DEFENDING DUE PROCESS: THE CASE FOR ABOLISHING THE SHOW-UP LINE-UP

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INTRODUCTION

Picture this: an individual walking in a neighborhood one morning is seized by police officers and taken to the scene of a car crash. He is placed in handcuffs and surrounded by law enforcement. Witnesses at the scene of the crash identify him as the driver of the car based solely on his generic black sweatshirt, not on any other features. The witnesses only caught a passing glance of the crash while they were driving to work. The individual is arrested, charged, and later pleads guilty to stealing the crashed vehicle on the basis of this on-scene identification.

This vignette depicts a police "show-up" line-up.[1] Show-ups exist as one of the most reviled police investigatory tactics.[2] Show-ups take many forms, but they broadly involve a single suspect being presented to witnesses for identification.[3] It is commonplace for such show-ups to occur at the scene of the crime with the suspect in police custody, handcuffed, and surrounded by officers.[4] This form of presentation creates a suggestive outcome for the witness, who has often only had a fleeting view of the suspect.[5] While courts have disparaged such tactics, judges continue to

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1. Show-up line-up is the technical term, as a show-up is a form of line-up. However, this author will use the term show-up going forward to distinguish from the more traditional line-up depicted in the popular imagination.

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

3. *Showup*, BLACK'S LAW DICTIONARY (11th ed. 2019). This definition includes the "traditional" show-up of police physically presenting a suspect to a witness as well as photo show-ups were only a single photograph is presented. This author's use of the term show-up refers primarily to the traditional, in-person method.

4. *E.g.*, United States v. Brownlee, 454 F.3d 131, 136 (3d Cir. 2006).

5. *Id.* at 135.

allow show-up identifications as admissible evidence.[6] The Supreme Court has ruled that defendants have a due process right to be free from eyewitness identifications that are "unnecessarily suggestive and conducive to irreparable mistaken identification."[7] Still, the Supreme Court has declined to hold show-ups to be per se unconstitutional, resorting instead to condemning the practice and developing a fact-based five factor test. State courts have added their own variations to the test in response to changing attitudes, new scientific understanding, and opposition to the practice. Academic literature has attacked show-ups by providing psychological research questioning the reliability and accuracy of eyewitness identification and by advocating for refinement of the Supreme Court's test and subsequent state variations. Despite repeated and sharp attacks on show-up identifications, police continue to employ and courts continue to allow this tactic. Even state legislatures, despite regulating more traditional line-up tactics and articulating standard procedures, have outright exempted show-up line-ups from such regulations.

This Note will marshal the voluminous scholarship and court opinions on show-ups and advocate abolition of the show-up via statute. In support of this proposal, this Note will argue that the variations of the Supreme Court's test adopted by state courts and advocated for in the academic literature are one and the same, all trafficking in flawed logic that flies in the face of scientifically supported witness identification techniques. Despite courts' best efforts to craft judicial tests avoiding the issues of show-up line-ups, no test has solved the problem of admitting unreliable show-up identifications. Judges notoriously find exemptions for even the best "reformed" tests. Police officers can always find a way to construct an "exigent circumstance" to persuade well-intentioned judges to circumvent safeguards. Strict statutory regulation abolishing the show-up is the only way to end this damaging practice and preserve a defendant's due process rights.

In Part I, this Note will cover the history of show-ups. Part I-A will define the term show-up and summarize the academic literature's view of the practice and eyewitness identifications generally. Part I-B covers the Supreme Court's jurisprudence on show-up admissibility. Part I-C explores

6. *E.g.*, People v. Manion, 367 N.E.2d 1313, 1316 (Ill. App. Ct. 1977) (noting "showups are not favored and are even condemned").

7. *Stovall*, 388 U.S. at 302.

how various states have embraced, modified, or departed from the Supreme Court test. Part I-D notes the lack of statutory regulation of show-ups. Part I-E concludes the historical survey by exploring various cases that have rolled back reform efforts. In Part II this Note will analyze the show-up's lengthy history to find that, despite all the efforts at reforming the Supreme Court's rules, show-ups continue to be a problematic and unreliable police tactic. Part III of this Note will discuss previous proposals for reforms and propose a new solution to show-ups: outright abolition by state legislatures.

I. THE HISTORY OF SHOW-UPS

A. Defining the Show-Up and Exploring Eyewitness Identification Science

The show-up is but one of several line-up procedures police employ for identifying suspects.[8] A show-up is best defined as "a suspect shown singly to a witness for identification."[9] Show-ups take many forms and can occur in the field at the scene of the crime,[10] in a dying witness hospital room,[11] or at a police station.[12] The suspect is usually in handcuffs and surrounded by police as the witness makes the determination whether the suspect is the perpetrator of the underlying crime.[13]

Such a procedure raises numerous risks of misidentification. Academic literature on show-ups has roundly attacked their effectiveness in correctly identifying a witness.[14] These critiques come not only from legal scholars, but from psychologists, who note the inherent unreliability of all eyewitness testimony, not just show-ups.[15] Studies suggest that 40% of all eyewitness

8. *See, e.g.*, R.C.L. Lindsay et al., *Simultaneous Lineups, Sequential Lineups, and Showups: Eyewitness Identification Decisions of Adults and Children*, 21 LAW & HUM. BEHAV. 391, 391–95 (1997).

9. *Showup*, *supra* note 4.

10. *E.g.*, People v. Lippert, 432 N.E.2d 605, 607 (Ill. 1982).

11. *E.g.*, *Stovall*, 388 U.S. at 295.

12. *E.g.*, Neil v. Biggers, 409 U.S. 188, 189 (1972).

13. *E.g.*, *Lippert*, N.E.2d at 606–07. *Lippert* is but one example of the hundreds, if not thousands of cases that involve a show-up line-up at the scene of the crime with the suspect in visible police custody.

14. *See* Amy Luria, *Showup Identifications: A Comprehensive Overview of Problems and a Discussion of Necessary Changes*, 86 NEB. L. REV. 515, 516 (2008).

15. Sandra Guerra Thompson, *Beyond a Reasonable Doubt: Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1489 (2008) (noting how

identifications are mistaken, demonstrating their profound unreliability.[16] Two significant variables drive mistaken identification. The first are "estimator variables," which concern numerous factors like a witness's ability to see the culprit due to the physical environmental conditions and any inherent biases the witness may have.[17] The second are "system variables" which concern instructions given to witnesses during identification procedures, the conduct of the identification procedure, and other related factors.[18] In short, the science quite clearly states that eyewitnesses have issues with providing accurate identifications. The academic consensus further concludes that such mistaken identifications likely occur more often in show-ups since only a single suspect is presented to the witness.[19]

These misidentification issues are closely related to the suggestive nature of show-ups. As the Court of Appeals of Louisiana succinctly put, "A suggestive identification is one that unduly focuses a witness' attention on the defendant."[20] This definition includes show-ups because they involve a single suspect being shown to a witness. Former Assistant U.S. Attorney Benjamin Rosenberg, however, notes that courts have not readily agreed upon what the definition of a "suggestive identification" includes.[21] For example, the Third Circuit declared that show-ups are "inherently suggestive"[22] but the Illinois Court of Appeals found no merit in the claim that show-ups were inherently suggestive.[23] Despite Illinois' view, the general consensus among academics and a majority of courts is that show-

psychological science has readily established that eyewitnesses make serious memory errors when recalling a crime); Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW & HUM. BEHAV. 1, 1 (2009) (applying psychological research on eyewitness identifications to demonstrate how individual factors in the Supreme Court are debased from the scientific consensus). These two articles provide an excellent recitation and explanation of the science of how individuals make errors in identifications. A thorough review of all eyewitness science is not the focus of this Note.

