(Re)defining "Unnecessary Suggestion" in Evaluating Due Process Challenges to the Admission of Eyewitness Evidence

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In 2018, in Sexton v. Beaudreaux*, the Supreme Court, while purporting merely to summarize prior caselaw, articulated a constitutional standard for assessing eyewitness identification evidence that distorted the Court's earlier due process jurisprudence and posed a serious—and until now largely unrecognized—threat to the truth-seeking function of the criminal justice system. Previously, the Court had used a relatively straightforward, two-part test for evaluating the constitutional admissibility of eyewitness evidence: First, the defendant was required to prove that police used an identification procedure that suggested the identity of the suspect and that police lacked any reasonable justification for failing to employ a more reliable procedure; second, if the defendant succeeded in showing that law enforcement used an "unnecessarily suggestive" procedure, the court should evaluate a series of ostensibly independent reliability factors to determine whether the suggestive procedure gave rise to a "substantial likelihood of misidentification." In* Beaudreaux*, however, the Court asserted that "unnecessary suggestion" means something more than suggestion that is unnecessary; instead, the Court concluded that judges should find an identification procedure to be unnecessarily suggestive only if the procedure was so egregiously defective that the court could conclude, even before evaluating the reliability factors, that the procedure gave rise to a high probability of misidentification. Then, if the defendant succeeds in clearing this heightened hurdle, the court should assess the reliability factors to determine (for a second time) whether the eyewitness in question was likely mistaken. Lower courts have already begun citing the* Beaudreaux *Court's flawed dictum with approval, and, even before* Beaudreaux*, it was common for lower courts to impose heightened burdens on defendants who challenged eyewitness evidence. Ultimately, the* Beaudreaux *Court's pronouncement not only misreads Supreme Court eyewitness precedent but will lead to more convictions of innocent defendants based on eyewitness misidentification, which is already a leading cause of wrongful conviction. Finally, analogies to the Court's due process jurisprudence on involuntary confessions and to its probable cause jurisprudence also counsel against adoption of the* Beaudreaux *Court's error.*

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INTRODUCTION

In 2018, in *Sexton v. Beaudreaux*,[1] the Supreme Court, while purporting merely to summarize prior caselaw, articulated a constitutional standard for assessing eyewitness identification evidence that distorted the Court's earlier due process jurisprudence and posed a serious—and until now largely unrecognized—threat to the truth-seeking function of the criminal justice system. Previously, the Court had used a relatively straightforward test for evaluating the constitutional admissibility of eyewitness evidence: First, the defendant was required to show that police used an identification procedure that suggested the identity of the suspect to the witness and that it was unnecessary for police to use the suggestive procedure; second, if the defendant could demonstrate the use of an unnecessarily suggestive procedure, the admissibility of the identification evidence would depend on evaluation of several ostensibly independent reliability factors to determine whether, under the totality of the circumstances, there was a "substantial likelihood" of misidentification.[2] In *Beaudreaux*, however, the Court stated that when police use a suggestive identification procedure and lack any justification for failing to use more reliable methods, such unnecessary suggestion will be insufficient to trigger a reliability analysis under the Due Process Clause unless the procedure was not merely flawed but so problematic that the procedure itself gave rise to "a very substantial likelihood of irreparable misidentification,"[3] without regard to the reliability factors. "It is not enough," the Court declared, "that the procedure 'may have in some respects fallen short of the ideal.'"[4] Under this framework, once a defendant has cleared the heightened hurdle of establishing that a police identification procedure was not merely unnecessarily suggestive but so egregiously flawed as to give rise to a "very substantial likelihood of irreparable misidentification," judges should then assess the reliability factors to resolve, for a second time, the ultimate question of whether there was, in fact, "a substantial likelihood of misidentification."[5] The *Beaudreaux* Court's summary of the law could create a new, onerous burden on defendants who already face an uphill battle in

1. 585 U.S. 961 (2018).
2. *See* Perry v. New Hampshire, 565 U.S. 228, 239 (2012) (citing Neil v. Biggers, 409 U.S. 188, 201 (1972)).
3. *Beaudreaux*, 585 U.S. at 965 (citations omitted).
4. *Id.* (citation omitted).
5. *Id.* (citations omitted).

attempting to suppress eyewitness evidence derived from unnecessarily suggestive identification procedures.[6] That burden would inevitably lead to the conviction of more innocent suspects as a result of eyewitness misidentification, which is already a leading cause of wrongful conviction.[7]

There is some reason to be skeptical of the force of the *Beaudreaux* Court's description of the due process test for excluding eyewitness evidence. First, *Beaudreaux* is a five-page per curiam opinion issued without oral argument,[8] and the Court has made clear on several occasions that such opinions lack the same precedential weight as opinions the Court promulgates after full briefing and argument.[9] Second, the language in *Beaudreaux* describing a heightened burden for establishing flawed identification procedures is dicta; the Court skirted the issue of whether the identification procedures in the case were, in fact, unnecessarily suggestive, finding only that the state court could have reasonably concluded that the evidence was reliable under the totality of the circumstances, given the witness's good opportunity to view the perpetrator, the witness's careful attention to the perpetrator's characteristics at the time of the crime, and the witness's high level of certainty in the identification.[10] Thus, even if the police had used unnecessarily suggestive procedures, the state court would have been reasonable in determining that the evidence was admissible.[11]

Despite plausible grounds for skepticism of the precedential significance of *Beaudreaux*, there are good reasons to treat the heightened burden it describes for excluding eyewitness evidence as a serious threat to the truth-seeking function of the criminal justice system. A significant number of lower courts have already cited

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6. In fact, even without *Beaudreaux*'s distortion of the Court's eyewitness jurisprudence, the Court's due process test has serious flaws that have led several state courts to adopt more protective approaches under state constitutional law. *See generally* Nicholas A. Kahn-Fogel, *The Promises and Pitfalls of State Eyewitness Identification Reforms*, 104 KY. L.J. 99 (2015). This Essay accepts the flaws inherent to the longstanding federal due process framework as a given and argues against *Beaudreaux*'s error in interpreting the Court's eyewitness precedent.

7. Of the hundreds of people the Innocence Project has helped exonerate with DNA evidence, eyewitness misidentification contributed to wrongful conviction in more than 60% of the cases. *See Eyewitness Misidentification*, INNOCENCE PROJECT, https://innocenceproject.org/eyewitness-misidentification/ [https://perma.cc/2MQ9-JX6B] (last visited Oct. 29, 2024). Of the 3,325 exonerations since 1989 that the National Registry of Exonerations has catalogued, 27% of the wrongful convictions involved a mistaken eyewitness. *Contributing Factors and Type of Crime*, NATIONAL REGISTRY OF EXONERATIONS, *% Exonerations by Contributing Factor*, https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx [https://perma.cc/Q7B2-NSDL] (last visited Oct. 29, 2024).

8. *See* THE SUPREME COURT DATABASE, *Analysis Case Detail:* Sexton v. Beaudreaux, http://scdb.wustl.edu/analysisCaseDetail.php?cid=2017-079-01 [https://perma.cc/UVS5-NSCS] (last visited Oct. 29 2024).

9. *See* U.S. Bancorp. Mortg. Co. v. Bonner, 513 U.S. 18, 24 (1994) (describing the Court's "customary skepticism toward *per curiam* dispositions that lack the reasoned consideration of a full opinion"); Gray v. Mississippi, 481 U.S. 648, 651 n.1 (1987) ("The Court, of course, at times has said that summary action here does not have the same precedential effect as does a case decided upon full briefing and argument."); Edelman v. Jordan, 415 U.S. 651, 671 (1974).

