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CRIMINAL PROCEDURE—DUE PROCESS—RIGHT TO COUNSEL AT PRETRIAL IDENTIFICATIONS

The area of law surrounding the conduct of pretrial identifications has been rather sketchy with regard to when the right to counsel attaches and how far the police may go without violating an accused’s due process rights. However, there have been recent developments in this area which become apparent through an analysis of the different types of identification procedures, the point at which the right to counsel becomes critical, the role of counsel at the identification proceeding, and the due process checks on identification procedures.

I. IDENTIFICATION PROCEDURES DISTINGUISHED

In order to illustrate potential abuses of an accused’s rights, it is helpful to first examine the manner in which each is conducted.

By far the most common type of identification procedure is the lineup, which is conducted by placing in a line a group of persons having similar physical characteristics.\(^1\) As the subjects stand stationary facing him, the witness views them to determine whether he recognizes any of the participants as the suspect.

An identification parade is similar to a lineup except that the members of the group walk out separately to be observed by the viewing witness.\(^2\) In both of these identification procedures, the subjects may be asked to try on certain articles of clothing,\(^3\) or to repeat certain innocuous phrases for voice identification purposes.\(^4\)

The showup is the method of identification which is most highly criticized as being unfairly suggestive.\(^5\) The witness is asked

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\(^1\) United States v. Hamilton, 469 F.2d 880, 882 n.1 (9th Cir. 1972).
\(^3\) People v. Parham, 60 Cal. 2d 378, 384 P.2d 1001, 33 Cal. Rptr. 497 (1963).
to come to the police station to view one person who is being held, the purpose being to determine whether or not a positive identification can be made by the witness. The idea of a one-to-one confrontation, combined with the police's belief that they have found the suspect, might sway an otherwise unbiased witness to make a positive identification.

Finally, photographic displays are also widely used for identification, especially when the police have not, as yet, brought the suspect into custody. The witness is shown several photographs or a book of "mug shots" from which he is asked whether he can identify a suspect.

II. PROBLEMS AND PREJUDICES INHERENT IN PRETRIAL IDENTIFICATIONS

Most authorities, as well as police officials and the conductors of identification procedures, agree that eyewitness identification is the most unreliable form of proof. Mr. Justice Frankfurter once wrote: "What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials." A major factor contributing to the high incidence of mistaken identification is the degree of suggestion inherent in the manner in which suspects are presented to witnesses for pretrial identification. In a California case, all members of the lineup but the suspect were known to the identifying witness.

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8 20 AM. JUR. PROOF OF FACTS Eyewitness Identification § 11 (1968). Photographic displays are not specifically treated in this article; however, it should be noted that the right to counsel during their conduct is not as broad as in other forms of identification procedures. See United States v. Ash, 413 U.S. 300 (1973), where the United States Supreme Court held that a photographic display is quite different from a lineup because there are fewer possibilities of impermissible suggestion, and those unfair influences can be readily reconstructed at trial. For this reason, the Court held that a photographic display cannot be considered a critical stage of the criminal prosecution, and therefore, the suspect is not entitled to the assistance of counsel during its conduct even after indictment.
other cases, the other participants in the lineup were grossly dissimilar in appearance to the suspect, only the suspect was required to wear distinctive clothing which the culprit allegedly wore, the suspect was pointed out before or during the lineup, and in a case where the participants in the lineup were asked to try on an article of clothing, it fit only the accused. Suggestion can be created either intentionally or unintentionally, but the result is the same: the accused is denied the right to a fair trial.

Another problem inherent in pretrial identifications is that the accused is often unable to reconstruct what occurred at the confrontation and is thereby denied a full hearing on the identification issue at trial. "Improper influences may go undetected by a suspect, guilty or not, who experiences the emotional tension which we might expect in one being confronted by potential accusers." Those participating in the lineup with the accused may often be police officers. If the issue of the fairness of the lineup is presented at trial, the jury's choice is between the defendant's unsupported version of what transpired and that of the police officers present. In any event, neither witnesses nor lineup participants are likely to be alert for conditions prejudicial to the suspect. Moreover, the injustice is compounded by the fact that once a witness has picked out the accused at the lineup, he is not likely to go back on his word at trial, even though he may later have had second thoughts.

