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Molly Eyerman

Catholic University of America (Student), eyerman@cua.edu

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Cover Page Footnote

J.D. Candidate, The Catholic University of America, Columbus School of Law, 2021; B.A. Communication Studies & B.S. Sociology, Virginia Tech, 2016. The author thanks Susan McEvoy for her valuable feedback on earlier drafts of this Comment. The author also thanks the staff and editors of the Catholic University Law Review for their help in preparing this Comment for publication. Finally, the author thanks her family for their unwavering support and encouragement.

POLICE USING PHOTOSHOP TO ALTER A SUSPECT'S PHOTO IN LINEUP AND COURTS ALLOWING IT: DOES IT VIOLATE DUE PROCESS?

Molly Eyerman⁺

In criminal investigations, about 80,000 eyewitness identifications occur each year.¹ Eyewitness identifications regularly serve as crucial evidence in criminal investigations and trials.² Police obtain this evidence through different eyewitness identification procedures, such as physical lineups, show-ups, and photo arrays.³ Despite the prevalence of eyewitness identification evidence, experts attribute the high rates of wrongful convictions to eyewitness misidentifications resulting from poorly administered procedures.⁴ To reduce this danger, an increasing number of law enforcement agencies have gradually started implementing expert recommendations into their eyewitness identification procedure policies with the goal of administering more reliable and fairer procedures.⁵

One procedure agencies began to improve were photo arrays, also known as photo lineups, photo-spreads, photo-montages, or six-packs.⁶ Photo arrays are the most commonly used identification procedure in the United States.⁷ Typically, the procedure involves an officer showing an eyewitness “only one

⁺ J.D. Candidate, The Catholic University of America, Columbus School of Law, 2021; B.A. Communication Studies & B.S. Sociology, Virginia Tech, 2016. The author thanks Susan McEvoy for her valuable feedback on earlier drafts of this Comment. The author also thanks the staff and editors of the *Catholic University Law Review* for their help in preparing this Comment for publication. Finally, the author thanks her family for their unwavering support and encouragement.

1. Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND. L. REV. 451, 457 (2012).

2. *Id.* at 458.

3. See Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 WIS. L. REV. 615, 616–18, 628 (2006).

4. *Eyewitness Identification Reform*, INNOCENCE PROJECT [hereinafter INNOCENCE PROJECT], <https://innocenceproject.org/eyewitness-identification-reform/> (last visited Mar. 27, 2021).

5. See Rebecca Brown & Stephen Saloom, *The Imperative of Eyewitness Identification Reform and the Role of Police Leadership*, 42 U. BALT. L. REV. 535, 537 (2013).

6. See Gary L. Wells et al., *Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence*, 44 L. & HUM. BEHAV. 3, 7–9, 28 (2020) (summarizing eyewitness identification research and current American Psychological Association recommendations).

7. *A National Survey of Eyewitness Identification Procedures in Law Enforcement Agencies*, POLICE EXEC. RES. F. 58 (2013) [hereinafter *National Survey*], <https://www.ncjrs.gov/pdffiles1/nij/grants/242617.pdf> (finding that around ninety-four percent of police departments use photo arrays); see also David A. Fahrenthold, *Police Lineups Falling Out of Favor*, WASH. POST (Apr. 19, 2004), <https://www.washingtonpost.com/archive/politics/2004/04/19/police-lineups-falling-out-of-favor/99d1070d-38c6-458b-a3e5-c994b77c8876/>.

[photograph of a] suspect (who might or might not be the culprit) and the remaining lineup [photos] are fillers.”⁸ A “filler is a known innocent person who is in the lineup to help make the procedure fair” and physically resembles the suspect.⁹ Fillers help lessen the suggestiveness of the procedure because a suspect’s photo remains indifferent, thus failing to draw an eyewitness’s attention to the suspect’s photo.¹⁰ To find fillers, police often input the suspect’s traits into “a computer-generated program,” which then produces “a compilation of similar photographs based on the suspect’s photograph.”¹¹ If an eyewitness describes a culprit as having a distinctive trait, such as facial hair, a tattoo, or a scar, police will sometimes add this feature to the filler photos by using photo-editing software.¹² However, such a trait will be included in an array *only if* an eyewitness initially described this trait.¹³ If an eyewitness fails to initially describe the culprit as having such features, police may “photoshop” it—i.e., digitally edit the suspect’s photo—by removing these distinguishing features, and use this modified photo in the array.¹⁴

Despite recent reform efforts to improve the fairness and reliability of photo arrays, researchers still criticize the identifications resulting from this procedure.¹⁵ Many scholars and legal experts find that photo arrays, especially those improperly and suggestively administered by police, are primary

8. See Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court’s Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW & HUM. BEHAV. 1, 7 (2009).

9. *Id.*

10. *Id.* “[A] . . . reason for using fillers is to help ensure that the procedure is not suggestive of which person is the focus of the police investigation. Accordingly, the qualities of these fillers are presumed to be critical to maintaining low levels of suggestiveness.” *Id.*

11. State v. Frazier, 60 N.E.3d 633, 638 (Ohio Ct. App. 2016); Nicholas Bogel-Burroughs, *The Police Photoshopped His Mug Shot for a Lineup. He’s Not the Only One*, N.Y. TIMES (Aug. 24, 2019), <https://www.nytimes.com/2019/08/24/us/police-photoshop-tattoos.html>.

12. Bogel-Burroughs, *supra* note 11; Antonia Noori Farzan, *Witnesses Didn’t Say a Bank Robber Had Facial Tattoos. So Police Digitally Altered a Suspect’s Mugshot*, WASH. POST (Aug. 19, 2019, 11:49 AM), <https://www.washingtonpost.com/nation/2019/08/19/portland-bank-robber-facial-tattoos-photoshop-mug-shot/>; see also Memorandum from Sally Q. Yates, Deputy Att’y Gen., U.S. Dep’t of Just., *Eyewitness Identification: Procedure for Conducting Photo Arrays* 9 (Jan. 6, 2017), <https://www.justice.gov/file/923201/download> (recommending adding distinctive features to fillers to create fairer lineups and arrays).

13. Eyewitness Identification Task Force, Report, *2019 Report of The United States Court of Appeals for The Third Circuit Task Force On Eyewitness Identifications*, 92 TEMP. L. REV. 1, 37–38 (2019).

14. Maxine Bernstein, *The Case of the Missing Tattoos: Altered Photo Lineup by Portland Police Draws Objection*, THE OREGONIAN (Aug. 16, 2019), <https://www.oregonlive.com/crime/2019/08/the-case-of-the-missing-tattoos-altered-photo-lineup-by-portland-police-draws-objection.html>; Bogel-Burroughs, *supra* note 11.

15. See Bogel-Burroughs, *supra* note 11 (discussing a 2016 study in which researchers found that “witnesses were more likely to identify [someone with a distinctive feature] as the perpetrator”).

contributors to wrongful convictions.¹⁶ Some researchers claim that reform efforts—for example, digitally editing photos—do not increase reliability, while proponents counter that “allowing police departments to incorporate eyewitness identification procedures developed through improved technology” does increase reliability.¹⁷ Although technology like Photoshop allows for an efficient way to create and conduct photo arrays, this advancement does not necessarily protect a criminal defendant’s due process rights.¹⁸ When law enforcement digitally alters a suspect’s photograph by removing distinct facial features, includes this modified photo in an array, presents the array to an eyewitness, and ultimately secures an identification, the suspect’s due process rights are violated.

This Comment first summarizes the history of the eyewitness identification in Supreme Court jurisprudence, and its current test to determine whether an eyewitness identification procedure violated due process. Next, this Comment examines how lower courts apply the Supreme Court’s due process test to situations where altered photographs appear in photo arrays. Finally, this Comment analyzes different scenarios where it would be appropriate to digitally alter photos used in arrays, and how, when inappropriately done, such photos will negatively impact criminal defendant’s rights.