10. *See Beaudreaux*, 585 U.S. at 965–968.

11. *See id.*

Beaudreaux for the proposition that an "unnecessarily suggestive identification procedure" means something more egregious than a police-arranged procedure that is unnecessarily suggestive.[12] Additionally, even before *Beaudreaux*, it was common for lower courts to treat the question of unnecessary suggestion as a more rigorous test than its plain language would suggest.

In Part I of this Essay, I will discuss the history of the Court's due process jurisprudence on eyewitness evidence. My examination of early and contemporary caselaw on due process challenges to eyewitness identification evidence will illustrate the evolution of the Court's approach and illuminate the nature of the *Beaudreaux* Court's confusion. In Part II, I will assess the impact of the *Beaudreaux* Court's directive and of similar, previous declarations by lower courts of a standard inconsistent with the concept of "unnecessary suggestion" at the heart of the Court's precedent. In Part III, I will argue that the *Beaudreaux* Court's directive is in tension not only with the Court's precedent on eyewitness identification but also with the Court's due process cases dealing with involuntary confessions and with its caselaw on Fourth Amendment probability.

I. *BEAUDREAUX*'S MISREADING OF THE COURT'S EYEWITNESS CASELAW

To understand the genesis of the *Beaudreaux* Court's subtle distortion of its previous eyewitness jurisprudence, it is necessary to review the historical evolution of the Court's approach to due process challenges to eyewitness evidence. Until the late 1960s, there was no constitutional limitation on the admissibility of eyewitness evidence; flaws in police-arranged identification procedures affected only the weight, not the admissibility, of evidence derived from such procedures.[13] Then, in three opinions published on the same day in 1967, the Court held for the first time that the Constitution places some limits on government-arranged identification procedures and the use of evidence derived therefrom at trial. First, in *United States v. Wade*[14] and *Gilbert v. California*,[15] the Court ruled that a live identification procedure after the Sixth Amendment right to counsel has attached constitutes a critical stage of the prosecution at which the defendant is entitled to the assistance of counsel.[16] Second, in *Stovall v. Denno*,[17] the Court determined that even if a Sixth Amendment claim were unavailable to a criminal defendant or habeas petitioner,[18]

12. *See, e.g.*, Wingate v. United States, 969 F.3d 251, 260 (6th Cir. 2020); United States v. Heard, 951 F.3d 920, 925 (8th Cir. 2020); Sims v. McCain, No. 18-cv-1038, 2021 WL 4099621 (W.D. La. July 29, 2021); United States v. Diaz, No. 3:19-cr-00197, 2021 WL 1110671, at *2 (M.D. Tenn. Mar. 23, 2021); Juarez v. Montgomery, No. CV 18-06562, 2019 WL 199987, at *6 n.2 (C.D. Cal. Jan. 15, 2019).

13. Simmons v. United States, 390 U.S. 377, 382 (1968).

14. 388 U.S. 218 (1967).

15. 388 U.S. 263 (1967).

16. *See Wade*, 388 U.S. at 227–37; *Gilbert*, 388 U.S. at 272.

17. 388 U.S. 293 (1967).

18. The *Stovall* Court held that *Wade* and *Gilbert* would have only prospective effect. *Id.* at 296–301. Additionally, the Court would later decide that there is no constitutional right to counsel at an identification procedure that takes place before the initiation of adversary judicial criminal

she might nonetheless challenge the admissibility of evidence derived from unnecessarily suggestive identification procedures on due process grounds.[19]

The *Stovall* Court opined that some identification procedures are "so unnecessarily suggestive and conducive to irreparable mistaken identification" that admission of evidence from such procedures denies a defendant due process of law.[20] Police in the case had conducted a showup identification, a procedure in which law enforcement confront a witness with a single suspect and ask the witness whether she can identify the suspect as the perpetrator.[21] As the Court noted, "The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned."[22] Indeed, such a procedure necessarily communicates to the witness the identity of the individual whom police believe to be the perpetrator, and because the defendant is the only participant in the identification procedure, any affirmative error by the witness necessarily leads to identification of an innocent suspect.[23] Nonetheless, the *Stovall* Court found no due process violation because, despite the suggestiveness of showup identifications, the procedure had been necessary.[24] Because the witness had suffered eleven stab wounds, it was unclear at the time of the identification whether she would survive, and she was the only person who could identify Stovall as the perpetrator or exonerate him if he were innocent.[25] Thus, with the need for "immediate action," the police were unable to use a more reliable, multiperson lineup.[26]

It is, of course, possible to read the *Stovall* Court's reference to procedures that are "*so* unnecessarily suggestive"[27] as incorporating a requirement that a challenged identification procedure must be egregiously flawed to implicate due process concerns. *Stovall*'s directive, however, excluded any resort to a separate reliability analysis after examination of the quality of police-arranged identification

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proceedings, Kirby v. Illinois, 406 U.S. 682, 688–90 (1972), and that even after attachment of Sixth Amendment rights, defendants lack any right to counsel at photographic identification procedures, United States v. Ash, 413 U.S. 300, 321 (1973).

19. *Stovall*, 388 U.S. at 301–02. The Court described due process challenges to eyewitness evidence as a "recognized ground of attack upon a conviction independent of any right to counsel claim." *Id.* at 302 (citing Palmer v. Peyton, 359 F.2d 199 (4th Cir. 1966)). Nonetheless, *Stovall* marked the Supreme Court's first recognition of the existence of such a right. *See* Simmons v. United States, 390 U.S. 377, 382–83 (1968).

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

21. *See id.* at 295.

22. *Id.* at 302.

23. *See, e.g.*, Andrew M. Smith, R.C.L. Lindsey & Gary L. Wells, *A Bayesian Analysis on the (Dis)utility of Iterative-Showup Procedures: The Moderating Impact of Prior Probabilities*, 40 L. & HUM. BEHAV. 503, 504 (2016) (noting that the use of known innocent "fillers" in lineups "manages to draw decision errors away from the innocent suspect and toward the fillers, which cannot happen when there are no fillers," and observing that "[t]here is no apparent dissent in the eyewitness science literature that lineups are better identification procedures than are showups").

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

25. *Id.*

26. *Id.*

27. *Id.* (emphasis added).

procedures. Instead, courts and scholars interpreted *Stovall* as establishing a per se exclusionary rule for all cases in which a court determined that an identification procedure was "unnecessarily suggestive" and "conducive" to misidentification.[28] Furthermore, although the *Stovall* Court stated that its due process test should include evaluation of the "totality of the circumstances,"[29] the circumstances to which the Court referred were only those relevant to the determination of whether the procedure in question was unnecessarily suggestive, without regard to any ostensibly independent reliability factors to assess the likelihood of misidentification in a given case.[30] Under such a regime, where constitutional analysis depends solely on evaluation of the quality of the eyewitness identification procedure and the necessity for its use, without regard to any independent factors that might help establish whether the witness in the case at bar was actually mistaken, it might make sense to require a seriously flawed procedure to implicate due process concerns. Under *Stovall*, that is, because a judge's assessment of the characteristics of the identification procedure had to do all of the constitutional work of identifying potentially untrustworthy eyewitness evidence, it might have made sense to require serious flaws in the composition or administration of the identification procedure to trigger constitutionally compelled exclusion of evidence.