III. HISTORICAL DEVELOPMENT

Historically, lineups, showups, and identification parades

17 388 U.S. at 230-231.
18 Id.
21 Williams and Hammelmann, Identification Parades (pt. 1), 1963 CRIM. L. REV. (Eng.) 479, 482.
have been accepted as a proper and legal method of identifying suspects. Early in the development of such procedures, they were attacked as being a forced presentation by the accused of his physical characteristics for viewing by a witness, which incriminated him in violation of his fifth amendment rights. This argument was short-lived, however, when the United States Supreme Court declared that the presentation of physical characteristics in court was not protected by the fifth amendment. In so deciding, the Court stated: "The prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." Although the privilege against self-incrimination is no longer confined to the trial stages in the majority of courts, an accused may not protect himself from exhibition in a lineup by claiming denial of that amendment's protection.

The United States Supreme Court reaffirmed this view in United States v. Wade when it held that the mere exhibition of the defendant's person for observation by a prosecution witness prior to the trial is not of testimonial significance and requires no disclosure by the defendant of any knowledge he might have. A California court extended this reasoning by holding that requiring the accused to assume poses or to utter particular phrases was not testimonial compulsion within the purview of the fifth amendment.

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23 Id.
24 Id. at 252-53.
26 388 U.S. 218, 221-23.
27 It is now generally accepted that the privilege against self-incrimination is limited to testimonial compulsion where the witness is forced to divulge information which might be used against him or which might uncover further evidence against him. McCarthy v. Arndstein, 266 U.S. 34, 40 (1924). The emphasis is upon protecting the accused from being required to provide information through the use of physical or moral pressures. Holt v. United States, 218 U.S. 245, 252-53 (1910).
28 388 U.S. at 222.
IV. SAFEGUARDS ASSURING THE FAIR CONDUCT OF IDENTIFICATION PROCEDURES

A. Right to Counsel

Recent cases have relied upon the sixth amendment as a means of establishing the constitutional boundaries for identification procedures. The right of an accused to the assistance of counsel is guaranteed by state and federal constitutions at all critical stages of a prosecution. That right, however, attaches only "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." Given this fundamental right to counsel, there remains the question whether an accused is entitled to the assistance of counsel during a pretrial identification procedure. The United States Supreme Court supplied a partial answer in United States v. Wade and Gilbert v. California where the Court first extended the right to counsel to post-indictment lineups. The Court held that the sixth amendment guarantees an

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31 Both the courts and defendants are concerned that the assistance of counsel may be necessary during the conduct of pretrial identifications so that the defendant may get a fair trial. The justification claimed by the defendants is that only when counsel is present are they assured that the procedure will be properly conducted. Otherwise, the police may not consider the defendants' due process rights, and the pretrial abuses will not be rectified at the trial. When counsel is not present, "[p]rivacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on" at the proceeding. Miranda v. Arizona, 384 U.S. 436, 448 (1966). Counsel cannot attack such abuses at trial if he has no proof that they in fact existed. The courts, on the other hand, consider two critical questions before determining whether the sixth amendment right to counsel applies in a particular case. They are (1) whether the identification procedure in question provides a potential substantial prejudice to the defendant's rights, and (2) whether the presence of or participation by counsel might make a difference to the defendant. 388 U.S. at 227.

32 Gideon v. Wainwright, 372 U.S. 335 (1963). This issue reached the West Virginia Supreme Court of Appeals in State ex rel. May v. Boles, 149 W. Va. 155, 139 S.E.2d 177 (1964). There the court held first, that the sixth amendment is obligatory upon the states under the due process clause of the fourteenth amendment; second, that the right to counsel is essential to a fair trial and is therefore a fundamental right; and, third, that the accused is entitled to counsel at every stage of the prosecution where his fundamental rights may be affected.


34 Pretrial identification procedures, as referred to in this article, include lineups, showups, and identification parades. See text accompanying notes 1 - 7, supra.


STUDENT NOTES

accused the right to counsel not only at trial, but also at pretrial proceedings where the accused's rights to a fair trial might be endangered. The Court further held that a post-indictment pretrial lineup is a critical stage of the criminal prosecution within the meaning of Powell v. Alabama, because the results obtained there might well determine the accused's fate. Once a viewing witness has made an identification before trial, he will not likely change his mind at the trial itself; so, in effect, the identification issue is conclusively determined at the lineup.

