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Eyewitness Identifications: A New Perspective on Old Law

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EYEWITNESS IDENTIFICATIONS: A NEW PERSPECTIVE ON OLD LAW

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"[P]erhaps erroneous identification of the accused constitutes the major cause of the known wrongful convictions."[1]

I. INTRODUCTION

"That's the man—seated over there at the table. I could never forget his face." Similar statements are heard in almost every trial in which an eyewitness is called by the prosecution to identify the accused.[2] There can be little doubt that this type of testimony has a devastating effect upon the jury's assessment of the defendant's guilt or innocence.[3] Historically such testimony has been the principal cause of erroneous or wrongful convictions.[4] Glanville Williams, in comment-

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1. B. FRANK & J. FRANK, NOT GUILTY 61 (1957).

2. N. SOBEL, EYE-WITNESS IDENTIFICATION 6-7 (1972 & Supp. 1980); Buckhout, *Eyewitness Testimony* 15 JURIMETRICS J. 171 (1975).

3. P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 19-23 (1965) [hereinafter cited as WALL].

4. One commentator, in looking at historical examples of misidentification, took special note of several obvious cases and stated:

> The defects in the identification evidence in these cases may be briefly catalogued. Amongst the identifications accepted as reliable were (1) a hesitating identification by one witness after the defendant had been on parade before 15 witnesses without being picked out by one of them; (2) identification by a witness who picked out the wrong man on one parade and walked past the defendant twice on the second parade before picking him out; (3) identification by one man three months after the incident; (4) identification by a girl who had seen the offender only by the light of the moon; (5) in a case where the offender had grey hair, identification of the defendant, a man with nearly white hair, in a parade where all the other 11 men had dark hair. In one case, where a member of the Metropolitan police attempted to intercede for a neighbour of unblemished character who was charged by the City of London police on implausible identification evidence, the result was that he himself was put on parade, "identified," and immediately suspended from duty as being under suspicion of being concerned in the same offence!

As if these incidents were not enough, the author catalogues numerous other cases of misidentification. *See* Williams, *Evidence of Identification: The Devlin Report*, 76 CRIM. L. REV. 407, 408 (1976).

ing on the Devlin Report on English identification procedures, has noted:

> Neither the *Beck* case at the turn of the century nor the many miscarriages of justice since then have sufficiently impressed those concerned with criminal justice of the dangers of identification evidence. To mention some of the instances in late years: three occurred in Bradford alone in the space of a few months in 1967-68. A memorandum of the National Council of Civil Liberties . . . in 1968 gave details of 15 cases from 1966 onwards; in most of these a person was convicted on identification evidence, and a mistake was either established or very likely; in a few of them the defendant had not gone beyond being committed for trial when by a happy accident the mistake was discovered. A memorandum later in the same year from 'Justice' (the British section of the International Commission of Jurists) instanced another six cases; and others have occurred since. In all of them the mistake came to light in some fortuitous way—as by the real offender coming forward and confessing.[5]

To be sure, the English experience is not unique. Similar instances can be found in recent years in the United States;[6] however, a comprehen-

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5. Williams, *supra* note 4, at 407 (footnotes omitted).

6. The English experience should not be disregarded in the United States as something that could not happen here due to our advanced criminal justice system. One noted psychologist in the area has stated:

> Frank Wiechman, was arrested and after being identified by four separate witnesses, he was charged with the kidnapping. Wiechman spent almost a week in jail, with the charge of kidnapping hanging over his head, maintaining his innocence the entire time.
>
> It turns out that Wiechman was completely innocent, but he was released only after the Cincinnati police subsequently found evidence that the actual kidnapper was Clifford J. Kroger. Wiechman's only "crime" was that he looked like Kroger, and for this he spent nearly a week in jail.
>
> This is far from a rare, isolated case of mistaken identification; we know there are others, but, unfortunately for those who may still be languishing in jail, we do not know how many.
>
> -In November, 1972, a 17-year old college freshman, Lawrence Berson was arrested and held on $60,000 bail on multiple rape charges in Queens, New York. He was released only after the arrest of a 20-year old Bronx "gypsy cab" driver who looks strikingly like Berson. Five women victims had mistakenly identified Berson as their attacker.
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> -In June, 1972, 43-year old Frank J. Doto was arrested in connection with a supermarket robbery in California in which a policeman was shot in the head. Seventeen witnesses identified Doto, who maintained he was in another city at the time of the holdup. His story checked out.
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> -In early 1973, Assistant District Attorney William Schrager was arrested in connection with a series of sexual assaults. He was put into a number of lineups, usually with policemen who were taller and heavier than he. To his horror, he was identified by four different women. Schrager was later released when a similar looking postman (who is the same height but 40 pounds heavier than Schrager) confessed to some of the crimes.
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> In October, 1971, a 34-year old Chicano, Ruben Garcia, was arrested and charged

sive study in the tradition of the English Devlin Report has not yet been carried out in this country.

Erroneous identifications can occur from procedures free from prejudice as well as from tainted or suggestive procedures. Therefore, defense attorneys, in cases where eyewitness testimony is introduced, carry two alternative burdens: (1) to insure against suggestive or tainted pre-trial identification procedures; and (2) in those cases where the procedures are not tainted, to attack the in-court identification testimony before the jury. Defense counsel must use every tool available, within the bounds of law and ethics, to prevent the criminal justice system from erring in meting out punishment. Owing to the Supreme Court's decisions in this area,[7] this task has been made most difficult. This article will analyze the law relating to eyewitness identification and attempt to provide defense counsel with methods to attack both the tainted and untainted identification procedures.

II. LEGAL PERSPECTIVES ON EYEWITNESS IDENTIFICATION

In order fully to comprehend the field of eyewitness identification, one should first be aware of its place in the criminal law with respect to the types of crimes with which it is generally associated. According to one commentator:

> [R]ecourse to lineups, showups and photo identifications are prevalent mainly in robberies. An examination of over two hundred reported identification decisions establishes that the number of robberies exceeds all other crimes combined. There are a few decisions dealing with forcible rapes, burgla-

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with the armed robbery of a restaurant-bar in California. Three people identified Garcia, one of whom was a police detective who happened to be eating at the restaurant on the night of the robbery. Garcia spent at least three months in the county jail, and probably would have been there longer had another man not confessed to the crime.

Gregory Boyd was ordered to stand trial after two gas station attendants identified him as the man who held them up. Boyd, who simply could not remember where he was on the night of the robbery, spent nearly a month in a Detroit county jail until his trial began. While on the stand, Boyd remembered, and he announced that he had been in jail on the date of the hold up. Probably no better alibi exists; the case was promptly dismissed.

These examples show that one witness, two witnesses, three, five or even 17 witnesses . . . all can be wrong. A night in jail, a week, a month or three months . . . all are pretty horrible, particularly when forced on an innocent man.

Loftus, *Eyewitness Testimony: Does the Malleable Human Memory Interfere With Legal Justice*, 2 SOCIAL ACTION & THE LAW 5 (Apr. 1975).

7. United States v. Ash, 413 U.S. 300 (1973); Neil v. Biggers, 409 U.S. 188 (1972); Kirby v. Illinois, 406 U.S. 682 (1972); Foster v. California, 394 U.S. 40 (1969); Simmons v. United States, 390 U.S. 377 (1968); Stovall v. Denno, 388 U.S. 293 (1967); Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967).

> ries, and an occasional homicide. But it is primarily in the crime of robbery that the identification issue recurs. There is generally, in such a crime, very little opportunity for observation, and consequently conviction often turns solely on the capacity of the eye-witness for memory and perception. It is in these crimes that the vagaries of eye-witness identification create the only real danger of convicting the innocent.[8]

Thus, defense counsel is most often faced with an identification problem in a crime wherein the time for perception was short; the witness, more often than not, was watching a menacing weapon instead of the perpetrator's face; and the crime occurred where the lighting was poor if not nonexistent. The factor of poor lighting is common. Fifty percent of all robberies are street muggings.[9] Counsel should be intimately aware of these general causes of erroneous identifications, for such an understanding may enable him to make the present state of the law work to his client's advantage.[10]

In working with the typical eyewitness identification case, defense counsel will be faced with one of three forms of identification procedure. First, the police may arrest a suspect and transport him to the jail where a lineup may be held, forcing the witnesses to choose the suspect

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8. SOBEL, *supra* note 2, § 2 at 5.

9. *Federal Bureau of Investigation*, 1972 UNIFORM CRIME REPORTS 17 (1972).

10. At least one commentator has recognized the following causes for erroneous identifications:

A. Normal and universal fallibilities of human sense perception.
   1. Great many people with normal vision cannot recognize similarities and differences, nor distinguish variations in form, size and position.
   2. Normal mental faculties may receive erroneous data because of similarities between persons. [Perceptual non-individuality].
   3. Tests have proved that people are unable to describe accurately what they saw.
   4. Ability to remember what was seen varies.