On the other hand, it is also possible to read the *Stovall* Court's use of the word "so" in the phrase "so unnecessarily suggestive" as modifying only the word "unnecessarily," such that any suggestion at all would potentially implicate due process concerns, so long as police clearly lacked any justification for failing to use a more reliable procedure. Either way, nine months after *Stovall*, the Court would shift course in *Simmons v. United States*.[31] In *Simmons*, witnesses identified one of the petitioners after having viewed at least six photographs, mostly depicting groups of people in which the petitioner and a codefendant appeared multiple times.[32] Presenting the same suspect to a witness repeatedly is suggestive because it signals to the witness the likely identity of the person whom police believe to be the perpetrator,[33] and the *Simmons* Court acknowledged that this reduced the reliability

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28. *See, e.g.*, Commonwealth v. Johnson, 650 N.E.2d 1257, 1260 (Mass. 1995) (observing that *Stovall* established a per se exclusionary rule for evidence from unnecessarily suggestive identification procedures and affirming that Massachusetts would continue to follow the per se approach under the state constitution); Marjory Malkin Koosed, *The Proposed Innocence Act Won't—Unless it also Curbs Mistaken Eyewitness Identifications*, 63 OHIO ST. L.J. 263, 292, 295 (2002) (stating that, under *Stovall*, "if the pre-trial identification procedure was unnecessarily suggestive, this required exclusion of the testimony of the witness regarding the out-of-court, pre-trial identification" and referring to *Stovall* as establishing a "'per se' rule"); Gary L. Wells & Deah S. Quinlivan, *Suggestive Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 L. & HUM. BEHAV. 1, 2 (2009) (noting that *Stovall* established a per se exclusionary rule for evidence derived from "unnecessarily suggestive eyewitness identification procedures").

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

30. *See id.*

31. 390 U.S. 377 (1968).

32. *Id.* at 385.

33. *See, e.g.*, Wells & Quinlivan, *supra* note 28, at 8.

of the identification procedures law enforcement had employed in the case.[34] However, instead of focusing only on the characteristics of the identification procedures, as the Court had done in *Stovall,* the *Simmons* Court evaluated a variety of factors to determine whether the witnesses had actually correctly identified Simmons, notwithstanding the use of imperfect identification procedures.[35] Specifically, the Court emphasized the high quality of the lighting at the scene of the crime;[36] that the witnesses had been able to view the perpetrator for up to five minutes;[37] that the culprits wore no masks;[38] that the witnesses participated in the flawed identification procedures only a day after the crime, when, the Court asserted, their memories were still fresh;[39] and that, despite cross-examination, all of the witnesses remained highly confident in the accuracy of their identifications of Simmons.[40] Ultimately, the *Simmons* Court concluded that "[t]aken together, these circumstances leave little room for doubt that the identification of Simmons was correct, even though the identification procedure employed may have in some respects fallen short of the ideal."[41]

Because the *Beaudreaux* Court invoked *Simmons* in support of its declaration that "unnecessary suggestion" means something more than suggestion that is unnecessary, appreciation of the precise language the *Simmons* Court used is critical to understand the *Beaudreaux* Court's error. First, the *Simmons* Court asserted that "convictions based on eyewitness identification at trial following pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[42] *Beaudreaux* quoted this passage while misconstruing its significance. Specifically, *Beaudreaux*

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34. *Simmons*, 390 U.S. at 386 & n.6.

35. *Id.* at 385–86.

36. *Id.* at 385.

37. *Id.*

38. *Id.*

39. *Id.* In fact, witnesses tend to experience significant memory decay within hours of having witnessed an event. *See, e.g.*, Manson v. Brathwaite, 432 U.S. 98, 131 (1977) (Marshall, J., dissenting) ("[T]he greatest memory loss occurs within hours after an event."); Carol Krafka & Steven Penrod, *Reinstatement of Context in a Field Experiment on Eyewitness Identification*, 49 J. PERSONALITY & SOC. PSYCHOL. 58, 65 (1985) (finding that the most substantial increase in misidentifications from target-absent photo arrays occurs two hours after initial confrontation); *Cf.* A. Daniel Yarmey, Meagan J. Yarmey & A. Linda Yarmey, *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 L. & HUM. BEHAV. 459, 464 (1996) (reporting results of experiment showing that photo showups conducted within minutes of a crime are as accurate as lineups, but 58% of witnesses who viewed a photo show up two hours after an encounter failed to reject an innocent suspect, as compared to only 14% who viewed photo arrays in which the "perpetrator" was absent).

40. *Simmons*, 390 U.S. at 385. Eyewitness scientists have recommended measuring a witness's confidence at the time of the pretrial identification procedure, rather than at trial, because post-identification confirmatory feedback, including the prosecution's decision to charge and try the defendant, artificially inflates eyewitness certainty. *See, e.g.*, State v. Henderson, 27 A.3d 872, 899–900 (N.J. 2011) (citing numerous studies).

41. *Simmons*, 390 U.S. at 385–86.

42. *Id.* at 384.

stated that "*to be* 'impermissibly suggestive,' the procedure must 'give rise to a very substantial likelihood of irreparable misidentification.'"[43] In contrast, the *Simmons* Court's statement that a *conviction would be set aside* only if a procedure were so impermissibly suggestive as to give rise to a high probability of misidentification equated the likelihood of misidentification with the ultimate question of whether a defendant has suffered a due process violation.[44] At the same time, as discussed, *Simmons* made clear that whether a due process violation has occurred depends not only on the quality and necessity of the pretrial identification procedure but, ultimately, on the *overall* likelihood of error in the case at hand, taking into account factors such as the witness's opportunity to view the perpetrator, the length of time between the crime and the identification, and the witness's level of certainty in her identification of the suspect as the perpetrator.[45]

Simmons thus represented the incipience of the Court's shift to a two-part due process test for eyewitness evidence: First, the defendant must show that police used an unnecessarily suggestive identification procedure; then, if the court agrees that police used such a procedure, it evaluates other reliability factors to gauge the actual likelihood of misidentification.[46] And, again, the *Simmons* Court's determination that Simmons's rights had not been violated depended on its conclusion that the witnesses in the case had probably correctly identified him despite the use of a flawed procedure.[47] In other words, for the *Simmons* Court, the overarching due process inquiry depended on whether there was a substantial likelihood of misidentification, but the *Simmons* Court's analysis revealed that one cannot determine whether a flawed procedure has given rise to such a likelihood until one examines other reliability factors, such as those discussed above. The *Beaudreaux* Court's innovation was thus a new or renewed (depending on one's interpretation of the language in *Stovall*) emphasis on the likelihood, in the abstract, that a particular flaw in an identification procedure will lead to misidentification, independent of the reliability factors the *Simmons* Court explored and that the Court would later flesh out in further detail.

Consequently, when the *Boudreaux* Court stated that "[i]t is not enough that the procedure 'may have in some respects fallen short of the ideal,'"[48] in support of its conclusion that only egregiously flawed procedures qualify as unnecessarily suggestive, it quoted *Simmons* out of context. *Simmons* used the quoted language only *after* evaluating opportunity to view, certainty, and time between crime and confrontation, stating that "[t]aken together, these circumstances leave little room

43. Sexton v. Beaudreaux, 585 U.S. 961, 965 (2018) (quoting Neil v. Biggers, 409 U.S. 188, 197 (1972) (quoting *Simmons*, 390 U.S. at 384)) (emphasis added).

44. *See Simmons*, 390 U.S. at 384.

45. *Id.* at 385–86.

46. *See Beaudreaux*, 585 U.S. at 965–966; Perry v. New Hampshire, 565 U.S. 228, 241 (2012); Manson v. Brathwaite, 432 U.S. 98, 109–114 (1977); *Biggers*, 409 U.S. at 198–200.

