ADMISSIBILITY OF FIRST TIME IN-COURT EYEWITNESS IDENTIFICATIONS: AN ARGUMENT FOR ADDITIONAL DUE PROCESS PROTECTIONS IN NEW YORK

Dakota Kann†

"[T]here is almost nothing *more convincing than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'"*[1]

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† Notes Editor, *Cardozo Law Review*. J.D. Candidate (May 2018), Benjamin N. Cardozo School of Law; B.A., Syracuse University, 2015. I would like to thank Professor Jessica Roth for all her guidance, advice, and thoughtful feedback throughout the Note writing process. I would also like to thank the *Cardozo Law Review*'s talented editors, especially Monica Chung, the Executive Board, and the numerous Staff Editors who worked on my Note. Most importantly, thank you to my family for their never-ending love, support, and encouragement throughout law school and beyond. All mistakes are my own.

1 Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting).

INTRODUCTION

Although the U.S. Supreme Court pronounces the minimum due process protections[2] afforded to a defendant under the Constitution, state governments have the ability to implement their own reforms to guard against suggestive identification procedures.[3] In the context of out-of-court eyewitness identifications, the Supreme Court has held that those procured through unnecessarily suggestive procedures may still be admissible so long as they are reliable.[4] Their suggestive nature alone does not warrant a rule of per se exclusion, but it does implicate a defendant's due process rights.[5] If undue suggestiveness[6] can be shown,

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2 *Due Process*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case.").

3 *See* Sandra Guerra Thompson, *Eyewitness Identifications and State Courts as Guardians Against Wrongful Conviction*, 7 OHIO ST. J. CRIM. L. 603, 621–31 (2010) [hereinafter Thompson, *Guardians Against Wrongful Conviction*] ("[S]tate supreme courts actually have several legal avenues . . . for developing rules that are consistent with scientific research and that require law enforcement to avoid suggestiveness in obtaining identification evidence. Over the years, state high courts have invoked these different legal bases in eyewitness identification cases, grounding their decisions on the supervisory authority of state high courts to ensure the fair administration of justice, on common law principles of fairness, on evidentiary grounds, as well as on state constitutional grounds.").

4 *See* Neil v. Biggers, 409 U.S. 188, 199 (1972) ("[T]he central question [is] whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive.").

5 *Id.* ("The purpose of a strict rule barring evidence of unnecessarily suggestive confrontations would be to deter the police from using a less reliable procedure where a more reliable one may be available, and would not be based on the assumption that in every instance the admission of evidence of such a confrontation offends due process.").

the Court employs a five-factor balancing test to determine the reliability, and thus admissibility, of the out-of-court identification.[7] While out-of-court identifications have been widely litigated and frequently addressed by the Supreme Court, issues involving in-court identifications, and in particular first time in-court eyewitness identifications (FTICEIs),[8] have yet to be addressed.[9] However, several state courts have addressed the issue, disagreeing whether FTICEIs are inherently suggestive and implicate the same due process protections as their suggestive, out-of-court counterparts.[10] Currently, the federal circuit courts remain split on whether the five-factor balancing test applies to these types of identifications.[11]

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6 *Id.* at 199 n.6 (finding a showup procedure to be unduly suggestive where "it appears to the Court that a line-up, which both sides admit is generally more reliable than a show-up, could have been arranged [and] [t]he fact that this was not done tended needlessly to decrease the fairness of the identification process to which petitioner was subjected").

7 *See* Perry v. New Hampshire, 565 U.S. 228 (2012); Manson v. Brathwaite, 432 U.S. 98, 114 (1977); Neil v. Biggers, 409 U.S. 188, 199–200 (1972) ("[T]he factors . . . 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.").

8 A FTICEI occurs when there has been no prior out-of-court, pre-trial identification, and the State seeks to have the witness identify the perpetrator as the defendant for the first time at trial. *See* Aliza B. Kaplan & Janis C. Puracal, *Who Could It Be Now? Challenging the Reliability of First Time In-Court Identifications After* State v. Henderson *and* State v. Lawson, 105 J. CRIM. L. & CRIMINOLOGY 947, 950 ("In first time, in-court identifications, a witness is identifying the defendant for the first time after he or she has already been identified by the state as the suspect and charged with the crime.").

9 Evan J. Mandery, *Due Process Considerations of In-Court Identifications*, 60 ALB. L. REV. 389, 389 (1996) ("Yet, while the constitutional issues surrounding pre-trial identifications have been widely litigated and explored by scholars, little attention has been paid to the issues raised by in-court identifications. The lack of appellate-level case law on the subject may be partially explained by the fact that few defendants ever object to the suggestiveness of in-court identifications."). As of this date, the U.S. Supreme Court has yet to grant certiorari on the issue. *See* State v. Dickson, 141 A.3d 810 (Conn. 2016), *cert. denied*, 137 S. Ct. 2263 (2017).

10 Several states have rested their decisions on interpretations of the Federal Constitution. *See Dickson*, 141 A.3d 810; Byrd v. State, 25 A.3d 761 (Del. 2011) ("Byrd argues that the trial judge violated his due process rights under the United States Constitution by allowing an impermissibly suggestive in-court identification of him by a police officer. We have concluded that argument is without merit."). Other states have rested their decisions on the protections afforded under the applicable state constitution. *See* State v. King, 934 A.2d 556, 561 (N.H. 2007) ("The inherent suggestiveness in the normal trial procedure employed here does not rise to the level of constitutional concern."); *id.* at 562 ("We reach the same result, based upon the same analysis, under the Federal Constitution."). Yet other states have rested their decisions on the state's supervisory powers. *See* Commonwealth v. Crayton, 21 N.E.3d 157, 169 n.16 (Mass. 2014) ("We base our decision today on '[c]ommon law principles of fairness.'" (citing Commonwealth v. Jones, 666 N.E.2d 994 (1996))). State decisions have also rested their decisions on interpretations of state evidentiary codes. *See* State v. Hickman, 330 P.3d 551, 558 (Or. 2014) ("Accordingly, any error in admitting D's identification testimony under OEC 403 was harmless.").

11 *See* United States v. Greene, 704 F.3d 298, 308 (4th Cir. 2013) ("Even if an impermissibly suggestive procedure is used to obtain an in-court identification, admission of the identification

In response to due process limitations adopted by the Supreme Court, state constitutions have provided defendants with additional protections, exceeding those afforded under the Federal Constitution.[12] For example, several states have addressed due process issues arising from pre-trial eyewitness identifications, rejecting the five-factor test as insufficient to guard against the dangers of misidentification and wrongful convictions.[13] While only a few states have addressed the admissibility of FTICEIs, the majority of states have found no due process violation, concluding that the suggestiveness of the identification can be addressed through normal trial procedures.[14] However, two states—Massachusetts and Connecticut[15]—have recognized the inherent suggestiveness of such identifications and the inability of normal trial procedures to adequately combat such suggestiveness.[16] Both states now require additional protections beyond what is traditionally required at trial.[17]

In *Commonwealth v. Crayton*,[18] the Supreme Judicial Court of Massachusetts employed the court's supervisory powers to hold FTICEIs unnecessarily suggestive, entitling defendants to heightened

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evidence is not error if the evidence was 'nevertheless reliable under the totality of the circumstances.'"); United States v. Rogers, 126 F.3d 655, 658 (5th Cir. 1997); United States v. Hill, 967 F.2d 226, 232 (6th Cir. 1992); United States v. Rundell, 858 F.2d 425, 427 (8th Cir. 1988); United States v. Archibald, 756 F.2d 223 (2d Cir. 1984). *But see* United States v. Bush, 749 F.2d 1227, 1232 (7th Cir. 1984) (holding that a FTICEI is not so suggestive as to trigger due process protections); Baker v. Hocker, 496 F.2d 615, 617 (9th Cir. 1974) ("The danger posed by a courtroom identification is insufficient to require [due process protections] . . . .").

12 *See* Matthew Gordon, *Is New York Achieving More Reliable and Just Convictions When the Admissibility of a Suggestive Pretrial Identification Is at Issue?*, 29 TOURO L. REV. 1305, 1306 n.8 (2013) (comparing the federal totality of the circumstances approach under *Manson v. Brathwaite* to the New York State per se exclusion approach under *People v. Adams*, in regards to excluding suggestive pre-trial identifications).

13 Thompson, *Guardians Against Wrongful Conviction*, *supra* note 3, at 621–31 (exploring various state courts that have made reforms to the admissibility standards of out-of-court and in-court identifications, as well as advancing additional due process protections to guard against the threat of wrongful conviction).

14 *See Byrd*, 25 A.3d at 767 ("Accordingly, we hold that the remedy for any alleged suggestiveness of an in-court identification is cross-examination and argument."); *King*, 934 A.2d at 560 ("In addition to affording the fact finder the opportunity to observe and assess the identification itself, an initial in-court identification is subject to immediate challenge through cross-examination."); *Hickman*, 330 P.3d at 564 ("'Counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification—including reference to both any suggestibility in the identification procedure and any countervailing testimony such as alibi.'" (quoting United States v. Domina, 784 F.2d 1361, 1369 (9th Cir.1986))); State v. Lewis, 609 S.E.2d 515, 518 (S.C. 2005) ("We conclude, as the majority of courts have, that *Neil v. Biggers* does not apply to in-court identifications and that the remedy for any alleged suggestiveness of an in-court identification is cross-examination and argument.").

15 *Dickson*, 141 A.3d 810; *Crayton*, 21 N.E.3d at 167.

16 *Dickson*, 141 A.3d 810; *Crayton*, 21 N.E.3d at 167.

17 *Dickson*, 141 A.3d 810; *Crayton*, 21 N.E.3d at 167.

18 *Crayton*, 21 N.E.3d 157.

protections.[19] The court rejected the five-factor reliability analysis of the federal courts and adopted a rule of per se exclusion unless the prosecution could show "good reason" for the in-court identification.[20] Following Massachusetts, the Supreme Court of Connecticut in *State v. Dickson*[21] found FTICEIs to be entitled to higher due process protections as a matter of constitutional law.[22] Massachusetts and Connecticut now require prescreening[23] by the trial court before a FTICEI can be made at trial.[24] Massachusetts and Connecticut are the only two states that recognize how inherently suggestive a FTICEI is and maintain policies that seek to limit the prejudice experienced by a defendant.[25]

Like many state courts, the New York Court of Appeals has yet to address the admissibility of FTICEIs.[26] However, in prior cases involving suggestive out-of-court identifications, the court has found that the state constitution provides defendants with additional

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19 *Id.* at 167, 169 n.16 ("We base our decision today on [c]ommon law principles of fairness." (citations omitted)); *see* Gary E. O'Connor, *Rule(make)r and Judge: Minnesota Courts and the Supervisory Power*, 23 WM. MITCHELL L. REV. 605, 606 (1997) (defining supervisory power as "the power exercised by courts, which sometimes is based on a constitutional or statutory provision granting such power, to establish rules and reverse cases in the interests of justice, judicial integrity, and notions of good policy").

20 *Crayton*, 21 N.E.3d at 169–70 (explaining that "good reason" may be present where the eyewitness knew or was familiar with the defendant before the crime at issue, where the defendant's identity is not at issue, or "where the witness is an arresting officer who was also an eyewitness to the commission of the crime, and the identification merely confirms that the defendant is the person who was arrested for the charged crime").

21 *Dickson*, 141 A.3d 810.

22 *Id.* at 825 n.11.

23 Both Massachusetts and Connecticut have adopted a system of pretrial hearings where the judge, in the absence of the jury, decides whether good reason exists for admission of the first time in-court eyewitness identification, otherwise it is barred under a rule of per se exclusion. *See id.* at 835–36 ("In cases in which there has been no pretrial identification, however, and the state intends to present a first time in-court identification, the state must first request permission to do so from the trial court. . . . The trial court may grant such permission only if it determines that there is no factual dispute as to the identity of the perpetrator, or the ability of the particular eyewitness to identify the defendant is not at issue."); *Crayton*, 21 N.E.3d at 171 ("[W]e place the burden on the prosecutor to move in limine to admit the in-court identification of the defendant by a witness where there has been no out-of-court identification. Once the motion is filed, the defendant would continue to bear the burden of showing that the in-court identification would be unnecessarily suggestive and that there is not 'good reason' for it.").

24 *Crayton*, 21 N.E.3d at 169; *Dickson*, 141 A.3d at 817.

25 Shirley LaVarco & Karen Newirth, *Connecticut Supreme Court Limits In-Court Identification in Light of the Danger of Misidentification*, INNOCENCE PROJECT (Aug. 29, 2016), http://www.innocenceproject.org/ct-supreme-court-limits-court-id ("Connecticut is now the second state to strictly limit in-court identifications, following two 2014 decisions by the Supreme Judicial Court of Massachusetts.").

