features of the robber other than his complexion," *id.* at 492, the court found this identification to be reliable. *Accord*, People v. Dortch, 64 Ill. App. 3d 894, 381 N.E.2d 1193 (1978); State v. Washington, 257 N.W.2d 890 (Iowa 1977), *cert. denied*, 435 U.S. 1008 (1978). In *Dortch*, the name of the defendant rather than his clothing proved to be the incriminating feature. The witness, who was aware of the perpetrator's name, saw one photograph of the defendant on which the same name was clearly displayed. 64 Ill. App. 3d at 899, 381 N.E.2d at 1196.

The focusing and potential for misidentification that results from displaying the suspect with an item or characteristic contained in the witness' original description can affect the viewer of a lineup or photographic array as well as one who sees a one-on-one display. In the only case in which the Supreme Court suppressed eyewitness testimony because of a due process violation, *Foster v. California*,[209] this form of lineup focusing was a contributing factor. Notwithstanding the serious possibility of misidentification produced by such focusing, courts have permitted identification testimony under the totality of circumstances approach in situations in which the suspect was the only person in a lineup or photographic array who shared a common characteristic with that of the description of the perpetrator given by the witness.[210] The reasoning common to all of these cases was that the reliability factors outlined by the Supreme Court in *Biggers* and reiterated in *Manson* required the admission of the suggestive eyewitness testimony involved. Had the Supreme Court, when fashioning its due process test, articulated the types of suggestive conduct to be avoided and particularly distinguished that conduct which is somewhat suggestive from that behavior which focuses the witness unavoidably upon the suspect, the decisions in the lower courts might more fully reflect the impact of gross suggestion upon reliability.[211]

Another form of suggestivity employed by police in procuring eyewitness identifications is the use of what has been referred to as the "photo-biased lineup." The display of a single photograph of the suspect or a photographic array with the suspect's picture included prior to the exhibition of the suspect at a lineup is said to have a significant effect upon the outcome of the lineup. Dr. Lof-

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209. 394 U.S. 440 (1968).

210. *See, e.g.*, United States v. Smith, 602 F.2d 834 (8th Cir.) (bib overalls), *cert. denied*, 444 U.S. 902 (1979); Royal v. Maryland, 529 F.2d 1280 (4th Cir. 1976) (short slight man with a detectable limp); State v. Montgomery, 588 S.W.2d 80 (Mo. 1979) (a shirtless 5'2" man—all other lineup participants taller and wearing shirts); State v. Carter, 572 S.W.2d 430 (Mo. 1978) (black shirt with white flowers); State v. Heald, 120 N.H. 319, 414 A.2d 1288 (1980) (man looking over forty years old); *In re* Mark J., 96 Misc. 2d 733, 412 N.Y.S.2d 549 (1979) (three black men wearing tan and denim jackets—other lineup participants white or mulatto and differently attired); Schaffer v. State, 75 Wis. 2d 673, 250 N.W.2d 326 (1977) (gold earring).

211. One commentator, in referring to this type of suggestion, wrote:

> [W]here a similarity exists between the physical characteristics of the perpetrator of the crime and those of a suspect, this similarity may cause a false recognition and an erroneous identification. A false recognition may also be caused by a similarity in clothing, for the clothes worn by the criminal may have made, consciously or subconsciously, a greater impression upon the mind of the witness than any physical characteristic.

WALL, *supra* note 72, at 31.

tus asserts that, in such photo-biased lineups, "the chances of misidentification rise dramatically."[212] This type of lineup identification may in fact be merely another manifestation of the process of unconscious transference.[213] A British commentator described the problem as follows: "The danger arising from photographs is that when the witness who has identified a suspect from them is asked to attend a parade, he is 'more likely to have the photograph in mind than the image he had previously formed of the criminal' . . . ."[214] Reasons for this tendency on the part of witnesses to retain at the lineup a clearer image of the photograph than of the criminal may include the closer time proximity of the lineup to the photographic display than to the incident and the greater period of time under far less stressful conditions that the witness had to study the features of the man pictured in the photograph than he did to study the features of the perpetrator of the crime.[215]

An experiment conducted in 1977 offers support for the contention that the viewing of a photograph of the suspect prior to a lineup can detract from the reliability of the lineup identification. In this experiment, a group of subjects was exposed to five "criminals" for twenty-five seconds each and informed that they would be called upon later to identify these five individuals.[216] That same day the subjects were shown fifteen "mug shots," some of which were photographs of the men seen earlier. At a series of lineups held one week later, the subject-witnesses were asked whether each lineup participant was one of the original "criminals." Of the number of innocent lineup participants incorrectly selected as one of the "criminals," more than twice as many included in the photographic displays were chosen as those whose photographs were not so included.[217] The witnesses had apparently transferred the image of those men viewed in the photographic display back to the original "crime" scene and this resulted in an erroneous lineup identification.

Washington v. Cupp[218] demonstrates the manner in which photo-biased lineups are often treated under the totality of circumstances approach to due process identification challenges. On the same day in which she was sexually attacked in her dormitory,

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212. LOFTUS, *supra* note 74, at 150. *See also* Wells, *Applied Eyewitness Testimony Research: System Variables & Estimator Variables*, 36 J. PERSONALITY & SOC. PSYCH. 1546, 1553 (1978).
213. LOFTUS, *supra* note 74, at 151. See notes 140-42 and accompanying text *supra*.
214. Jaffe, *Report of the Departmental Committee on Evidence of Identification in Criminal Cases*, 39 MOD. L. REV. 707, 708 (1976).
215. WALL, *supra* note 72, at 68.
216. LOFTUS, *supra* note 74, at 150.
217. *Id.*
218. 586 F.2d 134 (9th Cir. 1978).

a woman was shown photographs of several possible assailants. Although the defendant's photograph was among them, the victim passed by it without making any sign of recognition.[219] The investigating police officer then singled out the picture of the defendant so the victim could see that the photograph contained information concerning the defendant's prior rape conviction. In addition, the officer informed the victim that the man in this photograph was a suspect and had been seen in the area shortly after the attack.[220] Upon taking another look at the photograph, the victim said that the defendant was not her assailant. Four days later, the victim was again unable to identify the defendant from among 171 prints but, later that same day, selected the defendant from a group of 546 slides. Three months after the photographic arrays, the victim viewed a lineup from which she chose the defendant as her attacker.[221]

The court in *Cupp* looked to whether the first, admittedly suggestive photo session contaminated the subsequent slide and lineup identifications. In concluding that it did not, the court turned to the reliability factors enunciated in *Biggers* and adopted in *Manson*.[222] Determining that the victim had seen her assailant clearly during the attack, had her attention fixed upon him at that time, described him well to the police, ultimately was certain of her identification, and that the four-day and three-month intervals between the crime and the identifications were not unduly long, the court found this eyewitness testimony to be "highly reliable."[223] Included among those reasons offered by the court in reaching their conclusion was the fact that the witness had not yielded to police suggestion when it occurred during the first photographic display.[224]