16. Luria, *supra* note 14, at 516.

17. Thompson, *supra* note 15, at 1499.

18. *Id.*

19. *See, e.g.*, Luria, *supra* note 14, at 516.

20. State v. Dove, 194 So. 3d. 92, 110 (La. Ct. App. 2016).

21. Benjamin Rosenberg, *Rethinking the Right of Due Process in Connection with Pretrial Identification Procedures: An Analysis and a Proposal*, 79 KY. L.J. 259, 281–83 (1991).

22. United States v. Brownlee, 454 F.3d 131, 138 (2006).

23. People v. Jones, 81 N.E.3d 48, 56 (Ill. App. Ct. 2017) (reasoning defendant's claim of a suggestive show-up lacked merit). *But see* People v. Manion, 367 N.E.2d 1313, 1317 (Ill. App. Ct. 1977) (finding show-ups suggestive).

ups, if not inherently suggestive, possess at least an indicia of suggestiveness, likely contributing to mistaken identification.[24]

Suggestive show-ups and their tendency to promote misidentification can have dire consequences, chiefly wrongful conviction. In the popular imagination, our justice system runs on eyewitness identifications, and, in reality, tens of thousands of court cases see eyewitness identification made in criminal cases.[25] Yet, as the science has indicated, eyewitnesses can often be wrong. Consider the cautionary tale of William Gregory, a man wrongfully convicted of rape based solely on the basis of a mistaken show-up.[26] Michael Ciccihini and Joseph Easton soberly note that, of the approximately 10,000 wrongly convicted people a year, many are found guilty on the basis of an eyewitness misidentification.[27] If show-ups account for more misidentifications than other line-up procedures, it can be reasoned that show-ups often lead to a wrongful conviction. Ciccihini and Easton further note that jurors will believe even the most unreliable eyewitnesses, which compounds the issue of misidentification from show-ups and eliminates a serious judicial safeguard.[28]

In sum, academic literature has found show-up identifications to be suggestive procedures prone to causing misidentifications that can result in wrongful convictions. Numerous authors have noted specific due process concerns about show-ups based on the reasons previously stated.[29] Why then, despite all the criticism, has the Supreme Court permitted their continued use in court? As Part I-B examines, the literature came into existence after a series of Supreme Court rulings that upheld show-ups so long as they were found to be reliable.

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24. *See* J.P. Christian Milde, Note, *Bare Necessity: Simplifying the Standard for Admitting Showup Identifications*, 60 B.C. L. REV. 1771, app. at 1824 (2019) (summarizing in a thorough appendix all United States jurisdictions views on show-up line-ups).

25. *See generally* any episode of *Law & Order*; *see also* NATIONAL RESEARCH COUNCIL, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 9–11 (2014) (estimating eyewitness identifications occur in a sizeable number of cases).

26. Jessica Lee, Note, *No Exigency, No Consent: Protecting Innocent Suspects from the Consequences of Non-Exigent Showups*, 36 COLUM. HUM. L. REV. 755, 755 (2005).

27. Michael D. Cicchini & Joseph G. Easton, *Reforming the Law on Show-Up Identifications*, 100 J. CRIM. L. & CRIMINOLOGY 381, 386 (2010).

28. *Id.* at 387.

29. *See, e.g.*, Lee, *supra* note 26; Luria, *supra* note 14; Rosenberg, *supra* note 21; Cicchini & Easton, *supra* note 27. *See also* discussion of scholarly proposals *infra* Part III.

B. The Supreme Court and Show-ups as Seen in Stovall, Simmons, Biggers, *and* Brathwaite

The Supreme Court first addressed and ruled on the admissibility of show-ups in the context of Due Process Clause challenges in *Stovall v. Denno*.[30] Stovall stabbed and killed Dr. Behrendt while critically wounding his wife, Mrs. Behrendt.[31] Due to fears that Mrs. Behrendt would die, police conducted a show-up in her hospital room with only Stovall, Mrs. Behrendt, and the officers present.[32] Mrs. Behrednt later recovered and her identification in the hospital, along with her in-court identification, led to Stovall's conviction.[33] Stovall challenged the identification on several due process grounds, alleging violations of his Fifth, Sixth, and Fourteenth Amendment rights to be free from a suggestive line-up and over his lack of counsel during the identification.[34] The majority held that defendants are entitled to due-process based relief when a line-up is so "unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law."[35] However, the Court reasoned that such violations are to be assessed under a totality of the circumstances.[36] On the facts of this particular case, the majority found no due process violation:

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

30. Stoval v. Denno, 388 U.S. 293, 302 (1967).
31. *Id.* at 295.
32. *Id.*
33. *Id.*
34. *Id.* at 296.
35. *Id.* at 301-02. It should be noted *Stovall* was decided alongside two other cases, *Gilbert v. California*, 388 U.S. 263 (1967) and *United States v. Wade*, 388 U.S. 218 (1967). Those cases, specifically *Wade*, established the right to counsel in a post-indictment lineup. *Wade*, 388 U.S. at 236–37. Such a holding would have controlled this case had the Court chose to apply *Wade* retroactively to Stovall's case. The Court declined to do so and decided Stovall's case on due process grounds, not right to counsel grounds. *Stovall*, 388 U.S. at 301–02.
36. *Stovall*, 388 U.S. at 302.

> followed the only feasible procedure and took Stovall to the hospital room. Under these circumstances, the usual police station line-up, which Stovall now argues he should have had, was out of the question.[37]

The majority opinion condemned show-ups and stressed the unique facts of this case,[38] but declined to prohibit their use under the aforementioned totality of the circumstances approach. *Stovall* thus left a somewhat open question of whether show-ups were always admissible. The Court prohibited and condemned suggestive line-ups "conducive to misidentification"[39] as violations of due process, but nonetheless permitted a show-up against Stovall in light of the totality of the circumstances. The Court in *Stovall* seemed to hold that the totality of the circumstances turned on the suggestiveness and necessity of the show-up.

The Court further continued along this line of reasoning in *Simmons v. United States*.[40] Rather than a show-up, *Simmons* addressed a photograph spread line-up, in which witnesses to a bank robbery viewed photographs of the suspects and then identified the suspects in court based on these photographs.[41] Simmons challenged this identification as so "unnecessarily suggestive and conducive to misidentification as to deny him due process of law."[42] The Court rejected Simmons's contention and compared his case to *Stovall* by noting the photographic line-up was necessary to swiftly identify the still-at-large bank robbers.[43] In doing so, the Court affirmed *Stovall*'s rejection of suggestive evidence, but again nonetheless approved of a suggestive identification procedure. Thus, the Court seemed to place more emphasis on the necessity element of the totality of the circumstances test rather than the suggestiveness.[44]

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37. *Id.*

38. *Id.* ("The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned.").