26 *See* People v. Marshall, 45 N.E.3d 954, 963 n.2 (N.Y. 2015) ("Defendant did not challenge the bus driver's in-court identification; therefore we have no occasion on this appeal to consider any potential suggestiveness and admissibility of first-time, in-court identifications, as urged by amicus.").

protections beyond those afforded under the Federal Constitution[27]—leading the court to adopt a rule of per se inadmissibility for unnecessarily suggestive showup procedures under the state constitution.[28] As such, this Note argues that FTICEIs are amongst the most suggestive of all identifications and that the New York State Constitution requires additional due process protections before they may be admitted.

Part I of this Note will explain the significant weight juries give to eyewitness identifications and the role they play in wrongful convictions. This Note then explores the Supreme Court rulings related to eyewitness identifications, examining how the Court has viewed their admissibility and laid the foundation for the minimum requirements of due process. Next, this Note addresses the groundbreaking reforms made by Oregon in *State v. Lawson*[29] to prevent unreliable eyewitness identifications from being admitted into evidence and protecting defendants' due process rights.

Part II analyzes several states' approaches to FTICEIs—contrasting the similar approaches taken by Massachusetts in *Commonwealth v. Crayton*[30] and by Connecticut in *State v. Dickson*[31] with the approach taken by Oregon in *State v. Hickman*.[32] This Note then focuses on New York law—analyzing cases from the New York Court of Appeals, which lends support to the suggestiveness and inadmissibility of FTICEIs—as well as cases from the state appellate courts, which have found that FTICEIs do not present due process concerns.[33]

Part III will argue for New York to adopt the approach taken by Connecticut and Massachusetts, requiring FTICEIs to be prescreened by the trial court prior to their admission at trial. As New York's constitution has provided a high level of protection for defendants challenging the suggestiveness of an out-of-court identification,[34] the New York Court of Appeals has a constitutional basis for extending the per se exclusion rule for suggestive out-of-court identifications to

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27 *See* People v. Adams, 423 N.E.2d 379, 383 (N.Y. 1981) ("[T]his court has frequently found that the State Constitution affords additional protections above the bare minimum mandated by Federal law.").

28 *See supra* text accompanying note 12 (explaining the state's rejection of the federal balancing test in favor of a rule of per se exclusion).

29 291 P.3d 673 (Or. 2012).

30 21 N.E.3d 157 (Mass. 2014).

31 141 A.3d 810 (Conn. 2016).

32 330 P.3d 551 (Or. 2014). Massachusetts and Connecticut are the only two states that have decided that the inherent suggestiveness of a FTICEI entitles defendants to higher due process protections. *See* LaVarco & Newirth, *supra* note 25.

33 *See* People v. Adams, 423 N.E.2d 379 (1981). *But see* People v. Jackson, 561 N.Y.S.2d 828 (N.Y. App. Div. 1990), *appeal denied*, 573 N.E. 2d 583 (N.Y. 1991); People v. Alexander, 643 N.Y.S.2d 141 (N.Y. App. Div. 1996), *appeal denied*, 672 N.E.2d 612 (N.Y. 1996).

34 *See Adams*, 423 N.E.2d at 3832.

FTICEIs.

I. BACKGROUND

A. *The Role of Eyewitness Identifications*

Eyewitness identifications can occur both in-court and out-of-court; however, most in-court identifications are preceded by an out-of-court lineup, photo array, or a showup procedure.[35] While any identification, both in-court and out-of-court, is suggestive, an in-court identification is highly suggestive.[36] The jury is present to see the witness point to the defendant and state that they are the perpetrator.[37] Additionally, the defendant is often the only person in the courtroom who fits the perpetrator's description and is seated behind the defense table during trial.[38] These factors, paired with the witness's awareness that the State believes the defendant is guilty, can lead a witness to make a confident in-court identification—even though the witness may simply be affected by the suggestiveness of the proceeding.[39] The prejudice experienced by a defendant is even greater during a FTICEI

35 *See* 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); *see also Lineup*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A police identification procedure in which physically similar persons, one of whom may be the suspect, are shown to the victim, usu[ally] simultaneously, or a witness to determine whether the suspect can be identified as the perpetrator of the crime."); *Photo Array*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A series of photographs, often police mug shots, shown sequentially to a witness for the purpose of identifying the perpetrator of a crime."); *Showup*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A police procedure in which a suspect is shown singly to a witness for identification, rather than as part of a lineup. In a showup, a witness is brought to the scene and asked whether a detained or arrested suspect is the perpetrator.").

36 *See* Commonwealth v. Crayton, 21 N.E.3d 157, 166 (2014) ("In fact, in-court identifications may be more suggestive than showups."); Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND. L. REV. 451, 460 (2012) ("The courtroom identification is obviously highly suggestive. The defendant is sitting at the counsel's table, perhaps in prison clothing. There are no fillers and there is no lineup. And the identification may follow emotionally charged testimony by the victim describing a crime—a victim who, in the conclusion of the testimony, points out the culprit to the jury."); *see also* H.R. REP. NO. 94-355, at 3 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 1092, 1975 (noting that out-of-court identifications are more reliable because they occur outside the suggestiveness of the courtroom, take place soon after the event in question has taken place, and before a witness's memory can fade).

37 Garrett, *supra* note 36.

38 *See* LaVarco & Newirth, *supra* note 25; Garrett, *supra* note 36; Mandery, *supra* note 9, at 389 ("In-court identifications are inherently suggestive. In the ordinary criminal case, the defendant is conspicuously seated at the defense table, often distinctively dressed, and sometimes the only member of his or her race in the courtroom. In such an atmosphere, '[a]ny witness, especially one who has watched trials on television, can determine which of the individuals in the courtroom is the defendant, which is the defense lawyer, and which is the prosecutor.'").

39 LaVarco & Newirth, *supra* note 25.

because there was no prior out-of-court identification acquired under less suggestive means to confirm the identification's reliability.[40] With a FTICEI, although appropriate jury instructions can be given and the witness can be cross-examined, these limited protections are not enough to combat the prejudice experienced by a defendant.[41]

To date, mistaken eyewitness identifications have led to the conviction of at least seventy-one percent of the 344 people exonerated by DNA testing within the United States.[42] Of that seventy-one percent, more than half were misidentified during an in-court identification.[43] Misidentification results in more wrongful convictions than all other causes combined,[44] which corresponds with studies showing juries believe the witness making an identification up to eighty percent of the time, regardless if correct.[45] This is because jurors rely heavily on the confidence of the eyewitness.[46] Yet, the correlation between confidence in an identification and accuracy is highly variable,[47] as mistaken eyewitnesses can appear highly confident as a result of feedback or reinforcements.[48] In fact, studies have shown that the correlation

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40 *See* Crayton, 21 N.E.3d at 166 ("If anything, the evidence suggests that in-court identifications merit greater protection." (quoting Mandery, *supra* note 9, at 415)); *see also* Mandery, *supra* note 9, at 421–22 ("Whereas with pre-trial identifications judges make the threshold determination of reliability for otherwise unconstitutional identifications, with in-court identifications the assessment of reliability is left to the jury.").

41 *See* Crayton, 21 N.E.3d at 167–69; *see also* LaVarco & Newirth, *supra* note 25 ("[R]esearch has demonstrated that cross-examination and argument by defense counsel—the traditional tools of the adversarial process—do little to counteract . . . [the suggestiveness of the in-court procedure and memory contamination]; functioning best as tools to expose lying witnesses rather than those who are honestly mistaken, like most eyewitnesses who get it wrong.").

42 LaVarco & Newirth, *supra* note 25.

43 *Id.* However, this article does not clarify whether the half that was misidentified in an in-court identification was misidentified in a FTICEI or if a prior out-of-court identification occurred as well.

44 Sarah Anne Mourer, *Reforming Eyewitness Identification Procedures Under the Fourth Amendment*, 3 DUKE J. CONST. L. & PUB. POL'Y 49, 54 (2008).

45 *Id.* (citing Gary L. Wells, *Effects of Expert Psychological Advice on Human Performance in Judging the Validity of Eyewitness Testimony*, 4 LAW & HUM. BEHAV. 275, 278 (1980)).

46 *See* Richard S. Schmechel, Timothy P. O'Toole, Catharine Easterly & Elizabeth F. Loftus, *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS J. 177, 198–99 (2006) (highlighting the difference between confidence and accuracy as "confidence is a product of personality and social factors of which accuracy of observation is only a minor part [and a] witness' confidence will also depend on how self-confident the witness is to begin with and what interactions the witness has had with others to boost or undermine that confidence"); Wells, *supra* note 45, at 279 ("[W]e can conclude that . . . subject-jurors rely too heavily on eyewitness confidence in judging the validity of eyewitness accounts.").

47 *See* Wells & Quinlivan, *supra* note 35, at 11–12; Garrett, *supra* note 36, at 469.

48 For instance, when police inform eyewitnesses that a suspect has already been arrested and will be present in the lineup for identification purposes, eyewitnesses become even more certain of their identification. Garrett, *supra* note 36, at 470 ("Feedback or reinforcement after the identification can also have a dramatic effect on confidence. If police say, 'Good job, you picked the right one,' then the eyewitness will tend to be far more certain. If police tell the

between a witness's level of certainty and the accuracy of the identification is markedly low, especially where the identification procedure used is suggestive.[49]

Calculations of the relationship between a witness's certainty and the accuracy of identification reveal a correlation value as high as 0.41.[50] While this correlation value has some probative value, it is of limited utility.[51] However, what is known is that where an identification procedure is suggestive, a witness's sense of certainty is inflated.[52] In one study, less than fifteen percent of eyewitnesses whose identification was inaccurate reported that they were positive or nearly positive about their identification; however, when given a suggestive statement that confirmed the identification, fifty percent of the mistaken eyewitnesses reported they were positive or nearly positive about their identification.[53] If these inflated levels of certainty are present in an out-of-court identification, they are surely present in in-court identifications.[54]

B. *An Overview of Supreme Court Rulings on Eyewitness Identifications*

The Supreme Court has laid out rules on the admissibility of eyewitness identifications in several of its cases.[55] These cases address

eyewitness that a suspect had been arrested and would be present in the lineup, the eyewitness will likewise tend to be far more certain.").

49 Commonwealth v. Crayton, 21 N.E.3d 157, 168 (Mass. 2014) (citing SUPREME JUDICIAL STUDY GROUP ON EYEWITNESS EVIDENCE, REPORT AND RECOMMENDATIONS TO THE JUSTICES 12 (July 25, 2013)); *see also* Wells & Quinlivan, *supra* note 35, at 11–12.

50 Wells & Quinlivan, *supra* note 35, at 11–12 ("One way to think about a 0.41 correlation is to compare it to something with which people have some experience. For instance, the correlation between height and gender in humans is considerably greater than 0.41. . . . [W]e could better predict whether someone was male or female based on their height than we could predict whether a witness was accurate or inaccurate based on their certainty.").

51 *Id.*

52 *Id.* at 12 ("[C]onfirmatory suggestive remarks from the lineup administrator consistently inflate eyewitness certainty for eyewitnesses who are in fact mistaken. . . . A suggestive lineup procedure in which the suspect stands out as the only lineup member who fits the description has similar effects; witnesses are more confident in their identifications of the suspect when the suspect stands out than when the suspect is surrounded by appropriate fillers, regardless of whether the suspect is guilty or not.").

53 *Id.*

54 This rise in witness certainty would occur because in-court identifications and out-of-court identifications are generally different procedurally. In in-court identifications, the defendant is usually seated behind the defense table and the eyewitness proclaims that the defendant is the one who committed the crime. In an out-of-court identification, traditionally, multiple individuals are present (either physically or represented in photographic images) and the eyewitness is asked to choose amongst the individuals and identify the perpetrator. *See* Garrett, *supra* note 36, at 458–60.

55 *See* Perry v. New Hampshire, 565 U.S. 228 (2012); Manson v. Brathwaite, 432 U.S. 98

out-of-court and in-court identifications and whether the Federal Due Process Clause requires the trial court to intervene or the appellate court to review the admissibility of such evidence.[56] These cases provide the necessary background of the current state of the law and areas in need of improvement.