I. THE SUPREME COURT’S EYEWITNESS IDENTIFICATION DECISIONS

The Supreme Court has conceded that eyewitness misidentifications are a “major factor contributing to the high incidence of miscarriage of justice.”¹⁹ Yet, the Court has also recognized the important role eyewitness identifications play in criminal investigations and has not completely disallowed this evidence.²⁰ The Court instead has balanced these considerations when forming its due process analysis for eyewitness identification procedures.²¹

16. See INNOCENCE PROJECT, *supra* note 4 (finding that eyewitness misidentifications “contributed to approximately 69% of the more than 375 wrongful convictions in the United States overturned by post-conviction DNA evidence”); see also Suzannah B. Gambell, Comment, *The Need to Revisit the Neil v. Biggers Factors: Suppressing Unreliable Eyewitness Identifications*, 6 WYO. L. REV. 189, 190–91 (2006) (finding that about 10,000 people a year are wrongfully convicted primarily because of mistaken identifications).

17. Margery Malkin Koosed, *Reforming Eyewitness Identification Law and Practices to Protect the Innocent*, 42 CREIGHTON L. REV. 595, 613–14 (2009); Carrie Leonetti, *Showing Up: Eyewitness-Identification Requirements in Bosnia and Herzegovina: A Comparative Case Study*, 119 PENN ST. L. REV. 439, 476–77 (2014).

18. See Bernstein, *supra* note 14.

19. *United States v. Wade*, 388 U.S. 218, 228 (1967).

20. *Neil v. Biggers*, 409 U.S. 188, 198–99 (1972).

21. See *Perry v. New Hampshire*, 565 U.S. 228, 241–42 (2012) (discussing the need to deter law enforcement’s use of suggestive procedures while still providing the jury with reliable identification evidence).

A. *The Wade Trilogy: The Beginning of Eyewitness Identification Precedents*

The Court first attempted to fix the dangers of eyewitness misidentifications in the 1967 trilogy of cases: *United States v. Wade*,²² *Gilbert v. California*,²³ and *Stovall v. Denno*.²⁴ In *Wade*, the Court acknowledged that post-indictment physical lineups are “peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial.”²⁵ If a defendant’s attorney is absent from a post-indictment physical lineup, a defendant’s Sixth Amendment right to counsel is severely harmed because this right attaches at all “critical” stages of criminal procedure.²⁶ Thus, the Court concluded that identification evidence obtained from physical lineups conducted after indictment, where a defendant’s counsel was absent, must be excluded.²⁷

In the second case, *Gilbert v. California*, a criminal defendant convicted of robbery also had no counsel present at a post-indictment lineup and the defendant was identified in-court by multiple eyewitnesses.²⁸ An issue before the Court was to decide “what relief is required by application to this case of the principles today announced in *United States v. Wade*.”²⁹ The Court held that “[t]he admission of the in-court identifications without first determining that they were not tainted by the illegal lineup but were of independent origin was constitutional error[,]” and, like in *Wade*, the Court remanded “to afford the State the opportunity to establish that the in-court identifications had an independent source, or that their introduction in evidence was in any event harmless error.”³⁰ Thus, although an eyewitness identification procedure may be improper, the identification evidence still can be admissible if it had an independent basis.³¹

In the third case, *Stovall v. Denno*, the Court recognized that eyewitness identification evidence might also threaten due process rights.³² In *Stovall*, the Court faced the question of whether a victim’s identification of a defendant resulting from a show-up conducted at the hospital violated due process.³³ After

22. *Wade*, 388 U.S. 218.

23. *Gilbert v. California*, 388 U.S. 263 (1967).

24. *Stovall v. Denno*, 388 U.S. 293 (1967).

25. *Wade*, 388 U.S. at 228.

26. *Id.* at 224, 226–27. “[I]n this case it is urged that the assistance of counsel at the lineup was indispensable to protect Wade’s most basic right as a criminal defendant—his right to a fair trial at which the witnesses against him might be meaningfully cross-examined.” *Id.* at 223–24.

27. *Id.* at 237.

28. *Gilbert*, 388 U.S. at 269–70.

29. *Id.* at 269.

30. *Id.* at 272.

31. *Wade*, 388 U.S. at 242. If an independent basis existed, the state could offer in-court identifications as evidence if it came from a source that was separate from the improper procedure. *Id.*; see generally Garrett, *supra* note 1, at 465–67 (criticizing the admissibility of identification evidence at trial under this independent basis test).

32. *Stovall v. Denno*, 388 U.S. 293, 301–02 (1967).

33. *Id.* at 296.

criticizing “[t]he practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup” as inherently suggestive, the Court determined that a “violation of due process of law in the conduct of confrontation depends on the totality of the circumstances surrounding it.”³⁴ While the procedure at issue was “unnecessarily suggestive,” the Court held that the defendant was not denied due process because the procedure was not “conducive to irreparable mistaken identification.”³⁵ Looking at the totality of the circumstances, the Court held that the exigency involved allowed police to bring the defendant to the victim’s hospital room, so she could view him before going into surgery.³⁶ Thus, the Court adopted a totality of the circumstances approach as the standard for evaluating the constitutionality of eyewitness identification evidence.³⁷

B. Developing the Totality Approach

The Court subsequently applied *Stovall*’s totality approach to identifications resulting from photo arrays.³⁸ In *Simmons v. United States*, FBI agents investigated a bank robbery and suspected Simmons as one of the robbers.³⁹ The agents obtained photos of the suspects and presented them to five eyewitnesses, all of whom positively identified Simmons.⁴⁰ Based on this evidence, the jury convicted Simmons.⁴¹ Simmons appealed, arguing that the “pretrial identification by means of photographs was in the circumstances so unnecessarily suggestive and conducive to misidentification as to deny him due process of law”⁴² While the Court acknowledged the “hazards of initial identification by photograph,” it did not wish to stop photo identification procedures entirely.⁴³ Rather, the Court explained:

[E]ach case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground *only if* the photographic identification procedure was so impermissibly

34. *Id.* at 302.

35. *See id.*

36. *Id.*

37. *Id.*

38. *See Simmons v. United States*, 390 U.S. 377, 384 (1968).

39. *Id.* at 380–81.

40. *Id.* at 382. The photos were “mostly . . . group photographs of Andrews, Simmons, and others.” *Id.* The photos “were shown to the five bank employees who had witnessed the robbery . . . [and were] exhibited to each employee separately.” *Id.*

41. *Id.* at 381.

42. *Id.*

43. *Id.* at 384 (“We are unwilling to prohibit [the] employment [of photo arrays], either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement.”).

suggestive as to give rise to a very substantial likelihood of irreparable misidentification.⁴⁴

To determine if the array was “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification[.]” the Court considered the police procedure, analyzing how many photos the officers used, how the police presented photos to eyewitnesses, if police highlighted a particular suspect, or if officers indicated to witnesses that other evidence pointed to the suspect.⁴⁵ Using these factors, the Court held the photo lineup in *Simmons* was not impermissibly suggestive and did not violate due process.⁴⁶

After *Simmons*, the Court examined a “case present[ing] a compelling example of unfair lineup procedures” in *Foster v. California*.⁴⁷ In *Foster*, police conducted a physical lineup as part of its investigation of a bank robbery.⁴⁸ The lineup was comprised of Foster, the only participant wearing clothes similar to the robber, next to two noticeably shorter men.⁴⁹ The eyewitness did not identify anyone as the robber, but he asked to speak to Foster alone, and police allowed it.⁵⁰ Days later, police conducted another lineup with the same eyewitness.⁵¹ Foster was the only participant who appeared in both lineups, and the witness identified him as the robber.⁵² Foster appealed his conviction arguing these procedures violated his constitutional rights.⁵³ The Court agreed and found that the procedures had “suggestive elements . . . [that] made it all but inevitable that [the witness] would identify petitioner. . . . This procedure so undermined the reliability of the eyewitness identification as to violate due process.”⁵⁴ The Court reversed Foster’s conviction and held that because an unsure eyewitness only became sure after multiple suggestive procedures, all identification evidence should be excluded.⁵⁵

C. “Reliability is the Linchpin”: Court Favors Reliability Over Totality

Concerned that its previous rulings would create a per se exclusion rule of all eyewitness identification evidence, the Court added reliability factors in *Neil v. Biggers*.⁵⁶ At issue was whether a show-up conducted by police, along with the

44. *Id.* (emphasis added).

