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# Articles

## Due Process Challenges to Eyewitness Identification Based on Pretrial Photographic Arrays

Connie Mayer*

### I. Introduction

On January 30, 1985, an eighteen-year-old Queens, New York nursing home aide was attacked and sexually assaulted.[1] She described her attacker as a white male with a full beard, a reddish-blonde "Afro" and a web-like cross tattooed on his left hand.[2] After chasing fruitless leads for several months, the investigation of the assault came to a halt, and on November 15, 1985, the case was marked "no longer active."[3] Six months

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1. William Falk, *DNA and the Crime He Didn't Commit*, NEWSDAY, Nov. 22, 1992, at 6.

2. *Id.* This type of tattoo, called a "Pachecko cross" was not a rare tattoo. They were popular among motorcycle gangs and drug dealers in the 1960s according to Dr. Michael Baden, an expert on tattoos. *Id.*

3. *Id.*



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later, New York City police began looking for Leonard Callace who had been charged with an unrelated crime, criminal mischief, and who had failed to make his court appearance. When police investigators learned that Callace had a reddish beard and a "Pachecko cross" tattooed on his hand and that Callace lived in the vicinity of the aide's attack, they became convinced that Callace was the attacker.[4]

Certain of Callace's guilt, investigators called the victim in late June, eighteen months after the rape, to view a photographic array. The photographic array contained six photographs in which five of the men pictured had mustaches and only one, Callace, had a full beard.[5] Police testified that the victim pointed to the photograph of Callace and said, "That's

4. *Id.* The crime had been investigated by Detective Brian McDonald and Detective Kevin Harty. Harty was informed by another investigator of Callace's description and told McDonald. McDonald later testified, "I said, Kevin, this is the guy. I know it . . . We were convinced in our minds it was him." *Id.*

5. *Id.* Courts generally require that a photographic array depict individuals similar in appearance and matching the description given by eyewitnesses. If only the picture of the suspect matches the description given by the eyewitness, courts have held that the photographic array violates that person's due process rights because it enhances the chance of misidentification. *See* United States v. Wade, 388 U.S. 218, 233 (1967) (providing numerous instances of suggestive procedures which have the dissimilar effect of singling out the suspect); Salam v. Lockhart, 874 F.2d 525, 529 (8th Cir.) (finding identification procedures were not impermissibly suggestive when the individuals in a photographic display and line-up were of the same race, possessed similar physical features, and were alike in size, age, and dress), *cert. denied*, 493 U.S. 898 (1989); United States v. Langley, 848 F.2d 152, 153 (11th Cir. 1988) (concluding neither photographic array nor line-ups were suggestive when court found identification procedures were conducted with great care, to insure that persons who had physical characteristics similar to the defendant's were displayed to four eyewitnesses). *But see* Cikora v. Dagger, 840 F.2d 893, 896-97 (11th Cir. 1988) (finding photographic line-up was not impermissibly suggestive even though suspect's photograph was only one with height markings, suspect was the only non-Hispanic, and suspect had less facial hair than the other men); United States v. Monks, 774 F.2d 945, 956-57 (9th Cir. 1985) (finding even if line-ups were unduly suggestive by failing to include pictures of other persons with physical characteristics similar to defendant, due process was not violated because of the reliability of the witness identification).

Social-science research also demonstrates that if one photograph stands out, it is more apt to being selected by the eyewitness and, therefore, the rate of misidentification is increased. *See generally* Robert Buckhout, *Eyewitness Testimony*, 231 SCI. AM. 23 (1974); Anthony N. Doob & Hershi M. Kirshenbaum, *Bias in Police Lineups: Partial Remembering*, 1 J. POLICE SCI. 287 (1973); Felice Levine & June Tapp, *The Psychology of Criminal Identification: The Gap from Wade to Kirby*, 121 U. PA. L. REV. 1079 (1973); Gary L. Wells et al., *Guidelines for Empirically Assessing the Fairness of a Lineup*, 3 L. & HUM. BEHAV. 285 (1979).

him."[6] On July 31, 1986, police arrested Callace and called the victim to the precinct to view a line-up. A detective told the victim that the person whose photograph she had picked was in the line-up.[7] Of the six suspects in the line-up, Callace was again the only one who had a beard.[8] Furthermore, Callace was the only suspect in the line-up who was asked to say the phrase, "Get out of the car now."[9] The victim once again identified Callace as her attacker.

The prosecution of Callace was based almost exclusively on the eyewitness identification. The prosecution introduced no physical evidence linking Callace to the crime.[10] The victim testified at trial that, even though it was nearly two years after the crime, she was absolutely certain that Callace was the man who had attacked her.[11] The defense did not call an expert witness to testify about the unreliability of eyewitness identification.

In less than ninety minutes, the jury found Callace guilty of the attack. In February, 1987, he was sentenced to a term of twenty-five to fifty years in the state penitentiary. Jurors interviewed later said that the victim's absolute confidence in her

6. Falk, *supra* note 1, at 6. The victim contradicted police testimony when she apparently testified that she had simply said that the attacker had a beard and had not said, "That's him," as police testified. *Id.*

7. *Id.* Social-science research indicates that telling a witness that the suspect is present in a line-up significantly increases the chance of false identification. ELIZABETH LOFTUS, EYEWITNESS TESTIMONY 144 (1979); Brian L. Cutler et al., *The Reliability of Eyewitness Identification*, 11 L. & HUM. BEHAV. 233, 244 (1987) (concluding that biased instructions reduced the accuracy of identifications and significantly increased the number of false identifications).

The Supreme Court has also recognized that this increases the chance of misidentification: "The chance of misidentification is also heightened if the police indicate to the witness that they have evidence that one of the persons pictured committed the crime." Simmons v. United States, 390 U.S. 377, 383 (1968).

8. Falk, *supra* note 1, at 6.

9. *Id.* The detective testified that he had all six of the suspects state the phrase but the victim twice testified that only Callace was asked by police to state the phrase. *Id.*

10. *Id.* The prosecutor's case was so weak that the prosecution offered to allow Callace to plead to a misdemeanor in return for four months in county jail. *Id.*

11. *Id.* Social-science research indicates that after one year there is very little ability to recognize a person with whom one had a brief encounter. *See* LOFTUS, *supra* note 7, at 68-70; Brian L. Cutler et al., *Unconfounding the Effects of Contextual Cues on Eyewitness Identification Accuracy*, 1 SOC. BEHAV. 113, 131-32 (1986); Frances L. Krouse, *Effects of Pose, Pose Change, and Delay on Face Recognition Performance*, 66 J. APPLIED PSYCHOL. 651, 651 (1981).

identification swayed them to convict.[12] For nearly six years, Callace staunchly maintained his innocence. On October 19, 1992, a judge told Callace that he was free to go.[13] DNA tests had finally revealed that Callace could not have been the attacker. How could the eyewitness, who was so certain, have been so wrong? What happened to the procedural safeguards that were meant to protect an innocent person from wrongful conviction? Why would twelve jurors convict on the strength of eyewitness identification alone?

Most people believe that eyewitness identification is one of the most reliable forms of evidence that can be produced against a defendant.[14] Because of that belief, empirical studies have shown that jurors place an enormous amount of faith on eyewitness testimony.[15] The courts have also recognized the influential impact eyewitness identifications have on juries.[16] As

12. Falk, *supra* note 1, at 6. One of the jurors who was recently interviewed said, "I certainly had my doubts . . . but I felt it would have been a mistake to let someone go who had committed this crime . . . [because] the girl seemed so sure. She was very convincing." *Id.*

13. *Id.*

14. LOFTUS, *supra* note 7, at 19.

15. *See* Elizabeth F. Loftus, *Restructuring Memory: Incredible Eyewitness*, 8 PSYCHOL. TODAY 116, 118 (1974). In an experimental setting, jurors were given information about a crime and then presented evidence equally weighted in favor of the defendant and the prosecution. Only 18% of the jurors voted for conviction. When the testimony of an eyewitness was added, 72% of jurors voted for guilt. *Id.*; *see also* ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL & CRIMINAL 25-26 (1987) (study demonstrated that eyewitness testimony was given more weight than any other type of evidence, including testimony from handwriting, fingerprint, and other experts); Gary L. Wells et al., *Accuracy, Confidence and Juror Perceptions in Eyewitness Identification* 64 J. APPLIED PSYCHOL. 440, 446 (1979). After a mock theft, three eyewitnesses testified in a mock trial as to the circumstances of the theft and the identity of the perpetrator. Jurors were asked for their reactions and results indicated that they tended to believe the eyewitness testimony about 80% of the time. Results also revealed that jurors tended to believe those witnesses who made the identification in a highly confident manner even though their identification was inaccurate. *Id.*

16. *See* Manson v. Braithwaite, 432 U.S. 98, 120 (1977) (Marshall, J., dissenting) ("[J]uries unfortunately are often unduly receptive to such [identification] evidence."); United States v. Langford, 802 F.2d 1176, 1182 (9th Cir. 1986) ("[J]uries almost unquestioningly accept eyewitness testimony."); United States v. Greene, 591 F.2d 471, 475 (8th Cir. 1979) ("[T]he in-court testimony of an eyewitness can be devastatingly persuasive."); United States v. Russell, 532 F.2d 1063, 1067 (6th Cir. 1976) ("[O]f all the evidence that may be presented to a jury, a witness' in-court statement that he is the one is probably the most dramatic and persuasive.").

Justice Brennan stated in his dissent in *Watkins v. Sowders*:[17] "[E]yewitness identification evidence has a powerful impact on juries. Juries seem most receptive to, and not inclined to discredit, testimony of a witness who states that he saw the defendant commit the crime."[18]

Evidentiary rules allowing juries to convict solely on the basis of an eyewitness identification institutionally reinforce the credibility afforded to eyewitness testimony.[19] However, while a great deal of credibility is given to eyewitness identification, empirical studies have shown that eyewitness identification can actually be extremely unreliable.[20] Given the weight afforded eyewitness identification, it is not surprising that studies have shown that approximately fifty percent of those wrongly convicted were convicted based on eyewitness identification evidence.[21] This makes mistaken identity the factor most often responsible for wrongful conviction.[22]

What makes eyewitness identification unreliable? When crime victims attempt to recall faces of strangers they have seen for only a brief period of time, many factors affect their ability to accurately remember what they have seen. Factors that may affect the reliability of the identification include: lighting conditions; the duration of the event; violence; the age, sex and race of the perpetrator; the length of time between the event and the identification and the acquisition of post-event information that may distort the memory.[23]

In addition to these factors, special problems exist with respect to the identification of a person from a photographic ar-

17. 449 U.S. 341 (1981).

18. *Id.* at 352 (Brennan, J., dissenting).

19. Corroboration is not required to support a conviction based upon eyewitness identification testimony. *See, e.g.*, United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972); People v. DuByk, 285 A.D.2d 1025, 139 N.Y.S.2d 577 (1st Dep't), *aff'd*, 309 N.Y. 833, 130 N.E.2d 621 (1955).

20. *See generally* LOFTUS, *supra* note 7; LOFTUS & DOYLE, *supra* note 15.

21. EDWIN M. BORCHARD, CONVICTING THE INNOCENT, at xiii (1932) (Borchard reviewed 65 cases of wrongful convictions and found that 45% were the result of mistaken eyewitness identification.); Arye Rattner, *Convicted But Innocent*, 12 L. & HUM. BEHAV. 283, 289 (1988) (Rattner studied 200 cases of wrongfully convicted persons and found that 52.3% of the convictions resulted from faulty eyewitness identification.).

22. Rattner, *supra* note 21, at 292.

23. LOFTUS, *supra* note 7, at 123-29.

ray. After a crime has been committed, it is often standard police procedure to construct a photographic array to show to a witness.[24] One danger inherent in the reliability of an identification from such an array relates to the expectation on the part of the witness that the suspect is, in fact, in the photographic array. The eyewitness, believing the suspect is present in the array, will often identify the person that looks most like the criminal, rather than choosing no one.[25]

The number of photographs in an array[26] and the physical characteristics of the participants are also factors bearing on the reliability of a photographic identification.[27] But in addition, the photograph is merely a two-dimensional depiction of a person. Often a witness cannot discern height and weight accurately from a photograph. If the photograph is old and no longer accurately depicts its subject, it may also lead to a false identification.[28]

A subsequent corporeal line-up, which includes a suspect already selected from a photographic array, compounds the problems inherent in the use of photographs by creating what

24. *Id.* at 144; PATRICK M. WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES 66-68 (1965).

25. LOFTUS, *supra* note 7, at 144; Buckhout, *supra* note 5, at 30; Robert Buckhout et al., *Determinants of Eyewitness Performance on a Lineup*, 4 BULL. PSYCHONOMIC SOC'Y 191, 192 (1974); Robert Buckhout et al., *Eyewitness Identification: Effects of Suggestion and Bias in Identification from Photographs*, 4 BULL. PSYCHONOMIC SOC'Y 71, 71-72 (1975).