47. *See Simmons*, 390 U.S. at 385–86.

48. *Beaudreaux*, 585 U.S. at 966.

for doubt that the identification of Simmons was correct even though the identification procedure employed may have in some respects fallen short of the ideal."[49] Ultimately, that is, *Simmons* contained no requirement that an identification procedure must be flagrantly flawed to qualify as unnecessarily suggestive. Instead, it held that a due process violation occurs only when police use a suggestive and unnecessary identification procedure and when, *after evaluating independent reliability factors*, the court concludes that there was a substantial likelihood of misidentification.

On occasion, a court or commentator has argued that *Simmons*'s replacement of *Stovall*'s reference to "unnecessary" suggestion with an inquiry into whether an identification procedure was "impermissibly" suggestive itself raised the bar for excluding eyewitness evidence.[50] According to this line of thought, *Simmons*'s choice of words implied that a suggestive procedure might be unnecessary (because police had no good reason for eschewing a more reliable technique) but still permissible.[51] However, in later cases, the Court would again refer to "unnecessary" suggestion,[52] and it became clear that the Court used the words "unnecessarily," "impermissibly," and "unduly" interchangeably in this context.[53] In 2012, for example, the Court quoted from *Simmons* while substituting "unnecessarily" for *Simmons*'s reference to "impermissibly" suggestive procedures.[54] Likewise, in *Beaudreaux* itself, the Court first noted that due process concerns arise when police "use[d] a procedure that is *both* suggestive and unnecessary."[55] Then, in the very next sentence, the *Beaudreaux* Court described its heightened burden for establishing that a procedure was "impermissibly" suggestive.[56] Thus, *Simmons*'s use of "impermissible" instead of "unnecessary" was without significance. And, as I will demonstrate below, the Court's later cases revealed that "unnecessary suggestion" is no term of art. Instead, it means what it seems to mean: suggestion that was unnecessary.

In *Neil v. Biggers* and *Manson v. Brathwaite*, the Court would clarify and elaborate on its new approach, in which judges should evaluate the likelihood of misidentification only after concluding that police used a suggestive identification procedure without justification. If a court *does* conclude that police used an unnecessarily suggestive identification procedure, it should *then* assess a series of reliability factors to evaluate the overall likelihood of misidentification. If that analysis reveals a substantial likelihood of misidentification, then admission of the

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49. *Simmons*, 390 U.S. at 385–86.

50. *See* State v. Dubose, 699 N.W.2d 582, 589 (Wis. 2005) (arguing that *Simmons*' use of the word "impermissible" instead of "unnecessary" suggested that a suggestive procedure might be unnecessary but still permissible) (quoting David E. Paseltiner, Note, *Twenty Years of Diminishing Protection: A Proposal to Return to the* Wade *Trilogy's Standards*, 15 HOFSTRA L. REV. 583, 589–90 (1987)).

51. *See Dubose*, 699 N.W.2d at 589–90 (quoting Paseltiner, *supra* note 50, at 589–90).

52. *Beaudreaux*, 585 U.S. at 965–966; Perry v. New Hampshire, 565 U.S. 228, 238–39 (2012); Manson v. Brathwaite, 432 U.S. 98, 107, 109 (1977); Neil v. Biggers, 409 U.S. 188, 198 (1972).

53. *See* Perry, 565 U.S. at 254 n.3 (Sotomayor, J., dissenting) (noting that the Court had used the three terms interchangeably, including in *Manson*, *Biggers*, and *Simmons*) (citations omitted).

54. *Id.* at 238.

55. *Beaudreaux*, 585 U.S. at 966 (quoting *Perry*, 565 U.S. at 238–39).

56. *Beaudreaux*, 585 U.S. at 966.

evidence violates the defendant's due process rights. Conversely, if the court concludes that the evidence is reliable despite the use of an unnecessarily suggestive procedure, then the evidence is admissible.

In *Biggers*, a rape victim identified Biggers as the perpetrator after police officers displayed Biggers to the victim at a stationhouse showup seven months after the crime.[57] The *Biggers* Court described in straightforward terms the threshold requirement that a defendant must demonstrate the use of an unnecessarily suggestive identification procedure: "Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous."[58] This description, of course, contains no requirement of extreme or egregious suggestion.

Instead, the *Biggers* Court formalized the use of an expanded version of the reliability factors the *Simmons* Court had invoked to examine the likelihood of misidentification in the wake of an unnecessarily suggestive procedure. The *Biggers* Court observed that *Simmons* had found the contested evidence admissible after concluding that "the photographic identifications were reliable, the witnesses having viewed the bank robbers for periods of up to five minutes under good lighting conditions at the time of the robbery."[59] Nonetheless, the *Biggers* Court asserted that, at the time of the decision, it was still unclear whether unnecessary suggestion alone should lead, per se, to the exclusion of eyewitness evidence.[60] The Court then resolved that question in the negative. Although the Court was "inclined to agree with the courts below that the police did not exhaust all possibilities" for constructing a reliable lineup, it held that such unnecessary suggestion was insufficient, by itself, to require exclusion of the evidence as a matter of due process.[61] Instead, the Court addressed what it considered "the central question, whether under the 'totality of the circumstances,' the identification was reliable even though the confrontation procedure was suggestive."[62] "As indicated by our cases," the Court said:

> [T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.[63]

In rejecting the per se exclusionary approach in favor of this multi-factor

57. Neil v. Biggers, 409 U.S. 188, 194–95 (quoting Simmons v. United States, 390 U.S. 377, 385–86).
58. *Biggers*, 409 U.S. at 198.
59. *Id.* at 197.
60. *Id.* at 198–99.
61. *Id.* at 199.
62. *Id.*
63. *Id.* at 199–200.

reliability test, the Court stated, "[W]e think the District Court focused unduly on the relative reliability of a lineup as opposed to a showup."[64] Instead, although police-arranged, unnecessarily suggestive procedures are required to trigger the due process inquiry,[65] and although *Biggers* maintained that the due process inquiry turned on whether there was a substantial likelihood of misidentification,[66] the new, five-factor reliability test would be the primary mechanism for gauging that likelihood.[67]

The *Biggers* Court emphasized, however, that both the pretrial identification of Biggers and the trial had occurred before the Court decided *Stovall* and that, as such, a per se exclusionary rule whenever police use an unnecessarily suggestive procedure would be inappropriate.[68] Thus, the Court revisited the question once more in *Manson v. Brathwaite*,[69] five years after *Biggers*. Ultimately, the Court adopted the *Biggers* test for both pre- and post-*Stovall* identification procedures.[70] In doing so, *Manson* framed the question as whether "the Due Process Clause of the Fourteenth Amendment compels the exclusion, in a state criminal trial, *apart from any consideration of reliability*, of pretrial identification evidence obtained by a police procedure that was both suggestive and unnecessary."[71] The Court's description of the question at issue thus made plain that evaluation of the overall reliability of the identification is a distinct question from the issue of unnecessary suggestion. Additionally, immediately after concluding that "reliability is the linchpin of admissibility of identification testimony for both pre- and post-*Stovall* confrontations," the Court declared that the factors to be used to assess reliability were the five factors the *Biggers* Court had already articulated,[72] each of which is ostensibly independent of the question of unnecessary suggestion.[73]

At the same time, the Court's statement of the question demonstrated that "unnecessarily suggestive" is not a term of art requiring egregious error. Instead, the term means what it seems to mean: "a police procedure that was both suggestive and unnecessary."[74] Likewise, the Court's treatment of the issue of unnecessary suggestion in *Manson* reinforced this straightforward interpretation. As the Court

64. *Id.* at 200.