The Wade decision left unanswered the question of whether the sixth amendment is applicable to pre-indictment lineups, showups, or identification parades. The Supreme Court was faced with this question in Kirby v. Illinois which involved a pre-indictment showup. The Court stated in a plurality opinion that a showup after arrest, but before the initiation of any adversary criminal proceeding, is not a criminal prosecution at which the accused is entitled to counsel as a matter of right. Although it remains unclear what constitutes the initiation of an adversary

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287 U.S. 45 (1932). In this case, seven Negroes, strangers in the community, were charged with the rape of two white girls. Upon indictment, six were arraigned and pleaded not guilty. They were not asked whether they had, or were able to employ, counsel, or whether they wished to have counsel appointed for them. They were hurried to trial without effective assistance of counsel and without adequate opportunity to consult with the counsel casually appointed to represent them. The court held that the defendants were entitled to the assistance of counsel at all critical stages of the prosecution as a requisite of due process of law. This principle requires that all pretrial confrontations be carefully scrutinized to determine whether the presence of counsel is necessary to preserve the defendant's right to a fair trial.

The court justified its determination that a pretrial lineup is a critical stage as follows: eyewitness testimony is not generally reliable, yet it is given considerable weight by the jury; since no disinterested persons are present at the proceeding, the accused is not in a position to reconstruct what occurred when he comes to trial; and unfair techniques used by police create a potential influence on witnesses. 388 U.S. at 229-35. For a discussion of the role of counsel at the lineup, see text accompanying notes 68-91, infra.


Kirby and his companion were stopped for interrogation and taken to the police station on suspicion of robbery. Both were identified in a showup at that time which was six weeks prior to their indictment. Neither suspect had been advised of his right to counsel, nor did either ask for or receive legal assistance. Id.

criminal proceeding, many lower courts have held that *Wade* does not apply to pre-indictment confrontations between the accused and the witness.\(^2\) Such were the holdings in *State v. Moore\(^3\)* and *State v. Stollings.\(^4\)* In *Moore*, the West Virginia Supreme Court of Appeals stated that "[i]t is not . . . essential to the guarantee of an accused's constitutional rights that he be afforded the assistance of counsel at every stage of the investigation—from the commission of the crime to the time of his arrest."\(^4\) Rather than defining the starting point of an adversary proceeding, the court, relying on *Kirby*, stated that a routine investigation is not an adversary proceeding, and a lineup conducted during the course of such an investigation does not entitle a suspect to the assistance of counsel.\(^4\) In *Kirby*, the Court stated:

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified.\(^4\)

Since the exact moment of attachment of the right to counsel has not been specifically defined, authorities differ in opinion whether it attaches at arraignment or at the moment an arrest warrant is obtained. A Michigan court in a case decided before *Kirby* took the view that the presence of counsel is not always required in all suspect confrontations with witnesses, particularly where the confrontation is an on-the-scene identification in the course of, or immediately following a crime. However, where the investigation ceases to be a general investigation of "unsolved crime" and focuses upon the accused, the rule is otherwise. Coun-

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\(^3\) 212 S.E.2d 608 (W. Va. 1975).

\(^4\) 212 S.E.2d 745 (W. Va. 1975).


\(^4\) In *Moore*, the lineup occurred pursuant to and during a routine investigation of a breaking and entering, prior to the indictment of the defendant. The case had not reached the prosecutorial stage, so the court, relying on *Kirby*, and limiting *Wade* and *Gilbert* to their facts, declared that the defendant was not entitled to the assistance of counsel. In *Stollings*, the defendant was identified at the police station where he was being held for another offense. The victim was called to the jail to either identify or exonerate him prior to indictment. Again the suspect was not entitled to the assistance of counsel. Taken together, these two cases bring West Virginia in line with the *Wade* and *Gilbert* decisions.

