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The Need to Revisit the Neil v. Biggers Factors: Suppressing Unreliable Eyewitness Identification

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COMMENT

The Need to Revisit the *Neil v. Biggers* Factors: Suppressing Unreliable Eyewitness Identifications[1]

I. INTRODUCTION

On August 28, 1992, a Caucasian female college student, D.S., was sitting on her couch when an African-American male entered her New Jersey apartment uninvited.[2] The man, whom D.S. later described as five feet five inches tall, and in his late twenties or early thirties, said he was wanted for murder and demanded money to travel to New York.[3] D.S. told the intruder she did not have any money; the intruder then searched her purse and

1. 409 U.S. 188 (1972).
2. State v. Cromedy, 727 A.2d 457, 459 (N.J. 1999).
3. *Id.*

took money and credit cards.[4] He led D.S. to the kitchen, demanded she be quiet, and raped her from behind.[5] Although D.S. closed her eyes while being raped, her apartment was brightly lit throughout the incident, and at one point the perpetrator had threatened her from only two feet away.[6]

Five days after D.S. had been robbed and raped, she was shown many photographs at the police station; one was a picture of McKinley Cromedy.[7] D.S. identified no one.[8] Nearly eight months later, D.S. passed a man on the street whom she believed to be her attacker and notified the police.[9] The man was brought to the police station, where D.S. viewed him again.[10] He stood by himself behind a one-way mirror.[11] D.S. positively identified McKinley Cromedy as her assailant.[12] Fingerprints and hair found in D.S.'s apartment did not match Cromedy's; DNA testing did not take place as the defense attorney "felt the case was so strong that it wasn't worth the risk of testing."[13] A jury convicted Cromedy of first-degree aggravated sexual assault, second-degree robbery, second-degree burglary, and third-degree terroristic threats, and Cromedy was sentenced to sixty years.[14] Six years later, Cromedy was exonerated through DNA evidence that proved he could not have been the perpetrator.[15]

Eyewitness identification has been recognized as one of the least reliable types of evidence; if the identification is of a stranger, it has been called "proverbially untrustworthy."[16] Several studies have revealed that erroneous eyewitness identifications are the leading cause of wrongful convictions.[17] It is estimated there may be more than 10,000 people a year

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4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. Innocence Project, http://www.innocenceproject.org/case/display_profile.php?id=69 (last visited Nov. 18, 2005).
14. *Id.*; *Cromedy*, 727 A.2d at 460.
15. Ronald Smothers, *DNA Tests Free Man after 6 Years: Had Been Convicted in Rape of Student*, N.Y. TIMES, Dec. 15, 1999, at B6. The New Jersey Supreme Court had reversed a lower court decision to not issue a jury instruction on cross-racial identifications and remanded for a new trial. *Id.* In preparing for the new trial, prosecutors ordered DNA tests from a semen sample of the rape. *Id.* The sample did not match Cromedy's DNA. *Id.*
16. United States v. Wade, 388 U.S. 218, 228 (1967). An eyewitness identification takes place when a witness, often a victim, to a crime recognizes a suspect as the person who committed a crime. CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: REGULATION OF POLICE INVESTIGATION 463, 477 (3rd ed. 2002).
17. In a study of 130 wrongful convictions, 101, or over seventy-seven percent were at least partially based on an incorrect eyewitness identification. BARRY SCHECK ET AL., ACTUAL INNOCENCE 365 (2000). In a 2001 study, fifty-three of sixty-three wrongful convic-

wrongfully convicted, most of whom were convicted as a result of a mistaken identification.[18] For juries, however, eyewitness identifications are often the piece of evidence that is most persuasive.[19] Expert testimony can be offered to educate the jury about memory and principles of identification, but many courts do not allow this type of testimony.[20] Even if expert testimony is allowed, a jury is often more convinced by a witness who "points a finger at the defendant, and says 'That's the one!'"[21] Jurors tend to use this evidence as "absolute proof," even when flaws in the reliability of the identification are blatantly obvious.[22]

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tions were the result of a faulty eyewitness identification. Atul Gawande, *Under Suspicion: The Fugitive Science of Criminal Justice*, THE NEW YORKER, Jan. 8, 2001, at 50. A review of 205 wrongful convictions found fifty-two percent were due to a mistaken eyewitness identification. Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL'Y. & L. 765, 765 (1995), (citing Arye Rattner, *Convicted but Innocent: Wrongful Conviction and the Criminal Justice System*, LAW & HUM. BEHAV. 12, 283-93. (1988)).

18. ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL § 4-1 (3rd ed. 1997). Although some analysts believe as many as five percent of all convictions are wrongful, using a conservative estimate of six tenths of one percent would result in over 10,000 wrongful convictions a year. *Id.*

19. LAWRENCE TAYLOR, EYEWITNESS IDENTIFICATION, § 1 (1982).

20. Lisa Steele, *Trying Identification Cases: An Outline for Raising Eyewitness ID Issues*, 28 CHAMPION 8 (2004).

21. ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY, 19 (1979). It has been noted, "While a jury may display a healthy skepticism when confronted with, say, fingerprint evidence or testimony establishing an alibi, this doubt strangely disappears in the face of a witness pointing his finger at the defendant." TAYLOR, *see supra* note 19, at §1-1. Also, "[c]onviction rates approaching 90% are found when there is just a single eyewitness, even in the absence of any forensic evidence linking the defendant to the crime, and even when there is overwhelming evidence arguing that the defendant could not be the perpetrator." Ralph N. Haber & Lyn Haber, *Experiencing, Remembering and Reporting Events*, 6 PSYCHOL. PUB. POL'Y. & L. 1057, 1059 (2000).

22. TAYLOR, *supra* note 19, at § 1-1. In a frightening example of the power an identification has over a jury, Harry Cashin was found guilty of the murder of a police officer. People v. Cashin, 182 N.E. 74, 75 (N.Y. Ct. App. 1932). *See also* TAYLOR, *supra* note 19, at § 1-1. The only evidence was a "self-confessed perjurer['s]" identification of Cashin two months after the crime, after she had previously stated she could not identify him. *Cashin*, 182 N.E. at 75-76. *See also* TAYLOR, *supra* note 19, at § 1-1. The witness was also branded as a "common prostitute." *Cashin*, 182 N.E. at 75-76. *See also* TAYLOR, *supra* note 19, at § 1-1. Cashin did not meet the description of the perpetrator given by other witnesses, he had two alibi witnesses, and Cashin was not wounded as the suspect was believed to have been. [22] *Cashin*, 182 N.E. at 75-76. *See also* TAYLOR, *supra* note 19, at § 1-1. Despite overwhelming evidence of Cashin's innocence, the jurors found him guilty based on the questionable eyewitness identification. *Cashin*, 182 N.E. at 75. *See also* TAYLOR, *supra* note 19, at § 1-1. The Court of Appeals of New York disagreed and remanded the case for a new trial:

> That a record discloses some evidence which constitutes a question of fact which in the first instance must be submitted to a jury, does not permit us to close our minds to the fact that such evidence may not be sufficient to justify a jury in finding the issue in favor of the People beyond a reasonable doubt.

The United States Supreme Court has outlined when an eyewitness identification should be allowed in trial. *Neil v. Biggers* listed factors that, in 1972, the Court believed made an identification reliable despite being unnecessarily suggestive.[23] Based on a large amount of scientific research completed in the past quarter century, several of these factors have been shown to be unreliable.[24] The Court has not revisited the *Biggers* factors since 1972, leaving lower courts to struggle with factors that are outdated.[25] Additionally, *Biggers* and other Supreme Court decisions regarding eyewitness identifications created confusion in lower courts as to whether additional factors could be considered in determining reliability.[26]

This comment will explore why photographic and live lineup identifications can be unreliable and will discuss United States Supreme Court, federal circuit court, and state court decisions that attend to the issue.[27] These decisions address when reliable eyewitness identifications should be allowed at trial despite being unnecessarily suggestive, and what the courts believe makes identifications reliable. This comment will argue that the *Biggers* factors and at least one other factor, corroborative evidence of general guilt, which courts currently use to allow "reliable" eyewitness identifications, must be re-visited as they are currently outdated, under-inclusive, and unreliable.[28]

II. REASONS FOR UNRELIABLE EYEWITNESS IDENTIFICATIONS

To understand why so many errors are made in this area of the judicial system, it is necessary to consider why eyewitness identifications can be unreliable. Faulty identifications can be the result of numerous problems, often by no fault or ill will of the witness.[29] In general, these faulty identifi-

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> It is not sufficient that there be some evidence from which the jury could have found a verdict against the defendant.

Cashin, 182 N.E. at 75 (citing People v. Guadagnino, 135 N.E. 594, 595 (1922)).

23. 409 U.S. 188, 199-200 (1972). *See infra* note 151 and accompanying text.

24. *See infra* notes 271-81 and accompanying text.

25. *See infra* notes 163-223 and accompanying text.

26. *See infra* notes 163-94, 208-23 and accompanying text.

27. A live lineup takes place when a witness is shown more than one individual and asked if any of the individuals is the perpetrator of the crime. SLOBOGIN, *supra* note 16, at 477. A photographic lineup, or "array," takes place when an individual is shown pictures of more than one individual and asked if any of the individuals is the perpetrator of the crime. *Id.*

28. Some courts add a sixth factor to *Biggers*: corroborating evidence of general guilt. State v. Meeks, 1994 Tenn. Crim. App. LEXIS 654 ¶ 24. *See also*, State v. Contreras, 674 P.2d 792, 820 (Alaska Ct. App. 1983), *rev'd on other grounds*, 718 P.2d 129 (Alaska 1986); People v. Sanders, 797 P.2d 561, 580 (Cal. 1990). *See infra notes* 211-16 and accompanying text.

29. Radha Natarajan, Note, *Racialized Memory and Reliability: Due Process Applied to Cross-Racial Eyewitness Identifications*, 78 N.Y.U. L. REV. 1821, 1842 (2003).

cations may result from unnecessarily suggestive identification procedures and psychological memory and recognition issues.[30]

A. Unnecessarily Suggestive Procedures

Law enforcement techniques focus on helping police "get their man."[31] Many traditional techniques, however, can be unnecessarily suggestive and result in a suspect being identified, whether the suspect actually committed the crime or not.[32] The following subsections discuss procedural techniques that can prevent or lead to an erroneous identification and illustrate why procedures may create unreliable results.

1. Show-ups

Show-ups are identifications that take place when a single person is presented to a witness, who is then asked if that person is the perpetrator.[33] This type of identification procedure may take place because of exigent circumstances, such as if a witness may die, or if an identification must be made quickly to decide whether a search will continue.[34] Despite law enforcement efforts to the contrary, because the individual is the only one presented, witnesses assume the person is a suspect and often identify him as the perpetrator.[35] Show-ups may enhance accuracy because they often take place shortly after the crime before a witness has any memory loss of the event.[36] However, the accuracy gained in the speed of a show-up is outweighed by the suggestiveness that police believe the person presented is guilty.[37] "Courts generally hold that one-to-one show-ups are presumptively suggestive."[38] Show-ups where a suspect is presented in front of more than

30. *See* Wells & Seelau, *supra* note 17, at 765-66. Suggestive identification procedures are sometimes called system variables as law enforcement has control over them. *Id.* at 766. Psychological memory and recognition issues are sometimes called estimator variables, which affect accuracy of the eyewitness identification, but law enforcement has no control over. *Id.*

31. A. DANIEL YARMEY, THE PSYCHOLOGY OF EYEWITNESS TESTIMONY, 20 (1979).

32. *See* Haber & Haber, *supra* note 21, at 1080. In one study, lineups were conducted in which the perpetrator was known to not be present. *Id.* Approximately sixty percent of the time, eyewitnesses identified an innocent person. *Id.* This rate increased to ninety percent "when the observation conditions were poor, *and* the eyewitness is led to believe that the perpetrator is present." *Id.*

33. *Id.* at 1082.

