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Pretrial Identification Procedures--Wade to Gilbert to Stovall: Lower Courts Bobble the Ball

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Notes

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I. INTRODUCTION

In numerous criminal cases, an eyewitness to a crime will be asked by the police to make an identification of a suspect. The method of presentation of the suspect to the eyewitness will be by one of three identification procedures: (a) a lineup—presentation of the suspect in a group;[1] (b) a showup—presentation of the suspect alone,[2] or (c) a photograph—presentation of the suspect by photograph singly or with a group of other photographs for possible identification. Any one or a combination of these procedures may be used by the police to obtain a pretrial identification of the suspect. If the suspect is identified by the eyewitness as the criminal, testimony by the witness concerning the pretrial identification will usually be offered into evidence. The eyewitness will also be asked at trial to make an in-court identification of the suspect. This testimony will obviously be highly damaging to the suspect. He will be pointed out by the eyewitness to the court as the perpetrator of the crime. A mistake in identity by the eyewitness could be catastrophic to an innocent suspect. Numerous cases of mistaken identification, however, by an eyewitness which resulted in subsequent erroneous convictions have been extensively catalogued.[3]

In 1967, the United States Supreme Court in a trilogy of cases—*United States v. Wade*,[4] *Gilbert v. California*[5] and *Stovall*

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1. P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 40 (1965).

2. *Id.* at 28.

3. *See generally* E. BORCHARD, CONVICTING THE INNOCENT (1932); J. FRANK & B. FRANK, NOT GUILTY (1957); E. GARDNER, THE COURT OF LAST RESORT (1954); Q. REYNOLDS, COURTROOM (1950); G. WILLIAMS, THE PROOF OF GUILT (3rd ed. 1963).

4. 388 U.S. 218 (1967). Several weeks after Wade's arrest on a federal charge of bank robbery, the FBI, without notice to his appointed counsel, had Wade appear in a lineup for possible identification by two bank employees. Both witnesses identified Wade at the lineup, and at trial they both made in-court identifications.

5. 388 U.S. 263 (1967). Sixteen days after his indictment for aggravated robbery and murder, Gilbert, without notice to his appointed counsel, appeared in a lineup in a Los Angeles auditorium before more than 100 witnesses. Several witnesses who had previously

v. Denno[6]—recognized the "dangers inherent in eyewitness identification and the suggestibility inherent in the context of the pretrial identification."[7] In the Court's opinion, a suggestive pretrial identification procedure could lead to mistaken identification which, in turn, could taint any subsequent in-court identification of the suspect by the eyewitness.[8] Therefore, to avert any prejudice to a suspect because of a suggestive pretrial identification procedure and to provide for meaningful confrontation of the eyewitness at trial through cross-examination, the Court in *Wade* and *Gilbert* held that the pretrial identification procedure after indictment[9] was a "critical stage" of the prosecution which, under the sixth amendment, required the presence of counsel.[10]

In *Stovall*, the *Wade* and *Gilbert* decisions were given prospective application.[11] In addition, *Stovall* recognized another ground of attack upon a conviction independent of the sixth amendment right to counsel. If the procedure used in the pretrial identification "was so unnecessarily suggestive and conducive to irreparable mistaken identification," due process of law would have been denied to the accused.[12] The Court indicated that any claimed violation of due process in the procedure of the

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observed Gilbert in that lineup, later made in-court identifications of him at trial.

6. 388 U.S. 293 (1967). For a discussion of the material facts in *Stovall see* page 783 *infra*.

7. United States v. Wade, 388 U.S. 218, 235 (1967).

8. *Id.* at 228-29. "Moreover, '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, so that in practice the issue of identity may (in the absence of other relevant evidence) for practical purposes be determined there and then, before the trial.'" *Id.* at 229, quoting Williams & Hammelmann, *Identification Parades*, 1963 CRIM. L. REV. (Eng.) 479, 482.

9. Most courts have held that the doctrine of *Wade-Gilbert* was not limited to post-indictment identification procedures. *See, e.g., In re* Holley, — R.I. —, 268 A.2d 723 (1970). For a discussion of the pre-indictment exception used by some courts see Quinn, *In the Wake of Wade: The Dimensions of the Eyewitness Identification Cases*, 42 COLO. L. REV. 135, 143-44 (1970).

10. United States v. Wade, 388 U.S. 218, 235-37 (1967). *Wade* and *Gilbert* involved lineups, *Stovall* a showup. For an argument for the application of the right to counsel at photo identifications *see* Comment, 43 N.Y.U.L. REV. 1019 (1968). The Court, however, noted that the right to counsel could be waived by the suspect. 388 U.S. at 237.

11. Stovall v. Denno, 388 U.S. 293, 296-301 (1967).

12. *Id.* at 301-02. The Court cited as authority for this proposition, Palmer v. Peyton, 359 F.2d 199 (4th Cir. 1966), which found a voice identification to be so unnecessarily suggestive as to violate due process of law.

pretrial identification would depend upon the "totality of the circumstances."[13]

To assure respect by law enforcement officials of the constitutional right to counsel, the Court in *Wade* and *Gilbert* formulated a dual approach to the admission of evidence. Testimony by the eyewitness concerning a pretrial identification conducted without counsel or in violation of due process would be inadmissible *per se* because it was "the direct result of the illegal lineup 'come at by exploitation of [the primary] illegality.'"[14] An in-court identification of the suspect at trial by the eyewitness would also be inadmissible unless the prosecution could prove by "clear and convincing" evidence that the identification, rather than stemming from the pretrial confrontation, had an independent origin[15] or the appellate court could decide that the error in its admission was harmless.[16] Most subsequent lower court decisions have applied this dual approach by analogy to a violation of due process under *Stovall*.[17]

Stovall provided lower courts with no precise guidelines to follow in their examination of possible violations of due process in pretrial identification procedures. *Wade*, however, did provide examples of factors to be considered for the establishment of an

13. *Id.* at 302. The Court in *Stovall* decided that on the facts of the case due process had not been violated.

14. Gilbert v. California, 388 U.S. 263, 272-73 (1967), quoting Wong Sun v. United States, 371 U.S. 471, 488 (1963).

15. United States v. Wade, 388 U.S. 218, 241-42 (1967).

16. *Id.* The Court cited Chapman v. California, 386 U.S. 18 (1967) as the leading case for the "harmless error" doctrine. In *Chapman*, the Court held that before constitutional error can be held to be harmless, the Court must be able to declare its belief that it was harmless beyond a reasonable doubt. *Id.* at 21-24. In Harrington v. California, 395 U.S. 250 (1969), however, the Court, in an apparent departure from this standard, indicated that an error would be harmless when the untainted evidence against the defendant was overwhelming. *Id.* at 254. In his dissent, Mr. Justice Brennan stated that *Chapman* had been overruled by the majority opinion in *Harrington*, 395 U.S. 250, 255 (1969) (dissent).

17. *See, e.g.*, Wright v. United States, 404 F.2d 1256 (D.C. Cir. 1968); *In re* Hill, 71 Cal. 2d 1039, 458 P.2d 449, 80 Cal. Rptr. 537 (1969); People v. Caruso, 68 Cal. 2d 183, 436 P.2d 336, 65 Cal. Rptr. 336 (1968); People v. Blumenshine, 42 Ill. 2d 508, 250 N.E.2d 152 (1969); Coleman v. State, 8 Md. App. 65, 258 A.2d 42 (1969); People v. Damon, 24 N.Y.2d 256, 247 N.E.2d 651, 299 N.Y.S.2d 830 (1969); People v. Ballott, 20 N.Y.2d 600, 233 N.E.2d 103, 286 N.Y.S.2d 1 (1967). *But see* Clemons v. United States, 408 F.2d 1230 (D.C. Cir. 1968). The court in *Clemons* refused to give the *Gilbert per se* exclusionary rule retrospective operation for due process in a case where the pretrial confrontation occurred before the *Stovall* decision.

independent basis for an in-court identification.[18] This Note will first survey the application of the *Stovall* rule by the lower courts in the examination of showup and lineup procedures for violations of substantive due process;[19] second, it will examine the factors which the lower courts, upon finding a violation of due process, have considered to establish by "clear and convincing" evidence an independent source sufficient to allow admission of an in-court identification of the suspect by the eyewitness or in the finding of harmless error in the admission of the in-court identification; finally, it will suggest and examine procedures which, though arguably not required by the constitutional right to due process, would aid in removal of the "dangers inherent in eyewitness identification and the suggestibility inherent in the context of the pretrial identification."[20]

II. SUBSTANTIVE DUE PROCESS

A. SHOWUPS

A showup—the presentation of a suspect alone to an eyewitness for possible identification—has been called "the most grossly suggestive identification procedure now or ever used by the police."[21] The *Wade* Court, in a discussion of the showup in *Stovall*, stated that it was difficult "to imagine a situation more clearly conveying the suggestion to the witnesses that the one presented is believed guilty by the police."[22] In a showup, therefore, "[t]he message is quite clear: the police suspect *this* man."[23] Showup procedures, consequently, have been severely attacked by commentators and courts as unduly suggestive.[24]

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18. Examples of these factors would be,

> [t]he prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to the lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification.

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

19. Pretrial identification through the use of photographs will not be considered in detail. For a recent discussion of photographic identifications *see* Comment, 56 IOWA L. REV. 408 (1970).

20. United States v. Wade, 388 U.S. 218, 235 (1967).

21. P. WALL, *supra* note 1, at 28.

22. United States v. Wade, 388 U.S. 218, 234 (1967).

23. Biggers v. Tennessee, 390 U.S. 404, 407 (1968) (dissenting opinion).

24. "The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." Stovall v. Denno, 388 U.S. 293, 302 (1967). *See also* Note,

When a showup has been used by the police for identification purposes, the right of the accused to due process of law may, therefore, automatically have been violated because of the inherent suggestiveness of the procedure.

1. *No violation of Substantive Due Process*

Courts have been reluctant to find a violation of due process in a showup when, in the court's opinion, compelling circumstances dictated a showup, efficient law enforcement and "fresh" identification required an on-the-scene identification or external factors "proved" the accuracy of the identification.

a. Compelling Circumstances

The facts in *Stovall* provided an example of the compelling circumstances held necessary by the Court to justify a suggestive showup. In *Stovall* the victim was hospitalized for multiple stab wounds. The defendant was taken in handcuffs to the hospital bedside of the victim, whose survival was uncertain. The defendant, the only Negro in the room, was identified by her as the assailant after she had been asked by a police officer whether he "was the man," and after the defendant, at the request of an officer, repeated several words for voice identification. Under the "totality of the circumstances" the confrontation, in the opinion of the Court was considered justified because it was imperative that the victim identify her assailant while she was still able to do so.[25] No alternative identification procedure was readily and reasonably available.

Due Process Considerations in Police Showup Practices, 44 N.Y.U.L. REV. 377, 392 (1969); Comment, 14 VILL. L. REV. 535, 540 (1969).

25. Stovall v. Denno, 388 U.S. 293, 302 (1967). The Court stated:

> Here was the only person in the world who could possibly exonerate Stovall. Her words, and only her words, "He is not the man" could have resulted in freedom for Stovall. The hospital was not far distant from the courthouse and jail. No one knew how long [the witness] might live. Faced with the responsibility of identifying the attacker, with the need for immediate action and with the knowledge that [the witness] could not visit the jail, the police followed the only feasible procedure and took Stovall to the hospital room. Under these circumstances, the usual police station line-up, which Stovall now argues he should have had, was out of the question.

Id. Accord, People v. Riveria, 22 N.Y.2d 453, 239 N.E.2d 873, 293 N.Y.S. 2d 271 (1968); Commonwealth v. Dessus, 214 Pa. Super. 347, 257 A.2d 867 (1969) (the victim identified two of the group of three presented to her as the assailants). *But see* People v. Riveria, 22 N.Y.2d 453, 455, 239 N.E.2d 873, 874, 293 N.Y.S.2d 271, 272 (1968) (dissenting opinion). In *Riveria* the defendant was taken to a hospital to be identified by a gravely wounded witness. Another witness was taken to the hospital

b. On-the-Scene

Alternative identification procedures are more reasonably available for on-the-scene showups. These showups, however, have been held not to violate due process when the defendant was quickly apprehended and returned to the scene of the crime.[26] Two reasons have been expressed by the courts for refusal to find a violation of due process: the ensurance of fresh, accurate identification[27] and the need for efficient law enforcement.[28]

Bates v. United States[29] advanced both theories in an opinion by Judge (now Chief Justice) Burger. In *Bates*, a housebreaker was apprehended by police within thirty minutes after the commission of the crime. After the defendant was returned to the scene, the victim identified him while he sat alone in a patrol wagon. Judge Burger noted that "police action in returning the suspect to the vicinity of the crime for immediate identification . . . fosters the desirable objectives of fresh, accurate identification which in some instances may lead to immediate release

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to make an identification. Judge Fuld, in his dissent, stated that this second identification was the kind of technique condemned by the New York courts. *Id.*

26. The sixth amendment right to counsel under *Wade* and *Gilbert* has not been generally applied in on-the-scene identifications. *See, e.g.*, Russell v. United States, 408 F.2d 1280 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 928 (1969). For further discussion see Comment, *Right to Counsel at Scene-of-the-crime Identifications*, 117 U. PA. L. REV. 916 (1969).

