The Demise of Procedural Protections in Laywitness Identifications in Federal Court: Who Is the Culprit?

John F. Decker  
*Assoc. Prof. of Law, DePaul University*

Richard J. Moriarty  
*Staff Attorney, Prairie State Legal Services, Rockford, IL*

Edward Albert  
*Assist. Counsel, State of NY Joint Bar Assoc.*

Follow this and additional works at: [http://lawecommons.luc.edu/luclj](http://lawecommons.luc.edu/luclj)

Part of the [Fourteenth Amendment Commons](http://fourteenthamendmentcommons.luc.edu/

**Recommended Citation**

Available at: [http://lawecommons.luc.edu/luclj/vol9/iss2/3](http://lawecommons.luc.edu/luclj/vol9/iss2/3)
The Demise of Procedural Protections in Laywitness Identifications in Federal Court: Who is the Culprit?

JOHN F. DECKER*
RICHARD J. MORIARTY**
EDWARD ALBERT***

INTRODUCTION

Four days after the tenth anniversary of the United States Supreme Court's landmark enunciation of procedural protections in laywitness criminal identification procedures,1 the Court decided Manson v. Brathwaite,2 indicating more emphatically than in any intervening opinion its proclivity to abandon these protections.

The Supreme Court first directly confronted the troublesome problem of identifying participants in criminal activity in 1967 in United States v. Wade,3 Gilbert v. California,4 and Stovall v. Denno.5 The Court, using the sixth and fourteenth amendments,6 sought to insure fairness and accuracy in the various identification procedures utilized by law enforcement authorities by requiring the presence of counsel7 and by demanding the unbiased administration of such procedures.8 While the rules created by this trilogy were by no means unqualified, the Court in 1967 could not have anticipated how subsequent opinions, including those of a later composition of the Court itself,9 would so effectively demonstrate how exceptions

---

* Associate Professor of Law, DePaul University College of Law, Chicago. B.A., Loras College, 1966; B.A., University of Iowa, 1967; J.D., Creighton University, 1970; LL.M., New York University, 1971. Member, California Bar.
5. 388 U.S. 293 (1967).
can consume the initial rules. As a result of this development, it is imperative that lawyers understand not only the 1967 rules, but also the subtleties which have been devised by the courts.

**FORMS OF EYEWITNESS AND EARWITNESS IDENTIFICATION**

Law enforcement agencies may utilize one or more identification procedures to determine whether a witness or victim of criminal activity is able to identify the activity's participants. The lineup is the best known pre-trial procedure, and the one preferred by the courts. In a lineup, several individuals of similar physical, racial, sexual, tonsorial, and cosmetic characteristics initially are placed in a row facing the witnesses or victims. During the course of the lineup, the individual may be asked to move or act in certain ways, to put on or take off articles of clothing, or to speak certain words in order that his or her voice might be heard, all of which is intended to facilitate identification by the witnesses or victims.

Identification procedures need not be as structured as a formal lineup. A witness or victim may have an opportunity to view several individuals in a group display, such as by observing through a one-way mirror several persons walking about, sitting, or standing in a room. This method is useful to law enforcement agencies when it is believed that the persons to be included in an identification procedure may not cooperate in a formal lineup.

The showup is another method of pre-trial identification involving personal confrontation, and the one perhaps least preferred by the courts. In a showup, one person is displayed to a witness or victim of a crime. As with the lineup, the person may be asked to move or act in certain ways, to put on or take off articles of clothing, or to speak for purposes of voice identification.

Normally, pre-trial identification procedures involving personal confrontation occur at a police station or jail facility. The practice has also developed of having witnesses appear as part of the audience at a defendant's arraignment on other charges. This may

---

10. See, e.g., United States v. Gidley, 527 F.2d 1345 (5th Cir.), cert. denied, 429 U.S. 841 (1976); United States v. Scott, 518 F.2d 261 (6th Cir. 1975) (although use of a less preferred procedure is mitigated by defendant's uncooperativeness and representation by counsel); United States v. Boston, 508 F.2d 1171 (2d Cir. 1974), cert. denied, 421 U.S. 1001 (1975) (though not required, lineup preferred and recommended to prosecutors to avoid needless argument).


approximate a group display or a showup depending on how many of the persons present resemble the witness’ description. Of course, this practice clearly cannot be compared with a lineup due to such suggestive features as the witness’ awareness of the identity of the persons viewed, their status as defendants in the criminal justice system, and the possibility that the witness may presume a connection with the criminal activity at issue because of that status.

A witness may also identify a person in a courtroom during testimony under oath and subject to cross-examination. This procedure is similar to a showup since the layout of the typical courtroom, with the defendant and defense counsel at one table and the prosecutor and investigating officer at another, is well known to most of the American public. Here again bias is possible because a witness might surmise that the law enforcement agencies possess evidence that the person sitting next to defense counsel is the participant in the criminal activity at issue from the very fact that he or she has been brought to trial on the matter. This in-court identification procedure may follow a pre-trial identification procedure at which the witness may have viewed and identified the defendant as a participant.

Personal confrontation is not required in pre-trial identifications. A witness or victim of criminal activity may attempt to identify participants through a photo display in which the witness is shown a few or several hundred photographs of individuals of, hopefully, similar characteristics, with the quality of the photographs displaying no noticeable differences or any indication of the identity or status of the persons shown.

As with personal confrontations, a witness or victim of criminal activity may see a single photograph for purposes of determining whether the person shown in the picture was a participant in the crime. This procedure is also viewed with disfavor by the courts due to its inherent suggestiveness.14

---

14. See, e.g., Israel v. Odom, 521 F.2d 1370 (7th Cir. 1975). Identification of participants in criminal activity through visual observation is not the only method of identification for evidentiary purposes. What has come to be known as “scientific evidence”—e.g., fingerprint and spectrographic analysis, expert testimony on ballistic and paraffin tests, blood, skin, hair and clothing fiber specimens, and other physical evidence of the crime—can all assist in determining who the participants might be. However, all of these subjects are beyond the scope of this article. See, e.g., J. Richardson, Modern Scientific Evidence: Civil and Criminal (2d ed. 1974).
One other type of identification is non-expert earwitness identification. The methods of earwitness identification include: listening to the voices of persons involved in an eyewitness identification procedure, whether arranged by the authorities or at an arraignment; pre-trial listening to a tape recording of a sample of one or more persons speaking certain words, or listening to such a sample during testimony at trial.

CONSTITUTIONAL LIMITATIONS ON IDENTIFICATION PROCEDURES

While recognizing the need for identification procedures, the Court's attention has focused primarily upon their abuse. The 1967 trilogy provided two distinct constitutional grounds for attacking identification procedures: (1) the absence of counsel at certain types of lineups denied the defendant the opportunity for meaningful cross-examination of witnesses and effective assistance at trial; and (2) the identification procedure utilized was so unnecessarily suggestive as to be conducive to an irreparably mistaken identification and therefore violative of the defendant's right to due process of law, regardless of the presence or absence of counsel.

INAPPLICABILITY OF THE PRIVILEGE AGAINST SELF-INCrimINATION

It is a well-established although perhaps questionable principle that the fifth amendment right against self-incrimination extends only to evidence of a testimonial or communicative nature. While

18. U.S. Const. amend. V.
19. United States v. Wade, 388 U.S. 218, 221 (1967); Schmerber v. California, 384 U.S. 757, 761 (1966). Though the distinction between this type of evidence and "non-communicative" evidence may make sense in the context of physical features which are public by nature, such as one's face or fingerprints, it becomes more difficult to justify when potential defendants are required to write or speak certain words for purposes of determining whether or not they have participated in criminal activity. Professor Leonard Levy, who has brought his insightful writing abilities to bear on the meaning of the fifth amendment right against self-incrimination, has noted that the formulation of the words of that guarantee are quite broad and protect "against more than just compulsory self-incrimination or even disclosures merely tending to provide a link in a chain of circumstantial evidence that might be the basis of a prosecution." L. Levy, The Right Against Self-Incrimination: History and Judicial History, in Judgments: Essays on American Constitutional History 265, 273 (L. Levy ed. 1972). The fact that one's handwriting and voice may be exposed quite often by personal choice in public should not affect the application of the right to disclosure of these features. If such analysis were the guiding principle, a person could be interrogated without the protection of the fifth amendment whenever offhand comments regarding a subject matter are repeated, for example in a newspaper, or when a person such as a public speaker mentions a subject of interest to the authorities. That the person is, with regard to handwrit-
compelling a person to disclose knowledge which he might possess is thereby barred, forcing a person to exhibit physical characteristics is not.\textsuperscript{20} Thus, with respect to the subjects under discussion here, a person can be compelled to appear in a lineup,\textsuperscript{21} utter words for identification purposes,\textsuperscript{22} or wear certain clothes in a lineup,\textsuperscript{23} without engendering fifth amendment violations:

**SIXTH AMENDMENT RIGHT TO COUNSEL**

In *United States v. Wade*\textsuperscript{24} and *Gilbert v. California*,\textsuperscript{25} the Supreme Court extended to defendants, by way of the sixth amendment,\textsuperscript{26} a right to the presence of counsel at any in-court or out-of-court identifications.\textsuperscript{27} The Court also held that testimony must be *per se* excluded where it concerns a post-indictment out-of-court identification made while counsel was absent.\textsuperscript{28} In so holding, the Court indicated that no other considerations or factors prevent this exclusion; the absence of counsel automatically taints the procedure.\textsuperscript{29} Thus, the Court noted it would be irrelevant that the witness could have identified the defendant regardless of counsel's presence. An objection to the absence of counsel at the out-of-court identifica-

---

\textsuperscript{21} See, e.g., Hernandez v. Schneckloth, 425 F.2d 89 (9th Cir. 1970).
\textsuperscript{22} United States v. Dionisio, 410 U.S. 1 (1973).
\textsuperscript{24} 388 U.S. 218 (1967).
\textsuperscript{25} 388 U.S. 263 (1967).
\textsuperscript{26} U.S. CONST. amend. VI.
\textsuperscript{29} Gilbert v. California, 388 U.S. 263, 273 (1967): "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."

Two doctrines have developed which make this *per se* designation questionable. Several courts have found an "independent basis" for an in-court identification even though a *Wade* or *Gilbert* violation occurred at a prior out-of-court identification. See, e.g., United States v. Pigg, 471 F.2d 843 (7th Cir.), *cert. denied*, 411 U.S. 970 (1973); United States v. Singleton, 361 F. Supp. 346 (E.D. Pa. 1973). Other courts have found such violations to be "harmless error." See, e.g., Holland v. Perini, 512 F.2d 99 (6th Cir.), *cert. denied*, 423 U.S. 934 (1975).
tion is deemed waived if not timely raised.\textsuperscript{30} However, such admission of testimony may be held to be harmless error even if the absence of counsel is properly noted and the testimony improperly admitted.\textsuperscript{31} In fact, the vast number of affirmances based on “harmless error” lead to the conclusion that the words “\textit{per se}” in this context have become meaningless.\textsuperscript{32}

The \textit{Wade} Court indicated a denial of due process and of the right to counsel\textsuperscript{33} occurs where the defendant does not have counsel at an in-court identification and has not knowingly waived this right.\textsuperscript{34} In this situation, evidence of the in-court identification should be excluded. Similarly, if the defendant had counsel present at the in-court identification but not at an out-of-court identification prior to trial, the former is not admissible unless it is based upon observations other than the out-of-court identification which had been tainted by lack of counsel.\textsuperscript{35} This “qualified” exclusionary rule arose because mere suppression of the witness’ testimony as to the out-of-court identification was thought to be insufficient to eliminate the effect that the tainted out-of-court identification would have in crystallizing the witness’ impressions\textsuperscript{36} and influencing the in-court identification. According to this rationale, it is clear that testimony relating to an illegal out-of-court procedure cannot be cured by a second out-of-court identification with counsel present. Therefore, any such second lineup would be viewed under the same rules as a subsequent in-court identification.\textsuperscript{37}

In 1967, the Supreme Court believed it necessary to extend the protection of counsel to those faced with identification procedures because “identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even cru-

\textsuperscript{30} See, e.g., Guam v. Cruz, 415 F.2d 336 (9th Cir. 1969). \textit{See also} Cooper v. Picard, 428 F.2d 1351 (1st Cir. 1970).


\textsuperscript{33} See notes 81 through 88 \textit{infra} and accompanying text.

\textsuperscript{34} See Coleman v. Alabama, 399 U.S. 1, 9-10 (1970).

\textsuperscript{35} United States v. Wade, 388 U.S. 218, 239-41 (1967); Clemons v. United States, 408 F.2d 1230 (D.C. Cir. 1968).


cially, derogate from a fair trial." Specifically, the Court was concerned that "the annals of criminal law are rife with instances of mistaken identification," that a "major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification." Furthermore, the Court noted it is "a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on," and that "the defense can seldom reconstruct the manner and mode of lineup identification for judge or jury at trial." Moreover, the prejudice suffered at such identification procedures unduly compels defendants to forego their fifth amendment rights and take the stand to rebut the government's case. Of course, the problems which prompted the Court to extend the guarantee of counsel are inherent in all corporeal identifications, whether lineups or showups, both before a formal charge has issued and after. Notwithstanding these underlying reasons, a reconstituted, though perhaps less sensitive Supreme Court has subsequently held that certain identification procedures are not subject to the Wade-Gilbert mandate.

Prior to 1972, the federal courts of appeals disagreed regarding the point at which right to counsel commences. The Supreme Court's decision in Kirby v. Illinois settled the conflict. A plurality of the Court held that the right attaches at the "initiation of adversary judicial criminal proceedings." Although one might logically assume this occurs when a person is arrested, otherwise placed in custody, or when a criminal complaint is filed, the Kirby Court

39. Id.
40. Id.
41. Id. at 229, quoting Williams & Hammelmann, Identification Parades, 1963 CRIM. L. REV. 479, 482.
43. Id. at 231.
46. Id.
47. Id. at 689.
48. See, e.g., Robinson v. Zelker, 468 F.2d 159 (2d Cir. 1972), cert. denied, 411 U.S. 939 (1973), which, prior to Kirby, held the issuance of an arrest warrant to be the initiation of adversary criminal proceedings. See United States v. Duvall, 537 F.2d 15 (2d Cir.), cert. denied, 426 U.S. 950 (1976). See also Grano, Kirby, Biggers, and Ash: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent? 72 Mich. L. Rev. 719, 788 (1974) for an assertion that "a criminal prosecution commences at least with the preliminary arraignment when a formal complaint is filed in court against the accused."
considered only the filing of "formal charges" to constitute such a commencement, i.e., an indictment, information, or whatever other procedure is utilized to begin formal criminal proceedings within a state.\(^9\) While ignoring the rationale of *Wade* and *Gilbert*, the Kirby Court ostensibly adhered to precedent by noting that the defendants in *Wade* and *Gilbert* had been indicted,\(^{50}\) even though this fact does not appear to have been relevant to the Court's decisions in 1967.

No *Wade-Gilbert* right to counsel attaches, therefore, at on-the-scene\(^{51}\) or accidental\(^{52}\) confrontations occurring prior to the filing of "formal charges."\(^{53}\) Ironically, two short-term advantages result from the Kirby holding's pressure on law enforcement agencies to conduct identification procedures promptly after arrest if they are to circumvent the requirements of the 1967 trilogy. First, expeditious confrontations may produce more accurate identifications due to the relatively fresh recollection of prospective witnesses. Second, speedier releases of innocent persons from pre-trial detention may result. Of course, a positive identification of a defendant as a participant in criminal activity could produce a longer detention period, which is problematic where the identification procedures are suggestive in nature and that fact is concealed.

**Right to Counsel at Other Personal and Non-Personal Confrontations**

The *Wade* Court recognized that the judicial system was authorized to

scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the


\(^{50}\) Id. at 414.


\(^{52}\) See, e.g., United States v. Gentile, 530 F.2d 461 (2d Cir.), cert. denied, 426 U.S. 936 (1976) (confrontation outside courtroom not anticipated or arranged by prosecutor in any way); Allen v. Moore, 453 F.2d 970 (1st Cir.), cert. denied, 406 U.S. 969 (1972) (testimony of chance meeting in street admitted); United States v. Jackson, 448 F.2d 963 (9th Cir. 1971), cert. denied, 405 U.S. 924 (1972) (a spontaneous confrontation outside of the hearing on the motion to suppress evidence).

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. 54

Thus, at first glance it appears that the strict rules regarding the right to counsel at lineups might apply to other corporeal identifications occurring out of court. However, it has been held that no such right exists at accidental, 55 spontaneous, 56 or on-the-scene 57 confrontations.