45. *Id.* at 384–85.

46. *Id.* at 384.

47. *Foster v. California*, 394 U.S. 440, 442 (1969).

48. *Id.* at 441.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 441–42.

53. *Id.* at 441.

54. *Id.* at 443.

55. *Id.* at 443–44.

56. *Neil v. Biggers*, 409 U.S. 188, 198–200 (1972).

victim's identification of the defendant as her rapist, was permissible.⁵⁷ Instead of relying solely on the totality test, the Court created a two-step inquiry to determine if an "identification and the circumstances surrounding it failed to comport with due process requirements."⁵⁸ First, courts must assess the suggestiveness of the procedure to ensure that it did not result in "a . . . substantial likelihood of irreparable misidentification."⁵⁹ If the procedure was not unnecessarily suggestive, then the identification is admissible.⁶⁰ However, if the procedure was unnecessarily suggestive, then courts must examine, under the "totality of the circumstances[,]" whether the identifications can overcome the unnecessarily suggestive nature of the procedure.⁶¹ When examining this second inquiry, the Court identified the following five factors:

[1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness' degree of attention, [3] the accuracy of the witness' prior description of the criminal, [4] the level of certainty demonstrated by the witness at the confrontation, and [5] the length of time between the crime and the confrontation.⁶²

If, after weighing these factors, a court finds the identification reliable, then it is admissible despite the procedure's suggestive nature.⁶³

The Court adopted these factors in *Manson v. Brathwaite*.⁶⁴ In *Manson*, the Court faced the question of whether an undercover police officer's identification of the defendant as a drug dealer was unnecessarily suggestive when the officer identified him after looking at one picture of the defendant while alone.⁶⁵ Though finding that the procedure was unnecessarily suggestive, the Court affirmed the conviction because the identification was likely reliable.⁶⁶ The Court concluded "that reliability is the linchpin in determining the admissibility of identification testimony[,]" and "the corrupting effect of the suggestive identification itself" must be weighed against the *Biggers*' factors.⁶⁷ By emphasizing reliability, the Court anticipated that reliable eyewitness

57. *Id.* at 195–96.

58. *Id.* at 196.

59. *Id.* at 198 (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)) ("[T]he primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification.'").

60. *Id.* at 199.

61. *Id.*

62. *Id.* at 199–200.

63. *Id.* at 199–201.

64. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

65. *Id.* at 99, 101.

66. *Id.* at 109 ("[T]he procedure in the instant case was suggestive [because only one photograph was used] and unnecessary' [because there was no emergency or exigent circumstance].").

67. *Id.* at 114.

identification evidence could be admissible while also deterring impermissible identification procedures.⁶⁸

The Court revisited the *Manson* reliability test in *Perry v. New Hampshire*.⁶⁹ In *Perry*, the Court faced whether an unintentional viewing of the suspect violated due process when the witness “pointed to her kitchen window and said the person she saw breaking into [the] car was standing in the parking lot, next to the police officer,” though she failed to identify him in a subsequent police-arranged photo array.⁷⁰ The Court concluded that because “the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement,” a due process analysis was unnecessary and the conviction was affirmed.⁷¹ Thus, the *Manson* due process test “comes into play *only* after the defendant establishes improper police conduct,”⁷² and remains the current test today.

II. LOWER COURT RULINGS ON EYEWITNESS IDENTIFICATION EVIDENCE FROM PHOTO ARRAYS

When federal courts face issues of identification permissibility, all turn to the two-prong *Manson* standard and apply the *Biggers* factors to some degree.⁷³ Conversely, state courts differ in their due process analysis for eyewitness identification evidence.⁷⁴ Some reject *Manson* completely and only apply the *Stovall* totality approach, while others have diminished the *Biggers* factors.⁷⁵ No matter what, lower courts will apply a due process test when faced with improper police identification procedures.⁷⁶ Still, these tests are heavily

68. *Id.* at 112 (“The police will guard against unnecessarily suggestive procedures under the totality rule . . .”).

69. *Perry v. New Hampshire*, 565 U.S. 228, 238 (2012).

70. *Id.* at 234.

71. *Id.* at 248.

72. *Id.* at 241 (emphasis added).

73. See Gambell, *supra* note 16, at 207–08 (“All circuit courts also appear to apply the five Biggers factors, but they are split on whether the Supreme Court intended the Biggers factors to be exclusive.”).

74. Thomas D. Albright & Brandon L. Garrett, *The Law and Science of Eyewitness Evidence*, DUKE L. SCH. PUB. L. & LEGAL THEORY SERIES NO. 2020-62, 5-6 (2020), <https://ssrn.com/abstract=3675055>.

75. See Nicholas A. Kahn-Fogel, *Manson and its Progeny: An Empirical Analysis of American Eyewitness Law*, 3 ALA. CIV. RTS. & CIV. LIBERTIES L. REV. 175, 191 (2012); see also Nicholas A. Kahn-Fogel, *Beyond Manson and Lukolongo: A Critique of American and Zambian Eyewitness Law with Recommendations for Reform in the Developing World*, 20 FLA. J. OF INT’L L., 279, 301 (2008) (“Additionally, of the five states that have rejected *Manson*, three adopted formulations similar to the *Stovall* holding, believing that test to be more protective of due process rights.”); Gambell, *supra* note 16, at 211 (noting some state courts “have been more willing to disagree with *Biggers* factors if they appear scientifically outdated”).

76. See Leonetti, *supra* note 17, at 456.

criticized for allowing broad interpretations of what a permissible procedure is, including altering photos in arrays.⁷⁷

A. Determining if Physically Drawing on Photos in an Array Violates Due Process

Before addressing digital alterations in photo arrays, lower courts had to settle the issue of police physically drawing on photos used in arrays as possible due process violations.⁷⁸ Whether this conduct was impermissibly suggestive depended on if the court analyzed the identification procedure under the totality or the reliability approach.

For instance, in *People v. Slutts*, the California Court of Appeal applied the totality approach to an identification resulting from an array containing a photo that was physically modified by a police officer.⁷⁹ The officer showed a witness a photo array where “[n]one of the persons shown in the photographs wore a beard or a mustache[,]” an initial detail the first witness told police.⁸⁰ The officer then drew a beard and mustache on the defendant’s photograph after the first witness selected his photo.⁸¹ When the officer conducted a photo array with the second eyewitness, the drawn-on photo remained and was the only altered photo in the array, and this witness selected his photo.⁸²

The *Slutts* court ultimately held that “the method used by [the officer] to procure the identification of defendant was fair as to [the first eyewitness], but unfair as to [the second one].”⁸³ It reasoned that the procedure would have been permissible if the officer “sketched beards on all of the photographs[,]” or if she obtained an unmarked photograph of the suspect before presenting the photo array to the second witness.⁸⁴ By presenting the second witness with an obviously altered photograph, “[t]here could be no doubt in [the second witness]’ mind which man [the officer] suspected.”⁸⁵ By showing the witness

77. *Id.* at 455–56.