The facts of this case suggest that the inherent possibility of unconscious transference resulting from photo-biased lineups was significantly increased by the overt focusing conduct of the police officer.[225] Unlike a situation where several images of photographs displayed to a witness prior to a lineup or photo array may remain in her mind, here the police, by singling out one photo and transmitting highly incriminating information concerning the individual in that photo, ensured that it would be most unlikely that this

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219. *Id.* at 136.
220. *Id.*
221. *Id.*
222. *Id.* at 136-37.
223. *Id.*
224. *Id.* at 137. This conclusion was drawn notwithstanding, as the court pointed out, that the witness admitted on recross examination that she was unable to tell if and to what degree she was ultimately influenced by the suggestive conduct. The court attributed no significance to this statement by the witness. *Id.* at 137 n.1.
225. The court seemed to concede that overt focusing occurred by indicating that, had an identification occurred at the hospital where the first photographic display took place, its use would constitute a violation of due process. *See id.* at 137 n.2.

one face would ever be forgotten. The utilization by the court of the *Biggers* reliability factors to overcome this aggravated suggestion is most inappropriate because the victim, possessed of this supposedly clear and strong impression of her assailant, was unable to identify the defendant's photograph absent the effects of suggestion. What occurred in *Cupp* then was that a victim, who observed closely and at length the man who attacked her, had her attention focused emphatically and incriminatingly upon one suspect and then specifically denied this suspect was her attacker.[226] Unless a most persuasive explanation is offered as to why this denial of guilt occurred, reason dictates that any identification of the same man made subsequent to this post-suggestion denial involves a "substantial likelihood of misidentification" and should be suppressed.[227]

It is noteworthy that the court used the victim's denial of the defendant's culpability, made after the focusing police conduct, to demonstrate her ability to resist the suggestive behavior employed here. If, however, she had positively identified the defendant at the first photographic display, the argument undoubtedly would have been made that this identification was even more "highly reliable" than the subsequent ones because it possessed the additional *Biggers* factors of immediacy and certainty. Moreover, the court failed to realize that the effects of suggestion vary as to when and how they are manifested.[228] The fact that this witness may have been able to fend off the focusing conduct, of which

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226. There is no indication that the photograph shown to the victim on the day of the crime was anything but an accurate likeness of the defendant. It should be noted, however, that the victim was understandably nervous and had been given a tranquilizer at the hospital where the array was conducted. *Id.* at 137. Despite this nervousness, the victim was able to note, after the suggestive police focusing, that the high cheekbones of the man in the singled-out photograph did look like those of her assailant. This attention to detail casts serious doubt on the court's assertion that "[s]he was thus not in the frame of mind conducive to concentrating on an identification." *Id.*

227. *See* WALL, *supra* note 72, at 113. Wall concluded:

> Of all the danger signals presently under discussion, surely the most ominous, the one most clearly indicating that a mistake may have been made, is that which exists when a witness who identifies the defendant at the trial is found to have previously failed to identify him. . . . [T]he overwhelming majority of those authorities who have considered it have found it to be a strong indication that the subsequent identification is inaccurate.

Id.

228. Over 70 years ago, addressing the effects of suggestion, Hugo Munsterberg wrote:

> If a suggestion planted in a consciousness would remain there isolated, it would be easy to detect it. It would be in such manifold contradiction with all the normal reminiscences and habitual arguments that every court, for instance, would quickly recognise the strange thought as an intruder. But just this is the uncanny power of suggestion, that it once infects all the neighbouring ideas and emotions and forces the whole mental life of the personality under the unnatural influence.

MUNSTERBERG, *supra* note 159, at 179-80.

she was likely aware, in no way demonstrates her ability to be as resistant to the lingering, unconscious effects of suggestion.[229]

Awareness of these characteristics of suggestion combined with the effect of unconscious transference and the situation created for a victim in an emotional state when a figure of authority focuses so prominently on one suspect are all important considerations in determining the reliability of such an identification. The factors involved in *Cupp* demonstrate the potential value of the expert testimony of a psychologist in a court's determination as to the effects of suggestive conduct upon reliability. Moreover, it is fundamental to the success of the totality of circumstances approach that courts gain a fuller realization of the relationship between suggestion and misidentification.[230]

In *Cupp,* the witness initially indicated that the man in the photograph singled out was not her assailant. A different but related problem exists when a witness' first attempt at identification of the suspect is positive and, thereafter, repeated opportunities to view the suspect occur. The purpose of these subsequent identification proceedings is often to ensure that the witness has chosen the right man. Invariably, however, regardless of the accuracy of his initial identification, the witness tends to select again the individual he selected previously.[231] Dr. Loftus refers to this "high degree of persistence in the contents of one's recollections" as the "freezing effect."[232] Reasons offered for this freezing effect include the pride and stubbornness of witnesses,[233] the human tendency toward self persuasion,[234] and the fact that the image of the individual initially identified remains more vivid than the image of the criminal.[235] Regardless of the reason behind this freezing effect, juries should be made aware of the likelihood that when the witness on the stand points to the defendant in court as her assail-

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229. *See* People v. Anderson, 389 Mich. 155, 205 N.W.2d 461 (1973). In the appendix to this decision, the Michigan Supreme Court noted: "The importance of the existence of so many possible forms of unintentional suggestion lies in the fact that *we are peculiarly susceptible to it* and the fact that *it is an unconscious process* so that we are *unable* to detect its influence when it operates." *Id.* at 216, 205 N.W.2d at 492 (emphasis in original).

230. For other cases where the totality of circumstances has been held to overcome the effects of a photo-biased lineup, see *In re* L.W., 390 A.2d 435 (D.C. 1978); Bennett v. State, 530 S.W.2d 511 (Tenn. 1975). For a similar holding with regard to a photo-biased photographic array, see State v. Williams, 173 Conn. 567, 378 A.2d 588 (1977).

231. United States v. Wade, 388 U.S. 218, 229 (1967). *See also* United States v. Simmons, 390 U.S. 377, 383-84 (1968); SOBEL, *supra* note 4, § 3.01 at 10-11 (1972).