27. *See, e.g.*, Harris v. Dees, 421 F.2d 1079 (5th Cir. 1970); Stewart v. United States, 418 F.2d 1110 (D.C. Cir. 1969); Russell v. United States, 408 F.2d 1280 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 928 (1969); Young v. United States, 407 F.2d 720 (D.C. Cir. 1969), *cert. denied*, 394 U.S. 1007 (1969); Bates v. United States, 405 F.2d 1104 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 964 (1968); Sears v. Siegler, 298 F. Supp. 1318 (D. Neb. 1969); People v. Colgain, 276 Cal. App. 2d 118, 80 Cal. Rptr. 659 (1969); People v. Lynch, 111 Ill. App. 2d 52, 249 N.E.2d 649 (1969); Grant v. State, 466 S.W.2d 620 (Mo. 1969); People v. Ambrosoli, 33 App. Div. 2d 881, 307 N.Y.S.2d 785 (1969); Martin v. Commonwealth, 210 Va. 686, 173 S.E.2d 794 (1970); Johnson v. State, 47 Wis. 2d 13, 176 N.W.2d 332 (1970).

28. *See, e.g.*, Harris v. Dees, 421 F.2d 1079 (5th Cir. 1970); Stewart v. United States, 418 F.2d 1110 (D.C. Cir. 1969); Wise v. United States, 383 F.2d 206 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 964 (1968); United States v. Kinnard, 294 F. Supp. 286 (D.D.C. 1968); People v. Colgain, 276 Cal. App. 2d 118, 80 Cal. Rptr. 659 (1969); People v. Lynch, 111 Ill. App. 2d 52, 249 N.E.2d 649 (1969); Commonwealth v. Bumpus, 354 Mass 494, 238 N.E.2d 343 (1968), *cert. denied*, 393 U.S. 1034 (1969); Grant v. State, 446 S.W.2d 620 (Mo. 1969); People v. Ambrosoli, 33 App. Div. 2d 881, 307 N.Y.S.2d 785 (1969); Martin v. Commonwealth, 210 Va. 686, 173 S.E.2d 794 (1970); Johnson v. State, 47 Wis. 2d 13, 176 N.W.2d 332 (1970).

29. 405 F.2d 1104 (D.C. Cir. 1968). The soundness of any on-the-scene identification has been questioned. Quinn, *In the Wake of Wade: the Dimensions of the Eyewitness Identification Cases*, 42 COLO. L. REV. 135, 144-47 (1970).

of an innocent suspect and at the same time enable the police to resume the search for the fleeing culprit while the trail is fresh."[30] Under the "totality of the circumstances" surrounding the confrontation, any prejudice to the defendant through the suggestive on-the-scene showup was considered by the court to be outweighed by the freshness of the identification and the necessity for efficient police investigative techniques.[31]

These two justifications for on-the-scene identifications have been used to support additional suggestive procedures during the identification. Although requiring a suspect to don clothing similar to the perpetrator of the crime or clothing worn by the criminal in an on-the-scene showup aggravates an already suggestive situation,[32] two decisions—*Caruso v. United States*[33] and *Young v. United States*[34]—have refused to find those circumstances any more suggestive or less reliable.

In *Caruso* the defendant was apprehended and returned within fifteen minutes to the scene of the bank robbery. He was required to wear a ski hood that had been dropped at the scene of the crime. He was then identified by three witnesses. In the court's opinion the confrontation was neither suggestive nor conducive to mistaken identification because the confrontation took place fifteen minutes after the robbery, requiring a suspect to wear an article of clothing does not violate due process[35] and the suspect was otherwise distinctively garbed.[36]

In *Young* the defendant was arrested and returned to the scene within a few minutes of the robbery. The victim was unable to identify the suspect until the defendant had put on his own hat, trenchcoat and sunglasses. The court said that "obliging appellant to don his own apparel did not make the resulting identification less reliable; indeed, in the circumstances it is doubtful whether a reliable identification could have been made in the absence of the robber's distinctive accouterments."[37]

30. Bates v. United States, 405 F.2d 1104, 1106 (D.C. Cir. 1968).
31. *Id.*
32. P. WALL, *supra* note 1, at 32.
33. 406 F.2d 558 (2d Cir. 1969), *cert. denied*, 396 U.S. 868 (1969).
34. 407 F.2d 720 (D.C. Cir. 1969), *cert. denied*, 394 U.S. 1007 (1969).
35. For a discussion of the use of distinctive clothing in lineups *see* notes 171-181 *infra* and accompanying text.
36. Caruso v. United States, 406 F.2d 558, 559 (2d Cir. 1969), *cert. denied*, 396 U.S. 868 (1969).
37. Young v. United States, 407 F.2d 720, 721 (D.C. Cir. 1969), *cert. denied*, 394 U.S. 1007 (1969). *But see* People v. Ballott, 20 N.Y.2d 600, 233 N.E.2d 103, 286 N.Y.S.2d 1 (1967) (exhibition of defendant in his

Neither case required an on-the-scene identification under the reasons advanced by the courts for justification of such a showup. Fresh identification was not essential. In *Caruso* the ski hood would have prevented identification by facial features—only memories of the robber's build and dress would fade. Because of the distinctive dress of the robber, however, the witnesses easily identified the clothing worn by the defendant when arrested as the clothing worn by one of the holdup men when the clothing was introduced at trial.[38] In *Young* the witness admitted he could not identify the defendant until he saw him dressed in clothing similar to that worn by the holdup man.[39]

Nor did efficient law enforcement require an immediate identification in either case. The defendant in *Caruso* was pursued after the robbery by a bank employee until the arresting officer continued the chase.[40] In *Young* the suspect matched the clothing and physical description given by the victim. Further, $181 including a $2 bill had been taken by a man with a chrome-plated revolver during the crime. When the defendant was arrested, he had in his pocket $181 including a $2 bill and a toy revolver.[41] In light of these facts, there was little likelihood of police error in the arrest of an innocent party in *Caruso* and *Young*.

Under the "totality of the circumstances" test fashioned by the Court, the compelling circumstances in *Stovall* justified a showup. *Bates*, in applying the same test, concluded that due process was not violated by an on-the-scene showup which assured fresh memory and efficient law enforcement. *Caruso* and *Young* extended the "totality" test to allow, without a violation of due process, on-the-scene showups which were necessitated

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heavy coat and glasses before the witness could identify him was a factor in the finding of a violation of due process); State v. Cooper, 14 Ohio Misc. 173, 237 N.E.2d 653 (C.P. 1968) (display of defendant in his hat, glasses and trenchcoat seized in an unlawful search condemned). Under the facts of *Young*, it could be argued that it was doubtful whether *any* identification could have been made in the absence of the robber's "distinctive accouterments." Query whether Young or the clothing was identified. *Young* and *Bates* were decided by the same court. It may be that *Young* has extended the *Bates* rationale.

38. Caruso v. United States, 406 F.2d 558, 559 (2d Cir. 1969), *cert. denied*, 396 U.S. 868 (1969).

39. Young v. United States, 407 F.2d 720, 721 (D.C. Cir. 1969), *cert. denied*, 394 U.S. 1007 (1969).

40. Caruso v. United States, 406 F.2d 558, 559 (2d Cir. 1969), *cert. denied*, 396 U.S. 868 (1969).

41. Young v. United States, 407 F.2d 720-21 (D.C. Cir. 1969), *cert. denied*, 394 U.S. 1007 (1969).

neither by fresh memory, efficient law enforcement nor compelling circumstances. This extention finds little support in either *Stovall* or *Bates*. In *Bates*, Judge Burger expressed his opinion that "prudent police work could confine these on-the-scene identifications to situations in which possible doubts as to identification needed to be resolved promptly; absent such need the conventional line-up viewing is the appropriate procedure."[42] In both cases lineups, properly conducted, would have been far less suggestive. "With the stakes so high, due process does not permit second best."[43] *Caruso* and *Young*, however, allowed "second best" police procedures to pass without comment.

c. External Factors

Under the *Wade-Gilbert-Stovall* decisions, once a suspect's right to counsel or due process at a pretrial identification has been violated, in-court identification by the identifying witness would be inadmissible unless an "independent source" for that identification were established or unless it were established that the error in its admission was harmless.[44] The Court in *Wade* provided examples of the external factors that could be used to establish an "independent source" for the in-court identification.[45] Many courts, however, have not used the external factors to determine the existence of an "independent source" which would justify the in-court identification, even though there had been a denial of pretrial due process. Rather, these factors have been considered by the courts as additional "proof" of the accuracy of the pretrial identification.[46] Because the pretrial identification in the courts' opinion was correct, due process, therefore, had not been denied to the suspect.[47]

42. Bates v. United States, 405 F.2d 1104, 1106 (D.C. Cir. 1968).

43. Wright v. United States, 404 F.2d 1256, 1262 (1968) (dissenting opinion). It should be noted that Judge Bazelon, in his dissent in *Wright*, stated that a violation of due process occurred whenever the police unjustifiably failed to hold a lineup. Later, in *Young*, Bazelon acquiesced in a per curiam opinion. Apparently the showup in *Young*, in Bazelon's opinion, was justifiable or he has changed his attitude toward showups.

44. *See* notes 14-16 *supra* and accompanying text. The lower courts' approach to "independent source" and "harmless error" will be discussed later. *See* notes 195-219 *infra* and accompanying text.

45. *See* note 17 *supra*.

46. *See, e.g.*, State v. Carnegie, 158 Conn. 264, 259 A.2d 628 (1969), *cert. denied*, 396 U.S. 992 (1969).

47. It has been argued that court consideration of external factors to justify a showup cannot be supported by the *Stovall* decision. *See* Note, *Due Process Considerations in Police Showup Practices*, 44 N.Y.U.L. REV. 377, 383 (1969).

When the pretrial identification occurred soon after the crime, the courts' approach to external factors was also supported by the fresh identification and efficient law enforcement considerations used by the courts to justify the on-the-scene showups.[48] Other cases have alluded to the necessity for fresh identification and efficient law enforcement by their emphasis upon the brief lapse of time between the criminal act and the pretrial identification.[49] The brief lapse of time coupled with factors such as an accurate description of the criminal or the getaway car,[50] opportunity to view the criminal during the crime,[51] adequate illumination of the scene of the crime[52] and other incriminating evidence,[53] in the courts' opinion, have outweighed any prejudice to the suspect.

The arguments advanced by the courts in the on-the-scene showups[54] lose their force with the longer passage of time between the pretrial identification and the commission of the

48. *See* State v. Thomas, 107 N.J. Super. 128, 257 A.2d 377 (1969); State v. Gatling, 5 N.C. App. 536, 169 S.E.2d 60 (1969). *See* notes 26-43 *supra* and accompanying text for the discussion of arguments in support of on-the-scene showups.

49. *See, e.g.*, People v. Floyd, 1 Cal. 3rd 694, 464 P.2d 64, 83 Cal. Rptr. 608 (1970) (two and one-half hours after the crime); People v. Burns, 270 Cal. App. 2d 238, 75 Cal. Rptr. 688 (1969) (shortly after the crime); People v. Romero, 263 Cal. App. 2d 590, 69 Cal. Rptr. 748 (1968) (one-half hour after the crime); Asber v. State, — Del. —, 253 A.2d 204 (Super. Ct. 1969) (one and one-half hours after the crime); People v. Moore, 43 Ill. 2d 102, 251 N.E.2d 181 (1969) (shortly after the crime); People v. James, 109 Ill. App. 2d 328, 248 N.E.2d 777 (1969) (shortly after the crime); State v. Sanders, 202 Kan. 551, 451 P.2d 148 (1969) (one hour after the crime); Smith v. State, 6 Md. App. 23, 249 A.2d 732 (1969) (two and one-half hours after the crime); Commonwealth v. Blackburn, 354 Mass. 200, 237 N.E.2d 35 (1968) (evening of the crime); State v. Sears, 182 Neb. 384, 155 N.W.2d 332 (1967) (two and one-half to three hours after the crime).

50. *See, e.g.*, People v. Burns, 270 Cal. App. 2d 238, 75 Cal. Rptr. 688 (1969); People v. Romero, 263 Cal. App. 2d 590, 69 Cal. Rptr. 748 (1968); Commonwealth v. Blackburn, 354 Mass. 200, 237 N.E.2d 35 (1968); State v. Sears, 182 Neb. 384, 155 N.W.2d 332 (1967).

51. *See, e.g.*, People v. Romero, 263 Cal. App. 2d 590, 69 Cal. Rptr. 748 (1968); People v. James, 109 Ill. App. 2d 328, 248 N.E.2d 777 (1969); Smith v. State, 6 Md. App. 23, 249 A.2d 732 (1969); Commonwealth v. Blackburn, 354 Mass. 200, 237 N.E.2d 35 (1968).

