Marquette Law Review

Volume 58
Issue 4 *1975 (Number 4)*

Article 2

Criminal Law: Pretrial Identification: An Attempt to Articulate Constitutional Criteria

Howard B. Eisenberg

Bruce G. Feustal

PRETRIAL IDENTIFICATION: AN ATTEMPT TO ARTICULATE CONSTITUTIONAL CRITERIA

HOWARD B. EISENBERG* and BRUCE G. FEUSTEL**

Few pieces of evidence are as meaningful to the average jury as is the identification of the criminal defendant by a witness to the crime. No matter how strong the circumstantial evidence, the statement by the witness that "he is the man" is quite often the most significant evidence to the lay person. Even when a strong alibi case is presented, or when the circumstantial evidence points to the innocence of the accused, the identification of the defendant by a witness to the crime is sufficient evidence to convict. For this reason prosecutors and police are eager to present the jury with such evidence.

It has also long been recognized, however, that eyewitness identifications are among the most easily distorted pieces of evidence to present to a jury.[1] Such an eyewitness identification is highly susceptible to manipulation not only inadvertently, by a well-meaning witness' incomplete or mistaken perception, but also by suggestive and unfair identification techniques utilized by investigatory and prosecutorial agencies.

The United States Supreme Court attempted to come to grips with these problems in three cases decided in June, 1967. The rules and standards expressed in that trilogy were subsequently modified by more conservative or case-oriented decisions decided by the court since 1972. The purpose of this article will be to discuss the interrelationship of the various decisions and to provide some insight into how the Constitution relates to eyewitness identifications.

---

* B.A. 1968, Northwestern University; J.D. 1971, University of Wisconsin; State Public Defender, State of Wisconsin.

** B.A. 1970, J.D. 1974, University of Wisconsin; staff attorney, Legislative Reference Bureau, State of Wisconsin.

1. *See* F. FRANKFURTER, THE CASE OF SACCO AND VANZETTI (1927); P. WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES (1965) [hereinafter cited as WALL]; Murray, *The Criminal Lineup at Home and Abroad*, 1966 UTAH L. REV. 610; Comment, *Possible Procedural Safeguards Against Mistaken Identification by Eyewitnesses*, 2 U.C.L.A. L. REV. 552 (1955); Note, *Pretrial Identification Procedures - Wade to Gilbert to Stovall: Lower Courts Bobble the Ball*, 55 MINN. L. REV. 779 (1971).

I. RELIABILITY OF EYEWITNESS IDENTIFICATION

Judge William Ringel states that the unexpected involvement of a witness or a victim to a crime plays "havoc" with their perception and therefore impairs the accuracy with which they describe the events.[2] The reasons for this are quite normal:

> What we see is a function of what we are. The human organism by nature seeks harmony with its environment. If a perception upsets the balance, the mind will reshape the perception until it is more comfortable with it.
>
> The same device for intellectual harmony recurs when a witness is asked to recall what he had seen or heard. No one is satisfied with half a perception, and faced with this, the mind naturally rushes to fill the void with what should have been there. Of course, each of us has his own notion of what should have been there, and, accordingly, the gaps will be filled with details which our own environment suggests.[3]

The resulting inadequate observations are not made consciously by a witness to an event. Thus, the well-meaning, even impartial witness can be in error.

These conclusions have been documented. Patrick Wall in his book *Eye Witness Identification in Criminal Cases* cites several studies. In one "mock crime" experiment, height estimates made by college women concerning the height of two men who had been participants in the "crime" varied from four feet to six feet, four inches for one man, and from four feet, eight inches to seven feet for the other.[4] Another test showed that a group of experienced policemen varied in estimates of the person before them by fifteen years, five inches, and twenty pounds.[5] The above-mentioned tests dealt primarily with inadequacy of immediate perception. Psychologist S. E. Asch showed that pressure and suggestion by other individuals could cause some people to give obviously false answers in simple line measurement tests.[6]

II. THE WADE - GILBERT - STOVALL TRILOGY

On June 12, 1967, the Supreme Court reexamined its position

2. RINGEL, IDENTIFICATION & POLICE LINEUPS 10, 11 (1968) [hereinafter cited as RINGEL].

3. *Id.*

4. WALL note 1, *supra*, at 10.

5. *Id.* at 10, 11.

6. R. BROWN, SOCIAL PSYCHOLOGY 670-3 (1965).

concerning pretrial corporeal (lineup and showup) identification in the *United States v. Wade*,[7] *Gilbert v. California*,[8] and *Stovall v. Denno*[9] decisions. Justice Brennan, writing the opinion of the Court in all three cases, recognized the dangers of mistaken identification and determined that a major factor was, ". . . the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification."[10] The guidelines established concerned an accused person's right to counsel and to "due process of law."

A. Right to Counsel

The Sixth Amendment to the United States Constitution guarantees that: "In all criminal prosecutions, the accused shall enjoy the right . . . to have assistance of counsel for his defense." In *Wade*, the Court found that this right to counsel must attach at all "critical stages" of the criminal proceedings. It was noted that in the earlier case of *Powell v. Alabama*,[11] the time between arraignment and trial was crucial:

> In sum, the principle of *Powell v. Alabama* and succeeding cases requires that we scrutinize *any* pretrial confrontation of the accused to determine whether the presence of counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross examine the witnesses against him and to have effective assistance to counsel at the trial itself.[12]

The Court determined that Wade's post-indictment lineup was a critical stage of the criminal proceedings in which he was entitled to counsel. Therefore, both Wade and his attorney should have been notified of the lineup, and the attorney should have been present, absent an "intelligent waiver."[13]

The Court was adamant in its belief that presence of counsel would be beneficial:

> No substantial countervailing policy considerations have been advanced against the requirement of the presence of counsel. . . . In our view counsel can hardly impede legitimate law enforcement; on the contrary, for the reasons expressed, law

7. 388 U.S. 218 (1967).
8. 388 U.S. 263 (1967).
9. 388 U.S. 293 (1967).
10. Wade, 388 U.S. at 228.
11. 287 U.S. 45 (1932).
12. 388 U.S. at 227.

> enforcement may be assisted by preventing the infiltration of taint in the prosecution's identification evidence.[14]

The right to counsel at pretrial corporeal identification proceedings was recognized. The Court did not make explicit whether this right attached at all lineups; the post-indictment lineup was determined on the basis of the facts to be a critical stage of the proceedings. Also, the Court left open the question of whether substitute counsel could replace the suspect's own attorney.[15]

The *Wade* decision did not specifically decide if the right to counsel attached at all lineups, *i.e.*, that a corporeal identification proceeding was, per se, a critical stage of the proceedings. There was a subsequent division of authority in the lower courts concerning the question.

