Chapter 25

Motions To Suppress Identification Testimony

§ 25.01 INTRODUCTION AND OVERVIEW

In the vast majority of delinquency cases, the prosecution proves the respondent's identity as the perpetrator through an in-court identification of the respondent: The complainant or an eyewitness testifies that the youth seated next to defense counsel is the person who committed the crime. (The exceptions are cases in which the perpetrator's identity is proved through scientific evidence (such as fingerprints or serology evidence), circumstantial evidence (such as the respondent's possession of the fruits of the crime), the respondent's confession, and/or the testimony of a turncoat accomplice.)

Although some cases may involve a respondent who is a longstanding acquaintance of the complainant or eyewitness, most identifications in delinquency cases are based upon the complainant's or eyewitness's momentary observation of a stranger. Frequently, that identification has been shaped (or at least affected) by the witness's participation in one or more of the following police identification procedures:

(a) A "lineup" in which the witness observes the respondent standing among a group (usually ranging from seven to ten persons) and is asked to select the perpetrator.

(b) A "show-up" in which the witness is shown only the respondent and asked whether the respondent was the perpetrator.

(c) A "photographic identification procedure" in which the witness either is shown a group of photographs (a "photo array" usually consisting of five to ten "mug shots" or a "mug-book" – an entire book of mug shots) and asked to select the perpetrator or is shown a single photograph and asked whether the person depicted was the perpetrator.

As the Supreme Court has recognized, a "witness' recollection of the stranger can be distorted easily by the circumstances or by later actions of the police," *Manson v. Brathwaite,* 432 U.S. 98, 112 (1977), and "'[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor – perhaps it is responsible for more such errors than all other factors combined.'" *United States v. Wade,* 388 U.S. 218, 229 (1967). *See also Perry v. New Hampshire*, 565 U.S. 228, 245 (2012) ("'the annals of criminal law are rife with instances of mistaken identifications'" (quoting *Wade*, 388 U.S. at 228)).

The Court has established three separate constitutional doctrines regulating the use of identification testimony, each of which provides a basis for suppressing identification testimony by the complainant and any eyewitnesses:

(a) *The due process doctrine:* Testimony concerning pretrial identifications at police-staged confrontations that are "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" are constitutionally inadmissible, *Simmons v. United States,* 390 U.S. 377, 384 (1968) (dictum). *Accord*, *Perry v. New Hampshire*, 565 U.S. at 238-40 (dictum); *State v. Dickson*, 322 Conn. 410, 141 A.3d 810 (2016). See §§ 25.02-25.05 *infra.*

(b) *The Sixth Amendment doctrine:* Police-staged lineups and show-ups held after the right to counsel has attached may be unconstitutional if they were conducted in the absence of counsel for the respondent. See § 25.06 *infra.*

(c) *The Fourth Amendment doctrine:* Testimony regarding a lineup or other custodial identification made as a result of an illegal arrest or detention is inadmissible. See § 25.07 *infra*.

State-law doctrines may provide additional bases for objecting to identification testimony. See § 25.08 *infra.*

In some jurisdictions, statutes or court rules provide for a pretrial hearing on a defense motion to suppress identification testimony. At such a hearing the prosecutor ordinarily presents the police officer who conducted the identification procedure and the complainant or eyewitness who made the identification. (In some jurisdictions the prosecutor presents only the police officer, taking advantage of the admissibility of hearsay evidence in a suppression hearing (see § 22.03(e) *supra*) to have the officer testify to the witness's identification as well as the witness's account of his or her ability to observe the perpetrator.) In any pretrial identification suppression hearing at which an identifying witness will testify, it is advisable for the defense to waive the respondent's presence during the witness's testimony. See § 22.03(b) *supra.*

In other jurisdictions defense objections to identification testimony or motions to suppress it are litigated in a mid-trial hearing or a series of *voir dire* examinations of the prosecution's identification witnesses. In jury trials it "may often be advisable [and,] . . . [i]n some circumstances . . . may be constitutionally necessary" to conduct such hearings outside the presence of the jury, *Watkins v. Sowders,* 449 U.S. 341, 349 (1981), although there is no "*per se* [constitutional] rule compelling such a procedure in every case." *Id.* Here, too, counsel should arrange that the respondent be removed from the courtroom during the *voir dire* proceedings litigating the admissibility of identification testimony.

This chapter examines the various doctrines governing suppression or exclusion of identification testimony. Procedural requirements governing suppression motions and strategic considerations in drafting the motions are discussed in Chapter 7. Techniques for conducting a suppression hearing are discussed in Chapter 22.

Part A. Due Process Grounds for Suppressing an Identification as Unreliable

§ 25.02 THE DUE PROCESS STANDARD

Police-staged identification procedures that are unduly suggestive may impair the reliability of the resulting identification and render it inadmissible. *Foster v. California,* 394 U.S. 440 (1969); *Finch v. McCoy*, 914 F.3d 292 (4th Cir. 2019). The focus of the Due Process standard for admissibility of identification testimony is the interplay between (1) actions by law enforcement agents that may undermine the reliability of an identification, and (2) the susceptibility of each identifying witness's testimony to distortion by those actions. As in the case of confessions (see § 24.03 *supra*), unreliability alone – unaffected by any governmental behavior that could contribute to it – will not support suppression or exclusion of identification testimony. Some state activity conducing to inaccuracy is necessary. *See Perry v. New Hampshire*, 565 U.S. 228, 248 (2012), discussed in § 25.05 *infra.* Once that activity is shown, "[i]t is the reliability of identification evidence that primarily determines its admissibility." *Watkins v. Sowders,* 449 U.S. 341, 347 (1981); *Manson v. Brathwaite,* 432 U.S. 98, 113-14 (1977). *See Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2559-60 (2018) (per curiam) (dictum).

Under current Due Process doctrine, the admissibility of an identification is determined by weighing "the corrupting effect of the suggestive identification" against factors showing the identification to be reliable notwithstanding the suggestiveness of the police-staged confrontation. *Manson v. Brathwaite,* 432 U.S. at 114. *See also Neil v. Biggers,* 409 U.S. 188, 199 (1972) (the "central question" is whether "the identification procedure was reliable even though the confrontation procedure was suggestive"). In gauging the reliability of the identification, "[t]he factors to be considered . . . include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation." *Manson v. Brathwaite,* 432 U.S. at 114. *See also Neil v. Biggers,* 409 U.S. at 199-200; *Simmons v. United States,* 390 U.S. 377, 385 (1968). If a suggestive police identification procedure created a "very substantial likelihood of irreparable misidentification," then the court must suppress both the pretrial identification, *Neil v. Biggers,* 409 U.S. at 197 (dictum), and any in-court identifications tainted by the constitutionally defective pretrial identification, *see Coleman v. Alabama,* 399 U.S. 1, 4-6 (1970) (dictum).

Thus the prevailing federal Due Process inquiry has two distinct components. The court determines, first, whether any police identification procedure was suggestive. If it was suggestive, then the distorting influence of the procedure is weighed against considerations indicating that the identification is nevertheless reliable. *See*, *e.g.*, *State v. Thamer*, 777 P.2d 432, 435 (Utah 1989) ("We apply a two-step test to determine whether a pre-indictment or pre-information photo array is so suggestive that the subsequent admission of an in-court identification violates the due process clause. First, we must determine whether there was a pretrial photographic identification procedure used which was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. . . . Second, if the photo array is impermissibly suggestive, then the in-court identification must be based on an untainted,

independent foundation to be reliable."); *State v. Novotny*, 297 Kan. 1174, 1180-83, 307 P.3d 1278, 1284-86 (2013) (essentially the same). Section 25.03 *infra* examines the factors involved in assessing the suggestiveness of a police identification procedure, and § 25.04 examines the reliability factors. Section 25.05 explores the possible arguments that a respondent is entitled to suppression of an unreliable identification even when there was no police suggestiveness.

