

## NOTE

# Picture Perfect: Reforming Law Enforcement Use of Image Editing in Eyewitness Identification

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### ABSTRACT

*Eyewitness identification is a notoriously unreliable form of evidence in criminal trials, yet juries tend to accord significant weight to the testimony of eyewitnesses. This concern is at the forefront of modern efforts to reform eyewitness identification procedure and reduce the risk of misidentification and wrongful conviction. The U.S. Supreme Court has historically recognized limited constitutional protections against unnecessarily suggestive eyewitness identification procedures, such as the use of photo lineups where the suspect's photo clearly stands out to the witness. This poses a challenge for law enforcement when a suspect has uniquely identifying physical characteristics, and similar filler photos are impractical or impossible to obtain. Law enforcement agencies increasingly rely on modern tools like image editing software to ensure uniformity across photo lineups. Many agencies now use image editing programs to add, edit, or remove identifying physical characteristics from a suspect's photo. This can increase the risk of misidentification, particularly when the edits are made to better match a description of the culprit provided by a witness. Because existing law does not sufficiently regulate the use of image editing software in photo-based identification procedures, this Note proposes model language for state legislatures to adopt in a statute prohibiting the practice of making material edits to a suspect's photo for use in eyewitness identification.*

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## TABLE OF CONTENTS

INTRODUCTION .....	430
I. EYEWITNESS IDENTIFICATION AND REFORM EFFORTS ..	434
A. <i>Eyewitness Identification Evidence</i> .....	434
B. <i>Efforts at Reform</i> .....	435
II. CONSTITUTIONALITY OF EYEWITNESS IDENTIFICATION EVIDENCE .....	439
A. <i>Wade, Gilbert, and Stovall: The Origin of the Constitutional Right to Reliable Eyewitness Identification</i> .....	439
B. <i>Reliability and the Biggers Factors</i> .....	443
C. <i>Image Editing and Eyewitness Identification: A Response to Due Process Concerns</i> .....	446
III. STATE STATUTORY SOLUTION .....	453
A. <i>Proposed Statute Governing Image Editing</i> .....	453
B. <i>Alternative Approaches</i> .....	455
C. <i>Application of the Statutory Ban on Editing a Suspect's Photo</i> .....	457
CONCLUSION .....	459

## INTRODUCTION

In early April 2017, a serial robber was targeting banks and credit unions in Portland, Oregon.<sup>1</sup> Witnesses gave varying descriptions of the culprit, but generally described him as a black man with a medium build, light to medium complexion, average or above average height, and in his thirties to late forties.<sup>2</sup> When police released surveillance images to the media, an anonymous informant called and implicated Tyrone Lamont Allen as the culprit.<sup>3</sup> Allen fit most of the general physical description but had several prominent tattoos covering his face and head, and none of the bank tellers reported seeing facial tattoos on the culprit.<sup>4</sup>

Allen's tattoos created a challenge for the Portland Police Bureau in developing a photo array for the eyewitnesses. Because none of the tellers had reported seeing facial tattoos on the culprit, police were

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1 United States v. Allen, 416 F. Supp. 3d 1108, 1110–11 (D. Or. 2019).

2 *Id.*

3 Government's Response to Defendant's Motion to Suppress Identification Evidence at 7, *Allen*, 416 F. Supp. 3d 1108 (No. 3:18-cr-00072).

4 *Allen*, 416 F. Supp. 3d at 1111. Consistent with other articles on the topic, this Note uses the term "culprit" to refer to the individual responsible for the offense and the term "suspect" to refer to the individual whose photo is used in the lineup. See, e.g., Nicholas A. Kahn-Fogel, *The Promises and Pitfalls of State Eyewitness Identification Reforms*, 104 Ky. L.J. 99, 112 (2016).

concerned that a photo lineup including individuals with tattoos would increase the risk of misidentification.<sup>5</sup> Alternatively, including Allen’s photo alongside filler photos without tattoos risked distinguishing his photo and suggesting to witnesses that he was the culprit, potentially implicating his right to due process.<sup>6</sup> With these concerns in mind, the Portland police department had a technician use photo editing software to remove Allen’s facial tattoos by sampling his nearby skin tone and using it to “paint” over them, resulting in the edited photo below.<sup>7</sup> When presented with a photo array including the edited photo of Allen, three of the witnesses identified him as the culprit.<sup>8</sup>

FIGURE 1. UNEDITED PHOTO (LEFT) vs. EDITED LINEUP PHOTO (RIGHT)<sup>9</sup>



Prior to trial, Allen filed a motion to suppress the identification, arguing that it violated his right to due process because the edited photo was unnecessarily suggestive and created a substantial risk of misidentification.<sup>10</sup> The district court rejected his argument, finding

<sup>5</sup> See Government’s Response to Defendant’s Motion to Suppress Identification Evidence, *supra* note 3, at 13.

<sup>6</sup> See *infra* Part II.

<sup>7</sup> See *Allen*, 416 F. Supp. 3d at 1111.

<sup>8</sup> *Id.* at 1112.

<sup>9</sup> These photos have been enhanced and converted to black and white for printing purposes. The original photos can be found at Nicholas Bogel-Burroughs, *The Police Photoshopped His Mug Shot for a Lineup. He’s Not the Only One.*, N.Y. TIMES (Aug. 24, 2019), <https://www.nytimes.com/2019/08/24/us/police-photoshop-tattoos.html> [<https://perma.cc/2BH9-HNJS>].

<sup>10</sup> Motion to Suppress Identification Evidence and Memorandum in Support at 5, *Allen*, 416 F. Supp. 3d 1108 (No. 3:18-cr-00072).

that the identification was not unnecessarily suggestive and that its reliability is an issue for the jury.<sup>11</sup> The court also acknowledged, however, the novelty of the issue before it and expressed concern about the potential scope of police conduct.<sup>12</sup>

Although the use of image editing software in eyewitness identification procedure is relatively new,<sup>13</sup> general concerns about eyewitness reliability and misidentification have frequently factored into modern debates about criminal justice reform. Eyewitness misidentification is the primary contributing factor behind wrongful convictions in the United States.<sup>14</sup> Of the 375 people exonerated by DNA testing since 1989, sixty-nine percent of their cases involved eyewitness misidentification.<sup>15</sup> Among the many consequences of a wrongful conviction, misidentification means an innocent person is forced to suffer criminal penalties while a guilty person avoids accountability—and may be free to reoffend.<sup>16</sup>

Eyewitness misidentification plays a prominent role in wrongful convictions because of the unique relationship between the inherent unreliability of eyewitness identification evidence and the weight that juries nonetheless tend to afford it. Although eyewitness identification has long been recognized as a particularly unreliable form of evidence,<sup>17</sup> it is nevertheless uniquely persuasive for jurors.<sup>18</sup> For these reasons, the U.S. Supreme Court has recognized that the Due Process Clauses of the Fifth and Fourteenth Amendments mandate certain minimum requirements to reduce the risk of suggestion and unreliability inherent in eyewitness identification procedure.<sup>19</sup>

When a suspect has uniquely identifying physical characteristics that would make them stand out in an ordinary photo lineup, due process may require that law enforcement take affirmative steps to en-

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<sup>11</sup> *Allen*, 416 F. Supp. 3d at 1114.

<sup>12</sup> *See id.* at 1113–14.

<sup>13</sup> *See Mulazim v. Commonwealth*, 600 S.W.3d 183, 191 (Ky. 2020).

<sup>14</sup> *Eyewitness Identification Reform*, INNOCENCE PROJECT, <https://www.innocenceproject.org/eyewitness-identification-reform/> [<https://perma.cc/W9M6-L7JP>].

<sup>15</sup> *DNA Exonerations in the United States*, INNOCENCE PROJECT, <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/> [<https://perma.cc/2U33-RGYZ>]. Over fifty percent of these wrongful convictions involved misidentification using a photo array. *Id.*

<sup>16</sup> *See Commonwealth v. Walker*, 92 A.3d 766, 779–80 (Pa. 2014).

<sup>17</sup> *See Watkins v. Sowders*, 449 U.S. 341, 350 (1981) (Brennan, J., dissenting).

<sup>18</sup> *See* Steven E. Holtshouser, Note, *Eyewitness Identification Testimony and the Need for Cautionary Jury Instructions in Criminal Cases*, 60 WASH. U. L.Q. 1387, 1391 (1983); *see also State v. Copeland*, 226 S.W.3d 287, 299–300 (Tenn. 2007) (listing empirical studies indicating that jurors are generally insensitive to the factors affecting eyewitness identification reliability).