39. *Id.*

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

41. *Id.* at 382.

42. *Id.* at 381.

43. *Id.* at 384–85.

44. Two cases further emphasized the suggestiveness factor though. *See* Foster v. California, 394 U.S. 440, 443 (1969) (barring admission of a show-up and a traditional line-up for being unnecessarily suggestive due to overt police pressure); *see also* Coleman v. Alabama, 399 U.S. 1, 5–6 (1970) (finding an eyewitness identification permissible not suggestive when based on the witness's observations outside of the line-up procedure).

Such a distinction was crystallized when the Supreme Court again addressed a show-up identification in *Neil v. Biggers*.[45] The defendant was convicted of rape based on an eyewitness identification obtained via a show-up at the police station.[46] The Court considered whether a show-up must be excluded when it was suggestive and not necessary to the investigation.[47] The Court held it did not, instead stating "the central question [is] whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive."[48] The relevant test for identification procedures like show-ups is one of reliability, not suggestiveness, to be determined by the totality of the circumstances under five factors:

> As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.[49]

Thus, the Court concluded the police station show-up in the *Biggers* case was suggestive, but nonetheless reliable and admissible under the totality of the circumstances.[50]

Biggers settled and articulated a clear rule for show-ups. Still, the Supreme Court felt it necessary to revisit the issue in *Manson v. Brathwaite*. [51] *Brathwaite* involved an undercover officer making an identification through a photograph show-up, in which he was shown a single photograph of the suspect.[52] In *Brathwaite*, the Court stated the test for show-ups was one of reliability, based on the five *Biggers* factors.[53]

45. Neil v. Biggers, 409 U.S. 188 (1972).
46. *Id.* at 189.
47. *Id.* at 198-99.
48. *Id.* at 199.
49. *Id.* at 199–200.
50. *Id.* at 201.
51. Manson v. Brathwaite, 432 U.S. 98 (1977).
52. *Id.* at 101.
53. *Id.* at 114.

Suggestiveness is to be weighed against these five factors; in other words, reliability, not suggestiveness would be the dispositive issue in admissibility. The Court provided three reasons to depart from the suggestiveness test as articulated in *Stovall*. First, a per se rule against suggestive evidence would keep out reliable identifications.[54] Second, deterrence of unsavory police behaviors is obtained via the totality of the circumstances, not the reliability of the evidence.[55] Finally, a per se approach would harm the administration of justice by keeping evidence from the trier of fact.[56] Thus, under *Brathwaite*, reliability is the linchpin of show-up admissibility analysis,[57] with suggestiveness essentially, but not explicitly, presumed. The reliability of an identification outweighs *Stovall*'s warnings against "mistaken identification."[58]

To sum up the Supreme Court's jurisprudence on the admissibility of show-ups, the Court prohibits show-ups that are both suggestive and unreliable under the totality of the circumstances as violations of the right to due process. Thus, a suggestive line-up may still be admissible if it is found to be reliable under the totality of the circumstances considering the five *Biggers* factors. Only suggestive show-ups that are unreliable will be barred. The continued vitality of this test is remarkable when considered in light of two Supreme Court cases decided since *Brathwaite*. In *Perry v. New Hampshire*,[59] the Court, in an opinion by Justice Ginsburg, limited the *Biggers-Brathwaite* test to resolving misconduct performed by law enforcement.[60] In doing so, the Court stated, "[a] primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances . . . is to deter law enforcement use of improper lineups, showups, and photo arrays in the first place."[61] In *Moore v. Illinois*,[62] which was decided shortly after *Brathwaite*, the Court noted "a one-on-one confrontation generally is thought to present greater risks of mistaken identification than a lineup."[63] Despite these acknowledgments about the

54. *Id.* at 112.
55. *Id.*
56. *Id.*
57. *Id.* at 114.
58. *Id.* at 116.
59. Perry v. New Hampshire, 565 U.S. 228 (2012).
60. *Id.* at 231-33.
61. *Id.* at 241.
62. Moore v. Illinois, 434 U.S. 220 (1977).
63. *Id.* at 229.

harms of one-on-one identifications and the high risks of mistaken identification and wrongful conviction, the Supreme Court permits suggestive show-ups and finds no per se violation of the due process clause therein.

C. State Variations on the Supreme Court Show-Up Test

The Supreme Court gave state and federal courts a clear test when confronted with the admissibility of a show-up. Naturally, some states have embraced, modified, or departed entirely from the Supreme Court's approach. Scholars have broadly defined three distinct state approaches in the wake of the Supreme Court's rulings: 1) adherence to the Supreme Court rule, 2) modifications to the Supreme Court rule, and 3) clear departure from the Supreme Court rule.[64] Although some states have moved toward reforms through modifications and departures from the federal test, other states have reversed their reform efforts in the last two years.

1. States Adhering to the Supreme Court Rule

The vast majority of states, thirty-eight according to J.P. Christian Milde's recent survey,[65] adhere to the Supreme Court's standard. For example, the recent Illinois case of *People v. Jones*[66] represents a clear repetition of the Supreme Court's test. Illinois employs a two-part test for assessing the admissibility of a show-up. First, the court determines whether the police identification procedure was suggestive.[67] Second, if the procedure was suggestive, the court assesses whether the identification was nonetheless reliable under the totality of the circumstances by utilizing the *Biggers-Brathwaite* factors.[68] This test is completely in line with the

64. Marco Y. Wong, Note, *Convicting with Our Eyes Open: Regulation of Eyewitness Identification in the United States and England and Wales*, 54 COLUM. J. TRANSNAT'L L. 248, 269 (2015); Cicchini & Easton, *supra* note 34, at 391–92; Milde, *supra* note 24, at 1788.

65. Milde, *supra* note 24, at 1788.

66. People v. Jones, 81 N.E.3d 48 (Ill. App. Ct. 2017).

67. *Id.* at 56.

68. *Id.*

Supreme Court's view because Illinois will only admit a suggestive show-up if it is reliable. Thirty-seven other states do the same.[69]

2. States Modifying the Supreme Court Rule

The next category of states has modified the Supreme Court's test in light of academic and scientific research. Until recently, this group included just two states: Kansas and Utah. In early 2020, Utah overruled its prior decision, bringing it closer to the states that have significantly departed from the federal rule and leaving Kansas as the only modification state in the country.

