Article

On Suggestive and Necessary Identification Procedures

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Despite the paramount importance of identification evidence in criminal trials, Supreme Court precedents on the subject have been confusing and confused. The result is widespread misapplication of proper constitutional doctrine: lower courts habitually admit evidence of suggestive identification procedures if they find such procedures to have been "necessitated" by circumstances on the ground. Such reasoning misinterprets the governing Supreme Court cases and, in any event, makes little sense. Whether necessary or not, evidence of suggestive identification procedures, and any consequent in-court identifications, must be excluded from trial unless supported by sufficient indicia of reliability.

I. Introduction

The admissibility of police-arranged identification procedures and consequent in-court identifications is governed by the Sixth Amendment's right to counsel and by the Due Process clause. Under the Sixth

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Amendment, defendants have a right to the presence of counsel during corporeal identification procedures conducted after the initiation of judicial proceedings.[1] Evidence of identification procedures and consequent in-court identifications may be excluded from trial if that right to counsel was violated.[2] The Due Process clause, by contrast, forbids the admission of identification testimony that violates principles of "fundamental fairness," independent of any right to counsel issue.[3]

Supreme Court decisions dealing with identification procedures under both these constitutional provisions have been inconsistent and often unconvincing.[4] This failure is particularly galling given that misidentifications, aided by faulty identification procedures, are the leading cause of false convictions in the United States.[5] This article seeks to clarify one small aspect of this confused jurisprudence: the rules governing the admissibility of suggestive and necessary identification procedures under the Due Process clause.

A suggestive identification procedure is one that suggests to the identifying witness who is the suspect expected to be identified.[6] Suggestiveness may take many forms: asking the witness to pay particular attention to "number three" in a six-person lineup; having the defendant as the only Hispanic in a photo array; presenting numerous photographs with only the suspect appearing in all of them; or, as in many of the cases we will examine, presenting only the suspect to the witness, handcuffed and surrounded by police officers (the oft-used single-person showup). A suggestive *and necessary* identification procedure is a suggestive procedure whose suggestiveness was necessitated by exigent circumstances.[7]

As we shall soon see, this important area of Due Process doctrine is rife with confusion. The main responsibility for the mess lies with a string of confusing and confused United States Supreme Court decisions.[8]

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1. Moore v. Illinois, 434 U.S. 220, 231 (1977).

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

3. *See* Stovall v. Denno, 388 U.S. 293 (1967).

4. For example, see the Court's tenuous distinction between lineups and photo arrays in *United States v. Ash*, 413 U.S. 300 (1973), or the Court's argument in favor of admitting evidence of a single-photo identification procedure in *Manson v. Brathwaite*, 432 U.S. 98 (1977).

5. *See* Jonathan Saltzman, *Inmate's Exoneration Renews Calls for an "Innocence" Panel*, BOSTON GLOBE, Mar. 9, 2004, at A1 (reporting that more than 80 percent of DNA exonerations involved convictions based on mistaken eyewitness testimony); Gary L. Wells, *What Do We Know About Eyewitness Identification?*, 48 AM. PSYCHOLOGIST 553, 554 (1993) (claiming that eyewitness misidentification is the single largest factor in false convictions); PATRICK M. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 26 (1965) ("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.")

6. *See, e.g.*, United States v. Brownlee, 454 F.3d 131, 138 (3d Cir. 2006) ("As the Supreme Court has acknowledged, a show-up procedure is inherently suggestive because, by its very nature, it suggests that the police think they have caught the perpetrator of the crime.").

7. *See Stovall*, 388 U.S. 293, 298 (the defendant, handcuffed and surrounded by police officers, was presented to the only eyewitness while eyewitness was believed to be dying).

8. *See infra* Part III.

Section II surveys and criticizes those Supreme Court decisions; Section III examines flawed decisions on the subject by federal circuit courts; and Section IV articulates the correct doctrinal analysis, concluding with a plea for better judicial decision-making in this important area of criminal procedure.

