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NOTE

PROCESS V. OUTCOME: THE PROPER ROLE OF CORROBORATIVE EVIDENCE IN DUE PROCESS ANALYSIS OF EYEWITNESS IDENTIFICATION TESTIMONY

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INTRODUCTION

The reliability of criminal identifications[1] is highly contested in both legal and psychological circles. Commentators and psychologists label eyewitness evidence "inherently suspect" and argue that suggestive procedures often increase the risk not only of out-of-court misidentification,[2] but also of in-court misidentification.[3] Indeed, even the Supreme Court recognizes that "[t]he vagaries of eyewitness identification are well-known" and that "the annals of criminal law are rife with instances of mistaken identification."[4] These concerns are particularly troublesome because identifications are among the most com-

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1 Pretrial identification procedures come in three basic forms: the lineup, the showup, and the photographic identification. In a lineup, an eyewitness looks at several individuals at the same time in an effort to identify one of the individuals as the perpetrator. *See* P. WALL, IDENTIFICATION IN CRIMINAL CASES 40 (1965). The police include individuals in the lineup other than the suspect to lend credence to the fact that the witness is identifying the actual perpetrator. *See* Granville Williams & H.A. Hammelmann, *Identification Parades* (pt. I), 1963 CRIM. L. REV. 479, 480. Unlike a lineup, a showup involves a one-on-one confrontation. *See* Neil v. Biggers, 409 U.S. 188, 195 (1972). Two basic types of photographic identification procedures exist. The first, a photographic array, consists of a witness being shown a number of photographs simultaneously, one of which is of the suspect. This method is similar to a lineup. *See* N. Sobel, *Assailing the Impermissible Suggestion: Evolving Limitations on the Abuse of Pre-Trial Criminal Identification Methods*, 38 BROOK. L. REV. 261, 264 (1971). The second involves the witness being shown only the defendant's photograph. This method is similar to a showup. *See id.* Finally, counsel almost always asks the eyewitness to identify the perpetrator in the jury's presence at trial.

2 *See* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 701(a), at 374–75 (3d ed. 2000).

3 With regard to the increased risk of in-court misidentification, once an original identification is made, a witness often substitutes in his memory an image from the lineup for the prior image of the criminal at the time of the offense. *See* Simmons v. United States, 390 U.S. 377, 383–84 (1968); *infra* text accompanying notes 31–33. Similarly, the Court recognized in *United States v. Wade* that once a witness has picked out the accused at a lineup, he is "'not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial.'" United States v. Wade, 388 U.S. 218, 229 (1967) (quoting Williams & Hammelmann, *supra* note 1, at 482).

4 *Wade*, 388 U.S. at 228. Similarly, Justice Felix Frankfurter once commented that "[t]he identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials." FELIX FRANKFURTER, THE CASE OF SACCO AND VANZETTI 30 (Universal Library ed., Grosset & Dunlap 1962) (1927).

mon forms of evidence presented at trials[5] and are frequently an essential piece of evidence leading to a defendant's conviction.[6]

Although the unreliability of eyewitness identifications is widely documented,[7] the Supreme Court has spent relatively little time devising safeguards in this important area.[8] The Court has, however, recognized some constitutional guarantees under the Sixth Amendment[9] and the Due Process Clauses of the Fifth and Fourteenth Amendments.[10] With regard to due process, the Court has acknowledged that defendants possess a right to have unreliable identification testimony excluded if it is derived from unnecessarily suggestive identifica-

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5 *See* BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW 6 (1995); LAFAVE ET AL., *supra* note 2, § 701(a), at 374 ("Eyewitness identification . . . is frequently an essential piece of evidence . . . as more scientific forms of identification evidence, such as fingerprint and handwriting analyses, are not always available.").

6 *See* EDWARD CONNORS ET AL., U.S. DEP'T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 13–15 (1996) (examining twenty-eight cases of wrongful conviction uncovered by DNA comparison, of which twenty-three were based on eyewitness identification); LAWRENCE TAYLOR, EYEWITNESS IDENTIFICATION 1 (1982) (declaring that "[t]he tragic irony of eyewitness testimony is that it is at the same time the most trusted of evidence and too often the least reliable"); *cf.* Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUD. 395, 396 (1987) (noting that "while convictions based on eyewitness errors may be more frequent than are other types of erroneous convictions, in absolute terms they are rare"); Elizabeth F. Loftus, *Ten Years in the Life of an Expert Witness*, 10 LAW & HUM. BEHAV. 241, 242–43 (1986) (citing a 1983 Ohio State University doctoral dissertation estimating that over half of all wrongful convictions per year are due to false identification).

7 While this unreliability is well known in psychological circles and certain legal circles, *see infra* Part I, jurors seldom enter a courtroom with the knowledge that eyewitness identifications are unreliable, *see infra* note 48 and accompanying text (discussing the likelihood that jurors' common-sense knowledge includes information about the unreliability of eyewitness testimony and citing a study regarding juror common-sense knowledge).

8 Wayne LaFave notes that prior to the 1967 case, *United States v. Wade*, virtually no constitutional framework existed to deal with eyewitness identifications. *See* LAFAVE, *supra* note 2, § 701(a), at 376. Since *Wade*, the U.S. Supreme Court has heard relatively few cases directly on this subject. Oddly, the Supreme Court has adopted more rigorous rules, which have resulted in the exclusion of more reliable evidence, in several other areas of law. Most notable are the "fruit of the poisonous tree" doctrine in search-and-seizure cases and the requirement that suspects be given Miranda rights prior to police interrogation.

9 The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." U.S. CONST. amend. VI. Relevant cases recognizing Sixth Amendment constitutional guarantees and their limits include *United States v. Ash*, 413 U.S. 300 (1973), *Kirby v. Illinois*, 406 U.S. 682 (1972), *Gilbert v. California*, 388 U.S. 263 (1967), and *United States v. Wade*, 388 U.S. 218 (1967).

10 The Due Process Clause of the Fifth Amendment, which applies to the federal government, provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The Due Process Clause of the Fourteenth Amendment, which applies to state governments, states: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. Relevant cases recognizing due process guarantees include *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977), *Neil v. Biggers*, 409 U.S. 188, 196–97 (1972), *Simmons v. United States*, 390 U.S. 377, 384 (1968), and *Stovall v. Denno*, 388 U.S. 293, 301 (1967).

tion procedures. When the issue is the admissibility of an in-court identification, the constitutional question is phrased in terms of whether an earlier "unnecessarily suggestive" procedure created "a very substantial likelihood of irreparable misidentification."[11] When the issue is the admissibility of an out-of-court identification, the standard remains the same but "with the deletion of 'irreparable.'"[12] In both situations, a court must first determine whether the pretrial identification procedure unnecessarily suggested that the defendant was the perpetrator.[13] If the procedure was not unnecessarily suggestive, there exists no due process obstacle to admitting the identification testimony; the reliability of the identification in such a case is a matter for the jury.[14] If, on the other hand, a court finds that the procedure was unnecessarily suggestive, it must then determine whether the identification testimony would nonetheless be independently reliable; if so, its admission would not violate due process.

This Note examines a circuit split, recently reemphasized by the Second Circuit's decision in *Raheem v. Kelly*,[15] concerning the proper role of corroborative evidence in due process analysis of the admissibility of eyewitness identification testimony. The Second, Third, and Fifth Circuits agree that corroborative evidence of a criminal defendant's general guilt[16]—as opposed to corroborative evidence supporting the accuracy of the identification itself[17]—may not be considered

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11 *Simmons*, 390 U.S. at 381, 384.

12 *Biggers*, 409 U.S. at 198. In both situations, courts consider the "totality of the circumstances" to determine whether due process was violated. *See Brathwaite*, 432 U.S. at 106; *Biggers*, 409 U.S. at 196–97; *Stovall*, 388 U.S. at 302.

13 An example of an unnecessarily suggestive identification procedure is a lineup in which only the suspect is wearing distinctive clothing or otherwise matches important elements of the description provided by the victim. For instance, where eyeglasses were "the outstanding feature of the assailant's appearance to the victim and an integral part of the description provided the police," a lineup in which only the defendant wore eyeglasses was found unnecessarily suggestive. *See* Israel v. Odom, 521 F.2d 1370, 1374 (7th Cir. 1975). Unnecessary suggestiveness requires more than inherent suggestiveness, but courts evaluate whether a given procedure is unnecessarily suggestive on a case-by-case basis and have not always been consistent in their application. *See infra* note 50. For an example of a particularly egregious identification procedure, see *infra* note 26.

14 *See* Foster v. California, 394 U.S. 440, 442 n.2 (1969) (noting that "[t]he reliability of properly admitted eyewitness identification, like the credibility of the other parts of the prosecution's case is a matter for the jury," but also that "it is the teaching of *Wade*, *Gilbert*, and *Stovall* that in some cases the procedures leading to an eyewitness identification may be so defective as to make the identification constitutionally inadmissible as a matter of law." (citation omitted)).

15 257 F.3d 122 (2d Cir. 2001), *cert. denied sub nom*, Donnelly v. Raheem, 534 U.S. 1118 (2002).

16 An example of corroborative evidence of general guilt is a defendant's confession.

17 An example of corroborative evidence supporting the accuracy of the identification itself is testimony from an eyewitness who saw the defendant from a short distance, in good light, for a substantial period of time.

in determining whether identification evidence is reliable.[18] These circuits confine their consideration of corroborative evidence of general guilt to assessing, on appeal, whether the error in admitting identification testimony resulting from unnecessarily suggestive procedures was harmless.[19] The First, Fourth, Seventh, and Eighth Circuits, on the other hand, have indicated that their assessment of an identification's reliability—as distinct from any harmless-error analysis—may include consideration of corroborative evidence of a defendant's general guilt.[20]

Raheem's outcome illustrates the importance of this circuit split. When the lower courts considered general evidence of guilt in determining the reliability of identification testimony stemming from an unnecessarily suggestive procedure, Raheem was found guilty.[21] On appeal, however, the Second Circuit considered only corroborative evidence that was specifically relevant to the accuracy of the identification itself when determining its admissibility.[22] Under this standard, the court held that the lineup should not have been admitted.[23] As previously mentioned, identifications are often very powerful evidence,[24] and without the identification, Raheem's conviction was overturned.[25]

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18 *See, e.g.*, *Raheem*, 257 F.3d at 140–41; United States v. Rogers, 126 F.3d 655, 659 (5th Cir. 1997) (stating that the bulk of evidence presented at trial could not be used in analyzing whether an identification was reliable because "admissibility rests on the reliability of the identification judged solely by the circumstances indicating whether it was likely to be a well-grounded identification, not whether it seems likely to have been correct in light of other available evidence"); United States v. Emanuele, 51 F.3d 1123, 1128 (3d Cir. 1995) (stating that resorting to unrelated corroborative evidence "is contrary to the Supreme Court's guidance in *Brathwaite* that other evidence indicating a defendant's guilt 'plays no part in our analysis' of reliability").

19 *See Rogers*, 126 F.3d at 659–60; *Emanuele*, 51 F.3d at 1128.

20 It should be noted that the court in *Raheem* cites only Fourth and Seventh Circuit cases disagreeing with its approach. *Raheem*, 257 F.3d at 140. However, the First and Eighth Circuits also disagree with the Second Circuit. *See, e.g.*, United States v. Wilkerson, 84 F.3d 692, 695 (4th Cir. 1996) (stating that courts "may also consider other evidence of the defendant's guilt when assessing the reliability of the in-court identification"); United States v. Rogers, 73 F.3d 774, 778 (8th Cir. 1996) (finding a witness's identification reliable because other evidence showed at least two other witnesses also identified the defendant); Gilday v. Callahan, 59 F.3d 257, 270 (1st Cir. 1995) (finding an eyewitness identification reliable despite weaknesses of the identification testimony because defendant admitted buying the weapon and car used in the robbery and murder, stealing a license plate for another car used in the crime, and taking proceeds from the robbery); United States *ex rel.* Kosik v. Napoli, 814 F.2d 1151, 1156–57, 1161 (7th Cir. 1987) (considering the fact that defendant drove the getaway car described by witnesses in determining whether identifications of defendant were reliable).

21 *See Raheem*, 257 F.3d. at 131.

22 *See id.* at 141–42.

23 *See id.* at 142–43.

24 *See* LAFAVE ET AL., *supra* note 2, at 374.

25 *See Raheem*, 257 F.3d at 143. In other words, the Second Circuit determined that the trial court's admission of the identification was not harmless error.

This Note argues that *Raheem* v. *Kelly* correctly recognizes that corroborative evidence of general guilt should be considered only in any post-trial harmless error analysis. Part I of this Note provides psychological background, which demonstrates the inherent unreliability of eyewitness identification testimony and identification procedures. This unreliability underscores the importance of considering only corroborative evidence that is directly related to whether the witness independently identified the defendant when determining whether admitting identification testimony violates a defendant's right to due process. Part II sets forth the development of the right to counsel and due process jurisprudence as applied to eyewitness identifications. This background reveals how ineffective the right to counsel has proven and lays the foundation for a principled analysis of the proper use of general corroborative evidence according to the three primary concerns implicated when applying the Due Process Clause to identification testimony—reliability of the identification, the administration of justice, and deterrence of future corruptive identification procedures. Part III summarizes *Raheem v. Kelly*, which case best illustrates the different approaches courts take with regard to corroborative evidence of general guilt. Finally, Part IV analyzes the circuit split, concluding that the *Raheem* approach is the more proper analysis. First, the *Raheem* approach is more in accordance with prior caselaw. Second, applying concerns of reliability of the identification, the administration of justice, and deterrence, in conjunction with three larger constitutional principles—the concerns of appropriateness of process, accuracy of outcomes, and global appropriateness of process—demands this conclusion.