In *Stovall v. Denno*[57] the Supreme Court addressed for the first time whether a defendant is entitled to due process protections against suggestive out-of-court identification procedures.[58] Stovall was convicted of murder and sentenced to death after he was presented to the witness in a showup procedure two days after the crime occurred.[59] During the showup, Stovall was brought into the witness's hospital room, while handcuffed, and the police repeatedly asked the witness whether he "was the man."[60] During the trial, both the out-of-court identification and the witness's subsequent in-court identification were admitted.[61]

On appeal, Stovall argued that the State's unnecessarily suggestive identification procedure could lead to an irreparable mistaken identification and, that as a result, he was denied due process of law.[62] The Court denied relief to Stovall, stating his due process rights were not violated, because conducting the showup procedure "was imperative," as no one knew how long the witness might live following her life-saving surgery.[63] The Court held that due process violations surrounding identifications are to be determined on the totality of the circumstances.[64] The Court stated that the dangers of suggestive pre-trial identification procedures could be mitigated by defense counsel's

(1977); Neil v. Biggers, 409 U.S. 188 (1972); Stovall v. Denno, 388 U.S. 293 (1967).

56 *Neil v. Biggers* sets forth the federal standard for establishing a due process violation with respect to eyewitness identifications. *Biggers*, 409 U.S. at 198–99 (holding that due process requires the exclusion of an identification if the pre-trial identification procedure was unnecessarily suggestive and the identification is unreliable).

57 388 U.S. 293 (1967).

58 *See id.*

59 *Id.* at 295.

60 *Id.*

61 *Id.*

62 "[The question is whether] . . . the confrontation conducted . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that . . . [defendant] was denied due process of law." *See id.* at 301–02 (holding no due process violation given the facts of the case); Mandery, *supra* note 9, at 393 ("The Stovall Court concerned itself with the purely theoretical question whether the pre-trial procedures employed were 'conducive' to misidentification, regardless of whether they in fact likely caused a misidentification. The Stovall Court asked an objective question that focused purely on procedure.").

63 *See Stovall*, 388 U.S. at 301–02.

64 *Id.* at 302 ("The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned. However, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it, and the record in the present case reveals that the showing of Stovall to . . . [the witness] in an immediate hospital confrontation was imperative.").

opportunity to cross-examine the witness at trial.[65]

In *Neil v. Biggers*,[66] the Supreme Court further developed the totality-of-the-circumstances test, establishing a five-factor analysis to determine whether a suggestive identification should be admissible in court.[67] In *Biggers*, the petitioner was convicted by a jury of rape and sentenced to twenty years in prison.[68] After the Tennessee Supreme Court affirmed his conviction, Biggers brought a federal habeas corpus action, alleging that the eyewitness identification and the surrounding circumstances were so suggestive as to violate due process.[69] The Court restated its holding in *Stovall*[70] and expanded it to define the five factors necessary to determine the reliability of an out-of-court identification procured under suggestive circumstances.[71] The relevant factors include: the witness's ability to view the perpetrator at the time of the crime; the witness's degree of attention during the crime; the accuracy of the witness's prior descriptions of the perpetrator; the witness's degree of certainty during the initial identification; and the length of time between the crime and the identification.[72]

The *Biggers* Court acknowledged that suggestive identification procedures increase the risk of misidentification,[73] stating that the purpose for excluding these identifications is to prevent an irreparable misidentification.[74] However, the Court declined to adopt a per se rule

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65 *See* Simmons v. United States, 390 U.S. 377, 384 (1968) (explaining that harm from the suggestive procedure "may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error").

66 409 U.S. 188 (1972).

67 *Id.* at 199–200

68 *Id.* at 189.

69 *Id.* at 190. The identification at issue involved a showup procedure, where the victim was asked to come to the police station, seven months after the rape occurred, and asked whether a suspect who was being held on another charge was the man who committed the attack. *Id.* at 195. During the station house showup, two detectives walked Biggers past the victim and asked Biggers to repeat the words "shutup or I'll kill you," at the victim's request. *Id.* The police were unable to construct a suitable lineup due to Biggers' uncommon physical description. *Id.*

70 *See id.* at 196; Stovall v. Denno, 388 U.S. 293, 301–02 (1967).

71 *See Biggers*, 409 U.S. at 199.

72 *Id.* at 199–200. Here, the court found that the victim's identification was reliable. *Id.* at 200–01 ("The victim spent a considerable period of time with her assailant, up to half an hour. She was with him under adequate artificial light in her house and under a full moon outdoors, and at least twice, once in the house and later in the woods, faced him directly and intimately. . . . Her description to the police, which included the assailant's approximate age, height, weight, complexion, skin texture, build, and voice . . . was more than ordinarily thorough. She had 'no doubt' that respondent was the person who raped her. . . . There was, to be sure, a lapse of seven months between the rape and the confrontation. This would be a seriously negative factor in most cases. . . . Weighing all the factors, we find no substantial likelihood of misidentification.").

73 *Id.* at 198. ("Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.").

74 *Id.* ("It is, first of all, apparent that the primary evil to be avoided is 'a very substantial

of exclusion for any identification made under unnecessarily suggestive circumstances without further inquiry into the identification's reliability.[75] The Court relied on *Stovall*'s holding to clarify that a suggestive procedure, such as a showup, does not violate due process on its own.[76]

Following *Biggers*, the Court in *Manson v. Brathwaite*[77] applied the five-factor test to pretrial photographic identifications.[78] In *Manson*, an undercover narcotics officer gave a description of a heroin dealer to an on-duty police officer.[79] That officer, believing he knew whom the undercover officer was referring to, left a photograph of the defendant on the undercover officer's desk for identification.[80] The undercover officer positively identified the defendant as the dealer.[81] The Court of Appeals for the Second Circuit held that the pretrial photographic identification should have been excluded from evidence, as it was unnecessarily suggestive, regardless of its reliability.[82] The Supreme Court reversed the Second Circuit's ruling, applying *Biggers*, and reaffirming that reliability under the totality of the circumstances determines an identification's admissibility under the Constitution.[83] The Court again rejected a per se approach to suggestiveness, stating that the jury's denial of reliable evidence is one of the most serious

likelihood of misidentification.'" (quoting Simmons v. United States, 390 U.S. 377, 384 (1968))).

75 *Id.* at 198–99.

76 *Id.* at 198 ("But as Stovall makes clear, the admission of evidence of a showup without more does not violate due process.").

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

78 *Id.* at 114–16. As the Supreme Court has extended *Biggers* to apply in both pretrial photographic arrays and physical lineups, this Note will address the five-factor test as the "*Manson* analysis."

79 *Id.* at 101.

80 *Id.*

81 *Id.*

82 Following *Biggers*, there was debate amongst the circuit courts regarding whether a *Biggers* analysis should apply to identifications occurring post-*Stovall*. As such, the Second Circuit applied a per se approach, requiring the exclusion of identification evidence obtained through unnecessarily suggestive circumstances—rejecting the totality-of-the-circumstances approach. *Id.* at 110 ("The justifications advanced are the elimination of evidence of uncertain reliability, deterrence of the police and prosecutors, and the stated fair assurance against the awful risks of misidentification." (citations omitted)).

83 *Id.* at 112 ("The per se rule, however, goes too far since its application automatically and peremptorily, and without consideration of alleviating factors, keeps evidence from the jury that is reliable and relevant."). For a critique of this approach, see Garrett, *supra* note 36, at 470–71 ("The two prongs of the Manson test . . . undermine each other. Suggestion does not just make an uncertain eyewitness feel more confident, but it affects all of the other factors that the Supreme Court included in the Manson test. Memory is malleable. Suggestion will affect the details that an eyewitness remembers. The eyewitness may recall having seen the culprit for a longer period of time and will recall having had a better look at the culprit. The five Manson factors poorly assess 'reliability.' They are circular, and highlight the very features of eyewitness memory that may be most profoundly affected by suggestion.").

drawbacks of the per se approach to exclusion.[84] The Court arrived at its holding under the premise that reliability remains the cornerstone of admissibility under due process.[85]

In *Perry v. New Hampshire*[86]—the most recent Supreme Court case involving eyewitness identifications—the Court held that out-of-court identifications that are not the result of suggestive procedures planned by the State are not required to be prescreened by the court for reliability.[87] As such, a *Manson* analysis would not be performed to determine admissibility of a suggestive identification, where the State was not responsible for its suggestiveness.[88] In *Perry*, the Court did not explicitly analyze FTICEIs but did reference their suggestive nature.[89] The Court declined to adopt a broad holding that would create due process checks on eyewitness identifications[90] and instead followed precedent established in *Manson* by looking to the reliability of evidence.[91] As a result, due process protections are only employed once a defendant establishes improper State conduct.[92] In its opinion, the Court gives great weight to the adversarial process of a trial, including the right of defense counsel to cross-examine a witness and give specific jury instructions that would minimize the risk of misidentification.[93] In response, several state courts have implemented their own reforms to increase the reliability of eyewitness identifications and limit the admissibility of suggestive identifications, providing further protections than the federal courts.[94]

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84 *Brathwaite*, 432 U.S. at 112 ("Since it denies the trier reliable evidence, it may result, on occasion, in the guilty going free.").

85 *Id.* at 114 (concluding that "reliability is the linchpin" of admissibility); Mandery, *supra* note 9, at 398 ("It is widely accepted that the cumulative effect of the Court's decisions in *Biggers* and . . . [*Manson*] has been to shift the focus of the constitutional inquiry from process to substance; that is, from the suggestiveness of the procedure employed to the reliability of the identification.").

86 Perry v. New Hampshire, 565 U.S. 228 (2012).

87 *Id.* at 248.

88 *Id.* at 245 ("The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness.").

89 *Id.* at 244 ("Most eyewitness identifications involve some element of suggestion. Indeed, all in-court identifications do.").

90 *Id.* at 244–45.

91 Manson v. Brathwaite, 432 U.S. 98, 106 (1977) ("The admission of testimony concerning a suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability.").

92 *See Perry*, 565 U.S. at 241; *Manson*, 432 U.S. at 112–13 (explaining that the purpose of the check is to avoid depriving the jury of reliable evidence, notwithstanding improper police conduct).

93 *Perry*, 565 U.S. at 244–46.

94 *See* State v. Henderson, 27 A.3d 872 (N.J. 2011); State v. Lawson, 291 P.3d 673 (Or. 2012); *see also* Thompson, *Guardians Against Wrongful Conviction*, *supra* note 3, at 621–31.

C. *State Reforms to the Admissibility of Eyewitness Identifications*

To date, mistaken eyewitness identifications have contributed to twenty-nine percent of all exonerations for wrongful convictions within the United States.[95] In light of new research highlighting the effects of suggestive identification procedures on eyewitness memory, several states have implemented reforms to limit the admissibility of suggestive and unreliable eyewitness identifications.[96] Recently, the Supreme Court of Oregon, in *State v. Lawson*,[97] analyzed the five-factor *Manson* test used to determine admissibility. In doing so, the court found that its test for admissibility, which mirrored *Manson*, did not produce reliable identifications.[98] As such, Oregon adopted sweeping changes to its admissibility rules.

Lawson rejected *Manson*'s five-factor test and instead replaced it with a balancing test of estimator variables and system variables—variables identified by leading social science researchers as the two main categories that influence the reliability of eyewitness identifications.[99] Estimator variables focus on the factors surrounding the witness's viewing of the crime.[100] As such, these factors cannot be controlled by the criminal justice system.[101] Alternatively, system variables focus on the factors surrounding the witness's identification of the perpetrator.[102] These variables can and should be controlled by the criminal justice

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95 The Nat'l Registry of Exonerations, *Percentage of Exonerations by Contributing Factor*, NAT'L REGISTRY EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx (last visited Jan. 29, 2018) (showing that of 2162 total exonerations to date, 634 of these exonerations involved mistaken eyewitness identifications).

96 *See Henderson*, 27 A.3d 872; *Lawson*, 291 P.3d 673; *see also* Thompson, *Guardians Against Wrongful Conviction*, *supra* note 3, at 621–31.

97 291 P.3d 673.

98 *Id.* at 698 ("In light of current scientific knowledge regarding the effects of suggestion and confirming feedback, the preceding circumstances raise serious questions concerning the reliability of the identification evidence admitted at defendant's trial. . . . [B]ecause the Court of Appeals and trial court relied on the procedures set out in *Classen*—procedures that we have revised in this opinion—we reverse and remand the case to the trial court for a new trial.").

99 *The Science Behind Eyewitness Identification Reform*, INNOCENCE PROJECT, http://www.innocenceproject.org/science-behind-eyewitness-identification-reform (last visited Feb. 16, 2018); *see also* Thompson, *Guardians Against Wrongful Conviction*, *supra* note 3, at 610 (critiquing the U.S. Supreme Court for failing to consider both estimator and system variables in its reliability analysis).

100 *See* INNOCENCE PROJECT, *supra* note 99 (examples include: the lighting in which the witness viewed the crime take place; whether the witness and the perpetrator were of the same race; the presence of a weapon during the commission of the crime; and the level of stress experienced by the witness at the time of the incident).