34. EDWARD B. ARNOLDS ET AL., EYEWITNESS TESTIMONY: STRATEGIES AND TACTICS, § 3.15 (1984). *See also* Stovall v. Denno, 388 U.S. 293, 302 (1967) (indicating that show-ups have been "widely condemned," but finding that a hospital-room show-up was necessary as it was feared the witness might die).

35. *See* Haber & Haber, *supra* note 21, at 1082.

36. LOFTUS & DOYLE, *see supra* note 18, at § 6-17(a).

37. *Id. See also* NATHAN R. SOBEL, EYEWITNESS IDENTIFICATION, LEGAL AND PRACTICAL PROBLEMS, § 3:8 (20th ed. 2001).

38. *See* Steele, *supra*, note 20. It has been argued that show-ups "'constitut[e] the most grossly suggestive identification procedure now or ever used by the police.'" TAYLOR, *see*

one witness at the same time are viewed as exceptionally prejudicial.[39] In this comment's opening case, McKinley Cromedy was subjected to a show-up when he was viewed by D.S. by himself, behind a one-way mirror, which may have resulted in D.S.'s incorrect identification of Cromedy as her assailant.[40]

2. Simultaneous Lineups

Whether photographic or live, most lineups are simultaneous, or involve more than one person in the live or photographic lineup at the same time.[41] Simultaneous lineups often result in the eyewitness making a "relative judgment."[42] A relative judgment in eyewitness identification takes place when "the eyewitness selects the member of the lineup who most resembles the eyewitness's memory of the culprit relative to the other members of the lineup."[43] This technique results in an accurate identification if the genuine perpetrator is present in the lineup.[44] When the actual perpetrator is not present, however, one study gave a false identification rate of seventy-two percent.[45] Inaccuracy of simultaneous lineups results from the eyewitness looking for an individual who most resembles the perpetrator, instead of choosing which individual *is* the perpetrator.[46]

Conversely, it has been shown that sequential lineups, where individuals are seen one at a time, subjects the witness to an "absolute judgment."[47] In this type of lineup, a witness only views another person or photograph after they have decided whether the individual currently viewed is the perpetrator.[48] This forces the witness to compare the individual with the witness's memory of the perpetrator, not with other individuals in the

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supra note 19, at § 5-2 (citing PATRICK M. WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES, 28 (Charles C. Thomas 1965)).

39. *See* LOFTUS & DOYLE, *supra* note 18, at § 6-17(a).

40. State v. Cromedy, 727 A.2d 457, 459 (N.J. 1999).

41. Donald P. Judges, *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement*, 53 ARK. L. REV. 231, 254 (2000); *See* LOFTUS & DOYLE, *supra* note 18, at § 4-7.

42. *See* Wells & Seelau, *supra* note 17, at 768.

43. *Id.*

44. *Id.* at 769.

45. David L. Feige, *"I'll Never Forget that Face: The Science and Law of the Double-Blind Sequential Lineup*, 26 CHAMPION 28, 29 (2002). *See generally*, LOFTUS & DOYLE, *supra* note 18, at § 4-7. A different study had a false positive rate of eighty-one percent in simultaneous lineups as opposed to a false positive rate of twenty-five percent in sequential lineups. *Id.*

46. *See* Haber & Haber, *supra* note 21, at 1082.

47. *See* Feige, *supra* note 45, at 29.

48. *See id.*

lineup.[49] Research has shown that sequential lineups are more accurate and law enforcement are beginning to change procedures in this direction.[50]

3. Lineup Administrator Actions

If a lineup administrator is aware who the suspect is, suggestive cues can be given to the witness, which influence a witness's identification.[51] Double-blind lineups, where an administrator is unaware which person is the suspect, can solve this problem and are recommended by experts.[52] Research has also shown that a lineup administrator should give instructions that the suspect "may or may not" be present.[53] If such an instruction is not given, seventy-eight percent of eyewitnesses attempt to identify a suspect, even when the perpetrator is not in the lineup, as opposed to thirty-three percent when the instruction is given.[54] According to empirical data, this type of instruction reduces inaccurate identifications, but does not reduce the number of accurate identifications.[55]

4. Lineup Composition

Distractors are those individuals in a lineup who are not suspects and are known to be innocent of the instant offense.[56] Ideally, if a person who is unfamiliar with the case read a description of the perpetrator, that

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49. *Id.*

50. U.S. DEPARTMENT OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE TO LAW ENFORCEMENT 9 (1999). *See also* Haber & Haber, supra note 21, at 1082. By changing identification procedures from simultaneous lineups to sequential lineups, false identifications may be decreased by fifty percent. *See* Feige, *supra* note 45, at 29. The Boston Police adopted this method in 2004 to help ensure accuracy of identifications. Suzanne Smalley, *Boston Police Update Evidence Gathering Suspect Identification is Focus of Changes*, THE BOSTON GLOBE, July 20, 2004, at B1. New Jersey and Madison, Wisconsin currently require sequential line-ups, while Minneapolis-St. Paul is undergoing a pilot program. *Id. But see* Nancy Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 LAW & HUM. BEHAV. 459, 473 (2001) (concluding that the difference in correct identification rates between sequential and simultaneous lineups are small or non-existent).

51. *See* Taylor, *supra* note 19 at § 5-3. Cues are often given to the witness, even when the officer is not attempting to do so. *Id.* These subconscious cues which communicate the officer's theory of the case are so known as the "Rosenthal effect." *Id.* Examples of unintentional cues given by administrators are body language and tone of voice. *See* U.S. DEPARTMENT OF JUSTICE, *supra* note 50, at 9. *See also* Yarmey, *supra* note 31, at 154.

52. *See* Yarmey, *supra* note 31, at 154. *See also*, Wells & Seelau, *supra* note 17, at 775-76. *But see* U.S. DEPARTMENT OF JUSTICE, *supra* note 50, at 9 (stating that it may be impractical to implement a blind lineup in some jurisdictions, although this might be considered at a later date).

53. *See* Haber & Haber, *supra* note 21, at 1082. *See also*, U.S. DEPARTMENT OF JUSTICE, *supra* note 50, at 32.

54. *See* Wells & Seelau, *supra* note 17, at 769. In one study, false identifications dropped from 78% to 33% when a similar instruction was given. *Id.*

55. *Id.* at 769, 779.

56. *Id.* at 771.

person should not be able to guess which individual in the lineup is the suspect.[57] This is because each individual in the lineup should match the perpetrator's description to increase the chance the eyewitness will choose a distractor.[58] In other words, each individual in the lineup should be similar to the description of the perpetrator the eyewitness had given at an earlier time.[59] Similarities should include: age, size, facial features, facial and head hair color, facial and head hair style, and other physical characteristics.[60] While distractors should be selected to resemble the description of the perpetrator, they should not be selected to resemble the suspect in the lineup.[61] At the same time, suspects should not stand out as different from the others in the lineup, or an innocent suspect may be identified.[62] Lineup constructors, those who select distractors, should be of the same race as the description of the perpetrator and the suspect to avoid selection of dissimilar distractors.[63]

B. Psychology of Identifications

Numerous psychological factors influence an eyewitness's identification of a defendant.[64] In order for an identification to be accurate, the witness must have had the ability to perceive the event, remember the event, and adequately communicate the event.[65]

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57. *See* LOFTUS & DOYLE, *supra* note 18, at § 4-5(a). *See also* Wells & Seelau, *supra* note 17, at 779-80 (citing Anthony N. Doob & Hershi M. Kirshenbaum, *Bias in Police Lineups–Partial Remembering*, J. POLICE SCI. & ADMIN. 1, 287-93 (1973); Roy S. Malpass, *Effective Size and Defendant Bias In Eyewitness Identification Lineups*, LAW & HUM. BEHAV. 5, 299-309 (1981); Roy S. Malpass & Patricia G. Devine, *Measuring the Fairness of Eyewitness Identification Lineups*, *in* EVALUATING WITNESS EVIDENCE, 81-102 (S. Lloyd-Bostock & B. Cliffords eds., 1983); Gary L. Wells et al., *Guidelines for Empirically Assessing the Fairness of a Lineup*, LAW & HUM. BEHAV. 3, 285-293 (1979)).

58. *See* Wells & Seelau, *supra* note 17, at 771.

59. *Id.* at 780. *See also* U.S. DEPARTMENT OF JUSTICE *supra* note 50, at 30.

60. *See* SOBEL, *supra* note 37, at §3:14. For example, in Indiana, an African-American suspect was in a lineup in which the perpetrator was described as " a 'dark-skinned colored man,' tall, heavy, and between thirty-two and thirty-six years old. *Id.* The other distractors in the lineup consisted of ten Caucasians and one other African-American who was five feet three inches and eighteen years old. *Id.* This was obviously unnecessarily suggestive. *Id.*

61. *See* Wells & Seelau, *supra* note 17, at 780.

62. *See* Wells & Seelau, *supra* note 17, at 771.

63. Gary L. Wells & Elizabeth A. Olson, *The Other-Race Effect in Eyewitness Identification: What Do We Do About It?*, 7 PSYCHOL. PUB. POL'Y & L. 230, 242 (2001). The authors stated, "Those who select fillers for use in a lineup should be of the same race as the suspect in the case, because it appears that other-race observers cannot readily detect potential biases that make the suspect stand out as distinctive." *Id.*

64. YARMEY, *see supra* note 31, at 2.

65. *Id.* at 2-3.

1. Observations at the Scene

The time between an event and a subsequent identification is critical to the reliability of that identification.[66] That memory becomes less accurate with time has been established since 1885, when Hermann Ebbinghaus created the "forgetting curve."[67] Through research, Ebbinghaus found that memory fades up to fifty percent within an hour, sixty percent in the first twenty-four hours, and gradually declines thereafter.[68] Since then, research has shown that recognition is extremely high immediately following an event, but then fades quickly.[69]

The length of time an event took to occur is also a factor in an identification's reliability.[70] In one study, "witnesses" were shown four slides of one person's face.[71] Half of the witnesses viewed the slides for two and a half seconds each, for a total of ten seconds, while the other witnesses viewed the slides for eight seconds each, for a total of thirty-two seconds.[72] When the witnesses were asked to identify the person from the slides eight minutes later, those who had been exposed to the slides longer were eleven percent more accurate in their identification.[73] Another study found that the accuracy of an identification was sixty-nine percent after two weeks, forty-eight percent after one year, and "essentially nonexistent" after a year if the event involved "a single encounter lasting a brief period."[74] It should be

66. Wallace W. Sherwood, *The Erosion of Constitutional Safeguards in the Area of Eyewitness Identification*, 30 HOW. L.J. 439, 465 (1987).