II. Supreme Court Precedents

Today's confusions can be traced back to the Supreme Court's seminal case on the subject of suggestive and necessary identification procedures. *Stovall v. Denno* was one of three cases handed down on the same day in 1967, where the Court laid down the constitutional framework governing the admissibility of police-arranged identification procedures. Two of these cases addressed the right to counsel;[9] the third, *Stovall,* dealt with the Due Process clause.[10]

A. Stovall v. Denno (1967)

The facts in *Stovall* were horrific. On a summer night in 1961, Theodore Stovall entered the home of two Long Island doctors, stabbed the husband to death, and grievously injured the wife when she came to her husband's aid.[11] A day and a half later, following Stovall's arraignment, the police presented Stovall to the surviving victim, handcuffed and surrounded by police officers, by her hospital bed.[12] She made a positive identification.[13]

Following his conviction and death sentence, Stovall appealed his conviction to the United States Supreme Court, arguing (a) that admitting evidence of the identification procedure at his trial was a violation of the Sixth Amendment because he was deprived of his right to counsel at his identification procedure (a constitutional claim endorsed in *United States v. Wade*, decided on the same day as *Stovall*), and (b) that admitting evidence of the identification procedure at his trial was a violation of the Due Process clause.[14] The Court rejected the right to counsel claim by refusing to apply *Wade* retroactively.[15] It then acknowledged the validity of Stovall's Due Process challenge, stating that an identification procedure can indeed be "so

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9. *See* United States v. Wade, 388 U.S. 218 (1967) (holding that defendant has a constitutional right to the presence of counsel during a lineup conducted after the initiation of judicial proceedings); Gilbert v. California, 388 U.S. 263 (1967) (holding that evidence of post-indictment unrepresented lineup was inadmissible at trial, but in-court identifications could be admissible if not tainted by the illegal lineup).

10. Stovall v. Denno, 388 U.S. 293 (1967).

11. *Id.* at 295.

12. *Id.*

13. *Id.*

14. *Id.* at 294–95.

15. *Id.* at 300.

unnecessarily suggestive and conducive to irreparable mistaken identification [as to deny] due process of law."[16] The Court then proceeded to reject Stovall's claim:

> We turn now to the question whether petitioner, although not entitled to the application of *Wade* and *Gilbert* to his case, is entitled to relief on his claim that in any event the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law. . . . The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned. However, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it, and the record in the present case reveals that the showing of Stovall to Mrs. Behrendt in an immediate hospital confrontation was imperative. . . . No one knew how long Mrs. Behrendt might live. Faced with the responsibility of identifying the attacker, with the need for immediate action and with the knowledge that Mrs. Behrendt could not visit the jail, the police followed the only feasible procedure and took Stovall to the hospital room. Under these circumstances, the usual police station line-up, which Stovall now argues he should have had, was out of the question. The judgment of the Court of Appeals is affirmed.[17]

Here was the original sin from which all later confusions arose (and in an opinion written, of all people, by Justice William Brennan, a stalwart defender of the rights of criminal defendants and one of the Court's brightest).

As an initial matter, the Court misstated the constitutional question involved: the defendant did not claim that *administering* the identification procedure violated his Due Process rights, only that admitting evidence of that procedure at his trial did.[18] The question of whether the police should be able to conduct such procedures is independent of the question of whether those procedures should be admissible. The Court conflated these two questions, both in framing the issue and then in resolving it, stating that since a proper lineup was out of the question, admitting evidence of the showup was thereby constitutional.[19]

But the Court's most glaring mistake was its failure to consider the identification's reliability. Despite its reference to the totality of the circumstances, the *Stovall* opinion admitted testimony of a highly suggestive identification procedure by relying solely on the practical

16. *Id.* at 302.

17. *Id.* at 301–02 (internal citations omitted).

18. *Id.* at 296.

19. *Id.* at 302.

necessity of the procedure without examining how reliable the identification actually was—that is, without examining the factual basis for the witness's ability to identify the defendant as the perpetrator of the crime.[20] This makes little sense. No matter how necessary an identification procedure might have been, if the procedure was suggestive and the identification not reliable, its admission at trial would violate the "fundamental fairness" guaranteed by the Due Process clause. A determination of reliability is indispensable for assuring that such highly influential evidence—which can easily decide the fate of a trial—is not merely the creation of a biased identification procedure put together by the prosecution or the police.

This is not to say that the police should be precluded from using suggestive and necessary identification procedures for *investigative* purposes; however, to repeat, the question of whether such critical and, by definition, tainted evidence should be introduced at the trial must involve a determination of its reliability.