232. LOFTUS, *supra* note 74, at 84. *See also* FRANK & FRANK, *supra* note 69, at 158.

233. BORCHARD, *supra* note 67, at 261.

234. Levine & Tapp, *supra* note 106, at 1115.

235. LOFTUS, *supra* note 74, at 84.

ant, a psychological process of confirmation and not a new spontaneous act of recognition has occurred.[236]

Just as subsequent identifications of the suspect may be no indication of reliability, so the certainty displayed by the witness at the initial identification proceeding may be without real value as a reliability factor. The certainty with which a witness identifies the defendant was cited in *Biggers* and adopted in *Manson* as one factor that tends to demonstrate the reliability of an identification procedure notwithstanding the presence of suggestion.[237] That the witness identifies a suspect with certainty might in reality reveal more about the witness than about the reliability of his identification. Certainty can be a product of one's careless nature, tendency toward snap judgments,[238] or the need when making a decision to make it confidently and assuredly.[239] All of these personal traits, irrelevant to the reliability of the identification, can account for a witness' certainty in his selection.[240]

In addition to being a manifestation of a personal trait, certainty may be the product of the suggestive police conduct itself. In fact, the degree of certainty demonstrated by the witness is sometimes directly proportional to the degree and success of the suggestive message brought to bear upon him.[241] It is indeed ironic that, under the totality of circumstances approach, suggestive practices may not only contribute to the initial identification made by the witness but may also help save such an identification

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236. As one author explains:

> When the victim (or other identifying witness) takes the stand and, pointing to the defendant seated conspicuously at the counsel table, says "that's the man!" he rarely is saying "that's the man who robbed me several months ago." In truth, most often he is saying: (1) that's the man whose photo I identified shortly after the crime; (2) whom later I identified at a lineup; (3) whom later I identified at the preliminary examination; (4) whom later I identified by "mug shot" before the grand jury; (5) whom later I saw in the courtroom during several adjournments of the trial.

SOBEL, *supra* note 4, § 3.01 at 10 (1972).

237. Manson v. Brathwaite, 432 U.S. 98, 114 (1977); Neil v. Biggers, 409 U.S. 188, 199 (1972).

238. WALL, *supra* note 72, at 15.

239. LOFTUS, *supra* note 74, at 84.

240. In fact, experiments have shown that a witness who makes an incorrect identification is no less certain in his selection than is one who chooses correctly. *See* Wells, *supra* note 154, at 286.

241. *See, e.g.*, Sloan v. State, 584 S.W.2d 461 (Tenn. Crim. App. 1978). Noting that certainty is no guarantee of reliability, the *Sloan* court stated:

> It seems very likely that her level of certainty increased because of certain elements of the procedures alleged to be suggestive. . . . We do not doubt her sincere belief in her certainty; such sincere belief, however, is no guarantee that she was not influenced in subtle ways by suggestive elements in the identification procedures which took place so long before.

Id. at 466-67. *See also* State v. Commeau, 409 A.2d 247 (Me. 1979), wherein the court stated that "[t]he fact that Thomas immediately made an identification is not necessarily evidence of reliability; rather it may indicate that he yielded to the suggestivity of the circumstances." *Id.* at 249.

from being suppressed. After detailing the arrest and conviction of the positively, yet misidentified Benjamin Collins, Professor Borchard concluded, "[T]he positiveness of witnesses is sometimes, as in this case, in inverse ratio to their opportunity for knowledge or to their reliability."[242]

VI. CRITERIA OF SUGGESTION

After the Supreme Court's 1972 decision in *Biggers,* a debate ensued in the courts and among commentators as to whether the totality of circumstances test, as defined in *Biggers,* should be applied to post-*Stovall* as well as pre-*Stovall* displays.[243] With its holding in *Manson,* the Court's unequivocal response was that the *Biggers* approach should so apply. Given the Court's explicit rejection of the per se approach, attempts to protect defendants from the use of suggestive identification testimony of dubious reliability may better be directed to improving the meaning and application of the totality test. Specifically, the societal interests of deterrence of improper police procedures, furtherance of the administration of justice, and the avoidance of the use of unreliable identification testimony can provide the basis for expanding the criteria employed in determining the admissibility of identification evidence.

While five specific factors for evaluating reliability were provided by the Supreme Court, the Court failed to provide guidelines for determining what conduct is suggestive and what forms of suggestion are worse than others. As a result, many courts have come to regard suggestion as a monolithic concept devoid of gradations or merely as a prerequisite to be met prior to analyzing the *Biggers* reliability factors.[244] In adding to the reliability determination outlined in *Biggers,* the Supreme Court in *Manson* specifically required that the negative influence of suggestion must be weighed against these reliability factors.[245] In order to perform this weighing task adequately, factors that create and aggravate suggestion as well as those factors indicative of reliability must be considered. Clearly, some identification procedures are worse than

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242. BORCHARD, *supra* note 67, at 50.

243. *See, e.g.,* cases cited in Manson v. Brathwaite, 432 U.S. 98, 110-11 (1977). *See generally* Eisenberg & Feustel, *supra* note 73; Grano, *supra* note 82; Pulaski, *supra* note 17; Note, *Mandatory Exclusion of Identifications Resulting from Suggestive Confrontations: A Conceptual Alternative to the Independent Basis Test,* 53 B.U. L. REV. 433 (1973).

244. *See, e.g.,* Landry v. Alabama, 579 F.2d 353 (5th Cir. 1978); State v. Washington, 257 N.W.2d 890 (Iowa 1977), *cert. denied,* 435 U.S. 1008 (1978); State v. Lee, 340 So. 2d 1339 (La. 1976), *cert. denied,* 431 U.S. 941 (1977); State v. Montgomery, 588 S.W.2d 80 (Mo. 1979); *In re* Mark J., 92 Misc. 2d 733, 412 N.Y.S.2d 549 (1979); Commonwealth v. Rose, 265 Pa. Super. Ct. 159, 401 A.2d 1148 (1979).

245. Manson v. Brathwaite, 432 U.S. 98, 114 (1977).

others and more conducive to misidentifications. The Supreme Court can provide police departments and lower courts with guidance by indicating what types of suggestive conduct are more likely to result in unreliable identification testimony.[246] As to these extreme forms of suggestive procedures, a higher degree of reliability need be shown than that necessary to overcome nominal or less severe types of suggestive practices.[247]

In stating explicitly some of those types of suggestive police practices which will result in suppression of testimony, absent factors showing an extremely reliable identification, the Supreme Court would be injecting a degree of meaningful deterrence into the totality of circumstances test.[248] Further, with the likely increase in the exclusion of evidence stemming from grossly suggestive identification practices, there would then be some impetus for police departments and legislatures to promulgate rules for the proper conduct of identification confrontations. Moreover, although judicial uniformity in application of a due process standard is impossible, and each case would still be determined on its own unique factual situation, a step would be taken towards a

246. Most commentators who specify types of suggestive behavior to be avoided do so within the context of rules that should be followed when an identification proceeding is conducted. As a result, many worthwhile suggestions (*e.g.*, prosecutors, not policemen, should conduct the displays, other display participants should bear a reasonably close resemblance to the suspect, a minimum of five look-alikes should be included, the display should be preserved by videotaping, and a blank lineup should be employed where appropriate) are not offered, nor could they be, as due process minima but are offered instead as a means of achieving the fairest possible identifications. *See, e.g.*, SOBEL, *supra* note 4, §§ 55-57 (1972); WALL, *supra* note 72, at 26-65; Eisenberg & Feustel, *supra* note 73, at 680-81. *See also* WALL, *supra* note 72, at 26-89.

