LEVEL II

EYEWITNESS IDENTIFICATION

A thesis presented to the Faculty of the U.S. Army Command and General Staff College in partial fulfillment of the requirements for the degree

MASTER OF MILITARY ART AND SCIENCE

by

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CHAPTER 1

INTRODUCTION

Eyewitness identification can take many forms. The most dramatic is an on-the-street showup,[1] where the victim of the crime identifies the suspect who has been arrested or detained by the police. The identification of the suspect could also take place at the police station in the form of a corporeal lineup[2] or a display of photographs of the possible suspect. These are all out-of-court or pretrial identifications.[3] Other confrontations for identification are too numerous to mention. Another type of emotionally filled identification is the in-court identification of the defendant by the victim or eyewitness. Both pretrial and in-court identifications are important. The pretrial identification is admissible in many jurisdictions to strengthen the prosecution's in-court identification by establishing that the witness of victim identified the defendant shortly after the offense.[4] When the witness is senile, forgetful, or has been threatened, testimony of the pretrial identification by the police, is crucial to the prosecutions's case where there is a lack of other direct or circumstantial evidence.

Recently, eyewitness identification had been a neglected area of criminal law, even though it is probably the least reliable

type of evidence.[5] English[6] and American[7] annals are replete with instances of eyewitness identification, whose unreliability has been scientifically demonstrated.[8] Despite this unreliability, juries attach a great deal of weight to this kind of evidence.[9]

In his study of eyewitness identifications, Professor Borchard concluded that the major kind of error is the identification of the suspect by the victim of a violent crime.[10] This is especially true when the victim is a child or young person.[11] In such cases the emotional state of the witness or victim may render unreliable all recollections of the crime. Moreover, the victim or witness may desire to seek vengeance on the person believed guilty or desire merely to support the identification which he or she assumes, consciously or unconsciously, has already been made by another.[12] Even so, "juries seem disposed more readily to credit the veracity and reliability of the victim of an outrage than any amount of contrary evidence by or on behalf of the accused, whether by way of alibi, character witnesses, or other testimony."[13] Once a witness has identified someone, he or she tends to maintain the decision

> by a process of auto-suggestion which evidences itself in continually seeking means of justifying his opinion and reinforcing his belief. Questioned once more regarding the matter, the chances are that he would repeat, with even greater emphasis his previous declaration.[14]

In addition, a lineup only adds to the unreliability of

eyewitness identification, for certain suggestions are inherent in this procedure. Foremost, it suggests that the guilty person is in the lineup.

> Knowing that the man suspected by the police is present, and trusting the police not to have put up the wrong man, the witness may make every effort to pick out his man, on the mistaken assumption that if he can do so, this would provide the kind of corroboration of their suspicion that the police expect and require. His immediate reaction if he is not certain may be to strain his memory to the utmost to find some resemblance between one of the men before him and the offender as he remembers him. The witness may therefore be inclined to pick out someone, and that someone will be the one member of the parade who comes closest to his own recollection of the criminal. Discrepancies may be easily overlooked or explained away.[15]

Suggestions other than obvious differences in height, weight, age, race, etc., may be made by the participants in the lineup through nonverbal communication. Using police officers should be discouraged because altering their bearing and demeanor is difficult.[16] Furthermore, by their attitude the police participants might inadvertently suggest who is the suspect. This is true also on non-police participants who know the accused's identity.[17] The suspect, too, might communicate nonverbally if his or her shame or anxiety[18] is affecting facial expression, posture, or gait.

The possibility of intentional suggestion is also present in a pretrial confrontation.[19] Some law enforcement officials are not impartial.

> [W]ithout making any claim to generalization, it is common knowledge that the prosecution technique in the United States is to regard a conviction as a personal victory calculated to enhance the prestige of the prosecutor.[20]

This suggestiveness, the inherent unreliability of eyewitness identification, and the inability of defense counsel to reconstruct what has happened has led the Supreme Court to decide eleven cases dealing with the right to counsel and the requirements of due process of law during eyewitness identifications. In addition to these issues, numerous federal, state, and military courts have raised a multitude of issues to be explored in the other chapters.

This thesis will identify a methodology for examining these issues for the practicing attorney,[21] both military and civilian. In the recent past, prosecutors and law enforcement officials have been so concerned with the pronouncements of the Supreme Court as to the right to counsel and due process, some have overlooked the fundamental issues, for example, the seizure of the suspect to stand in a lineup. To avoid overlooking any issues this thesis will identify them and set forth a systematic procedure for examining them.

The methodology will aid defense counsel as to tactics, for example, requesting a postponement of the lineup, requesting an in-court lineup, or allowing the client to sit with the spectators at trial. Additionally, counsel can ensure that the rights of the client are not violated.

Chapter 2 discusses sixth amendment rights since it was the focus in this area that brought eyewitness identification to the forefront. This chapter analyzes whether there is a right to counsel and if this right does exist, the extent of the right. More important than the right to counsel is the due process standard in chapter 3. If there is a violation of due process, the prosecution will be forbidden from introducing any testimony concerning an eyewitness identification. To protect society and thus the suspect, some suggested procedures are set forth that will aid in eliminating the suggestiveness that takes place at lineups. Chapter 3 also examines those factors to consider in determining admissibility of an in-court identification when there has been a violation of the right to counsel, or the admissibility of both pretrial and in-court identifications when there has been an unnecessarily suggestive pretrial identification or illegal seizure of the suspect for a confrontation for identification. Chapter 4 examines the legality of the initial seizure for the showup or lineup and the application of the exclusionary rule when there has been an illegality. Many miscellaneous problems are analyzed in chapter 5, such as the statutory attacks on pretrial identifications, in-court lineups and cautionary instructions to the jury on the subject of eyewitness identification.

CHAPTER 1

FOOTNOTES

1. A "showup" describes an event in which only the suspect is presented to the witness, who is then asked whether or not this was the person who committed the offense. See P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 27-28, 40-41 (1965).
2. A "lineup" for the purpose of this thesis describes an event in which the suspect is placed in a group of people and a witness viewing this group is asked to pick out the guilty party.
3. The term "confrontation" as used in this thesis describes any situation arranged by the police subsequent to the crime in which the witness or the victim observes the suspect or the accused for the purpose of identification. The victim or witness may or may not identify the suspect or accused.
4. See, e.g., People v. Gould, 54 Cal. 2d 621, 354 P.2d 865, 7 Cal. Rptr. 273 (1965).
5. Williams & Hammelmann, Identification Parades, Part I, 1963 CRIM. L. REV. 479, 480 [hereinafter cited as Williams & Hammelmann].

6. See G. WILLIAMS, THE PROOF OF GUILT 106-24 (3d ed. 1963); Williams & Hammelmann, Parts I and II 479, 545.

7. See generally E. BORCHARD, CONVICTING THE INNOCENT (1932); F. BLOCK, THE VINDICATORS (1963); J. FRANK & B. FRANK, NOT GUILTY (1957); E. GARDNER, THE COURT OF LAST RESORT (1952).

8. See generally A. ANASTASI, FIELDS OF APPLIED PSYCHOLOGY 548-50 (1964); F. BERREN, PRACTICAL PSYCHOLOGY 416-44 (rev. ed. 1952); H. BURTT, APPLIED PSYCHOLOGY 232-65 (2d ed. 1957); F. RUCH, PSYCHOLOGY AND LIFE 291 (5th ed. 1958); Buckout, Eyewitness Testimony, SCIENTIFIC AMERICAN 23 (Dec. 1974); Levine & Tapp, The Psychology of Criminal Identification: The Gap from Wade to Kirby, 121 U. PA. L. REV. 1079 (1973).

9. See E. BORCHARD, CONVICTING THE INNOCENT XII (1932); P. WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES 41 (1965); Williams & Hammelmann, Parts I and II at 480 and 545, 550.

10. See E. BORCHARD, CONVICTING THE INNOCENT XIII (1932); see also M. HOUTS, FROM EVIDENCE TO PROOF 19-20 (1956).

11. Willimas & Hammelmann, Part II at 545, 546.

12. E. BORCHARD, CONVICTING THE INNOCENT XIII (1932).

13. Id.

14. Gorphe, Showing Prisoners to Witnesses for Identification, 1 AM. J. POLICE SCI. 79, 82 (1930).

> It is a matter of common experience that once a witness has picked out the accused at a lineup, he is not likely to go back on his word later on,

> so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial. United States v. Wade, 388 U.S. 218, 229 (1967), quoting Williams & Hammelmann, Part I at 482.

15. Williams & Hammelmann, Part I at 486-87, see also C. POLPH, LAW AND THE COMMON MAN 192 (1968); P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 47 (1965).

16. Williams & Hammelmann, Part I at 486-87. "[P]olice officers should never be used in a parade unless, indeed, it is case in which a policeman is suspect." Williams, Identification Parades, 1955 CRIM. L. REV. 525, 534.

    Another reason for not using police officer is that police techniques have been developed to make sure that any particular person can, if necessary, be "forced" on a witness, the way a magician forces a card. One of the most popular means is to line the suspect up between a group of detectives who then cast their eyes slightly in the direction of the suspect, instead of straight ahead. Result: the witness's gaze is directed as though be arrows to the right place. M. MACHLIN & W. WOODFIELD, NINTH LIFE 61 n.2 (1961).

17. Williams & Hammelmann, Part I at 489.

18. See United States v. Wade, 388 U.S. 218, 230-31 (1967); P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 44-45 (1965); Napley, Problems of Effecting the Presentation of

the Case for a Defendant, 66 COLUM. L. REV. 94, 99 (1966). See also R. ALLEN, E. FERSTER, & J. RUBIN, READINGS IN LAW AND PSYCHIATRY 36 (1968).