An identification for use in a criminal prosecution might be arranged by a private individual. For example, a confrontation might take place in a retail store when the owner or agent apprehends a suspected shoplifter and arranges for customers and employees to verify that suspicion. In the absence of state action, the courts are reluctant to require the presence of counsel at an identification confrontation. 58 This is undoubtedly the basis for the general consensus that there is no right to counsel at accidental confrontations. 59

Photographic displays have always been considered essential police investigative tools. 60 They serve not only to identify the perpetrators of crime, but also to exonerate the innocent. In light of Wade, a question arises as to the effect these procedures have on the defendant's right to a fair trial.

The protections enunciated by Wade and Gilbert, 61 presumably also relevant to photo identifications, were not extended to photographic situations by a 1973 Supreme Court decision. In United States v. Ash, 62 a six justice majority held that there is no right to

---

56. See, e.g., United States v. Colclough, 549 F.2d 937 (4th Cir. 1977); United States v. Jackson, 448 F.2d 963 (9th Cir. 1971), cert. denied, 405 U.S. 924 (1972).
57. See, e.g., Russell v. United States, 408 F.2d 1280 (D.C. Cir.), cert. denied, 395 U.S. 928 (1969). "While the language of Wade would thus seem to encompass prompt on-the-scene identifications, they do not fall within the holdings of Wade or its companion case, Gilbert v. California." Id. at 1283. See also United States v. Hines, 455 F.2d 1317 (D.C. Cir.), cert. denied, 406 U.S. 929 (1972) and 406 U.S. 975 (1972); United States v. Wilson, 435 F.2d 403 (D.C. Cir. 1970); United States v. Sanchez, 422 F.2d 1198 (2d Cir. 1970); Solomon v. United States, 408 F.2d 1306 (D.C. Cir. 1969). These decisions rest on the premise that the less time there is between the crime and the viewing, the more reliable the ensuing identification becomes.
58. See, e.g., United States v. Venere, 416 F.2d 144 (5th Cir. 1969).
59. See notes 52 & 55 supra.
60. See, e.g., C. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 600 (1970).
61. See notes 15 & 16 supra.
counsel at post-indictment photographic displays. The majority indicated that a photographic identification was a “non-critical” stage because defects may be remedied at trial; it was thus outside the scope of Wade-Gilbert. This holding was based on the belief that photographic displays are not trial-like confrontations and therefore application of the sixth amendment right to counsel would be contrary to the amendment’s historical purpose. The display was equated to the prosecution’s right to interview witnesses, a right also possessed by the defense counsel.

The Court did not consider why the Wade and Gilbert Courts implicitly and necessarily rejected classifying identification procedures as part of the prosecutor’s “trial preparation.” According to the Ash majority, the right to counsel was designed to protect only the defendant, and not witnesses, from falling into traps. The fallacy of this position lies in its implication that defendants have an active role in identification procedures. The truth is that defendants are passive participants—merely presenting their person for display. Had the Wade and Gilbert Courts accepted this premise of active participation, the fifth amendment arguments would have been viable.

The focus of concern in Wade and Gilbert was in fact the relationship between witnesses and authorities and the “traps” witnesses might fall into due to suggestiveness. In eschewing the prophylactic protections of Wade and Gilbert, the Ash Court substituted the prosecutor’s ethical obligation of fairness as a sufficient guard of defendants’ rights. Yet, this rationale assumes that the prosecutor, rather than the police, routinely confronts crime victims and witnesses with photographic displays—a notion which hardly needs refutation. Moreover, the Wade and Gilbert holdings implicitly rejected as inadequate protections reliance on the ethical compunctions of law enforcement authorities in constructing fair corporeal identification procedures.

Mr. Justice Stewart, concurring in the Ash result, presented an opinion more consistent with the Wade rationale due to his understanding of photographic identification. He took the position that “few possibilities for unfair suggestiveness” exist in such settings because they could be effectively reconstructed at trial through the

63. Id. at 312-13, 317.
64. Id. at 317-18.
65. Id. at 317, quoting United States v. Bennett, 409 F.2d 888, 899-900 (2d Cir. 1969).
66. See notes 17 & 19 supra.
67. 413 U.S. 320.
68. Id. at 321.
examination of the photos and witnesses, and any possible prejudicial remarks and implications would then become apparent. Accordingly, the Wade-Gilbert inquiry appears to be foreclosed in the area of photographic identifications.

Whether the right to counsel is a necessity at laywitness voice identification proceedings has not been the subject of an authoritative statement. Although it is arguable that such an identification is a critical stage, the Supreme Court's refusal to extend the right to photo identifications appears to preclude such a holding.

In considering non-personal identifications and pre-indictment personal confrontations, the Court has refused to extend the aforementioned exclusionary rules and has instead limited defendants' safeguard to application of the Stovall v. Denno due process test, that is, problems which arise from such identifications are evaluated in light of whether that particular confrontation was offensive to due process. In essence, Wade and Gilbert have been narrowly construed and applied. Though expansion of these rules can be urged, the courts have been moving in the opposite direction.

Use of Substitute Counsel

The Wade Court explicitly declined to reach the question of whether the presence of substitute counsel suffices where the notification and presence of the suspect's own counsel would result in a prejudicial delay to the prosecution. The presence of substitute counsel, according to the Court, might eliminate the hazards rendering post-indictment identification a critical stage requiring the presence of the suspect's own counsel.

In deciding this issue, the various appellate courts balanced the relative advantages and disadvantages of such a substitution. The use of substitute counsel is advantageous in that such counsel are: (1) likely to have particular expertise in the matter of lineups; (2) more likely to know what information can and should be available to counsel from police; (3) more aware of what techniques may enhance reliability; and (4) in a better position to testify as to the surrounding circumstances than the retained counsel.

These factors may be mitigated by the considerable advantages

---

69. Id. at 324-25.
72. Id. at 237 n.27.
to the defendant of having his own counsel present at the identification. The assigned or retained counsel may be more familiar with the particular facts (such as previous identifications, efforts to obtain identifications, and the conditions under which the eyewitnesses said they made their original observation) and better able to ascertain any potential suggestiveness in the course of the identification. His presence may enhance the effectiveness of cross-examination of the eyewitness at trial, and the danger that counsel might fail to devote the time necessary to interview properly the substitute counsel would be avoided. Finally, since a substitute counsel is likely to have participated in a number of lineups within a relatively short period of time, defendant's counsel would preclude the risk that the substitute counsel might have just a vague recollection of the lineup in question.

Satisfaction of the requirement of counsel at identification procedures by the use of substitute counsel may be heavily influenced by the presence or absence of photographs of the lineup. In any event, if the substitute counsel could not recall the particular identification attempt in question, the combination of that counsel's notes and trial testimony regarding his perceived function at a lineup has been deemed sufficient to render the identification admissible even though defendant's own counsel was not present. Once admitted, the jury is to evaluate the weight to be given the identification testimony in light of the counsel's difficulty in being able to challenge the testimony.

Wade has been interpreted to require substitute counsel to assist defendant's counsel in preparing a challenge to the fairness of the identification procedure and in cross-examining the witnesses who were present at the procedure. Since the government is in charge of the identification procedure, the prosecution is charged with the duty of assuring that the observations and opinions of the substitute

76. See, e.g., United States v. Queen, 435 F.2d 66 (D.C. Cir. 1970) (where a photograph exists, courts are less likely to hold use of substitute counsel insufficient).
77. See, e.g., United States v. Randolph, 443 F.2d 729 (D.C. Cir. 1970). Six months earlier the same court had implied that the use of substitute counsel is to be limited. United States v. Kirby, 427 F.2d 610 (D.C. Cir. 1970).
Laywitness Identifications

Many jurisdictions have established a system where substitute counsel can be summoned rapidly to view a lineup when defendant's own counsel is not available. Where delay would not be prejudicial to the defense, it is still arguable that *Wade* compels the use of defendant's own counsel instead of a substitute. An interplay between *Wade-Gilbert* and *Stovall* inquiries arises here because *Stovall*'s correlation between reliability and lack of delay makes almost any delay at least *potentially* prejudicial, thus severely limiting the utility of this *Wade-Gilbert* argument.