52. *See, e.g.*, People v. Moore, 43 Ill. 2d 102, 251 N.E.2d 181 (1969); Smith v. State, 6 Md. App. 23, 249 A.2d 732 (1969).

53. *See, e.g.*, People v. Burns, 270 Cal. App. 2d 238, 75 Cal. Rptr. 688 (1969); People v. James, 109 Ill. App. 2d 328, 248 N.E.2d 777 (1969); State v. Sanders, 202 Kan. 551, 451 P.2d 148 (1969). But when the police have ample evidence for a possible conviction, no efficiency would be lost by the use of a lineup, and the suspect would not be prejudiced by a suggestive showup.

54. *See* notes 27-28 *supra* and accompanying text.

crime.[55] Fresh memory may be valid when the pretrial identification occurred within a few hours of the crime, but when that identification did not occur until days after the crime, little validity can be found in the argument. Efficient law enforcement required no quick identification of a suspect. In most cases the suspect was already in jail. Lineups, apparently, could have been arranged with little effort.[56] Courts, however, have been reluctant to find a violation of due process even though other grossly suggestive facts are added to a prolonged period of time between the crime and the pretrial identification:

> We think it plain that the totality of attendant circumstances show that the confrontation here was fraught with hazards of serious unfairness. It was strongly suggestive and conducive to mistaken identification to summon the victims to the precinct to view a suspect twenty days after the robbery and present them with a single Negro in obvious custody of a white policeman when the victims had previously described the culprit as a Negro. The situation, without more, clearly conveyed the suggestion that the Negro presented was believed by the police to be the culprit. The vice was heightened by the victims' identification of the suspect in each other's presence, and the opportunity for objective observation was destroyed by exciting the victims' imagination when the suspect, still alone without others for image and voice comparison, donned the culprit's pork pie hat and spoke his words, "Where's the money?" The spotlight of suggestion could hardly be focused with greater intensity than it was here.[57]

The court concluded, however, that the tainted showup had not affected competent witnesses and the prosecution had established an "independent source" for the in-court identification.[58]

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55. *But see* United States *ex rel.* Rutherford v. Deegan, 406 F.2d 217 (2d Cir. 1968) (identification eleven days after the crime); State v. Hill, 419 S.W.2d 46 (Mo. 1967) (identification seven days after the crime).

56. *But see* People v. Floyd, 15 Mich. App. 284, 166 N.W.2d 506 (1968). The jail rarely had sufficient prisoners, especially Negroes, to have a lineup. The use of a group of photographs would have been preferred to a showup. P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 72 (1965).

57. United States *ex rel.* Geralds v. Deegan, 292 F. Supp. 968, 973 (S.D.N.Y. 1968) (footnotes omitted). *See also* United States *ex rel.* James v. Follette, 301 F. Supp. 569 (S.D.N.Y. 1969) where two months after the crime the witness could not identify the suspect at the scene of the crime in a showup until the suspect had washed his face, combed his hair, donned clothing described as being worn during the crime and uttered words used during the crime; People v. Bey, 42 Ill. 2d 139, 246 N.E.2d 287 (1968) where the witness identified the suspect two days after a rape by his voice and the configuration of his head. No mention of this unusual fact had been made in the original description of the criminal.

58. United States *ex rel.* Geralds v. Deegan, 292 F. Supp. 968, 974 (S.D.N.Y. 1968). Under this decision it would be difficult to see how

The Court in *Wade* suggested several factors that could be used by the lower courts to establish an "independent source" for an in-court identification after a violation of the suspect's right to due process of law. These lower courts, however, have erroneously seized upon those external factors as support for a failure to find a due process violation. The decision in *Stovall* will not support that approach. In *Stovall* the Court stated that a violation of due process should be measured by the "totality of the circumstances" surrounding the confrontation. If those circumstances were unnecessarily suggestive and conducive to mistake, due process would be violated. Indeed, showups were condemned by the Court as unnecessarily suggestive, but in certain instances the Court, under the "totality" test, has allowed the use of a showup. These lower courts go well beyond the Court's application of the "totality" test. In the opinion of those courts, a showup may be used any time if external factors lead to the conclusion that the identification was correct.

The decisions have also circumvented the evidentiary rules established by the Court by their allowance of testimony at trial by the eyewitness concerning the pretrial identification and their failure to shift the burden of proof to the prosecution to establish the "independent source" for an in-court identification by "clear and convincing" evidence. The evidentiary rules were formulated by the Court to assure respect by law enforcement officials for the suspect's right to due process. These decisions, however, protect only the due process rights of those suspects who, in the court's opinion, are innocent. If "competent" witnesses give an identification that "seems accurate" no matter how suggestive the confrontation might have been, the suspect's right to due process goes unprotected. In other words, anything goes as long as he's guilty: an attitude which does little to insure proper respect by law enforcement officials for constitutional rights. It has no support in the *Stovall* decision or in the spirit in which that decision was rendered.

2. *Violation of Substantive Due Process*

a. New York Rule

The New York approach to a showup and due process violations has been markedly different. Showups apparently have

there could ever be a violation of due process if the police have competent witnesses. This competency could be used by the court to negate the most suggestive pretrial identification.

been viewed, absent imperative circumstances, as violations of due process.[59] Although this rule has not been specifically adopted, the thrust of the opinions has indicated a preference for an initial finding of a violaton of due process in a showup. Any testimony by the eyewitness at trial concerning the pretrial identification has then been inadmissible *per se* and the burden of proof for the establishment of an "independent source" to support an in-court identification by the eyewitness then has been shifted to the prosecution.

In *People v. Brown*,[60] the witness, through a small window, viewed and identified two Negro suspects as they sat with a white policeman in another room. The concurring opinion stated that "absent 'imperative' circumstances . . . [the showup] can be 'so unnecessarily suggestive and conducive to irreparable mistake' as to amount to a denial of due process."[61] The court, however, affirmed the conviction because there was no prejudice to the defendant in the identification.[62]

Later, in *People v. Ballott*[63] the victim identified the defendant in a showup one year after the crime after the defendant had, at her request, dressed in a hat and heavy coat and spoken words similar to those used in the crime. The court did not find on the record an "independent source" for the in-court identification by the eyewitness. Because of the violation of due process during the pretrial identification procedure, the conviction was reversed and remanded. At the new trial the court said that an in-court identification would be allowed only if the prosecution established at a hearing to be held by the judge out of the presence of the jury the independent basis for the in-court identification of the suspect by clear and convincing proof.[64] New York

59. The courts have not provided a definition for "imperative circumstances."

60. 20 N.Y.2d 238, 229 N.E.2d 192, 282 N.Y.S.2d 497 (1967). The constitutionality of any showup has been questioned. *See, e.g.*, Comment, 14 VILL. L. REV. 535, 543 (1969).

61. 20 N.Y.2d at 243-44, 229 N.E.2d at 194, 282 N.Y.S.2d at 501 (1967).

62. *Id.* The concurring opinion stated that the introduction into evidence of the impermissible pretrial identification was harmless error because the victim had ample opportunity to view the defendant before and during the crime. *Id.* at 244, 229 N.E.2d at 195, 282 N.Y.S.2d at 502. On facts similar to *Brown* the court simply found a violation of due process and remanded to see if the in-court identification had been tainted. People v. Hill, 22 N.Y.2d 686, 238 N.E.2d 913, 291 N.Y.S.2d 802 (1968).

63. 20 N.Y.2d 600, 233 N.E.2d 103, 286 N.Y.S.2d 1 (1967).

64. *Id.* at 607, 233 N.E.2d at 107, 286 N.Y.S.2d at 7.

cases since *Ballott* have found the failure to employ a lineup by the police, absent imperative circumstances, violative of due process with little or no discussion of the facts of each case.[65]

Dissenting opinions in two other jurisdictions have expressed similar views. In *Commonwealth v. Choice*[66] the dissent would have found a due process violation because an unnecessary showup had been used.[67] In *Wright v. United States*[68] Judge Bazelon felt that due process was violated whenever the police unjustifiably failed to hold a lineup.[69]

Bazelon's dissent in *Wright* has apparently been partially followed in *McRae v. United States*.[70] In *McRae* four hours after a rape, the defendant was taken by the police to the victim at a hospital for possible showup identification. The victim walked from the emergency room of the hospital to the police car where she identified the Negro defendant as he sat in the back seat with a white policeman. The court found that there was no evidence that the victim was likely to die or that her condition would prevent her attendance at a proper lineup. The court stated:

> [A]t some point the nexus of time and place between offense and identification must become too attenuated to outweigh the admitted dangers of presenting suspects singly to witnesses. We conclude that this point was reached, and more, in this case.[71]

Although, in the opinion of the court, the showup was "unnecessarily suggestive," this did not "automatically imply that it

65. *See, e.g.*, People v. Damon, 24 N.Y.2d 256, 247 N.E.2d 651, 299 N.Y.S.2d 830 (1969); People v. Hill, 22 N.Y.2d 686, 238 N.E.2d 913, 291 N.Y.S.2d 802 (1968); People v. Colabella, 31 App. Div. 2d 827, 298 N.Y.S. 2d 40 (1969). The in-court identification can still be admitted if it has an "independent source," or its admission was "harmless error." People v. Damon, 24 N.Y.2d at 261 & n.1, 247 N.E.2d at 653 & n.1, 299 N.Y.S.2d at 834 & n.1.

66. 211 Pa. Super. 176, 235 A.2d 173, 174 (1967) (dissenting opinion). In *Choice* the defendant was shown to two witnesses who were brought into an interrogation room and asked, "Is this the one?" The majority found no violation of due process. *Id.*

67. *Id.* at 178, 235 A.2d at 175.

68. 404 F.2d 1256, 1262 (D.C. Cir. 1968) (dissenting opinion). The majority remanded the case for further findings of fact.

69. *Id.*

70. 420 F.2d 1283 (D.C. Cir. 1969).

71. *Id.* at 1290. *But see* Commonwealth v. Connolly, — Mass. —, 255 N.E.2d 191 (1970). The defendants in *Connolly* were identified by the victim from a hospital bed. In the opinion of the court they were not denied due process. The court stated, "[it was] *immaterial* whether [witness'] wounds were so critical that haste, as in the *Stovall* case, was essential if any identification at all was to occur . . . ." *Id.* at 196 (emphasis added).

was so conducive to irreparable mistaken identification that the appellant was denied due process."[72] The case was remanded to the district court because that court was better suited to decide whether there was an independent source supporting the probable reliability of the hospital confrontation that the circuit court found unnecessarily suggestive.[73]

b. Flagrant Pretrial Confrontation

Some courts *have* found a violation of due process in the face of a highly suggestive pretrial identification showup. In *State v. Cooper*[74] a violation of due process was found upon a review of all evidence so as to destroy the probative value of the identification. In *Cooper* the police took four of the five witnesses in a police cruiser to "identify Mr. Cooper." The defendant was displayed to the group after the police had told the witnesses that they "thought they had the right man." When two of the witnesses failed to identify the suspect, he was made to put on a hat and glasses, items that were the fruits of an unlawful search and seizure. All of them subsequently identified him. Two of the victims then gave statements to the police at headquarters in front of the suspect after again viewing him in a trenchcoat, hat and glasses. In the opinion of the court:

> Each of the five things the police did would in and of itself, be grossly suggestive and likely to result in mistake. Together their effect is crushing and in this case not a single one of them was at all necessary to accomplish any legitimate police purpose.[75]

In *Coleman v. State*[76] the witness failed to identify the de-

72. McRae v. United States, 420 F.2d 1283, 1291 (D.C. Cir. 1969). In an earlier case in the same court, however, Judge J. Skelly Wright stated that an unnecessarily suggestive showup was a violation of due process. Clemons v. United States, 408 F.2d 1230, 1254 (D.C. Cir. 1968) (concurring in part and dissenting in part).

73. McRae v. United States, 420 F.2d 1283, 1291 (D.C. Cir. 1969). *See also* People v. McMath, 45 Ill. 2d 33, 256 N.E.2d 835 (1970). The court in *McMath* found the showup unnecessarily suggestive but not so conducive to irreparable mistaken identification as to be a violation of due process. *Id.* at —, 256 N.E.2d at 837.

74. 14 Ohio Misc. 173, 237 N.E.2d 653 (C.P. 1968).