26. United States v. Maldonado-Rivera, 922 F.2d 934, 974 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2811 (1991); LOFTUS, *supra* note 7, at 144.

27. Courts generally require that the photographic array depict persons of similar race and features to admit pretrial identification. *See* United States v. Wade, 388 U.S. 218, 233 (1967); Salam v. Lockhart, 874 F.2d 525 (8th Cir.), *cert. denied*, 493 U.S. 898 (1989); United States v. Langley, 848 F.2d 152 (11th Cir. 1988). *But see* Cikora v. Dagger, 840 F.2d 893 (11th Cir. 1988); United States v. Monks, 774 F.2d 945 (9th Cir. 1985).

Social-science research demonstrates that high similarity line-ups increase identification accuracy. *See* BRIAN R. CLIFFORD & RAY BULL, THE PSYCHOLOGY OF PERSON IDENTIFICATION 194 (1978); Buckhout, *supra* note 5, at 26; Doob & Kirshenbaum, *supra* note 5 at 289; *see also* Felice J. Levine & June Louin Tapp, *The Psychology of Criminal Identification: The Gap from Wade to Kirby*, 121 U. PA. L. REV. 1079 (1973).

28. WALL, *supra* note 24, at 68-70. Photographs depicting persons with different expressions (i.e., smiling vs. nonsmiling) have also been seen to play a role in recognition memory. Ruth Ellen Galper & Julian Hochberg, *Recognition Memory for Photographs of Faces*, 84 AM. J. PSYCHOL. 351, 351, 353-54 (1971).

researchers have called a photo-biased line-up.[29] After being shown a photographic array, a witness will often be asked to view a corporeal line-up. The witness often chooses the person who looks most familiar, believing that the person is familiar because of the crime, when the familiarity actually relates back to the recently viewed photograph and not to the crime.[30] Studies have demonstrated that viewing a suspect's photograph after a crime but prior to a corporeal line-up dramatically increases the chances of identification of that particular suspect at the subsequent line-up.[31] This finding casts serious doubt on the reliability of pretrial and in-court identifications when a photographic array has first been displayed to the witness.

Because of the problems inherent in eyewitness identification of suspects, especially through the use of photographs, courts have attempted to construct procedural safeguards to protect against false identification. This article outlines the application of current procedural safeguards to protect an accused who has been the subject of a pretrial identification based on a photographic array. It also explores the "fit" between the predictors of reliability, as demonstrated by empirical studies, and the rulings on reliability made by the courts. Would Leonard Callace have been convicted if the jury had been made aware of the possible problems affecting the reliability of the eyewitness identification in his case? Effective challenges on behalf of an accused must be based on the law, but an effective advocate must be aware of the empirical findings and make an effort to get this information before the tribunal whenever appropriate.

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29. LOFTUS, *supra* note 7, at 150.

30. *Id.* at 151; Elizabeth F. Loftus & Edith Greene, *Warning: Even Memory for Faces Can Be Contagious*, 4 L. & HUM. BEHAV. 323, 332-34 (1980).

31. A study completed in 1977 demonstrated this danger inherent in viewing a photograph during the interval between a crime and a corporeal line-up. Witnesses viewed two groups of "criminals" for 25 seconds and later that evening were asked to identify the "criminals" from 15 mug shots. One week later they were asked to identify the criminals in a line-up. Of the persons whose mug shots had not been displayed, eight percent were falsely identified. But of those whose faces that appeared in the mug shots, their chances of being falsely identified in the line-up rose to 20%. Evan Brown et al., *Memory for Faces and the Circumstances of Encounter*, 62 J. APPLIED PSYCHOL. 311, 314 (1977).

## II. Procedural Safeguards

While constitutional challenges to pretrial identification through line-ups and show-ups may be based on both the defendant's Sixth Amendment right to counsel and on Fifth Amendment or Fourteenth Amendment rights to due process,[32] challenges to a photographic line-up are based solely on a due process analysis.[33] The right to counsel in the line-up/show-up context begins as soon as adversarial, judicial criminal proceedings are initiated "by way of formal charge, preliminary hearing, indictment, information, or arraignment."[34] This right to counsel is based upon the "potential substantial prejudice to defendant's rights [which] inheres in the particular confrontation and the ability of counsel to help avoid that prejudice."[35] Thus, the rationale for extending the right to counsel to line-ups and show-ups lies in the "trial-like" confrontation between the accused and the witness. Counsel serves as an observer "to preserve the defendant's basic right to a fair trial . . . ."[36] At a photographic display, however, the defendant is not present, nor does he have the right to be.[37] Because there is no actual confrontation between the accused and the witness, the Supreme Court has held that the accused has no right to counsel at a photographic identification, whether it occurs before or after the initiation of criminal prosecution.[38] Thus, any challenge to a photographic pretrial identification must be based on the requirements of due process, using a totality of circumstances analysis.[39]

## III. The Due Process Standard

The Supreme Court, in *Stovall v. Denno*,[40] held that a pre- or post-indictment identification procedure that is conducted in

32. United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967).

33. United States v. Ash, 413 U.S. 300 (1967).

34. Kirby v. Illinois, 406 U.S. 682, 689 (1972).

35. *Wade*, 388 U.S. at 227.

36. *Id.*

37. *Ash*, 413 U.S. at 317.

38. *Id.* at 321.

39. *Id*; Manson v. Brathwaite, 432 U.S. 98, 107-14 (1977); Simmons v. United States, 390 U.S. 377, 384 (1973); Neil v. Biggers, 409 U.S. 188, 198-99 (1972).

40. 388 U.S. 293 (1967).

a manner that is "so unnecessarily suggestive and conducive to irreparable mistaken identification" violates the due process rights of an accused.[41] The totality of circumstances must be examined to determine whether the accused was deprived of due process.[42] The *Stovall* Court found that, on the facts of the case, the one-on-one confrontation did not violate due process, emphasizing that the critical condition of the injured witness justified a show-up in her hospital room and that the victim was the only one who could exonerate Stovall.[43] Though the procedure was suggestive, exigent circumstances made it necessary and did not produce a likelihood of misidentification.[44]

While *Stovall* involved a one-on-one show-up, one year later the rule set out in *Stovall* was applied to the display of a single photograph of a suspect in *Simmons v. United States*.[45] The Court in *Simmons* discussed the hazards of using photographs for identification purposes, identifying some of the situations the Court would find to be "suggestive":

> This danger [that the witness may make an incorrect identification] will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime. Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification.[46]

However, in the face of these hazards, the Court expressed approval of the use of photographic identification and adopted the *Stovall* rule with respect to admissibility of this type of evidence. Thus, pretrial photographic identification and subsequent in-court identification based on pretrial procedures must

41. *Id.* at 301-02.
42. *Id.* at 302.
43. *Id.*
44. *Id.*
45. Simmons v. United States, 390 U.S. 377 (1968).
46. *Id.* at 384.

be excluded "only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[47] In applying this standard to the facts in the *Simmons* case, the Court found that, although the display of a single photograph was suggestive, it was justified by exigent circumstances since the perpetrators were at large and agents had to act quickly to try to identify them.[48]

In both *Stovall* and *Simmons*, the Court emphasized the necessity of the procedure and the reliability of the identification as factors justifying a suggestive identification procedure. However, after *Simmons*, it was unclear whether a suggestive procedure could only be justified if *both* factors were present. In other words, if a procedure was highly suggestive yet reliable, is it nevertheless inadmissible if no exigent circumstances were present to make the procedure "necessary"? This question was addressed in two subsequent Supreme Court cases.

In *Neil v. Biggers*,[49] a rape victim was called to the police station to view a suspect seven months after the offense.[50] Apparently the police were unable to find persons fitting the suspect's description, so instead of a line-up, they conducted a show-up, in which the victim identified the suspect as the rapist.[51] The defendant claimed that the show-up was clearly suggestive and should be excluded, regardless of the reliability of the identification, since the police did not make an effort to put together an adequate line-up and there were no exigent circumstances justifying the show-up.[52]

The Court declined to constitutionalize a strict rule requiring exigent circumstances to justify the suggestive identification procedure.[53] The central question, according to the *Biggers* Court, was "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation

47. *Id.*

48. *Id.* at 385. The Court also determined that there was little chance that the procedure gave rise to misidentification. *Id.*

49. 409 U.S. 188 (1972).

50. *Id.* at 195.

51. *Id.*

52. *Id.*

53. *Id.* at 199.

procedure was suggestive."[54] The Court determined that in cases where the likelihood of misidentification threatens the fairness of the trial, the defendant's due process rights would be violated unless the evidence is excluded.[55] With respect to reliability, the Court set out five factors to consider in evaluating the likelihood of misidentification:

> As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.[56]

Applying these factors to the *Biggers* facts, the Court found that the identification was so reliable that it was admissible, despite the fact that the procedure used was unnecessarily suggestive.[57]

In deciding *Biggers*, the Court noted that a strict rule of exclusion would not make sense because the underlying identification procedure in *Biggers* occurred prior to the *Stovall* ruling.[58] Thus, at the time the procedure was carried out, there was no indication that such a suggestive procedure might lead to exclusion of the evidence.[59] Therefore, by implication, the Court left open the question of whether a strict rule requiring exclusion for any unnecessarily suggestive post-*Stovall* procedures would be constitutionalized.

In 1977, the United States Supreme Court granted certiorari in *Manson v. Brathwaite*[60] to address the question left open in *Biggers* — whether a strict rule excluding evidence would be required when the unnecessarily suggestive pretrial identification procedure took place post-*Stovall*. In *Manson*, an undercover police officer went to an apartment to make a drug purchase.[61] After the officer knocked, a man came to the door

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54. *Id.* at 200.
55. *Id.* at 199.
56. *Id.* at 199-200.
57. *Id.* at 201.
58. *Id.* at 199.
59. *Id.*
60. 432 U.S. 98 (1977).
61. *Id.* at 100.

and opened it twelve to eighteen inches.[62] The police officer purchased two glycine bags of narcotics through the door.[63]

The officer returned to the station house and described the seller to two other police officers who produced a single photograph of a suspect matching the description of the seller.[64] After viewing the single photograph, the police officer who made the buy identified it as the seller.[65] No explanation was offered at trial for the officers' failure "to use a photographic array or to conduct a line-up."[66]

The lower court held that the identification evidence should have been excluded, regardless of reliability, because the examination of a single photograph was unnecessary and suggestive [hereinafter the "*per se* approach"].[67] The state conceded before the Supreme Court that the procedure was both suggestive and unnecessary. However, it claimed that the *Biggers* analysis should be applied, permitting the admission of identification evidence if, despite the suggestive and unnecessary aspects, the out-of-court identification was nonetheless reliable [hereinafter the "totality of circumstances approach"].[68]

In determining whether to follow the totality of circumstances approach or the *per se* approach, the Court balanced three factors: (1) the Court's concern with the problems of eyewitness identification; (2) the deterrent effect on police behavior; and (3) the effect on the administration of justice.[69] The Court concluded that both approaches were responsive to the first two concerns, but that the totality of circumstances approach was clearly superior with respect to the administration of justice.[70] The *per se* approach would deny the trier of fact reliable evidence, the denial of which might result in "the guilty going free."[71] The totality of circumstances approach, on the other hand, would promote justice by allowing use of reliable

62. *Id.*
63. *Id.*
64. *Id.* at 101.
65. *Id.*
66. *Id.* at 102.
67. *Id.* at 103-04.
68. *Id.* at 109.
69. *Id.* at 111.
70. *Id.* at 111-12.
71. *Id.* at 112.

identification testimony resulting in a fair conviction of the guilty.[72]

The Court concluded that "reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-*Stovall*" identification procedures.[73] Reliability is to be determined using the factors set out in *Biggers*.[74] In applying the *Biggers* factors to the *Manson* facts, the Court found that the identification procedure was so reliable that the identification was admissible, despite the fact that the procedure was highly suggestive and not justified by exigent circumstances.[75]

Through this line of cases, the Supreme Court has fashioned a two-pronged test for the exclusion of eyewitness identifications based on impermissibly suggestive pretrial identification procedures. The first prong involves the determination of whether the identification procedure was highly suggestive.[76] If it was not, evidence of the pretrial identification is admissible, as is any in-court identification, whether based on the pretrial procedure or independently based.[77] Even if the pretrial identification is found to have been highly suggestive, the identification evidence is still not automatically excluded.

The second prong requires that a court make further inquiry as to whether, in light of the totality of circumstances, the suggestiveness is such that a likelihood of misidentification exists.[78] If, after applying the five *Biggers* factors, the identification appears to have been reliable, a court should admit it, regardless of its impermissibly suggestive nature.[79] Thus, after *Biggers* and *Manson*, it seems clear that the Supreme Court will not require that exigent circumstances be present to justify the use of a suggestive procedure. While exigent circumstances may still be used to justify and support a suggestive procedure,

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72. *Id.* at 113.

73. *Id.* at 114.

74. *Id.*

75. *Id.* at 117.

