DUE PROCESS CONSIDERATIONS IN POLICE SHOWUP PRACTICES

I

INTRODUCTION

Recently, in *United States v. Wade*,[1] *Gilbert v. California*,[2] and *Stovall v. Denno*,[3] the Supreme Court dealt with the long-neglected problems besetting police lineups and showups.[4] The Court recognized that suggestive police practices could lead to misidentification at a pretrial confrontation[5] which, in turn, could adversely affect the validity of a subsequent in-court identification.[6] Thus, to afford defense attorneys a chance to limit the use of suggestive lineup practices[7] and to assure that they have sufficient knowledge of pretrial identifications to adequately cross-examine identifying witnesses at trial,[8] *Wade* and *Gilbert* held that a pretrial confrontation conducted after indictment occurred at a "critical stage" of the criminal proceeding and, therefore, that the sixth amendment required counsel's presence at such confrontations.[9] In order to effectuate this right, the Court ruled not only that evidence of a pretrial identification conducted without counsel was inadmissible per se,[10] but also that any subsequent in-court identification was inadmissible unless the prosecution could prove by "clear and convincing" evidence that such identification had a basis independent of the improper pretrial confrontation.[11]

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1 388 U.S. 218 (1967).

2 388 U.S. 263 (1967).

3 388 U.S. 293 (1967).

4 In the lineup a witness views a group of persons and is asked to pick out the guilty party if he is present. In the showup a lone suspect is presented to a witness who is asked whether or not the party presented is the criminal being sought. P. Wall, Eye-Witness Identification in Criminal Cases 27-28, 40-41 (1968).

5 United States v. Wade, 388 U.S. 218, 228-39 (1967).

6 "Moreover, '[i]t is a matter of common experience that, once a witness has picked out the accused at the lineup, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial.'" Id. at 229, quoting Williams & Hammelmann, Identification Parades—I, 1963 Crim. L. Rev. (Eng.) 479, 482.

7 United States v. Wade, 388 U.S. 218, 236 (1967), noted that the "presence of counsel itself can often avert prejudice."

8 Id. at 230-36.

9 Id. at 236-37.

10 Gilbert v. California, 388 U.S. 263, 272-73 (1967).

11 United States v. Wade, 388 U.S. 218, 241-42 (1967). *Wade* dealt merely with the inadmissibility of an in-court identification made by a witness who had previously identified him at a pretrial lineup conducted in derogation of Wade's newly found right to counsel. The state did not attempt to offer into evidence the fact that a pretrial identification had been made. *Gilbert* dealt directly with the admissibility of a pretrial identification conducted in derogation of the right to counsel, as well as with that of the subsequent in-court identification. The pretrial identification secured in derogation of defendant's right to counsel was, unlike any subsequent identification to be offered in court, absolutely inadmissible, since it

Stovall limited the holdings of *Wade* and *Gilbert* to prospective application.[12] However, the Court went on to note that, aside from contravening the sixth amendment, a pretrial confrontation could be so conducted as to violate due process of law.[13] Citing but a single authority in support of its position,[14] the Court stated that the well-established test for determining whether such a violation had been committed was whether the procedures employed at the identification were "unnecessarily suggestive and conducive to irreparable mistaken identification."[15] Deciding that the showup used to procure Stovall's identification did not violate this due process test, the Court elaborated on its standard: "[A] claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it . . . ."[16]

Far from providing clear criteria for deciding when a pretrial identification violates due process, the *Stovall* test poses difficult problems of application for lower federal and state courts.[17] What are the significant factors that are to be considered under the totality test? Once a violation of due process is found, what are the evidentiary implications? Is the evidence of the illegally conducted identification absolutely inadmissible? Is the subsequent in-court identification presumed inadmissible by analogy to *Wade* and *Gilbert*? In the alternative, are either or both types of evidence treated differently than their counterparts in right to counsel cases? And finally, if courts are to hold that a "tainted" in-court identification is presumed inadmissible, what type

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was "the direct result of the illegal lineup 'come at by exploitation of [the primary] illegality.'" Gilbert v. California, 388 U.S. 263, 272-73 (1967).

Where a witness' testimony that he identified defendant at a pretrial lineup is treated as hearsay, one does not reach the problem of the propriety of an exclusionary rule grounded in due process or right to counsel. Hearsay was not a problem in *Gilbert*, since California has a statutory exception to the hearsay rule which would have allowed evidence of the pretrial identification of the defendant had it not been elicited in violation of due process. Cal. Evid. Code § 1238 (West 1966). See also N.Y. Code of Crim. Proc. § 393-b (McKinney 1958).