The Supreme Court's failure to consider reliability was particularly unfortunate given that the Second Circuit, whose decision the Court affirmed, clearly relied on the reliability of the identification: "[Mrs. Behrendt,]" said that opinion, "had more than a fleeting glimpse of the attacker. Although stabbed many times, she was not unconscious and the attacker had remained in full view in the brightly lighted kitchen for a considerable period of time after killing Dr. Behrendt and stabbing her."[21] The Supreme Court did not mention this crucial finding.[22]

Finally, the Supreme Court further complicated things by using the unfortunate expression "unnecessarily suggestive" (stating that Stovall was entitled to relief if the identification procedure was "unnecessarily suggestive and conducive to irreparable mistaken identification . . . .").[23] The expression put together two concepts—suggestiveness and necessity—that should have been kept apart, and it left it unclear whether an "unnecessarily suggestive procedure" was (1) a procedure whose *degree* of suggestiveness was unnecessary or (2) a procedure whose suggestiveness was not necessitated by circumstances. The difference between these two interpretations is significant. In the former case, suggestive identification procedures do not implicate Due Process concerns unless the suggestiveness crosses a certain threshold. In the latter case, any degree of suggestiveness implicates Due Process concerns unless the suggestiveness is necessitated by exigent circumstances. This ambiguity, like the rest of *Stovall*'s failings, still plagues today's lower courts opinions.[24]

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20. *Id.*

21. Stovall v. Denno, 355 F.2d 731, 738 (2d Cir. 1966).

22. *See generally Stovall*, 388 U.S. 293.

23. *Id.* at 302.

24. *See infra* Part III.

B. Simmons v. United States (1968)

A year after *Stovall,* the Court again dealt with the admissibility of a suggestive identification procedure.[25] In *Simmons v. United States,* witnesses of a bank robbery were shown photographs that repeatedly featured the defendant.[26] The witnesses identified the defendant as one of the robbers.[27] Evidence of the procedure was not introduced at the trial, but the defendant claimed that the witnesses' in-court identifications were the product of the suggestive procedure, and that they therefore violated his Due Process rights.[28]

The Court rejected the claim.[29] It began by rephrasing the governing standard, declaring that "convictions based on eyewitness identification at trial following a pretrial identification . . . will be set aside . . . only if the . . . identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[30] The opinion then continued to commit a number of missteps.

First, *Simmons* repeated *Stovall*'s mistake of conflating the constitutionality of administering suggestive identification procedures with the constitutionality of admitting such procedures (and consequent in-court identifications) as evidence at the trial.[31] Second, the Court relied in part on a determination that, as in *Stovall,* the employed identification procedure was *necessary.* It explained:

> A serious felony had been committed. The perpetrators were still at large. The inconclusive clues which law enforcement officials possessed led to [the defendant and his co-defendant]. It was essential for the FBI agents swiftly to determine whether they were on the right track, so that they could properly deploy their forces in Chicago and, if necessary, alert officials in other cities. The justification for this method of procedure was hardly less compelling than that which we found to justify the "'one-man lineup"' in *Stovall v. Denno.*[32]

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25. Simmons v. United States, 390 U.S. 377, 381 (1968).

26. *Id.* at 385.

27. *Id.* at 382.

28. *Id.* at 381–82.

29. *Id.* at 385.

30. *Id.* at 384.

31. *See id.* ("[I]t is not suggested that it was unnecessary for the FBI to resort to photographic identification in this instance.") This statement indicates that the Court deduced admissibility from the necessity of administering the procedure. The Court also stated "that in the factual surroundings of this case the identification procedure used was not such as to deny Simmons due process of law . . . or to call for reversal under our supervisory authority." *Id.* at 386. However, whether it was constitutional to use such a procedure is a different question from whether the products of such a procedure are admissible at the trial.

32. *Id.* at 384–85.