In 1972, the Supreme Court attempted to resolve the conflict in *Kirby v. Illinois*,[16] deciding that the right to counsel would commence only at the point in time when "adversary judicial proceedings" have been initiated against the accused.[17] Thus, where defendant Kirby had been identified in a one man showup after his arrest, but before adversary proceedings had begun, he was not entitled to the presence of counsel as a matter of right.

The *Kirby* decision definitely restricts some of the language of *Wade*. *Wade* recognized that one of the primary functions of counsel at lineups was to insure that a fair lineup was held and to make an accurate description of the lineup to bring into the courtroom.[18] The problems a suspect faces at a lineup of noting what is happening between the police and the witnesses, being able to make suggestions, and usually not having the credibility to convince a fact-finder of her version of the story, seem to be just as great at a pre-indictment lineup as a post-indictment lineup. Also, it is still not specifically clear how "adversary judicial proceedings" will be construed. It would definitely seem to apply to any time after the arraignment, preliminary hearing, indictment or information. The Missouri Supreme Court has determined that *Kirby* requires counsel at lineups following the filing of a complaint.[19]

The limitation on the right to counsel imposed in *Kirby* may

13. *Id.* at 237; *see* Cornley v. Cochrane, 369 U.S. 506 (1962).
14. 388 U.S. at 237-8.
15. *Id.* at 237.
16. 406 U.S. 682 (1972).
17. *Id.* at 688.
18. 388 U.S. at 236-9.
19. Arnold v. State, 484 S.W.2d 248 (Mo. 1972).

not have had a great impact in practical terms. After *Wade* police departments began expanding their use of photographic displays and relying less on corporeal identification procedure.[20] Most courts decided that there was no right to counsel when a photographic display was shown to a witness.[21]

The Supreme Court upheld this point of view in *United States v. Ash*,[22] and held that right to counsel did not attach at any stage of the proceedings as far as photographic displays were concerned:

> Since the accused is not present at the time of photo display and as here, asserts no right to be present, there is no right to be present, there is no possibility that he might be misled by his lack of familiarity with the law or overpowered by his professional adversary.[23]

In dealing with the *Wade* arguments about defense counsel's role in ensuring fairness, the Court said: "[t]he primary safeguard against abuses of this kind is the ethical responsibility of the prosecutor."[24]

B. Due Process

Aside from the issue of right to counsel, a pretrial identification procedure must comport with certain due process requirements. The Supreme Court first analyzed the problem in *Stovall*:

> We turn now to the question whether petitioner although not entitled to the application of *Wade* and *Gilbert* to his case, is entitled to relief on his claim that in any event the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law. This is a recognized ground of attack upon a conviction independent of any right to counsel claim. *Palmer v. Peyton*, 359 F. 2d 199 (C.A. 4th Cir. 1966). The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned. However, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it.[25]

---

20. Steele, *Kirby v. Illinois: Counsel at Lineups*, 9 CRIM. L. BULL. 49, 53 (1973).

21. *Id.* at 53-4; *see also*, United States v. Ballard, 423 F.2d 127 (5th Cir. 1970); United States v. Zeller, 427 F.2d 1305 (3d Cir. 1970); People v. Lawrence, 4 Cal. 3d 273, 481 P.2d 212, 93 Cal. Rptr. 204 (1971).

22. 413 U.S. 300 (1973).

23. *Id.* at 315.

24. *Id.* at 320.

25. Stovall v. Denno, 388 U.S. 293, 301 (1967).

Thus, a reviewing court should examine the confrontation and determine whether it was so unnecessarily suggestive and conducive to irreparable mistaken identification.

Applying this standard to the facts of *Stovall*, the Court found that due process of law had not been violated. Theodore Stovall had been taken to the hospital room of the victim, Mrs. Behrendt. Stovall was the only black person in the room. The police officers asked her "if he was the man." She then identified him as being the man who stabbed her. The Court felt that, looking at the totality of the circumstances surrounding the confrontation, the immediate confrontation at the hospital was imperative. They cited the court of appeals opinion which noted that no one knew how long Mrs. Behrendt would live and she was the only person in the world who could exonerate Stovall.[26]

In the companion cases of *Wade* and *Gilbert*, the Court indicated how the due process and right to counsel requirements were to be applied. *Gilbert* established a per se exclusionary rule concerning evidence of the pretrial confrontation itself. If the trial court orders the suppression of lineup evidence or if an appellate court rules on review that such evidence should have been suppressed, use of the lineup identification by the prosecution in its case-in-chief requires reversal.[27]

Failure to comply with the *Wade-Gilbert-Stovall* standards of right to counsel and due process require exclusion of testimony concerning the confrontation. However, the Court in *Wade* noted that an in-court identification could be allowed if the witness was shown to have a source independent of the tainted identification procedure. The question was:

> . . . [W]hether granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.[28]

Wade also listed several factors to be considered in the "independent source" determination:

> . . . [T]he prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pretrial description and the defendant's actual description, any identifica-

26. *Id.*

27. Gilbert v. California, 388 U.S. 263, 272-3 (1967).

28. United States v. Wade, 388 U.S. 218, 241 (1967); *see also*, Wong Sun v. United States, 371 U.S. 471 (1963).

> tion prior to lineup of another person, the identification 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.[29]

The prosecution has the burden of showing an independent source of identification by "clear and convincing evidence."[30]

There have been four subsequent occasions for the Supreme Court to consider the scope of the due process limitations on the use of testimony and evidence derived from suggestive identification procedures. In *Simmons v. United States*,[31] the petitioner argued that various witnesses who identified him in court had been influenced by a suggestive photographic display. It was noted that photograph identification was an effective law enforcement procedure and the Supreme Court would not prohibit its use:

> Instead, we hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.[32]

Applying this standard to the facts in *Simmons*, the claim of petitioner failed. The F.B.I. agents needed to swiftly determine whether they were "on the right track." Also, the witnesses had ample opportunity to view the robbers and the photographs were shown to them on the day after the robbery, while their memories were fresh.