75. *Id.* at 175, 237 N.E.2d at 654. *See also* People v. King, 266 Cal. App. 2d 437, 464-66, 72 Cal. Rptr. 478, 496 (1968) where the court found a suggestion by the police to the witness of their certainty of the suspect's guilt too suggestive; United States v. Gilmore, 398 F.2d 679 (7th Cir. 1968) where the victim said after the crime that he could not identify the criminal and then identified the defendant at a showup. Under those circumstances the court in *Gilmore* found a violation of due process. *Id.*

76. 8 Md. App. 65, 258 A.2d 42 (1969).

fendant when she viewed him in a lineup. She had also viewed a number of photographs of which she selected three other men as possible suspects. The identification was finally positively made when the defendant was called forward and accused of the crime at the preliminary hearing. After a finding of a violation of due process, the court reversed the conviction and remanded to see if the prosecution could establish an "independent source" for an in-court identification by the eyewitness.[77]

3. *Summary*

Few courts, in the interpretation of *Stovall* have found a violation of due process in the use of a showup. If the concept of fairness which motivated the Court in *Stovall* to protect a suspect's right to due process during a pretrial confrontation is therefore to be applied, the New York approach to *Stovall* should be followed by the lower courts. Showups, absent imperative circumstances, should be a violation of due process. Imperative circumstances should be limited to compelling circumstances and on-the-scene showups. Beyond these circumstances pretrial identifications should be confined to lineups or identification through the use of a photograph of the suspect presented with other photographs of individuals similar in appearance. In addition, testimony at trial concerning the pretrial identification in violation of due process should be excluded, and the burden of proof for an in-court identification of the suspect by the witness based on an "independent source" should be shifted to the prosecution. Persistent use of a suggestive showup would be discouraged by this approach while efficient law enforcement would be unharmed.

III. LINEUPS

The witness who views a lineup will have a minimum of two people from which to make a possible identification. Ideally, there should be at least six participants who closely resemble each other in stature, clothing and physical characteristics. All participants should be displayed to the witness simultaneously with no undue attention being drawn to any of them. The witness may request the participants to repeat a statement or movement made by the criminal to facilitate identification, but all members of the lineup should be made to comply with this request to negate focusing on one participant, unless the witness

77. *Id.* at 78, 258 A.2d at 49.

requests a specific lineup member to repeat the phrase or movement. If there are several witnesses, each witness should convey his conclusions to the police while isolated from the other witnesses to avoid influencing the others' decisions.[78]

This identification procedure, although seemingly free from influence, can still impart subtle suggestion and affect the witness' judgment and subsequent selection of a participant as "the criminal." The witness may feel that the police would not ask him to view a lineup unless they felt that they had the culprit. He may also feel an obligation to reward the police for their effort by selecting a participant as the "guilty party." The question in the witness' mind may then become, "Which one of the participants is he?" rather than, "Is the criminal in the lineup?" In light of these inherent influences, any suggestion which focuses attention upon an individual within the lineup can affect the impartiality of the confrontation. Thus, it is imperative that the lineup be conducted with the greatest care and diligence to assure fundamental fairness and preserve due process.[79]

Stovall, although dealing with a showup, by analogy has been applied to lineups.[80] The Court in *Stovall* held that under the "totality of the circumstances" the confrontation must not be "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to be a violation of due process. In formal and informal lineup confrontations, one or more items may be "unnecessarily suggestive and conducive to irreparable mistaken identification," but under the forgiving guise of the "totality of the circumstances" surrounding the confrontation, the courts are not forced to find a violation of due process. In practice the lower courts have seldom invalidated a lineup identification because of one defect.

"Totality of the circumstances," when applied to lineups, appears to encompass both a consideration of external factors as in the showup cases and a weighing process with respect to the characteristics of the lineup itself, *i.e.*, the unfair characteristics of the confrontation are measured against the fair characteristics. The subsections below which discuss the formal and informal lineup confrontations in relation to the lower court decisions will, there-

78. *See* Murray, *The Criminal Lineup at Home and Abroad*, 1966 UTAH L. REV. 610, 627-28, cited in *Wade*, 388 U.S. 218 at 236 n.26.

79. P. WALL, *supra* note 56, at 40-41.

80. The Court in *Stovall* directed its attention to a violation of due process in a *confrontation* and subsequent courts have interpreted this to include lineups as well as showups.

fore, be measured against the "unnecessarily suggestive" standard with the realization that most courts have not found a violation of due process after examining the "totality of the circumstances."

A. Informal Confrontations

Often a suspect will be identified while in an informal group rather than in a formal lineup. This has occurred in the lobby of the police station,[81] in a police department office,[82] in a corridor of the police station,[83] in a courtroom,[84] in a room designed for viewing and identification[85] or in a jail cell.[86] Although this procedure is not subject to the inherent suggestiveness of a showup, at least one authority feels that even this method is unfair.[87] The suspect may unconsciously, by nervous actions, focus attention on himself during the secret observation. To prevent this possible unfair suggestion, it has been suggested that the suspect should be allowed a direct confrontation with his accuser to allow him to compose himself and disguise any fear he may have of the proceedings.[88] Direct confrontation, which is required in England, also would assure that the other participants, through fear of the suspect when left alone with him, or otherwise, would not inadvertently direct the witness' attention to the suspect. An exception to direct confrontation should be allowed when the witness would be too nervous to face his assailant. But even then the suspect should be told when the unobserved witness is viewing him.[89]

American courts have not concerned themselves with this aspect of the pretrial identification procedure. In affirming the

81. Simon v. State, 7 Md. App. 446, 256 A.2d 348 (1969).
82. United States v. Gregg, 414 F.2d 943 (7th Cir. 1969); United States v. Clark, 294 F. Supp. 44 (D.D.C. 1968); People v. Logan, 25 N.Y.2d 184, 250 N.E.2d 454, 303 N.Y.S.2d 353 (1969).
83. United States v. Gregg, 414 F.2d 943 (7th Cir. 1969); People v. Logan, 25 N.Y.2d 184, 250 N.E.2d 454, 303 N.Y.S.2d 353 (1969).
84. Dade v. United States, 407 F.2d 692 (D.C. Cir. 1968); United States v. Marson, 408 F.2d 644 (4th Cir. 1968); United States v. Davis, 407 F.2d 846 (4th Cir. 1969).
85. State v. Brown, 104 Ariz. 510, 456 P.2d 368 (1969); People v. Pelow, 24 N.Y.2d 161, 247 N.E.2d 150, 299 N.Y.S.2d 185 (1969); State v. Nelson, 250 S.C. 6, 156 S.E.2d 341 (1967).
86. Commonwealth v. Sullivan, 354 Mass. 598, 239 N.E.2d 5 (1968), *cert. denied*, 393 U.S. 1056 (1969).
87. P. Wall, *supra* note 56, at 44-45.
88. *Id.*
89. *Id.* at 45-46.

convictions, they have focused on the fact that the suspect wore clothes similar to those worn by others in the room,[90] was not wearing handcuffs[91] and no attempt was made to single out the suspect for a witness.[92]

When the *Stovall* standard of "unnecessarily suggestive" is applied to an informal viewing, it would appear that this procedure could be acceptable since any suggestion or influence must come from the suspect himself. Indeed, it could be argued that the suspect is seen in a more natural setting than the artificial atmosphere of a police lineup. It would be difficult to imagine a confrontation which would provide a more neutral setting than that employed by the police in *United States v. Clark*.[93] The witness was requested to come to the Robbery Squad office to view a suspect. When he arrived, the suspect was seated behind a detective's desk talking on the telephone. He was neatly attired in a manner similar to the others milling around the room. Despite the fact that the witness did not expect to see the suspect in the office and certainly not behind a desk using the telephone, he immediately identified him. There certainly was no suggestive influence present in this confrontation.

Despite the possibility of fairness as evidenced in *Clark*, proper standards of fairness could more easily be applied to a lineup by the courts. An informal confrontation inititated by the police, therefore, should not be preferred over a properly conducted lineup.

B. Formal Confrontations

There are a variety of subtle, suggestive influences on the witness which may be present in a formal police lineup. These may exist before, during or after the actual confrontation and may be by design of the police or innocent in nature.

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90. People v. Pelow, 24 N.Y.2d 161, 166, 247 N.E.2d 150, 152, 299 N.Y.S.2d 185, 188 (1969); United States v. Marson, 408 F.2d 644, 651 (4th Cir. 1968); United States v. Clark, 294 F. Supp. 44, 48 (D.D.C. 1968). *But see* People v. Logan, 25 N.Y.2d 184, 250 N.E.2d 454, 303 N.Y.S.2d 353 (1969), where the defendant was the only person in the room not wearing a police uniform or business suit.

91. United States v. Davis, 407 F.2d 846, 847 (4th Cir. 1969); United States v. Marson, 408 F.2d 644, 651 (4th Cir. 1968); State v. Galloway, 247 A.2d 104, 108 (Me. 1968).

92. State v. Galloway, 247 A.2d 104, 108 (Me. 1968); Dade v. United States, 407 F.2d 692, 693 (D.C. Cir. 1968); State v. Brown, 104 Ariz. 510, 511, 456 P.2d 368, 369 (1969).

93. 294 F. Supp. 44 (D.D.C. 1968).

1. *Pre-lineup Suggestion*

Before the actual lineup, it is possible for the authorities to influence the witness by suggestive police statements, by a pre-lineup photographic display, by a pre-lineup confrontation with the suspect or other lineup participants or by multiple lineup confrontations.

a. Police Statements

The witness' conviction that one of the participants in the lineup is probably the criminal can be reinforced by a police statement indicating the presence in the lineup of the "right man." Apparently, however, the statement must be grossly unfair before an American court will reverse a conviction based on a denial of due process. In *Bradley v. Commonwealth*,[94] a robbery victim before viewing the lineup was told that "[a]ll you have to do is point him out. We know we got him."[95] In the court's opinion the lineup, under the "totality of the circumstances," was acceptable.[96]

The court concluded that the police, in *United States v. Mancusi*,[97] however, went too far. The victim of a purse snatching was requested to come to the police station one and one-half months after the crime to view a suspect. After studying two men standing outside their cell, she pointed to one, identifying him as the purse snatcher. The officer then pointed to the other man, stating, "No, it was him that took your money, wasn't it?"[98] She agreed. The court affirmed the lower court's reversal of the conviction as being based on an unreliable identification.[99]

Proper identification procedures should permit no indication by the police as to whom the guilty party is when the witness confronts the suspect in a lineup situation. Any such indication before the lineup only places undue pressure upon the witness to make an identification. The possibility of "irreparable mistake" through unnecessary police suggestion is thereby needlessly increased.

b. Photographic Display

The reliability of a witness' identification at a formal lineup

94. 439 S.W.2d 61 (Ky. 1969).
95. *Id.* at 64.
96. *Id.*
97. 409 F.2d 801 (2d Cir. 1969).
98. *Id.* at 802.
99. *Id.* at 803.

can be eroded by allowing the witness to see a photograph of the suspect, the suspect himself, or the innocent members of the lineup in such a way that their innocence is displayed, prior to the lineup observation.[100] A witness' attention will inevitably be drawn to a familiar face in viewing the persons before him, and, if he is in doubt, that face may be chosen.

The use of photographs, although subject to this condemnation, is often a necessary procedure in the apprehension of a suspect by the police. An identification of a suspect through the use of "mug shots" frequently provides the authorities with their only clue to a suspect's identity. On the other hand, identification by a witness of a photograph before apprehension of the criminal can influence the selection of that same person in a subsequent lineup after apprehension because of the familiarity of the features. Efficient law enforcement dictates that this risk should be taken, however, when the photographic display may possibly lead to the apprehension of the criminal.[101]

Because the *only* legitimate reason for showing photographs to a witness is to aid in the apprehension of suspects, a photograph should not be shown to a witness after the suspect has been arrested.[102] Subsequent identification of the accused at a lineup then shows nothing except that the picture was a good likeness. The suspect will undoubtedly be singled out by the witness as the criminal.[103] The California Court of Appeals held, however, that where a witness had been shown three sets of photographs after the suspect had been arrested, including one colored photo among black and white photos of others, the subsequent identification of the defendants in two lineups had little likelihood of mistake.[104] The Second Circuit also affirmed the conviction of a suspect identified in a lineup immediately after being picked out of a group of pictures. It distinguished *Stovall* by limiting that case to situations in which a long period of time had elapsed between the crime and the lineup confrontation.[105] This strained reading of *Stovall* ignored the lack of necessity for showing photographs when the suspect was already in custody.

