THE PSYCHOLOGY OF PRETRIAL IDENTIFICATION PROCEDURES: THE SHOWUP IS SHOWING OUT AND UNDERMINING THE CRIMINAL JUSTICE SYSTEM

I. INTRODUCTION

Over the last century, scholars have studied the relevance of psychological influences and their growing presence in the legal context, specifically in criminal law. As a result, the areas of eyewitness identification, testimony, and jury awareness have received heavy examination. Pre-trial identifications have come under scrutiny based on psychological factors and constitutional issues that often arise, and remain to be a topic of interest among legal and psychology scholars. While the commonly used lineup procedure has received much attention, researchers have not been as generous to the showup procedure commonly used by police. This note will first examine the historical background of lineup and showup procedures to date through a review of the Supreme Court’s jurisprudence on showup procedures. Specifically, the analyses and arguments of this note will address the psychological relevance of pre-trial, showup identifications through the following: a) the inherently suggestive nature of showup procedures; b) the psychological effect of eyewitness identifications on the jury; and c) the constitutional implications as a result of showup identification. Further, recommendations to the judicial community will be made along with suggested legislative reforms and policies that will, if implemented, alleviate the many problems associated with showup identification procedures.

II. SUPREME COURT JURISPRUDENCE – THE WADE TRILOGY

In 1967, the United States Supreme Court first discussed the problems associated with eyewitness identification procedures in three landmark cases: United States v. Wade, United States v. Gilbert, and Stovall v. Denno. The Court’s main focus was confronting the “dangers inherent in eyewitness identification and the suggestibility inherent in the context of the pretrial identification.” They were primarily concerned about the high occurrence of misidentification by eyewitnesses as a result of deliberate or accidental suggestibility during lineups and showups.

The first two cases, Wade and Gilbert, involved post-indictment, pretrial lineups wherein the Supreme Court found that such a lineup conducted without counsel present and without a

---

1 A lineup is a “police identification procedure in which a criminal suspect and other physically similar persons are shown to the victim or a witness to determine whether the suspect can be identified as the perpetrator of the crime.” BLACK’S LAW DICTIONARY 949 (8th ed. 2004).
2 A showup is a “pretrial identification procedure in which a suspect is confronted with a witness to or the victim of a crime. Unlike a lineup, a showup is a one-on-one confrontation.” Id. at 1413.
3 While there is much intertwinement between lineup and showup case law, this note will focus on showup procedures and their psychological influences on eyewitnesses.
7 Wade, 388 U.S. at 235.
8 See id. at 233-35.
waiver of the right to counsel violated a defendant’s Sixth Amendment right to counsel.9 The lineup was deemed a “critical stage” where Sixth Amendment protection applied;10 however, the assessment of the “critical stage” posed some ambiguities for subsequent case law.11

The third case of the Wade Trilogy, Stovall v. Denno, involved a showup.12 Here, the Court dealt with a defendant’s general due process protection, recognizing that a pretrial identification procedure that is so unnecessarily suggestive and conducive to irreparable misidentification that it denies the defendant due process of law is constitutionally impermissible.13 The Court observed, “[i]t is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police,” when describing the showup that took place in Stovall.14

Five years after the Wade Trilogy, the Supreme Court moved backwards with its decision in Kirby v. Illinois.15 In Kirby, the question remained whether the defendant had the right to counsel at the showup.16 The defendant had been arrested but judicial proceedings had not been initiated.17 The Kirby Court limited the Wade principle strictly to its facts – post-indictment lineups – in determining the “critical stage” standard, and concluded that the defendant in Kirby did not have a right to counsel because he had not yet been indicted.18 Importantly, the Wade Court, in defining the lineup procedure as a critical stage, expressly relied on Escobedo v. Illinois,19 which involved the right to counsel before arraignment.20 Thus, the Kirby Court created a loophole for police manipulation by allowing unfair pretrial identifications and all such procedures before the indictment, defeating the intentions of the Wade and Gilbert rulings.21

While the benchmark cases initially provided a glimmer of hope for correcting the many problems of pretrial identification procedures, the recent Supreme Court jurisprudence has failed on almost all accounts, dismantling many of the protections it sought to safeguard. This note argues against suggestive pretrial identification procedures that eradicate the very basic rights that our country’s founders fought to establish. Further, it should serve as a reminder of the historical relevance of our country’s foundation, and highlight the fact that the seemingly archaic notion of the dangers of basic rights deprivation is, unfortunately, still ever present and looming.

