Journal of Criminal Law and Criminology

Volume 100
Issue 2 *Spring*

Article 2

Spring 2010

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0091-4169/10/10002-0381
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY Vol. 100, No. 2
 Printed in U.S.A.

CRIMINAL LAW

REFORMING THE LAW ON SHOW-UP IDENTIFICATIONS

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When a crime has been committed, law enforcement will often ask the crime victim to identify the perpetrator in a lineup, photo array, or show-up. A show-up is an identification procedure in which, unlike in a lineup or photo array, the suspect is presented singly to the crime victim. Based on a positive identification, the prosecutor will then prosecute, and often convict, the defendant.

Research has shown, however, that eyewitness identification evidence is incredibly unreliable and is by far the leading cause of wrongful convictions. Further, show-ups are the least reliable of all the identification procedures, and their use further increases the incidence of wrongful convictions. Despite this serious problem, the majority of states follow the Supreme Court's framework for determining whether show-up evidence is admissible at trial. This majority approach, or majority rule, employs a malleable and outdated facts-and-circumstances analysis. As a result, unreliable show-up evidence is routinely used against defendants in criminal trials.

Some states, however, have decided to offer defendants meaningful protection under their individual state constitutions. One type of reform is best described as an evolution of the majority approach, in which additional relevant factors have been added to the facts-and-circumstances analysis. A second type of reform is best described as a revolution against the majority approach, in which show-up identification evidence is

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generally prohibited unless at the time of the show-up: (1) exigent circumstances prevented the use of a lineup or photo array; or (2) the police lacked probable cause to arrest the suspect and, therefore, could not have legally detained him long enough to conduct a lineup or photo array.

This revolutionary approach to show-up reform, also known as the minority approach or the minority rule, offers innocent defendants genuine protection against false identifications and wrongful convictions and, therefore, should be adopted by the Supreme Court. However, despite these increased protections, trial courts that wish to admit show-up evidence have been able to thwart the minority rule by distorting its two exceptions—the exigent circumstances exception and the probable cause exception. This Article will expose and explain these judicial abuses and will recommend further modifications to the minority rule in order to eliminate judicial abuse and better protect defendants' due process rights as originally intended.

I. INTRODUCTION

When false eyewitness identifications and wrongful convictions are discovered, they are usually exposed through postconviction DNA testing.[1] However, in the vast majority of criminal cases, DNA evidence has either been destroyed[2] or, more commonly, never even existed in the first place.[3] This, of course, poses a significant problem for the innocent defendant convicted based primarily on eyewitness evidence. To illustrate this,

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[1] *See, e.g.*, Suzannah B. Gambell, Comment, *The Need to Revisit the* Neil v. Biggers *Factors: Suppressing Unreliable Eyewitness Identifications*, 6 WYO. L. REV. 189 (2006) (discussing *State v. Cromedy*, 727 A.2d 457 (N.J. 1999), in which the defendant was falsely identified, wrongly convicted, sentenced to sixty years of incarceration, and then exonerated six years later); Jessica Lee, Note, *No Exigency, No Consent: Protecting Innocent Suspects from the Consequences of Non-Exigent Show-Ups*, 36 COLUM. HUM. RTS. L. REV. 755 (2005) (discussing *Gregory v. State*, No. 93-SC-878-MR (Ky. Nov. 23, 1993), in which the defendant was falsely identified, wrongfully convicted, sentenced to seventy years of incarceration, and then exonerated seven years later); Ruth Yacona, Comment, Manson v. Brathwaite: *The Supreme Court's Misunderstanding of Eyewitness Identification*, 39 J. MARSHALL L. REV. 539 (2006) (discussing *State v. Cotton*, 394 S.E.2d 456 (N.C. Ct. App. 1990), in which the defendant was falsely identified, wrongly convicted, sentenced to life imprisonment, and then exonerated eleven years later).

[2] *See* Cynthia E. Jones, *The Right Remedy for the Wrongly Convicted: Judicial Sanctions for Destruction of DNA Evidence*, 77 FORDHAM L. REV. 2893 (2009) (discussing how poor handling of evidence has resulted in premature destruction in thousands of cases, including in states in which laws have been enacted mandating evidence preservation).

[3] *See* Barry Scheck, *Closing Remarks to* Symposium, *Thinking Outside the Box: Proposals for Change*, 23 CARDOZO L. REV. 899 (2002) (discussing how only a minority of serious felony cases involve biological evidence).

consider the following hypothetical example, to which we will refer periodically throughout this Article.

> A crime victim calls 9-1-1 to report a robbery at his apartment. The perpetrator is a white male of medium height who was wearing a black jacket. The man brandished a gun, demanded that the victim turn over his wallet, and then fled the scene. Police respond immediately, and while en route, one officer sees a white male of medium height, wearing a black jacket, standing on a street corner about two blocks from the crime scene.
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> The man sees the officer and immediately turns and attempts to walk away. Based on the man's proximity to the crime scene, his general appearance, and his behavior, the officer stops him and conducts a pat-down search. When doing so, he finds a folding utility knife in the man's pocket; no gun or stolen wallet is found. The officer arrests the man for carrying a concealed weapon, a misdemeanor, and places him in his squad car.
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> No other suspects are found in the immediate area, so one of the on-scene officers radios the arresting officer and instructs him to hold the man for a show-up procedure, in which he will be presented singly to the crime victim for identification. The arresting officer then removes the man, now the suspect, from the squad car. The suspect is surrounded by three officers, two of whom have just arrived to assist. Two other officers take the crime victim in another squad car and drive slowly past the suspect.
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> The victim sees the suspect handcuffed, standing near a squad car, and surrounded by three uniformed police officers. An officer asks the victim whether he can identify the suspect as the perpetrator. Despite having seen the perpetrator for only a few seconds while under a great deal of stress and despite not being able to describe the perpetrator with any amount of detail, the victim is convinced that the police arrested the right man. As a result of the show-up procedure, he positively identifies the suspect as the perpetrator. The suspect, having already been arrested for carrying the folding utility knife, is taken to the county jail for booking.
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> After reviewing the case, the prosecutor decides to charge the suspect, now the defendant, with armed robbery. The defendant denies the allegation and demands a trial. The prosecutor has no evidence other than the show-up identification procedure, which the defendant moves to suppress on due process grounds. The prosecutor argues that the show-up was constitutionally proper and, therefore, is admissible at the defendant's trial.

This hypothetical example—subtle variations of which play out on a daily basis in criminal courts throughout our country—raises a number of issues. As a preliminary matter, is the victim's positive identification of the suspect really *reliable*? Part II of this Article briefly discusses how eyewitness identification evidence, even when obtained under the best of circumstances, is hopelessly *unreliable* and is the leading cause of wrongful

convictions in our country.[4] Part III then briefly explains how the use of a show-up procedure, such as the one employed in the robbery example above, greatly exacerbates the problem and makes already unreliable evidence even *less* reliable.[5]

This background information then leads us to other issues that lie at the heart of this Article. First and foremost, given that show-up procedures are highly unreliable, is show-up evidence nonetheless *admissible* at trial? Part IV.A discusses the Supreme Court's framework for determining whether show-ups are admissible. This framework, which has been adopted by most states and is known as the majority approach or the majority rule, employs a malleable and outdated facts-and-circumstances analysis and permits nearly unrestricted use of show-ups at trial. Consequently, it offers virtually no due process protection against highly unreliable, yet persuasive, show-up evidence.[6]

Some states, however, have recognized this problem and now offer greater protection under their own state constitutions. Part IV.B discusses the *evolutionary* approach to reform, which essentially modernizes and updates the majority rule's facts-and-circumstances approach.[7] Part IV.C then discusses the *revolutionary* approach to reform, which essentially rejects the majority rule's facts-and-circumstances framework. Instead, the revolutionary approach begins with the general rule that show-up evidence is *not* admissible *unless* at the time of the show-up: (1) exigent circumstances prevented the use of a less suggestive procedure, such as a lineup or photo array; or (2) the police lacked probable cause to arrest the defendant and, therefore, could not have legally detained him long enough to conduct a lineup or photo array.[8]

Part IV.C further explains why this revolutionary approach—also known as the minority approach or the minority rule—is the superior model

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[4] *See infra* Part II.

[5] *See infra* Part III.

[6] *See infra* Part IV.A.

[7] *See infra* Part IV.B.

[8] *See infra* Part IV.C. This phrasing of the revolutionary approach to reform is based on *State v. Dubose*, 699 N.W.2d 582 (Wis. 2005), which holds that show-ups will only be admissible at trial if they were "necessary," and they will be found to be "necessary" only if "the police lacked probable cause to make an arrest or, as a result of other exigent circumstances, could not have conducted a lineup or photo array." *Id.* at 584-85. Other cases that have adopted this approach have phrased the same substantive test slightly differently. *See, e.g.*, Commonwealth v. Johnson, 650 N.E.2d 1257 (Mass. 1995) (requiring a finding of exigent circumstances in order to justify a show-up procedure); State v. Adams, 423 N.E.2d 379 (N.Y. Ct. App. 1981) (requiring a finding of necessity in order to justify a show-up procedure).

for reform and should, therefore, be adopted by the Supreme Court.[9] However, despite the minority rule's benefits, trial courts do not like the constraints that it places on law enforcement and have easily been able to thwart this would-be revolution in the law of show-up identifications.[10]

More specifically, Part V.A illustrates how the courts have distorted the exigent circumstances exception to the minority rule. If a court can somehow find that, at the time of the show-up, exigent circumstances prevented the use of a lineup or photo array, then the show-up will be admissible at trial.[11] Similarly, Part V.B shows how courts have distorted the probable cause exception to the minority rule. If a court can somehow find that, at the time of the show-up, the police did *not* have probable cause to arrest the defendant and, therefore, could not have conducted a time-consuming lineup or photo array, then the show-up will, once again, be admissible at trial.[12]

The ease with which courts are able to bypass the minority rule and its strengthened due process safeguards is alarming. Part VI, therefore, proposes a solution that calls for further modification of the minority rule in order to protect against judicial abuses. Only by constraining judicial discretion—especially with regard to the exigent circumstances and probable cause exceptions to the minority rule—will the underlying policy objectives of the revolutionary approach to reform be realized.[13] Part VII then concludes the Article.[14]

II. EYEWITNESSES AND MISIDENTIFICATIONS

Erroneous eyewitness identifications have plagued our criminal justice system since its inception. When DNA evidence became a prevalent tool for law enforcement in the 1980s, not only did it assist prosecutors in obtaining convictions, but it also reopened prior convictions that were obtained based primarily on eyewitness testimony. Studies now reveal that erroneous eyewitness identifications "are the single greatest cause of wrongful convictions in the United States, and are responsible for more wrongful convictions than all other causes combined."[15] In fact, in 80% of the first one hundred postconviction DNA exonerations, the underlying

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[9] *See infra* Part IV.C.