19. See United States v. Wade, 388 U.S. 218, 230-35 (1967). See also Foster v. California, 394 U.S. 440 (1969).

20. E. BORCHARD, CONVICTING THE INNOCENT XV (1932). See also P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 46 (1965). Speaking for the majority in McDonald v. United States, 335 U.S. 451, 456 (1948), Justice Douglas said, [H]istory shows that the police acting on their own cannot be trusted."

21. It has been uniformly held that chapter 27, Manual for Courts-Martial (Rev. ed. 1969) sets forth the rules of evidence for the military except where the Manual is ambiguous or there is no rule. If either the military follows the federal rules. Compare United States v. Jordan, 20 U.S.C.M.A. 614, 44 C.M.R. 44 (1971), with United States v. Massey, 15 U.S.C.M.A. 274, 35 C.M.R. 246 (1965); United States v. Moore, 14 U.S.C.M.A. 635, 639, 34 C.M.R.415, 419 (1964). However, if the Manual provision is unconstitutional then the federal rules will be followed.

CHAPTER 2

SIXTH AMENDMENT

In 1967 the Supreme Court decided three cases on the same day dealing with the subject discussed in this thesis. Two of these cases dealt with the right to counsel, United States v. Wade[1] and Gilbert v. California.[2] The third case, Stovall v. Denno,[3] considered due process of law.

I. Accrual of the Right to Counsel

In Wade, the Supreme Court attempted to avert prejudice in a lineup situation and to ensure adequate cross-examination for a fair trial. In that case the witness had identified the suspect in the absence of counsel at a post-indictment lineup[4] conducted approximately eight months after the crime.[5] The Supreme Court held that this witness's in-court identification must be excluded unless the prosecution could establish that such evidence was not tainted by the pretrial identification. In Gilbert, the Court held that the pretrial identification was conducted in derogation of the suspect's right to counsel and that the in-court identification was inadmissible if it was "the direct result of the illegal lineup."[6] These rules apply to both state and federal prosecutions[7] but affect only confrontations which occurred after June 12, 1967.[8]

A. Corporeal Identification

The impact of Wade has been severely limited by the Supreme Court's decision in Kirby v. Illinois.[9] There the Court indicated that an individual is not entitled to a lawyer at a lineup until the "initiation of [the] adversary judicial criminal proceedings."[10] This initiation takes place when "the government has committed itself to prosecute"[11] and "the adverse positions of [the] Government and defendant have solidified."[12] At this point the accused "finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law."[13]

Kirby's language is unclear as to the exact procedural stage at which the accused is entitled to counsel at a confrontation for identification. The opinion states only that the answer depends on when the "initiation of [the] adversary judicial criminal proceedings" takes place. Although Chief Justice Burger seemed to indicate that this initiation occurs when formal charges have been made against the accused,[14] the plurality opinion suggests that this right accures at the time of formal charge, preliminary hearing, indictment, information, or arraignment.[15] While not naming a specific stage when the accused is entitled to counsel, the Court did set forth a rule that can be easily followed by law enforcement officials. The accused is not entitled to counsel at any confrontation for identification prior to formal

charge, preliminary hearing, indictment, information, or arraignment, provided that these stages of the prosecution are not purposely delayed to deny the accused the right to counsel.[16]

The Kirby decision was proper in respect to the holding in Wade but did not rely on the underpinnings of Wade.[17] Justice Brennan's opinion in Wade relied upon the sixth amendment and the accused's right to counsel in criminal proceedings. But the purpose of the right to counsel announced in Wade-Gilbert was primarily to ensure the fairness of the identification proceedings and a fair trial.[18] It was not limited to the case when the suspect was already indicted.[19]

There have been various interpretations of Kirby. Some lower courts have indicated that an arrest without a warrant,[20] an arrest pursuant to a warrant,[21] or an arrest plus confinement triggers the right to counsel at a lineup.[22] However, other courts have ruled that an arrest is not a "formal charge" or "initiation of [the] adversary criminal proceedings."[23] A third line of cases declares that no right to counsel exists prior to information or indictment.[24]

This third view was rejected in Moore v. Illinois.[25] In Moore, the Supreme Court held that the defendant was entitled to counsel at a showup conducted at the time of the preliminary hearing. The Court specifically rejected the argument that a defendant is only entitled to counsel after the indictment.[26] The Court also rejected the argument that the right to counsel did not

accrue at a showup conducted at the preliminary hearing.[27] The Court stated that Wade-Kirby applied to all confrontations after the "initiation of [the] adversary criminal proceedings" whether at the stationhouse or in the courtroom.[28] The Court said in dictum, "The prosecution in this case was commenced under Illinois law when the victim's complaint was filed in court."[29]

B. Photographic Identification

The emphasis has shifted away from corporeal lineups. Many police departments now rely on photographic identifications for numerous reasons. In some cases, the whereabouts of the defendant is unknown or the suspect has changed appearance. Even if the defendant's whereabouts are known, the police must arrange for many people to appear at the police station for the lineup; the suspect, his counsel, fillers, and the witnesses. Lastly, many police departments and prosecutors use photographs to refresh the witness's memory before trial which may be some months or years after the incident. In United States v. Ash,[30] the trial was some three years after the crime. Approximately one day prior to the witness testifying, the prosecutor showed the witness a series of photographs and had the witness make an identification apparently to refresh the witness's memory prior to testifying.

An analysis similar to Kirby is applicable to Ash. In Ash, the Court refused to extend the right to counsel at a photographic display made more than three years after the offense and

approximately a day before the witness was scheduled to testify. Although the majority recognized the unreliability and the difficultyof reconstructing what happened, the evils that prompted Wade-Gilbert, it refused to apply the sixth amendment right to counsel to such a confrontation. Counsel is not needed to advise the defendant as to his conduct since he does not participate. The majority and Justice Stewart concurring found photographic identification less suggestive and more easily reconstructed than lineups.[31]

The ruling in Ash has resulted in increased reliance on photographic identification procedures rather than corporeal lineups. The former save time and labor, but they have led to requests to have the witness's identification tested at a subsequent corporeal lineup.[32]

Although there is no duty to segregate all the photographs used for a lineup, they should be kept so that the photographic display can be reconstructed.[33] Michigan and Nevada have imposed the requirement that the police preserve the photographs used in a display.[34]

C. Accidental Viewing

The question of accrual of right to counsel is not limited to corporeal lineups. In some cases the identification may take place while attempting to hold a lineup. Does a right to counsel exist if an identification takes place as the result of an

accidental viewing of the suspect by the witness?

The reason for fashioning the exclusionary rule in Wade and Gilbert was to "deter law enforcement authorities from exhibiting an accused to witnesses before trial for identification purposes without notice to and in the absence of counsel."[35] Thus, applying the right to counsel rule to inadvertent identification proceedings would be illogical when the police have acted in good faith.[36] Most jurisdictions follow the logical approach. In addition to holding no right to counsel at accidental confrontations, the courts have uniformly indicated that such identification does not violate due process of law if there was no deliberate misconduct by the police and if the confrontation was truly accidental.[37]

Many accidental identifications, though seemingly spontaneous, may be the result of maneuvering by the police. The fact that a witness fortutiously "bumped into" the suspect should itself arouse suspicion on the part of counsel, for the meeting could have been the result of a police ploy known as the "Oklahoma showup."[38]

D. Waiver of the Right to Counsel

Once it is determined that the right to counsel exists may the suspect waive this right? A number of courts follow the Wade language that "counsel's presence should have been a requisite to conduct . . . the lineup, absent an 'intelligent waiver.'"[39] These courts have held that the defendant, following advice of his or her

right to appointed or retained counsel may waive the presence of counsel.[40] A general Miranda warning is insufficient;[41] the police must inform the defendant that he or she has a right to counsel at the lineup.[42] The warning need not include a Miranda warning.[43] The police must give the counsel a reasonable period of time to travel to the stationhouse where the lineup will be conducted.[44] The Model Rules for Law Enforcement, Eyewitness Identification, state that the subject must be informed that he or she will be provided with a lawyer free of charge and that the lineup will be delayed for a reasonable time after his or her lawyer has been notified in order to allow the lawyer to appear.[45] This advice precludes the claim that the waiver was made because the suspect felt that the assigned or retained lawyer may be busy at the time and unwilling to attend.

II. The Content of the Right to Counsel at a Lineup

Assume that the right to counsel attaches at the suspect's lineup. Do the police have to appoint an attorney who will continue to represent the suspect throughout all subsequent stages of the case? May the attorney testify about the lineup at a subsequent trial? What role does the attorney play during the lineup? These are major problems which arise if the right to counsel attaches at the lineup.

A. Substitute Counsel

In Wade, the Supreme Court stated that

> [a]lthough the right to counsel usually means a right to the suspect's own counsel, provision for a substitute counsel may be justified on the ground that the substitute counsel's presence may eliminate the hazards which render the lineup a critical stage for the presence of the suspect's own counsel.[46]

Relying on this language, some courts have held that the requirement of the "presence of counsel"[47] is met when an attorney is present to ensure the fairness of the proceedings, even though he or she does not establish a confidential relationship with the accused.[48] This ad hoc counsel may meet the requirements of Wade-Kirby, for his or her presence can serve to eliminate the hazards that make a pretrial identification potentially unfair to the accused.