I
EYEWITNESS RELIABILITY

Misidentifications occur for a variety of reasons. Some misidentifications result from the intentional use of suggestive techniques by police officers.[26] Many, however, result from conditions beyond police control, such as the "inherent unreliability of human perception and memory and . . . human susceptibility to unintentional, and often

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26 *See, e.g.*, LUDOVIC KENNEDY, THE AIRMAN AND THE CARPENTER: THE LINDBERGH KIDNAPPING AND THE FRAMING OF RICHARD HAUPTMANN 176–77 (1985). This book describes a highly suggestive lineup involving the man suspected of kidnapping and murdering the Lindbergh baby. A policeman informed an eyewitness to certain critical events prior to the lineup and said to him, "we've got the right man," and "don't say anything until I ask you if he is the man." *Id.* at 176. Then the defendant, who was a short man, was placed between two "beefy, 6-foot New York policemen" for identification. *Id.* at 177. Unsurprisingly, the witness identified the defendant as the perpetrator. *See id.* The defendant was later executed, and many continue to believe he was innocent. *See id.* at 1–2.

quite subtle, suggestive influences."[27] People can simultaneously perceive only a limited number of stimuli from their environment.[28] As a result, eyewitnesses often have difficulty simultaneously perceiving and remembering the facial features, height, weight, age, and other characteristics of a perpetrator.[29] Additionally, witnesses tend to see what they expect or want to see and to fill in gaps in their memory by stereotyping—a natural phenomenon that helps individuals distill stimuli and thus understand their complex environment.[30]

The human mind integrates information from separate occurrences, "incorporating the memory of a person on one occasion into the memory of another occasion altogether, superimposing one upon the other, perhaps due to the similarity of occasions."[31] For example, a witness often identifies a suspect in a lineup because he looks familiar.[32] The witness then "subconsciously identifies the familiarity with the [criminal] incident, and the two become integrated into one: the familiar face was 'seen' during the perpetration of the crime," even though in truth the witness never actually saw the suspect at the time of the crime.[33] Beyond these difficulties, memory decays over time, and witnesses continuously fill in new gaps with new information.[34]

Most psychologists agree that this process of perception and memory can be divided into three sequential stages: acquisition, retention, and retrieval.[35] In the first stage, a witness perceives an event and enters this information into his memory system.[36] During the second stage, time passes before a witness attempts to remember the event.[37] In the final stage, a witness tries to recall the information.[38]

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27 Fredric D. Woocher, Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969, 970 (1977). A classic example of mistaken perception and memory occurred during the Senate Watergate hearings in 1973, when John Dean testified about a meeting with Herbert Kalmbach. *See* ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL 10 (Lexis Law Publ'g 1997) (1987). Dean repeatedly claimed that he had met Kalmbach in the Mayflower Hotel's coffee shop in Washington D.C., and that they had both gone directly to Kalmbach's room. *Id.* Even after one of Dean's questioners revealed that the Mayflower Hotel did not show that Kalmbach was registered at the time in question, Dean reaffirmed his testimony and explained that perhaps Kalmbach had used a fake name. *See id.* Eventually, the mistake was discovered and the story was cleared up: the Statler Hilton Hotel in Washington had a coffee shop called the Mayflower Doughnut Coffee Shop, and Kalmbach had been registered at that hotel during the time in question.

28 *See* TAYLOR, *supra* note 6, at 23, 35–37.

29 *See* ELIZABETH LOFTUS, EYEWITNESS TESTIMONY 36–37 (1979).

30 *See id.* at 36–37.

31 *Id.* at 39.

32 *Id.* at 39.

33 *Id.*

34 Woocher, *supra* note 27, at 982–83.

35 *See, e.g.*, LOFTUS & DOYLE, *supra* note 27, at 11.

36 *Id.*

37 *Id.*

38 *Id.*

Several factors at each stage affect the accuracy of the eyewitness account.[39] According to Elizabeth Loftus and James Doyle, these stages and factors may be summarized in chart form as follows:

I. Acquisition Stage
  A. Event Factors
    1. Lighting conditions
    2. Duration of event
    3. Violence
  B. Witness Factors
    1. Stress or fear
    2. Age
    3. Sex
    4. Expectations
II. Retention Stage
  A. Length of retention interval
  B. Post-event information
III. Retrieval Stage
  A. Method of questioning
  B. Confidence level[40]

As indicated by this chart, in addition to the numerous psychological phenomena associated with acquiring and retaining information, the particular identification procedures or "methods of questioning" also may contribute to the unreliability of eyewitness identifications, even if they are not the product of purposeful police misconduct.[41] One problem is that the police officer conducting a lineup often has a suspect in mind. Scientists accept that the only way to keep a police officer, like any interviewer, from affecting the outcome of a lineup is to keep officers "blind"—that is, unaware of the desired outcome.[42] When police officers know the desired outcome, they tend "to obtain results they expect, not simply because they have correctly anticipated the response but rather because they have helped to shape the response through their expectations."[43] The cues suggesting an officer's expectations, often subtle and unintentional, may include visual signals such as raised eyebrows and change of posture or vocal symbols such as voice tone.[44]

Another flaw with identification procedures is that witnesses commonly feel that they must pick the person in a lineup who looks most

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39 *Id.*

40 *See id.*

41 *See supra* note 26 (discussing an example of purposeful police misconduct).

42 *See* Bill Nettles et al., *Eyewitness Identification: 'I Noticed You Paused on Number Three'*, CHAMPION, Nov. 1996, at 10, 11–12.

43 *Id.* at 11.

44 *See* ROBERT ROSENTHAL, EXPERIMENTER EFFECTS IN BEHAVIORAL RESEARCH 286 (1966); WILLEM A. WAGENAAR, IDENTIFYING IVAN: A CASE STUDY IN LEGAL PSYCHOLOGY 55–57 (1988).

like the perpetrator and that no "none-of-the-above" answer exists.[45] One study found that when witnesses were warned that the perpetrator might not be in the lineup, misidentifications occurred in thirty-three percent of the cases; without this warning, however, the error rate was seventy-eight percent.[46]

Such problems inherent[47] in identifications are regularly considered by courts to be issues for the jury to sort out in determining the weight to give identification testimony.[48] As a result, some courts have recently been more willing to allow expert witnesses to testify as to the inherent unreliability of identifications and to the deficiencies in

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45 *See* Roy S. Malpass & Patricia G. Devine, *Eyewitness Identification: Lineup Instructions and the Absence of the Offender*, 66 J. APPLIED PSYCHOL. 482, 483 (1981). To address this problem, some commentators have suggested using blank lineups, which require the witness to view two lineups. *See* Gerald D. Lefcourt, *The Blank Line-up: An Aid to the Defense*, 14 CRIM. L. BULL. 428, 430 (1978). Authorities should tell the witness that the suspect may not be present in either lineup. *Id.* Although the suspect is not present in the first lineup, the suspect is present in the second lineup. *Id.* If the witness is someone who has a tendency to pick the person who most resembles the perpetrator, this tendency would be brought out during the first lineup in which the suspect is not present. *Id.* However, if the witness is able to identify the actual suspect in the second lineup, that identification will properly carry greater weight. *Id.*

46 *See* Malpass & Devine, *supra* note 45, at 485.

47 Unlike the psychological phenomena that make accurate identification difficult, the two procedural flaws just discussed are not truly inherent. This Note considers them as such, however, in the sense that they are pervasive and courts have not found them constitutionally offensive.

48 If a trial judge denies a motion to suppress an identification, the defense attorney typically will try to convince the jury that the eyewitness identification is inaccurate by emphasizing the suggestive aspects of the identification through examining experts and cross-examining eyewitnesses. Jennifer L. Devenport et al., *Eyewitness Identification Evidence: Evaluating Commonsense Evaluations*, 3 PSYCHOL. PUB. POL'Y & L. 338, 346 (1997). Believing that jurors can properly weigh such evidence is based upon assumptions regarding attorneys', judges', and jurors' common-sense knowledge about factors that influence identifications. *Id.* at 340–44. "[R]esearch examining the role of commonsense knowledge in juror evaluations of eyewitness evidence suggests that jurors have commonsense knowledge regarding some factors that influence eyewitness identification accuracy but appear to lack scientific knowledge regarding other factors." *Id.* at 357. In one study, over 500 subjects answered questions designed to test their knowledge of factors that influence eyewitness identifications. The results suggest that much of what is known about eyewitness identification is not "within the jury's common knowledge." Roger B. Handbery, *Expert Testimony of Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 AM. CRIM. L. REV. 1013, 1035 (1995).

Unfortunately, studies have found that although expert psychological testimony improves juror commonsense knowledge about some factors affecting eyewitness identification memory, such as violence, eyewitness confidence, and other factors that influence witnessing conditions, it does not "appear to enhance juror commonsense knowledge of factors influencing lineup suggestiveness." Devenport et al., *supra*, at 357. Several Supreme Court Justices have echoed this sentiment. *See, e.g.*, Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) ("'[T]here is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says "That's the one!"'" (quoting LOFTUS, *supra* note 29, at 19)); Manson v. Brathwaite, 432 U.S. 98, 120 (1977) (Marshall, J., dissenting) (stating that "juries unfortunately are often unduly receptive to [identification] evidence").

human perception and memory.[49] Only if the court finds that the procedures were "*unnecessarily* suggestive"[50] must it and not the jury determine whether testimony deriving from the procedure is nonetheless independently reliable.[51] If such testimony lacks reliability, yet is presented to a jury, the defendant's due process rights will be violated.[52] In critically examining due process analysis of identification testimony this Note works within the doctrinal construct that the Supreme Court has developed. However, one should recognize that, according to psychological evidence discussed in this Part, it may be quite difficult to accurately ascertain the reliability of potentially tainted eyewitness testimony. This fact underscores the importance that courts consider only evidence that directly sheds light on reliability once an identification procedure is deemed unnecessarily suggestive.

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49 This trend began in the 1980s. *See, e.g.*, United States v. Moore, 786 F.2d 1308, 1313 (5th Cir. 1986) (declaring that "in a case in which the sole testimony is casual eyewitness identification, expert testimony regarding the accuracy of that identification is admissible and properly may be encouraged"); United States v. Downing, 753 F.2d 1224, 1232 (3d Cir. 1985) (pronouncing that "expert testimony on eyewitness perception and memory [should] be admitted at least in some circumstances"); United States v. Smith, 736 F.2d 1103, 1107 (6th Cir. 1984) (stating that "[t]he day may have arrived, therefore, when [expert] testimony can be said to conform to a generally accepted explanatory theory"). State court decisions also reflect this trend. *See, e.g.*, State v. Buell, 489 N.E.2d 795, 801 (Ohio 1986) (holding that expert testimony is admissible for the purpose of informing the jury about factors affecting memory process). Several courts have gone as far as to find it an abuse of discretion to exclude such expert testimony. *See, e.g.*, United States v. Stevens, 935 F.2d 1380, 1400–01 (3d Cir. 1991) (reversing and remanding for a new trial for abuse of discretion); *Downing*, 753 F.2d at 1242 (holding error harmless due to the presence of other inculpatory evidence); *Smith*, 736 F.2d at 1107 (same). Yet, other courts continue to exclude such evidence altogether. *See, e.g.*, United States v. Benitez, 741 F.2d 1312, 1315 (11th Cir. 1984) (holding that expert testimony regarding eyewitness identifications is "not admissible in this circuit").

50 Although the qualification, "unnecessarily," certainly suggests that something more than inherent suggestiveness is required, the Supreme Court has never clearly defined what transforms an identification from suggestive to unnecessarily suggestive. *See* Benjamin E. Rosenberg, *Rethinking the Right to Due Process in Connection with Pretrial Identification Procedures: An Analysis and a Proposal*, 79 Ky. L.J. 259, 275 (1991). As a result, lower courts have inconsistently applied this concept. *See id.* For example, some courts have found that lineups in which the defendant has a distinguishing feature not shared by others in the lineup are *not* unnecessarily suggestive, *see, e.g.*, Raheem v. Kelly, 257 F.3d 122, 135–36 (2d Cir. 2001), *cert. denied sub nom*, Donnelly v. Raheem, 534 U.S. 1118 (2002); United States v. Bice-Bay, 701 F.2d 1086, 1089 n.3 (4th Cir. 1983), while others have been more permissive of such variations, *see, e.g.*, Jarrett v. Headley, 802 F.2d 34, 41 (2d Cir. 1986) ("It is not required, however, that all of the photographs in the array be uniform with respect to a given characteristic."); United States v. Jackson, 509 F.2d 499, 505–06 (D.C. Cir. 1974) (holding that a lineup was not suggestive despite the fact that none but the defendant wore the "bush hairstyle" that the witness previously described the perpetrator as wearing).

51 Neil v. Biggers, 409 U.S. 188, 199 (1972).

52 *See Brathwaite*, 432 U.S. at 106; *Biggers*, 409 U.S. at 197.

II
IDENTIFICATION TESTIMONY: THE CONSTITUTIONAL BACKGROUND

In addition to the Fifth Amendment's Due Process Clause, courts have applied the Sixth Amendment's right to assistance of counsel to certain eyewitness identifications. This Part begins by examining the right to counsel jurisprudence, finding that it has proven largely ineffective as a means for defendants to challenge potentially corrupted eyewitness identifications. This Part then explores the evolution of applying the Due Process Clause to identification testimony deriving from potentially tainting identification procedures. The underlying themes—concern for reliability of the identification, the administration of justice, and deterrence—and rules set forth in the due process case law lay the foundation for concluding that the *Raheem* approach is both constitutionally and logically more correct than the non-*Raheem* alternative.