[10] *See infra* Part V.

[11] *See infra* Part V.A.

[12] *See infra* Part V.B.

[13] *See infra* Part VI.

[14] *See infra* Part VII.

[15] State v. Dubose, 699 N.W.2d 582, 592 (Wis. 2005) (citing Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 605 (1998)).

wrongful convictions were based primarily, if not solely, on false identifications.[16]

In these DNA exoneration cases, the DNA evidence proved to a scientific certainty that the defendant did not commit the crime charged and had been wrongfully convicted. But even today, most innocent defendants do not have the luxury of DNA evidence to prove their innocence. For example, in some cases the police do not collect or properly preserve the available DNA evidence.[17] In most cases—including the hypothetical robbery discussed in Part I—DNA evidence simply does not exist.[18] This leaves eyewitness identification evidence as the primary, if not sole, basis for a jury's decision.

Alarmingly, research shows "that approximately 40% of eyewitness identifications are mistaken."[19] Further, "[i]t is estimated there may be more than 10,000 people a year wrongfully convicted, most of whom were convicted as a result of mistaken identification."[20] This has led many in the criminal justice system to finally realize what others concluded long ago: eyewitness identification evidence is "hopelessly unreliable."[21] This unreliability, in turn, leads to a dual problem: not only is an innocent person

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[16] *See* Yacona, *supra* note 1, at 556 (discussing JIM DWYER ET AL., ACTUAL INNOCENCE (2000)); *see also* Calvin TerBeek, *A Call for Precedential Heads: Why the Supreme Court's Eyewitness Identification Jurisprudence is Anachronistic and Out-of-Step with Empirical Reality*, 31 LAW & PSYCHOL. REV. 21, 21-22 (2007) (discussing Gary L. Wells & Amy L. Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED PSYCHOL. 360 (1998)).

[17] *See, e.g.*, People v. Cress, 645 N.W.2d 669, 692 (Mich. Ct. App. 2002); Cynthia E. Jones, *Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes*, 42 AM. CRIM. L. REV. 1239, 1243 (2005) (discussing how the "actual 'management' of evidence is, at best, inefficient and, at worst, nonexistent") (citing Steve Berry, *Disposal of DNA Leads to Review Policy: Rape Survivors and Police Rethink Limit for Keeping Evidence*, L.A. TIMES, Aug. 18, 2002, at B1; Tasgola Karla Bruner, *Detective Accused of Destroying Rape Evidence*, ATLANTA J. CONST., Apr. 5, 2003, at 3H; Michael Perlstein, *Evidence Missing at NOPD Storage; Items Lost, Destroyed in Cleaning of Room*, TIMES-PICAYUNE, Feb. 4, 2003; Walt Philbin, *N.O. Police Want Lee's DNA to Investigate Local Killings*, TIMES-PICAYUNE, May 29, 2003, at 1).

[18] *See* Scheck, *supra* note 3, at 901 (discussing how only a minority of serious felony cases involve biological evidence that can be used for DNA testing).

[19] Amy Luria, *Showup Identifications: A Comprehensive Overview of the Problems and a Discussion of Necessary Changes*, 86 NEB. L. REV. 515, 516 (2008) (discussing Aldert Vrij, *Psychological Factors in Eyewitness Testimony*, *in* PSYCHOLOGY AND LAW: TRUTHFULNESS ACCURACY AND CREDIBILITY 105, 106 (Amina Memon, Aldert Vrij & Ray Bull eds., 1998)).

[20] Gambell, *supra* note 1, at 190-91 (discussing ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL § 4-1 (3d ed. 1997)).

[21] Commonwealth v. Johnson, 650 N.E.2d 1257, 1262 (Mass. 1995).

likely to be convicted, but the true perpetrator necessarily goes free, often to commit additional crimes.[22]

Despite its hopeless unreliability, eyewitness identification evidence has proven to be an extremely powerful tool for the prosecution. The reality is that jurors are "unduly receptive to identification evidence and are not sufficiently aware of its dangers."[23] Nothing is more convincing to jurors than a live witness who takes an oath and confidently proclaims that he saw the defendant commit the crime.[24] In fact, the level of confidence exhibited by an eyewitness has been found to be the most powerful predictor of guilty verdicts.[25] In other words, jurors equate confidence with reliability. Social science research, however, has revealed yet another problem: a witness's *confidence* in his identification has little, if any, correlation to the *accuracy* of his identification.[26] In light of this, it becomes even more difficult for jurors to distinguish accurate identifications from inaccurate ones.[27]

Even weak eyewitness testimony is incredibly powerful and, therefore, often leads to wrongful convictions. Furthermore, cross-examination is not a particularly useful tool when the witness is simply mistaken, rather than outright lying.[28] This phenomenon is best illustrated by a classic psychological study, in which three sets of mock jurors were presented with

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[22] *See* Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH L. REV. 133 (2008) (discussing the injustice of convicting the innocent and allowing the guilty suspect to continue to victimize the community); Michael H. Hoffheimer, *Requiring Jury Instructions on Eyewitness Identification Evidence at Federal Criminal Trials*, 80 J. CRIM. L. & CRIMINOLOGY 585 (1989) (discussing the dual problem of allowing a dangerous suspect to go free while convicting an innocent person).

[23] Lee, *supra* note 1, at 772 (quoting Patrick M. Wall, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 19 (1965)).

[24] *See* TerBeek, *supra* note 16, at 21 ("[T]here is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says, 'That's the one!'" (quoting ELIZABETH LOFTUS, EYEWITNESS TESTIMONY 19 (1979))).

[25] *See* Lee, *supra* note 1, at 772 (discussing multiple psychological studies linking an eyewitness's confidence at trial to the likelihood of conviction).

[26] *See id.* at 773 (citing multiple psychological studies proving that "eyewitness confidence is not a reliable indicator of accuracy").

[27] *See* TerBeek, *supra* note 16, at 26 (citing multiple psychological studies proving that jurors are unable to determine the accuracy of eyewitness testimony).

[28] *See* Timothy P. O'Toole & Giovanna Shay, Manson v. Brathwaite *Revisited: Towards a New Rule of Decision For Due Process Challenges to Eyewitness Identification Procedures*, 41 VAL. U. L. REV. 109, 135 (2006) ("Finally, because the use of suggestive procedures and unreliable identifications almost always occur with eyewitnesses who honestly believe their own mistaken identifications, cross-examination is nearly useless.").

identical evidence in a mock trial.[29] The only difference was that each set of jurors was presented with different eyewitness evidence. One group was told that no eyewitness existed, and only 18% voted to convict.[30] Another group heard a store clerk testify that he saw the defendant commit the crime, and 72% voted to convict, despite the defense lawyer's argument that the clerk was mistaken.[31] Amazingly, when the third group learned that the store clerk "was legally blind and not wearing his glasses at the time" of the crime, an incredible 68% of the jurors *still* voted to convict.[32] This demonstrates how willing jurors are to simply accept eyewitness testimony without any critical evaluation whatsoever.

Unfortunately, as Part III illustrates, eyewitness identification evidence—evidence that is generally proven to be highly unreliable—can be made even *less* reliable, and consequently more harmful, when police use show-up procedures instead of lineups or photo arrays.

III. SHOW-UPS: INCREASING THE RISK OF MISIDENTIFICATION

A show-up is an identification procedure in which the police present a single suspect to an eyewitness and then ask the eyewitness whether the suspect is the perpetrator.[33] Typically, show-ups are conducted in the area of, and shortly after, the alleged crime.[34] Often, when the eyewitness views the sole suspect, the suspect will be in police custody and may even be hand-cuffed or locked in a police squad car.[35] Show-ups are very

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[29] Luria, *supra* note 19, at 525 (citing Elizabeth Loftus, *Incredible Eyewitness*, PSYCHOL. TODAY, Dec. 1974, at 117-18).

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *See* State v. Dubose, 699 N.W.2d 582, 584 n.1 (Wis. 2005) ("A 'showup' is an out-of-court pretrial identification procedure in which a suspect is presented singly to a witness for identification purposes."). A show-up is usually conducted live and in person between the witness and the arrested suspect. However, show-ups can also take the form of photo show-ups, where a single photo, rather than a photo array, is presented to a witness. *See, e.g.*, Commonwealth v. Blake, Nos. BRCR2006-0851 & BRCR2006-0852, 2007 WL 3104405 (Mass. Super. Ct. Aug. 10, 2007).

[34] In fact, police commonly conduct show-ups at the crime scene and within a short time after the crime for purposes of convenience. As a result, even courts that are bound to follow the minority rule have gradually carved out an exception based on "temporal and spatial considerations." People v. Duuvon, 571 N.E.2d 654, 657 (N.Y. 1991); *see also* Commonwealth v. Wen Chaio Ye, 756 N.E.2d 640, 645 (Mass. App. Ct. 2001) (permitting the use of a show-up when conducted within ninety minutes and at the scene of the crime).