247. Forms of extreme suggestion that would require a higher degree of reliability to avoid suppression might include informing a witness that the suspect has confessed or was apprehended while in possession of the fruits of the crime, displaying a group of suspects together, having more than one witness view a display at the same time, and presenting the suspect with a distinguishing trait or item also possessed by the perpetrator. No list of aggravating factors can be all-inclusive, but specifying a number of forms of suggestion that are extreme not only reduces the likelihood that these techniques will be upheld by the courts and utilized by the police but also puts these institutions on notice that there is a legal consequence to the degree of suggestion employed. This consequence could result not only from these specifically designated aggravating factors but from other severely focusing behavior or from a combination of techniques not grossly suggestive when used individually. This consequence, however, does not automatically involve the "Draconian sanction" of reversal in cases where reliable but suggestive identification evidence is admitted by the trial court. In fact, suppression would be tied directly to reliability as desired by the Supreme Court, but the concept of reliability would gain a new and more scientifically accurate meaning.

248. *See* Grano, *supra* note 82, at 786.

more consistent interpretation of what constitutes suggestion and to what degree certain suggestive practices diminish reliability.[249] This promulgation of rules for identification procedures and the more uniform application of the totality test, when combined with the reasonably anticipated decrease in grossly suggestive identification procedures, should serve to further the administration of justice.

The particular societal interest that would be most directly affected by the Supreme Court's articulation of degrees of suggestion is preventing the jury from hearing unreliable evidence. Without guidelines as to types and gradations of suggestion, courts have quite often failed to appreciate the impact of specific forms of focusing behavior upon the reliability of an identification. One commentator, referring to the present totality of circumstances approach, has observed: "The problem with this approach is that even people who have had a good opportunity to view a crime may be open to suggestiveness."[250] In theory, the weighing process required by the Court in *Manson* provides for the suppression of identification testimony derived from highly suggestive circumstances notwithstanding the presence of some reliability.[251] In practice, however, courts have been most reluctant to preclude the admission of evidence deemed reliable under the standards enunciated in *Biggers*.[252]

The designation of certain highly suggestive practices, together with the evidentiary requirement of an especially strict standard of reliability to sustain the admission of identifications derived from such procedures should diminish measurably the chances of unreliable evidence being used to convict a defendant. Additionally, the act of articulation itself calls attention to and emphasizes the close and complex relationship between suggestion and misidentification. Still, unlike the per se approach specifically rejected by the Supreme Court, it would be the effect of the suggestive procedure upon the reliability of an identification and

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249. *See* Eisenberg & Feustel, *supra* note 73, at 680. As these authors stated: "If the case by case approach is going to be used, it should be accompanied by adequate criteria so that the lower courts will have some guidance in the application of constitutional standards in eyewitness confrontation cases." *Id.*

250. *Id.* In certain situations, witnesses have even misidentified their own friends and relatives. WALL, *supra* note 72, at 13.

251. Justice Marshall noted in his dissent in *Manson:*

> The Court holds, as *Neil v. Biggers* failed to, that a due process identification inquiry must take account of the suggestiveness of a confrontation and the likelihood that it led to misidentification, as recognized in *Stovall* and *Wade*. Thus, even if a witness did have an otherwise adequate opportunity to view a criminal, the later use of a highly suggestive identification procedure can render his testimony inadmissible.

Manson v. Brathwaite, 432 U.S. 98, 129 (1977) (Marshall, J., dissenting).

252. *See* SOBEL, *supra* note 4, § 37 at 60-63; *id.* §§ 38-40.

not the procedure itself that would ultimately determine the outcome of a due process challenge.

VII. EXPERT PSYCHOLOGICAL TESTIMONY

In addition to articulating those police procedures which are especially suggestive and conducive to misidentifications, the Supreme Court can take another step towards improving the application of the totality of circumstances test. In the federal courts and in those states which require a hearing out of the jury's presence to determine whether eyewitness identification evidence is violative of due process,[253] the Court should encourage the use of expert witnesses to explain the impact of certain suggestive procedures upon reliability. Judges required to conduct the weighing process mandated by *Manson* could do so more meaningfully with the benefit of information supplied by a perceptual psychologist as to the manner in which specific types of focusing can produce misidentification. The psychologist's testimony concerning the effects of suggestion could be given without the expert's having to examine the eyewitness himself or to offer a conclusion as to whether the identification testimony should be suppressed.[254]

Expert testimony is generally admissible if it will assist the trier of fact in making an "intelligent evaluation of facts."[255] The trial judge possesses broad discretion in determining the admissibility of such testimony, and the exercise of that discretion will not be disturbed unless it is manifestly erroneous.[256]

Appellate courts have consistently upheld the exclusion from trial of expert testimony regarding the fallibility of eyewitness

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253. *See* Watkins v. Sowders, 449 U.S. 341 (1981) (states are not required by the due process clause of the fourteenth amendment to hold such hearings out of the presence of the jury).

254. *See* LOFTUS, *supra* note 74, at 196.

255. FED. R. EVID. 702, Advisory Committee's Notes. Rule 702 of the Federal Rules of Evidence provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

256. United States v. Amaral, 488 F.2d 1148, 1152 (9th Cir. 1973).

identification.[257] However, no reported case has addressed the admissibility of such evidence at a pretrial *Wade*-type hearing to suppress an identification. An examination of the rules concerning the admissibility of expert testimony reveals that experts on eyewitness identification should be permitted to testify at this type of hearing.

Generally, the admissibility of expert testimony is determined by the following criteria: (1) whether the witness is a qualified expert; (2) whether the testimony concerns the proper subject matter (*i.e.*, will it assist the trier of fact); and (3) whether the testimony conforms to a generally accepted explanatory theory.[258] The admissibility of expert testimony is further subject to the general qualification that its probative value must not be outweighed by its prejudicial effect.[259]

A. Qualified Expert

Under the Federal Rules of Evidence, a witness may qualify as an expert by reason of specialized knowledge, skill, experience, training, or education.[260] It has been suggested that the most qualified expert on eyewitness identifications would be one who has done actual research in memory and perception and has a thorough understanding of the factors influencing the accuracy of eyewitness reports.[261] At minimum, the proposed expert should hold an advanced degree in psychology and should be knowledgeable in the specific area of eyewitness identification.