A. Sixth Amendment Right to Counsel

In *United States v. Wade*, the Supreme Court considered "whether courtroom identifications of an accused at trial are to be excluded from evidence because the accused was exhibited to the witnesses before trial at a post-indictment lineup conducted for identification purposes without notice to and in the absence of the accused's appointed counsel."[53] The Court held that a post-indictment lineup is a "critical stage" of the prosecution at which point the Sixth Amendment[54] entitles a defendant to "'as much . . . aid (of counsel) . . . as at the trial itself.'"[55] Testimony regarding such an identification is,

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53 388 U.S. 218, 219–20 (1967).

54 The Sixth Amendment states that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI. In *Kirby v. Illinois*, the Court defined this phrase to mean that the right to counsel does not attach until "criminal prosecutions" have been initiated. *See infra* note 60 and accompanying text.

55 *Wade*, 388 U.S. at 237 (second alteration in original) (quoting Powell v. Alabama, 287 U.S. 45, 57 (1932)). *Gilbert v. California* was argued with *Wade* and "present[ed] the same alleged constitutional error in the admission in evidence of in-court identifications . . . considered [in *Wade*]." 388 U.S. 263, 264 (1967). The relevant lineup in *Gilbert* also occurred post-indictment, and therefore the Court determined that the defendant had a right to have counsel present at that lineup. *See id.* at 272. As in *Wade*, the record in *Gilbert* did not permit the Court to make an informed judgment about whether the in-court identifications at the trial had an independent source. *Id.* Accordingly, the conviction was vacated pending such a determination. *See id.* *Gilbert* also involved the admission of handwriting exemplars. *Id.* at 266. The Court found that "[t]he taking of the [handwriting] exemplars was not a 'critical' stage of the criminal proceedings entitling petitioner to the assistance of counsel." *Id.* at 267. The Court set aside the fact that the exemplars were taken prior to an indictment and focused on the fact that even if a given exemplar were unrepresentative, the defendant could produce an unlimited number of exemplars at trial. *Id.*

therefore, inadmissible at trial, unless the defendant has made an "intelligent waiver" of his right to counsel.[56] Nonetheless, even if a pretrial identification were suppressed, a witness may still identify the defendant at trial if the prosecution establishes that the in-court identification is independently reliable.[57] The Court listed several factors that trial courts should consider in evaluating whether a witness's in-court identification derives from sources independent of the uncounseled, pretrial identification: prior opportunity to observe the alleged criminal act, existence of a discrepancy between a pre-lineup description and the defendant's actual description, identification of another person prior to the lineup, identification of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and lapse of time between the alleged act and the lineup identification.[58]

Just five years after *Wade*, the Court, in *Kirby v. Illinois*, refused to extend the right to counsel to a police station identification of a defendant that occurred shortly after his arrest, but before he had been formally charged.[59] According to the *Kirby* Court, *Wade* applies only to identifications that occur "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[60] The Court again declined to extend *Wade* in *United States v. Ash*.[61] Unlike it had been in *Kirby*, the Court in *Ash* was not concerned so much with when the identification occurred; rather, it recognized that regardless of when they occur, certain types of identification procedures will not trigger the right to counsel.[62] Specifically, *Ash* established that a defendant has no right to have counsel present when the police show photographs of a defendant to a witness even if the defendant has already been indicted[63] because, unlike lineups, photograph arrays

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56 *See Wade*, 388 U.S. at 236–37.

57 *See id.* at 240–41.

58 *Id.* at 241.

59 *See* Kirby v. Illinois, 406 U.S. 682, 690 (1972).

60 *Id.* at 689. *Wade* and *Gilbert* had left this issue unresolved because the lineups in each had occurred after both indictment and the appointment of counsel. *See Gilbert*, 388 U.S. at 269; *Wade*, 388 U.S. at 220. *Gilbert* had also set aside the fact that the handwriting exemplars were taken prior to the indictment and instead focused on the nature of such evidence. *See supra* note 55. This being the case, until *Kirby*, lower courts were in disagreement as to whether counsel was required at pre-indictment identifications. *See* Joseph D. Grano, *A Legal Response to the Inherent Dangers of Eyewitness Identification Testimony*, *in* EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 315, 321 (Gary L. Wells & Elizabeth F. Loftus eds., 1984).

61 413 U.S. 300 (1973).

62 *See id.* at 321. This rationale is similar to that used in *Gilbert* to uphold the admission of the handwriting exemplars. *See Gilbert*, 388 U.S. at 266–67.

63 *See Ash*, 413 U.S. at 321.

are not "trial-like confrontation[s]" involving the "presence of the accused."[64]

The application of the Sixth Amendment to certain identifications has thus proved to be a somewhat hollow victory for defendants. Foremost, the right to counsel will seldom apply to identification procedures because identifications usually occur before the right to counsel attaches. Additionally, with respect to certain types of identification procedures, the right to counsel will never attach. Moreover, even if a defendant's right to counsel is violated, a witness nonetheless may identify the defendant in court if the government establishes the accuracy of the identification. Even in situations in which *Wade* otherwise appears to offer protection, counsel's role in the identification process is little more than that of a passive observer.[65] And counsel is ill-suited to later testify at trial,[66] so even if counsel were to view something suggestive, the practical import would be negligible.[67] Indeed, the fact that the Sixth Amendment offers so little protection in the identification context makes due process an area quite worthy of the Court's attention.

B. Fifth Amendment Due Process

1. Stovall v. Denno

On the same day that *Wade* was decided, the Supreme Court, in *Stovall v. Denno*, considered for the first time whether the Fifth Amendment Due Process Clause prohibits the admission of evidence deriving from suggestive identification procedures.[68] In *Stovall*, the

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64 *Id.* at 338 (Brennan, J., dissenting) (internal quotation marks omitted).

65 In *Ash*, the Court explained *Wade* as follows: "Counsel was seen by the Court as being more sensitive to, and aware of, suggestive influences than the accused himself, and as better able to reconstruct the events at trial." *Id.* at 312. The Court's rationale indicates that the lawyer must observe the lineup so that he can decide whether it is tactically wise to bring out the lineup identification to impeach the credibility of a later in-court identification. LAFAVE ET AL., *supra* note 2, at 387.

66 Under rule 3.7(a) of the ABA Model Rules of Professional Conduct, a lawyer who is a witness at trial for his client, except as to an uncontested issue, should withdraw from the case unless doing so "would work substantial hardship on the client." MODEL RULES OF PROF'L CONDUCT R. 3.7(a) (1999). Further, the comments to rule 3.7(a) recognize that the opposing party has a proper objection if the lawyer's testimony may prejudice the jury. *Id.* R. 3.7(a) cmt. For instance, it may not be clear whether a statement by an advocate-witness "should be taken as proof or as an analysis of the proof." *Id.* Confusion might occur because, although a witness is required to testify on the basis of personal knowledge, an advocate is expected to explain and comment on evidence given by others. *Id.*

67 *See* LAFAVE ET AL., *supra* note 2, at 387–88. Additionally, counsel cannot protect against the inherent unreliability of many proper procedures. "The constitutional rules are designed to eliminate the added danger that arises from suggestive police identification procedures, but they cannot, of course, remedy deficiencies in a witness's perception and recall." Grano, *supra* note 60, at 331.

68 *See* 388 U.S. 293 (1967). In fact, *Stovall* was the first case in which the Court found that "the suggestiveness of confrontation procedures was anything other than a matter to

sole eyewitness to the victim's murder was his wife, who was critically injured in the course of her husband's murder.[69]

The authorities brought the defendant, who was the key suspect, to her hospital room for a showup, at which the defendant was the only black man in the room and was handcuffed to a police officer.[70] The witness identified the defendant from her hospital bed, and at trial both the witness and the police officers who were present in the hospital room testified as to that identification and made in-court identifications of the defendant as well.[71]

The Court pronounced that a defendant may claim that "the confrontation conducted . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law."[72] According to the Court, in analyzing whether such a violation has occurred, courts must consider "the totality of the circumstances."[73] Applying this standard to the facts at hand, the Court held that the state did not deprive the defendant of due process.[74] Although the Court acknowledged that the identification procedure was suggestive, it found that the procedure did not violate due process because the immediate hospital confrontation was necessary in light of the victim's critical condition.[75]

Stovall dealt with testimony regarding both an out-of-court identification and an in-court identification, but failed to distinguish the two circumstances. As a result, some courts interpreted *Stovall* as mandating a single test for both types of identification testimony.[76] Other courts, however, analogized *Stovall* to *Wade*, interpreting *Stovall* as having created the following two-tiered test: a pretrial identification would be inadmissible if it were the product of an unnecessarily suggestive procedure, but a subsequent in-court identification would be admissible if it had independent indicia of reliability.[77]

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be argued to the jury." *See* Neil v. Biggers, 409 U.S. 188, 199 (1972). *Stovall* was a companion case to *Wade* and *Gilbert*, and although counsel did not accompany the defendant at the identification, the Court chose not to apply *Wade-Gilbert* retroactively. *See Stovall*, 388 U.S. at 296.

69 *Stovall*, 388 U.S. at 295.

70 *Id.*

71 *Id.*

72 *Id.* at 301–02.

73 *Id.* at 302.

74 *Id.*

75 *Id.* "No one knew how long [the witness] might live. Faced . . . with the knowledge that [the witness] could not visit the jail, the police followed the only feasible procedure and took [the defendant] to the hospital room." *Id.* (quoting United States *ex rel.* Stovall v. Denno, 355 F.2d 731, 735 (2d Cir. 1966)).

76 *See* Note, *Identification: Unnecessary Suggestiveness May Not Violate Due Process*, 73 COLUM. L. REV. 1168, 1174 & n.48 (1973) (citing cases).

77 *See, e.g.*, Smith v. Coiner, 473 F.2d 877, 880–83 (4th Cir. 1973); Rudd v. Florida, 477 F.2d 805, 809 (5th Cir. 1973).

2. Simmons v. United States

One year later, in *Simmons v. United States*, the Court appeared to confirm the two-tiered approach in determining the admissibility of an in-court identification following an out-of-court display of a series of photographs of a single suspect.[78] The Court began by discussing the potential hazards of using photographs for identification purposes and identified some of the situations that may cause witnesses to err in identifying perpetrators: if the witness gets only a brief glimpse of a criminal; if the police show the witness the picture of only a single individual who generally resembles the person the witness saw; if the police show the witness pictures of several persons within which the photograph of one individual recurs; or if the police indicate to the witness that they have evidence that one of the individuals pictured committed the crime.[79] The Court recognized that in such cases, "[r]egardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen."[80] Nevertheless, the Court upheld the use of the eyewitness identification testimony at trial because the pretrial photographic identifications were not "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[81] According to the Court, a serious robbery had been committed, and inconclusive clues had led law enforcement officials to the defendant.[82] Because the FBI had a pressing need to find the suspects, who were still at large, the Court did not consider it "unnecessary" for the FBI to resort to the photographic identification.[83] The Court went on to discuss that there was little chance that the circumstances led to misidentification, as the robbery took place at a well-lit bank, and the witnesses had an opportunity to view the perpetrator for a period of five minutes.[84] Moreover, these same witnesses were shown photographs of the suspect the day after the robbery, and each witness again identified the defendant.[85]

Simmons thus adopted a test similar to the one used in *Stovall*, but to be applied when the issue is not the admissibility of the out-of-court

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78 *See* 390 U.S. 377 (1968).

79 *Id.* at 383.

80 *Id.* at 383–84; *see also* discussion *supra* Part I (discussing the psychological sources of misidentification).

81 *Id.* at 384.

82 *Id.* at 384–85.

83 *Id.* at 384. According to the Court, it was "essential for the FBI agents swiftly to determine whether they were on the right track, so that they could properly deploy their forces . . . and, if necessary, alert officials in other cities." *Id.* at 385.

84 *Id.* It is noteworthy that these facts satisfy a list of factors, first laid out by the Court in *Neil v. Biggers*, that courts should consider when determining the reliability of eyewitness identifications. *See infra* text accompanying note 101.

85 *Simmons*, 390 U.S. at 385.

identification, but rather the admissibility of an in-court identification following a possibly tainted out-of-court identification. Although the Court stated that the *Simmons* standard accorded with the standard announced in *Stovall*,[86] there were in fact two subtle differences between the standards, which laid the groundwork for later changes. First, the *Simmons* Court seemed to devalue, or at least leave in doubt, the constitutional significance of the "unnecessarily" portion of the "unnecessarily suggestive" test by continuing its analysis even after the identification procedure was deemed necessary. Second, in *Stovall*, the Court asked the objective and theoretical question of whether the pretrial identification procedures employed were "conducive" to misidentification.[87] In *Simmons*, on the other hand, the Court focused primarily on the subjective question of whether the procedure in a pretrial lineup gave rise to a "likelihood" of irreparable misidentification in light of case-specific circumstances.[88] The objective nature of the *Stovall* test does not demand heavy inquiry into reliability factors, such as the quality of lighting, that the more subjective *Simmons* test requires. The major difference between the test set forth in *Stovall* and the one adopted in *Simmons*, therefore, is that the *Simmons* test concentrates more on case-specific reliability, whereas the *Stovall* test focuses more on procedure generally.

Still, both the *Stovall* and *Simmons* tests discuss the necessity of the procedure utilized and the reliability of the resulting identification as factors justifying the admission of evidence obtained through an otherwise suggestive procedure. Neither *Stovall* nor *Simmons* made clear, however, whether a suggestive procedure could be justified *only* if both factors were present. That is to say, if an identification procedure were suggestive yet reliable, would it nevertheless be inadmissible if no exigent circumstances made the procedure necessary?[89] In two subsequent cases, *Neil v. Biggers*[90] and *Manson v. Brathwaite*,[91] the Court fully addressed this question.