76. Simmons v. United States, 390 U.S. 377, 384 (1968).

77. *Id.*

78. Manson v. Brathwaite, 432 U.S. 98, 110 (1977); Neil v. Biggers, 409 U.S. 188, 199 (1972).

79. *Manson*, 432 U.S. at 114-16; *Biggers*, 409 U.S. at 199-200.

necessity is not a prerequisite to the admissibility of eyewitness identification testimony.[80]

The cases outlined in the section that follows, section IV, are illustrative of the types of photographic displays that courts have found to be suggestive. As the Second Circuit in *United States v. Maldonado-Rivera*[81] stated: "The fairness of a photographic array depends on a number of factors, including the size of the array, the manner of presentation by the officers, and the array's contents."[82] Broadly speaking, any manner of display that tends to emphasize a particular suspect's photograph or causes the witness to focus on a particular photograph may be found to be impermissibly suggestive.[83] Additionally, an array that is too small[84] or one that includes photographs grossly dissimilar from the suspect's description may also be found to be suggestive.[85]

As discussed previously, the mere fact that a photographic array is suggestive does not mean the identification based on the array is inadmissible. Even if the manner or content of a photographic array is suggestive, to determine whether the identification is admissible, the court must still determine whether the identification is reliable. Section V describes trends in how the five *Biggers* factors, the Supreme Court's indicia of reliability, have been applied and analyzed by the courts.

## IV. Suggestiveness of the Procedure

### A. *Size of the Array*

Social-science research has demonstrated the unreliability of an identification made after the display of a single photo-

80. *Manson*, 432 U.S. at 116.

81. 922 F.2d 934 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2811 (1991).

82. *Id.* at 974.

83. Simmons v. United States, 390 U.S. 377, 384 (1968).

84. *Id.* at 383; Manson v. Brathwaite, 432 U.S. 98, 111 (1977).

85. *See* United States v. Wade, 388 U.S. 218, 233 (1967); *see also* Salam v. Lockhart, 874 F.2d 525, 529 (8th Cir.), *cert. denied*, 493 U.S. 898 (1989); United States v. Langley, 848 F.2d 152, 153 (11th Cir. 1988). *But see* Cikora v. Dugger, 840 F.2d 893, 897 (11th Cir. 1988); United States v. Monks, 774 F.2d 945, 956-57 (9th Cir. 1985).

graph.[86] As stated above, the Supreme Court has also recognized the danger of suggestiveness when only one picture is displayed.[87] Thus, most courts routinely find that the display of a single photograph is one of the most suggestive and, hence, objectionable methods of identification.[88] Researchers have further demonstrated the danger of misidentification when repeat images of a single suspect are shown to a witness.[89] Likewise, the Supreme Court has also recognized that the repeated showing of a particular picture of an individual in a series of arrays reinforces the image of the photograph in the mind of the viewer, causing the procedure to be highly suggestive.[90] Thus, courts have generally condemned procedures in which multiple photographs of the defendant appeared in a single array.[91]

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86. *See* LOFTUS, *supra* note 7, at 148-50; WALL, *supra* note 24, at 74-80 (citing case studies where defendants were victims of false identifications after witnesses were shown single photographs); Wells et al., *supra* note 5, at 286.

87. *Manson*, 432 U.S. at 111; *Simmons*, 390 U.S. at 383.

88. *See, e.g.*, Robinson v. Clarke, 939 F.2d 573, 576 (8th Cir. 1991); Williams v. Armontrout, 877 F.2d 1376 (8th Cir. 1989), *cert. denied*, 493 U.S. 1082 (1990); United States v. Givens, 767 F.2d 574, 581 (9th Cir. 1985); Bloodworth v. Hopper, 539 F.2d 1382, 1383 (5th Cir. 1976); Wicks v. Lockhart, 569 F. Supp. 549, 553 (E.D. Ark. 1983). *But see* Herrera v. Collins, 904 F.2d 944, 946-47 (5th Cir.) (holding the display of single photograph to dying police officer was justified due to exigent circumstances), *cert. denied*, 498 U.S. 925 (1990).

89. Using multiple photographs of the same individual in an array increases the probability that the individual will be selected and also may lead the witness to think that the individual looks familiar because of the crime when in fact the individual becomes familiar because of the repeat images. LOFTUS, *supra* note 7, at 150-51; Loftus & Greene, *supra* note 30, at 332-34 (1980); Brown et al., *supra* note 31, at 314.

90. Simmons v. United States, 390 U.S. 377, 383 (1968). The Supreme Court stated that the danger of misidentification:

> will be increased if the police . . . show [the witness] pictures of several persons among which the photograph of a single such individual recurs . . . . Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent line-up or courtroom identification.

*Id.* at 383-84.

91. United States v. Myers, 892 F.2d 642, 647 (7th Cir. 1990) (holding where array included only three photographs, two of which were of the defendant, the procedure was unnecessarily suggestive though admitted the in-court identification as reliable); Dobbs v. Kemp, 790 F.2d 1499 (11th Cir. 1986) (where one witness was shown four or five photographs, all of which were of the defendant and a second witness was shown 12 photographs, four of which were of the defendant), *cert. denied*, 481 U.S. 1059 (1987); United States v. Mears, 614 F.2d 1175, 1177

On the other hand, courts have allowed several types of procedures that would seem to contradict the rule against using repeat images of a single suspect. At least five circuits have held that inclusion of the same suspect's picture in two different arrays, even inclusion of the same picture, is constitutionally permissible.[92] The courts of appeal in the Eighth and Ninth Circuits have also allowed pretrial procedures consisting of both a photographic line-up and corporeal line-up in which the defendant was the only person common to both procedures. In *United States v. Briley*,[93] the Eighth Circuit, after reviewing the photo spread and the picture of the line-up, concluded that "the fact that Briley was the only person displayed in both the photospread and the lineup [does not make] the identification procedures *per se* suggestive."[94] Similarly, the Ninth Circuit, in *United States v. Davenport*,[95] found that "[t]he fact that Davenport was the only individual common to the photospread and the lineup cannot, without further indicia of suggestiveness, render the lineup conducive to irreparable misidentification."[96]

It appears likely that a photographic display containing multiple photographs of a particular suspect will be found to be highly suggestive. However, the use of a series of identification procedures in which a particular suspect appears a single time in each, but is the only person common to all, is allowable. This

(8th Cir. 1980) (where two photographs of defendant appeared in a single array of seven photographs).

92. United States v. Maguire, 918 F.2d 254, 265 (1st Cir. 1990) (where same photograph of suspect was included in two different arrays), *cert. denied*, 111 S. Ct. 1421 (1991); United States v. Dowling, 855 F.2d 114, 116-18 (3d Cir. 1988) (holding a pretrial procedure was not so suggestive as to render the photographic identification inadmissible where defendant's photograph was repeated in successive photograph arrays); United States v. Bagley, 772 F.2d 482, 493 (9th Cir. 1985) (holding it was not impermissibly suggestive to show the witness two sets of photographs in which only the defendant's photograph was common to both sets); Perron v. Perrin, 742 F.2d 669, 675 (1st Cir. 1984) (holding that the identification procedure was not impermissibly suggestive where a photograph of the defendant appeared in the first array, followed two weeks later by a second array in which the defendant's photograph appeared again); United States *ex rel.* Kubat v. Thieret, 679 F. Supp. 788, 801 (N.D. Ill. 1988) (holding that the identification procedure was not impermissibly suggestive where defendant's photograph was only one used in three successive photograph line-ups), *aff'd*, 867 F.2d 351 (7th Cir. 1989).

93. 726 F.2d 1301 (8th Cir. 1984).

94. *Id.* at 1306-07.

95. 753 F.2d 1460 (9th Cir. 1985).

96. *Id.* at 1463.

result is inconsistent with empirical findings concerning the reliability of the identification procedures.[97]

## B. *Manner of Display*

### 1. *Collaboration Between Witnesses*

Researchers have demonstrated that collaboration between witnesses increases the rate of misidentification.[98] Courts have likewise disapproved of any consultation between witnesses who are viewing a photographic array or line-up.[99] The preferred procedure is to keep witnesses apart while they view photographic spreads.[100]

In *United States v. Bagley*,[101] a police officer passed a car matching the description of the get-away car involved in a bank robbery that had just occurred in the vicinity, and the officer briefly observed the driver.[102] Later that day, the officer and the bank teller jointly viewed two sets of photographs, and the police officer saw the teller choose the photograph of the defendant, Bagley.[103] Later at the trial, the police officer identified Bagley as the person driving the get-away car.[104] In holding that the joint viewing was unnecessarily suggestive, the Court of Appeals for the Ninth Circuit reaffirmed the general rule about witness collaboration by declaring that, "A joint confrontation is a disapproved identification procedure."[105]

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97. LOFTUS, *supra* note 7, at 150; Brown et al., *supra* note 31, at 312.

98. Levine & Tapp, *supra* note 27, at 1112-14.

99. *See* Escalera v. Coombe, 826 F.2d 185, 187 (2d Cir. 1987), *cert. granted and vacated on other grounds*, 484 U.S. 1054 (1988), *on remand*, 852 F.2d 45 (2d Cir.), *on remand*, 697 F. Supp. 120 (E.D.N.Y. 1988); United States v. Field, 625 F.2d 862, 870 (9th Cir. 1980); United States v. Bridgefourth, 538 F.2d 1251, 1253 (6th Cir. 1976); United States v. Wilson, 435 F.2d 403, 405 (D.C. Cir. 1970). *But see* Barron v. Newsome, 712 F. Supp. 915, 918 (N.D. Ga. 1988) (holding that procedure was not unduly suggestive where witness viewed two sets of photographs in same room but could not see which photograph the other witness chose); Tavarez v. LeFevre, 649 F. Supp. 526, 530 (S.D.N.Y. 1986) (holding that allowing three witnesses to view photographs simultaneously did not render procedure unduly suggestive).

100. *Wilson*, 435 F.2d at 405.

101. 772 F.2d 482 (9th Cir. 1985).

102. *Id.* at 485.

103. *Id.* at 492.

104. *Id.*

105. *Id.* at 494.

### 2. *Police Instructions / Statements*

In addition to prohibiting the joint viewing of photographic arrays, courts have disallowed procedures where police inform a witness that the photo spread will include a picture of a suspect already arrested for the crime.[106] This ruling conforms to the results of social-science research, which demonstrates that there is a much greater likelihood of misidentification when witnesses are lead to believe that the suspect is present in the array.[107] Witnesses tend to select the person who most closely resembles the person they observed, rather than selecting no one from the array at all.[108] For this reason, courts have generally held that this type of police statement will taint the identification procedure.[109]

Studies have found that *any* kind of instructions that pressure a witness to make an identification from a line-up increases the number of false identifications.[110] Courts have agreed and, thus, have disapproved of procedures where state agents provided information or made statements that caused the witness to focus on a particular suspect. For example, in *United States v. Russell*,[111] the witness was shown a photo spread, and she narrowed the identification down to two photographs, from which she chose one.[112] The FBI agent told her, in effect, that she had chosen incorrectly and that the other photograph, depicting the defendant, portrayed the person who the FBI believed committed the robbery.[113] The Sixth Circuit held that it was "clear that this information was sufficient to create a very substantial likelihood of irreparable misidentification."[114]

However, courts have allowed certain police statements made to a witness during a photographic line-up, finding that

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106. *See, e.g.*, United States v. Lewin, 900 F.2d 145, 148 (8th Cir. 1990). *But see* Cikora v. Wainwright, 661 F. Supp. 813, 816 (S.D. Fla. 1987), *aff'd*, 840 F.2d 893 (11th Cir. 1988).

107. LOFTUS, *supra* note 7, at 144; Cutler et al., *supra* note 7, at 244 (concluding that biased instructions reduced the accuracy of identifications and significantly increased the number of false identifications).

108. LOFTUS, *supra* note 7, at 144.

109. *See, e.g.*, *Lewin*, 900 F.2d at 148.

110. Buckhout et al., *supra* note 25, at 192.

111. 532 F.2d 1063 (6th Cir. 1976).

112. *Id.* at 1068.