78. *See* *People v. Slutts*, 66 Cal. Rptr. 862, 865–66 (Ct. App. 1968) (drawing mustaches on array photo was suggestive). *But see* *People v. Colon*, 805 N.Y.S.2d 744, 746 (N.Y. App. Div. 2005) (drawing facial hair on all array photos was not unduly suggestive); *State v. Simpson*, No. 25163, 2013 Ohio App. LEXIS 1585, at *12 (Ct. App. Apr. 26, 2013) (drawing hats on all photos in the array was not suggestive); *Tinsley v. State*, No. 01-17-00296-CR, 2018 Tex. App. LEXIS 8732, at *5–6 (App. Oct. 25, 2018) (drawing hat and glasses on all photos was permissible).

79. *Slutts*, 66 Cal. Rptr. at 866. Notably, this case was decided before *Manson*. *Id.* at 862.

80. *Id.* at 864.

81. *Id.* The eyewitness picked the defendant’s photo because he “most closely resemble[ed] the man she had seen,” but at trial, she “refused to make a positive identification.” *Id.* at 864–65.

82. *Id.* at 864.

83. *Id.* at 865.

84. *Id.* at 865–66.

85. *Id.* at 866.

one altered photograph, in an array of otherwise unaltered photographs, the identification procedure violated due process.⁸⁶

Alternatively, the reliability approach was used in *State v. Simpson*.⁸⁷ In *Simpson*, the defendant argued that a detective drawing hats on all the photographs in a photo array violated due process.⁸⁸ The detective justified the drawings as a way to make the array “more uniform . . . because [the defendant] had an irregular scar on his hairline where hair would not grow. [The detective] feared that leaving the scar uncovered would attract attention to [the defendant’s] photo.”⁸⁹ The Ohio Court of Appeals agreed and held that, under the first prong of the *Manson* test, the drawn hats were not impermissibly suggestive.⁹⁰

B. Determining if Digitally Editing a Photo in an Array Violates Due Process

With the advancement of technology in eyewitness identification procedures, courts began facing the issue of police digitally modifying a suspect’s photograph.⁹¹ In such cases, courts struggle to determine whether police digitally altering photos in arrays is a permissible or impermissible procedure.

1. Digitally Adding Facial Features and Clothing

Sometimes police will “retouch” photographs by making the array photos more similar to how the culprit looked when committing the crime.⁹² For instance, the police in *United States v. Dunbar* showed witnesses an “array containing six photographs, each retouched to show the suspect with a beard and

86. *Id.* While using the drawn-on photo in the second array violated due process, the court ultimately held this error was harmless, and thus did not require reversal of the conviction. *Id.*

87. *State v. Simpson*, No. 25163, 2013 Ohio App. LEXIS 1585, at *6–7 (Ct. App. Apr. 26, 2013).

88. *Id.* at *6–7, *12.

89. *Id.* at *12.

90. *Id.* (reasoning that drawing a hat to cover a visible scar prevented defendant’s photo from standing out).

91. *See generally* *United States v. Allen*, 416 F. Supp. 3d 1108, 1111–14 (D. Or. 2019) (using Photoshop to remove facial and neck tattoos from defendant’s photo only); *United States v. Ellis*, 121 F. Supp. 3d 927, 934, 944–45 (N.D. Cal. 2015) (analyzing digital addition of sweatshirts to all array photos); *Juarez v. Stainer*, No. CV 11-10410-GW (RZ), 2012 U.S. Dist. LEXIS 177675, at *5–7, *9–15 (C.D. Cal. Oct. 29, 2012) (discussing digital addition of beanies to all array photos); *Chavez v. Gipson*, No. CV 11-7356 AG (FFM), 2012 U.S. Dist. LEXIS 174099, at *17–26 (C.D. Cal. Sept. 27, 2012) (examining digital alteration of facial hair to suspect’s photo only to match filler photos); *United States v. Martinez*, No. 11-16-GMS, 2012 U.S. Dist. LEXIS 103608, at *6–26 (D. Del. July 25, 2012) (using Photoshop to remove facial tattoo from defendant’s photo); *People v. Butler*, 33 N.Y.S.3d 602, 604 (N.Y. App. Div. 2016) (adding digital facial tattoos to filler photos only); *Solomon v. State*, 469 S.W.3d 641, 643–47 (Tex. App. 2015) (removing defendant’s facial tattoos with Photoshop); *Garza v. State*, No. 03-06-00216-CR, 2008 Tex. App. LEXIS 7004, at *2–8 (App. Sep. 19, 2008) (adding facial tattoos to filler photos only).

92. *See* Connie Mayer, *Due Process Challenges to Eyewitness Identification Based on Pretrial Photographic Arrays*, 13 PACE L. REV. 815, 843 (1994).

cap exactly like the one in the surveillance photograph.”⁹³ The witnesses selected the defendant, and he was convicted and subsequently appealed.⁹⁴ The Third Circuit Court affirmed because “each photograph was altered in the same way and, if anything, the alteration increased the reliability of the [witnesses’] identification[s].”⁹⁵

Similarly, a California district court held in *United States v. Ellis* that the police department’s use of Adobe Photoshop to add a black-hooded sweatshirt to all the photographs in the array did not violate due process.⁹⁶ While investigating a shooting, officers showed the victim, another police officer, multiple photo arrays.⁹⁷ The victim “requested that black hooded sweatshirts be added over the faces because the third assailant wore a hoodie that covered his face throughout the duration of the shooting.”⁹⁸ After the sweatshirts were added, the victim selected the defendant as one of the shooters.⁹⁹ The defendant argued that this identification evidence resulted from an impermissibly suggestive procedure.¹⁰⁰ However, the court found “the fact that hoods were added to all the photos in the . . . photo array made the identification procedure more reliable, not suggestive.”¹⁰¹ The court concluded that “[e]ven if the . . . photo array was somehow suggestive, . . . the identification was nonetheless reliable under the factors set forth in *Neil v. Biggers*”¹⁰²

2. Digitally Altering Suspect’s Facial Characteristics

Besides digitally adding clothing to photos, courts also hear cases involving digital modifications of photographs that add or remove a suspect’s facial features.¹⁰³ In *United States v. Martinez*, a detective prepared a photo array to see if an eyewitness to a robbery could identify the suspect as one of the robbers.¹⁰⁴ When preparing the array, the officer “used the PhotoShop program

93. *United States v. Dunbar*, 767 F.2d 72, 73 (3d Cir. 1985).

94. *Id.*

95. *Id.* at 74.

96. *Ellis*, 121 F. Supp. 3d at 934, 944.

97. *Id.* at 934. The victim was shown five different photo arrays, each with only one suspect and done on different days. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 944.

101. *Id.*

102. *Id.* The court further found that the undercover officer victim’s identification was reliable because he “had close, albeit brief, contact with [the assailant] and provided details about his appearance. More importantly, [the officer victim] demonstrated a high degree of attention and was specially trained to observe details.” *Id.*

103. See, e.g., *United States v. Martinez*, No. 11-16-GMS, 2012 U.S. Dist. LEXIS 103608, at *8–9 (D. Del. July 25, 2012).