[35] *See e.g.*, People v. Clark, 673 N.Y.S.2d 308 (N.Y. App. Div. 1998) (involving a suspect who was arrested and locked in squad car at time of show-up); People v. Hall, 617 N.Y.S.2d 579 (N.Y. App. Div. 1994) (noting same); People v. Knight 535 N.Y.S.2d 31 (N.Y. App. Div. 1988) (noting same).

convenient for law enforcement as they allow for a quick and easy resolution of the investigation, without having to take the time to assemble a lineup or photo array.[36]

Unfortunately, the convenience of a show-up comes at a high price: the increased risk of a false identification. First, in a show-up, the risk of a false identification falls entirely on the sole suspect and is not spread out among six or eight individuals, as it would be in a lineup or photo array.[37] Second, the way in which show-ups are necessarily conducted makes them incredibly suggestive. As one expert has stated, show-ups are "the most grossly suggestive identification procedure now or ever used by the police."[38]

Show-ups are grossly suggestive in part because the sole suspect is already in custody and is being presented by a police officer. Eyewitnesses often believe that when an officer presents a suspect for identification, the officer has caught the true perpetrator. Few people would think that an officer would show a suspect without truly believing that the suspect was, in fact, the criminal.[39] Even one state's attorney general has conceded that show-ups "convey the impression to witnesses that the police think they have caught the perpetrator and want confirmation."[40] Lineups and photo arrays, of course, are far less suggestive; if conducted properly, the witness will not know which person the officer believes to be the true perpetrator and, therefore, will not be influenced in the identification process.[41]

Other factors also make show-ups highly suggestive. For example, when show-ups are conducted immediately after a crime and near the crime scene, as is usually the case, the eyewitness may make a positive identification simply because the suspect was in the area at the time and not

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[36] *See* Lee, *supra* note 1, at 759 (discussing how the benefit of show-ups includes the speedy resolution of law enforcement investigations); *see also infra* Part V.A.2.

[37] *See Dubose*, 699 N.W.2d at 594 ("A lineup or photo array is generally fairer than a showup, because it distributes the probability of identification among the number of persons arrayed, thus reducing the risk of a misidentification." (citing Richard Gonzales et al., *Response Biases in Lineups and Showups*, 64 J. PERSONALITY & SOC. PSYCHOL. 525, 527 (1993))).

[38] Lee, *supra* note 1, at 769 (quoting Patrick M. Wall, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 28 (1965)).

[39] *See* United States v. Funches, 84 F.3d 249, 254 (7th Cir. 1996) ("A show-up is inherently suggestive because the witness is likely to be influenced by the fact that the police appear to believe the person brought in is guilty, since presumably the police would not bring in someone that they did not suspect had committed the crime." (citation omitted)).

[40] WIS. DEP'T OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL, MODEL POLICY AND PROCEDURE FOR EYEWITNESS IDENTIFICATION 22 (2005).

[41] *See id.*

because he is actually the perpetrator.[42] Police can also consciously or subconsciously influence an eyewitness's identification by what they say and do and the manner in which they present the suspect during the show-up procedure.[43]

Social science research supports the commonsense conclusion that show-ups are highly suggestive, making already bad evidence (eyewitness identifications) even worse. One study revealed that "when the identification was conducted twenty-four hours afterwards, fourteen percent of those who viewed a *lineup* made a mistaken identification, whereas fifty-three percent of those who viewed a *show-up* made a mistaken identification."[44] Other research has also documented the suggestive nature of show-ups, as well as their link to false identifications and wrongful convictions.[45]

Interestingly, however, the risk inherent in a show-up extends much further than simply the wrongful conviction of an innocent person.[46] That is, in a show-up, when the witness makes a false identification, the innocent suspect will be arrested and prosecuted, and law enforcement will *not* continue to search for the true perpetrator.[47] With a lineup or photo array,

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[42] *See, e.g.*, Commonwealth v. Johnson, 650 N.E.2d 1257, 1259 (Mass. 1995) (permitting show-ups "in the immediate aftermath of a crime," even in the absence of exigency).

[43] *See* Lee, *supra* note 1, at 760 (discussing how officers may require a suspect to wear clothing allegedly worn by the perpetrator, or require the suspect to hold a weapon or other object that was allegedly used by the perpetrator); *see also* Brisco v. Ercole, 565 F.3d 80, 84-85 (2d Cir. 2009) (involving show-up conducted while suspect was surrounded by uniformed officers and was forced to model an article of clothing similar to that worn by the perpetrator); People v. Duuvon, 571 N.E.2d 654, 656 (N.Y. 1991) (involving show-up conducted while suspect wearing handcuffs and detained in a squad car, thereby suggesting that suspect was, in fact, the perpetrator).

[44] Lee, *supra* note 1, at 770 (emphasis added) (citing A.D. Yarmey et al., *Accuracy of Eyewitness Identifications in Show-ups and Lineups*, 20 LAW & HUM. BEHAV. 459, 464 (1996)).

[45] *See, e.g.*, Luria, *supra* note 19, at 516; Richard Gonzalez, Phoebe C. Ellsworth & Maceo Pembroke, *Response Biases in Lineups and Showups*, 64 J. PERSONALITY & SOC. PSYCHOL. 525 (1993); R.C.L. Lindsay et al., *Simultaneous Lineups, Sequential Lineups, and Showups: Eyewitness Identification Decisions of Adults and Children*, 21 LAW & HUM. BEHAV. 391 (1997).

[46] A conviction based on unreliable eyewitness identification evidence poses a unique problem in the criminal justice system. For example, a constitutional violation does indeed occur when a defendant is convicted based on illegally obtained, but otherwise reliable, physical evidence. Nonetheless, the end result, albeit unjustified, is that a factually guilty defendant is convicted. Conversely, prosecuting a defendant with unreliable show-up evidence is not only a constitutional violation, but it advances no competing interest whatsoever as a factually innocent defendant may well be convicted. *See* State v. Adams, 423 N.E.2d 379, 383 (N.Y. 1981).

[47] See Findley, *supra* note 22, at 138 (discussing the dual problem of failing to convict the guilty while wrongly convicting the innocent).

however, if the witness makes a false identification, he will identify a subject that the police have purposely inserted as filler. Consequently, the witness's misidentification will be known to the police, who can then continue with their investigation and their search for the true perpetrator.[48]

Social science research proves that show-ups have a special place in the realm of eyewitness identification evidence. First, eyewitness identification evidence, even when produced by lineup and photo array procedures, is hopelessly unreliable and is largely responsible for the wrongful convictions in our country. Second, show-up procedures produce even *less* reliable eyewitness evidence, which makes already bad evidence even worse, and is even more likely to result in false identifications and wrongful convictions.

IV. THE ADMISSIBILITY OF SHOW-UPS

Given the long held belief in American jurisprudence that "it is far worse to convict an innocent man than to let a guilty man go free,"[49] one might think that show-up evidence would *not* be admissible at a defendant's trial. The reality, however, is that the Supreme Court's framework—also known as the majority approach or the majority rule—offers virtually no due process protection against show-up evidence.

In addition, only a small number of states offer any meaningful protection under their own state constitutions. Instead, most states follow the majority rule, which employs a malleable and outdated facts-and-circumstances analysis and allows prosecutors nearly unrestricted use of show-up identification evidence at criminal trials.[50] Some states, however, have chosen to afford their citizens greater protection against false identifications and wrongful convictions by implementing meaningful reform.

States have taken two different approaches to reform. First, there is evolutionary reform, in which the majority rule's facts-and-circumstances framework is updated and modernized to allow courts, at least in theory, to better assess the reliability of show-up evidence.[51] Second, there is revolutionary reform, in which the majority rule's facts-and-circumstances framework is rejected and show-ups are generally *not* admissible, unless a specific exception to the general prohibition can be satisfied. Because of its theoretical and fundamental differences from the majority rule, this

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[48] *See id.*

[49] *In re* Winship, 397 U.S. 358, 372 (1970).

[50] *See infra* Part IV.A.

[51] *See infra* Part IV.B.

revolutionary reform is also called the minority approach or the minority rule.[52]

A. SUPREME COURT FRAMEWORK—THE MAJORITY RULE

The majority rule governing the admissibility of show-up evidence is based on a series of United States Supreme Court decisions from the 1970s. Even at the time of those decisions, the Court was well aware that eyewitness identifications could be incredibly unreliable.[53] The Court's response to the problem was to develop a factor-based approach that was, in theory, designed to admit only reliable identifications into evidence.

In *United States v. Biggers*, the Court held that a show-up identification does not violate due process if "under the totality of circumstances the identification was reliable even though the confrontation procedure was suggestive."[54] The Court listed five factors to be considered in evaluating reliability:

> 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.[55]

Prosecutors are easily able to satisfy this totality-of-circumstances test, and as a result, show-up evidence is routinely admitted at trial. Conversely stated, this factor-laden approach allows for a tremendous amount of flexibility, and few, if any, show-up identifications are ever excluded under this framework.[56] This approach was then affirmed in *Manson v. Brathwaite*, a case in which the Court terminated any real hope that it would offer due process protection based on the suggestiveness of the identification procedures. Instead, it affirmed that "reliability is the linchpin in determining the admissibility of identification testimony."[57]

Social science research, however, has shown that most of the *Biggers* factors do not accurately measure reliability and, therefore, do not address the risk of misidentification, as the Court had hoped. First, the witness's opportunity to view the perpetrator at the time of the crime "does not

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[52] *See infra* Part IV.C.

[53] *See* Stovall v. Denno, 388 U.S. 293, 302 (1967) (discussing how the practice of showing suspects singly to crime victims for the purpose of identification has been widely condemned).

[54] 409 U.S. 188, 199 (1972).

[55] *Id.* at 199-200.