\(^4\) 406 U.S. at 689.
sel is required if the purpose of the confrontation is to build a case against the defendant by eliciting identification evidence, but not if the purpose of the identification procedure is to extinguish a case against an innocent bystander. This case suggests that an accused is entitled to counsel even during the investigatory stages of the prosecution, provided that the police believe they have a suspect and are trying to build a case against him. Although this case holds that the controlling factor is the purpose of the confrontation, it still leaves the exact moment of attachment of the right to counsel uncertain. Until another pre-indictment case reaches the United States Supreme Court, and a more definitive decision is reached, the state courts are free to decide for themselves the relevant moment of attachment. The only guidance from Wade and Gilbert is that counsel must be present during a post-indictment lineup, showup, or identification parade, or the accused may claim denial of his sixth amendment rights.

B. Due Process Check on the Conduct of Identification Procedures

Due process considerations also provide a safeguard for the conduct of lineups. Such rights are violated in an identification procedure which gives rise to "a very substantial likelihood of irreparable misidentification." The United States Supreme Court has stated that a "violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it." It is interesting to note, however, that the Court has found the surrounding circumstances of the identification process to be violative of due process in only one case. The first case attempting to establish guidelines in determining the reliability of

49 It should be noted that Kirby was decided by a plurality of four Justices with one Justice concurring in the result. This implies that the issue of whether counsel is required during a pre-indictment lineup may not have been finally decided.
52 Foster v. California, 394 U.S. 440 (1969). Foster, the defendant, was placed in a lineup with three other men, two of whom were considerably shorter than he. The victim was unable to identify a suspect, so Foster was brought into an office for a one-to-one confrontation. The victim still could not make a positive identification. About a week later, Foster participated in another lineup with four different men at which time the victim positively identified him as the robber. The Court held the conduct of the lineup to be so unfairly suggestive as to amount to a denial of due process of law. Id. at 443.
an identification was *Neil v. Biggers.* The Court set out five factors to be considered in evaluating the likelihood of misidentification, and most courts subsequently deciding the due process issue have noted them. They are "the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's 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." The West Virginia Supreme Court of Appeals in *State v. Stollings* mentioned that the in-court identification was positive and completely unshaken by cross-examination, and that the witness demonstrated a high degree of certainty in his identification of the defendant. Further, the witness had a good chance for observation during the commission of the crime. These factors led the court to conclude that there had been no denial of due process because of the pretrial identification.

Although the due process argument is available as an avenue by which to attack the suggestiveness and unfairness of lineups, it is by no means an easy solution since many courts in viewing the totality of the circumstances generally find that there has been no such denial of due process.

V. THE WADE DOCTRINE AND ITS EFFECT ON THE ADMISSIBILITY OF EVIDENCE

The Court in *Gilbert* held that the admission of an in-court identification is constitutional error if the trial court does not first establish that such identification was not brought about or influenced by an earlier illegal lineup procedure. If such derivative

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55 409 U.S. at 199-200.
56 The court noted that the prosecuting witness had caught more than a fleeting glance of the suspect because he stood face-to-face with the defendant while defendant held a gun to his stomach. The defendant wore neither a mask nor a disguise, and the premises were adequately lighted during the course of the robbery. *State v. Stollings*, 212 S.E.2d 745, 748 (W. Va. 1975).
57 For a more extensive treatment of the Wade doctrine's effect on the admissibility of evidence, see Annot., 39 A.L.R.3d 487 (1971).
58 388 U.S. at 269-74. Where there is substantial evidence that the lineup was fairly conducted at a pretrial hearing on a motion to suppress the identification evidence, the state has met its burden of establishing that the in-court identifica-
evidence is admitted, however, the state has the burden of proving that the in-court identification was not "come at by exploitation of that illegality," but rather "by means sufficiently distinguishable to be purged of the primary taint." In other words, the Court adopted the "source" test, or, as it is sometimes referred to, the "independent origin" test. The test requires that the in-court identification stand on its own, and that the factors triggering the witness's identification at the trial must not include or be dependent upon the prior illegal lineup identification. In State v. Moore, the West Virginia court stated that "[d]enial of a motion to suppress courtroom identification . . . should not in itself form a basis for a new trial at which such identification evidence will be excluded without first giving the State the opportunity to establish by clear and convincing evidence that the in-court identification was based upon observation of the accused other than at the lineup."

