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*, 132 S. Ct. 716, 728 (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*, 132 S. Ct. at 724-25 (dictum). 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). 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*, 132 S. Ct. 716, 730 (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).

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.*, *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."); *State v. Dubose*, 285 Wis. 2d 143, 148, 165-66, 699 N.W.2d 582, 584-85, 593-94 (2005) ("adopt[ing] standards for the admissibility of out-of-court identification evidence similar to those set forth in the United States Supreme Court's [pre-*Manson*] decision in *Stovall v. Denno*, 388 U.S. 293 . . . (1967) [§ 27.3.1 *infra*]" and holding that "evidence obtained from an out-of-court showup is inherently suggestive and will not be admissible unless, based on the totality of the circumstances, the procedure was necessary"; recognizing that "[a] lineup or photo array is generally fairer than a showup," and therefore specifying that "[a] showup will not be necessary . . . unless the police lacked probable cause to make an arrest or, as a result of other exigent circumstances, could not have conducted a lineup or photo array."); *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.").

§ 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); 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*, 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 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"). 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.

§ 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'").

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. 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).

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").

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. 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).

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").

§ 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*, 132 S. Ct. 716, 730 (2012). *See id*. at 720-21 ("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 (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*, 132 S. Ct. at 738-39 & nn.5-11 (Sotomayor, J., dissenting).

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*.