113. *Id.*

114. *Id.*

the procedure was not suggestive. In *United States v. Olson*,[115] when a store clerk was unable to identify the person who gave him a counterfeit bill in a photo spread, an FBI agent took the defendant's photograph from the spread and asked, "What about this photograph?"[116] The clerk acknowledged that the moustache was correct but that the individual did not have enough hair. The agent reassembled the photographic array, including a picture of the defendant with a toupee. The witness then identified the defendant Olson as the person who gave her the counterfeit bill.[117] Olson claimed that the agent improperly directed the witness's attention to Olson's photograph during the first array, thereby tainting the subsequent photographic identification and in-court identification.[118] The court held that the agent's question, "What about this photograph," was a "neutral inquiry designed to obtain the witness' point of view rather than to intimate to the witness that the photograph was indeed that of the suspect."[119]

Courts have allowed police officers to give witnesses information about the height, weight and age of persons pictured,[120] to give information about the description of the suspect,[121] and to question witnesses as to how they felt about the selections they made.[122] Most of these types of comments and inquiries made by police officers are considered to be neutral and not designed to focus the witness on any one particular suspect.[123]

When the "neutral question" or "help" from law enforcement becomes a threat, however, the identification procedure will most likely taint any subsequent identification. In *Mata v. Sumner*,[124] for example, prison authorities threatened inmate-witnesses with "getting shipped" if they did not "cooperate" during a photographic line-up.[125] The Ninth Circuit held that these

115. 730 F.2d 544 (8th Cir. 1984).
116. *Id.* at 545.
117. *Id.* at 546.
118. *Id.*
119. *Id.*
120. Judd v. Vose, 813 F.2d 494, 496 (1st Cir. 1987).
121. United States v. Turner, 892 F.2d 11, 14 (1st Cir. 1989).
122. United States v. Givens, 767 F.2d 574, 580 (9th Cir.), *cert. denied*, 474 U.S. 953 (1985).
123. *Turner*, 892 F.2d at 14; *Judd*, 813 F.2d at 498; *Givens*, 767 F.2d at 581.
124. 696 F.2d 1244 (9th Cir.), *vacated on other grounds*, 464 U.S. 957 (1983).
125. *Id.* at 1255.

threats, surrounding the pretrial identification of a fellow inmate, caused the procedure to be impermissibly suggestive.[126]

### C. *Content of Photographs*

Putting aside issues surrounding the size and manner of displaying the photo spread, a photographic line-up may also be challenged on the basis of the content of the photographs displayed.[127] If the photographs depict persons so dissimilar from the defendant that they suggest the identification of the defendant, the procedure may be subject to challenge.[128] Other challenges have been made where the police altered one or all of the photographs[129] or required the defendant to dress in a particular way for the photograph.[130] Other defendants have challenged the inclusion of captions, names, and/or height charts in the photograph,[131] or the use of different types or qualities of photographs in the photospread.[132]

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126. *Id.*

127. United States v. Maldonado-Rivera, 922 F.2d 934, 974 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2858 (1991).

128. *See, e.g.*, United States v. Carbajal, 956 F.2d 924 (9th Cir. 1992); United States v. Jakobetz, 955 F.2d 786 (2d Cir. 1992); United States v. Maldonado-Rivera, 922 F.2d 934 (2d Cir. 1990); Marsden v. Moore, 847 F.2d 1536 (11th Cir.), *cert. denied*, 488 U.S. 983 (1988); United States v. Ricks, 817 F.2d 692 (11th Cir. 1987).

129. *See* United States v. Dunbar, 767 F.2d 72 (3d Cir. 1985); United States v. Olson, 730 F.2d 544 (8th Cir. 1984); Griffin v. Commonwealth of Virginia, 606 F. Supp. 941 (E.D. Va. 1985).

130. United States v. Alexander, 868 F.2d 492 (1st Cir.) (only individual in photographic array with an earring and hat), *cert. denied*, 493 U.S. 979 (1989); Baca v. Sullivan, 821 F.2d 1480 (10th Cir. 1987) (defendant was only one depicted wearing a leather jacket that was linked to the crime).

131. *See, e.g.*, Cikora v. Dugger, 840 F.2d 893 (11th Cir. 1988) (height markings appeared only in defendant's photograph); Jarrett v. Headley, 802 F.2d 34 (2d Cir. 1986) (words "Sheriff's Department" appeared at the bottom of only the defendant's photograph); United States v. Archibald, 734 F.2d 938 (2d Cir. 1984) (legend on photograph indicated that suspect had been arrested in Manhattan); United States v. Tyler, 714 F.2d 664, 667 (6th Cir. 1983) (mug board and height chart appeared only in defendant's photograph); United States v. Lee, 700 F.2d 424 (10th Cir.) (seven photographic arrays where only the photographs of the codefendants were in front of a measuring scale for height), *cert. denied*, 462 U.S. 1122 (1983).

132. *See, e.g.*, Perry v. Lockhart, 871 F.2d 1384 (10th Cir.), *cert. denied*, 493 U.S. 959 (1989); O'Brien v. Wainwright, 738 F.2d 1139 (11th Cir. 1984).

1. *Different Appearance*

Once the police have obtained a description of a suspect, courts and social-science researchers agree that the police should attempt to compile a photographic line-up including photographs depicting persons matching that general description.[133] For example, if the police have information that the offender is a white male with fair complexion and red bushy hair, a photographic line-up depicting five dark complected males with black hair and only one photograph conforming to the general description is obviously suggestive. Thus, defendants have challenged pretrial identification procedures when the defendant's photograph could be singled out because of a physical feature not shared by the other persons in the array,[134] or because of a particular style of dress not shared by others depicted in the photo spread.[135] To avoid differences in photographs dramatic enough to make a procedure suggestive, courts have required that the photographs used must be reasonably similar in appearance.[136] The test is to determine whether there is a differ-

133. Courts generally prefer that the photographic array depicts persons of similar race and features. *See* Salam v. Lockhart, 874 F.2d 525 (8th Cir.), *cert. denied*, 493 U.S. 898 (1989). *But see* Cikora v. Dugger, 840 F.2d 893 (11th Cir. 1988); United States v. Monks, 774 F.2d 945 (9th Cir. 1985).

Social-science research demonstrates that high similarity line-ups increase identification accuracy. *See* CLIFFORD & BULL *supra* note 27, at 111; Doob & Kirshenbaum, *supra* note 5, at 289; Lindsay & Wells, *supra* note 5, at 55 (high similarity line-ups reduce the rate of false identification of innocent suspects); *see also* Levine & Tapp, *supra* note 5, at 1120.

In constructing a line-up, Luus and Wells argue that the focus should be on similarity to the initial description given by the eyewitness rather than similarity to the suspect. Elizabeth Luus & Gary L. Wells, *Eyewitness Identification and the Selection of Distractors for Lineups*, 15 L. & HUM. BEHAV. 43, 55 (1991).

134. *See* Marsden v. Moore, 847 F.2d 1536, 1545 (11th Cir.) (only male depicted in the array), *cert. denied*, 488 U.S. 983 (1988); United States v. Whitney, 787 F.2d 457, 459 (8th Cir. 1986) (only light complexioned black male in the array); United States v. Bice-Bey, 701 F.2d 1086, 1089 (4th Cir.) (only female with dredlocks), *cert. denied*, 464 U.S. 837 (1983).

135. *See, e.g.*, Gibson v. Blackburn, 744 F.2d 403, 404 (5th Cir. 1984); United States v. Baykowski, 583 F.2d 1046, 1047 (8th Cir. 1978).

136. United States v. Lewis, 547 F.2d 1030, 1034-35 (8th Cir. 1976) (stating that, "[P]olice stations are not theatrical casting offices; a reasonable effort to harmonize the line-up is normally all that is required."), *cert. denied*, 429 U.S. 1111 (1977).

ence between the photographs that tend to isolate or emphasize a particular suspect's photograph.[137]

In applying this standard, the Fourth Circuit in *United States v. Bice-Bey*[138] found that it was suggestive to place only one photograph in the array which portrayed a woman with dredlocks and a head covering.[139] The single photograph was so unusual that it tended to isolate and emphasize the photograph, making the array unreasonable.[140] Similarly, the Eleventh Circuit has held, in *Marsden v. Moore,*[141] that the photographic identification procedure was unreasonably suggestive when the defendant was the only male in the photographs shown to the victim.[142]

In *United States v. Ricks,*[143] after a bank robbery, police put together a photo spread which included six males of the same race, but only one, defendant Ricks, had glasses.[144] Since the perpetrator had worn sunglasses during the robbery, but not eyeglasses, the Eleventh Circuit admitted the identification of Ricks. The court implied, however, that the photo spread bordered on being suggestive since Ricks's photograph stood out. "Although we do not find the photospread in this case to be too suggestive, . . . that is not to say that we approve of this practice. Prosecutors and law enforcement agents must guard against this type of photo spread."[145]

In other photo spreads, the courts have held that the differences between photographs were not so dramatic as to be unreasonable. In *United States v. Thurston,*[146] the defendant claimed that the pretrial photographic display was impermissi-

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137. United States v. Jakobetz, 955 F.2d 786, 803 (2d Cir. 1992) ("[T]he test is, whether the picture of the accused, matching descriptions given by the witness, so stood out from all the other photographs as to suggest to an identifying witness that [that person] was more likely to be the culprit."). *But see* Jarrett v. Headley, 802 F.2d 34, 41 (2d Cir. 1986) ("It is not required . . . that all of the photographs in the array be uniform with respect to a given characteristic.").

138. 701 F.2d 1086 (4th Cir.), *cert. denied,* 464 U.S. 837 (1983).

139. *Id.* at 1089.

140. *Id.* at 1090. Though the court held that the procedure was suggestive, the court admitted the identification on the basis of its reliability. *Id.*

141. 847 F.2d 1536 (11th Cir.), *cert. denied,* 488 U.S. 983 (1988).

142. *Id.* at 1545.

143. 817 F.2d 692 (11th Cir. 1987).

144. *Id.* at 697.

145. *Id.*

146. 771 F.2d 449 (10th Cir. 1983).

bly suggestive because his photograph was the only one of six blacks who appeared with a beard and whose hair was braided.[147] The Tenth Circuit reviewed the display and found that it was not so unreasonable as to make it suggestive:

> We find that Thurston's general complexion and facial profile fairly resembles those of the other subjects in the photospread, all of whom were blacks. We cannot say that it was unduly suggestive because his picture was the only one among the display exhibits which had a beard . . . [and] . . . the only one whose hair . . . was braided.[148]

In *United States v. Carbajal*,[149] the defendant claimed that the photo spread was suggestive because he was the only person in the photo spread with discernible bruises on his face.[150] The Ninth Circuit pointed out that the six photographs in the array were all of Hispanic males in the same age range with similar skin, eye and hair coloring. The fact that the defendant was the only one with bruises on his face did not make the photograph stand out to such an extent that it was unduly suggestive.[151]

The Second Circuit, in *United States v. Jakobetz*,[152] likewise held that the different type of facial hair on those depicted in the photo spread did not isolate or emphasize the defendant's photograph to an impermissible level.[153] In *Jakobetz*, a witness described the perpetrator as having no facial hair. She was shown a photo spread of six males of the same race, height, and coloring. All had moustaches, except that the moustache of the defendant was thinner, lighter and less prominent. The court noted the district court's statement:

> [T]o be sure, defendant's moustache does appear to be smaller than the others. This fact alone, however, does not rise to the level of impermissible suggestiveness. The court does not believe that the victim's description of a man with no facial hair causes defendant's photograph with a thinner moustache to stand out from all the others.[154]

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147. *Id.* at 452.
148. *Id.* at 453.
149. 956 F.2d 924 (9th Cir. 1992).
150. *Id.* at 929.
151. *Id.*
152. 955 F.2d 786 (2d Cir. 1992).
153. *Id.* at 803.
154. *Id.*

In addition to claims based on differences in physical characteristics, defendants have also challenged arrays that depicted the defendant in particular clothing that would suggest he was the perpetrator. In *Gibson v. Blackburn*,[155] the defendant claimed that he was photographed in a black jacket similar to one worn by the robbery suspect and that none of the others in the array were so dressed, causing the witness to single out his photograph.[156] The Fifth Circuit held that the clothing worn by the defendant in the photograph did not contribute to the pretrial identification of him as the offender. The coat was barely visible in the photograph and appeared to be cloth, as opposed to leather which was worn by the suspect.[157]

On the other hand, the Eighth Circuit in *United States v. Baykowski*,[158] held that a photo spread in which the defendant was the only one wearing a sweater was impermissibly suggestive.[159] The victim of a burglary reported certain items stolen from her home, including a particular sweater. Two months after the burglary, she went to identify some property and was also shown a photospread in which one of the suspects wore a sweater. While the victim could not identify the person, she recognized the sweater as being similar to the one taken in the burglary.[160]

The court held that a subsequent in-court identification of the defendant should have been excluded.[161] Since the photograph of Baykowski was the only one that depicted an individual wearing a sweater, the court found that the photographic display tended to isolate and emphasize her photograph and was, therefore, unnecessarily suggestive.[162] Similarly in *Baca v. Sullivan*,[163] the Tenth Circuit held that a photographic array was unduly suggestive where the defendant was the only one

155. 744 F.2d 403 (5th Cir. 1984).
156. *Id.* at 404.
157. *Id.* at 405.
158. 583 F.2d 1046 (8th Cir. 1978).
159. *Id.* at 1047.
160. *Id.*
161. *Id.* at 1048.
162. *Id.*
163. 821 F.2d 1480 (10th Cir. 1987).

depicted in a brown-leather jacket similar to the one worn by the gunman who shot the witness's husband.[164]

Thus, when testing a claim that a pretrial procedure was suggestive because of defendant's unusual characteristics or clothing, the courts will generally review the photo spread to determine whether there was a "reasonable effort to harmonize the line-up."[165] If the array is such that some unusual characteristic draws attention to the defendant and causes the defendant's photograph to be singled out, then the pretrial procedure will be held to be impermissibly suggestive.