[56] *See* Peter F. Nardulli, *The Societal Costs of the Exclusionary Rule Revisited*, U. ILL. L. REV. 223, 226 (1987) (discussing research showing motions to suppress identifications are rarely granted).

[57] 432 U.S. 98, 114 (1977).

translate into an eyewitness being able to accurately recall the suspect."[58] Second, the witness's degree of attention can be easily misstated, and further, this factor actually ignores more important considerations of stress and anxiety, which cause identifications to be less reliable. For example, someone who is held at gunpoint is likely to be quite attentive, at least with regard to the gun, but at the same time, will probably not produce a reliable identification because of the high degree of stress and anxiety experienced in such a situation.[59]

Third, although the majority approach requires the assessment of the witness's level of confidence when identifying the suspect, the social science research shows that a witness's confidence level is not indicative of accuracy. In fact, many studies have shown little or no predictive relationship between a witness's confidence in his identification and the accuracy of that identification.[60] Further, confidence can be increased artificially. For example, positive feedback from an officer after the identification procedure will reaffirm the witness's choice, thereby increasing confidence. This type of feedback from police, even when unintentional, not only inflates the eyewitness's confidence level, but studies have shown that it also "leads them to report that they had a better view of the culprit, that they could make out details of the face . . . that their memorial image of the [person was] particularly clear, and that they are adept at recognizing faces of strangers."[61]

Consequently, realizing the ineffectiveness of the majority rule and its out-dated factors, some states have modernized the factor-laden analysis in order to allow courts to more accurately assess the reliability of show-up identifications. This approach offers marginal improvement over the majority rule and is therefore best described as an evolutionary approach to reform.

B. EVOLUTION—IMPROVING THE MAJORITY RULE

In light of this social science evidence and the DNA exonerations of falsely identified and wrongfully convicted defendants, some states—particularly Utah and Kansas—have taken steps to improve the majority rule. The Utah Supreme Court, for example, essentially modified

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[58] TerBeek, *supra* note 16, at 24 (citing Michael R. Leippe et al., *Crime Seriousness as a Determinant of Accuracy in Eyewitness Identification*, 63 J. APPLIED PSYCHOL. 345, 345 (1978)).

[59] *See* Gambell, *supra* note 1, at 219.

[60] *See* Lee, *supra* note 1, at 770 (citing Yarmey et al., *supra* note 44, at 464).

[61] O'Toole & Shay, *supra* note 28, at 121 (citing Gary L. Wells & Amy L. Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED PSYCHOL. 360, 374 (1998)).

and expanded the *Biggers* factors to address their shortcomings.[62] Utah's factors now require a more thorough analysis of the circumstances under which the identification was made. For example, when analyzing the witness's opportunity to view the suspect, Utah requires consideration of

> the length of time the witness viewed the actor; the distance between the witness and the actor; whether the witness could view the actor's face; the lighting or lack of it; whether there were distracting noises or activity during the observation; and any other circumstances affecting the witness's opportunity to observe the actor.[63]

Additionally, under Utah's framework, a court must also consider "whether the witness's capacity to observe was impaired by stress or fright at the time of the observation, by personal motivations, biases, or prejudices, by uncorrected visual defects, or by fatigue, injury, drugs, or alcohol."[64] Utah also added the factor requiring a court to consider "whether the witness's identification was . . . the product of suggestion."[65] Similarly, the Kansas Supreme Court adopted the Utah factors, but cautioned that "our acceptance should not be considered as a rejection of the *Biggers* model but, rather, as a refinement in the analysis."[66]

The Utah and Kansas models, while very well-intended, offer only marginal or incremental improvement to the fundamentally flawed majority rule. First, the malleable nature of any facts-and-circumstances type of analysis still allows for manipulation by police, prosecutors, and judges and can easily result in the admission of unreliable evidence.[67] Second, even when the factors are applied in good faith, the problem remains that the show-up procedure is itself inherently suggestive, and as a result, the factors become "infected by the suggestive identification methods."[68]

For these and other reasons, some states have decided to completely reject, rather than merely improve upon, the majority rule. This approach, which is discussed in Part III.C, essentially starts anew and is, therefore, best described as a revolutionary approach to reform.

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[62] *See* State v. Ramirez, 817 P.2d 774 (Utah 1991).

[63] *Id.* at 782.

[64] *Id.* at 783.

[65] *Id.* at 784.

[66] State v. Hunt, 69 P.3d 571, 576 (Kan. 2003).

[67] *See, e.g.*, Michael D. Cicchini, *Judicial (In)Discretion: How Courts Circumvent the Confrontation Clause Under* Crawford *and* Davis, 75 TENN. L. REV. 753 (2008) (illustrating how prosecutors and judges are able to manipulate the Supreme Court's facts-and-circumstances framework in the Sixth Amendment context in order to bypass a defendant's right of confrontation).

[68] O'Toole & Shay, *supra* note 28, at 122.

C. REVOLUTION—THE MINORITY RULE

In light of the complete failure of the majority rule to offer any due process protection, as well as the limited benefits available under an incremental, evolutionary approach to reform, some states—particularly New York, Massachusetts, and Wisconsin—have rejected the majority rule's factor-based framework. Instead, these states have chosen a more revolutionary approach to reform.

Under this reform, also known as the minority approach or the minority rule, the treatment of show-up identification evidence is much simpler. Because show-ups are inherently suggestive, such evidence is generally *not* admissible at trial.[69] There are, of course, exceptions to this general rule. Show-up evidence may be used at trial if, at the time of the show-up: (1) there existed exigent circumstances that prevented the police from conducting a lineup or photo array; or (2) the police lacked probable cause to arrest the defendant, again preventing them from conducting a lineup or photo array.[70]

First, a brief example will illustrate the intended use of the exigent circumstances exception. Consider the hypothetical scenario from Part I, in which the perpetrator robbed the victim at gunpoint and took his wallet before fleeing on foot. However, for purposes of this example, also assume that the victim suffered ill health, which was exacerbated by the stress of the robbery. After the crime, he was in a very weak condition, and the police rushed him to a nearby hospital. Further assume that the police did not know whether the victim would survive or for how long. The police therefore brought the suspect into the hospital room for a show-up procedure. Under these facts, the exigent circumstances—that is, the ill health of the victim—would have prevented the police from assembling a

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[69] *See* State v. Dubose, 699 N.W.2d 582 (Wis. 2005); Commonwealth v. Johnson, 650 N.E.2d 1257 (Mass. 1995); State v. Adams, 423 N.E.2d 379 (N.Y. 1981).

[70] *Dubose*, 699 N.W.2d at 584-85. New York and Massachusetts describe the test differently. New York recognizes show-ups as "flawed" procedures and requires a showing of need to justify their use. *Adams*, 423 N.E.2d at 382-83. Massachusetts recognizes show-ups as "disfavored" procedures and requires a showing of "exigent circumstances" to justify their use. *Johnson*, 650 N.E.2d at 1259. However, both states have also carved out an exception for show-ups conducted close in time or place to the crime, regardless of need or exigency. *See, e.g.*, Commonwealth v. Wen Chaio Ye, 756 N.E.2d 640, 645 (Mass. App. Ct. 2001) (admitting a show-up in large part because it was conducted within one and one-half hours of the crime); People v. Duuvon, 571 N.E.2d 654, 656 (N.Y. 1991) (admitting a show-up in large part because it was conducted "within minutes and within a New York City block and a half" of the crime). This exception appears to be nothing more than an exception for police convenience and, in both New York and Massachusetts, has the effect of completely swallowing the general rule excluding show-ups. In addition, this police convenience exception actually creates a near *per se* rule of *admissibility* for show-up evidence. *See Duuvon*, 571 N.E.2d at 658 (Titone, J., concurring); *see also infra* Parts V.A.1-2.

lineup and bringing the victim to the police station for a viewing. Because this situation meets the exigent circumstances exception, the show-up identification would be admissible at trial.[71]

Second, an example will also illustrate the intended use of the probable cause exception. Consider the same hypothetical scenario from Part I and assume, once again, that the crime victim is healthy and mobile. However, this time assume that the suspect is simply standing innocently on the corner and makes no attempt to leave the area when approached by police. Further assume that he does not meet the general description of the perpetrator, and when he is frisked, he does not possess the folding pocket knife or anything else illegal. In this case, the only thing linking him to the crime is his proximity to the crime scene. As a result, the police would *not* have probable cause to arrest him, transport him to the police station, and force him to take part in a lineup.[72] Consequently, the only viable option for the police would be a show-up. Because this situation meets the probable cause exception—or perhaps more accurately, the *lack* of probable cause exception—the show-up identification would be admissible at trial.

Admittedly, there is something counterintuitive about the probable cause exception to the minority rule's general prohibition on show-ups. That is, the suspect has done nothing wrong; in fact, he has behaved so innocently (perhaps because he *is* innocent) that the police don't even have probable cause for an arrest, which is an incredibly low burden to begin with. Precisely because the suspect appears to be innocent, he cannot be arrested and, therefore, does not have the right to a fair identification procedure, such as a lineup or photo array. Instead, his apparent innocence counter-intuitively subjects him to a show-up, the procedure most likely to lead to a false identification and wrongful conviction.[73]

This paradox notwithstanding, the revolutionary approach to reform (the minority rule) is still far superior to the majority rule's facts-and-circumstances framework, which routinely allows prosecutors the unrestricted use of show-up identification evidence at trial. Additionally, the minority rule is superior to the incremental, evolutionary reform implemented in Utah and Kansas, which, while certainly an improvement

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[71] This hypothetical scenario was derived from the case *Stovall v. Denno*, 388 U.S. 293 (1967).

[72] Probable cause is best defined as the existence of any facts or circumstances that would "lead a reasonable officer to believe that guilt is more than a possibility." CHRISTINE WISEMAN & MICHAEL TOBIN, CRIMINAL PRACTICE AND PROCEDURE § 2:22, at 43 (2d ed. 2008).