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257. The majority of these cases did not involve allegations that the identification was the result of an unnecessarily suggestive pretrial confrontation. Consequently, the expert's testimony would have related primarily to the reliability factors set forth in *Biggers*. *E.g.*, United States v. Fosher, 590 F.2d 381 (1st Cir. 1979); United States v. Watson, 587 F.2d 365 (7th Cir. 1978); United States v. Brown, 501 F.2d 146 (9th Cir. 1974), *rev'd on other grounds sub nom.* United States v. Nobles, 422 U.S. 225 (1975); United States v. Amaral, 488 F.2d 1148 (9th Cir. 1973); United States v. Collins, 395 F. Supp. 629 (M.D. Pa. 1975); Criglow v. State, 183 Ark. 407, 36 S.W.2d 400 (1931); People v. Brooks, 51 Cal. App. 3d 602, 124 Cal. Rptr. 492 (1975); People v. Guzman, 47 Cal. App. 3d 380, 121 Cal. Rptr. 69 (1975); Nelson v. State, 362 So. 2d 1017 (Fla. 1978); Jones v. State, 232 Ga. 762, 208 S.E.2d 850 (1974); State v. Reed, 226 Kan. 519, 601 P.2d 1125 (1979); Commonwealth v. Anderson, 6 Mass. App. 492, 378 N.E.2d 451 (1978); Porter v. State, 94 Nev. 142, 576 P.2d 275 (1978); People v. Valentine, 53 A.D.2d 832, 385 N.Y.S.2d 545 (1976); State v. Porraro, 404 A.2d 465 (R.I. 1979). *Contra*, People v. Johnson, 38 Cal. App. 3d 1, 112 Cal. Rptr. 834 (1974); Dyas v. United States, 376 A.2d 827 (D.C. 1977). By comparison, in a *Wade* hearing, the expert testimony would also concern the suggestive factors surrounding the identification and the impact those factors have on the reliability factors.

258. United States v. Amaral, 488 F.2d 1148, 1153 (9th Cir. 1973); *see* United States v. Hearst, 412 F. Supp. 893, 895 (N.D. Cal. 1976); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 13, at 31 (E. Cleary ed. 1972).

259. FED. R. EVID. 402; *see* United States v. Amaral, 488 F.2d 1148, 1152 (9th Cir. 1973).

260. FED. R. EVID. 702.

261. Wilson, *Psychological Opinions on the Accuracy of Eyewitness Testimony*, 14 JUDGE'S J. 72, 73 (1970).

B. Proper Subject Matter

The second requirement for determining the admissibility of expert testimony is that such testimony must be in regard to a proper subject matter. Many courts have used this requirement to justify the exclusion of expert testimony on the reliability of eyewitness reports. The courts have generally stated either that the subject of the eyewitness expert's testimony is not beyond the common experience of a layman[262] or that the expert, by testifying to the accuracy of the witness' identification, would invade the province of the jury.[263] In excluding expert testimony, a few courts have also relied upon the fact that the testimony would not specifically address the perceptual capacity of a particular witness[264] and would, therefore, not assist the trier of fact in its ultimate determination.

1. Beyond the Common Experience of a Layman

The common law rule requires that the subject matter of the testimony must be beyond lay comprehension before an expert may be employed.[265] This requirement, however, was modified by the Federal Rules of Evidence. Rule 702 does not require that a layman have no ability to evaluate the evidence but merely that the expert testimony be helpful to a complete and competent understanding of the facts.[266] One commentator has referred to the test of admissibility as "a common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the *best possible degree* the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute."[267]

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262. United States v. Amaral, 488 F.2d 1148, 1152-53 (9th Cir. 1973); United States v. Fosher, 449 F. Supp. 76, 77 (D. Mass. 1978), *aff'd*, 590 F.2d 381 (1st Cir. 1979); Criglow v. State, 183 Ark. 407, 409, 36 S.W.2d 400, 401 (1931); Dyas v. United States, 376 A.2d 827, 832 (D.C. 1977); Nelson v. State, 362 So. 2d 1017, 1021 (Fla. 1978); State v. Reed, 226 Kan. 519, 522, 601 P.2d 1125, 1128 (1979); Commonwealth v. Jones, 362 Mass. 497, 501, 287 N.E.2d 599, 602 (1972); People v. Valentine, 53 A.D.2d 832, 833, 385 N.Y.S.2d 545, 546 (1976); State v. Parrow, 404 A.2d 465, 471 (R.I. 1979).

263. United States v. Brown, 501 F.2d 146, 150 (9th Cir. 1974), *rev'd on other grounds sub nom.* United States v. Nobles, 422 U.S. 225 (1975); People v. Brooks, 51 Cal. App. 3d 602, 608, 124 Cal. Rptr. 492, 495 (1975); People v. Guzman, 47 Cal. App. 3d 380, 385-86, 121 Cal. Rptr. 69, 72 (1975); People v. Johnson, 38 Cal. App. 3d 1, 7, 112 Cal. Rptr. 834, 837 (1974); Jones v. State, 232 Ga. 762, 764, 208 S.E.2d 850, 852-53 (1974); People v. Valentine, 53 A.D.2d 832, 833, 385 N.Y.S.2d 545, 546 (1976).

264. Porter v. State, 94 Nev. 142, 148, 576 P.2d 275, 278 (1978). *See also* United States v. Fosher, 590 F.2d 381 (1st Cir. 1979).

265. Cramer v. Clark Memorial Hosp., 45 Wis. 2d 147, 150, 172 N.W.2d 427, 428-29 (1970); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 13, at 29 (E. Cleary ed. 1972).

266. FED. R. EVID. 702; Wilson, *Psychological Opinions on the Accuracy of Eyewitness Testimony*, 14 JUDGE'S J. 72, 72 (1970); Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969, 1016 (1977) [hereinafter cited as *Eyewitness Identification*].

267. Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 418 (1952) (emphasis added).

Manson requires judges to evaluate the impact that suggestive police procedures have upon the reliability of an identification. Admittedly, judges may have some common sense understanding of what practices are suggestive and the Supreme Court has indicated that cross-examination is the tool to reveal the nature of these suggestive practices in court.[268] The assertion that cross-examination is the appropriate vehicle for eliciting the impact of suggestive identification techniques has never been shown to have any factual basis, however,[269] and in fact most psychologists and some judges argue the reverse is true.[270] One reason that cross-examination fails to demonstrate the possibility of an unreliable identification is that the sincerity and certainty displayed by the witness while testifying are usually genuine and therefore impressive to the trier of fact.[271] Adversarial questions, no matter how skillfully put, are unlikely to dent this impression.[272] Moreover, attempts to show that the witness' testimony, while given honestly, is nonetheless inaccurate are also likely to prove futile. In the words of one author:

> It is assumed that cross-examination will bring out truth and unveil false or inaccurate testimony. While it is true that a witness can be challenged on the accuracy of his observation, the point here made is not that the observation of the individual witness may be at fault but that

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268. Watkins v. Sowders, 449 U.S. 341, 348-49 (1981); Manson v. Brathwaite, 432 U.S. 98, 113 n.14, 116 (1977).