3. Neil v. Biggers

In *Neil v. Biggers*, the Court considered the admissibility of an unnecessarily suggestive out-of-court identification (rather than a sugges-

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86 *See id.* at 384.

87 *See* Stovall v. Denno, 388 U.S. 293, 301–02 (1967); *see also* Evan J. Mandery, *Due Process Considerations of In-Court Identifications*, 60 ALB. L. REV. 389, 392–94 (1996) (discussing *Stovall* and *Simmons*).

88 *See Simmons*, 390 U.S. at 384; *see also* Mandery, *supra* note 87, at 393–94.

89 *See* Connie Mayer, *Due Process Challenges to Eyewitness Identification Based on Pretrial Photographic Arrays*, 13 PACE L. REV. 815, 824 (1994).

90 409 U.S. 188 (1972).

91 432 U.S. 98 (1977).

tive yet necessary identification).[92] The Court first reiterated that "the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification.'"[93] The Court went on to state that even though the previous phrase was "coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of 'irreparable' it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself."[94]

The Court also mentioned that it was not clear from earlier cases whether unnecessary suggestiveness alone requires the exclusion of evidence.[95] Prior to *Biggers*, many lower courts had applied a per se exclusionary rule in deciding whether an out-of-court identification should be admissible.[96] Under this rule, if the prosecution were to introduce evidence concerning a pretrial identification based on an unnecessarily suggestive procedure, any subsequent conviction would be automatically reversed and a new trial ordered regardless of whether the prosecution could establish an independent source for the identification.[97] In contrast, other courts had been using a "totality of the circumstances" approach. This approach permits admission of identification evidence if, despite the suggestiveness of the procedure, the out-of-court identification is reliable.[98] The Court declined to decide between these approaches because both the confrontation and trial in *Biggers* preceded the Court's decision in *Stovall*, which was

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92 *See Biggers*, 409 U.S. at 198–99.

93 *Id.* at 198 (quoting *Simmons*, 390 U.S. at 384).

94 *Id.* By using this standard, which was set out in *Simmons* and which focuses on case-specific reliability and not procedure generally, the Court blurred the distinction between *Stovall*-type cases (such as *Biggers*), in which the identification at issue is the out-of-court identification, and *Simmons*-type cases, where the in-court identification is at issue. *See Brathwaite*, 432 U.S. at 123 (Marshall, J., dissenting).

95 *See Biggers*, 409 U.S. at 198–99. *Foster v. California*, 394 U.S. 440 (1969), is the only case before *Biggers* in which the Supreme Court held that the admission of identification testimony violated due process. In *Foster*, the witness failed to identify the defendant the first time he confronted him despite a suggestive lineup. *See* 394 U.S. at 441–43. The police then arranged a showup, but the witness could only tentatively identify the defendant. *Id.* at 443. At yet another lineup, the witness finally gave a definite identification. *Id.* at 441–42. The Court held that all of the identifications were inadmissible because they were "all but inevitable" under the circumstances. *Id.* at 443.

96 *See Brathwaite*, 432 U.S. at 110.

97 *Biggers*, 409 U.S. at 198–99. Apparently, before *Biggers*, several scholars thought that this test was implied from *Wade*, *Gilbert*, and *Stovall*. Grano, *supra* note 60, at 327. Indeed, this rule is a logical outgrowth of the fact that *Stovall* focused primarily on objective procedures while both *Simmons* and *Wade* stressed reliability when dealing with in-court identifications. *See supra* notes 57, 87–88 and accompanying text. According to *Biggers*, the purpose of such a per se rule is to deter police from using less reliable procedures if more reliable procedures are available. 409 U.S. at 199. This rule thus is prophylactic in nature and not based on the assumption that in every instance the admission of evidence of such a confrontation offends due process.

98 *See Brathwaite*, 432 U.S. at 110.

the first case in which the Court gave notice that the suggestiveness of an identification procedure was anything more than one factor for the jury to weigh in evaluating identification testimony.[99] The Court then turned to the "central question" of "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive."[100] The Court stated that the factors to consider in evaluating the likelihood of misidentification include: (1) the witness's opportunity to view the perpetrator at the time of the crime; (2) the witness's degree of attention at the time of the crime; (3) the accuracy of the witness's prior description of the perpetrator; (4) the witness's level of certainty when identifying the defendant as the perpetrator at the time of the confrontation; and (5) the length of time between the crime and the confrontation.[101]

The victim in *Biggers* had been raped and had spent almost a half-hour with her assailant,[102] satisfying the first factor; the lighting was adequate,[103] satisfying the second factor; and her description of the perpetrator was accurate and detailed, satisfying the third factor.[104] Although the identification failed the fifth factor because there was a lapse of seven months between the rape and confrontation,[105] the victim made no identifications prior to the identification at issue and her record for reliability was good.[106] The Court therefore concluded that, on balance, no substantial likelihood of misidentification existed and consequently that the identification evidence was admissible.[107]

4. Manson v. Brathwaite

In *Manson v. Brathwaite*, the Court was faced with addressing the question that *Biggers* left unanswered—should the Court adopt a per se rule barring all testimony regarding an out-of-court identification

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99 *See Biggers*, 409 U.S. at 199. Because of this fact, the Court waited until *Manson v. Brathwaite* to fully dispose of this issue. Prior to *Stovall*, the Court had not recognized that unnecessary suggestiveness could potentially violate due process. *See* Stovall v. Denno, 388 U.S. 293, 299 (1967). Instead, when lower courts admitted suggestive confrontations, the Court assumed that juries could properly weigh the effect of such suggestiveness. *See id.* at 299–300 ("The overwhelming majority of American courts have always treated the evidence question not as one of admissibility but as one of credibility for the jury.").

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

101 *Id.* at 199–200.

102 *See id.* at 193–94.

103 *See id.* at 194.

104 *See id.* at 194–95, 200–01.

105 The Court expressed concern about this time lapse, stating that it "would be a seriously negative factor in most cases." *Id.* at 201.

106 *Id.*

107 *Id.* Therefore, even though the procedure was unnecessarily suggestive, the identification was admissible because it was reliable. It should be noted that even if the pretrial identification passes muster under *Biggers*, a witness's subsequent failure to identify the defendant at trial may call the original identification into question. *See, e.g.*, United States v. Anglin, 169 F.3d 154, 159–60 (2d Cir. 1999).

stemming from an unnecessarily suggestive procedure or a totality-of-the-circumstances approach under which such testimony would be admissible if it possesses certain indicia of reliability?[108] *Brathwaite* resolved this conflict in favor of the latter approach.[109] The Court based its decision on three factors. First, the Court recognized that the "driving force" behind *Wade*, *Gilbert*, and *Stovall* was concern for the reliability of eyewitness identifications.[110] The Court reasoned that the per se rule extends too far because "its application automatically and peremptorily . . . keeps evidence from the jury that is reliable and relevant" without permitting the court to consider "alleviating factors."[111] The totality approach, on the other hand, is flexible enough to allow the admission of such evidence despite suggestive procedures.[112]

The Court next focused on the need to deter suggestive behavior.[113] It acknowledged that the per se approach had a more significant deterrent effect than the totality approach, but found that the totality approach also influences police behavior: "[P]olice will guard against unnecessarily suggestive procedures . . . for fear that their actions will lead to the exclusion of identifications as unreliable."[114] Finally, the Court considered the effect of admitting identification testimony, despite the use of suggestive procedures, on the administration of justice.[115] It recognized that the per se approach might permit guilty defendants to go free by excluding reliable evidence and stated that in "cases in which the identification is reliable despite an unnecessarily suggestive identification procedure[,] reversal is a Draconian sanction."[116]

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108 *See* Manson v. Brathwaite, 432 U.S. 98, 99 (1977).

109 *See id.* at 114. In fact, the Court indicated that *Biggers* could be interpreted to provide the answer to the Court's question in *Brathwaite*. *See id.* at 109. According to the Court, *Biggers* held that "[t]he 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." *Id.* at 106. However, the Court acknowledged that *Biggers* did not ultimately answer the question posed in *Brathwaite* because the confrontation and trial in *Biggers* preceded the Court's decision in *Stovall*. *See id.* at 107; *see also supra* note 99 and accompanying text (discussing *Stovall*, *Biggers*, and *Brathwaite*).

110 *See Brathwaite*, 432 U.S. at 111–12. *Wade* allows reliable in-court identification testimony regardless of whether the right to an attorney was denied. *See* United States v. Wade, 388 U.S. 218, 239–42 (1967). It should be noted that the actual driving force behind *Stovall*, as opposed to *Simmons*, was procedural concerns, even though reliability was also important in *Stovall*. *See supra* note 88 and accompanying text.

111 *Brathwaite*, 432 U.S. at 112.

112 *See id.* at 112.

113 *See id.*

114 *Id.*

115 *See id.*

116 *Id.* at 112–13.

Ultimately, the Court concluded that "reliability is the linchpin in determining the admissibility of identification testimony,"[117] and that courts should consider the factors set forth in *Biggers* in determining the reliability of identifications.[118] These factors should be evaluated and then weighed against the "corrupting effect of the suggestive identification itself."[119]

Applying this framework to the facts at hand, the *Brathwaite* Court held that an out-of-court, single-photograph identification was admissible.[120] The witness was an undercover police officer who had purchased drugs from a dealer.[121] The Court noted that the officer paid close attention to the drug dealer's features, gave an accurate description shortly thereafter, and viewed the dealer from close range for two to three minutes in adequate lighting.[122] These indicators of reliability were not "outweighed by the corrupting effect of the challenged identification itself."[123] The Court went on to state that "[a]lthough it plays no part in our analysis," all the assurance as to the reliability of the identification is "hardly undermined by the facts that respondent was arrested in the very apartment where the sale had taken place, and that he acknowledged his frequent visits to that apartment."[124]

Justice Marshall, joined by Justice Brennan, argued in dissent that "*Stovall* and *Simmons* established two different due process tests for two very different situations."[125] He proposed that *Stovall* should govern pretrial identifications, and that courts should exclude evidence without regard to reliability if the identification is based on an unnecessarily suggestive procedure.[126] *Simmons*, on the other hand, should govern in-court identifications, the admissibility of which should turn on reliability.[127] *Biggers* adopted reliability as the guiding factor in de-

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117 *Id.* at 114.

118 *See id.* For a list of these factors, see *supra* text accompanying note 101.

119 *Brathwaite*, 432 U.S. at 114.

120 *See id.* at 117.

121 *Id.* at 99–100.

122 *Id.* at 114–15. These facts are certainly illustrative of several *Biggers* factors. The good lighting, close range, and time the officer spent with the perpetrator fall under the first *Biggers* factor—the witness's opportunity to view the perpetrator at the time of the crime. *See* Neil v. Biggers, 409 U.S. 188, 199 (1972). The fact that the police officer paid close attention to the drug dealer goes toward the second *Biggers* factor—the witness's degree of attention at the time of the offense. *See id.* The officer's high level of certainty supports the fourth *Biggers* factor—the witness's level of certainty when identifying the defendant as the perpetrator at the time of the confrontation. *See id.* Finally, the officer's accurate description shortly after the drug deal satisfies the fifth *Biggers* factor—the length of time between the crime and confrontation. *See id.* at 199–200.

123 *Brathwaite*, 432 U.S. at 116.

124 *Id.*

125 *Id.* at 122 (Marshall, J., dissenting).

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

127 *Id.* at 122–23 (Marshall, J., dissenting).

termining the admissibility of both types of identifications and, according to Justice Marshall, should be condemned for doing so.[128]

Justice Marshall also contended that there were "two significant distinctions"[129] between the per se rule and other exclusionary rules: (1) the identification evidence suppressed under the per se rule is not "forever lost,"[130] because, "when a prosecuting attorney learns that there has been a suggestive confrontation, he can easily arrange another lineup conducted under scrupulously fair conditions";[131] and (2) "[s]uggestively obtained eyewitness testimony is excluded . . . precisely because of its unreliability and concomitant irrelevance,"[132] and exclusion "both protects the integrity of the truth-seeking function of the trial and discourages police use of needlessly inaccurate and ineffective investigatory methods."[133]

III
RAHEEM V. KELLY: THE COMPETING DUE PROCESS ANALYSES APPLIED

Although the Supreme Court has articulated the standards for admitting eyewitness identification testimony that is challenged under the Due Process Clause, as is often the case, lower courts disagree as to the exact application of the Court's precedent. Specifically, the circuits disagree about the proper role of corroborative evidence in due process analysis of eyewitness identifications. This Part examines *Raheem v. Kelly*,[134] the case that best illustrates this tension.

A. Background

In January of 1976, three men robbed a bar.[135] One of the men, "described principally as wearing a black leather coat," shot and killed one of the bar owners.[136] After two trials, Jehan Abdor Raheem was convicted as the shooter.[137] Ultimately, Raheem successfully argued that his convictions should be vacated "on the ground that he was

128 *See id.* at 123–24 (Marshall, J., dissenting).

129 *Id.* at 126 (Marshall, J., dissenting).

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

131 *Id.* at 126–27 (Marshall, J., dissenting). This contention seems misplaced and is contrary to studies finding that once tainted, a witness's memory may remain distorted. *See* discussion *supra* Part I.

132 *Braithwaite*, 432 U.S. at 127 (Marshall, J., dissenting).

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

134 Raheem v. Kelly, 257 F.3d 122 (2d Cir. 2001), *cert. denied sub nom*, Donnelly v. Raheem, 534 U.S. 1118 (2002).

135 *See id.* at 125.