<sup>19</sup> *See Stovall v. Denno*, 388 U.S. 293, 301–02 (1967).

sure that the eyewitness identification is nevertheless reliable. To ensure uniformity across photo lineups, the most common form of eyewitness identification procedure in modern use,<sup>20</sup> law enforcement agencies increasingly rely on digital tools like image editing software.<sup>21</sup> These practices vary significantly by jurisdiction—often governed solely by internal agency policies—and may permit editing of the suspect’s photo, the filler photos, or both.<sup>22</sup>

Despite its intended goal of increasing eyewitness identification reliability, use of image editing software in eyewitness identification may actually increase the risk of irreparable misidentification, particularly when edits are made to the suspect’s photo. When law enforcement agencies edit a suspect’s photo to match the description of the culprit, a subsequent positive identification is more likely, independent of any change in the identification’s reliability, and witness confidence is bolstered accordingly.<sup>23</sup> Such identifications may even implicate a defendant’s right to due process—the very consideration that often leads to use of image editing—but current due process doctrine does not sufficiently address these concerns.<sup>24</sup>

Because eyewitness identification is inherently unreliable and edits to a suspect’s photograph risk increasing the danger of misidentification, states should bar this practice except under limited circumstances. This Note proposes model language for a statutory prohibition on editing a suspect’s photo for use in photo-based identification procedures. The proposed statute would bar “material” edits of a suspect’s photo, primarily defined as edits that add, remove, alter, or obscure a suspect’s physical characteristics. This Note does not advocate, however, prohibiting the use of image editing in the development of photo arrays. The model language applies only to edits of a suspect’s photo, leaving law enforcement agencies free to edit filler photos. The proposed statute further bars only edits deemed “material,” exempting general edits to the composition of photos or use of strategic markers when necessary to ensure uniformity across a photo lineup.

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20 POLICE EXEC. RSCH. F., A NATIONAL SURVEY OF EYEWITNESS IDENTIFICATION PROCEDURES IN LAW ENFORCEMENT AGENCIES, at viii (2014).

21 See Bogel-Burroughs, *supra* note 9.

22 See *id.*

23 See Motion to Suppress Identification Evidence and Memorandum in Support, *supra* note 10, at 5–7; Thomas D. Albright, *Why Eyewitnesses Fail*, 114 PNAS 7758, 7763 (2017).

24 See *United States v. Allen*, 416 F. Supp. 3d 1108, 1113–14 (D. Or. 2019); *Mulazim v. Commonwealth*, 600 S.W.3d 183, 190 (Ky. 2020).

This Note contributes to existing legal scholarship on eyewitness identification by providing the first examination of the use of image editing software in development of photo-based identification materials and proposing limitations on existing practices. Part I provides background on eyewitness identification procedure and efforts at reform. Part II details the constitutional considerations guiding eyewitness identification procedure and explores how these considerations contribute to the use of image editing software in development of photo lineups. Part III explains the proposed statutory solution and addresses the limitations of alternative proposals.

## I. EYEWITNESS IDENTIFICATION AND REFORM EFFORTS

### A. *Eyewitness Identification Evidence*

Despite critiques of its reliability, eyewitness identification is one of the most powerful evidentiary tools available to law enforcement and prosecutors. The policies that govern administration of eyewitness identification procedure vary by jurisdiction and circumstance, but typically they fall into one of two categories: photographic or in-person identification.<sup>25</sup> These procedures are further divided into subcategories based on the number of participants and the method of presentation to the witness.<sup>26</sup> The most widely used procedure in law enforcement eyewitness identification is the photo lineup.<sup>27</sup> In a photo lineup, law enforcement officers present multiple photos to a witness for identification.<sup>28</sup> The lineup normally contains a single suspect's photo and at least five nonsuspect—or “filler”—photos, which are often selected from a database that is filtered to include individuals with physical characteristics that are similar to those of the suspect.<sup>29</sup> The lineup is presented to the witness either all at once—a “simultaneous” presentation—or individually—a “sequential” presentation.<sup>30</sup>

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<sup>25</sup> See NAT'L RSCH. COUNCIL, IDENTIFYING THE CULPRIT 28–29 (2014). The scope of this Note and its proposed solution are limited to the use of photograph-based procedures, including photo lineups, mug books, year books, or single-photo identifications. It does not address the use of in-person identification procedures including lineups and showups, which are not subject to the same concerns about image editing. See *id.* at 25–28.

<sup>26</sup> See *id.* at 28–29.

<sup>27</sup> See POLICE EXEC. RSCH. F., *supra* note 20, at viii (finding that 94.1% of law enforcement agencies use photo lineups, with the second most common procedure being showups at 61.8%).

<sup>28</sup> See NAT'L RSCH. COUNCIL, *supra* note 25, at 23.

<sup>29</sup> See *id.* at 23–24.

<sup>30</sup> See *id.*

The reliability of eyewitness identification is affected by many variables, some within the control of law enforcement and some beyond it. These variables are typically divided into one of two categories: (1) system variables, which are those that are subject to law enforcement control; and (2) estimator variables, which are specific to the witness, culprit, and circumstances of the crime.<sup>31</sup> System variables generally include factors related to the administration of eyewitness identification procedure, such as the method used to display the photos, use of witness instructions, documentation, and inadvertent cues by the administrator.<sup>32</sup> Estimator variables include factors like the lighting during the crime, the presence of a weapon, the race of the culprit, and the stress of the witness.<sup>33</sup> Because system variables are within the control of law enforcement agencies, they have largely been the subject of reform efforts to improve eyewitness accuracy and minimize the risk of misidentification.

### B. Efforts at Reform

Eyewitness identification procedure is governed by several sources of federal and state law. At the federal level, a defendant's right to due process under the Fifth and Fourteenth Amendments of the U.S. Constitution is implicated when a pretrial identification is secured through unnecessarily suggestive police procedure.<sup>34</sup> Although Congress has never enacted comprehensive national legislation governing eyewitness identification procedure, the Department of Justice ("DOJ") has issued guidelines for federal law enforcement agencies.<sup>35</sup> Many state statutes and regulations govern eyewitness identification procedure for state law enforcement agencies or defer authority to local agencies to promulgate their own policies.<sup>36</sup> Some state courts have implemented judicially created standards for eyewitness identifi-

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<sup>31</sup> Brian L. Cutler, Ph.D., *A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy*, 4 *CARDOZO PUB. L. POL'Y & ETHICS J.* 327, 327–28 (2006).

<sup>32</sup> See NAT'L RSCH. COUNCIL, *supra* note 25, at 74–75.

<sup>33</sup> See *id.* at 74. Although harder to measure than system variables, these factors can also impact the reliability of an identification. For example, studies have found that the accuracy of a witness's identification decreases when the culprit used a weapon ("weapon focus"), when the culprit was a different race than the witness ("own-race bias"), and when the witness was experiencing high levels of stress and fear. *Id.* at 92–97.

<sup>34</sup> See *infra* Part II.

<sup>35</sup> Memorandum from Sally Q. Yates, Deputy Att'y Gen., U.S. Dep't of Just., to Heads of Dep't Law Enf't Components & All Dep't Prosecutors (Jan. 6, 2017).

<sup>36</sup> See, e.g., N.C. GEN. STAT. § 15A-284.52 (2019); W. VA. CODE § 62-1E-1 to -2 (2020); MD. CODE ANN., PUBLIC SAFETY § 3-506 (LexisNexis 2019); WIS. STAT. § 175.50 (2020).

cation procedure, largely through interpretation of state constitutions and rules of evidence.<sup>37</sup>

Several states have recently enacted statutory reforms of eyewitness identification procedure. One of the most common reforms is a requirement that the photo lineup be conducted “double-blind,” where neither the administrator nor the witness knows who the suspect is or whether the suspect’s photo is present in the lineup.<sup>38</sup> Double-blind administration minimizes the risk that the administrator will give subtle, inadvertent cues to the witness about which photo belongs to the suspect.<sup>39</sup> Many states have also implemented standards governing how the photos are presented to a witness. Although there is insufficient data to determine whether simultaneous or sequential presentation better promotes identification accuracy,<sup>40</sup> modern eyewitness identification reform has skewed towards the use of sequential presentation.<sup>41</sup> Finally, several states have adopted reforms requiring the use of witness instructions<sup>42</sup> and documentation of the lineup administration, including the procedure used and witness confidence at the time of the identification.<sup>43</sup>

<sup>37</sup> See, e.g., *State v. Anthony*, 204 A.3d 229 (N.J. 2019); *State v. Lawson*, 291 P.3d 673 (Or. 2012).

<sup>38</sup> See, e.g., N.C. GEN. STAT. § 15A-284.52(b)(3) (2019). State terminology on this method varies, with some states referring to this as “blind” administration. See, e.g., W. VA. CODE § 62-1E-1 to -2 (2020). “Blind” or “blinded” administration is also used to refer to a procedure where the administrator is aware of the suspect’s identity, but the photos are presented to the witness in a way that prevents the administrator from seeing which photo the witness is viewing until after an identification is made. See *id.* § 62-1E-1(3)–(4) (defining blind administration as when the administrator does not know the suspect’s identity and blinded administration as when the administrator may know the suspect’s identity).

<sup>39</sup> See NAT’L RSCH. COUNCIL, *supra* note 25, at 106–07.

<sup>40</sup> See *id.* at 118.

<sup>41</sup> See POLICE EXEC. RSCH. F., *supra* note 20, at xii (observing that 37.3% of law enforcement agencies have reported transitioning to sequential presentation since 1999); see also N.C. GEN. STAT. § 15A-284.52(b)(2) (“Individuals or photos shall be presented to the witnesses sequentially . . .”); W. VA. CODE § 62-1E-1 to -2 (“All lineups should be conducted in a sequential presentation.”).

<sup>42</sup> See, e.g., N.C. GEN. STAT. § 15A-284.52(b)(3); W. VA. CODE § 62-1E-2(b); CONN. GEN. STAT. § § 54-1p(c)(3) (2019). While the language of these instructions varies, they typically include statements that the culprit’s photo may or may not be included in the lineup, that the witness is not obligated to make an identification, that excluding innocent people is just as important as identifying the culprit, that continuing the investigation is not dependent upon an identification, and, in the case of double-blind administration, that the administrator does not know the suspect’s identity. See N.C. GEN. STAT. § 15A-284.52(b)(3); W. VA. CODE § 62-1E-2(b); CONN. GEN. STAT. § 54-1p(c)(3).