269. In referring to eyewitness testimony, psychologist L. Craig Parker wrote: "*It appears that too often the courts view the adversarial system as an adequate safeguard when in fact there is little empirical evidence to support their views.* In general, the scientific community's disagreements with the Courts appear to be very strong on this issue." C. PARKER, LEGAL PSYCHOLOGY 105-06 (1980) (emphasis in original).

270. United States v. Wade, 388 U.S. 218, 235 (1967). In Watkins v. Sowders, 449 U.S. 341 (1981), Justice Brennan, in his dissent, commented on the effectiveness of cross-examination in this regard:

> Cross-examination, of course, affects the weight and credibility given by the jury to evidence, but cross-examination is both an ineffective and a wrong tool for purging inadmissible identification evidence from the jurors' minds. It is an ineffective tool because all of the scientific evidence suggests that much eyewitness identification testimony has an unduly powerful effect on jurors. Thus, the jury is likely to give the erroneously admitted evidence substantial weight, however skillful the cross-examination.

Id. at 356-57 (Brennan, J., dissenting) (footnote omitted).

Dr. Parker disagrees even with the assertion that, at least when counsel is present at the identification display, cross-examination can ultimately serve as an adequate safeguard against unreliable identifications: "There are so many conditions under which distortion and bias may interfere with accurate eyewitness identification, that cross-examination, with or without counsel's presence at the moment of identification, is hardly sufficient to insure the integrity of the process." C. PARKER, LEGAL PSYCHOLOGY 106-07 (1980).

271. *See* notes 237-42 and accompanying text *supra.*

272. *See, e.g.,* Grano, *supra* note 82, at 747. As this author explained: "The danger arises not because the witness chooses to lie, but rather because the witness sincerely believes that the new image portrays the actual offender. Therefore, if the witness has erred, cross-examination will frequently fail to reveal it." *Id.*

on the whole the observation of all witnesses is faulty in some degree or in some situations.[273]

When an unreliable identification is attributable to the effects of suggestion upon the human thought process, cross-examination is a particularly inappropriate means of exposing the error.[274] Witnesses are frequently unaware of the existence of suggestion when they make an identification and are thus nearly incapable of being cross-examined as to the influence of these suggestive elements.[275] The police themselves are likely to be unaware of the fact that they are communicating to the witness their own preconceptions of who committed the crime.[276] This lack of awareness on the part of the police is especially acute when the individual officer's preconception stems from his own past experiences and expectations.[277] Cross-examination is still less likely to be of any real value in revealing suggestive conduct when the method of communication of the suggestion is non-verbal.[278]

In performing the balancing procedure mandated by the Supreme Court's interpretation of the totality of circumstances test, the trial judge must be aware of the precise effect that police focusing has upon the reliability of an identification. The fact that many popular opinions concerning the reliability of identifications have been disproved by psychological experiments indicates that this assessment as to the impact of suggestion is beyond the awareness of the average layman or judge. The impact of factors such as stress, certainty, weapon focus, unconscious transference, identifying several suspects at once, and the role of distinguishing characteristics is often quite different in substance and degree than common knowledge dictates. Thus, it is evident that laymen do not possess "the best possible knowledge of organic and behavioral mechanisms of perception."[279]

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273. MARSHALL, *supra* note 95, at 35.
274. *See* Comment, *Expert Testimony on Eyewitness Perception*, 82 DICK. L. REV. 465, 480-81 (1978); *Eyewitness Identification*, *supra* note 266, at 994-95.
275. YARMEY, *supra* note 96, at 155; Levine & Tapp, *supra* note 106, at 1114; *Eyewitness Identification*, *supra* note 266, at 994.
276. Levine & Tapp, *supra* note 106, at 1114. Even trained researchers are often unaware of the information they unconsciously communicate. Professor Robert Rosenthal informed his class that they were about to do research designed to test the ability of genetically bred intelligent rats to solve a maze when compared to genetically bred dull rats. The students assigned to work with the bright rats reported their ability to learn the maze in significantly less time than it took the dull rats. The fact that in reality all of the rats were chosen totally at random led Rosenthal to conclude that the expectations of the testers were passed unconsciously and obviously non-verbally to the rats. Fanselow, *How to Bias an Eyewitness*, SOC. ACT. & L., May 1975, at 3, 3.
277. MARSHALL, *supra* note 95, at 51-52.
278. For examples of the methods and impact of non-verbal cues at eyewitness identification proceedings, see Fanselow, *How to Bias an Eyewitness*, SOC. ACT. & L., May 1975, at 3, 3-4.
279. United States v. Fosher, 590 F.2d 381, 383 (1979). The *Fosher* court, however, ruled that there was no abuse of discretion by the trial judge in excluding the testimony because the offer of proof did not sufficiently focus on the particular issue involved in the case. *Id.* at 382-83.

An expert on eyewitness identifications could provide the judge with scientific data obtained through psychological experiments. Scientific evidence that bears on the reliability of an identification, in light of the suggestive factors present, would assist the judge in weighing the impact of those factors in a knowledgeable, informed manner.

2. Invading the Province of the Jury

Several courts have concluded that expert testimony is inadmissible because it would take over the jury's task of determining the weight and credibility of the witness' testimony.[280] According to these courts, the credibility of a witness is an ultimate issue before the jury, upon which an expert may not express an opinion.[281]

In a pretrial *Wade* hearing concerning a due process challenge, the analogous argument exists that the expert's testimony embraces the ultimate issues to be determined by and thereby invades the province of the judge. The ultimate issue rule, however, has been the subject of much criticism[282] and has been specifically abolished by the Federal Rules of Evidence.[283] The majority of states have also abandoned the rule.[284] Thus, in most cases, whether the expert's testimony goes to an ultimate issue is not a relevant consideration.

Even in those jurisdictions which have retained the ultimate issue rule, the suggested use of expert testimony would not be objectionable as an invasion of the province of the judge. The expert's testimony would be limited to an enumeration and expla-

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280. United States v. Brown, 501 F.2d 146, 150 (9th Cir. 1974), *rev'd on other grounds sub nom.* United States v. Nobles, 422 U.S. 225 (1975); People v. Brooks, 51 Cal. App. 3d 602, 608, 124 Cal. Rptr. 492, 495 (1975); People v. Guzman, 47 Cal. App. 3d 380, 385-86, 121 Cal. Rptr. 69, 72 (1975); People v. Johnson, 38 Cal. App. 3d 1, 7, 112 Cal. Rptr. 834, 837 (1974); Jones v. State, 232 Ga. 762, 764, 208 S.E.2d 850, 852-53 (1974); People v. Valentine, 53 A.D.2d 832, 833, 385 N.Y.S.2d 545, 546 (1976).