A variation of this problem will occur when a suspect's pho-

100. P. WALL, *supra* note 56, at 68-69.
101. *Id.* at 66-68.
102. *See* general discussion of identification by photograph in P. WALL, *supra* note 56, at 66.
103. *Id.*
104. People v. Romero, 272 Cal. App. 2d 39, 77 Cal. Rptr. 175 (1969).
105. United States v. Culotta, 413 F.2d 1343 (2d Cir. 1969).

tograph has been published in a newspaper and identified with the crime in question before the lineup. English courts are very aware of the extent to which such a practice may influence a witness' identification, and they have taken direct steps to curtail it. If a suspect's photograph has been published in a manner which may prejudice him, the publisher will be found in contempt of court.[106]

By contrast, American courts have not been concerned with the effect such a publication may have on the identification of a suspect. In *Roberts v. Gladden*,[107] all of the witnesses to a bank robbery had seen a suspect's picture and the report of his arrest for that crime in the newspaper. The court, in affirming the conviction, stated that since the police were not instrumental in causing the publication of the picture and because the lineup was conducted less than a week after the crime, the suspect was not prejudiced.[108] In a later case, the Fifth Circuit held that even though the police were responsible for the publication of the picture in the newspaper, the subsequent identification of the suspect was not tainted by the publication.[109]

A lineup identification after the witnesses have seen a picture in a newspaper of the suspect who has been expressly linked with the commission of the crime has little value. If the person depicted in the newspaper photograph is obviously not the criminal, a lineup is not necessary in order for a witness to convey that fact to the police. If the picture, however, closely resembles the person the witnesses remember as the criminal, the person in the photograph is more likely to be singled out by them in the lineup. The publishing of the suspect's photograph in a newspaper or the viewing by the witness before a lineup of the suspect's photograph must, at the very least, be considered to be "unnecessarily suggestive and conducive to irreparable mistaken identification."

c. Pre-lineup Confrontation

Similarly, if a suspect has been seen prior to a lineup in circumstances which made it obvious that he was in custody for that crime, the lineup has little value. In *People v. Jones*,[110]

106. P. WALL, *supra* note 56, at 86.
107. 292 F. Supp. 385 (D. Ore. 1968).
108. *Id.* at 387. *See also* United States v. Zeiler, 296 F. Supp. 224 (W.D. Pa. 1969).
109. Agius v. United States, 413 F.2d 915 (5th Cir. 1969).
110. 18 Mich. App. 368, 171 N.W.2d 223 (1969).

the victim, in hot pursuit of the criminal, finally caught up to him after the police had already apprehended him. He saw the suspect seated in the patrol car and later identified him in a lineup. The court, in affirming the conviction, stated that the police officer who arrested the defendant could not have prevented the confrontation.[111] In a similar situation, the fact that the victim saw the suspect handcuffed in a police car immediately after the crime did not taint the subsequent lineup identification because the victim had seen the suspect several other times during the day prior to the crime.[112]

The Supreme Court of Illinois condemned the practice of allowing the witness to see the suspect before the lineup but affirmed the conviction in a case in which the victim of a rape was too hysterical to identify the suspect presented to her by the police on the night of the crime, but later identified him in a formal police lineup.[113] Although a source other than the lineup identification may have been established, the circumstances were suggestive, and it is questionable whether the lineup identification was of any value other than to add unfounded reliability to the victim's testimony at trial.

d. Multiple Confrontations

After a lineup has failed to produce an identification, a flagrant form of police suggestion has been the viewing by the same witness of another lineup in which the suspect reappears. This not only presents the danger of erroneous identification by merely seeing a familiar face again, but also plainly suggests to the witness that the police think that this is the criminal.[114] An independent source for an in-court identification must also be suspect since the witness was not confident enough of his ability to identify the criminal to single him out in the first lineup. Under these circumstances the United States Supreme Court in *Foster v. California*[115] reversed the conviction and remanded to the trial court:

> In the first lineup arranged by the police, petitioner stood out from the other two men by the contrast of his height and by the fact that he was wearing a leather jacket similar to that worn by the robber. . . . When this did not lead to a positive

111. *Id.* at 372, 171 N.W.2d at 225.
112. State v. Batchelor, 418 S.W.2d 929 (Mo. 1967).
113. People v. Raymond, 42 Ill. 2d 564, 248 N.E.2d 663 (1969).
114. P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 64 (1965).
115. 394 U.S. 440 (1969).

> identification, the police permitted a one-to-one confrontation between petitioner and the witness. . . . Even after this the witness' identification of petitioner was tentative. So some days later another lineup was arranged. Petitioner was the only person in this lineup who had also participated in the first lineup. . . . This finally produced a definite identification.[116]

In condemning this procedure, the Court stated:

> The suggestive elements in this identification procedure made it all but inevitable that [the witness] would identify petitioner whether or not he was in fact "the man." In effect, the police repeatedly said to the witness, "*This* is the man." . . . This procedure so undermined the reliability of the eyewitness identification as to violate due process.[117]

Another court, however, has held that multiple confrontations did not violate the fourteenth amendment. In *State v. Cummings*,[118] the victim, after tentatively identifying an individual from mug shots, viewed a lineup which included the defendant but could not identify anyone. In a subsequent lineup, with the defendant again participating, the victim picked out the defendant. The court held that the defendant's right to due process of law had not been violated. This case, decided after *Foster*, cannot readily be distinguished from *Foster*, and it is difficult to understand how the court ignored the holding in that case in affirming the conviction.

The Pennsylvania Superior Court, however, reversed a conviction because a lineup was conducted in an unnecessarily suggestive manner. There the witness had viewed a lineup without being able to identify anyone. He then accompanied police to look at the car he had previously described to them and, after the police indicated that two of the lineup participants had been apprehended in the car, and at the police's request, viewed the lineup again and identified two of the participants.[119] The court, in reversing, quoted the witness as testifying, "[I]t was supposed to be two boys, so I guessed and I said those two boys. The more I did look the more they actually did look like the guys that did rob me."[120]

An even more blatant violation of due process results when a suspect is viewed in a showup after the witness failed to identify him in a lineup. Yet, at least one court has held that there was not a violation of due process when the witness identified the

116. *Id.* at 442-43.
117. *Id.* at 443.
118. 445 S.W.2d 639 (Mo. 1969).
119. Commonwealth v. Lee, 215 Pa. Super. 240, 257 A.2d 326 (1969).
120. *Id.* at 243, 257 A.2d at 328.

suspect in this second confrontation.[121]

The Supreme Court of North Carolina was confronted with a case in which the witness, after viewing a lineup without being able to identify anyone, observed one participant alone at the authorities' request while the suspect was wearing clothing similar to that which she had described. The court held that her identification after this second confrontation was induced by a violation of due process.[122]

Any pre-lineup influence by suggestive police statement, unnecessary photographic display, pre-lineup confrontation or multiple confrontations can be "unnecessarily suggestive and conducive to irreparable mistaken identification." Most courts, however, have used the "totality of the circumstances" reasoning to avoid finding a violation of due process. Under this approach pre-lineup procedures can continue to be suggestive as long as the suggestive factors are outweighed by the proper procedures used in the same lineup by law enforcement officials. If courts continue to find a violation of due process only in the face of flagrant police conduct, the spirit in which *Stovall* was decided will, in all but a few isolated cases, be effectively throttled.

2. *Lineup Suggestion*

If the lineup has not been tainted by suggestive procedures prior to the actual confrontation, the police have a continuing responsibility to assure fairness during the actual viewing. Due process of law may be impaired at this stage both by the composition of the lineup and by the actions of the lineup participants:

> The composition of the line-up—how many persons are in it, what they look like, what they wear, who they are—is a matter of great importance, for unless it is completely free from suggestive influences, its value will be greatly diminished, if not destroyed. Indeed, so important is this point considered in England, that informal police rules require that the suspect be asked if he is satisfied with the lineup, and suggestions have been made that the officer in charge have one or two persons in reserve for the substitutions which are sometimes made at the suspect's request.[123]

The physical characteristics of the other participants should closely resemble those of the suspect.[124] If the lineup is composed so as to focus undue attention on one participant, any iden-

121. People v. Brunson, 1 Cal. App. 3d 226, 81 Cal. Rptr. 726 (1969).
122. State v. Wright, 274 N.C. 84, 161 S.E.2d 581 (1968).
123. P. WALL, *supra* note 114, at 52.
124. *Id.* at 53; Murray, *The Criminal Lineup at Home and Abroad*, 1966 UTAH L. REV. 610, 628.

tification made would be of little probative value.

Lower courts have chosen, however, to apply loose limits to the "unnecessarily suggestive" standard set forth in *Stovall* when considering the clothes and physical characteristics of the lineup participants.

a. Race

Obviously, persons exclusively of the same race,[125] ethnic background or sex[126] should be used as participants when the description so dictates. In *State v. Parker*,[127] however, the Supreme Court of Minnesota held that there was no violation of due process when the witness, who had been assaulted by three Indians, picked three Indians out of a lineup of six people, when the lineup contained only three Indians. The court relied on the fact that since the witness had been with the defendants for a considerable length of time, and since the lineup was staged shortly after the crime, the identification was not based on the lineup.[128]

The California Court of Appeals reversed the conviction of a robbery suspect in a similar situation, but this lineup, unlike *Parker*, took place six and one-half months after the crimes.[129] The defendant was the only Negro in a four-man lineup. The court stated, "[Witness] had seen a Negro commit the burglary. Defendant was a Negro: the three men lined up with him for confrontation by [the witness] were not, and this fact was immediately evident to [the witness]."[130] In a subsequent case, the California Court of Appeals reversed the conviction of the defendant after he had been identified in a lineup in which he was the only Mexican, finding that the lineup was unnecessarily suggestive and therefore constitutionally unfair.[131] This lineup occurred shortly after the crime, as in *Parker*.

125. People v. Graves, 263 Cal. App. 2d 719, 70 Cal. Rptr. 509, 524 (1968).

126. *But see* State v. Batchelor, 418 S.W.2d 929 (Mo. 1967), in which defendant was the only female in the lineup. The court in affirming the conviction stated, "There was nothing done here by the officer conducting the lineup which would tend to suggest to the identifying witness that appellant was the guilty culprit in the minds of the police."

127. 282 Minn. 343, 164 N.W.2d 633 (1969).

128. *Id.* at 359, 164 N.W.2d at 643.

129. People v. Hogan, 264 Cal. App. 2d 254, 70 Cal. Rptr. 448 (1968).

130. *Id.* at 260, 70 Cal. Rptr. at 452.

131. People v. Espinoza Menchaca, 264 Cal. App. 2d 642, 70 Cal. Rptr. 843 (1968).

The courts are sometimes faced with circumstances in which it is impossible to present a lineup with sufficient members of the same ethnic background because none were available at the time. The California Court of Appeals held that a lineup conducted with two Caucasian suspects and three Mexicans did not warrant reversal. The court noted that the jail at the time of the lineup contained the two Caucasian suspects, ten Mexicans and a hippy and that the delay necessary to procure participants for a proper lineup would necessarily sacrifice freshness of the witness' memory.[132]

Two California courts have taken a functional approach to this requirement and have held that even though the lineup participants were of different ethnic backgrounds, as long as they resembled each other closely, it was permissible.[133] This approach would be in accord with the *Stovall* standard of suggestive influences since a witness would not focus on any one individual.

If the police, through necessity, are forced to display participants of obviously diverse ethnic and racial backgrounds, it would seem that the lineup has served no legitimate purpose and should be eliminated. The confrontation is obviously unduly suggestive under *any* lineup circumstances—in their totality or in any conceivable discerptible portion thereof—and *Stovall* has been compromised.

b. Physical Characteristics

A similar problem of suggestion during a lineup is presented when the suspect has an unusual physical characteristic or defect which was included in the witness' description of the criminal. In order to avoid this as a source of suggestion the suspect's noticeable abnormality or defect should be concealed or, if that is not possible, all members of the lineup should be made to appear as if they have the same characteristic.[134] This precaution is often taken in England.[135] The authorities in the United States, however, have not been overly concerned with lineup identifications made from participants with different colored hair, beards, mustaches and distinctive marks.

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132. People v. Smith, 273 Cal. App. 2d 547, 78 Cal. Rptr. 405 (1969).
133. People v. Noisey, 265 Cal. App. 2d 543, 71 Cal. Rptr. 339 (1968); People v. Lasiter, 265 Cal. App. 2d 361, 71 Cal. Rptr. 218 (1968).
134. P. WALL, *supra* note 114, at 54.
135. *Id.*

1. Physical Features

Because hair color will usually be a part of a witness' description, fairness dictates that the color and length of hair should be closely approximated among all participants of the lineup.[136] Courts have, however, upheld convictions based on identifications of a light-haired suspect in a lineup with two other dark-haired persons[137] and of a Negro suspect with "processed" hair when only one other participant had such a hair treatment,[138] on the ground that the lineups were not unnecessarily suggestive.

Similar problems occur when a description of a criminal includes a mustache or beard. To avoid unnecessary suggestion, the police should present all participants clean-shaven or all with beards or mustaches.[139] In *People v. Graves*,[140] the criminal was described as clean-shaven. The court, however, held that even though the suspect was the only clean-shaven participant, due process had not been violated.[141] Similarly, in *State v. Dessureault*,[142] the police presented the suspect with a beard and mustache together with three other clean-shaven participants. The court held that this was an unduly suggestive lineup, but affirmed the conviction on the ground that the witness positively and unequivocally made the identification.[143] To avoid focusing attention on a suspect, distinguishing marks or defects of that person should be covered or reproduced on the other members of the lineup.[144]

The court, in *People v. Beivelman*,[145] properly recognized the authorities' efforts at fairness in minimizing the effect of a distinguishing defect and affirmed the conviction. There, the suspect had broken a leg during the commission of the crime.