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

13 Id. at 301-02.

14 Id. at 302. The authority the Court cited was Palmer v. Peyton, 359 F.2d 199 (4th Cir. 1966), which invalidated a voice showup on the ground that it was so unnecessarily suggestive as to violate due process of law.

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

16 Id. at 302.

17 Cf. Commonwealth v. Bumpus,— Mass.—, 238 N.E.2d 343, 347 (1968):

> Reasonable confrontations of this type, in the course of (or immediately following) a criminal episode, seem to us to be wholly different from post-indictment confrontations (such as those in the *Wade* and *Gilbert* cases) in serious crimes after a significant interval of time, and in the absence of already appointed counsel. The Supreme Court of the United States has not applied the principle of the *Wade* and *Gilbert* cases in such circumstances. Until we have more guidance than at present about the scope of necessary application of these cases, we shall regard them as not intended to apply to facts like those in the case at bar. This is an area where proper police protection of the public may be greatly embarrassed by rigid rules restricting intelligent, fair police action. Such action must be appraised with commonsense appreciation of the problems which confront policemen patrolling a residential area.

of showing of independent basis by the prosecution will suffice to rebut such a presumption? An attempt to answer these questions will comprise the subject matter of this Note.

II

THE TOTALITY TEST

The language in both *Stovall*[18] and *Wade*[19] indicates that, in considering the totality of circumstances surrounding any pretrial identification, the fact that such identification is conducted, in effect, as a one-to-one confrontation weighs heavily against its validity. On the other hand, the presence of certain other facts in the totality may serve either to justify an improperly conducted identification or to rebut the presumption that the defendant has been prejudiced by the allegedly suggestive confrontation. The cases following *Stovall* suggest that there are presently two types of situations in which courts are willing to find that apparently suggestive pretrial confrontations do not violate due process. One line of cases has upheld the use of questionable identification procedures where, despite the presentation of the defendant in a one-to-one situation, the court believed that factors external to the confrontation itself tended to prove that the witness' identification was accurate and hence not prejudicial to the defendant.[20] The other line of cases has held that showups are legally justified where the use of fairer identification procedures would entail risk to societal interests disproportionate to any prejudice defendant might suffer. For example, in *Stovall* the showup was "imperative" because there was a good chance that the only witness to the crime would have died before a less suggestive procedure could have been employed.[21] These two judicial approaches to the totality test must be scrutinized carefully in order to determine what considerations should properly be taken into account in deciding whether a pretrial confrontation violates due process.

A. Court's Appraisal of the Accuracy of a Suggestive Confrontation

United States ex rel. *Rutherford v. Deegan*,[22] a Second Circuit decision, is a paradigm of the cases which have attempted to evaluate

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

[19] "And the vice of suggestion created by the identification in *Stovall* . . . was the presentation to the witness of the suspect alone handcuffed to police officers. It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police." United States v. Wade, 388 U.S. 218, 234 (1967).

[20] United States ex rel. Rutherford v. Deegan, 406 F.2d 217 (2d Cir. 1969), is the case used by this Note as a vehicle for critical examination of this approach to the due process validity of showups and other identification confrontations. See also Cline v. United States, 395 F.2d 138 (8th Cir. 1968); Hanks v. United States, 388 F.2d 171 (10th Cir. 1968).

[21] Stovall v. Denno, 388 U.S. 293, 301-02 (1967). See also Biggers v. Tennessee, 390 U.S. 404 (1968); Simmons v. United States, 390 U.S. 377 (1968).

[22] 406 F.2d 217 (2d Cir. 1969).

the accuracy of the identifications resulting from suggestive pretrial confrontations. In *Rutherford* the witness, whose cleaning establishment had been robbed, was called to the police station to examine a suspect. At the station house the witness viewed the defendant, a Negro, in a room with several white detectives by means of a one-way mirror, and immediately identified him as the criminal.

The court of appeals in *Rutherford* rejected an interpretation of *Stovall* which would find showup-type identifications per se violations of due process in the absence of compelling circumstances.[23] Holding that the identification of the defendant was probably accurate, regardless of the prejudicial nature of the confrontation, Judge Medina placed great emphasis on the following facts: (1) that the witness had for some five minutes closely watched the two men who had committed the robbery, making a deliberate attempt to study the face of the criminal who rifled her pocketbook; (2) that the witness had 20-20 vision; and (3) that the witness had worked closely with Negroes and contended that she had no difficulty distinguishing one from another.[24] Thus finding no violation of due process, *Rutherford* sanctioned the state's admission into evidence of the witness' in-court identification, and would have admitted evidence of the pretrial identification had it been offered.[25]

