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Guess Who?: First-Time In-Court Identifications and Due Process

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Abstract

Juries believe eyewitnesses. When an identifying eyewitness takes the stand and points to a defendant in a courtroom, the jury is more likely to render a guilty verdict. But how reliable is that identification? What if the eyewitness is on the stand identifying a perpetrator for the first time, in the court room, rather than at the police station with a lineup or photo array? How do those suggestive circumstances implicate a criminal defendant's due process rights?

First-time in-court identifications are inherently suggestive. While the Supreme Court has acknowledged the suggestive nature of similar identifications, it did not directly address first-time in-court identifications in its most recent eyewitness identification case, Perry v. New Hampshire. *State and lower federal courts have filled the void in the Supreme Court's jurisprudence, but they remain divided on how to handle identifications occurring for the first time in the courtroom. Some courts opt to require a preliminary screening to assess the*

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reliability of the identification prior to in-court admission, while other courts maintain that traditional trial procedures, such as cross-examination, the right to counsel, and jury instructions, adequately protect defendants.

After Perry*, some state courts have provided defendants with additional protections. The high courts of Massachusetts, Connecticut, New Jersey, and Michigan all recognize the inherent suggestiveness of first-time in-court identifications and have adopted different procedures to protect defendants against the risks of misidentification.*

This Note explores the problems with first-time in-court identifications, the inadequacy of the Supreme Court's current jurisprudence, and several states' approaches to offering additional protection for defendants facing a first-time in-court identification. This Note calls for state and federal courts to adopt a more stringent standard of admissibility for first-time in-court identifications, and also urges courts to construe Perry *broadly to encompass actions by prosecutors. Additional protections are necessary, and even critical, to prevent misidentifications that lead to wrongful convictions. Reforming the way trial courts handle first-time in-court identifications is one way to protect the rights of criminal defendants.*

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[T]he arc of logic trumps the weight of authority.

State v. Dickson[1]

INTRODUCTION

The United States Supreme Court has ruled on a number of cases involving out-of-court identification procedures, particularly those arranged by police that are unnecessarily suggestive. The Court has recognized "a due process check on the admission of eyewitness identification, applicable when the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime."[2] But what happens when the prosecutor creates suggestive circumstances in the courtroom? State and federal courts are still answering this question. The Supreme Court has not directly addressed first-time in-court eyewitness

1. 141 A.3d 810, 827 (Conn. 2010).
2. Perry v. New Hampshire, 565 U.S. 228, 232 (2012).

identifications[3] and the ways that such identifications can implicate, and even violate, a criminal defendant's due process rights.[4]

The Supreme Court's most recent decision on eyewitness identification, *Perry v. New Hampshire*,[5] purported to "resolve [in the negative] a division of opinion on the question whether the Due Process Clause requires a trial judge to conduct a preliminary assessment on the reliability of an eyewitness identification made under suggestive circumstances not arranged by the police."[6] However, even after *Perry*, state and federal courts remain divided on how to handle first-time in-court identifications. Though first-time in-court identifications are "not arranged by the police," some courts interpret *Perry*'s different language in its holding, "arranged by law enforcement," to include prosecutors.[7] Those courts found that asking a witness to identify the defendant in court for the first time can be unnecessarily suggestive, triggering a preliminary reliability screening requirement under the Due Process Clause.[8] Other courts decline to extend *Perry*'s language to prosecutors.[9] Instead, these courts rely on traditional trial procedures, such as cross-examination, the right to counsel, and jury instructions, to protect defendants from "the likelihood of misidentification which violates a defendant's right to due process."[10]

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3. A first-time in-court eyewitness identification occurs when there has been no prior out-of-court, pretrial identification, and the State asks a witness to identify the defendant as the perpetrator for the first time at trial. *See* Dakota Kann, Note, *Admissibility of First Time In-Court Eyewitness Identifications: An Argument for Additional Due Process Protections in New York*, 39 CARDOZO L. REV. 1457, 1495 n.8 (2018).

4. *See* Evan J. Mandery, *Legal Development: Due Process Considerations of In-Court Identifications*, 60 ALB. L. REV. 389, 398 (1996) ("No Supreme Court decision has decided the standard to be applied in determining the admissibility of in-court identifications in the face of claims of suggestiveness by defendants.").

5. 565 U.S. 228 (2012).

6. *Id.* at 236; *see also id.* at 248 (holding "the Due Process Clause does not require a preliminary judicial inquiry . . . when the identification was not . . . arranged by law enforcement").

7. *See id.*; *infra* Part II.A–B.

8. *Id.* at 248; *see infra* Part II.A–B.

9. *See infra* Part II.C.

10. Neil v. Biggers, 409 U.S. 188, 198 (1972).

Some state courts have also chosen to provide defendants with additional protections in the wake of *Perry*. Massachusetts, Connecticut, New Jersey, and Michigan all recognize the inherent suggestiveness of first-time in-court identifications and have adopted protections for defendants against the risks of misidentification.[11] Although these states are in the minority, the logic of their reasoning, when coupled with recent social science research about the faults of eyewitness memory and juries' continued confidence in them, makes clear that reform is imperative.[12]

Part I of this Note provides background about eyewitness identification, explaining the methods police officers use when asking eyewitnesses to identify perpetrators and outlining how juries often credit eyewitness identification above other evidence. Part I then provides an overview of the major Supreme Court rulings addressing eyewitness identification and traces the transformation of due process protections in this area.

Part II analyzes four states' approaches to handling first-time in-court identifications and the ways these courts attempt to protect the accused from misidentification and wrongful convictions. Part II then explains the constitutional weakness in one state's decision to rely solely on traditional trial procedures to satisfy the accused's right to due process.

Part III urges state and federal courts to increase protection for the accused by following the lead of the four states discussed herein: Massachusetts, Connecticut, New Jersey, and Michigan. It also calls for the Supreme Court to clarify the topic of first-time in-court identifications.[13] Part III additionally advocates for more courts to adopt the "good reason" standard of admissibility for first-time in-court identifications, set forth by *Commonwealth v. Crayton*,[14] as the best solution for decreasing the risk of misidentification of criminal defendants.

I. BACKGROUND

In the absence of convincing physical or scientific evidence, eyewitness identification testimony is often critical to the

11. *See infra* Part II.A–B.
12. *See infra* Part I.A.
13. *See infra* Part III.
14. 21 N.E.3d 157 (Mass. 2014).

prosecution's ability to prove that the defendant is guilty of an alleged crime.[15] Therefore, eyewitnesses can play a pivotal role in prosecuting crimes.[16] But, eyewitness evidence is not always reliable.[17] The following subparts explore the challenges and risks associated with eyewitness identification and showcase the Supreme Court's reliance on reliability of eyewitness identification, despite growing evidence to the contrary.

A. *Eyewitness Identification: A Practice Riddled with Problems*

Eyewitnesses to a crime often identify criminal suspects or defendants outside the courtroom prior to trial, as well as inside the courtroom at trial. Out-of-court identifications are typically facilitated by law enforcement, in either a lineup, photo array, or "showup" procedure.[18] A lineup is a police-facilitated identification procedure in which the police present the witness with a group of physically similar persons, one of whom may be the suspect, and then ask the witness to determine whether any of the individuals is the perpetrator of the crime.[19] A photo array refers to another type of police-facilitated identification procedure in which the police present the witness with mug shots and ask the witness to identify whether any of the photos

15. *See* Kenneth A. Deffenbacher et al., *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation*, 14 J. EXPERIMENTAL PSYCH. 139, 139 (2008) ("Unless the government has other incriminating physical evidence, eyewitness identification testimony is crucial whenever the prosecution attempts to prove that the defendant and the perpetrator are one and the same.").

16. *See* Fredric D. Woocher, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969, 969 (1977) ("Identifying the defendant as the wrongdoer presents an issue, and often the sole one for determination, in every criminal trial.").

17. *See id.* ("The unreliability of eyewitness identification evidence poses one of the most serious problems in the administration of criminal justice.").

18. *See* Kann, *supra* note 3, at 1463 (referencing the three types of out-of-court identification procedures).

19. *See Lineup*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A police identification procedure in which physically similar persons, one of whom may be the suspect, stand in a row in front of the victim, usually simultaneously, or a witness to determine whether the suspect can be identified as the perpetrator of the crime.").

depict the perpetrator of the crime.[20] A showup is the last main police-facilitated identification procedure, in which the police show the witness only one suspect, usually at the scene of the crime or the police station, and ask the witness whether that specific individual is the perpetrator.[21]

Showups are often thought to be the most suggestive of the identification procedures, since the police present the victim or witness with only one potential suspect, usually one who is already being held in custody.[22] Consequently, the use of showups has been "widely condemned," except in narrow circumstances where police can justify the single suspect showup for public safety reasons.[23]

While out-of-court showups have proven to be problematic due to their suggestive nature, first-time in-court identifications may be more suggestive than out-of-court showups.[24] For an

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20. *See Photo Array*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A series of photographs, often police mug shots, shown sequentially to a witness for the purpose of identifying the perpetrator of a crime."); *see also* NAT'L RSCH. COUNCIL OF THE NAT'L ACAD. OF SCIS., IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 23 (2014) [hereinafter IDENTIFYING THE CULPRIT] ("The photo array is the most common police-arranged identification procedure used in the United States. A photo array consists of six to nine photographs displayed to a witness.").

21. *See Showup*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A police procedure in which a suspect is shown singly to a witness for identification, rather than as part of a lineup. In a showup, a witness is brought to the scene and asked whether a detained or arrested suspect is the perpetrator.").

22. *See* IDENTIFYING THE CULPRIT, *supra* note 20, at 28 ("Courts consider showups highly suggestive, and prosecutors urge the police to exercise caution when conducting them.").

23. *See* Stovall v. Denno, 388 U.S. 293, 302 (1967) ("[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 [the defendant] to [the victim] in an immediate hospital confrontation was imperative."); BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 55 (2011) [hereinafter CONVICTING THE INNOCENT] ("[S]hortly after a crime occurs, . . . police have an important public safety reason to detain a potentially dangerous person immediately; otherwise they would have to let him go while they tried to prepare a lineup procedure.").

24. *See Stovall*, 388 U.S. at 302 ("The practice of showing suspects singly to persons for the purpose of identification has been widely condemned."); *see also* Commonwealth v. Crayton, 21 N.E.3d 157, 166 (Mass. 2014) ("In fact,

in-court identification during a criminal trial, the accused sits at the counsel table, often the only person in the courtroom matching the perpetrator's description.[25] The prosecutor then asks the witness to identify the culprit of the crime.[26] At this point, the witness is aware that the person at the defense table is "not only *a* suspect, but is also *the* suspect and the only one on trial."[27] The jury watches as the witness points, "sometimes with dramatic flair," to the defendant.[28]

Social science data about the unreliability of eyewitness testimony and the impact of this evidence on juries indicate that these theatrics may be detrimental to the truth. Jurors rely heavily on eyewitness identification, sometimes convicting in the face of evidence that casts doubt on the witness's ability to identify the culprit.[29] In a mock trial experiment, jurors were given information about a robbery in which two victims were shot.[30] When jurors were told there was no eyewitness to the shooting, only 18 percent voted to convict.[31] When a second group of jurors heard the store clerk testify that he saw the defendant shoot the two victims during the robbery, 72 percent

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in-court identifications may be more suggestive than showups."); State v. Watson, 298 A.3d 1049, 1065 (N.J. 2023)

> Asking witnesses long after a crime was committed if they can identify the culprit—when the only person at counsel table who could reasonably be the defendant would be obvious to the witness, and when it is evident the prosecution team believes the person is the culprit—presents an even greater risk of misidentification than an out-of-court showup.

25. *See* Mandery, *supra* note 4, at 389 ("In the ordinary criminal case, the defendant is conspicuously seated at the defense table, often distinctively dressed, and sometimes the only member of his or her race in the courtroom.").

26. Aliza B. Kaplan & Janis C. Puracal, *Who Could It Be Now? Challenging the Reliability of First Time In-Court Identifications After* State v. Henderson *and* State v. Lawson, 105 J. CRIM. L. & CRIMINOLOGY 947, 950 (2015) ("In first-time, in-court identifications, a witness is identifying the defendant for the first time after he or she has already been identified by the state as the suspect and charged with the crime.").

27. *Id.* at 954.

28. Walker v. Commonwealth, 887 S.E.2d 544, 549 (Va. 2023).

29. *See* Elizabeth F. Loftus, *Reconstructing Memory: The Incredible Eyewitness*, 15 JURIMETRICS J. 188, 189 (1975) (presenting data about a mock trial experiment in which multiple sets of jurors were given the same evidence about the crime but some received eyewitness testimony while others did not).