[73] This odd glitch in the minority rule is easily remedied and is addressed more fully *infra* Part VI.

over the majority rule, still maintains the majority rule's malleable facts-and-circumstances framework.

Consequently, this Article advocates for the Supreme Court's adoption of the minority rule—the rule that has already been adopted in varying forms by New York, Massachusetts, and Wisconsin[74]—in order to better protect due process rights.[75] However, as Part V illustrates, the minority rule's prohibition on show-ups is easily evaded by courts that wish to admit such evidence at trial. Therefore, the rule still requires significant modification in order to more fully protect innocent defendants from false eyewitness identifications and wrongful convictions.

V. JUDICIAL ABUSE: THWARTING THE REVOLUTION

Commentators have reasonably predicted that if a jurisdiction were to implement the minority rule, its general prohibition on show-up evidence would eventually, if not immediately, force police officers to discontinue their use of show-up procedures.[76] Unfortunately, however, this has not occurred in jurisdictions that currently subscribe to the minority approach. The reason for this is that courts continue to tolerate, and even approve of, the use of show-ups, despite their general prohibition.

It may, at first, seem unlikely that courts could permit the use of show-up evidence at trial under the minority approach. After all, the minority rule strictly prohibits the use of show-ups unless exigent circumstances existed, or the police lacked probable cause to arrest the suspect, thereby preventing the use of more reliable identification procedures. In fact, the

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[74] The minority rule discussed in this Article is actually the Wisconsin rule expressed in *Dubose*. Wisconsin is the most recent of the three states—New York, Massachusetts, and Wisconsin—to have abandoned the majority rule in favor of revolutionary reform. However, the Wisconsin rule is expressed most clearly and, perhaps due to its recency, has not yet been eroded by new exceptions, such as the police convenience exception that has been adopted by both New York and Massachusetts. *See* cases discussed *supra*, note 70.

[75] "[E]xperimentation in state courts serves to guide the United States Supreme Court in its determinations . . . . 'Indeed, state judicial review may be said to foster the values of federalism by allowing the nation to profit by using what succeeds in a state and avoiding what fails.'" *Dubose*, 699 N.W.2d at 597-98 n.19 (citing Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951, 966 (1982) (quoting Shirley S. Abrahamson, *State Constitutional Law, New Judicial Federalism, and the Rehnquist Court*, 51 CLEV. ST. L. REV. 339, 347 (2004))).

[76] *See* Luria, *supra* note 19, at 545 ("[M]aking admissibility of showup identifications contingent upon exigency and immediacy will more effectively deter police officers from engaging in [show-up] procedures because the threat of exclusion will loom large."); Benjamin E. Rosenberg, *Rethinking the Right to Due Process in Connection with Pretrial Identification Procedures: An Analysis and a Proposal*, 79 KY. L.J. 259, 304 (1990) ("[I]f a *per se* rule were enforced, the police would soon stop using unnecessarily suggestive procedures.").

minority approach and its underlying policy are quite clear. Nonetheless, courts have easily bypassed the rule by dramatically expanding the use of its two exceptions.[77] Wherever exceptions exist—here, the exigent circumstances exception and the probable cause exception—courts can simply expand and distort them in order to reach a predetermined outcome—here, the admission of unreliable show-up evidence at trial.

A. EXIGENT CIRCUMSTANCES

The first exception to the minority approach and its general prohibition on show-up evidence is the exigent circumstances exception. If, at the time of the show-up, exigent circumstances prevented the use of a lineup or photo array, then the show-up was justified and may be admitted at trial.[78] There are at least two ways in which courts have inappropriately expanded this exception in order to admit show-up evidence. First, courts have misapplied the concept of exigency by adopting the Fourth Amendment definition of the term; and second, they have simply found exigency where none exists.

1. Confusion with Fourth Amendment Exigency

The concept of exigency is well known in Fourth Amendment jurisprudence. For example, if the police become aware of a fast-paced, fluid, and potentially life-threatening situation inside of a home, they are *not* required to obtain a warrant prior to entering that home. Instead, they may rely on the exigent circumstances exception to the warrant requirement and simply enter without a warrant, and without consent, in order to aid potential crime victims.[79] Requiring a warrant in this circumstance would severely hamper a critical law enforcement function—and could be extremely detrimental to the citizens inside of the home who may be in need of police assistance.

Similarly, courts can, and often do, find this same type of exigency in the context of the show-up situation in order to justify the use of a show-up procedure. Again consider the hypothetical scenario from Part I. There, the perpetrator robbed the victim at gunpoint and then fled on foot with the victim's wallet. The police, while en route to the crime scene, spotted the

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[77] *See* Lee, *supra* note 1, at 756 ("Police departments are often able to continue suggestive procedures and rely on . . . the leniency of the court."); Luria, *supra* note 19, at 540 ("[P]olice officers have little incentive to use more reliable methods of identification, such as a lineup, because the showup identification will not be suppressed.").

[78] *See Dubose*, 699 N.W.2d at 584-85.

[79] *See, e.g.*, Brigham City, Utah v. Stuart, 547 U.S. 398 (2006) (upholding police entry into a home to render assistance to potential victims when there was reason to believe that violence was occurring within the home).

suspect, who matched the perpetrator's general description. The police arrested the suspect for a reason unrelated to the robbery and held him in police custody a short distance from the crime scene. Does this situation, fast-paced and fluid as it is, constitute exigent circumstances to justify the use of a show-up instead of a more reliable lineup or photo array?

Yes, according to many courts. For example, one court held that the "unbroken chain of events—crime, escape, pursuit, apprehension and identifications—all within minutes and within a New York City block and a half" justified the use of a show-up.[80] The court's reasoning was that "fast-paced street episodes and encounters" constitute sufficient exigency to render a show-up necessary.[81] Show-ups in these types of circumstances are necessary, the court believed, because the police rightly want "reasonable assurances that they have arrested or detained the right person."[82] Another court echoed this sentiment when it held that "it was critically important for the protection of the community that the police make extraordinary efforts to locate the true perpetrator and eliminate the risk of further violent behavior, and that this concern fully justified the police decision to employ a show-up in this case."[83]

There are several problems with this reasoning. First, show-ups simply *cannot* provide any level of assurance that the police have arrested the true perpetrator. Recall that the problem with show-ups is that they are highly *unreliable*.[84] If show-ups were as reliable as lineups or photo arrays, then their immediate use at the scene of the crime would not be troublesome. "However, the circumstances which surround these one-on-one procedures also involve a high degree of suggestiveness, which gives rise, in turn, to a substantial risk of error."[85] Consequently, any perceived assurances that flow from the use of show-up procedures are purely illusory.

Second, not only do show-ups fail to provide these much desired assurances, but their use also poses distinct risks, not only to the defendant but also to the community. Recall that at the time of the show-up, the suspect was already arrested and remained in police custody for an

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[80] People v. Duuvon, 571 N.E.2d 654, 656 (N.Y. 1991); *see also* Commonwealth v. Wen Chao Ye, 756 N.E.2d 640, 645 (Mass. App. Ct. 2001) (permitting show-up made near in time and place to crime); People v. Briscoe, 788 N.E.2d 611, 612 (N.Y. 2003) (permitting show-up in the "context of a continuous, ongoing investigation").

[81] *Wen Chao Ye*, 756 N.E.2d at 657.

[82] *Id.*

[83] Trial Court Memorandum at 6, Wisconsin v. Siebeneich, No. 2007-CF-0478 (Cir. Ct. Kenosha County 2007) [hereinafter *Siebeneich*, Tr. Ct. Mem.] (on file with authors).

[84] *See supra* Part III; *see also* Lee, *supra* note 1, at 770.

[85] *Duuvon*, 571 N.E.2d at 659 (Titone, J., concurring).

unrelated reason.[86] At this point, there are only two mutually exclusive possibilities: either the suspect *is* or is *not* the true perpetrator of the robbery. If the suspect is, in fact, the perpetrator, the community is no safer as a result of the show-up because the suspect is already under arrest and is being transported to the police station anyway. Therefore, a lineup or photo array could have been conducted just as easily as the show-up.[87] In other words, as another court was forced to concede, the police "had the luxury of some time, because [the suspect] was in custody."[88]

Alternatively, if the suspect is *not* the perpetrator, then the community obviously is no safer and, in fact, is far *less safe* because of the show-up. Why? Because instead of continuing the search for the true perpetrator in the immediate area, the police stopped their investigation and used several officers to conduct a highly unreliable show-up procedure focused on an innocent man. During this time, of course, the true perpetrator had gone free, perhaps to continue his crime-spree or to commit new, unrelated crimes. Therefore, regardless of whether the suspect is or is not the true perpetrator, the community is either no safer or far less safe as a result of the show-up procedure.

The third problem with the reasoning in support of show-ups is that at best it completely misapplies, or at worst intentionally distorts, the concept of exigent circumstances. The reason is that in nearly every case where a show-up is conducted, there *will be* exigent circumstances in the Fourth Amendment sense of the term. That is, there will nearly always be the risk that the perpetrator is in the middle of an ongoing crime-spree, or that he will commit a second, unrelated crime, or that he will simply escape arrest and punishment for his completed crime. Therefore, if this is the standard for exigency, then the exigent circumstances exception swallows the minority rule whole, and show-ups should be permitted in every case.[89]

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[86] In our hypothetical example, the suspect was in custody for unrelated reasons. In other cases, the suspect will be in custody for the crime under investigation. *See id.* ("[T]he arresting officers, who had chased and subdued defendant as he alit from the taxi, had no doubt that they had the 'right man' in custody and had no thought of releasing him whatever the outcome of any subsequent identification might be.").

[87] *See id.* (stating that "there is no reason *not* to '[f]reez[e] the frame at the point of apprehension'" and conduct a more reliable procedure such as a lineup or photo array).