**Waiver of Right to Counsel**

Allowing an accused to knowingly, intelligently, and voluntarily waive his right to counsel is a long-accepted practice, and has been held applicable to identification procedures. The accused must know that he has such a right if he is to be able to relinquish it intelligently. A mere recital of the *Miranda* warnings does not sufficiently enable the accused to assert or intelligently waive his right to counsel at a lineup. Hence, the accused should be told specifically that: (1) he is going to be placed in a lineup; (2) he has the right to the presence of counsel at the lineup; (3) a lawyer will be appointed if he cannot afford one; and (4) a substitute counsel

---


80. See note 201 infra. In *Stovall* v. *Denno*, the last of the 1967 trilogy of cases, the Court held the rules of *Wade* and *Gilbert* were to be applied only prospectively. 388 U.S. 293, 296-301. This holding was grounded on the belief that retroactivity would seriously disrupt the administration of criminal justice and that the possibility of unfairness without the presence of counsel is not as great as in the situation where criminal rules of procedure are applied retroactively. *Id.* at 298-301. Thus, a general *Stovall* due process test has been applied to lineups and showups occurring prior to June 12, 1967. See *Neil* v. *Biggers*, 409 U.S. 188 (1972); *Coleman* v. *Alabama*, 399 U.S. 1 (1970); *Foster* v. *California*, 394 U.S. 440 (1969); *Gibbs* v. *Vincent*, 524 F.2d 634 (2d Cir. 1975); *Johnson* v. *Beto*, 466 F.2d 528 (5th Cir. 1972), cert. denied, 410 U.S. 945 (1973); *Choice* v. *Brierley*, 460 F.2d 68 (3d Cir. 1972); *Sewell* v. *Cardwell*, 454 F.2d 177 (6th Cir. 1972); *Utsler* v. *Erickson*, 440 F.2d 140 (8th Cir.), cert. denied, 404 U.S. 956 (1971); United States v. *Liquori*, 438 F.2d 663 (2d Cir. 1971) (see the appendix for a review of cases dealing with retroactivity); *Terry* v. *Peyton*, 433 F.2d 1016 (4th Cir. 1970); *Levine* v. United States, 430 F.2d 641 (7th Cir. 1970), cert. denied, 401 U.S. 949 (1971); *Hernandez* v. *Schneckloth*, 425 F.2d 89 (9th Cir. 1970); *Trask* v. *Robbins*, 421 F.2d 773 (1st Cir. 1970).


83. *Miranda* warnings include the right to presence of counsel; the right to remain silent; that anything said can be used against him; and, if indigent, that the accused can have counsel appointed. *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

can be provided in any event,\textsuperscript{85} assuming such substitute is available to the jurisdiction.

It is the government's burden to establish that the accused has intelligently and knowingly waived his right to counsel.\textsuperscript{86} The right to counsel will be deemed waived when a waiver is signed and the accused offers no evidence to contradict the government's contention that it was an uncoerced intentional relinquishment of a known right, rather than the product of an impetuous act.\textsuperscript{87} Notwithstanding this presumption, failure to provide the necessary warnings may be mitigated if the prosecution establishes, by clear and convincing evidence, an independent basis for the waiver.\textsuperscript{88}

\textbf{ROLE OF COUNSEL}

The role of counsel during identification procedures is unclear. Though \textit{Wade} envisioned a positive posture, the Court enumerated no explicit functions for counsel, except that he or she should "assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution."\textsuperscript{89} Counsel's most obvious function is to observe so that he or she can meaningfully cross-examine the witness' in-court identification and testimony as to an out-of-court identification. However, this may put the defense counsel in the difficult position of having to testify and perhaps thereby damaging his or her own case.\textsuperscript{90} This possibility raises serious ethical considerations\textsuperscript{91} which may force the defense counsel to withdraw.\textsuperscript{92}

Although defense counsel has no explicit authority at the lineup, the District of Columbia Court of Appeals has suggested that the defense counsel make recommendations to the police to make the

\begin{itemize}
\item[85.] \textit{See, e.g.}, Long v. United States, 424 F.2d 799, 803 (D.C. Cir. 1969).
\item[86.] \textit{See, e.g.}, United States v. Valez, 431 F.2d 622 (8th Cir. 1970).
\item[87.] \textit{See, e.g.}, United States v. Moher, 445 F.2d 584 (2d Cir. 1971).
\item[88.] \textit{See, e.g.}, United States v. Ayers, 426 F.2d 524, 527 (2d Cir.), cert. denied, 400 U.S. 842 (1970); Long v. United States, 424 F.2d 799, 803 (D.C. Cir. 1969).
\item[90.] \textit{See, e.g.}, United States v. Kennon, 447 F.2d 465 (4th Cir. 1971), cert. denied, 404 U.S. 1062 (1972).
\item[91.] \textit{See ABA CODE OF PROFESSIONAL RESPONSIBILITY} (1969), EC 5-9: "The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively. \textit{Id.}, DR 5-102(A): "If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he . . . ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial. . . ."
\item[92.] \textit{See, e.g.}, United States v. Gholston, 437 F.2d 260 (6th Cir. 1971).
\end{itemize}
procedure more fair. The Court even interpreted Wade as suggesting it would best serve the interests of justice if the defense counsel were provided with "the names of the witnesses who would attend; the time, place and nature of the crimes involved; and the descriptions of the suspect, if any, which the witnesses had given to the police." Since the reason for the presence of counsel at identifications is limited to his observation of the proceedings, some courts will not condone defense counsel's attempt to use the lineup as a discovery device by talking with the witnesses after the confrontation.

At a minimum, Wade insures that a defense counsel can attempt to ascertain the type of procedure to be employed by the police. He may make suggestions, but cannot obstruct the proceedings. The law in this area does not preclude counsel from trying to help arrange or at least preview an identification procedure in which his client will take part. Given the right to counsel articulated in Wade, it appears counsel would be remiss if he failed to make any perceived objections.

Some courts are also sensitive to potential prejudice stemming from communication among witnesses during the identification. Accordingly, the law enforcement authorities should assure that witnesses are instructed not to communicate among themselves; additionally, witnesses should be affirmatively informed that the purpose of the identification procedure is as much exoneration as implication. Moreover, the government seems to have the burden of insuring that witnesses have no opportunity to communicate and

94. Id. at 1289; Spriggs v. Wilson, 419 F.2d 759 (D.C. Cir. 1969).
95. See, e.g., United States v. Cunningham, 423 F.2d 1269 (4th Cir. 1970). See also United States v. Wilcox, 507 F.2d 364 (4th Cir. 1974), cert. denied, 420 U.S. 979 (1975) (counsel not entitled to monitor police-witness interviews after lineups); United States v. Daniels, 506 F.2d 791 (3d Cir. 1974), cert. denied, 421 U.S. 967 (1975) (although a better practice, it is not constitutionally required that counsel be shown marked ballots of witnesses at lineup); United States v. Gholston, 437 F.2d 260 (6th Cir. 1971) (counsel's only function is to observe). But see Bellew v. Gunn, 424 F. Supp. 31 (N.D. Cal. 1976).
96. In United States v. Holsey, 437 F.2d 250 (10th Cir. 1970), an identification was admissible where the defendant obstructed proceedings by failing to cooperate. The resulting procedure became "suggestive" because defendant refused to wear the style of clothes worn by the other participants, and refused to dye his hair back to the color it was at the time of the crime.
97. Several possibilities are (1) to request the authorities to hold the first lineup without the accused, (2) to have all participants do and say the same things, and (3) to be sure two or more suspects are separated and placed in other lineups.
98. Objections made in writing to the officer in charge foreclose the possibility of varying memories as do photographs taken of the proceedings by defense counsel.
that the officers in charge devise a system whereby the witnesses can ask questions or make remarks through them without attracting the other witnesses' attention. Although some courts dislike the practice of defense counsel interviewing the witnesses after the lineup, defense attorneys are not automatically barred from doing so. Finally, there is state court authority for the proposition that the defendant has the right to counsel immediately after an identification is made.

**LEGISLATIVE AND JUDICIAL REGULATION REGARDING THE RIGHT TO COUNSEL**

*Wade* specifically noted that the adoption of adequate legislation or regulations eliminating the risk of abuse and unintentional suggestion might be sufficient to prevent a finding that identification is a critical stage. The limited number of cases that specifically discuss police department rules indicate that few comprehensive regulations have been implemented. The impact of *Wade* and *Gilbert* on the authorities' conduct of identification procedures is apparently confined to grudging compliance with the right to have counsel present when required.

One sign of this resistance is manifested in the Omnibus Crime Control and Safe Streets Act of 1968. Section 3502 of that Act states:

> The testimony of a witness that he saw the accused commit or participate in the commission of the crime for which the accused is being tried shall be admissible in evidence in any trial court ordained and established under article III of the Constitution of the United States.