67. *See* LOFTUS, *supra* note 21, at 53.

68. ARNOLDS, *see supra* note 34, at § 2.31 (citing HERMANN EBBINGHAUS, MEMORY (1913)). Ebbinghaus's research consisted of himself as a single subject recalling nonsense syllables made of three syllables such as "DAX, COL, or FUP." LOFTUS & DOYLE, *see supra* note 18, at § 3-2(a). Research that has been done since Ebbinghaus has found that recognition testing resulted in only a five percent loss in the first hour, a twenty percent loss in the first day, and a gradual decline thereafter. ARNOLDS, *see supra* note 34, at § 2.31.

69. *See* LOFTUS & DOYLE, *supra* note 18, at § 3-2(a). One study found that recognition of a picture after two hours was 100 percent, while after four months is only fifty-seven percent. *Id.*

70. *See* LOFTUS, *supra* note 21, at 23.

71. *Id.*

72. *Id.*

73. *Id.* Those who viewed the slides for thirty-two seconds identified the correct person fifty-eight percent of the time, while those who viewed the slides for ten seconds identified the correct person forty-seven percent of the time. *Id.*

74. Connie Mayer, *Due Process Challenges to Eyewitness Identification Based on Pretrial Photographic Arrays*, 13 Pace L. Rev. 815, 851 (1994), (citing Harry P. Bahrick, *Memory for People*, reprinted in EVERYDAY MEMORY, ACTIONS, AND ABSENTMINDEDNESS, 27 (J.E. Harris & P.E. Morris eds., 1983)).

recognized, however, that a witness's perception of the length of an event is often inaccurate.[75]

Other issues of perception are relevant in the accuracy of an identification.[76] Visual acuity of the witness, depth perception, darkness adaptation, color blindness, and other visual defects can result in an unreliable eyewitness identification.[77] The witness's line of sight and the amount of lighting in the area should also be considered.[78]

2. Weapon Focus

Stress and anxiety can result in a person narrowing her attention.[79] Although this may be a natural reaction to allow the person to confront what is threatening her, it also results in a decrease in "perceptual scope and acuity."[80] When a crime involves a weapon, witnesses often focus their attention on that weapon.[81] This distracts the witness from other important details of the event and often results in an incorrect eyewitness identification.[82] Research has shown that up to fifty percent of identifications made when a weapon was present during the crime are incorrect.[83]

This inability to remember details also occurs in other highly violent or stressful circumstances.[84] In one study where one half of the subjects watched a non-violent tape, and the other half watched a violent tape, the latter subjects' ability to recall the events in the tape were "significantly worse."[85] In *Cromedy*, for example, D.S. was not attacked by a man with a weapon, but was threatened twice and raped, which may have caused fear

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75. *See* ARNOLDS, *supra* note 34, at § 2.42. In one study, subjects estimated a time interval of one minute had been anywhere between one second and ten minutes. *Id. See also*, LOFTUS & DOYLE, *supra* note 18, at § 2-5.

76. *See* TAYLOR, *supra* note 19, at § 2-1.

77. *Id.*

78. *Id.* at §2-2.

79. *See* LOFTUS, *supra* note 21, at 35.

80. TAYLOR, *see supra* note 19, at 32.

81. *Id. See also* Haber & Haber, *supra* note 21, at 1061-62.

82. *See* Haber & Haber, *supra* note 21, at 1061-62, (citing Loftus et al, *Some Facts about Weapon Focus,* LAW & HUM. BEHAV. 11, 55-62 (1987); Vaughn Tooley et al., *Facial Recognition: Weapon Effect and Attentional Focus*, 17 J. APPLIED SOC. PSYCHOL. 845, 845-59 (1987); Patricia A. Tollestrup et al., *Actual Victims and Witnesses to Robbery and Fraud: An Archival Analysis, in* ADULT EYEWITNESS TESTIMONY (1994)). Scientific research shows when a weapon is present, witnesses are less able to remember details of people at the crime scene, including the person holding the weapon. *Id.* at 1062.

83. *Id.* at 1079.

84. *Id.* at 1062. When an event is "highly dramatic, frightening, violent, or distasteful to the witness," attention will narrow to that part of the event, resulting in the other details of the event being encoded into the witness's memory less completely or not at all. *Id. See also* LOFTUS, *supra* note 21, at 32.

85. *See* LOFTUS, *supra* note 21 at 31.

and reduced her ability to focus on the facial features of her attacker, leading to McKinley Cromedy's misidentification.[86]

3. Witness familiarity and expectations

According to Lawrence Taylor, author of EYEWITNESS IDENTIFICATION, "[p]ersonal expectations will also influence observations."[87] If a witness is unfamiliar with a type of event, such as a crime, a subsequent description of that event is often somewhat inaccurate or even completely wrong.[88] Also, a witness's beliefs and expectations of what might or should happen during an event can result in different descriptions of the same event.[89] If an event deviates from what individuals expect, their understanding of the event may influence their memory.[90] A person then "sees" what she expects to see.[91] For example, a man was shot three times and killed by a fellow hunter.[92] The shooter and another close friend of the deceased individual believed they had seen a deer.[93] However, when a policeman viewed the scene under the same conditions, he could clearly see an object as a human, not a deer.[94] The probable explanation for this is the police officer was expecting to see a man, while the two individuals responsi-

86. State v. Cromedy, 727 A.2d 457, 459 (N.J. 1999).

87. *See* TAYLOR, *supra* note 19, at § 2-3.

88. Haber & Haber, *supra* note 21, at 1063-64. If a witness is not familiar with a type of object or person, fewer details are observed, descriptions of the object or person are difficult to describe, and correct subsequent identifications are less likely. *Id.*

89. *Id. See also* John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 AM. J. CRIM. L. 207, 208 (2001) (citing GORDON W. ALLPORT & LEO POSTMAN, THE PSYCHOLOGY OF RUMOR 104, 111 (1965)). In one study, where individuals observed the same scene of a Caucasian man and an African-American man, with a Caucasian man holding a knife, most individuals (both African-American and Caucasian) incorrectly reported the Caucasian man had held the knife, or that the Caucasian man held the knife but was defending himself when there was no evidence of such. *Id.* at 1063. All of the individuals believed African-American men were more likely to commit crimes than Caucasian men, which suggests their expectation of the event changed how they remembered the event. *Id.*

90. Haber & Haber, *supra* note 21, at 1063-64 (citing FREDERICK C. BARTLETT, REMEMBERING (1932)). During one study in which individuals read descriptions of ceremonies, if the ceremony was different from anything the individual had ever experienced, their later description of the ceremony often altered facts and they did not remember sequences and people that did not make sense to them. *Id.* On the other hand, if the individual read a description of a familiar ceremony, their later description tended to be quite accurate. *Id.*

91. *See* TAYLOR, *supra* note 19, at § 2-3.

92. *See* LOFTUS, *supra* note 21, at 36.

93. *Id.* at 37.

94. *Id.* The individual who was shot had been walking with another friend to a farmhouse nearby to get help as their car had broken down. *Id.* at 36. He then decided that he would try to locate a deer to shoot while his friend got help. *Id.* The men who had remained close to the broken down car were unaware of the deceased's changed plans and believed he was at the farmhouse. *Id.*

ble for the death of their friend were deer hunting and expecting to see a deer.[95]

4. Cross-Racial Identification

A cross-racial identification takes place when an eyewitness of one race identifies a suspect of another race.[96] Cross-racial identifications are more subject to error than if the witness identified a suspect of her own race.[97] This is known as the "own-race" bias.[98] This effect is strongest when a Caucasion witness attempts to identify an African-American subject.[99] "Own-race" bias may be a result of a witness failing to focus on facial features of individuals of another race.[100] The "own-race" bias is unaffected by racial attitudes of the witness or regular exposure to individuals of another race.[101] In reviewing McKinley Cromedy's conviction, the New Jersey Supreme Court held that a special jury instruction is required in appropriate cases where a cross-racial identification is made.[102] Cromedy's conviction may have partially been a result of D.S.'s cross-racial identification.[103]

5. Memory Alterations

When a witness observes an event, a neurological impression becomes "encoded" within the witness's brain.[104] The first report of that event is an independent memory and is typically the most accurate description of the witness's observations.[105] Subsequent influences, including giving detailed and repetitious descriptions of the event, having leading questions

95. *Id.* at 36-37.
96. *See* Rutledge, *supra* note 89, at 211.
97. *Id.* at n.27, (citing Jennifer L. Devenport et al., *Eyewitness Identification Evidence: Evaluating Commonsense Evaluations*, 3 PSYCHOL. PUB. POL'Y. & L. 338, 338 (1997), and Stephanie J. Platz & Harmon M. Hosch, *Cross-Racial/Ethnic Eyewitness Identification: A Field Study*, 18 J. APPLIED SOC. PSYCHOL. 972 (1988)).
98. *See* Rutledge, *supra* note 89, at 211.
99. *Id. See also* Christian A. Meissner & John C. Brigham, *Thirty Years of the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL'Y & L. 3, 15 (2001), finding that eyewitnesses are fifty-six percent more likely to incorrectly identify an individual as someone they have seen before if the individual is of another race.
100. Hadyn D. Ellis et al., *Descriptions of White and Black Faces by White and Black Subjects*, 10 INT'L J. PSYCHOL. 119, 122 (1975).
101. Harvey Gee, *Eyewitness Testimony and CrossRacial Identification*, 35 NEW ENG. L. REV. 835, 843 (2001).
102. State v. Cromedy, 727 A.2d 457, 467 (N.J. 1999).
103. *Id.* at 459.
104. *See* Judges, *supra* note 41, at 240.
105. *See* Haber & Haber, *supra* note 21, at 1065, 1068. "A report of a memory is independent under the following three conditions: a) the witness has not yet spoken with or listened to any other people about what happened; b) the witness is describing the events for the first time; and c) the witness provides the description in the absence of leading questions...." *Id.* at 1065. This memory is often described to officers at the scene of a crime and is often unrecorded. *Id.* at 1068.

posed, and acquiring information from other sources, often taint this memory.[106] As stated earlier, memory of an event is subject to "the forgetting curve," which shows that memory originally declines quickly and then at a more gradual rate, which leave gaps in memory which witnesses often "fill in" if questioned.[107]

"Unconscious transference" is another memory problem.[108] This phenomenon was first recognized by Elizabeth Loftus, a leading researcher in eyewitness identifications.[109] Unconscious transference occurs when a witness identifies an individual because the individual looks familiar.[110] Because the witness had seen the suspect at an earlier time, the familiarity of the person leads the witness's mind to believe the suspect is the perpetrator.[111] There are numerous examples of this phenomenon.[112] McKinley Cromedy's conviction was probably a result of unconscious transference. D.S. did not recognize Cromedy as her attacker in a photograph five days after she was raped, yet she identified Cromedy nearly eight months later.[113] This was probably a result of Cromedy looking familiar to D.S. because earlier she had viewed Cromedy's photograph.[114]

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106. *See id.* at 1066-68. Memory is not similar to that of a video recording that can be replayed. *Id.* at 1067. Changes in memory often happen when a witness is asked about details of an event that were not of importance to the witness, so were not encoded into memory; in effect, the details were not witnessed. *Id.* at 1066. When asked for details, the witness "often adds content and details that 'must have happened . . .'" to make sense of the event. *Id.* Furthermore, research found that by repeatedly describing an event, predictable changes are made, such as leaving out certain details, and adding or altering others. *Id.* at 1067. When asked for a complete description of events, those investigating often do not tolerate responses such as "I don't know," so the witness fills in gaps in memory, creating alterations. *Id.* at 1068. Memory research has shown that witnesses are unaware when they acquire new information regarding an event, and treat the information as that which they observed themselves, and are also unaware that they changed their description of the event as a result of the new information. *Id.* This is referred to as "post-event information." *Id.*

107. *See* Arnolds, *supra* note 34, at § 2.08 for an in-depth discussion of how the mind "fills in the blanks." *See also, supra* notes 67, 104 and accompanying text.