65. Perry v. New Hampshire, 565 U.S. 228, 241 (2012) ("The due process check for reliability, *Brathwaite* made plain, comes into play only after the defendant establishes improper police conduct.") (citing Manson v. Brathwaite, 432 U.S. 98, 112–13 (1977)).

66. *Biggers*, 409 U.S. at 198 (quoting United States v. Simmons, 390 U.S. 377, 384 (1968)).

67. *See Biggers*, 409 U.S. at 199–201.

68. *Id.* at 199.

69. 432 U.S. 98 (1977).

70. *Id.* at 114.

71. *Id.* at 99 (emphasis added).

72. *Id.* at 114 (citing *Biggers*, 409 U.S. at 199–200).

73. In fact, suggestive identification procedures artificially inflate a witness's level of certainty in her identification, her perception of the quality of the viewing conditions at the time of the crime, and her memory of the degree of attention she paid to the perpetrator at the time of the crime, resulting in a perverse feedback loop in which flawed identification procedures increase the likelihood that a court evaluating the reliability factors will conclude that the evidence is reliable. *See, e.g.*, Kahn-Fogel, *supra* note 6, at 115.

74. Manson v. Brathwaite, 432 U.S. 98, 99 (1977).

noted, the petitioner had conceded that "'the procedure in the instant case was suggestive (because only one photograph was used) and unnecessary' (because there was no emergency or exigent circumstance)."[75]

Years later, in considering whether suggestiveness for due process purposes must be related to police conduct, the Court would once again confirm that the test for the substantiality of the likelihood of misidentification comes into play only after the defendant shows police use of an unnecessarily suggestive procedure. *Perry v. New Hampshire* stated this in clear, explicit terms: "The due process check for reliability, *Brathwaite* made plain, comes into play *only after* the defendant establishes improper police conduct."[76] Taken together, the Court's pre-*Beaudreaux* statements evince a simple threshold for initiating reliability analysis under the Due Process Clause: Courts should conduct such reliability analysis any time an eyewitness identifies a defendant in the wake of a police-arranged identification procedure that was suggestive when police lacked any justification for failing to use a more reliable procedure. In the *Perry* Court's words, "due process concerns arise . . . when law enforcement officers use an identification procedure that is both suggestive and unnecessary."[77] If the *Biggers*, *Manson*, and *Perry* Courts had intended to impose a more rigorous threshold requirement, it would have been easy enough to say so.

II. WHY *BEAUDREAUX* MATTERS: LOWER COURT TREATMENT OF UNNECESSARY SUGGESTION

As I have noted, despite good reasons to discount the precedential weight of *Beaudreaux*, the Court's error warrants serious consideration. This is not only because lower courts have already started to cite *Beaudreaux*'s flawed definition of unnecessary suggestion but also because, even before *Beaudreaux*, some courts imposed similar requirements on defendants attempting to suppress evidence from suggestive identification procedures. In 2021, for example, in *Sims v. McCain*,[78] the United States District Court for the Western District of Louisiana examined a habeas corpus petition in which the petitioner claimed his counsel had been ineffective, in part for failing to move for the suppression of eyewitness evidence.[79] Sims had been charged with murder after an eleven-year-old witness tentatively identified him from the second of two photo arrays that police showed him.[80] The boy told police that he had seen "a portion of [the perpetrator's] face and the side

75. *Id.* at 109.

76. Perry v. New Hampshire, 565 U.S. 228, 241 (2012) (emphasis added).

77. *Id.* at 238–39. Notably, the *Biggers*, *Manson*, and *Perry* Courts' descriptions of the threshold requirement of demonstrating unnecessary suggestion also excluded any reference to procedures that are "*so* unnecessarily suggestive," except when summarizing the historical development of Court's approach to evaluating eyewitness evidence in the face of a due process challenge. *See id.* at 238 (summarizing *Simmons*); *Manson*, 432 U.S. at 104 (summarizing *Stovall*); *Biggers*, 409 U.S. at 196–97 (summarizing *Simmons*).

78. No. 18-cv-1038, 2021 WL 4099621 (W.D. La. July 29, 2021).

79. *Id.* at *3–5.

80. *Id.* at *2.

of him" for about seven seconds.[81] A detective showed the witness a photo array including "frontal facial view[s]" of the petitioner and five other men, but the boy was unable to identify anyone.[82] Then, the detective composed a second photo array, again depicting six men, but with profile views of their faces.[83] In the second photo array, the petitioner was one of only two men who had also appeared in the first array.[84] The witness picked two photos from the second array, telling police that both resembled the perpetrator but that petitioner's photo was closer to his memory of the culprit.[85] At trial, the witness positively identified Sims.[86]

As discussed above, exposing a witness to multiple identification procedures in which the suspect appears more than once, while surrounding the suspect with new fillers, suggests to the witness the identity of the suspect.[87] However, the *Sims* court took out of context the same language on which the *Beaudreaux* Court had relied for the proposition that unnecessary suggestion means more than suggestion that is unnecessary,[88] and it cited *Beaudreaux* directly in support of the notion that only serious flaws render an identification procedure impermissibly suggestive.[89] Ultimately, the *Sims* court held that the record failed to support the argument that the photo arrays "included coaching or other impermissibly suggestive tactics," though it acknowledged that "[i]t was perhaps unusual that the two lineups repeated only two photos."[90] Consequently, the *Sims* Court never reached analysis of the

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81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* Eyewitness scientists recommend taking confidence statements at the time of a pretrial identification procedure precisely because postidentification confirmatory feedback, including the mere fact that the prosecution has charged the defendant with the crime in question, artificially inflates witness certainty. *See, e.g.*, Amy Bradfield Douglass & Nancy Steblay, *Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect*, 20 APPLIED COGNITIVE PSYCHOL. 859 (2006); Jeffrey S. Neuschatz, Elizabeth L. Preston, Amanda D. Burkett, Michael P. Toglia, James M. Lampinen, Joseph P. Neuschatz, Andrew H. Fairless, Deah S. Lawson, Rachael A. Powers, & Charles A. Goodsell, *The Effects of Post-Identification Feedback and Age on Retrospective Eyewitness Memory*, 19 APPLIED COGNITIVE PSYCHOL. 435, 441 (2005) (describing effects of post-identification confirming feedback); 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); Wells & Quinlivan, *supra* note 28, at 12.

87. *See supra* notes 36–37 and accompanying text.

88. *Sims*, No. 18-cv-1038, 2021 WL 4099621, at *4 (W.D. La. July 29, 2021) (citing the same passage from *Neil v. Biggers*'s summary of *Simmons* that *Beaudreaux* had invoked).

89. *Id.*

90. *Id.* It is, of course, also possible that the *Sims* court's reasoning reflected in part the deferential standard of review in federal habeas cases. *See id.* at *3 (noting that, in a habeas case, to overturn a state court's holding, "[t]he state court decision must be so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement") (quoting Woods v. Etherton, 578 U.S. 113, 115–16 (2016)). Although the witness in *Sims* told police that he had seen only a profile view of the perpetrator, and although police nonetheless displayed a series of frontal-view photos in the first array, the *Sims* court excused the "perhaps unusual" repetition of only two men from the first array in the second procedure by speculating that "perhaps profile views were not available of all of the men in the first lineup." *Sims*, 2021 WL 4099621, at *4.

Biggers/Manson reliability factors before denying Sims's claim for relief.