In other words, the Court unabashedly equated the necessity of presenting a suspect to a dying witness with the necessity of determining whether the police were "on the right track."[33] Many of today's lower court decisions also employ such ridiculously broad definitions of necessity.[34]

Nevertheless, *Simmons* corrected *Stovall*'s most important failure: in considering the "totality of the circumstances," Simmons also considered the reliability of the identifications:

> [T]here was in the circumstances of this case little chance that the procedure utilized led to misidentification of [the defendant]. The robbery took place in the afternoon in a well-lighted [sic] bank. The robbers wore no masks. Five bank employees had been able to see the robber later identified as [the defendant] for periods ranging up to five minutes. Those witnesses were shown the photographs only a day later, while their memories were still fresh. . . . Taken together, these circumstances leave little room for doubt that the identification of [the defendant] was correct, even though the identification procedure employed may have in some respects fallen short of the ideal.[35]

Examining the reliability of the identification was a critical improvement over *Stovall*. Unfortunately, however, *Simmons* never explicitly repudiated *Stovall*. That failure was made particularly dangerous given *Simmons*' extremely broad understanding of "necessity," and *Stovall*'s claim that necessity alone could justify the admissibility of the most suggestive identification procedure.

And yet, *Simmons* did implicitly repudiate that claim: the opinion relied on the reliability of a suggestive but necessary identification procedure when determining the admissibility of consequent in-court identifications.[36] And this enormous doctrinal improvement was in fact

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33. *Id.*

34. *See, e.g.*, Ramirez v. Taylor, 103 Fed. App'x 248, 250 (9th Cir. 2004).

35. *Id.* at 385–86 (footnote omitted).

36. *See Simmons*, 390 U.S. at 385–86 (noting circumstances that made witness identification of Simmons reliable). Ten years later, in *Manson v. Brathwaite*, Justice Marshall authored a dissenting opinion joined by Justice Brennan, the author of *Stovall*, where Marshall offered a different interpretation of the relationship between *Stovall* and *Simmons*:

> *Stovall* and *Simmons* established two different due process tests for two very different situations. Where the prosecution sought to use evidence of a questionable pretrial identification, *Stovall* required its exclusion...unless the necessity for the unduly suggestive procedure outweighed its potential for generating an irreparably mistaken identification. The *Simmons* test, on the other hand, was directed to ascertaining due process violations in the introduction of in-court identification testimony.

Manson v. Brathwaite, 432 U.S. 98, 114, 122 (1977) (Marshall, J., dissenting). I do not subscribe to Marshall's interpretation, but his interpretation, in any event, does read a concern with reliability into Stovall. *See infra* Part III.

followed by all subsequent Supreme Court decisions.[37]

C. Neil v. Biggers (1972) and Manson v. Brathwaite (1977)

The issue of reliability took center stage four years later in *Neil v. Biggers*.[38] In *Biggers*, the Supreme Court reversed both the district court and the Sixth Circuit in holding that the admission of a suggestive identification procedure—a one-man showup—did not violate the Due Process clause.[39] The lower courts relied on the fact that the procedure was both suggestive and *unnecessary*; but the Court rejected the claim that suggestive identification procedures were inadmissible simply by virtue of being gratuitous.[40] Instead, it was "the likelihood of misidentification which violates a defendant's right to due process."[41] The Court explained: "Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous."[42] However, the mere combination of suggestiveness and gratuitousness was not fatal so long as the identification was reliable:

> [T]he central question [is] whether under the "totality of the circumstances" the identification was reliable even though the confrontation procedure was suggestive. As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.[43]

Thus, although *Biggers*' identification procedure was suggestive and unnecessary, the identification was reliable and the procedure was therefore admissible under the Due Process clause.[44]

Biggers's trial took place before *Stovall*, where the Court first

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37. Two years later, the Supreme Court rejected a Due Process challenge concerning a suggestive identification procedure by examining the identification's reliability. Citing *Stovall*, the Court first noted that such a claim "must be determined on the totality of the surrounding circumstances" and then relied on the fact that the identifying witness "got a real good look" at the defendant in rejecting the challenge. Coleman v. Alabama, 399 U.S. 1, 4–6 (1970).

38. Neil v. Biggers, 409 U.S. 188 (1972).

39. *Id.* at 198.

40. *See id.* at 198–99.

41. *Id.* at 198.

42. *Id.*

43. *Id.* at 199–200.