III. INHERENT SUGGESTIVENESS OF THE SHOWUP

9 Gilbert, 388 U.S. at 272; Wade, 388 U.S. at 236-37. See generally U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”).
10 Wade, 388 U.S. at 237.
12 Stovall, 388 U.S. at 295.
13 Id. at 301-02.
14 Wade, 388 U.S. at 234.
16 Id. at 684.
17 Id. at 684-85.
18 Id. at 690. This narrow standard was the most infrequent standard applied by lower courts. Most federal and state courts applied Wade broadly as not intended to be limited to its facts. See Felice J. Levine & June Louin Tapp, The Psychology of Criminal Identification: The Gap from Wade to Kirby, 121 U. PA. L. REV. 1079, 1080 (1973).
21 See Right to Counsel, supra note 11, at 837.
According to recent studies, 40% of eyewitness identifications are incorrect. Further, there is much evidence to support that showup misidentifications are more prevalent than in any other pretrial misidentification procedure. A showup can occur at any number of places and has no specific location restrictions. It could happen anywhere—in the “field,” at the police station, at the scene of the crime, at the hospital if the witness/victim is dying, etc. While there may be exigent circumstances warranting the expedition of eyewitness identification by using a showup procedure, the absence of such immediacy significantly reduces the reliability of the identification and there are few protections to limit the devastating effects of the suggestiveness of the showup procedure. Showups can be necessary but even in such circumstances police should only employ them shortly after the crime.

A. Manner and Means of the Showup

Because of the rise of occurrences of misidentification, showups are considered to be inferior to lineups. The witness is given one option during a showup procedure and there is no control over other variables, as there is in a lineup procedure. Ultimately, the way in which a suspect is presented to a witness and how a showup procedure is uniformly conducted in and of itself inherently suggests the guilt of the suspect presented, potentially inducing a subconscious misidentification. The Supreme Court in *Stovall* also addresses the implications of the manner and means of the showup procedure:

The possibility of unfairness at [the] point [of showup] is great, both because of the manner in which confrontations are frequently conducted, and because of the

---

24 See, e.g., Neil v. Biggers, 409 U.S. 188, 194-95 (1972) (conducting showup at stationhouse); Stovall, 388 U.S. at 295 (conducting showup at hospital); Archuleta v. Kerby, 864 F.2d 709, 709-10 (10th Cir. 1989) (conducting showup while in the back of a police car); Smith v. Coiner, 473 F.2d 877, 879 (4th Cir. 1973) (conducting showup at the doctor’s office); People v. Evans, No. 233021, 2002 WL 3192972, at *2 (Mich. Ct. App. Nov. 15, 2002) (conducting showup by officer and witness driving around a nearby apartment complex where the witness identified the defendant).
25 See Lindsay et al., *supra* note 23, at 393-402 (finding that the showup is a “dangerous procedure” that increases rates of false identifications. *Id*., at 402.). For a discussion of more recent eyewitness identification research and its impact, see Wells, *supra* note 23.
26 See Gonzalez et al., *supra* note 23, at 525-26 (pointing to police as strong advocates of showups and their immediacy as a validation for their suggestiveness).
27 See Lee, *supra* note 23, at 759-760 (stating showups are inferior because of the increased chance of misidentification).
28 See Wells, *supra* note 23, at 795 (finding that a lineup is superior because “it can control errors by spreading errors to the fillers (‘known errors’), whereas an error with a showup is always an error of mistakenly identifying a suspect.”); see also Brazell v. State, 369 So.2d 25, 29 (Ala. Crim. App. 1978) (noting that the showup does not give the witness a choice of identifying any other person as being the perpetrator of the crime charged).
likelihood that the accused will often be precluded from reconstructing what occurred and thereby from obtaining a full hearing on the identification issue at trial. 29