<sup>43</sup> See, e.g., N.C. GEN. STAT. § 15A-284.52(b)(14)–(15); W. VA. CODE § 62-1E-2(k); CONN. GEN. STAT. § 54-1p(c)(15). A witness’s confidence at the time of the identification is particularly important to record when the witness will be making an in-court identification because confi-



State courts have also led reform of eyewitness identification procedure by developing judicial rules that grant rights to defendants beyond those guaranteed in the U.S. Constitution. In *State v. Henderson*,<sup>44</sup> the New Jersey Supreme Court appointed a Special Master to oversee an extensive review of the empirical evidence relating to eyewitness identifications.<sup>45</sup> The court found that eyewitness identification is particularly susceptible to reliability issues and that criminal defendants were inadequately protected under contemporary due process doctrine.<sup>46</sup> The court based this finding, in part, on concerns that existing due process protections impose limitations on consideration of estimator variables, which can have a significant impact on an identification's reliability.<sup>47</sup> The court developed a revised test for admissibility of eyewitness identification evidence,<sup>48</sup> explicitly permitting consideration of both estimator and system variables, and grounded this test in the due process rights guaranteed under the New Jersey Constitution.<sup>49</sup> Similarly, in *State v. Lawson*,<sup>50</sup> the Oregon Supreme Court evaluated modern literature on the reliability of eyewitness identification evidence and found that its test inadequately considered the variables affecting eyewitness identification reliability.<sup>51</sup> Updating its legal standard, the *Lawson* court directed trial courts to consider both estimator and system variables, holding that suggestive procedures can give rise to an inference of unreliability and warrant exclusion of subsequent identifications.<sup>52</sup> Instead of finding this protection in due process, the court held that suggestive identifi-

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dence tends to increase between the initial identification and trial, and witness confidence is a powerful predictor of juror decision making. See *Watkins v. Sowders*, 449 U.S. 341, 352–53 (1981) (Brennan, J., dissenting); Brian L. Cutler, Steven D. Penrod & Hedy Red Dexter, *Juror Sensitivity to Eyewitness Identification Evidence*, 14 *LAW & HUM. BEHAV.* 185, 190 (1990).

<sup>44</sup> 27 A.3d 872 (N.J. 2011).

<sup>45</sup> *Id.* at 877.

<sup>46</sup> *Id.* at 877–78 (“[The] evidence offers convincing proof that the current test for evaluating the trustworthiness of eyewitness identifications should be revised. Study after study revealed a troubling lack of reliability in eyewitness identifications. . . . We are convinced from the scientific evidence in the record that memory is malleable, and that an array of variables can affect and dilute memory and lead to misidentifications.”).

<sup>47</sup> *Id.* at 918.

<sup>48</sup> The New Jersey Supreme Court recently expanded the test to entitle defendants to a pretrial hearing on admissibility of eyewitness identification evidence upon either a showing that the procedure was suggestive or that law enforcement failed to adequately record it. *State v. Anthony*, 204 A.3d 229, 241–42 (N.J. 2019).

<sup>49</sup> *Henderson*, 27 A.3d at 919.

<sup>50</sup> 291 P.3d 673 (Or. 2012).

<sup>51</sup> *Id.* at 690.

<sup>52</sup> *Id.* at 697.

cations could be excluded as unfairly prejudicial under the state's rules of evidence.<sup>53</sup>

The federal government has taken steps to reduce the risk of eyewitness misidentification in proceedings involving federal law enforcement as well. In 1999, in response to the rise in DNA evidence-based exonerations, the U.S. Attorney General released a report detailing recommended best practices for law enforcement agencies across the country.<sup>54</sup> The report included recommendations on use of witness instructions and documentation of the identification, but declined to express a preference between sequential and simultaneous lineups and excluded blind procedures out of practicality concerns and lack of field testing.<sup>55</sup> These guidelines were updated in 2017, when the Deputy Attorney General issued an advisory memorandum to the heads of federal law enforcement agencies with directives on conducting photo lineups.<sup>56</sup> The updated guidelines acknowledged that significant research on eyewitness identification procedure had led to an increased awareness of the factors that affect eyewitness accuracy, and the guidelines proposed several new policies for federal law enforcement agencies to adopt.<sup>57</sup> Among these recommended policies were witness instructions, documentation standards, and encouragement to use blind or blinded administration when possible.<sup>58</sup>

Although eyewitness identification procedure has been the subject of recent efforts at reform, the use of image editing software in the development of photo lineups is largely unregulated. Legislative efforts at eyewitness identification reform have generally ignored law enforcement use of image editing, and the few courts that have addressed the issue have only attempted to do so in the context of due process concerns about suggestibility.<sup>59</sup> State statutes governing eyewitness identification procedure typically lack explicit policies for image editing,<sup>60</sup> and the limited federal guidance on the topic is advisory

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<sup>53</sup> *Id.*

<sup>54</sup> See U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, NAT'L INST. OF JUST., NCJ 178240, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999).

<sup>55</sup> See *id.* at 9, 31–38. Notably, the guide also recommends “artificially adding or concealing” identifying features to ensure consistency between the suspect and filler photos. *Id.* at 29–30.

<sup>56</sup> Memorandum from Sally Q. Yates, *supra* note 35.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 3–8.

<sup>59</sup> See *infra* Section II.C.

<sup>60</sup> See, e.g., COLO. REV. STAT. § 16-1-109 (2020); MD. CODE ANN. PUBLIC SAFETY § 3-506.1 (LexisNexis 2019); OKLA. STAT. ANN. tit. 22, § 21 (West 2019); TEX. CODE CRIM. PROC.

and nonbinding.<sup>61</sup> Given the novelty of the practice and its purported role in guaranteeing due process, courts have been reluctant to craft new standards for the use of image editing in the context of eyewitness identification.

## II. CONSTITUTIONALITY OF EYEWITNESS IDENTIFICATION EVIDENCE

For much of the nation's history, the procedure used to secure a witness's out-of-court identification of a defendant was considered relevant only as it pertained to the weight of the evidence. It was not until 1967, when the U.S. Supreme Court decided a trio of cases implicating the right to counsel under the Sixth Amendment and the right to due process under the Fourteenth Amendment, that the Court held that improper identification procedure could affect the *admissibility* of identification evidence.<sup>62</sup> The Court justified this development by citing the "innumerable dangers and variable factors" inherent in eyewitness identification that threaten fair adjudication.<sup>63</sup> The Court has since established a test for determining whether an eyewitness identification is sufficiently reliable to comport with the Constitution's guarantee of due process.<sup>64</sup> These concerns about due process have motivated many law enforcement agencies to use image editing software in the development of eyewitness identification materials.<sup>65</sup>

### A. *Wade, Gilbert, and Stovall: The Origin of the Constitutional Right to Reliable Eyewitness Identification*

The U.S. Supreme Court first addressed the constitutionality of eyewitness identification procedure in its 1967 opinions in three separate cases: *United States v. Wade*,<sup>66</sup> *Gilbert v. California*,<sup>67</sup> and *Stovall v. Denno*.<sup>68</sup> All decided on the same day, the *Wade* trilogy laid out the principles that the Court used to develop its modern approach to the constitutional limitations on eyewitness identification procedure.

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ANN. art. 38.20 (West 2019); VT. STAT. ANN. tit. 13, § 5581 (2020); W. VA. CODE §§ 62-1E-1 to -2 (2020).

<sup>61</sup> Memorandum from Sally Q. Yates, *supra* note 35, at 2.

<sup>62</sup> See *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *Stovall v. Denno*, 388 U.S. 293 (1967).

<sup>63</sup> *Wade*, 388 U.S. at 228.

<sup>64</sup> See *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972).

<sup>65</sup> See *infra* Section II.C.

<sup>66</sup> 388 U.S. 218 (1967).

<sup>67</sup> 388 U.S. 263 (1967).

<sup>68</sup> 388 U.S. 293 (1967).

In *Wade*, the Court held that the Sixth Amendment entitles a defendant to have counsel present when participating in a pretrial eyewitness identification.<sup>69</sup> The defendant in *Wade* was arrested and charged in connection with a bank robbery, and the FBI presented him to witnesses in an in-person lineup without providing notice to his attorney.<sup>70</sup> Rejecting the government's argument that pretrial eyewitness identification is a "mere preparatory step"<sup>71</sup> towards trial, the Court observed that it is a "critical stage"<sup>72</sup> of the proceedings with "innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial."<sup>73</sup> The Court acknowledged that eyewitness misidentification has historically played a significant role in wrongful convictions, largely due to suggestive procedure.<sup>74</sup> Recognizing that trial protections like cross-examination may be insufficient to remedy the harms of an unreliable pretrial identification, the Court affirmed the importance of proper procedure to minimize the risk of eyewitness misidentification.<sup>75</sup>

The Court reiterated these principles in *Gilbert*, affirming the Sixth Amendment right to have counsel present at critical stages of prosecution, including during pretrial eyewitness identification.<sup>76</sup> After the defendant was arrested for armed robbery and the murder of a police officer,<sup>77</sup> law enforcement presented him to approximately a hundred witnesses at a lineup, which was conducted without his counsel present and on a brightly lit stage.<sup>78</sup> Analyzing his Sixth Amendment claim, the Court acknowledged the "undesirability of excluding relevant evidence," but nevertheless found an overriding interest in deterring unconstitutional pretrial eyewitness identification procedure.<sup>79</sup> As in *Wade*, the *Gilbert* Court's focus on the importance of proper eyewitness identification procedure appeared to signal the

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<sup>69</sup> *Wade*, 388 U.S. at 235–37.