136. *Id.* at 53.
137. Massen v. State, 41 Wis. 2d 245, 163 N.W.2d 616 (1969). *See also* United States v. Holsey, 414 F.2d 458 (10th Cir. 1969) where the blond suspect was given the choice of wearing a dark-colored wig to resemble the other members of the lineup but refused and was subsequently identified.
138. People v. Boyce, 113 Ill. App. 2d 266, 252 N.E.2d 71 (1969).
139. This requirement follows from the prohibition of any physical characteristic which noticeably sets the suspect apart from the other participants. *See* Comment, 29 PITT. L. REV. 65 (1967) and P. WALL, *supra* note 114.
140. 263 Cal. App. 2d 719, 70 Cal. Rptr. 509 (1968).
141. *Id.* at 741-42, 70 Cal. Rptr. at 524.
142. 104 Ariz. 380, 453 P.2d 951 (1969).
143. *Id.* at 385, 453 P.2d at 956.
144. P. WALL, *supra* note 114, at 54.
145. 70 Cal. 2d 60, 447 P.2d 913, 73 Cal. Rptr. 521 (1968).

The other participants in the lineup wore a shoe on one foot, a white sock on the other and used crutches, as did the suspect.[146]

The Minnesota Supreme Court, however, held that where the defendant was identified in a lineup in which he was the only participant with freckles, there was no violation of due process. Although the witness had described the criminal as freckled, the court stressed the fact that there were nine men in the lineup and all were about the same age and height.[147] A conviction was upheld in a similar case before the Illinois Supreme Court.[148] In that case the victim's description, although vague on other characteristics of the criminal, was definite on the fact that the criminal had a pock-marked face. Defendant was the only participant in the lineup with a pock-marked face. The court held that this confrontation did not violate due process of law. The court emphasized that the victim immediately selected defendant, all participants were Negro and all were approximately the same age and height.[149] In short, these two courts balanced the acceptable attributes of the lineup against the unacceptable and, since there were more good features than bad, found that the suspect's right to due process had not been violated. This approach, however, does little to insure lineups from unnecessary suggestion.

2. Size

Since height and weight are perhaps the most common features used in describing an individual, lineup participants should be similar in size.[150] Because these are such common identifying characteristics and lineup identifications are so often based on compliance with the initial description given by the witness, one authority has gone so far as to suggest that height delineations on the wall behind the lineup members be removed to preclude a witness from relying on them to identify a suspect similar to his initial description.[151]

American courts have generally not felt compelled to reverse a conviction based on the difference in size of the members of the lineup. The Ninth Circuit affirmed a conviction which had been appealed on the ground that the defendant was the only

146. *Id.* at 78, 447 P.2d at 923, 73 Cal. Rptr. at 531.
147. State v. McConoughie, 282 Minn. 161, 163 N.W.2d 568 (1968).
148. People v. Chambers, 112 Ill. App. 2d 347, 251 N.E.2d 362 (1969).
149. *Id.* at 352, 251 N.E.2d at 364-65.
150. *See* Comment, *supra* note 139, at Appendix I(3).
151. P. WALL, *supra* note 114, at 63.

one in the lineup fitting the description of a light-skinned Negro, 6 ft. 2 in. to 6 ft. 4 in. tall and 190 pounds.[152] The other lineup members were all darker complected and shorter. In a concurring opinion which focused on harmless error, it was stated that "the lineup procedures employed in this case were not perfect, but they were *fairly good* and were not so devoid of merit as to make them wholly suspect."[153]

The Court in the *Wade-Gilbert-Stovall* trilogy indicated a desire to remove unnecessary suggestion which could lead to erroneous identification from pretrial confrontation. A pretrial identification procedure which is "fairly good" does little to move identification procedures toward that end.

Several courts, in affirming convictions, have relied on the circular reasoning that since the jury had a chance to weigh the evidence of the lineup and had voted to convict the defendant, the lineup was not suggestive.[154] Other courts have held that a discrepancy in size between members of a lineup is not, by itself, sufficient grounds for reversal of a conviction.[155]

A suspect of unusual stature, of course, will present a problem to the police in presenting a lineup free from suggestive influence. The California Court of Appeals held that where the suspect was five feet tall and the other participants were as short as possible, there was no violation of due process.[156] In such a situation, the police should be able to equalize the participants' height by requiring some to stand on platforms of varying heights and concealing the participants from the shoulders to the floor. It would, of course, be desirable to view a suspect fully, but this procedure would, at least, disguise an obvious distinguishing characteristic of the suspect.

Several courts have found the differences in the participants' height, weight and coloring to be so great as to violate the defendant's right to due process of law. An example is the decision

152. Parker v. United States, 400 F.2d 248 (9th Cir. 1968).

153. *Id.* at 253-54 (emphasis added).

154. State v. Lyons, 251 S.C. 541, 164 S.E.2d 445 (1968); People v. Terczak, 96 Ill. App. 2d 373, 238 N.E.2d 626 (1968).

155. United States v. Johnson, 403 F.2d 1002 (6th Cir. 1968); People v. Farley, 267 Cal. App. 2d 214, 72 Cal. Rptr. 855 (1968); People v. Bonville, 268 Cal. App. 2d 107, 71 Cal. Rptr. 851, *modified and aff'd*, 268 Cal. App. 2d 107, 73 Cal. Rptr. 741 (1968); State v. Balle, 442 S.W.2d 35 (Mo. 1969).

156. People v. Elder, 274 Cal. App. 2d 381, 79 Cal. Rptr. 466 (1969). Other mitigating circumstances in this case were the fact that the witness had identified the defendant immediately and had ample opportunity to observe the defendant during the commission of the crime.

of the California Court of Appeals in *People v. Caruso*.[157] There the defendant was "of imposing stature, being 6 feet 1 inch tall, and weighing 238 pounds. He is of Italian descent, with a very dark complexion, and has dark wavy hair."[158] The witnesses testified that "the other lineup participants did not physically resemble defendant. They were not his size, not one had his dark complexion, and none had dark wavy hair."[159] The court, in reversing the conviction for robbery, stated, "[I]f they were to choose anyone in the lineup, defendant was singularly marked for identification. We can only conclude that the lineup was 'unnecessarily suggestive and conducive to irreparable mistaken identification.' "[160]

The Supreme Court of Minnesota, although affirming the conviction of a suspect selected from a three-man lineup in which the participants were of widely varying height, weight and coloring, indicated that the police were to be more conscientious in presenting a formal lineup in the future.[161] The court emphasized:

> [W]e think that the police should make every effort in their conduct of lineups to insure against the dangers of the number of persons appearing in lineups and using persons with some degree of similarity, at least in height and weight, to the one thought to have committed the crime. This is not to say that everyone in the lineup must be exactly the same in height and build, but the greater the number of persons in the lineup who approximate the description of the one who committed the crime, the greater the chance the identification is correct and the stronger it will be in the eyes of a jury.[162]

In a subsequent case,[163] the Supreme Court of Minnesota reversed and remanded a conviction for robbery in a case in which evidence of a lineup identification had been used. The lineup consisted of three people, one of whom was "substantially larger" than defendant. The court focused on this size variance along with the fact that the witness had identified defendant from mug shots fifteen minutes before the lineup, and that the witness had observed the criminal for only 30 seconds during the commission of the robbery.[164]

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157. 68 Cal. 2d 183, 436 P.2d 336, 65 Cal. Rptr. 336 (1968).
158. *Id.* at 187, 436 P.2d at 339, 65 Cal. Rptr. at 339.
159. *Id.*
160. *Id.* at 187-88, 436 P.2d at 339, 65 Cal. Rptr. at 339.
161. State v. Burch, 284 Minn. 300, 170 N.W.2d 543 (1969).
162. *Id.* at 315, 170 N.W.2d at 553.
163. State v. Gluff, 285 Minn. 148, 172 N.W.2d 63 (1969).
164. *Id.* at 150-51, 172 N.W.2d at 65. *See also* text accompanying notes 100-109 *supra*.

3. Age

Age also is usually part of the description given by a witness. Thus, the participants in the lineup should be approximately the same age or appear to be so.[165] The court, however, in *People v. Terry*,[166] held that an obvious difference in age was not enough by itself to show that a denial of due process had occurred. In that case, the description given by the witness indicated that the criminal was in his thirties. The defendant, who coincided with that description, was placed in a lineup with persons in their early twenties or in their teens.[167] However, the court in *United States v. Washington*[168] reversed a conviction where the pre-trial identification had been tainted by placing the defendant in a cell along with older men for the confrontation, although other factors present also reduced the reliability of the identification.[169]

c. Clothing

When a suspect is presented in a lineup wearing a style of clothing different from that of the other participants, particularly when the clothes are not those worn during the crime, the courts generally have ignored the suggestive implications involved in the procedure. The Fourth Circuit affirmed the conviction of a defendant who was picked out of a lineup composed of five policemen wearing white shirts and dress trousers and the defendant who wore a light blue shirt and "shiny or silky black pants."[170] The court stated, "[W]e see no telling variation from [defendant's] appearance in the dress . . . or other features of those in the lineup, as would mark him as a nonconformist."[171]

Although the practice of requiring only the suspect to wear the clothes worn during the crime is suggestive, some courts have held this not to be a violation of due process. The Sixth Circuit

165. Comment, *supra* note 139, at Appendix I(3).
166. 70 Cal. 2d 410, 545 P.2d 36, 77 Cal. Rptr. 460 (1969).
167. This court seemed to be balancing the acceptable and unacceptable attributes of the lineup and since the acceptable outweighed the unacceptable, there was no violation of due process. This is contra to the spirit of *Stovall*. *See* text accompanying notes 11-13 *supra*.
168. 292 F. Supp. 284 (D.D.C. 1968).
169. *Id.* at 289. Other factors were the suggestive photographic display procedure used by the police prior to the actual confrontation and the fact that a considerable length of time had elapsed between the crime and the identification confrontation.
170. United States v. Collins, 416 F.2d 696 (4th Cir. 1969).
171. *Id.* at 698.

held that a lineup in which only the suspect was forced to wear a black, hooded jacket which was part of the description of the robber was not unnecessarily suggestive.[172] In affirming the conviction, the court stated, "[a]ll that happened here was that [defendant] was placed in a lineup and required to wear his own jacket."[173] The same rationale was used by the Supreme Court of North Carolina in holding that the defendant's right to due process of law had been preserved in a lineup conducted with only the defendant wearing a belt looped around his neck in the manner described by the victim.[174] The court justified its affirmance by concluding:

> [The belt] was placed there by defendant himself—not by law enforcement authorities. The officers were under no compulsion, constitutional or otherwise, to remove it. Nor were they required to place similar belts around the necks of the other boys in the lineup. Its presence cannot be attributed to the officer or regarded as the kind of rigged "suggestiveness" in identification procedures which *Wade* and *Gilbert* and *Foster* were designed to deter. Its presence was simply an existing fact—it was around defendant's neck when he was picked up, there when he was taken to the police station, and still there when viewed by the victim. No one put the belt on him and no one asked him to remove it. The victim was permitted to see him in raiment of his own choosing.[175]

The court in *People v. Chambers*[176] held that the fact that the defendant was the only participant to wear a green jacket such as the one described by the victim was not a violation of due process. Although the police did not force the suspect to wear the incriminating garb, it must be conceded that such an appearance was "unnecessarily suggestive." Despite the witness' statement that she recognized the defendant by his green jacket, this fact was considered only in the weight of the evidence to be given the identification.[177] The California Court of Appeals also has held that a lineup in which defendant was forced to wear a green shirt that was a part of the criminal's description was fair because the defendant would have focused more attention on himself if he had appeared bare-chested as he had requested.[178] Several less suggestive alternatives could have been used by the police:

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172. United States v. Ball, 381 F.2d 702 (6th Cir. 1967).
173. *Id.* at 703.
174. State v. Rogers, 275 N.C. 411, 168 S.E.2d 345 (1969).
175. *Id.* at 429, 168 S.E.2d at 356. *Accord*, Hernandez v. State, 7 Md. App. 355, 255 A.2d 449 (1969).
176. 112 Ill. App. 2d 347, 251 N.E.2d 362 (1969).
177. *Id.* at 354-55, 251 N.E.2d at 366.
178. People v. Stanton, 274 Cal. App. 2d 13, 78 Cal. Rptr. 771 (1969).

a different shirt could have been produced by the police for the defendant to wear, all participants could have been dressed in prison clothes or all could have been required in turn to wear the green shirt. The Sixth Circuit recognized the fairness of providing similar clothes for all participants in a lineup where all participants were required to wear a blue coat, sunglasses and a handkerchief mask. The suspect was identified and the court affirmed the conviction.[179]

It would seem that the police should not be excused from the requirement of presenting all participants similarly clothed, even if similar civilian clothes are not available for the participants. The police could provide all participants with prison garb to maintain fairness.[180]

d. Suggestive Police Action

The police, in addition to refraining from focusing attention on an individual participant by his physical characteristics and clothing, should avoid drawing attention to him by requiring him to do something not done by the other lineup participants.