Due to the nature of how showup identification procedures are conducted, research shows that the manner of such procedures affects eyewitness performance. 30 In showups, a witness is presented with one suspect in close temporal and physical proximity to the witnessed event, making the task clear and the sense of urgency clearer. The characteristics of the situation, more often than not, can pressure the witness into thinking that the police have a good reason for apprehending the suspect, and the witness’s expectation is further pressed by a question or instruction that psychologically implies a confirming answer. Psychological researchers have found that expectative and implicative forms of questioning elicit more wrong responses than straightforward questions, that the objective form is more suggestive than the subjective form, and that double negatives introduce confusion and inaccuracy. 31 Many times, a police officer might say, “we have picked up the suspect and need you to take a look,” or even more suggestive, “we caught the guy and are bringing him for you to ID him.” These statements are a cue for the witness to confirm the suspect as the perpetrator, much like the cue of “get set” for runners at a track meet to concentrate on and perceive the split second firing of the starting gun. 32

Another suggestive method often employed by police is having the suspect wear clothing similar to what the perpetrator was wearing at the time of the offense. 33 Research shows, especially in the context of a showup, that the clothing of the criminal may leave more of an impression on the witness than other physical characteristics 34 and requiring a suspect to wear clothing similar to the perpetrator’s risks misidentification. 35 Further, other clothing such as jailhouse uniforms or handcuffs are also suggestive to the eyewitness of the suspect’s guilt. 36 Ultimately, there are minimal ways in which a suspect can be presented to an eyewitness in a showup procedure without the presence of guilt being embedded in the identification procedure itself, and thus the manner of the showup will always present the implication of guilt, which will likely subconsciously affect the eyewitness.

In addition to the methods of the showup procedure, the location further intensifies the intrinsic suggestiveness of the procedure. Placing a suspect at the scene of the crime shortly after its commission further sets up the suspect in a suggestion of guilt. Locations such as the

29 Stovall, 388 U.S. at 298.
32 See id. at 301.
33 See, e.g., Commonwealth v. Johnson, 650 N.E.2d 1257, 1259 (Mass. 1995) (determining that the showup procedure was “unnecessarily suggestive” where the suspect was exhibited in a showup wearing clothes similar to those worn by perpetrator).
34 Patrick M. Wall, Eye-Witness Identification in Criminal Cases 31-33 (1965); see also People v. Russell, 188 N.Y.S. 872, 873 (N.Y. App. Div. 1921) (stating that the victim, identifying a suspect who was wearing a police uniform at time of crime, would have identified anyone in a police uniform); State v. Mitchell, No. 21413, 2003 WL 2239720, at *2 (Ohio Ct. App. Oct. 22, 2003) (witness acknowledge that the white shoes the perpetrator was wearing played a crucial role in identifying him where no other individual was wearing predominately white shoes).
35 See Wall, supra note 34, at 32.
36 See id. at 30; see also United States v. Russell, 532 F.2d 1063, 1069 (6th Cir. 1976) (holding that “it is suggestive to permit a witness to observe a defendant in manacles”).
station house or a jail cell also imply guilt to the eyewitness. The Wisconsin Supreme Court in *State v. Dubose* stated:

[I]t is important that showups are not conducted in locations, or in a manner, that implicitly conveys to the witness that the suspect is guilty. Showups conducted in police stations, squad cars, or with the suspect in handcuffs that are visible to any witness, all carry with them inferences of guilt, and thus should be considered suggestive. . . . [Also], it is important that a suspect be shown to the witness only once. If a suspect is identified, the police have no reason to conduct further identification procedures. Conversely, if the suspect is not identified by the witness, he or she should not be presented to that witness in any subsequent showups.