B. Susceptibility of human mind to suggestive inferences.
   1. Improper suggestion upon identifying witnesses probably accounts for most mistakes in identification and more miscarriages of justice than any other single factor. [Citation omitted].
      a. Suspect pointed out by police beforehand.
      b. Only suspect required to act or speak like perpetrator of crime.
      c. Only suspect in handcuffs during showup.
      d. Only suspect required to dress similar to perpetrator.
      e. Witness told that police have culprit.
      f. Witness permitted to see suspect before lineup.
      g. Witnesses make identification in presence of each other.
      h. Suspect grossly dissimilar from others in lineup.
      i. Witness has seen photograph of suspect before lineup.
   2. Showup procedure most dangerous—inherently suggestive.

Outline by Ronald Meshbesher distributed at August 1977 Boston meeting of the Association of Trial Lawyers of America College of Advocacy 458-59 (compiled from WALL, *supra* note 3, at 8-11) [hereinafter cited as Meshbesher].

from an array of persons. Second, the police may use a showup procedure where only the suspect is shown to the witness. Finally, the identification may be made from a picture of the suspect or a group of pictures, one of which is the suspect. The Supreme Court has been faced with each of these identification procedures and has enunciated certain guidelines and tests with regard to each type.

III. THE LAW OF LINEUPS

The Court, in analyzing the lineup procedures used by law enforcement, has been faced with two constitutional conflicts: (1) the application of the sixth amendment right to counsel in such procedures; and (2) the application of fourteenth amendment due process considerations. Each of these conflicts represents an area ripe for attack by defense counsel faced with a lineup situation.

A. *Right to Counsel at Lineup*

The Court, in two cases involving lineups, has defined the parameters of the right to counsel in lineup identifications. In *United States v. Wade*,[11] the Court was faced with a lineup which was held after the defendant was indicted and counsel had been appointed but not given notice of the identification proceeding. The defendant, relying on several recent Supreme Court cases,[12] argued that the lineup proceeding was a "critical stage" of the criminal justice process and that counsel was necessary "to assure a meaningful defense" at trial.[13] The Court, in this regard, stated:

> [T]he principle of *Powell v. Alabama* and succeeding cases requires that we scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice.[14]

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11. 388 U.S. 218 (1967).

12. *See, e.g.*, Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964); White v. Maryland, 373 U.S. 59 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961); Powell v. Alabama, 287 U.S. 45 (1932).

13. 388 U.S. at 220-21.

14. *Id.* at 227 (emphasis in original).

Having established the proper test to be applied, the Court then analyzed and rejected the government's contention that a lineup was merely a preparatory, investigatory step such as scientific analysis of fingerprints, blood samples, and other similar tests which are part of criminal investigations.[15] The Court found that, unlike the scientific procedures mentioned, a lineup is subject to innumerable variables and to possibilities of incurable taint and suggestion.[16] However, the Court, in determining whether the in-court identification should be suppressed, found that if the prosecution could prove an independent origin for the in-court identification, other than the tainted lineup[17] or one in which counsel was not present, then it should be admissible.[18]

While *Wade* analyzed the admissibility of the testimony of an in-court identification, it did not address the admissibility of testimony regarding the identification of the defendant at the lineup. This gap was closed by the Supreme Court's decision in *Gilbert v. California*[19] handed down the same day as *Wade*. The Court in *Gilbert* extended the right to counsel and the independent origin test for in-court identifications found in *Wade* to state court proceedings. The Court went on to announce a per se exclusionary rule with regard to testimony concerning a lineup identification where a defendant had been denied his right to counsel.[20] The Court in enunciating this rule stated:

> Quite different considerations are involved as to the admission of the testimony . . . that they identified Gilbert at the lineup. That testimony is the direct result of the illegal lineup "come at by exploitation of [the primary] illegality." The State is therefore not entitled to an opportunity to show that that testimony had an independent source. Only a per se exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup. In the absence of legislative regulations adequate to avoid the hazards to a fair trial which inhere in lineups as presently conducted, the desirability of

15. *Id.* at 227-28.

16. *See, e.g.*, note 9 *supra* and accompanying text.

17. A tainted lineup is one made so inherently suggestive by the actions of law enforcement officials that it is likely to produce an erroneous identification. It would include the use of persons who do not resemble the suspect, cross-racial lineups, and other activities which would be likely to cause such a result.

18. 388 U.S. at 241-42.

19. 388 U.S. 263 (1967).

20. *Id.* at 272-74.

> deterring the constitutionally objectionable practice must prevail over the undesirability of excluding relevant evidence.[21]

Thus, the gap in *Wade* was closed and a set of constitutional guidelines for lineups was complete except for two crucial issues: (1) When does the right to counsel at a lineup proceeding vest; and (2) what is the scope of that right?

As yet, the Court has only implicitly answered the question of when the right to counsel at a lineup vests. Both *Wade* and *Gilbert* involved lineups conducted after the defendant was indicted. Thus, it is clear that, at the latest, the right is vested after indictment. But does it vest at some earlier point in the criminal process? The Court has not been faced with such a question in a lineup situation but has answered it indirectly in a decision concerning showups.[22]

As to the second issue, the Court has not yet determined the scope of the right to counsel, but this issue has been faced by the Oklahoma Court of Criminal Appeals. In *Richardson v. State*,[23] a lineup was held with counsel present, but then the police took the eyewitnesses to another room out of the presence of the accused's counsel to interview them regarding their identification. At no time during their viewing of the lineup did they make an identification in the presence of the accused's counsel. The Oklahoma court, relying upon *Wade*, held that an accused's right to counsel under *Wade* extends to the interview of a witness following a post-indictment lineup when that interview is conducted for the purpose of identifying an individual who has appeared in a lineup.[24] The court went on, however, to find that this illegality did not taint the witness's in-court identification. The holding in *Richardson* clearly reinforces the right to counsel at a lineup identification and the reasons for such a right.[25]

B. *Due Process at Lineups*

The Supreme Court has also been faced with determining the applicability of the fourteenth amendment due process clause to tainted or suggestive lineup procedures. In the case of *Foster v. California*[26] the

21. *Id.* at 272-73 (footnote and citation omitted).
22. Kirby v. Illinois, 406 U.S. 682 (1972).
23. 600 P.2d 361 (Okla. Crim. 1979).
24. *Id.* at 365; People v. Williams, 3 Cal. 3d 853, 92, Cal. Rptr. 6, 478 P.2d 942 (1971); State v. McGhee, 350 So.2d 370 (La. 1977). Both *Williams* and *McGhee* were cited with approval by the Oklahoma Court of Criminal Appeals. 600 P.2d at 365 n.1.
25. 600 P.2d at 366.
26. 394 U.S. 440 (1969).

Court was faced with what it termed "a compelling example of unfair lineup procedures."[27] In that case, the defendant, who was approximately six feet tall, was placed in a lineup shortly after arrest with two other men who were approximately five feet, five inches tall. The defendant was the only person in the lineup wearing a leather jacket previously described by the witness. The witness failed to identify positively the defendant and requested to see the defendant alone. The police then had the defendant confront the witness alone. Despite this procedure, the witness was still unsure of his identification. Approximately one week later, a second lineup was held wherein the defendant was the only person in the second lineup who had also appeared in the first lineup. This time the witness positively identified the defendant. The Court first noted that the conviction was prior to its decisions in *Wade* and *Gilbert* and thus, those decisions were not applicable, as it had refused to grant retroactivity to them in its decision in *Stovall v. Denno*.[28] The Court then noted that in *Stovall* it had stated:

> But in declaring the rule of *Wade* and *Gilbert* to be applicable only to lineups conducted after those cases were decided, we recognized that, judged by the "totality of the circumstances," the conduct of identification procedures may be "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to be a denial of due process of law.[29]

In analyzing the facts surrounding the identification procedure, the Court concluded that the law enforcement officials involved were repeatedly suggesting to the witness that they knew that the defendant was the culprit. The Court then held that under the test enunciated in *Stovall*[30] the defendant's right to due process had been violated. The case was reversed and remanded for a determination by the state court whether such procedure was harmless error.[31] In any event, it is clear that the due process clause of the fourteenth amendment does provide some protection against tainted or suggestive lineups.

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27. *Id.* at 442.
28. 388 U.S. 293 (1967).
29. 394 U.S. at 442.
30. Under *Stovall*, one must look at the totality of the circumstances surrounding the identification procedure. If they are unnecessarily suggestive and conducive to irreparable mistaken identity, the identification has violated due process, and the conviction must be reversed. 388 U.S. at 302.
31. 394 U.S. at 443-44.

IV. THE LAW OF SHOWUPS

The law of showups has progressed along the same lines as the law of lineups. It does, however, have some significant differences. Owing to the one-on-one nature of a showup, the real possibility of taint or suggestion is inherent in the showup procedure. This, at times, has troubled the Court in its approach to guidelines for showups.[32]

A. *Right to Counsel at Showups*

The first major case involving a showup was decided the same day as *Wade* and *Gilbert*. The Court in *Stovall v. Denno*[33] was confronted with a showup held in the victim's hospital room. The Court, without significant analysis, applied the analysis of the *Wade-Gilbert* lineup cases and held that it would not retroactively apply the exclusionary rule it had earlier announced[34] for identifications made without the presence of counsel.