Foster v. California[33] is the only case to date in which the Supreme Court found that the identification procedures involved violated due process. There were a series of confrontations involved in this armed robbery case. First, petitioner Foster and two other men were exhibited in a lineup before the only eyewitness. Foster was approximately six inches taller than the other participants and was wearing a leather jacket similar to the one the witness had mentioned in his description of one of the robbers. No positive identification resulted, so the witness was shown Mr. Foster in a one-to-one showup confrontation. There was still no identi-

29. 388 U.S. at 241.
30. *Id.* at 240.
31. 390 U.S. 377 (1968).
32. *Id.* at 384.
33. 394 U.S. 440 (1969).

fication. A week or ten days later, the police arranged a second lineup, where petitioner was the only person who had also appeared in the first lineup. The eyewitness now claimed that he was certain Foster was one of the robbers.

The Court felt that this case presented a compelling example of unfair confrontation procedures:

> The suggestive elements in this identification procedure made it all but inevitable that David [the eyewitness] 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. (emphasis original).[34]

As the Court was reviewing the admissibility of evidence concerning out of court identification, they did not consider circumstances such as the opportunity of the witness to view the crime. They also specifically declined to decide whether the due process violation was harmless error.[35]

The Court seemed to stress the concept of fairness more than in previous decisions although the holding was on the basis of the unreliability of the confrontation procedures. In dissent, Justice Black expressed his displeasure with the expanded concept of due process. Basically, he felt that standards of "decency and fairness" applied by the Court on review were inconsistent with the written Constitution.[36]

---

34. *Id.* at 443.

35. *Id.* at 444.

36. *Id.* at 444-53. Justice Black dealt at length with his interpretation of the Constitution:

> Far more fundamental, however, is my objection to the Court's basic holding that evidence can be ruled constitutionally inadmissible whenever it results from identification procedures that the Court considers to be 'unnecessarily suggestive and conducive to irreparable mistaken identification.' One of the proudest achievements of this country's Founders was that they had eternally guaranteed a trial by jury in criminal cases, at least until the Constitution they wrote had been amended in the manner they prescribed. Only last year in Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), this Court emphatically decided, over strong dissents, that this constitutional right by jury in criminal cases is applicable to the States. Of course it is an incontestable fact in our judicial history that the jury is the sole tribunal to weigh and determine facts. That means that the jury must, if we keep faith with the Constitution, be allowed to hear eyewitnesses and decide for itself whether it can recognize the truth and whether they are telling the truth. It means that the jury must be allowed to decide for itself whether the darkness of the night, the weakness of a witness' eyesight, or any other factor impaired the witness' ability to make an accurate identification. To take that power away from the jury is to rob it of the responsibility to perform the precise functions the Founders most wanted it to perform. And

In *Coleman v. Alabama*,[37] an in-court identification was challenged. Petitioners claimed that the conduct of the lineup in question was so unduly prejudicial that the witness, Mr. Reynolds, should not have been allowed to identify them at trial. The Supreme Court, on review, determined that the trial court could properly find that Reynolds' identification was independently based on his observations at the time of the crime. The testimony from the record indicated that Reynolds had had a "good look" at his assailants.

The Supreme Court decisions to this point appeared to be fairly straightforward extensions of the standards espoused in *Wade, Gilbert*, and *Stovall*. The Court in *Neil v. Biggers*,[38] appears to have altered their analysis of due process as it relates to confrontation procedures. Petitioner in *Neil* was identified at a showup conducted almost seven months subsequent to the crime. Before deciding whether this violated due process of law, the Court reviewed the relevant cases and decided that several guidelines emerged. The main problem to be avoided was misidentification, not suggestiveness:

> It is, first of all, apparent that the primary evil to be avoided is "a very substantial likelihood of irreparable misidentification." *Simmons v. United States, supra*, 390 U.S., at 384, 88 S. Ct., at 971. While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of 'irreparable' it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself. It is the likelihood of misidentification which violates a defendant's right to due process, and it is this which was the basis of the exclusion of evidence in *Foster*. Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous. But as *Stovall* makes clear, the admission of evidence of a showup without more does not violate due process.[39]

---

certainly a Constitution written to preserve this indispensable, unerodible core of our system for trying criminal cases would not have included, hidden among its provisions, a slumbering sleeper granting the judges license to destroy trial by jury in whole or in part.

37. 399 U.S. 1 (1970).

38. 409 U.S. 188 (1972).

39. *Id.* at 212.

The Court further stated that it was not clear from past cases that unnecessary suggestiveness alone required exclusion of evidence of the confrontation. They declined to reach the question because the trial of Biggers had taken place before the *Stovall* decision was rendered, and previous to *Stovall* suggestiveness was merely a matter to be argued to the jury. The central question, according to the Court was whether the identification was reliable even though the showup was suggestive. Looking at the totality of the circumstances, the factors to be considered were:

> . . . [T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.[40]

Here, the victim spent up to half an hour with the assailant in adequate light, gave a description which matched the petitioner, and had "no doubt" that he was the person who raped her. Therefore, the Court found that under the totality of the circumstances, due process had not been violated.

The *Neil* decision essentially said that the factors relevant to establishing an independent source for an in-court identification would also be relevant to determining whether testimony concerning out of court identifications would be admissible. Some courts and commentators had seen a distinct difference in the due process question of in-court and out of court identifications. In *Stovall* the totality of the circumstances surrounding the confrontation itself was considered, and external factors such as the witness' opportunity to view the crime were not discussed. Similarly, in *Foster*, these factors were not considered.

The lower courts have dealt with numerous claims of due process violations in eyewitness identifications since *Stovall*. A wide variety of considerations have been noted in the various decisions.

1. Suggestive Pre-lineup Occurrences

Actions by police or witnesses may be so suggestive that they render the lineup itself meaningless. In *United States ex rel. Stevenson v. Mancusi*,[41] a victim was asked to come to the police station and view a suspect. After viewing two men, the victim identified one as the man who stole her purse. The officer with her

40. *Id.*

41. 409 F.2d 801 (2d Cir. 1969).

then pointed to the other man and said, "No, it was him that took your money, wasn't it?"[42] She then changed her mind. The conviction was reversed because the identification was deemed unreliable.

In *Dearinger v. United States*,[43] defendant contended that the newspaper publication of his photograph in conjunction with a story on a robbery unduly prejudiced him. The claim was that the paper identified him as a suspect and thus fatally tainted any subsequent lineup. The Court looked to the totality of the circumstances and decided the in-court identification should be allowed. The witnesses had been in close proximity to the robbers in the bank for five minutes and the newspaper photographs were not that clear anyway.

In pre-lineup procedures, it seems to be crucial whether the suggestive procedure or occurence focusses undue attention on the accused. Thus in *Rudd v. Florida*,[44] the viewing of the accused who sat beside police officers in the state attorney's office was unduly suggestive.