101 *Id.*

102 *Id.* (examples include: the use of a lineup procedure, showup procedure, or photo array; blind administration of an identification procedure; instructions to witnesses before the identification procedure; and communication with witnesses after the identification procedure).

system to decrease the suggestiveness of an identification and increase its reliability.[103] Oregon's new balancing test takes into consideration a wide range of variables, including suggestiveness, when assessing its admissibility.

While other states have adopted similar reforms,[104] the Supreme Court of Oregon went even further by shifting the burden to the State to establish the admissibility of the evidence.[105] The new framework adopted by Oregon requires courts to take into consideration all the factors that may contribute to an identification's reliability,[106] as well as instructing the courts to employ remedies that may limit the witness's testimony and permit expert testimony to explain the scientific research on eyewitness identifications and memory.[107] Even if the State satisfies its initial burden, the court held that a judge might still need to impose remedies to prevent the defendant from being unfairly prejudiced by the evidence.[108] In contrast to other states, *Lawson*'s burden shift helps to promote best practices by the police and prosecution.[109]

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103 *Id.*

104 *See* State v. Henderson, 27 A.3d 872, 878 (N.J. 2011) ("In the end, we conclude that the current standard for assessing eyewitness identification evidence does not fully meet its goals. It does not offer an adequate measure for reliability or sufficiently deter inappropriate police conduct. It also overstates the jury's inherent ability to evaluate evidence offered by eyewitnesses who honestly believe their testimony is accurate.").

105 State v. Lawson, 291 P.3d 673, 696–97 (Or. 2012) ("Under this revised test governing the admission of eyewitness testimony, when a criminal defendant files a pretrial motion to exclude eyewitness identification evidence, the state as the proponent of the eyewitness identification must establish all preliminary facts necessary to establish admissibility of the eyewitness evidence."); Paul Cates, *Oregon Supreme Court Issues Landmark Decision Mandating Major Changes in the Way Courts Handle Identification Procedures*, INNOCENCE PROJECT (Nov. 29, 2012), http://www.innocenceproject.org/oregon-supreme-court-issues-landmark-decision-mandating-major-changes-in-the-way-courts-handle-identification-procedures.

106 *Lawson*, 291 P.3d at 694 ("The more factors—the presence of system variables alone or in combination with estimator variables—that weigh against reliability of the identification, the less persuasive the identification evidence will be to prove the fact of identification . . . and correspondingly, the less probative value that identification will have.").

107 While the court still uses reliability as the measure of admissibility, the court rejects the five-factor *Manson* analysis and requires the suggestiveness of the identification be taken into account. *See* Cates, *supra* note 105.

108 Even if the State can prove the identification is reliable, it may be excluded by the judge should the pretrial hearing on the matter show that admitting the identification would unfairly prejudice the defendant. *Id.*

109 By shifting the burden to the prosecution, the State would be more apt to employ less suggestive identification procedures, as the *Manson* reliability test would no longer apply and the court would weigh the suggestiveness of the identification in determining its admissibility. *Id.*

II. STATE APPROACHES TO ANALYZING FIRST TIME IN-COURT EYEWITNESS IDENTIFICATIONS

Several state courts have addressed whether a FTICEI is so unduly suggestive as to render a trial fundamentally unfair,[110] yet only a few states have adopted changes to promote best practices for FTICEIs.[111] To date, Massachusetts and Connecticut are the only two states that have introduced additional protections to FTICEIs.[112] Most states that have addressed the issue have held that a defendant is not deprived of a fair trial if afforded the standard protections of cross-examination and the introduction of expert testimony to challenge the FTICEI.[113] Although the New York Court of Appeals has yet to rule on the issue, the Second and Fourth Departments of the New York State Appellate Division have adopted the majority position.[114] The New York appellate courts have failed to consider the similarities between an unduly suggestive out-of-court showup procedure, which is unconstitutional under the New York Constitution, Article I, Section 6,[115] and a FTICEI.[116] The approach taken by Massachusetts and Connecticut

110 Both Connecticut and Massachusetts have held a FTICEI to be unduly suggestive and have implemented a per se exclusion rule with an exception for good reason. *See* State v. Dickson, 141 A.3d 810 (Conn. 2016), *cert. denied*, 137 S. Ct. 2263 (2017) (interpreting the Federal Constitution); Commonwealth v. Crayton, 21 N.E.3d 157 (Mass. 2014) (invoking the state's supervisory powers). However, the other states that have addressed the admissibility of FTICEIs have found no due process violation so long as normal trial procedures, such as cross-examination of the identifying witness, are followed. *See* Young v. State, 374 P.3d 395 (Alaska 2016) (analyzing the state constitution); State v. Hickman, 330 P.3d 551, 563 (Or. 2014) (analyzing Oregon's evidence code); Byrd v. State, 25 A.3d 761 (Del. 2011) (analyzing the Federal Constitution); State v. King, 934 A.2d 556 (N.H. 2007) (analyzing the Federal Constitution); State v. Lewis, 609 S.E.2d 515 (S.C. 2005) (analyzing the Federal Constitution).

111 *See Dickson*, 141 A.3d 810; *Crayton*, 21 N.E.3d 157. *But see Hickman*, 330 P.3d at 563 (refusing to extend additional due process protections to FTICEI).

112 LaVarco & Newirth, *supra* note 25 ("Connecticut is now the second state to strictly limit in-court identifications, following two 2014 decisions by the Supreme Judicial Court of Massachusetts.").

113 *See Byrd*, 25 A.3d 761; *King*, 934 A.2d 556; *Hickman*, 330 P.3d at 563; *Lewis*, 609 S.E.2d 515.

114 *See* People v. Alexander, 643 N.Y.S.2d 141 (N.Y. App. Div. 1996), *appeal denied*, 672 N.E.2d 612 (N.Y. 1996); People v. Brazeau, 759 N.Y.S.2d 268, 271 (N.Y. App. Div. 1994), *appeal denied*, 796 N.E.2d 481 (N.Y. 2003) ("In cases where there has been no pretrial identification procedure and the defendant is identified in court for the first time, the defendant is not deprived of a fair trial because [defendant] is able to explore weaknesses and suggestiveness of the identification in front of the jury."); People v. Jackson, 561 N.Y.S.2d 828 (N.Y. App. Div. 1990), *appeal denied*, 573 N.E. 2d 583 (N.Y. 1991);.

115 *See* N.Y. CONST. art. I, § 6; *see also* People v. Adams, 423 N.E.2d 379 (N.Y. 1981).

116 *See* Mandery, *supra* note 9, at 390 ("Despite the notorious unreliability of eyewitness identifications and the fact that the overwhelming majority of in-court identifications are nothing more than show-ups, courts have afforded less protection to in-court identifications than to those made before trial."); Sandra Guerra Thompson, *Judicial Gatekeeping of Police-Generated Witness Testimony*, 102 J. CRIM. L. & CRIMINOLOGY 329, 383–84 (2012) [hereinafter Thompson, *Judicial Gatekeeping*] ("Prior identifications, being made closer in time to the

adequately addresses the concerns of suggestibility resulting from a FTICEI and highlights why normal trial protections are insufficient.

A. *Massachusetts's and Connecticut's Expansion of Due Process Protections*

1. *Commonwealth v. Crayton*—Massachusetts (2014)

In *Commonwealth v. Crayton*,[117] following a jury trial, the defendant was convicted of two counts of possession of child pornography, in violation of state law.[118] The defendant was accused of viewing child pornography in a public library after two eyewitnesses saw him looking at images of young girls without clothes on, on a library computer.[119] Prior to trial, neither the police nor the prosecution asked the eyewitnesses to participate in an out-of-court identification.[120] At trial, the defense counsel moved to preclude the in-court identification, as it would be unnecessarily suggestive.[121] The judge denied the motion to preclude, stating that an in-court identification could not be unnecessarily suggestive as no suggestive pretrial identification occurred.[122]

The Supreme Judicial Court of Massachusetts reversed the lower court's holding and announced a new standard of admissibility for FTICEIs.[123] The court held that where an eyewitness has not participated in an identification procedure prior to trial, and the prosecution seeks to acquire a FTICEI, the identification would only be admissible where "good reason"[124] exists. Good reason may exist where the witness was familiar with or knew the defendant prior to the crime at issue, where the defendant's identity is not at issue, or where the arresting officer also witnessed the commission of the crime and the in-

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crime, will be more accurate than those done later in time, such as at the trial. However, the notion that they are made 'under less suggestive conditions' than an in-court identification does not hold up to scrutiny. For one thing, the prior identification may have been made at a one-person show-up, which is just as suggestive as in-court identification.").

117 21 N.E.3d 157 (Mass. 2014).

118 *Id.* at 161.

119 *Id.* at 161–62.

120 *Id.* at 164.

121 *Id.*

122 *Id.* ("The judge noted that the in-court identifications could not be tainted by a suggestive pretrial identification procedure where there had been none. The judge recognized that 'an in-court identification always has some suggestiveness to it,' but said that defense counsel '[could] highlight that suggestiveness' on cross-examination.").

123 *Id.* at 161.

124 *Id.* at 169 ("Where an eyewitness has not participated before trial in an identification procedure, we shall treat the in-court identification as an in-court showup, and shall admit it in evidence only where there is 'good reason' for its admission.").

court identification is simply confirmation that the person who was arrested and charged for the crime is the defendant.[125]

In Massachusetts's analysis, the court likened a FTICEI to an unnecessarily suggestive out-of-court showup procedure, which had previously been held inadmissible in Massachusetts without good reason.[126] The court further clarified that "good reason," which might justify an out-of-court showup procedure,[127] will not justify a FTICEI, because admission of an out-of-court showup requires a short period of time between the commission of the crime and the identification.[128] Taking a more protective view than the Supreme Court, Massachusetts rejected *Manson*,[129] reasoning that the Supreme Court's reliability test does little to prevent police from using suggestive identification procedures.[130] Furthermore, the court rejected all three of the State's arguments as to how a FTICEI differs from an out-of-court showup in an effort to justify maintaining different standards of admissibility.[131]

First, the court stated that the ability of the fact finder to view a witness's demeanor and level of confidence during an identification does not influence the jury's ability to determine the accuracy of the in-court identification.[132] Second, the court held that the short length of time between cross-examination during a FTICEI, compared to an out-of-court showup procedure, does not entitle the State to a different

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125 *Id.* at 170.

126 *Id.* at 165–66 ("[T]here is generally 'good reason' where the showup identification occurs within a few hours of the crime, because it is important to learn whether the police have captured the perpetrator or whether the perpetrator is still at large, and because a prompt identification is more likely to be accurate when the witness's recollection of the event is still fresh."); *id.* ("[E]ven where there is 'good reason' for a showup identification, it may still be suppressed if the identification procedure so needlessly adds to the suggestiveness inherent in such an identification that it is 'conducive to irreparable mistaken identification.'"). Massachusetts's per se exclusion rule for unnecessarily suggestive out-of-court showup procedures comports with New York's per se exclusion rule under *People v. Adams*. *See* People v. Adams, 423 N.E.2d 379, 384 (N.Y. 1981) ("Excluding evidence of a suggestive showup does not deprive the prosecutor of reliable evidence of guilt. . . . [P]roperly conducted pretrial viewings can still be proven at trial and, would be encouraged by the rule prohibiting use of suggestive ones. . . . We have never held that it is proper to admit evidence of a suggestive pretrial identification. Indeed it seems to have been understood by courts and prosecutors that a pretrial identification would not be admissible if the procedures were unnecessarily suggestive.").

127 *Crayton*, 21 N.E.3d at 165–66, 170 ("[C]oncerns for public safety; the need for efficient police investigation in the immediate aftermath of a crime; and the usefulness of prompt confirmation of the accuracy of investigatory information." (quoting Commonwealth v. Austin, 657 N.E.2d 458 (Mass. 1995))).

128 *Id.* This would not be so with an FTICEI, where presumably, weeks, months, or even years have passed since the commission of the crime.

129 *Id.* at 164.

130 *Id.*

131 *Id.* at 167–69.