104. *Id.* During an attempted robbery at a convenience store, two masked men’s faces were uncovered during a fight with an eyewitness. *Id.* at *3–5. The witness described the armed robber

to remove the tattoo from the [defendant's] photograph" so his photo would not stand out.¹⁰⁵ Police conducted two arrays with this photoshopped photo, and the eyewitness eventually identified the defendant as a robber.¹⁰⁶ The Delaware District Court applied the *Manson* test to both arrays.¹⁰⁷ Instead of focusing on the permissibility of digitally altering the defendant's photo, the court focused on the officer's interactions with the eyewitnesses.¹⁰⁸ The court held that, although one of the lineups was suggestive, none were unnecessarily suggestive; thus, due process was not violated.¹⁰⁹ Though it was unnecessary for the court to analyze the second prong of the *Manson* test, it concluded that the defendant failed to show how such a procedure "created a 'very substantial likelihood of irreparable misidentification,'" and the five factors "weigh[ed] strongly in favor of denying [the defendant's] motion" to suppress.¹¹⁰

Similar to the *Martinez* holding, a Texas court in *Solomon v. State* held that an officer's use of Photoshop to remove a defendant's facial tattoos and the subsequent inclusion of that photo in an array was not impermissibly suggestive.¹¹¹ In *Solomon*, police removed the facial tattoos from the defendant's photo because it "proved difficult" to find fillers similar to the defendant's appearance.¹¹² Instead of editing the filler photos to appear more like the defendant, the officer "photo-shopped out the tattoos in appellant's photo, such that none of the six photos depicted persons with facial tattoos."¹¹³ An uninvolved officer subsequently presented this photo lineup to the witness, who picked the defendant's photo and responded, "I know he had tattoos, but I don't see tattoos on his face."¹¹⁴ The officer allegedly informed the witness that all the photos had the individuals' tattoos removed, and the witness then

as "a black male, late teens, approximately five-five, average to stocky build, wearing all black clothing," but never mentioned a facial tattoo. *Id.* at *6.

105. *Id.* at *8 n.3; see also *People v. Butler*, 33 N.Y.S.3d 602, 604 (N.Y. App. Div. 2016) (adding tattoo to filler photos so defendant's photo did not stand out among fillers); *Solomon v. State*, 469 S.W.3d 641, 644 (Tex. App. 2015) (removing defendant's facial tattoos to prevent his photo from standing out); *Garza v. State*, No. 03-06-00216-CR, 2008 Tex. App. LEXIS 7004, at *6 (App. Sept. 19, 2008) (adding facial tattoos to filler photos only).

106. *Martinez*, 2012 U.S. Dist. LEXIS 103608, at *8–13. In the first photo array, the witness selected the defendant's photograph as "'possibly' [being] one of the robbers, but he could not be sure." *Id.* at *10. In the second lineup, the police kept the photoshopped photo of the defendant and re-arranged the positions of the photos. *Id.* at *11–12.

107. *Id.* at *16, *24.

108. *Id.* at *17–23.

109. *Id.* at *18–22.

110. *Id.* at *24–25. The court reasoned that the eyewitness "had a good opportunity to view his attacker[,] gave a 'detailed account of the robbery[,] saw the robbers two times, and identified the defendant on two separate occasions." *Id.* at *25–26.

111. *Solomon v. State*, 469 S.W.3d 641, 644 (Tex. App. 2015). In this case, the eyewitness was shot during a drug transaction and later identified the defendant as the shooter. *Id.* at 642–43.

112. *Id.* at 644.

113. *Id.*

114. *Id.*

confidently identified the defendant.¹¹⁵ The court held that the procedure was not unnecessarily suggestive and did not give a high likelihood of misidentification; rather, it made the lineup fairer.¹¹⁶ Further, the court explained that because the defendant offered “no authority that an officer is precluded from removing distinguishing features when preparing a photo array,” the photoshopping was also permissible.¹¹⁷

The lack of authority prohibiting police from removing unique features also contributed to the ruling in *United States v. Allen*.¹¹⁸ In *Allen*, police received information that Allen was responsible for several robberies and had worn makeup while committing them.¹¹⁹ Detectives began to compile “a photo lineup that included a recent booking photo of [Allen],” to show to eyewitnesses.¹²⁰ Because Allen’s tattoos were “visible in the original booking photo, . . . [the detective] asked a technician to digitally alter the photo to remove the tattoos The technician used photo editing software to disguise [Allen’s] tattoos”¹²¹ When police conducted the photo lineup, only two witnesses identified him as the robber.¹²² At a pre-trial motion to suppress the identifications, Allen argued that the sole modification of his photo violated due process.¹²³ However, the court denied the motion and held that the removal of Allen’s face and neck tattoos from his mugshot was permissible.¹²⁴ The court recognized that no prior case law existed regarding the issue of solely photoshopping a defendant’s photo in an array.¹²⁵ The court reasoned that the photoshopping was not unnecessarily suggestive and did not weaken the reliability of the identifications because:

[1], the method of editing Defendant’s photo was neutral. . . . [2], at least one of the informants suggested to investigators that Defendant was wearing makeup, and a witness described seeing faint tattoos on the robber, as if they had been covered. This information provide[d] an independent justification for the investigator’s decision to alter

115. *Id.* at 645–46. The eyewitness said, “I’m a hundred percent sure this is the person that shot me.” *Id.* at 644. At trial, he testified that the officer conducting the lineup told him that the tattoos were removed. *Id.* at 645–46. The court held that the determination of whether such statements were actually made was properly within the factfinder’s discretion, “because it turned on the credibility and demeanor of witnesses.” *Id.* at 646.

116. *Id.* at 645, 647.

117. *Id.* at 645.

118. *United States v. Allen*, 416 F. Supp. 3d 1108, 1111, 1114 (D. Or. 2019).

119. *Id.* at 1111.

120. *Id.*

121. *Id.*

122. *Id.* at 1112.

123. *Id.*

124. *Id.* at 1114; *see also* Bernstein, *supra* note 14.

125. *Allen*, 416 F. Supp. 3d at 1113–14; *see also* Solomon v. State, 469 S.W.3d 641, 644 (Tex. App. 2015) (noting that the defendant provided no authority regarding the alteration of photos as a prohibited practice).

Defendant's photograph . . . [3], the photo lineup itself was conducted double-blind to eliminate bias and suggestibility. . . . [4], three of the four tellers identified Defendant's photograph as the bank robber with a reasonably high degree of certainty.¹²⁶

While the court acknowledged that photoshopping can almost cross "the line between constitutional and unconstitutional police conduct," the court concluded that the line was not crossed here.¹²⁷

III. IMPLICATIONS OF ALLOWING PHOTO ARRAYS WITH DIGITAL EDITS

The Supreme Court's holdings on when eyewitness identification procedures are impermissibly suggestive and likely to result in misidentification have been broadly interpreted by lower courts to apply a "litmus test."¹²⁸ *United States v. Allen*, a 2019 case discussed above, demonstrates the broad application of the Supreme Court's expansive *Manson* test on identifications resulting from photo arrays with digitally altered photos.¹²⁹

A. *United States v. Allen: Highlighting Issues with Allowing Digital Edits to Photos in Arrays*

Allen demonstrates how police use photoshop to create lineups and how courts analyze such lineups.¹³⁰ In this case, Allen was charged with multiple bank robberies.¹³¹ When police started their investigation, they asked multiple eyewitnesses to describe the robber, and most described him as a middle-aged black man wearing glasses, a hat, and a hoodie.¹³² Investigators eventually viewed surveillance footage of the robberies and determined that the same person was involved in all of them.¹³³ Using the media, police asked the public for help in identifying the robber and distributed a still from the security

126. *Allen*, 416 F. Supp. 3d at 1114.

127. *Id.*

128. 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, 113 (2006) ("The *Manson* factors have become reduced to a checklist to determine reliability, and a checklist is a poor means of making a subtle, fact-intensive, and case-specific determination as to whether a given eyewitness identification is reliable, despite the use of suggestive police procedures.").

129. *See generally Allen*, 416 F. Supp. 3d at 1110.

130. *Allen*, 416 F. Supp. 3d at 1114; *see also* Bernstein, *supra* note 14; Bogel-Burroughs, *supra* note 11; Farzan, *supra* note 12; RJ Vogt, *Tattoo Removal: Case Shines Light On Cop Photoshopping*, LAW360 (Aug. 25, 2019, 8:02 PM), <https://www.law360.com/articles/1192163>.