136 *Id.*

137 *See id.*

denied due process at trial by the admission of unreliable identification evidence."[138]

1. *The Robbery and the Murder*

On January 4, 1976, three strangers entered a bar in Brooklyn, New York.[139] At the time, several patrons (Cooke, Hayward, Moore, and Shiloh), the bar's owner (Hill), and the bartender (Dukes), were inside watching a football game.[140] After entering, one of the strangers stayed near the front window, while the others went briefly into the restroom.[141] Upon returning from the restroom, the strangers separated; one positioned himself near the patrons, while the other approached Hill and began a conversation.[142] Shortly thereafter, a shot was fired.[143] The patrons and bartender did not see the actual shooting, but turned in time to see Hill fall to the floor dead.[144] They also saw a gun in the hand of the stranger who had been closest to Hill.[145] Then, the man who had been standing behind Shiloh, Cooke, and Moore brandished a gun and announced a robbery.[146] After taking personal items from Shiloh, Cooke, Hayward, and Moore as well as money from the cash register,[147] the three robbers fled the scene in Moore's car.[148]

2. *The Investigation and the Identifications*

Shortly after the crime, the police interviewed all the witnesses and obtained their descriptions of the robbers, all of which emphasized that the shooter was wearing a black leather coat.[149] The subsequent police investigation was unusual in several respects. First, six days after the shooting, the police showed Cooke and Shiloh a photographic spread.[150] Although both independently identified the same person as the shooter, the police later determined that this person

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138 *Id.*
139 *See id.*
140 *Id.*
141 *Id.*
142 *Id.*
143 *Id.*
144 *Id.*
145 *Id.*
146 *Id.*
147 *Id.*
148 *Id.*
149 *Id.* The one officer who testified at the *Wade* hearing (pretrial suppression hearings regarding identification testimony) maintained that the descriptions in the police report stated only that the shooter was wearing a three quarter length black coat. *See id.* However, Shiloh and Cooke testified to slightly more detailed descriptions at the *Wade* hearing and at trial. *Id.*
150 *Id.* at 126.

could not possibly have been involved in the robbery.[151] The police then showed Cooke, Shiloh, and Dukes a lineup, and two of them identified Raheem, who was participating in the lineup "purely by happenstance."[152] The police had set up this lineup after receiving a tip from an informant that the killer was another man named Lindsay Webb.[153] Because the police could not find five officers who looked similar to Webb for the lineup, they included Raheem and another arrestee, both of whom had been arrested in connection with wholly separate crimes.[154] Raheem was the only person in the lineup wearing a black leather coat.[155] Shiloh could not identify anybody at his first viewing of the lineup, and Dukes was never able to identify anybody.[156] Cooke surprisingly identified Raheem.[157] After both Shiloh and Cooke viewed the lineup, they spoke in the waiting room, but supposedly did not talk about the lineup.[158] Following his conversation with Cooke, Shiloh asked to view the lineup again and subsequently identified Raheem.[159] Both Cooke and Shiloh mentioned that the black leather coat Raheem was wearing factored into their identification.[160] Both men also mentioned, however, that they would have picked Raheem out of the lineup even if he had not been wearing a black leather coat.[161]

Although Raheem remained in police custody for a separate crime, he was neither charged nor accused of the Hill homicide until several weeks after the lineup.[162] During that time, the investigation into Hill's homicide continued, but did not produce any additional evidence against Raheem.[163] A month later, the "final twist" in the

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151 *See id.*

152 *Id.* These two misidentifications are illustrative of the fact that witnesses often feel that there exists no "none-of-the-above" answer. *See* Malpass & Devine, *supra* note 45, at 483; *see also supra* Part I (discussing the reliability of eyewitness identifications).

153 *Raheem*, 257 F.3d at 126.

154 *Id.*

155 *Id.* at 127. This coat was similar to the one used in the robbery/murder. *See id.* However, it was not so identical that it was likely to have been the one used in the crime. *See id.*

156 *Id.* at 126.

157 *Id.*

158 *Id.* at 127.

159 *Id.*

160 *Id.* at 127–28. At the *Wade* hearing, Cooke testified as follows: "And I could tell from his, you know—his coat is another thing. He had on a leather coat that I remembered." *Id.* at 127 (emphasis omitted). Shiloh was asked at the *Wade* hearing: "[D]id you make the identification basically on the facts that the man in the bar on January the 4th was wearing a neat [ ] black leather coat, and [Raheem], number one in the lineup, was wearing a black leather coat?" *Id.* (emphasis omitted) (second alteration in original). Shilob answered: "Right." *Id.*

161 *Id.* at 127–28. Specifically, both Cooke and Sbiloh claimed that they also remembered Raheem's face. *Id.*

162 *See id.* at 128

163 *See id.*

case occurred: according to Detective Crabb, Raheem summoned Crabb to his cell and confessed to murdering Hill.[164] Crabb took notes during their conversation, but neither showed them to Raheem nor asked Raheem to initial them.[165]

B. Raheem's First Trial

The state trial court denied Raheem's motions to suppress both the confession and the identification.[166] Therefore, the court permitted both Cooke and Shiloh to identify Raheem as the shooter at trial.[167] Moreover, the court permitted Crabb to testify that Raheem had confessed.[168] The jury convicted Raheem.[169] He appealed his conviction, challenging the admission of the identification and confession testimony.[170] The New York Supreme Court, Appellate Division, ruled that the trial court should have suppressed Crabb's testimony and ordered a new trial,[171] but held that suppressing the identifications was unwarranted because the identification procedures were fair.[172]

C. Raheem's Second Trial

Shiloh and Cooke identified Raheem as the shooter at the second trial,[173] and Raheem was found guilty once more.[174] Raheem appealed again, alleging that the identifications were "the product of an unconstitutionally suggestive lineup."[175] For the second time, the Appellate Division found this constitutional challenge to be "'without merit.'"[176] The Appellate Division granted Raheem leave to appeal to the New York Court of Appeals, which held that "'[t]he lower court's determination that the lineup was not suggestive involves a mixed

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164 *Id.*

165 *Id.*

166 *Id.*

167 *See id.* at 129.

168 *See id.*

169 *Id.*

170 *Id.* Raheem did not argue that his confession never took place, but argued instead that because he was represented by counsel in a concurrent case, and his confession in this case took place without that counsel present, his confession could not be used against him as a matter of New York state constitutional law. *See id.* The New York Supreme Court, Appellate Division, found this argument persuasive and held that his confession was inadmissible. *See id.*

171 *See id.*

172 *See id.* at 130.

173 *Id.*

174 *Id.* at 131.

175 *Id.*

176 *Id.* (quoting People v. Whitaker, 468 N.Y.S.2d 168, 169 (N.Y. App. Div. 1983)).

question of law and fact which is supported by the record and thus is beyond review in this court.'"[177]

Raheem next petitioned the federal district court for habeas corpus relief.[178] Although the district court agreed that the lineup was impermissibly suggestive, it concluded that the identifications were nevertheless reliable because there was other general corroborative evidence of Raheem's guilt.[179] The three sources of corroboration were "Raheem's possession of a black leather coat, his confession, and the fact that he was convicted of other murders, showing a 'propensity . . . to kill.'"[180] In light of this evidence, the court denied habeas corpus relief, but granted a certificate of appealability to the Second Circuit.[181]

D: The Second Circuit's Decision

The Second Circuit held that the identification evidence would be admissible if (a) the procedures were not suggestive or (b) the identification had independent reliability.[182] In applying this standard to the facts of the case, the Second Circuit agreed with the district court that the identification procedures were unnecessarily suggestive because Raheem appeared in his black leather coat, which both Cooke and Shiloh had emphasized in their eyewitness descriptions on several occasions.[183] However, the court disagreed with the district court's finding that Cooke's and Shiloh's identifications were reliable because of corroborative evidence of Raheem's general guilt,[184] reiterating that "in the identification context," reliability "means essentially that the witness's recollection was '[un]distorted.'"[185] In order to determine whether the witnesses' identifications of Raheem were reliable despite the unduly suggestive identification procedures, the court looked instead to the factors set forth in *Biggers*[186] because, according to the court, those are the factors that *Brathwaite* requires courts to consider.[187] Therefore, unlike

177 *Id.* (quoting People v. Whitaker, 476 N.E.2d 294, 296 n.*1 (N.Y. 1985)).

178 *See id.*

179 *Id.* at 131–32.

180 *Id.* at 132 (alteration in original) (quoting Raheem v. Kelly, 98 F. Supp. 2d 295, 316 (E.D.N.Y. 2000)). The district court found that, taken together, the three sources of corroboration were sufficient to justify allowing the jury to weigh the eyewitness testimony. *See id.*

181 *See id.* at 132–33.

182 *Id.* at 133.

183 *See id.* at 135–37.

184 *See id.* at 138.

185 *Id.* at 140 (alteration in original) (quoting Manson v. Brathwaite, 432 U.S. 98, 112 (1977)).

186 *See supra* text accompanying note 101.

187 *See Raheem*, 257 F.3d at 135, 138–40. For a discussion of the *Biggers* factors, see *supra* text accompanying note 101.

the district court, the Second Circuit did not consider Raheem's possession of a black leather coat, his confession, or the fact that he had been convicted of other murders to be relevant to the reliability of the identification.[188] The court ultimately held that the identification at issue was unreliable because of the witnesses' inability to describe the murderer's face, their misidentification of the other gunman who had been closest to them, and the undue emphasis they placed on the black leather coat in their descriptions of the shooter.[189]

In rejecting the district court's reliance on corroborative evidence of general guilt, the Second Circuit clearly articulated its disagreement with other circuits to the extent that their assessment of an identification's reliability—as distinct from any harmless-error analysis—may include evidence unrelated to the identification that corroborates the defendant's guilt.[190] The court instead agreed with those circuits that consider evidence corroborative of guilt, but unrelated to the identification, only when assessing whether the error in admitting identification testimony resulting from unnecessarily suggestive procedures was harmless.[191] The Second Circuit stated: "'Independent evidence of culpability will not cure a tainted identification procedure, nor will exculpatory information bar admission of reliable identification testimony.'"[192]

Finally, the court determined that admitting the identification was not harmless error because there was little evidence of Raheem's guilt apart from that impermissible identification.[193] In fact, other than the identification, the prosecution had presented no evidence tying Raheem to the murder.[194] Therefore, the court overturned Raheem's conviction.[195]

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188 *See Raheem*, 257 F.3d at 140.

189 *Id.* at 141.

190 *See id.* at 140–41; *see also supra* note 20 and accompanying text (discussing approaches adopted by other circuits).

191 *Raheem*, 257 F.3d at 140–41; *see supra* note 18 and accompanying text.

192 *See Raheem*, 257 F.3d at 141 (quoting United States v. Emanuele, 51 F.3d 1123, 1128 (3d Cir. 1995)).

193 *See id.* at 142–43.

194 *See id.* at 143. As previously mentioned, after Raheem's first trial, the Appellate Division held that Crabb's testimony that Raheem had confessed was inadmissible. *See supra* note 170 and accompanying text.

195 *See Raheem*, 257 F.3d at 143. It should be noted that Raheem was not released from prison after the court overturned his conviction because he was serving time for other convictions. *See id.*

IV
ANALYZING PRECEDENT AND IMPLEMENTING THE POLICY CONSIDERATIONS UNDERLYING THE SUPREME COURT'S IDENTIFICATION CASES

Although, in *Raheem v. Kelly*, the Second Circuit acknowledged the current circuit split regarding the proper role of corroborative evidence in due process analysis of identification testimony based on unnecessarily suggestive identification procedures, it offered little reasoning to support its choice of position. The court only stated that its view is consistent with *Brathwaite*.[196] Similarly, other courts that have considered this issue have failed to provide in-depth analyses as to why courts should or should not take into account corroborative evidence of general guilt when determining the reliability of an identification.[197] The best way to resolve this circuit split is to focus on the three main considerations set forth in *Brathwaite*—reliability of the evidence, the administration of justice, and deterrence—which, as mentioned above, led the *Brathwaite* Court to reject a per se approach in favor of the totality-of-the-circumstances approach.[198] Although the split identified in *Raheem* does not deal directly with the merits of the totality-of-the-circumstances approach, *Brathwaite* spoke generally to considerations in the identification context.[199] In analyzing the *Brathwaite* factors, this Note considers three larger principles of the American legal system and constitutional jurisprudence—(1) appropriateness of process, (2) accuracy of outcomes, and (3) global appropriateness of outcomes.[200]

A. Reliability of the Evidence

This subpart begins by examining Supreme Court jurisprudence on the proper role of reliability—*Brathwaite*'s first concern—in due process analysis of eyewitness identification testiomony. In an effort to sharpen this inquiry, this subpart then applies larger constitutional principles of appropriateness of process and accuracy of outcomes to this concern.

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196 *See id.* at 140.

197 For example, the Fifth Circuit provided only a terse explanation of its chosen approach in *United States v. Rogers*: "The bulk of the evidence presented at trial could not be used in our . . . analysis of whether [the eyewitness's] identification of [the defendant] was reliable because admissibility rests on the reliability of the identification judged solely by the circumstances indicating whether it was likely to be a well-grounded identification, not whether it seems likely to have been correct in light of other available evidence." 126 F.3d 655, 659 (5th Cir. 1997).

198 *See supra* Part II.B.4.

199 *See* Manson v. Brathwaite, 432 U.S. 98, 111–13 (1977).

200 Although these three factors sometimes overlap, they remain largely separate concerns. 1 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 1.6 (1984).