30. *Id.*

31. *Id.*

of those jurors voted to convict.[32] A third group of jurors heard the store clerk testify that he saw the defendant shoot the victims, but cross-examination additionally revealed that the store clerk was legally blind.[33] Startlingly, 68 percent of those jurors still voted to convict.[34] That study demonstrates juries' susceptibility to the persuasive power of an eyewitness who declares, "that's the man," even if cross-examination reveals evidence that may tell another story.[35]

People tend to believe that "witnesses are considerably more likely to be accurate than they actually are."[36] Yet, studies show that people often forget the faces of strangers soon after the encounter, pointing toward a greater likelihood that a witness to a crime committed by a stranger will make an inaccurate identification.[37] The chances of an accurate identification decrease further when people are asked to make identifications of those who do not share their race.[38] People are better at distinguishing between faces of those who share their race than those who do not.[39]

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32. *Id.*

33. *Id.*

34. *Id.*

35. *See id;* ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 8–9 (1979)

> [Even] when no other evidence is available, the testimony of one or more eyewitnesses can be overwhelmingly influential [for determining guilt]. A jury seems to find it proof enough when a single person implicates another with a remark such as "I am certain that's the man!" Jurors have been known to accept eyewitness testimony pointing to guilt even when it is *far* outweighed by evidence of innocence.

36. Melissa Boyce et al., *Belief of Eyewitness Identification Evidence*, *in* HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR PEOPLE 501, 508 (R.C.L. Lindsay et al. eds., 2007) (presenting multiple studies that show that people overestimate the percentage of witnesses who would make a correct identification of a culprit).

37. *See* Deffenbacher et al., *supra* note 15, at 148 ("Rate of memory loss for an unfamiliar face is greatest right after the encounter and then levels off over time.").

38. *See id.* at 146 ("[T]he cross-race effect . . . [is] a forensically relevant phenomenon whereby once-seen faces of another race or ethnic grouping are discriminated from one another less well and later recognized less well than are once-seen faces of the observer's own race.").

39. *See id.* ("[S]ame-race faces are more easily discriminated from one another than are other-race faces.").

Cross-examination is hardly an adequate mechanism for determining whether the eyewitness's identification is accurate because "a witness who mistakenly believes that he is accurately identifying the defendant will come across in cross-examination as quite sincere and confident."[40] This confidence can be persuasive to a jury. Even though a witness's confidence is not linked to the accuracy of the identification, "cross-examination is unlikely to expose any witness uncertainty or weakness in the testimony because cross-examination is far better at exposing lies than at countering sincere but mistaken beliefs."[41] Ultimately, "all the evidence points rather strikingly to the conclusion that there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says '[t]hat's the one!'"[42]

It is precisely because eyewitness identifications are so persuasive to jurors that misidentifications inevitably occur and can lead to wrongful convictions of innocent people.[43] Post-conviction DNA testing has resulted in more than 300 exonerations since 1989.[44] At least one mistaken eyewitness identification was present in almost three-quarters of DNA exonerations.[45] Critically, in those cases, "eyewitness identification played a significant evidentiary role, and almost

40. Garner v. People, 436 P.3d 1107, 1122 (Colo. 2010) (Hart, J., dissenting).

41. State v. Dickson, 141 A.3d 810, 832 (Conn. 2016) (internal quotation omitted); *see* Kann, *supra* note 3, at 1464 ("[S]tudies have shown that the correlation between a witness's level of certainty and the accuracy of the identification is markedly low, especially where the identification procedure used is suggestive."); *see also* Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) ("Eyewitness testimony is likely to be believed by jurors, especially when it is offered with a high level of confidence, even though the accuracy of an eyewitness and the confidence of that witness may not be related to one another at all." (internal quotation omitted)).

42. *Watkins*, 449 U.S. at 352 (Brennan, J., dissenting).

43. Walker v. Commonwealth, 870 S.E.2d 328, 345 (Va. Ct. App. 2022) (Lorish, J., dissenting) ("It is because eyewitness identification is so persuasive to jurors that eyewitness misidentification is widely recognized as the single greatest cause of wrongful convictions in this country." (internal quotation omitted)).

44. IDENTIFYING THE CULPRIT, *supra* note 20, at 11.

45. *Id.*

without exception, the eyewitnesses who testified expressed complete confidence that they had chosen the perpetrator."[46]

Nevertheless, courts rely on eyewitness confidence to assess the reliability of an identification,[47] despite research indicating that such confidence is actually "highly malleable and may be the product of police suggestion."[48] For instance, police sometimes comment or validate the eyewitness after an out-of-court identification, such as telling a witness, "Good, you identified the suspect."[49] This can reinforce an eyewitness's confidence in their selection and affect their testimony at trial.[50] This phenomenon also highlights that a witness's identification at trial might be from his memory of the crime, or he might simply be confirming the person he picked in the pretrial identification procedure.[51]

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46. *Id.*

47. *See* infra Part I.B.3 (explaining that level of certainty expressed by the witness is one of the Biggers factors).

48. Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND. L. REV. 451, 453 (2012) [hereinafter *Eyewitnesses and Exclusion*]; *see* Kaplan & Puracal, *supra* note 26, at 964–65 (explaining that numerous factors, "including confirming feedback from police and prosecutors," can increase eyewitness confidence but have no bearing on the accuracy of the eyewitness's identification); *see also* GARRETT, CONVICTING THE INNOCENT, *supra* note 23, at 60 (describing how police can bias eyewitnesses by telling them that the suspect is in the lineup or by failing to tell them that the perpetrator may not be in the lineup at all).

49. Garrett, *Eyewitnesses and Exclusion*, *supra* note 48, at 453; *see* Gary L. Wells & Amy L. Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED PSYCH. 360, 360 (1998) (presenting a study in which witnesses were given confirming feedback, disconfirming feedback, or no feedback after identifying suspects and finding that the manipulations produced strong effects on the witness's retrospective reports of their certainty).

50. *See* Garrett, *Eyewitnesses and Exclusion*, *supra* note 48, at 470 ("Feedback or reinforcement after the identification can also have a dramatic effect on confidence."); *see also* Wells & Bradfield, *supra* note 49, at 361 ("Courts have been concerned primarily with the idea that the person who administers the lineup should not influence the choice of the eyewitnesses, but they have shown no particular concern with the possibility that the investigators' postidentification comments might inflate the confidence of the eyewitnesses.").

51. *See* Manson v. Brathwaite, 432 U.S. 98, 122 (1977) (Marshall, J., dissenting) ("The issue is whether the witness is identifying the defendant solely on the basis of his memory of events at the time of the crime, or whether he is merely remembering the person he picked out in a pretrial procedure.").

Eyewitness identifications and associated flaws ultimately diminish the rights of the accused both before trial and during trial.[52] Despite increased awareness of the unreliability of eyewitness testimony, the United States Supreme Court has yet to incorporate this compelling data from social scientists and change the way eyewitness identifications are permitted to be used by the prosecution at trial.

B. *The Supreme Court's Precedent and Avoidance*

The United States Supreme Court has recognized the "hazards" of potentially tainted eyewitness identification since the 1960s, acknowledging the "dangers for the suspect are particularly grave when the witness's opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest."[53] Despite scientific findings that continue to exemplify the dangers associated with eyewitness identifications, the Supreme Court has declined to expand protections for defendants identified for the first time in the courtroom.[54] The discussion below explores the major Supreme Court cases dealing with eyewitness identification and exemplifies the ways in which the Court has assiduously avoided answering the specific question of first-time in-court identifications.

1. *Stovall v. Denno*

In *Stovall v. Denno*,[55] the Supreme Court analyzed identification evidence using a due process lens for the first time.[56] Stabbed by an attacker, the victim in *Stovall* was

52. *See* Garrett, *Eyewitnesses and Exclusion, supra* note 48, at 463 ("In a case that goes to trial, there may be both prior lineups and a courtroom identification. There may even be a courtroom identification at a preliminary hearing and another at trial before the jury. . . . [O]ver time, the Court's jurisprudence failed to differentiate those multiple identifications . . . .").

53. United States v. Wade, 388 U.S. 218, 229 (1967); *see id.* at 228 ("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.").

54. *See* Kaplan & Puracal, *supra* note 26, at 965–66 ("[T]he Court has refused to take the reins on bringing the law on eyewitness identification in line with the prevailing scientific research findings.").

55. 388 U.S. 293 (1967).

56. *Id.* at 301–02.

hospitalized and in critical condition when the police asked her to identify the assailant.[57] The police used a showup; they handcuffed Stovall, took him into the victim's hospital room, and repeatedly asked the victim if he "was the man."[58] Stovall was the only Black man in the room.[59] At trial, the court admitted the out-of-court identification and permitted the victim to make an in-court identification.[60] Stovall was convicted and sentenced to death.[61]

On appeal, Stovall argued that the unnecessarily suggestive identification procedure denied him due process of law.[62]The Court determined that whether an identification procedure violates due process depends on the "totality of the circumstances surrounding it."[63] The Court stated that the showup procedure used "was imperative."[64] Even though showing the victim a single, handcuffed suspect was suggestive, the victim, who was in critical condition, could not come to the station to identify the suspect promptly and ultimately might have died from the stab wounds before trial.[65] Therefore, the

57. *Id.* at 295.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *See id.* at 301–02 ("[The petitioner argued that the identification] was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law.").

63. *See id.* at 302 ("[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 [the victim] in an immediate hospital confrontation was imperative.").

64. *See id.*

> Here was the only person in the world who could possibly exonerate Stovall. Her words, and only her words, "He is not the man" could have resulted in freedom for Stovall. The hospital was not far distant from the courthouse and jail. No one knew how long [the victim] might live. Faced with the responsibility of identifying the attacker, with the need for immediate action and with the knowledge that [the victim] 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.

65. *Id.*

Court held, under the totality of the circumstances, the defendant's due process rights were not violated by the admission of the hospital identification at trial.[66]

The Court focused on the need to acquire identification evidence that might be lost, rather than on the suggestiveness of the identification procedure.[67] Nevertheless, the Court reaffirmed its condemnation of showups as unnecessarily suggestive in most circumstances.[68]

Showups and first-time in-court identifications arise out of almost identical scenarios: a defendant or suspect is singled out and a witness is asked to identify them as the culprit. Because of their similar qualities, the Court should condemn first-time in-court identifications with equal force.[69] *Stovall*'s reasoning that the showup was "imperative" for the collection of the identification evidence will almost never apply to first-time in-court identifications.[70] As a practical matter, there is not likely to be an exigency that would justify a witness only making an identification for the first time in the courtroom but at no other time before the trial.

2. *Foster v. California*

Although the Supreme Court recognizes that suggestive identifications are problematic, the Court rarely finds an identification procedure to be suggestive enough to violate due process. But, in *Foster v. California*,[71] the Court did just that. In *Foster*, police employed three separate identification procedures before the witness identified Foster as the culprit of an armed

66. *Id.*

67. *See* Kaplan & Puracal, *supra* note 26, at 969–70 ("The Court put the recognized suggestiveness aside and instead focused on the need for evidence that would otherwise be lost.").

68. *See* Stovall v. Denno, 388 U.S. 293, 302 (1967) ("The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned.").

69. *See* Kaplan & Puracal, *supra* note 26, at 970 ("That condemnation should apply with just as much force to first time, in-court identifications where the defendant is singled out in the courtroom and is already on trial for the crime.").

70. *See id.* ("It is rarely, if ever, necessary to conduct a first time, in-court identification, making the *Stovall* Court's 'need for the evidence' analysis inapposite.").

71. 394 U.S. 440 (1969).

robbery.[72] During the first identification attempt, the police used a lineup and the witness failed to identify Foster as the culprit.[73] In a subsequent showup, the witness made only a tentative identification of Foster.[74] The police then organized a final lineup—one in which Foster was the only participant who had been present at both of the other identification procedures.[75] During this last lineup, the witness identified Foster as the robber.[76]

The Court reiterated the rule that "judged by the 'totality of the circumstances,' the conduct of identification procedures may be 'so unnecessarily suggestive and conducive to irreparable mistaken identification' as to be a denial of due process of law."[77] Accordingly, the Court reversed and remanded the case, holding that the lineup procedures at issue in *Foster* "so undermined the reliability of the eyewitness identification as to violate due process."[78]

The repeated and unfair lineup procedures in *Foster* undermined the reliability of the eyewitness identification because, once Foster appeared in multiple lineups, it became "all but inevitable" that the witness would identify him, even if the witness did not independently remember seeing Foster commit the crime.[79] The police put Foster in front of the witness on multiple occasions—in effect, telling the witness, "*This* is the man."[80]

While it is reassuring that the Supreme Court recognized a violation of due process in this extreme case of police-suggested identification, the Court's current protections fail to aid defendants in situations less flagrant than those in *Foster*.

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72. *Id.* at 441.

73. *Id.*

74. *Id.*

75. *Id.* at 441–42.

76. *See id.* at 442 ("This time [the witness] was 'convinced' petitioner was the man.").

77. *Id.* at 441 (quoting *Stovall*, 388 U.S. at 302).

78. *Id.* at 443.