Likewise, in *Phillip v. Jackson*,[91] the District Court for the Eastern District of Michigan quoted *Beaudreaux*'s elevated requirement for establishing unnecessary suggestion before evaluating what it acknowledged to be a flawed pretrial lineup.[92] First, the court cited *Beaudreaux* for the propositions that "unnecessary suggestion" means flaws that give rise to a "very substantial likelihood of irreparable misidentification" and that a procedure that "may have in some respects fallen short of the ideal" is not necessarily unnecessarily suggestive.[93]

The *Phillip* court then concluded that "[t]he lineup in Petitioner's case was not ideal."[94] Specifically, although the petitioner was thirty-one or thirty-two years old at the time of the lineup, the five fillers included two men in their teens, two in their mid-twenties, "and one man who was almost fifty years old."[95] Additionally, although the victim who identified Phillip from the lineup had described the perpetrator as being about six feet, four inches tall, Phillip, who was six feet, four inches tall, was the tallest man in the lineup, and four of the five fillers were only six feet tall.[96] Nonetheless, the court glossed over these flaws by noting that the victim testified that she had relied on Phillip's facial features rather than his height to pick him from the lineup.[97] Ultimately, without deciding definitively whether the lineup was sufficiently flawed to be classified as "unnecessarily suggestive," the court concluded that evaluation of the *Manson* reliability factors revealed that the evidence was reliable (and, therefore, admissible) even if there had been unnecessary suggestion.[98] Phillip appealed to the Sixth Circuit Court of Appeals, which affirmed the district court's holding after once again quoting *Beaudreaux* for the proposition that an identification procedure qualifies as "impermissibly suggestive" only if it gives rise to "a very substantial likelihood of irreparable misidentification."[99] The Sixth Circuit opinion concluded that "[j]urists of reason would agree that the corporeal lineup was not so impermissibly suggestive as to be conducive to irreparable misidentification."[100] Numerous other courts have also quoted *Beaudreaux*'s problematic definition of unnecessary suggestion.[101]

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91. No. 2:18-CV 10779, 2020 WL 6118531 (E.D. Mich. Oct. 16, 2020)
92. *Id.* at *3–4.
93. *Id.* at *3 (citing Sexton v. Beaudreaux, 585 U.S. 961, 965–966 (2018) (internal citations omitted).
94. *Phillip*, 2020 WL 6118531, at *4.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at *5.
99. Phillip v. Floyd, No. 20-2142, 2021 WL 5856876, at *2 (6th Cir. June 21, 2021).
100. *Id.*
101. *See, e.g.*, United States v. Vines, 4 F.4th 500, 506 (7th Cir. 2021); United States v. Heard, 951 F.3d 920, 925 (8th Cir. 2020); Wingate v. United States, 969 F.3d 251, 260 (6th Cir. 2020); Lynn v. Dixon, 4:20-cv-229-MW, 2022 WL 1096576, at *9 (N.D. Fla. Feb. 28, 2022); Dangerfield v. Warden, Southeastern Correctional Complex, No. 1:20-cv-582, 2022 WL 2817442, at *2 (S.D. Ohio July 19, 2022); United States v. Miller, No. 2:21-cr-20213-MSN-atc, 2022 WL 1501772, at *2 (W.D. Tenn. May 12, 2022); United States v. Cannon, No. 1:19-CR-09-HAB, 2021 WL 4272884, at *2 (N.D. Ind. Sept. 21, 2021); Juarez v. Montgomery, No. CV 18-06562, 2019 WL 199987, at *6 n.2 (C.D. Cal. Jan. 15, 2019).

In addition to the courts that have invoked *Beaudreaux*'s flawed definition of unnecessary suggestion, numerous lower courts before *Beaudreaux* imposed heightened burdens on defendants who attempted to establish that police procedures were unnecessarily suggestive. The Supreme Court of Georgia, for example, has repeatedly declared that a police-arranged pretrial identification procedure is impermissibly suggestive only if flaws in the procedure make it "all but inevitable" that the witness will identify the suspect.[102] This standard has led the court to conclude that including a suspect's photo in two successive photo arrays in which no one else's photo appeared twice, does not render the identification procedures "impermissibly defective."[103] Including the suspect's photo in more than one array when no other participants reappear in the second procedure is, of course, suggestive and unnecessary.[104] If we knew that using such a procedure would increase the odds of a witness mistakenly identifying an innocent suspect from 12% to 46%,[105] we might justifiably disapprove its use. Yet, under the Georgia standard, one would be unable to claim that these flaws make it "all but inevitable" that the witness will identify the suspect whose picture appeared in both arrays, so a court would be justified in concluding that the pretrial identification procedures were free from impermissible suggestion. Likewise, it is unclear whether a court applying *Beaudreaux*'s test would conclude that a 46% chance of misidentification represents a "very substantial likelihood," sufficient to render the procedures unnecessarily suggestive and trigger analysis of the overall reliability of the evidence under *Manson*.

Similarly, the Supreme Court of Arkansas has suggested that eyewitness identification procedures are impermissibly suggestive only if flaws in the procedures make it "all but inevitable" that the witness will identify the suspect.[106]

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102. *E.g.*, Roseboro v. State, 841 S.E.2d 706, 711 (Ga. 2020); Bowen v. State, 792 S.E.2d 691, 695 (Ga. 2016); Davis v. State, 686 S.E.2d 249, 252 (Ga. 2009); Padilla v. State, 544 S.E.2d 147, 148 (Ga. 2001); Clark v. State, 515 S.E.2d 155, 161 (Ga. 1999); Brewer v. State, 463 S.E.2d 906, 911 (Ga. 1995).

103. *See* Clark v. State, 611 S.E.2d 38, 42 (Ga. 2005).

104. *See, e.g.*, Wells & Quinlivan, *supra* note 28, at 8.

105. *See* Tiffany Hinz & Kathy Pezdek, *The Effect of Exposure to Multiple Lineups on Face Identification Accuracy*, 25 L. & HUM. BEHAV. 185, 191 (2001) (describing the results of an experiment showing an increase in the false positive rate from 12% to 46% when an innocent suspect reappears in a second photo array and the actual target is absent).

106. The Arkansas Supreme Court has used somewhat ambiguous language on the issue. The court has stated that a pretrial identification procedure "violates the Due Process Clause when there are suggestive elements in the identification procedure that make it all but inevitable that the victim will identify one person as the perpetrator. Even if the identification technique used was impermissibly suggestive, however, testimony concerning it is admissible if the identification was reliable." Monk v. State, 895 S.W. 904, 907 (Ark. 1995) (citations omitted). The reference to the *violation* of a defendant's due process rights could suggest that the inevitability requirement applies only after completing analysis of the overall reliability of the evidence. Nonetheless, the juxtaposition of the requirement that the procedure makes it "all but inevitable" that the witness will pick the suspect with the next sentence asserting that reliable evidence will be admissible despite impermissible suggestion suggests that the "inevitability" requirement applies to the first prong of the analysis. Moreover, Arkansas courts have, in fact, applied the standard in a manner consistent with the latter interpretation—they have found identification procedures free from impermissible suggestion so long as the procedures would not inevitably lead the witness to identify the suspect.