The approach to the totality test adopted by the *Rutherford* court had apparent support in two Supreme Court decisions following *Stovall*. In *Simmons v. United States*,[26] the Court validated a photographic showup relying, at least in part, upon its belief that there was little chance that a misidentification had taken place because the witnesses had an excellent opportunity to observe the criminals during the robbery. In *Biggers v. Tennessee*,[27] the Court, splitting four-to-four, affirmed a conviction resting upon a showup identification. Significantly, Justice Douglas in his dissent considered factors similar to those weighed by the courts in both *Simmons* and *Rutherford*, although he reasoned that, on the facts of the case, the accuracy of the identification was in doubt and, therefore, the confrontation violated due process.[28]

However, whether or not the *Rutherford* approach to totality has indeed been sanctioned by the Supreme Court is questionable. Moreover, regardless of a court's professed ability to gauge the accuracy of suggestive pretrial identifications, there are important considerations which militate against permitting the introduction of *any* showup identification into evidence.

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23 Id.

24 Id.

25 Although the admissibility of the pretrial identification was not at issue, since the prosecutor chose to rely upon the in-court identification, the court's finding that the prior identification was compatible with due process opened to the prosecution the opportunity of admitting it into evidence. Id.

26 391 U.S. 377 (1968).

27 391 U.S. 404 (1968).

28 Id. at 407-08.

1. The Inherent Suggestibility of a Showup

Obviously the possibility of misidentification is present whenever an identification confrontation is conducted. However, the relative danger of mistake depends on the manner in which a suspect is presented to a witness.

Wade outlined in detail the reasons why lineups are peculiarly susceptible to prejudicial suggestion on the part of police officers.[29] The Court held that the sixth amendment required counsel's presence at such confrontations not only to preserve meaningful cross-examination at trial, but also to enable counsel to deter the police from unnecessarily suggesting a suspect's guilt or to correct any situation in which he detected potential prejudice to his client.[30] However, counsel's presence at a showup cannot offer defendant the same degree of protection from prejudicial suggestion that it offers him at a lineup.[31] By its very nature, a showup hints at the suspect's guilt. At the minimum, the presentation of a suspect to a witness in a one-to-one situation suggests that the police initially had reason for holding this particular person. This suggestion could very well influence the witness to make a positive identification where he otherwise might not, had the suspect been presented in a fairly conducted lineup. Since protection against showup-type practices is one of the basic needs underlying the right to counsel at lineups,[32] the salutory effect of counsel's presence at a showup would appear to be minimal.

2. A Critique of Rutherford

Apart from any consideration of in-court identifications, an examination must be made of the *Rutherford* approach to totality regarding the admissibility of pretrial identifications.[33] The clear implication of *Stovall* is that the former type of evidence is excluded when the defense is able to prove that the identification was the product of a confrontation which violated due process.[34] *Rutherford* held that, in judging the merit of such a claim, it is permissible for a court to weigh against the fact that a confrontation was conducted as a showup, evidence indicating that the witness could have identified the suspect absent the suggestive confrontation.[35]

From the preceding examination of the prejudicial suggestion

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[29] United States v. Wade, 388 U.S. 218, 228-39 (1967).

[30] See notes 7 & 8 supra and accompanying text.

[31] See note 36 infra.

[32] See note 41 infra.

[33] See discussion of the admissibility of in-court identifications in Part III below.

[34] Nowhere in *Stovall* does the Court expressly mention the fate which befalls a pretrial identification conducted in derogation of due process. From the discussion of Wong Sun v. United States, 371 U.S. 471 (1963), appearing in Gilbert v. California, 388 U.S. 263, 272-73 (1967), it seems unquestionable that such an identification is absolutely inadmissible.

[35] United States ex rel. Rutherford v. Deegan, 406 F.2d 217 (2d Cir. 1969).

which is built into the showup confrontation, it is clear that the showup is fraught with the possibility of misidentification. Indeed, it is the overwhelming opinion of experts in the field of evidence that identifications procured at confrontations which focus upon a single suspect are highly unreliable.[36] Consequently, it would appear that it is *unnecessarily*[37] suggestive and, hence, violative of due process for the police to present an accused in a showup when they are unable to offer a justification for their failure to conduct a proper lineup. To be sure, a court may surmise, as did the court in *Rutherford,* that on the basis of facts external to the confrontation itself no mistake was made in the identification. But no judicial guesswork, however discerning, would be needed if the police were required to conduct pretrial lineups whenever practicable. In short, while the police should be free to continue to use showup identifications as an investigatory tool, the due process clause of the fifth amendment in federal cases and that of the fourteenth in state proceedings should bar the prosecution from admitting such identifications into evidence, unless it can sustain the burden of proving compelling reasons for not employing fairer identification procedures.