281. *E.g.*, Jones v. State, 232 Ga. 762, 764, 208 S.E.2d 850, 853 (1974).

282. *E.g.*, C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 12 (E. Cleary ed. 1972); WALL, *supra* note 72, at 213; J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1921 (J. Chadborn ed. 1978); Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 423-24 (1952).

283. *See* FED. R. EVID. 704.

284. *E.g.*, Crawford Coal Co. v. Stephens, 382 So. 2d 536 (Ala. 1980); Crump v. Universal Safety Equip. Co., 79 Ill. App. 3d 202, 398 N.E.2d 188 (1979); Davis v. Schneider, 395 N.E.2d 283 (Ind. 1979); Stanks v. A.F.E. Indus., Inc., 403 N.E.2d 849 (Ind. Ct. App. 1980); Grismore v. Consolidated Prods. Co., 5 N.W.2d 646 (Iowa 1942); *In re* Gatson, 3 Kan. 2d 265, 593 P.2d 423 (1979); Commonwealth Dep't of Highways v. Widner, 388 S.W.2d 583 (Ky. 1965); Dudek v. Popp, 373 Mich. 300, 129 N.W.2d 393 (1964); Deskin v. Brewer, 590 S.W.2d 392 (Mo. 1979); Southern Pac. Co. v. Watkins, 83 Nev. 471, 435 P.2d 498 (1968); McKay Mach. Co. v. Rodman, 11 Ohio St. 2d 77, 228 N.E.2d 304 (1967); Welch v. United States Bancorp Realty & Mortgage Trust, 286 Or. 673, 596 P.2d 947 (1979); Groce v. Fidelity Gen. Ins. Co., 252 Or. 296, 488 P.2d 554 (1968); Redman v. Ford Motor Co., 253 S.C. 266, 170 S.E.2d 207 (1969); Edwards v. Didericksen, 597 P.2d 1328 (Utah 1979); Rabata v. Dohner, 45 Wis. 2d 111, 172 N.W.2d 409 (1969).

nation of the various factors involved in the case in issue that generally influence an identification. The expert would not be expressing an opinion on the accuracy of a particular witness' identification and would, therefore, not be invading the province of the judge.[285] The judge, with the assistance of the expert's testimony, would make the ultimate determination of whether the corrupting influence of suggestion would outweigh the reliability of the identification.

3. Perceptual Capacity of a Particular Witness

A few courts have suggested that expert testimony that addresses only the powers of observation and recollection of the average person and does not address those powers as they relate to a particular witness is not relevant and, therefore, not admissible.[286] There is no evidentiary principle, however, that makes it improper "to develop general testimony in an area of expert knowledge, and rely upon other evidence to relate such testimony to the case."[287] Generally, evidence is relevant if it has any tendency to prove a material fact.[288] If the testimony of an expert addresses the effect certain suggestive factors may have on the accuracy of an identification, and those suggestive factors are present in a particular case, the testimony is directly relevant to the reliability of the challenged identification and should therefore be admissible.[289]

C. Conformity to a Generally Accepted Explanatory Theory

The third requirement for the admissibility of expert testimony is that it be in accordance with a generally accepted explanatory theory.[290] Through years of extensive research, experimental psychologists have developed a comprehensive body of knowledge regarding eyewitness perception and memory. The vast amount of material published in this field suggests its acceptance by the scientific community. Several trial courts have also implicitly recognized the validity of expert testimony on eyewitness identifications.[291] Moreover, there are no reported cases in which

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285. *See Eyewitness Identification, supra* note 266, at 1020-21.
286. Porter v. State, 94 Nev. 142, 147-48, 576 P.2d 275, 278-79 (1978). *See also* United States v. Fosher, 590 F.2d 381 (1st Cir. 1979).
287. Porter v. State, 94 Nev. 142, 151, 576 P.2d 275, 280 (1979) (Gunderson, J., concurring).
288. FED. R. EVID. 401; *see, e.g.*, United States v. Amaral, 488 F.2d 1148, 1152 (9th Cir. 1973).
289. *See* FED. R. EVID. 402.
290. United States v. Amaral, 488 F.2d 1148, 1152 (9th Cir. 1973).
291. *See Eyewitness Identification, supra* note 266, at 1006 n.173.

expert testimony of this type has been excluded solely on the ground that it is outside a recognized field of expertise.[292] It appears, therefore, that expert testimony on eyewitness identifications falls within a field of expertise that is generally recognized by both the scientific and the legal communities.

D. Probative Value vs. Prejudicial Effect

Even if the criteria for admitting expert testimony are satisfied, the testimony may still be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or needless presentation of cumulative evidence.[293]

The primary danger presented by allowing experts to testify in regard to eyewitness identifications is that of undue prejudice. Courts often fear that an eyewitness expert's impressive credentials may lead the jury to rely too heavily on his opinion and undervalue the weight of the eyewitness' testimony.[294] The significance of these fears, however, is greatly diminished when the expert testimony is offered at a pretrial *Wade* hearing, which is before a judge, not a jury. Courts have long recognized the distinction between the application of the prejudice rule to a trial before a jury and its application to a trial before a judge.[295] A judge, due to

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292. Porter v. State, 94 Nev. 142, 150, 567 P.2d 275, 280 (1978) (Gunderson, J., concurring). The majority of the court, however, held, *inter alia*, that the offer of proof was inadequate here because it failed to establish that the testimony was within a recognized field of expertise. *Id.* at 147, 567 P.2d at 278. *See also* United States v. Jackson, Cr. No. 16158-74 (D.C. Super. Ct. Feb. 10, 1975), wherein the trial judge ruled that the subfield of eyewitness identification within the fields of perception and memory had not reached a state of general acceptability.

293. FED. R. EVID. 402; *accord*, CAL. EVID. CODE § 352 (West 1966); KAN. STAT. ANN. § 60-445 (1964); N.M. STAT. ANN. § 20-4-403 (Supp. 1973); WIS. STAT. ANN. § 904.03 (West 1975); *see, e.g.*, Delacy v. Manson City, 240 Iowa 951, 954-55, 38 N.W. 587, 589 (1949); Brener v. St. Louis Pub. Serv. Co., 160 S.W.2d 780, 784 (Mo. 1942); State v. Freeman, 232 Or. 267, 273-74, 374 P.2d 453, 456 (1962).