2. Lineups

Race. A primary consideration in determining the fairness of a lineup has been the examination of the way the accused appears in relation to the other participants. Clearly, it is desirable that the lineup participants be of the same racial or ethnic background. The victim in *State v. Parker*,[45] had been assaulted by three Indians. The ensuing lineup consisted of three Indian suspects and three non-Indians, and the victim identified the Indians. The court found no violation of due process due to the length of time the victim had been with his assailants and the fact that the lineup was held only a short time after the crime occurred.

Defendant James Crummie was identified in a six man lineup in *Crummie v. Wainwright*.[46] In his subsequent petition of habeas corpus Crummie contended that he was the only overweight, light-skinned Negro in the lineup. He felt that this caused him to stand out from the other lineup participants. The reviewing court noted that no other man in the lineup looked, "quite like appellant Crummie who is very distinctive in appearance."[47] The Court felt the

42. *Id.* at 802.
43. 468 F.2d 1032 (9th Cir. 1972).
44. 477 F.2d 805 (5th Cir. 1973).
45. 282 Minn. 343, 164 N.W.2d 633 (1969).
46. 427 F.2d 135 (5th Cir. 1970).
47. *Id.* at 137.

lineup complied with due process since the persons in the lineup had similar features and the police had not systematically attempted to insure the identification of the accused.

A lineup consisting of two Mexican suspects and two non-Mexicans was deemed obviously unfair in *People v. Castillo*.[48] In that lineup, defendant and his brother, who were both about 5'6" tall and weighed about 120 pounds, were joined by two white policemen who were about 5'10" tall and weighed over 200 pounds. An in-court identification was upheld, however, because of the opportunity of the eyewitness to view the crime.

Racial differences in a lineup are an important factor in the determination of suggestiveness, but it is not enough alone to require suppression of a lineup on due process grounds.

Height and Weight. Height and weight were factors considered by the courts in *Crummie* and *Castillo*. The *State v. King*[49] case examined a lineup where the defendant at 6'5" was the tallest participant by five inches. The procedure was not unduly suggestive since the witness had an adequate opportunity to observe the crime.

In *People v. Caruso*,[50] defendant was 6 feet 1 inch tall and weighed 238 pounds. The other lineup participants were not close to his size, and no one else had wavy hair or a dark complexion like the defendant. The California Court of Appeals reversed his conviction, finding the defendant was, "singularly marked for identification."[51]

Height discrepancy in the lineup was one of the various factors that led the Supreme Court to reverse the conviction in *Foster*. However, as with other physical criteria, there seem to be no absolute limits on the differences in the heights and weights of the participants of a lineup.

Distinctive Marks. A lineup should be conducted so that attention is not focused on a suspect because of a deformity or a distinctive mark. In general these should be covered or some effort should be made to have other participants appear to have the same characteristic. An interesting example of a good attempt to negate a distinguishing factor was noted in *People v. Beivelman*.[52] The sus-

48. 130 Ill. App. 2d 387, 264 N.W.2d 516 (1970).
49. 296 Minn. 306, 208 N.W.2d 287 (1973).
50. 68 Cal. 2d 183, 436 P.2d 336, 65 Cal. Rptr. 336 (1968).
51. *Id.* at 187-8.
52. 70 Cal. 2d 60, 447 P.2d 913, 73 Cal. Rptr. 521 (1968).

pect had a broken leg and authorities had the other participants use crutches and wear only a sock on one foot.

Other authorities have been less diligent. A bearded suspect was placed in a lineup where everyone else was clean shaven in *State v. Desereault*.[53] The procedure was determined to be unduly suggestive, but the conviction was upheld. Defendant in *State v. Cummings*,[54] was the only person in a lineup who had a scar on his arm. The court also noted that defendant was nervous at the time, while the other participants appeared to be jovial and relaxed. The procedure was found not unduly suggestive with the court stressing that it was impossible to get other people who closely resembled the defendant and that the police had not contrived to deprive the defendant of due process.

Distinctive marks such as scars or tatoos would seem to be an easy matter for police to deal with in lineup procedures. A long sleeve shirt could cover the arms and a scar on the face could be covered with a bandage.

Clothing. A problem often encountered is that the suspect is the only participant wearing clothing matching the description given by witnesses. The defendant in *State v. Boyd*,[55] was the only participant who was wearing white sneakers, and the witness had mentioned sneakers in the description. Also the witness viewed the defendant through a one-way mirror and thus could not record for himself possible suggestive proceeures. The court found that they were unable to discern how long the victim had been able to view her assailant at the time of the crime, and therefore, the court felt that a new trial was required.

Number of Participants. There is no magic number of defendants necessary for a lineup. As noted above, one man showups are often found not to violate due process. Various commentators have suggested that at least six participants should be in each lineup,[56] and Wigmore feels that a one to twelve ratio of suspects to non-suspects would be fair.[57] In England the ratio varies between one to eight and one to fourteen.[58]

53. 104 Ariz. 380, 453 P.2d 951 (1969).

54. 27 Utah 2d 365, 496 P.2d 709 (1972).

55. 294 A.2d 459 (Me. 1972).

56. N. SOBEL, EYEWITNESS IDENTIFICATION: LEGAL AND PRACTICAL PROBLEMS (1972) [hereinafter cited as SOBEL]; Note, *Pretrial Identification Procedures - Wade to Gilbert to Stovall: Lower Courts Bobble the Ball*, 55 MINN. L. REV. 779 (1971); 20 AM. JUR. PROOF OF FACTS, *Eyewitness Identification* at 546.

57. 3 WIGMORE ON EVIDENCE § 786a at 206, (Chadborne rev. 1970).

58. Williams, *Identification Parades*, 1955 CRIM. L. REV. 525, 533.

Suggestive Actions by Law Enforcement Authorities. Courts have allowed lineups where there seemed to be substantial differences between the suspect and other participants. They have been somewhat more strict in dealing with procedural problems. The problem for defendant without counsel is in determining just exactly what happened. In essence, his due process claim must be established by the eye-witnesses and the police, who stand against him at trial.

The procedure in *Commonwealth v. Lee*,[59] violated due process. Police there exhibited four men and one woman together to a robbery victim. At that time he could not identify anyone. The police then took the victim to a car which he identified as belonging to the alleged robbers. After telling the victim that the five people he had seen previously had been picked up by the police when they had gotten out of the car, the police asked him if he wanted to look at the group of suspects a second time. His subsequent identification was found to have been tainted by the police procedure.