### 2. *Difference in Type or Quality of Photographs*

Courts and researchers generally agree that photographs included in an array should be of similar type and quality.[166] Any difference which tends to draw attention to a particular suspect's photograph may be suggestive. However, minor distinctions in type or quality of the photograph will not be held to be unnecessarily suggestive.[167]

Photo spreads which mix color and black-and-white photographs have been found to be unnecessarily suggestive because of the dramatic difference between color and black-and-white

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164. *Id.* at 1482. Even though the court found the photo spread unduly suggestive, because the witness had positively identified the defendant in a previous photo spread that was not suggestive, the court found that the degree of suggestiveness was outweighed by sufficient evidence of reliability. *Id.*

165. United States v. Lewis, 547 F.2d 1030, 1035 (8th Cir. 1976), *cert. denied*, 429 U.S. 1111 (1977).

166. Courts recognize that if photographs tend to emphasize one suspect's picture, the procedure may violate the suspect's due process rights. *See, e.g.*, Simmons v. United States, 390 U.S. 377, 383 (1968); *see also* Styers v. Smith, 659 F.2d 293, 297 (2d Cir. 1981) (holding that a small group of photographs, only two of which were fresh and in color depicting the codefendants in a robbery case was impermissibly suggestive); Passman v. Blackburn, 652 F.2d 559, 570 (5th Cir. 1981) (holding a color photograph of the defendant displayed with eleven other black-and-white mug shots carried inherent suggestiveness), *cert. denied*, 455 U.S. 1022 (1982).

Social-science researchers have demonstrated empirically that witnesses are more likely to select a photograph that is distinctive, even slightly, from others (i.e., if a picture were taken at a different angle from others). *See* Levine & Tapp, *supra* note 5, at 1120.

167. *See, e.g.*, United States v. Russo, 796 F.2d 1443 (11th Cir. 1986) (holding that the yellow tint of defendant's photograph did not make it stand out from others and was therefore not suggestive).

photographs.[168] For example, in *O'Brien v. Wainwright*,[169] the police compiled a photographic line-up consisting of black-and-white mug shots except for the picture of defendant O'Brien, which was a color polaroid print.[170] The witness identified O'Brien from the display.[171] Two weeks later, the witness again identified the color print of O'Brien in a slightly different photo spread.[172] In the new array, additional black-and-white mug shots had been added, including shots of O'Brien.[173] The witness examined the photographic display two more times and identified the color print of O'Brien without noticing the black-and-white mug shots of him.[174] The Eleventh Circuit concluded that O'Brien's picture "stuck out like a sore thumb," making the photographic display unduly suggestive.[175]

Arrays in which the defendant's photograph is of a different type than the others shown have been held to be suggestive. For example, a photo spread in which the defendant's photograph is a family snapshot, while all other photographs are mug shots may draw attention to the defendant.[176] However, at least one court has held that the use of a family-type photograph of the defendant displayed with mug shots actually reduced the likelihood that he would be identified because there was noth-

168. *See, e.g.*, Styers v. Smith, 659 F.2d 293, 297 (2d Cir. 1981) (holding a small group of photographs, only two of which were fresh and in color, depicted codefendants in a robbery case, were suggestive); Passman v. Blackburn, 652 F.2d 559, 570 (5th Cir. 1981) (holding where a color photograph of defendant was displayed with eleven black-and-white mug shots), *cert. denied*, 455 U.S. 1022 (1982).

169. 738 F.2d 1139 (11th Cir. 1984).

170. *Id.* at 1140.

171. *Id.*

172. *Id.* at 1141.

173. *Id.*

174. *Id.*

175. *Id.*

176. *See* Perry v. Lockhart, 871 F.2d 1384, 1391 (8th Cir.), *cert. denied*, 493 U.S. 959 (1989) (holding suggestive a photographic line-up that showed defendant in snapshot-type photograph sitting up in a hospital bed while other photographs in the array were standard mug shots); United States v. Alexander, 816 F.2d 164 (5th Cir. 1987) (holding a photo spread suggestive but identification was admitted on the basis of reliability where defendant's driver's license picture was displayed with six black-and-white mug shot photographs), *cert. denied*, 493 U.S. 1069 (1990).

ing to suggest that the defendant had ever been arrested for a crime.[177]

### 3. *Superfluous Content of Photographs*

Not only does a lack of uniformity of appearance provide a basis for a constitutional challenge to a photographic array, but many defendants have also challenged arrays because their particular photograph contained a caption[178] or a measurement chart[179] when other photographs did not. Empirical findings suggest that *any* distinctive quality of one photograph might lead to an increased probability of its selection and, therefore, enhance the rate of false identification.[180] However, courts have generally held that these inclusions of distinctive photographs do not, standing alone, make an array unreasonably suggestive.[181]

Courts have held that photographs containing captions or names do not render photographic arrays impermissibly suggestive. In *United States v. Archibald*,[182] the photographic array contained photographs of six black men who bore certain resemblances to one another.[183] The defendant's mug shot, however, was the only one that indicated that he was arrested in the Borough of Manhattan, the location of the robbery.[184] All of the mug shots contained an identification plate showing the

177. United States *ex rel.* Kubat v. Thieret, 679 F. Supp. 788 (N.D. Ill. 1988), *aff'd*, 867 F.2d 351 (7th Cir.), *cert. denied*, 493 U.S. 874 (1989).

178. *See, e.g.*, United States v. Archibald, 734 F.2d 938 (2d Cir. 1984) (legend on photograph indicating suspect had been arrested in Manhattan); Jarrett v. Headley, 802 F.2d 34 (2d Cir. 1986) (word "Sheriff" appeared at bottom of defendant's photograph only).

179. Cikora v. Dugger, 840 F.2d 893, 894 (11th Cir. 1988) (defendant's photograph was the only one amongst other mug shots that had height markings); United States v. DeBardeleben, 740 F.2d 440, 445 (6th Cir.) (defendant's photograph was the only photograph in the array containing a height chart and depicting the defendant's shoulder area), *cert. denied*, 469 U.S. 1028 (1984); United States v. Tyler, 714 F.2d 664, 667 (6th Cir. 1983) (defendant's photograph was different from others in array in that it showed a mug board and height chart); United States v. Lee, 700 F.2d 424, 426 (10th Cir.) (seven photographic arrays where only the photographs of the codefendants were in front of a measuring scale for height), *cert. denied*, 462 U.S. 1122 (1983).

180. Buckhout, *supra* note 5, at 71.

181. *See* cases cited *supra* note 178.

182. 734 F.2d 938 (2d Cir. 1984).

183. *Id.* at 940.

184. *Id.*

date and borough of the arrest, but the Second Circuit found that the captions were not unduly prominent and that, in this case, the array was "a remarkably fair group of photographs."[185]

Although it concluded that the array was not impermissibly suggestive, the court found that leaving these captions on the photographs was unnecessary.[186] As the court noted, "It would have been a simple matter to cut out the identifying captions . . . ."[187] The court concluded that the use of captioned photographs did not amount to constitutional error, but was "poor prosecutorial practice."[188] Height charts and pose differences in photographs have also been deemed insufficient to render a photographic array impermissibly suggestive.[189]

In *United States v. Hanigan*,[190] the Ninth Circuit held that the identification, which consisted of picking the defendants' photographs out of a high school yearbook, was not impermissibly suggestive.[191] In *Hanigan*, two brothers, Thomas and Patrick Hanigan, brutally tortured and robbed three undocumented Mexican citizens on the Hanigans' ranch in southern Arizona.[192] The victims, who were illiterate, were later shown a copy of a high school yearbook and asked if they could identify anyone.[193] Both victims picked out pictures of the two Hanigan brothers.[194]

Patrick Hanigan contended that the procedure was suggestive because his name appeared under his picture and the victims might have learned the name "Hanigan" from the sign located in front of the ranch.[195] While implying that, in some circumstances, this pretrial procedure would be suggestive, the court found that it was unlikely that the pretrial identification

185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *See* cases cited *supra* note 179.
190. 681 F.2d 1127 (9th Cir. 1982).
191. *Id.* at 1133.
192. *Id.* at 1129.
193. *Id.* at 1132-33.
194. *Id.*
195. *Id.*

was suggestive in this case given the fact that the victims were unable to read.[196]

### 4. *Disguise and Alteration of the Photographs*

Courts have held that requiring all participants in a photographic line-up, including the defendant, to have their photographs taken in disguise was not impermissibly suggestive.[197] Courts have also allowed the practice of retouching all photographs in an array.[198] However, if the police retouch only one photograph or force only one participant to wear a disguise, thereby focusing the witness's attention on the single photograph, the procedure would probably violate due process.[199]

Thus, as demonstrated above, any procedure that unreasonably draws attention to the defendant's photograph in an array can be challenged as suggestive.[200] If the court finds that the procedure was not suggestive, the pretrial identification, as well as the in-court identification, is admissible. If the pretrial identification procedure is impermissibly suggestive, then the court must make further inquiry into the reliability of the procedure.[201]

## V. Reliability

The second prong of the *Biggers / Manson* test is whether, regardless of the pretrial procedure, the identification is clothed with indicia of reliability.[202] The goal of the due process protec-

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196. *Id.* at 1133. The court also held that the identifications were reliable and therefore should be admitted even if the pretrial procedure had been suggestive. *Id.*

197. *See, e.g.*, Griffin v. Virginia, 606 F. Supp. 941, 946 (E.D. Va. 1985) (where all participants were required to wear a false beard, a cap, and sunglasses when posing for a photograph to be used in an array).

198. *See, e.g.*, United States v. Dunbar, 767 F.2d 72, 73 (3d Cir. 1985) (where police retouched all six photographs in an array to show the suspect with a beard and cap exactly like the one depicted in the surveillance photograph).

199. *Id.*

200. Simmons v. United States, 390 U.S. 377, 383-84 (1968).

201. Manson v. Brathwaite, 432 U.S. 98, 114 (1977); *see also* Robinson v. Clarke, 939 F.2d 573, 575-76 (8th Cir. 1991); United States v. Stevens, 935 F.2d 1380 (3d Cir. 1991); Herrera v. Collins, 904 F.2d 944, 948-49 (5th Cir.), *cert. denied*, 498 U.S. 925 (1990).

202. *Brathwaite*, 432 U.S. at 114 ("We therefore conclude that reliability is the linchpin in determining the admissibility of identification testimony . . . .").

tion is to "avoid having suggestive methods transform a selection that was only tentative into one that is positively certain."[203] However, if the identification is reliable even though the pretrial procedures were suggestive, the identification is admissible unless the procedures would lead to a substantial likelihood of misidentification.[204] Five factors to be considered when determining reliability were set out in *Neil v. Biggers*[205] and reaffirmed in *Manson v. Brathwaite*:[206]

> These include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.[207]

In general, courts find that: the longer the witness's opportunity to view the offender; the greater the attention to the offender at the time of the offense; the more detailed the initial description from the witness; the greater the certainty demonstrated by the witness; and the shorter the length of time between the crime and the viewing of the photographic array; the more reliable the identification.[208]

While social-science researchers would agree that some of these factors enhance the accuracy of the identifications, studies have shown that others do not. Researchers have generally found that longer exposure to the offender enhances the reliability of a subsequent identification.[209] Likewise, a greater amount of attention to the offender[210] and a shorter time inter-

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203. Solomon v. Smith, 645 F.2d 1179, 1185 (2d Cir. 1981).

204. *Brathwaite*, 432 U.S. at 114.

205. 409 U.S. 188, 199-200 (1972).

206. 432 U.S. 98 (1977).

207. *Id.* at 114.

208. *See* Reese v. Fulcomer, 946 F.2d 247, 258 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1679 (1992); United States v. Burke, 738 F.2d 1225, 1229 (11th Cir. 1984); Hakeem v. Beyer, 774 F. Supp. 276, 286 (D.N.J. 1991).

209. The amount of time that the perpetrator is exposed has been found to influence the accuracy of the identification. Correct recognition is facilitated by increasing exposure time. *See* Kenneth R. Laughery et al., *Recognition of Human Faces: Effects of Target Exposure Time, Target Position, Pose Position, & Type of Photograph*, 55 J. APPLIED PSYCHOL. 477, 477 (1971); Peter Shapiro & Steven Penrod, *A Meta-Analysis of the Facial Identification Literature*, 100 PSYCHOL. BULL. 139, 148 (1986).