Although the words are clearly intended to override the 1967 trilogy by legislative fiat, no court has directly confronted the constitutionality of the provision. Courts prefer to interpret it as a limitation on the supervisory power of the courts in other than constitutional

---

areas,' an interpretation which makes the provision less meaningful.

This section constitutes the only real federal legislative attempt to regulate identification procedures; most of the current regulation is judicially mandated. One approved practice involves sending a court order to the accused and his counsel, together with a statement that substitute counsel will be provided in the event that retained counsel is not available. Courts also favor the use of photographs of the lineup to insure adequate review of the procedure. However, most discussions of identification regulations merely describe the various pitfalls of lineup procedures and suggest possible corrective measures. To sufficiently comply with Wade, regulations should do more than suggest: they should either control the manner in which the lineup is conducted or require extraordinary devices such as the presence of an impartial magistrate or the implementation of electronic procedures like audio and video monitoring.

Under Federal Rule of Criminal Procedure 5(a), once the accused is arrested he must be brought before a magistrate without unnecessary delay. The reasons for prompt presentment, in accordance with the McNabb-Mallory rule, involve the necessity that the accused be warned of his rights to allow him to obtain counsel at the earliest possible time and to give him a chance to exonerate himself rather than remain in custody without probable cause. Before counsel was deemed an essential element of identification proceedings, the courts uniformly held that a delay in presentment to a magistrate in order to hold a lineup was not a violation of rule 5(a).

There is authority that a delay must be analyzed under a Stovall standard, i.e., all circumstances of the particular case must be assessed, to decide whether rule 5(a) requires suppression of the iden...
tification testimony. The better view is that of Judge Wright and Chief Justice Burger (while on the District of Columbia Court of Appeals) that rule 5(a) requires the exclusion of any identification evidence stemming from an unnecessary delay. In any event, it is apparent that the McNabb-Mallory rule is only a general policy of excluding evidence gathered during a period of detention upon an unlawful arrest. Since the unnecessary delay would render the detention unlawful, there is no reason not to exclude the identification evidence.

**Summary**

The right to counsel during identification, guaranteed by the 1967 Supreme Court trilogy, was severely limited by *Kirby v. Illinois* and is threatened by extensive use of substitute counsel. Still, the basic rules, spirit, and sanctions of *Wade* and *Gilbert* have emerged mostly intact from appellate review which generally has been hostile to defendants with regard to identification procedures. Two problem areas are the harmless error and the independent basis rules, to be discussed at greater length in the next section. The aforementioned hostility is eloquently expressed in interpretations of *Stovall* requirements, to which the focus now turns.

**Due Process Requirements in Identification Procedures**

The second guarantee to a defendant undergoing identification procedures, articulated in *Stovall v. Denno*, is that the procedures must be administered in an unbiased manner in order to guard against mistaken identifications. This guarantee has suffered badly by virtue of both lower court and Supreme Court decisions.

---

114. See Williams v. United States, 419 F.2d 740 (D.C. Cir. 1969). The applicability of rule 5(a) may turn on the same consideration which *Stovall* was based on, namely, exigency. Wise v. United States, 383 F.2d 206 (D.C. Cir. 1967), cert. denied, 390 U.S. 964 (1968).


120. See notes 29, 31 & 32 supra and accompanying text.

121. See notes 29, 35 & 36 supra and accompanying text.

122. 388 U.S. 293 (1967).
Although the Supreme Court has acknowledged the need for identification procedures, its recent attentions have focused on the abuse of such procedures. To deny an accused the benefit of a pre-trial lineup, the most preferred procedure,\textsuperscript{123} as a matter of right,\textsuperscript{124} is held not to be an abuse of discretion; nor is it considered prejudicial to omit a pre-trial lineup.\textsuperscript{125} A defense request for a lineup is subject to the discretion of the court, which will weigh several factors: the length of time between the crime or arrest and the trial, the possibility the defendant may have altered his or her appearance, the extent of inconvenience to the prosecution witnesses, the possibility that revealing the prosecution witnesses may subject them to intimidation, the propriety of other identification procedures, and the degree of doubt concerning the identification.\textsuperscript{126} As a moment's reflection might indicate, it is extremely difficult for a defendant to prove abuse of discretion in this area.\textsuperscript{127}

Just as one is not \textit{per se} entitled to a lineup, an accused generally has no right to a second lineup when one has already been provided.\textsuperscript{128} Though no court requires that a lineup be held, many courts have expressed the belief that it is a proper procedure\textsuperscript{129} which should be timely, well coordinated,\textsuperscript{130} and fair.\textsuperscript{131}

When the converse is true, and the defendant does not wish to participate in a lineup or other identification procedure, he has no

\textsuperscript{123} See note 9 supra.
\textsuperscript{125} See, e.g., United States v. Bowie, 515 F.2d 3 (7th Cir. 1975); United States v. Hill, 449 F.2d 743 (3d Cir. 1971).
\textsuperscript{126} See, e.g., United States v. Ravich, 421 F.2d 1196 (2d Cir.), \textit{cert. denied}, 400 U.S. 834 (1970); United States v. Estremera, 533 F.2d 1103 (2d Cir.), \textit{cert. denied}, 425 U.S. 979 (1976) (no abuse to deny request shortly before trial and two years after offense where witnesses had viewed photo display six days after offense and persons in photographs looked sufficiently similar). \textit{But see} United States v. Caldwell, 481 F.2d 487 (D.C. Cir. 1973) (abuse found, conviction reversed, and indictment dismissed due to futility of holding lineup on a remand where only eyewitnesses failed to identify defendant at lineup held several weeks after offenses under less than ideal circumstances).
\textsuperscript{127} See, e.g., United States v. Caldwell, 481 F.2d 487 (D.C. Cir. 1973).
\textsuperscript{131} See notes 151 & 152 \textit{infra} and accompanying text.
right to avoid confrontation with his accusers after charges have been filed. If a defendant is involuntarily available for an identification procedure solely because of an illegal arrest and he is thereby identified, any testimony regarding that identification must be excluded. However, the evidence will be inadmissible only if the court finds a nexus between the illegal arrest and the defendant's availability. Forcing a defendant into such a procedure may also result in civil liability when the underlying arrest has no basis.

An incarcerated person must not only participate in a lineup which relates to the offense with which he is charged, he may also be forced to take part in identification procedures for other offenses. The Third Circuit Court of Appeals denied a lineup participant's claims of due process and equal protection violations when he argued that persons out on bail would not have been required to participate in such a lineup.

A citizen who is not suspected of criminal activity has the right to refuse to participate in a lineup. However, since subtle pressures may cause an innocent citizen to feel a refusal implies guilt, at least one district court has set forth stringent requirements which are necessary to show the consent was an intentional relinquishment of a known right. That court, in a civil rights action for damages and injunctive relief, granted an injunction on behalf of all the citizens of Philadelphia which prevents the Philadelphia Police Department

---


from conducting lineups in which citizen "fill-ins" participate un-
less

such citizen 'fill-ins' execute a written form certifying that they are
aware that there are no charges against them, that they have not
been arrested and they are under no compulsion whatever to par-
ticipate in the lineup, that they realize that they are legally free
to leave at any time, and that, if they are minors, they have con-
sulted with a parent or guardian and there is no objection from
such person to their participation in the lineup. 140

The Stovall Standards

In Stovall v. Denno, 141 the United States Supreme Court articu-
lated the due process standards applicable to cases not covered by
the personal confrontations umbrella of Wade and Gilbert. Those
standards consist of inquiring whether, considering all the attend-
ant circumstances, the identification procedure utilized was so un-
necessarily suggestive as to give rise to an irreparable mistaken
identification. 142

Stovall was clearly intended to encompass more situations—and
those more severely harmful to individual rights—than Wade and
Gilbert. The Stovall standards apply to all identification procedures
rather than just the personal confrontations addressed in Wade and
Gilbert. 143 In light of the Kirby case, the Stovall test is the only bar
to the admissibility of identifications made prior to the commence-
ment of formal proceedings against an accused. 144 When confronta-
tion and identification takes place subsequent to the commence-
ment of formal proceedings and after June 12, 1967, the Wade and
Gilbert standards and Stovall's due process standard are all applic-
able to personal identifications at trial.