1. *Strictly Interpreting Precedent*

Reliability of the "evidence" was the "linchpin" in *Brathwaite*[201] and the driving force behind *Biggers*, *Simmons*, and *Wade*.[202] "Reliability" clearly refers to the reliability of the identification testimony itself, and not to the reliability of the overall outcome—an obvious, yet important distinction on which this Note focuses. Such a conclusion is inevitable for a number of reasons. First, the word that the *Brathwaite* Court chose to use, "evidence," in speaking of reliability is significant, because "evidence" logically must mean less than the overall outcome.[203] Second, the Court considered the reliability of the *overall outcome* in addressing its third concern—the administration of justice—and thus must have meant something different by the word "evidence,"[204] lest we presume the Court was simply being superfluous. Third, the *Brathwaite* Court stated that both the per se and the totality-of-the-circumstances approaches address the reliability of the identification itself, rather than the reliability of the overall outcome, because both approaches prevent unreliable identifications from reaching the jury.[205]

Since the Supreme Court's decision in *Biggers*, the reliability of identification testimony—the "evidence"—has been the courts' sole inquiry. *Biggers* extended the reasoning behind *Simmons* to *Stovall*-type situations, in which the identification at issue is an out-of-court identification[206] (not an in-court identification, as in *Simmons*[207]), and in so doing, clearly shifted the focus in such situations away from whether the police identification procedure was "unnecessarily suggestive"[208] and "conducive to irreparable mistaken identification"[209] to whether the identification is reliable.[210] The only question since *Biggers*, therefore, is "whether the witness is identifying the defendant solely on the

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201 *See Brathwaite*, 432 U.S. at 114.

202 *See, e.g.*, Neil v. Biggers, 409 U.S. 188, 198 (1972) (noting that "[i]t is the likelihood of misidentification which violates a defendant's right to due process"); Simmons v. United States, 390 U.S. 377, 384 (1968) (stating that a suggestive identification will be set aside only if there is a likelihood of misidentification); United States v. Wade, 388 U.S. 236–38, 240–41 (1967) (stating that a defendant cannot properly reconstruct the fairness and reliability of the identification procedures without a lawyer present at an identification, but that a court may permit a witness to identify the defendant in court if indicia of reliability exist regardless of whether the defendant was improperly denied a lawyer).

203 To elaborate, because evidence is what leads to a conviction or acquittal, and because multiple pieces of evidence are almost always used, the term "evidence" must imply less than the overall result of the trial.

204 *See Brathwaite*, 432 U.S. at 112–13.

205 *See id.* at 112.

206 *See supra* text accompanying note 71.

207 *See Simmons*, 390 U.S. at 382–84.

208 Stovall v. Denno, 388 U.S. 293, 302 (1967).

209 *Id.*

210 *See Brathwaite*, 432 U.S. at 122 (Marshall, J., dissenting).

basis of his memory of events at the time of the crime."[211] Consequently, courts may consider corroborative evidence that sheds light on the reliability of the identification itself. The question becomes whether corroborative evidence of general guilt sheds such light.

The Supreme Court in *Brathwaite* recognized that the per se approach was overinclusive because it kept evidence from the jury without considering "alleviating factors."[212] The inquiry remains the same, but can be reworded as follows: is corroborative evidence of general guilt an alleviating factor? The answer is not patently clear from the language in *Brathwaite*, but the Supreme Court's pre-*Raheem* opinions indicate that the answer is no. For instance, the Court in *Brathwaite* mentions that the factors a court must consider in assessing the reliability of an identification are those that the Court set forth in *Biggers*, none of which deal with general evidence of guilt.[213] Moreover, in determining the reliability of the identification in *Brathwaite*, the Court weighed only the *Biggers* factors and explicitly stated that existing corroborative evidence of guilt "plays no part in our analysis."[214] Additionally, in *Simmons*, the Court focused on similar, *Biggers*-type factors: the bank's lighting, the period of time the witness had to view the defendant, and the time that elapsed before the witness identified the defendant.[215] Finally, in *Wade*, although in the context of the right to counsel, the Court listed several *Biggers*-type factors to be considered in evaluating whether an in-court identification is properly derived from sources independent of the uncounseled, pretrial identification.[216]

The fact that the Court in *Brathwaite*, *Simmons*, and *Biggers* did not consider corroborative evidence of general guilt in these analyses is highly probative of the conclusion that courts should consider only *Biggers*-type factors in assessing the reliability of identifications. However, this fact is not dispositive. Indeed, one could argue that because the Court admitted the identifications in *Simmons*, *Biggers*, and *Brathwaite* after considering only *Biggers*-type factors,[217] the Court did

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

212 *Id.* at 112.

213 *See id.* at 114. It should be noted that the factors the Court applies to determine reliability are similar to those factors that psychologists believe affect identification accuracy. *See supra* Part I. Some argue, however, that these factors are not sufficiently correlated with psychological phenomena. *See* Rosenberg, *supra* note 50, at 275–81.

214 *Brathwaite*, 432 U.S. at 116.

215 *See* Simmons v. United States, 390 U.S. 377, 384–86 (1968). At the time, *Stovall* would not have permitted consideration of such evidence because the question in *Stovall* focused on the unnecessary suggestiveness of the identification procedure and not on the identification's reliability. *See* discussion *supra* Part II.B.1.

216 *See supra* text accompanying note 58.

217 *Simmons* obviously did not refer to these factors as *Biggers* factors because *Simmons* preceded *Biggers*.

not need to consider non-*Biggers*-type factors as part of its respective analyses even if the Court thought that such factors (that is, evidence of general guilt) could properly be considered. This interpretation may help explain the language in *Brathwaite* that general corroborative evidence of outside guilt "plays no part in our analysis."[218] However, if the Court wanted to depart from precedent that considered only *Biggers*-type factors, *Brathwaite* certainly offered ample opportunity, which fact Justice Stevens recognized in his concurrence when he remarked that although it is sometimes difficult to put general evidence of guilt to one side, the Court "carefully avoid[ed] this pitfall and correctly relie[d] only on appropriate indicia of the reliability of the identification itself."[219]

Therefore, Supreme Court precedent strongly supports the conclusion that courts should consider only *Biggers*-type factors, and not general evidence of guilt, in determining an identification's reliability. Of course, because these cases do not explicitly exclude the possibility that courts may consider non-*Biggers* type factors, additional and more theoretical analysis in support of this conclusion is beneficial.

2. *Appropriateness of Process*

This Note's analysis now shifts to considering the appropriateness of the respective processes used by the *Raheem* and non-*Raheem* circuits to determine the reliability of identification testimony. First, the *Raheem* approach is simply more logical. If an identification procedure is "unnecessarily suggestive," it is probably so because corroborative evidence of guilt made the police think that the defendant was the perpetrator.[220] Confronted with such a procedure, the witness will most likely pick the suspect against whom the police have the most corroborative evidence of guilt, not because that evidence makes it more likely that the witness independently remembers the defendant as the perpetrator, but because the lineup procedures "suggest" the witness should pick him.[221] Using this evidence to subsequently support the independence of an identification is nothing short of ab-

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218 *Brathwaite*, 432 U.S. at 116.

219 *Id.* at 118 (Stevens, J., concurring).

220 The Court articulated this sentiment in *Wade*:

> [T]he fact that the police themselves have, in a given case, little or no doubt that the man put up for identification has committed the offense, and that their chief pre-occupation is with the problem of getting sufficient proof . . . involves a danger that this persuasion may communicate itself . . . to the witness in some way.

United States v. Wade, 388 U.S. 218, 235 (1967) (first alteration in original) (quoting Williams & Hammelmann, *supra* note 1, at 483). However, in some cases, like *Raheem*, the defendant was not the suspect in the lineup.

221 *See supra* text accompanying note 43.

surd.[222] Additionally, even if the police did not have a defendant in mind at the time of the out-of-court identification, corroborative evidence of general guilt is hardly, if at all, related to whether a witness independently identified the defendant, but rather is related to whether the defendant is in fact "the right guy."[223]

This distinction leads to the second fault with the non-*Raheem* approach: if a court considers evidence of general guilt in assessing the reliability of identification testimony, it fails to adequately consider the procedural aspects of the trial and therefore violates the Due Process Clause. In determining the appropriateness of process under the Due Process Clause, defining "process" is a necessary first step. Although it is quite difficult to pinpoint the precise meaning or intention behind the Due Process Clause, Edward Corwin has noted that the phrase "process" probably was intended "to consecrate a *mode of procedure.*"[224] Similarly, John Hart Ely has stated that "the proper function of the Due Process Clause [is] that of guaranteeing *fair procedures.*"[225] Both correctly stress that due process should be defined with a focus on the procedural aspects of a trial. The Supreme Court has expressed this notion by stating that procedures used to determine a defendant's guilt or innocence must comport with "fundamental ideas of fair play and justice."[226] Due process, then, seems to encompass the concept of fundamental fairness in trial procedures.[227]

Process should be heavily scrutinized with regard to identification testimony because, as Benjamin Rosenberg has observed, unlike most other improper law enforcement activities, suggestive eyewitness identification procedures do not further any valid law enforcement need.[228] For example, an invasive search under the Fourth Amendment may be unconstitutional, yet at the same time may further the valid law enforcement need of collecting relevant evidence.[229] Unnecessarily suggestive identification procedures, by contrast, create unreliable evidence in cases in which reliable evidence otherwise could have

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222 Of course, if general evidence of guilt is collected after the identification, its effects are not so damaging.

223 This evidence is not related to any factors that psychologists agree affect perception and memory. *See supra* Part I. In contrast, *Biggers* factors are related. *See infra* note 278.

224 EDWARD S. CORWIN, LIBERTY AGAINST GOVERNMENT 114 (1948).

225 JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 19 (1980) (emphasis added).

226 *In re* Oliver, 333 U.S. 257, 282 (1948) (Rutledge, J., concurring); *see also* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring) (observing due process "[r]epresent[s] a profound attitude of fairness between man and man, and more particularly between the individual and government").

227 But the Court has recognized that the meaning of "fundamental fairness" is "as opaque as its importance is lofty." Lassiter v. Dep't of Social Servs. of Durham County, N.C., 452 U.S. 18, 24 (1981).

228 *See* Rosenberg, *supra* note 50, at 291.

229 *See id.*

been collected, and according to Rosenberg, the state should have a special obligation to behave correctly in cases in which it creates rather than merely collects evidence.[230]

With a procedural focus in mind, admissibility of identification testimony should rest on whether the identification was likely well-grounded, not whether it was likely correct.[231] General corroborative evidence is probative only as to whether the witness identified "the right guy"[232] (end-result- or outcome-oriented), rather than whether the witness independently identified the defendant (procedure- or process-oriented). Therefore, it is more appropriate for courts to consider general evidence of guilt only on appeal during any harmless-error analysis.

The approach utilized by the Second Circuit in *Raheem*[233] makes constitutional sense precisely because of this process/outcome distinction. The distinction previously mentioned between the reliability of the individual piece of evidence (in this case, the identification), and the reliability of the overall outcome of the trial parallels the distinction between process- and outcome-oriented constitutional jurisprudence in general. The former consideration assures that the process of admitting an identification is within constitutionally permissible limits. The latter consideration, however, does not concern itself with process, but rather solely with the accuracy of the end result. To be sure, both approaches focus on reliability, but the process-oriented approach asks whether the process of admitting the identification evidence is unconstitutional in light of the reliability of that evidence, while the outcome-oriented approach asks solely whether the end result is reliable.

It is indeed tautological that the Due Process Clause requires proper process, which is necessarily distinct from outcome. Table I illustrates how a trial outcome may be inaccurate even though the process employed in achieving the result is proper, and vice versa. Beginning with the proposition that a person accused of a crime is either guilty or innocent, several distinct relationships between process and outcome are possible.

As Table I illustrates, trials that employ either proper or improper processes can end with either a proper or improper outcome. Adding a given procedure to a trial (or removing one), therefore, may have either a positive or negative impact on the accuracy of end re-

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230 *See id.* at 292 n.158 (analogizing pretrial identification procedures to entrapment).

231 *See supra* note 197.

232 *See, e.g.*, United States v. Wilkerson, 84 F.3d 692, 695–96 (4th Cir. 1996) (implying that courts should consider evidence of general guilt when evaluating the admissibility of an identification because it helps determine whether a witness identified the correct person).

233 *See supra* notes 190–92 and accompanying text.

TABLE 1
CORRELATION BETWEEN PROCESS AND OUTCOME

Guilt/ Innocence	Type of Process	Result	Accurate Outcome	Correlation Between Proper Process/Accurate Outcome
Guilty	Proper	Acquitted	NO	NO
Guilty	Proper	Convicted	YES	YES
Guilty	Improper	Acquitted	NO	YES
Guilty	Improper	Convicted	YES	NO
Innocent	Proper	Acquitted	YES	YES
Innocent	Proper	Convicted	NO	NO
Innocent	Improper	Acquitted	YES	NO
Innocent	Improper	Convicted	NO	YES

sults. Indeed, courts (and legislatures) do try to create judicial processes that will yield accurate end results, and end results should properly be considered in particular cases to determine whether a given procedure is constitutionally offensive. Yet, process and end result remain two distinct concepts. The non-*Raheem* approach is incorrect because, by considering evidence that indicates solely whether the police "have the right guy"[234] rather than only that evidence which bears on whether the witness's identification is well-grounded, the approach focuses on the accuracy of outcome (column 4) while ignoring the adequacy of the process (column 2). The *Raheem* approach, by focusing on whether the identification was well-grounded,[235] properly addresses concerns for both appropriateness of process (column 2) and accuracy of outcome (column 4), as well as the separate concern of the global appropriateness of outcomes.[236]

The Supreme Court has recognized this process/outcome distinction in analyzing a parallel issue under the Confrontation Clause of the Sixth Amendment. The Confrontation Clause of the Sixth Amendment (made applicable to the states through the Fourteenth Amendment) provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[237] Since the beginning of its Confrontation Clause jurisprudence, the Supreme Court has consistently held that the Confrontation Clause does not necessarily prohibit the admission of hearsay

234 *See supra* note 20 and accompanying text (discussing cases employing non-*Raheem* approach).