After the *Stovall* decision, the Court was faced with a showup which the police carried out prior to the indictment or arraignment of the defendants. In *Kirby v. Illinois*[35] the Court addressed one of the issues left unanswered in the *Wade-Gilbert-Stovall* trilogy: When does the right to counsel vest? The Court in analyzing the prior cases concerning the right to counsel stated:

> *[A]ll* of those cases have involved points of time at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.[36]

The Court held that where the showup, and by analogy the lineup, takes place prior to formal initiation of criminal proceedings, there is no right to counsel and any testimony regarding an identification proceeding during this time would be admissible.[37] Nevertheless, this testimony may not be admissible if the identification procedure violates due process, and the Court specifically stated in a footnote that the due process question was left to be decided in federal habeas corpus pro-

32. The Supreme Court in *Stovall v. Denno* 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." 388 U.S. 293, 302 (1967) (citation omitted).

33. 388 U.S. 293 (1967).

34. *Id.* at 299-300.

35. 406 U.S. 682 (1972).

36. *Id.* at 689 (emphasis in original).

37. *Id.* at 689-690.

ceedings.[38] Thus, subject only to the limitations of due process, the door has been left open to some abuse by law enforcement officials to proceed prior to arraignment with identification proceedings in the absence of counsel.

B. *Due Process at Showups*

In *Stovall*,[39] in addition to the exclusionary rule, the Court was confronted with a claim that the showup violated the defendant's right to due process of law. The Court in its analysis stated that the applicable test was whether the identification "was so unnecessarily suggestive and conducive to irreparable mistaken identification"[40] and that such a finding "depends on the totality of the circumstances surrounding"[41] the identification procedure. In this case the victim was in peril of death and she was the only person who could exonerate the defendant by her failure to identify him. Circumstances, therefore, dictated an immediate showup at the hospital. The Court did, however, recognize the widespread condemnation of the showup procedure.[42]

The Supreme Court directly confronted the issue of the applicabil-

38. The Court stated: "In view of our limited grant of certiorari, we do not consider whether there might have been deprivation of due process in the particularized circumstances of this case. That question remains open for inquiry in a federal habeas corpus proceeding." *Id.* at 691 n.8.

39. 388 U.S. 293 (1967).

40. *Id.* at 302.

41. The Court of Appeals for the District of Columbia, reviewing a conviction for possible violations of due process under this test, outlined ten factors to be considered:

> 1. Was the defendant the only individual that could possibly be identified as the guilty party by the complaining witness, or were there others near him at the time of the confrontation so as to negate the assertion that he was shown alone to the witness?
> 2. Where did the confrontation take place?
> 3. Were there any compelling reasons for a prompt confrontation so as to deprive the police of the opportunity of securing other similar individuals for the purpose of holding a lineup?
> 4. Was the witness aware of any observation by another or other evidence indicating the guilt of the suspect at the time of the confrontation?
> 5. Were any tangible objects related to the offense placed before the witness that would encourage identification?
> 6. Was the witness' identification based on only part of the suspect's total personality?
> 7. Was the identification a product of mutual reinforcement of opinion among witnesses simultaneously viewing the suspect?
> 8. Was the emotional state of the witness such as to preclude objective identification?
> 9. Were any statements made to the witness prior to the identification indicating to him that the police were sure of the suspect's guilt?
> 10. Was the witness's observation of the offender so limited as to render him particularly amendable to suggestion, or was his observation and recollection of the offender so clear as to insulate him from a tendency to identify on less than a positive basis?

Clemmons v. United States, 408 F.2d 1230, 1245 n.16 (D.C. Cir. 1968).

42. 388 U.S. at 302.

ity of the due process clause to showups in *Neil v. Biggers*.[43] In *Biggers*, the witness had seen the suspect for approximately fifteen minutes in the moonlight at the time she was raped. Her description of the attacker to the police was characterized by the Court as very general: fat and flabby with smooth skin, bushy hair, and a youthful voice.[44] Over the period of the next seven months, the witness viewed many lineups and photograph arrays but identified none of the suspects. The police, after arresting the defendant on another charge, then requested the witness to view him. The police attempted to arrange a lineup but were unable to find any person in the jail or juvenile detention center who looked similar to the defendant. Instead, they proceeded to conduct a showup. The witness positively identified the defendant.[45] Because the identification took place before the effective date of *Wade-Gilbert-Stovall*,[46] the defendant was forced to rely solely on the due process rationale of *Foster v. California*,[47] a lineup case, and *Simmons v. United States*,[48] a case involving photographic identification.[49] The Court, in analyzing the relevant factors of a due process claim, clarified the test by stating:

> Some general guidelines emerge from these cases as to the relationship between suggestiveness and misidentification. It is first of all, apparent that the primary evil to be avoided is "a very substantial likelihood of irreparable misidentification. . . ." But as *Stovall* makes clear, the admission of evidence of a showup without more does not violate due process.
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> . . . .
>
> We turn, then, to the central question, whether under the "totality of the circumstances" the identification was reliable even though the confrontation procedure was suggestive.[50]

Thus, the test for whether due process is violated in a showup confrontation is a two-stage test. The triggering stage of the test is proof by the defendant that some taint or suggestiveness existed at the identification proceeding. Once the defendant has met this burden, the Court

43. 409 U.S. 188 (1972).
44. *Id.* at 194.
45. *Id.* at 194-96.
46. The Court in *Stovall* held that the *Wade-Gilbert* exclusionary *per se* rule would not apply to confrontations held prior to June 12, 1967. 388 U.S. at 296.
47. 394 U.S. 440 (1969). *See* pp. 44-45 *supra*, for a discussion of the case and due process in lineup proceedings.
48. 390 U.S. 377 (1968).
49. *See* pp. 49-51 *infra*, for a discussion of the *Simmons* case and the law surrounding photographic identifications and due process considerations.
50. 409 U.S. at 198-99 (citation omitted) (*quoting* Simmons v. United States, 390 U.S. at 384).

will then weigh the factors present in the case to determine whether, under the totality of the circumstances, the identification is unreliable. The factors which have been ennunciated by the Court are: (1) the opportunity of the witness to view the criminal; (2) the level of certainty demonstrated by the witness at the confrontation; and (3) the length of time between the crime and the confrontation.[51] If, and only if, the Court is convinced that the identification is unreliable, will it exclude the testimony under the due process rationale. Therefore, defense counsel is under a heavy burden in those cases where he must rely solely on due process to correct problems of improper identification procedures. Unfortunately, with the loophole in the right to counsel approach—counsel is not required prior to formal adversary proceedings—this may be the only constitutional attack available in many identification situations.

V. THE LAW OF PHOTOGRAPHIC IDENTIFICATION

The law applicable to photographic identifications has developed in reverse order as compared to that of lineups and showups. The Supreme Court was faced first with due process considerations and then right to counsel arguments. It therefore becomes necessary, in order to grasp the Court's approach to the subject properly, to analyze the cases first from a due process perspective and then from the right to counsel approach.

A. *Due Process in Photographic Identification*

In *Simmons v. United States*,[52] the Supreme Court was confronted with a photographic identification and the application of the due process rationale in relation to that type of identification procedure. In *Simmons*, the FBI obtained snapshots of two men suspected of robbing a savings and loan association. The day after the robbery, five employees identified the defendant from his snapshot. A week or two later, three of the five employees also identified the second robber from his snapshot. These identification proceedings could be considered photographic showups as opposed to photographic lineups since only the suspects' photographs were shown to the witnesses. The defendant did not contend that under the *Wade-Gilbert* rationale he had a right to have counsel present at the photographic identifications, but rather that

51. *Id.* at 199.
52. 390 U.S. 377 (1968).

under the *Stovall* rationale, the identification procedure was, considering the totality of surrounding circumstances, conducive to irreparable misidentification.[53] The Court, applying the *Stovall* test, determined that the procedure used to identify the defendant did not exceed the bounds of due process. It did note the inherent defects and potential for suggestiveness of photographic identifications, but found that such identification procedures were widespread among law enforcement practices and under the facts of this case, essential. It was clear, in this case, that a serious felony had occurred and that the perpetrators were still at large. Consequently, swift identification was necessary so that the FBI could move to apprehend the felons before they fled the vicinity. Further, the physical factors surrounding the crime were such as to lead to an extremely reliable identification: no masks were worn by the robbers; they were observed for a period of approximately five minutes; and the identification was made shortly after the crime.[54] Although the photographic showup may have been inherently suggestive, there was no showing that under the totality of circumstances surrounding the identification it was unreliable; therefore, due process had not been violated.