210. LOFTUS, *supra* note 7, at 31-36; Cutler et al., *supra* note 7, at 240, 244.

val between the crime and the identification[211] have both been shown to enhance the accuracy of an identification. But researchers have cast doubt on whether the level of certainty and detail of the description actually enhance the accuracy of the identification.[212]

Many studies demonstrate that there is no correlation between the confidence of the witness and the accuracy of the identification.[213] Additionally, studies have shown that the correlation between prior descriptions and identification accuracy is, at best, very weak or nonexistent.[214] Yet, studies have indicated that juries are highly influenced by a confident witness and have placed importance on the witness's ability to make prior descriptions and accurate identifications.[215] These discrepancies between lay intuition and research findings raise questions as to whether the *Biggers* factors should continue to be used as predictors of identification accuracy and reliability.

In addition to these discrepancies, other factors not recognized by the courts may be present, and these factors may decrease the likelihood of a reliable identification. Experts in eyewitness identification have established that the memory

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211. LOFTUS, *supra* note 7, at 52-53, 68-70; Cutler et al., *supra* note 11, at 131-32; Krouse, *supra* note 11, at 651.

212. *See* sources cited *infra* notes 213-14.

213. *See, e.g.*, Brian R. Clifford & Jane Scott, *Individual and Situational Factors in Eyewitness Testimony*, 63 J. APPLIED PSYCHOL. 352, 358 (1978); Kenneth Deffenbacher, *Eyewitness Accuracy and Confidence: Can We Infer Anything about their Relationship?*, 4 L. & HUM. BEHAV. 243, 258 (1980). After reviewing 43 studies on the accuracy/confidence relationship, Deffenbacher concluded that the judicial system should stop relying on witness confidence as a predictor of identification accuracy. *Id.*

214. Melissa Pigott & John C. Brigham, *The Relationship Between the Accuracy of Prior Description and Facial Recognition*, 70 J. APPLIED PSYCHOL. 547 (1985); Alvin G. Goldstein et al., *Does Fluency of Face Description Imply Superior Face Recognition?* 13 BULL. PSYCHONOMIC SOC'Y 15 (1979).

Studies have also shown that memory for peripheral details surrounding an event is negatively correlated with identification accuracy. Cutler et al., *supra* note 7, at 253-54. However, the more detailed the witness's description of an event, the more credibility jurors give the identification. Gary L. Wells & Michael R. Lieppe, *How Do Triers of Fact Infer the Accuracy of Eyewitness Identification? Using Memory for Peripheral Detail Can be Misleading*, 66 J. APPLIED PSYCHOL. 682, 685 (1981).

215. Empirical studies have shown that a juror's perception of witness confidence accounts for 50% of the variance in juror judgment as to the accuracy of a witness's identification. Wells et al., *supra* note 15, at 440.

does not work like a videocassette recorder.[216] Memory does not perfectly record an event or permanently store it to be "played back" at a later time.[217] Experts break down the memory process into three major stages: acquisition (when an event is perceived by a witness and information is entered into the memory system), retention (the time between the witnessing of the event and the attempt to recall it), and retrieval (the attempt to recall the event).[218]

Many factors exist at each stage which affect the reliability of a witnesses' memory. In the acquisition stage, factors are broken down into "event factors" (lighting conditions, duration of event, and violence) and "witness factors" (stress/fear, age, sex, and expectations).[219] Factors during the retention stage include length of retention interval and acquisition of post-event information.[220] At the retrieval stage, researchers have identified two crucial factors: method of questioning and confidence level.[221] Additionally, particular problems have been identified with respect to the difficulty of accurately recognizing a person of a different race.[222] Studies have shown an increased rate of error when an individual attempts to identify a member of a different race.[223] Although it has been demonstrated by empirical studies that the many factors discussed above affect the reliability of an identification, only a few of them are utilized by the courts when they apply the required totality of circumstances approach set out in *Biggers*.

With respect to the acquisition stage, courts do analyze many of the "event factors" recognized in social-science research. Courts take several issues into account when determining if a witness had an adequate opportunity to view the

216. LOFTUS, *supra* note 7, at 20-21.

217. *Id.*

218. *Id.* at 21.

219. *Id.* at 23, 32.

220. *Id.* at 54, 64.

221. LOFTUS & DOYLE, *supra* note 15, at 31-32.

222. Roy S. Malpass & Jerome Kravits, *Recognition for Faces of Own and Other Race*, 13 J. PERSONALITY AND SOC. PSYCHOL. 330, 330 (1969); *see also* John C. Brigham & Paul Barkowitz, *Do they All Look Alike? The Effect of Race, Sex, Experience & Attitudes on the Ability to Recognize Faces*, 62 J. APPLIED PSYCHOL. 306, 307 (1978); Terence Luce, *Blacks, Whites and Yellows: They All Look Alike to Me*, 8 PSYCHOL. TODAY 105, 106 (1974).

223. *See, e.g.*, Luce, *supra* note 222, at 105-06.

perpetrator: length of time in viewing, distance between witness and perpetrator, and lighting.[224] Overlapping with the opportunity to view is the witness's degree of attention. This refers to whether the witness's attention was focused on the offender, whether the witness was distracted by other people or events, or whether the witness was just a casual observer.[225]

With respect to the accuracy of the description of the perpetrator, courts look to the detail of the description as an important factor in the reliability.[226] A description giving the height, weight, age, build, race, complexion, hair color, and clothing of a perpetrator will be given more weight than a general description lacking in similar detail.[227]

With respect to the retention stage, courts generally find that the longer the time between the crime and the photographic identification, the more suspect the reliability of the identification.[228] However, the longer the witness has had an opportunity to view the perpetrator during the commission of the crime, the longer the time frame the courts will allow between the crime and the photographic identification.[229] With respect to the final, retrieval stage, courts look at the certainty of the identification, but do not extensively analyze what post-event information might affect the reliability of the identification.[230]

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224. *See* United States v. Donahue, 948 F.2d 438 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 1600 (1992); Herrera v. Collins, 904 F.2d 944 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 307 (1991); United States v. Gregory, 891 F.2d 732 (9th Cir. 1989); United States *ex rel.* Kosik v. Napoli, 814 F.2d 1151, 1157 (7th Cir. 1987); United States v. Serna, 799 F.2d 842 (2d Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987); United States v. Goodman, 797 F.2d 468 (7th Cir. 1986); United States v. Damsky, 740 F.2d 134 (2d Cir.), *cert. denied*, 469 U.S. 918 (1984); Robinson v. Wyrick, 735 F.2d 1091 (8th Cir.), *cert. denied*, 469 U.S. 983 (1984); United States v. Woolery, 735 F.2d 818 (5th Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985).

225. *See* Marsden v. Moore, 847 F.2d 1536 (11th Cir. 1988); Velez v. Schmer, 724 F.2d 249 (1st Cir. 1984); Mata v. Sumner, 696 F.2d 1244 (9th Cir.), *vacated on other grounds*, 464 U.S. 957 (1983).

226. *See, e.g.*, Velez v. Schmer, 724 F.2d 249 (1st Cir. 1984).

227. *Id.* at 252.

228. *See, e.g.*, Manson v. Brathwaite, 432 U.S. 98, 115-16 (1977); Neil v. Biggers, 409 U.S. 188, 201 (1972).

229. *See, e.g.*, United States v. Rundell, 858 F.2d 425 (8th Cir. 1988); United States v. Serna, 799 F.2d 842 (2d Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987).

230. United States v. Rundell, 858 F.2d 425, 426 (8th Cir. 1988).

The above "rules" indicate that there is a fairly systematic way that courts go about analyzing reliability. However, the actual application of these "rules" result in decisions in which identifications are found to be accurate and, therefore, reliable under widely varying circumstances.

### A. *Adequate Opportunity to View*

At one end of the spectrum, one court found that a witness had an adequate opportunity to view the defendant when the witness saw the defendant ten to fifteen times over the course of one year, at close range, in good lighting, for several minutes on each occasion.[231] At the other end of the spectrum, however, another court found that a witness who saw a drive-by shooting at night had an adequate opportunity to view, even though the incident was over in a few seconds, the only lighting was from a street lamp, and the witness was the width of the road away from the occupant of the car when he fired the shots.[232] In other cases, observations of the defendant from fourteen seconds to thirty minutes have been held to support a reliable identification when the observations were at relatively close range with fairly good lighting.[233]

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231. United States v. Damsky, 740 F.2d 134, 140 (2d Cir.), *cert. denied*, 469 U.S. 918 (1984).

232. United States *ex rel.* Kosik v. Napoli, 814 F.2d 1151, 1157 (7th Cir. 1987). Four witnesses gave differing testimony about the length of time over which the incident took place. Estimates ranged from a few seconds to two minutes and one witness said it took six to eight minutes. However, all witnesses testified that the car drove by and did not stop or slow down markedly so the lower court concluded that the incident "occurred quickly." *Id.* at 1154 n.4.

233. *See* United States v. Donahue, 948 F.2d 438 (8th Cir. 1991) (witness saw defendant's face for about one minute during a robbery at a distance of two to three feet), *cert. denied*, 112 S. Ct. 1600 (1992); Herrera v. Collins, 904 F.2d 944 (5th Cir.) (witness saw gunman in headlights for about 14 seconds at 15 feet), *cert. denied*, 498 U.S. 925 (1990); United States v. Gregory, 891 F.2d 732 (9th Cir. 1989) (witness saw robber at close range for 30 seconds); United States v. Goodman, 797 F.2d 468 (7th Cir. 1986) (witness saw defendant for 15 to 20 seconds under good lighting at close range); United States v. Serna, 799 F.2d 842 (2d Cir. 1986) (witness had been within two to three feet of defendant for 30 minutes), *cert. denied*, 481 U.S. 1013 (1987); Robinson v. Wyrick, 735 F.2d 1091 (8th Cir.) (witness observed defendant in good light for about 30 seconds at a distance of 25 feet), *cert. denied*, 493 U.S. 983 (1984); United States v. Woolery, 735 F.2d 818 (5th Cir. 1984) (witness saw defendant face-to-face for two to three minutes in broad daylight), *cert. denied*, 469 U.S. 1208 (1985).

B. *Degree of Attention and Accuracy of Description*

It is rare for a court to find that a witness did not have an adequate opportunity to view. Courts have found inadequate viewing only where it was evident that the witness could not actually have seen the perpetrator or where the witness's attention was so focused on a distracting object that his or her opportunity to observe the perpetrator was severely limited. In *Mata v. Sumner*,[234] the Ninth Circuit found the identification unreliable because one witness did not have his glasses on at the time of the offense and the other admitted that the attack happened so fast, he did not get a good look at the attacker.[235]

In *Velez v. Schmer*,[236] the First Circuit found that two teenage witnesses who had suddenly been confronted by a man with a rifle were so focused on the man's vehicle that their identification of the assailant was suspect.[237] Their detailed description of the car and their very vague description of the assailant indicated that the witnesses' attention was not directed at the assailant.[238]

In *Marsden v. Moore*,[239] the Eleventh Circuit likewise found that the witness could not have focused her attention on the suspect sufficiently to make her identification reliable.[240] The suspect had briefly shared a hospital room with the witness's husband two years prior to the identification, and there was no reason for the witness to pay any special attention to the suspect at that time.[241]

The importance of the degree of attention to identification accuracy is supported by social-science research, especially where a weapon is used in the crime. If there is a weapon present during the commission of a crime, the reliability and accuracy of an identification decreases because the witness's attention will be focused on the weapon rather than on encoding

234. 696 F.2d 1244 (9th Cir.), *vacated on other grounds*, 464 U.S. 957 (1983).
235. *Id.* at 1247.
236. 724 F.2d 249 (1st Cir. 1984).
237. *Id.* at 250.
238. *Id.* at 253.
239. 847 F.2d 1536 (11th Cir. 1988).
240. *Id.* at 1546.
241. *Id.*

the perpetrator's facial features.[242] Though some courts have acknowledged this theory, most courts have found that a weapon alone is not so distracting as to nullify the accuracy of a witness's identification.[243]

One last factor that courts review with respect to the degree of attention is whether the witness has had special training in observational skills. For example, police officers have this type of training.[244] It is commonly believed that a police officer pays a higher degree of attention to details than a lay witness does because of the special training the police receive in observational techniques.[245]

However, social-science research indicates that police officers are actually no more accurate than other witnesses.[246] One study demonstrated that a police officer actually performs more poorly than a civilian, due to the police officer's biased interpretation of events.[247] Therefore, the reliance that courts place on a police officer's special training to enhance identification accuracy may be misplaced.

### C. *Time Interval*

With respect to the retention stage, social-science research demonstrates that the shorter the time interval between the crime and the identification, the more accurate the identification.[248] Courts likewise recognize that a shorter time interval

242. Cutler et al., *supra* note 7, at 240, 244 (weapon visibility significantly lowered identification accuracy); Elizabeth F. Loftus et al., *Some Facts About Weapon Focus*, 11 L. & HUM. BEHAV. 55, 55 (1987) (experiments showed that the presence of a weapon significantly lowered identification accuracy of eyewitnesses).

243. *See, e.g.*, United States *ex rel.* Kosik v. Napoli, 814 F.2d 1151 (7th Cir. 1987).