Thus, like Georgia, the Arkansas high court has deemed pretrial procedures free from undue suggestion despite the defendant being the only person to appear in two successive identification procedures.[107] Likewise, in *Bradley v. State*, witnesses described a perpetrator as wearing a "gold 'grill' on his teeth."[108] Police arranged a photo array in which only the defendant and one other person were depicted wearing gold grills.[109] Nonetheless, the Arkansas Court of Appeals concluded that the array was free from impermissible suggestion because the fact that another participant in the array also fit the description of the culprit meant that "it was not inevitable that the witnesses would select one person as the perpetrator."[110]

In the years before *Beaudreaux*, federal courts also regularly found procedures that were incontrovertibly suggestive and unnecessary to be free from unnecessary suggestion. For example, in *United States v. Maguire*,[111] the United States Court of Appeals for the First Circuit concluded that presenting a witness with successive identification procedures in which the suspect is the only common denominator is not impermissibly suggestive.[112] Likewise, the *Maguire* court found that it is not impermissibly suggestive to construct a photo array in which the suspect is the only person wearing clothing consistent with witnesses' descriptions of the perpetrator.[113] In the past several years, several federal courts of appeals have confirmed that, in their view, presenting a suspect to a witness repeatedly across multiple identification procedures is permissible.[114] In fact, in an analysis of every federal case to cite *Manson* between the publication of the decision in 1977 and January of 2010, I found that, in 20.73% of federal cases in which the record revealed clear evidence of suggestion that was unnecessary, courts held that the police procedures were permissible.[115]

Thus, *Beaudreaux*'s flawed reasoning is important both because lower courts have already begun to rely on it and because, even before *Beaudreaux*, courts often used overly exacting standards for determining whether flawed police procedures qualified as unnecessarily suggestive. In addition to *Beaudreaux*'s inconsistency with the Supreme Court's previous pronouncements on due process challenges to eyewitness evidence, doctrinal insights from other areas of the Court's jurisprudence counsel against adoption of the *Beaudreaux* Court's directive. I will discuss those concerns in the next Part of this Essay.

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107. King v. State, 916 S.W.2d 725, 727–28 (Ark. 1996).

108. Bradley v. State, 370 S.W.3d 263, 266 (Ark. Ct. App. 2009).

109. *Id.* at 271.

110. *Id.*

111. 918 F.2d 254 (1st Cir. 1990)

112. *Id.* at 263.

113. *Id.* at 265.

114. *See, e.g.*, United States v. St. Louis, 889 F.3d 145, 153 (4th Cir. 2018); United States v. Williams, 688 Fed. Appx. 895, 897 (11th Cir. 2017); Moore v. Dickhaut, 842 F.3d 97, 103 (1st Cir. 2016).

115. Nicholas A. Kahn-Fogel, *Manson and its Progeny: An Empirical Analysis of American Eyewitness Law*, 3 ALA. C.R. & C.L. L. REV. 175, 211–12 (2012).

III. THE TENSION BETWEEN *BEAUDREAUX* AND THE COURT'S INVOLUNTARY CONFESSION AND PROBABLE CAUSE JURISPRUDENCE

Assessment of the Court's due process jurisprudence on involuntary confessions and analysis of its probable cause caselaw also support the conclusion that any suggestion that is unnecessary should be sufficient to trigger reliability analysis under *Manson*. As with due process challenges to eyewitness evidence, the Court's opinions evaluating due process challenges to allegedly involuntary confessions involve a two-part inquiry. First, a defendant seeking exclusion of a confession on due process grounds must establish that the government engaged in coercive conduct to extract the confession.[116] Second, if the court concludes that police did use coercive tactics, then it should examine the totality of the circumstances, including any vulnerabilities of the defendant, to determine whether the confession was a product of the defendant's free will, or, alternatively, whether his will was overborne by the official coercion.[117]

Importantly, the Court has set no minimum threshold of coerciveness to trigger the totality-of-the-circumstances analysis for voluntariness. Any coercive conduct will suffice, just as the Court has previously held that any unnecessary suggestion is adequate to trigger reliability analysis in the eyewitness context. Of course, the devil is in the details, and the Court has sometimes been unwilling to characterize arguably heavy-handed conduct by police as coercive. In *Colorado v. Spring*, for example, agents of the Bureau of Alcohol, Tobacco, and Firearms arrested Spring under circumstances suggesting that they were investigating him only for trafficking in stolen firearms.[118] Spring waived his *Miranda* rights, and after interrogating him about the firearms sales that had led to his arrest, the agents began questioning Spring about an unrelated murder they suspected him of having committed.[119] Justice Marshall, in dissent, described the technique the agents had employed as a "coercive …. psychological ploy" in which investigators "take advantage of the suspect's psychological state, as the unexpected questions cause the compulsive pressures [of custodial interrogation] suddenly to reappear."[120] Nonetheless, the *Spring* majority concluded that law enforcement's failure to inform Spring of all of the subjects about which they wished to question him did "not relate to any of the traditional indicia of coercion: 'the duration and conditions of detention . . . , the manifest attitude of the police toward him, his physical and

116. *See* Colorado v. Connelly, 479 U.S. 157, 167 (1986) ("[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment.").

117. *See id.* at 164 (agreeing that the mental condition of the defendant is relevant to voluntariness analysis, but only when there has been official coercion); *see also* Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973) (describing a totality-of-the-circumstances test for voluntariness of confessions including examination of "both the characteristics of the accused and the details of the interrogation"); Arizona v. Fulminante, 499 U.S. 279, 286 n.2, 286–88 (1991).

118. *See* Colorado v. Spring, 479 U.S. 564, 566–67 (1987).

119. *Id.* at 567.

120. *Id.* at 580–81 (Marshall, J., dissenting).

mental state, the diverse pressures which sap or sustain his powers of resistance and self-control.'"[121] The *Spring* Court left open the possibility that affirmative misrepresentation about the subjects of interrogation could be relevant to voluntariness analysis.[122]

Likewise, in *Moran v. Burbine*, the Court concluded that the failure of law enforcement officers to inform an arrestee that his lawyer had tried to reach him was "irrelevant" to the voluntariness of his confession, regardless of whether police had deliberately deceived the attorney.[123] The Court drew this conclusion despite its acknowledgment that a rule requiring police to inform a suspect of her lawyer's attempts to reach her "might add marginally" to the "goal of dispelling the compulsion inherent in custodial interrogation."[124] Nonetheless, the Court has concluded that misrepresentation of the evidence against a suspect is a legitimate factor to consider in determining whether the suspect's confession was voluntary.[125]

The Court has also had to draw somewhat arbitrary lines in other contexts in distinguishing between coercive and noncoercive conduct. For example, while sending in relays of officers to question a suspect for thirty-six hours without allowing the suspect an opportunity to sleep is certainly coercive,[126] the Court has held that interrogation for nearly three hours in a straight-backed chair is not coercive.[127] But these cases are distinguishable from due process challenges to eyewitness evidence in at least two ways. First, although there might be reasonable disagreement about the line between legitimate and illegitimate pressures on a suspect to speak, there is, by definition, never a good reason for unnecessary suggestion in an eyewitness identification procedure.[128] This is not to suggest that judges will never have to make difficult judgment calls regarding unnecessary suggestion; in some instances, a court might reasonably conclude that minor differences between participants in an identification procedure would be unlikely to

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121. *Id.* at 574 (citation omitted).

122. *Id.* at 576 n.8.

123. Moran v. Burbine, 475 U.S. 412, 423–24 (1986).

124. *Id.* at 426.