Of course, the state courts are free to construe their state constitutions as establishing a more protective due process standard than the federal test for admission of identification testimony. *See, e.g.*, *State v. Martinez*, 2021-NMSC-002, 478 P.3d 880 (N.M. 2020) ("In light of the significant, recurrent, and deeply troubling problems caused by unnecessarily suggestive, police-arranged identification procedures, we take this opportunity to consider our state constitutional jurisprudence as it relates to the admission of this type of powerful yet problematic evidence in New Mexico courts. We ultimately hold that the *Manson* test does not satisfy due process under . . . [the due process clause] of the New Mexico Constitution . . . ." *Id*. at 886. "Under the per se exclusionary rule we adopt herein, if a witness makes an identification of a defendant as a result of a police identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification, the identification and any subsequent identification by the same witness must be suppressed." *Id*. at 905.); *Young v. State*, 374 P.3d 395 (Alaska 2016) (construing the state constitution to "depart from *Manson v. Brathwaite* and the Alaska cases that relied on it as the touchstone" because "[d]evelopments in the science related to the reliability of eyewitness identifications, and courts' responses to those developments, have significantly weakened our confidence in the *Brathwaite* test as a tool for preventing the admission of unreliable evidence at trial, and therefore its capacity for protecting the due process rights afforded by the Alaska Constitution" (*id*. at 413); "we are convinced that the *Brathwaite* test does not adequately assess the reliability of eyewitness identifications and thus allows the admission of very persuasive evidence of doubtful reliability" (*id*. at 416); the court replaces "the [*Neil v.*] *Biggers* factors" with a list that reflects the "scientific literature" on "the factors that can affect the reliability of eyewitness identifications" (*id*. at 417); the court also holds that a defendant's presentation of "'some evidence of suggestiveness'" is sufficient to require "an evidentiary hearing on the issue," that "a defendant need not show that a procedure was 'unnecessarily suggestive' in order to get a hearing," and that "[a]t the hearing the State must present evidence that the identification is nonetheless reliable" (*id*. at 427); the court further holds that "[i]f eyewitness identification is a significant issue in a case, the trial court should issue an appropriate jury instruction that sets out the relevant factors affecting reliability." (*id*. at 428)); *State v. Henderson*, 208 N.J. 208, 287 n.10, 288-93, 27 A.3d 872, 919 n.10, 919-922 (2011) (construing the state constitution's due process clause to remedy the "shortcomings" of the Supreme Court's *Manson v. Braithwaite* standard by adopting a "new framework" that "allows judges to consider all relevant factors that affect reliability in deciding whether an identification is admissible; that is not heavily weighted by factors that can be corrupted by suggestiveness; that promotes deterrence in a meaningful way; and that focuses on helping jurors both understand and evaluate the effects that various factors have on memory."); *People v. Adams,* 53 N.Y.2d 241, 423 N.E.2d 379, 440 N.Y.S.2d 902 (1981) (rejecting the "totality of the circumstances" analysis of *Neil v. Biggers* and *Manson v. Brathwaite* in favor of the Supreme Court's earlier analytical approach,

which looked first at the suggestiveness of the identification and, upon finding it unduly suggestive, excluded the identification unless the prosecution could show that the identification had an "independent source"); *Commonwealth v. Johnson*, 420 Mass. 458, 463, 472, 650 N.E.2d 1257, 1260, 1265 (1995) (same as *People v. Adams*, *supra*: "reject[ing] *Brathwaite*" on state constitutional grounds and "adher[ing] to the stricter rule of per se exclusion previously followed by the Supreme Court and first set forth in the *Wade-Gilbert-Stovall* trilogy"); *State v. Lawson*, 352 Or. 724, 740, 761-62, 291 P.3d 673, 685, 696-97 (2012) ("Based on [an] . . . extensive review of the current scientific research and literature," the state supreme court takes "judicial notice of the data contained in those various sources as legislative facts" to revise the state-law "test governing the admission of eyewitness testimony." *Inter alia*, the burden rests on "the state as the proponent of the eyewitness identification" to "establish all preliminary facts necessary to establish admissibility of the eyewitness evidence"; then, "[i]f the state satisfies its burden," the burden shifts to the defendant to establish that, "although the eyewitness evidence is otherwise admissible, the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence."); *see also Dennis v. Secretary, Pennsylvania Department of Corrections*, 834 F.3d 263, 336-40 (3d Cir. 2016) (en banc) (McKee, C.J., concurring) (discussing the above-cited opinions of the New Jersey and Oregon Supreme Courts as examples of state courts' "creat[ion] [of] new procedures and evidentiary frameworks that minimize the risks associated with erroneous eyewitness identifications"); and see generally § 7.09 *supra*.

§ 25.03 SUGGESTIVENESS OF POLICE IDENTIFICATION PROCEDURES

There are a number of useful reference works that will assist counsel to identify the suggestive features in any particular police-staged identification confrontation. *See* NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION (National Academies Press 2014); BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011); ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY (1996); ELIZABETH LOFTUS, JAMES M. DOYLE & JENNIFER E. DYSART, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL (4th ed. 2007); NATHAN R. SOBEL, EYEWITNESS IDENTIFICATION – LEGAL AND PRACTICAL PROBLEMS (2d ed. 2002); PATRICK M. WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES (1965); A. DANIEL YARMEY, THE PSYCHOLOGY OF EYEWITNESS TESTIMONY (1979); Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND. L. REV. 451 (2012); John B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIM. 825, 841-43 (2010); Radha Natarajan, Note, *Racialized Memory and Reliability: Due Process Applied to Cross-Racial Eyewitness Identifications*, 78 N.Y.U. L. REV. 1821 (2003); Gary L. Wells & Elizabeth A. Olson, *The Other Race Effect in Eyewitness Identification*, 7 (No. 1) PSYCHOLOGY, PUBLIC POLICY, AND LAW 230 (2001); Fredric D. Woocher, Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification,* 29 STAN. L. REV. 969 (1977); *cf.* Samuel R. Gross & Michael Shaffer, *Exonerations in the United States 1989-2012: Report by the National Registry of Exonerations*, *available at*