Aside from the Court's comment that the police may not have adequate records to aid the suspect,[49] the police may also be determined to get a conviction, for they may have already concluded that the suspect they apprehended is guilty. Language in Wade indicates that the Court wishes to subject the police to the impartial scrutiny of an observer not connected with the prosecution.[50] Therefore, the use of a substitute counsel identified with the police will not satisfy the requirements of Wade-Kirby.[51] However, the Wade Court did leave "open the question whether the presence of substitute counsel might not suffice."[52]

The presence of substitute counsel is crucial to law enforcement officials when the suspect's retained or appointed

counsel cannot be reached, cannot come immediately, or refuses to appear.[53][54] Furthermore, counsel may appear and then walk away from the lineup in an effort to stop the procedure. But, the courts have stated that this action does not preclude continuing the lineup.[55]

In many cases,[56] counsel refuse to attend or walk away from the lineup so they can object to the lineup at the time of trial, and the prosecution will not be able to point to defense counsel's presence in supporting the fairness of the lineup procedure. Prosecutors sometimes argue that the procedure must have been fair because the defendant's lawyer was present and had made no objection. This argument is certainly irrelevant and subject to objection, but is questionable whether this sort of remark can be cured by an insturction by the judge.

The courts have been liberal in upholding the qualifications of the substitute counsel. The substitute counsel need not be formally appointed.[57] Usually the police use an attorney from the legal aid society or agency.[58] In one case, the court refused to find error when the police used an assistant district attorney as the substitute counsel.[59]

When substitute counsel has been employed, "it may well be incumbent upon the prosecution to ensure that the observations and opinions of the substitute counsel are transmitted to the accused's subsequently appointed trial counsel."[60] However, when

no request is made for these records until after trial, counsel has probably waived objection that substitute counsel failed to turn over the records.

B. The Propriety of the Counsel's Testimony at Trial

If counsel was present at the time of the lineup, serving as the impartial observer, may counsel testify at trial concerning the procedure used to identify his client? Disciplinary Rules 5.101 and 5.102 of the Code of Professional Responsibility require that except when essential to the ends of justice, lawyers should not testify in court on behalf of their clients.[61] If eyewitness identification is material to the trial, obviously the testimony of the lawyer-witness would not be confined to merely formal matters, for example, to authentication of documents or to ensuring attestation of the custodial instruments. If the lawyer believes he or she may testify on more than formal matters either before the judge or jury and then argue in support of his or her credibility, the lawyer must withdraw from the case. In order to avoid this situation the lawyer-witness should take a third party with him or her to view any lineup, thus eliminating the issue of withdrawal from the case. Also substitute counsel avoids placing the trial defense counsel in this difficult predicament.

C. Role of Counsel at the Lineup

Counsel must make a decision of whether to be an active or passive observer at the lineup. Counsel may go to a lineup as an

observer and notice that the lineup is unfair because police fillers in the lineup in effect identify his client because of their attitude and glances that they are making at the suspect. The same could also be true if the fillers know the identity of the suspect. These subtle suggestions may be such as to violate due process of law and thus proclude any testimony of the witness who is making the identification at the lineup. By being passive, this may result in a loss of the prosecution case if this is the sole surviving witness of the crime as in Stovall. If counsel does take an active part and ensures the fairness of the lineup or inadvertently makes a suggestion to change the lineup that proves to be suggestive in hindsight and an identification is made, this may seal the fate of his or her client. What role counsel will play will depend on how the courts will view the action or non-action by counsel.

Some courts hold that if counsel remains passive or does not inquire into the identification procedures this is one factor that may be relied upon to establish the fairness of the procedure.[62] A second view is that if counsel is allowed to

> have a role in setting up a lineup and proposing changes to avoid suggestive features . . . absent plain error or circumstnaces unknown to counsel at the time of the lineup, no challenges to the physical staging of the lineup could successfully be raised beyond objections raised at the time of the lineup.[63]

Another view taken by some courts is that if counsel remains

passive at a lineup, he or she waives any claim of a violation of due process.[64]

In their commentary, the Reporters to the American Law Institute, Model Code of Pre-Arraignemnt Procedure have indicated that the defendant's lawyer, who was present at a lineup, should not be deemed to have waived objections if he or she does not immediately object upon noting some unfairness. And, police officials are not required to follow the suggestions of counsel.[65] However, the Model Code states that the absence of any objections by defense counsel is some indication of the fairness of the proceeding.[66] A presumption of fairness may provide some degree of incentive for defense counsel to make a reasonable objection which the police might heed, rather than to sit back and hope to attack the lineup procedure later.

D. Ineffective Representation by the Lineup Counsel

Testimony as to eyewitness identification may be attacked on the basis of ineffective representation by counsel. The result would be the same as a violation of the right to counsel at a confrontation for identification. The courts have been relatively tolerant in supervising the quality of representation at confrontations. In one case, the counsel neglected to inform the suspect that he was representing the suspect at the lineup but the court refused to reverse.[67] Convictions have also been sustained where the attorney admitted his attention was focused on another person

during most of the lineup;[68] where the counsel left the room just prior to the witness's actual identification of the suspect;[69] and where the confrontation counsel failed to communicate with the trial defense counsel.[70]

Most cases seem to assume that an effective representation claim is cognizable, but courts seem to have been reluctant to sustain such a claim.[71]

III. The Propriety of an In-Court Identification

If the right to counsel accrued at a lineup and the police did not satisfy the right, the witness may not testify to an identification at the lineup. But the prosecution may attempt to have the witness identify the defendant in the courtroom. The trial judge usually has discretion to permit an in-court identification or lineup.[72] What effect does the violation at the pretrial lineup have on the propriety of an in-court identification? In Wade, Justice Brennan wrote that a violation bars an in-court identification unless the prosecution can "establish by clear and convincing evidence that the in-court identifications [are] based upon observations of the suspect other than the lineup identification."[73] The Court rejected a "per se rule of exclusion of courtroom identification"[74] and allowed the prosecution to establish an independent basis for the in-court identification. The factors that should be examined in determining whether an independent basis does or does not exist are discussed in chapter 3.

IV. Summary

The Burger Court in Kirby and Ash has changed the emphasis of the Supreme Court in favor of effective law enforcement rather than individual rights as to eyewitness identification. Rather than relying on the right to counsel at confrontations for identifications to ensure the fairness of the proceedings, the Burger Court in both of these decisions relied on the sixth amendment right to counsel. These decisions rejected the underpinnings of Wade. The Court thus delayed the right to counsel under the federal constitution.

However, federal prosecutions constitute about ten percent of the criminal prosecutions in the United States.[75] Thus, defense counsel should argue that the state courts adopt more stringent standards than have been set by the federal courts. This type of argument has been successful concerning the right to counsel at photographic identifications[76] and the right of counsel to be present at the time of the witness's response to the police.[77]

Defense counsel must be circumspect as to accidental viewings to ensure that they are truly accidental and not staged confrontations for identification.

Once it is determined that there is a right to counsel or the police allow the presence of counsel, defense counsel must make some practical decisions as to the role of counsel while avoiding any charge of ineffective counsel. As to ineffective counsel, the

courts are not likely to second guess counsel as to tactics that are used. If counsel is allowed to play a major role at the confrontation for identification, he or she should follow through if there is little likelihood there will be an identification or another substantial defense is present.

If counsel plays a major rule and an identification takes place, counsel will not be able to complain about the conduct of the confrontation procedures absent unknown factors. Where the two conditions set forth above are not present, counsel should "sandbag" the lineup complaining about the unfairness of the lineup at trial hoping to exclude any identification evidence relying on due process of law.

CHAPTER 2

FOOTNOTES

1. 388 U.S. 218 (1967).
2. 388 U.S. 263 (1967).
3. 388 U.S. 293 (1967).
4. A "lineup" for the purpose of this thesis describes an event in which the suspect is placed in a group of people and a witness viewing this group is asked to pick out the guilty party. A "showup" describes an event in which only the suspect is presented to the witness, who is then asked whether or not this was the person who committed the offense. See P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 27-28, 40-41 (1965).
5. United States v. Wade, 388 U.S. 218, 220 (1967).
6. Gilbert v. California, 388 U.S. 263, 272-73 (1967).
7. The term confrontation as used in this thesis describes a situation arranged by the police subsequent to the crime in which the witness or the victim observes the suspect or the accused for the purpose of identification. The victim or witness may or may not identify the suspect or accused.
8. Stovall v. Denno, 388 U.S. 293 (1967).
9. 406 U.S. 682 (1972).
10. Id. at 689.
11. Id.

12. Id.

13. Id.

14. Id. at 691. In a terse dissent Justice White stated that "Wade . . . and Gilbert . . . govern this case and compel reversal of the judgment below." Id. at 705.

15. Id. at 689.

16. Id. Compare Adams v. United States, 399 F.2d 574 (D.C. Cir. 1968), with United States v. Broadhead, 413 F.2d 1351 (7th Cir. 1969).

17. Both Wade and Gilbert were post-indictment cases. Nn.4-6. The Court referred to this fact in Wade at least twice. United States v. Wade, 388 U.S. 218, 219, 237 (1967).

18. Id. at 227-39.

19. Israel, Criminal Procedure, The Burger Court, and the Legacy of the Warren Court, 75 MICH. L. REV. 1319, 1367 (1977). Wade was "not limited to situation in which the suspect had already been charged."

20. See, e.g., Commonwealth v. Richman, 456 Pa. 167, 320 A.2d 351 (1974). See also State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974)(after arrest or arrest plus warrant).

21. Robinson v. Zelker, 468 F.2d 159 (2d Cir. 1972); State v. Morris, 484 S.W.2d 288 (Mo. 1972).

22. Patler v. Slayton, 503 F.2d 472, 476 (5th Cir. 1974)(counsel present at police station); People v. Coleman, 381 N.Y.S.2d 692 (App. Div. 1976).

23. See, e.g., Lane v. State, 506 S.W.2d 212 (Tex. Cr. App. (1974); West v. State, 229 Ga. 427, 192 S.E.2d 163 (1972).

24. See, e.g., Dearinger v. United States, 468 F.2d 1032 (9th Cir. 1972); Ashford v. State, 274 So. 2d 517 (Fla. App. 1973); State v. St. Andre, 263 La. 48, 267 So. 2d 190 (1972); State v. Carey, 486 S.W.2d 443 (Mo. 1972); Chandler v. State, 501 P.2d 512 (Okl. 1972)(court thought better procedure is to afford defendant an opportunity to obtain counsel).