44. *Id.* at 199–201.

explicitly recognized such Due Process claims.[45] A subsequent case, *Manson v. Brathwaite*, affirmed the applicability of the *Biggers* holding to post-*Stovall* cases as well, stating that "reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-*Stovall* confrontations."[46] The *Brathwaite* Court applied the reliability factors mentioned in *Biggers* and stated that "[a]gainst these factors is to be weighed the corrupting effect of the suggestive identification itself."[47] It then concluded that the procedure employed was admissible.[48]

Biggers and *Brathwaite* were controversial decisions. Both refused to exclude from subsequent trials suggestive but utterly gratuitous identification procedures, thereby rejecting a major disincentive for police use of such faulty methods.[49] They did so by holding it irrelevant, for purposes of Due Process analysis, whether a police-arranged suggestive identification procedure was necessary or not: whether necessitated by circumstances or completely gratuitous, the Due Process question remained the same—namely, whether the identification was reliable given the procedure's level of suggestiveness.[50]

Although both *Biggers* and *Brathwaite* dealt with unnecessary identification procedures, both clearly deemed reliability the "central question" irrespective of necessity. Indeed, both *Biggers* and *Brathwaite* explicitly relied on *Stovall* and *Simmons* (cases dealing with necessary identification procedures) for their holdings, claiming that both of these earlier cases supported the focus on reliability.[51] In fact, *Brathwaite* went so far as to claim that *Stovall* was all about reliability:

> The driving force behind *United States v. Wade*, *Gilbert v. California*, and *Stovall*, all decided on the same day, was the Court's concern with the problems of eyewitness identification. Usually the witness must testify about an encounter with a total stranger under circumstances of emergency or emotional stress. The witness' recollection of the stranger can be distorted easily by the circumstances or by later actions of the police. *Thus,* Wade *and its companion cases reflect the concern that the jury not hear eyewitness testimony unless that evidence has aspects of*

45. *See supra* Part II.

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

47. *Id.* at 114–16.

48. *Id.*

49. At least one state court refused to follow *Biggers* and *Brathwaite*, relying instead on state constitutional Due Process protections. *See* State v. Dubose, 699 N.W.2d 582, 594–95 (Wis. 2005).

50. *See Brathwaite*, 432 U.S. at 114 ("reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-Stovall confrontations"); *Biggers*, 409 U.S. at 198 ("It is, first of all, apparent that the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification.'").

51. *See* Neil v. Biggers, 409 U.S. 188, 196–98 (1972); Manson v. Brathwaite, 432 U. S. 98, 104–06 (1977).

reliability.[52]

Even William Brennan, the author of the *Stovall* opinion, was happy to join in this reconstruction of *Stovall.* He joined Thurgood Marshall's dissenting opinion in *Brathwaite,* which similarly reinterpreted *Stovall* as requiring reliability determinations. "Despite my strong disagreement with the Court over the proper standards to be applied in this case," wrote Marshall:

> I am pleased that its application of the totality test does recognize the continuing vitality of *Stovall.* In assessing the reliability of the identification, the Court mandates weighing "the corrupting effect of the suggestive identification itself" against the "indicators of [a witness's] ability to make an accurate identification." The Court holds . . . that a due process identification inquiry must take account of the suggestiveness of a confrontation and the likelihood that it led to misidentification, as recognized in *Stovall* and *Wade.*[53]

Whether this reading of *Stovall* is correct or not (it isn't), there can be little doubt that both *Biggers* and *Brathwaite* trace their concern with reliability to cases dealing with *necessary* identification procedures, and that both regard reliability as the central question in the admissibility of both necessary and unnecessary procedures.

In any event, as mentioned before, there is no good reason to dispense with the reliability requirement where the procedure happens to be necessary. Whether a procedure was or was not necessitated by circumstances is simply irrelevant to whether such evidence would compromise the fairness of the trial. When the police administer an identification procedure that suggests to the identifying witness who is the suspect expected to be identified, Due Process protections should guarantee that the identification—often the most powerful evidence at a trial—is based on a sound foundation. This is true whatever the exigencies at the time the procedure takes place.

However, as we saw, these doctrinal insights do not appear in a clear and straightforward manner; rather, they need to be teased out of cases that are meandering, ambiguous, and often themselves confused. So it is not surprising that lower courts dealing with suggestive and necessary identification procedures often—in fact, very often—get things wrong.

III. Doctrinal Mess

Federal courts habitually make mistakes in handling suggestive and

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52. *Brathwaite,* 432 U.S. at 111–12 (1977) (emphasis added) (internal citations omitted).

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

necessary identification procedures. The most common and harmful mistake is their disregard of reliability: lower courts regularly admit testimony of police-arranged suggestive identification procedures and consequent in-court identifications without inquiring into the reliability of those identifications. The following cases are typical.