Moreover, the manner and means of showups are not fair to the suspect and increase the unreliability of eyewitness identification, which is already problematic.

**B. Exigent Circumstances**

While the main focus of this note is on the overwhelming evidence of the unreliability of showup identification procedures, there are rare instances where such procedures are helpful. It may not be possible to put together a lineup procedure in every circumstance. If other identification procedures are available, the courts have maintained that those procedures should be employed absent exigent circumstances.

The benefits of showups in exigent circumstances are immeasurable for many reasons. Witnesses will have the benefit of their fresh memory, the innocent suspect benefits from speedy resolution and exoneration, and the police benefit from the convenience of the procedure and its assistance to the investigation. On the contrary, non-exigent showups often result in erroneous eyewitness identification, which leads to incorrect eyewitness testimony in court. “[M]istaken eyewitness identification is responsible for more of [the] wrongful convictions than all other causes combined.” According to one researcher, the showup is “the most grossly suggestive identification procedure now or ever used by the police.” Thus, without the immediacy of the showup procedure for eyewitness identification, the reliability of such a procedure is gravely diminished and should not be employed.

---

37 See *State v. Gordon*, 441 A.2d 119, 126 (Conn. 1981) (finding that “the circumstances of the station house show-up unnecessarily suggested to the victim that she should positively identify the defendant”); *In re Duane F.*, 764 N.Y.S.2d 434, 445 (N.Y. App. Div. 2003) (finding the procedure so suggestive that it necessitated suppressing the eyewitness evidence where the suspect was the only civilian in the room).

38 *State v. Dubose*, 699 N.W.2d 582, 594 (Wis. 2005).

39 See, e.g., *Wise v. United States*, 383 F.2d 206, 208 (D.C. Cir. 1967) (determining that the use of field identification while the witness’s memory is still fresh is “effective . . . law enforcement”).

40 See, e.g., *People v. Adams*, 423 N.E.2d 379, 382 (N.Y. 1981) (discussing whether it would be unduly burdensome to form a lineup in order to justify the circumstances of the procedure).

41 See *Lee*, *supra* note 23, at 763; see, e.g., *Ex parte Appleton*, 828 So.2d 894, 903 (Ala. 2001) (citing non-exigency of the circumstances, including the possibility of conducting the lineup the next morning, as one of the characteristics of the identification procedure that rendered it inadmissible).


43 WALL, *supra* note 34, at 28.
C. Witness Susceptibility to Suggestion

Another aspect of the embedded suggestiveness of the showup procedure is the ability of the eyewitness to be affected by a number of factors. Such elements are more likely uncontrollable in a showup procedure and decrease the reliability of the eyewitness identification. The methods used to obtain the eyewitness identification can be controlled by the criminal justice system and can increase accuracy rates. Over the last thirty years, researchers have recognized the importance of eyewitness confidence and found that misidentifications would not be quite as problematic if the confidence of the witness was taken into account. This contention has been confirmed through numerous studies and surveys indicating that people believe there is a strong correlation between eyewitness confidence and the accuracy of the identification. The Supreme Court explicitly listed eyewitness certainty as one of the five factors that should be considered when determining the accuracy of the eyewitness identification. “Confidence malleability refers to the tendency for an eyewitness to become more or less confident in his or her identification as a function of events that occur after the identification.” This is particularly important because actors in the legal system can contaminate the confidence of an eyewitness through confidence build up or confidence breakdown, using psychological elements to achieve the desired result. False confidence can be achieved by learning that another co-witness identified the same person, when a police officer responds with confirmation of the identification, learning that the suspect has a prior criminal record, or through trial preparation. Additionally, as previously discussed, the police methods used can also affect the witness when confronted with a showup procedure, further demonstrating the susceptibility of the witness and the psychological factors that can lead to improper identifications pursuant to a showup.