125. *See* Frazier v. Cupp, 394 U.S. 731, 739 (1969) (finding the misrepresentation relevant to voluntariness analysis, but concluding that, under the totality of the circumstances, including the short period of questioning and the petitioner's status as a mature adult of normal intelligence, his confession was voluntary); Colorado v. Connelly, 479 U.S. 157, 163–64, 164 n.2 (1986) (counting the misrepresentation in *Frazier* as the kind of misconduct or overreaching that can trigger voluntariness analysis, but noting that even a "causal connection between police misconduct and a defendant's confession" does not lead to a per se finding of involuntariness). Although the Supreme Court has never retreated from the position that misrepresentation of the evidence against a suspect is relevant to voluntariness analysis, courts rarely conclude that a suspect's confession was involuntary as a result of such deception. *See, e.g.*, Michael J. Zydney Mannheimer, *Fraudulently Induced Confessions*, 96 NOTRE DAME L. REV. 799, 813–14 (2020).

126. *See* Ashcraft v. Tennessee, 322 U.S. 143 (1944).

127. *See* Berghuis v. Thompkins, 560 U.S. 370, 386–87 (2010).

128. *See* Neil v. Biggers, 409 U.S. 188, 198 (1972) ("Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.").

draw a witness's attention to the suspect at all,[129] and it is neither possible nor desirable to construct an identification procedure in which all participants look identical to each other.[130] Nonetheless, any time a court concludes that an identification procedure would have been likely to have drawn a witness's attention to the suspect and that police had no good reason for such suggestion, the court should classify the procedure as unnecessarily suggestive.

Second, the Court has made clear that "reliability is the linchpin in determining the admissibility of identification testimony";[131] in contrast, the Court has repeatedly emphasized that the Due Process Clause's condemnation of involuntary confessions stems from values largely independent of the truth-seeking function of the trial. In *Colorado v. Connelly*, for example, the Court asserted that "[t]he aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false."[132] Likewise, the Court had previously stated that due process requires exclusion of involuntary confessions:

> not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.[133]

In seeking to distinguish the United States' approach from the historical excesses of continental inquisitions and the English Star Chamber, the Court might well have intended to condemn only those practices that it considered so extreme

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129. In *Dokins v. Montgomery*, No. CV 17-1269 PA, 2018 WL 7199496, at *5 (C.D. Cal. Dec. 28, 2018), one witness described the perpetrator as a "light skinned African American," and another had described the culprit as "kind of light . . . [n]ot dark, dark." The habeas petitioner argued that a photo array from which witnesses identified him was unnecessarily suggestive because some fillers in the array had darker skin and longer hair than petitioner. *Id.* at *15. The California Court of Appeals, however, had concluded that, of the six participants in the photo array, three had "lighter" skin, one had medium skin, and two had darker skin, and the habeas court concluded that, although three of the people in the array had longer hair than petitioner, none of the participants had "what would commonly be considered long hair." *Id.* at *16 n.13. The magistrate thus recommended upholding the state court's judgment that the procedure had been free of unnecessary suggestion.

130. *See, e.g.*, Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 L. & HUM. BEHAV. 603, 632 (1998) (noting that selecting fillers to resemble the witnesses' descriptions of the perpetrator is superior to choosing fillers to match the suspect because "such practices might create undue homogeneity and interfere with recognition of the actual culprit").

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

132. Colorado v. Connelly, 479 U.S. 157, 167 (1986) (quoting Lisenba v. California, 314 U.S. 219, 236 (1941)).

133. Rogers v. Richmond, 365 U.S. 534, 540–41 (1961); *see also* Arizona v. Fulminante, 499 U.S. 279, 293 (1991) (White, J., dissenting) (noting that one reason to exclude involuntary confessions is that "some coerced confessions may be untrustworthy, but asserting that the reasons articulated by the *Rogers* Court are more important").

as to be inconsistent with our accusatorial system of justice. In contrast, there is no reason to require not only misconduct but egregious misconduct by police before evaluating the issue at the core of the Court's eyewitness jurisprudence: reliability.

The Court's probable cause jurisprudence offers an additional reason to reject any notion that a court must conclude, in the abstract, that an identification procedure has given rise to a "very substantial likelihood of misidentification" *before* conducting reliability analysis to gauge such odds in the case at hand. Although Fourth Amendment concepts such as reasonable suspicion and probable cause necessarily entail evaluation of probability, the Court has clarified that that inquiry is "not technical." Instead, it depends on "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."[134] Similarly, the Court has insisted that judges should avoid gauging Fourth Amendment probabilities from the perspective of "library scholars";[135] instead, they should use a "commonsense, nontechnical" lens, "as understood by those versed in the field of law enforcement." Thus, the Court has refused to quantify the probability thresholds associated with probable cause and reasonable suspicion. As the Court asserted in *Florida v. Harris*, "probable cause is not reducible to precise definition or quantification," and "[f]inely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence . . . have no place in the probable cause decision."[136]

If the Court believes that police should be free to gauge probability only through the lens of nontechnical, commonsense judgment,[137] then it would be wise to abandon the notion that whether an identification procedure qualifies as "unnecessarily suggestive" hinges on the probability, in the abstract, that such a procedure will lead to misidentification. When courts apply the traditional *Manson* test, under which they evaluate the likelihood of misidentification with reference to supposedly independent reliability factors and to the totality of the circumstances, such intuitive, commonsense reasoning is inevitable because the immense variety of factors that can impact considerations such as the witness's opportunity to view a perpetrator or the witness's degree of attention, present police and courts with idiosyncrasies across cases that preclude the sort of data collection necessary to inform quantitative analysis.[138]

On the other hand, if police and courts must evaluate the likelihood of misidentification in the abstract, based on the quality of the identification procedure and without reference to factors like viewing conditions at the time of the crime,

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134. Brinegar v. United States, 338 U.S. 160, 175 (1949).

135. United States v. Cortez, 449 U.S. 411, 418 (1981).

136. Florida v. Harris, 568 U.S. 237, 243–44 (2013) (citations omitted).

137. In fact, there are powerful arguments that the Court should endorse quantitative analysis for assessment of reasonable suspicion and probable cause in cases in which the facts are susceptible to such analysis. *See, e.g.*, Andrew Manuel Crespo, *Probable Cause Pluralism*, 129 YALE L.J. 1276, 1291–1309 (2020).

138. In the context of probable cause, Professor Andrew Crespo refers to cases in which constellations of idiosyncratic considerations render quantitative analysis impossible as "narrative mosaics." *See id.* at 1310.

then the only available data are the studies produced by research psychologists over the course of the last several decades. Those studies, of course, rely on statistical methods and produce quantitative odds that a particular kind of suggestion will lead to misidentification.[139] Consequently, the *Beaudreaux* Court's approach would require specification of the probability threshold that constitutes a "substantial likelihood" of misidentification and would necessitate reconsideration of the assertion that police should never have to grapple with constitutional probability using anything other than commonsense judgment.[140]

CONCLUSION

The *Beaudreaux* Court's interpretation of the Court's eyewitness precedent is flawed on its own terms and has the potential to increase the already onerous burden on criminal defendants attempting to exclude evidence derived from suggestive identification procedures. Analogies to the Court's jurisprudence on involuntary confessions and Fourth Amendment probability also counsel against the *Beaudreaux* Court's articulation of the due process test for suppression of eyewitness evidence. Adoption of the *Beaudreaux* Court's test would compound preexisting flaws in the Court's eyewitness jurisprudence and lead, inevitably, to more wrongful convictions.

139. *See, e.g.*, Hinz & Pezdek, *supra* note 105.

140. Given the frequent inability of courts applying *Manson* to consistently identify unnecessarily suggestive identification procedures as such, this approach could actually provide useful guidance to judges and police officers on the kinds of procedures that should raise constitutional concerns. Nonetheless, it would be in tension with the Court's probable cause jurisprudence.