132 *Id.* at 167–68; *see* discussion *supra* Section I.A.

standard of admissibility.[133] Eyewitnesses are frequently subject to cross-examination on identifications that result from showup procedures, but the ability to cross-examine does not make those identifications admissible where they are the result of unnecessarily suggestive procedures.[134] The court also recognized the difficulty for a defense attorney to prove to the jury that the witness's confidence in the identification is nothing more than a result of the suggestive circumstances it occurred under.[135] Lastly, the court rejected the notion that defense counsel's ability to move for a less suggestive identification procedure entitled the State to a different standard of admissibility.[136] While several courts have adopted policies that place the burden on the defendant to identify less suggestive identification procedures,[137] *Crayton* views this as meaning that the State is entitled to use unnecessarily suggestive procedures unless the defendant is able to propose—and the trial judge agrees to—using a less suggestive method.[138]

In *Crayton*, the court invoked its state supervisory powers, leaving open the question of whether FTICEIs require prescreening by the trial court under the state constitution.[139] The court used prior precedent and its analysis of the similarities between a FTICEI and an out-of-court showup identification to hold that both rise to the same level of suggestiveness.[140] As such, where there is no good reason, this first time in-court showup violates a defendant's rights to due process of law as a matter of fundamental fairness.[141]

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133 *Crayton*, 21 N.E.3d at 168–69.

134 *Id.*

135 *Id.* at 169 ("[E]yewitness identifications upend the ordinary expectation that it is 'the province of the jury to weigh the credibility of competing witnesses.' . . . [J]urors find eyewitness evidence unusually powerful and their ability to assess credibility is hindered by a witness' false confidence in the accuracy of his or her identification." (quoting Perry v. New Hampshire, 132 S. Ct. 716, 737 (2012) (Sotomayor, J., dissenting))).

136 *Id.* ("We do not join those courts that have placed the burden on the defendant to avoid a suggestive in-court identification by proposing alternative, less suggestive identification procedures. . . . Placing this burden on the defendant suggests that the Commonwealth is entitled to an unnecessarily suggestive in-court identification unless the defendant proposes a less suggestive alternative that the trial judge in his or her discretion adopts.").

137 *See* United States v. Brown, 699 F.2d 585, 594 (2d Cir. 1983); United States v. Domina, 784 F.2d 1361, 1369 (9th Cir. 1986); State v. Hickman, 330 P.3d 551 (Or. 2014).

138 *Crayton*, 21 N.E.3d at 169; *see infra* text accompanying notes 274–78 (critiquing this approach, which provides the trial judge with too much discretion).

139 *See Crayton*, 21 N.E.3d at 169 n.16 ("We base our decision today on '[c]ommon law principles of fairness.' . . . We do not address whether State constitutional principles would also require "good reason" before in-court identifications are admitted in evidence. Nor do we address the admissibility of in-court identifications in civil cases." (citations omitted)).

140 *Id.* at 166.

141 *See* discussion *supra* Section II.A.1.

2. *State v. Dickson*—Connecticut (2016)

Most recently, the Supreme Court of Connecticut ruled in *State v. Dickson*[142] that in-court identifications are among the most suggestive identification procedures.[143] In *Dickson*, the defendant was convicted after allegedly shooting the victim during a robbery.[144] Prior to trial, the defendant filed a motion to preclude the victim's in-court identification after he failed to identify the defendant in a photographic array out-of-court.[145] At trial, the defendant claimed that allowing the FTICEI would violate his due process rights under Article 1, Section 8 of the Connecticut constitution,[146] as any in-court identification would be unnecessarily suggestive and would lead to a high probability of an irreparable misidentification.[147] The trial court denied the motion.[148] During the in-court identification, the defendant was seated behind the defense table and was the only African-American male in the courtroom.[149] On appeal, the defendant claimed that the trial court had violated his due process rights under the Fifth and Fourteenth Amendments to the Federal Constitution.[150] The appellate court rejected this argument under prior precedent.[151]

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142 141 A.3d 810 (Conn. 2016).

143 *Id.* at 822–23 ("[W]e are hard-pressed to imagine how there could be a *more* suggestive identification procedure than placing a witness on the stand in open court, confronting the witness with the person who the state has accused of committing the crime, and then asking the witness if he can identify the person who committed the crime. If this procedure is not suggestive, then *no* procedure is suggestive.").

144 *Id.* at 818.

145 *Id.*

146 C.G.S.A. CONST. art. 1, § 8.

> In all Criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his behalf; to be released on bail upon sufficient security, except in capital offenses, where the proof is evident or the presumption great; and in all prosecutions by information, to a speedy, public trial by an impartial jury. No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law, nor shall excessive bail be required nor excessive fines imposed.

Id.; *see also Dickson*, 141 A.3d at 818.

147 *Dickson*, 141 A.3d at 818.

148 *Id.*

149 *Id.*; *see also* Mandery, *supra* note 9, at 389 ("In-court identifications are inherently suggestive. In the ordinary criminal case, the defendant is conspicuously seated at the defense table, often distinctively dressed, and sometimes the only member of his or her race in the courtroom. In such an atmosphere, 'any witness, especially one who has watched trials on television, can determine which of the individuals in the courtroom is the defendant, which is the defense lawyer, and which is the prosecutor.'").

150 *Dickson*, 141 A.3d at 818–19. The Supreme Court of Connecticut based its holding on an interpretation of federal constitutional law, as the defendant, on appeal, only raised claims based on his Fifth and Fourteenth Amendment rights and did not raise a claim, as he did at

Reconsidering its case law on in-court identifications, the Supreme Court of Connecticut held that a FTICEI amounts to a form of improper vouching[152] and should be treated the same as an in-court identification that is tainted by an unduly suggestive out-of-court identification, requiring prescreening by the trial court.[153] The court also overruled its decision in *State v. Tatum*[154] and held that there is no good reason why the State could not obtain a necessary identification through a photo array or lineup, prior to requesting that a FTICEI be admitted into evidence.[155]

The Supreme Court of Connecticut distinguished its holding with respect to *Perry v. New Hampshire*, rejecting the prosecution's assertions that *Perry* required an unduly suggestive identification to be excluded only when it results from *police* misconduct, not when it results from the *prosecution* presenting evidence at trial.[156] The court in *Dickson* clarified that *Perry* did not address FTICEIs, and, regardless, *Perry* expressly stated that admissibility of eyewitness identifications turned on the existence of *state action*.[157] Rejecting the State's contentions that in-court identifications do not implicate the same due process concerns as an unduly suggestive out-of-court identification, *Dickson* states that the presence of the jury during the identification does not provide enough of a protection against due process violations.[158] This is because the witness is far less likely to appear hesitant in a situation where the

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trial, under Article 1, Section 8 of the Connecticut Constitution. *Id.* at 851 n.11 (Zarella, J., concurring) ("Even if the defendant had argued that the Connecticut constitution provides greater due process protections than does the Federal Constitution, it is unlikely that he could have prevailed on that claim. . . . [as the] Connecticut constitution provides no greater protection than the Federal Constitution in context of reliability of eyewitness identifications.").

151 *See* State v. Smith, 512 A.2d 189 (Conn. 1986) (finding a FTICEI not to be so unduly suggestive as to violate due process).

152 *Dickson*, 141 A.3d at 823 ("[V]ouching consists of placing the prestige of the government behind a witness through . . . suggesting that information not presented to the jury supports the [witness'] testimony." (quoting United States v. Necoechea, 986 F.2d 1273, 1276 (9th Cir. 1993))).

153 *Id.* at 825.

154 595 A.2d 322 (Conn. 1991) (holding that it was necessary for the State to present a FTICEI at a probable cause hearing for the defendant).

155 *Dickson*, 141 A.3d at 830.

156 *Id.* at 827. *See* Perry v. New Hampshire, 565 U.S. 228 (2012).

157 *Dickson*, 141 A.3d at 828.

158 *Id.* at 832.

> Most recently, the Court blithely noted in *Perry v. New Hampshire* that "all in-court identifications" involve "some elements of suggestion," identifying this as one reason to leave the problem of unreliable eyewitness identification evidence to the states and to jurors. Yet, state courts permit courtroom displays to obscure the reliability of eyewitness identifications and to mislead the jury.

Id.; see Garrett, *supra* note 36, at 497*; see also* discussion *supra* Section I.A. (discussing the jury's inability to discern the difference between the accuracy of an identification and the witness's certainty in the identification).

prosecution informs him that the defendant has been charged with the crime and then is asked to identify who perpetrated the crime.[159] The court acknowledges the same problems with relying on eyewitness certainty as *Crayton* pronounced.[160]

The court sets forth specific procedures for prescreening FTICEIs.[161] Following *Crayton*, the burden is placed on the State to request permission for a FTICEI to occur.[162] Once the prosecution makes this motion, the trial court should only allow the identification to proceed if it determines the identity of the perpetrator is not at issue.[163] If the trial court denies the prosecution's motion, the State may request permission to conduct a non-suggestive out-of-court identification prior to trial.[164] If the State's request to perform a non-suggestive out-of-court identification is denied, the prosecution will still be able to examine the witness during trial about his observations of the perpetrator's appearance, but will not be permitted to inquire as to whether the defendant fits that description.[165] The court chose to adopt *Crayton*'s measure of admitting a FTICEI only where there is good reason, rather than adopting a *Manson* analysis as several circuit courts have done.[166]

B. *Oregon's Rejection of Due Process Protections for FTICEIs—* State v. Hickman *(2014)*

While Massachusetts and Connecticut have expanded due process protections for FTICEIs, the majority of states that have addressed the issue have found that the normal protections afforded to a defendant at

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159 *Dickson*, 141 A.3d at 832.

160 *Id.* ("Moreover, cross-examination is unlikely to expose any witness uncertainty or weakness in the testimony 'because cross-examination is far better at exposing lies than at countering sincere but mistaken beliefs.'" (quoting State v. Guilbert, 49 A.3d 705 (Conn. 2012))).

161 *Id.* at 835.

162 This requires the prosecution to file a motion *in limine*, seeking approval from the judge. *Id.*

163 *Id.* at 836.

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

Id.

164 *Id.*

165 *Id.* at 837.

166 *Id.* at 835–36.

trial provide sufficient protection.[167] In *State v. Hickman*,[168] the Supreme Court of Oregon addressed whether a FTICEI should be admissible under the Oregon Evidence Code.[169] On appeal, the court examined the FTICEI and testimony of two eyewitnesses, referred to as "D" and "N."[170] Before trial, the State did not attempt to have either of the two eyewitnesses make an out-of-court identification, nor did the State inform defense counsel that a FTICEI would occur at trial.[171] Prior to trial, D gave descriptions of the shooter but stated that she was uncertain if she could identify him.[172] Twenty-three months later, at trial, D identified the defendant for the first time.[173]

At trial, D described the shooter's appearance[174]; however, before D could make an in-court identification, defense counsel objected citing to the Fourteenth Amendment's Due Process Clause and the Oregon Evidence Code section 403.[175] The trial court overruled the defendant's objections, allowing the in-court identification to proceed.[176] Returning to the courtroom, D testified that she was ninety-five percent certain that the defendant was the shooter.[177] When N took the stand, she repeated her pretrial description of the perpetrator[178] and was also asked if she could identify the shooter in the courtroom.[179] Again, defense counsel objected but the trial court overruled the objection.[180] The defendant proceeded to offer expert testimony that an eyewitness identification occurring more than two years after such a stressful event

167 Four of the six states that have addressed the issue have held that FTICEIs do not require additional due process protections. *See* Byrd v. State, 25 A.3d 761 (Del. 2011); *see also* State v. King, 934 A.2d 556 (N.H. 2007); State v. Hickman, 330 P.3d 551, 562–64 (Or. 2014); State v. Lewis, 609 S.E.2d 515 (S.C. 2005).

168 330 P.3d 551 (Or. 2014).

169 *Id.* at 563. Note that Oregon's evidence code is completely codified—modeled after the Federal Rules of Evidence—unlike New York's common law approach to evidence. *See infra* text accompanying note 265.

170 *Hickman*, 330 P.3d at 554.

171 *Id.* at 555.

172 *Id.*

173 *Id.* at 555–56.

174 *Id.* at 556 ("According to D, the shooter was then standing 12 feet away from her and under street lighting. D described the shooter as being black, in his 20s to early 30s, stocky, tall 5' 7" to 6', and having a 'close' Afro hairstyle or braids. She also described his facial features.").

175 OR. REV. STAT. ANN. § 40.160 (West 2017) ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence."); *Hickman*, 330 P.3d at 556.

176 *Hickman*, 330 P.3d at 556.

177 *Id.*

178 *Id.* (describing the perpetrator as "a 'black male, stocky, in his mid-twenties, and wearing a do-rag.' In addition, N testified that the shooter was 5'7" tall and that his hair was about three inches long and 'nappy.'").

179 *Id.* at 557.