294. *See, e.g.*, United States v. Amaral, 488 F.2d 1148, 1152 (9th Cir. 1973); United States v. Fosher, 449 F. Supp. 76, 77 (D. Mass. 1978), *aff'd*, 590 F.2d 381 (1st Cir. 1979); United States v. Collins, 395 F. Supp. 629, 636 (M.D. Pa. 1975); Porter v. State, 94 Nev. 142, 148, 576 P.2d 275, 278-79 (1978).

295. *See, e.g.*, People v. McNeal, 56 Ill. App. 132, 138, 371 N.E.2d 926, 931 (1977); State v. Garvi, 3 Or. App. 391, 394, 474 P.2d 363, 364 (1970). *See also* Trovinger v. State, 34 Md. App. 357, 363, 367 A.2d 548, 552 (1977); Nevil v. Wahl, 228 Mo. 49, 65 S.W.2d 123 (1933); State v. Price, 17 Wash. App. 247, 250-51, 562 P.2d 256, 258 (1977).

In Matson v. Matson, 226 N.W.2d 659 (N.D. 1975), the court held that, when an action is tried without a jury, all evidence that is not clearly inadmissible should be admitted. *Id.* at 665. *See also* Lappin v. Lappin, 18 Ariz. App. 444, 503 P.2d 402 (1972).

his professional training and judicial temperament, would not have the fallibility of a juror.[296] Judges often deal with experts and are less likely to be overwhelmed by the experts' impressive credentials.[297] Furthermore, their professional experience in evaluating all types of evidence reduces the likelihood that judges will give undue weight to the testimony.[298] Consequently, any possibility that the expert testimony will be misleading is significantly reduced when the testimony is presented at a pretrial *Wade* hearing. As a result, the probative value will not be outweighed by the danger of undue prejudice.

E. Considerations of Judicial Economy

Expert testimony may also be excluded if its admissibility would result in an undue consumption of time.[299] If experts were permitted to testify on the general fallibilities of human perception, every case involving an eyewitness identification would warrant the use of an expert. Under such circumstances, undue delays become a legitimate concern. However, the number of cases warranting the use of expert testimony would be significantly less if the use of experts was limited to *Wade* hearings.[300] If need be, the use of experts could further be limited to those cases in which guilt is established exclusively by identification testimony. Considering the highly persuasive impact of eyewitness testimony and the grave consequences of mistaken identifications,[301] the few hours consumed by expert testimony should be a minor concern in determining its admissibility.

An expert, qualified in the area of perception and memory, could assist the judge at a *Wade* hearing in weighing the corrupting effect of a suggestive identification against its reliability. The expert's testimony would also be in accordance with a generally accepted explanatory theory. Because the hearing is before a

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296. *See* State v. Hutchinson, 260 Md. 227, 271 A.2d 641 (1970), in which the court stated:

> [J]udges, being flesh and blood, are subjected to the same emotions and human frailties as affect other members of the species; however, by his legal training, traditional approach to problems, and the very state of the art of his profession, he must early learn to perceive, distinguish and interpret the nuances of the law which are its "warp & woof."

Id. at 233, 271 A.2d at 644.

297. *Id.*

298. *See* Nevil v. Wahl, 228 Mo. 49, 65 S.W.2d 123 (1933); Laumeier v. Gehner, 19 S.W. 82, 82 (Mo. 1892).

299. FED. R. EVID. 402; *see, e.g.*, United States v. Brown, 501 F.2d 146, 150 (9th Cir. 1974), *rev'd on other grounds sub nom.* United States v. Nobles, 422 U.S. 225 (1975).

300. This is not to suggest that the use of an expert on eyewitness identifications at trial would not be most helpful to the jury in determining the likelihood that the identification is accurate. Limiting, at least initially, the use of the expert to pretrial hearings examining the impact of suggestiveness upon the reliability of an identification, however, would avoid the prejudicial effect on juries that some judges seem to fear.

301. WALL, *supra* note 72, at 19-23.

judge, not a jury, the probative value of the testimony would not be outweighed by any prejudicial effect. Consequently, the testimony satisfies the prerequisites of admissibility, and no logical justification exists for its exclusion.

VIII. CONCLUSION

In *Manson v. Brathwaite*,[302] the Supreme Court articulated three societal interests that should be served by any approach utilized to determine the admissibility of eyewitness identification testimony challenged as a violation of due process. Deterring suggestive police procedures, furthering the administration of justice, and avoiding the submission of unreliable identification evidence to the jury were all rightfully cited by the Court as significant due process concerns. Unfortunately, the totality of circumstances test as adopted by the Supreme Court in *Manson* and applied by lower federal and state courts has satisfied none of these interests.

Rather than being deterred, the police have been afforded vast discretion in their choice of methods to procure identifications. Since no procedure, regardless of its flagrantly suggestive nature, is held out as particularly likely to result in suppression, and reliability factors outside the control of the police are often determinative in the decision to admit eyewitness testimony, the police are without incentive to employ the fairest identification procedures possible under the circumstances.

The Court's failure to define factors of suggestivity has resulted in inconsistent and often questionable judicial decisions as to whether certain police practices are suggestive and, if suggestive, whether the impropriety is overcome by indicia of reliability. As the use of this questionable identification testimony at trial has a significant impact upon a jury and as it goes directly to the truth-finding process, the totality approach has done little to prevent wrongful convictions. With neither guidelines nor incentive, legislatures and police departments are not likely to promulgate rules to ensure the fairest possible identification procedures. In short, the totality approach as now applied has been notably unsuccessful in furthering the administration of justice.

Where the totality approach as applied by federal and state courts has failed most clearly is in its lack of awareness of the impact of suggestive police practices upon the reliability of an identification. Until the courts comprehend fully this impact, juries will continue to hear testimony given with certainty and honesty but possessing that degree of unreliability against which due process is designed to protect.

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302. 432 U.S. 98 (1977).

The articulation of specified types of extreme suggestion to be avoided and the requirement that identifications obtained after the use of such techniques require the highest degree of reliability to be admissible would serve several purposes. First, police officers would be deterred from utilizing these grossly suggestive but not uncommon procedures for fear of the explicitly increased likelihood of the exclusion of such identification testimony. Second, courts would have some guidance as to what procedures are suggestive and which are particularly likely to lead to misidentification and, therefore, would less often be in the position of condoning admittedly improper conduct that contaminates the truth-finding process.

The use of expert witnesses in the area of eyewitness identifications is another means by which the application of the totality of circumstances test can be improved. In explaining the different, often subtle, ways suggestion is communicated and the impact of specific focusing conduct upon the reliability of an identification, a psychologist can provide help in answering the very question judges are called upon to determine at pretrial identification hearings.

The expansion of the due process approach herein offered maintains the framework of the totality of circumstances approach and its use of reliability as the touchstone upon which eyewitness identification evidence is admitted. Where these proposals differ from the current approach is that, unlike the latter, the proposals offered herein begin to address the societal interests behind due process articulated in *Manson*.