Courts are even more distrubed by possibly suggestive procedure where the witness appears unsure of himself. According to the Court in *State v. Clark*,[60] the danger of misidentification is directly related to the susceptibility of the witness to suggestion. In *Clark*, two sisters, eight and ten years old, attempted to identify from a photographic display, a man who had indecently exposed himself. Each girl picked the photograph of a different man. At this point, police suggested that the parents take the girls to a service station where the defendant worked, so that they could observe and speak with him. The danger in this procedure was that the police, and not the witnesses, did the identifying.[61]

In the previously noted *Foster* case, the Supreme Court found the police had shown the defendant in successive lineups to witnesses. Since defendant was the only person who participated in both lineups, this obviously focused witness attention upon him.

Remarks by the Defendant. According to *Wade*, having a suspect speak at a lineup does not violate his privilege against self-incrimination. Defendant in *Crume v. Beto*[62] claimed that having him say certain words connected with the crime deprived him of due process of law. The police actually singled out the accused

59. 215 Pa. Super 240, 257 A.2d 326 (1969).
60. 2 Wash. App. 45, 467 P.2d 369 (1970).
61. *Id.*
62. 383 F.2d 36 (5th Cir. 1967).

twice in a lineup - once having him put on a hat and later having him say, "This is a stick-up." The court found the procedure was not unduly suggestive because it was the witness who requested that the defendant do these things. Also, the witness felt quite certain about the identification. Judge Wisdom, writing for the court, did suggest that the better practice was to have everyone in the lineup speak the words, noting:

> When the witness' "original identification is tentative or is for some other reason suspect, such a procedure could easily rise to the dignity of a due process requirement."[63]

Witnesses. Witnesses should definitely view a lineup separately. The court in *People v. Blumenshire*[64] found it improper that the defendant was identified by several witnesses at the same time.

Showups. The practice of showing just one subject alone to a witness was condemned in *Stovall* as being highly suggestive. The showup confrontation in *Stovall* was upheld due to the exigencies of the situation. Lower courts have subsequently taken the position that if the showup is held shortly after the occurence of the crime, and is in the due course of prompt police investigation for suspects, the testimony concerning the showup confrontation will be admissible. Thus a showup was found proper where less than twenty-four hours had elapsed in *United States ex rel. Valentine v. Zelker*,[65] but a five month delay was improper in *United States ex rel. Harden v. Follette*.[66]

Some courts have found themselves in the dilemma of upholding a conviction based in part on grossly unfair procedure. *United States ex rel. Geralds v. Deegan*[67] involved a striking example of suggestive procedure. Twenty days after the crime a single black man, in the custody of white policemen, was shown to the victims in each other's presence. Furthermore, the suspect had to put on a hat and utter the words, "Where's the money?" The reviewing court found that the spotlight of suggestion could hardly have been focused with greater intensity than it was here,[68] but concluded that the in-court identification had been founded on an independent source. The *Neil* decision seems to uphold this type of determina-

63. *Id.* at 40.
64. 42 Ill. 2d 508, 250 N.E.2d 152 (1969).
65. 446 F.2d 857 (2d Cir. 1971).
66. 333 F. Supp. 371 (S.D.N.Y. 1970), *aff'd*, 450 F.2d 879 (2nd Cir. 1971).
67. 292 F. Supp. 968 (S.D.N.Y. 1968).
68. *Id.* at 973.

tion and applies it to out of court identifications as well.

Photograph Displays. The Supreme Court applied the *Stovall* due process requirements to photographic displays in *Simmons.* Factors relating to undue suggestiveness are much the same in these displays as in lineups. Where none of the photographs shown in *United States v. Fernandez*[69] even remotely resembled the defendant, the procedure was suggestive. In *United States v. Bell,*[70] however, the court allowed a procedure where Bell was the only person pictured with a bandage on his forehead and an open mouth exposing "snaggled teeth." Courts have similarly split in judging the propriety of showing only one suspect's photograph to a witness[71] or using mug shots.[72]

The Likelihood of Misidentification. The Supreme Court in *Neil* stressed that the reliability of an identification was the key question in deciding a due process claim. They also indicated that factors relevant to establishing an independent source of an in-court identification would be relevant to the determination of the admissibility of out of court examination.

Various criteria have been mentioned in the previous sections that courts use in judging whether suggestive procedures actually have undermined a witness' ability to give a reliable identification. These criteria were summarized in *United States v. O'Connor:*[73]

> 1. Was the defendant the only individual that could possibly be identified as the guilty party by the complaining witness, or were there others near him at the time of the confrontation so as to negate the assertion that he was shown alone to the witness?
> 2. Where did the confrontation take place?
> 3. Were there any compelling reasons for a prompt confrontation so as to deprive the police of the opportunity of securing other similar individuals for the purpose of holding a line-up?
> 4. Was the witness aware of any observation by another or other evidence indicating the guilt of the suspect at the time of the confrontation?

---

69. 456 F.2d 638 (2nd Cir. 1972).

70. 457 F.2d 1231 (5th Cir. 1972).

71. Held suggestive: Workman v. Caldwell, 338 F. Supp. 893 (N.D. Ohio 1972), *aff'd* in part and vacated in part on other grounds, 471 F.2d 909 (6th Cir. 1972); Held not suggestive: Kain v. State, 48 Wis. 2d 212, 179 N.W.2d 777 (1970).

72. Held suggestive: Workman v. Caldwell, 338 F. Supp. 893 (N.D. Ohio 1972); United States v. Washington, 292 F. Supp. 284 (D.D.C. 1968); Held not suggestive: State v. Newman, 4 Wash. App. 588, 484 P.2d 473 (1971); McClain v. State, 444 S.W.2d 99 (Ark. 1969).

73. 282 F. Supp. 963 (D.D.C. 1968).

5. Were any tangible objects related to the offense placed before the witness that would encourage identification?

6. Was the witness' identification based on only part of the suspect's total personality?

7. Was the identification a product of mutual reinforcement of opinion among witnesses simultaneously viewing defendant?

8. Was the emotional state of the witness such as to preclude objective identification?

9. Were any statements made to the witness prior to the confrontation indicating to him that the police were sure of the suspect's guilt?

10. Was the witness' observation of the offender so limited as to render him particularly amenable to suggestion, or was his observation and recollection of the offender so clear as to insulate him from a tendency to identify on a less than positive basis?