<sup>70</sup> *Id.* at 220.

<sup>71</sup> *Id.* at 227.

<sup>72</sup> *Id.* at 237.

<sup>73</sup> *Id.* at 228.

<sup>74</sup> *See id.* at 228–29 ("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.")

<sup>75</sup> *See id.* at 235 ("[E]ven though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability.")

<sup>76</sup> *See Gilbert v. California*, 388 U.S. 263, 272 (1967).

<sup>77</sup> *Id.* at 265.

<sup>78</sup> *Id.* at 269–70.

<sup>79</sup> *Id.* at 273.

Court's willingness to recognize constitutional protections where legislative safeguards were lacking.<sup>80</sup>

In *Stovall*, the Court further expanded the Constitution's protections against improper pretrial identification procedure, holding that the procedure could be so "unnecessarily suggestive" as to violate a defendant's right to due process, availability of counsel notwithstanding.<sup>81</sup> After police found evidence at the scene of a stabbing that led them to the defendant, officers brought the defendant to a hospital room where one of the victims was recovering from surgery.<sup>82</sup> The defendant, the only black man in the room,<sup>83</sup> was handcuffed to an officer and the victim identified him as her assailant.<sup>84</sup> After he was convicted and sentenced to death, the defendant filed a habeas corpus petition, arguing that the identification procedure violated his Sixth and Fourteenth Amendment rights.<sup>85</sup> The Court declined to apply the Sixth Amendment rule announced in *Wade* and *Gilbert* retroactively,<sup>86</sup> but acknowledged that the defendant's due process claim merited independent evaluation.<sup>87</sup> The Court held that analysis of due process challenges to eyewitness identification procedure requires an evaluation of the "totality of the circumstances."<sup>88</sup> The Court found that the identification procedure used was not so "unnecessarily suggestive and conducive to irreparable mistaken identification," as to deny the defendant his right to due process.<sup>89</sup> Because the victim was in the best position to exonerate the defendant, and because her injuries precluded any stationhouse lineup, the Court held that admitting her identification did not violate the defendant's right to due pro-

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<sup>80</sup> *See id.*

<sup>81</sup> *Stovall v. Denno*, 388 U.S. 293, 301–02 (1967).

<sup>82</sup> *Id.* at 295.

<sup>83</sup> Empirical evidence suggests that cross-racial identifications are particularly unreliable. *See* NAT'L RSCH. COUNCIL, *supra* note 25, at 96 ("Recent analyses revealed that cross-racial (mis) identification was present in 42 percent of the cases in which an erroneous eyewitness identification was made."). As a result, some states require a jury instruction on cross-racial identification when the eyewitness and defendant are members of different races. *See, e.g.*, *State v. Cromedy*, 727 A.2d 457, 467 (N.J. 1999) (requiring cross-racial identification instruction when identification is critical to the case and unsupported by independent evidence); *People v. Boone*, 91 N.E.3d 1194, 1196 (N.Y. 2017) (requiring cross-racial identification instruction upon request of defendant when identification is an issue in the case and when "the identifying witness and defendant appear to be of different races").

<sup>84</sup> *Stovall*, 388 U.S. at 295.

<sup>85</sup> *Id.* at 295–96.

<sup>86</sup> *Id.* at 300.

<sup>87</sup> *See id.* at 301–02.

<sup>88</sup> *Id.* at 302.

<sup>89</sup> *Id.*

cess.<sup>90</sup> Although the Court found that the specific circumstances at issue in *Stovall* did not constitute a due process violation, the principles established in the *Wade* trilogy suggested that the Court was prepared to recognize significant constitutional protections for eyewitness identification reliability.

The Court began to retreat from this approach a year later in *Simmons v. United States*,<sup>91</sup> when it held that a conviction based on a pretrial photo identification violates due process only when it is “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.”<sup>92</sup> In *Simmons*, FBI agents investigating a bank robbery presented photos of the defendant to the bank tellers who had witnessed the robbery.<sup>93</sup> Several of the tellers identified the defendant as one of the robbers and made the identifications again during trial.<sup>94</sup>

Rejecting the defendant’s due process claim, the U.S. Supreme Court referred to eyewitness identification as a tool “used widely and effectively” in law enforcement,<sup>95</sup> drawing a sharp contrast to the more critical language of *Wade*. The *Simmons* Court upheld the defendant’s conviction, finding that law enforcement use of the photos was justified by the seriousness of the felony committed and the urgency inherent in capturing culprits that were still at large.<sup>96</sup> The Court further found that the likelihood of misidentification was low based on the well-lit conditions of the bank during the robbery, the failure of the robbers to wear masks, the extended exposure that the witnesses had to the robbers, and the immediacy with which the identifications were made under neutral procedures.<sup>97</sup> Although the Court acknowledged that there is a risk of misidentification inherent in using photographs to identify a suspect, it noted that cross-examination is an adequate remedy because it allows the jury to consider the procedure’s “potential for error.”<sup>98</sup> The Court’s dicta here again signaled a departure from the concerns echoed in *Wade* a year prior regarding

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<sup>90</sup> *See id.*

<sup>91</sup> 390 U.S. 377 (1968).

<sup>92</sup> *Id.* at 384.

<sup>93</sup> *Id.* at 380.

<sup>94</sup> *Id.* at 380–81.

<sup>95</sup> *Id.* at 384.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 385.

<sup>98</sup> *Id.* at 384.

the ineffectiveness of cross-examination in remedying eyewitness misidentification.<sup>99</sup>

### B. *Reliability and the Biggers Factors*

The Court's later cases further weakened the constitutional protections for eyewitness identification reliability. Four years after *Simmons*, the Court announced a two-part test for lower courts to use in determining whether an eyewitness identification violates a defendant's right to due process.<sup>100</sup> In *Neil v. Biggers*,<sup>101</sup> the defendant was convicted of rape after a pretrial showup<sup>102</sup> at the stationhouse where the victim identified him as her assailant.<sup>103</sup> The defendant challenged his conviction in federal court and the district court applied the *Simmons* rule, finding that the showup was "so suggestive as to violate [the defendant's right to] due process."<sup>104</sup> The Supreme Court reversed, finding that the identification was unnecessarily suggestive but that it was nonetheless reliable.<sup>105</sup> Although the Court found that the procedure used by police was unnecessarily suggestive and that alternative, less suggestive means of identification were available, it declined to hold this sufficient alone to warrant exclusion of the identification.<sup>106</sup> The Court rejected the district court's conclusion that suggestive procedure is determinative and reiterated that "the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification.'"<sup>107</sup> Although suggestive identification procedure poses an increased risk of misidentification, the Court held that this risk is not sufficient alone to violate due process.<sup>108</sup>

Rather, the Court turned to the "totality of the circumstances," and listed several factors to be used in evaluating whether suggestive

<sup>99</sup> See *United States v. Wade*, 388 U.S. 218, 235 (1967) ("[E]ven though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability.").

<sup>100</sup> *Neil v. Biggers*, 409 U.S. 188, 198–99 (1972).

<sup>101</sup> 409 U.S. 188 (1972).

<sup>102</sup> A showup is a form of eyewitness identification where law enforcement brings the suspect, in person and alone, before the witness for identification—contrasted with a lineup, where police present the suspect along with multiple nonsuspects. See NAT'L RSCH. COUNCIL, *supra* note 25, at 14. Because of its inherent suggestibility, showups are generally disfavored, but the Court has declined to hold them per se unreliable. See *Stovall v. Denno*, 388 U.S. 293, 302 (1967).

<sup>103</sup> See *Biggers*, 409 U.S. at 189.

<sup>104</sup> *Id.* at 190.

<sup>105</sup> *Id.* at 199–200.

<sup>106</sup> *Id.* at 198–99.

<sup>107</sup> *Id.* at 198 (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)).

<sup>108</sup> *Id.*

identification procedure posed a substantial risk of misidentification.<sup>109</sup> These nonexhaustive factors included:

[T]he 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.<sup>110</sup>

In applying these factors to the facts of *Biggers*, the Court found that there was no substantial risk of misidentification.<sup>111</sup> The Court noted that the witness spent up to thirty minutes with her assailant and had multiple opportunities to see him under sufficient lighting conditions.<sup>112</sup> She provided a "more than ordinarily thorough" description of her assailant and expressed a high level of confidence in identifying the defendant.<sup>113</sup> Although the seven-month delay between the victim's assault and her identification of the defendant would normally increase the risk of misidentification, the Court found that it was offset by the undisputed testimony that the victim had made no prior identification despite multiple previous attempts using in-person and photo-based procedures.<sup>114</sup> As a result, the Court held that the victim's identification was sufficiently reliable that admitting it did not violate the defendant's right to due process, notwithstanding the unnecessarily suggestive showup.<sup>115</sup>

In *Manson v. Brathwaite*,<sup>116</sup> the Court again rejected a per se rule of exclusion for eyewitness identification evidence based on unnecessarily suggestive procedure. After purchasing two bags of heroin, an undercover officer described the seller to a colleague, who suspected the defendant.<sup>117</sup> The colleague left a photo of the defendant in the undercover officer's office, and the officer identified him as the seller.<sup>118</sup> The defendant was charged with and convicted of possession and sale of heroin.<sup>119</sup> On appeal of the denial of his habeas corpus petition, the Second Circuit reversed the defendant's conviction, find-

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<sup>109</sup> *Id.* at 199–200.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 201.