In *Ramirez v. Taylor*, the Ninth Circuit affirmed the admission of a one-person showup.[54] It reasoned as follows:

> [T]he curbside identification of Ramirez, while suggestive, was not unnecessarily suggestive. . . . A suggestive identification violates due process if it was unnecessary or "gratuitous" under the circumstances. *Neil v. Biggers*, 409 U.S. 188, 198 (1972). The state court reasonably concluded that time pressures and a concern for accuracy made the curbside identification of Ramirez necessary. One-on-one identifications are necessary because of officers' and suspects' strong interest in the expeditious release of innocent persons and the reliability of identifications made soon after and near a crime. In addition, the procedure used here was not especially likely to yield an "irreparable misidentification." We have held that similar curbside identifications—and some even more suggestive—did not raise a substantial likelihood of irreparable misidentification. . . . [U]nless the identification procedure was unnecessarily suggestive, reliability is for the jury to consider.[55]

The mistakes are legion. First, it is inaccurate to describe *Biggers* as holding that "[a] suggestive identification violates due process if it was unnecessary or 'gratuitous' under the circumstances."[56] On the contrary, *Biggers* held that even if a suggestive identification procedure *was* unnecessary, it could still be admissible if reliable.[57] Nor did *Biggers* hold that *only* unnecessary or gratuitous procedures may violate Due Process; as we saw, *Biggers* flatly rejected any distinction between the Due Process analysis of necessary and unnecessary identification procedures.[58]

Such a distinction, however, lies at the heart of the *Ramirez* opinion. In a throwback to the error and ambiguity of *Stovall*, the Ninth Circuit declared reliability a Due Process concern only in cases of "unnecessarily suggestive" identification procedures.[59] It then obviated the need for any reliability determination by finding the procedure to be "necessary" because of the strong interest in the prompt release of innocent

54. Ramirez v. Taylor, 103 Fed. App'x 248, 251 (9th Cir. 2004).

55. *Id.* at 250–51 (internal citations omitted).

56. *Id.* at 250.

57. *See* Neil v. Biggers, 409 U.S. 188, 198–201 (1972).

58. *See supra* Part II.C.

59. *Ramirez*, 103 Fed. App'x at 251.

suspects and the purported reliability of prompt identifications.[60] This understanding of necessity, coupled with the court's exegesis of the relevant doctrine, made all on-the-scene suggestive identification procedures instantly admissible, no matter how unreliable they may be.

In *United States v. Hawkins*, the Seventh Circuit held that determining whether "the admission of testimony regarding an out of court identification offends the defendant's due process rights" was a two-step process.[61] "First, the defendant must establish that the identification procedure was unduly suggestive."[62] (The term "unduly suggestive," apparently intended as synonymous with *Simmons*'s "impermissibly suggestive," is common among lower courts, even though its only appearance in the Supreme Court came in Justice Marshall's dissenting opinion in *Manson v. Brathwaite*.[63]) Second, said the court, if the defendant established that the identification was unduly suggestive, the court must determine whether "under the totality of the circumstances, the identification was nonetheless reliable."[64] Thus far, the analysis appears accurate: if an identification procedure is suggestive, it would be admissible only if it is reliable. However, the Seventh Circuit went on to state that "[t]o satisfy the first prong of our analysis, the defendant must show both that the identification procedure was suggestive *and that such suggestiveness was unnecessary*."[65] In other words, the reliability determination is not required if a suggestive identification procedure was necessary. The court then found that, since the defendant was "apprehended close in time and proximity to the scene of the crime," the procedure was indeed necessary, and testimony of the procedure was therefore admissible without any reliability inquiry.[66] Once again, the *Stovall* analysis—faulty and subsequently repudiated by the Supreme Court—cast its long shadow over the admissibility of a suggestive identification procedure. Similar analyses can be found in the Second, Third, Fifth, and Eighth Circuits.[67]

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60. *Id.*

61. United States v. Hawkins, 499 F.3d 703, 707 (7th Cir. 2007).

62. *Id.*

63. Manson v. Brathwaite, 432 U.S. 98, 114, 122–23 (1977) (Marshall, J., dissenting). There are two possible explanations as to why the term "unduly suggestive" is so popular. First, it more clearly conveys the truism that all identification procedures are to some extent suggestive. Thus, it is only the "unduly suggestive" procedures that raise Due Process concerns, and not just any suggestive procedure. Second, courts may be concerned that the term "impermissibly suggestive" appears to state a conclusion about the legality of the procedure, when actually a finding of suggestiveness is only the beginning of the inquiry, not its end. Courts therefore speak of "unduly suggestive" procedures to avoid suggesting unlawfulness ahead of the required analysis.