The Supreme Court was recently faced with re-examining the *Stovall* two-tier test of due process in photographic identifications after the Court of Appeals for the Second Circuit decided the case of *Manson v. Brathwaite*.[55] The court of appeals held that the showing of a single photograph was impermissibly suggestive, and absent exigent or emergency circumstances, testimony of such identification would be excluded as violating due process. The Supreme Court granted certiorari and reversed the circuit court.[56] The Court looked to *Stovall* and *Biggers* and reiterated the two-tier test which was applied in those cases.[57] It was also noted in *Biggers*, prior to applying the two-tier *Stovall* test, that the challenged procedure occurred pre-*Stovall* and that the question remained open as to what test should be applied to post-*Stovall* cases.[58] Therefore, *Brathwaite* presented the Court with an opportunity to clarify the analysis and test to be applied in post-*Stovall* due process challenges to identification procedures, especially

53. *Id.* at 383.
54. *Id.* at 384-86.
55. 527 F.2d 363 (2d Cir. 1975), *rev'd*, 432 U.S. 98 (1977).
56. 432 U.S. 98 (1977).
57. *See* note 29 *supra*.
58. 432 U.S. at 107.

photographic identifications. After reviewing the various pros and cons of the per se exclusionary rule and the "totality of the circumstances" test, the Court concluded that the *Stovall-Biggers* two-tier test applied to both pre- and post-*Stovall* identification procedures. Finally, the Court applied the two-tier test and found that although the one picture showup was suggestive, the identification was nevertheless reliable and did not violate due process considerations of fundamental fairness.[59]

B. *Right to Counsel at Photographic Identification*

Following the *Simmons* decision, the Supreme Court was still left with the question of whether the right to counsel applied to photographic identifications, and if so, at which point in the process the right to counsel would vest.

In *United States v. Ash*,[60] a photographic lineup was held approximately six months after a bank robbery which had lasted three to four minutes. At that time the four witnesses made uncertain identifications of the defendant Ash. Later, Ash and a codefendant, Bailey, were indicted for the robbery. Prior to trial, the prosecutor again held a photographic lineup to determine whether the witnesses would be able to make in-court identifications. However, only three of the four witnesses were able to identify Ash positively and none of them identified Bailey. The defendant objected to this last photographic lineup as a violation of his right to counsel at a "critical stage" of his prosecution, but recognized that the first photographic lineup did not require counsel because it was not a critical stage under the *Kirby* rationale.[61] Therefore, the stage was set for the determination of whether the right to counsel applied to photographic identifications made during a "critical stage" of the prosecution.

The Court, as in *Wade* and *Gilbert*, analyzed the historical roots of the right to counsel and concluded that the right was to assure effective assistance at trial, and that this assistance would be something less than meaningful if limited to formal trials.[62] The Court, in analyzing past extensions of the right, stated:

> Throughout this expansion of the counsel guarantee to trial-like confrontations, the function of the lawyer has remained essentially the same as his function at trial . . . to act

59. *Id.* at 117.
60. 413 U.S. 300 (1973).
61. *Id.* at 303.
62. *Id.* at 306-13.

> as a spokesman for, or advisor to, the accused. . . . In *Hamilton* and *White*, for example, the Court envisioned the lawyer as advising the accused on available defenses in order to allow him to plead intelligently. In *Massiah* counsel could have advised his client on the benefits of the Fifth Amendment and could have sheltered him from the overreaching of the prosecution. In *Coleman* the skill of the lawyer in examining witnesses, probing for evidence, and making legal arguments was relied upon by the Court to demonstrate that, in the light of the purpose of the preliminary hearing under Alabama law, the accused required "Assistance" at that hearing.
>
> The function of counsel in rendering "Assistance" continued at the lineup under consideration in *Wade* and its companion cases. Although the accused was not confronted there with legal questions, the lineup offered opportunities for prosecuting authorities to take advantage of the accused. Counsel was seen by the Court as being more sensitive to, and aware of, suggestive influences than the accused himself, and as better able to reconstruct the events at trial. Counsel present at lineup would be able to remove disabilities of the accused in precisely the same fashion that counsel compensated for the disabilities of the layman at trial.[63]

The Supreme Court then noted that the court of appeals approach of focusing on the potential for misidentification and the lack of scientific precision in photographic identifications was not the proper test for determining whether the right to counsel applied,[64] but was a misapplication of the due process test. The Court stated that the threshold question is whether the procedure employed is one of confrontation; and that photographic identification is not of a confrontation nature but would become so if counsel for the defense were interjected into the process. Further, the Court decided that such an expansion of the right to counsel would intrude upon a portion of the prosecutor's preparation interviews with witnesses, and was vehemently opposed to such a result.[65] It concluded that the adversary process was sufficient to expose any possible defects in photographic identification procedures. The case was reversed and remanded to allow further findings concerning the potential due process issues.[66]

63. *Id.* at 312 (citations omitted).
64. *Id.* at 314.
65. *Id.* at 317-18.
66. *Id.* at 312.

The result of these cases involving photographic identifications is that no right to counsel exists at any stage of the proceeding—another potential loophole for law enforcement abuse. Defense counsel is left, therefore, with only due process considerations to attack such identification procedures.

VI. A DEFENDANT'S RIGHT TO IDENTIFICATION PROCEDURES

For the most part, the courts have been faced with determining what rights a defendant has in relation to an identification proceeding compelled by the state.[67] A concomitant issue of recent development, however, is the extent to which a defendant can claim a constitutional right to compel the state to hold identification proceedings when the state decides not to do so.[68] The law is exceedingly unclear; but when measured against the policies underlying the Supreme Court decisions in the previously discussed identification cases,[69] it appears that such a right should exist. This conclusion is bolstered by the Court's decision in the area of criminal discovery[70] and the American Bar Association Criminal Justice Standards Relating to Discovery.[71]

The California Supreme Court, in *Evans v. Superior Court*,[72] was confronted with a writ of mandamus filed on behalf of a defendant who had filed a motion with the trial court prior to trial requesting a lineup in his robbery prosecution. An order by the appellate court had been issued to the trial court directing it to vacate its denial of the lineup or, in the alternative, to show cause why the order denying a lineup should

67. *See, e.g.*, Manson v. Brathwaite, 432 U.S. 98 (1977); United States v. Ash, 413 U.S. 300 (1973); Neil v. Biggers, 409 U.S. 188 (1972); Kirby v. Illinois, 406 U.S. 682 (1972); Foster v. California, 394 U.S. 440 (1969); Simmons v. United States, 390 U.S. 377 (1968); Stovall v. Denno, 388 U.S. 293 (1967); Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967).

68. *See* United States v. Zane, 495 F.2d 683, 699 (2d Cir. 1974), *cert. denied*, 419 U.S. 895 (1974); United States v. Ravich, 421 F.2d 1196, 1203 (2d. Cir. 1970), *cert. denied*, 400 U.S. 834 (1970); Evans v. Superior Court, 11 Cal. 3d 617, 114 Cal. Rptr. 121, 522 P.2d 681 (1974); State v. Boettcher, 388 So.2d 1356 (La. 1976); State v. Walls, 138 N.J. Super. 445, 351 A.2d 379 (1976).

69. It appears that the policies running throughout the Supreme Court's reasoning in the identification cases are twofold: (1) To guard against an erroneous conviction by attempting to prevent identification procedures which are so suggestive as to lead to a misidentification; and, (2) to provide for counsel in those proceedings in which his presence will aid in the accused's defense at trial.

70. *See, e.g.*, Wardius v. Oregon, 412 U.S. 470 (1973); Williams v. Florida, 399 U.S. 78 (1970); Brady v. Maryland, 373 U.S. 83 (1963).

71. *See* AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE RELATING TO DISCOVERY AND PROCEDURES BEFORE TRIAL §§ 1.1, 1.2, (Approved Draft 1969). As set forth therein, liberal discovery should be allowed because it facilitates the accused's decision regarding a plea of guilty; insures that such a plea is intelligently made; and, if trial is required, insures that it is competently prepared and not delayed because of surprise.