<sup>112</sup> *Id.* at 200.

<sup>113</sup> *Id.* at 200–01.

<sup>114</sup> *Id.* at 201.

<sup>115</sup> *Id.*

<sup>116</sup> 432 U.S. 98 (1977).

<sup>117</sup> *Id.* at 99–101.

<sup>118</sup> *Id.* at 101.

<sup>119</sup> *Id.* at 101–02.



ing that the identification “should have been excluded, regardless of [its] reliability,” due to the unnecessarily suggestive procedure.<sup>120</sup>

The *Brathwaite* Court reversed the Second Circuit’s order, rejecting a per se rule of exclusion for unnecessarily suggestive eyewitness identification procedure in both pre- and post-*Stovall* cases.<sup>121</sup> Although it acknowledged that the per se rule was favored among legal scholars with “surprising unanimity” for its deterrent effect on misidentification,<sup>122</sup> it determined that three main considerations warranted a totality of the circumstances approach.<sup>123</sup> First, the Court expressed concern that, under the per se approach, relevant evidence would be excluded “automatically and peremptorily.”<sup>124</sup> Second, the Court stated that a totality standard would function as a deterrent to improper eyewitness identification procedure in a similar manner as per se exclusion.<sup>125</sup> Finally, the Court found that the per se approach could exclude reliable evidence, which “may result, on occasion, in the guilty going free.”<sup>126</sup> In holding that “reliability is the linchpin . . . [of] admissibility,” the Court asserted that the availability of less suggestive procedures—and the decision to forgo their use—is pertinent to the weight of the evidence, not its admissibility.<sup>127</sup> In so holding, the *Brathwaite* Court effectively eliminated the requirement of exigency under *Stovall* for suggestive eyewitness identification procedure, further weakening constitutional protections for reliable eyewitness evidence.<sup>128</sup>

The *Brathwaite* Court effectively enshrined a two-step test for admissibility of eyewitness identification evidence, asking (1) whether the identification procedure used was unnecessarily suggestive, and

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<sup>120</sup> *Id.* at 103–04. Although the *Biggers* Court had rejected a per se rule against identifications obtained through unnecessarily suggestive procedure, dicta in the *Biggers* opinion suggested that its holding might apply only to pre-*Stovall* cases because of the lack of notice for law enforcement. See 409 U.S. at 199. For this reason, the Second Circuit declined to apply *Biggers* and instead found that the identification at issue was improperly admitted under *Stovall* because it was unnecessarily suggestive. See *Brathwaite*, 432 U.S. at 108–09.

<sup>121</sup> *Brathwaite*, 432 U.S. at 113–14, 117.

<sup>122</sup> *Id.* at 111 (quoting *United States ex rel. Kirby v. Sturges*, 510 F.2d 397, 405 (7th Cir. 1975)).

<sup>123</sup> See *id.* at 111–14.

<sup>124</sup> *Id.* at 112.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* The majority did not express any concern about the innocent being wrongfully convicted under the totality of the circumstances standard. See *id.* at 111–13.

<sup>127</sup> See *id.* at 114.

<sup>128</sup> See *id.* at 118 (Marshall, J., dissenting) (“Today’s decision can come as no surprise to those who have been watching the Court dismantle the protections against mistaken eyewitness testimony erected a decade ago in [*Wade, Gilbert, and Stovall*].”).

(2) if so, whether the identification was nevertheless reliable.<sup>129</sup> If a court determines that a pretrial eyewitness identification was not suggestive, or that it was but emergency or exigent circumstances applied,<sup>130</sup> then due process is not implicated.<sup>131</sup> If the court determines that the procedure *was* unnecessarily suggestive, then it applies the *Biggers* factors to determine whether it was nevertheless reliable.<sup>132</sup> In effect, this means that courts are only required to apply the second prong of the *Biggers* test—assessing reliability—if the identification procedure was unnecessarily suggestive due to law enforcement action.<sup>133</sup> Forty years after *Brathwaite*, the Court has continued to narrowly interpret the constitutional safeguards against unreliable eyewitness identification evidence.<sup>134</sup>

### C. *Image Editing and Eyewitness Identification: A Response to Due Process Concerns*

Notwithstanding the narrow constitutional protections against unreliable eyewitness identifications, due process concerns frequently factor into decisions by law enforcement regarding photo-based procedures. A suspect's due process rights may be triggered if police compose an array with a small number of photos or one in which the suspect stands out from the filler photos.<sup>135</sup> Concerns about a suspect standing out are heightened when the suspect has uniquely identifying physical characteristics and comparable filler photos are not readily accessible.

When developing photo lineups, many modern law enforcement agencies use image editing software to ensure uniformity between the suspect and filler photos.<sup>136</sup> Programs like Adobe Photoshop can be used to mirror a suspect's unique characteristics, such as a birthmark or tattoo, on the filler photos. Law enforcement can also use these programs to add, edit, obscure, or remove characteristics from a suspect's photo based on a witness's description of the culprit.<sup>137</sup>

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<sup>129</sup> See *Perry v. New Hampshire*, 565 U.S. 228, 235 (2012).

<sup>130</sup> See, e.g., *Stovall v. Denno*, 388 U.S. 293, 302 (1967).

<sup>131</sup> See *Perry*, 565 U.S. at 241.

<sup>132</sup> See *Brathwaite*, 432 U.S. at 114.

<sup>133</sup> See *Perry*, 565 U.S. 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.”).

<sup>134</sup> See *id.* at 245 (holding suggestive eyewitness identification must be result of police misconduct to require independent evaluation of its reliability under *Bigger* factors).

<sup>135</sup> *Jarrett v. Headley*, 802 F.2d 34, 40–41 (2d Cir. 1986).

<sup>136</sup> See *Bogel-Burroughs*, *supra* note 9.

<sup>137</sup> See *id.*

Because law enforcement agencies have broad discretion to establish eyewitness identification procedures, policies on the use of image editing software in photo-based identifications vary substantially by jurisdiction.<sup>138</sup> Some agencies, including the Los Angeles Police Department and the Baltimore Police Department, have strict policies prohibiting the use of image editing software in photo lineups out of a concern of public protest and legal liability.<sup>139</sup> This approach is feasible when the agency has access to a large selection of filler photos, and thus is likely to be able to secure an adequate number of photos that are physically similar to that of the suspect, but it may be less effective for smaller agencies with less resources.

Where adequate fillers are unavailable and failure to perform any editing would result in a suggestive lineup, some agencies, including the Miami-Dade Police Department, use image editing to duplicate the suspect's unique characteristic on some or all of the filler photos.<sup>140</sup> DOJ also advocates for this approach for federal law enforcement agencies.<sup>141</sup> When that is not feasible, federal law enforcement agencies are instructed to place a black mark over the unique characteristic on the suspect's photo and duplicate the mark on the filler photos.<sup>142</sup> These approaches effectively address potential due process violations without unnecessarily altering a suspect's physical appearance and potentially increasing the risk of irreparable misidentification.

Some of the largest law enforcement agencies in the country, such as the New York Police Department and the Portland Police Bureau, go even further and edit a suspect's photo to add or remove unique characteristics.<sup>143</sup> When this is done to ensure that the suspect's photo better matches the description provided by a witness,<sup>144</sup> police risk ar-

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<sup>138</sup> State laws governing eyewitness identification typically lack explicit guidelines on the use of image editing software in photo lineups. These statutes often require that the filler photos resemble that of the suspect when "practicable," but do not have any proscriptions on the use of image editing software to achieve that goal. *See, e.g.*, N.C. GEN. STAT. § 15A-284.52 (2019); W. VA. CODE § 62-1E-1 to -2 (2020). As a result, that discretion is typically left to local law enforcement.

<sup>139</sup> *See* Bogel-Burroughs, *supra* note 9 ("We don't tamper with [photo arrays] at all. . . . We would get killed in the courts as well as the media." (quoting Interview with Donny Moses, Spokesman, Balt. Police Dep't)).

<sup>140</sup> *See id.*

<sup>141</sup> Memorandum from Sally Q. Yates, *supra* note 35; *see supra* text accompanying notes 56–58.

<sup>142</sup> *Id.* at 4.

<sup>143</sup> *See* Bogel-Burroughs, *supra* note 9.

<sup>144</sup> *See, e.g.*, *United States v. Allen*, 416 F. Supp. 3d 1108, 1110–11 (D. Or. 2019).

tificially inflating witness confidence, independent of any increase in the identification's accuracy.<sup>145</sup> Because jurors tend to credit eyewitness confidence over suggestive identification procedures,<sup>146</sup> this practice may actually increase the risk of misidentification and wrongful conviction.