180 *Id.*

was inherently unreliable.[181]

The Supreme Court of Oregon analyzed the suggestiveness of these identifications. In regards to D's identification, the court intimated that D's more precise description of the perpetrator's physical appearance could have been a result of the suggestiveness of the courtroom setting.[182] The court also noted that defense counsel had no reason to expect that D would be making a FTICEI at trial, as her pretrial descriptions to police were vague, and D had not claimed to be able to identify the perpetrator prior to trial.[183] As such, defense counsel would have had no reason to believe it necessary to make a precautionary request for an out-of-court identification or another less suggestive identification procedure to test D's memory.[184] However, the court concluded that a FTICEI is not so unfairly prejudicial as to be inadmissible.[185] Moreover, since there was overwhelming DNA evidence and several positive identifications of the defendant made by other witnesses, the court held that any error in admitting the identifications of D and N was harmless.[186]

The majority of the court's opinion was based on the admissibility of the identifications under Oregon Evidence Code section 403[187]; however, the court did provide a minimal analysis under the Due Process Clause of the Fourteenth Amendment.[188] The court relied

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181 *Id.*

182 *Id.* at 570 ("After D returned to the stand following the recess, she was able for the first time to give a detailed description of the perpetrator. . . . That sudden 'improvement' in D's recollection of detail . . . permitted an inference that her in-court identification of defendant may have been influenced by the suggestiveness of the courtroom setting.").

183 *Id.*

184 *Id.*

185 *Id.* at 571 ("Finally, the inherent suggestiveness of a trial setting may be prejudicial in a general sense, but, as the trial court properly observed, that does not necessarily make a FTICEI unfairly prejudicial in the sense required for exclusion under OEC 403."). This view is in direct contradiction with studies focusing on imposter cases, whereby another person, besides the defendant, is placed behind the defense table without the knowledge of the witness. *See* Mandery, *supra* note 9, at 417 ("The imposter cases offer strong anecdotal evidence of the inherent suggestiveness of the in-court setting for identifications. . . . [I]n each instance an individual was misidentified as the defendant by a person or series of people who simply pointed to the individual seated at the defense table.").

186 *Hickman*, 330 P.3d at 571.

187 Unlike in Massachusetts or New York, where an unnecessary showup procedure is barred under a per se exclusion rule, Oregon adheres to a balancing test and has rejected a per se exclusion rule to unnecessarily suggestive eyewitness identifications.

188 *See Hickman*, 330 P.3d at 571–72 ("The United States Supreme Court has not extended constitutional protections to in-court identifications that are untainted by a prior identification resulting from unduly suggestive procedures. . . . Further, the Supreme Court has recently made clear that due process rights of defendants identified in the courtroom under suggestive circumstances are generally met through the ordinary protections in trial. . . . [W]e cannot hold that the in-court identification procedure complained of was so impermissibly suggestive as to violate defendant's due process rights." (citations omitted)).

heavily on opinions by various states and federal courts,[189] as well as on the U.S. Supreme Court case, *Perry*, to hold that a defendant's due process rights are generally limited to the ordinary protections afforded at trial.[190]

What is most interesting about *Hickman* is the court's refusal to expand the due process protections established under *Lawson*[191] to the setting of an FTICEI. *Lawson* introduced system variables into the balancing test to determine an identification's admissibility.[192] Yet, *Hickman* rejects the view that the courtroom setting operates as a system variable, similar to a police-administered showup procedure out-of-court.[193] *Lawson* is thus limited to a discrete evidentiary class, which includes eyewitness identifications that have been subject to suggestive out-of-court procedures.[194] According to *Hickman*, *Lawson* does not apply.[195]

C. *State of the Law in New York*

1. Precedent Under the New York Court of Appeals

The New York Court of Appeals has not explicitly addressed the issue of whether FTICEIs are entitled to higher due process protections; however, the court has addressed the admissibility of out-of-court identifications that are unduly suggestive.[196] In *People v. Marshall*,[197] the court held that a defendant is entitled to a formal pretrial hearing to determine the admissibility of an out-of-court identification, where the

189 *See id.* (relying on holdings from the Ninth Circuit Court of Appeals (*United States v. Domina*, 784 F.2d 1361 (9th Cir. 1986)), Delaware (*Byrd v. State*, 25 A.3d 761 (Del. 2011)), New Hampshire (*State v. King*, 156 N.H. 371, 934 A.2d 556 (2007)), South Carolina (*State v. Lewis*, 609 S.E.2d 515 (S.C. 2005)), and the United States Supreme Court (*Perry v. New Hampshire*, 565 U.S. 228 (2005))).

190 *Hickman*, 330 P.3d at 572 ("Those protections include the right to confront witnesses; the right to representation of counsel, who may expose flaws in identification testimony on cross-examination and closing argument; the right to jury instructions advising use of care in appraising identification testimony; and the requirement of proof beyond a reasonable doubt.").

191 State v. Lawson, 291 P.3d 673 (Or. 2012).

192 *See id.* at 705–10; *see* discussion *supra* Section I.C.

193 *Hickman*, 330 P.3d at 565–66.

194 *Id.*

195 *Id.* ("This court in *Lawson/James* did not intimate—let alone hold—that admission of a first time in-court eyewitness identification of a defendant that is untainted by suggestive pretrial state-administered procedures is 'unfairly prejudicial' under OEC 403 merely because it occurs in a courtroom setting where the identity of the accused is apparent to the witness.").

196 *See, e.g.*, People v. Marshall, 45 N.E.3d 954 (N.Y. 2015); People v. Adams, 423 N.E.2d 379 (N.Y. 1981).

197 *Marshall*, 45 N.E.3d 954.

defendant's identity was exposed to the witness in an unduly suggestive manner.[198] In *People v. Adams*,[199] the court addressed whether a showup procedure arranged by law enforcement was so unnecessarily suggestive, as a matter of state constitutional law, to deny a defendant due process.[200] Answering in the affirmative, the Court of Appeals reaffirmed that the state constitution provides additional protections beyond the minimum required by federal law.[201] The court's opinion emphasizes that suggestive pretrial identifications only increase the risk of a wrongful conviction and that without the State maintaining rules that protect from this, a defendant's due process rights would be merely theoretical.[202] *Adams* held that the out-of-court showup procedure was so unnecessarily suggestive as to violate due process under the state constitution and that the witness's testimony regarding such identifications should have been inadmissible at trial.[203]

In finding that the showup procedure violated due process, the court extended due process protections to a defendant challenging the admissibility of an eyewitness identification. However, the court did not establish a complete bar to prevent an eyewitness from making an identification following a showup.[204] Rather, the court adopted an "independent source" exception, allowing the witness to make a positive in-court identification of the perpetrator if the witness possessed an independent source for their identification, apart from the suggestive identification that previously took place.[205]

2. Views from the New York Appellate Courts

While the New York Court of Appeals has yet to address the inherent suggestiveness of an FTICEI, the New York Appellate Division, Second and Fourth Departments, have found them to be admissible.[206]

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198 *Id.* at 962.

199 *Adams*, 423 N.E.2d 379.

200 *Id.* at 380.

201 *Id.* at 383 ("After the Supreme Court condemned the practice of police arranged showups and established minimum standards for pretrial identifications this court found that additional protections were needed under the State Constitution."); *see also* Gordon, *supra* note 12.

202 *Adams*, 423 N.E.2d at 383–84 ("A reliable determination of guilt or innocence is the essence of a criminal trial. A defendant's right to due process would be only theoretical if it did not encompass the need to establish rules to accomplish that end.").

203 *Id.* at 384 (finding the showup to be unnecessarily suggestive as it did not occur within moments after the crime).

204 *Id.*

205 *Id.* ("Excluding evidence of a suggestive showup does not deprive the prosecutor of reliable evidence of guilt. The witness would still be permitted to identify the defendant in court if that identification is based on an independent source.").

206 People v. Jackson, 561 N.Y.S.2d 828 (App. Div. 1990), *appeal denied*, 573 N.E. 2d 583 (N.Y. 1991); People v. Alexander, 643 N.Y.S.2d 141 (App. Div. 1996), *appeal denied*, 672 N.E.2d

In *People v. Jackson*, the Second Department held that the defendant was not deprived of a fair trial when a witness identified him for the first time in-court.[207] In this case, the defendant did not inquire into other less suggestive procedures for identification; rather, the defendant proceeded to identify the weaknesses of the identification during cross-examination.[208] In the eyes of the court, the inherent suggestiveness was brought to the attention of the jury, and this was enough to satisfy due process.[209] Following *Jackson*, in *People v. Alexand*er, the Second Department once again held that the FTICEI was not so unduly suggestive that it needed to be excluded.[210] The court stated that the suggestiveness goes to the weight of the evidence to be weighed by the jury, not to the admissibility of the evidence.[211] Likewise, in *People v. Brazeau*, the New York Appellate Division, Fourth Department cited the defendant's ability to highlight the weaknesses and suggestibility of the identification during cross-examination in holding that a FTICEI was not so unduly suggestive as to be excluded.[212]

D. *Similarities Between a Showup and a FTICEI*

The Second and Fourth Departments' admission of first time in-court eyewitness identifications is contradictory to the Court of Appeals' general desire to limit the admission of suggestive eyewitness identifications, as it increases the risk of misidentification that the court sought to avoid in *Adams.*[213] Moreover, the New York appellate courts fail to understand the similarities between a showup procedure and an FTICEI.[214] In *Crayton*, the Supreme Judicial Court of Massachusetts

612 (N.Y. 1996); People v. Brazeau, 759 N.Y.S.2d 268, 271 (App. Div. 2003), *appeal denied*, 796 N.E.2d 481 (N.Y. 2003).

207 *Jackson*, 561 N.Y.S.2d at 828–29.

208 *Id.*

209 *Id.*

210 643 N.Y.S.2d 141 (App. Div. 1996), *appeal denied*, 672 N.E.2d 612 (N.Y. 1996).

211 *Id.* at 142.

212 People v. Brazeau, 759 N.Y.S.2d 268, 271 (App. Div. 2003), *appeal denied*, 795 N.E.2d 481 (N.Y. 2003) ("In cases where there has been no pretrial identification procedure and the defendant is identified in court for the first time, the defendant is not deprived of a fair trial because [the defendant] is able to explore [the] weaknesses and suggestiveness of the identification in front of the jury.").

213 *See* People v. Adams, 423 N.E.2d 379, 383–84 (N.Y. 1981) ("Permitting the prosecutor to introduce evidence of a suggestive pretrial identification can only increase the risks of convicting the innocent in cases where it has the desired effect of contributing to a conviction.").

214 *See supra* text accompanying notes 132–38 (citing *Crayon*'s analysis of the similarities between a showup and a FTICEI); Mandery, *supra* note 9, at 413 n.173 ("[I]t is true, of course, that the circumstances at trial may themselves be tantamount to a showup, and the trial court has discretion to take steps to avoid any unfairness in the in-court identification." (quoting United States v. Matthews, 20 F.3d 538, 547 (2d Cir. 1994))).

examined the similarities and differences between an out-of-court showup procedure and an FTICEI, equating the two in terms of suggestiveness.[215] In *Crayton*, the court states that a FTICEI is even more suggestive than an out-of-court showup because in a showup the eyewitness is unlikely to know how confident the police are that the suspect is the perpetrator.[216] Conversely, with an FTICEI, the eyewitness is aware that the defendant has been charged and is being tried for the crime at issue.[217] As such, an eyewitness may view the identification as a mere confirmation by the prosecutor that their investigation yielded the appropriate defendant and identify the defendant out of conformity with what is expected.[218]

III. PROPOSAL

This Note proposes that the New York Court of Appeals follow Massachusetts and Connecticut by adopting a rule of per se exclusion for FTICEIs without good reason. The New York Court of Appeals' precedent in *Adams*, barring admission of a suggestive showup identification, lends support for a per se exclusion rule with a limited exception.[219] Because a FTICEI is essentially an in-court showup, a defendant should be entitled to the same, if not greater, due process protections. As such, an FTICEI, without good reason, should be inadmissible under Article I, Section 6 of the New York State

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215 *See* Commonwealth v. Crayton, 21 N.E.3d 157, 165–70 (Mass. 2014); *id.* at 166 ("Where, as here, a prosecutor asks a witness at trial whether he or she can identify the perpetrator of the crime in the court room, and the defendant is sitting at counsel's table, the in-court identification is comparable in its suggestiveness to a showup identification.").

216 *Id.* ("At a showup that occurs within hours of a crime, the eyewitness likely knows that the police suspect the individual, but . . . the eyewitness is unlikely to know how confident the police are in their suspicion. However, where the prosecutor asks the eyewitness if the person who committed the crime is in the court room, the eyewitness knows that the defendant has been charged and is being tried for that crime. The presence of the defendant in the court room is likely to be understood by the eyewitness as confirmation that the prosecutor, as a result of the criminal investigation, believes that the defendant is the person whom the eyewitness saw commit the crime.").