131. *Allen*, 416 F. Supp. 3d at 1112.

132. *Id.* at 1110–11.

133. *Id.* at 1110.

footage.¹³⁴ Shortly afterward, police received tips that Allen was the robber and had disguised himself.¹³⁵

About a month later, detectives prepared a photo array using a recent mugshot of Allen that clearly depicted his facial tattoos.¹³⁶ Because Allen's tattoos were visible, a "technician used photo editing software to disguise [the] tattoos by capturing [Allen]'s skin tone and painting over the tattoo as though he was applying electronic makeup."¹³⁷ However, none of the witnesses "mentioned [the robber] having tattoos on his face. Tattoos weren't visible on security camera footage either."¹³⁸ Of the four witnesses, only two identified Allen.¹³⁹

Allen filed a motion to suppress the identification evidence, but, as mentioned earlier, it was denied.¹⁴⁰ While the court believed the removal of Allen's tattoos created a fairer lineup, "the concern here [was] that, in doing so, officers potentially made the suspect look more like the witness's memory of the culprit (i.e., without tattoos)," increasing the risk of misidentification.¹⁴¹ Additionally, it was problematic that police never mentioned altering Allen's photo to witnesses or defense counsel until after discovery.¹⁴² Thus, Allen's case "highlights the controversial but technically standard practice of police editing lineup photographs . . ."¹⁴³

B. Factors Courts Consider When Determining the Permissibility of Altered Photos

When looking at whether digitally altering a defendant's photo in an array violates due process, lower courts, like the court in *Allen*, primarily adopt the *Manson* "reliability is the linchpin" test.¹⁴⁴ Thus, the level of reliability is often

134. *Id.* at 1111.

135. *Id.*

136. *Id.*

137. *Id.*

138. Vogt, *supra* note 130.

139. Farzan, *supra* note 12.

140. *Allen*, 416 F. Supp. 3d at 1115.

141. Vogt, *supra* note 130; *see also* Bogel-Burroughs, *supra* note 11; Farzan, *supra* note 12.

142. *Allen*, 416 F. Supp. 3d at 1111 n.1 ("This does not affect the outcome here, but a better practice for the Government in the future would be for the technician or the case agent to create a report describing the line-up and photo alteration process and to produce that report in discovery."); *see also* Bernstein, *supra* note 14; Bogel-Burroughs, *supra* note 11; Farzan, *supra* note 12; Vogt, *supra* note 130.

143. Vogt, *supra* note 130.

144. *Allen*, 419 F. Supp. 3d at 1113 (quoting *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977)); *accord* *United States v. Martinez*, No. 11-16-GMS, 2012 U.S. Dist. LEXIS 103608, at *14-16 (D. Del. July 25, 2012); *Solomon v. State*, 469 S.W.3d 641, 643 (Tex. App. 2015); *see also* Leonetti, *supra* note 17, at 452 ("The focus of most cases involving challenges to an eyewitness identification is the reliability of the identification, rather than the suggestiveness of the procedure . . .").

the most important factor in a due process analysis.¹⁴⁵ As the Supreme Court established in *Manson*, most lower courts apply the *Biggers* factors to determine if identifications are likely reliable.¹⁴⁶ Such courts steadfastly hold these variables as strong indicators of reliability, even though research has shown otherwise.¹⁴⁷

Additionally, some courts examine how the procedures were conducted, such as if the procedure was double-blind or if the witness's confidence level was recorded immediately afterward.¹⁴⁸ Some courts also consider whether law enforcement instructed eyewitnesses before conducting a lineup, to make sure that there was no suggestion that a suspect's photo was in the lineup.¹⁴⁹ According to these courts, use of these methods in lineup procedures results in more reliable results, which in turn affects how a court applies the *Manson* test.¹⁵⁰

Ultimately, it seems the main reason that these lower courts find the use of Photoshop permissible is that they believe this practice prevents the suspect's photo from standing out in a lineup.¹⁵¹ As the Supreme Court noted, having a photo stand out is an unnecessarily suggestive procedure and likely to lead to misidentifications.¹⁵² The impact of the Court's underlying policy of fair and proper lineups leads police to use methods like Photoshop to keep a defendant's distinct features from being the reason why witnesses are drawn to the suspect's photo—which is also why lower courts continue to rule that photoshopping does not violate due process.¹⁵³ The tendency of lower courts allowing the use of Photoshop will impact how police perform lineups, and will likely result in an increase of misidentifications. The result will be overall harm to the integrity of the judicial system.

145. See Leonetti, *supra* note 17, at 452–53 (noting that sometimes “identifications involve police procedures that are unnecessarily suggestive, but which courts nonetheless find to have resulted in sufficiently reliable identifications”).

146. See *Manson*, 432 U.S. at 114.

147. Albright & Garrett, *supra* note 74, at 30 (“Nevertheless, courts have long treated the confidence of an eyewitness as a marker of reliability, but in a manner not supported by scientific research.”).

148. See *id.* at 44 (summarizing how a state court used different factors in analyzing reliability).

149. Mayer, *supra* note 92, at 832.

150. See Brian L. Cutler, *Sources of Contamination in Lineup Identifications*, 41 CHAMPION 16, 20–22 (2017).

151. *People v. Butler*, 33 N.Y.S.3d 602, 604 (N.Y. App. Div. 2016) (removing tattoo was permissible as it did not make defendant's photo suggestive); *Solomon v. State*, 469 S.W.3d 641, 644–45 (“If anything, that action was favorable to appellant by removing distinguishing characteristics.”).

152. See *Foster v. California*, 392 U.S. 440, 442 (1969); *Simmons v. United States*, 390 U.S. 377, 384 (1968).

153. See *United States v. Allen*, 416 F. Supp. 3d 1108, 1114 (D. Or. 2019); *Solomon v. State*, 469 S.W.3d 641, 644–45 (Tex. App. 2015).

C. Photoshopped Array Photos May Result in Injustice

Misidentification has been a persistent problem in criminal law.¹⁵⁴ The Supreme Court has been aware of misidentification as a dilemma and its negative effect on justice.¹⁵⁵ For decades, scholars have researched misidentification's effects in the judicial system and also explored how more accurate identifications can be procured from eyewitnesses.¹⁵⁶ With the prevalence of misidentification, it makes sense that police would turn to technology to help create fairer lineups.¹⁵⁷ However, when using technology such as Photoshop, the police need to be cautious because altering photos may affect the reliability of identifications.

If police remove distinct features from a suspect's face with Photoshop, it could lead to more misidentifications because witnesses could misremember what the culprit looked like. It is a known fact that witness memory is fallible and can lead to wrongful convictions.¹⁵⁸ If a witness sees the modified photograph, he or she may begin to associate this photo with the culprit, and eventually assume that the suspect was the culprit.¹⁵⁹ This could lead the witness to later testify in court with confidence that the suspect was the culprit, even if it was untrue.¹⁶⁰

Allowing such practices to continue will negatively impact the integrity of the judicial process. If courts continue to hold that altering a defendant's photo to remove tattoos and other facial features is permissible, eventually police may feel justified in altering other features as well.¹⁶¹ As defense attorneys have indicated, if courts continue to validate Photoshop as a way to obtain fairer lineups, "there would presumably be nothing wrong with adjusting various pixels to make someone's face appear slimmer, so long as the government's

154. INNOCENCE PROJECT, *supra* note 4.

155. See *United States v. Wade*, 388 U.S. 218, 228 (1967).

156. See Yates, *supra* note 12, at 2; see also Richard A. Wise et al., *Criminal Law: A Tripartite Solution to Eyewitness Error*, 97 J. CRIM. L. & CRIMINOLOGY 807, 850–51 (2007).

157. See *National Survey*, *supra* note 7, at 75 ("These technologies help law enforcement agencies create more standardized lineups that incorporate more of the 1999 NIJ guidelines regarding lineup composition.").