Existing due process doctrine is poorly situated to address concerns about the reliability of eyewitness identifications based on doctored photos. Courts have generally upheld the admissibility of eyewitness evidence even when the identification was based on an edited photo of the defendant.<sup>147</sup> In the introductory case, *United States v. Allen*,<sup>148</sup> the court denied the defendant's motion to suppress eyewitness identification evidence where his photo had been edited to remove his facial tattoos.<sup>149</sup> After an informant implicated the defendant in a series of bank robberies, police digitally altered a recent photo of him to remove his facial tattoos.<sup>150</sup> Police presented the edited photo to four witness bank tellers as part of a photo lineup, and three of them identified the defendant.<sup>151</sup> In his motion to suppress, the defendant argued that the identification should be excluded because police edited the photo to make the defendant's appearance more consistent with the witnesses' descriptions of the culprit.<sup>152</sup> Applying the first prong of the *Biggers* test, the district court held that the eyewitness identification process was not unnecessarily suggestive.<sup>153</sup>

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<sup>145</sup> See Albright, *supra* note 23, at 7763 (describing the role of external factors on "confidence inflation" in eyewitness testimony).

<sup>146</sup> See Cutler et al., *supra* note 43, at 185, 189 (finding in a study of mock jurors that procedural factors like the use of witness instructions or the similarity of lineup members had a "trivial" effect on verdicts, while eyewitness confidence was "the most powerful predictor").

<sup>147</sup> Prior to the advent of image editing software, courts took different approaches to admissibility of eyewitness evidence based on a physically altered photo of the defendant. Compare *State v. Earich*, No. 90-C-23, 1992 WL 356180, at \*1-2 (Ohio Ct. App. Nov. 25, 1992) (upholding admissibility of an identification where police "whited out" defendant's mustache), with *State v. Alexander*, 503 P.2d 777, 785 (Ariz. 1972) (overturning a conviction based on an eyewitness identification where police had drawn facial hair on the suspect's photo).

<sup>148</sup> 416 F. Supp. 3d 1108 (D. Or. 2019).

<sup>149</sup> *Id.* at 1114.

<sup>150</sup> *Id.* at 1111. The government argued that police engaged in this practice out of a concern that including the defendant's tattoos would increase the risk of misidentification, as none of the tellers had reported seeing facial tattoos on the culprit. Government's Response to Defendant's Motion to Suppress Identification Evidence, *supra* note 3, at 13.

<sup>151</sup> *Allen*, 416 F. Supp. 3d at 1112.

<sup>152</sup> Motion to Suppress Identification Evidence and Memorandum in Support, *supra* note 10, at 4-6.

<sup>153</sup> *Allen*, 416 F. Supp. 3d at 1113. Because the court found that the procedure was not

Acknowledging the limited case law that governs editing a defendant's photo, the court based this finding on several factors.<sup>154</sup> First, the court found that the methods employed in editing the photo were "neutral" because they were not made in reference to any pictures of the culprit, the tattoos were removed by matching the defendant's nearby skin color, and only the tattoos were affected, with no other changes to the defendant's face.<sup>155</sup> Second, the court found independent justification for the edits because there was a suggestion that the culprit may have been wearing makeup.<sup>156</sup> Third, the administration of the photo lineup was conducted double-blind and sequentially.<sup>157</sup> Finally, the court found that the witnesses' high degree of confidence suggested that there was not a "substantial likelihood of irreparable misidentification."<sup>158</sup> Despite expressing concerns about the police department's practices and the unclear boundaries between constitutional and unconstitutional editing, the court found that the reliability of the identification was an issue for the jury and declined to exercise its supervisory authority to exclude it.<sup>159</sup>

Similarly, in *United States v. Ellis*,<sup>160</sup> a federal judge denied a defendant's motion to suppress an eyewitness identification where a hooded sweatshirt had been added to his photo, obscuring part of his face.<sup>161</sup> The witness, an undercover police officer, had been unable to identify the defendant's photo during an earlier lineup and had requested that hoods be digitally added to the photos to better reflect the appearance of the culprit.<sup>162</sup> Applying the *Brathwaite* test, the court rejected the defendant's argument that this practice was unnecessarily suggestive,<sup>163</sup> finding that the addition of hoods to all of the photos actually made the identification more reliable, not less.<sup>164</sup> Alternatively, the court held that even if the identification was unneces-

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unnecessarily suggestive, it did not independently analyze the identification's reliability under the *Biggers* factors. *Id.* at 1113–14.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 1114.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 1114–15.

<sup>160</sup> 121 F. Supp. 3d 927 (N.D. Cal. 2015).

<sup>161</sup> *Id.* at 934, 944.

<sup>162</sup> *Id.* at 934.

<sup>163</sup> *See id.* at 944. Although courts may be reluctant to definitively state that an identification is *not* suggestive, they are usually upheld regardless as reliable under the *Brathwaite* test. *See, e.g., id.*

<sup>164</sup> *Id.*

sarily suggestive, it was nevertheless reliable because the officer had close contact with the culprit, “demonstrated a high degree of attention[,] and was specially trained to observe details.”<sup>165</sup>

State courts have similarly rejected due process challenges to eyewitness identification admissibility where the identification was made using an edited photo of the defendant. In *Solomon v. State*,<sup>166</sup> a Texas appellate court considered a due process challenge based on an eyewitness identification where, as in *Allen*, the defendant’s photo had been altered to remove his facial tattoos.<sup>167</sup> After the defendant was implicated in a drug deal that ended in a robbery and shooting, police obtained a photo of him and used an image editing program to remove his distinct facial tattoos.<sup>168</sup> Police compiled a photo lineup including the altered photo of the defendant alongside filler photos without tattoos and presented it to the victim.<sup>169</sup> Unlike the identification at issue in *Allen*, the victim knew the defendant and was able to identify him in a lineup, although he expressed some confusion regarding the absence of the defendant’s facial tattoos.<sup>170</sup> The *Solomon* court rejected the defendant’s argument that this practice was impermissibly suggestive, finding that it was actually “favorable” towards the defendant because it resulted in removal of his distinguishing physical characteristics.<sup>171</sup> Addressing police testimony that officers declined to duplicate the defendant’s tattoos on the filler photos out of a concern that it would be too time consuming, the court found that there was no evidence that this practice would have been more “fair” than removal of defendant’s tattoos.<sup>172</sup> Consistent with the approach of federal courts that have addressed this issue, the *Solomon* court focused on the fact that editing the defendant’s photo decreased suggestibility and the court declined to independently address its impact on the identification’s reliability.<sup>173</sup>

State courts have also upheld the admissibility of eyewitness identifications in cases where less egregious edits were made to a defendant’s photo. In *Smith v. Commonwealth*,<sup>174</sup> a Virginia appellate court

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<sup>165</sup> *Id.*

<sup>166</sup> 469 S.W.3d 641 (Tex. App. 2015).

<sup>167</sup> *Id.* at 644.

<sup>168</sup> *Id.* at 642–44.

<sup>169</sup> *Id.* at 643–44.

<sup>170</sup> *Id.* at 644.

<sup>171</sup> *Id.* at 645.

<sup>172</sup> *Id.*

<sup>173</sup> *See id.* at 644.

<sup>174</sup> 733 S.E.2d 683 (Va. Ct. App. 2012).

upheld the admissibility of an identification where the defendant's face had been elongated during resizing.<sup>175</sup> After the defendant was implicated in an abduction and sexual assault, police prepared a photo array for the victim and took a photo of the defendant to include in the lineup.<sup>176</sup> Police resized the defendant's photo to match the dimensions of the filler photos, which slightly elongated the defendant's face, and the victim subsequently identified him as the culprit.<sup>177</sup> On appeal, the defendant argued that the identification violated his right to due process because only his photo was elongated and the filler photos were left untouched, suggesting to the victim that he was the culprit.<sup>178</sup> The court rejected this argument, finding that due process was not implicated because nothing in the witness's statements to police or in their statements to her suggested that the culprit had a longer face.<sup>179</sup> Acknowledging that the defendant's photo appeared elongated, the court nevertheless found that this "innocuous feature" did not suggest to the victim that the defendant was her assailant.<sup>180</sup>

In *State v. Wolford*,<sup>181</sup> a Missouri appellate court addressed the admissibility of an identification where law enforcement covered up the defendant's tattoo with a black mark and duplicated the mark on the filler photos,<sup>182</sup> similar to the practice recommended by DOJ when duplication of the identifying characteristic itself is impractical.<sup>183</sup> After an accomplice implicated the defendant in a shooting, police generated a photo lineup, which included the defendant's photo.<sup>184</sup> Police placed a small black mark on the defendant's photo to cover up his tattoo and duplicated this mark on the filler photos.<sup>185</sup> Police then presented the photo lineup to the victim, who identified the defendant as the shooter.<sup>186</sup> The *Wolford* court rejected the defendant's argument that this practice was impermissibly suggestive, finding that police efforts to obscure the defendant's tattoo ensured that it did not

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<sup>175</sup> *Id.* at 686, 688.

<sup>176</sup> *Id.* at 685–86.

<sup>177</sup> *Id.* at 686.

<sup>178</sup> *Id.* at 686.

<sup>179</sup> *Id.* at 688.

<sup>180</sup> *Id.*

<sup>181</sup> 590 S.W.3d 324 (Mo. Ct. App. 2019).

<sup>182</sup> *Id.* at 327–28.

<sup>183</sup> See Memorandum from Sally Q. Yates, *supra* note 35 at 4.

<sup>184</sup> *Wolford*, 590 S.W.3d at 327.

<sup>185</sup> *Id.* at 328.