72. 11 Cal. 3d 617, 114 Cal. Rptr. 121, 522 P.2d 681 (1974).

not be vacated. The trial court then found that although fairness demanded that a lineup be held, it did not have the discretion to order such a proceeding. The appellate court found that the trial court did have the discretion to direct such a proceeding and remanded the case for a determination of whether such a proceeding should be granted under the guidelines set out in the opinion.[73]

In its analysis, the appellate court made clear that this was not a question of whether an in-court identification was admissible, but, whether fairness to an accused in the pre-trial discovery process demanded such a proceeding.[74] It noted that the search for truth at trial would be furthered by such discovery, and that if the state could require a defendant to submit to such a process, then the defendant should be afforded the same opportunity.[75] Moreover, the court then found that due process requires the state to conduct identification proceedings in those cases where, (1) contingent upon a timely request by the defendant, (2) eyewitness identification is a material issue, and (3) there is a reasonable likelihood of misidentification, (4) which would be resolved by a lineup.[76] A trial court is therefore confronted, in every case where a defendant requests pre-trial identification procedures, with an ad hoc balancing of the costs of such procedures against the likelihood that they will clarify the identification in the case or rectify a misidentification in the case. It should be noted that the test adopted by the California Supreme Court in this regard is quite similar to the test of due process set forth in *Stovall*[77] and *Biggers*[78] in that it focuses on the potential of misidentification and reliability of the identification procedures employed. Due process considerations of a fair trial and right to counsel policies of effective and meaningful assistance of coun-

73. 522 P.2d at 686-87. The court therein states:

> [I]n an appropriate case . . . an accused, upon timely request therefor, be afforded a pre-trial lineup in which witnesses to the alleged criminal conduct can participate. The right to a lineup arises, however, only when eyewitness identification is shown to be in material issue and there exists a reasonable likelihood of a mistaken identification which a lineup would tend to resolve.
>
> . . . Such motion should normally be made as soon after arrest or arraignment as practicable. We note that motions which are not made until shortly before trial should, unless good cause is clearly demonstrated, be denied in most instances by reason of such delay.

Id.

74. *Id.* at 684.
75. *Id.* at 684-85.
76. *Id.* at 686.
77. 388 U.S. 293 (1967).
78. 409 U.S. 188 (1972).

sel at trial are therefore advanced by the finding of a qualified right to identification proceedings by the defendant.

In their views of the defendant's right to identification procedures, the federal courts are divided. Some courts hold that the defendant does not have a right to compel the government to provide him a lineup;[79] others find that in appropriate circumstances a trial court, upon request by the defendant, may order identification procedures,[80] or that such an order is within its inherent discretion and would not be reversible error if granted.[81] Several state courts, at this time, have found at least a discretionary right to a lineup based upon the Supreme Court's decisions in *Williams v. Florida*[82] and *Wardius v. Oregon*[83] that there is a reciprocal-fairness doctrine[84] at work, and have held that where the state can compel a lineup, fairness would dictate that the defendant be given the same right.[85]

It has also been mentioned that the *Brady v. Maryland*[86] holding, requiring the prosecution to disclose to the defense exculpatory evidence, would require a lineup based upon a demand by the defense and knowledge by the state that such a proceeding might prove exculpatory.[87] Therefore, it should be observed by defense counsel that a qualified right to compel identification procedures has four foundation points. It furthers the policies underlying the expansion of due process and the right to counsel in identification proceedings of *Wade-Gilbert-Stovall*. It promotes the truth seeking process of trial. It falls within the enunciated reciprocal fairness doctrine of *Williams* and *Wardius*. It falls within the disclosure of exculpatory evidence holding of *Brady*.

79. *See, e.g.*, United States v. Poe, 462 F.2d 195 (5th Cir. 1972), *cert. denied* 414 U.S. 845 (1973); United States v. Munroe, 421 F.2d 644 (5th Cir. 1970), *cert. denied* 400 U.S. 851 (1970).

80. *See, e.g.*, United States v. Zane, 495 F.2d 683 (2d Cir. 1974), *cert. denied*, 419 U.S. 895 (1974).

81. *See, e.g.*, United States v. Savich, 421 F.2d 1196 (2d Cir. 1970), *cert. denied*, 400 U.S. 834 (1970).

82. 399 U.S. 78 (1970).

83. 412 U.S. 470 (1973).

84. The reciprocal-fairness doctrine as stated in Wardius v. Ore., 412 U.S. 470 (1973), merely holds that where the state has the duty to allow discovery of evidence then the defendant should have a similar duty subject to constitutional limitations. It has also been stated that discovery must be a two-way street in order to be fair to all parties concerned. Therefore, if the state has the power to compel a lineup in certain situations, it would only be fair to allow the accused the same right.

85. *See, e.g.*, Evans v. Super. Ct., 11 Cal. 3d 617, 114 Cal. Rptr. 121, 522 P.2d 681 (1974); State v. Boettcher, 338 So.2d 1356 (La. 1976); State v. Walls, 138 N.J. Super. Ct. 445, 351 A.2d 379 (1976).

86. 373 U.S. 83 (1963).

87. Evans v. Super. Ct., 11 Cal. 3d 617, 621, 114 Cal. Rptr. 124, __, 522 P.2d 681, 684 (1974).

Counsel should not discard the possibility that a timely motion[88] for

88. The author has adopted the following form from one used by the Public Defenders Office of Tulsa County, Oklahoma, and has used it with some success in that jurisdiction.

IN THE DISTRICT COURT FOR THE COUNTY OF _____

STATE OF _____

STATE OF _____,

Plaintiff,

-vs- Case No. _____

_____,

Defendant.

MOTION TO COMPEL LINEUP

COMES NOW the defendant by his/her attorney of record, _____, and moves this Court to compel the State to conduct a lineup prior to preliminary hearing with the defendant in participation wherein any potential identification witness would be requested to make, if possible, a positive identification of the person alleged to have committed the offense. The defendant makes this motion on the following grounds:

(1) The preliminary hearing for the defendant is set for hearing on the __ day of _____, 19__;

(2) Defendant alleges that at said preliminary hearing he/she would be required to be present at the counsel table. Only counsel for the State and Defendant will be in his/her immediate vicinity. From this situation, any complaining witness is made obviously aware of who the defendant is.

(3) The prior opportunity of the complaining witness to observe the allege criminal act and its alleged perpetrator was extremely limited.

(4) There have been no lineups or showups to the defendant's knowledge prior to this time where the complaining witness had an opportunity to observe the subject accused of the crime. Given the placement of the defendant in the preliminary hearing, there arises for the complaining witness an inescapable assumption that the defendant is the perpetrator of the offense.

(5) The placement of the defendant at preliminary hearing amounts to a one-man showup, wherein the complaining witness is confronted by only the defendant.

(6) The practice of showing the suspect singly to persons for the purposes of identification, and not as part of a lineup, has been widely condemned. *Stovall v. Denno*, 388 U.S. 293 (1967).

(7) The placement of the defendant at the preliminary hearing is so impermissibly suggestive that the defendant will be denied due process as guaranteed by the Fourteenth Amendment of the United States Constitution and Article II, Section 7, of the Oklahoma Constitution. *U.S. v. Caldwell*, 481 F.2d 487 (D.C. Cir. 1973).

WHEREFORE, the Defendant moves this Court to order the State to conduct a lineup with the Defendant appearing, for all potential identification witnesses prior to preliminary hearing in this case. Further, the defendant requests a continuance of the preliminary hearing until such time as the lineup can be held.

_____

ATTORNEY FOR DEFENDANT

Such a motion may very well result in a lineup for the defendant but as has been stated in Evans v. Super. Ct., 11 Cal. 3d 617, 114 Cal. Rptr. 121, 522 P.2d 681 (1974), it must be timely made. Counsel should also be aware of the line of cases which hold that in-court identification is not inadmissible on the grounds that no pre-trial identification proceeding was held. Those cases have language that seems to indicate that an accused cannot compel a lineup prior to an in-court identi-

identification proceedings in appropriate cases may well be a viable part of the defense strategy.

VII. METHODS OF ATTACKING IDENTIFICATION PROCEDURES

Defense counsel, when faced with either an in-court identification or testimony concerning a prior extra-judicial identification, should be cognizant of the various factors which compound the probability of misidentification[89] and the danger signals of probable misidentification.[90] With a firm understanding of these factors, counsel is in a better position to attack the testimony of the witness both at trial and on appeal. First, by recognizing the factors which increase the likelihood of misidentification and the danger signals of a misidentification, counsel can better consider the possibility of successfully raising any constitutional objections based upon the law as previously discussed. If there is a likelihood that a constitutional violation has occurred, counsel should timely file his objections and preserve the objections for possible appel-

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fication. It would seem, however, that these cases only go to the admissibility of an in-court identification and not the accused's right to compel pre-trial identification proceedings. *See, e.g.*, Fortune v. State, 549 P.2d 380 (Okla. Crim. 1976); Grigsby v. State, 496 P.2d 1188 (Okla. Crim. 1972); Roberson v. State, 483 P.2d 353 (Okla. Crim. 1971).

89. One commentator has catalogued various factors that highlight and compound the problem of erroneous identification:

A. Suspect may be erroneously identified by a number of witnesses.
B. Relatives and close friends have erroneously identified persons.
C. Trained observers may be in error—policemen, etc.
D. The most positive identification may be wrong.
E. Witnesses' fear is difficult to assess.
F. Erroneous identification [has occurred] in even capital cases.
G. Juries are often unduly receptive to evidence of identification.
H. Erroneously identified person often does not resemble [the] actual guilty party.

Meshbesher, *supra*, note 10, at 459 (compiled from WALL, *supra* note 2, at 11-25).