A witness’s susceptibility to suggestion is the result of the circumstances of the crime or the identification procedure; however, there is an implied average witness assumption in the susceptibility analysis. A witness may consider a variety of factors for identification procedures, and the courts have perceived a psychological effect that presents special dangers to fairness. A witness may defer to the investigating officer’s judgment or may identify a person based on clues, intentionally or inadvertently given by the officers or other persons present during the identification procedure.

Further, the stress and emotions present shortly after being a victim of a crime or witnessing a crime can often have an impact on the circumstances of a showup identification procedure. Most people have experienced a devastating event at some point in their lives that has caused stress and strain on the other aspects of their lives, and this situation is no different.

---

45 See id. at 773-75.
47 Neil, 409 U.S. at 199.
48 Wells & Seelau, supra note 44, at 774.
49 See id. at 781.
51 See id. at 149.
52 Id.
Moreover, the individual impact of witnessing a crime or being victim to a crime will produce varying psychological effects that may not be measurable.

Memory deterioration is a huge element when discussing showup identification procedures. Psychologists have divided the memory process into three distinct levels: (1) the acquisition stage, where information is perceived and fragments are stored; (2) the retention stage, which is the period between acquisition and recollection; and (3) the retrieval stage, where the person recalls the initial perception. Many things occur during these stages that influence the reliability of the memory recollection, including the passage of time. Thus, requiring that a showup only be conducted shortly after the crime and only under exigent circumstances reduces the opportunity for unreasonable biases and helps to ensure that the eyewitness identification will not be influenced by suggestive elements.

IV. THE PSYCHOLOGICAL EFFECTS OF EYEWITNESS IDENTIFICATION ON THE JURY

In addition to the inescapable insinuation of suggestion embedded in the showup procedure itself, the result of witness identifications has a lasting and persuasive effect all the way to the jury deliberation room. The principle danger of suggestive identification procedures has surfaced in studies conducted on juries. Research has found that “juries are unduly receptive to identification evidence and are not sufficiently aware of its dangers.” Eyewitness confidence is the most powerful predictor of guilty verdicts. Research, including surveys and mock juror experiments, demonstrates that jurors overestimate the accuracy of identifications due to the eyewitness’s confidence and their own confidence in that eyewitness. This juror reliance on the eyewitness’s confidence is disconcerting because it is not a reliable indicator of accuracy. The witness is affected by feedback and officers who state or indicate that the witness has identified the “right” guy, which inflates the witness’s confidence resulting in the notion that the level of attention at the time of the crime was better than it actually was. The Supreme Court has recognized this phenomenon and observed:

[D]espite its inherent unreliability, much eyewitness identification evidence has a powerful impact on juries. . . .

“. . . All the evidence points rather strikingly to the conclusion that there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says, ‘That’s the one!’”

[54] See id. at 298.
[55] See discussion supra Part III.B.
[56] WALL, supra note 34, at 19.
[57] See Brian L. Cutler et al., Juror Sensitivity to Eyewitness Identification Evidence, 14 LAW & HUM. BEHAV. 185 (1990) (study finding that jurors give a disproportionate weight to the confidence of eyewitnesses).
[58] See, e.g., id.
[59] See YARMEY, supra note 53, at 315-16 (noting that the accuracy of memory and confidence in the identification are separate factors and studies have shown “little or no predictive relationship between the two”).
[60] See id. (stating that feedback given to the witness by the investigating officer results in the officer, not the witness, determining confidence of the identification).
American case law is filled with instances where defendants were convicted based almost entirely on eyewitness testimony, and were later found to have been wrongly convicted.62 In fact, a recent study reviewing 340 exonerations between 1989 and 2003 found that 64% involved at least one mistaken identification.63 Another study concluded that approximately 90% of the cases analyzed therein involved one or more mistaken identification.64

Ultimately, the impact of eyewitness testimony on the jury, erroneous or not, is a heavy point of reference in the research and statistical analysis of those wrongly convicted. It serves as a glaring reminder of the fallibility of eyewitness identification, compelling pretrial identification procedures to be reformed so that the level of suggestion is minimized as much as possible. In light of such psychological and legal research establishing the correlation between the eyewitness and the jury and its effect on the outcome of the verdict, we must take heed and make changes.