79. *See id.* at 443 ("The suggestive elements in this identification procedure made it all but inevitable that [the witness] would identify petitioner whether or not he was in fact 'the man.'").

80. *See id.* ("In the present case the pretrial confrontations clearly were so arranged as to make the resulting identifications virtually inevitable.").

3. *Neil v. Biggers*

In *Neil v. Biggers*,[81] the Supreme Court clarified the totality of the circumstances approach to eyewitness identification by adding a five-factor test to aid courts in determining the admissibility of potentially suggestive out-of-court identifications.[82] In *Biggers*, a rape victim viewed suspects in lineups, showups, and photo arrays at her house and the police station.[83] She did not make any affirmative identification of the suspects.[84] While Biggers was detained at the police station on another charge, the police called the victim to the station to view him.[85] Although the police attempted to conduct a lineup, they could not find enough people that fit his description, so they ultimately conducted a showup instead.[86] Upon seeing and hearing him speak, the victim made her identification.[87] She later testified at trial that she had no doubt that Biggers was her assailant.[88]

The Supreme Court articulated a five-factor test and determined that the victim's identification of Biggers was reliable.[89] The Court acknowledged that the "primary evil to be avoided is a very substantial likelihood of irreparable misidentification."[90] The factors presented in *Biggers* are, therefore, designed to assist with evaluating the likelihood of potential misidentification as well as the original probability

81. 409 U.S. 188 (1972).

82. *See id.* at 196.

83. *See id.* at 194–95 ("On several occasions over the course of the next seven months, she viewed suspects in her home or at the police station, some in lineups and others in showups, and was shown between 30 and 40 photographs.").

84. *Id.* at 195.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 195–96.

89. *See id.* at 199–201 (framing the "central question" as "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive").

90. *Id.* at 198 (internal quotation omitted).

that the witness could reliably identify the culprit.[91] According to the *Biggers* Court,

> [T]he 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.[92]

After applying the factors in *Biggers*, the Court determined the showup identification was admissible because the victim's identification was sufficiently reliable even though the showup procedure was suggestive.[93] On those particular facts, where the rape victim "was no casual observer, but rather the victim of one of the most personally humiliating of all crimes," the factors weighed in favor of the victim's reliability.[94] The victim spent a considerable period of time with her assailant and gave a detailed description of him following the crime.[95] She made no identification at any of the prior photo arrays, showups, or lineups, and only identified a perpetrator when she viewed Biggers at the station.[96]

The Court stated that "the admission of evidence of a showup without more does not violate due process."[97] So, under the five-factor test in *Biggers*, the Court determined there was no substantial likelihood of misidentification and the evidence was properly admitted.[98]

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91. *See id.* at 201 (explaining that the victim's record for reliability was "good" because she had previously resisted the suggestiveness of prior showups in which she did not identify Biggers).

92. *Id.* at 199–200.

93. *See id.* at 201 ("Weighing all the factors, we find no substantial likelihood of misidentification.").

94. *Id.* at 200.

95. *See id.* ("Her description to the police, which included the assailant's approximate age, height, weight, complexion, skin texture, build, and voice, might not have satisfied Proust but was more than ordinarily thorough.").

96. *Id.*

97. *Id.* at 198.

98. *Id.* at 201.

4. *Manson v. Brathwaite*

In *Manson v. Brathwaite*,[99] the Supreme Court revisited the *Biggers* five-factor test, emphasizing an oft-quoted principle: "reliability is the linchpin in determining the admissibility of identification testimony."[100] There, an undercover officer purchased narcotics from a known drug dealer and gave a description of the dealer to a second police officer less than an hour after the drug deal.[101] The second officer, thinking he recognized the dealer from the description, pulled a photograph of Brathwaite and left it on the undercover officer's desk.[102] Two days after the initial meeting with the dealer, the undercover officer viewed the photograph and identified the person in the photograph as the dealer from whom he purchased the narcotics.[103] Months later, the officers arrested Brathwaite.[104] He was charged with possession and sale of heroin, and, at trial, the photograph was entered into evidence.[105] The undercover officer also made an in-court identification of Brathwaite and the jury found him guilty.[106]

On appeal, the Second Circuit held that the photograph should have been excluded "regardless of reliability[] because the examination of the single photograph was unnecessary and suggestive."[107] The Supreme Court reversed.[108] Using the *Biggers* factors, the Court found that the identification was

99. 432 U.S. 98 (1977).

100. *Id.* at 114.

101. *Id.* at 101.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 102.

106. *Id.*

107. *Id.* at 103–04. Brathwaite had filed a petition for habeas corpus in the United States District Court for the District of Connecticut, which ultimately dismissed his petition. *Id.* at 103. The Second Circuit reversed, with instructions to issue the writ unless the State would agree to a new trial. *Id.* The Second Circuit also noted that the in-court identification had "little meaning" since Brathwaite was seated at the defense table. *Id.* at 109. The court found there was too great a danger that Brathwaite was convicted simply because the officer thought he was a likely offender, rather than because the undercover officer truly remembered him. *Id.*

108. *Id.* at 117.

sufficiently reliable to be admissible.[109] As a result, *Manson* stands for the principle that unnecessarily suggestive out-of-court identifications can be admissible if they are reliable under *Biggers'* totality of the circumstances test.[110]

In *Biggers* and *Manson*, the Supreme Court shifted its focus "from the suggestiveness of the [identification] procedure employed to the reliability of the identification."[111] This shift is notable for two reasons.

First, the analysis firmly became a "challenge to the weight, and not the admissibility, of the evidence."[112] Courts are not encouraged to screen identification evidence before admitting it to the jury—juries are supposed to be able to measure and weigh questionable identification testimony on their own.[113] Under *Manson*, the burden rests on the defendant to show why the identification is unduly suggestive.[114] But even if the defendant meets this burden, courts may still admit the evidence by determining the identification is reliable under the totality of the circumstances, using the *Biggers* factors.[115]

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109. *See id.* ("We conclude that the criteria laid down in *Biggers* are to be applied in determining the admissibility of evidence offered by the prosecution . . . and that those criteria are satisfactorily met and complied with here.").

110. *See id.* at 106 ("The admission of testimony concerning a suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability.").

111. Mandery, *supra* note 4, at 398.

112. Kaplan & Puracal, *supra* note 26, at 971.

113. *See* Manson v. Brathwaite, 432 U.S. 98, 116 (1977) ("We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.").

114. *See* Kaplan & Puracal, *supra* note 26, at 972 (explaining that the *Manson* framework requires the defendant to show why the identification was unduly suggestive and that courts may still admit the identification despite its suggestiveness).

115. *See id.* ("Even if [the defendant] is successful in meeting this burden, the court must still consider the 'totality of the circumstances' to determine whether the identification is nonetheless reliable, despite its suggestiveness." (citing *Manson*, 432 U.S. at 110–14)); *see also Manson*, 432 U.S. at 106 ("The 'central question,' however, was 'whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive.'" (quoting Neils v. Biggers, 409 U.S. 188, 199 (1972))).

These factors are related to the second reason the Supreme Court's shift in focus is notable: the *Biggers* factors are not good indicators of reliability.[116] The factors are largely based on information that the witness reports, and as previously discussed, a witness may feel certain in his memory despite being mistaken.[117] Recent social science data shows that witnesses' confidence in reporting information has little or no correlation with accuracy or reliability.[118] The *Biggers* factors do not take into account the vast increase in social science research pointing to the unreliability of these purported reliability factors.[119] Nevertheless, Supreme Court jurisprudence has not strayed from its support of these factors, and the majority of federal and state courts rely solely on the framework from *Manson* and *Biggers* to assess eyewitness identification procedures.[120]

116. *See* Kaplan & Puracal, *supra* note 26, at 972 ("The Biggers factors have proven to be poor indicators of reliability . . . ."); Wells & Bradfield, *supra* note 49, at 361 ("These five criteria have been criticized on theoretical and empirical grounds in psychology, including the fact that four of the five criteria rely on memory-based self-reports from the very eyewitnesses whose memory is being called into question."(citation omitted)).

117. *See id.* (arguing that an examination of objective factors may promote fairness and reliability better than the *Manson* framework). See *supra* Part I.A for a discussion of the faults of eyewitness memory.

118. *See* Kaplan & Puracal, *supra* note 26, at 973 ("In fact, an abundance of social science research indicates that eyewitnesses are vulnerable to suggestion, and that in most criminal cases, the eyewitness's confidence has little or no correlation with accuracy."); *see also supra* notes 48–50 and accompanying text.

119. *See* Adam Liptak, *34 Years Later, Supreme Court Will Revisit Eyewitness IDs*, N.Y. TIMES (Aug. 22, 2011), https://perma.cc/Y2HB-4RHJ ("[T]here is no area in which social science research has done more to illuminate a legal issue. More than 2,000 studies on the topic have been published in professional journals in the past 30 years.").

120. *See* Kaplan & Puracal, *supra* note 26, at 972 ("[T]he *Manson* due process analysis of the 1970s is alive and well, and today, is the leading framework used for assessing eyewitness identification procedures in federal and state courts.").

5. *Perry v. New Hampshire*

Perry v. New Hampshire is the Supreme Court's most recent case involving eyewitness identification.[121] The witness in *Perry*, Blandon, looked out her apartment window and saw a man walking around the apartment parking lot at 2:30 a.m.[122] The man smashed a car window with a bat and attempted to steal the car stereo and amplifiers.[123] Blandon called the police and the police intercepted the man while he was standing by the vehicle.[124] When one of the officers asked Blandon for a description of the person she saw breaking into the car, Blandon simply pointed to Perry, who was still standing outside the car with another officer.[125] After this identification, the officers arrested Perry.[126] One month later, police showed Blandon a photo array that included Perry.[127] When asked to identify the person who broke into the car, Blandon was unable to identify Perry's photo.[128]

At trial, Perry moved to suppress the identification, arguing that admitting "what amounted to a one-person showup in the parking lot" would violate due process.[129] The trial court noted Blandon's identification on the night of the crime was not a result of suggestive procedures arranged by police.[130] Blandon spontaneously pointed to the man outside in response to the police asking her for a description.[131] The trial court denied the

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121. *See* Perry v. New Hampshire, 565 U.S. 228, 236 (2012) ("We granted certiorari to resolve a division of opinion on the question whether the Due Process Clause requires a trial judge to conduct a preliminary assessment of the reliability of an eyewitness identification made under suggestive circumstances not arranged by the police.").

122. *Id.* at 233–34.

123. *See id.* 233 (noting that the reporting officer asked Perry where "the amplifiers came from" and Perry responded he "found them on the ground" soon after witnesses heard what "sounded like a metal bat hitting the ground" and that windows "had been shattered").

124. *Id.*

125. *Id.* at 234.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 234–35.

130. *Id.* at 235.

131. *Id.*

motion to suppress and admitted the identification, reasoning that without improper law enforcement involvement, due process was not implicated.[132] Perry was found guilty of theft.[133] On appeal, Perry argued that "suggestive circumstances alone . . . suffice to trigger the court's duty to evaluate the reliability of the resulting identification before allowing presentation of the evidence to the jury."[134] The New Hampshire Supreme Court rejected Perry's argument.[135]

The United States Supreme Court outlined its eyewitness identification jurisprudence and noted, critically, that the decisions all "turn on the presence of state action" in conducting the identification procedures.[136] The Court further reasoned that, where there is no improper state action, normal trial procedures suffice to test reliability of eyewitness identification evidence.[137] "[O]ther safeguards built into our adversary system" protect defendants from potentially unreliable identification evidence when there is no improper law enforcement activity involved.[138] These protections are central to the Court's ultimate holding in this case:

> When no improper law enforcement activity is involved, we hold, 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.[139]

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132. *Id.*

133. *Id.* at 236.

134. *Id.*

135. *See id.* ("Only where the police employ suggestive identification techniques . . . does the Due Process Clause require a trial court to assess the reliability of identification evidence before permitting a jury to consider it.").

136. *Id.* at 233.

137. *See id.* at 245–47 (presenting the right to counsel, right to cross-examination, and the use of jury instructions as safeguards that "caution juries against placing undue weight on eyewitness testimony of questionable reliability").

138. *Id.* at 245.

139. *Id.* at 233.