The courts have generally held that an express instruction by the officer conducting the lineup to a participant which would draw unnecessary attention to him is too suggestive and violates the defendant's right to due process. The District Court of the District of Columbia held in two cases that such a procedure was unfair when special attention was focused on the suspects. In one case,[181] a witness was taken to a jail cell in which the defendant and four or five older men were confined. The officer, before the witness had made an identification, told the defendant to move over with the rest of the men. The witness then identified him. The court in reversing the conviction said that the nature of this procedure was "shoddy."[182] The second case[183] involved a confrontation in which the witness viewed the suspect, a Caucasian, along with two other Caucasians and ten Negroes in a cell. The defendant was told by the officer to step closer to the witness so that he could see him better. The witness then identified him. Although the conviction was affirmed because of an identification by another witness, the jail cell identification was

179. United States v. Beard, 381 F.2d 325 (6th Cir. 1967).
180. This was done in Barker v. State, 84 Nev. 224, 438 P.2d 798 (1968) and Calbert v. State, 84 Nev. 148, 437 P.2d 628 (1968).
181. United States v. Washington, 292 F. Supp. 284 (D.D.C. 1968).
182. *Id.* at 288.
183. United States v. Clark, 294 F. Supp. 44 (D.D.C. 1968).

held to be too suggestive and, therefore, inadmissible in evidence.[184]

The Supreme Court of North Carolina reversed and remanded a case in which the police flagrantly violated this requirement of fairness.[185] The victim of the crime saw her assailant walk away from her, but never saw his face. The description she gave the police was of a man wearing dark pants, a light shirt and a baseball cap. The defendant was arrested for another crime and participated in a lineup with nine other men, no one of whom could be identified by the victim. The officer then forced only the defendant to wear dark pants, a light shirt and a baseball cap and to utter words spoken during the crime as he walked back and forth in front of her. The victim then identified him.[186]

The court in *People v. Nelson*,[187] however, held that where the defendant attempted to conceal his face with his arms during the confrontation and was subsequently identified, the conviction should be affirmed. In justifying its position the court stated that an independent source for in-court identification had been established and that, if the defendant stood out at the lineup, it was his own fault, not that of the police.[188]

Several cases have held that where the suspect has been focused upon at the initiation of the witness, due process has not been violated. The witness in *People v. Eaton*,[189] after viewing a lineup and tentatively identifying the two suspects in prison clothes, asked to view the two suspects again in civilian clothes. At the second confrontation, the witness again identified them. The court affirmed the conviction, relying on the fact that the witness had already identified the suspects in a fair lineup before the second confrontation.[190] Similarly, the Fifth Circuit upheld the conviction of a robber who was compelled to put on a hat and to utter certain words at the witness' insistence.[191] He was then positively identified after being required

184. *Id.* at 52.
185. State v. Wright, 274 N.C. 84, 161 S.E.2d 581 (1968).
186. *Id.* at 584.
187. 40 Ill. 2d 146, 238 N.E.2d 378 (1968).
188. *Id.* at 152, 238 N.E.2d at 382. An independent source was based on the facts that the witness had known defendant for about five months, that defendant "came in the store 'quite frequently' and that he had contacts with the defendant 'outside the store . . . on various occasions.'" *Id.* at 151, 238 N.E.2d at 381.
189. 275 Cal. App. 2d 584, 80 Cal. Rptr. 192 (1969).
190. *Id.* at 588-89, 80 Cal. Rptr. at 195.
191. Crume v. Beto, 383 F.2d 36 (5th Cir. 1967).

to wear a coat that had been described by the witness. The court affirmed on the grounds that the witness had initiated the singling out of the defendant and that the witness "had already settled firmly on defendant."[192] The court, however, stated in dicta, "[E]ven when the witness requests that the person he has tentatively identified be required to do or say something, all participants in the lineup should be required to act or speak . . . . We think it is unquestionably fairer than singling out the tentative suspect."[193]

3. *Summary*

The courts, although acknowledging the application of *Stovall* to due process questions involving fundamental fairness, have generally not applied the test in the spirit of the *Stovall* decision. The majority of the courts have eagerly seized on the ambiguity inherent in the phrase "totality of the circumstances" used by the *Stovall* Court to find grossly unfair lineups not in violation of due process. Most courts have interpreted "totality" to refer only to the lineup confrontation itself. This interpretation has allowed the court to balance the "fair" characteristics of the lineup with the "unfair" and find the lineup not violative of due process if the "fair" outweighs the "unfair." If a suspect was significantly shorter, for example, than the other lineup participants, but other characteristics of the participants were similar, this interpretation of "totality of the circumstances" would permit a finding that the confrontation satisfied due process requirements. This interpretation, however, has done little to protect the suspect from possible "irreparable mistaken identification" because of this "unnecessarily suggestive" characteristic in the pretrial identification procedure. In addition, because due process has required only this simple weighing process, law enforcement officials have had little incentive to remove an "unnecessarily suggestive" characteristic from the lineup. The "dangers inherent in eyewitness identification and the suggestibility inherent in the context of the pretrial identification," recognized by the Court, have remained despite the spirit of the decision in *Stovall*.

IV. EVIDENTIARY CONSIDERATIONS

If, in the opinion of the court, a pretrial confrontation has violated due process, the in-court identification of the suspect by

192. *Id.* at 40.
193. *Id.*

the witness may still be allowed if the witness had an independent source for the in-court identification, or an appellate court holds that the admission of the in-court identification was harmless error.[194]

A. INDEPENDENT SOURCE

Lower courts since *Stovall* have considered various factors in the establishment of an independent source:[195] opportunity for observation of the criminal,[196] illumination of the scene of the crime,[197] accuracy of the description of the criminal,[198] the lapse of time between the crime and the pretrial identification,[199] failure of the witness to identify other suspects,[200] prompt identification,[201] positive identification[202] and the intelligence of the witness.[203]

Most factors suggested by the Court[204] and many factors considered by the lower courts have been weighed as positive or negative variables and have thereby influenced the decisions of the lower courts.[205] For example, if the opportunity for observation of the criminal by the witness during the crime was extensive, that factor would be used as a positive variable by the court to establish an independent basis for the in-court identification. If the opportunity for observation was brief, that factor would be

194. *See* notes 14-18 *supra* and accompanying text.

195. *See* note 18 *supra* for the factors given by the *Wade* court to be considered by the lower courts in an examination of an independent basis for in-court identification.

196. *See, e.g.*, State v. Brown, 104 Ariz. 510, 456 P.2d 368 (1969) (one hour to observe); People v. Singletary, 268 Cal. App. 2d 41, 73 Cal. Rptr. 855 (1968) (thirty to forty-five minutes to observe); People v. James, 109 Ill. App. 2d 328, 248 N.E.2d 777 (1969) (twenty minutes to observe).

197. *See, e.g.*, People v. Airheart, 262 Cal. App. 2d 673, 68 Cal. Rptr. 857 (1968); People v. Terczak, 96 Ill. App. 2d 373, 238 N.E.2d 626 (1968); Smith v. State, 6 Md. App. 23, 249 A.2d 732 (1969).

198. *See, e.g.*, Massen v. State, 41 Wis. 2d 245, 163 N.W.2d 616 (1969).

199. *See, e.g.*, Hill v. State, 6 Md. App. 555, 252 A.2d 259 (1969).

200. *See, e.g.*, Massen v. State, 41 Wis. 2d 245, 163 N.W.2d 616 (1969).

201. *See, e.g.*, Commonwealth v. Sullivan, 354 Mass. 598, 239 N.E. 2d 5 (1968), *cert. denied*, 393 U.S. 1056 (1969); State v. Balle, 442 S.W.2d 35 (Mo. 1969); Massen v. State, 41 Wis. 2d 245, 163 N.W.2d 616 (1969).

202. *See, e..g.*, United States v. Black, 412 F.2d 687 (6th Cir. 1969); People v. Smith, 273 Cal. App. 2d 547, 78 Cal. Rptr. 405 (1969), *cert. denied*, 396 U.S. 1020 (1970); State v. Balle, 442 S.W.2d 35 (Mo. 1969).

203. United States v. Black, 412 F.2d 687 (6th Cir. 1969).

204. *See* note 18 *supra*.

205. Some factors suggested by the Court were constants rather than variables, *i.e.*, any identification prior to the lineup of another person.

considered by the court as a negative variable to question the reliability of the in-court identification.

The opportunity for observation of the criminal by the witness during the crime has been the most frequent factor to be weighed by the lower courts. When the length of time has been considerable, the reliability of the identification has been almost unquestioned,[206] but as the length of time has decreased, the reliability of the in-court identification has become suspect. In *People v. Ballott*[207] the brief opportunity for observation by the victim could not support an in-court identification on the record. The court said that the victim had seen the robber "but for a few minutes during a frightening and upsetting episode."[208] The court continued:

> We cannot say . . . that on the record before us the in-court identification was not predicated at least in part, upon the earlier grossly and unnecessarily suggestive show-up in the police station a year after the crime had been committed.[209]

Other courts have held, however, that brief periods of time could provide ample opportunity for studied observation by the witness. In *Hill v. State*[210] two witnesses had fifteen seconds at a distance of 30 yards and three seconds at a distance of one foot to observe two robbers. More than four months after the crime, both witnesses in the presence of each other identified two men as the criminals. One defendant was acquitted at trial because he was in a hospital at the time of the crime. The second defendant was convicted. In affirming the conviction the court stated that eighteen seconds was a sufficient time for observation by the witnesses to establish an independent basis for an in-court identification.[211] The court in *Ballot* quite properly used the factor of brief opportunity for observation as a negative variable in questioning the reliability of the in-court identification. In contrast thereto a much shorter opportunity for observation was considered by the court in *Hill* as a positive variable in establishing the reliability of the in-court identification.

The length of time between the crime and the pretrial iden-

206. *See, e.g.*, State v. Brown, 104 Ariz. 510, 456 P.2d 368 (1969); People v. Singletary, 268 Cal. App. 2d 41, 73 Cal. Rptr. 855 (1968); People v. James, 109 Ill. App. 2d 328, 248 N.E.2d 777 (1969).

207. 20 N.Y.2d 600, 233 N.E.2d 103, 286 N.Y.S.2d 1 (1967).

208. *Id.* at 607, 233 N.E.2d at 107, 286 N.Y.S.2d at 7.

209. *Id.*

210. 6 Md. App. 555, 252 A.2d 259 (1969).

211. *Id.* at 558, 252 A.2d at 261.

tification has also been considered by the lower courts. When the length of time has been short, this lapse has been used as support for an independent basis for the in-court identification. Some courts, however, have used a somewhat flexible definition of the term "short." In *Lucas v. State*,[212] for example, two months were considered to be a "short" lapse of time between the crime and the pretrial identification.[213] This would seem to be further evidence of an effort by some courts to twist a factor to establish an independent basis for an in-court identification.

The speed with which the pretrial identification was made also has been considered as a factor. It has been used, however, by the courts for the establishment of an independent basis for the in-court identification irrespective of the speed with which the pretrial identification was made. If the pretrial identification was without hesitation, this has indicated instant recognition by the witness.[214] If the identification took a long period of time, this has indicated the fairness of the witness in an effort to be certain.[215] If speed of identification is only used as a positive variable to uphold an in-court identification, it should be removed from court consideration as a self-serving factor.

B. HARMLESS ERROR

Few courts have used the doctrine of harmless error to allow an in-court identification of the suspect by an identifying witness.[216] When the doctrine has been used, it has been applied in two ways. Most courts which have considered the doctrine have held that the defendant was not prejudiced by an in-court identification since the witness could have identified the suspect irrespective of any tainted pretrial identification procedure.[217]

212. 44 S.W.2d 638 (Tex. Crim. App. 1969).

213. *Id. But see* Biggers v. Tennessee, 390 U.S. 404 (1967) (dissent); People v. Ballott, 20 N.Y.2d 600, 233 N.E.2d 103, 286 N.Y.S.2d 1 (1967). In both opinions emphasis was placed upon the extreme lapse of time between the crime and the pretrial identification.

214. *See, e.g.*, Commonwealth v. Sullivan, 354 Mass. 598, 239 N.E.2d 5 (1968), *cert. denied*, 393 U.S. 1056 (1969); State v. Balle, 442 S.W.2d (Mo. 1969); Massen v. State, 41 Wis. 2d 245, 163 N.W.2d 616 (1969).

215. People v. Pelow, 24 N.Y.2d 161, 247 N.E.2d 150, 299 N.Y.S.2d 185 (1969).

216. The leading case for the doctrine of harmless error is Chapman v. California, 386 U.S. 18 (1967). The Court in *Chapman* held that a court must be able to declare its belief that the error was harmless beyond a reasonable doubt before constitutional error can be held to be harmless. *Id.* at 21-24. If the untainted evidence against the defendant is overwhelming, the error in admission of the tainted evidence will also be harmless. Harrington v. California, 395 U.S. 250 (1969).