https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf (June 2012), pp. 40-56; Cory S. Clements, *Perception and Persuasion in Legal Argumentation: Using Informal Fallacies and Cognitive Biases to Win The War of Words*, 2013 B.Y.U. L. REV. 319. *See also Dennis v. Secretary, Pennsylvania Department of Corrections*, 834 F.3d 263, 314-45 (3d Cir. 2016) (en banc) (McKee, C.J., concurring) (documenting and analyzing factors that undermine the reliability of eyewitness identifications); *United States v. Nolan*, 956 F.3d 71, 75 (2d Cir. 2020) (same: "[e]yewitness identification testimony is notoriously prone to error"); *Bey v. Superintendent Greene SCI*, 856 F.3d 230, 240 & nn.50-51 (3d Cir. 2017) ("The scientific community has understood for decades that eyewitness identifications that are certain and confident are not necessarily accurate. . . . Rather, a witness may honestly hold beliefs about what he or she saw that are distorted, inaccurate, or even completely wrong."); *Commonwealth v. Gomes*, 470 Mass. 352, 369-76, 22 N.E.3d 897, 910-16 (2015) (discussing five principles of eyewitness identification that "we determine to have achieved a near consensus in the relevant scientific community and therefore are 'so generally accepted' that it is appropriate that they now be included in a revised model jury instruction regarding eyewitness identification," and "also summariz[ing] the research that informed our conclusions as to each generally accepted principle"); *Commonwealth v. Bastaldo*, 472 Mass. 16, 18, 32 N.E.3d 873, 877 (2015) (supplementing the court's decision in *Gomes*, *supra*, by further discussing cross-racial and cross-ethnic identifications, and holding that "[i]n criminal trials that commence after the issuance of this opinion, a cross-racial instruction should always be included when giving the model eyewitness identification instruction, unless the parties agree that there was no cross-racial identification," and that trial judges have the "discretion to include a cross-ethnic eyewitness identification instruction in appropriate circumstances"); *People v. Boone*, 30 N.Y.3d 521, 529-30, 535-36, 91 N.E.3d 1194, 1198-99, 1202-03, 69 N.Y.S.3d 215, 219-20, 223-24 (2017) ("In light of our discussion of the cross-race effect, which has been accepted by a near consensus in the relevant scientific community of cognitive and social psychologists, and recognizing the very significant part that inaccurate identifications play in wrongful convictions, we reach the following holding: in a case in which a witness's identification of the defendant is at issue, and the identifying witness and defendant appear to be of different races, a trial court is required to give, upon request, during final instructions, a jury charge on the cross-race effect, instructing (1) that the jury should consider whether there is a difference in race between the defendant and the witness who identified the defendant, and (2) that, if so, the jury should consider (a) that some people have greater difficulty in accurately identifying members of a different race than in accurately identifying members of their own race and (b) whether the difference in race affected the accuracy of the witness's identification." ¶ Such an instruction is needed because "[t]here is . . . a significant disparity between what the psychological research shows and what uninstructed jurors believe." ¶ "Expert testimony on the cross-race effect is not a precondition of a jury charge on the subject."); *State v. Henderson*, 208 N.J. 208, 27 A.3d 872 (2011) (a comprehensive discussion of the dangers of unreliability of eyewitness identification, summarizing the scientific literature on the subject, and specifically requiring a cautionary instruction on cross-racial identifications whenever such identifications are at issue); *People v. Lemcke*, 11 Cal. 5th 644, 486 P.3d 1077, 278 Cal. Rptr. 3d 849 (2021) (suspending the portion of California's pattern jury instruction on identification testimony which

advises jurors that in evaluating eyewitness identification testimony they should consider, as a factor, how certain the witness was of his or her identification; this opinion also provides a wide-ranging discussion of eyewitness-identification problems, including a comprehensive canvass of the empirical studies and judicial decisions on the subject of the lack of correlation between certainty and reliability.); *State v. Martinez*, 2021-NMSC-002, 478 P.3d 880 (N.M. 2020), summarized in § 25.02 *supra* (an exhaustive opinion collecting the empirical literature and legal materials that document the fallibility of eyewitness identification testimony). The following subsections discuss recurring features of identification procedures that *judicial opinions* have recognized as suggestive. Counsel should emphasize these when they are present but should also consult the social-science literature cited above to document other factors that tend to make identifications unreliable.

A model for best practices in staged identification proceedings is set out in Louisiana Code of Criminal Procedure, Title V-a (articles 251-253), signed into law on May 23, 2018, and constitutes a valuable resource for defense counsel as illustrating state-of-the-art understanding of how these proceedings should be conducted. It requires agencies administering identification procedures to adopt policies designed to reduce erroneous eyewitness identifications and to enhance the reliability and objectivity of such identifications. All agencies must either adopt the model policy recommended by the Louisiana Sheriff's Executive Management Institute or draft their own policies based on "[c]redible field, academic, or laboratory research on eyewitness memory." LA. CODE CRIM. PRO. art. 253(B)(1)(a). The policies must include, *inter alia*, the following information regarding evidence-based practices:

> "(a) Procedures for selecting photograph and live lineup filler photographs or participants to ensure that the photographs or participant:
>
> > "(i) Are consistent in appearance with the description of the alleged perpetrator.
> >
> > "(ii) Do not make the suspect noticeably stand out.
>
> "(b) Instructions given to a witness before conducting a photograph or live lineup identification procedure shall include a statement that the person who committed the offense may or may not be present in the procedure.
>
> "(c) Procedures for documenting and preserving the results of a photograph or live lineup identification procedure, including the documentation of witness statements, regardless of the outcome of the procedure.
>
> "(d) Procedures for administering a photograph or live lineup identification procedure to an illiterate person or a person with limited English language proficiency.
>
> "(e) For a live lineup identification procedure, if practicable, procedures for assigning an administrator who is unaware of which member of the live lineup is the suspect in the case or alternative procedures designed to prevent opportunities to influence the witness.
>
> "(f) For a photograph identification procedure, procedures for assigning an administrator who is capable of administering a photograph array in a blind manner or in a blinded manner consistent with other proven or supported best

practices designed to prevent opportunities to influence the witness."

Id., art. 253(B)(2). The policies must "[p]rovide [(i)] that a witness who makes an identification based on a photograph or live lineup identification procedure be asked immediately after the procedure to state, in the witness's own words, how confident the witness is in making the identification" and (ii) that these witness statements be documented and preserved. *Id*., art. 253(B)(3). "A video record of identification procedures shall be made or, if a video record is not practicable, an audio record shall be made. If neither a video nor audio record are practicable, the reasons shall be documented in writing, and the lineup administrator shall make [and preserve] a full and complete written record of the lineup . . . ." *Id*., art. 253(F). Noncompliance with the procedures is not alone grounds for exclusion of identification testimony but "[e]vidence of failure to comply . . . (1) [m]ay be considered by the . . . court in adjudicating motions to suppress an eyewitness identification" and (2) [m]ay be admissible in support of any claim of eyewitness misidentification . . . ." *Id*., art. 253(H).

In 2020 the Minnesota Legislature amended the State's statutes to provide a similar, although less detailed, set of requirements fully effective on February 1, 2020. MINN. STAT. ANN. § 626.8433. California enacted similar legislation in 2018, effective January 1, 2020. CAL. PENAL CODE § 859.7. Counsel challenging eyewitness identifications can point to the increasing legislative and administrative recognition of the need for meticulous procedures to assure reliability. *See* Thomas D. Albright & Brandon L. Garrett, *The Law and Science of Eyewitness Evidence*, *available at:* https://ssrn.com/abstract=3675055; *2019 Report of the United States Court of Appeals for the Third Circuit Task Force on Eyewitness Identifications,* 92 TEMPLE L. REV. 1 (2019).

§ 25.03(a) Show-ups

The Supreme Court has recognized that show-up identification procedures, in which the accused is exhibited to the witness in a one-on-one confrontation, are inherently suggestive. *See, e.g., United States v. Wade,* 388 U.S. 218, 234 (1967) ("[i]t is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police"); *Stovall v. Denno,* 388 U.S. 293, 302 (1967) (dictum) ("[t]he practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned").