158. See *Eyewitness Evidence: A Guide for Law Enforcement*, NAT'L INST. OF JUST. iii (1999), <https://www.ncjrs.gov/pdffiles1/nij/178240.pdf> ("Recent cases in which DNA evidence has been used to exonerate individuals convicted primarily on the basis of eyewitness testimony have shown us that eyewitness evidence is not infallible.").

159. See Wise et al., *supra* note 156, at 852–53 (discussing the reasoning of eyewitnesses during an identification procedure).

160. Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCH. PUB. POL'Y & L. 765, 774 (1995) ("[A]ctors in the legal system can contaminate the confidence of an eyewitness in ways that can make an eyewitness's in-court expression of confidence a meaningless indicator of the goodness of the eyewitness's memory.").

161. See Bogel-Burroughs, *supra* note 11 (noting that police digitally altering distinct features could lead to them "alter[ing] photos in other ways, like making a suspect look thinner if they believed that the person gained weight after committing a crime").

theory was that the suspect had gained weight since the crime.”¹⁶² Police could be influenced by courts’ broad rulings of what is permissible to alter suspect’s photos by elongating noses, adding hair, or changing other facial structures, all with the goal of obtaining identification evidence. If the court believes the identification to be reliable, it may not matter that law enforcement significantly changed the physical appearance of a suspect. Such a practice is concerning because “officers [can] potentially [make] the suspect look more like the witness’s memory of the culprit,” rather than the culprit himself.¹⁶³ If such changes are made and identifications result, this could lead to an increase in misidentifications and wrongful convictions, thus ultimately harming the judicial system.

Additionally, although courts may hold that such a dangerous practice would encroach on a defendant’s due process rights, courts may also retain the reliability linchpin analysis from *Manson*—and ultimately admit it, finding that even if the police applied such a technique, there is some other independent basis for the identification.¹⁶⁴ By emphasizing the reliability factors, the courts lose focus on the procedure itself and on whether the identification is actually reliable. Rather, they focus primarily on the possible reasons why the identifications may be reliable.¹⁶⁵ The courts do not see the dangerous precedent being set by allowing identifications in a trial that result from arrays with digitally modified photos of the suspect.

IV. WHEN PHOTOSHOPPING SHOULD BE PERMISSIBLE AND IMPERMISSIBLE

While it is important that police avoid procedures where a suspect’s photo stands out in a lineup, the removal of distinctive features introduces more problems for due process than safeguards.¹⁶⁶ Though the primary focus of this procedure is the removal of prominent features that will likely cause the suspect to stand out, the lower courts’ broad interpretations of *Manson* could result in police adopting practices of altering more than just superficial features on a suspect’s photograph. Such a practice violates due process because it creates a photograph that is inconsistent with a defendant’s appearance and thus actually decreases the likelihood of a reliable identification.

A. When Photoshop is Permissible

As mentioned earlier, police departments utilize Photoshop in their investigations.¹⁶⁷ While initially meant for crime scene work and evaluating

162. Farzan, *supra* note 12.

163. Vogt, *supra* note 130.

164. See O’Toole & Shay, *supra* note 128, at 113; see also Cutler, *supra* note 150, at 20–21.

165. See O’Toole & Shay, *supra* note 128, at 113, 131–32.

166. See Bernstein, *supra* note 14; Bogel-Burroughs, *supra* note 11; Farzan, *supra* note 12.

167. See generally George Reis, *Adobe Photoshop Helps Police*, 52 LAW & ORDER 70 (2004) (discussing how police use Photoshop in investigations).

digital evidence, police turned to Photoshop to aid in the retrieval of eyewitness identifications.¹⁶⁸ Photoshop can remain a valuable tool for law enforcement when composing a photo array if used in a way that comports with a suspect's due process rights.¹⁶⁹

1. Insert Clothing Items to All Photographs in the Array

One way police can permissibly use Photoshop is by adding articles of clothing to all the photographs used in the array, as law enforcement did in *United States v. Ellis*.¹⁷⁰ This procedure is the technological version of an officer physically drawing a hat onto a photo, as seen in *State v. Simpson*.¹⁷¹ Further, studies regarding eyewitness confidence have found that the clothing worn by those in an identification procedure may play a bigger role than physical appearance in an eyewitness' processing an identification procedure.¹⁷² The addition of clothing items allows for a more reliable identification because it allows witnesses to access what they saw in their memories, and better identify the culprit.¹⁷³ Using Photoshop to add clothing to photo arrays ensures that a defendant's due process rights remain protected while also avoiding misidentification.

By adding these items to all the photographs, the police compose a fairer lineup by not altering any physical or permanent characteristics of the suspect as they would do when removing a facial tattoo or scar. As seen in *Ellis*, the addition of such items with Photoshop is possible and allows greater protection of a suspect's due process rights.¹⁷⁴ This practice better protects due process because it ensures that the police do not single out a suspect by only altering one photo contained in the array, thus avoiding the risk of "focusing the witness's attention on the single photograph" and using an unnecessarily suggestive procedure.¹⁷⁵

168. Bogel-Burroughs, *supra* note 11; Leonetti, *supra* note 17, at 476.

169. See *National Survey*, *supra* note 7, at 117 (commenting that "innovative technologies . . . might increase the reliability of eyewitness testimony" in identification procedures).

170. *United States v. Ellis*, 121 F. Supp.3d 927, 934, 944 (N.D. Cal. 2015); see also *Juarez v. Stainer*, No. 11-10410-GW (RZ), 2012 U.S. Dist. LEXIS 177675, at *5, *28-29 (C.D. Cal. Oct. 29, 2012) (photoshopping beanies to all array photos made suspect's photo unsuggestive).

171. *State v. Simpson*, No. 25163, 2013 Ohio App. LEXIS 1585, at *12 (Ct. App. Apr. 26, 2013).

172. See generally R.C. Lindsay et al., *Do the Clothes Make the Man? An Exploration of the Effect of Lineup Attire on Eyewitness Identification Accuracy*, 19 CANADIAN J. OF BEHAV. SCI. 463 (1987).

173. Wise et al., *supra* note 156, at 850, 865 n.3 (internal citations omitted) (noting that clothing can act as a "retrieval cue," or "a stimulus that helps an individual to remember an event").

174. See *Ellis*, 121 F. Supp. 3d at 934, 944.

175. Mayer, *supra* note 92, at 843.

2. *Alter Filler Photographs Only*

Besides adding clothing to all the photographs, another permissible application of photoshopping pictures in arrays is altering filler photos. When a police officer, like the one in *Solomon v. State*, faces the challenge of creating a fair lineup because a suspect has a distinct mark and similar looking fillers are difficult to locate, it should be just as easy for the technician to add the distinct mark to the filler photographs and keep the suspect's photo unchanged.¹⁷⁶ The Department of Justice recommended the following to federal law enforcement agencies:

Where the suspect has a unique feature, such as a scar, tattoo, or mole, or distinctive clothing that would make him or her stand out in a photo array, filler photographs should include that unique feature either by selecting fillers who have such a feature themselves or by altering the photographs of fillers to the extent necessary to achieve a consistent appearance.¹⁷⁷

By using Photoshop this way, the police avoid a potential due process violation—and the risk of a suggestive lineup—because they do not alter the suspect's photograph.