217. Soloman v. United States, 408 F.2d 1306 (D.C. Cir. 1969); People

Other courts have indicated that the admission of the in-court identification of the defendant was harmless error because the other evidence introduced by the prosecution was overwhelmingly against the defendant.[218] Only in a few isolated instances have courts held that the prosecution's burden of proving the error harmless has not been met. Where the prosecution has failed to meet this burden, the convictions have been overturned.[219]

Most courts in applying the standard have accorded the concept cursory treatment or no treatment at all. Instead the courts have used independent source as justification for an in-court identification of the suspect by the witness after a tainted pretrial identification procedure.

V. CONCLUSION

The Supreme Court in the *Wade-Gilbert-Stovall* trilogy recognized the "dangers inherent in eyewitness identification and the suggestibility inherent in the context of the pretrial identification,"[220] and the Court acted to protect the accused during the pretrial identification procedure. Lower courts, however, in the application of *Stovall*, except in outrageous situations, have failed to find a violation of due process. Every method of avoidance has been used by the lower courts. In a substantial majority of cases, the courts have found that the confrontation was not "so unnecessarily suggestive and conducive to irreparable mistaken identification,"[221] as to be a violation of due process. If the confrontation was tainted, the courts have easily found an "independent source" for an in-court identification of the suspect,

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v. Brown, 273 Cal. App. 2d 109, 77 Cal. Rptr. 863 (1969); People v. Laursen, 266 Cal. App. 2d 116, 71 Cal. Rptr. 863 (1969). A typical statement by a court is:

> In some cases the proceeding leading to an eyewitness identification may be so defective as to make the identification constitutionally inadmissable as a matter of law. But [the courts] then look to Chapman v. California . . . and find that the invalid lineup was harmless and for the reason that defendant was in fact identified from source independent of the lineup.

Hampton v. State, 462 P.2d 760 (Nev. 1969). The use of harmless error in this fashion closely resembles the court use of independent source.

218. Harrington v. California, 395 U.S. 250 (1969); Soloman v. United States, 408 F.2d 1306 (D.C. Cir. 1969); Russell v. United States, 408 F.2d 1280 (D.C. Cir. 1969).

219. Russell v. United States, 408 F.2d 1280 (D.C. Cir. 1969); People v. Hogan, 264 Cal. App. 2d 254, 70 Cal. Rptr. 448 (1968); Watson v. State, 7 Md. App. 225, 255 A.2d 103 (1969).

220. United States v. Wade, 388 U.S. 218, 235 (1967).

221. Stovall v. Denno, 388 U.S. 293, 301-02 (1967).

or in the court's opinion any error in the admission of the in-court identification was harmless. Consequently, law enforcement officials have not been motivated to provide pretrial identification procedures free from unnecessary suggestion. They have been moved only to provide "fairly good" procedures which meet the due process requirements.

Thus, the courts have placed their imprimatur upon highly questionable pretrial identifications. The continued case-by-case determination by the courts will do little to remove unnecessary suggestibility in pretrial identification. If pretrial identification procedures free from unnecessary suggestion are eventually to be achieved, other methods will have to be developed.

Recently there has been some discussion concerning expansion of the rule-making process to include areas not presently covered by the Federal Rules of Criminal Procedure. An expansion of the rules could properly include pretrial identification procedures. Alternatively, a statute governing those procedures could be adopted. This would serve to clarify the exact procedures to be followed by law enforcement officials while assuring suspects an atmosphere free from unnecessary suggestion during pretrial identification. The rule of procedure or statute might take the following form:

A. GENERAL RULE

Pretrial identification by a witness of a suspect who has been taken into custody will be through a formally conducted lineup. Absent an intelligent waiver, the suspect will be represented by counsel who will be permitted to be in the presence of the witness during the pretrial identification. The lineup will consist of at least six participants similarly clothed who approximate each other in age, height, weight, hair and skin coloration. Law enforcement officials shall make a written report of the names, addresses and descriptive details of the participants in the lineup, and lineups will be photographed. If voice identification is requested by a witness, the participants in the lineup shall repeat an identical innocuous phrase, but use of words allegedly used during the crime will be impermissible.

Before the lineup witnesses will be required to give a description of the suspect, and law enforcement officials shall make a written record of the description which must be signed by the witness. If more than one witness is to make a

pretrial identification, witnesses will view the lineup separately and will not be allowed to communicate with other witnesses until all witnesses have completed the identification process.

Law enforcement officials shall not suggest to a witness before or during the lineup that a participant in the lineup has been arrested as a suspect. Photographs of a suspect who has been taken into custody or of other participants in the lineup will not be shown to a witness prior to the lineup. The suspect who has been taken into custody or other participants in the lineup will not be viewed by a witness prior to the lineup.

B. EXCEPTIONS TO THE GENERAL RULE

(1) A lineup consisting of photographs of individuals will be permissible if it is in conformance with the requirements of (A) and if

(i) five individuals who resemble the suspect are not available, or

(ii) a witness is in danger of death.

(2) If a suspect has been taken into custody by law enforcement officials within one hour of the crime, a field identification will be permissible.

C. EVIDENTIARY EXCLUSIONS

Failure to conform with any pretrial identification procedure in (A) or (B) will prevent the admission of an in-court identification of the suspect by the witness and testimony at trial by the witness concerning a pretrial identification. However, if an accidental pretrial confrontation and identification or a field identification of the suspect by a witness has occurred the prosecution shall give notice to the defendant or his counsel of their intention at trial to rely upon the accidental confrontation and identification or upon the field identification. A pretrial hearing on the admissibility of the in-court identification of the suspect by the witness will then be conducted.[222] Failure by the prosecution to give notice to defendant or his counsel will prevent the admission of an in-court identification.

222. At the pretrial hearing the factors suggested by *Wade* to establish an "independent source" would be used to rule on the admissibility of an in-court identification. A pretrial hearing rule has been

Defense counsel for the suspect will be allowed to make copies of photographs or written reports required by (A) or (B).[223]

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adopted in the District of Columbia. *See* Clemons v. United States, 408 F.2d 1230, 1237 and n.4 (D.C. Cir. 1968). This practice has also been recommended by Judge Friendly. *See* United States *ex rel.* Phipps v. Follette, 428 F.2d 912, 913 and n.1 (2d Cir. 1970).

223. The Court has quoted with approval one commentator's ideal statute. United States v. Wade, 288 U.S. 218, 236 n.26 (1967). The American Law Institute has also written a proposed statute for pre-arraignment procedure which provides:

(1) Restrictions on Identification. No law enforcement officer shall conduct a line-up or otherwise attempt, by having a witness view or hear the voice of an arrested person, to secure the identification of an arrested person as a person involved in crime unless such identification procedure is authorized by this section.

(2) Presence of Counsel or Other Witness. An identification procedure is authorized by this section if
   (a) counsel for the arrested person is present or has consented thereto;
   (b) counsel for the arrested person has received reasonable notice and opportunity to be present at such procedure, but refuses or fails to be present;
   (c) counsel for the arrested person designates some other person to be present at such procedure, and such other person is given a reasonable opportunity to be present;
   (d) the arrested person is unable to obtain counsel to represent him at such identification procedure and there is present a lawyer specially designated [in accordance with prescribed procedures], who shall represent such person at the identification procedure;
   (e) the arrested person, having been informed of his right to be represented by counsel as provided in this section, waives such presentation, *provided* that the arrested person may designate some other person to be present, and such other person must be given notice and a reasonable opportunity to be present at such procedure; or
   (f) awaiting the presence of counsel or such other person as the arrested person or his counsel designates is likely to prejudice the possibility of making an identification.

(3) Required Procedures: Regulations. An identification procedure is authorized by this section only if there has been compliance with regulations, to be issued pursuant to Section 1.03 [of Tentative Draft No. 1], setting forth procedures designed to insure
   (a) that identifications will not be erroneous or otherwise prejudice the rights of the arrested person; and
   (b) that written, sound and visual records, and disinterested testimony, will be available so far as necessary to verify the conditions under which such identification procedures were conducted.

[Note: In cases of urgent necessity, as where a witness is dying at the scene of the crime, it should be lawful to allow an identification with only such compliance with paragraph (b) as the circumstances permit. A provision to that effect should be included in Article 9, which will deal generally with exclusion of evidence. Such a provision would make admissible evidence of

When a slight error in procedure, such as failure by the witness to sign a statement, occurs, the difficulty with a rule of procedure or statute which excludes testimony, however, becomes apparent. Courts will be extremely reluctant to exclude testimony because of a mere technicality. But by necessity a statute or rule of procedure which attempts to delineate exact procedures to be followed will result in technical errors by law enforcement officials.

Another desirable alternative would be the voluntary establishment by police and attorneys of regulations which would assure defendants of fair identification procedures. The regulations jointly promulgated by the District Attorney and the Public Defender's office of Clark County, Nevada have received favorable comment as an example of this approach.[224] These regulations provide a police check list for lineup identifications:

> 1. No line-up identification should be held without discussing the legal advisability of such line-up with the office of the District Attorney.
>
> 2. No line-up should be held without a member of the District Attorney's office being present.
>
> 3. No line-up should be held without a member of the Public Defender's office* being present.
>
> 4. Insofar as possible, all persons in line-up should be of the same general age, racial and physical characteristics (including dress).
>
> 5. Should any body movement, gesture, or verbal statement be necessary, this should also be done uniformly and any such movement, gesture, statement should be done one time only by each person participating in the line-up and repeated only at the express request of the person attempting to make identification.
>
> 6. The customary line-up photograph should be taken, developed as soon as possible and a copy of such photograph made available immediately to the Public Defender's office.*
>
> 7. If more than one person is called to view a line-up, the persons should not be allowed, before the completion of all witnesses' attempted identification, to discuss among themselves any facet of their view of the line-up or the result of their conclusions regarding the same.
>
> 8. All witnesses who are to view the line-up should be prevented from seeing the suspect in custody and in particular in handcuffs, or in any manner that would indicate to the witness the identity of the suspect in question.

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an identification and evidence deriving therefrom, in cases of urgent necessity.]

ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § A5.09 (Study Draft No. 1, 1968).

224. *See* ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § A5.09, comment at 32 (Study Draft No. 1, 1968).

9. All efforts should be made to prevent a witness from viewing any photographs of the suspect prior to giving the line-up.

10. All conversation between the police officer and prospective witnesses should be restricted to only indispensible direction. In all cases nothing should be said to the witness to suggest suspect is standing in the particular line-up.

11. Should there be any more than one witness, only one witness at a time should be present in the room where the line-up is conducted.

12. There should be a minimum of persons present in the room where the line-up is conducted, and a suggested group would be the law enforcement officer conducting the line-up, a representative of the District Attorney's office, a representative of the Public Defender's* office and an investigator of that office if requested by the Public Defender.

13. The line-up report prepared by the law enforcement agency conducting the line-up should be prepared in sufficient number of copies to make a copy available, at the line-up, to the Public Defender.*

14. Each witness, as he appears in the room where the line-up is conducted, should be handed a form for use in the identification. Explanation for the use of the form is self-explanatory and a sample copy is attached hereto. This form should be signed by the witness, by a representative of the Public Defender's office*, and by the law enforcement officer conducting the line-up.

15. A copy of this Identification Form should be given to the Public Defender's office* at the completion of the viewing of the line-up by each individual witness.

* This would apply to any privately retained attorney, should he be there in lieu of the Public Defender.[225]

This approach is, however, somewhat unrealistic. Identification problems will be solved only when regulations are drawn up. Some communities will eventually complete them, but others will never do so. In those communities "fairly good" procedures will still be the only protection for defendants.

Finally, the use of neutral magistrates to supervise and scrutinize pretrial identification has been suggested.[226] This suggestion seems to provide the most flexibility for this area. By the adoption of a rule of criminal procedure or a statute, identification procedures, absent urgent necessity, could simply require the presence of defense counsel and a neutral magistrate. The standards of fairness to be used by the magistrate could then be drafted by the offices of the Public Defender and District Attorney in a manner similar to the regulations adopted in Clark

225. *See,* Comment, *The Right to Counsel During Pretrial Identification Proceedings—An Examination,* 47 NEB. L. REV. 740, 760 (1968).
226. *Id.* at 757.

County, Nevada. The magistrate could then apply the regulations as the identification procedure was occurring.

If a magistrate was not present for the identification procedure because of urgent necessity or accidental confrontation and identification, the prosecution could be required to give timely notice to the defense of their intent to use an in-court identification. Defense counsel could then move for a pretrial hearing to determine the admissibility of the identification of the suspect by the witness. The court could consider the criteria developed for the establishment of an "independent source" in its decision at the pretrial hearing.

Under this alternative the exact procedures for pretrial identifications would be clarified for law enforcement officials, and a case-by-case determination by the courts of "independent source," "harmless error," or "totality of the circumstances" would be unnecessary. More importantly, however, suspects would be assured a pretrial identification procedure relatively free from unnecessary suggestion, and many dangers in pretrial identification recognized by the Court in *Wade, Gilbert* and *Stovall* would finally be removed.