Other factors will also be significant in a particular case.[74]

Harmless Error. In *United States v. Counts*[75] the court found no error in the failure of the lower court to suppress identification testimony based on a pretrial showup because an independent source of identification was shown, and moreover, any error was harmless beyond a reasonable doubt. Few courts have followed the harmless error approach; most have found that there was simply no likelihood of misidentification. In *Foster*, the Supreme Court specifically refused to consider the harmless error question.

III. Role of Counsel

Even assuming that counsel is provided at a pretrial confrontation, it is not at all clear exactly what the role of counsel is. While Justice White, dissenting in *Wade*, expressed the fear that defense counsel would harrass witnesses,[76] there is nothing to support that assertion seven years after *Wade*. On the other hand, there is nothing to suggest that the presence of counsel has meaningfully made the identification process more fair.

Perhaps the most important role of counsel at a pretrial confrontation is simply to observe the proceedings. The mere presence of an advocate for the defendant will often have the effect of deterring improper police conduct. Going beyond the passive role of the observer, however, it also appears likely that counsel should be able to suggest methods of presentation and procedure that he

74. *Id.* at 965.

75. 471 F.2d 422 (2d Cir. 1973).

76. United States v. Wade, 388 U.S. 218, 258-9 (1967).

deems to be more fair to his client. The problem is, however, to whom counsel objects, and what counsel does if his objections are not sustained. Often a senior police officer will be conducting the identification, and he will not be inclined in most cases to comply with the wishes of counsel for the accused. It is also likely that counsel will attempt to manipulate the lineup to make it overly fair to his client. That is, he will attempt to arrange the presentation in such a way so as to have the least likelihood of identification. Even assuming that there is someone to whom objections can be made, the next problem becomes preservation of the objection and preservation of the identification process itself.

It can thus be said that the primary purpose of having an attorney at a pretrial confrontation is simply to observe and to make suggestions to the person in charge. While counsel should be present at the time the witness is identifying the defendant to make certain that no suggestive technique is used for the identification, it would be inappropriate for counsel to, in any way, question or discuss the case with those witnesses. Counsel's relationship should be entirely with the individuals conducting the lineup and not with the witnesses. Counsel should also make certain that whatever objections he has to the lineup are made immediately upon identification so that there is no question but that all parties remember the same facts. In situations in which the objection cannot be preserved by a photograph, it would be appropriate for counsel to write down his objections to the procedure and have them countersigned by the individual conducting the lineup.

What should counsel do if he believes that the lineup is unfair, and his subsequent suggestions have been ignored? Consider the case of *Beals v. State*.[77] A robbery occurred in Madison, Wisconsin in the late evening of August 7, 1970. Prior to the lineup, an assistant district attorney had requested that a legal aid attorney be provided to represent the suspects. An attorney was sent to the police station. After counsel had talked briefly with the suspects, a practice lineup was held without the witnesses present. The legal aid attorney objected to the ratio of suspects to non-suspects in the lineup, to the disparity of the heights of the participants in the lineup, and to the fact that the suspects' clothing and hair style distinguished them from the other participants. When his objections were not acted upon, the attorney refused to participate further and left the police station.

77. 52 Wis. 2d 599, 191 N.W.2d 221 (1971).

A second and third lineup were held without counsel being present. The court on review found that defendant's right to counsel had been violated, and that counsel's conduct was improper.

The solution defendant's counsel found in this case was not proper and in most cases would probably be both harmful to the defendant and leave counsel open for disciplinary actions. It would seem, however, that the failure of the police to comply with a good faith reasonable request by a defense attorney would be an important factor in the undue suggestiveness question. The real problem is that the suggestive lineup may implant a false impression on a witness who may be able to establish an independent source of identification.

It seems clear that if counsel for the defendant is going to be meaningful at a pretrial confrontation, counsel for the State will also have to be present and some type of relationship will have to be developed between the prosecutor and the defense attorney. While an investigatory agency may object to the infusion of more attorneys into the process, such use would almost certainly result in better lineup and more valuable identification processes. The validity of the identification at trial is emphasized, and thus investigatory agencies should not have any objections to giving counsel for both the defendant and the state more leeway in proposing fair lineup procedures.

IV. SUMMARY

The problems of eyewitness identification are well documented. People have been shown to be less than adequate observers. The problem is increased in times of stress; a witness or a victim of a crime is normally quite frightened or unnerved by the whole event.

The Supreme Court in the *Wade-Gilbert-Stovall* trilogy recognized these problems. Both the suspect and law enforcement officials would benefit from standards that would ensure nonsuggestive identification procedures. To deal with the problem, the Court enacted a due process test and decided that a suspect would have a right to counsel if the lineup was a critical stage in the proceedings.

Not surprisingly, the change in the composition of the United States Supreme Court resulted in a change in attitude from that reflected in the *Wade-Stovall-Gilbert* trilogy. In a series of three cases, *Kirby v. Illinois*,[78] *Neil v. Biggers*,[79] and *United States v.*

78. 406 U.S. 682 (1972).
79. 409 U.S. 188 (1972).

Ash,[80] the Supreme Court has upheld criminal convictions as not being tainted by improper pretrial confrontation. In *Kirby* the issue was a pre-indictment lineup, while in *Neil* the issue was whether the identification of the defendant by the witness was independent of an overly suggestive lineup, and in *Ash* the issue was whether a defendant is entitled to counsel when the prosecution displays a set of photographs, including the defendant's to the witness after the defendant has been indicted for the crime. Each of these cases were decided over the vigorous dissents of at least three members of the court. In each case the minority justices asserted that the mandate of the majority was in violation of the *Wade-Stovall-Gilbert* rules. In each decision, the majority members of the Court asserted with equal vigor that the decisions were entirely consistent with the *Wade* line of cases.

It is submitted that the *Kirby-Neil-Ash* trilogy can be reconciled with the *Wade-Gilbert-Stovall* decisions. The fundamental change in attitude reflected in the more recent decisions, however, is not in the general application of the Constitution to pretrial identification processes, but rather in the conclusions drawn from the application of the general rules to the facts of the case being scrutinized. The Burger Court appears to retain the general constitutional propositions espoused in *Wade-Gilbert-Stovall* while upholding convictions by reason of inapplicability of right to counsel or no substantial likelihood of misidentification. This is perhaps consistent with a more conservative attitude towards criminal convictions, which applies "fundamental fairness" to appellate review of convictions, but which does not countenance reversal of a conviction because of a denial of a constitutional right which may not be deemed to be prejudicial to the defendant.