90. There are various danger signals which counsel should be aware of and which one author has listed as:

A. The witness originally stated that he would be unable to identify anyone.
B. Witness knew defendant before [the] crime but made no accusation when first questioned.
C. Serious discrepancy between original description of culprit and actual description of defendant [identified at lineup].
D. Witness first identified another.
E. Other witnesses failed to identify defendant.
F. Prior to trial, witness sees defendant but fails to identify him.
G. Limited opportunity to observe criminal.
H. Witness and defendant are of different racial groups.
I. Considerable time lapse between the crime and identification.
J. Crime was committed by a number of persons.
K. Witness fails to make positive trial identification.
L. Original observation of perpetrator (was) made when witness was unaware that a crime was being committed.
M. Witnesses confuse activities of multiple defendants at scene of crime.

Meshbesher, *supra* note 10, at 460 (compiled from WALL, *supra* note 3, 90-130).

late review. Second, once possible constitutional objections have been thoroughly considered, counsel should consider the various possible pre-trial, trial, and appellate strategies available to attack either testimony of an in-court identification or of an extra-judicial identification. This analysis must begin the moment counsel enters the case, because much can be done early in the defense which may prevent later difficulties.

A. *Initiating the Right to Counsel*

A starting point for analysis would be the interrelationship of the constitutional rules set out in the case law with the pre-trial procedure of the jurisdiction. In particular, the rule of *Kirby*[91] as to when the right to counsel attaches has great significance when considered with the timing of a preliminary arraignment for the accused. If counsel were able to compel initiation of formal criminal proceedings, the right to counsel would vest, and he would have the right to be present to observe and possibly control any actions taken after that. Several decisions of the Supreme Court may give counsel some control over the initiation of proceedings and thus make counsel's presence at any identification proceeding mandatory.

Under the rules set forth in *Miranda v. Arizona*,[92] the defendant has a right to call counsel to be present at any custodial interrogation.[93] It would seem, then, that counsel will be called into a case, in many instances, very early. Counsel's duty at that point should be to manipulate the system so that formal proceedings are initiated, thus triggering the right to counsel.

Counsel may have two options available to force formal proceedings. In many states, either by legislation or judicial construction, the defendant has a right to a prompt preliminary arraignment[94] similar to the guidelines established in the federal system under the *McNabb-Mallory*[95] rule. Although this rule was established prior to *Miranda* to

91. 406 U.S. 682 (1972).

92. 384 U.S. 436 (1966).

93. For a comprehensive treatment of what constitutes custody for the triggering of *Miranda* rights see 31 A.L.R.3d 565.

94. *See, e.g.*, OKLA. STAT. tit. 22, § 181 (1971); MICH. COMP. LAWS ANN. § 764.13 (1968). A complete list of statutes may be found in ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE app. VI (Tent. Draft No. 1 1966).

95. In two cases the Supreme Court, by its supervisory powers over federal courts, held that a confession would be invalid and inadmissible if obtained during a delay in taking the defendant before a magistrate for arraignment. Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943).

guard against coerced confessions, it would appear that its policies of swiftly attaching the right to counsel so as to protect against abuses of the defendant's rights would be served by applying it in cases where identification proceedings will be necessary.[96] If, however, prompt arraignment is not available to defense counsel, there is at least one other alternative in limited circumstances. In the case of *Gerstein v. Pugh*,[97] the Supreme Court held that where a defendant was arrested without a warrant and not shortly released on bail, he or she was entitled to a prompt non-adversary hearing on whether there was probable cause for the arrest.[98] This issue and its relationship to identification procedures does not appear to have been addressed by any court, but it would seem that such a hearing would be the "initiation of formal criminal proceedings,"[99] and that from that point forward, the right to counsel would have attached.

There is, however, one limitation to both the prompt arraignment and probable cause hearing analysis. Both are contingent upon counsel being called shortly after the defendant's arrest under the *Miranda* guidelines. If the police decide to postpone custodial interrogation until after an identification proceeding, the right to counsel will not have attached and the accused will not have had the opportunity to contact counsel. Defense counsel would not be notified of the identification proceeding, but even if he were notified, the accused would have no right to have his lawyer present.[100]

B. *Pre-trial Identification Strategies*

Assuming that counsel is successful in forcing the formal initiation of criminal proceedings and thus attaching the right to counsel at subsequent identification proceedings, the question then arises as to what counsel can do to protect his client at the identification.[101] Most often

96. *See generally* Grano, *Kirby, Biggers and Ash; Do Any Constitutional Safeguards Remain Against The Danger of Convicting The Innocent?*, 72 MICH. L. REV. 717, 786 (1974).

97. 420 U.S. 103 (1975).

98. *Id.* at 126.

99. 460 U.S. at 689.

100. As the Court in *Miranda* noted: "If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him during that time." 384 U.S. at 474.

101. The staff of the Center for Responsive Psychology has, from its research in the area of eyewitness identification, developed a checklist for counsel to tally points of suggestiveness at a lineup proceeding. The following questions are to be answered by counsel, all yes responses should be totaled and the higher the total the more unreliable the lineup proceeding.

1. Was the witness shown any photographs of the suspect prior to the lineup?

he will be faced with a formal lineup and the following suggestions are focused on that procedure, although they may be modified for any identification confrontation.[102]

First, counsel should request the presence of a court reporter or hire a certified reporter to be present with him at the proceeding.[103] The reporter has several tasks: (1) to report all statements made before, during and after the proceeding; (2) to report for counsel his dictated descriptions of all those participating in the lineup as well as any factors counsel may observe to be suggestive; and (3) to preserve for the record any objections counsel might have to the procedures of the identification. This record, although at this early point not part of the trial record, may be invaluable at a later suppression hearing and possibly may be introduced in evidence at that time.[104] Even if such a record is

2. Have the witnesses been shown prior lineups related in this case?
3. Are there less than six people in the lineup?
4. Are any of the participants in the lineup from a different race and/or ethnic background?
5. Do the participants have different skin tones?
6. Do the participants have different amounts and styles of facial hair?
7. Are the participants widely varied in age?
8. Do the participants differ in height?
9. Do the participants have different body frames or stature (weight included)?
10. Are the participants different in modes of dress?
11. Do the participants have different styles of hair (example: braided, afro, DA, partial balding)?
12. Do any of the participants in the lineup differ from the original description given by the witness?
13. Did the officer in charge make the witness aware that a suspect is present in the lineup?
14. If a suspect is present in the lineup, does the officer in charge know his position within the lineup?
15. Is there more than one witness present at the lineup?
16. If there is more than one witness, did they have an opportunity to discuss the events of the case?
17. If a positive identification is made, does the witness give a verbal response instead of writing down the choice on a form?
18. Does the form lack a zero choice (a number representing a non-identification)?
19. Is there anyone else in the lineup other than the one suspect who could be a suspect in this or related crimes?
20. Was the witness told in any way that he or she was 'correct' in making an identification?
21. Did the officer conducting the lineup suggest or emphasize any one individual through word, gesture, tone or number?

Staff Project, Center for Responsive Psychology, *How Fair is Your Lineup?*, 2 SOC. ACT. & THE LAW 9 (1975).

102. *See, e.g.*, 1 CRIMINAL DEFENSE TECHNIQUES § 2.16(2) (S. Bernstein ed. 1969).

103. *See, e.g.*, Meshbesher, *supra* note 9, at 465.

104. If the lineup was tainted and a suppression hearing is held, it may be possible to call the reporter and have him or her use the transcript of the event to refresh their memory. If due to the press of work upon the reporter they do not remember all of the events, the transcript could then be introduced into evidence. *See generally* MCCORMICK ON EVIDENCE § 9, at 14 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK].

inadmissible, it may prove useful at trial to cross-examine the eyewitnesses and the law enforcement authorities about the identification. Second, counsel should request the names and addresses of all witnesses who attend the lineup proceeding.[105] This would allow the defense to start immediately to investigate the witnesses for possible points of impeachment with regard to their ability to observe, perceive, and recollect the incident in question. Third, counsel should request copies of any descriptions given to the authorities by the witnesses prior to the identification proceeding.[106] This may provide counsel with inconsistencies between the written descriptions and the identification and thus prove useful for impeachment. Fourth, counsel should request that the lineup be photographed so as to preserve a record of any variations in physical appearance between the lineup subjects.[107] Fifth, counsel should consider requesting either a "blank" lineup to test whether the witnesses are guessing, or that the lineup consist of as many persons as possible. For example, a twelve-man lineup would increase the probabilities against a random choice or guess.[108] Sixth, counsel should request time to confer with his client to advise him that he has no right to refuse to participate in the lineup[109] and that he may be compelled to say certain words or wear certain clothes.[110] Finally, counsel should make certain prior to the lineup that if certain clothing is to be worn before the witnesses, it fits all participants in the lineup.[111]

By taking these steps, counsel can avoid a tainted lineup or at least preserve the tainted points for later objection at a suppression hearing. These actions also enable counsel to fulfill the policies underlying the right to counsel by equipping him to protect effectively the defendant's rights and assist him at trial.