The Court placed significant weight on the adversarial process of a trial, particularly the power of cross-examination, to reveal potentially unreliable identifications rather than any five-factor reliability analysis under *Manson*.[140] Since the Court declined to require pretrial screening for reliability unless law enforcement officers created the suggestive circumstances of the identification, the Court determined that the *Manson* framework was inapplicable to determining the reliability of the identification in *Perry*.[141] The Court further pointed out that tainted identification evidence is excluded to deter law enforcement from using unnecessarily suggestive lineups, showups, and photo arrays.[142] If law enforcement does not create the suggestive circumstances involved with the identification, there is no reason to exclude the identification evidence entirely.[143] While acknowledging that suggestive identification procedures and unreliability may affect eyewitness identifications, the Court determined that fallibility of eyewitness evidence alone does not require pretrial screening for reliability before submission to the jury.[144] This rationale

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140. *Id.* at 247–48

> While cross-examining Blandon and Officer Clay, Perry's attorney constantly brought up the weaknesses of Blandon's identification. She highlighted: (1) the significant distance between Blandon's window and the parking lot . . . ; (2) the lateness of the hour . . . ; (3) the van that partly obstructed Blandon's view . . . ; (4) Blandon's concession that she was "so scared [she] really didn't pay attention" to what Perry was wearing; (5) Blandon's inability to describe Perry's facial features or other identifying marks . . . ; (6) Blandon's failure to pick Perry out of a photo array . . . ; and (7) Perry's position next to a uniformed, gun-bearing police officer at the moment Blandon made her identification . . . . (citations omitted).

141. *Id.* at 233, 245, 248.

142. *Id.* at 241 ("A primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances . . . is to deter law enforcement use of improper lineups, showups, and photo arrays in the first place.").

143. *See id.* at 242 ("This deterrence rationale is inapposite in cases, like Perry's, in which the police engaged in no improper conduct.").

144. *See id.* at 244 ("Most eyewitness identifications involve some element of suggestion."); *id.* at 245 ("The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness.").

also recognizes "that the jury, not the judge, traditionally determines the reliability of evidence."[145]

The Court went on to emphasize that "due process concerns arise only when law enforcement officers use an identification procedure that is both *suggestive and unnecessary*."[146] Therefore, the preliminary judicial inquiry into reliability "comes into play only after the defendant establishes improper police conduct."[147]

The Court did not revisit the *Manson* framework but specifically focused on unnecessarily suggestive identification procedures arranged by law enforcement as the required triggers for potential due process issues.[148] In the absence of suggestive police conduct, the Court is clear: no judicial pretrial screening is required for eyewitness identification evidence to be presented to a jury.[149]

II. STATE COURTS AND FIRST-TIME IN-COURT IDENTIFICATIONS

Perry is at the heart of a lingering dispute: whether *Perry*'s analysis of an out-of-court identification extends to in-court identifications. State and federal courts have taken a variety of stances regarding whether and when *Perry* applies to first-time in-court identifications. The majority of courts have determined that *Perry* covers both in-court and out-of-court identifications.[150] Under this view, the absence of suggestive

145. *Id.* at 245.

146. *Id.* at 238–39 (emphasis added).

147. *Id.* at 241.

148. *See id.* at 245 (expressing "unwillingness to enlarge the domain of due process" and relying on other "safeguards built into our adversary system" to protect defendants).

149. *See id.* at 232 ("We have not extended pretrial screening for reliability to cases in which the suggestive circumstances were not arranged by law enforcement officers."); *id.* at 248 ("[W]e hold that the introduction of Blandon's eyewitness testimony, without a preliminary judicial assessment of its reliability, did not render Perry's trial fundamentally unfair.").

150. *See, e.g.*, United States v. Thomas, 849 F.3d 906, 910 (10th Cir. 2017) (finding that the *Perry* court expressly rejected a "rule requiring trial judges to prescreen eyewitness evidence for reliability any time an identification is made under suggestive circumstances"); United States v. Whatley, 719 F.3d 1206, 1216 (11th Cir. 2013) (explaining that *Perry* makes clear that due

circumstances arranged by law enforcement renders any eyewitness identification evidence admissible and not subject to a preliminary reliability analysis.[151] Accordingly, due process is not violated when the government seeks to introduce a first-time in-court eyewitness identification at trial.[152] The majority reasons that normal trial procedures are sufficient to protect against the risks of misidentification.[153] Courts holding the majority view also point out that the jury's ability to view the witness make the initial identification and hear the witness undergo cross-examination protects against the risk of misidentification in cases of first-time in-court identifications.[154]

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process requirements are satisfied with normal trial protections for defendants who are identified under suggestive circumstances not arranged by police).

151. *See* cases cited *supra* note 150 and accompanying text.

152. *See, e.g.*, State v. Doolin, 942 N.W.2d 500, 508 (Iowa 2020) (declining to hold that "identifications during trial are unconstitutionally suggestive"); United States v. Bush, 749 F.2d 1227, 1232 (7th Cir. 1984) (holding that a first-time in-court identification is not a suggestive circumstance that would implicate due process); Baker v. Hocker, 496 F.2d 615, 617 (9th Cir. 1974) (holding that an in-court identification does not present unnecessary suggestion and does not require due process protections).

153. *See, e.g.*, United States v. Hughes, 562 Fed. Appx. 393, 398 (6th Cir. 2014) (clarifying that *Perry* indicates that "due process rights of defendants identified in the courtroom under suggestive circumstances are generally met through the ordinary protections in trial"); Fairley v. Commonwealth, 527 S.W.3d 792, 799 (Ky. 2017) (determining that the "trial safeguards identified in *Perry* were present and fully utilized" so no additional safeguards were necessary).

154. *See, e.g.*, United States v. Correa-Osorio, 784 F.3d 11, 20 (1st Cir. 2015) ("The jurors had ring-side seats for [the defendant's] identification."); *Baker*, 496 F.2d at 617 ("The risk of a mistaken identification becoming irreparably 'fixed' . . . is far less present in the court proceeding because, as here, the identification can be immediately challenged by cross-examination."); United States v. Domina, 784 F.2d 1361, 1368 (9th Cir. 1986)

> The concern with in-court identification, where there has been suggestive pretrial identification, is that the witness later identifies the person in court, not from his or her recollection of observations at the time of the crime charged, but from the suggestive pretrial identification. Because the jurors are not present to observe the pretrial identification, they are not able to observe the witness making that initial identification. The certainty or hesitation of the witness when making the identification, the witness's facial expressions, voice inflection, body language, and the other normal observations one makes in everyday life when judging the

But there is a problem the majority view does not encompass: the repeated language in *Perry*—"improper police conduct" and "arranged by law enforcement"—emphasizes police deterrence as the reason for due process checks on suggestive out-of-court identification procedures, but not first-time in-court identifications.[155] A minority of courts have embraced an alternative view: due process requires a preliminary reliability analysis when the government seeks to make a first-time in-court identification.[156] Some courts of the minority view have regarded *Perry* as inapposite to the problem, suggesting that the *Perry* Court did not address whether an identification elicited by prosecutors for the first time at trial offends the Due Process Clause.[157] Still other courts within the minority have interpreted *Perry*'s "arranged by law enforcement" language to include prosecutors, concluding that due process requires a preliminary reliability analysis when the government seeks to make a first-time in-court identification.[158]

> reliability of a person's statements, are not available to the jury during this pretrial proceeding. There is a danger that the identification in court may only be a confirmation of the earlier identification, with much greater certainty expressed in court than initially.
>
> When the initial identification is in court, there are different considerations. The jury can observe the witness during the identification process and is able to evaluate the reliability of the initial identification. (internal quotation omitted).

155. Perry v. Hampshire, 565 U.S. 228, 232, 241 (2012); *see supra* Part I.B.5.

156. *See, e.g.*, United States v. Morgan, 248 F. Supp. 3d 208, 213 (D.D.C. 2017) (disagreeing with "the Tenth and Eleventh Circuits' conclusion that initial in-court identifications are automatically permissible under *Perry*, without any reliability screening"); People v. Posey, 1 N.W.3d 101, 115 (Mich. 2023) ("[W]e hold that evidence of an unnecessary first-time-in-court identification procured by the prosecution—a state actor—implicates a defendant's due-process rights . . . .").

157. *See* State v. Watson, 298 A.3d 1049, 1063 (N.J. 2023) ("[In *Perry*,] the question whether suggestive in-court identifications carried out by a prosecutor could pose due process concerns was not before the court . . . ."); *see also infra* Part II.B.1.

158. *See Morgan*, 248 F. Supp. 3d at 213

> An in-court identification of defendant would be "arranged by law enforcement" because the government chose to bring this particular defendant to trial and would be choosing to ask the witness for an identification at his trial. To ask for such an identification would be

Prior to *Perry*, some federal circuits determined that in-court identifications were unnecessarily suggestive and required a totality of the circumstances analysis of the identification's reliability.[159] After *Perry*, some courts have provided preliminary reliability screening and thus signaled their inclination to protect defendants against potential misidentification and wrongful conviction.[160]

The following two subparts explore four state court of last resort cases that have adopted the minority view.[161] When the government seeks to introduce first-time in-court identifications, these state court opinions offer more protection for defendants using different methods: under state supervisory powers, under state Constitutions, and by distinguishing *Perry* itself.[162] The third subpart explores one state supreme court case that has adopted the majority view.[163] That decision exemplifies

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> "improper" government conduct if the government did not have a basis for believing that the witness could make a reliable identification. (quoting Perry v. New Hampshire, 565 U.S. 228, 248)

see also Posey, 1 N.W.3d at 115 (including prosecutors in *Perry*'s scope); *infra* Part II.B.2.

159. *See, e.g.*, United States v. Archibald, 734 F.2d 938, 941 (2d Cir. 1984) (finding that it is "obviously suggestive" to ask a witness to identify a perpetrator in the courtroom when it is clear who is the defendant); United States v. Rogers, 126 F.3d 655, 658 (5th Cir. 1997) (deciding that it is suggestive to ask a witness to identify the defendant in the courtroom and moving to the totality of the circumstances reliability analysis); United States v. Hill, 967 F.2d 226, 232 (6th Cir. 1992) (assuming without deciding that an in-court identification was unnecessarily suggestive and moving to the second part of the *Manson* framework—the reliability factors under the totality of the circumstances); United States v. Rundell, 858 F.2d 425, 427 (8th Cir. 1988) (same).

160. *See* Commonwealth v. Crayton, 21 N.E.3d 157, 165 (Mass. 2014) (admitting first-time in-court identifications only with "good reason"); State v. Dickson, 141 A.3d 810, 817 (Conn. 2016) (providing a reliability screening for first-time in-court identifications); United States v. Morgan, 248 F. Supp. 3d 208, 213 (D.D.C. 2017) ("Although the Supreme Court implied in *Perry* that it did not want all in-court identifications to be subject to judicial reliability screening, due process concerns require such screening for an initial in-court identification that is equivalent to a one-man showup."); *see also infra* Part II.A.

161. *See infra* Parts II.A–B.

162. *See Posey*, 1 N.W.3d at 113 ("*Perry* did not opine on whether a due-process violation occurs when a witness identifies the defendant for the first time at trial.").

163. *See infra* Part II.C.

the reasoning of the majority of courts that do not require judicial screening of first-time in-court identifications and instead continue to rely on traditional trial procedures to protect defendants from the risks of misidentification.[164]

A. *The Original Protectors: Massachusetts and Connecticut*

Connecticut and Massachusetts were among the first states to recognize "the inherent suggestiveness of [first-time in-court] identifications and the inability of normal trial procedures to adequately combat such suggestiveness."[165] Massachusetts created a new standard of admissibility for first-time in-court identifications by admitting them only for "good reason."[166] Connecticut imposed additional requirements for the government to fulfill if the prosecutor wishes to admit a first-time in-court identification.[167] The next sections explore the strengths in the reasoning behind these state court decisions.

1. *Commonwealth v. Crayton*

In *Commonwealth v. Crayton*, Massachusetts announced a new standard for the admission of in-court identifications where the eyewitness had not previously participated in an out-of-court identification procedure.[168] The defendant in that case was caught viewing child pornography on a public computer in a public library.[169] The two teenagers who saw the accused at the computer were never presented with a photo

164. *See* Walker v. Commonwealth, 887 S.E.2d 544, 549–52 (Va. 2023) (concluding that the Due Process Clause does not require prescreening of in-court identifications and defendants can make use of traditional safeguards of the right to counsel, the right to present evidence, and the right to cross-examination).

165. Kann, *supra* note 3, at 1460–61.

166. *See infra* Part II.A.1.

167. *See infra* Part II.A.2.

168. *See Crayton*, 21 N.E.3d at 161 ("We establish a new standard for the admission of in-court identifications where the eyewitness had not previously participated in an out-of-court identification procedure and conclude that the in-court identifications in this case would not have been admissible under that standard.").

169. *Id.*

array or asked to view the defendant in a lineup.[170] The prosecution asked the teens to identify the defendant for the first time at trial—two years after the first and only time they had ever seen Crayton.[171] Since no previous out-of-court identification could taint the in-court identification, the trial court determined the in-court identification would not be unnecessarily suggestive and was therefore admissible.[172]

The Massachusetts Supreme Judicial Court reversed, finding that in-court identifications are similar in their suggestiveness to out-of-court showups.[173] In fact, the court recognized that "in-court identifications may be more suggestive than show-ups."[174] When a witness is presented with a suspect during a showup, they are simply a suspect, and "the eyewitness is unlikely to know how confident the police are in their suspicion."[175] But once in the courtroom, the presence of the defendant is "likely to be understood by the eyewitness as confirmation that the prosecutor, as a result of the criminal investigation, believes that the defendant is the person whom the eyewitness saw commit the crime."[176] This setting can encourage the eyewitness to make an identification relying less on their memory and more on the expectation that the eyewitness will identify the person seated at the defense table.[177]

Since Massachusetts had already determined that unnecessarily suggestive out-of-court showups were inadmissible without "good reason," the court found that in-court identifications should also be inadmissible without

170. *See* Commonwealth v. Crayton, 21 N.E.3d 157, 164 (Mass. 2014).