Notwithstanding the inherent suggestiveness of show-ups, the Court has sustained a show-up in the victim's hospital room against due process challenge when the use of this procedure was "imperative" because the witness was so gravely wounded that it was impossible to "kn[o]w how long . . . [the witness] might live." *Stovall v. Denno,* 388 U.S. at 302. Under these circumstances the Court found that the show-up was not *"unnecessarily* suggestive," *id.* (emphasis added); "the police followed the only feasible procedure," *id.* Several lower courts have similarly sustained immediate, on-the-scene show-ups as justified by the need to find the perpetrator rapidly. However, show-ups will not be approved when the lapse of time between the

crime and the show-up rendered it unnecessary to employ the inherently suggestive show-up procedure. *See, e.g., People v. Cruz*, 129 A.D.3d 119, 122, 125, 10 N.Y.S.3d 214,218, 220 (N.Y. App. Div., 1st Dep't 2015) (a show-up which took place "approximately one hour after the 911 telephone call had been placed" was unnecessarily suggestive because there were no "exigent circumstances warranting a showup identification": "The 55 year old complainant, though bruised and visibly shaken, was not suffering from any life threatening wounds that would have made her otherwise unable or unavailable to make an identification at a later time or at the precinct where she was already located."); *People v. Brown,* 121 A.D.2d 733, 504 N.Y.S.2d 457 (N.Y. App. Div., 2d Dep't 1986) (a show-up which was "conducted an hour after the crime was committed" was not justified by "'exigent circumstances'" or a showing that "it would have been unduly burdensome . . . 'to form some kind of lineup'"); *People v. Knox*, 170 A.D.3d 1648, 1649-50, 96 N.Y.S.3d 811, 812-13 (N.Y. App. Div., 4th Dep't 2019) (suppressing a show-up identification as insufficiently """justified by exigency or temporal and spatial proximity [to the crime]""" because the police had already obtained an identification of the suspect by the complainant prior to the challenged show-up (with an eyewitness), and "[t]he People have proffered no reason that a lineup identification procedure would have been unduly burdensome" given that the show-up occurred "approximately 90 minutes after the crime, about five miles from the scene of the crime").

The inherent suggestiveness of a show-up is exacerbated by the police officers' use of procedures that:

(a) provide the witness with additional reasons for believing that the single person being shown is the perpetrator, *see, e.g., Velez v. Schmer,* 724 F.2d 249 (1st Cir. 1984) (the police used suggestive language: "'This is him, isn't it?'"); *Styers v. Smith,* 659 F.2d 293 (2d Cir. 1981) (a show-up at the police station after a police officer told the victim that he was leaving to pick up the robbery suspects); *People v. Adams,* 53 N.Y.2d 241, 248-49, 423 N.E.2d 379, 382, 440 N.Y.S.2d 902, 905 (1981) ("[s]howing the suspects together also enhanced the possibility that if one of them were recognized the others would be identified as well . . . [and] permitting the victims as a group to view the suspects . . . increased the likelihood that if one of them made an identification the others would concur"); *People v. Buckery*, 130 A.D.3d 640, 641, 12 N.Y.S.3d 291, 292 (N.Y. App. Div., 2d Dep't 2015) (before the show-up of the defendant and three others for a robbery committed by four people, a police officer "walked up to the complainant, holding the wallet [which had been "recovered from one of the suspects other than the defendant"], and . . . the complainant identified it immediately before being asked by the police whether he recognized any of the suspects"); *State v. Moore*, 343 S.C. 282, 287, 540 S.E.2d 445, 448 (2000) ("the witness was brought to a location where two individuals, wearing clothing similar to that described by the witness, were surrounded by uniformed police officers"); *State v. Williams,* 162 W. Va. 348, 249 S.E.2d 752 (1978) (the police told the victim that his money was found in the possession of the three suspects whom he was about to view), or

(b) magnify the custodial features of the situation, so as to enhance the impression that the police are certain of the respondent's guilt, *see, e.g.*, *Clark v. Caspari*, 274 F.3d 507, 511 (8th Cir. 2001) (during the show-up, the two suspects were handcuffed and "surrounded" by police officers, "one of whom was holding a shotgun"); *United States ex rel. Hudson v. Brierton,* 699 F.2d 917 (7th Cir. 1983) (the defendant was locked in a jail cell at the time of viewing); *People v. Williams*, 127 A.D.3d 1114, 1116, 7 N.Y.S.3d 434, 437 (N.Y. App. Div., 2d Dep't 2015) ("the defendant was the only person standing in the street, in handcuffs, surrounded by the police with high-beam headlights shining on his face, during the showup proceeding"); *People v. Brown,* 121 A.D.2d 733, 504 N.Y.S.2d 457 (NY. App. Div., 2d Dep't 1986) (during the show-up the suspects were surrounded by several police officers and had handcuffs dangling from their wrists).

§ 25.03(b) Lineups

A lineup is impermissibly suggestive if some aspect of the respondent's appearance (age, race, skin complexion, height, weight, attire) renders him or her distinctive from the others in the line, especially if the unique characteristic makes the respondent the only person in the line who fits the known description of the perpetrator. *See, e.g.*, *Raheem v. Kelly*, 257 F.3d 122, 135–37 (2d Cir. 2001) (lineup was suggestive in the case of two witnesses because they had given a description of the perpetrator as wearing a black leather coat and the defendant was the only person in the line wearing a black leather coat); *United States v. Downs*, 230 F.3d 272, 273, 275 (7th Cir. 2000) (lineup was suggestive because the witnesses had described the perpetrator as "lightly unshaven" and the defendant "was the only man in a line-up of five who lacked a moustache"); *Martin v. Indiana,* 438 F. Supp. 234 (N.D. Ind. 1977), *aff'd,* 577 F.2d 749 (7th Cir. 1978) (lineup was suggestive because the perpetrator had been described as a tall black man in his mid-thirties, and the only black man in the line other than the defendant was short and eighteen years old); *State v. Henderson,* 116 Ariz. 310, 569 P.2d 252 (1977) (lineup was suggestive because the perpetrator had been described as being in his early to middle thirties, and the defendant was 36 years old but the other five persons in the lineup were in their early to middle twenties); *People v. Colsen*, 181 A.D.3d 618, 618, 117 N.Y.S.3d 580, 580 (N.Y. App. Div., 2d Dep't 2020) (a lineup was suggestive because "[t]he defendant was the only person in the lineup with dreadlocks, and dreadlocks featured prominently in the description of one of the assailants that the complainant gave to the police," and "the dreadlocks were distinctive and visible despite the fact that the defendant and the fillers all wore hats"); *People v. Perry*, 133 A.D.3d 410, 410, 18 N.Y.S.3d 539, 539 (N.Y. App. Div., 1st Dep't 2015) (a lineup was suggestive because the defendant was the only participant who matched the complainant's description of the perpetrator as having a "'deformed right eye'"; notwithstanding "the practical difficulties in finding fillers with similarly defective eyes," a "'simple eye patch provided to each of the lineup participants or a hand over an eye would have sufficed to remove any undue suggestiveness of the procedure.'"); *People v. Robinson*, 123 A.D.3d 1062, 1062, 999 N.Y.S.2d 499, 500 (N.Y. App. Div., 2d Dep't 2014) (a lineup was suggestive where "three [of the four]

fillers appear[ed] visibly older than the defendant" and "[t]he age disparity was sufficiently apparent as to orient the viewer toward the defendant as a perpetrator of the crimes charged"); *People v. Pena*, 131 A.D.3d 708, 709, 16 N.Y.S.3d 184, 184 (N.Y. App. Div., 2d Dep't 2015) (a lineup was suggestive where the defendant "was the only lineup participant dressed in a red shirt, the item of clothing which figured prominently in the description of the assailant's clothing that the complainant gave to the police"); *People v. Sapp,* 98 A.D.2d 784, 469 N.Y.S.2d 803 (N.Y. App. Div., 2d Dep't 1983) (a lineup was suggestive where the defendant was the only person in the line wearing the type of jacket that the witness had described the perpetrator as wearing); *State v. Boykins*, 173 W. Va. 761, 765-66, 320 S.E.2d 134, 138 (1984) (a lineup was suggestive where the defendant "was the only person in the lineup who wore a dark blue or black toboggan: the type of clothing the culprit allegedly wore," and "all but one of the people in the lineup was taller than" the defendant). *See also People v. Perkins*, 28 N.Y.3d 432, 437, 68 N.E.3d 679, 682, 45 N.Y.S.3d 860, 863 (2016) (a "distinctive feature" that causes a defendant to stand out in a lineup can render the lineup "unduly suggestive" even if that feature did not "figure[ ] prominently in the witness's description" of the perpetrator).