108. *See* Scheck, *supra* note 17, at 57.

109. *Id.*

110. *Id.*

111. LOFTUS & DOYLE, *supra* note 18, at § 4-10.

112. *See* Scheck, *supra* note 17, at 57. Barry Scheck's *Actual Innocence* gives several examples of this phenomenon. *Id.* In one incident, a railroad ticket agent was a victim of an armed robbery. *Id.* The agent picked a local sailor out of a lineup. *Id.* The sailor was at sea at the time of the robbery, so could not have been responsible for the robbery. *Id.* It was later found that the sailor "looked familiar" to the agent because he had bought railroad tickets from the agent on three occasions. *Id.* In another famous example, a university professor staged the crime of a student assaulting a professor. *Id.* The "crime" was witnessed by 141 students who were unaware the situation was staged. *Id.* Twenty-five percent of the witnesses who were later asked to identify the attacker picked a photograph of a student who had been a bystander at the incident, instead of the perpetrator. *Id.* at 58. For further examples of this phenomenon, *see* LOFTUS & DOYLE, *supra* note 18, at § 4-10.

113. State v. Cromedy, 727 A.2d 457, 459 (N.J. 1999).

114. *Id.*

6. Confidence

Confidence by the witness in an eyewitness identification has been shown to be of little significance to accuracy.[115] Confidence can be altered after the identification and is considered to be malleable.[116] Typically, witness confidence of an identification increases with time instead of decreasing.[117] For this reason, defense attorneys are encouraged to discover what the eyewitness's level of confidence was at the time of the identification and to present any changes in confidence to the jury.[118] When a witness's confidence in an identification improves, their description of the details of the event tend to improve as well, although the details of the description are probably "filled in" and inaccurate.[119] Even more troublesome, prosecutors and jurors usually believe that a confident identification is a reliable indicator of a defendant's guilt.[120] Experts in eyewitness testimony have explained that "[f]ew moments are more dramatic than when a courtroom witness, upon prompting from the prosecutor, outstretches an arm, extends a finger, and declares with rock-solid certainty that the accused is the person she saw . . . ."[121] Jurors are just as likely to believe incorrect identification testimony as correct identification testimony if the witness appears confident.[122]

III. EYEWITNESS IDENTIFICATIONS, DUE PROCESS, AND THE COURTS

A. United States Supreme Court Decisions

Courts have not been oblivious to the problems of eyewitness reliability. In the 1967 case of *Stovall v. Denno*, the United States Supreme Court recognized that a defendant's due process rights can be violated as a result of an eyewitness identification.[123] In *Stovall*, the defendant, suspected

115. *See* Haber & Haber, *supra* note 21, at 1084. *See also* Brian Cutler et al., *The Reliability of Eyewitness Identification*, 11 L. & HUM. BEHAV. 233, 234 (1987), *and* Steven Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 PSYCHOL. PUB. POL'Y & L. 817, 819 (1995).

116. *See* Haber & Haber, *supra* note 21, at 1084. How much confidence a witness has in an identification can be altered by: exposure to post-event information such as another witness identifying the same suspect, being asked to justify the identification, or the witness repeatedly answering the same questions. *Id. See also*, Wells & Seelau, *supra* note 17, at 774.

117. LOFTUS & DOYLE, *see supra* note 18, at § 3-12; SOBEL, *see supra* note 37, at § 1:3. *See also* James M. Doyle, *No Confidence: A Step Toward Accuracy in Eyewitness Trials*, 22 CHAMPION 12, 13 (1998).

118. *See* Doyle, *supra* note 117, at 13.

119. *Id.* at 13.

120. *See* Rutledge, *supra* note 89, at 223. In one survey, seventy-five percent of prosecutors and fifty-six percent of jury-eligible citizens believed a confident identification was more accurate. *Id. See also*, Doyle, *supra* note 117, at 12.

121. *See* LOFTUS & DOYLE, *supra* note 18, at § 4-1.

122. *See* Doyle, *supra* note 117, at 12.

123. 388 U.S. 293, 299 (1967).

of murder, was subjected to a show-up.[124] The eyewitness had been stabbed by the perpetrator eleven times and it was unknown whether she would live.[125] As a result, police brought the defendant to the witness's hospital room in handcuffs, where he was identified as the perpetrator.[126] The *Stovall* Court suggested that a defendant's rights are violated when an identification method is "so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law."[127] An unnecessarily suggestive identification is to be determined through the totality of the circumstances.[128]

On the same day *Stovall* was decided, the Court decided *United States v. Wade*.[129] In one of the most referenced quotes regarding eyewitness identifications, the Supreme Court noted that "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."[130] The *Wade* court recognized that a

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124. *Id.* at 295. For a discussion of show-ups, *see supra* notes 33-39 and accompanying text.

125. *Id.*

126. *Id.*

127. *Id.* at 301-02. It should be noted, however, that the Court found that Stovall's due process rights were not violated because the show-up was *necessarily* suggestive as the only eyewitness to the crime was critically injured and was the only person that could exonerate him. *Id.* at 302. Interestingly, the witness did not die and later identified Stovall in-court at the subsequent trial. *Id.* at 295. Also, the key holding in *Stovall* was that in order to protect defendant's due process rights, defendants in pre-trial identifications were guaranteed a right to counsel. *Id.*

128. *Id.* at 302.

129. 388 U.S. 218 (1967).

130. *Id.* at 228. In emphasizing the problems of eyewitness identifications, the Supreme Court stated that:

> But the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial . . . . Mr. Justice Frankfurter once said: 'What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent–not due to the brutalities of ancient criminal procedure.' The Case of Sacco and Vanzetti 30 (1927). A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. A commentator has observed that 'the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor – perhaps it is responsible for more such errors than all other factors combined.' [Citation omitted]. Suggestion can be created intentionally or unintentionally in many subtle ways. And the dangers for the suspect are particularly grave when the

witness's pre-trial identification typically determines the identification at trial, as witnesses are "not likely to go back on [their] word later on."[131] Because lineups have risks of suggestion, and often seal the fate of the defendant at trial, the Court held that Wade was entitled to counsel at the post-indictment lineup.[132] The Court held the pre-trial identification should be suppressed if the defendant was not allowed counsel.[133] However, the Court also held the later in-court identification should be suppressed only if the Government could not prove "by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification."[134] In other words, the subsequent in-court identification must be based on an independent source.[135] To determine if an in-court identification is based on an independent source, the Court considered factors such as the witness previously identifying a different suspect, the failure of the witness to identify the defendant previously, and the length of time between the identification and the crime.[136]

After several intervening cases, the United States Supreme Court decided *Neil v. Biggers*.[137] In *Biggers*, the defendant was identified in a show-up.[138] The witness had not identified any other suspects despite regu-

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> witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest.

Id. at 228-29.

131. *Id.* at 229.

132. *Id.* at 236-37.

133. *See id.* at 239-40.

134. *Id.* The Court recognized an earlier identification could "taint" the later identification, but subjected it to the test established in *Wong Sun v. United States*, 371 U.S. 471, 488 (1963), whether the illegal actions of police resulted in obtaining the evidence in question, or whether the primary taint had been purged to make the subsequent evidence distinguishable. *Id.* at 241.

135. *Wade*, 388 U.S. at 242.

136. *Id.* at 241. Other factors listed were "the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description . . . the identification by picture of the defendant prior to the lineup . . . [and] facts which, despite the absence of counsel, are disclosed concerning the conduct of the lineup. *Id.*

137. 409 U.S. 188 (1972). Intervening cases which are not of significant concern for this comment include: Simmons v. United States, 390 U.S. 377, 384 (1968) (holding that pretrial photographic identifications do not violate due process when admitted in trial unless the "procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification"); Foster v. California, 394 U.S. 440, 442 (1969) (reiterating that due process is violated if identification procedures are unnecessarily suggestive and create a situation "conducive to irreparable mistaken identification," under the totality of the circumstances); Coleman v. Alabama, 399 U.S. 1, 5-6 (1970) (finding that a tainted pretrial identification does not automatically taint an in-court identification). Also, decided on the same day as *Wade* and *Stovall* was Gilbert v. California, 388 U.S. 263, 272 (1967) (holding that before allowing an in-court identification, a trial court must first determine whether the in-court identification is based on a prior illegal identification or based on an independent source).

138. *Biggers*, 409 U.S. at 195.

larly being shown individuals in her home and at the police station and regularly viewing photographs.[139]

The perpetrator in *Biggers* had grabbed the witness in a poorly-lit doorway, and using a butcher knife as persuasion, threw her to the kitchen floor.[140] Hearing screams, the witness's twelve-year old daughter was awakened, entered the kitchen and also began screaming.[141] The perpetrator then walked the witness at knifepoint to a nearby wooded area and raped her for approximately fifteen minutes to half an hour.[142] Testifying that she could see her assailant clearly as the moon was full, the witness described the perpetrator as "between 16 and 18 years old and between five feet ten inches and six feet tall, as weighing between 180 and 200 pounds, and as having a dark brown complexion."[143]

The Court held that Biggers's due process rights had not been violated because there was "no substantial likelihood of misidentification."[144] In so holding, the Court modified a two-part due process analysis which it had introduced in the earlier cases of *Stovall* and *Wade*.[145] First, to violate a defendant's due process, the identification must be unnecessarily suggestive.[146] An identification is unnecessarily suggestive if there is not an emergency or exigent circumstances that made a suggestive technique unavoidable.[147] The defendant bears the burden of proving the identification was