Additionally, the Supreme Court requires that an array show individuals resembling the suspect.¹⁷⁸ If a suspect has a distinct mark, it could logically be inferred that the police must then find fillers containing similar features. When the police cannot find such fillers, it is a better practice to alter the filler photographs rather than the suspect's, because this ensures both that the witness sees an actual photograph of the suspect and that the fillers appear similar to the suspect.¹⁷⁹ If law enforcement cannot find an appropriate filler photograph when the suspect has a unique feature, and “is nevertheless determined to conduct a lineup (perhaps for its persuasive appeal to the jury), then researchers recommend that investigators either artificially create the unique characteristics on all distractors or cover up those features on all lineup members.”¹⁸⁰

176. See *Garza v. State*, No. 03-06-00216-CR, 2008 Tex. App. LEXIS 7004, at *6 (App. Sept. 19, 2008) (“Because [the defendant] has a teardrop tattoo under his left eye, to ensure a representative lineup, [the officer] digitally enhanced three other pictures in the array to show tattoos under the subjects’ left eyes.”). *But see* *Solomon v. State*, 469 S.W.3d 641, 645 (Tex. App. 2015) (reasoning that altering fillers instead of the defendant’s photo would not change the outcome).

177. Yates, *supra* note 12, at 2.

178. See *Simmons v. United States*, 390 U.S. 377, 384 (1968).

179. Eyewitness Identification Task Force, *supra* note 13, at 37–38.

180. Donald P. Judges, *Two Cheers for the Department of Justice’s Eyewitness Evidence: A Guide for Law Enforcement*, 53 ARK. L. REV. 231, 260 (2000); see also Eyewitness Identification Task Force, *supra* note 13, at 38 (recommending that “[t]he administrator should take into account unique or unusual features, such as scars or tattoos, which can be added or overtly concealed on the fillers so that all participants or photographs are consistent”).

B. *When Photoshopping Photos in Arrays is Impermissible*

While Photoshop assists police in procuring reliable eyewitness identifications, it also has the potential to violate a defendant's due process rights. Such conduct should be found impermissible, and the identifications resulting from such practices should be excluded.

1. *Editing Only the Suspect's Photograph*

One way the use of Photoshop potentially violates due process rights is when police only alter a suspect's photograph.¹⁸¹ All efforts should be made to avoid altering only the suspect's photograph as this "procedure would probably violate due process."¹⁸² When police only modify the suspect's photo, they essentially physically draw on the suspect's photo and present only one modified photograph to an eyewitness.¹⁸³ This is similar to *People v. Slutts* where the court held that, under the totality of the circumstances, showing a witness a modified photo of a suspect with a drawn-on beard and mustache was impermissible.¹⁸⁴

Additionally, photoshopping would be impermissible under *Manson*. Only photoshopping a suspect's photo should fail the first prong because this procedure probably increases "the likelihood of misidentification."¹⁸⁵ It is unnecessarily suggestive because police modify only the suspect's photo and do so in a way that arguably indicates that the officer believes the suspect is the culprit. Further, application of reliability factors in the second prong shows that only photoshopping a suspect's photo leads to an unreliable identification because the photograph presented to the witness is not the actual appearance of the suspect—thus, the witness only identifies a suspect based on a modified photograph, not on the actual physical appearance.¹⁸⁶ Overall, such a procedure would be a "photographic identification procedure . . . so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."¹⁸⁷

181. See *United States v. Allen*, 416 F. Supp. 3d 1108, 1111, 1114.

182. Mayer, *supra* note 92, at 843.

183. Compare *People v. Slutts*, 66 Cal. Rptr. 862, 864–66 (drawing mustaches on the suspect's array photo was suggestive) with *Chavez v. Gipson*, No. 11-7356 AG (FFM), 2012 U.S. Dist. LEXIS 174099, at *17–19, *22–23 (adding facial hair via photo-editing software to suspect's photo only to match filler photos was permissible).

184. *Slutts*, 66 Cal. Rptr. at 864–66.

185. *Neil v. Biggers*, 409 U.S. 188, 199 (1972).

186. See Nicholas A. Kahn-Fogel, *The Promises and Pitfalls of State Eyewitness Identification Reforms*, 104 KY. L.J. 99, 110 (2016) ("Likewise, if die [sic] suspect stands out in any other significant way, it is likely to draw witnesses' attention to him and may suggest that police believe he is the perpetrator.").

187. *Simmons v. United States*, 390 U.S. 377, 384 (1968).

2. Using Photoshop to Match Witnesses' Descriptions of the Perpetrator

Another way police may use Photoshop improperly is by altering the photo in a way that matches the witnesses' descriptions of the culprits. Similar to adding clothing, the police also use Photoshop to alter a permanent feature of the defendant, such as a tattoo or scar.¹⁸⁸ Unlike adding clothing, however, altering permanent features should be impermissible. While a witness may not describe the culprit as having a unique mark, like a tattoo, police justify the removal of such features because retaining them would make the suspect stand out.¹⁸⁹ However, it could be argued that the police officer's "Photoshop job had a different motivation: It [makes the suspect] look more like the perpetrator[.]" and produces an arguably unreliable identification.¹⁹⁰

For instance, in *United States v. Allen*, the surveillance footage clearly showed that the robber had no visible facial tattoos.¹⁹¹ Additionally, none of the witnesses described seeing a facial tattoo.¹⁹² However, the main suspect had a visible facial tattoo, and the police removed it from his photo used in the lineup.¹⁹³ The police equated the removal of the suspect's tattoos to "applying electronic makeup" because investigators believed the robber disguised himself.¹⁹⁴ Altering a photograph to make the suspect appear similar to the footage and consistent with the witnesses' descriptions, then justifying this because of an alleged disguise, is impermissible and violates due process because there is a "substantial likelihood of irreparable misidentification," a danger the Supreme Court has persistently tried to abolish.¹⁹⁵

Additionally, the practice of editing a suspect's photograph is impermissible because the Supreme Court requires an array to include individuals who appear similar to the suspect—not similar to an eyewitness' description.¹⁹⁶ When the police edit how a suspect looks in a photo and it comports with what an eyewitness remembers seeing, this could influence the witness to pick the suspect's photo, although the edited image does not actually match the suspect's appearance.¹⁹⁷ Instead of making a fairer, unsuggestive procedure, the goal of

188. See *United States v. Allen*, 416 F. Supp. 3d 1108, 1111 (D. Or. 2019) (photoshopping out facial and neck tattoos from defendant's photo before compiling lineup); *United States v. Martinez*, No. 11-16-GMS, 2012 U.S. Dist. LEXIS 103608, at *8 n.3 (D. Del. July 25, 2012) (photoshopping out defendant's facial tattoo); *Solomon v. State*, 469 S.W.3d 641, 644 (Tex. App. 2015) (using software to remove defendant's facial tattoos).

189. See *Allen*, 416 F. Supp. 3d at 1111; *Martinez*, 2012 U.S. Dist. LEXIS 103608, at *8 n.3; *Solomon*, 469 S.W.3d at 644.

190. Farzan, *supra* note 12.

191. *Id.* (discussing *Allen*)

192. *Id.*

193. *Allen*, 416 F. Supp. 3d at 1111.

194. *Id.*

195. See discussion *supra* Section I.B.

196. See *Simmons v. United States*, 390 U.S. 377, 384 (1968).

197. See John T. Wixted & Gary L. Wells, *The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis*, 18 PSYCH. SCI. PUB. INT. 10, 16 (2017).

the Supreme Court's jurisprudence, editing in this manner actually allows police to partake in a suggestive practice that the Supreme Court heavily criticized in its numerous rulings.¹⁹⁸ Such a practice should not stand.

V. CONCLUSION

With police officers using new technology to investigate crimes, it is understandable why they would use programs such as Photoshop in identification procedures. However, with courts rarely holding such practices as impermissible, there is no telling how far this practice will continue. Eventually, courts need to realize that constitutional rights are being threatened in favor of keeping the current due process test alive. Until a better standard is established, police should avoid using problematic methods such as photoshopping a suspect's photo.

198. See *Perry v. New Hampshire*, 565 U.S. 228, 248 (2012); *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977); *Neil v. Biggers*, 409 U.S. 188, 196 (1972).