171. *Id.*

172. *Id.*

173. *See id.* at 166 ("Where, as here, a prosecutor asks a witness at trial whether he or she can identify the perpetrator of the crime in the court room, and the defendant is sitting at counsel's table, the in-court identification is comparable in its suggestiveness to a showup identification.").

174. *Id.*

175. *Id.*

176. *Id.*

177. *See id.* at 166–67 ("Under such circumstances, eyewitnesses may identify the defendant out of reliance on the prosecutor and in conformity with what is expected of them rather than because their memory is reliable.").

"good reason" for conducting them.[178] The court analyzed three differences between first-time in-court identifications and out-of-court showups before concluding that their comparable suggestiveness rendered in-court identifications subject to the same "good reason" admissibility standard.[179] First, a jury's observation of the witness making an identification in the courtroom does not have any meaningful bearing on the jury's determination of the accuracy of the witness's identification.[180] Second, though cross-examination may lessen "the hazards of undue weight or mistake" and can take place immediately after an in-court identification, it is an insufficient safeguard.[181] Third, the burden should not be on the defendant to propose alternative measures in order to avoid a suggestive in-court identification.[182] While defendants might have advance warning of a potential in-court identification and could move for a less suggestive identification procedure, the Massachusetts Supreme Judicial Court explained that "placing this burden on the defendant suggests that the Commonwealth is entitled to an unnecessarily suggestive in-court identification unless the defendant proposes a less suggestive alternative that the trial judge in his or her discretion adopts."[183]

Relying on common law principles of fairness, the Massachusetts Supreme Judicial Court adopted a new rule:

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178. *See id.* at 165

> [T]here is generally "good reason" where the showup identification occurs within a few hours of the crime, because it is important to learn whether the police have captured the perpetrator or whether the perpetrator is still at large, and because a prompt identification is more likely to be accurate when the witness's recollection of the event is still fresh.

179. *See id.* at 167–69 (observing three differences: (1) "with an in-court identification, the jury see the identification procedure, whereas the jury do not see a showup identification procedure;" (2) showups occur "in court, and [are] therefore subject to immediate challenge through cross-examination;" and (3) "defense counsel has the opportunity to propose alternative identification procedures" at trial (internal citation omitted)).

180. *See id.* at 168 ("Social science research has shown that a witness's level of confidence in an identification is not a reliable predictor of the accuracy of the identification, especially where the level of confidence is inflated by its suggestiveness.").

181. *Id.*

182. *See id.* at 169.

183. *Id.*

"Where an eyewitness has not participated before trial in an identification procedure, we shall treat the in-court identification as an in-court showup, and shall admit it in evidence only where there is 'good reason' for its admission."[184] The court went on to define situations that would qualify as "good reason," including cases in which the eyewitness was familiar with the defendant before the commission of the crime.[185] The court put the burden on the prosecutor to move in limine to admit the first-time in-court identification.[186] By announcing this standard for admissibility, the court attempted to lower the risk of misidentification arising from the in-court identification procedures.[187] Under Massachusetts's rule, the defendant still bears the burden of showing that the in-court identification is unnecessarily suggestive and that there is no "good reason" for it.[188]

Still, even in Massachusetts, eyewitness testimony remains admissible where its source was a non-suggestive out-of-court identification procedure, and eyewitness evidence remains a large part of many criminal trials; "[a]ll that is lost by barring first-time in-court showups where there is no 'good reason' for such a showup is the unfair evidentiary weight of a needlessly suggestive showup identification that might be given more weight by a jury than it deserves."[189]

Massachusetts has relied on "common-law principles of fairness" to suppress identifications made under "especially suggestive circumstances," even if those circumstances did not

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184. *Id.*

185. *See id.* at 170 ("'Good reason' might also exist where the witness is an arresting officer who was also an eyewitness to the commission of the crime, and the identification merely confirms that the defendant is the person who was arrested for the charged crime.").

186. *See id.* at 171 ("[W]e place the burden on the prosecutor to move in limine to admit the in-court identification of the defendant by a witness where there has been no out-of-court identification.").

187. *See id.* ("[W]here the witness is not identifying the defendant based solely on his or her memory of witnessing the defendant at the time of the crime, there is little risk of misidentification arising from the in-court showup despite its suggestiveness.").

188. *Id.*

189. *Id.* at 171; *see id.* (explaining that eyewitness evidence is still important, and prosecutors may opt to conduct out-of-court identification procedures before the witness takes the stand).

result from improper police activity.[190] The Massachusetts Supreme Judicial Court recognized that its jurisprudence is in contrast with *Perry* but did not elect to debate the issue further.[191] A footnote in *Crayton* provides clarification: the court did not purport to address "whether State constitutional principles would also require 'good reason' before in-court identifications are admitted in evidence," placing the court's holding squarely in the realm of common-law principles of fairness.[192]

2. *State v. Dickson*

In *State v. Dickson*,[193] Connecticut increased due process protection for defendants by holding that trial courts must prescreen in-court identifications unless the witness successfully identified the defendant in a non-suggestive, out-of-court identification procedure.[194] The defendant in *Dickson* attempted a robbery and ultimately shot one person.[195] While the victim of the shooting identified one of the other participants in the attempted robbery, he could not identify the defendant's picture in a photo array that police presented to him one year after the shooting.[196] The victim identified the defendant for the first time at trial with the defendant sitting next to counsel at the defense table.[197] "Except for a judicial

190. *See id.* at 165 ("[W]here an unreliable identification arises from 'especially suggestive circumstances' other than an unnecessarily suggestive identification procedure conducted by the police, we have declared that '[c]ommon law principles of fairness' dictate that the identification should not be admitted." (quoting Commonwealth v. Jones, 666 N.E.2d 994, 1001 (1996))).

191. *See id.* ("Our reliance on common-law principles of fairness to suppress an identification made under 'especially suggestive circumstances' even where the circumstances did not result from improper police activity is also in contrast with the United States Supreme Court jurisprudence.").

192. *Id.* at 169 n.16.

193. 141 A.3d 810 (Conn. 2016).

194. *See id.* at 817 ("In-court identifications that are not preceded by a successful identification in a nonsuggestive identification procedure implicate due process principles and, therefore, must be prescreened by the trial court.").

195. *Id.*

196. *Id.* at 818.

197. *Id.*

marshal who was in uniform, the defendant was the only African-American male in the courtroom."[198]

Connecticut had previously held that in-court identifications should only be excluded when tainted by an unnecessarily suggestive out-of-court identification procedure.[199] Bound by this rule and finding only a mere attempt at identification in this case, not a tainted one, the trial court determined that the in-court identification was admissible.[200] On appeal, the defendant argued that the trial court violated his due process rights under the Fifth and Fourteenth Amendments of the United States Constitution when it denied his motion to preclude the in-court identification, but the appellate tribunal rejected this claim pursuant to Connecticut's precedent.[201]

The Connecticut Supreme Court overturned its prior rulings on in-court identifications, accepting the defendant's argument that first-time in-court identifications are inherently suggestive and implicate a defendant's due process rights no less than unnecessarily suggestive out-of-court identifications.[202] Because the "extreme suggestiveness and unfairness" of a one-on-one in-court identification is "so obvious," the court

198. *Id.*

199. *See* State v. Smith, 513 A.2d 189, 193 (Conn. 1986) ("[A]n in-court testimonial identification need be excluded, as violative of due process, only when it is tainted by an out-of-court identification procedure which is unnecessarily suggestive and conducive to irreparable misidentification."); State v. Nelson, 495 A.2d 298, 299 (Conn. 1985) (holding that if there is no pretrial out-of-court identification procedure, there is no basis to suppress eyewitness's in-court identification because there was nothing to taint it).

200. *See Dickson*, 141 A.3d at 818; *see also id.* at 821 ("If the trial court determines that there was no unduly suggestive identification procedure, that is the end of the analysis, and the identification evidence is admissible." (citing State v. Outing, 3 A.3d 1, 17 (2010))).

201. *Id.* at 818–19. Connecticut's prior precedent treated first-time in-court identifications the same way as identifications that were not tainted by an unnecessarily suggestive identification procedure conducted by a state actor. *Id.* at 822.

202. *Id.* at 822

> First, and most importantly, we are hard-pressed to imagine how there could be a *more* suggestive identification procedure than placing a witness on the stand in open court, confronting the witness with the person who the state has accused of committing the crime, and then asking the witness if he can identify the person who committed the crime.

reasoned that a jury might assume the witness would only be permitted to identify the defendant in court for the first time if the witness could identify the defendant in a non-suggestive, out-of-court setting.[203] First-time in-court identifications operate as "a form of improper vouching," in which the prosecution places the "prestige of the government behind a witness."[204] The court also emphasized that the law enforcement deterrence rationale for excluding identifications resulting from unnecessarily suggestive procedures applies equally to prosecutors.[205]

Consequently, in concluding that first-time in-court identifications implicate due process protections, the Connecticut Supreme Court recognized the role of the prosecutor as a state actor as a matter of law.[206] Like police, prosecutors are government actors, subject to due process constraints.[207] This recognition of prosecutors as state actors helped the Connecticut Supreme Court distinguish *Perry* from *Dickson*. First, the court observed that the United States Supreme Court has not addressed "whether first time in-court identifications are in the category of unnecessarily suggestive procedures that trigger due process protections."[208] While the Supreme Court in *Perry* repeatedly stated that due process protections are only triggered when unduly suggestive identification procedures are arranged by police, the Connecticut Supreme Court ruled in *Dickson* that due process safeguards also attach when state actors other than the police

203. *Id.* at 823.

204. *Id.* (quoting United States v. Necoechea, 986 F.2d 1273, 1276 (9th Cir. 1993)).

205. *See id.* at 824.

206. *See id.* ("[W]e cannot perceive why, if an in-court identification following an unduly suggestive pretrial police procedure implicates the defendant's due process rights because it is the result of state action, the same would not be true when a prosecutor elicits a first time in-court identification.").

207. *See id.* (explaining that there are no cases suggesting that the conduct of the prosecutor is not state action).

208. *Id.* at 821; *see also id.* at 827 ("The question of whether a first time in-court identification orchestrated by a prosecutor could trigger due process protections simply was not before the court in *Perry*.").

conduct unfair identification procedures.[209] Prosecutors, too, can stage identification procedures that infringe upon a defendant's due process entitlements.[210]

The Connecticut Supreme Court rejected the state's argument that first-time in-court identifications are necessary because there is no feasible alternative, countering that non-suggestive out-of-court lineups and photo arrays would be feasible at any point until the witness testifies.[211] Furthermore, the court also reasoned that the jury's ability to observe a witness make an initial identification does not make the situation any less suggestive or offer any other protective measures.[212] While some courts find that juries are competent to assess an eyewitness's reliability when the identification is made for the first time in the courtroom, Connecticut's highest court concluded that such a fail-safe is not enough.[213]

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209. *See id.* at 828 ("Accordingly, we do not believe that the court's repeated statements that due process protections are triggered only when unduly suggestive identification procedures are arranged by the police means that due process protections are not triggered when state actors other than the police conduct unfair identification procedures.")

210. *See infra* Part II.B.2.

211. State v. Dickson, 141 A.3d 810, 830–32 (Conn. 2016). This argument is persuasive among courts that continue to allow first-time in-court identifications without protective procedures. *See, e.g.,* Walker v. Commonwealth, 887 S.E.2d 544, 550 (Va. 2023) ("[T]he mechanism for determining the reliability of evidence is generally the trial itself, not a pretrial weeding out of evidence by judges.").

212. *See id.* at 832

> [T]he very reason that first time in-court identifications are so problematic is that, when the state places the witness under the glare of scrutiny in the courtroom and informs the witness of the identity of the person who has been charged with committing the crime, it is far less likely that the witness will be hesitant or uncertain when asked if that person is the perpetrator.

213. *See id.*

> The state also claims that in-court identifications do not implicate the same concerns as unduly suggestive pretrial identification procedures because, when the identification is in court, jurors are present to observe the witness making the initial identification. These courts fail to recognize . . . that the very reason that first time in-court identifications are so problematic is that . . . it is far less likely that the witness will be hesitant or uncertain when asked if that person is the perpetrator. (internal citations omitted).