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139. *Id.* at 194-95.
140. *Id.* at 193.
141. *Id.* at 194.
142. *Id.*
143. *Id.*
144. *Id.* at 201. The Court found there was "no substantial likelihood of misidentification," because the victim had spent a sufficient amount of time with her attacker, the lighting had not impaired her vision, she was observant because she was the "victim of one of the most personally humiliating of all crimes," her description of the perpetrator was adequate, and she was confident Biggers was her attacker. *Id.* at 200-201. Although the identification took place nearly eight months after the crime, the victim's testimony was reliable for the above reasons and because she had not identified other individuals as the perpetrator despite seeing numerous live and photographic lineups. *Id.*
145. *Id.* at 199. The Court later stated, "*Biggers* is not properly seen as a departure from the past cases, but as a synthesis of them." Manson v. Brathwaite, 432 U.S. 98, 107 n.9 (1977). *But see infra* note 149-50 and accompanying text.
146. *Biggers* 409 at 199. In photographic identifications, factors of unnecessary suggestiveness can include the amount of photographs, the way the photographs are presented by police, and the details of the photographs, such as background color. United States v. Wiseman, 172 F.3d 1196, 1208 (10th Cir. 1999); Bernal v. People, 44 P.3d 184, 191-192 (Colo. 2002). Also, "The police do not have to provide a photo array containing only 'exact replicas' of the defendant's picture; all that is required is that the 'photos are matched by race, approximate age, facial hair, and a number of other characteristics.'" *Bernal*, 44 P.3d at 191-192.
147. Manson v. Brathwaite, 432 U.S. 98, 109 (1977).

unnecessarily suggestive.[148] Second, *if* the identification was unnecessarily suggestive, the burden shifts to the Government to prove under the totality of the circumstances that the identification is reliable and therefore not a due process violation.[149] *Biggers* diverged from *Stovall* and *Wade* by focusing on whether the identification was *reliable* instead of focusing on whether the identification was unnecessarily suggestive.[150]

In the totality of the circumstances test, *Biggers* gave five factors that indicate the reliability of an identification: "[1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness' degree of attention, [3] the accuracy of the witness' prior description of the criminal, [4] the level of certainty demonstrated by the witness at the confrontation, and [5] the length of time between the crime and the confrontation."[151] If the totality of the circumstances does not present a substantial likelihood of irreparable misidentification, the evidence should not be suppressed.[152]

Manson v. Brathwaite, decided four years after *Biggers*, declared: "Reliability is the linchpin in determining the admissibility of identification testimony."[153] The *Brathwaite* Court reinforced *Biggers*, stating the introduction of an unnecessarily suggestive pre-trial identification at trial does not violate due process if the identification is otherwise sufficiently reliable.[154] The Court also reiterated that the *Biggers* factors should be considered in determining when an identification is reliable and pointed out the factors should be weighed against the "corrupting effect of the suggestiveness."[155] Three policy reasons were given for adopting a totality of the circumstances approach and not allowing a per se exclusion of an unnecessarily suggestive identification: 1) reliable and relevant evidence would be kept from the jury; 2) a totality approach would still have some deterrent effect on police behaviors; and 3) administration of justice would not be served as

148. Howard v. Bouchard, 405 F.3d 459, 469 (6th Cir. 2005); *Bernal*, 44 P.3d at 191. If the defendant does not meet the burden, further inquiry is not needed; the evidence is allowed. *Id.*

149. *Bernal*, 44 P.3d at 191; United States v. Sanchez, 24 F.3d 1259, 1261-62 (10th Cir. 1994)

150. *Biggers*, 409 U.S. at 199.

151. *Id.* at 199-200.

152. *See id.* at 201.

153. 432 U.S. 98, 114 (1976).

154. *Id.* at 106.

155. *Id.* at 114.

the guilty may go free.[156] The Court then applied the *Biggers* factors and concluded that Brathwaite's due process rights had not been violated.[157]

In dissent, Justices Marshall and Brennan argued that the protections given in *Wade* and *Stovall* against erroneous eyewitness identifications had been significantly eroded.[158] While not surprised by the decision, Justice Marshall wrote, "[I]t is still distressing to see the Court virtually ignore the teaching of experience embodied in those decisions and blindly uphold the conviction of a defendant who may well be innocent."[159] The dissent was disturbed that the Court had reinterpreted due process for criminal defendants by no longer enforcing fundamental fairness standards, and instead "rel[ied] on the probable accuracy of a challenged identification."[160] In other words, the Court found the defendant was likely guilty, and thus allowed the introduction of a fundamentally-flawed identification procedure.[161] According to Justice Marshall, strong evidence of guilt is only relevant during a harmless error review, not a due process review.[162]

B. Federal Circuit Courts

Currently, federal circuit courts follow the two-prong due process analysis to determine when an unnecessarily suggestive identification should be allowed or suppressed.[163] All circuit courts also appear to apply the five

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156. *Id.* at 111-12. This does not seem to agree with William Blackstone's famous maxim that it is "[b]etter that ten guilty persons escape, than that one innocent suffer." Alexander Volokh, *Aside: n Guilty Men*, 146 U. PA. L. REV. 173, 174 (1997) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *358).

157. *Brathwaite*, 432 U.S. at 114-16. The Court concluded Glover, the witness in a narcotics transaction, had adequate opportunity to view Brathwaite as he was within two feet of the defendant for two or three minutes, and there was adequate lighting. *Id.* at 114. Glover, as a African-American police officer, also had specialized police training which increased his degree of attention, was identifying a person of the same race, and was paying attention to detail as he was aware he may have to testify at a later trial. *Id.* at 115. Glover gave an accurate description, which included Brathwaite's race, height, build, color, and style of hair, and facial features (high cheekbones). *Id.* Glover's certainty of identification was very high, and the photo identification took place only two days after the crime occurred. *Id.* The Court also noted that Glover was allowed to view the photograph alone at his leisure, erasing any coercive pressures of identification. *Id.* at 116. *See also supra* note 151 and accompanying text.

158. *Brathwaite, 432 U.S.* at 118 (Marshall, J., dissenting).

159. *Id.* (Marshall, J., dissenting).

160. *Id.* at 128 (Marshall, J., dissenting).

161. *See id.* (Marshall, J., dissenting).

162. *Id.* (Marshall, J., dissenting). Justice Marshall wrote, "By importing the question of guilt into the initial determination of whether there was a constitutional violation, the apparent effect of the Court's decision is to undermine the protection afforded by the Due Process Clause." *Id.* (Marshall, J., dissenting). Justice Marshall then suggested that the state courts give more protection to defendants under state constitutions than the United States Supreme Court was giving. *Id.* at 128-29 (Marshall, J., dissenting).

163. United States v. Henderson, 320 F.3d 92, 100 (1st Cir. 2003); Dunnigan v. Keane, 137 F.3d 117, 128 (2d Cir. 1998); Virgin Islands v. Riley, 973 F.2d 224, 228 (3d Cir. 1992); Ghiz v. Bordenkircher, 519 F.2d 759, 761-62 (4th Cir. 1975); United States v. Honer, 225

Biggers factors, but they are split on whether the Supreme Court intended the *Biggers* factors to be exclusive.[164] At least seven circuit courts disagree whether the factors should also include corroborating evidence of general guilt (First, Fourth, Seventh, and Eighth Circuits), or only include corroborating evidence of the identification itself (Second, Third, and Fifth Circuits).[165] While this circuit split has existed for at least a decade, the Supreme Court has not yet resolved the issue.

The Second Circuit appears to give the most forceful argument for disallowing evidence of general guilt to support the admission of unreliable eyewitness identifications. In *Raheem v. Kelly*, Jehan Abdur Raheem was convicted of robbing a local bar and murdering one of the bar's owners.[166] The perpetrator of the crime had been described as "dressed very neat, brown skin, had a black leather coat and cap," and also "about 5'8," 165 or 170 pounds, and perhaps 27-30 years of age."[167] One bartender and four patrons of the bar witnessed part or all of the crime.[168] Two witnesses identified a photograph of a man who had been in prison at the time of the robbery as the perpetrator.[169] Twenty days after the crime, a lineup was constructed in which another man, Lindsay Webb, was the suspect and Raheem was used as a distractor since there were not enough police officers available who matched Webb's appearance.[170] Raheem wore his own black leather coat and was identified by the same two witnesses who had erroneously identi-

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F.3d 549, 552-53 (5th Cir. 2000); Howard v. Bouchard, 405 F.3d 459, 469 (6th Cir. 2005); United States v. Rogers, 387 F.3d 925, 937-38 (7th Cir. 2004); Mann v. Thalacker, 246 F.3d 1092, 1100 (8th Cir. 2001); United States v. Plunk; 153 F.3d 1011, 1021 (9th Cir. 1998), *amended*, 161 F.3d 1195 (9th Cir. 1998); United States v. Bredy, 209 F.3d 1193, 1195 (10th Cir. 2000); United States v. Diaz, 248 F.3d 1065, 1102 (11th Cir. 2001); United States v. Washington, 12 F.3d 1128, 1134 (D.C. Cir. 1994).

164. *See supra* note 151, *infra* note 165 and accompanying text.

165. Allowing corroborative evidence of general guilt: *See* United States v. Wilkerson, 84 F.3d 692, 695 (4th Cir. 1996); United States v. Rogers, 73 F.3d 774, 778 (8th Cir. 1996); Gilday v. Callahan, 59 F.3d 257, 270 (1st Cir. 1995); United States v. Napoli, 814 F.2d 1151, 1156 (7th Cir. 1987). Only allowing corroborative evidence of the reliability of the identification: Kennaugh v. Miller, 289 F.3d 36, 47-48 (2d Cir. 2002); Raheem v. Kelly, 257 F.3d 122, 144 (2d Cir. 2001); United States v. Rogers, 126 F.3d 655, 659 (5th Cir. 1997); United States v. Emanuele, 51 F.3d 1123, 1128 (3d Cir. 1995).

166. 257 F.3d 122, 124 (2d Cir. 2001). Raheem was formerly known as John Whitaker. *Id.* The robbery involved three men, but Raheem was identified as having shot the bar owner. *Id.* at 125.

167. *Id.* at 125-26. The black coat was a distinctive three-quarter-length leather item that appeared to be expensive, not a common item of clothing. *Id.* at 125-26, 136.

168. *Id.* at 125.

169. *Id.* at 126.

170. *Id.* Raheem was in custody at the 77th Precinct at the time of the lineup as he was suspected in the murder of Harriet Gathers. *Id.*

fied an earlier suspect.[171] Both witnesses testified that the black leather coat Raheem wore was a largely influential part of their identification.[172]

On habeas review, even though the district court "agreed that the lineup was impermissibly suggestive, it concluded that the identifications should be held reliable because there was other evidence of Raheem's guilt."[173] The Second Circuit reversed after applying the five *Biggers* factors, finding that the identifications were unnecessarily suggestive and had no independent reliability.[174] The *Raheem* court stated that to find an identification reliable based partially or wholly on corroborative evidence of general guilt would "confuse the due process inquiry with harmless-error analysis."[175] The court also pointed out that if the identification was erroneously admitted because of evidence of general guilt, the issue would be resolved under harmless-error review.[176] In emphasizing the irrationality of using evidence of general guilt in finding an identification reliable, the Second Circuit stated, "[E]ven where there was irrefutable evidence of the defendant's guilt, if an identification were made by a witness who, it transpired, was not even present at the event, we could hardly term the identification reliable."[177] The *Raheem* court found its decision consistent with *Manson v. Brathwaite*'s requirement of fundamental fairness in identifications.[178] Incidentally, the court noted it did not find other evidence of Raheem's guilt overwhelming.[179]

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171. *Id.*

172. *Id.* at 126-27.