V. THE CONSTITUTIONAL IMPLICATIONS OF THE SHOWUP

As a result of the benchmark cases on pretrial identification procedures, there are constitutional issues that have consistently been raised.65 The courts have not been clear on the issues and continue to undercut the safeguards that it initially employed, resulting in contradictory holdings in lower courts.

A. Sixth Amendment: Right to Counsel

An accused’s right to have counsel present when brought before a witness for identification was first discussed by the Supreme Court in Wade and Gilbert.66 In those cases, the Court found there to be no doubt that counsel is available to the accused while he is in a police lineup.67 In Wade, Justice White suggested that the rule “appl[y] to any lineup, to any other techniques employed to produce an identification and a fortiori to a face-to-face encounter between the witness and the suspect alone, regardless of when the identification occurs, in time or place, and whether before or after indictment or information.”68 However, the Stovall case, involving a showup, held that a defendant was not entitled to counsel at a showup.69 This result completely violates the precedent set forth in Wade and Gilbert by allowing a defendant to be confronted by the witness at a “critical stage” without counsel present. Indeed, the broad language of the rule set forth in Wade requires counsel at all identification confrontations, which would logically include a showup confrontation.

64 Wells et al., supra note 42, at 605-08.
65 See discussion supra Parts I., II.
67 Gilbert, 388 U.S. at 273-74; Wade, 388 U.S. at 237.
68 Wade, 388 U.S. at 251 (White, J., dissenting in part and concurring in part).
69 Stovall, 388 U.S. at 302.
Further, having counsel present at any pretrial identification procedure, including a showup, would help avoid prejudice and prevent an improper identification procedure from prejudicing a defendant’s rights at trial.\(^{70}\) Having counsel present could potentially discourage the creation of suggestive circumstances by deterring improper suggestion by police officers.\(^{71}\) Moreover, the unconstitutionality of allowing such a confrontation flies in the face of the *Miranda* rights of a suspect. If a suspect is brought to the scene of a crime shortly after its commission, *Miranda* rights should be read to the suspect, invoking protections, including his right to counsel.\(^{72}\) Thus, the courts are incorrect to read *Wade* and *Gilbert’s* broad rules in a fashion that excludes showups from the “critical stage” necessary for Sixth Amendment protection. Indeed, reading it to do so actually contradicts the rules established by the Supreme Court.

**B. Fifth & Fourteenth Amendments: Due Process of Law**

The Due Process Clauses also often arise in relevant case law addressing the constitutionality of showup identification procedures.\(^{73}\) Again, the element of inherent suggestion comes into play to determine whether such a right has been violated. The Supreme Court in *Stovall* articulated a “totality of the circumstances” standard to determine whether identification evidence is “so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant is] denied due process of law.”\(^{74}\) However, the Court did not apply the standard to the case at hand, resulting in the web of conflict that exists today in the context of showup procedures. In the subsequent *Neil v. Biggers*, the Court did away with the “totality of the circumstances” test and established reliability as the central question,\(^{75}\) thus bringing full circle this note’s previous analyses on the importance of reliable eyewitness identification and its subsequent effects.\(^{76}\) Under this new standard, an identification procedure that is found to be suggestive may be admitted at trial if it is otherwise reliable.\(^{77}\) But in *Manson v. Brathwaite*, the Court further weakened initial safeguards and held that due process only requires the exclusion of evidence if, under the totality of the circumstances, it is unreliable.\(^{78}\)

The recent case law exhibits the subsequent dismantling of the protections which were initially safeguarded and significantly narrowed the grounds on which pretrial identification procedures can be challenged. The Court does not focus on the objective nature of the procedure itself as it should, but rather solely on its relationship to the in-court identification. The current standard is subjective and allows for the most egregious situations to maintain admissibility and constitutionality. The numerous cases of wrongly convicted defendants are evidence of the inadequacy of the current standard.