A fourth view is expressed in paragraph 153(a), MANUAL FOR COURT-MARTIAL (REV. ED. 1969). A military suspect is entitled to counsel at a "lineup for the purpose of identification" conducted by United States or other domestic authorities irrespective of "arrest" or "charges." The term "lineup for the purpose of identification" does not include a showup conducted at the scene of the crime or in the commander's officer. United States v. Porter, 50 C.M.R. 508 (NCMR 1975); United States v. Wright, 50 C.M.R. 364 (NCMR 1975); United States v. Torres, 47 C.M.R. 192 (NCMR 1973). See also United States v. Beebe, 47 C.M.R. 386 (ACMR 1973). The term "lineup for the purpose of identification" does not mean an identification procedure used to identify a person personally known by the witness.

25. 46 U.S.L.W. 4050 (U.S., December 12, 1977).

26. Id. at 4053. The Court of Appeals read

> Kirby as holding that evidence of a corporeal identification conducted in the absence of defense counsel must be excluded only if the identification is made after the defendant is indicted. . . . Such a reading cannot be squared with Kirby itself. . . . (Emphasis in original).

27. Id. "If the [appellate] court believed that petitioner did not have a right to counsel at this identification procedure because it was conducted in the course of a judicial proceedings, we do not agree."

28. Id. "Although Wade and Gilbert both involved lineups, Wade clearly contemplated that counsel would be required in both [lineups and showups] situations. . . ."

29. Id. See also Arnold v. State, 484 S.W.2d 248 (Mo. 1972).

30. 413 U.S. 300 (1973).

31. Id. at 313-17, 321. But see People v. Stewart, 63 Mich. App. 6, 233 N.W.2d 870 (1975); State v. Wallace, 285 So. 2d 796, 801 (La. 1973)("Since photographic identification is far inferior to lineup identification, it would appear that after a suspect is in police custody, there is seldom any justification for employing photographic identification."); People v. Metcalf, 236 N.W.2d 573 (Mich. App. 1975); Thompson v. State, 451 P.2d 704 (Nev. 1969).

32. See ch. 5.

33. United States v. Clemons, 445 F.2d 711 (D.C. Cir. 1971); United States v. Hamilton, 420 F.2d 1292, 1295 (D.C. Cir. 1969); People v. Lawrence, 4 Cal. 3d 273, 481 P.2d 212, 93 Cal. Rptr. 204 (1971); Commonwealth v. Gibson, 357 Mass. 45, 255 N.E.2d 742 (1970).

34. People v. Anderson, 42 Mich. App. 10, 201 N.W.2d 299 (1972); Hernandez v. State, 490 P.2d 1245 (Nev. 1971).

35. Stovall v. Denno, 388 U.S. 293, 297 (1967).

36. See, e.g., People v. Covington, 47 Ill. 2d 198, 265 N.E.2d 112 (1970); Robertson v. State, 464 S.W.2d 15 (Mo. 1971); (encounter at police station); State v. Turner, 81 N.M. 571, 569 P.2d 720 (1970)(no right to counsel where confrontation inadvertent); United States v. Young, 44 C.M.R. 670 (AFCMR 1971).

37. See United States v. Brown, 461 F.2d 134 (D.C. Cir. 1972).

38. See, e.g., United States ex rel. Raggazzini v. Brierly, 321 F. Supp. 440 (W.D. Pa. 1970); People v. Winfrey, 11 Ill. App. 3d 164, 298 N.E.2d 413 (1973). How the Oklahoma works is set forth in ch. 1, n.16.

39. United States v. Wade, 388 U.S. 218, 237 (1967).

40. United States v. Clark, 499 F.2d 802 (4th Cir. 1974)(unreasonable delay may be waiver when suspect financially capable of hiring counsel); United States v. Ayers, 426 F.2d 524 (2d Cir. 1970).

41. See United States v. Thomas, 536 F.2d 1253 (8th Cir. 1976).

42. Rivers v. United States, 400 F.2d 935, 940 (5th Cir. 1968); People v. Banks, 2 Cal. 3d 127, 465 P.2d 263, 84 Cal. Rptr. 367 (1970).

43. Taylor v. Swenson, 458 F.2d 593 (9th Cir. 1972); People v. Banks, 2 Cal. 3d 127, 465 P.2d 263, 84 Cal. Rptr. 367 (1970).

44. People v. Keim, 8 Cal. App. 3d 776, 87 Cal. Rptr. 597 (1970) (half hour wait counsel insufficient to constitute waiver). For an example of waiver see Taylor v. Swenson, 458 F.2d 593 (8th Cir. 1973).

45. MODEL RULES FOR LAW ENFORCEMENT, EYEWITNESS IDENTIFICATION, Rule 404 (Approved Draft 1974).

46. United States v. Wade, 388 U.S. 218, 237 n.27 (1967)(emphasis in original).

47. Id. at 228, 236, 237.

48. Zamora v. Guam, 394 F.2d 815, 816 (9th Cir. 1968); State v. Griffin, 205 Kan. 370, 469 P.2d 417 (1970); Wright v. State, 46 Wis. 2d 75, 175 N.W.2d 646 (1970). But see People v. Thorne, 21 Mich. App. 478, 175 N.W.2d 527 (1970)(suspect was not effectively represented when the attorney who was present at the lineup did not know he was representing the suspect).

49. United States v. Wade, 388 U.S. 218, 230 (1967).

50. Id. at 236, 237 n.27.

51. But see State v. Lacoste, 256 La. 697, 237 So. 2d 871 (1970). The court approved of the use of an assistant district attorney as a lineup counsel when no objection to his competency was raised until the end of trial. The court also noted that the accused did not show that the assistant district attorney did not "properly . . . represent him at the lineup."

52. United States v. Wade, 388 U.S. 218, 237 (1967).

53. United States v. Kirby, 427 F.2d 610 (D.C. Cir. 1970); Sommerville v. State, 178 S.E.2d 162 (Ga. 1970).

54. United States v. Valez, 431 F.2d 622 (8th Cir. 1970); People v. Poyning, 393 N.Y.S.2d 888 (Sup. Ct. 1977).

55. Vernon v. State, 12 Md. App. 430, 278 A.2d 609 (1971). See also Redding v. State, 10 Md. App. 601, 272 A.2d 70 (1971)(counsel refused to attend).

56. See, e.g., United States v. Kirby, 427 F.2d 610 (D.C. Cir. 1970); Sommerville v. State, 178 S.E.2d 162 (Ca. 1970).

57. United States v. Queen, 435 F.2d 66 (D.C. Cir. 1970).

58. United States v. Kirby, 427 F.2d 610 (D.C. Cir. 1970); Sutton v. United States, 434 F.2d 462 (D.C. Cir. 1970).

59. State v. Lacoste, 256 La. 697, 237 So. 2d 871 (1970).

60. Marshall v. United States, 436 F.2d 155, 160 n.18 (D.C. Cir. 1970).

61. United States v. Austin, 46 C.M.R. 950 (ACMR 1972). A.B.A. Disciplinary Rules 5.101-10.

62. United States v. Rundle, 464 F.2d 1348 (3d Cir. 1972); United States v. Cole, 449 F.2d 194 (8th Cir. 1971).

Other cases that have considered the presence of counsel in the totality of circumstances to find no violation of due process of law are: Sutton v. United States, 434 F.2d 462 (D.C Cir. 1970); People v. Thomas, 3 Cal. App. 3d 859, 83 Cal. Rptr. 879 (1970); State v. Carpenter, 257 S.C. 162, 184 S.E.2d 715 (1971).

63. United States v. Allen, 408 F.2d 1287 (D.C. Cir. 1969).

64. See People v. Stearns, 14 Cal. App. 3d 178, 92 Cal. Rptr. 69 (1971).

65. ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Comment 432 (Proposed Official Draft 1975). See also id. at § 160.2(7)c and 160.4(5).

66. Id.

67. Ferguson v. Slayton, 340 F. Supp. 276 (W.D. Va. 1972).

68. United States v. Randolph, 443 F.2d 729 (D.C. Cir. 1970).

69. Vernon v. State, 12 Md. App. 430, 278 A.2d 609 (1971).

70. United States v. Jones, 477 F.2d 1213 (D.C. Cir. 1973).

71. Cf. Strazzella, Ineffective Identification Counsel: Cognizability Under the Exclusionary Rule, 48 TEMPLE L.Q. 241 (1975).

72. United States v. Hamilton, 469 F.2d 880 (9th Cir. 1972); United States v. Williams, 436 F.2d 1166 (9th Cir. 1970); Commonwealth v. Jones, 287 N.E.2d 599 (Mass. 1972); People ex rel. Blassick v. Callahan, 50 Ill. 2d 330, 279 N.E.2d 1 (1972); People v. Maire, 42 Mich. App. 32, 201 N.W.2d 318 (1972)(no abuse of discretion was found in trial judge ordering an in-court identification lineup to be conducted at preliminary hearing).

73. United States v. Wade, 388 U.S. 218, 240 (1967).

74. Id.

75. Israel, Criminal Procedure, The Burger Court, and the Legacy of the Warren Court, 75 MICH. L. REV. 1319, 1330 n.41 (1977).