173. *Id.* at 131. The United States District Court for the Eastern District of New York found three factors compelling of Raheem's general guilt: first, Raheem's possession of the problematic black leather coat, second, Raheem's confession, and third, Raheem's other murder conviction. *Id.* at 132. Raheem's "confession" occurred under questionable circumstances: the detective had "'put [Raheem's] tail in the soup'" over the Gathers murder he was suspected of; Raheem was told he could talk to the detective without counsel as his counsel was only required for the Gathers case; and the detective was the only witness to the unwritten confession. *Id.* at 128. Consequently, the New York Court of Appeals reversed the trial court's decision to allow the confession. *Id.* at 129. Interestingly, the district court then chose to use the confession as reason to allow the suggestive identification. *Id.* at 132.

174. *Id.* at 141-43.

175. *Id.* at 140. In criminal proceedings, "the due process clause requires that the procedures used to determine the guilt or innocence of the defendant comport with 'fundamental ideas of fair play and justice.'" Michael T. Fisher, *Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process than the Bottom Line*, 88 COLUM. L. REV. 1298, 1299 (1988) (quoting *In Re* Oliver, 333 U.S. 257, 282 (1948)). Conversely, when a procedure does not concern a substantial right, "[a]ppellate courts use harmless error analysis to determine whether a given error in a lower court proceeding is serious enough to require reversal of a criminal conviction. The harmless error inquiry asks whether the result of the proceeding would have been the same had the error not occurred." *Id.* at 1301.

176. Raheem, 257 F.3d at 141.

177. *Id.* at 140.

178. *Id.*

179. *Id.* at 141-42. The court found Raheem's possession of the black coat unconvincing as evidence of his guilt since police had not bothered to test it for blood residue, even though

The Second Circuit acknowledged the split between the other federal circuit courts on the issue.[180] It noted that the Fourth and Seventh Circuit courts relied on corroborative evidence of general guilt in allowing an identification in addition to *Biggers* factors, while the Fifth and Third Circuit courts did not.[181] The circuit split is more prevalent than the Second Circuit revealed, however, with at least seven circuit courts involved in the split.[182]

The Third Circuit has warned that only factors related to the reliability of the identification should be relevant in a due process analysis.[183] That court has urged using evidence of guilt to corroborate the reliability of an identification is contrary to *Brathwaite*: "Independent evidence of culpability will not cure a tainted identification procedure, nor will exculpatory information bar admission of reliable identification testimony."[184] Similarly, in *United States v. Rogers*, the Fifth Circuit held that corroborative evidence of a defendant's guilt should not be used to find an unnecessarily suggestive identification reliable.[185] Only a brief explanation was given for this decision; the admission of the identification rested on whether the circumstances of the identification were reliable, not whether the identification was more likely to be correct.[186]

However, the Fifth Circuit appears to have not followed at least one of its own earlier decisions.[187] Ten years earlier, in *Mullen v. Blackburn*, the Fifth Circuit had allowed an identification to be admitted based on the defendant's probable guilt, stating that the "[Defendant's] first claim is that the eyewitness identifications made by three eyewitnesses at trial should have been excluded from evidence. He concedes, however, that he was apprehended while committing the robbery and was, in fact, guilty as charged. Thus, he effectively concedes that the identifications were reliable."[188] Following similar reasoning, in *United States v. Wilkerson*, the Fourth Circuit stated in addition to the five *Biggers* factors, courts "may also consider other

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the gunshot wound had produced large amounts of blood spatter. *Id.* at 142. Also, the detective's testimony regarding Raheem's confession was not "compelling" as the detective had not called in a stenographer or even another witness to hear the conversation, had not asked Raheem for a written statement, or even asked Raheem to initial the detective's notes. *Id.*

180. *Id.* at 140.

181. *Id.*

182. *See supra* note 165.

183. United States v. Emanuele, 51 F.3d 1123, 1128 (1995).

184. *Id.*

185. 126 F.3d 655, 659 (1997).

186. *Id.*

187. *Compare* Mullen v. Blackburn, 808 F.2d 1143, 1145 (5th Cir. 1987), *and Rogers*, 126 F.3d at 659.

188. *Id.* at 1145. Mullen's confession is corroborating evidence of his guilt, not corroborating evidence of his identification.

evidence of the defendant's guilt when assessing the reliability of the in-court identification."[189]

While not giving helpful reasoning for their decisions, three other circuit courts agree that corroborative evidence of general guilt can result in an identification being reliable.[190] In one case, the Seventh Circuit found an identification reliable because it was proven the defendant drove a getaway car.[191] In another, the Eighth Circuit found an identification reliable when two other witnesses had identified the defendant.[192] In *Gilday v. Callahan*, the First Circuit admitted an eyewitness's testimony regarding an identification was weak, but still found it reliable.[193] The *Gilday* court reasoned the identification was reliable because the defendant confessed to buying a car and gun used in the homicide and robbery, and also confessed to profiting from the robbery and stealing a license plate for a vehicle used during the crime.[194]

C. State Court Decisions

The large majority of state courts follow the guidelines given in *Biggers* and *Brathwaite* and generally apply the *Biggers* factors.[195] At least four state courts, Kansas, Massachusetts, New York, and Utah, have diverged from the *Biggers* and *Brathwaite* analysis of when an identification should be found reliable.[196] These courts have been more willing to disagree with *Biggers* factors if they appear scientifically outdated.[197]

In *State v. Ramirez*, the Utah Supreme Court gave more protection under its state constitution to defendants who had been subjected to eyewitness identifications.[198] That court recognized that the *Biggers* factors were flawed, stating, "'several of the criteria listed by the Court are based on assumptions that are flatly contradicted by well-respected and essentially unchallenged empirical studies . . . the time has come for a more empirically sound approach.'"[199] The *Ramirez* court followed the *Biggers* totality of the circumstances test but rejected the *Biggers* factor of confidence.[200] The

189. 84 F.3d 692, 695 (4th 1996).
190. *See infra* notes 191-93 and accompanying text.
191. United States *ex rel.* Kosik v. Napoli, 814 F.2d 1151, 1156-57, 1161 (7th Cir. 1987).
192. United States v. Rogers, 73 F.3d 774, 778 (8th Cir. 1996).
193. 59 F.3d 257, 270 (1st Cir. 1995).
194. *Id.*
195. Lisa Steele, *Identification Law Reform*, 29 CHAMPION 24 (Apr. 2005).
196. State v. Hunt, 69 P.3d 571, 576 (Kan. 2003); Commonwealth v. Johnson, 650 N.E.2d 1257, 1264-65 (Mass. 1995); People v. Adams, 423 N.E.2d 379, 384 (N.Y. 1981); State v. Ramirez, 817 P.2d 774, 780 (Utah 1991).
197. *See Ramirez*, 817 P.2d 774, 780-81.
198. *Id.*
199. *Id.* at 780 (citing State v. Long, 721 P.2d 483, 491-92 (Utah 1986)).
200. *Id.* at 781.

court found that the factor of confidence had not been scientifically proven to create reliability and adopted an additional unique factor—suggestibility of the identification.[201] In modifying the *Biggers* factors, the Utah Supreme Court stated the identification would then be consistent with the due process guarantees of its state constitution.[202] Kansas adopted the *Ramirez* identification analysis in *State v. Hunt*.[203]

Massachusetts and New York have both held that unnecessarily suggestive identifications are per se inadmissible and have rejected the *Biggers/Brathwaite* totality of the circumstances test.[204] In *Commonwealth v. Johnson*, the Massachusetts Supreme Court found Justice Marshall's dissent in *Brathwaite* to be convincing.[205] The *Johnson* court found unnecessarily suggestive procedures should be per se admissible because "eyewitness testimony is often hopelessly unreliable."[206] Similarly, in *State v. Adams*, the Court of Appeals of New York held that a defendant's due process rights would be violated if an unnecessarily suggestive identification were not per se excluded.[207]

State courts also seem to disagree on whether corroborative evidence of general guilt should be included as a *Biggers* factor.[208] Most decisions do not analyze why this evidence was or was not used in addition to the five *Biggers* factors, but simply apply the factors.[209] Thus, these courts' decisions must be inferred from the facts and outcome of the case.[210]

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201. *Id.* The Utah Supreme Court listed five factors which would determine the reliability of an identification:

> (1) The opportunity of the witness to view the actor during the event; (2) the witness's degree of attention to the actor at the time of the event; (3) the witness's capacity to observe the event, including his or her physical and mental acuity; (4) whether the witness's identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and (5) the nature of the event being observed and the likelihood that the witness would perceive, remember and relate it correctly.

Id.

202. *Id.* at 780.

203. 69 P.3d 571, 577 (Kan. 2003). In adopting this analysis, the *Hunt* court made clear that its "acceptance should not be considered as a rejection of the *Biggers* model, but, rather, as a refinement in the analysis." *Id.* at 576.

204. Commonwealth v. Johnson, 650 N.E.2d 1257, 1264-65 (Mass. 1995). *See also* People v. Adams, 423 N.E.2d 379, 384 (N.Y. 1981).

205. 650 N.E.2d at 1262.

206. *Id.*

207. *See Adams*, 432 N.E.2d at 383-84.

208. *See infra* notes 211 and 223 and accompanying text.

209. *See infra* notes 211 and 223 and accompanying text.

210. *See infra* notes 211 and 223 and accompanying text.

The Tennessee Court of Appeals at Nashville made a straightforward argument to allow corroborating evidence of general guilt in *State v. Meeks*.[211] After stating and applying the five *Biggers* factors in an aggravated robbery and aggravated sexual assault battery case, the court noted that Tennessee "routinely" recognized a sixth factor that *Biggers* had never mentioned.[212] This factor was "whether an eyewitness identification is supported by corroborating evidence."[213] In other words, the Tennessee courts consider corroborative evidence of general guilt in determining whether an eyewitness's identification is reliable. *Meeks* gives no explanation of why Tennessee courts decided it was appropriate to add a sixth factor of corroborative evidence to the *Biggers* test.[214] The corroborating evidence considered in *Meeks* was minimal; a mask similar to the one worn by the perpetrator was found in the defendant's home.[215] Because there was a lack of corroborating evidence of general guilt and the reliability of the identification was not supported by other *Biggers* factors, the case was reversed and remanded for a new trial, excluding the eyewitness identification.[216]

Conversely, other states have only considered evidence that indicates reliability of the eyewitness identification.[217] These courts have strictly followed the *Biggers* factors and have not added as "sixth factor" of evidence of general guilt.[218] In *State v. Luqman*, the defendant was convicted of aggravated robbery.[219] A Brink's company armored truck driver had been robbed at gunpoint; one of the robbers had been shot in the right shoulder by another Brink's employee.[220] Two hours after the incident, both Brink's

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211. 1994 Tenn. Crim. App. LEXIS 654.

212. *Id.* ¶ 24. The eyewitness identification in *Meeks* was based on a photographic array of six pictures in which the defendant's picture was the only one with a measuring instrument indicating he was six feet tall. *Id.* ¶ 8. The two witnesses had only given police the perpetrator's height as one of the robbers wore a ski mask and the other wore a toboggan mask covering his entire face except for his eyes. *Id.* ¶ 2. Furthermore, the identification was made more than eight months after the crime had occurred and after the suspects had been detained for a different robbery. *Id.* ¶¶ 2, 4.