Problems with Suggestive Procedures

Stovall violations have been considered by many courts. A clear
and extreme example was provided in the Supreme Court case of

140. Id. at 904.
141. 388 U.S. 293 (1967).
143. See, e.g., United States v. DiMuro, 540 F.2d 503 (1st Cir. 1976), cert. denied, 429
U.S. 1038 (1977) (voice exemplar); United States v. Bowie, 515 F.2d 3 (7th Cir. 1975) (photo);
United States v. Jones, 512 F.2d 347 (9th Cir. 1975) (photo); United States v. McBride, 499
F.2d 525 (D.C. Cir. 1974) (photo); United States v. Burke, 496 F.2d 373 (5th Cir.), cert.
144. See, e.g., Felix v. Cardwell, 404 F. Supp. 165 (D. Ariz. 1975), appeal dismissed, 545
F.2d 92 (9th Cir. 1976), cert. denied, 430 U.S. 910 (1977); Burbank v. Warden, Ill. St. Pen.,
404 F. Supp. 656 (N.D. Ill. 1975), rev'd on other grounds, 535 F.2d 361 (7th Cir. 1976), cert.
Foster v. California. An eyewitness testified at trial that he observed the accused at the first police lineup and that that individual stood out from the other two men in the lineup, because: (1) he was close to six feet tall while the other two men were about six inches shorter; and (2) he was wearing a leather jacket similar to that worn by the robber. When positive identification did not result from the lineup, the police permitted a one-to-one confrontation upon the witness’ request to speak to the accused. Definite identi-

---

147. Where the item of clothing at issue is central to the description, the fact that only defendant is wearing such an item can render an identification inadmissible. See, e.g., United States ex rel. Cannon v. Smith, 527 F.2d 702 (2d Cir. 1975); Israel v. Odom, 521 F.2d 1370 (7th Cir. 1975). But see United States v. Roberts, 481 F.2d 892 (5th Cir. 1973). Where the authorities conducting the identification procedure are not made aware of the centrality of the item to that description, testimony as to an identification of the only person wearing the item in a photo display may be admissible. United States v. Smith, 546 F.2d 1275 (5th Cir. 1977). But see Ortiz v. Sielaff, 404 F. Supp. 268 (N.D. Ill. 1975), aff’d, 542 F.2d 377 (7th Cir. 1976).

It is not improper to have all the persons in an identification procedure, or all those the witness has chosen as looking like the offender, wear incriminating clothing. See, e.g., Rudd v. Florida, 477 F.2d 805 (5th Cir. 1973); Souza v. Howard, 488 F.2d 462 (1st Cir. 1973), cert. denied, 417 U.S. 933 (1974).

Laywitness Identifications

...
quately review claims of suggestiveness. Yet, courts have stated only their “preference” that lineups be photographed, and have not re-
quired it.\textsuperscript{153}

The courts have addressed several situations in which “suggestiveness” may present problems. Obviously, an explicit statement that the police suspect the person being shown to a wit-
ness is improper.\textsuperscript{154} It is equally impermissible for authorities to inform a witness he or she has chosen the “wrong” person.\textsuperscript{155} Telling the witness to “take time” in examining the persons in the lineup is allowable prior to the lineup, but not after an identification has been made and retracted.\textsuperscript{156} Courts differ on whether it is illegally suggestive to inform witnesses that one or more suspects are among the persons in the lineup.\textsuperscript{157} Courts are exceedingly lenient about a witness’ pre-trial failure to identify the defendant\textsuperscript{158} or a mistaken identification\textsuperscript{159} when the witness had an unfettered opportunity to previously view the defendant at the scene of the crime. Conducting an identification procedure with more than one witness present is disapproved\textsuperscript{160} but is not necessarily prohibited.\textsuperscript{161} Allowing them to converse about their identifications or the persons to be identified, however, may be impermissible.\textsuperscript{162} On the other hand, it is clearly


\textsuperscript{155} An extreme case of this suggestiveness occurred in Texas where a prosecutor’s trial conduct rendered a witness’s pre-trial photographic identification of defendant incapable of saving the witness’s in-court identification. Taylor v. Estelle, 506 F.2d 326 (5th Cir. 1975). The prosecutor not only informed the witness his lineup identification had been incorrect and directed attention to the defendant, but also argued to the jury that the lineup error was understandable, since six black men in a lineup look like “six black crows on a limb.” Id. at 328. See also United States v. Russell, 532 F.2d 1063 (6th Cir. 1976).

\textsuperscript{156} See, e.g., Government of Virgin Islands v. Francis, 507 F.2d 635 (3d Cir. 1975).


\textsuperscript{159} See, e.g., United States v. Bowie, 515 F.2d 3 (7th Cir. 1975); United States v. O’Neal, 496 F.2d 368 (6th Cir. 1974); Lucas v. Regan, 503 F.2d 1 (2d Cir. 1974); McNeary v. Stone, 482 F.2d 804 (9th Cir. 1973), cert. denied, 414 U.S. 1071 (1973); Gilliard v. LaVallee, 376 F. Supp. 205 (S.D.N.Y. 1974).


\textsuperscript{161} See, e.g., Clark v. Fike, 538 F.2d 750 (7th Cir. 1976), cert. denied, 429 U.S. 1064 (1977); United States v. Purry, 545 F.2d 217 (D.C. Cir. 1976); Johnson v. Wainwright, 523 F.2d 1253 (5th Cir. 1975), cert. denied, 425 U.S. 961 (1976); Monteiro v. Picard, 443 F.2d 311 (1st Cir. 1971), cert. denied, 404 U.S. 1041 (1972).

proper to show witnesses a photograph taken at the scene of the offense prior to making an identification. Discrepancies between features of defendants and the other persons displayed or shown in identification procedures as to clothing, hair and hairstyle, and other factors are analyzed on a case-by-case basis.

An important consideration in this area is whether any potential suggestiveness stems from conduct by the police. Of course, even in the absence of police misconduct, a faulty identification procedure can occur. Courts are more willing to find a Stovall violation if the law enforcement officials have instigated the suggestiveness, although if a witness resists police efforts to suggest a particular person, courts may find no realistic possibility of misidentification at trial. Since suggestive identifications not originating from law enforcement officials are less likely to be found inadmissible, the extent of procedural protections afforded a defendant in such circumstances will relate to whatever cross-examination occurs. Thorough cross-examination and jury instructions concerning the identification procedures may cure the problem of suggestiveness.


164. See, e.g., United States v. Smith, 546 F.2d 1275 (5th Cir. 1977); Caver v. Alabama, 537 F.2d 1333 (5th Cir. 1976); United States v. Roberts, 481 F.2d 892 (5th Cir. 1973); Rudd v. Florida, 477 F.2d 805 (5th Cir. 1973); Ortiz v. Sielaff, 404 F. Supp. 268 (N.D. Ill. 1975), aff'd, 542 F.2d 377 (7th Cir. 1976).


169. See, e.g., United States v. Russell, 532 F.2d 1063 (6th Cir. 1976) (impermissibly suggestive for witness to be shown defendant in handcuffs in non-emergency situation); Rudd v. Florida, 477 F.2d 805 (5th Cir. 1973) (impermissibly suggestive to show defendant to witness before identification while defendant seated between two policemen in State's Attorney's office). But see United States v. Lee, 485 F.2d 1075 (D.C. Cir. 1973) for approval of showing defendant in handcuffs at crime scene.

170. See, e.g., United States v. Eatherton, 519 F.2d 603 (1st Cir. 1975), cert. denied, 433 U.S. 987 (1975) (witness refused to identify defendant's photograph even though repeatedly displayed and witness informed by police that others had identified defendant). See also United States v. Higginbotham, 539 F.2d 17 (9th Cir. 1976).


Hence, an effective defense counsel can defeat the issue with competent advocacy. The standards for suggestiveness are considered different in jury and bench trials.\textsuperscript{173} 

\textit{Stovall v. Denno} supplied the standards for judging due process challenges in photographic identification procedures.\textsuperscript{174} As with personal confrontation procedures, subtle suggestiveness normally does not weigh heavily with the appellate courts.\textsuperscript{175} One-photo displays, while not \textit{per se} unconstitutional,\textsuperscript{176} usually are considered impermissibly suggestive in non-emergency situations.\textsuperscript{177} On the other hand, no court requires a particular number of photographs.\textsuperscript{178} While it may be considered markedly suggestive for a defendant's picture to be the only one repeated in two or more photo displays,\textsuperscript{179} some courts have held otherwise.\textsuperscript{180}


Contrary to the view of the Court in United States v. Ash, 413 U.S. 300 (1973), a photo display has more tendency, not less, to be subject to abuse since the accused is not present to relay what limited impressions might be gathered from his presence. See id. at 337 (Brennan, Douglas & Marshall, JJ., dissenting).