Kansas articulated its modification to the Supreme Court rule in *State v. Hunt*.[70] Hunt was subjected to a classic show-up when police officers drove the store clerk he had robbed to the nearby location of Hunt's arrest.[71] The clerk identified Hunt at the scene, leading to Hunt's conviction.[72] The Kansas Supreme Court, noting the issues with eyewitness identification, adopted Utah's modified *Biggers* factors, taken from *State v. Ramirez*:[73]

> (1) the opportunity of the witness to view the actor during the event; (2) the witness' degree of attention to the actor at the time of the event; *(3) the witness' capacity to observe the event, including his or her physical and mental acuity; (4) whether the witness' identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and (5) the nature of the event being observed and the likelihood that the witness would perceive, remember, and relate it correctly*.[74]

As the Kansas Supreme Court noted, the first and second factors are carbon copies of the *Biggers* factors.[75] The third factor differs sharply from

69. *See also* Milde, *supra* note 24, at app. 1823–29 (including a thorough appendix of "majority rule" states).
70. State v. Hunt, 69 P.3d 571 (Kan. 2003).
71. *Id.* at 573.
72. *Id.*
73. State v. Ramirez, 817 P.2d 774 (Utah 1991).
74. *Hunt*, 69 P.3d at 576 (citing *Ramirez*, 817 P.2d at 781) (emphasis added).
75. *Id.*

Biggers because it is more rooted in a scientific understanding of witness recollection.[76] The fourth and fifth factors are related to the original *Biggers* factors, but again are more rooted in a scientific understanding of witness recollection.[77] Thus, Kansas and Utah modified but did not depart from the *Biggers-Brathwaite* test. The Kansas Supreme Court made it explicitly clear that this was a "refinement," not a rejection, of *Biggers-Brathwaite*.[78] In Hunt's case, the court applied the modified factors and still found a sufficient basis for a conviction.[79] The Kansas Supreme Court still permits a suggestive show-up if it is reliable by employing only a variation on the Supreme Court's reliability test.[80]

As noted, Utah, until February 2020, was a modification state. This changed with the Utah Supreme Court's opinion in *State v. Antonio Lujan*.[81] *Antonio Lujan* kept *Ramirez's* list of factors, but ultimately concluded that show-ups were regulated under the state's rules of evidence, not the state constitution's due process clause.[82] The court noted that the recently adopted state Rule 617 would achieve greater protection for criminal defendants and be more flexible to take advantage of scientific research regarding eyewitness identifications than the modified federal standard articulated in *Ramirez.*[83] Thus the new rule promulgated by the Utah Supreme Court and its rules of evidence requires courts to first "determine whether the identification procedure was unnecessarily suggestive or conducive to mistaken identification."[84] If so, the identification evidence must be excluded unless one of the nine factors discussed in Rule 617 leads the court to find "that there is not a substantial likelihood of misidentification"[85] This is a clear departure from the Supreme Court rules, adding more factors and placing greater emphasis on the suggestive nature

76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 578.
80. Milde notes several other states who have made relatively minor modifications the Supreme Court test: Arkansas, Idaho, and Vermont. Milde, *supra* note 24, at 1806–12. Kansas and Utah represent the most significant modifications mentioned in the literature. *See, e.g.*, Cicchini & Easton, *supra* note 27, at 393; *See, e.g.*, Wong, *supra* note 64, at 272–74.
81. State v. Lujan, 459 P.3d 992 (Utah 2020).
82. *Id.* at 1003.
83. *Id.*
84. *Id.* at 1002 (quoting UTAH R. EVID. 617(b)).
85. *Id.* at 1001–02 (quoting UTAH R. EVID. 617(b)). The *Ramirez* factors are likely most helpful in resolving the ninth factor of Rule 617.

of a show-up. Utah has moved closer to the states that have significantly departed from the federal standard but retains its own unique analytical approach.

3. States Departing Significantly from the Supreme Court Rule

Utah's departure from the Supreme Court test is the most recent but hardly the first. The most notable departures fall into two broad camps. The first group is New York, Massachusetts, and Wisconsin, whose tests focus on excluding suggestive evidence.[86] The second is New Jersey, Alaska, Oklahoma, Connecticut, and Oregon, whose tests are heavily based on the scientific literature but still admit suggestive show-ups if found to be reliable.[87] However, these states depart significantly enough from the Supreme Court rules to be considered more than just "modifiers" like Kansas and now formerly Utah.[88] For brevity, this Note will discuss the leading opinions from New York and Massachusetts, as they represent the most significant departures from the Supreme Court standard.[89] New Jersey's approach will be briefly noted, as its approach spawned replication by other states.[90] Wisconsin recently repudiated its departure from the Supreme Courts *Biggers-Brathwaite* test, and this departure will also be quickly discussed.

New York in *People v. Adams*[91] and Massachusetts in *Commonwealth v. Johnson*[92] both concluded that the Supreme Court standard for show-ups is inadequate under their constitutions.[93] In *Adams*, the defendants were subjected to a station show-up in which they were presented to the robbery victims with officers standing behind them.[94] The New York Court of Appeals held that this show-up violated the state constitution's guarantee of due process.[95] In doing so, the court noted that the state constitution affords

86. Milde, *supra* note 24, at 1788–812.
87. *Id.*
88. *Id.*
89. For a more extended discussion, *see id.*
90. *Id.* at 1791.
91. People v. Adams, 423 N.E.2d 379 (N.Y. 1981).
92. Commonwealth v. Johnson, 650 N.E.2d 1257 (Mass. 1995).
93. *Adams*, 423 N.E.2d at 383; *Johnson*, 650 N.E.2d at 1261.
94. *Adams*, 423 N.E.2d at 381.
95. *Id.* at 383. It should be noted that the Court of Appeals did not reverse the convictions in this case, for other evidence supported upholding their convictions. *Id.* at 384.

greater protections than the federal constitution,[96] and crafted a rule that excludes unnecessarily suggestive pretrial identification evidence.[97] Instead of addressing suggestiveness and then reliability, New York prohibits all unnecessarily suggestive show-ups, viewing the practice as inherently suggestive. Reliability of the witnesses has no bearing on legitimacy—the court only considers the necessity of the procedure. It is important to note, though, that this rule does not bar all show-ups, only *unnecessary* show-ups.

Massachusetts struck a similar chord in *Johnson*. The defendant was identified in a show-up conducted at the scene of his arrest.[98] The victim of the robbery had failed to identify the defendant in a previous photo line-up and show-up.[99] Like New York, Massachusetts held the show-up violated the state constitution's due process clause.[100] In doing so, the Supreme Judicial Court found the *Biggers-Brathwaite* test lacking and not well reasoned under the state constitution and in light of practical realities in the criminal law.[101] Massachusetts thus adopted a per se rule barring unnecessarily suggestive show-ups, which is similar to New York.

Initially, Wisconsin, in *State v. Dubose* in 2005,[102] largely followed New York and Massachusetts' logic, when the Wisconsin Supreme Court held that "evidence obtained from an out-of-court showup is inherently suggestive and will not be admissible unless, based on the totality of the circumstances, the procedure was necessary."[103] This view changed dramatically in 2019 with the factually analogous case of *State v. Roberson*,[104] in which the Wisconsin Supreme Court held that "*Dubose* was unsound in principle. Therefore, we overturn *Dubose* and return to 'reliability [a]s the linchpin in determining the admissibility of identification testimony.'"[105] The court further described categorical rules of evidence based on social science as "the antithesis of justice."[106] Essentially, the Wisconsin Supreme Court, unlike their sister courts in New

96. *Id.* at 383.
97. *Id.* at 384.
98. *Johnson*, 650 N.E.2d at 1259.
99. *Id.* at 1258.
100. *Id.* at 1261.
101. *Id.* at 1263.
102. State v. Dubose, 699 N.W.2d 582 (Wis. 2005).
103. *Id.* at 593–94.
104. State v. Roberson, 935 N.W.2d 813 (Wis. 2019).
105. *Id.* at 828 (quoting Manson v. Brathwaite, 432 U.S. 98, 114 (1977)).
106. *Id.* at 821.