If a witness directly testifies in court that he has previously identified the accused in a lineup, showup, or identification parade that was improperly conducted, any resulting conviction must be overturned on that basis alone. The state is not entitled in such a case to show that the in-court identification had an independent source, the court's reasoning being that only a per se exclusionary rule is effective as a deterrent to police officers in denying an accused the presence of his counsel at the pretrial lineup or in denying him his due process rights. If, however, the trial court is

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59 Evidence refers to evidence used at trial which was obtained by an illegal process, and which would not have been available to the prosecution had the illegal means not been employed.
61 Id.; See Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).
64 State v. Moore, 212 S.E.2d 608, 613 (W. Va. 1975).
able to determine that such testimony was "harmless beyond a reasonable doubt," then there need be no reversal. The test in determining if the error was "harmless beyond a reasonable doubt" is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.

VI. THE ROLE OF COUNSEL AND SUGGESTIONS FOR THE CONDUCT OF PRETRIAL IDENTIFICATION PROCEDURES

"The main purpose of an identification parade or lineup from the point of view of the police is to provide them with fairly strong evidence of identity on which to proceed with their investigations and to base an eventual prosecution." Since the identification evidence is given so much weight even before the trial, it is important to insure that the accused is not prejudiced at the initial witness-suspect confrontation. As stated in Wade, "the trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, . . . with little or no effective appeal from the judgment there rendered by the witness—'that's the man!'" In the interest of fairness to the accused, the following guidelines should be kept in mind.

First, counsel should be present during the identification procedures. The Court in Wade mentioned two reasons why counsel should be called to attend post-indictment, pretrial identification confrontations. The first was that counsel could object to the unfairness or suggestiveness of the procedure. Although he is not in a position to demand that the lineup be conducted in a particular manner, he would be able to make proposals with the hopes that his requests might be respected. For example, before the lineup proceedings begin, counsel might ask that the police warn his client that if he is identified, such fact may be used against him.

[notes]

64 Chapman v. California, 386 U.S. 18, 24 (1967). Harmless error rules are designed to "block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." Id. at 22.


66 Williams and Hammelmann, Identification Parades, (pt. 1), 1963 CRIM. L. REV. (Eng.) 479, 482.

67 388 U.S. at 235-36.


69 388 U.S. at 227-27.
in court. He may also make suggestions concerning the composition of the lineup and urge that the suspect be able to choose his position in the line. The second suggestion was that counsel would be better prepared for trial after attending the lineup. He would then be in a position to note discrepancies in the witness's testimony at the trial and to object to identification testimony where the identification itself was obtained by an illegal procedure.

Second, a written record of the identification procedure should be required. To implement the role of protecting the accused's rights at trial, defense counsel should be afforded a complete written report of everything that transpired at the lineup or showup, including names, addresses, and descriptive details of the other persons who participated in the identification. This report should include reasons given by the witness for a particular identification and the features of the suspect which sparked his recollection. There should also be a written record taken in advance of the viewing in which the witness would be required to give a complete description of the criminal. These two reports taken together would provide counsel with a means of attacking the reliability of the eyewitness testimony on cross-examination, thus insuring the defendant a full hearing at trial on the identification issue. Attorneys in jurisdictions which can afford a more accurate system of record preservation could accomplish the same result in a more efficient manner by using movie cameras and tape recorders.

Third, police should require, and counsel should insure, that all participants are similar in appearance. The cases in which the suspect was prejudiced by the police forcing him to wear distinctive garb which set him apart from the others in the lineup are too numerous to discuss in detail; however, a few are mentioned to

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23 Id. at 86.
24 388 U.S. at 223-27.
show the general treatment they receive from the courts. In a Maryland case the defendant was the only one required to wear a red cap described by the witness as being worn by her attacker. In another case the lineup was composed of the suspect and police officers who were wearing parts of their regular uniforms, thus singling out the suspect. In both cases the respective courts held that the lineups were not unreasonably suggestive. In a Canadian case the defendant had been picked out of a lineup of six men of which he was the only Oriental. There are cases in which a black-haired suspect was placed among a group of light-haired persons, a tall suspect was forced to participate with short non-suspects, and a suspect approximately age twenty stood with five other persons all of whom were over forty. To correct such injustices, police should require at least six persons in addition to the accused to participate in the lineup. These six subjects should be of approximately the same height, weight, coloration of skin, coloration of hair, and bodily build. They should also be similarly dressed so no one person stands out from the rest.