76. People v. Stewart, 63 Nich. App. 6, 233 N.W.2d 870 (1975).

77. See, e.g., People v. Williams, 3 Cal. 3d 853, 478 P.2d 942, 92 Cal. Rptr. 6 (1971).

CHAPTER 3

FIFTH AMENDMENT

I. General

The primary concern of defense counsel and the prosecutor should not be when the individual is entitled to counsel, but whether a violation of the due process clause of the fifth amendment has occurred. Even if there has been a violation of the right to counsel, all testimony from the witness is not automatically precluded. The witness may make an in-court identification of the defendant provided an independent basis for the in-court identification exists. However, if there is a violation of due process of law the prosecution will be forbidden from introducing any of the witness's testimony.

II. Did the Lineup Procedure Violate Due Process?

The test for determining if a violation of due process has occurred is whether, considering the totality of circumstances, the pretrial identification was so unnecessarily suggestive that it created a substantial likelihood of irreparable mistaken identification at trial.[1] The remaining issue is how the trial court applies this test. In the United States[2] the prevailing rule encompasses a two step procedure which focuses on the reliability of the identification. The trial court must first examine the totality of circumstances to decide if the pretrial identification

was unnecessarily suggestive, even if counsel was present. Despite the pretrial identification being unnecessarily suggestive, the Court in Manson v. Brathwaite[3] held that if it possesses certain features of reliability, it may be admitted at the time of trial. The second step is to determine if the pretrial identification was so suggestive that it created a substantial likelihood of irreparable mistaken identification at the time of trial. If the pretrial identification was suggestive and would lead to a mistaken identification at the trial, the prosecution is forbidden from allowing that witness from making an in-court identification.

Prior to Brathwaite, some courts had applied a per se exclusionary rule if the pretrial identification was unnecessarily suggestive.[4] The Court in Brathwaite stated,

> The per se rule, however, goes too far since its application automatically and peremptorily, and without consideration of alleviating factors, keeps evidence from the jury that is reliable and relevant.[5]

A. The First Step: Unnecessarily Suggestivity

The question of whether the pretrial identification is unnecessarily suggestive must be divided into its component parts: Under the circumstances was the pretrial identification suggestive? If so, were the suggestive aspects of the identification unnecessary?[6] These questions were raised for the first time in Stovall v. Denno.

In Stovall, the accused, a Black man handcuffed to a police officer, was presented to the victim one day after major surgery to

save the victim's life. The confrontation took place in a hospital room containing, with the exception of the accused, only white people, five police officers and two hospital attendants. The victim was asked whether the accused "was the man"? The Supreme Court stated that in determining whether there had been a denial of due process, the applicable test was whether, judged by the totality of circumstances, the identification procedures were unnecessarily suggestive and conducive to irreparable mistaken identification.[7] The Court stated that in this instance no denial of due process occurred, for the necessity of the sole surviving witness identifying the suspect outweighed the highly suggestive circumstances.

The only case in which the Supreme Court has found a violation of due process is Foster v. California.[8] There the Court held that the lineup procedures employed were unnecessarily suggestive and remanded the case for further proceedings. The facts in Foster were that the police first placed the defendant in a lineup with two shorter, heavier men; only the defendant was wearing the clothes similar to those worn by the perpetrator of the offense. When these tactics failed to produce an identification, the police arranged a face-to-face confrontation between the victim and the accused. However, when the victim still could not make a positive identification, the police showed him the defendant in a five-man lineup in which the accused was the only person who had

also appeared in the first lineup. Because of the unnecessarily suggestive face-to-face confrontation, the case was remanded to the trial court.

A review of the cases dealing with due process of law indicates that the courts will find a denial of due process only if an outrageous violation of the individual's rights has occurred --that is, where flagrantly suggestive pretrial identification took place.

B. The Second Step: Conducivity to Irreparably Mistaken Identification

Even if the pretrial identification has been extremely and unnecessarily suggestive, the identification at the trial can be reliable. For example, if there had been a suggestive lineup involving either a person known to the witness or a person with distinctive physical characteristics, the interests of society would not be served by excluding the testimony of all witnesses. If the pretrial identification is shown to have been unnecessarily suggestive, but not conducive to unreliable identification at the trial, the exclusionary rule will not apply. It will only apply when the pretrial identification is substantially unreliable.

The following is a list of the factors the courts may consider in deciding whether testimony concerning the unnecessarily suggestive pretrial identification creates a substantial likelihood of irreparably mistaken identification at trial. Additionally,

the same factors can be applied in two other situations: reliability of suggestive pretrial identification and independent basis for an in-court identification when there has been a violation of the right to counsel at a pretrial identification. The factors mentioned in Neil v. Biggers[9] include: the witness's opportunity to view the actual perpetrator of the offense;[10] the witness's degree of attention;[11] the accuracy of the witness's prior description of the criminal;[12] the level of certainty demonstrated by the witness at the confrontation;[13] and the length of time between the crime and the confrontation.[14] Other factors that may be considered alone or in combination are listed below.

Supports or Negates a Finding of A Reliable Identification at the Time of Trial	Factors to be Considered
Negates a finding a reliable identification	Existence of a discrepancy between any pre-lineup description and the actual appearance of the defendant[15]
Negates finding a reliable identification	An identification of another person prior to the lineup[16]
Negates finding a reliable identification	Failure to identify the defendant on a prior occasion[17]
Ambiguous factor	Lapse of time between the criminal act and the lineup identification[18]
Ambiguous factor	Prior photographic identification from a large group of photographs[19]
Supports finding a reliable identification	The exercise of unusual care to make observation[20]
Supports finding a reliable identification	Prompt identification at first confrontation[21]
Supports finding a reliable identification	Fairness of lineup[22]
Supports finding a reliable identification	The presence of a perpetrator with distinctive charactertics[23]
Supports finding a reliable identification	Prior acquaintance of witness with suspect[24]
Ambiguous factor	Ability and training in identification procedures[25]

An example on how to employ these factors can be demonstrated by the facts in Biggers. Biggers was convicted of rape and complained that his in-court identification violated due process. The Court conceded that the pretrial identification was unnecessarily suggestive but under the circumstances it was not conducive to a substantial likelihood of mistaken identification made at the defendant's trial.

The victim was in her unlighted kitchen standing by the outside door when she was grabbed by a youth with a knife. A light was shining from the adjacent bedroom into the kitchen. When the victim screamed, her twelve year old daughter came out of the bedroom and also began to scream. The assailant directed the victim to "tell her [daughter] to shut up, or I'll kill you both." The victim complied and was then walked at knifepoint about two blocks along a railroad track, taken into a woods and raped. After the rape, the assailant ran off. The whole incident took between fifteen to thirty minutes.

The victim gave the police a general description of the assailant "as being fat and flabby with smooth skin, bushy hair and a youthful voice." She also testified on the collateral attack that she told the police that the assailant was between 16-18 years of age and was between 180 to 200 pounds. This was also corroborated by the police officer who still had his notes.

Over the next seven months, she viewed many corporeal

lineups in her home and at the police station. She was also shown between thirty and forty photographs. She did not make any identification but told the police that one of the photographs had features similar to the assailant. Seven months later she was presented with a showup with the defendant at the police station. The showup consisted of two detectives walking past the victim with the defendant. At the victim's request, the police directed the defendant to say "shut up or I'll kill you." At the trial it was not clear whether the victim identified him before or after he spoke. But she said that she was positive of the in-court identification.

In determining that the pretrial identification would not lead to a mistaken identification at trial, the Court relied on the opportunity of the witness to view the assailant and her degree of attention.

> She was with him under adequate artifical light in her home and later in the woods, faced him directly and intimately. She was no casual observer, but rather the victim of one of the most personally humiliating of all crimes.[26]

Her prior description was accurate as to age, height, weight, complexion, skin texture, build, and voice. As to the level of certainty, she had "no doubt" that the defendant was the person who raped her. The Court noted that the lapse of seven months would be a "serious negative factor"[27] but for the fact she made no previous identifications.

Assuming there was not a violation of the right to counsel

at the pretrial identification or that the initial seizure of the person was illegal and the prosecution wanted to ensure that the witness would be allowed to make an in-court identification. In determining that the in-court identification did not relate to the illegality but to the victim's recollection at the time of the crime, the trial court would rely on the same factors.

III. Proper Procedures for Conducting a Lineup

Identifications can occur under many circumstances; hospitals, on the street, station-house showups or lineups. Some suggestive procedures for avoiding suggestions at lineups are set forth below. If these procedures are followed by law enforcement officials, it would preclude many claims of violations of due process thus eliminating the time and effort involved in the criminal process in litigating these issues.

Fillers. There should be at least four fillers in the lineup. The fillers in the lineup should resemble the suspect. If the police cannot find proper fillers, photographic identifications should be used. Additionally, the fillers in a lineup should not be informed of whom the suspect is, otherwise their non-verbal communication may affect the witnesses. If the suspect is required to try on clothing or perform other acts, all should have to do so. In United States v. Rodriquez,[28] it was held that the use of police fillers is not impermissibly suggestive by itself, but is a practice to be avoided.

Witnesses. The witnesses should be separated before and after any identification. Allowing the witnesses to mingle together is not good practice, but it may not of itself amount to undue suggestiveness. The witnesses to the lineup should not be allowed to make an identification in the presence of one another otherwise tailoring by the witnesses might occur.[29]

People Who Conduct the Lineup. The individual conducting the lineup should be a police officer who is not involved with the specific investigation. Suggestions by the police may adversely affect the integrity of the lineup.

The Suspect. The police may require the defendant to wear distinctive clothing, speak for identification, or perform specific acts.[30] The police may also require the defendant to shave, trim hair, or even grow a beard prior to participating in a lineup.[31] The suspect or counsel should be allowed to determine the suspect's position in the lineup. In addition, the suspect or counsel should be permitted to change the positions after each viewing. Changes prevent tailoring by the witnesses.