York and Massachusetts, no longer found that due process protections against show-ups existed in their state constitution.[107] Thus, Wisconsin whiplashed by first departing from the Supreme Court test to then strictly adhering to *Biggers-Brathwaite*.

The second category of states who have sharply departed from the Supreme Court test typically take an approach similar to New Jersey in *State v. Henderson*.[108] In *Henderson*, the New Jersey Supreme Court sought to totally rework its approach to admitting eyewitness identifications in the face of scientific research challenging the underlying assumptions of *Biggers-Brathwaite*.[109] The court had a special master conduct extensive evidentiary proceedings, marshaling all the scientific research on eyewitness identifications.[110] The special master produced a lengthy report, which the court largely adopted.[111] The result changed the state's procedures for admitting show-ups. The new procedures recommends that when a defendant can plausibly raise an issue of suggestiveness, the court should conduct a hearing into all possible system and estimator variables, as detailed by the court's accepted social science findings, to weigh whether the evidence is admissible.[112] The court declined to adopt a per se rule, like Massachusetts or New York, that would exclude reliable suggestive evidence.[113] Thus, New Jersey clearly departed from the Supreme Court rules of *Biggers-Brathwaite* by adopting numerous factors and variables to consider in light of the social science, yet it does not follow its neighboring states in adopting a per se rule against suggestive evidence. New Jersey therefore permits, subject to rigorous judicial scrutiny, suggestive show-up identifications. This approach is followed by Alaska, Connecticut, and Oregon, whose high courts have taken their lead from *Henderson*'s findings.[114]

In sum, states have taken various approaches in the wake of the Supreme Court's approach to show-up admissibility. Some have adopted

107. *Id.* at 824.
108. State v. Henderson, 27 A.3d 872 (N.J. 2011).
109. *Id.* at 877.
110. *Id.*
111. *Id.*
112. *Id.* at 878.
113. *Id.*
114. Milde, *supra* note 24, at 1788–812.

the *Biggers-Brathwaite* test as is.[115] A couple have modified the test or altered their rules of evidence accordingly.[116] Others have made more significant departures from the test by placing greater emphasis on the suggestiveness or rigorous application of the science.[117] The latter group of states, like New York and Massachusetts, seem to offer serious protection to defendants, yet these protections only extend to *unnecessarily* suggestive show-ups, which means these reform states recognize that sometimes a show-up is necessary. A fuller discussion of these eroded protections is covered in Part I-E.

D. The Absence of State Regulation

State courts have extensively crafted the law on show-up identifications by finding suggestive and unreliable show-ups to be violations of due process rights. State legislatures, however, have not engaged with show-ups, despite passing statutes for more traditional line-up practices. Such an approach leaves the law on show-ups squarely in the hands of judges.

States who adhere to the Supreme Court's test for show-ups generally lack extensive regulation of the practice. Consider Illinois, a state adhering to the Supreme Court's test for show-ups. Illinois statutes contain extensive regulations of traditional line-ups and list many individual steps law enforcement must take when conducting a line-up.[118] Illinois defines show-ups separately from other line-ups, thus indirectly excluding them from the regulations.[119] Illinois is not alone in this approach, as California, another state that follows the traditional Supreme Court test, also defines show-ups separately from other line-ups.[120] California, though, goes further than Illinois by explicitly stating the traditional line-up regulations shall not "affect policies for field show up procedures."[121] Both Illinois and California legislatures permit police departments to promulgate their own standards for show-ups, further removing state legislatures from the

115. *See* discussion of Illinois *supra* Part I-C-1.
116. *See* discussion of Kansas and Utah *supra* Part I-C-2.
117. *See* discussion of New York, Massachusetts, and New Jersey *supra* Part I-C-3.
118. 725 ILL. COMP. STAT. ANN. 5/107A-2 (West 2015).
119. 725 ILL. COMP. STAT. ANN. 5/107A-0.1 (West 2015).
120. CAL. PENAL CODE § 859.7 (West 2020).
121. *Id.*

process.[122] States that have modified the Supreme Court test for show-ups fare little better in crafting statutory regulations. Kansas law contains only a brief command that police departments be responsible for crafting line-up identification procedures and makes no explanation of the regulations' applicability to show-ups.[123] Utah's statutes governing line-up procedures are even briefer, and only bar law enforcement from influencing a particular outcome.[124] Utah does go further than Kansas in that it has adopted court rules governing the admissibility of show-ups, which list the court-created factors a judge should consider when deciding whether to admit a show-up.[125] However, these are court-created rules subject to changes as the common law evolves and crafted only by judges, not elected legislators.

Finally, states that have significantly departed from the Supreme Court test also fail to codify their show-up rules in statutes. Wisconsin is similar to other states by only requiring law enforcement agencies to adopt their own policies that reduce the risk of misidentification, with no distinction between traditional line-ups and show-ups.[126] New York also outsources its line-up procedures to the Division of Criminal Justice Services, which then promulgates the rules concerning line-up procedures.[127] These rules, like so many other states, make no mention of show-up procedures.[128] Massachusetts provides no statutory regulation either, and leaves their high court to promulgate a "guide" which simply re-articulates the state's common law rules on show-ups.[129] In sum, states generally lack statutory regulation of show-ups. Although states have created regulations on traditional line-up procedures to varying degrees, most outsource the crafting of line-up procedures to the courts or police departments, resulting in few, if any, stated policies from state legislatures concerning the use of show-ups.

122. 725 ILL. COMP. STAT. ANN. 5/107A-2 (West 2015); CAL. PENAL CODE § 859.7 (West 2020).
123. KAN. STAT. ANN. § 22-4619 (West 2016).
124. UTAH CODE ANN. § 77-8-3 (West 1980).
125. UTAH R. CRIM. P. 617 (2019).
126. WIS. STAT. ANN. § 175.50 (West 2021).
127. N.Y. EXEC. LAW § 837 (McKinney 2020).
128. N.Y. DIV. OF CRIM. JUST. SERVS., *Identification Procedures: Photo Arrays and Line-ups* (June 2017), https://www.criminaljustice.ny.gov//crimnet/ojsa/standards/MPTC%20Model%20Policy-Identification%20Procedures%20and%20Forms%20June2017.pdf [https://perma.cc/88JC-PDRK].
129. MASS. GUIDE TO EVID., § 1112 (2020).