[88] *Siebeneich*, Tr. Ct. Mem., *supra* note 83, at 5.

[89] Other courts and legal commentators, having been conditioned to the concept of exigency in the Fourth Amendment context, have also made the mistake of using Fourth Amendment exigency when analyzing show-ups. *See, e.g.*, State v. Dodd, 2008 Wis. App. LEXIS 696, at *3-4 (Wis. Ct. App. Sept. 3, 2008) (describing exigency in the context of the Fourth Amendment, rather than whether the exigency prevented the use of a lineup or photo array); Luria, *supra* note 19, at 528 (discussing exigency in the proper context, but also in the classic Fourth Amendment context).

What the courts tend to gloss over is this: the minority approach requires that, in order to qualify under the exigency exception, the exigency must be such that it *prevents the use of a lineup or photo array*.[90] Going back to our hypothetical robbery scenario in Part I, nothing in that set of facts prevented the use of a lineup or photo array. The suspect was already in custody, and the victim was capable of (and certainly would have been safer) traveling to the police station where a lineup or photo array could have been assembled. All the while, the police could have continued their investigation in the immediate area of the crime scene, rather than diverting resources to conduct an unreliable show-up procedure. This course of action—and not the show-up procedure—would have *truly* protected the community while simultaneously reducing the risk of the false identification of an innocent man.

Instead of the always-present Fourth Amendment type of exigency, the classic (and perhaps only) type of exigency that qualifies under the exception for show-ups is the case of the ill or dying witness.[91] In that situation, if the show-up is not conducted immediately, the witness may die and no identification would be made. Under these circumstances, the identification must be made posthaste, or the guilty man could go free. There simply is no time, under these circumstances, to take the ill or dying witness to the police station while a lineup or photo array is assembled. This, not the Fourth Amendment type of exigency, is the situation envisioned by the exigent circumstances exception to the minority rule and its general prohibition on show-ups.

2. Watered-Down Exigency

Having established that the relevant type of exigency is one that truly prevents the use of a lineup or photo array, courts still have other ways of expanding the exigent circumstances exception in order to admit show-up evidence at trial. The most straightforward of these ways is simply to find exigency where none exists.

Again consider the hypothetical scenario from Part I, in which a victim was robbed at gun point in his apartment, and the perpetrator fled on foot. This time, assume that an eyewitness witnessed the crime at about 9:30 p.m. Further assume that the eyewitness was a federal government employee who resided in a neighboring state and had planned to leave for home the next day. Finally, assume that the police had actually arrested the suspect

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[90] *See* State v. Dubose, 699 N.W.2d 582, 584-85 (Wis. 2005) (allowing the use of show-ups when, "as a result of . . . exigent circumstances, [the police] *could not have conducted a lineup or photo array*") (emphasis added).

[91] *See, e.g.*, Stovall v. Denno, 388 U.S. 293 (1967).

and were able to interview the eyewitness about one hour after the crime, at 10:30 p.m.

Do these facts constitute exigent circumstances to justify the show-up? Yes, according to many courts; in fact, one court held, under nearly identical facts, that "the totality of the circumstances justified a show-up identification because exigent circumstances of [the witness's] immediate but highly limited availability to identify the suspect was likely to be lost absent a show-up identification."[92]

The problem with this reasoning is that it confuses exigency with police convenience. In fact, the officer who conducted the show-up in this case even testified that "it's a big inconvenience [not to conduct a show-up] when you have cooperative witnesses standing around. Furthermore, holding on to a witness for multiple hours to conduct a lineup at the jail, that would not have been practical."[93] Despite this revealing and surprisingly honest admission by the officer, the court was willing to take these facts and somehow turn an "inconvenience" into an exigency.[94]

Some courts have gone even further. Instead of trying to force various factual scenarios into the exigency framework, they have found it easier to gradually and subtly replace the minority rule's exigency exception with a police convenience exception. For example, some courts will allow show-ups if there is "good reason" to do so.[95] "The good reason inquiry does not require a showing that the one-on-one identification was necessary, only that the police have good cause for their actions."[96] The term "good cause" has, in turn, come to be synonymous with police convenience. That is, simply because photo arrays and lineups take more time, the police will nearly always be justified in conducting a show-up procedure instead.[97]

Other courts have expanded this police convenience exception to include the use of show-ups whenever they are conducted near in time and place to the crime. One court justified this because "[t]emporal and spatial

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[92] *Dodd*, 2008 Wis. App. LEXIS 696, at *4.

[93] *Id.*

[94] *Id.*

[95] Commonwealth v. Austin, 657 N.E.2d 458, 460 (Mass. 1995).

[96] Commonwealth v. Blake, Nos. BRCR2006-0851 & BRCR2006-0852, 2007 WL 3104405, at *8 (Mass. Super. Ct. Aug. 10, 2007) (citing Commonwealth v. Martin, 850 N.E.2d 555 (Mass. 2006)).

[97] *See Blake*, 2007 WL 3104405, at *5 (permitting the use of a show-up because assembling a photo array "would have taken about an hour to an hour and a half"); *Martin*, 850 N.E.2d at 561 (permitting the use of a show-up because assembling a photo array "would be unnecessarily burdensome"); Commonwealth v. Martinez, 857 N.E.2d 1096 (Mass. App. Ct. 2006) (permitting the use of a show-up because assembly of a photo array would have taken additional time); Commonwealth v. Sylvia, 781 N.E.2d 46 (Mass. App. Ct. 2003) (permitting same).

considerations become so intertwined that precious compartmentalization to discern levels of exigency, involving fast-paced street episodes and encounters, is unwarranted."[98] Of course, most show-ups *are* conducted near in time and place to the crime. Consequently, "this syllogism results in its own rule of *per se* or presumptive *admissibility*" of show-ups, thus turning the minority rule completely on its head.[99] In other words,

> The [court's] holding rests on its [equating] . . . temporal and spatial proximity to the crime with the exigency element of the due process analysis. To support its position, the [court] then invokes a series of phrases and concepts, including an 'unbroken chain of events,' 'fast-paced street episodes and encounters,' 'fast-moving, uninterrupted array of activity' and 'the uncertain, emergent realities of these street situations.' However, these phrases are insufficient to dispose of the due process problem presented [by the use of show-up procedures].[100]

The holdings discussed in this section illustrate a recurring problem, both at the trial and appellate court levels. After decades of routinely approving the use of show-ups—despite their well-known propensity to produce false identifications and wrongful convictions—courts simply have a difficult time understanding that the issue is not one of police convenience. Rather, it is one of exigency. The facts and circumstances surrounding the show-up must truly have prevented the use of a lineup or photo array, otherwise there really was no exigency at all.

There is no question that police would rather stop their investigation, conduct an immediate show-up, and obtain a positive identification as well as closure to their case. This is far more desirable to the police because it provides instant (but unreliable) results and also requires somewhat less work than assembling a lineup or photo array. But again, exigency—not convenience—is the real test. Nonetheless, one court actually upheld the constitutionality of a show-up in part because "the evidence suggests . . . at least the possibility that police detectives will be called away from their duties to either assemble or stand in the lineup."[101] Of course, given the minority rule's plain language and underlying policy concerns, nothing could be further off-point.

B. PROBABLE CAUSE TO ARREST

The second exception to the minority approach and its general prohibition on show-up evidence is the probable cause exception. If, at the time of the show-up, the police *lacked* probable cause to arrest a suspect,

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[98] People v. Duuvon, 571 N.E.2d 654, 657 (N.Y. 1991).

[99] *Id.* at 658 (Titone, J., concurring) (emphasis added).

[100] *Id.*

[101] *Siebeneich*, Tr. Ct. Mem., *supra* note 83, at 6.

they are unable to hold him legally in custody while assembling a lineup or photo array. Consequently, a show-up is justified and will be admitted at trial.[102]

When a defendant moves to suppress show-up evidence, and the prosecutor asserts the probable cause exception—that is, the prosecutor argues that probable cause did *not* exist at the time of the show-up—the trial judge is forced into foreign and uncomfortable territory. Normally, judges will go to great lengths to find that the police *did* have probable cause to arrest a defendant. Such a finding of probable cause accomplishes a number of things for the prosecutor, such as ensuring that all subsequent searches will be upheld as searches incident to a valid arrest.[103] However, in the case of show-ups, the prosecutor is asking the court to find that the police *lacked* probable cause to arrest the suspect.

There are at least two ways in which courts can misapply this probable cause exception in order to admit show-up evidence. First, when courts are forced to acknowledge that probable cause for arrest *did* exist, they may attempt to distinguish the underlying basis for that probable cause in order to admit the show-up evidence. Second, courts may simply find that probable cause for arrest did *not* exist, even when an abundance of case law has established that, under the facts, it did exist.

1. Probable Cause and the Independent Basis

The purpose behind the probable cause exception to the minority approach is simple: if police do *not* have probable cause to arrest, then they cannot legally hold the suspect long enough to conduct a lineup or photo array. Without being able to hold the suspect and compel his participation in a more time-consuming identification procedure, a show-up is the only procedure available to the police. However, some courts set out with the goal of admitting the show-up evidence and, therefore, look for ways around the rule, even if their holdings violate the rule's underlying policy and purpose.

Again consider the hypothetical scenario from Part I, in which a victim was robbed at gun point in his apartment and the perpetrator fled on foot. Recall that the police had probable cause to arrest the suspect, and in fact *did* arrest the suspect, prior to the show-up. But the basis for that arrest was the suspect's possession of a folding knife, which was completely unrelated to the robbery being investigated. Does that mean that the show-up procedure for the robbery was necessary and therefore admissible at trial?

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[102] *See* State v. Dubose, 699 N.W.2d 582, 584-85 (Wis. 2005).

[103] *See, e.g.*, Michigan v. DeFillippo, 443 U.S. 31, 35 (1979) (upholding a search incident to a lawful arrest, even when the arrest is for an ordinance violation).