235 *See supra* Part III.D.

236 This concern is not represented in Table I, but is discussed in reference to *Brathwaite*'s third concern—the administration of justice. *See infra* Part IV.B.1.

237 U.S. CONST. amend. VI.

statements against a criminal defendant.[238] The Court set forth in *Ohio v. Roberts* that "a general approach" for determining the circumstances under which incriminating statements are admissible under an evidentiary hearsay exception also meets the requirements of the Confrontation Clause.[239] In the usual case, the Court noted, the prosecution must either produce the declarant whose statement it wishes to use against the defendant, or demonstrate his unavailability.[240] If the prosecution satisfies this requirement, then the witness's "statement is admissible only if it bears adequate indicia of reliability."[241] The Court went on to suggest that the prosecution could satisfy the "indicia of reliability" requirement in either of two circumstances: if the hearsay statement "falls within a firmly rooted hearsay exception," or if it is supported by "a showing of particularized guarantees of trustworthiness."[242]

In *Idaho v. Wright*, the Court clarified what categories of evidence courts may properly weigh in determining whether hearsay testimony falls into the latter category.[243] Notably, the Court held that courts may not rely on evidence corroborating the defendant's guilt—as opposed to evidence regarding the circumstances surrounding the making of the out-of-court statement—to support a finding that the statement bears "particularized guarantees of trustworthiness."[244] The Court opined that such evidence "more appropriately indicates that any error in admitting the statement might be harmless rather than that any basis exists for presuming the declarant to be trustworthy."[245] The Court was particularly worried that the use of this type of evidence to support the reliability of hearsay statements would permit admission of presumptively unreliable statements "by bootstrapping on the trustworthiness of other evidence at trial."[246]

Therefore, with respect to admitting either hearsay or eyewitness identifications stemming from an unnecessarily suggestive identification procedure, the Court has developed a test of reliability to determine whether the Constitution has been violated. The Court labeled reliability the "linchpin" of due process[247] around the same time it determined that the "mission" of the Confrontation Clause was to pro-

238 *See* Idaho v. Wright, 497 U.S. 805, 813 (1990).

239 *See* 448 U.S. 56, 64–65 (1980).

240 *See id.* at 65.

241 *Id.* at 66 (internal quotation marks omitted).

242 *Id.* The rationale for admitting hearsay testimony if it falls under a "firmly rooted" hearsay exception is that if such evidence were not trustworthy it would not fall under such an exception. *See* California v. Green, 399 U.S. 149, 161–62 (1970).

243 *See* 497 U.S. 805 (1990).

244 *See id.* at 818–19.

245 *Id.* at 823 (footnote omitted).

246 *Id.*

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

mote reliability.[248] As the Supreme Court did in *Wright*, the Second Circuit in *Raheem* struck the proper balance for determining reliability by refusing to consider corroborative evidence of general guilt.

Nevertheless, in less related areas, the Supreme Court has rarely articulated and often overlooked the constitutionally and logically sound thesis that procedural fairness reflects concerns for fair treatment, not merely for correct outcomes.[249] For example, in the well-known case *Strickland v. Washington*, the Court applied an outcome-determinative test in considering whether a defendant was denied the effective assistance of counsel under the Sixth Amendment.[250] Even if this test is tenable in the area of effective assistance of counsel, such a test certainly should not be adopted in the area of eyewitness identification because unlike the violation created by ineffective assistance of counsel, where the government cannot prevent the occurrence of the constitutional violation, the violation created when the government employs an unnecessarily suggestive identification procedure is the direct result of government action.[251] The burden, therefore, should remain on the prosecutors to prove reliability of the identification. The non-*Raheem* approach absolves the prosecutor of this burden by reasoning that, because the defendant is "the right guy," the identification is probably reliable, and therefore its admission into evidence is not a violation of due process.[252] The *Raheem* approach, on the other hand, properly demands that the prosecution affirmatively prove that the identification testimony is not the product of an unnecessarily suggestive identification procedure. Imagine using the non-*Raheem* reasoning in other constitutional areas where the prosecution is responsible for the potential violation. For example, could the Court

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248 Tennessee v. Street, 471 U.S. 409, 415 (1985).

249 Laurence H. Tribe, *Perspectives on* Bakke*: Equal Protection, Procedural Fairness, or Structural Justice?*, 92 HARV. L. REV. 864, 871–72 (1979).

250 *See* Strickland v. Washington, 466 U.S. 668, 684–87 (1984). In formulating the constitutional standard for ineffective assistance of counsel, *Strickland* articulated a two-pronged test: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose *result is reliable*." *Id.* at 687 (emphasis added). In practice, the first prong essentially collapses into the second, making this test completely outcome-determinative. In his dissent, Justice Marshall recognized this fact and argued that the prejudice prong improperly treated the Sixth Amendment's guarantee of effective assistance of counsel as if its "only purpose . . . is to reduce the chance that innocent persons will be convicted." *Id.* at 711 (Marshall, J., dissenting). In Justice Marshall's view, "the guarantee also functions to ensure that convictions are obtained only through fundamentally fair procedures." *Id.* (Marshall, J., dissenting).

251 In this respect, the case for not considering evidence corroborating the defendant's guilt is even stronger in the context of eyewitness identifications based on unnecessarily suggestive procedures than it is in the context of determining the reliability of hearsay statements under the Confrontation Clause.

252 *See supra* note 20 and accompanying text.

in good faith hold that if a defendant is probably guilty, then an otherwise impermissible search does not in fact violate the Constitution? Or that because the defendant is probably guilty, his coerced confession does not in fact violate the Constitution?

Further evidence that the non-*Raheem* circuits improperly conflate process and outcome is apparent from the role that the concept of harmless-error plays in these circuits' analysis. The social function of harmless-error analysis has been explained best by Chief Justice Rehnquist:

> The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences. . . . These societal costs of reversal and retrial are an acceptable and often necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence. But the balance of interest tips decidedly the other way when an error has had no effect on the outcome of the trial.[253]

The same social functions are served whether an outcome-determinative analysis is used to define constitutional errors or is used merely to determine their harmlessness. However, employing a purely outcome-determinative analysis to define constitutional errors improperly shifts to defendants the burden of proving the error's impact on the outcome of the proceeding, distorts evidence, and usurps the role of the jury.

The Supreme Court has divided constitutional errors into two categories for purposes of harmless-error analysis, which differs depending on the category of error. The first type of error is a "trial error," or an "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless."[254] The second type of error is "structural error"—"structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards."[255]

The errors in most cases, including those cases involving a pretrial identification procedure conducted in violation of the accused's constitutional rights, fall into the first category.[256] These errors usu-

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253 United States v. Mechanik, 475 U.S. 66, 72 (1986).

254 Arizona v. Fulminante, 499 U.S. 279, 307–08 (1991).

255 *Id.* at 309.

256 *See, e.g.*, Moore v. Illinois, 434 U.S. 220, 232 (1977) (holding that a witness's pretrial identification of a suspect in the absence of the suspect's lawyer violates the suspect's Sixth and Fourteenth Amendment right to counsel and remanding "for a determination of whether the failure to exclude that evidence was harmless constitutional error").

ally are subject to the *Chapman* rule, which acquires its name from the Supreme Court's decision in *Chapman v. California*.[257] In *Chapman*, the Court held that if a constitutional error occurs, then the government must prove beyond a reasonable doubt that the error was harmless—that is, that it "did not contribute to the verdict obtained."[258] This rule is based on the view that a criminal defendant is entitled "to a fair trial, not a perfect one."[259]

The Supreme Court applied the *Chapman* rule in all federal habeas corpus proceedings until 1995, when it held in *Brecht v. Abrahamson* that the less stringent harmless-error standard used by federal courts to analyze nonconstutional trial errors also applies in determining whether habeas relief should be granted in cases of constitutional trial errors.[260] This standard, known as the *Kotteakos* standard,[261] asks whether an error "had substantial and injurious effect or influence in determining the jury's verdict."[262]

Regardless of which harmless-error standard courts apply in a given case, the non-*Raheem* approach effectively collapses harmless-error analysis into the trial stage by declining to regard the deficient process as unconstitutional in the first instance if it is apparent that the witness identified "the right guy."[263] Such an approach is impermissible because it fails to recognize that the process itself was unconstitutional, but instead blindly considers that process to be constitutional because it was harmless. Moreover, this approach usurps the role of the jury because an appellate court that considers the error harmless at the trial stage necessarily helps to determine the weight the jury gives such evidence. Worse yet, doing so often leads to distorted outcomes. For example, when the court in *Raheem* implicitly employed this kind of harmless-error analysis at the trial stage, the analysis became circular: the identification's suggestiveness was in effect harmless because the police "had the right guy," but part of the reason the jury determined that the police did in fact have "the right guy" was because of this identification.[264] When the Second Circuit applied the proper standard, on the other hand, each piece of evidence retained its independent value, and the court ultimately deter-

257 386 U.S. 18 (1967).

258 *Id.* at 24.

259 Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986).

260 *See* 507 U.S. 619, 638 (1993).

261 This standard is so-named because it comes from the Supreme Court case *Kotteakos v. United States*, 328 U.S. 750 (1946).

262 *Id.* at 776.

263 *See supra* note 20 and accompanying text.

264 This was certainly part of the reason that the jury found Raheem guilty as the State had no evidence tying Raheem to the murder other than the identification evidence. *See* Raheem v. Kelly, 257 F.3d 122, 142 (2d. Cir. 2001), *cert. denied sub nom*, Donnelly v. Raheem, 534 U.S. 1118 (2002).

mined that the trial court's admission of the identification was not merely harmless error.[265]

3. *Accuracy of Outcomes*

While the non-*Raheem* approach improperly focuses on outcome to the exclusion of process, it does not necessarily yield more accurate outcomes. Again, if courts were to consider evidence of general guilt in determining whether an identification is reliable, that evidence would essentially be counted twice—first toward general guilt, then again toward admitting the identification, which would, in turn, act as further evidence of guilt. This evidence would therefore be weighted too heavily, to the point that outcomes could become distorted. Indeed, this problem would be compounded by the fact that evidence of general guilt would be used in part to support a proposition—that the witness identified the defendant on the basis of information independent of the tainted identification procedure—that is unrelated to this evidence. Finally, the non-*Raheem* approach may impede progress toward more accurate outcomes because it provides the police with little incentive to improve their investigatory procedures.[266] Nonetheless, the corroborative evidence of general guilt does make it more probable that the individual identified by the witness is in fact the perpetrator, or the "right guy," a fact that may or may not outweigh the otherwise harmful effects that the non-*Raheem* approach has on accuracy.[267]

Although corroborative evidence of general guilt points to the fact that a particular defendant is "the right guy," defendants are usually "the right guy," regardless of such evidence.[268] This proposition is probably true because prosecutors may indict only those defendants they actually believe are guilty and whose guilt the prosecutor believes

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265 *See id.* at 142–43. It should be noted that *Raheem*'s result is somewhat of an anomaly. Often, recognition of the process/outcome distinction discussed in this Note will not determine whether a defendant is incarcerated. The more evidence corroborative of guilt supporting an identification at trial, the more likely an appellate court will uphold a conviction under harmless-error analysis. That *Raheem* did not deem the due process violation harmless was largely due to the fact that his confession was suppressed on a technicality. *See id.* at 129.

266 See *infra* Part IV.C for a fuller discussion of the deterrent effects of the respective approaches.

267 Indeed, the more evidence corroborative of guilt, the more likely that under the *Raheem* approach a court would find admitting an unreliable identification harmless. *See supra* note 265.

268 This assumption is quite difficult to verify, but has been made by many prominent legal scholars, including Richard Posner. *See* Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1506 (1999). But several commentators do not agree that this is a proper assumption. *See* Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Really Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1341 (1997).

he can prove beyond a reasonable doubt at trial.[269] Also, in addition to the evidence that they will present at trial, prosecutors often possess other corroborative evidence of a defendant's guilt that is inadmissible.[270] One commentator has stated this idea quite well: "If [juries] return few erroneous convictions it is because they are given few opportunities to judge innocent defendants."[271]

Nevertheless, the accuracy of outcomes in individual cases can be directly affected by evidence and procedures. Therefore, the unreliable aspects of the non-*Raheem* approach may lead to fewer accurate outcomes even though this approach leads to more convictions and most defendants are in fact guilty. Many guilty defendants who would be convicted under the non-*Raheem* approach would also be convicted under the *Raheem* approach, and more innocent defendants may be convicted under the non-*Raheem* approach than would be convicted under the *Raheem* approach. If the number of extra innocent defendants who are convicted under the non-*Raheem* approach exceeds the number of guilty defendants who are convicted under that approach but who would escape conviction under the *Raheem* approach, the *Raheem* approach actually will lead to more accurate outcomes. Regardless, the criminal justice system does not concern itself solely with accuracy of outcomes, but rather values erring on the side of protecting the innocent in considering what process is due.[272] This Note refers to this concern as the "global appropriateness of outcomes."