105. *See, e.g.*, 1 CRIMINAL DEFENSE TECHNIQUES § 2.16(2) (S. Bernstein ed. 1969) (citing with approval, United States v. Allen, 408 F.2d 1287 (D.C. Cir. 1969)).

106. *Id.*

107. *See, e.g.*, Thompson v. State, 438 P.2d 287, 289 (Okla.Crim. 1968).

108. *See, e.g.*, Meshbesher, *supra* note 9, at 464.

109. This is important because the accused's demeanor when compared to others in the lineup, may be a crucial factor in causing a witness to focus on him. If the accused is aware that he must cooperate with the police in this proceeding, he will be less likely to give himself away to a witness by uncooperative behavior.

110. *See, e.g.*, 1 CRIMINAL DEFENSE TECHNIQUES § 2.16(2) (S. Bernstein ed. 1969).

111. It would seem that the pinnacle of suggestiveness would be a lineup wherein the participants are directed to wear a particular coat and that coat fit only the defendant. However, counsel should be aware that, although the garment might fit all of the participants, it may fit correctly only the suspect.

C. *Jury Selection and Identification Strategies*

Assuming counsel has properly and adequately prepared prior to trial, there are many stages during the trial which offer means of attacking identification testimony. Counsel should be aware of the possibilities of voir dire and the opening statement as a means of conditioning the jury for the potential identification testimony which will be introduced later. Within legal and ethical limits, counsel should attempt to "teach" the jury: (1) the fallibility of eyewitness identifications; (2) the factors which confound the identification process; and (3) the danger signals of potential misidentification.[112] The psychological research in the area of eyewitness identification[113] combined with a scientific approach to jury selection[114] may provide counsel with a jury receptive to the possibility that an eyewitness may be fallible and has made an erroneous identification.

D. *Evidence and Identification Strategies*

Although somewhat outlandish at first thought, a possible approach for counsel would be to attack admissibility of an eyewitness identification from the standpoint of relevancy. Professor McCormick, in analyzing the test for relevance, concluded that it is twofold: Does the evidence tend to prove or establish a material issue in the case; does its probative value outweigh its prejudicial costs.[115] It may be argued

112. *See* notes 74, 75 *supra* and accompanying text.

113. *See, e.g.*, Buckhout, *Psychology and Eyewitness Identification*, 2 LAW & PSYCH. REV. 75 (1976); Buckhout, *Eyewitness Testimony*, 15 JURIMETRICS J. 171 (1975); Buckhout, Alper, Chern, Silverberg & Slomovits, *Determinants of Eyewitness Performance On a Lineup*, 4 BULL. PSYCHONOMIC SOC. 191 (1974); Feingold, *The Influence of Environment On Identification of Persons and Things*, 5 J. CRIM. L.C. & P.S. 39 (1914); Levine & Tapp, *The Psychology of Criminal Identification: The Gap from Wade to Kirby*, 121 U. PA. L. REV. 1079 (1973); Loftus, *Unconscious Transference in Eyewitness Identification*, 2 LAW & PSYCH. REV. 93 (1976); Loftus, *Reconstructing Memory: The Incredible Eyewitness*, 15 JURIMETRICS J. 188 (1975); Loftus, Altman & Geballe, *Effects of Questioning Upon A Witness' Later Recollections*, 3 J. POLICE SCI. & ADMIN. 162 (1975); Loftus & Zanni, *Eyewitness Testimony: The Influence of the Wording of a Question*, 5 BULL. PSYCHONOMIC SOC. 86 (1975); Luce, *Blacks, Whites and Yellows: They All Look Alike To Me*, PSYCH. TODAY, Nov. 1974, at 105; Malpass & Kravitz, *Recognition For Faces of Own & Other Races*, 13 J. PERS. & SOC. PSYCH. 330 (1969); Marshall, Marquis & Oskamp, *Effects of Kind of Question And Atmosphere of Interrogation On Accuracy And Completeness Of Testimony*, 84 HARV. L. REV. 1620 (1971).

114. *See, e.g.*, A. GINGER, JURY SELECTION IN CRIMINAL TRIALS: NEW TECHNIQUES AND CONCEPTS (1977); Forum, *Forensic Sociology and Psychology: New Tools for the Criminal Defense Attorney*, 12 TULSA L.J. 274 (1976); NATIONAL JURY PROJECT, JURYWORK: SYSTEMATIC TECHNIQUES (1979); NATIONAL JURY PROJECT, THE JURY SYSTEM: NEW METHODS FOR REDUCING PREJUDICE (1975).

115. MCCORMICK, *supra* note 103, § 185, at 434-41.

that under certain circumstances, eyewitness testimony of identification fails to meet either part of the test.

In considering the first tier of the test, counsel should focus on the level of error in eyewitness identifications. As has previously been discussed,[116] eyewitness identifications both in this country and abroad have been shown to be subject to erroneous results. However, high levels of error would not, without more, justify exclusion of eyewitness testimony.[117] No system of justice could survive if it required total accuracy from the evidence presented to its courts. Consider, however, the effect upon such testimony's tendency to prove a material issue, if it were proven to have a considerable level of error. For example, one statistical survey[118] tested the effect of a bystander's picture being included in a photographic lineup. In a photographic array without the bystander's picture, eighty-four percent of those tested were able to correctly identify the perpetrator with an error of twelve percent and a four percent refusal to make an identification. When the bystander's picture was added to the array, sixty percent of those tested chose the bystander, sixteen percent were incorrect and twenty-four percent refused to make a choice.[119] It can be concluded from such results that, in many instances, eyewitness testimony concerning identification does not tend to prove a material fact, and therefore, fails the first tier of the relevancy test. By having a knowledge of those factors which tend to reduce the reliability of eyewitness testimony, counsel may be able to raise a valid objection to the relevancy of such evidence.

Even if there is still a slight tendency for the evidence to prove a material issue, it may still be rationally argued that the evidence's probative value is outweighed by its prejudicial costs. Error laden evidence is, without doubt, highly prejudicial and has little probative value. The courts would therefore be faced with the task under the traditional rules of evidence of justifying the admission of evidence which is arguably inadmissible.[120]

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116. *See* notes 3-5 *supra* and accompanying text.

117. With the notable exception of the polygraph, which has been shown to have an error factor of less than one percent and yet is inadmissible, the courts of this country are forced to accept evidence which is less than one hundred percent reliable. *See*, J. REID & F. INBAU, TRUTH AND DECEPTION 234 (1966).

118. Loftus, *Unconscious Transference in Eyewitness Identification*, 2 LAW & PSYCH. REV. 93 (1976).

119. *Id.* at 96.

120. From exhaustive research, it appears that this objection has either not been raised or else not been dealt with by the appellate courts. Counsel has little likelihood of getting such an objection sustained. By raising it, however, and making an offer of proof of psychological data which

E. *Cross-examination and Identification Strategies*

Cross-examination offers defense counsel an opportunity to attack directly the identification of his client and he must be prepared to do so vigorously. One method of mounting such an attack is to question the witness as to factors which may have tainted the identification procedure based upon counsel's knowledge of the causes of erroneous identifications,[121] the factors which compound or highlight erroneous identifications,[122] the danger signals of misidentification,[123] the factors which some courts have recognized as leading to misidentification,[124] and the factors used as a checklist of suggestiveness at identification proceedings.[125] If these various factors have been properly outlined to the jury in the opening statement, the jury should be able to comprehend counsel's line of attack and therefore be cognizant of the potential errors in the witness's testimony. Because of the damaging nature of eyewitness identification testimony,[126] counsel should prepare thoroughly for cross-examination of an identifying witness and should leave no stone unturned in his attempts to impeach the witness. Only through searching cross-examination can counsel hope to attack directly the identification of his client made by an eyewitness.

F. *The Expert Witness and Identification Strategies*

A new possibility for attacking eyewitness identification testimony has emerged recently in the form of expert testimony on the psychology[127] of perception, memory, and identification.[128] Several federal courts have faced the issue[129] and have rejected the expert's testimony on the basis that identification is an issue which is of common knowl-

would show the high percentage of error, counsel may achieve two advantages: (1) the trial judge may be more receptive to defense oriented instructions on the issue of eyewitness identification testimony; and (2) the offer of proof in the record may affect the appellate court's ruling on a claim of a violation of due process.

121. *See* note 9 *supra.*

122. *See* note 74 *supra.*

123. *See* note 75 *supra.*

124. *See* note 29 *supra.*

125. *See* note 85 *supra.*

126. *See* notes 2-5 *supra* and accompanying text.

127. For an exhaustive treatment and bibliography of the area, the reader is directed to A. YARMEY, THE PSYCHOLOGY OF EYEWITNESS TESTIMONY (1979).

128. The possibilities of expert testimony in this area are almost endless and counsel should make himself aware of them. The reader is directed to a new publication entitled, SOCIAL ACTION & THE LAW, which is published by the Center for Responsive Psychology, Brooklyn College, for a continuing source of new psychological data relevant to the practice of law.