E. Exigency Exceptions Eroding Protections against Show-Ups

In the absence of state statutory regulation, courts are the sole entity left to discern the law concerning show-ups. The Supreme Court, as explained in Part I-B, adopted a two part test to determine admissibility, which hinges completely on reliability. States have variously embraced, modified, or rejected this test, as explained in Part I-C. Yet even in states that have attempted reform, police tactics and arguments have eroded those efforts by allowing for the admission of suggestive show-ups for "exigencies" in the context of an ongoing investigation or at the scene of a crime.

The rise of an exigency exception is not surprising. The first Supreme Court case addressing show-ups, *Stovall*, addressed an exigent deathbed show-up in a hospital.[130] States like Illinois that adhere to the Supreme Court's rule have further elaborated on this exigency exception. In *People v. Lippert*, the Illinois Supreme Court reasoned: "prompt showups near the scene of the crime [are an] acceptable police procedure designed to aid police in determining whether to continue or to end the search for the culprits."[131]

Even states with sharp departures from the Supreme Court rule have adopted some form of the exigency argument. In *Commonwealth v. Wen Chao Ye*[132] the Massachusetts Court of Appeals held that a prompt show-up at the scene of the crime was not unnecessarily suggestive given the exigent circumstances of the crime.[133] Three armed men had committed a violent robbery, then fled the scene as police arrived.[134] After a brief search, the defendants were arrested and subjected to a show-up at the scene of the crime with the victim and another witness identifying them.[135] The court reasoned that a show-up was necessary and justified, as three armed men who committed a violent felony were at large, it was night, and the defendants had made serious threats.[136] Notably, the court further reasoned

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

131. People v. Lippert, 432 N.E.2d 605, 612 (Ill. 1982); *see also* People v. Manion, 367 N.E.2d 1313, 1316 (Ill. 1977) (acknowledging that under some circumstances "prompt identification [is] necessary for the police to determine whether or not to continue their search") (citing People v. McMath, 256 N.E.2d 835 (Ill. 1970)).

132. *Commonwealth v. Wen Chao Ye*, 756 N.E.2d 640 (Mass. App. Ct. 2001).

133. *Id.* at 644–45.

134. *Id.* at 642.

135. *Id.* at 643.

136. *Id.* at 644–45.

that the witnesses obtained a reliable view of the defendants given the specific lighting in the area and that they possessed "excellent" eyesight.[137] In reaching this result, the court reformulated the "unnecessarily suggestive" test for show-ups into one that "turns, in large measure, on whether the police had good reason for using a one-on-one identification procedure."[138] New York, in *People v. Brisco*,[139] has adopted a similar exigency style exception for show-ups conducted in response to ongoing police investigations at the scene of the crime.[140] The court defined the "ongoing investigation" broadly, allowing a show-up an hour after a simple burglary, not a violent felony, had been committed.[141] The show-up was therefore not unnecessarily suggestive in the view of the court, especially since the witness could reliably identify the defendant.[142]

In short, police and prosecutors have successfully argued for an exigency exception to the show-up rule. Courts across the country have generally embraced such arguments. Where this leaves the law and protections against show-ups is discussed in Part II.

II. THE FAILURE OF SHOW-UP REFORM

Despite reams of court decisions denouncing suggestive evidence, show-ups continue to be admitted into evidence and remain a common police investigatory tactic. This section analyzes the attempts by the Supreme Court, state judges, and legislatures to block admission of show-ups and considers their success in excluding suggestive, unreliable evidence. Furthermore, this section will discuss how even the states with the most robust safeguards against show-ups have eroded those protections.

137. *Id.* at 645.

138. *Id.* at 644.

139. People v. Brisco, 788 N.E.2d 611 (N.Y. 2003).

140. *Id.* at 612. For another case supporting the New York exigency exception in more explicit terms see *People v. Duuvon*, 571 N.E.2d 654, 656 (holding a show-up *immediately* following an armed robbery and hot pursuit permissible).

141. *Id.*

142. *Id.* The sole dissenter sharply disagreed and would have found the show-up unnecessary under New York law. *Id.* at 616 (Smith, J., dissenting). As a further note on the *Brisco* case, the defendant filed a habeas action in federal court, essentially challenging his show-up identification. Brisco v. Phillips, 376 F. Supp. 2d 306, 307–08 (E.D.N.Y. 2005). The federal appellate court ultimately held the show-up was permissible under the *Biggers-Brathwaite* standard. Brisco v. Ercole, 565 F.3d. 80, 94 (2d Cir. 2009). This is an interesting outcome, considering New York's purported "departure" from the prevailing federal standard.

A. Suggestive Evidence Remains Admissible

In *Stovall*, the Supreme Court seemed to disapprove of and even ban show-ups except in the direst of situations.[143] The Court spoke disapprovingly of the tactic and held it to be a due process violation when a defendant is subject to an identification process that is "unnecessarily suggestive and conducive to irreparable mistaken identification."[144] Show-ups, being *inherently* suggestive and conducive to irreparable mistaken identification, are a violation of due process. Yet in *Brathwaite* the Supreme Court rattled off three reasons why it was not adopting a per se ban against suggestive show-ups and instead opting for a test of reliability. First, a per se rule against suggestive evidence would keep out reliable identifications.[145] Second, deterrence of unsavory police behaviors is obtained via the totality of the circumstances, not through the exclusion of reliable evidence.[146] Finally, a per se approach would harm the administration of justice by keeping evidence from the trier of fact.[147] The Court's reasons have failed to stand up to the test of time.

The first reason crystallizes the Court's desire to keep reliable evidence in court. However, the Court's fatal flaw is their assumption that a show-up is a reliable identification. Scores of scholars have attacked this prong by pointing to science that clearly suggests eyewitnesses are not as accurate as they think they are.[148] The second reason offered by the Court does not play out as intended. Judicially-prescribed repercussions based on the totality of the circumstances simply does not deter unsavory police behaviors. The totality of circumstances deterrent approach may curb the more egregious police tactics, but tactics have evolved to keep the use of show-ups alive and well.[149] The exigency exception, for example, has been greatly expanded and allows for a myriad of questionable investigatory tactics by police. A fuller critique of the frequent use of exigency exceptions is detailed in Part II-B. Finally, the Court's third reason assumes that show-ups are an important law enforcement investigatory tactic. Show-ups are

143. *See supra* Part I-B.
144. Stovall v. Denno, 388 U.S. 293, 302 (1967).
145. Manson v. Brathwaite, 432 U.S. 96, 112 (1977).
146. *Id.*
147. *Id*. at 112–13.
148. *See supra* Part I-A.
149. *See supra* Part I-E.

simply a one-man line-up that are consequently more suggestive than the traditional line-up. Police could still arrest individuals they suspect are involved in a crime and conduct a traditional line-up, which is significantly less suggestive than the show-up.[150]

The main issue with the approach to show-ups adopted by the Supreme Court and most states is that it admits suggestive evidence. The Supreme Court test is one of reliability alone, despite claiming otherwise. The test first asks if the evidence is suggestive, and if so, then to ask if it is reliable under the five *Biggers* factors. Show-ups are almost always found to be suggestive, a fact conceded by the Supreme Court in *Moore* and *Perry*, and scholars universally agree that show-ups are suggestive. Common sense, too, would find the act of showing a single suspect, in handcuffs and surrounded by officers, suggestive to a witness. Despite their suggestiveness, courts continue to admit show-up identifications because they meet a contrived understanding of reliability. The five factors of *Biggers* are not based in sound science,[151] and eyewitnesses are, at best, only correct in their identifications 60% of the time.[152] Reliability of the witness is simply not enough of an inquiry when evaluating show-ups. The Supreme Court and the majority of states that follow it fail to take into account the scholarly research on the effectiveness of eyewitness identifications. More importantly, they also fail to consider how suggestive the identifications really are and how that suggestiveness affects reliability. The current Supreme Court test fails to live up to *Stovall*'s declaration against suggestive show-ups that are conducive to cases of irreparable mistaken identification.