64. *Hawkins*, 499 F.3d at 707.

65. *Id.* (emphasis added).

66. *Id.* at 707–08. As an aside, the court went on to state that "Even if we had concluded that the identification procedures were unduly suggestive [meaning unnecessary], we nevertheless would conclude that, under the totality of the circumstances, the identification was reliable." *Id.* at 710.

67. *See, e.g.*, United States v. Bautista, 23 F.3d 726 (2nd Cir. 1994); United States v. Stevens, 935 F.2d 1380 (3rd Cir. 1991); Herrera v. Collins, 904 F.2d 944 (5th Cir. 1990); United States v. Martinez,

A somewhat peculiar way of reaching the same result comes from the Eleventh Circuit. In *United States v. Walker*, the court stated that single-person "[s]how-up identifications 'are not unnecessarily suggestive unless the police aggravate the suggestiveness of the confrontation.'"[68] The opinion added: "Walker cites no authority for his position that identification of a single individual is intrinsically suggestive, and our precedent suggests that it is not."[69] The Due Process challenge was then rejected without any inquiry into the identification's reliability.

This is strange reasoning indeed. As we saw, a procedure's suggestiveness consists of its tendency to suggest to the identifying witness that the defendant is the sought-after criminal. Thus, there can be little doubt that a single-person showup is "intrinsically" suggestive, and most courts treat it as such.[70] Whether the police then further "aggravate" the suggestiveness is beside the point: the police may exacerbate an already bad situation, but suggestiveness warrants a reliability determination whether or not the situation was aggravated.

One way or another, reliability goes by the wayside when these and other circuit courts admit evidence of police-arranged suggestive identification procedures at trial. A number of these opinions rely on the celebrated criminal procedure treatise by LaFave et al. in support of their position.[71] This usually superb treatise endorses the view that suggestive identification procedures are admissible if found to have been necessary.[72] Like many of the cases relying on it, the treatise traces this position to *Stovall*.[73] But as we have seen, this position overlooks the significant changes made to *Stovall* by subsequent Supreme Court decisions, and the doctrinal untenability of the *Stovall* analysis.

It need be added that, naturally, not all circuit court decisions misunderstood the matter.[74] Among those is a 1983 Ninth Circuit decision

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462 F.3d 903 (8th Cir. 2006).

68. United States v. Walker, 201 Fed. App'x 737, 741 (11th Cir. 2006) (citing Johnson v. Dugger, 817 F.2d 726, 729 (11th Cir. 1987)).

69. *Id.*

70. *See, e.g.*, United States v. Sanders, 547 F.2d 1037, 1040 (8th Cir. 1976) (holding that showups are "inherently suggestive"); United States v. Brownlee, 454 F.3d 131, 138 (3rd Cir. 2006) ("As the Supreme Court has acknowledged, a show-up procedure is inherently suggestive because, by its very nature, it suggests that the police think they have caught the perpetrator of the crime.").

71. *See, e.g.*, *Hawkins*, 499 F.3d at 707; *Stevens*, 935 F.2d at 1389.

72. *See* 2 WAYNE R. LAFAVE et al., CRIMINAL PROCEDURE § 7.4(b) (3rd ed., updated 2009):

> Under the *Stovall* due process test . . . the first question to be asked is whether the initial identification procedure was unnecessarily . . . or impermissibly . . . suggestive . . . . This first inquiry can in turn be broken down into two constituent parts: that concerning the suggestiveness of the identification, and that concerning whether there was some good reason for the failure to resort to less suggestive procedures. . . . Assuming suggestive circumstances, the question then is whether they were impermissible or unnecessary. The Court gave a negative answer in *Stovall* . . . [concluding] that "an immediate hospital confrontation was imperative."