213. *Id.* (citing Bennett v. State, 530 S.W.2d 511, 515 (Tenn. 1975); State v. Sanders, 842 S.W.2d 257 (Tenn. Crim. App.1992); State v. Brown, 795 S.W.2d 689, 694-95 (Tenn. Crim. App. 1990); State v. Blanks, 668 S.W.2d 673 (Tenn. Crim. App. 1984); State v. Mosley, 667 S.W.2d 767, 770 (Tenn. Crim. App. 1983); Sloan v. State, 584 S.W.2d 461, 468 (Tenn. Crim. App. 1978)).

214. *Meeks*, 1994 Tenn. Crim. App. LEXIS 654, ¶ 27.

215. *Id.* ¶ 25.

216. *Id.* ¶ 27.

217. *See* State v. Luqman, 1985 Ohio App. LEXIS 7422; State v. Sadler, 511 P.2d 806 (Idaho 1973); Gavin v. State, 891 So.2d 907 (Ala. Crim. App. 2003); Bernal v. State, 44 P.3d 184 (Colo. 2002); Commonwealth v. Engram, 686 N.E.2d 1080 (Mass. App. Ct. 1997).

218. *See supra* note 217.

219. *Luqman*, 1985 Ohio App. LEXIS 7422, ¶ 4.

220. *Id.* ¶ 2. John Armstrong, a part-time Brink's truck driver and full-time police officer, shot the perpetrator twice when he heard Jimmy Turner say he was "hit" over the radio transmitter. *Id.* ¶¶ 2-3. Because the perpetrator had a bulletproof vest on, only one bullet penetrated the skin. *Id.*

employees and another witness were brought to a local hospital to identify a man with a gunshot to his right shoulder.[221] All three witnesses identified Luqman as the perpetrator.[222] Despite this damning corroborative evidence, the Ohio Court of Appeals did not consider the gunshot wound when deciding whether the eyewitness identification was reliable.[223]

IV. FAILURES AND SOLUTIONS: THE UNRELIABILITY OF *NEIL V. BIGGERS* RELIABILITY FACTORS

Neil v. Biggers held both pre-trial and in-court identifications should be allowed despite being unnecessarily suggestive if the identification is found to be reliable by applying the *Biggers* factors.[224] The United States Supreme Court has also declared that when deciding whether an eyewitness identification should be excluded, "The standard, after all, is that of fairness as required by the Due Process Clause of the Fourteenth Amendment."[225] However, as the dissent in *Brathwaite* and others stated, the Court's refusal to exclude unnecessarily suggestive identifications reveals the Court was not particularly concerned with the fairness of the process.[226] The Court has instead held that the *reliability* of an identification will prevent an identification from being excluded.[227] Justice Marshall suggested that instead of fundamental fairness, the Court is relying "on the probable accuracy of a challenged identification," or an ascertainment of "whether the defendant was probably guilty."[228]

Considering the numerous factors that can influence an eyewitness identification, it is reasonable for courts to adopt a rule, similar to New York's and Massachusetts', that unnecessarily suggestive identifications violate a defendant's right to fundamental fairness and are inadmissible per se.[229] The failure to exclude a procedurally suggestive identification has been compared to allowing a coerced or involuntary confession.[230] A per se exclusion of unnecessarily suggestive identifications could alleviate many dangers posed to defendants from eyewitness identifications.

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221. *Id.* ¶ 3.
222. *Id.*
223. *See id.* ¶ 6-7. However, the court found that the identification should be allowed as reliable after applying the *Biggers* factors. *Id.* ¶ 7.
224. 409 U.S. 188, 199-200; *Brathwaite*, 432 U.S. at 114.
225. *Id.* at 113.
226. *Id.* at 128 (Marshall, J., dissenting). *See also*, SOBEL, *supra* note 37, at § 3:1.
227. *See Brathwaite*, 432 U.S. at 114.
228. *Id.* at 128.
229. Benjamin E. Rosenberg, *Rethinking the Right to Due Process in Connection With Pretrial Identification Procedures: An Analysis and a Proposal*, 79 KY. L. J. 259, 297 (1991). *See also* Commonwealth v. Johnson, 650 N.E.2d 1257, 1264 (Mass. 1995); People v. Adams, 423 N.E.2d 379, 384 (N.Y. 1981).
230. TAYLOR, *supra* note 19 at § 8-1. Taylor stated, "This is analogous to a Supreme Court ruling that a confession is admissible if it is deemed truthful – regardless of the fact that it has been beaten out of the defendant." *Id.*

The United States Supreme Court considered adopting this per se rule in *Brathwaite*.[231] Scholars urged the per se rule was necessary to prevent a "'serious miscarriage of justice,'" as eyewitness identification can be unreliable and this would deter police from using suggestive procedures.[232] However, the Court chose not to follow such a rigid approach which it believed frustrated instead of promoted justice in that reliable and relevant evidence was not presented to a jury and resulted "in the guilty going free."[233] This is a valid concern; an eyewitness identification may be reliable despite an error made in the identification technique.[234] For this reason, even eyewitness experts have agreed that to proscribe all unnecessarily suggestive identifications in all cases may indeed be too rigid a rule.[235]

Instead of adopting a per se rule, a modified version of the *Biggers* test would restore fundamental fairness by excluding eyewitness identifications in appropriate instances, if the test is applied correctly.[236] The following sections contain changes necessary to return fundamental fairness to eyewitness identifications in the courts.

A. Weigh Biggers *Factors Against the Corrupting Effect of the Unnecessarily Suggestive Procedure*

What appears to have stripped many defendants of their right to due process and fundamental fairness is a failure to follow *Brathwaite*'s instruction to weigh the *Biggers* factors against "the corrupting effect of the suggestive identification itself."[237] If an identification is found to be unnecessarily suggestive, courts typically apply the *Biggers* factors and do not consider the identification procedure's corrupting effects.[238] This failure to consider the procedure's corrupting effects has been recognized as "a serious omission."[239] Due to this omission, lower courts have allowed unnecessarily suggestive identifications except in the most outrageous cases.[240] One author

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231. Manson v. Brathwaite, 432 U.S. 98, 109-10 (1977).
232. *Id.* at 111-12.
233. *Id.* at 112-13.
234. For example, if a witness is kidnapped and able to view the perpetrator for six hours, a later identification that involves unnecessarily suggestive techniques would probably still result in a reliable identification. State v. Orlando, 634 A.2d 1039, 1044 (N.J. 1993). Under the *per se* rule, this identification would be excluded as unnecessarily suggestive.
235. *See* LOFTUS, *supra* note 21, at 187-88.
236. As stated previously, Kansas and Utah have already done so. State v. Hunt, 69 P.3d 571 (Kan. 2003); State v. Ramirez, 817 P.2d 774 (Utah 1991).
237. Manson v. Brathwaite, 432 U.S. 98, 114 (1977). *See also* Rosenberg, *supra* note 229, at 284.
238. *See* Rosenberg, *supra* note 229, at 284.
239. *Id.* Rosenberg noted that the Supreme Court stated and scientific evidence has proven that a procedure which is suggestive can affect a subsequent identification's reliability. *Id.*
240. *Id.* at 284 n.121, (citing Seidman, *Soldiers, Martyrs and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315, 328, n.43 (1984)).

remarked that the Supreme Court should have known this would be the lower court's interpretation of the *Biggers/Brathwaite* decisions.[241]

The effect of suggestive procedures must be weighed against factors making the identification reliable. Courts should recognize that show-ups are highly suggestive, and if used, the effect of this procedure should be less easily overcome by factors which suggest the identification was reliable.[242] Likewise, simultaneous as opposed to sequential lineups must be acknowledged as influential to a witness's identification decisions.[243] Courts should realize administrator actions can be unnecessarily suggestive to a witness, whether the actions were intentional or not.[244] Courts must be aware that lineup composition can be particularly suggestive to a witness trying to identify a person who resembles the perpetrator.[245] The use of any one of the above procedures typically should justify the exclusion of an eyewitness identification.[246] However, the use of two or more of the above factors should result in a per se exclusion of the identification as the suggestiveness of the procedures clearly outweigh any *Biggers* factors that suggest reliability. This would not only result in fewer unreliable identifications being allowed at trial, but also could influence law enforcement to change lineup procedures.[247]

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241. *Id.* "'[T]he Supreme Court should have anticipated that courts generally would use every conceivable method to avoid finding due process violations except in the most outrageous situations.'" *Id.* (quoting Grano, *Kirby, Biggers and Ash: Do Any Constitutional Safeguards Remain After the Danger of Convicting the Innocent?* 72 MICH. L. REV. 717, 780 (1974)).

242. *See supra* notes 33-40 and accompanying text.

243. *See supra* notes 41-50 and accompanying text.

244. *See supra* notes 51-55 and accompanying text.

245. *See supra* notes 56-63 and accompanying text.

246. Lisa Steele, a criminal defense appellate attorney suggested that courts should have an "[e]xplicit standard for weighing suggestiveness and reliability, weighted in favor of suppressing unreliable identifications made after police failed to follow 'best practice' methods, such as the Department of Justice Guide, unless the prosecution proves that the witness' identification is clearly otherwise reliable." *See* Steele, *supra* note 195, at 25.

247. Law enforcement has received some guidance on how to make eyewitness identifications more reliable. *See* U.S. DEPARTMENT OF JUSTICE, *supra* note 50, at 9. Suggestions have included using sequential rather than simultaneous lineups, only using show-ups when necessary, giving instructions that a suspect may or may not be present, and using fillers that are similar to the description of the perpetrator. *Id.* at 19, 29. However, while these guidelines by the United States Department of Justice were given to create uniformity in practice and prevent mistaken identifications, the Guide "is not a legal mandate . . . ." *Id.* at 2. *See also* Steele, *supra* note 195, at 24 (listing eleven suggested police practices that could reduce mistaken identifications).

B. *Recognize* Biggers *Factors Must Change With Current Scientific Research*

Scientific evidence of what makes an eyewitness's identification more or less accurate is constantly evolving.[248] *Neil v. Biggers* was decided in 1972.[249] Much of the relevant literature on the problems of eyewitness identifications was not published until the 1970s and thereafter.[250] Elizabeth Loftus, one of the leading psychologists on the subject, did not publish her first article on the dangers of eyewitness identifications until 1974.[251] As a result, the factors the Court gave in *Biggers* to support the reliability of an eyewitness identification are currently under-inclusive and outdated. One law review article stated only two of the *Biggers* factors—opportunity to observe the criminal and the length between the crime and the identification—could be scientifically linked to the accuracy of the identification, while the other three factors "have received mixed support by researchers."[252]

While not directly specifying whether the five *Biggers* factors were an exhaustive list, it appears that the Court meant for other factors to be considered when it stated, "the factors to be considered in evaluating the likelihood of misidentification *include* . . . ."[253] In the *Biggers* decision, the Court considered another factor indicating reliability of the eyewitness identification: the victim's failure to identify other suspects.[254] However, most lower

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248. *See* Rosenberg, *supra* note 229, at 280-81.

249. 409 U.S. 188 (1972).