244. *See* Manson v. Brathwaite, 432 U.S. 98, 115 (1977); United States v. Dring, 930 F.2d 687, 693 (9th Cir. 1991); Herrera v. Collins, 904 F.2d 944, 948 (5th Cir.), *cert. denied*, 498 U.S. 925 (1990); United States v. Lewin, 900 F.2d 145, 149 (8th Cir. 1990); United States v. Bagley, 772 F.2d 482, 494 (9th Cir. 1985).

245. *Dring*, 930 F.2d at 693; *Herrera*, 904 F.2d at 948; *Lewin*, 900 F.2d at 149.

246. Elizabeth F. Loftus, *Eyewitnesses: Essential But Unreliable*, 18 PSYCHOL. TODAY 22, 24 (Feb. 1984).

247. Brian Clifford, *Police as Eyewitnesses*, 36 NEW SOC'Y 176 (1976).

248. LOFTUS, *supra* note 7, at 52-53, 68-70; Cutler et al., *supra* note 11, at 131-32; Krouse, *supra* note 11, at 651.

enhances identification reliability.[249] However, there is a discrepancy between legal rulings and social-science research regarding how long that interval can be before it negatively affects the reliability of the identification.

The "forgetting curve" describes the uneven rate at which information is forgotten, with a severe decline in recall occurring quickly, followed by a slower decline.[250] Post-event information has been found to distort the memory, permanently altering it to conform with the post-event information received.[251] One study found that the accuracy of an identification of students seen several times a week for ten weeks fell to sixty-nine percent after just two weeks, and to only forty-eight percent after one year.[252] The ability to accurately identify a stranger with whom a witness had a single encounter lasting a brief period has been shown to be essentially nonexistent in less than one year.[253] Despite this, courts have allowed identifications that took place as long as four years after the witness had an opportunity to view the perpetrator.[254]

In *Neil v. Biggers*,[255] the Supreme Court found that a lapse of seven months between the rape and the identification "would be a seriously negative factor in most cases."[256] The Eighth Circuit, in *United States v. Rundell*,[257] likewise found a delay of eight months to be "the factor most negatively affecting the reliability of the identification."[258] The Second Circuit, in *United*

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249. Manson v. Braithwaite, 432 U.S. 98, 115-16 (1977); Neil v. Biggers, 409 U.S. 188, 201 (1972).

250. *See generally* Kenneth Deffenbacher, *On the Memorability of the Human Face, reprinted in* ASPECTS OF FACE PROCESSING (1985); H. E. EBBINGHOUS, MEMORY: A CONTRIBUTION TO EXPERIMENTAL PSYCHOLOGY (1964).

251. LOFTUS, *supra* note 7, at 54-55.

252. Harry P. Bahrick, *Memory for People, reprinted in* EVERYDAY MEMORY, ACTIONS, AND ABSENTMINDEDNESS, 27 (J.E. Harris & P.E. Morris eds., 1983). In another study, a researcher tested clerical workers' recognition of pictures after intervals of two hours, three days, one week, and four months. Retention dropped from about 100% at the two hour interval to 57% after four months. Roger N. Shepard, *Recognition Memory for Words, Sentences & Pictures*, 6 J. VERBAL LEARNING AND VERBAL BEHAV. 156 (1987).

253. LOFTUS, *supra* note 7, at 68-70.

254. *See, e.g.*, United States v. Samalot-Perez, 767 F.2d 1 (1st Cir. 1985).

255. 409 U.S. 188 (1972).

256. *Id.* at 201.

257. 858 F.2d 425 (8th Cir. 1988).

258. *Id.* at 427.

*States v. Maldonado-Rivera*,[259] termed a time interval of one year "a lengthy delay."[260]

In *United States v. Marchand*,[261] the Second Circuit found that a nine-month delay "did not weigh in favor of admissibility."[262] In each of these cases, however, the court admitted the identifications despite the time delays, finding that the delay was outweighed by other indicia of reliability.[263] Courts routinely find that delays of a few hours to several months do not negatively affect the reliability and accuracy of an identification.[264]

D. *Confidence of Witness*

While the *Biggers* Court specifically listed eyewitness confidence as a valid criterion upon which to judge the reliability of eyewitness testimony,[265] the correlation between identification accuracy and confidence level has been the subject of a massive debate among social-science researchers. A few studies show that confidence level is a valid predictor of identification accu-

259. 922 F.2d 934 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2811 (1991).

260. *Id.* at 976.

261. 564 F.2d 983 (2d Cir. 1977), *cert. denied*, 98 S. Ct. 732 (1978).

262. *Id.* at 996.

263. Neil v. Biggers, 409 U.S. 188, 201 (1972); *Maldonado-Rivera*, 922 F.2d at 976; United States v. Rundell, 858 F.2d 425, 427 (8th Cir. 1988); *Marchand*, 564 F.2d at 996.

264. *See, e.g.*, United States v. Donahue, 948 F.2d 438 (8th Cir. 1991) (five-day delay did not affect reliability), *cert. denied*, 112 S. Ct. 1600 (1992); United States v. Dring, 930 F.2d 687 (9th Cir. 1991) (two-week delay did not taint reliability); Scroggy v. Kordenbrak, 919 F.2d 1091 (6th Cir. 1990) (less than one-month delay did not taint reliability), *cert. denied*, 111 S. Ct. 1608 (1991); Porter v. United States, 831 F.2d 760 (8th Cir. 1987) (seven weeks not too long a delay), *cert. denied*, 484 U.S. 1069 (1988); Clark v. Fike, 538 F.2d 750 (7th Cir. 1976) (five-month delay upheld), *cert. denied*, 429 U.S. 1064 (1977); Hodge v. Henderson, 761 F. Supp. 993 (S.D.N.Y. 1990) (six-week delay upheld), *aff'd*, 929 F.2d 61 (2d Cir. 1991); United States *ex rel.* McTush v. O'Brien, 644 F.Supp. 322 (N.D. Ill. 1986) (three-month delay did not taint reliability), *aff'd*, 832 F.2d 157 (7th Cir. 1987).

265. One of the five factors enumerated was "the level of certainty demonstrated by the witness at the time of the confrontation . . . ." *Biggers*, 409 U.S. at 199-200.

racy,[266] while many others demonstrate that there is no correlation between certainty and reliability of the identification.[267]

Researcher Kenneth Deffenbacher reviewed twenty-five studies reporting forty-three separate assessments of the accuracy-confidence relationship and concluded that there may be a confidence-accuracy relationship under certain "optimal" witnessing conditions, but that there is no reasonably precise way to determine the degree of optimality for any given real-life situation.[268] Given the weight afforded the testimony of a confident eyewitness by the jury,[269] Deffenbacher concluded that "the judicial system should cease and desist from a reliance on eyewitness confidence as an index of eyewitness accuracy."[270]

Regardless of the lack of support for the confidence-accuracy correlation in the social-science world, courts continue to rely on confidence as a predictor of reliability. Under the totality of circumstances approach, courts tend to review two issues regarding certainty: one is the degree of certainty required to support the admissibility of the identification; and the second is the point at which the eyewitness becomes certain.[271] In *Biggers*, the Court stated that one of the factors to be reviewed was "the level of certainty demonstrated by the witness at the confrontation."[272] But if the initial confrontation is a highly suggestive pretrial procedure, the confidence of the eyewitness will

266. *See, e.g.*, Jack P. Lipton, *On the Psychology of Eyewitness Testimony*, 62 J. APPLIED PSYCHOL. 90 (1977).

267. *See, e.g.*, Clifford & Scott, *supra* note 213; Michael R. Lieppe et al., *Crime Seriousness as a Determinant of Accuracy in Eyewitness Identification*, 63 J. APPLIED PSYCHOL. 345 (1978).

268. Deffenbacher, *supra* note 213, at 249.

269. Wells, Lindsay & Tousignant conducted studies demonstrating that potential jurors rely heavily on an eyewitness's confidence in determining their credibility. Up to 50% of the variation in jurors' decisions regarding the believability of an eyewitness can be based on the perceived confidence of the witness. Gary L. Wells et al., *Effects of Expert Psychological Advice on Human Performance in Judging the Validity of Eyewitness Testimony*, 4 L. & HUM. BEHAV. 275 (1980). The juror's statement in the Leonard Callace case that the certainty of the eyewitness swayed her to convict is a real-life example of the weight afforded eyewitness testimony. *See supra* note 12 and accompanying text.

270. Deffenbacher, *supra* note 213, at 258.

271. *See supra* text accompanying notes 56, 68.

272. Neil v. Biggers, 432 U.S. 188, 199-200 (1972).

in all likelihood be enhanced as a result of the suggestive procedure.[273]

Courts have recognized that determinations of reliability based on a witness's certainty after the use of suggestive procedures "are complicated by the possibility that the certainty may reflect the corrupting effect of the suggestive procedures."[274] The danger lies in the risk of "having suggestive methods transform an identification that was only tentative into one that is positively certain."[275] However, this inherent danger has not prevented the courts from finding "sufficient certainty" to support the reliability of identifications even after suggestive pretrial procedures.[276]

While many eyewitnesses testify that they were absolutely positive about their initial identification,[277] courts do not require this degree of certainty. Courts have found sufficiently reliable identifications where witnesses said they were "95% certain"[278] and where witnesses only stated that a particular photograph "looked like" the perpetrator.[279] Courts also recognize that certainty is only one of five factors of admissibility, and as a result, have found identifications inadmissible despite

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273. LOFTUS, *supra* note 7, at 144; Buckhout et al., *supra* note 25, at 71-72; Cutler et al., *supra* note 7, at 244 (biased instructions reduced the accuracy of identifications and significantly increased the number of false identifications).

274. United States *ex rel.* Kosik v. Napoli, 814 F.2d 1151, 1159 (7th Cir. 1987); *see also* United States *ex rel.* Hudson v. Brierton, 699 F.2d 917 (7th Cir. 1983); United States *ex rel.* Moore v. Illinois, 577 F.2d 411 (7th Cir. 1978); Escalera v. Coombe, 652 F. Supp. 1316, 1327 (E.D.N.Y.), *rev'd*, 826 F.2d 185 (2d Cir. 1987), *cert. granted and vacated on other grounds*, 484 U.S. 1054, *on remand*, 852 F.2d 45 (2d Cir. 1988).

275. Solomon v. Smith, 645 F.2d 1179, 1185 (2d Cir. 1981).

276. *Napoli*, 814 F.2d at 1159.

277. *See, e.g.*, United States v. Donahue, 948 F.2d 438 (8th Cir. 1991) (witness was "positively sure" that defendant was bank robber), *cert. denied*, 112 S. Ct. 1600 (1992); Hakeem v. Beyer, 774 F. Supp. 276 (D.N.J. 1991) (two eyewitnesses positively identified defendant); People v. Fulcomer, 731 F. Supp. 1242 (E.D. Pa. 1990) (witnesses were positive in their identifications); Escalera v. Coombes, 652 F. Supp. 1316 (E.D.N.Y. 1987) (where neither witness expressed doubt after selecting defendant's picture).

278. United States v. Jarrad, 754 F.2d 1451, 1455 (9th Cir.), *cert. denied*, 474 U.S. 830 (1985).

279. United States v. Monsour, 893 F.2d 126, 128 (6th Cir. 1990).

the certainty of the witness when the other factors weighed heavily against reliability.[280]

Some rulings, however, seem to contradict both social-science research and the confidence factor as it is described in the *Biggers* case. As explained above, the Supreme Court in *Biggers* held that courts could use the certainty of the witness at the time of the confrontation as a predictor of the accuracy of an identification.[281] Implied in the language of *Biggers* is that the certainty must be indicated at the *first* confrontation.

As the Supreme Court recognized in *Simmons v. United States*,[282] once a witness has seen a photograph of a suspect, the witness is likely to retain in his memory the image from the photograph, rather than the person actually seen at the crime.[283] The confidence of a witness is bound to increase as the image of a particular suspect is reinforced by repeated exposure to a suspect.[284]

Therefore, if confidence is to be used as an indicator of reliability, courts should look to the confidence of the witness at the *initial* confrontation. Certainty developed over time might be a product of the repeated images, rather than a reflection of a memory of the crime. Despite this danger, several courts have found that, even though a witness was tentative and unsure at

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280. *See, e.g.*, Marsden v. Moore, 847 F.2d 1536 (11th Cir.), *cert. denied*, 488 U.S. 983 (1988).

281. Neil v. Biggers, 432 U.S. 188, 200 (1972); *see supra* text accompanying notes 56, 271.

282. 390 U.S. 377 (1973); *see supra* text accompanying notes 56, 68.

283. *Simmons*, 390 U.S. at 384.

284. The Supreme Court stated that the danger of misidentification:

> will be increased if the police . . . show [the witness] pictures of several persons among which the photograph of a single such individual recurs . . . Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen reducing the trustworthiness of subsequent line-up or courtroom identification.