As a result, Connecticut established new procedures for prescreening first-time in-court identifications, dispensing with the suggestion to apply the *Biggers* factors in a footnote.[214] Although a chief argument against judicial prescreening of first-time in-court identifications is that criminal trials have always allowed them and there has been no need to screen them in the past, Connecticut did not allow this reliance on history to sway its new method of affording protection to defendants.[215]

Connecticut's court of last resort stressed that "in cases in which the identity of the perpetrator is at issue and there are eyewitnesses to the crime, the best practice is to conduct a non-suggestive identification procedure as soon after the crime as is possible."[216] But, when no pretrial identification has occurred, the state must request permission from the trial court to present a first-time in-court identification; the trial court may grant the request "only if it determines that there is no factual dispute as to the identity of the perpetrator, or the ability of the particular eyewitness to identify the defendant is not at

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But see United States v. Domina, 784 F.2d 1361, 1368 (9th Cir. 1986) ("When the initial identification is in court . . . [t]he jury can observe the witness during the identification process and is able to evaluate the reliability of the . . . identification."); State v. Hickman, 330 P.3d 551, 564 (Or. 2014) (en banc) ("[W]hen a first-time eyewitness identification occurs in court . . . the factfinder is better able to evaluate the reliability of the identification because he or she can observe the witness's demeanor and hear the witness's statements *during* the identification process.").

214. State v. Dickson, 141 A.3d 810, 836 n.29 (Conn. 2016) (rejecting "that a first-time in-court identification [is] allowed if the . . . court determines that the identification [is] reliable under the *Biggers* factors," since they apply when the witness's ability to identify "has already been tainted by an unnecessarily suggestive identification procedure that the . . . court was powerless to prevent").

215. *See id.* at 832–33 ("[I]t is beyond dispute that the fact that a criminal procedure has roots in tradition does not necessarily mean that it is constitutional."); *see also id.* at 833

> [I]t would appear that the reason that eyewitness identifications played a predominant role in early English and American history is that a large proportion of criminals who were brought into court had been caught in the act by private parties, not because first time in-court eyewitness testimony was deemed to be particularly reliable.

216. *Id.* at 835.

issue."[217] If the trial court does not grant the request to make a first-time in-court identification, the state should still attempt to conduct a non-suggestive identification procedure out of court; if the eyewitness can identify the defendant in this manner, then the eyewitness can proceed to identify the defendant in court.[218] If, however, the eyewitness cannot identify the defendant in a non-suggestive out-of-court identification procedure, such as a lineup or a photo array, then "a one-on-one in-court identification should not be allowed."[219] The prosecutor may still question the witness about what he remembers about the perpetrator of the crime, but these questions must not ask whether the defendant is in fact the perpetrator.[220]

B. *The New Protectors: New Jersey and Michigan*

Two summer 2023 judicial opinions, one from New Jersey and one from Michigan, suggest that state supreme courts are increasingly willing to fortify protections for defendants against unreliable eyewitness identification.[221] Both courts directly confront *Perry*, either by fitting prosecutors within *Perry*'s "law enforcement" language or by concluding that *Perry*'s holding did not address due process concerns surrounding in-court identifications conducted by prosecutors.[222]

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217. *Id.* at 835–36; *see id.* at 836

> [I]n cases in which the trial court determines that the only issue in dispute is whether the acts that the defendant admittedly performed constituted a crime, the court should permit a first time in-court identification. In cases in which the defendant concedes that identity or the ability of a particular witness to identify the defendant as the perpetrator is not in dispute, the state may satisfy the prescreening requirement by given written or oral notice to that effect on the record.

218. *Id.*

219. *Id.* at 836–37.

220. *Id.* at 837.

221. *People v. Posey*, 1 N.W.3d 101 (Mich. 2023) was issued on July 31, 2023. *State v. Watson*, 298 A.3d 1049 (N.J. 2023) was issued on August 2, 2023.

222. *See infra* Part II.B.1–2.

1. *State v. Watson*

In *State v. Watson*,[223] the Supreme Court of New Jersey created heightened protection for defendants under the New Jersey State Constitution.[224] In that case, there was one eyewitness to a bank robbery—the teller.[225] Twenty months after the robbery, a detective showed the teller six photos and asked if he could identify the person who robbed the bank.[226] The teller picked someone other than Watson.[227] The police ultimately charged Watson based on other evidence and a former girlfriend's tip that he robbed the bank.[228] At trial, the teller, testifying about the prior photo array identification, said "he was 75 to 90 percent sure of the identification."[229] The teller then proceeded to identify the defendant in the courtroom, saying he was "80 percent sure."[230] During cross-examination, the teller revealed that the prosecutor, prior to trial, informed the teller where the defendant would be sitting.[231]

The Supreme Court of New Jersey, like Massachusetts's and Connecticut's highest courts, compared first-time in-court identifications to out-of-court showups.[232] The court highlighted the purpose that showups can serve if conducted shortly after a crime occurs, but acknowledged that generally, showups are

223. 298 A.3d 1049 (N.J. 2023).

224. *See id.* at 1066 (holding first-time in-court identifications can be conducted only when there is "good reason" for them in order to avoid triggering serious due process concerns under the New Jersey State Constitution).

225. *Id.* at 1056.

226. *Id.* at 1057.

227. *Id.* In this case, there was a pretrial identification attempt, but the defendant, Watson, was not identified. Thus, the eyewitness's identification of Watson at trial was a first-time in-court identification.

228. *Id.*

229. *Id.*

230. *Id.* (internal quotations omitted).

231. *Id.*

232. *See id.* at 1061 ("An in-court identification is essentially a live, single-person line-up in a courtroom. It is comparable to a showup but is conducted well after the crime has taken place.").

highly suggestive.[233] Showups that are conducted more than two hours after a crime often present a heightened risk of misidentification due to lapses in the witness's memory.[234] First-time in-court identifications at trial occur many months or years after the crime and present even greater risks of misidentification since memories never improve with time.[235] Therefore, if a showup or "one-on-one confrontation at the police station is highly suggestive, then surely such a confrontation in court is the most suggestive situation of all."[236] The court also presented psychological research data to support its conclusion that first-time in-court identifications are inherently suggestive.[237] The New Jersey Attorney General conceded that in-court identification procedures should be analyzed through the lens of due process since they are guided by state actors—prosecutors.[238] Consequently, the court evaluated the due process implications of the in-court identification as it pertains to prosecutors, determining that *Perry* was inapplicable.[239] The court distinguished *Perry*, explaining that it only addressed suggestive pretrial circumstances not arranged by law enforcement—meaning police.[240] In *Perry*, "the question

233. *See id.* ("[Showups] may help the police confirm whether they 'have captured the perpetrator or whether the perpetrator is still at large,' while a witness's memory is still fresh." (quoting Commonwealth v. Crayton, 21 N.E.3d 157, 165 (Mass. 2014))).

234. *See id.* at 1061–62 ("[S]howups . . . 'present a heightened risk of misidentification' if 'conducted more than two hours after an event.'" (quoting State v. Henderson, 27 A.3d 872, 903 (N.J. 2011))).

235. *See id.* at 1062 ("[M]emory decay is irreversible; memories never improve with time." (quoting State v. Henderson, 27 A.3d 872, 907 (N.J. 2011))).

236. *Id.* (quoting WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE, § 7.4, at 341 (1985)); *see id.* ("Plus in-court identifications are conducted in the presence of a judge, lending the court's imprimatur to the procedure.").

237. *See id.* at 1062–63 (presenting findings from 2019 from the Third Circuit Task Force on Eyewitness Identifications that indicate that jurors may not understand the extreme "suggestivity" of in-court identifications and reliability concerns).

238. *Id.* at 1063.

239. *See id.* (distinguishing *Perry* by explaining that the identification in that case was neither arranged by law enforcement nor was it arranged by a prosecutor).

240. *Id.*

whether suggestive in-court identifications carried out by a prosecutor could pose due process concerns was not before the court."[241] After dispensing with the argument that *Perry* was controlling, the Supreme Court of New Jersey highlighted other state courts that have placed restrictions on first-time in-court identifications, including Massachusetts and Connecticut.[242]

The *Watson* court then concluded that the court system should not permit identification procedures at trial that would not be appropriate prior to trial.[243] In doing so, the court sought to prevent witnesses who cannot identify a defendant in a non-suggestive pretrial proceeding from making an identification for the first time in court only because "suggestive cues directed them to the person on trial."[244] By conducting first-time in-court identifications, the government deprived defendants of their due process rights in ways that cross-examination or jury instructions cannot restore or mitigate.[245]

Drawing on language in *Crayton*, *Watson* held that "first-time in-court identifications can be conducted only when there is 'good reason' for them."[246] "Good reason" can exist when the eyewitness is familiar with the defendant before the crime, or when an officer simply needs to confirm that the person on trial is the same person the officer arrested.[247] The *Watson* court also reasoned that it was a better practice for the State to conduct identifications before trial, since there may not be a

241. *Id.*; *see id.* ("[W]e disagree with courts that have interpreted *Perry* differently.").

242. *See id.* at 1064 (presenting summaries of *Crayton*'s and *Dickson*'s reasoning).

243. *See id.* at 1065 ("[I]t is hard to see how the court system can justify overseeing the very type of identification procedure it would likely criticize law enforcement officers for conducting.").

244. *Id.*

245. *See id.* ("By conducting a suggestive identification procedure in a courtroom, the State may implicate due process concerns and deprive defendants of their due process rights in a way that either cross-examination nor jury instructions can adequately address.").

246. *Id.* at 1066.

247. *Id.*

"good reason" to allow a first-time in-court identification at trial.[248]

The court set out discrete procedures for proposed first-time in-court identifications—including the requirements that the State file a motion in limine if it intends to conduct one at trial, and that the defendant must receive advance notice and opportunity to challenge in-court evidence before trial.[249] The prosecution must also disclose in writing any discussion with the witness in preparation for the in-court identification.[250] Ultimately, New Jersey trial courts, with input from the parties, must determine whether "good reason" exists to allow the State to conduct a first-time in-court identification.[251]

2. *People v. Posey*

In *People v. Posey*,[252] the Michigan Supreme Court held that unnecessary first-time in-court identifications procured by the prosecution should be subject to a reliability analysis using the same factors that are used when an in-court identification is tainted by an unduly suggestive out-of-court identification procedure.[253] The witness in *Posey* could not pick out the defendant in a photo array before the trial but was still allowed to identify the defendant during the trial after being prompted by the prosecution.[254] Eyewitnesses Scott and Byrd were at a grocery market when two other men approached and confronted them.[255] Scott and Byrd recalled little about what occurred; however, both reported that gunfire erupted and Byrd stated that he fired seventeen shots from his own gun, striking both

248. *See id.* ("By the time a criminal trial begins, the original investigation is long over, a suspect has been apprehended, and prompt confirmation is no longer needed to help ensure public safety.").

249. *Id.*

250. *Id.*

251. *Id.*

252. 1 N.W.3d 101 (Mich. 2023).

253. *See id.* at 115–16 (holding that the same due process rights are at issue when an in-court identification occurs for the first time and when it occurs after being tainted by an unduly suggestive out-of-court identification procedure).

254. *Id.* at 114.

255. *Id.* at 109.

men.[256] Police later determined that at least three guns had been fired and one of those guns undisputedly belonged to Byrd.[257] Defendant Posey was admitted to the hospital for gunshot wounds around 7:12 p.m., but he stated that he had been shot at 7:45 p.m. in a part of town that was far from the grocery market.[258] He also lied when he was admitted to the hospital, providing a different first name.[259]

The day after the shootout, police showed Scott and Byrd two photo arrays and asked each one whether they could identify the shooters from the market.[260] Byrd identified two men, neither of whom were charged in connection with the shooting.[261] Scott identified one man, Posey, as the shooter but later testified he was unsure of his choice.[262]

One year later, identity was a key issue at trial.[263] Byrd identified Posey as one of the shooters for the first time, while Scott, who had previously identified Posey, was not asked to identify him at trial.[264] Posey was ultimately convicted.[265]

On appeal, Posey argued that his due process rights were violated because Byrd was allowed to identify him for the first time at trial despite the fact that Byrd had been given a photo array before trial and identified other individuals.[266] Citing *Perry*, the Court of Appeals disagreed, holding that there could be no due process violation because there was no suggestive pretrial identification and no improper police behavior.[267]

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256. *Id.*

257. *Id.* at 110.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. The prosecution argued that:

> Scott had previously identified defendant two days after the shooting while his mind was fresh, and defendant [argued] that Scott did not identify defendant at trial, that Byrd's first identification came at trial, and that no other evidence of identity was produced. *Id.*

264. *Id.*

265. *Id.* at 111.

266. *Id.* at 113.

267. *See id.* (citation omitted).