The manner in which the police conduct the lineup can also make it impermissibly suggestive. *See, e.g., United States v. Wade,* 388 U.S. 218, 234 (1967) (dictum) (practice of permitting witnesses to be present during each other's viewing of a lineup is "a procedure said to be fraught with dangers of suggestion"); *People v. Boyce,* 89 A.D.2d 623, 452 N.Y.S.2d 676 (N.Y. App. Div., 2d Dep't 1982) (suggestive post-lineup remarks by police).

§ 25.03(c) Photographic Identifications

Courts have consistently recognized that:

> "improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime. Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification." (*Simmons v. United States,* 390 U.S. 377, 383-84 (1968).)

Showing a potential identification witness a single photograph is both highly suggestive and

unnecessarily so because – in the absence of extraordinary circumstances – the police can easily put together a photo array. *See Manson v. Brathwaite,* 432 U.S. 98, 99, 109, 117 (1977) (dictum) (accepting the state's concession); *United States v. Dailey,* 524 F.2d 911, 914 (8th Cir. 1975); *State v. Al-Bayyinah*, 356 N.C. 150, 157, 567 S.E.2d 120, 124 (2002). In *Simmons* and *Manson*, the Supreme Court declined to adopt a "per se rule" (*Manson*, 432 U.S. at 112) excluding identifications that follow a single-photo display, but both cases allow the admission of such identifications only after conducting the two-step analysis described in § 25.02 *supra* and finding a strong showing that, "'under the "totality of the circumstances[,]" the identification was reliable even though the confrontation procedure was suggestive'" (*Manson*, 432 U.S. at 106). *See also, e.g., State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995) ("In determining whether pretrial eyewitness identification evidence must be suppressed, a two-part test is applied. . . . The first inquiry focuses on whether the procedure was unnecessarily suggestive. . . . Whether a pretrial identification procedure is unnecessarily suggestive turns on whether the defendant was unfairly singled out for identification. . . . Single photo line-up identification procedures have been widely condemned as unnecessarily suggestive. . . . However, under the second prong of the test, the identification evidence, even if suggestive, may be admissible if the totality of the circumstances establishes that the evidence was reliable. . . . If the totality of the circumstances shows the witness' identification has adequate independent origin, it is considered to be reliable despite the suggestive procedure. . . . The test is whether the suggestive procedures created a very substantial likelihood of irreparable misidentification."). *Compare State v. Jackson*, 454 So.2d 398, 400-01 (La. App. 1984) ("In the present case, the witness was shown a two-view mug shot of the defendant from the D.A.'s file. There can be little doubt that this procedure was impermissibly suggestive. The display of a single photograph of the defendant rather than an array of photographs depicting different individuals has repeatedly been held to be improper. . . . ¶ . . . [T]he photographic identification took place some eight months after the crime. This substantial lapse of time, coupled with the relatively brief period of observation and the absence of a physical description, casts grave doubt upon the reliability of the in-court identification. . . . ¶ Weighing these indicia of reliability against the corrupting effect of the one photograph show-up, we conclude there was a substantial likelihood of misidentification. Accordingly, the trial judge committed reversible error in admitting the identification testimony."); *Wise v. Commonwealth*, 6 Va. App. 178, 367 S.E.2d 197 (1988) (a police investigator showed bank-robbery eyewitnesses "a bank surveillance photograph depicting a man who had robbed a Maryland bank" and then showed them "a photo array consisting of six photographs" (*id*. at 180, 367 S.E.2d at 198); "We believe that significant problems are inherent in the use of a single-photograph identification procedure. . . '[A] single photograph display is one of the most suggestive methods of identification and is always to be viewed with suspicion.' . . . [S]ince the police showed Phelps and Wampler a single photograph of Wise as part of their out-of-court identification procedure, we find the out-of-court identification process was unduly suggestive. ¶ . . . In the present case, both Phelps and Wampler first identified Wise five months after the robbery when shown a single photograph of him. The record shows that both witnesses were unable to describe the robber's facial features at any time prior to seeing the single photograph. Further, Phelps could not pick him out of the photo array in January 1986, one month prior to seeing the single photograph. Wampler was not shown the photo array at that time. We believe that these facts

demonstrate an absence of other indicia of reliability and require us to find that the trial court erred in admitting evidence of their out-of-court identifications. ¶ . . . [S]ince we find that neither Wampler's nor Phelps' in-court identifications originated independently of their out-of-court identifications, we conclude that the trial court erred in admitting this evidence at trial." (*Id*. at 184-87, 367 S.E.2d at 200-02.)); *People v. Marshall*, 26 N.Y.3d 495, 506-08, 45 N.E.3d 954, 962-64, 25 N.Y.S.3d 58, 66-68 (2015) (even if the defendant's photograph was shown to the witness by the prosecutor as part of "trial preparation" and "not for purposes of an identification," the witness's exposure "to defendant's likeness" creates a risk that "the display was unduly suggestive, and therefore, tainted an in-court identification"); *Morales v. United States*, 248 A.3d 161 (D.C. 2021) (reversing a conviction for error in admitting a police officer's in-court identification of the defendant where "[t]he salient facts are: (1) a police officer caught a two-to-three second glimpse of a fleeing suspect's face more than four months before trial, (2) the officer did not identify the defendant before trial – no show-up, lineup, photographic array, or any other type of pretrial identification procedure was conducted – but (3) on the cusp of trial, the prosecuting attorney handed the officer a single mugshot of the defendant to study 'in preparation for this case.'" (*id*. at 166). "We disagree with the [trial] court's assessment both as to the suggestivity of the mugshot display and as to the reliability of the officer's in-court identification. . . . ¶ It was constitutional error to permit the officer to make an in-court identification of Mr. Morales." *Id*. at 167.).

A "photo array" – a group of photographs (usually mug shots) including the respondent's photograph – will be found suggestive if the respondent's photograph is the only one that matches the description of the perpetrator (*see, e.g., United States v. Sanders,* 479 F.2d 1193 (D.C. Cir. 1973) (only the defendant's photograph depicted facial hair that was in any way comparable to the witness's description of the perpetrator); *Commonwealth v. Thornley*, 406 Mass. 96, 99-101, 546 N.E.2d 350, 352-53 (1989) (a thirteen-photograph array was suggestive because both witnesses had described the perpetrator as wearing glasses, and "the defendant's picture was the only one in the array with glasses"); *Butler v. State*, 102 So.3d 260, 263, 265-66 (Miss. 2012) (a photo of a lineup stage was impermissibly suggestive because the witness described the perpetrator as "around five-feet-five-inches tall," the accused is "actually five-feet-six-inches tall," the "other suspects in the photo lineup were between five-feet-eleven-inches and six-feet-four-inches tall," and their relative heights would have been apparent because the suspects "were pictured standing beside a height marker")) or if the respondent's photograph differs from the others in some way that would give it special salience (*see*, *e.g.*, *Sloan v. State*, 584 S.W.2d 461, 467 (Tenn. Crim. App.1978) ("the photographic identification procedure was suggestive in that the photograph of defendant was emphasized by the fact that it was a portrait of him in a Navy uniform, and the other photographs were mugshots"); *People v. Smith*, 122 A.D.3d 1162, 1163, 997 N.Y.S.2d 534, 535-36 (N.Y. App. Div., 3d Dep't 2014) (a photo array was unduly suggestive, even though "[t]he array depicts six individuals of equivalent age and ethnicity who are reasonably similar in appearance," because of a formatting difference between the defendant's photo and the other photos: "[W]hile the other five photos depict individuals from the shoulders up with the upper portion of their photos consisting of nothing more than a blank, gray background, defendant is shown from the chest up

with the top of his head reaching to the very top of the photo," and "[t]hus, defendant's face occupies the space that, in all of the other photos, is bare.")).