Another safeguard which should be built into the procedure is that the witness should not know any of the persons he is called upon to view, and no one in the lineup should know the suspect. Unintentional glances by non-suspects are suggestive to a perceptive viewing witness.

Fourth, voice identification should be permitted, but only to the extent of allowing repetition of innocuous phrases. Voice identification is a useful method of identifying a suspect whose voice was distinctive during the commission of the crime, especially in cases where the victim or witness did not get a complete or long view of the culprit. Repetition of the exact words used during the commission of the crime might be too suggestive, however, especially in the mind of a victim causing the possibility of misidentification and raising the question of reliability. In a South Carolina

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75 United States v. Richards, 442 F.2d 922 (4th Cir. 1971).
76 WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES 53 (1965). In each of these cases, the lineup procedure was held not to be unnecessarily suggestive.
78 20 AM. JUR. PROOF OF FACTS EYEWITNESS IDENTIFICATION § 10 (1968).
79 State v. Taylor, 213 S.C. 330, 49 S.E.2d 289 (1948). Some courts have held that requiring a defendant to repeat words allegedly spoken at the time of the criminal act is not unfairly suggestive as long as all participants in the identifica-
case the court held that forcing the accused to repeat the alleged words used by a rapist was inadmissible and highly prejudicial.22

Where the witness bases his identification on voice alone, the weight of prior suggestions is especially heavy in the victim's mind.83 If it is necessary to use voice identification, each individual in the lineup should be asked to repeat the same words the same number of times.84 Possibly two lineups should be conducted, the first in the dark where voice is the only characteristic presented, and the second with the lights on so that the witness must make an identification combining the voice with the physical appearance.85 This two-step process would insure the accused that it was not coincidental that the victim or witness recognized his voice.

Fifth, each witness should make his identification separately. In a California case, a lineup was conducted in an auditorium on a stage behind bright lights. The audience consisted of over one hundred witnesses to several alleged state and federal robberies each charged to the suspect, and the identification by each witness was made in the presence of the other witnesses.86 On appeal to the United States Supreme Court, the conviction was reversed and the lineup procedure declared illegal. In the language of the Court, “[i]n the absence of legislative regulations adequate to avoid the hazards to a fair trial which inhere in lineups as presently conducted, the desirability of deterring the constitutionally objectionable practice must prevail over the undesirability of excluding relevant evidence.”87 This decision suggests that the courts are willing to go further in protecting the post-indictment rights of the accused than they were prior to the Wade decision, especially where the identification procedure is clearly out of line. The courts are now allowing counsel to appear at the lineup to protect his client's due process rights, with the penalty for noncompliance being the exclusion of any evidence there obtained.

Sixth, police should be enjoined by statute from suggesting to the witness which person is the suspect. The overreaching inherent
when the police suggest to the witness which person is the suspect is illustrated by cases in which the police have informed a witness in advance of the viewing that one of the persons exhibited was thought to have committed the crime, 88 or where the police actually tell the witness which person they suspect. 89 Knowing that the man suspected by the police is present, the witness is likely to trust the police not to have brought in the wrong man. On this assumption the witness may make every effort to strain his recollection in an attempt to corroborate the suspicion of the police in order to bring a suspected criminal to justice. 90 If counsel is present at the time of the lineup, he may ask that the police do not suggest that the suspect is in fact present or that one particular participant is the suspect. If the police disregard his request, he can note the illegality and move to have the evidence suppressed so that it does not reach the jury. 91

VII. CONCLUSION

Regardless of how the initial misidentification comes about, it is clear that the witness is apt to remember the image of the person he identified, and the reliability of any subsequent identification in the courtroom is greatly reduced. At present most courts are unwilling to exclude evidence obtained in violation of these guidelines unless the conduct of the lineup, showup, or identification parade was clearly abusive. The requirement that counsel be present during pretrial confrontations to oversee the process is a step forward in assuring the accused a fair trial; however, until statutes are adopted outlining permissible and impermissible lineup procedures, the fate of the accused may be within the hands of those conducting the lineup, and the "totality of the circumstances" test will continue to allow the prosecution to engage in subtle, and often not so subtle, forms of suggestion in the conduct of such identifications.

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91 See note 41 supra.