<sup>186</sup> *Id.* at 327.

distinguish his photo and that the defendant failed to show that his tattoo had any bearing on the victim's identification.<sup>187</sup>

While courts are increasingly grappling with the implications of image editing under existing due process doctrine, they have been largely resistant to analyzing the issue outside of the *Brathwaite* framework. But *Brathwaite* was not decided with image editing in mind. Existing due process jurisprudence is poorly equipped to address image editing claims because these claims are not grounded in traditional concerns about suggestive procedure. As some courts have observed, image editing may make a suspect's identification *less* suggestive,<sup>188</sup> but this does not mean that the identification is automatically more reliable. Under *Brathwaite*, these claims can be quickly disposed of without any independent consideration of whether the edits made the identification less reliable.<sup>189</sup>

Contemporary due process concerns aside, editing a suspect's photo for use in eyewitness identification procedure risks making the identification less reliable and, as a result, increasing the risk of wrongful conviction. By permitting law enforcement to tailor a suspect's photo to better match the description provided by a witness, police are effectively providing independent corroboration of the witness's recall, artificially inflating witness confidence regardless of the identification's accuracy.<sup>190</sup> Confidence inflation is a particularly damaging contributor towards wrongful conviction due to the significant role that eyewitness confidence plays in juror decision making.<sup>191</sup> Although jurors do not tend to give substantial weight to suggestive identification procedures, they do tend to credit eyewitness confidence.<sup>192</sup> Because witness confidence tends to increase between the initial identification and trial,<sup>193</sup> an unreliable pretrial identification can increase the risk of misidentification at trial and result in wrongful conviction.

The current legal environment offers little to no protection against the practice of editing a suspect's photo for use in photo line-ups. State statutes governing eyewitness identification procedure do not typically address the use of image editing software,<sup>194</sup> leaving it up

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187 See *id.* at 328.

188 See *Solomon v. State*, 469 S.W.3d 641, 645 (Tex. App. 2015).

189 See *United States v. Allen*, 416 F. Supp. 3d 1108, 1113–14 (D. Or. 2019).

190 See *Albright*, *supra* note 23, at 7763.

191 See *supra* note 43.

192 See *Cutler*, *supra* note 31, at 190–91.

193 See *Albright*, *supra* note 23, at 7763.

194 See, e.g., COLO. REV. STAT. § 16-1-109 (2020); MD. CODE ANN. PUBLIC SAFETY § 3-



to the discretion of local law enforcement agencies. Federal guidelines recommend alternatives to editing a suspect's photo, including editing filler photos, but these guidelines are limited in scope and largely non-binding.<sup>195</sup> Current due process doctrine is ill-equipped to address claims of image editing because it requires a finding that the procedure was "impermissibly suggestive" before courts are required to independently analyze the reliability of the identification.<sup>196</sup> As a result, a practice that may increase the risk of misidentification, and which bears directly on reliability, is effectively immune from legal challenge.

### III. STATE STATUTORY SOLUTION

#### A. *Proposed Statute Governing Image Editing*

States should ban the practice of making material edits to a suspect's image in photograph-based eyewitness identification procedures. This would protect defendants against unreliable and unnecessary image editing practices and ensure uniformity across state law enforcement agencies. The provision could be implemented either as an amendment to an existing statute or as part of a comprehensive eyewitness identification reform bill. This Note proposes the following language:

- (1) Eyewitness identification procedure in criminal proceedings shall not include any images of a suspect that have been materially altered.
- (2) Material alterations include:
  - a. Alterations that add, remove, change, or obscure a suspect's physical characteristics;
    - i. "Physical characteristics" include immutable traits, such as tattoos, scars, birthmarks, skin and eye

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506.1 (LexisNexis 2019); OKLA. STAT. ANN. tit. 22, § 21 (West 2019); TEX. CODE CRIM. PROC. ANN. art. 38.20 (West 2019); VT. STAT. ANN. tit. 13, § 5581 (2020); W. VA. CODE §§ 62-1E-1 to -2 (2020). Some state statutes require that a suspect's photo resemble the suspect's appearance at the time of the offense, but they do not provide any explicit guidance on image editing or require that the photo match exactly the suspect's true appearance. *See, e.g.*, HAW. REV. STAT. § 801K-2(b)(1) (2020) ("[A]ny photograph of the suspect shall be contemporary and shall resemble the suspect's appearance at the time of the offense."); 725 ILL. COMP. STAT. 5/107A-2(f)(7) (2020) ("[T]he photograph of the suspected perpetrator . . . shall resemble the suspected perpetrator's appearance at the time of the offense.").

<sup>195</sup> *See* Memorandum from Sally Q. Yates, *supra* note 35, at 4.

<sup>196</sup> *See* Perry v. New Hampshire, 565 U.S. 228, 250 (2012) (Sotomayor, J., dissenting); *id.* at 248 (majority opinion) ("[T]he Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement.").

- color, and characteristics that are subject to change, such as age, weight, hair color or style, and facial hair
  - b. Alterations that add, remove, change, or obscure a suspect's clothing, jewelry, or other accessories;
  - c. Any other alterations that substantially change a suspect's appearance.
- (3) Material alterations do not include:
- a. Edits to the composition of the image including adjustments to the contrast, resolution, or cropping when necessary to ensure uniformity across a photo lineup;
  - b. Limited use of markers to cover up identifying characteristics when necessary to ensure uniformity across a photo lineup, and when identical markers are reflected on filler photos.
- (4) In adjudicating a motion to suppress an eyewitness identification, the court shall exclude any identification that the court finds was based on a materially altered photo of the suspect.

This approach effectively weighs protections for reliable eyewitness identification against the probative value of that evidence. It also deters law enforcement procedures that unnecessarily increase the risk of misidentification when alternative approaches exist, such as editing the filler photos or making nonmaterial edits to the suspect's photo.<sup>197</sup> States can minimize the risk of confidence inflation, lowering the risk of jurors crediting unreliable evidence, by prohibiting material edits of a suspect's photo.<sup>198</sup> Under this proposal, law enforcement would still be permitted to make edits necessary to the composition of the suspect's photo, use markers on a suspect's identifying characteristics provided identical markers are placed on the filler photos, and mirror characteristics on to filler photos<sup>199</sup> to ensure compliance with due process.

In determining which characteristics of a suspect's appearance are sufficiently important to qualify as "material," concerns about line drawing and loopholes warrant a broad definition. Barring only edits of physical characteristics that are immutable, like tattoos or skin

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<sup>197</sup> See Memorandum from Sally Q. Yates, *supra* note 35, at 4.

<sup>198</sup> See Albright, *supra* note 23, at 7763; Cutler, *supra* note 31, at 190–91.

<sup>199</sup> The due process rights of individuals portrayed in filler photos are not implicated because they are not the subject of a particular criminal investigation or prosecution. In addition, the U.S. Supreme Court has never held that edits made to filler photos to ensure uniformity across a photo lineup implicate a suspect's right to due process.

color, would require courts to develop arbitrary standards on which features qualify. This would present difficulties with line drawing for characteristics that may change at certain times or in certain circumstances but are largely considered static—such as height or weight. Allowing law enforcement to make changes to these characteristics to match witness descriptions would be inconsistent with the purpose of the statute to reduce the risk of eyewitness misidentification.<sup>200</sup> Furthermore, permitting changes to clothing or other accessories could create a loophole in the ban on obscuring physical characteristics. This policy could potentially allow law enforcement agencies to use clothing to cover up a suspect's physical features, as was the case in *Ellis*.<sup>201</sup>

Critics may argue that this approach could encourage suggestive procedure by barring edits to a defendant's photo where the witness did not report seeing a unique characteristic, as was the concern expressed by police in *Allen*.<sup>202</sup> Although duplicating a characteristic on to filler photos that the witness had not previously reported seeing could suggest that a suspect's photo is included in the lineup, this risk can be mitigated through multiple procedural safeguards. The use of witness instructions, particularly those that indicate that a suspect's photo may or may not be present, could reduce any risk of suggestion inherent in the process.<sup>203</sup> In addition, law enforcement agencies can increase the number of filler photos used and duplicate the unique characteristic on some, but not all, of the filler photos, as is done by the Miami-Dade Police Department.<sup>204</sup>

### B. *Alternative Approaches*

In lieu of a statutory ban on editing a suspect's photo for use in eyewitness identification procedures, the U.S. Supreme Court could establish a test for evaluating whether such identification constitutes a due process violation. One potential approach would be a holding that this evidence is per se inadmissible under an exclusionary rule, as the Court has held for several other law enforcement practices implicating constitutional rights.<sup>205</sup> This is unlikely to occur, as the U.S. Supreme

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200 See Bogel-Burroughs, *supra* note 9 (“[P]olice could alter photos . . . [to] mak[e] a suspect look thinner if they believed that the person gained weight after committing a crime.”).

201 See *United States v. Ellis*, 121 F. Supp. 3d 927, 934 (N.D. Cal. 2015).

202 See Government's Response to Defendant's Motion to Suppress Identification Evidence, *supra* note 3, at 12–13.

203 See, e.g., N.C. GEN. STAT. § 15A-284.52(3)(a) (2019); W. VA. CODE § 62-1E-2 (2020).

204 See Bogel-Burroughs, *supra* note 9.

205 See, e.g., *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (holding that evidence obtained in violation of the Fourth Amendment's protections against unreasonable

Court previously declined to adopt a per se rule of exclusion for eyewitness evidence where the identification procedure was unnecessarily suggestive, an analogous issue.<sup>206</sup> Since deciding *Brathwaite*, the Court has further strengthened the barriers to exclusion of eyewitness identification evidence,<sup>207</sup> so it does not appear poised to adopt a per se rule of exclusion based on photo editing.