Some states, rightfully, have taken issue with the Supreme Court approach. Yet attempts to modify it have largely failed to solve the problem of admitting suggestive show-up identifications. Modification states like Kansas and Utah have allowed their reliability test to be influenced more by social science,[153] yet they still admit suggestive evidence by focusing on the reliability of the witness in light of social science, not the suggestiveness which *Stovall* finds to be a due process violation. Utah, as noted in *Antonio-*

150. Those line-ups may have their flaws too, but nowhere near the issues presented by show-ups. A full discussion of the pros and cons of line-ups is outside the scope of this Note.

151. Wells & Quinlivan, *supra* note 15, at 9–15 (applying social science concerning eyewitness identifications to each *Biggers* factor).

152. Luria, *supra* note 14, at 516.

153. *See supra* Part I-C-2.

Lujan, does not even consider a suggestive show-up to be a violation of the state's due process clause, only a violation of the state rules of evidence.[154]

Even states that have sharply departed from the Supreme Court rule find themselves admitting suggestive evidence. New York and Massachusetts come the closet to fulfilling *Stovall*'s due process holding by adopting a rule against unnecessarily suggestive show-ups. These states, in theory, do not consider reliability as a factor in their assessment, yet they have eroded this protection by allowing for exigency exceptions.[155] Wisconsin, which was once among these departure states, conducted a complete reversal and explicitly removed due process protections against show-ups in *Roberson*.[156] New Jersey in *Henderson*, and the states that followed, explicitly declined to adopt the per se rule against suggestive evidence articulated by New York and Massachusetts.[157] Instead these states have adopted a multi-factored hearing structure that examines system and estimator variables surrounding the show-up. Show-ups in New Jersey are subject to fairly rigorous judicial scrutiny, but the scrutiny still turns on reliability and necessity, not how suggestive the process was. Thus, in all jurisdictions across the United States, suggestive show-up evidence is admissible. Attempts to modify, reform, and depart from this reality have failed, and *Stovall*'s due process protections for defendants goes unfulfilled.

B. The Failures of Judges: Exigency Overload and Reversals of Protections

Departure states seem to offer the most safeguards against show-ups, yet New York, Massachusetts, and Wisconsin all serve as cautionary tales at the fragility of such protections, especially when left only to judges who may grant exigency exceptions and even outright reverse existing law. New York and Massachusetts's rollbacks of their show-up tests that barred unnecessarily suggestive show-ups is particularly disturbing. The two states offer the strongest protections against show-ups, yet their judges permit a fairly expansive exigency exception.[158] The crux of the exception rests on

154. State v. Antonio-Lujan, 459 P.3d 992, 1003 (Utah 2020).
155. *See infra* Part II-B; *see also supra* Part I-E.
156. State v. Roberson, 935 N.W.2d. 813, 828 (Wis. 2019).
157. *See supra* Part I-C-3.
158. For a more detailed and nuanced discussion of the exigency exception see Cicchini & Easton, *supra* note 27, at 398–403.

police being able to rapidly identify a suspect in the context of an ongoing investigation or at the scene of a crime to better deploy police resources.[159] In essence, the two states' judges have created "necessary" show-ups for ongoing police investigations. This is simply an illogical invention by the courts for two reasons.

First, the notion that an ongoing investigation requires prompt show-ups could apply to many situations. As seen in *Brisco*, police conducted a show-up an hour after a simple burglary, which is hardly a situation requiring immediate resolution.[160] In *Wen Chao Ye*, the police exigency claim finds more support, as a violent armed robbery had occurred, and police claimed a need to conduct a show-up to verify they had apprehended the right suspects.[161] Both situations represent an unnecessary show-up. The case in *Brisco* was hardly a police emergency or violent felony, and there was no reason why they could not take the suspect to the station for a traditional line-up. *Wen Chao Ye* made a show-up appear necessary at first, given the violent crime, but considering the facts a show-up was unnecessary. The police arrested the suspects after a pursuit and had ample reason to suspect the arrested individual committed the crime before any show-up occurred. Thus, the "exigency" of having dangerous armed suspects on the street was negated because they were no longer armed and were in custody. The ongoing police investigation exception is simply an excuse to allow for show-ups.[162] Show-ups themselves do not make a dangerous situation less dangerous, especially since the suspects are usually in custody for the show-up. Furthermore, show-ups based on an ongoing police investigation run the risk of snatching up an innocent bystander, who may match the vague description given, and leaving the true perpetrator at large. The suggestive nature of show-ups might very well seal the innocent's fate.

Second, the very nature of permitting a show-up in the context of an ongoing police situation runs afoul of the New York and Massachusetts tests by delving into the reliability of the witness. Although not explicitly stated in the opinions, judges support their decisions by reasoning with factors that sound eerily similar to the *Bigger-Brathwaite* test by looking at the certainty

159. *See supra* Part I-E.
160. People v. Brisco, 788 N.E.2d 611, 612 (N.Y. 2003).
161. Commonwealth v. Wen Chao Ye, 756 N.E.2d 640, 644–45 (Mass. 2001).
162. Cicchini & Easton, *supra* note 27, at 398–403.

of the witness, the ability to view the suspect, and the time between the crime and the show-up.[163] These factors relate directly to reliability, something purportedly barred by the New York and Massachusetts tests, yet appears in the judges' decisions.

Judges are also prone to making abrupt reversals, as seen in Wisconsin. Wisconsin previously followed the New York and Massachusetts test, which still offered the most protection from a show-up even though weakened by the exigency exception. In *Roberson*, the judges suddenly no longer found the same due process protection in the state constitution against show-ups.[164] Instead, Wisconsin enthusiastically embraced the Supreme Court's *Bigger-Brathwaite* test. In the span of fourteen years, Wisconsin judges reversed the state show-up modifications, which highlights just how fragile show-up reform is when placed solely in the hands of judges.

State legislatures have abdicated responsibility over show-ups and have contributed to judges creating, strengthening, weakening, and outright reversing the law concerning show-ups. There are few, if any, explicit mentions of show-ups in state statutes. States that do mention show-ups by name, Illinois and California for example, explicitly exclude show-ups from their detailed regulations of other line-ups.[165] Most states, however, have outsourced regulation of show-ups to local police departments and statewide law enforcement agencies,[166] or to the courts themselves.[167] This means there is little to stop judges, either implicitly or explicitly, from altering the law on show-ups. In sum, the courts have near complete control over show-ups, from rolling back protections to crafting the rules for their use.