250. Lawrence Taylor's book, *Eyewitness Identification* was first published in 1982. *See* TAYLOR, *supra* note 19. Elizabeth Loftus's first book, *Eyewitness Testimony* was originally published in 1979. *See* LOFTUS, *supra* note 21. A. Daniel Yarmey's book, *The Psychology of Eyewitness Testimony* was first published in 1979. *See* YARMEY, *supra* note 31. Gary L. Wells, another well known psychologist who is an expert in eyewitness testimony, first published a book Loftus entitled, *Eyewitness Testimony: Psychological Perspectives* in 1984. GARY L. WELLS & ELIZABETH A. LOFTUS, EYEWITNESS TESTIMONY (1984).

251. ELIZABETH A. LOFTUS & KATHERINE KETCHAM, WITNESS FOR THE DEFENSE 7 (1991). This article was entitled, "Reconstructing Memory: The Incredible Eyewitness," and appeared in the December issue of *Psychology Today*. *Id.* Since the publication of this article, Loftus has consistently been called upon by lawyers to give her opinion or be an expert witness in cases that involve eyewitness identifications. *Id.*

252. John C. Brigham et al., *Disputed Eyewitness Identification Evidence: Important Legal and Scientific Issues*, 36 CT. REV. 12, 17 (1999).

253. *Biggers*, 409 U.S. at 199-200 (emphasis added).

254. *Biggers*, 409 U.S. at 201. The Court stated that:

> There was, to be sure, a lapse of seven months between the rape and the confrontation. This would be a seriously negative factor in most cases. Here, however, the testimony is undisputed that the victim made no previous identification at any of the showups, lineups, or photographic showings. Her record for reliability was thus a good one, as she had previously resisted whatever suggestiveness inheres in a showup.

Id.

state and federal courts continue to apply only the five factors given in *Biggers* or add in only one other factor: corroborative evidence of general guilt.[255] Because the *Biggers* factors were not an exhaustive list, courts should be flexible in using factors that correlate to current scientific research, similar to Kansas' and Utah's modified version of the *Biggers* test.[256] Factors should be added or subtracted as scientific evidence in the area shifts and grows.

C. Current Factors Courts Should Consider

Biggers included the adequate opportunity for a witness to view a perpetrator as a factor indicating an identification is reliable.[257] Viewing time does improve reliability; thus courts should continue to consider this factor.[258] As Loftus and Doyle point out, "It seems obvious that the longer a person has to look at something, the better his memory will be."[259] Unfortunately, it is unclear how long is long enough to make an identification more accurate as experts have not given any set time frame.[260] Visual ability to view the crime should also be considered.[261]

The Supreme Court also included in the *Biggers* factors the accuracy of the eyewitness's original description of the perpetrator.[262] There is little evidence supporting how this factor makes an identification reliable. However, it is obvious if a witness previously described the perpetrator as being between the ages of twenty-eight and thirty-eight and weighing between 160 and 170 pounds, an identification of a person who is seventeen years old and weighing approximately 100 pounds should be recognized as unreliable.[263]

The time elapsed between the crime and the identification is also a *Biggers* factor of reliability that courts should consider.[264] Some courts have correctly recognized if an identification occurs months after a crime, this negatively impacts the reliability of an identification.[265] However, each of

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255. *See supra* notes 208-23 and accompanying text.
256. State v. Hunt, 69 P.3d 571, 576-77 (Kan. 2003); State v. Ramirez, 817 P.2d 774, 780-81 (Utah 1991).
257. *Biggers*, 409 U.S. at 199-200.
258. *See supra* notes 70-75 and accompanying text.
259. *See* LOFTUS & DOYLE, *supra* note 18, at § 2-5.
260. *See id.* Complicating the matter is a witness's failure to accurately describe the amount of time they were able to view the perpetrator. *Id.* Witnesses typically overestimate time during complex events. *Id.*
261. *See* TAYLOR, *supra* note 19, at § 2-1.
262. *Biggers*, 409 U.S. at 199-200.
263. People v. Fuller, 71 A.D.2d 589 (N.Y. 1978). *See also* SOBEL, *supra* note 37, at § 6:7.
264. *Biggers*, 409 U.S. at 199-200.
265. *Id.* at 201; United States v. Maldonado-Rivera, 922 F.2d 934, 976 (2d Cir. 1990); United States v. Rundell, 858 F.2d 425, 427 (8th Cir. 1988). *See also*, SOBEL, *supra* note 37, at § 6:13.

these courts allowed the identification despite the lessened reliability.[266] The "forgetting curve" and other scientific studies demonstrate that the sooner the identification is made, the more likely it is accurate.[267] Thus, courts should consider a prompt identification to be more reliable than an identification after a lengthy period of time.

While not discussed in *Biggers*, courts should consider several psychological factors that affect the accuracy of an eyewitness identification. It has become clear that cross-racial identifications are less reliable than identifications of individuals of the same race.[268] The *Cromedy* court recognized cross-racial identifications are less reliable than same race identifications, and other courts should do the same to protect defendants' rights.[269] Memory alterations, such as unconscious transference, should also be considered in determining that an identification is less reliable as this significantly affects witness memory.[270]

D. Current Factors Courts Should Not Consider

A *Biggers* factor that courts should not rely on to make an eyewitness identification more reliable is the witness's degree of attention.[271] Contrary to scientific evidence, Justice Blackmun appeared to have come to the conclusion that a stressful situation would result in a heightened degree of attention.[272] It may be tempting for a court to place more weight on a police officer's identification because the officer's attention would seem more focused, but studies have shown and at least one court has held that a police identification is not more reliable than another.[273] Courts should consider whether the crime was one which produced stress and anxiety and whether there was a weapon present or being used.[274] These factors decrease the eyewitness's attention and make an identification less reliable, thus courts typically should not equate a witness's degree of attention with reliability.[275]

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266. *Biggers*, 409 U.S. at 201; *Maldonado-Rivera*, 922 F.2d at 976; *Rundell*, 858 F.2d at 427.
267. *See* LOFTUS, *supra* note 21, at 53. *See also* Mayer, *supra* note 74, at 850-51.
268. *See supra* notes 96 – 103 and accompanying text.
269. State v. Cromedy, 727 A.2d 457, 467 (N.J. 1999).
270. *See* SCHECK, *supra* note 17, at 57.
271. *Biggers*, 409 U.S. at 200-201.
272. *See* Moore v. Illinois, 434 U.S. 220, 234-35 (1977) (Blackmun, J., concurring). Justice Blackmun stated, "One need only observe another person's face for 10 seconds by the clock . . . . To the resisting woman, the 10 to 15 seconds would seem endless." *Id.* (Blackmun, J., concurring).
273. *See* YARMEY, *supra* note 31 at 159. It has also been suggested that police are more apt to make interpretive errors in perceiving people. *Id.* at 160. *See also* State v. Williams, 698 P.2d 678, 685 (Ariz. 1985) (*en banc*).
274. *See* LOFTUS, *supra* note 21, at 33-36.
275. *Id.*

Biggers also included witness confidence as one of the five factors that show reliability in an unnecessarily suggestive identification.[276] However, as explained previously, a witness's confidence has little to no bearing on the accuracy of an identification and should not be considered.[277] While it has not been suggested that confidence decreases the accuracy of an identification, scientific evidence has shown that a confident identification has no increase in accuracy.[278] Of psychologists surveyed, eighty-seven percent stated they would testify in a court proceeding that confidence does not indicate accuracy.[279] Also, the effect of witness confidence on a jury can be dangerous in that most juries believe a confident witness is more accurate, yet confidence is not scientifically linked to accuracy of an identification.[280] Several courts have held it is reversible error to not allow expert testimony regarding the lack of correlation between witness confidence and accuracy.[281] For a court to use confidence as a factor to increase the reliability of an eyewitness identification is simply outdated and wrong.

Although it may indicate an identification is correct, corroborative evidence of general guilt does not increase the reliability of an eyewitness identification itself and should not be considered by courts.[282] A defendant's guilt has no bearing on the reliability of an identification, yet courts have become confused on the issue and have used this evidence to proclaim an identification reliable.[283] In *Brathwaite*, the Court implied it would be inappropriate to consider corroborative evidence in determining whether an identification is reliable.[284] As one commentator stated, this is similar to allowing an illegal search or seizure or an illegally obtained confession simply because all other evidence points towards the defendant's guilt.[285]

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276. *Biggers*, 409 U.S. at 200.

277. *See* supra notes 115–122 and accompanying text.

278. *See supra* note 115.

279. *See* Doyle, *supra* note 117, at 13.

280. See *supra* notes 115-22 and accompanying text.

281. *See* Brigham et al., *supra* note 252 at 18 (citing United States v. Jordan, 924 F. Supp. 443 (W.D.N.Y. 1996); United States v. Stevens, 935 F.2d 1380 (3d Cir. 1991); State v. Chapple, 660 P.2d 1208 (Ariz. 1983); People v. Campbell, 847 P. 2d 228 (Colo. App. 1992); People v. McDonald, 690 P.2d 709 (Cal. 1984); Weatherred v. State, 963 S.W.2d 115 (Tex. Ct. App. 1998)), *vacated and remanded*, 975 S.W.2d 323 (Tex. Crim. App. 1998).

282. *See* Rosenberg, *supra* note 229, at 287-88.

283. *Id. See also supra* notes 164-94, 208-23 and accompanying text for federal court and state court analysis.

284. Manson v. Brathwaite, 432 U.S. 98, 116 (1977). The *Brathwaite* court stated, "*Although it plays no part in our analysis*, all this assurance as to the reliability of the identification is hardly undermined by the facts that respondent was arrested in the very apartment where the sale had taken place, and that he acknowledged his frequent visits to that apartment. *Id.* (emphasis added).

285. *See* Rosenberg, *supra* note 229, at 287. Rosenberg wrote that this reasoning "puts the cart before the horse" as a court should ensure a reliable identification points towards a defendant's guilt, not ensure a defendant's guilt points toward a reliable identification. *Id.*

V. CONCLUSION

Numerous factors can result in a faulty eyewitness identification. In trying to address this issue, the United States Supreme Court listed five factors to ensure an unnecessarily suggestive identification was nonetheless reliable. Unfortunately, the five *Biggers* factors do not correspond with scientific research completed since the case was decided. Until the Court revisits this issue, to ensure fundamental fairness to defendants lower courts must take a proactive approach. State courts may choose to adopt a *per se* approach and exclude all unnecessarily suggestive identifications. In the interests of justice, however, the better approach is to modify the *Biggers* test. In doing so, courts must follow *Brathwaite*'s command to exclude the identification if factors assuring reliability are outweighed by the corrupting effect of the identification. Courts also must recognize that a factor that may be considered significant in the reliability of an identification today may be proven to be insignificant or untrustworthy tomorrow due to scientific and psychological research; courts must be willing to change their analysis accordingly. The dangers inherent in cross-racial identifications and psychological influences on perception and memory are currently two factors that courts should consider. Courts should not confuse due process with harmless error review by applying corroborative evidence of general guilt as a sixth *Biggers* factors as this does not make an identification more reliable. Finally, courts must acknowledge that the *Biggers* test is a totality of the circumstances test and should not reserve exclusion for the most outrageous cases. Modifications to *Biggers* are necessary to ensure innocent defendants like McKinley Cromedy will not be mistakenly convicted and to restore fundamental fairness to the adversary process.

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