73. *Id.*

74. *See, e.g.*, United States v. Craig, 198 Fed.App'x 459 (6th Cir. 2006).

that stated:

> [T]he rationale[] of *Manson* . . . dictate[s] that the need, or lack of it, for the identification procedures employed by the prosecution's officers plays no part in the determination of the admissibility of identification evidence, a determination that focuses solely on reliability. . . . [T]he extent to which the officers *needed* to use a certain identification procedure cannot render eyewitness identification testimony admissible or, on the other hand, mandate its exclusion. . . . [W]e do not consider relevant whether [the suggestive procedure at issue] was necessary[.][75]

Unfortunately, that decision was later reversed by the Supreme Court on other grounds,[76] and its doctrinal insight was lost and replaced by cases like *Ramirez*.[77]

IV. Conclusion

There are two operative concepts in determining the admissibility of identification procedures and consequent in-court identifications: suggestiveness and reliability. Reliability pertains to the witness's ability to identify the sought-after criminal independent from, and in spite of, the suggestive procedure employed. Suggestiveness, in turn, pertains to the degree to which a police-arranged identification procedure suggests to the identifying witness that the defendant is the sought-after criminal. Showups, where defendants are presented singly to identifying witnesses, are clearly sufficiently suggestive so as to implicate Due Process concerns. But suggestiveness may take many forms—verbal exchanges, body language, indicative contexts—and may infect all sorts of identification procedures, from photo arrays, to lineups, to voice-recognitions, to the construction of police sketches. The question is always whether the defendant was singled out as the likely perpetrator of the crime vis-à-vis other actual or hypothetical suspects.

The threshold inquiry in Due Process challenges is whether an identification procedure was suggestive. Without suggestiveness, there can be no Due Process violation. But when the government sets up an identification procedure that points to the defendant as the suspect to be identified, Due Process concerns are implicated. In such instances, the possibility of misidentification necessitates a determination of the identification's reliability before such evidence, or any consequent

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75. Mata v. Sumner, 696 F.2d 1244, 1254 (9th Cir. 1983), *rev'd on other grounds*, 64 U.S. 957 (1983).

76. Mata v. Sumner, 64 U.S. 957 (1983).

77. *See supra* notes 58–64.

identification, can be introduced at the trial. Reliability determinations involve, among other factors, the circumstances surrounding the initial viewing of the defendant at the time of the crime (duration, lighting, witness stress level, whether the defendant wore a mask, the witness's degree of attention, etc.), the certainty of the identification and the explanation for that certainty, the passage of time between the initial viewing and the identification procedure, and the accuracy of any previous identification or non-identification. These factors must be examined in light of the level of suggestiveness present in the procedure; as the Supreme Court put it, "[a]gainst these factors is to be weighed the corrupting effect of the suggestive identification itself."[78] The more suggestive the procedure, the more reliable the identification must be.

The importance of weighing suggestiveness against reliability is self-explanatory—the more suggestive the procedure, the greater the risk of misidentification absent strong reliability indicators. But the test also provides a much-needed incentive for the police to avoid excessive suggestiveness in their identification procedures, even when some level of suggestiveness is unavoidable or necessary under the circumstances.

Finally, it need be emphasized that *no* Due Process violations occur solely through the use of suggestive identification procedures by law enforcement officials, no matter how unnecessary they may be. Violations can occur only when evidence regarding a suggestive procedure, or any consequent in-court identification tainted by said procedure, is admitted at trial. Due Process concerns have to do with the evidentiary hazards of such identifications, not with any impropriety in administering them (like the improprieties inherent in the use of coercive interrogations, or in searches or seizures that violate reasonable expectations of privacy).[79] The police should be free to administer such procedures for legitimate investigative purposes.

However, when a defendant is identified as the sought-after criminal in a suggestive procedure orchestrated by the prosecution or the police, and that identification is not backed up by sufficient indicia of reliability, the Due Process clause requires that evidence of the procedure, and any consequent identification, be excluded from trial. Admitting such powerful but tainted evidence undermines truth-seeking, offends the Due Process principle of fundamental fairness, and adds to the risk that "society [has been left] unprotected from the depredations of an active criminal."[80]

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

79. *See id.* at 112 ("*Wade* and its companion cases [*Gilbert* and *Stovall*] reflect the concern that the jury not hear eyewitness testimony unless that evidence has aspects of reliability.")

80. *Id.* at 127 (Marshall, J., dissenting).