IV. Summary

Those concerned with the criminal justice practice in the United States must be aware of the correlation of the rights of due process of law to eyewitness identification. It is this right that protects the innocent and prevents unreliable evidence from becoming before our courts. Due process is more important than the right to

counsel. Once a violation of due process has been established, the prosecution is forbidden from introducing any testimony of that witness. Since the right to counsel exists in only a small fraction of cases and due process applies to all confrontations, due process is a means of achieving the objectives of Wade. But the courts must be careful to insure that the factors that support the reliability of an in-court identification do not serve as a mechanical means of admitting eyewitness identification regardless of the suggestiveness of the pretrial identification. The courts would do well to follow the lead of Justice Stevens in Brathwaite[32] to find other evidence of guilt in addition to finding that the in-court identification was reliable.

CHAPTER 3

FOOTNOTES

1. Stovall v. Denno, 388 U.S. 293 (1967).
2. Haberstroh v. Montanye, 493 F.2d 483 (2d Cir. 1974); United States v. Henderson, 489 F.2d 802 (5th Cir. 1973); Souza v. Howard, 488 F.2d 462 (1st Cir. 1973); United States v. Hurt, 476 F.2d 735 (3d Cir. 1973); United States v. Gambrill, 449 F.2d 1148 (D.C. Cir. 1971); United States ex rel. Phipps v. Follette, 428 F.2d 912 (2d Cir. 1970). See also Neil v. Biggers, 409 U.S. 188 (1972).
3. U.S. (1977).
4. See, e.g., Smith v. Coiner, 473 F.2d 877, 882 (4th Cir.), cert. denied sub. nom. Wallace v. Smith, 414 U.S. 1115 (1973); State v. Grenier, 313 A.2d 661 (R.I. 1973).
5. Manson v. Brathwaite, U.S. (1977).
6. 388 U.S. 293 (1967).
7. Id. at
8. 394 U.S. 440 (1969).
9. 409 U.S. 188 (1972).

10. Neil v. Biggers, 409 U.S. 188, 199-200. See also Manson v. Brathwaite, U.S. (1977); United States ex rel. Lucas v. Regan, 503 F.2d 1 (2d Cir. 1974)(same five factors were decisive--prior misidentification did not render the in-court identification unreliable); Souza v. Howard, 488 F.2d 462 (1st Cir. 1973); United States v. Quick, 3 M.J. 70 (CMA 1977); United States v. Clifford, 48 C.M.R. 852 (ACMR 1974).

11. Neil v. Biggers, 409 U.S. 188, 199-200 (1972). See also Manson v. Brathwaite, U.S. (1977); United States ex rel. Lucas v. Regan, 503 F.2d 1 (2d Cir. 1974); Haberstroh v. Montanye. 493 F.2d 483 (2d Cir. 1973); United States v. Evans, 484 F.2d 1178 (2d Cir. 1973); United States v. Smith, 473 F.2d 1148 (D.C. Cir. 1972); People v. Owens, 54 Ill. 2d 286, 296 N.E.2d 728 (1973); People v. Jackson, 54 Ill. 2d 143, 295 N.E.2d 462 (1973); State v. McClooum, 211 Kan. 631, 507 P.2d 196 (1973); Rozza v. State, 58 Wis. 2d 434, 206 N.W.2d 606 (1973).

12. Neil v. Biggers, 409 U.S. 188, 199-200 (1972). See also Manson v. Brathwaite, U.S. (1977); United States ex rel. Gonzalez v. Zelker, 477 F.2d 797 (2d Cir. 1973)(prior descriptions reasonably accurate); United States ex rel. Rivera v. McKendrick, 474 F.2d 259 (2d Cir. 1973)(no discrepancy as negating suggestive identification as impermissibly suggestive); United States ex rel. Miller v.

LaValle, 320 F. Supp. 452 (E.D.N.Y. 1970)(inaccurate description as negating independent basis); State v. Sadler, 95 Idaho 524, 511 P.2d 806 (1973); Rozga v. State, 58 Wis. 2d 434, 206 N.W.2d 606 (1973)(prior correct identification).

13. Neil v. Biggers, 409 U.S. 188, 199-200 (1972). See also Manson v. Brathwaite, U.S. (1977); Haberstroh v. Montanye, 493 F.2d 483 (2d Cir. 1974); United States ex rel. Lucas v. Regan, 503 F.2d 1 (2d Cir. 1974); United States ex rel. Rivera v. McKendrick, 474 F.2d 259 (2d Cir. 1973); Goff v. State, 506 P.2d 585 (Okl. 1973); United States v. Holmes, 43 C.M.R. 430 (ACMR 1970).

14. Neil v. Biggers, 409 U.S. 188, 199-200 (1972). See also Manson v. Brathwaite, U.S. (1977); United States ex rel. Lucas v. Regan, 503 F.2d 1 (2d Cir. 1974); United States v. Evans, 484 F.2d 1178 (2d Cir. 1973); Souza v. Howard, 488 F.2d 462 (1st Cir. 1973)(one year as negative factor but outweighed by other factors).

15. United States ex rel. Lucas v. Regan, 503 F.2d 1 (2d Cir. 1974); (discrepancy not controlling in light of other factors); United States v. Fortune, 49 C.M.R. 616 (ACMR1974).

16. United States v. Wade, 388 U.S. 218, 241 (1967); Perryman v. State, 470 S.W.2d 703 (Tex. 1971).

17. United States v. Wade, 388 U.S. 218, 241 (1967).

18. Id.

19. Id. See also United States ex rel. Woods v. Rundle, 326 F. Supp. 592 (E.D. Pa. 1971); State v. Walters, 457 S.W.2d 817 (Mo. 1970).

20. United States v. Sera-Leyva, 433 F.2d 535 (D.C. Cir. 1970); People v. Jackson, 54 Ill. 2d 143, 295 N.E.2d 462 (1973).

21. People v. Covington, 47 Ill. 2d 198, 265 N.E.2d 112 (1970).

22. United States v. Evans, 484 F.2d 1178 (2d Cir. 1973); United States v. Longoria, 43 C.M.R. 676 (ACMR 1971).

23. State v. DeLuna, 107 Ariz. 534, 490 P.2d 8 (1971); People v. Bey, 42 Ill. 2d 139, 246 N.E.2d 287 (distinctive bump on the head).

24. United States v. Wade, 388 U.S. 218, 241 n.33 (1967); Stanley v. Cox, 486 F.2d 48 (4th Cir. 1973)(observed twice as robber of same premises); State v. Taylor, 109 Ariz. 518, 514 P.2d 439 (1973)(defendant seen on two prior occasions); People v. Mueller, 54 Ill. 2d 189, 295 N.E.2d 705 (1973); People v. Covington, 47 Ill. 2d 198, 265 N.E.2d 112 (1970); State v. Johnson, 457 S.W.2d 762 (Mo. 1970); State v. Kandzerski, 106 R.I. 1, 255 A.2d 154 (1969); State v. McLeod, 260 S.C. 445, 196 S.E.2d 645 (1973).

25. United States ex rel. Geralds v. Deegan, 292 F. Supp. 968 (S.D.N.Y. 1968). But see E. GARNER, THE COURT OF LAST RESORT 81-82 (1952)(reports inability of trained, experienced officers to estimate accurately height, weight, and age).

26. Neil v. Biggers, 409 U.S. 188, (1972).

27. Id.

28. 363 F. Supp. 499 (D.P.R. 1973).

29. Rudd v. Florida, 477 F.2d 805 (5th Cir. 1973). The court indicated that an identification of the defendant by two or more witnesses in the presence of each other does not per se amount to a denial of due process. See also United States v. Henderson, 489 F.2d 802 (5th Cir. 1973); United States v. Rodriquez, 363 F. Supp. 499 (D.P.R. 1973); Commonwealth v. Cofield, 305 N.E.2d 858 (Mass. 1974).

30. United States v. King, 433 F.2d 937 (9th Cir. 1970).

31. United States v. O'Neal, 349 F. Supp. 572 (N.D. Ohio 1972); United States v. Barnaby, 5 U.S.C.M.A. 63, 17 C.M.R. 63 (1954)(Quinn, C.J., dissenting).

CHAPTER 4

FOURTH AMENDMENT

I. Out-of-Court Identification Evidence

Although most of the cases dealing with eyewitness identification testimony focus on fifth and sixth amendment issues, this type of testimony can also raise significant fourth amendment issues.

In order for such testimony to be admissible the prosecution must establish that the initial seizure of the person resulting in eyewitness identification was legal. The seizure of the person must be distinguished from the viewing of the suspect by the witnesses. The viewing itself does not violate the fourth amendment since an individual's privacy does not extend to the viewing of one's outward appearance.[1] If the seizure did not comply with the fourth amendment, the prosecution must establish that the exclusionary rule does not apply during periods of illegal detention.[2]

A. Initial Seizure of the Person

There are numerous theories that may be used to justify the initial seizure of the person during which time an identification takes place.

1. Incident to Arrest

Some courts have held that an arrestee may be required

to stand in a lineup for an unrelated offense.[3] The rationale is that an arrested person has lost a substantial part of the right to privacy.[4] Practically, an arrestee is asked to stand in a lineup for unrelated offenses when the police need fillers with characteristics similar to the arrestee. Where the arrestee is detained for a crime with a modus operandi similar to those of some unsolved crimes, it is good investigative technique to place the arrestee in a lineup related to these unsolved crimes. Although some courts hold this is permissible,[5] others require a showing of reasonable suspicion that the arrested person committed the unsolved crimes.[6]

Rather than using the fact of arrest as a basis for a lineup, judicial authority might be obtained.[7] Prior to releasing a suspect on bail, the commissioner or magistrate may make an appearance in a lineup a condition of release.[8] Again this authority may be limited to crimes of a similar modus operandi or to unrelated offenses that the magistrate or commissioner has reason to suspect were committed by the arrestee.[9] The authority for this type of conditional release of an arrestee will be discussed below.