Yes, according to many courts, which have held under nearly identical facts that the police were justified in conducting the show-up. Why? Because, although the police had probable cause to arrest, the basis for that probable cause was something *other* than the robbery, which was the crime currently under investigation.[104]

Courts employ this type of reasoning to defeat, rather than to apply, the minority approach and its general prohibition on show-ups. The reason for the probable cause exception is this: if the police cannot legally arrest the suspect and take him to the police station, then a lineup or photo array cannot be conducted. Conversely, if the suspect is arrested, then a lineup or photo array is not only possible but is required. The obvious point that the trial courts often ignore is that it doesn't matter *why* the suspect was, or could have been, arrested. The fact is that once he is, or can be, arrested, regardless of the reason, he can be taken to the police station for a lineup or photo array. The show-up is, therefore, no longer necessary, and a more reliable identification procedure is required.

Fortunately, some courts have recognized this incredibly basic but critical point and corrected this erroneous reasoning. Although it should not have been necessary, one appellate court specifically clarified that the reason or basis for a suspect's arrest is irrelevant; rather, once arrested for any reason, a show-up is no longer necessary and a lineup or photo array is required.[105]

2. Role Reversal: No Finding of Probable Cause

In Fourth Amendment scenarios where defendants move to suppress *physical* evidence of guilt, they often argue that the police lacked probable cause to arrest, and therefore, the physical evidence uncovered in the search incident to arrest should be excluded from evidence. However, due to the incredibly minimal standard of "probable cause," courts routinely deny these defense motions and nearly always uphold arrests and subsequent

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[104] *See* State v. Nawrocki, 746 N.W.2d 509, 518 n.7 (Wis. Ct. App. 2008) (explaining that even though the State conceded, and the trial court found "that officers had a legal basis upon which to detain Nawrocki," the trial court nonetheless found the show-up necessary, and therefore admissible, because the basis for detaining Nawrocki was different than the crime under investigation at the time).

[105] *See id.* at 519 ("[W]here probable cause exists, *whether it is related to the offense under investigation or some other offense*, officers have the constitutional means to detain the suspect and secure an identification using a procedure that is less conducive to misidentification [than a show-up]." (emphasis added)); *cf.* People v. Milza, 529 N.Y.S.2d 31 (N.Y App. Div. 1988) (finding the show-up justified in part because police *had* probable cause to arrest).

searches.[106] In fact, probable cause only requires the existence of minimal facts and circumstances to "lead a reasonable officer to believe that guilt is more than a possibility."[107]

For example, in one case an officer arrested three individuals two days after reading a periodical that described the suspects as slim, black men within a five-year age span and a three-inch height span.[108] It also described two of them as wearing dark clothing and one as wearing a white leather jacket and blue jeans with an emblem.[109] In response to a defendant's probable cause challenge, the court held that his "*clothing alone* might have established probable cause for his arrest."[110] Other cases have held that the recognition of height, weight, and facial features "bearing resemblance" to the description of the perpetrator is sufficient for probable cause.[111] Sometimes, similarity in hair length alone is sufficient.[112] Probable cause has even been found where a witness gave a description of the perpetrator's vehicle, and officers pulled over a vehicle that was similar but of a different color and make.[113]

In short, Fourth Amendment challenges to arrests and searches are nearly always denied.[114] The reality is that almost any fact or circumstance, no matter how vague, and even if later determined to be mistaken, will give rise to probable cause.[115] And it is this same probable cause standard that is

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[106] *See* Albert W. Alschuler, *Studying the Exclusionary Rule: An Empirical Classic*, 75 U. CHI. L. REV. 1365, 1375 (2008) (citing empirical research demonstrating that suppression motions are successful less than 1% of the time). Further, the probable cause for an arrest need not even be related to the crime under investigation. This allows the police to use a pretext, such as a minor ordinance violation, as a tool to arrest a suspect and investigate a completely unrelated crime for which the police have no probable cause. *See, e.g.*, United States v. Wisel, 110 F.3d 1269, 1275 (7th Cir. 1997) ("After *Whren*, the officer's subjective intentions 'play no role' in [the] probable cause inquiry." (citing Whren v. United States, 517 U.S. 806 (1996))); *see also* United States v. Bass, 325 F.3d 847, 850 (7th Cir. 2003) ("Any ulterior motive an officer may have for making the stop is irrelevant.").

[107] WISEMAN & TOBIN, *supra* note 72, at 43 (emphasis added); *see also* Wong Sun v. United States, 371 U.S. 471, 479 (1963) (requiring something more "than mere suspicion").

[108] United States v. Carpenter, 342 F.3d 812, 814 (7th Cir. 2003).

[109] *Id.*

[110] *Id.* (emphasis added).

[111] United States v. Thomas, 79 F. App'x 908, 913 (7th Cir. 2003).

[112] *See* State v. Guzy, 407 N.W.2d 548 (Wis. 1987).

[113] *See* Creighton v. Anderson, 922 F.2d 443, 450 (8th Cir. 1990).

[114] *See* Alschuler, *supra* note 106, at 1375.

[115] *See, e.g.*, Kaminski v. City of Whitewater, 877 F. Supp. 1289, 1293 (E.D. Wis. 1995) (finding probable cause to arrest because defendant loosely matched the description of the perpetrator, was only "a few blocks from the victim's apartment," and there was no evidence that the victim's allegation was untrustworthy); State v. Isham, 235 N.W.2d 506, 512 (Wis. 1975) (finding probable cause to arrest due to defendant's two-and-a-half block proximity to

to be applied under the minority approach in order to determine whether the show-up procedure was necessary.[116] However, if a judge is determined to admit show-up evidence at trial, then he must struggle to make the *opposite* finding—that probable cause did *not* exist. Once this finding is made, it necessarily follows that, without probable cause, the police could *not* have legally detained the defendant for a lineup or photo array, and the show-up was therefore necessary and admissible at trial.

In states that apply the minority approach, courts have found that probable cause did *not* exist at the time of the show-up, even when the facts would have led to a finding of probable cause under a Fourth Amendment challenge. That is, police are allowed to use show-up procedures even when they "had no doubt that they had the 'right man' in custody and had no thought of releasing him whatever the outcome of any subsequent identification might be."[117]

For example, in a case discussed earlier in this Article, two victims were held at gunpoint in their apartment by a white male wearing a tan jacket.[118] The perpetrator then fled the scene in a pickup truck.[119] Then, while responding to the victims' 9-1-1 call, an officer observed a white male wearing a tan jacket standing next to a pickup truck, a mere two blocks from the crime scene.[120] When the officer approached, the man attempted to get in his truck and leave.[121] The officer, however, stopped and detained him.[122] A show-up was conducted, and the victims identified the suspect as the perpetrator.[123]

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the crime scene, even though the perpetrator was reported to have short sleeves and no shoes, and the defendant had three-quarter sleeves and work boots).

[116] This Article is *not* inconsistent by arguing, on the one hand, for a seemingly different standard of exigency, while arguing on the other hand for the same standard of probable cause. In fact, the exigency standard advanced in this Article is actually the same as the exigency standard employed in the Fourth Amendment context. The only difference is that in the Fourth Amendment context, the exigency must be one that prevents the police from obtaining a search warrant, while in the show-up context, the exigency must be one that prevents the police from using a lineup or photo array. This distinction is appropriate, and in fact required, based on the different nature of the police action. Conversely, whether there is probable cause to arrest a suspect remains the same regardless of the constitutional issue being litigated.

[117] People v. Duuvon, 571 N.E.2d 654, 659 (N.Y. 1991) (Titone, J., concurring).

[118] Transcript of Suppression Motion Hearing at 10, Wisconsin v. Siebeneich, No. 2007-CF-0478 (Cir. Ct. Kenosha County 2007) [hereinafter *Siebenach*, Tr. Suppress. Mot. Hr'g] (on file with authors).

[119] *Id.* at 12.

[120] *Id.* at 3.

[121] *Id.*

[122] *Id.* at 3.

[123] *Id.* at 4-5.

The defendant moved to suppress the show-up, arguing that the police *did* have probable cause to arrest him and, therefore, *should* have arrested him and conducted a less suggestive identification procedure at the police station.[124] In fact, the prosecutor conceded that probable cause *did* exist at the time of the show-up.[125] Despite the prosecutor's concession and the quantum of evidence that would have easily supported a finding of probable cause in a Fourth Amendment context—including the defendant's race, sex, clothing, vehicle, attempted flight, and proximity to the crime scene—the court still concluded that probable cause did *not* exist, and therefore the show-up was permissible.[126]

This example illustrates how the very same evidence that consistently amounts to probable cause in the Fourth Amendment context can easily be side-stepped in the show-up context. In fact, it is interesting to imagine how the outcome in the above case would have differed if the officer would have arrested the suspect, searched him incident to arrest, and found the gun or other evidence linking him to the robbery. Under those circumstances, the defendant would have argued that the search was incident to an *unlawful* arrest—that is, an arrest that *lacked* probable cause. A lack of probable cause is, after all, the exact finding the judge made in the context of the show-up issue.

However, under these circumstances, if the defendant was seeking to suppress the handgun evidence, nearly every judge would have rightly concluded that the defendant's race, sex, clothing, vehicle, attempted flight, and proximity to the crime scene were sufficient to "lead a reasonable officer to believe that guilt [was] more than a *possibility*."[127] In other

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[124] Defendant's Brief in Support of Motion to Suppress at 6-7, *Siebeneich*, No. 2007-CF-0478 (Cir. Ct. Kenosha County 2007) (on file with authors).

[125] *Siebeneich*, Tr. Ct. Mem., *supra* note 83, at 2.