163. *Brisco*, 788 N.E.2d at 612; *Wen Chao Ye*, 756 N.E.2d at 644–45.
164. *Roberson*, 935 N.W.2d. at 828.
165. *See* discussion of Illinois and California *supra* Part I-D.
166. *See* discussion of New York, Kansas, and Wisconsin *supra* Part I-D.
167. *See* discission of Utah and Massachusetts *supra* Part I-D.

III. THE CASE FOR ABOLITION AND STATUTORY CONTROL

From the Supreme Court to the most well-intentioned reform states, suggestive show-ups continue to be admitted into evidence. Various scholars and writers have offered different solutions. Benjamin Rosenberg proposes excluding all show-ups unless they met a redefined definition of suggestiveness, were necessary, passed a "scientifically sound threshold test for probativity," and could be challenged in court by an expert witness.[168] Jessica Lee proposes ending all non-exigent show-ups,[169] a call echoed in part by Amy Luria.[170] Sandra Guerra Thompson proposes adding a corroboration requirement to all eyewitness testimony, essentially requiring some other piece of evidence to support any eyewitness identification.[171] Gary L. Wells and Deah S. Quinlivan offer a variety of possible solutions—the most novel being jury instructions and higher burdens on prosecutors.[172] Michael D. Cicchini & Joseph G. Easton propose an expansion of the New York and Massachusetts approach with safeguards against erosion to the liberal use of police exigency in the context of ongoing investigations[173] J.P. Christian Milde proposes only considering the necessity of the show-up.[174] Marco Y. Wong proposes barring admission of show-ups when a defendant can prove the show-up was either suggestive or involved unreliable eyewitness observations.[175]

These proposals deserve praise for highlighting the shortcomings of the current approach to show-ups in the United States and offering improvements. However, these proposals all share certain flaws. First, all of the proposals keep suggestive evidence in courts to varying degrees. This is a direct contravention of *Stovall*'s due process holding. Certainly, *Stovall* permitted necessarily suggestive show-ups, like the deathbed hospital show-up in that case. However, *Stovall* spoke disapprovingly of suggestive evidence. This leads to the second reason these proposals fall short: the

168. Rosenberg, *supra* note 21, at 315.
169. Lee, *supra* note 26, at 797.
170. Luria, *supra* note 14, at 548–51.
171. Thompson, *supra* note 15, at 1541–43.
172. Wells & Quinlivan, *supra* note 15, at 20–21.
173. Cicchini & Easton, *supra* note 27, at 409.
174. Milde, *supra* note 24, at 1817–21.
175. Wong, *supra* note 64, at 294–95.

proposals permit too many exigency exceptions. To their credit, Cicchini & Easton make a point to limit the explosive growth of the exigency exception. However, other authors permit the continuation of the "necessary" suggestive show-up coming into court. New York and Massachusetts consider the concept of a necessary show-up in their expansion of the exigency exception. The exigency exception in the context of ongoing police investigations allows too many show-ups to come into court. Finally, these proposals all hinge on judges in courts, not lawmakers in legislatures, making the necessary changes. Judges have had fifty years since *Stovall* to devise a test for show-ups that protects a defendant's due process rights. Clearly, the courts have failed on this task.

State legislatures, not judges, represent the best chance for meaningful reform. To honor *Stovall*'s original intent, state legislatures should bring the case's holding into the black letter of their statutes and abolish the show-up. Abolition should include banning the show-up as a police investigatory tactic and updating the rules of evidence to bar admission of show-ups in court. Only under the strong explicit threat of exclusion will police tactics change. The only remaining use for a show-up should be in the explicit factual circumstances of cases like *Stovall*, a hospital deathbed identification. Thus, state legislatures should abolish the show-up, bar its admission, and leave its use only for homicide cases involving a possible deathbed identification.[176] Only this will protect citizen's due process rights.

Naturally, legislative abolition of the show-up would have some detractors. Three arguments are often raised to support continued use of show-ups. First, show-ups allow for innocent suspects to be cleared. This argument exists under the flawed assumption that show-ups actually clear a suspect's name. Given their suggestive nature, show-ups very often result in the suspect being arrested, charged, and convicted regardless of whether they are actually guilty.[177] Second, show-ups are considered a vital

176. This call for abolition is not as revolutionary as it might seem. Carrie Leonetti suggests implicitly banning show-ups in her comparative work examining Bosnian police practices. Though, critically, our rationales differ on the reasons why we seek abolition. Further, this Note's proposal importantly keeps a narrow exception for show-ups: deathbed identifications in homicide cases. Without this exception, the abolition of all show-ups would be too harsh a solution. Still, this Note enthusiastically advocates for abolition of show-ups in all other cases. Carrie Leonetti, *Showing Up: Eyewitness-Identification Requirements in Bosnia and Herzegovina: A Comparative Case Study*, 119 PENN. S. L. REV. 439, 480 (2014).

177. *See supra* Part I.

investigatory tactic for police, especially in an exigent circumstance or in the context of an ongoing police investigation. Such an argument is without strong support. Certainly, courts have bought this argument to expand the use of show-ups, but rarely is there an exigent circumstance justifying a show-up.[178] Further, the notion that show-ups are a necessary investigatory tactic fails to take notice of other investigatory tactics like fingerprinting, DNA, scouring for surveillance footage, etc. In this Note's opening vignette, the police did not fingerprint the stolen vehicle, and only employed a show-up. Fingerprints would have more conclusively linked the defendant to the vehicle than a vague identification. Abolishing the show-up would simply encourage police to use other less suggestive investigatory tactics in their toolkit. Finally, it might be argued that courts, not legislatures, are better equipped to address and respond to issues surrounding show-ups. This argument fails due to the simple fact that in all the years since the Supreme Court articulated *Bigger-Brathwaite* test, states continue to use it verbatim or in only slightly modified forms. Some courts, like Wisconsin, have even reversed their more robust protections.[179] A new approach is needed.

CONCLUSION

Legislatures, not courts, should finally abolish the show-up. Only then can *Stovall*'s ban against unnecessarily suggestive show-ups conducive to irreparable mistaken identification be firmly realized. In his vigorous dissent in *Manson v. Brathwaite*, Justice Marshall, a champion of defendant's rights, wrote:

> [A]doption of the per se rule [against show-ups] would enhance, rather than detract from, the effective administration of justice. In my view, the Court's totality test will allow seriously unreliable and misleading evidence to be put before juries. Equally important, it will allow dangerous criminals to remain on the streets while citizens assume that police action has given them protection.[180]

178. *See supra* Part I-E & Part II-B.
179. *See supra* Part I-C.
180. Manson v. Brathwaite, 432 U.S. 127, 128 (1977) (Marshall, J., dissenting).

Abolishing show-ups does not mean the end of solving crime. It simply recalibrates police investigatory procedures towards other possible outcomes. Police will instead rely on traditional line-ups, DNA evidence, fingerprints, and other tactics that do not raise serious due process concerns. In the wake of 2020's reckoning with policing in America, abolishing the show-up is but one simple step we can take towards justice.