

graphic displays, and the like.¹⁰⁶¹ But not all cases have alleged careful police orchestration.¹⁰⁶²

The Court generally disfavors judicial suppression of eyewitness identifications on due process grounds in lieu of having identification testimony tested in the normal course of the adversarial process.¹⁰⁶³ Two elements are required for due process suppression. First, law enforcement officers must have participated in an identification process that was *both* suggestive and unnecessary.¹⁰⁶⁴ Second, the identification procedures must have created a substantial prospect for misidentification. Determination of these elements is made by examining the “totality of the circumstances” of a case.¹⁰⁶⁵ The Court has not recognized any *per se* rule for excluding an eyewitness identification on due

¹⁰⁶¹ *E.g.*, *Manson v. Brathwaite*, 432 U.S. 98, 114–17 (1977) (only one photograph provided to witness); *Neil v. Biggers*, 409 U.S. 188, 196–201 (1972) (showup in which police walked defendant past victim and ordered him to speak); *Coleman v. Alabama*, 399 U.S. 1 (1970) (lineup); *Foster v. California*, 394 U.S. 440 (1969) (two lineups, in one of which the suspect was sole participant above average height, and arranged one-on-one meeting between eyewitness and suspect); *Simmons v. United States*, 390 U.S. 377 (1968) (series of group photographs each of which contained suspect); *Stovall v. Denno*, 388 U.S. 293 (1967) (suspect brought to witness’s hospital room).

¹⁰⁶² *Perry v. New Hampshire*, 565 U.S. ___, No. 10–8974, slip op. (2012) (prior to being approached by police for questioning, witness by chance happened to see suspect standing in parking lot near police officer; no manipulation by police alleged).

¹⁰⁶³ *See Perry v. New Hampshire*, 565 U.S. ___, No. 10–8974, slip op. at 6–7, 15–17 (2012).

¹⁰⁶⁴ “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.” *Neil v. Biggers*, 409 U.S. 188, 198 (1972). An identification process can be found to be suggestive regardless of police intent. *Perry v. New Hampshire*, 565 U.S. ___, No. 10–8974, slip op. at 2 & n.1 (2012) (circumstances of identification found to be suggestive but not contrived; no due process relief). The necessity of using a particular procedure depends on the circumstances. *E.g.*, *Stovall v. Denno*, 388 U.S. 293 (1967) (suspect brought handcuffed to sole witness’s hospital room where it was uncertain whether witness would survive her wounds).

¹⁰⁶⁵ *Neil v. Biggers*, 409 U.S. 188, 196–201 (1972); *Manson v. Brathwaite*, 432 U.S. 98, 114–17 (1977). The factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the suspect at the time of the crime, the witness’s degree of attention, the accuracy of the witness’s prior description of the suspect, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *See also Stovall v. Denno*, 388 U.S. 293 (1967).