[126] *Id.* Actually, whether there was probable cause to arrest was, at best, a secondary issue at the motion hearing. At the time of the show-up, the defendant had *actually* been arrested for reasons independent of the crime under investigation. *See Siebeneich*, Tr. Suppress. Mot. H'rg, *supra* note 118, at 3. Therefore, given the actual arrest, the issue of whether there was probable cause to arrest should have been moot. Surprisingly, the trial court ruled that the show-up was admissible in part because the police did not have probable cause to arrest for the specific crime under investigation. *See Siebeneich*, Tr. Ct. Mem., *supra* note 83, at 5. The trial court's erroneous reasoning was later corrected by *State v. Nawrocki*, 746 N.W.2d 509, 512 (Wis. Ct. App. 2008), which overruled a different trial court that had admitted show-up evidence on identical grounds. *See supra* Part V.B.1.

[127] WISEMAN & TOBIN, *supra* note 72, at 43 (emphasis added). In fact, it is the rarest of cases where probable cause is found *not* to exist in the Fourth Amendment contexts. *See, e.g.*, State v. Garrett, Nos. 2008AP437-CR & 2008AP438-CR, 773 N.W.2d 225, 2009 WL 2180899, at *4 (Wis. Ct. App. July 23, 2009) (reversing trial court's finding of reasonable suspicion for investigatory stop where perpetrator was described as a "tall, thin, black male

words, the reality is that a double standard has been created. Whether probable cause is found to exist no longer depends on the facts, but rather on whether the defendant is asking the court to suppress show-up evidence—in which case probable cause will be found *not* to exist—or to suppress physical evidence—in which case probable cause will be found to exist.

VI. SOLVING THE PROBLEM

The minority approach to show-ups is a vast improvement over the majority approach. Further, the minority approach is not an incremental, evolutionary change, as is the approach in states that still embrace the factor-laden framework of the majority rule. Instead, the minority approach is a revolutionary reform rooted in the scientific evidence regarding show-ups, false identifications, and wrongful convictions.[128] However, as this Article illustrates, even the best reform is of little value if the police and the courts are permitted to distort and circumvent the law.

Consequently, based on the analysis in Part V, the Supreme Court should adopt the minority rule,[129] but with the following, additional reforms. First, the test for the exigency exception to the minority rule must be whether the exigency prevents the use of a lineup or photo array, not whether exigency exists for Fourth Amendment purposes.[130] Second, with this proper definition of exigency in mind, the term cannot be degraded to the point where it becomes synonymous with the concept of police convenience.[131]

Third, when determining whether the probable cause exception is satisfied—that is, whether the police *lacked* probable cause to arrest the defendant—the reason for the probable cause is irrelevant. The issue is whether the defendant was, or could have been, arrested, regardless of the reason. If so, then the show-up was not necessary, and a lineup or photo array should have been conducted.[132] Fourth, the determination of probable cause must be consistent with existing law on probable cause. For example,

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wearing glasses," and the defendant was a white male and did not otherwise match the description).

[128] *See* State v. Dubose, 699 N.W.2d 582 (Wis. 2005) (citing numerous psychological and empirical studies in support of its adopting the minority rule on show-ups). The *Dubose* court also stated that "this case is not the first to result in a change in principles based on extensive new studies." *Id.* at 598. The court then discussed how the Supreme Court used similar studies in *Brown v. Board of Education*, 347 U.S. 483 (1954), to overrule *Plessy v. Ferguson*, 163 U.S. 537 (1896). *See Dubose*, 699 N.W.2d at 598.

[129] *See supra* note 75.

[130] *See supra* Part V.A.1.

[131] *See supra* Part V.A.2.

[132] *See supra* Part V.B.1.

if a jurisdiction has previously held that a given set of facts was sufficient for probable cause to arrest and search a suspect, then that jurisdiction must be bound by that holding. Consequently, that same set of facts must also give rise to probable cause in the context of show-ups, and when those facts are present, an arrest must be made and a lineup or photo array must be conducted.[133]

These reforms address the bulk of what is needed to advance the goal and policy of the minority approach. However, there is still one flaw that is inherent in the approach and must be corrected. We have seen that the minority approach works quite well when there is probable cause to arrest a suspect. In that case, a lineup or photo array is not only possible but is required. This creates a much lower risk that an innocent person, despite the existence of facts giving rise to probable cause, will be falsely identified and wrongfully convicted.[134]

However, although the minority approach is superior to the majority approach, it still offers little protection when the police completely *lack* probable cause to arrest a suspect. For example, if there is no indication that a person was involved in the crime currently under investigation, and there is no other unrelated reason to justify an arrest, then the police are actually permitted, under the minority approach, to conduct a show-up of that person.

The paradox is that, with regard to any suspect, the stronger the initial evidence of innocence, the more likely a show-up will be permitted and the greater the risk of false identification and wrongful conviction. Consider, once again, our hypothetical scenario from Part I, in which a victim was robbed at gun point in his apartment, and the perpetrator fled on foot. Under these facts, the minority rule creates the counterintuitive result of offering stronger due process protection to the suspect who flees upon seeing police, or who is carrying a concealed weapon, than it does to the completely innocent and unaware bystander who just happens to be in the vicinity of the crime.

This paradox, however, is easily solved. When police completely lack probable cause to arrest a suspect, that suspect should have the *right* to request a lineup or photo array in lieu of a show-up. First, this is nothing more than what the minority approach already affords the suspect for whom the police *have* probable cause to arrest. Second, such a request would constitute a waiver by the suspect of his freedom for the time necessary to assemble and conduct the lineup or photo array. This waiver would, of

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[133] *See supra* Part V.B.2.

[134] *See supra* Part IV.C.

course, substitute for probable cause to arrest, and the show-up would no longer be necessary.[135]

Further, the police must be required to notify the suspect of the risk associated with a show-up procedure, as well as the suspect's right to a lineup or photo array procedure. This is, of course, very similar to the process of "informing the accused" when the police suspect a person of drunk driving,[136] or reading *Miranda* rights before the police interrogate an in-custody suspect.[137] The law already requires that police read a suspect his rights in these other related contexts. This demonstrates that the administrative burden of informing a suspect of his right to a lineup or photo array procedure would be minimal. Further, it would ensure due process protection for all citizens, rather than the counterintuitive approach of protecting only those citizens whose actions or appearance have created probable cause for their own arrest.

VII. CONCLUSION

Social science research has shown that eyewitness identification testimony in criminal trials has a dual problem: first, it is highly unreliable; and second, it is highly persuasive to juries. This, of course, is a dangerous combination, and erroneous eyewitness identifications often lead to wrongful convictions of innocent defendants.[138] Further, when the identification evidence is derived from a show-up procedure—an incredibly suggestive and highly unreliable identification procedure—the risk to innocent defendants is increased several-fold.[139]

However, the risks associated with show-ups begin, but do not end, with the risk of wrongfully convicting an innocent defendant. Additionally, the community in general is far *less* safe due to the use of show-up procedures. When a show-up is conducted and an innocent suspect is falsely identified, the police have no way of determining that the identification is false. Therefore, not only is the innocent suspect arrested and prosecuted, but the true perpetrator goes free. This, in turn, allows the perpetrator to continue an ongoing crime spree or commit additional,

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[135] This proposed rule is a modification of a proposal by Jessica Lee, who argued that, because the dangers of show-ups are not commonly known, even a defendant's waiver should not operate to allow the use of a show-up, as the waiver could not have been made knowingly and intelligently and therefore would be invalid. *See* Lee, *supra* note 1, at 757.

[136] *See, e.g.*, WIS. STAT. § 343.305(4) (2006) (requiring that individuals suspected of operating while intoxicated be read their rights regarding tests for breath, blood, or urine).

[137] Miranda v. Arizona, 384 U.S. 436, 492 (1966).

[138] *See supra* Part II.

[139] *See supra* Part III.

unrelated crimes. All of this, of course, threatens the safety of the community.[140]

Because show-up procedures are incredibly harmful to both innocent defendants and society generally, some states have revolutionized their approach to show-up evidence and adopted the minority rule. Under this minority rule, show-up evidence may only be used at trial if, at the time of the show-up: (1) there existed exigent circumstances that prevented the police from conducting a lineup or photo array; or (2) the police lacked probable cause to arrest the defendant, again preventing them from conducting a lineup or photo array.[141]

This minority approach is a tremendous improvement over the old majority approach. Its advantages lie not only in its recognition of the social science research but also in its departure from the easily manipulated facts-and-circumstances framework of the majority rule. Nonetheless, even where the minority rule has been adopted, some courts have been successful in circumventing the rule by distorting its two exceptions: the exigent circumstances exception and the probable cause exception.

The judiciary's distortion of these rules, however, is easily remedied. First, with regard to the exigent circumstances exception, the test must be whether the exigency prevented the use of a lineup or photo array, not whether exigency existed for Fourth Amendment purposes.[142] Additionally, the term exigency cannot be degraded to the point where it becomes synonymous with the concept of police convenience.[143] Second, with regard to the probable cause exception, the underlying reasons for the probable cause are irrelevant,[144] and the determination of whether probable cause exists must be consistent with existing law on probable cause.[145]

Finally, the one flaw of the minority approach—that is, the complete *lack* of probable cause to arrest a person actually operates to that person's detriment by allowing the police to conduct a show-up—is easily remedied. Much like reading rights in the *Miranda* context, police would be required to inform the suspect of the risk of a show-up, as well as his right to accompany the police for a less suggestive, and more reliable, identification procedure such as a lineup or a photo array.[146]

Only these reforms will ensure due process protection for all citizens, as intended by the minority rule's general ban on show-up evidence.

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[140] *See id.*
[141] *See supra* Part IV.C.
[142] *See supra* Part V.A.1.
[143] *See supra* Part V.A.2.
[144] *See supra* Part V.B.1.
[145] *See supra* Part V.B.2.
[146] *See supra* Part VI.

Further, the last of these proposed reforms will eliminate the counterintuitive approach of protecting only those citizens whose actions or appearance have created probable cause for their own arrest.[147]

[147] *See id.*