The Michigan Supreme Court concluded that the Court of Appeals of Michigan erred in finding no due process violation.[268] Michigan's highest court found *Perry* to be distinguishable: *Perry* did not involve "intentional state action that *created* a substantial likelihood of misidentification."[269] There was no evidence that a state actor intended the witness in *Perry* to see or identify the defendant at the scene of the crime.[270] The court further noted that "*Perry* did not change the due process requirement that an identification procured by improper state action must be sufficiently reliable to be presented to the jury."[271] Therefore, the court concluded that the crux of the analysis should not be whether any particular action by the police or state actor was improper.[272] "Rather, 'reliability is the linchpin in determining the admissibility of identification testimony."[273]

The court opined that in-court identifications tainted by unnecessarily suggestive out-of-court identification procedures necessarily involve state action.[274] "[W]hen the prosecution—another agent of the state—conducts an unnecessarily suggestive in-court law-enforcement procedure by obtaining an in-court identification of a defendant by a witness who was unable to identify a defendant at any point prior to that identification," a defendant's due process rights are also implicated due to the involvement of state action in procuring that identification.[275] Since the same due process rights are at

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268. *See id.*

269. *See id.* at 114.

270. *See id.* at 113 ("[*P*]*erry* was a case in which a defendant sought suppression of a pretrial witness identification when the witness initially identified the defendant as an assailant during a conversation with a police officer at the scene of the crime but later could not identify the defendant in a photographic array.").

271. *Id.* at 114.

272. *Id.*

273. *Id.* (quoting Manson v. Brathwaite, 432 U.S. 98, 114 (1977)).

274. *See id.* at 115 ("An in-court identification following an unnecessarily suggestive out-of-court law-enforcement procedure implicates a defendant's due-process rights because of the involvement of improper state action.").

275. *Id.*; *see id.* ("[W]e hold that evidence of an unnecessary first-time-in-court identification procured by the prosecution—a state actor—implicates a defendant's due-process rights in the same manner as an in-court

issue in either circumstance, the solution is for trial courts to consider reliability factors in either instance before admitting an in-court identification at trial.[276]

Ultimately, the Michigan Supreme Court returned the constitutional focus to the reliability screening of in-court identifications and confirmed that prosecutors eliciting first-time in-court identifications implicates due process rights to the same extent as police misconduct.[277] The court distinguished *Perry* on the grounds that no state actor manufactured the identification improperly in that case.[278] By placing the focus on reliability screening, Michigan aligned its test with the "substantially similar" *Biggers* factors and offered additional protection against the risks of misidentification for defendants.[279]

C. *Declining to Protect: Virginia*

About a month before *Watson* and *Posey* were decided, the Supreme Court of Virginia came down on the opposite side of the issue from Michigan and New Jersey.[280] In *Walker v. Commonwealth*,[281] Virginia's highest court sided with the

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identification that is tainted by an unduly suggestive out-of-court identification procedure employed by the police.").

276. *See id.* at 115–16. Michigan's reliability factors for evaluating the likelihood of misidentification are outlined in *People v. Gray*, 577 N.W.2d 92, 96–97 (Mich. 1998). The court notes that federal courts use the *Biggers* factors but concludes that the factors their state court has derived are "substantially similar" to the *Biggers* factors and serve the same purpose. *Id.* at 96 n.10.

277. *See* People v. Posey, 1 N.W.3d 101, 114–15 (Mich. 2023) (comparing first-time in-court identifications to unduly suggestive out-of-court identification procedures employed by police).

278. *See id.* at 113–14 ("[In *Perry*,] [t]here was no evidence that any state actor intended the witness to see or identify the defendant at the scene of the crime.").

279. *See Gray*, 577 N.W.2d at 96 n.10 (explaining that the five factors outlined in *Biggers* are substantially similar to the factors in Michigan precedent); *see also Posey*, 1 N.W.3d at 132 ("Generally, the reliability and independent-basis inquiries substantially overlap." (citing *Gray*, 577 N.W.2d at 96 n.10)).

280. Walker v. Commonwealth, 887 S.E.2d 544 (Va. 2023). *Walker v. Commonwealth* was issued on June 1, 2023. *Id. People v. Posey*, 1 N.W.3d 101 (Mich. 2023) was issued on July 31, 2023. *State v. Watson*, 298 A.3d 1049 (N.J. 2023) was issued on August 2, 2023.

281. 887 S.E.2d 544 (Va. 2023).

majority view, ruling that in-court identifications need not be judicially prescreened.[282] The Supreme Court of Virginia concluded that *Perry* resolved the question in *Walker*.[283] Although *Walker* involved a first-time in-court identification and *Perry* did not, the Supreme Court of Virginia focused on precisely that issue—*Perry* only granted due process protections to defendants when police conducted improperly suggestive out-of-court identification procedures.[284] Therefore, in a case such as *Walker*, where there was no out-of-court identification, the Supreme Court of Virginia held that *Perry* did not offer any additional protection to a defendant facing a first-time in-court identification.[285]

1. *Walker v. Commonwealth*

Wearing a mask that only revealed his eyes, Walker robbed a bank.[286] He was arrested two days later after a traffic stop.[287] Three years later, the teller identified Walker for the first time, in court.[288] The teller stated that she remembered his eyes, but when asked what about his eyes she remembered, she had no

282. *See id.* at 552 ("[W]e hold that the Due Process Clause did not compel the circuit court to pre-screen the identification [the witness] made of the defendant, when that identification was made for the first time in court."). Perhaps if the Supreme Court of Virginia had the benefit of the Michigan and New Jersey decisions as persuasive authority, it may have chosen to adopt additional protections for defendants after seeing other state supreme courts do the same.

283. *Id.* at 549 ("Neither *Perry*, nor the cases that precede it, support the argument that the Due Process Clause applies to in-court identifications. Instead, they manifest a concern for *out-of-court*, improperly suggestive *police* procedures.").

284. *Id.*

285. *Id.* at 546 ("[W]e conclude that the Due Process Clause does not require a court to pre-screen an eyewitness identification made for the first time in court.").

286. *Id.* at 545.

287. *Id.* at 546. Walker was a passenger in the vehicle, which was speeding almost forty miles per hour above the speed limit when it was stopped. *Id.* at 547. It was a white Acura with a license plate that matched one that had been reported by another bank employee on the day of the robbery as suspicious. *Id.* A search of the vehicle revealed $9,060 in cash, wrapped in the distinctive bands from the bank. *Id.* Walker also had about $2,600 in cash in his pocket. *Id.*

288. *Id.* at 548.

answer.[289] She stated that she had only been able to see his eyes, eyebrows, and his skin complexion due to the mask obscuring much of the rest of his face and head.[290]

Walker argued that a first-time in-court identification is "the kind of suggestive, improper identification procedure that the Due Process Clause regulates" and that these types of identifications should be subject to judicial screening.[291] The court was only minimally persuaded by Walker's cause.[292] The court presented five distinct reasons the Due Process Clause does not require any judicial prescreening of in-court eyewitness identifications.[293]

The first response to Walker's argument was simply that the Supreme Court in *Perry* did not "construe the Due Process Clause to require pre-screening . . . of in-court identifications."[294] The court did not make any reference to *Perry*'s language as potentially inclusive of prosecutors as state actors.[295] Instead, the court highlighted *Perry*'s inapplicability to in-court identifications, concluding that its intended scope was limited to out-of-court police procedures.[296] Restating portions of *Perry* that were also grounded in preceding cases, the court reasoned that "[a] primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances . . . is to deter law enforcement use of improper lineups, showups, and photo arrays in the first place."[297] Therefore, "'the Due Process Clause does not require a preliminary judicial inquiry into the reliability of' eyewitness

289. Walker v. Commonwealth, 870 S.E.2d 328, 344 (Va. Ct. App. 2022) (Lorish, J., dissenting).

290. *Walker*, 887 S.E.2d at 548.

291. *Id.* at 549.

292. *See id.* ("There is no denying that an in-court identification *is* suggestive . . . . The question is whether this practice is *improperly* or *unnecessarily* suggestive within the intendment of the Due Process Clause.").

293. *See id.* at 549–51.

294. *Id.* at 549.

295. *See id.* ("[*Perry*] manifest[s] a concern for *out-of-court*, improperly suggestive *police* procedures.").

296. *See id.* ("Neither *Perry*, nor the cases that precede it, support the argument that the Due Process Clause applies to in-court identifications.").

297. *Id.* (alteration in original) (quoting Perry v. New Hampshire, 565 U.S. 228, 241 (2012)).

identifications that are 'not procured under unnecessarily suggestive circumstances arranged by law enforcement.'"[298]

Second, the court noted that identifications are simply evidence and "the mechanism for determining the reliability of evidence is generally the trial itself, not a pretrial weeding out of the evidence by judges."[299] The court acknowledged the prudence of creating rules that "address conduct outside the courtroom that produces tainted evidence in the courtroom."[300] The court did not find it convincing, however, to "extend these rules, designed to address flawed police practices prior to trial, to the presentation of evidence in the courtroom when there has been no allegation of impropriety prior to trial."[301] The jury is expected to determine the reliability of the identification at trial.[302]

Third, the court stated that the "practice of in-court identifications has existed continuously for centuries."[303] The court relied on that history as an "indicator" that no prescreening is required by the Due Process Clause.[304]

Fourth, the court reasoned that even if it chose to adopt a reliability test for the purposes of conducting judicial prescreening of in-court identifications, the five *Biggers* factors do not adequately assess eyewitness reliability as they are not based in scientific research.[305] Therefore, the court declined to extend the *Biggers* factors to in-court identification screenings since "authorities on eyewitness testimony universally view [the factors] as flawed."[306]

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298. *Id.* (quoting Perry v. New Hampshire, 565 U.S. 228, 248 (2012)).

299. *Id.* at 550.

300. *Id.*

301. *Id.*

302. *See id.* ("The trial is the crucible that is designed to determine the reliability of this evidence.").

303. *See id.* at 550–51.

304. *Id.*

305. *See id.* at 551 ("The five factors the Court articulated in [*Biggers* and *Manson*] were drawn from earlier judicial rulings and not from scientific research." (internal quotation omitted)).

306. *Id.*

Fifth, the court noted the majority of courts that have ruled on the issue of first-time in-court identifications have determined that the Due Process Clause is not implicated.[307]

Beyond those reasons, the court concluded that "the Due Process Clause does not require a court to conduct a pre-screening of an eyewitness's testimony before that witness is permitted to identify the defendant for the first time in court."[308] While the court acknowledged that eyewitness testimony can be fraught with potential for error, it returned to the traditional safeguards as the solution for protecting defendants from misidentification.[309] Like most other courts that take the majority view, the Supreme Court of Virginia pointed to the defendant's right to counsel, right to present evidence, and right to cross-examination as ways to expose mistaken eyewitness testimony.[310] Furthermore, the court observed that trial judges can give juries instructions about the subject of eyewitness testimony, legislatures can require law enforcement to establish policies for conducting line-ups, and judges and lawyers can be educated on the subject.[311]

Though there was no dissenting opinion in the Supreme Court of Virginia decision, the affirmed opinion of the Virginia Court of Appeals included a vigorous dissent by Judge Lorish.[312] Judge Lorish's dissent endorsed some of the same considerations at play in *Watson* and *Posey*.[313] She argued that both in-court and out-of-court identifications can elicit

307. *Id.* ("[A]lthough a minority of courts have concluded that the Due Process Clause regulates eyewitness identifications made for the first time in court, a strong majority of courts have rejected such an interpretation of the Clause.").

308. *Id.*

309. *See id.* at 552 ("There are ways to address the problem of flawed eyewitness testimony, however, without tearing down our long accepted understanding of the Due Process Clause to rebuild it on the shifting sands of social science.").

310. *See id.* (citing Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 596 (1993)).

311. *See id.* at 522 (presenting other ways to address problems with flawed eyewitness testimony without judicial prescreening).

312. *See* Walker v. Commonwealth, 870 S.E.2d 328, 344 (Va. Ct. App. 2022) (Lorish, J., dissenting).

313. *See id.* at 345 (Lorish, J., dissenting) (concluding that due process requires more protection for defendants when identifications occur for the first time in the courtroom).

misidentification, so the court must apply a due process prescreen based on the *Biggers* factors to both types of identifications.[314] Judge Lorish stated that suggestiveness is the main issue in all types of identifications.[315] If the circumstances surrounding a witness's identification of a suspect are unduly suggestive, "the witness' independent memory and will are functionally overridden and any subsequent identification is categorically unreliable."[316] Following *Neil v. Biggers*, Virginia's prior decisions concerning out-of-court pretrial identifications established a two-prong due process screen.[317] First, the court must evaluate whether the circumstances surrounding the identification were suggestive, and then, second, the court must "determine whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive."[318] Consequently, Judge Lorish pointed out that because first-time in-court identifications are not meaningfully different from out-of-court, pretrial identifications, they should be subject to the same due process analysis conducted in *Biggers*.[319] This dissent is consistent with the views expressed by other federal courts that have offered increased protection.[320]

While it is disappointing that the Supreme Court of Virginia did not join the minority of state supreme courts that have begun to handle first-time in-court identifications differently, *Walker* may not have been the right vehicle for the

314. *See id.* ("I would hold that an initial identification during trial is unnecessarily suggestive and that, therefore, the court should have applied the *Biggers* factors to determine whether, under the totality of the circumstances, the teller's identification of Walker was reliable enough to be presented to the jury." (citing Winston v. Commonwealth, 604 S.E.2d 21 (Va. 2004))).