*Id.*

Using multiple photographs of the same individual in an array or in a subsequent corporeal line-up increases the probability that the individual will be selected and also may lead the witness to think that the individual looks familiar because of the crime, when in fact the individual becomes familiar because of the repeat images. Evan Brown et al., *Memory for Faces and the Circumstances of Encounter*, 62 J. APPLIED PSYCHOL. 311, 313 (1977); LOFTUS, *supra* note 7, at 150; Loftus & Greene, *supra* note 30, at 332-34.

the initial confrontation, his or her certainty at a later identification made the identification sufficiently reliable to be admissible.[285]

## VI. Summary and Conclusions

As a result of the *Biggers* and *Manson* decisions, courts must use a two-pronged test to evaluate due process challenges to identifications based on photo spreads.[286] Courts must first determine whether the pretrial procedure was impermissibly suggestive.[287] The defendant can challenge procedures in which there were too few photographs to produce a fair array or where the array included more than one picture of the defendant.[288]

Challenges can also be made if there was collaboration between witnesses when they viewed the array[289] or if the police made any kind of statements or gave instructions that may have caused the witness to focus on a particular suspect.[290] Procedures may also be suggestive if the type or quality of the photographs emphasizes a particular picture[291] or if the photographs depict a suspect with distinct characteristics that draw attention to his or her picture.[292]

If a court finds that the pretrial photographic array was not impermissibly suggestive, then the identification is admissible. Even if the photographic array was impermissibly suggestive, it is not automatically excluded. If the court finds, using the five *Biggers* factors, that the identification is reliable then it is admissible despite its impermissibly suggestive origins.[293]

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285. *See* United States v. Woolery, 735 F.2d 818 (5th Cir. 1984) (admitting identification as reliable where witness chose someone other than defendant at initial confrontation but at time of trial displayed certainty); United States *ex rel.* Rockman v. DeRobertis, 717 F. Supp. 553 (N.D. Ill. 1987) (holding identification admissible where witness selected wrong person at pretrial identification but at trial testified he would never forget defendant's face).

286. Manson v. Brathwaite, 432 U.S. 98, 115 (1977); Neil v. Biggers, 409 U.S. 188, 201 (1972).

287. *Brathwaite*, 432 U.S. at 117; *Biggers*, 409 U.S. at 189.

288. *See supra* notes 86-91 and accompanying text.

289. *See supra* notes 98-105 and accompanying text.

290. *See supra* notes 106-26 and accompanying text.

291. *See supra* notes 166-77 and accompanying text.

292. *See supra* notes 133-65 and accompanying text.

293. *Manson*, 432 U.S. at 114-17; *Biggers*, 409 U.S. at 199-200.

The court's determination of reliability takes into account the witness's opportunity to view the perpetrator, the witness's degree of attention, the detail of the witness's original description of the perpetrator, the length of time between the crime and the identification, and the certainty of the witness.[294] Social-science research supports the importance of some of these factors as predictors of reliability.[295] However, confidence of the witness and detail of description have been shown to be poor predictors of identification accuracy.[296]

Additionally, courts fail to take into account many other factors that may interfere with the reliability of an identification such as post-event information, the forgetting curve, and the difficulties in cross-racial identification.[297] Even in areas where researchers and courts are in agreement theoretically, the practical application of the theory to an actual case often results in a decision that seems contrary to the empirical findings.[298]

Leonard Callace's case is a good example of the discrepancy between court rulings and empirical findings. The victim first identified Callace eighteen months after the commission of the assault.[299] Callace was the only person with a beard in the photographic line-up.[300] The victim's initial identification, accord-

294. *Biggers*, 409 U.S. at 199-200; see *supra* text accompanying note 56.

295. Longer exposure time enhances reliability. *See* Laughery et al., *supra* note 209, at 477; Shapiro & Penrod, *supra* note 209, at 141. Greater degree of attention to the perpetrator enhances identification accuracy. *See* LOFTUS, *supra* note 7, at 31-36; Cutler et al., *supra* note 70, at 240, 244. The shorter the time interval between the crime and the initial identification enhances the reliability of the identification. *See* LOFTUS, *supra* note 7, at 52-53, 68-70.

296. As to the correlation between confidence and accuracy, see generally Clifford & Scott, *supra* note 213, and Deffenbacher, *supra* note 213. As to the relationship between description and accuracy see generally Goldstein et al., *supra* note 214, and Pigott & Brigham, *supra* note 214.

297. *See supra* notes 222-23, 250-53 and accompanying text.

298. For example, social-science research has shown that after one year there is very little ability to identify strangers with whom one had a brief encounter. *See supra* note 253. Courts in theory agree that a long time interval between crime and identification negatively affects the identification. *See* cases cited *supra* note 208. However, one court found reliable an identification made four and one-half years after the crime. *See* United States v. Samalot-Perez, 767 F.2d 1 (1st Cir. 1985).

299. Falk, *supra* note 1, at 6; *see supra* text accompanying notes 4-6.

300. Falk, *supra* note 1, at 6; *see supra* text accompanying notes 4-6.

ing to her own testimony, was not positive.[301] One month later she viewed Callace a second time in a line-up. Police told her that the suspect was present in the line-up.[302] Again, Callace was the only one with a beard.[303] This time the victim did identify him, and by the time the trial began, she was absolutely certain he was her attacker. The judge admitted the identification evidence over defense counsel's objection.[304] The admission of the evidence indicated that the judge found the identification to be reliable.

Assuming the trial judge's ruling on reliability was legally correct, was it in agreement with empirical findings? Empirical studies demonstrate that the ability to recall a face fades rapidly over the course of one year, and by eighteen months the ability to recognize a face would be minimal.[305] Studies have also demonstrated that a photographic spread depicting only one man with a beard, when the victim had described the perpetrator as having a beard, dramatically increases the probability that that individual will be selected.[306] Following this suggestive procedure with a line-up in which the suspect is the only person present from the earlier identification further increases the probability that the witness will select the suspect, because he is now familiar.[307]

In Callace's case, he was twice the only suspect in the line-ups with a beard. Again, empirical studies would predict that the probability of selecting Callace was increased since he was the only individual who matched the victim's description of the perpetrator.[308] Given these circumstances, coupled with empirical results of eyewitness identification, it would have been shocking if the witness had *not* identified Callace as her attacker. By the time of trial, Callace was so familiar to the victim that she testified that she was absolutely certain he was the

301. *See supra* note 6.

302. *See supra* note 6.

303. *See supra* note 6.

304. Falk, *supra* note 1, at 6.

305. LOFTUS, supra note 7, at 52-53, 68-70; Krouse, *supra* note 11, at 651.

306. *See* Luus and Wells, *supra* note 133, at 55; CLIFFORD & BULL, *supra* note 27, at 197; Doob & Kirshenbaum, *supra* note 5, at 289.

307. This has been called a "photo-biased" line-up. *See* LOFTUS, supra note 7, at 150; Loftus & Greene, *supra* note 30, at 332-334. *See generally* Brown et al., *supra* note 31.

308. *See supra* note 305.

attacker.[309] But was he familiar to her because of the attack or because of the subsequent opportunities she had to view him at length? There is no question now that there was a miscarriage of justice in the Callace case. The jurors' heavy reliance on the eyewitness identification was misplaced.

What could have been done to protect Leonard Callace? Many commentators have treated the question of how the criminal justice system can counter unjustified reliance on eyewitness identification. Common recommendations include the requirement of corroboration,[310] the use of special cautionary instructions,[311] and the use of expert witnesses to testify about the problems of eyewitness identification.[312] However, the requirement of strict corroboration has been criticized as being too drastic. Such a rule would not allow prosecution of a case based solely on eyewitness identification even when the identification was extremely reliable.[313] As for the second proposal, the use of cautionary instructions has been called "a step in the right direction but not a cure-all."[314] Studies show that jurors

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309. Falk, *supra* note 1, at 6.

310. *See* LOFTUS, supra note 7, at 188-89; Frederic D. Woocher, *Did Your Eyes Deceive You? Eyewitness Identification?* 29 STAN. L. REV. 969, 1001-02 (1977). In England, the requirement of corroboration has been recommended. The Home Secretary of Great Britain appointed a committee to investigate identification procedures in England after two innocent individuals who had been convicted on eyewitness testimony alone were pardoned. The Report of the Committee recommended that juries be instructed "that it is not safe to convict upon eyewitness evidence . . . unless . . . supported by substantial evidence of another sort." LOFTUS, *supra* note 7, at 190 (quoting HER MAJESTY'S STATIONARY OFFICE, THE DEVLIN REPORT 149 (London 1976)).

311. LOFTUS, *supra* note 7, at 189; Woocher, *supra* note 310, at 1002; Rattner, *supra* note 21, at 292. The cautionary instruction is sometimes referred to as the *Telfaire* instruction, after the leading case in which the court established a model instruction for use in cases where the issue of identity is central to the case. *See* United States v. Telfaire, 469 F.2d 552, 558-559 (D.C. Cir. 1972).

312. *See* LOFTUS, *supra* note 7, at 191-194; Harmon M. Hosch et al., *Influence of Expert Testimony Regarding Eyewitness Accuracy on Jury Decisions*, 4 L. & HUM. BEHAV. 287, 295 (1980); Rattner, *supra* note 21, at 292; Wells et al., *supra* note 15, at 446; Woocher, *supra* note 310, at 1006.

313. For example, where the victim personally knew the perpetrator or where the victim had spent several days with the perpetrator in a kidnap or false imprisonment case.

314. James P. Murphy, *An Evaluation of the Arguments Against the Use of Expert Testimony on Eyewitness Identification*, 8 U. BRIDGEPORT L. REV. 21, 26 (1987); *see also* LOFTUS, *supra* note 7, at 189; Woocher, *supra* note 310, at 1004.

often do not adequately understand and follow instructions from the bench.[315]

Use of eyewitness identification experts has also been criticized as invading the province of the jury,[316] misleading or confusing the jury,[317] unnecessary because the right to cross-examine the testimony of the eyewitness would reveal any lack of credibility,[318] or unnecessary because the testimony relates to matters of common knowledge.[319] Despite these criticisms, studies have demonstrated that expert testimony increases the amount of attention to eyewitness identification and causes jurors to more closely scrutinize the quality of the identification evidence.[320]

While jurors do not necessarily see eyewitnesses as more or less credible, they tend to lower the importance of the eyewitness testimony relative to other testimony,[321] and discount testimony of witnesses who had poor witnessing conditions.[322] However, many courts are still reluctant to allow into evidence this sort of expert testimony.[323] Given the defendant's substantial liberty interests, courts should be more open to admitting

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315. Edith Greene, *Eyewitness Testimony and the Use of Cautionary Instructions*, 8 U. BRIDGEPORT L. REV. 15, 20 (1987). Greene found that a *Telfaire* instruction was not effective at cautioning jurors about the problems with eyewitness testimony; the revised instruction also has its limitations. *Id.* at 19-20.

316. Rule 704 of the Federal Rules of Evidence provides: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." FED. R. EVID. 704. Though the Advisory Committee's notes indicate that it was enacted specifically to abolish the "province of the jury" concept, some courts continue to refuse to admit the expert testimony citing grounds very similar to the "ultimate issue" rule. *See, e.g.*, United States v. Fosher, 590 F.2d 381 (1st Cir. 1979).

317. *See, e.g.*, United States v. Downing, 609 F. Supp. 784 (E.D. Pa.), *aff'd*, 780 F.2d 1017 (3d Cir. 1985).

318. *See, e.g.*, Moore v. Tate, 882 F.2d 1107 (6th Cir. 1989); United States v. Christophe, 833 F.2d 1296 (9th Cir. 1987).

319. *See, e.g.*, United States v. Hudson, 884 F.2d 1016 (7th Cir. 1989).

320. Hosch et al., *supra* note 312, at 294; Elizabeth F. Loftus, *Impact of Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 65 J. APPLIED PSYCHOL. 9, 9 (1980).

321. Hosch et al., *supra* note 312, at 294; Wells et al., *supra* note 15, at 446.

322. Harmon M. Hosch, *A Comparison of Three Studies on the Influence of Expert Testimony on Jurors*, 4 L. & HUM. BEHAV. 297 (1980).

323. *See, e.g.*, United States v. Hudson, 884 F.2d 1016 (7th Cir. 1989); United States v. Christophe, 833 F.2d 1296 (9th Cir. 1987); United States v. Affleck, 776 F.2d 1451 (10th Cir. 1985); Robertson v. McClosky, 676 F. Supp. 351 (D.D.C. 1988).

expert testimony in order to overcome the misconceptions that jurors have about eyewitness identification.

The use of expert witnesses is crucial to a defendant's fair trial. Expert testimony should be liberally allowed, especially when the prosecution's case relies significantly on eyewitness identification. Training trial attorneys how and when to use this testimony is important. The government should be required to provide these experts if the defendant cannot afford to pay for the assistance.

Denial of experts when eyewitness identification is central to the prosecutor's case would result in a fundamentally unfair trial. Allowing expert testimony and providing defendants with this type of assistance would serve one of the main goals of the criminal justice system: ensuring that citizens like Leonard Callace are not convicted and punished for crimes they did not commit.