2. Investigatory Detention

When the suspect is not in custody and not subject to the control of the court, what is the basis for the seizure of the suspect? In some instances "investigatory detentions" conducted without probable cause for an arrest or judicial authority have

been allowed under specific circumstances. In Terry v. Ohio,[10] the Court stated that the police may stop a person on "reasonable suspicion." There is a division of authority on the question of whether more than a mere stop and frisk, such as transportation to the scene of a crime or the police station for a lineup, may be based on reasonable suspicion.[11] In Morales v. New York,[12] the Court noted in dictum that detention for questioning "goes beyond" Terry.

3. Judical Authority

In Davis v. Mississippi,[13] the Court held that the detentions and taking of fingerprints violated the fourth amendment. During a ten day period, at least twenty-four Blacks, including the defendant, were taken to the police station where they were questioned and fingerprinted. The Court speaking through Justice Brennan held that this "dragnet" operation to be illegal. But he said:

> We have no occasion in this case, however, to determine whether the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest.[14]

In response to this language some states by statute or court rule permit a judge to issue a subpoena authorizing the temporary detention for the purpose of obtaining identifying physical charactertistics.[15] The term "identifying physical characteristics" includes fingerprints, hair samples, blood specimens,

handwriting exemplars, voice samples, photographs, and lineups."[16] Rather than relying on statutory authority or rule of court, there is substantial authority that a court has inherent jurisdiction to order a suspect to appear for a lineup on reasonable suspicion.[17] But there are some jurisdictions that limit this authority to circumstances when reasonable suspicion exists that the suspect committed the unrelated crime.[18]

B. Application of Exclusionary Rule

While subpoenas for lineup appearances are becoming increasingly common, the police usually place persons in lineups while they are in post-custody arrest. Suppose that the arrest or detention was illegal. How does the legality of the detention affect the admissibility of testimony about an identification?

The courts are in disagreement over the threshold question of the application of the exclusionary rule to out-of-court identification during periods of illegal detention. One group of courts seems to take the view that the exclusionary rule should not apply automatically.[19] A second group of courts refuses to apply the exclusionary rule if the police made the arrest in good faith.[20] A third group of courts apply the exclusionary rule but alse recognize the attenuation exception to the rule.[21] In Johnson v. Louisiana,[22] the Court applied the attenuation exception to the rule. The police illegally arrested Johnson, but a magistrate committed him prior to the lineup. The Court

remarked that

> At the time of the lineup, the detention of the appellant was under the authority of this commitment. Consequently, the lineup was conducted not by "exploitation" of the challenged arrest but "by means sufficiently distinguishable to be purged of the primary taint."[22a]

A fourth group relies on Davis to hold that evidence of a lineup identification during a period of illegal detention is inadmissible.[23]

II. Subsequent In-Court Identification

If the out-of-court identification violates the fourth amendment, the witness may not make an in-court identification unless the prosecution demonstrates an independent basis.[24] In determining whether there is an independent basis, the same factors mentioned in chapter 3 may be considered.[25] Some cases suggest that an in-court identification is absolutely forbidden if the fourth amendment violation is willful.[26]

III. Summary

To avoid the fourth amendment pitfalls, the prosecutor must insure the legality of the initial seizure of the person. This can be done by educating the police or advising the police to call for assistance when help is needed. If nothing else is done, the police should be aware of the issue. If in a given case, there was no basis for the initial seizure of the person, the prosecutor must at least insure that the court will allow an in-court identification. At least when there has been no

intentional violation of the suspect's rights, the courts will allow the in-court identification if the prosecutor can establish an independent basis for the in-court identification which is sufficiently distinguishable from the initial illegality. Where the witness who made the pretrial identification is senile, forgetful, or absent, the prosecutor must argue for a limitation of the exclusionary rule. The best the prosecutor can hope for is an application of the independent basis rule. Other views are open to the defense.

Because of the reluctance of the Supreme Court to extend the exclusionary rule in other areas,[27] it is doubtful that it will be extended to exclude altogether eyewitness identification when there is an independent basis for such in-court identification.

CHAPTER 4

FOOTNOTES

1. Cf. United States v. Mara, 410 U.S. 19, 21 (1973)(no expectation of privacy as to handwriting exemplars); United States v. Dionisio, 410 U.S. 1, 14 (1973)(no expectation of privacy as to voice exemplars).

2. Nn. 15-17.

3. See, e.g., Johnson, v. Louisiana, 406 U.S. 356, 365 (1972) (person arrestee and arraigned placed in lineup); United States v. Perry, 504 F.2d 180 (D.C. Cir. 1974)(person arrested and arraigned on unrelated charge properly placed in lineup); United States v. Evans, 359 F.2d 776 (3d Cir. 1966)(incarcerated defendant compelled to appear in lineup on unrelated charge); State v. Fierro, 107 Ariz. 479, 489 P.2d 713 (1971) (dictum)(defendant may be placed in lineup while in jail for an unrelated crime); People v. Hodge, 526 P.2d 309 (Colo. 1974) (defendant peroperly detained on one charge properly placed in lineup on another charge); People v. Nelson, 40 Ill. 2d 146, 238 N.E.2d 378 (1968)(defendant incarcerated on another charge may be placed in lineup); People v. Hall, 24 Mich. App. 509, 180 N.W.2d 363 (1970).

4. See, e.g., United States v. Edwards, 415 U.S. 800, (1974); United States v. Robinson, 414 U.S. 218, (1973).

5. See, e.g., United States v. Allen, 408 F.2d 1287 (D.C. Cir. 1969); Rigney v. Hendrick, 355 F.2d 710 (3d Cir. 1965).

6. People v. Cantor, 36 N.Y.2d 106, 112-13, 324 N.E.2d 872, 877, 365 N.Y.S. 509, 516 (1975).

7. See, e.g., United States v. Anderson, 352 F. Supp. 33, 36 n. 7 (D.D.C. 1972), aff'd 490 F.2d 785 (D.C. Cir. 1974)(once defendant has been arrested he may be ordered to appear in lineup for unrelated crime even if on bail); Morris v. Crumlish, 239 F. Supp. 498 (E.D. Pa. 1965)(persons free on bail for unrelated crimes may be required to submit to possible identification by victim in crime for which he or she was not formally charged).

8. Id.

9. See, e.g., United States v. Allen, 408 F.2d 1287 (D.C. Cir. 1969) per curiam); Rigney v. Hendrick, 355 F.2d 710 (3d Cir. 1965).

10. 392 U.S. 1 (1968).

11. In re Carlos B., 86 Misc. 2d 160, 163-64, 382 N.Y.S.2d 655, 658-59 (Fam. Ct. 1976)(detention for purpose of showup reasonable); State v. Byers, 85 Wash. 2d 783, 539 P.2d 833 (1975) (en banc)(transporting suspect to scene of crime was a permissible detention). But see People v. Harris, 15 Cal. 3d 384, 540 P.2d 632, 124 Cal. Rptr. 536 (1975)(transporting suspect to scene of crime was an impermissible detention).

12. 396 U.S. 102 (1969).

13. 394 U.S. 721 (1969).

14. Id. at 727.

15. Ariz. Rev. Stat. Ann. § 13-1424 (Supp. 1973); Colo. Rev. Stat. Ann. Rules of Crim. P. 41.1 (1973); Idaho Code § 19-625 (Supp. 1975); Neb. Rev. Stat. § 29-3301-07 (Supp. 1974); N.C. Gen. Stat. § 77-13-37 (Supp. 1975).

16. Id.

17. Doss v. United States, 431 F.2d 601 (9th Cir. 1970); Wise v. Murphy, 275 A.2d 205 (D.C.C.A. 1971). But see In re Melvin, 546 F.2d 1 (1st Cir. 1976).

18. N.11.

19. United States v. Young, 512 F.2d 321 (4th Cir. 1975); State v. Crider, 341 A.2d 1 (Me. 1975)(initial intrusion into the hallway was illegal); People v. Brown, 15 Ill. App. 3d 606, 304 N.E. 2d 662 (1973); Yancey v. State, 48 Ala. App. 476, 265 So. 2d 918 (1972); Metallo v. State, 10 Md. App. 76, 267 A.2d 804 (1970); State v. Brown, 50 Wis. 2d 565, 185 N.W.2d 323 (1971).

20. United States v. Kilgen, 445 F.2d 287 (5th Cir. 1971).

21. Crews v. United States, 20 Crim. L. Rptr. 2501 (D.C. Cir., Feb. 16, 1977); Rozga v. State, 58 Wis. 2d 434, 206 N.W.2d 606 (1973).

22. 406 U.S. 356 (1972).

22a. Id. at 365.

23. United States v. Barragan, 504 F.2d 1155 (9th Cir. 1974)(pre-trial and in-court identification suppressed as the result of illegal detention); People v. Bean, 257 N.E.2d 562 (Ill. App. 1970)(both pretrial and in-court identification because directly related to illegal arrest); State v. Accor, 175 S.E.2d 583 (N.C. 1970).