315. *See id.* ("The issue is, and has always been, suggestiveness.").

316. *Id.* (citing Neil v. Biggers, 409 U.S. 188, 198 (1972)).

317. *See id.* at 346 (citing Winston v. Commonwealth, 604 S.E.2d 21, 37 (Va. 2004); Neil v. Biggers, 409 U.S. 188, 198–99 (1972)).

318. *Id.* (quoting Winston v. Commonwealth, 604 S.E.2d 21, 37 (Va. 2004)).

319. *See id.* ("[T]here is no meaningful due process distinction that divides in-court and out-of-court identifications.").

320. *See, e.g.*, United States v. Hill, 967 F.2d 226, 232 (6th Cir. 1992) ("The due process concerns are identical in both [in-court and out-of-court identifications] and any attempt to draw a line based on the time the allegedly suggestive identification technique takes place seems arbitrary.").

court to alter its precedent.[321] Nonetheless, the case serves as an example of the continued relevance and timeliness of discussing potential alternative solutions for the ways courts address first-time in-court identifications.

III. PROPOSED SOLUTION

To counterbalance fallibility of eyewitness testimony and the degree to which jurors are convinced by this type of evidence, first-time in-court identifications must be subject to some type of judicial prescreening for reliability. The United States Supreme Court should establish prophylactic measures for first-time in-court identifications and "declare that the reference to 'improper state conduct' in *Perry* encompasses unnecessarily suggestive identification procedures orchestrated by prosecutors as well as by police officers."[322] Prosecutors are government actors. The government must be held accountable if they unduly influence witnesses to identify the accused as a perpetrator.

If the Supreme Court declines to establish such prophylactic measures, this Note proposes two additional solutions that state and federal courts can take. First, more courts should construe *Perry* broadly to encompass actions by prosecutors.[323] Second, courts should institute a standard of admissibility that prevents first-time in-court identifications unless there is "good reason" to allow them.[324]

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321. Although it is possible that the eyewitness in Walker was only identifying the defendant at trial based on the suggestive circumstances of the courtroom setting, DNA evidence in the record strongly supported the government's theory of the defendant's guilt. *See* Walker v. Commonwealth, 887 S.E.2d 544, 554 n.6 (Va. 2023) (noting that social science studies may not capture how flawed eyewitness testimony affects actual cases and stating that the impact of flawed eyewitness testimony may be smaller than estimated because few criminal cases proceed to jury trials).

322. Reply Brief for Petitioner at 4, Walker v. Virginia, No. 23-5505, 2024 U.S. LEXIS 607, *cert. denied*, 144 S. Ct. 827 (2024) (mem.).

323. *See infra* Part III.A.

324. *See infra* Part III.B.

A. *Distinguish* Perry v. New Hampshire *to Reduce Misidentifications*

Although a majority of courts still rely on existing safeguards such as cross-examination of witnesses and the jury's ability to watch witnesses make in-court identifications, a growing minority of courts hold that first-time in-court identifications of defendants should be subject to judicial prescreening for reliability.[325] In the absence of additional Supreme Court clarification,[326] more state courts can and should embrace the minority view. By construing *Perry* broadly to include actions by prosecutors, courts can reduce misidentifications without waiting for the Supreme Court to issue further guidance.

At best, "*Perry* should be read broadly to mandate judicial prescreening for eyewitness reliability to deter all state actors, particularly prosecutors, from resorting to unfairly suggestive procedures that pose a substantial risk of misidentification."[327] To ensure that trials comport with the Due Process Clause, first-time in-court identifications should be subject to a preliminary judicial inquiry into the reliability of witness testimony under the *Biggers* factors.[328]

This route avoids drastic alterations to the analytical framework for determining admissibility of identification evidence. Performing a judicial prescreening for reliability affords defendants facing first-time in-court identifications the same decades-old due process protections as those facing unnecessarily suggestive out-of-court identifications.[329]

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325. *See supra* Part II.A–B.

326. The United States Supreme Court denied the petition for writ of certiorari for *Walker v. Virginia* on February 20, 2024. *See* Walker v. Virginia, 144 S. Ct. 827 (2024) (mem.).

327. Reply Brief for Petitioner at 4, Walker v. Virginia, No. 23-5505, 2024 U.S. LEXIS 607, *cert. denied*, 144 S. Ct. 827 (2024) (mem.).

328. *See* People v. Posey, 1 N.W.3d 101, 116 (Mich. 2023) (determining that courts should consider reliability factors before admitting an in-court identification).

329. *See id.* (holding that first-time in-court identifications should receive the same reliability screening as other identifications procured by improper police activity).

B. *Bar First-Time In-Court Eyewitness Identifications Unless "Good Reason"*

For more sweeping reform and better shields against misidentification, courts should erect fortified frameworks that prevent first-time in-court identifications from occurring unless there is a good reason to permit them.[330]

First, courts should require that prosecutors disclose when they plan to ask witnesses to identify the defendant at trial.[331] Witnesses who have not yet made a pretrial identification should be prevented from making a first-time in-court identification.[332] In other words, the prosecutor would not be allowed to ask the witness to identify the defendant unless the prosecutor can affirmatively show that a pretrial identification occurred.[333] If no pretrial identification was possible, courts should require the prosecutor to request permission to conduct an in-court first-time identification by filing a motion in limine to admit the identification into evidence.[334]

After the filing of this motion, the trial judge should conduct a pretrial hearing to determine whether good reason exists to admit the first-time in-court identification. Good reason includes situations in which the eyewitness was familiar with the defendant before the commission of the crime, or when a police officer might need to confirm that the person he arrested was also the person he saw commit the crime.[335] In any event,

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330. *See* Commonwealth v. Crayton, 21 N.E.3d 157, 169 (Mass. 2014) (holding that first-time in-court identifications are inadmissible without "good reason" to admit them).

331. *See* Kaplan & Puracal, *supra* note 26, at 990 (suggesting solutions for how courts should handle cases in which prosecutors seek to have witnesses identify defendants).

332. *See id.* (suggesting that first-time in-court identifications be prohibited unless a pretrial identification has occurred).

333. *Id.*

334. *See Crayton*, 21 N.E.3d at 171 ("[W]e place the burden on the prosecutor to move in limine to admit the in-court identification of the defendant by a witness where there has been no out-of-court identification."); State v. Dickson, 141 A.3d 810, 835 (Conn. 2016) (requiring that the State request permission from the trial court to present a first-time in-court identification).

335. *See Crayton*, 21 N.E.3d at 170 (describing a scenario in which "good reason" may exist "where the witness is an arresting officer who was also an

good reason typically does not include situations in which an eyewitness's only encounter with the accused was witnessing the alleged crime, and there has been no pretrial identification.[336]

This suggested framework would place the burden on the government to file a motion to admit the identification as well as prove that good reason exists. As a result, the government would have to show that it would not be unnecessarily suggestive for the identification to be admitted at trial.[337] Given that the courtroom environment is inherently suggestive, the government must show that this suggestion would not be present or that good reason exists to allow the identification.[338] If the government cannot meet its burden of proof, then there is typically still time before trial to arrange a less suggestive out-of-court identification procedure, and that should be the preferred method.[339]

Lastly, courts may grant permission for the prosecutor to conduct a first-time in-court identification if the ability of the eyewitness to identify the defendant is not at issue, as in *State v. Dickson*.[340]

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eyewitness to the commission of the crime, and the identification merely confirms that the defendant is the person who was arrested for the charged crime").

336. *See id.* ("[W]here the witness is not identifying the defendant based solely on his or her memory of witnessing the defendant at the time of the crime, there is little risk of misidentification arising from the in-court showup despite its suggestiveness.").

337. *See* Kann, *supra* note 3, at 1488 n.233 (explaining that Massachusetts shifted the burden of proof back to the defense to prove good reason was not present, but arguing that the defendant should not have the burden of proving suggestiveness given the inherent suggestiveness of a first-time in-court identification).

338. *See id.* (arguing that the inherent suggestiveness of the courtroom should relieve the defendant of having to prove that the first-time in-court identification would be unnecessarily suggestive).

339. *See id.* at 1488 ("The motion in limine should be filed by the State prior to trial to enable the State, should it fail to meet its burden of proof, to conduct a less suggestive out-of-court identification proceeding.").

340. *See Dickson*, 141 A.3d at 835–36

> [I]n cases in which the trial court determines that the only issue in dispute is whether the acts that the defendant admittedly performed constituted a crime, the court should permit a first time in-court identification. In cases in which the defendant concedes

C. *Addressing Concerns: Increased Administrative Burdens and Exclusion of Reliable Evidence*

One of the main concerns with implementing pretrial hearings and prescreening processes is that these additional steps would create administrative burdens for courts. Since the circumstances that would satisfy a "good reason" test for admission of first-time in-court identifications are relatively limited, prosecutors would be deterred from relying on a pretrial hearing to secure judicial permission to admit a first-time in-court identification.[341] Instead, prosecutors would be incentivized to conduct non-suggestive out-of-court identifications. Thus, pretrial hearings for determining "good reason" would likely be rare.

Other arguments against increasing due process protections for defendants surrounding first-time in-court identifications focus on the possibility of excluding potentially reliable identification evidence. An eyewitness to a crime who may not have the opportunity to identify the perpetrator prior to trial may be able to identify the perpetrator at the trial. But the due process paradigm proposed here is only trivially different than any other constitutional rule protecting criminal defendants.[342] "The rule excluding evidence seized by unconstitutional searches, for example, excludes some relevant evidence, but the relevancy of that evidence is generally not considered in the constitutional analysis."[343] The same

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> that identity or the ability of a particular witness to identify the defendant as the perpetrator is not in dispute, the state may satisfy the prescreening requirement by given written or oral notice to that effect on the record.

341. *See* Kann, *supra* note 3, at 1492 ("[B]ecause situations with good reason would be incredibly limited, there would be a disincentive for the State to conduct a [first-time in-court eyewitness identification] or to rely on the pretrial hearings to acquire an admissible eyewitness identification.").

342. *See* Mandery, *supra* note 4, at 421 (explaining that a per se exclusion rule for first-time in-court identifications is the same as any other constitutional rule protecting the criminal defendant).

343. *Id.*

reasoning should apply to eyewitness identifications in the courtroom.[344]

Some scholars have gone so far as to argue that until courts find ways to diminish the inherent suggestiveness of first-time in-court identifications, such identifications should be excluded entirely.[345] While there is certainly some merit to this position, the "good reason" standard is a sounder approach; it recognizes that there are circumstances in which first-time in-court identifications satisfy due process imperatives. The "good reason" test attempts to ensure that unreliable identification evidence is not admitted at trial while still acknowledging the importance of eyewitness identifications. Unlike complete exclusion, the "good reason" test allows first-time in-court eyewitness identification when justice requires it. Therefore, the "good reason" standard is the best available alternative that diminishes the risk of misidentification of criminal defendants in the courtroom.

CONCLUSION

The United States Supreme Court has established due process protection for defendants against unnecessarily suggestive identifications that occur outside of the courtroom, but a majority of state and federal courts do not provide additional safeguards when first-time in-court identifications are at issue. Massachusetts and Connecticut, as well as New Jersey and Michigan, are frontrunners in reforming due process protections against eyewitness identifications in the courtroom. These states recognize that first-time in-court eyewitness identifications are inherently suggestive in ways that cannot be

344. *See id.* at 423–24 ("There is no basis either in law or policy to suggest that identification evidence should be treated less carefully than other classes of evidence, to which the exclusionary rule applies as the default, and considerable anecdotal and scientific evidence exists to suggest that it deserves equal protection.").

345. *See* Kaplan & Puracal, *supra* note 26, at 990 ("Absent a way to cure the suggestiveness of a first time, in-court identification, courts should encourage out-of-court identification procedures either pretrial or with leave during trial by prohibiting the first time, in-court identification."); *see also* Garrett, *Eyewitnesses and Exclusion*, *supra* note 48, at 497 ("If the prior [identification] procedures were suggestive, then, at minimum, the courtroom identification should be per se excluded.").

overcome by cross-examination, the right to counsel, or jury instructions. Even though witness confidence may not be linked to the accuracy of the identification, this confidence is compelling for juries as they decide whether to convict the defendant of the alleged crime. With overwhelming data suggesting that first-time in-court identifications deserve additional safeguarding, courts should adopt new standards for admitting this type of evidence, or at the very least, include prosecutors in their reading of *Perry*. Ultimately, it should remain a priority of the justice system to prevent misidentifications that lead to wrongful convictions. Reforming the way trial courts handle first-time in-court identifications is one way to protect the rights of criminal defendants.