217 *Id.*; *see* Mandery, *supra* note 9, at 416 ("Since the in-court identification is an extremely ambiguous experience for most witnesses, a reliance on others in a position of trust—the prosecutor—and action in conformity with the familiar—identifying the person seated at the defense table—might be expected . . . . [W]hile it is true that both pre-trial identifications and in-court identifications are ambiguous situations for the witness, the presence of jurors and the formality of the trial may create conditions under which the potential for self-persuasion is even greater.").

218 *See Crayton*, 21 N.E.3d at 166; *see also* Mandery, *supra* note 9, at 413 n.171 (noting how imposter cases offer anecdotal evidence of the inherent suggestiveness of the courtroom setting "it is to be expected that a witness would identify, as the defendant, a model sitting at the defense table").

219 *See* People v. Adams, 423 N.E.2d 379 (N.Y. 1981).

constitution.[220]

The approach taken by Oregon,[221] guaranteeing only the protections of cross-examination and presentation of expert testimony, does not provide adequate protections given the significant risk of misidentification and wrongful conviction.[222] By adopting this proposed change, the trial court would not be denying the jury access to reliable evidence, as the State would be provided with an opportunity to conduct a less suggestive out-of-court identification should the judge find that good reason is lacking.[223] A "good reason" analysis would rest on whether the identifying eyewitness has personal knowledge of the perpetrator prior to the crime at issue and whether the perpetrator's identity is even at issue in the crime.[224] This would reduce the risk of misidentification, as the eyewitness would be less likely to identify the defendant by merely guessing based on the defendant's seated location at trial.[225]

The New York Court of Appeals' holding in *Adams* provides a strong argument for finding a FTICEI inadmissible except in limited situations, as opposed to implementing a bright line rule of per se exclusion.[226] In *Adams*, the court held that while a suggestive out-of-court identification resulting from a showup procedure is inadmissible,

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220 N.Y. CONST. art. I § 6.

> No person shall be held to answer for a capital or otherwise infamous crime . . . unless on indictment of a grand jury . . . In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him or her. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he or she be compelled in any criminal case to be a witness against himself or herself . . . .

Id.

221 State v. Hickman, 330 P.3d 551 (Or. 2014).

222 *See* Mandery, *supra* note 9, at 422 ("[T]he question is why juries [as opposed to judges] are better able to perform the function of assessing reliability for in-court identifications than for pre-trial identifications. The only differences between the two cases are that, for in-court identifications, the jury is present for the identification and the opportunity for cross-examination is immediate. The presence of the jury and the possibility for cross-examination, however, are only relevant for testing the credibility of the eyewitness' belief, not the reliability of an honest belief. Juries' misperceptions of reliability persist and there is nothing in the scientific literature to suggest that they are well equipped to assess reliability." (citations omitted)).

223 *See Crayton*, 21 N.E.3d at 171 ("Where a prosecutor recognizes during trial preparation that no lineup or photographic array has been shown to an eyewitness who may be able to identify the defendant, nothing bars the prosecutor from causing such an identification procedure to be conducted out-of-court before the witness takes the stand.").

224 *See supra* text accompanying note 125.

225 *See* Garrett, *supra* note 36, at 471 ("[T]he trial setting is inherently suggestive, as well as public. While there have not been field studies of courtroom identifications, there is every reason to think that in a courtroom setting 'conformity is at its peak' since 'pressure is high and . . . judgments are made without anonymity.'" (citations omitted)).

226 *See* People v. Adams, 423 N.E.2d 379 (N.Y. 1981).

an eyewitness would still be permitted to make an in-court identification if that witness possessed an independent source for the identification.[227] While the independent source rule has been more expansive than the good reason exception,[228] *Adams* lends support for the Court of Appeals to consider specific factors that will affect the reliability of the eyewitness identification in court.[229]

A. *The Burden Should Rest with the State to Prove Good Reason Exists*

Under the framework adopted by Massachusetts and Connecticut, the State should bear the burden of filing a motion in limine to admit the FTICEI into evidence.[230] By requiring the State to file the motion, defense counsel would not be placed in the unfortunate situation presented in *State v. Hickman*,[231] in which defense counsel was reasonably unaware that multiple eyewitnesses would be making FTICEIs and thus could not move to suppress the identifications in advance.[232] Once the motion is filed, the burden would remain with the State to prove good reason exists, and that it would not be unnecessarily suggestive for the identification to be admitted at trial.[233] The motion in limine should be filed by the State prior to trial to enable the State, should it fail to meet its burden of proof, to conduct a less suggestive

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227 *Id.* at 384.

228 *See* Gordon, *supra* note 12, at 1306 n.13 ("People v. Young, 850 N.E.2d 623, 625 (N.Y. 2006) . . . holding that the witness had a basis independent from the suggestive pretrial identification procedure when the witness testified that although the perpetrator wore a mask during the crime, she retained a mental image of the defendant's eyes."). For a critique of the independent source rule, see Garrett, *supra* note 36, at 476–89.

229 In this case, the relevant factors to be analyzed would be the witness's personal knowledge of the perpetrator and whether or not the perpetrator's identity is at issue in the case.

230 Commonwealth v. Crayton, 21 N.E.3d 157, 171–72 (Mass. 2014) ("If the burden were on the defendant to move to suppress an identification in these circumstances, a defendant would need to file motions to suppress the in-court identification of witnesses whom the prosecutor might not intend to ask to make such an identification. To avoid the filing of needless motions, we place the burden on the prosecutor to move in limine to admit the in-court identification of the defendant by a witness where there has been no out-of-court identification.").

231 State v. Hickman, 330 P.3d 551 (Or. 2014).

232 *See Crayton*, 21 N.E.3d at 171–72; *id.* at 747 ("[D]efendant had no reason to expect that D would be asked to make an in-court identification . . . [so] defense counsel had little reason to make a precautionary request for pretrial or in-trial steps to test D's recollection with a fairly constructed and administered identification procedure.").

233 The State's burden to file the motion *in limine* and burden of proof of good reason deviates slightly from *Commonwealth v. Crayton*, as the Supreme Judicial Court of Massachusetts shifted the burden of proof back to defense counsel to prove good reason was not present. *See Crayton*, 21 N.E.3d at 171. Here, no preliminary showing of suggestiveness need be proved by the defendant prior to the pretrial hearing being held, given the inherent suggestiveness of a FTICEI.

out-of-court identification proceeding.[234] If these procedures are not followed, the State will be barred from conducting an FTICEI.

Requiring the State to file the motion prior to the commencement of trial would also seem to follow in the spirit of section 710.30 of the New York Criminal Procedure Law (N.Y. C.P.L).[235] Section 710.30 requires that the State provide notice to the defendant of its intention to offer eyewitness testimony, prior to trial.[236] This section also requires that the State specify the evidence intended to be offered.[237] While this section specifically relates to an eyewitness's out-of-court identification,[238] the purpose of the law[239] would be abrogated if notice were not required prior to conducting a FTICEI. By extending N.Y. C.P.L. § 710.30 to the context of a FTICEI, notice would be required within fifteen days after arraignment and before trial, in order to provide defense counsel with a reasonable opportunity to move to suppress the identification.[240]

New York's independent source rule also lends support for the State to bear the burden of proof in admitting the FTICEI.[241] Under an independent source analysis, the defense bears the burden of showing undue suggestiveness, but once suggestiveness is shown, the State bears the burden of proving an independent source exists.[242] However, with an FTICEI, no proof of suggestiveness need be shown.[243] As such, the

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234 *See id.* ("Although we impose no restrictions on when such a motion must be filed, a prosecutor would be wise to file it in advance of trial, because, if the defendant were to prevail in suppressing the in-court identification as unnecessarily suggestive, the Commonwealth would still have time, if it chose, to conduct a less suggestive out-of-court identification procedure.").

235 N.Y. CRIM. PROC. LAW § 710.30 (McKinney 2016) ("1. Whenever the people intend to offer at a trial . . . (b) testimony regarding an observation of the defendant either at the time or place of the commission of the offense or upon some other occasion relevant to the case, to be given by a witness who has previously identified him as such, they must serve upon the defendant a notice of such intention, specifying the evidence intended to be offered 2. Such notice must be served within fifteen days after arraignment and before trial, and upon such service the defendant must be accorded reasonable opportunity to move before trial, pursuant to subdivision one of section 710.40, to suppress the specified evidence.").

236 *Id.*

237 *Id.*

238 *Id.*

239 *Id.*, *construed in* Peter Preiser, *Practice Commentaries to McKinney's CPL* ("[The categories] were selected by legislation to cover situations where it was likely that defendant might not be aware that the government had acquired potentially suppressible evidence for use at trial.").

240 *Id.*

241 *See* People v. Marshall, 45 N.E.3d 954, 962 (N.Y. 2015) ("If the court finds the procedure to have been unduly suggestive, and the People have failed to establish by clear and convincing evidence the existence of an independent source for the identification, the motion . . . [to preclude will be] granted.").

242 *Id.*

243 This is so because a FTICEI is inherently suggestive and equivalent to an out-of-court showup procedure. *See* sources cited *supra* note 116 (explaining the similarities between

burden of showing good cause should rest with the State under a clear-and-convincing-evidence standard.[244]

B. *Implementation of Pre-Trial Hearings*

Following the filing of the motion in limine, the trial judge would conduct a pretrial hearing to determine whether good reason exists to admit the FTICEI.[245] By imposing this additional judicial safeguard, the judge would act as a gatekeeper to prevent the introduction of an unreliable and suggestive identification into evidence.[246] While the New York appellate court in *Alexander* stated that the suggestiveness of a FTICEI should go to the weight of the evidence, rather than its admissibility, this approach fails to appreciate the jury's inability to evaluate reliability.[247] If a witness is credible, in that they are authentic in their beliefs and are not lying, this does not necessarily mean that their identification is correct.[248] Research confirms that jurors are unable to appreciate how suggestive identification procedures can influence whether a witness makes a positive identification.[249] Isolating the jury from this hearing would further limit the suggestiveness of the identification and reduce prejudice to the defendant.

C. *Applying the Proposal to New York Appellate Case Law*

Applying this proposal to *People v. Alexander*[250] would have resulted in an exclusion of the in-court identification. In *Alexander*, the defendant was convicted of multiple counts of burglary, rape, sexual abuse, assault, and unlawful imprisonment.[251] During the out-of-court identification proceedings, the victim was unable to make a positive identification of the defendant; however, at trial, the court permitted the

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unnecessarily suggestive out-of-court showup procedures and a FTICEI).

244 *See* source cited *supra* note 241.

245 Following the procedures set forth in *State v. Dickson*. *See* State v. Dickson, 141 A.3d 810, 835–36 (Conn. 2016), *cert denied*, 137 S. Ct. 2263 (2017).

246 Thompson, *Judicial Gatekeeping*, *supra* note 116, at 336 ("Pretrial reliability hearings would transform the judicial role from one of passively admitting what may be patently unreliable evidence to one that involves actively scrutinizing the process by which the police have generated the witness testimony.").

247 *Id.*

248 *Id.* ("[E]yewitnesses who misidentify an innocent suspect and police officers who testify to a suspect's false confession usually give truthful testimony. These witnesses actually believe that the defendant is guilty. The witnesses are 'credible' in that they are not lying, but their testimony is nonetheless incorrect.").

249 *Id.*

250 643 N.Y.S.2d 141 (N.Y. App. Div. 1996).

251 *Id.* at 141.

victim to make a FTICEI of the defendant.[252] Had a per se exclusion rule been in effect, the victim's in-court identification would have been inadmissible, because had a pretrial hearing been held, none of the good cause exceptions[253] would likely have been allowed in this unreliable identification.[254]

Applying this proposal to the facts of *People v. Brazeau*[255] likewise would have resulted in an exclusion of the in-court identification. In *Brazeau*, the defendant was convicted of robbery and assault following a fight at a local bar.[256] The victim called the police four days after the incident occurred after learning the name of the man who had been a substitute pool player at the bar on the night of the assault—informing the police that Brazeau was the man who attacked him.[257] The victim was never asked to participate in an out-of-court lineup or photo array procedure, yet subsequently identified Brazeau as the perpetrator for the first time at trial.[258] Despite timely filed requests from the defense to test the reliability of the identification by seating the defendant in a different position within the courtroom or having another person join him at the defense table, the trial court rejected these alternative measures.[259] Because the victim did not have personal knowledge of the defendant and the defendant's identity was at issue in the case, under a per se rule of exclusion, the FTICEI should have been inadmissible.[260] However, applying a per se rule of exclusion would not have prevented the prosecution from obtaining an admissible, non-suggestive out-of-court identification prior to trial.[261]

D. *Counterarguments*

Some may argue that a change in evidence law should be undertaken by the state legislature, rather than relying on the Court of Appeals to intervene. While this argument is valid, since the New York

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252 *Id.*

253 *See supra* text accompanying note 125 (explaining the three situations where good reason would exist).