129. *See, e.g.*, United States v. Brown, 501 F.2d 146 (9th Cir. 1974); United States v. Amaral,

edge to the jury, and an expert is therefore unnecessary. Nevertheless, this conclusion is erroneous in light of the recent developments of psychology in the fields of perception, memory and identification.[130] It can hardly be argued that the average layman has knowledge of and understands the psychological theories of how one perceives events occurring around him, the factors which affect such perception, the means by which the human brain retains and recalls such perception, and recent psychological findings in the field of eyewitness identification.[131] Thus, excluding expert testimony on the basis that the testimony is common knowledge to the jury is not a valid ruling.[132] Counsel should realize, however, that the exclusion of his expert at trial is, without more, probably not worth the trouble of appellate review because the standard to be applied upon appeal is whether the trial court abused its discretion by excluding the evidence.[133] Under such a standard there is little likelihood of reversing a conviction solely upon the exclusion of expert testimony concerning identification. Despite the rejection of such testimony by the appellate courts,[134] counsel should be aware that a growing number of trial courts are allowing such testimony.[135] The old maxim, "nothing ventured, nothing gained," is applicable here. Counsel would be well advised to consider calling an expert witness to testify upon the issues of eyewitness identification and its psychological defects.

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488 F.2d 1148 (9th Cir. 1973). *Accord*, People v. Guzman, 47 Cal. App. 3d 380, 121 Cal. Rptr., 69 (1975); Commonwealth v. Jones, 362 Mass. 497, 287 N.E.2d 599 (1972).

130. *See* note 96 *supra*.

131. It would appear from the rulings of the various courts in this area that counsel, in order to gain the right to call an expert witness, must overwhelm the trial judge with a vast amount of psychological data on the particular scientific point for which he wishes to call the expert. Unless the judge is convinced that this area is beyond the realm of common knowledge for the average layman, there is very little likelihood that it will be allowed into evidence.

132. It takes very little review of the new psychological research in the fields of perception, memory, retention, and recall, as well as the specific research on eye-witness identification, to realize that such is beyond the common knowledge of the average juror. What must be impressed upon the judge is that, although we all see things every day, very few of us perceive them and are able to retain and recall them. For instance, you probably saw the person sitting in front of you during your last bus or airplane ride, however, probably very few of us remember what that person looked like or what they were wearing. The expert witness would be able to explain the scientific basis of perceptive processes and explain what factors were working for and against the eyewitness and his perception of the perpetrator of the crime.

133. *See* note 111 *supra*.

134. *Id.*

135. Professor Buckhout, one of the leading authorities in this field, has listed approximately twenty trials in which he has been allowed to testify concerning the psychology of eye-witness identification. *See*, Buckhout 3 SOC. ACT. & THE LAW 51-52 (1976).

G. *Jury Instructions and Identification Strategies*

Another procedure during the criminal trial which has often been ignored or taken lightly by defense counsel but offers another mode of attacking eyewitness testimony of identification is jury instruction. The Court of Appeals for the District of Columbia in the case of *United States v. Telfaire*[136] recommended model special instructions[137] dealing

136. 469 F.2d 552 (D.C. Cir. 1972).

137. The text of the model special instructions is as follows:

One of the most important issues in this case is the identification of the defendant as the perpetrator of the crime. The Government has the burden of providing identity, beyond a reasonable doubt. It is not essential that the witness himself be free from doubt as to the correctness of his statement. However, you, the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict him. If you are not convinced beyond a reasonable doubt that the defendant was the person who committed the crime, you must find the defendant not guilty.

Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification later.

In appraising the identification testimony of the witness, you should consider the following:

(1) Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?

Whether the witness had an adequate opportunity to observe the offender at the time of the offense will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness had had occasion to see or know the person in the past.

[In general, a witness bases any identification he makes on his perception through the use of his senses. Usually the witness identifies an offender by the sense of sight—but this is not necessarily so, and he may use other senses*].

(2) Are you satisfied that the identification made by the witness subsequent to the offense was the product of his own recollection? You may take into account both the strength of the identification, and the circumstances under which the identification was made.

If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care. You may also consider the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see defendant, as a factor bearing on the reliability of the identification.

[You may also take into account that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness*].

[(3) You may take into account any occasions in which the witness failed to make an identification of defendant, or made an identification that was inconsistent with his identification at trial*].

(4) Finally, you must consider the credibility of each identification witness in the same way as any other witness, consider whether he is truthful, and consider whether he had the capacity and opportunity to make a reliable observation on the matter covered in his testimony.

I again emphasize that the burden of proof on the prosecutor extends to every element of the crime charged, and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime with which he stands charged. If after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty. *Sentences in brackets to be used only if appropriate.

469 F.2d 552, 558 app. (D.C. Cir. 1972).

with identification testimony. These instructions are an excellent example of what defense counsel should consider in requesting instructions in a criminal case involving identification evidence.

In the first instance, the instructions state clearly the burden of proof carried by the prosecution to prove beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime. This is crucial because the other techniques of attacking identification testimony are of little value if the jury does not clearly understand that the identity issue must be proven beyond a reasonable doubt by the state. Techniques for attacking identification testimony are aimed toward raising a reasonable doubt in the minds of the jurors and they must therefore clearly understand the burden of proof. The model instructions then explain several factors which may cause misidentification and ask the jury to examine the evidence to determine whether any of these factors exist. The instructions end by reiterating the burden of proof on establishing the identity of the defendant as the perpetrator of the crime.

Counsel, when drafting instructions in an eyewitness identification case, should consider which points of taint or suggestion have been proven and which factors tending to cause misidentification have been proven by the evidence and draft into his proposed instruction specific means by which the jury may deal with this evidence.[138] In this manner, if the state's procedure permits, the jury will have with them in the jury room a checklist of misidentification factors when they are deliberating. There can be little doubt as to the value such an instruction can be to the defense.

H. *Criminal Appeals and Identification Strategies*

One final area which defense counsel should not overlook when faced with eyewitness testimony is the possibility of establishing special state procedures or state constitutional standards as a point of appeal. Since the advent of the Burger Court and the passing of the Warren era, the Supreme Court decisions in the area of criminal defendants and their rights have been few and, for the most part, restrictive in their analysis of prior decisions. One commentator has noted this trend and

138. As should be noted, the model in *Telfaire* does not cover all possible points of taint or misidentification and therefore counsel should take extreme care in inserting proper language to cover any such points that may have been brought out at trial. This type of careful drafting will insure that these crucial issues will be before the jury and may be the subject of jury deliberations.

has suggested that state constitutions may provide a barrier to such inroads.[139] This attitude can be seen in Pennsylvania's rejection of the narrow approach taken by the Supreme Court to the right to counsel in identification procedures. The Pennsylvania court held that under its constitution, a much broader right to counsel exists.[140] Similarly, Oklahoma has adopted specific guidelines on the procedure to be used in conducting a lineup.[141] Such independent state grounds should be urged on appeal in order to build a strong state basis against the encroachment upon individual rights on the federal level.

VIII. CONCLUSION

The law in regard to identification procedures, both from a right to counsel perspective and a due process approach, appears at this time to be firmly established and leaves room for abuse from overzealous law enforcement tactics. The right to counsel in an identification procedure exists only if the accused has been formally charged and the criminal proceedings have been formally initiated. Law enforcement officials are thereby given great leeway in their actions prior to the filing of an information or the return of a grand jury indictment. An accused's fourteenth amendment right to due process provides only that under the totality of the circumstances, if the procedures are conducive to an unnecessarily suggestive identification, the courts may suppress the identification. The challenge for the defense counsel, who might not be allowed to be present, is how the totality of the circumstances can be proved, except by the testimony of the very law enforcement officers whose procedure he is attacking.

In order to combat excessive zeal on the part of law enforcement officials and to protect the rights of his client, defense counsel must assume an active role throughout the criminal justice process. The advent of new and verified psychological research data may provide a multitude of approaches to attack the damaging evidence of eyewitness identification. Because of the duty of zealous advocacy,[142] defense counsel bears the burden of both researching and understanding this

139. Comment, *Protecting Fundamental Rights in State Courts: Fitting A State Peg to A Federal Hole*, 12 HARV. C.R.-C.L. L. REV. 63 (1977).

140. Commonwealth v. Richman, 458 Pa. 167, 320 A.2d 351 (1974). *See*, Note, Commonwealth v. Richman: *A State's Extension of Procedural Rights Beyond Supreme Court Requirements*, 13 DUQ. L. REV. 577 (1975).

141. Thompson v. State, 438 P.2d 287 (Okla. Crim. 1968).

142. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7.

psychological data and applying it in those cases where it is appropriate. Further, by undertaking such a duty, defense counsel may well protect the innocent from the misidentification which, although not frequent, does occur in the criminal justice system. Defense counsel may thereby further the search for truth in a professional and meaningful manner.