B. The Administration of Justice

This subpart explores how concern for the administration of justice reflects concern not only for accuracy of outcomes, but also for the global appropriateness of outcomes, and further argues that the non-*Raheem* approach may offend this notion. This subpart then examines how the individual procedural aspects of the non-*Raheem* ap-

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269 It is possible that while most defendants are guilty, the plea bargaining process eliminates so many more guilty than innocent defendants (due to the strength of the evidence and/or the fact that innocents may want to go to trial because they believe in the system) that at trial, the ratio of guilty to innocent defendants has reversed. *See* Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS L. REV. 85, 101 (2002). However, as Lillquist recognizes, it is also plausible that guilty defendants may be more likely to go to trial because they are less risk averse. *See* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1943 (1992).

270 For example, under Federal Rule of Evidence 404(a), character evidence is not admissible for the purpose of "proving action in conformity therewith." FED. R. EVID. 404(a). However, it may be admissible for other purposes. *See* FED. R. EVID. 404(b).

271 Gross, *supra* note 6, at 432. The possible effect of a base number of actually guilty defendants being higher than the base number of actually innocent defendants is discussed below in the section on the administration of justice. *See infra* Part IV.B.1.

272 *See supra* Part IV.B.

proach may be procedurally offensive in ways apart from the concerns mentioned thus far.

1. *Global Appropriateness of Outcomes*

In discussing the administration of justice, the *Brathwaite* Court specifically stated that the per se approach would not adequately protect society's interest in preventing the guilty from going free.[273] The non-*Raheem* approach certainly may prevent more guilty defendants from going free by admitting more identifications.[274] Additionally, under the non-*Raheem* approach defendants will have one less procedural aspect to appeal, which will probably lead to fewer overturned convictions. Courts, however, have traditionally recognized the strong, countervailing interest in preventing innocent defendants from going to jail.[275] Just as the per se approach is over-inclusive because it keeps evidence from the jury,[276] employing the non-*Raheem* approach may be under-inclusive because it may lead to the conviction of an unacceptable number of innocent defendants.[277] In contrast, the *Raheem* approach concentrates on reliability, but it does not do so at the expense of protecting innocent defendants because the reliability factors that it permits courts to consider are directly related to whether a witness has identified a defendant on the basis of information perceived during the crime rather than during a suggestive identification.[278]

In determining the acceptable ratio of convictions of innocent defendants, the U.S. legal system does not look only to accuracy of outcomes in the aggregate, but rather accepts the proposition that it is better to let x number of guilty go free than to allow y number of innocents to be jailed. Our system gives x a significantly higher value

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273 *See* Manson v. Brathwaite,,432 U.S. 98, 112 (1977) ("The third factor is the effect on the administration of justice. Here the *per se* approach suffers serious drawbacks. Since it denies the trier reliable evidence, it may result, on occasion, in the guilty going free.").

274 These identifications unquestionably are an important piece of evidence for the prosecution. Without such evidence, the prosecution may have difficulty proving its case even if the defendant is guilty. *See supra* notes 5–6 and accompanying text.

275 For example, most are familiar with Blackstone's maxim that it is better to let ten guilty men go free than to put one innocent man in jail. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES 352 (photo. reprint 1992) (1765).

276 *See supra* text accompanying notes 111, 116.

277 Many experts believe that mistaken identifications "present what is conceivably the greatest single threat to the achievement of our ideal that no innocent man shall be punished." Carl McGowan, *Constitutional Interpretation and Criminal Identification*, 12 WM. & MARY L. REV. 235, 238 (1970). The negative effects on accuracy of outcomes previously discussed are part of the reason innocents may be jailed under the non-*Raheem* approach. *See supra* Part IV.A.3.

278 *See supra* text accompanying note 101. At least in a general sense, the *Biggers* factors are correlated to scientific evidence regarding affects on accuracy of eyewitness identifications. *See* Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL'Y & L. 765, 785 (1995).

than *y*—this is the United States' common sense of justice.[279] It is for this reason, for example, that U.S. courts employ a "beyond a reasonable doubt" standard of proof in criminal trials; a "preponderance of the evidence" standard of proof would yield a greater number of accurate results, but also would lead to the conviction of more innocent defendants.[280] Thus, courts should measure the global appropriateness of a legal outcome differently from the accuracy of a given result in a particular trial because global appropriateness specifically values erring on the side of the innocent. As previously discussed, the non-*Raheem* approach may offend this notion by permitting the conviction of an unacceptable extra number of innocent defendants, even if it helps to convict an even greater number of guilty defendants.[281] This possibility is quite realistic because all of the outcome-distorting effects of the non-*Raheem* approach are potentially harmful to innocent defendants.[282] The non-*Raheem* approach is, therefore, potentially offensive to the administration of justice because it may produce results that are not correlated to accuracy of outcomes in a manner that errs on the side of the innocent.

2. *Appropriateness of Process*

Protecting the integrity of the judicial system, not only for potentially innocent defendants but also for guilty defendants, is one aspect of the proper administration of justice.[283] Indeed, it is for this reason that fair procedure is guaranteed as an entity distinct from accurate

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279 Society values *x* more than *y* because jailing an innocent person offends traditional notions of justice more than releasing a guilty person offends those same notions. Indeed, the Supreme Court has noted that it is "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re* Winship, 397 U.S. 358, 372 (1970).

280 *See id.* at 375. The Court noted that the reasonable doubt standard "is a prime instrument for reducing the risk of convictions resting on factual error." *Id.* at 363. The Court went on to stress that "doubt whether innocent men are being condemned" would dilute "the moral force of the criminal law" and would impair the confidence of "every individual going about his ordinary affairs . . . that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty." *Id.* at 364.

281 The word "may" is used in this sentence because one would need to derive a precise formula that values the acceptable number of convictions of innocents to determine whether the non-*Raheem* approach is globally unacceptable. This formula would have to consider how many more innocents are actually jailed under the non-*Raheem* approach. Determining this number would be quite difficult because society does not actually know whether an innocent person was jailed unless that person is subsequently exonerated. Additionally, one would have to assign normative values to probabilities of jailing individuals for particular crimes, which also would be quite a complex task. For a related discussion on the complexities of such formulas, see Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1386–93 (1971).

282 *See supra* Part IV.A.2–3.

283 Justice Marshall echoed this sentiment in his dissent in *Strickland*. *See supra* note 250. As noted by Justice Douglas, due process respects "the dignity even of the least wor-

and globally appropriate outcomes.[284] Consequently, particular procedures themselves may be offensive wholly apart from the accuracy and appropriateness of the outcomes that result from those procedures.[285] Regardless of whether innocent defendants are actually jailed, the process afforded in non-*Raheem* circuits offends procedural notions of justice by allowing a person to be convicted by a jury that counts evidence of general guilt twice.[286] What is even more offensive is the fact that the jury counts this evidence to support a proposition—the legitimacy of an identification—to which it is loosely correlated at best.[287] Perhaps the most offensive aspect of the non-*Raheem* approach is that it encourages police to create suggestive environments. In his dissent in *Brathwaite*, Justice Marshall recognized this concern, stating that the exclusion of suggestive identifications "both protects the integrity of the truth-seeking function of the trial and discourages police use of needlessly inaccurate and ineffective investigatory methods."[288]

Raheem is a prime example of a case in which applying the non-*Raheem* approach would offend the proper administration of justice. Raheem was convicted of murder at the trial level based solely on an identification resulting from an unnecessarily suggestive identification procedure (which was supported by only an inadmissible confession perhaps motivated by the very suggestive identification it was used to support), the confession and the simple fact that Raheem, like the perpetrator, owned a black leather coat.[289]

C. Deterrence

This subpart concludes the analysis by considering in greater detail the deterrent effects—*Brathwaite's* second concern—of both the

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thy citizen." Stein v. New York, 346 U.S. 156, 207 (1953) (Douglas, J., dissenting), *overruled on other grounds by* Jackson v. Denno, 378 U.S. 368, 391 (1964).

284 The purely outcome-determinative approach shifts the focus from fairness to guilt and could be logically extended to mean that a guilty person has no fundamental right to a fair trial. Note, *Prosecutor Indiscretion: A Result of Political Influence*, 34 IND. L.J. 477, 486 (1959). Additionally, employing a different approach to fairness depending on the amount of evidence of general guilt would permit acceptable prosecutorial conduct to fluctuate with the strength of the state's case.

285 However, as previously mentioned, these procedures should be correlated with the concepts of accuracy and appropriateness of outcomes. *See supra* Part IV.A.2–3. Therefore, many offensive procedures overlap with those procedures that lead to distorted and inappropriate outcomes.

286 *See supra* Part IV.A.3.

287 *See supra* Part IV.A.3.

288 Manson v. Brathwaite, 432 U.S. 98, 127 (1977) (Marshall, J., dissenting).

289 *See supra* Part III.A–C.

Raheem and non-*Raheem* approaches.[290] In *Brathwaite*, the Supreme Court recognized that the totality-of-the-circumstances approach does serve as a deterrent to the use of unnecessarily suggestive identification procedures, albeit to a lesser degree than the per se approach.[291] According to the Court, the totality-of-the-circumstances approach deters police from conducting unnecessarily suggestive procedures "for fear that their actions will lead to exclusion of identifications as unreliable."[292] This deterrent effect cannot be fully recognized, however, unless courts employ the *Raheem* approach to corroborative evidence. Under the non-*Raheem* approach, police will have less fear that an identification will be found unreliable once corroborative evidence of guilt is collected.[293] This result is particularly troubling because those police officers who already have evidence of a suspect's guilt are the very people that courts should be most concerned about deterring.[294] The fact that, as mentioned previously, few other safeguards exist to protect suspects from such behavior further compounds this danger.[295] For example, the right to counsel applies only to lineups that occur "at or after the initiation of adversary judicial criminal proceedings."[296] Moreover, even if *Wade* applies to a particular identification,

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290 The deterrent effect of both approaches is a legitimate consideration because, as already touched upon, deterrent effects factor into accuracy and appropriateness of outcomes and appropriateness of process. *See supra* Parts IV.A.2–3, IV.B.2.

291 *See Brathwaite*, 432 U.S. at 112.

292 *Id.* However, not all commentators agree:

> [R]egardless of how specifically opinions define what is unnecessarily suggestive, a police officer can never know whether he is violating a suspect's constitutional rights when he is conducting an identification procedure. That can be determined only when the indicia of reliability are examined. These factors may not be known to the officer and certainly cannot be controlled by him. The Court's approach leaves the officer without any firm rules as to what conduct violates the Constitution. If the officer has no way of knowing what actions are forbidden, he can hardly be deterred from those actions.

Randolph N. Jonakait, *Reliable Identification: Could the Supreme Court Tell in* Manson v. Brathwaite?, 52 U. COLO. L. REV. 511, 515 n.15 (1981).

293 A court employing the non-*Raheem* approach is more likely to uphold the use of identification testimony derived under such a procedure because any corroborative evidence that the police produce to support the fact that the defendant is the perpetrator could be used by the court to uphold the lineup regardless of the unnecessary suggestiveness of the procedure. *See supra* note 20 and accompanying text.

294 For an example of inappropriate police conduct when the police already have some evidence of a suspect's guilt, see generally KENNEDY, *supra* note 26 and accompanying text.

295 *See supra* notes 65–67 and accompanying text.

296 Kirby v. Illinois, 406 U.S. 682, 689 (1972); *see also* United States v. Ash, 413 U.S. 300 (1973) (holding that a defendant has no *Wade-Gilbert* right to have counsel present when a witness is shown photographic arrays of the defendant, even if the defendant has already been indicted); *supra* Part II.A (discussing *Wade*, *Gilbert*, *Kirby*, and *Ash*).

the defendant's lawyer is usually relegated to little more than an inactive observer.[297]

In *Raheem*, had the defendant's confession occurred before the lineup, what incentive would the police have had to conduct a non-suggestive lineup? *Wade* did not apply to the identification because formal, adversarial proceedings had not yet been initiated against Raheem at the time the police placed him in the lineup.[298] Under the non-*Raheem* approach, the police would have been more likely to conduct a suggestive lineup because they would have known that a court would consider this corroborative evidence of general guilt and that a court, accordingly, would most likely admit the suggestive identification on the basis of this evidence.

CONCLUSION

The Supreme Court should resolve the circuit split discussed in this Note in favor of the *Raheem* approach. That is, courts should consider corroborative evidence of general guilt that does not bear directly on an identification's reliability only in any post-trial harmless-error analysis. First, Supreme Court precedent strongly supports the proposition that courts should consider only *Biggers*-type factors, which factors are directly related to whether a witness independently identified a defendant, in determining the reliability of identification testimony. Second, evaluating both approaches in light of *Brathwaite*'s three concerns—reliability of the evidence, the administration of justice, and deterrence—illustrates that the *Raheem* approach is preferable to the non-*Raheem* approach. Corroborative evidence of general guilt may make it more likely that the defendant was the perpetrator, but it does not make it more likely that the witness independently identified the defendant. For this reason, considering this evidence in determining the reliability of an identification impermissibly focuses on outcome at the expense of process, which is both procedurally offensive and, ironically, more likely to lead to inaccurate outcomes. The non-*Raheem* approach also fails to consider the legitimate and separate concern of the global appropriateness of outcomes.

In sum, the *Raheem* approach strikes a more acceptable balance, permitting the admission of often-necessary identifications into evidence, yet at the same time ensuring their reliability. If an identification meets this threshold, a jury perhaps will be more able to accurately weigh its probative value in light of its suggestiveness.

The result in *Raheem* underscores the importance of this circuit split. The district court employing the non-*Raheem* approach found

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297 *See supra* note 66 and accompanying text.

298 *See supra* text accompanying note 162.

Raheem guilty, but when the Second Circuit considered corroborative evidence of general guilt only in its harmless-error analysis, it overturned Raheem's conviction. Hopefully, in resolving this conflict between circuits, the Supreme Court will better define its theoretical approach to interpreting the Due Process Clause.