254 The facts of *Alexander* suggest that the victim did not have personal knowledge as to who the perpetrator was. Furthermore, the inability of the witness to identify the defendant as the perpetrator in the conducted out-of-court identification procedures highlights how problematic it is to allow this FTICEI to occur.

255 759 N.Y.S.2d 268 (N.Y. App. Div. 1994).

256 *See* Brief for Appellant at 9, 29, People v. Brazeau, 759 N.Y.S.2d 268 (N.Y. App. Div. 1994) (No. 565, 00-02346), 2003 WL 25658739, at *9, *29.

257 *Id.* at *6. Neither the defendant, nor the victim, claimed to have ever seen each other prior to the night of the incident at the bar. *Id.* at *29.

258 *Id.*

259 *Id.* at *30–31.

260 *See supra* text accompanying note 125 (discussing good reason exceptions).

261 *See supra* text accompanying note 234.

State legislature has the power to implement new rules of evidence,[262] the New York Court of Appeals has traditionally taken an active role in determining identification procedures.[263] This is in part due to the fact that New York's rules of evidence are not completely codified.[264] Unlike states like Oregon, whose rules of evidence mirror the Federal Rules of Evidence,[265] New York State has yet to fully codify its evidentiary laws—instead relying on a combination of statutes and court opinions.[266] New York's long battle against codification[267] suggests that the Court of Appeals may be the most capable party to address the admissibility of first time in-court eyewitness identifications and implement the necessary due process protections.[268]

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262 57 N.Y. Jur. 2d Evidence and Witnesses § 4 (2016)

> It is well settled that the legislature of a state has the power to prescribe new, and alter existing, rules of evidence or to prescribe methods of proof. There is no vested right in a rule of evidence that places it beyond the power of the legislature to modify it. Such matters concern the internal policy of the State, over which the legislative department necessarily has authority, limited only by the constitutional guaranties of due process of law and equal protection of the law. The legislature may change the rules of evidence without derogation to a party's constitutional rights. It may cast the burden of proof upon a party; may make certain acts prima facie evidence of facts if the acts, by any reasonable intendment, bear upon or tend to establish the facts; or provide that the courts shall take judicial notice of the laws of a sister state.

Id. (citations omitted).

263 *See* People v. Marshall, 45 N.E.3d 954, 962–63 (N.Y. 2015) (holding that a court must hold a pretrial hearing to determine whether a State-arranged out-of-court identification procedure exposed the defendant's identity to the identifying witness in an unduly suggestive manner, regardless whether the identification was being used merely for the purpose of trial preparation).

264 *See infra* note 266.

265 *See* State v. Hickman, 330 P.3d 551 (Or. 2014) (analyzing claims of due process in relation to its rules of evidence).

266 4 N.Y. PRAC., COM. LITIG. IN NEW YORK STATE COURTS § 45:2 (4th ed. 2016) ("Unlike the Federal Rules of Evidence, in New York there is no comprehensive codification of the law of evidence applicable in civil proceedings. . . . In essence, therefore, New York is a common law jurisdiction with respect to evidence, except to the limited albeit sometimes important extent it has been supplemented by statute. . . . [T]he common law of evidence in New York is sometimes a matter of the customary practice followed in the various areas of the state or the result of the preferences or proclivities of particular trial judges."). While this comment pertains to civil practice in New York, the same is true for criminal practice in the state. *See* 33 N.Y. Jur. 2d Criminal Law: Procedure § 2049 (2d ed. 2017) ("The rules governing judicial notice of matters of law are set forth in the Civil Practice Law and Rules.").

267 The proposed code of evidence has yet to be adopted by the state legislature. *See* 4 CRIM. PROC. IN NEW YORK § 74.14 (2d ed. 2016); Barbara C. Salken, *Symposium: Comparing New York and Federal Evidence Law a Brief Look at New York's Efforts to Codify Its Law of Evidence*, 16 PACE L. REV. 237, 240 (1997) ("New York's [evidence] law is dispersed throughout both judicial decisions and statutes. . . .[E]ven though New York has a significant amount of its law already in statutes, these provisions are widely scattered over 9000 frequently unrelated statutory provisions . . . .[T]he latest proposal is an accurate codification of New York's common law. . . . Unfortunately, . . . [t]his last proposal has joined its ancestors for a long rest in the Codes Committee, with no expectation that it will ever see the light of day." (citations omitted)).

268 Such protections, as mentioned above, would include a per se exclusion rule with a good

Additionally, it may be argued that implementing a system of pretrial hearings would lead to extensive administrative costs. However, because situations with good reason would be incredibly limited,[269] there would be a disincentive for the State to conduct a FTICEI or to rely on the pretrial hearings to acquire an admissible eyewitness identification.[270] This will lead to more reliable identifications acquired through less suggestive means, decreasing the risk of wrongful convictions and misidentifications.[271] In the alternative, the Court of Appeals could implement a system that would require defense counsel to file a formal objection to the State's motion within a certain timeframe, otherwise the defendant would waive its objection, and the FTICEI could proceed without a pretrial hearing. This would operate similarly to a notice-and-demand statute.[272] While this process would arguably reduce the number of pretrial hearings being held,[273] given the weight of the constitutional due process violation, it would be problematic for these types of identifications to occur merely because of a procedural error by defense counsel.

If pretrial hearings are not implemented and cross-examination cannot adequately challenge the suggestiveness of an FTICEI,[274] there

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reason exception.

269 Good reason would only exist where the perpetrator's identity is not at issue in the case (such as an incident of domestic violence), where the witness to the crime personally knows the perpetrator and can easily identify them or where the arresting police officer is also a witness to the crime and is merely confirming the person they arrested is the person being charged for the crime at issue. *See* Commmonwealth v. Crayton, 21 N.E.3d 157, 170 (Mass. 2014) (explaining the three situations where good reason would exist).

270 Shifting the burden to the State to prove good reason exists follows the approach taken by *State v. Lawson* in an attempt to promote best practices by the police and prosecution. *See* State v. Lawson, 291 P.3d 673 (Or. 2012). Additionally, while this would lead to some additional administrative costs, in reality, there are likely to be few hearings because the prosecution will know it will be unlikely to win them.

271 As a result, the prosecution will either drop this identification from its case, or it will conduct an out-of-court identification procedure long before trial to ensure there is an admissible identification. This would essentially move the "cost" to an earlier point in the case, as the State seeks to acquire these less suggestive, and more easily admissible, identifications.

272 *See, e.g.*, TEX. CODE CRIM. PROC. ANN. § 38.41(4) (2013) ("Not later than the 20th day before the trial begins in a proceeding in which a certificate of analysis under this article is to be introduced, the certificate must be filed with the clerk of the court and a copy must be provided . . . to the opposing party. The certificate is not admissible under Section 1 if, not later than the 10th day before the trial begins, the opposing party files a written objection to the use of the certificate with the clerk of the court and provides a copy of the objection . . . to the offering party.").

273 Because a pretrial hearing would only occur upon objection by defense counsel, failure to challenge the identification would lead to a waiver of the objection and its subsequent admission.

274 *See* Jules Epstein, *In-Court Eyewitness Identifications—What Process Is "Due" Process?*, VOICES AT TEMPLE LAW (Aug. 5, 2016), https://www2.law.temple.edu/voices/court-eyewitness-identifications-process-due-process ("The accepted practice of in-court eyewitness identifications can influence juries in ways that cross-examination, expert testimony, or jury instructions are unable to counter effectively. . . . [T]he passage of time since the initial

are only a few other methods that can be employed by defense counsel to highlight the suggestive nature and unreliability of these identifications. Defense counsel could be permitted to place the defendant in another position within the courtroom; however, several courts have held it to be an ethics violation for defense counsel to attempt to deceive the witness and the court if permission is not granted by the trial judge.[275] Yet, *Brazeau* provides an excellent example of the deficiencies of leaving this issue up to the trial judge's discretion.[276] If alternative methods, which challenge the idea that the witness can merely point to the individual behind the defense table without much thought, are not allowed, defense counsel will not be adequately able to defend against a persuasive, yet unreliable, identification.[277] Requiring a pretrial hearing to determine the eyewitness's ability to identify the defendant would provide this additional safeguard without requiring an attorney to violate ethics rules or be subject to criminal contempt in

identification may mean that a courtroom identification is a less accurate reflection of an eyewitness' memory . . . The confidence of an eyewitness may increase by the time of the trial as a result of learning more information about the case, participating in trial preparation, and experiencing the pressures of being placed on the stand . . . An identification of the kind dealt with in this report typically should not occur for the first time in the courtroom." (quoting the NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMY OF SCIENCES 2014 REPORT)); *see also* United States v. Wade, 388 U.S. 218, 235 (1967) ("And even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability.").

275 *See* People v. Simac, 641 N.E.2d 416 (Ill. 1994) (upholding a criminal contempt conviction of a defense attorney who had a clerical worker sit at the defense table while the defendant was seated in the back of the courtroom); *see also* United States v. Sabater, 830 F.2d 7, 9 (2d Cir. 1987) (finding an attorney's substitution of another person behind the defense table to be a violation of the Model Rules of Professional Conduct); Mandery, *supra* note 9, at 413 ("Though the in-court impostor cases are a small group, they are significant for at least two reasons. First, they call into question the sincerity of placing substance before process in evaluating ordinary identifications. Second, they offer useful anecdotal evidence of the inherent suggestiveness of the courtroom setting.").

276 *See* text accompanying *supra* note 259. The trial judge's refusal to allow the defendant to implement these no-cost protections prevented the defendant from being able to challenge the in-court identification in a meaningful way. If this protection is left to the discretion of the trial judge, the due process protections afforded to each defendant could vary greatly, as certain judges would be more apt to allow defense counsel to employ these techniques.

277 *See* Mandery, *supra* note 9, at 409–10 ("While a trial court's decision to approve or reject an application for an alternate in-court identification procedure is ordinarily reviewed for abuse of discretion and the government is under no obligation to take steps to ensure that an in-court identification is not suggestive, defense attorneys are held to a stricter standard of conduct. The focus in cases where an imposter is substituted for the defendant, has ordinarily been on the impropriety of the attorney's conduct, and not on the unreliability of the identification. This is a double standard since in the ordinary cases it is the reliability of the identification, rather than the procedure by which it was generated, that is relevant."); *id.* at 412 n.162 ("Compare United States v. Rundell, 858 F.2d 425, 426–27 (8th Cir. 1988) (finding a suggestive in-court identification permissible on the basis of its reliability) with Sabater, 830 F.2d at 9 (referencing possible ethical violations arising from a defense attorney's conduct with respect to an in-court identification of the defendant).").

order to prevent the suggestive identification from proceeding.[278]

CONCLUSION

While many states have held that FTICEIs are not so inherently suggestive as to require additional due process protections, Massachusetts and Connecticut have made groundbreaking reforms to challenge the majority view.[279] Both states highlight how normal trial procedures, such as cross-examination of an identifying witness, are not enough to combat the suggestive nature of a first time in-court eyewitness identification.[280] This is in part due to the fact that the suggestiveness of an identification procedure can create false reports of certainty by the witness.[281] Moreover, the witness's feelings of certainty in their identification during a suggestive procedure do not have a high correlation to the actual accuracy of the identification.[282] If the harm that we seek to avoid is misidentification, additional protections are necessary to insulate the identification from suggestive factors. Implementing pretrial hearings to determine the admissibility of FTICEIs in New York, and requiring the prosecution to bear both the burden of filing the motion in limine and burden of proof of good cause, will promote best practices to ensure against misidentifications and wrongful convictions.[283]

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278 *See* N.Y. RULES OF PROF'L CONDUCT § 8.4(c) (McKinney 2017) ("A lawyer . . . shall not . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."); *id.* at § 1.0(I) (defining fraud as "failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another"). If an attorney fails to disclose to the court that the defendant is seated elsewhere, the attorney would be engaging in misrepresentation to the judge, jury, opposing counsel, and the witness. Yet, if the trial court denies the request to seat defendant elsewhere, there are few other options for a defense attorney to advance.

279 *See* State v. Dickson, 141 A.3d 810, 817 (Conn. 2016); Commonwealth v. Crayton, 21 N.E.3d 157, 169 (Mass. 2014).

280 *See supra* text accompanying note 41.

281 *See supra* text accompanying notes 50–54.

282 *See supra* text accompanying notes 50–54.

283 *See* discussion *supra* Part III.