As with lineups, see § 25.03(b) *supra,* a police officer's comments or the way in which the police conduct the photographic identification can render even a properly constituted photo array suggestive. *See, e.g., Simmons v. United States,* 390 U.S. at 383 ("[t]he chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime"); *United States v. Trivette,* 284 F. Supp. 720 (D. D.C. 1968) (a detective drew the witness's attention to the defendant's photograph by asking "'Is that the man?'"); *Young v. State*, 374 P.3d 395, 399-400, 407 (Alaska 2016) (a "detective's comment made . . . [the photo array] identification procedure 'so suggestive as to create "a very substantial likelihood of irreparable misidentification"'": after the eyewitness – who was "a criminal defense lawyer and former prosecutor" – "put his finger tentatively on Young's photograph, . . . the detective told him to 'trust your instincts'"; although the witness "testified that he 'was kind of going there' in selecting Young as the shooter and may well have picked Young anyway, he also testified that he took the detective's comment to mean 'that's the guy we want you to pick' and that it ended his deliberations."); *People v. Jones*, 173 A.D.3d 1062, 1065, 102 N.Y.S.3d 265, 269 (N.Y. App. Div., 2d Dep't 2019) ("[b]y showing [the complainant] . . . [a video on] the cell phone and telling him that the phone was recovered from the scene of the robbery, the detective suggested that the phone may belong to one of the perpetrators of the robbery"; during the robbery, the perpetrator had threatened the complainant with a taser; the video displayed the defendant tasing a sleeping individual; "the procedure employed by the detective in showing . . . [the complainant] the cell phone videos was a police-arranged identification procedure, even though the police did not arrange the content of the videos on the phone"; "[t]he People failed to meet their initial burden of establishing the reasonableness of the police conduct and the lack of any undue suggestiveness created by the video identification procedure."); *People v. Fernandez*, 82 A.D.2d 922, 440 N.Y.S.2d 677 (N.Y. App. Div., 2d Dep't 1981) (four eyewitnesses were permitted to view photographs together). A roster of safeguards aimed at assuring the reliability of photo displays is found in United States Department of Justice, Memorandum for Heads of Department Law Enforcement Components, All Department Prosecutors, *Eyewitness Identification: Procedures for Conducting Photo Arrays* (January 6, 2017), *available at* https://apps.npr.org/documents/document.html?id=3254083-DAG-Memo-Procedures-for-Photo-Arrays (policies, *e.g.*, governing the number and nature of photos displayed, directing federal investigators to document or record an eyewitness's confidence in an identification at the time the i.d. is made, and encouraging "blind" or "blinded" photo arrays [*i.e.*, arrangements that keep the agent conducting the session ignorant of information that could tip the witness off as to which photo represents the prime suspect]). Counsel arguing that the photographic identification procedure used in his or her case was unduly suggestive can usefully contrast them with these DOJ guidelines. See also the Louisiana statutory model summarized in § 25.03 *supra.*

If the police or the prosecution failed to preserve the photo array used in the identification procedure, counsel should ask the court to apply a presumption that the array was impermissibly

suggestive. *See, e.g.*, *United States v. Honer*, 225 F.3d 549, 553 (5th Cir. 2000) ("when the government fails to preserve the photographic array used in a pretrial line-up 'there shall exist *a presumption* that the array is impermissibly suggestive'"); *People v. Holley*, 26 N.Y.3d 514, 517, 45 N.E.3d 936, 937, 25 N.Y.S.3d 40, 41 (2015) (the prosecution's "fail[ure] to preserve a computer-generated array of photographs shown to an identifying witness" gave rise to "a rebuttable presumption that the array was unduly suggestive").

§ 25.03(d) Aggregation of Identification Procedures

Frequently, a witness is exposed to a combination of identification procedures For example, a witness who identifies the respondent in a show-up or a photographic identification display is thereafter shown the respondent in a lineup. The employment of successive identification procedures all involving the respondent is itself suggestive because the witness learns to recognize the respondent from the previous police-arranged viewing(s). *See Foster v. California,* 394 U.S. 440, 442-43 (1969).

§ 25.04 RELIABILITY OF THE IDENTIFICATION

As explained in § 25.02 *supra,* under the federal Due Process rule even unduly suggestive police procedures will not render an identification inadmissible if the factors indicating its reliability outweigh the suggestiveness of the police conduct.

The factors to be considered in assessing the reliability of an identification "include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation." *Manson v. Brathwaite,* 432 U.S. 98, 114 (1977). Thus, in *Manson,* the Court held that the identification was reliable because:

(a) The witness had a good "opportunity to view" the perpetrator, since the scene was well-lit and the witness was "within two feet" of the perpetrator and "looked directly at" him for "two to three minutes." *Id.* at 114.

(b) The witness's "degree of attention" was excellent, in that the witness was "a specially trained, assigned, and experienced officer [who] . . . could be expected to pay scrupulous attention to detail, for he knew that subsequently he would have to find and arrest [the perpetrator] . . . [and] that his claimed observations would be subject later to close scrutiny and examination at any trial." *Id.* at 115. In addition, since the witness was of the same race as the defendant, there were no problems of cross-racial identification. *Id.*

(c) The description given by the witness was extremely detailed and accurate, including the perpetrator's "race, his height, his build, the color and style of his hair, and the high cheekbone facial feature" as well as the "clothing the

[perpetrator] . . . wore." *Id*.

(d) The witness was absolutely certain of the identification, stating, "'There is no question whatsoever.'" *Id*.

(e) The witness gave his description to the investigating officer "within minutes of the crime" and "[t]he photographic identification took place only two days later." *Id.* at 116.

In cases not exhibiting the indicia of reliability that marked the identification in *Manson,* lower courts have held that the suggestiveness of police procedures outweighed the identification's reliability. *See, e.g.*, *Raheem v. Kelly*, 257 F.3d 122, 138-40 (2d Cir. 2001) (the witnesses to a robbery and shooting in a bar were "drinking scotch" and were not paying attention to the robbers until the witnesses "heard the shot and saw the shooter holding a gun, [and] the hold-up was announced," and "[p]lainly their attention was immediately focused more on th[e] man" who "brandished his gun at them" than at the other robber, and "[f]urther, it is human nature for a person toward whom a gun is being pointed to focus his attention more on the gun than on the face of the person pointing it"); *Velez v. Schmer*, 724 F.2d 249, 251-52 (1st Cir. 1984) (the witnesses had only about a minute to observe the perpetrator and gave virtually no description); *Dickerson v. Fogg,* 692 F.2d 238, 245 (2d Cir. 1982) (victim was "frightened and agitated . . . having just had his life threatened and a gun at his neck"); *Jackson v. Fogg,* 589 F.2d 108 (2d Cir. 1978) (the eyewitnesses had only a few seconds to observe the gunman before running for cover); *United States v. Dailey,* 524 F.2d 911 (8th Cir. 1975) (the witness had limited opportunity to observe the perpetrator, seeing him for no more than 30 seconds in heavy rain, and there was a discrepancy between the description and the defendant's appearance); *People v. Fuller,* 71 A.D.2d 589, 418 N.Y.S.2d 427 (N.Y. App. Div., 1st Dep't 1979) (there was a gross discrepancy between the appearance of the 17-year-old defendant and the witness's description of the perpetrator's age and build); *State v. Moore*, 343 S.C. 282, 289, 540 S.E.2d 445, 449 (2000) (the eyewitness "saw the two defendants for only a very brief period of time, at some distance"; her "attention was likely not as acute as it might have been had she been the victim of a crime"; and "the degree of accuracy of [her] description is tenuous, at best . . . [inasmuch as] [h]er descriptions were based primarily on the suspects' clothing and race, and that one was taller than the other"); *United States v. Emanuele*, 51 F.3d 1123 (3d Cir. 1995); *State v. Williams*, 162 W. Va. 348, 249 S.E.2d 752 (1978); *State v. Gomez*, 937 So.2d 828 (Fla. App. 2006); *State v. Almaraz*, 154 Idaho 584, 301 P.3d 242 (Idaho 2013); *State v. Jones*, 224 N.J. 70, 128 A.3d 1096 (2016); *State v. Cooper*, 2018 WL 4167696 (N.J. Super. 2018).