\textsuperscript{175} See, e.g., United States v. Burke, 496 F.2d 373 (5th Cir.), cert. denied, 419 U.S. 966 (1974) (not impermissibly suggestive to show one picture of the defendant and two pictures of other subjects in display); United States v. Lincoln, 494 F.2d 833 (9th Cir. 1974) (not suggestive that defendant's picture in color and other subjects are in black and white where nine photos shown to witness).

\textsuperscript{176} See, e.g., United States v. Higginbotham, 539 F.2d 17 (9th Cir. 1976); Nassar v. Vinzant, 519 F.2d 798 (1st Cir. 1975).

\textsuperscript{177} See, e.g., Manson v. Brathwaite, 97 S. Ct. 2243 (1977); Government of Virgin Islands v. Petersen, 553 F.2d 324 (3d Cir. 1977); Bloodworth v. Hopper, 539 F.2d 1382 (5th Cir. 1976); United States v. Higginbotham, 539 F.2d 17 (9th Cir. 1976); United States v. Kimbrough, 528 F.2d 1242 (7th Cir. 1976); United States v. Dailey, 524 F.2d 911 (8th Cir. 1975); United States v. Reid, 517 F.2d 953 (2d Cir. 1975); Israel v. Odom, 521 F.2d 1370 (7th Cir. 1975); Gonzales v. Zelker, 477 F.2d 797 (2d Cir.), cert. denied, 414 U.S. 924 (1973); John v. Casciules 489 F.2d 20 (2d Cir. 1973), cert. denied, 416 U.S. 959 (1974). See also United States v. Burse, 531 F.2d 1151 (2d Cir. 1976); United States v. Porter, 430 F. Supp. 208 (W.D.N.Y. 1977). But see Smith v. Estelle, 531 F.2d 290 (5th Cir. 1976) (one-photo display a few days after multiphoto display not impermissibly suggestive); United States v. Anderson, 484 F.2d 746 (10th Cir. 1973), cert. denied, 415 U.S. 924 (1974) (one-photo display not impermissibly suggestive where not for purpose of identification but just to ascertain name); United States v. Baxter, 492 F.2d 150 (9th Cir.), appeal dismissed, 414 U.S. 801 (1973), cert. denied, 416 U.S. 940 (1974) (showing one photo in context of showing several hundred over period of time is not impermissibly suggestive).

\textsuperscript{178} See, e.g., United States v. Smith, 546 F.2d 1275 (5th Cir. 1977); United States v. Francoeur, 547 F.2d 891 (5th Cir. 1977).

\textsuperscript{179} See, e.g., United States v. Sullivan, 456 F.2d 1273 (5th Cir. 1972).

\textsuperscript{180} See, e.g., United States v. Jennings, 528 F.2d 222 (6th Cir. 1975); Moss v. Wolff, 505 F.2d 811 (8th Cir. 1974), cert. denied, 421 U.S. 933 (1975); United States v. Cooper, 472 F.2d


184. The Supreme Court has been particularly lenient with regard to photographic identification procedures—which seems an unusual method of inducing police to utilize personal confrontation procedures instead. See Manson v. Brathwaite, 97 S. Ct. 2243 (1977); United States v. Ash, 413 U.S. 300 (1973); Simmons v. United States, 390 U.S. 377 (1968).

185. See, e.g., United States v. Gidley, 527 F.2d 1345 (5th Cir.), cert. denied, 429 U.S. 841 (1976); United States v. Sanders, 479 F.2d 1193 (D.C. Cir. 1973) (display impossibly suggestive where only the defendant had facial hair comparable to descriptions and defendant was only heavyyet person and tallest of subjects); Hogan v. Paderick, 399 F. Supp. 1014 (E.D. Va. 1975) (display impossibly suggestive where defendant was only black male and only subject with scar and goatee in display of 11 white males, five black females and one black male); Haberstroh v. Montanye, 362 F. Supp. 838 (W.D.N.Y. 1973), aff'd, 493 F.2d 483 (2d Cir. 1974) (display impossibly suggestive since only defendant resembled description of robber). But see United States v. Smith, 546 F.2d 1275 (5th Cir. 1977) (though a marked difference between defendant's and other subjects' hair, not impossibly suggestive where defendant had close cropped hair and witness stated the offender had long, shoulder-length hair which was probably a wig); United States v. Munn, 507 F.2d 563 (10th Cir. 1974), cert. denied, 421 U.S. 968 (1975) (not impossibly suggestive although none of the subjects resembled defendant, inasmuch as each was a male Caucasian of the same general age and had similar complexion and hair); United States v. Porter, 430 F. Supp. 208 (W.D.N.Y. 1977) (not impossibly suggestive that witness recalled defendant was of slighter build than other subjects); United States v. Getz, 381 F. Supp. 43 (E.D. Pa. 1974), aff'd, 510 F.2d 971 (3d Cir.), cert. denied, 421 U.S. 950 (1975) (though defendant one with disheveled hair and co-defendant only mulatto, not impossibly suggestive where 10 subjects otherwise similar); United States v. Bostic, 360 F. Supp. 1300 (E.D. Pa. 1973), aff'd sub nom. Appeal of Bradby, 491 F.2d 748 (3d Cir. 1973) and 491 F.2d 751 (3d Cir. 1973), cert. denied, 416 U.S. 989 (1974) (though subjects of different complexions, not impossibly suggestive where all subjects generally fit description and each shade of complexion was represented by at least two subjects). The distinctiveness of a defendant's face can even vitiate suggestiveness where a
tions on the face of the photographs,\textsuperscript{186} and police communications with the witness.\textsuperscript{187} Suggestiveness which is considered impermissible by the courts may even originate from sources other than police conduct.\textsuperscript{188} Regardless of the form of suggestion, unless the defendant is able to specify the prejudice with thoroughness and detail and have such objections preserved on the record, he will be unable to gain useful judicial review of his due process claim.\textsuperscript{189}

Voice identifications can also be unduly suggestive. However, most of the decisions in this area have not found illegal suggestiveness. Marked speech characteristics are the normal focus of such

\textsuperscript{186} See, e.g., United States v. Ayendes, 541 F.2d 601 (6th Cir. 1976) (impermissibly suggestive that all subjects but defendants were pictured in typical black and white "mug shots" with police markings while defendants' pictures were in color without markings); Crump v. Riddle, 408 F. Supp. 975 (W.D. Va. 1976) (impermissibly suggestive that defendant's picture bore date of crime); Johnson v. Hatrak, 417 F. Supp. 316 (D.N.J. 1976) (impermissibly suggestive where only defendant's picture bore the legend "Rob." in photo display regarding robbery). Compare, United States v. McBride, 499 F.2d 525 (D.C. Cir. 1974) (not impermissibly suggestive that witness found defendant's name in book containing defendant's picture was dated the day before the display whereas other subject's pictures were dated two years or more previous to the display); Clemmer v. Mazurkiewicz, 385 F. Supp. 1158 (E.D. Pa. 1973), aff'd, 487 F.2d 1396, cert. denied, 415 U.S. 929 (1974) (marks on subjects' photo indicating prior involvement with the law not impermissibly suggestive where witness testified she did not notice the marks). As to this latter case, one must wonder as to the reliability of a witness who did not notice such marks.

\textsuperscript{187} See, e.g., United States v. Allen, 497 F.2d 160 (5th Cir.), cert. denied, 419 U.S. 1035 (1974) and 419 U.S. 1036 (1974) (impermissibly suggestive that police tell witness they have a suspect in custody). See also United States v. Russell, 532 F.2d 1968 (6th Cir. 1976) (impermissibly suggestive for police to tell witness they believed defendant was the robber); Ghiz v. Bordenkircher, 519 F.2d 759 (4th Cir. 1975), cert. denied, 424 U.S. 924 (1976) (same); Robinson v. Vincent, 371 F. Supp. 409 (S.D.N.Y. 1974), aff'd, 506 F.2d 923 (2d Cir.), cert. denied, 421 U.S. 969 (1975). But see United States v. Skeens, 494 F.2d 1050 (D.C. Cir. 1974) (not impermissibly suggestive that witness was advised of defendant's recent release from prison prior to viewing random selection of slides after tentatively identifying defendant); United States v. Caulton, 498 F.2d 412 (6th Cir.), cert. denied, 419 U.S. 898 (1974) (not impermissibly suggestive that witness failed to identify defendant from photo display whereupon police officer left and was observed by witness passing by door with defendant, who witness immediately identified upon officer's return).