This seems to be a "harmless error" approach of sorts which the Warren Court specifically avoided in *Foster*. The earlier Warren Court decisions reflect an attitude that general constitutional restrictions must be placed upon police and prosecutorial activities to protect the accused against arbitrary action by law enforcement officials. These earlier decisions can be seen as an attempt to deal with such abuses prophylactically, while the Burger Court first reviews the facts in the case and then determines whether the State action involved was, in fact, prejudicial to the defendant's fair trial.

One difficult aspect of the recent decisions of the United States

80. 413 U.S. 300 (1973).

Supreme Court is the position that it can review factual determinations made by lower courts with a view to determining whether the facts of that case require suppression of the tainted identification. Justice Brennan, in his dissenting opinion to *Neil*, makes clear the proposition that such review by the United States Supreme Court is contrary to a substantial body of law. On the other hand, this gut reaction reversal of lower court determinations did not deter the liberal majority in *Foster v. California*, from reversing a state court determination, again, on the totality of the circumstances. The Court has rejected mechanical application of the rules in favor of a case by case review. Their lineup decisions seem similar to the, "I know it when I see it," determination of obscenity questions.

In his dissent in *Foster*, Justice Black noted that this substantive due process approach did not have a proper constitutional basis. In addition these decisions lack guidelines and criteria to be applied by law enforcement officials and courts throughout the fifty states.

The *Kirby* decision is illustrative of the problem. *Kirby* is usually cited for the proposition that counsel is not required at a pre-indictment lineup. That clearly is not the mandate of the case. At most, the plurality decision written by Justice Stewart supports the proposition that in *most* cases such representation is not needed. The decision held that the right to counsel attached at the time of initiation of adversary proceedings against an individual, but did not explicitly state at what time proceedings reach this point. Applying the standard of "initiation of adversary proceedings" to the facts of *Kirby*, the Court felt that the right to counsel had not yet attached at the point of routine police investigation.

It would seem that *Kirby* can be read to place a premium on dilatory conduct by the prosecutor in seeking an indictment or in commencing criminal proceedings. If a prosecutor knows that he will have to supply counsel in a post-indictment lineup, he is going to attempt to avoid the purview of that requirement by conducting pre-indictment lineups even when the evidence he has in his possession is sufficient to obtain an indictment or file a criminal complaint. In *Hayes v. State*,[81] the Wisconsin Supreme Court adopted a rule whereby counsel would be required at any time proceedings actually, as opposed to formally, moved from an investigatory to an accusatorial stage. Subsequent to *Kirby*, however, the Wiscon-

81. 46 Wis. 2d 93, 175 N.W.2d 625 (1969).

sin Supreme Court withdrew that mandate, and now requires counsel only after formal charges have been filed. The Wisconsin court had previously recognized the distinction between the investigatory and accusatorial lineup, and had made that the line of demarcation, rather than the formal filing of papers by the district attorney. The court in *State v. Taylor*,[82] however, abandoned that practical approach in favor of a strictly formal right to counsel at post-indictment lineups.

If the case by case approach is going to be used, it should be accompanied by adequate criteria so that the lower courts will have some guidance in the application of constitutional standards in eyewitness confrontation cases. As the situation now stands, the lower courts have not acted uniformly in their approach to the question. More importantly the cases have shown that a variety of very suggestive lineup procedures are being upheld, often under the justification of totality of the circumstances.

The problem with this approach is that even people who have had a good opportunity to view a crime may be open to suggestiveness. Wall noted in *Eyewitness Identification in Criminal Cases* that there were cases where people had even failed to identify their relatives.[83] The results of the various experiments concerning perception and suggestability show that there is a real need to stop unfair identification procedures.

If the Supreme Court intends to keep the case by case analysis of lineup procedures, and ensure that fair and relatively uniform lineup procedures will exist, they must expand their criteria and guidelines. The remainder of this article will be devoted to determining the criteria which must be considered.

V. GUIDELINES

If truly fair lineup procedures are to be achieved, certain guidelines must be adopted and followed. The first general concern must be to determine that a confrontation is free from suggestiveness. The following guidelines, extracted from the cases and comments discussed in this article, could be feasibly adopted.

A. Showups

Showups are a highly suggestive form of confrontation and should only be used in the prompt course of investigation. If a

82. 60 Wis. 2d 506, 210 N.W.2d 873 (1973).

83. WALL, *supra* note 1, at 13-4.

suspect is taken into custody within twenty-four hours of the crime, a one-to-one confrontation may be allowed. In all other circumstances, lineup or photograph identification procedures should be used.

One-to-one confrontations are basically unfair procedures, and their use should be restricted. The high degree of human suggestiveness must be balanced against the need for prompt law enforcement. In the hours immediately following a crime the police must determine if they are on the right path. As time passes from the moment the crime occurs, the witness' memory is more open to suggestion and the police do not require immediate answers as to whether a potential suspect is indeed the perpetrator of a crime. Therefore, after twenty-four hours has elapsed, law enforcement authorities should use a lineup rather than a showup.[84]

B. Lineups

1. A Prosecutor Should Conduct the Lineup Proceedings

A prosecutor, at the time of the lineup, has had less contact with the case than the police officers. He or she also will presumably be more cognizant of the possibility of suggestiveness and the need to conduct a fair lineup.[85]

2. No Communication Prior to Lineup

Prior to the lineup, there should be no communication about the suspects between the witnesses themselves or between any of the witnesses and the law enforcement authorities. Also, before viewing the lineup, each witness should write out a description of the alleged criminal.

Any impropriety before a lineup can undermine the fairness of the whole process. Any indication that a certain participant is suspected by them could easily influence a witness.[86]

3. Number in Lineup

There should be at least six participants in the lineup. Each person should have approximately the same age, height, weight, complexion, hairstyle, and body type.

If a sufficient number of people are participating in a lineup,

84. *See* Tinio, *Admissibility of Evidence of Showup Identification as Affected by Allegedly Suggestive Showup Procedures*, 39 A.L.R. 3d 791; *see also* cases cited notes 65-7 *supra*; Stovall v. Denno, 388 U.S. 293.

85. *See, e.g.*, WALL, *supra* note 1; RINGEL, *supra* note 2; SOBEL, *supra* note 56.

86. *Id. See also* cases cited notes 41-4 *supra*.

the likelihood that a subsequent identification was based on chance is diminished. The number of people that can be gathered that match the characteristics of a suspect are limited. A small town in northern Minnesota may have a real problem in this regard if a black man is a suspect. It may be necessary to transport the identification proceedings to a city where participants can be obtained.