Counsel should be aware that *Manson*'s factor (d) – the witness's certainty in the correctness of his or her identification – has been empirically discredited in the more than four decades since *Manson* was decided. A consistent body of persuasive research has accumulated demonstrating that there is no significant correlation between confidence and accuracy (*see* the sources collected in *People v. Lemcke*, 11 Cal. 5th 644, 661-68, 486 P.3d 1077, 1090-95, 278 Cal. Rptr. 3d 849, 865-70 (2021)); and the courts have begun to take the research seriously (see the *Lemcke*, *Bey*, *Gomes*, and *Henderson* opinions summarized in § 25.03 *supra*). Because jurors

do tend to find an eyewitness identification more persuasive in proportion to the witness's degree of confidence in it (*see* Brandon L. Garrett, Alice Liu, Karen Kafadar, Joanne Yaffe & Chad S. Dodson, *Factoring the Role of Eyewitness Evidence in the Courtroom*, 17 J. EMPIRICAL LEGAL STUDIES 556 (2020)), counsel in jurisdictions where the courts have not yet recognized the fallacy of the certainty-accuracy equation may be well advised to prepare expert testimony for use in challenging the reliability of testimony by eyewitnesses who claim to be sure of their identification of the defendant. *See*, *e.g.*, *United States v. Stevens*, 935 F.2d 1380, 1384 (3d Cir. 1991) (the trial court abused its discretion in excluding proffered testimony by a defense expert "concerning the lack of a correlation between confidence and accuracy in eyewitness identifications. Both of the victims expressed a great deal of confidence in their identifications of Stevens. To counteract this highly damaging testimony, Stevens offered expert testimony that, contrary to popular belief, scientific studies have shown 'a fairly weak relationship' between confidence and accuracy. We conclude that the district court erred in holding that there was no 'fit' between this testimony and the facts at bar. We also are satisfied that such testimony would have proven helpful to the jury in assessing the victims' identifications."); *Jones v. United States*, 262 A.3d 1114, 1125-28 (D.C. 2021) (vacating a conviction on the ground of ineffective assistance of counsel where the defendant's lawyer failed to present expert testimony regarding the factors that render eyewitness identifications inaccurate: "Courts across the country now accept that certain factors can greatly affect the accuracy of eyewitness identification testimony. A non-exhaustive list of factors includes: (1) transference, which occurs when a person seen in one context is confused with a person seen in another; (2) the weak correlation between confidence and accuracy regarding an identification; (3) the diminishing reliability of an identification caused by the witness's focus on a weapon; and (4) the negative impact of high stress at the time of the observation on the ability to retain an accurate perception of events. We reiterate that numerous other factors are generally accepted as well. . . . ¶ . . . Although these findings are widely accepted by scientists and, to a lesser extent, recognized by judges and attorneys, they remain largely unfamiliar to the average person and often run counter to the beliefs of jurors. . . . ¶ . . . We are convinced that a satisfactory understanding of the eyewitness testimony reliability factors 'require[s] information beyond that ordinarily attributable to the average juror.'"); *cf. State v. Lawson*, 352 Or. 724, 761, 291 P.3d 673, 696 (2012) ("Because many of the system and estimator variables that we described earlier are either unknown to the average juror or contrary to common assumptions, expert testimony is one method by which the parties can educate the trier of fact concerning variables that can affect the reliability of eyewitness identification. Expert testimony may also provide an avenue to introduce and explain scientific research or other indicia of reliability not specifically addressed by our opinion in these cases. In that regard, the use of experts may prove vital to ensuring that the law keeps pace with advances in scientific knowledge, thus enabling judges and jurors to evaluate eyewitness identification testimony according to relevant and meaningful criteria.").

§ 25.05 SUPPRESSION OF AN IDENTIFICATION AS UNCONSTITUTIONALLY UNRELIABLE EVEN THOUGH POLICE ACTION IS MINIMAL OR NON-EXISTENT

Under the federal due process standard for suppressing an identification as unconstitutionally unreliable, "a preliminary judicial inquiry into the reliability of an eyewitness

identification" is required only if the identification was "procured under unnecessarily suggestive circumstances arranged by law enforcement." *Perry v. New Hampshire*, 565 U.S. 228, 248 (2012). *See id*. at 232-33 ("We have not extended pretrial screening for reliability to cases in which the suggestive circumstances were not arranged by law enforcement officers. . . . Our decisions . . . turn on the presence of state action and aim to deter police from rigging identification procedures, for example, at a lineup, showup, or photograph array. When no improper law enforcement activity is involved, . . . it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.").

In States that have not already chosen to follow the federal constitutional standard on this issue, counsel can argue that the state constitution or state statutes or rules should be construed to afford a suppression remedy for unreliable identifications even in the absence of suggestive police conduct. *See, e.g.*, *State v. Chen*, 208 N.J. 307, 310-11, 27 A.3d 930, 932 (2011) ("Recent social science research reveals that suggestive conduct by private actors, as well as government officials, can undermine the reliability of eyewitness identifications and inflate witness confidence. We consider that evidence in light of the court's traditional gatekeeping role to ensure that unreliable, misleading evidence is not presented to jurors. We therefore hold [under N.J. R. EVID. 104] that, even without any police action, when a defendant presents evidence that an identification was made under highly suggestive circumstances that could lead to a mistaken identification, trial judges should conduct a preliminary hearing, upon request, to determine the admissibility of the identification evidence."). *See also State v. Hibl*, 290 Wis. 2d 595, 610-13, 618, 714 N.W.2d 194, 202-03, 206 (Wis. 2006) (even when an identification does not stem from a "police procedure," as in cases of "'spontaneous' identifications resulting from 'accidental' confrontations" between an eyewitness and the suspect, the "circuit court still has a limited gatekeeping function to exclude such evidence under [WIS. STAT.] § 904.03"). See generally § 7.09 *supra*. *Compare State v. Johnson*, 312 Conn. 687, 688-90, 700, 703-05, 94 A.3d 1173, 1174-75, 1180-81, 1183-84 (2014) (rejecting the argument that "the due process clauses of the Connecticut constitution provide protection against allegedly unduly suggestive eyewitness identification procedures undertaken by a private actor," but recognizing that due process principles are implicated if "the [identification] evidence is so extremely unreliable that its admission would deprive the defendant of his right to a fair trial" and furthermore recognizing that state evidentiary law "goes above and beyond minimal constitutional requirements" and provides a basis for excluding, at trial, "unreliable identification evidence that is tainted by unduly suggestive private conduct").

In seeking to persuade a state court to construe the state constitution to provide a suppression remedy for unconstitutionally unreliable identifications even though police action is minimal or non-existent, counsel will often find it useful to direct the court's attention to the extensive empirical evidence on the unreliability of eyewitness identifications even when the police were not involved. *See, e.g.*, the sources cited in § 25.03 *supra* and in *State v. Chen*, 208 N.J. at 938-40, 27 A.3d at 320-23; *Perry v. New Hampshire*, 565 U.S. at 262-65 & nn.5-11

(Sotomayor, J., dissenting).