\textsuperscript{188} See, e.g., Thomas v. New Jersey, 472 F.2d 735 (3d Cir.), cert. denied, 414 U.S. 878 (1973) (impermissibly suggestive that son of dazed and injured witness took witness to police station, informed witness of his own identification of defendant and essentially chose defendant's picture for the witness). But see, e.g., United States v. Grose, 525 F.2d 1115 (7th Cir. 1975), cert. denied, 424 U.S. 975 (1976) (newspaper photo of robber viewed by witness before identification did not taint identification).

\textsuperscript{189} See United States v. Rowan, 518 F.2d 685 (6th Cir.), cert. denied, 423 U.S. 949 (1975) (counsel's mere allegation of suggestiveness without more required only a judicial examination of the photos by the court as opposed to a hearing considering the suggestiveness).
claims. Other challenges have been based on police communications with the witness, and on the fact that the voice sample amounted to a one-person showup. Judicial reluctance to find suggestiveness in aural identifications, together with the fact that only fleeting familiarity with the offender’s voice is required for purposes of identification, creates an even greater potential for misidentification than with visual identifications.

Erosions of the Stovall Standard

A finding that an identification procedure is impossibly suggestive is merely the first step in a Stovall inquiry. Recent opinions of the Supreme Court in Neil v. Biggers and Manson v. Brathwaite mandate that upon a finding of impossibly suggestive, courts must then determine whether there is a substantial likelihood of irreparable misidentification; however, the Stovall Court did not utilize this “substantial likelihood” standard at all. Obviously, this new standard renders all but the most glaring and obtrusively suggestive identifications constitutionally proper. Neil introduced a “totality of circumstances” test which allows courts

190. See, e.g., United States v. DiMuro, 540 F.2d 503 (1st Cir. 1976), cert. denied, 429 U.S. 1038 (1977) (marked racial speech characteristics not enough); United States v. Kopaci, 488 F.2d 900 (5th Cir. 1973), cert. denied, 416 U.S. 987 (1974) (difference in accents not suggestive where identification made prior to hearing voices even though witnesses did not inform police of identification until after hearing voices); United States v. Otero-Hernandez, 418 F. Supp. 572 (M.D. Fla. 1976) (different pronunciation by defendant of particular word all right since identification not based on such pronunciation). See also United States v. Dupree, 553 F.2d 1189 (8th Cir. 1977).

191. See, e.g., United States v. Pheaster, 544 F.2d 353 (9th Cir. 1976), cert. denied, 429 U.S. 1099 (1977) (impossibly suggestive to ask witness if he knew defendant and could identify his voice prior to playing single voice sample which witness identified as defendant’s). See generally Annot., 79 A.L.R.3d 79 (1977).


to negate suggestiveness and its inherent dangers by consideration of several factors. In this drastically expanded second phase of the "due process" inquiry, courts may examine: (1) the opportunity of the witness to view the criminal; (2) the accuracy of the witness' prior description of the criminal; (3) the level of certainty demonstrated by the witness at the confrontation; (4) the length of time between the crime and the suggestive identification; (5) the witness' degree of attention at the crime scene and identification procedure; (6) the witness' mistaken identification, failure to identify defendant previously, or inability to identify without confronting the defendant; and (7) the presence of corroborative evidence.\textsuperscript{9} Though an identification based upon an improperly suggestive procedure must be excluded,\textsuperscript{9} an exception is made, if with reference to these factors the prosecutor can show by clear and convincing evidence that a subsequent in-court identification is based upon an independent observation of the criminal at the scene\textsuperscript{200} and not upon the suggestive procedure.

The opportunity of the witness to view the criminal at the scene is the factor given the most weight by the courts. Since this opportunity must be sufficient, in combination with other factors,\textsuperscript{201} to

\begin{itemize}
\item See, e.g., Sanchell v. Parratt, 530 F.2d 286 (8th Cir. 1976); United States v. Dailey, 524 F.2d 911 (8th Cir. 1975); Gonzales v. Zelker, 477 F.2d 797 (2d Cir.), cert. denied, 414 U.S. 924 (1973); Riley v. Hocker, 441 F.2d 552 (9th Cir. 1971). But some courts have merely examined the record and found nothing to support a defendant's contention of taint by a suggestive procedure, implying that they did not require such a burden to be satisfied by the prosecution. See, e.g., United States v. Clark, 499 F.2d 802 (4th Cir. 1974); United States v. Trejo, 501 F.2d 138 (9th Cir. 1974); United States ex rel. Robinson v. Vincent, 371 F. Supp. 409 (S.D.N.Y.), aff'd, 506 F.2d 923 (2d Cir. 1974), cert. denied, 421 U.S. 969 (1975). Even so, a witness' mere statement that no taint exists should not be deemed sufficient (see, e.g., United States v. Dailey, 524 F.2d 911 (8th Cir. 1975)) although such denials combined with opportunities to observe may be deemed enough. See, e.g., United States v. Benson, 495 F.2d 475 (5th Cir.), cert. denied, 419 U.S. 1035 (1974).
\item The opportunity factor is most often not by itself sufficient to satisfy the state's burden. See, e.g., Bloodworth v. Hopper, 539 F.2d 1382 (5th Cir. 1976) (opportunity and lack of delay); United States v. Cepulonis, 530 F.2d 238 (1st Cir.), cert. denied, 426 U.S. 908 (1976) and 426 U.S. 922 (1976) (opportunity and corroborative testimony); United States v. Ochoa, 523 F.2d 130 (10th Cir. 1975).
Laywitness Indentifications

overcome the assumption that an intervening suggestive procedure has influenced the in-court identification, in theory it should be more extensive than the "adequate opportunity" a witness must have to observe the criminal in order to make any identification. Yet some cases have found independent identifications upon ascertaining the existence of just such a minimal opportunity. In any event, the absence of one of the factors is normally not fatal to a finding of an independent basis.

The Supreme Court's recent decision in Manson v. Brathwaite is an excellent illustration of the dangers of the independent basis analysis and the manner in which it can almost completely eliminate the protections contemplated by the Stovall Court in 1967. Despite a severely limited opportunity to view the offender and


202. The witness' opportunity to observe the criminal must at least be sufficient to believe the witness can identify the criminal. See, e.g., Cannon v. Smith, 527 F.2d 702 (2d Cir. 1975); Goodyear v. Delaware Correctional Center, 419 F. Supp. 93 (D. Del. 1976).

203. See, e.g., Hilleary v. Wallace, 519 F.2d 786 (4th Cir. 1975).


206. Rather than repeat a detailed criticism of the alleged logic of the Manson Court, the authors believe the reader would profit by examining the excellent dissenting opinion of Justices Marshall and Brennan, which also reviews the demise of due process protections occurring since 1967. See id. at 2255-64. (Marshall & Brennan, JJ., dissenting).

the witness' lack of attention which resulted in a vague and extremely general description, the lack of delay between the crime and the identification, and the certainty of the witness convinced the Manson Court to find admissible what the State characterized as an unnecessary and suggestive one-photo display.

Many of the inherent difficulties with suggestiveness might be overcome if defendants were allowed to introduce expert testimony at trial to demonstrate the subjective problems associated with eyewitness or earwitness identification testimony. However, most such offers of proof are rejected by trial courts, thereby keeping this information from the jury. Moreover, appellate courts generally do not find these refusals to be an abuse of discretion.

In any event, the independent basis doctrine is not the only potential means for approving suggestive identification procedures. When a court considers the suggestiveness to be harmless error, this can also constitute grounds for denying the claim. Frequently, harmless error is found where the identification evidence is deemed to be merely cumulative of other evidence or where the suggestiveness of the procedure is negated by other circumstances. The harmless error doctrine is one normally reserved for appellate court review and must be found to be harmless beyond a reasonable doubt when constitutional rights are involved, as they are here.

**CONCLUSION**

The Supreme Court and lower courts have indicated their explicit lack of receptivity to claims of unconstitutional suggestiveness in recent years. Stovall v. Denno has not been overruled, perhaps because its now empty shell serves to present an appearance of fairness until closer examination reveals otherwise. Although courts are still willing to find impermissible suggestiveness, few courts fail to adjudicate a reason to uphold convictions despite the fact that identifica-

---

208. See id. at 2261. See especially, id. at 2262 n. 12.
209. Id. at 2250. But see id. at 2261.
210. See id. at 2250.
tions involve *substantial* suggestiveness. Perhaps *Stovall* is looked upon by the federal courts today as an error. If so, by now it is surely a harmless error.