Another problem concerns the participants themselves. Usually, the non-suspects are either policemen or people in jail. In some cases, volunteers have been used from attorneys and neighborhood youth groups. In any event, participants should closely resemble the suspect. If the suspect appears to stand out from the others, then the lineup in essence becomes a showup.[87]

4. Marks and Clothing

Any distinctive features or markings on a lineup participant should be covered or camouflaged. Also, all participants should be wearing similar clothing.

Again, a suspect should not appear to stand out from the other participants. With a little ingenuity, almost any abnormality can be blocked from the witness' view or the whole group can be made to appear similarly afflicted.[88]

5. Vocal Comments

Participants should not speak during the lineup. If any voice identification proceedings are requested by a witness, all the participants should make the same comment.

It has been noted that voice identifications are not very reliable. Therefore, statements should not be elicited from lineup participants as a matter of course. If a witness does make a request to hear someone's voice all the participants should speak. If only one person speaks then the confrontation becomes, in essence, a showup.[89]

6. Witness Identification

Witnesses should view the lineup separately and their identifications recorded out of each other's presence.

Witnesses can sway each other. The Wall study referred to

87. Note 85 *supra; see also* Tinio, *Admissibility of Evidence of Lineup Identification as Affected by Allegedly Suggestive Lineup Procedures*, 39 A.L.R.3d 487.

88. Note 85 *supra*; *see also* cases cited notes 52-4 *supra.*

89. Note 85 *supra; see, e.g.*, Annot., *Requiring Suspect or Defendant to Demonstrate Voice for Purpose of Identification*, 24 A.L.R.3d 1261; *see also* Crume v. Beto, 383 F.2d 36 (5th Cir. 1967).

earlier demonstrated how many people can be persuaded to follow other people's opinions. If various witnesses view the lineup together, they might try to reach a consensus rather than having each person decide carefully for himself.[90]

7. Record of Lineup

At least two large color photographs should be taken of the lineup. If feasible, the entire procedure should be videotaped or filmed. A written record should also be made.

The procedure should be preserved in order to allow subsequent scrutinization. It is important that disputes over the fairness of a lineup do not become solely questions of credibility.[91]

8. Presence of Counsel

If counsel is present, he should be allowed to make suggestions, and they should be implemented where reasonable. All such requests should be made a part of the written record.

Counsel for a suspect can play a helpful role in the lineup proceedings. Reasonable suggestions that diminish the likelihood of identifications by chance benefits all concerned.[92]

C. Photograph Identification

Witnesses should view photographs separately. They should make a written description of the alleged criminal before they view the display. As with lineup procedures, every possible consideration should be taken to ensure that it is the witness, himself, and not a police officer or another witness, who is determining who the alleged criminal was.[93]

At least ten photographs should be shown to each witness. All photographs should be of people who have similar age, complexion, hair, and hairstyle. When full length photographs are used, the height and weight should be similar. The photographs should not be of different size and mixed batches of black and white and color photographs should not be used. A photograph like a participant at a lineup, should not appear to stand out to a witness. Difficulties may occur when a particular suspect has distinctive characteristics

90. Note 85 *supra; see also* People v. Blumenshire, 42 Ill. 2d 508, 250 N.E.2d 152 (1969).

91. Note 85 *supra*; *see also* Foster v. California, 394 U.S. 440 (1969).

92. Note 85 *supra; see also* United States v. Wade, 388 U.S. 218(1967); United States v. Allen, 408 F.2d 1287 (D.C. Cir. 1969).

93. *See* Tinio, *Admissibility of Evidence of Photographic Identification as Affected by Allegedly Suggestive Identification Procedures*, 39 A.L.R.3d 1000; SOBEL, *supra* note 56.

but the police have many photographs at their disposal.[94]

A prosecutor should conduct the proceedings and a written record should be made. As noted in the discussion in the lineup section, a prosecutor at the point of pretrial identification has had less contact with the case. He or she also would be more cognizant of the constitutional requirements of a fair identification procedure.[95]

If a lineup, showup, or photograph identification is determined to comply with the above guidelines, testimony concerning the out of court identification should be admissible at trial. If the procedure is found not to have met the criteria, then it should be deemed suggestive.

Given the Supreme Court's decision in *Neil*, a suggestive confrontation may be admissible if certain factors indicate that there is no substantial likelihood of misidentification. These factors were:

> . . . [T]he opportunity of the witness to view the criminal at the time of the crime, the witness degree of attention, the accuracy of the 'witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.[96]

It is submitted that the above considerations are not enough. Even where these factors might seem to indicate that an identification was reliable, a suggestive procedure might have unduly influenced a witness. One author notes that establishing an independent source of identification is a difficult task, and suggests that an identification procedure be instituted.[97] That is, when an out of court procedure is deemed suggestive, then it would be inadmissible unless the witness could make a positive identification in a proper lineup held before the trial. Testimony concerning this procedure would not be admissible at trial, but would merely be a check on their independent source test.

If the above criteria are not generally adopted, it may be up to legal aid groups, prosecutors, and law enforcement officials to develop the criteria. Almost all police departments have a standard procedure developed. In Clark County, Nevada the following regu-

94. *Id. See also* cases cited notes 69-72 *supra*.

95. WALL, *supra* note 1; SOBEL, *supra* note 56.

96. 409 U.S. 188 at 212.

97. Note, *Due Process Considerations in Police Showup Practices*, 44 N.Y.U. L. REV. 377, 390-1 (1969).

lations were adopted jointly by the District Attorney and the Public Defender's Office:

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.

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 officer at the completion of the viewing of the line-up by each individual witness.[98]

VI. CONCLUSION

The *Wade* trilogy of cases definitely established the application of constitutional safeguards to pretrial identification processes. Subsequent decisions of the United States Supreme Court have made clear, however, that a factual analysis of each case will be undertaken to determine, one, whether there has been a constitutional violation, and, two, whether that violation actually tainted the criminal conviction. Counsel for both the prosecution and the defense must be mindful, therefore, that the courts will look to certain definite criteria in evaluating the constitutional validity of any pretrial identification procedure. The application of certain definite rules for the conduct of pretrial confrontations will insure that in most situations the process will be upheld and that any substantial deviations from such standard procedures will be important factors in determining whether the identification should be suppressed.

98. Note, *Pretrial Identification Procedures - Wade to Gilbert to Stovall: Lower Courts Bobble the Ball*, 55 MINN. L. REV. 779 (1971).