The Court could also endorse the approach taken by many lower courts and indicate that eyewitness identification evidence based on an edited photo of the defendant is subject only to the suggestibility and reliability analysis under *Biggers* and *Brathwaite*.<sup>208</sup> Because the *Brathwaite* standard was not developed with image editing in mind, however, it gives lower courts no guidance on how much editing is acceptable to comply with due process requirements.<sup>209</sup> Additionally, the concern with editing a defendant's photo is less about suggestibility<sup>210</sup> and more about its potential impact on the independent reliability of the identification. For these reasons, the *Brathwaite* standard does not sufficiently address the admissibility of eyewitness evidence based on an edited photo of the defendant.

Federal legislative solutions to this problem face similar challenges of feasibility and scope. Despite increasing public awareness of the dangers of unreliable eyewitness testimony, Congress has declined to enact comprehensive eyewitness identification procedure reform.<sup>211</sup> While DOJ has developed guidelines for federal law enforcement agencies,<sup>212</sup> those standards have historically been advisory and non-binding.<sup>213</sup> Because there are so many more state law enforcement

searches and seizures is per se inadmissible); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (holding that statements made by a defendant during interrogation are per se inadmissible if the suspect was not sufficiently apprised of the Fifth Amendment's right against self-incrimination).

<sup>206</sup> See *Manson v. Brathwaite*, 432 U.S. 98, 109–14 (1977).

<sup>207</sup> See *Perry v. New Hampshire*, 565 U.S. 228, 248 (2012) (finding that a defendant is not entitled to an evaluation of an eyewitness identification's reliability when suggestive procedure is not the result of police misconduct).

<sup>208</sup> See *United States v. Allen*, 416 F. Supp. 3d 1108, 1112–14 (D. Or. 2019); *United States v. Ellis*, 121 F. Supp. 3d 927, 944 (N.D. Cal. 2015); see also *supra* text accompanying notes 129–34 (discussing the *Brathwaite* framework).

<sup>209</sup> See *Allen*, 416 F. Supp. 3d at 1114.

<sup>210</sup> See *Ellis*, 121 F. Supp. 3d at 944.

<sup>211</sup> See *United States v. Wade*, 388 U.S. 218, 239 (1967) (“[N]either Congress nor the federal authorities have seen fit to provide a solution [to the risks of eyewitness identification procedure abuse].”); Kahn-Fogel, *supra* note 4, at 109.

<sup>212</sup> See Memorandum from Sally Q. Yates, *supra* note 35.

<sup>213</sup> See Kahn-Fogel, *supra* note 4, at 109.

agencies than federal agencies,<sup>214</sup> even binding federal law enforcement policy would have only a marginal impact.

States are better equipped than the U.S. Supreme Court or federal government to address novel technological issues due to their ability to test out regulatory measures affecting individual communities. The Court has historically acknowledged the role of the states as “laboratories” of democracy<sup>215</sup> and has encouraged legislative experimentation in the creation of standards for eyewitness identification procedure.<sup>216</sup> In developing rules governing admissibility of eyewitness testimony, states are well positioned to analyze advances in law enforcement tools and create standards that minimize the risk of wrongful convictions.<sup>217</sup>

### C. *Application of the Statutory Ban on Editing a Suspect’s Photo*

Applying the proposed standard to the cases discussed above changes the results in some instances. Because the proposed statute hinges upon whether an edit to a defendant’s photo is “material,” the extent and manner in which law enforcement officers edited the photo would be determinative.

In *Allen*, the defendant’s photo was altered to remove his unique facial tattoos by mirroring his nearby skin tone and “painting over the tattoo[s]” to create the effect of “electronic makeup.”<sup>218</sup> A similar approach was taken with respect to the defendant’s photo in *Solomon*,<sup>219</sup> and both identifications were upheld as admissible.<sup>220</sup> Under the proposed statutory standard, edits that remove or alter an immutable physical characteristic, such as a tattoo, would be considered material.

<sup>214</sup> See *Types of Law Enforcement Agencies*, DISCOVER POLICING, <https://www.discoverpolicing.org/explore-the-field/types-of-law-enforcement-agencies/> [<https://perma.cc/8WAM-CFE9>] (noting that there are more than 17,000 state and local law enforcement agencies in the United States compared to only 65 federal agencies).

<sup>215</sup> See *Oregon v. Ice*, 555 U.S. 160, 171 (2009).

<sup>216</sup> See *Wade*, 388 U.S. at 239 (“Legislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestion at lineup proceedings . . . may also remove the basis for regarding the stage as ‘critical.’”).

<sup>217</sup> See *Manson v. Brathwaite*, 432 U.S. 98, 118 (1977) (Stevens, J., concurring) (“I am persuaded that this rulemaking function can be performed ‘more effectively by the legislative process than by a somewhat clumsy judicial fiat’ . . . and that the Federal Constitution does not foreclose experimentation by the States in the development of such rules.” (citation omitted) (quoting *United States ex rel. Kirby v. Sturges*, 510 F.2d 397, 408 (7th Cir. 1975))).

<sup>218</sup> *United States v. Allen*, 416 F. Supp. 3d 1108, 1111 (D. Or. 2019); see also *supra* text accompanying notes 4–8 (discussing *Allen*).

<sup>219</sup> See *Solomon v. State*, 469 S.W.3d 641, 645 (Tex. App. 2015); see also *supra* text accompanying notes 166–69 (discussing *Solomon*).

<sup>220</sup> *Allen*, 416 F. Supp. 3d at 1114; *Solomon*, 469 S.W.3d at 645.

As a result, the alterations made to the defendants' photos in *Allen* and *Solomon* would be considered material, and the identifications would be suppressed.

In *Ellis*, the court admitted an eyewitness identification where the defendant's photo had been altered to add a hooded sweatshirt, which partially obscured his face and which was added after the witness failed to make an initial positive identification.<sup>221</sup> The addition of the sweatshirt falls in to the second category of proscribed edits, which bar edits to a defendant's clothing. For this reason, the identification in *Ellis* would be excluded as well.

Challenges in distinguishing between material and nonmaterial edits may arise when dealing with edits to the composition of a photo. In *Smith*, the court upheld an identification where the defendant's photo had been resized to match the filler photos.<sup>222</sup> The resizing effort had resulted in the defendant's face appearing "slightly elongated," but was not significant and was not done in response to any suggestion by the witness that the culprit had a long face.<sup>223</sup> Although changes to the composition of a photo may alter a suspect's physical appearance, the risk arising from minor changes is outweighed by the value in ensuring uniformity across the lineup and avoiding unnecessary suggestiveness. The analysis of these edits should consider several factors, including: (1) how substantial the edits were, (2) the impact of the edits on the defendant's physical appearance, and (3) whether the edits were necessary to ensure uniformity across the lineup. The editing in *Smith* would likely not be considered material under the proposed statute because the resizing was minimal, resulting in only a "slight" elongation, and because it was necessary to ensure uniformity with the fillers, and not due to any suggestion on behalf of the witness.<sup>224</sup>

Consistent with an interest in promoting uniformity across filler and suspect photos, the statute also excepts edits to a defendant's photo that obscure unique characteristics when those edits are reflected across filler photos. In *Wolford*, the court upheld admissibility of an eyewitness identification where black marks had been placed over the defendant's tattoo and mirrored on the filler photos.<sup>225</sup> This

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<sup>221</sup> United States v. Ellis, 121 F. Supp. 3d 927, 934, 944 (N.D. Cal. 2015); see also *supra* text accompanying notes 160–62 (discussing *Ellis*).

<sup>222</sup> Smith v. Commonwealth, 733 S.E.2d 683, 688 (Va. Ct. App. 2012); see also *supra* text accompanying notes 174–77 (discussing *Smith*).

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 686.

<sup>225</sup> State v. Wolford, 590 S.W.3d 324, 328 (Mo. Ct. App. 2019).

approach may be appropriate when duplicating a defendant's unique characteristics on filler photos is too costly, time consuming, impractical, or impossible. Because the impact on the defendant's physical appearance is minimal, and because this practice is not gratuitous, but may be necessary to ensure uniformity across the lineup and avoid unnecessary suggestion, such edits would be permissible under the statute. For these reasons, the identification at issue in *Wolford* would likely still be admissible.

In summary, the proposed ban would apply only to edits made to a suspect's photo, permitting edits to filler photos. It would further only proscribe material edits, carving out an exception for edits to a suspect's photo that are necessary to ensure uniformity across a photo lineup and either alter the composition of the photo—such as those that adjust the contrast, resolution, or cropping—or involve the addition of an obscuring mark when similarly reflected on filler photos.

#### CONCLUSION

Eyewitness identification is inherently unreliable, and current procedures governing photo-based identifications do not always adequately address reliability concerns. Because photo-based identification is the most common form of eyewitness identification procedure used by law enforcement agencies in the United States, it is particularly susceptible to eyewitness misidentification. This Note has sought to remedy concerns about eyewitness identification reliability by proposing a framework governing the use of image editing software in photo-based identification procedures.

By banning material edits to a suspect's photo, states can appropriately balance the due process interests in nonsuggestive photo lineups with the interests of both the defendant in excluding unreliable evidence and the state in preventing wrongful convictions. Current law insufficiently addresses the potential for eyewitness misidentification when the witness is relying on an edited photo of a suspect. States should adopt this proposed legislation to protect the rights of criminal defendants against unnecessary procedures that potentially increase the risk of eyewitness misidentification.