§ 25.05(a) Identifications Made for the First Time in Court

In *State v. Dickson*, 322 Conn. 410, 141 A.3d 810 (2016), the Connecticut Supreme Court observed that "[t]he United States Supreme Court has not yet addressed the question of whether first time in-court identifications are in the category of unnecessarily suggestive procedures that trigger due process protections" (*id*. at 422, 141 A.3d at 821), but it agreed with Dickson's contention that "first time in-court identifications are inherently suggestive and implicate a defendant's due process rights no less than unnecessarily suggestive out-of-court identifications" (*id*. at 423, 141 A.3d at 822). "[W]e are hard-pressed to imagine how there could be a *more* suggestive identification procedure than placing a witness on the stand in open court, confronting the witness with the person who the state has accused of committing the crime, and then asking the witness if he can identify the person who committed the crime." *Id*. (original emphasis). "Accordingly, we conclude that first time in-court identifications, like in-court identifications that are tainted by an unduly suggestive out-of-court identification, implicate due process protections and must be prescreened by the trial court." *Id*. at 426, 141 A.3d at 825. "[W]e now set forth the specific procedures that the parties and the trial court must follow. Preliminarily, we take this opportunity to emphasize that, in cases in which the identity of the perpetrator is at issue and there are eyewitnesses to the crime, the best practice is to conduct a nonsuggestive identification procedure as soon after the crime as is possible." *Id*. at 444-45,141 A.3d at 835. "In cases in which there has been no pretrial identification, however, and the state intends to present a first time in-court identification, the state must first request permission to do so from the trial court." *Id*. at 445, 141 A.3d at 835. "The trial court may grant such permission only if it determines that there is no factual dispute as to the identity of the perpetrator, or the ability of the particular eyewitness to identify the defendant is not at issue." *Id*. at 446, 141 A.3d at 835-36.

> "If the trial court determines that the state will not be allowed to conduct a first time identification in court, the state may request permission to conduct a nonsuggestive identification procedure, namely, at the state's option, an out-of-court lineup or photographic array, and the trial court ordinarily should grant the state's request. If the witness previously has been unable to identify the defendant in a nonsuggestive identification procedure, however, the court should not allow a second nonsuggestive identification procedure unless the state can provide a good reason why a second bite at the apple is warranted. If the eyewitness is able to identify the defendant in a nonsuggestive out-of-court procedure, the state may then ask the eyewitness to identify the defendant in court.
>
> If the trial court denies a request for a nonsuggestive procedure, the state declines to conduct one, or the eyewitness is unable to identify the defendant in such a procedure, a one-on-one in-court identification should not be allowed. The prosecutor may still examine the witness, however, about his or her observations of the perpetrator at the time of the crime, but the prosecutor should avoid asking the witness if the defendant resembles the perpetrator." (*Id*. at 446-47, 141 A.3d at 836-37.)

Accord, *State v. Torres*, 175 Conn. App. 138, 167 A.3d 365 (2017). *Dickson* is a seminal decision supported by a well-reasoned opinion; counsel in other jurisdictions would do well to urge its adoption on both federal and state due process grounds (see §§ 7.09, 25.02 *supra*) and alternatively as an appropriate application of judicial authority to prescribe common-law evidentiary rules that avert the danger of unreliable criminal verdicts (*Commonwealth v. Crayton*, 470 Mass. 228, 21 N.E.3d 157 (2014)). *Cf. State v. Lawson*, 352 Or. 724, 291 P.3d 673 (2012), quoted in § 25.04 *supra* (establishing rigorous conditions for the admission of eyewitness identification evidence).

Part B. Other Grounds for Suppressing Identification Testimony

§ 25.06 VIOLATIONS OF THE SIXTH AMENDMENT RIGHT TO COUNSEL

Section 24.13 *supra* describes the doctrine establishing that the Sixth Amendment right to counsel attaches at the time of commencement of adversary judicial proceedings. As noted in that section, some state courts have relied upon state constitutional guarantees to afford the protections of the right to counsel even earlier in the criminal process.

Once the right to counsel has attached, the respondent is entitled to the assistance of counsel at a lineup or show-up. *United States v. Wade,* 388 U.S. 218 (1967). The violation of that right requires the suppression of testimony relating to any identification made at the lineup or show-up. *Moore v. Illinois,* 434 U.S. 220, 231-32 (1977); *Gilbert v. California,* 388 U.S. 263, 272-74 (1967). In cases in which the right to counsel was violated, witnesses who participated in the unconstitutional lineup or show-up are also precluded from making an in-court identification of the respondent unless the prosecution proves "by clear and convincing evidence that the in-court identifications [are] . . . based upon observations of the suspect other than the lineup [or show-up] identification." *See United States v. Wade,* 388 U.S. at 240.

Unlike lineups and show-ups, photographic identification procedures do not require the presence of counsel under the Sixth Amendment caselaw. *United States v. Ash,* 413 U.S. 300 (1973).

§ 25.07 VIOLATIONS OF THE FOURTH AMENDMENT: IDENTIFICATIONS RESULTING FROM AN ILLEGAL ARREST OR *TERRY* STOP

If a lineup, show-up, or other identification exhibition is held while the respondent is in custody following an illegal arrest or *Terry* stop, any resulting identification must be suppressed as the fruit of the Fourth Amendment violation. See § 23.37 subdivision (e) *supra.* In-court identifications tainted by the illegality of the earlier ones would also be inadmissible. *See United States v. Crews,* 445 U.S. 463, 472-73 (1980) (dictum); *Young v. Conway*, 698 F.3d 69, 84-85 (2d Cir. 2012).

A fact pattern that arises with considerable frequency and provides fertile grounds for suppression of identifications is that an eyewitness gives a very vague description of the

perpetrator, the police arrest or detain the respondent because s/he matches the description, and an identification procedure is then held. If the defense succeeds in invalidating the arrest or *Terry* stop on the ground that the vague description failed to provide the requisite probable cause or articulable suspicion, see §§ 23.07, 23.09 *supra,* the identification must be suppressed.

§ 25.08 STATE LAW GROUNDS OF OBJECTION TO IDENTIFICATIONS

In addition to the constitutional rules that may require suppression of an identification, some jurisdictions have evidentiary doctrines that afford a basis for objecting to identification testimony. In some jurisdictions, police officers and other observers of an out-of-court identification are barred from recounting the identification, either by rules prohibiting third-party bolstering of identifications (*see, e.g., People v. Walston,* 99 A.D.2d 847, 472 N.Y.S.2d 453 (N.Y. App. Div., 2d Dep't 1984); *Brownfield v. State,* 668 P.2d 1165 (Okla. Crim. App. 1983); *Lyons v. State,* 388 S.W.2d 950 (Tex. Crim. App. 1965)), or by a hearsay-based rule barring such testimony generally or in specific circumstances such as when the eyewitness does not testify at trial (*see, e.g.*, *People v. Johnson*, 68 Ill. App. 3d 836, 842, 386 N.E.2d 642, 647, 25 Ill. Dec. 371, 376 (1979)) or when the eyewitness takes the stand but is unable to make an in-court identification (*see generally* Francis M. Dougherty, Annot., *Admissibility and weight of extrajudicial or pretrial identification where witness was unable or failed to make in-court identification*, 29 A.L.R.4th 104 (1984 & Supp.)). Some jurisdictions recognize an objection to identification evidence when the identification is so unreliable that its probative value is outweighed by its prejudicial nature. *See, e.g.*, *State v. Lawson*, 352 Or. 724, 740, 761-62, 291 P.3d 673, 685, 696-97 (2012), summarized in § 25.02 concluding paragraph, *supra*; *State v. Johnson*, 312 Conn. 687, 700, 94 A.3d 1173, 1180-81 (2014), summarized in § 25.05 second paragraph *supra*; and see § 30.03 *infra*.