24. Hamrick v. Wainwright, 465 F.2d 940(5th Cir. 1972); Wright v. State, 528 S.W.2d 905 (Ark. 1975).

25. Ch. 3, nn.10-21.

26. United States v. Edmons, 432 F.2d 577, 584 (2d Cir. 1970).

CHAPTER 5

MISCELLANEOUS IDENTIFICATION TESTIMONY PROBLEMS

I. Statutory Attacks on Out-of-Court Identification Evidence

In McNabb v. United States,[1] the Supreme Court excluded a confession obtained during a period of unnecessary delay violating Federal Rule of Criminal Procedure 5(a), guaranteeing prompt presentation to a magistrate. The Court reaffirmed the doctrine in Mallory v. United States.[2] Several states have statutes or rules of criminal procedure comparable to Rule 5(a). Several of these jurisdictions have taken the position that an out-of-court identification obtained during a period of unnecessary delay is inadmissible at least if the suspect lacked counsel at the confrontation.[3] There is also federal authority for adopting this view.[4] However, some suggest that an investigatory lineup prior to presentment is legitimate and that the delay necessary to arranging the lineup does not render the identification evidence inadmissible.[5]

Note that the delay can also be used to bolster the argument that the police were purposefully attempting to defer the formal initiation of criminal proceedings to deprive the suspect of the right to counsel under Wade as limited by Kirby.[6]

II. Right to Counsel's Presence During the Interview of the Witness by the Police

Two bases for the Wade-Gilbert decisions are to allow counsel to reconstruct what happened at lineups and to detect any suggestive practices utilized at lineups. The periods before and after the lineup are also crucial because suggestions during these periods often influence the identification. These suggestions might be unintentional ones made when witnesses talk to one another, or they might be intentional ones by law enforcement officials. Nevertheless, many courts have indicated that the defendant does not have a right to have counsel present at the interviews when the witness is asked who committed the crime.[7] However, the Fifth Circuit Court of Appeals in United States v. Banks[8] stated:

> We emphasize that similar procedures [requests for response of witness without the presence of counsel] might require a different result if counsel is denied the opportunity to reconstruct all elements of the lineup and related agent-witness interviews, or if any witness indicates suggestive statements or actions by prosecution agents while counsel for the accused is excluded. Clandestine conferences may not be used for the purpose of evading the clear constitutional mandate of Wade and Gilbert.[9]

III. Right to Lineup to Test the Witness's Identification of the Defendant

With the increased use of photographic identifications rather than corporeal identifications, many defense counsel are requesting to have the witness's identification of the defendant in a photographic display tested at a corporeal lineup. Most

courts have held that the defendant has no right to such a test. Generally, the issue is left to the trial judge because of many factors pro and con.

> Without any attempt at being exhaustive, we think some relevant factors are the length of time between the crime or arrest and the request, the possibility that the defendant may have altered his appearance (as was at least attempted here), the extent of inconvenience to prosecution witnesses, the possibility that revealing the identity of the prosecution witnesses will subject them to intimidation, the propriety used by the prosecution, and the degree of doubt concerning the identification.[11]

There is some authority supporting the defendant's right to a corporeal lineup.[12] The California Supreme Court has held that the defendant has a right to have a witness's testimony tested at a lineup when there has been a timely request and the identification is a "material issue and there exists a reasonable likelihood of mistaken identification which a lineup would tend to resolve."[13]

IV. Right to Have the Defendant Sit Among the Spectators at Trial

Because of the increasing use of pretrial photographic identifications, the witness may not have personally confronted and identified the defendant prior to trial. The prosecution will probably attempt to have the witness identify the defendant in court. As a tactical manuever defense counsel may want the defendant to sit with the spectators at trial. However, the

defense counsel should not direct the defendant to sit with the spectators or have a third party sit at counsel table for the defendant without the permission of the trial court judge, whose decision on the matter is discretionary.[14] There is no right to have the defendant sit among the spectators at trial.

V. Right to Present Expert Testimony

Because of the variables involved in eyewitness identification, the testimony of a psychologist or psychiatrist familar with the area is helpful.[15] However, the courts have indicated that their testimony should be about only matters not "within the common experience of men."[16] Thus, if expert testimony is not admissible, defense counsel must resort to the use of examples in his or her argument about the unreliability of eyewitness identification: for instances, the suggestiveness of a lineup; the impact of intelligence on recollection;[17] the impact of stress and perceptual readiness;[18] perceptual selectivity;[19] and the time factor and its impact on memory.[20]

The issue of expert testimony also arises when there has been photographs of a crime, usually film of a bank robbery. If the proponent of the evidence can convince the judge outside the presence of the jury of the need for expert testimony to prove or disprove the similarity between the film and photographs of the at the time of the crime, the testimony concerning the photographs is admissible.[21]

VI. Cautionary Instructions About Eyewitness Identification Testimony

Most courts subscribe to the view that the trial judge is not required to instruct on the uncertainty and unreliability of eyewitness identification,[22] nor is he or she required to instruct that identification testimony should be scrutinized with extreme care.[23] Also a requested instruction that no class of testimony is more unreliable than that of eyewitness identification may be granted or denied at the trial judge's discretion.[24] It is sufficient for the trial judge to instruct the jury simply on the credibility of witnesses and the government's burden of proof.[25]

VII. Summary

The expansion of constitutional rights in some areas set forth in this chapter are doubtful. The Warren Court thought that the investigatory stage of the criminal prosecution was the area in the criminal process most in need of supervision, and that this should be done by the federal courts. The Burger Court is of a different mind. The Warren Court recognized that its decisions would not completely eliminate the risks of conviction of the innocent, but it certainly sought to minimize those risks. The Wade-Gilbert-Stovall decisions were steps in that direction. But the underpinnings of these decisions have been rejected. Thus, the Burger Court is not likely to expand constitutional rights to eliminate the risks that are still present in the area of eyewitness identification. Unless defense counsels are able to convince

the states to adopt more stringent rules than are constitutionally required,[26] elimination of these risks will have to be achieved by other means.

Even though the right to counsel attaches in a small fraction of confrontations, the objectives of Wade continue to be achieved. Many police departments have followed the advice of Wade and adopted regulations to "eliminate the risks of abuse and unintentional suggestion at lineup procedures and the impediments of meaningful confrontation at trial may . . . remove the basis for the stage as 'critical.'"[27] Additionally, counsel may rely on other tools that are still available, carefully constructed cross-examination, instructions, and arguments that are aiding the jury in overcoming the unfairness of eyewitness identification.

CHAPTER 5

FOOTNOTES

1. 318 U.S. 332 (1943).
2. 354 U.S. 499 (1957).
3. See, e.g., People v. Williams, 137 Cal. Rptr. 70 (App. 1977); Commonwealth v. Futch, 447 Pa. 389, 290 A.2d 417 (1972).
4. Frazier v. United States, 419 F.2d 1161 (D.C. Cir. 1969).
5. People v. Blake, 35 N.Y.2d 331, 361 N.Y.S.2d 881, 320 N.E.2d 325 (1974).
6. See ch. 2.
7. See, e.g., United States v. Wilcox, 507 F.2d 364 (4th Cir. 1974); Nance v. State, 7 Md. App. 433, 256 A.2d 377 (1969); But see People v. Williams, 3 Cal. 3d 853, 478 P.2d 942, 92 Cal. Rptr. 6 (1971).
8. 485 F.2d 545 (5th Cir. 1973).
9. Id. at 548-59.
10. United States v. Zane, 495 F.2d 683 (2d Cir. 1974); United States v. McGhee, 488 F.2d 781 (5th Cir. 1974); United States v. White, 482 F.2d 485 (4th Cir. 1973); United States v. Furtney, 454 F.2d 1 (3d Cir. 1972); United States v. Kennecy, 450 F.2d 1089 (9th Cir. 1971); People v. Kimmons, 6 Ill. App. 3d 565, 286 N.E.2d 115 (1972); Dunlap v. State, 212 Kan. 822, 512 P.2d 146 (1972); State v. Boettcher, 338 So. 2d 1356 (La. 1976)

(discretionary with trial judge); Franklin v. State, 18 Md. App. 65, 308 A.2d 752, 763 (1973); Eeople v. Maire, 42 Mich. App. 32, 201 N.W.2d 318, 327 (1972).

11. United States v. Ravich, 421 F.2d 1196, 1203 (2d Cir. 1970).

12. United States v. Caldwell, 481 F.2d 487 (D.C. Cir. 1973).

13. Evans v. Superior Court, 11 Cal. 3d 617, 625, 114 Cal. Rptr. 121, 126, 522 P.2d 681, 686 (1974). However, in Commonwealth v. Wilder, 337 A.2d 564 (Pa. 1975), when the defendant made repeated requests for a confrontation with the victim in the hospital, who subsequently died, the court held that the failure to grant the request was error absent a clear showing that the victim was mentally or physically unable to cooperate.

14. See note 10, supra.

15. Levine & Tapp, The Psychology of Criminal Identification: The Gap from Wade to Kirby, 121 U. PA. L. REV. 1079 (1973).

16. Commonwealth v. Jones, 287 N.E.2d 599, 602 (Mass. 1972). See also United States v. Brown, 540 F.2d 1048 (10th Cir. 1976); United States v. Amaral, 488 F.2d 1148 (9th Cir. 1973).

17. See ch. 1.

18. Levine & Tapp, The Psychology of Criminal Identification: The Gap from Wade to Kirby, 121 U. PA. L. REV. 1079, 1097-99 (1973).

19. Id. at 1096-97.

20. Id. at 1099-1100.

21. See, e.g., United States v. Burke, 506 F.2d 1165 (9th Cir. (1974). Some courts have not required such a side bar showing. See United States v. Snow, 552 F.2d 165 (6th Cir. 1977); United States v. Green, 525 F.2d 386 (8th Cir. 1975).

22. United States v. Barber, 442 F.2d 517 (3d Cir. 1971) and cases cited therein.

23. Id.

24. Id.

25. Id. at 528. For a set of model instructions, see United States v. Telfaire, 469 F.2d 552, 558 (D.C. Cir. 1972).

26. Even where the state and federal constitutions are similar or identical, some states have adopted more stringent standards. Brennan, State Constitutions and the Protection of Individual Rights, 90 HARV. L. REV. 489 (1977); Howard, State Courts and Constitutional Rights in the Day of the Burger Court, 62 VA. L. REV. 873 (1976).

27. United States v. Wade, 388 U.S. 218, 239 (1967).

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