\(^{70}\) See Rivlin, *supra* note 50, at 150-51.

\(^{71}\) See id.

\(^{72}\) See id. at 146.

\(^{73}\) See U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property without due process of law”); U.S. CONST. amend. XIV (requires state governments to provide these guarantees as well).

\(^{74}\) *Stovall*, 388 U.S. at 302.

\(^{75}\) *Neil*, 409 U.S. at 199-200 (setting out the following five factors to consider when evaluating misidentification: 1) “the opportunity of the witness to view the criminal at the time of the crime;” 2) “the witness’ degree of attention;” 3) “the accuracy of the witness’ prior description of the criminal;” 4) “the level of certainty demonstrated by the witness at the confrontation;” and 5) “the length of time between the crime and the confrontation”).

\(^{76}\) See *supra* Part III.

\(^{77}\) See *Neil*, 409 U.S. at 199.

VI. RECOMMENDATIONS

While this note generally discusses the negative impact of showup identification procedures, they should not be eliminated.79 However, the constitutionality of such procedures is minimal, despite the application and allowance of the showup procedure over the years. The right to counsel includes showup procedures so suspects should always be afforded that inherent right granted to persons by the United States Constitution. Additionally, legislative restrictions should prevent police officers and their respective departments from employing any suggestive behavior during such procedures. Proactive procedures and policies can be uniformly applied and guidelines imposed to advise police departments against showup procedures. The procedures employed by the police are the first line of defense against the risk of misidentification, and thus showups should only be conducted in exigent circumstances. Moreover, these proactive procedures place minimal burdens on police officers, but produce substantially better results by lowering the occurrence of misidentification through suggestive procedures. Further, having counsel present will minimize and prevent any unreliable identification and therefore will result in better efficiency of the justice system.

Another safeguard which would alleviate the many problems associated with showup procedures is making the presence of counsel at such procedures an unwaivable right.80 This would safeguard the right to a fair trial. The suspect should have the right to abstain from a non-exigent showup in an effort to prevent, among other things, the risk of misidentification due to the inherent suggestion in the procedure. As evidence has demonstrated, the harmful effects of the showup procedure are daunting and compel legislative and judicial action.

Moreover, the current admissibility standards are laughable, allowing any egregiously obtained identification evidence to be admissible so long as the “totality of the circumstances” warrants it. From this perspective, anything could be admissible. Further, the reliability standard is completely subjective and relies largely in part on the confidence of the eyewitness, rather than on accuracy.81 If these recommendations are employed, our justice system will be better able to protect the inherent rights enshrined in the Constitution.

VII. CONCLUSION

Showup procedures jeopardize the honor and integrity of the criminal justice system and should only be allowed in limited circumstances. The Supreme Court jurisprudence has only muddled and confused the initial purpose of confronting the troubling issue of pretrial identification procedures so it is no wonder why the issue is currently in such a web of conflict. The scholarly community has recognized the psychological relevance of pre-trial showup identifications, and it is important that case law follow suit not only through dicta, as it has already done, but also through binding decisions. The inherently suggestive nature of the showup, the psychological effect of eyewitness identifications on the jury, and the constitutional implications as a result of the showup are all far too impacted by the inadequacies of the current

79 As discussed supra Part III.B., exigent circumstances are the ideal use of showup procedures when employed shortly after the commission of the crime.
80 See Lee, supra note 23, at 794-95.
81 See discussion supra Parts III.C., IV. on witness susceptibility and the effect of witness identification on the jury.
laws and standards. If allowed to continue in this manner, the inherent constitutional rights considered to be so fundamental will soon become a distant memory.

Barbara H. Agricola