The above position finds support by analogy to the evidentiary rules established in *Wade. Wade* explicitly adopted a per se exclusionary rule in the case of evidence procured at a confrontation without counsel.[38] There are two reasons for total exclusion, both of which are applicable to identifications made at pretrial showups. There is first the immediate need of preventing the use of unreliable evidence. This rationale is even more persuasive in the case of showups. While the Court in *Stovall* admitted that there was a good possibility that many of the lineups conducted before the *Wade* decision had been fair and nonsuggestive,[39] it is quite apparent that prejudicial suggestion always exists in one-to-one confrontations.[40]

The second basis for the per se exclusionary rule is prophylactic—to deter the police from carrying out identification procedures in the absence of counsel. While counsel, having witnessed the confrontation, may be able to reveal prejudicial police tactics during trial, his presence is also needed to inhibit the police from turning a lineup into a one-to-one confrontation.[41] Therefore, it would be anomalous indeed for a

[36] Wigmore has said that "in modern times . . . there is no excuse for jeopardizing the fate of innocent men by such clumsy antiquated methods; a recognition under such circumstances is next to worthless." 4 J. Wigmore, Evidence § 1130 n.2 (3d ed. 1940). See generally P. Wall, supra note 4, at 26-40.

[37] Stovall v. Denno, 388 U.S. 293, 302 (1967).

[38] United States v. Wade, 388 U.S. 218 (1967). See notes 10 & 11 supra and accompanying text.

[39] Stovall v. Denno, 388 U.S. 293, 298-99 (1967).

[40] See note 36 supra and accompanying text.

[41] *Wade* recognizes the danger of making the accused stand out at a lineup. The main thrust of the right to counsel which it recognized is aimed at procedures which do so. 388 U.S. at 232-34.

Specifically, the danger is that the police's belief of guilt will " 'communicate

court on the one hand to exclude evidence of an identification made without counsel and yet, on the other, to admit an identification which is the product of a showup confrontation. This conclusion would obtain even if the showup were conducted in counsel's presence but without his acquiescence.

3. *Is the* Rutherford *Approach Mandated by Recent Supreme Court Decisions?*

Stovall itself is certainly not authority for the *Rutherford* court's approach to totality since, in the former case, the Court approved the showup because there was pressing need for its use, and not because it considered the identification free from the possibility of mistake.[42] In fact, the Court in *Wade* said of the showup conducted in *Stovall*, "It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police."[43] Yet in the face of this admission, the *Stovall* Court condoned the use of the showup since it was highly possible that the victim-witness would die before alternative, fairer procedures could be arranged.[44]

Wright v. United States,[45] decided before the Supreme Court's decision in *Simmons*, highlights the uncertainty with which courts view the totality approach to due process announced in *Stovall*. There, the Court of Appeals for the District of Columbia Circuit refused to decide on the record whether, in light of *Stovall*, the failure to conduct a

itself even in a doubtful case to the witness in some way . . . .'" Id. at 235, quoting Williams & Hammelmann, supra note 6, at 483. The examples the *Wade* Court gives of suggestive presentations are almost exclusively those where the only prejudice is that the defendant was made to stand out. For example, the Court found the following lineups so comprised as to be extremely suggestive: a) six men of whom defendant was the only Oriental, b) all but one member had light hair, c) all older men except one youth, where the perpetrator was known to be a youth, d) all but the suspect were known to the identifying witness, e) the suspect is pointed out before or during the lineup, and f) all participants are asked to try on an article of clothing which fits only the suspect. See 388 U.S. at 232-33.

The Court also lists prejudicial practices used outside of the lineup setting: a) an actual showup, defendant being brought before the witness alone, b) allowing the witness to identify in the presence of other witnesses, and c) presenting the suspect in handcuffs. Id. It seems clear, then, that *Wade* is almost exclusively attacking the practice of spotlighting.

[42] In Stovall v. Denno, 388 U.S. 293, 302 (1967), the Court found that despite the degree of suggestion inherent in the showup which was involved therein, it survived a due process attack, since, in the Court's words, it was "imperative." The Court found persuasive the reasons advanced by the Court of Appeals: "Here was the only person . . . who could possibly exonerate Stovall. . . . No one knew how long [the witness] might live. Faced with the responsibility of identifying the attacker, with the need for immediate action and with the knowledge that [the witness] could not visit the jail, the police followed the only feasible procedure and took Stovall to the hospital room. Under these circumstances, the usual police station lineup . . . was out of the question." United States v. Denno, 355 F.2d 731, 735 (2d Cir. 1966).

[43] United States v. Wade, 388 U.S. 218, 234 (1967).

[44] See note 42 supra and accompanying text.

[45] 404 F.2d 1256 (D.C. Cir. 1968).

lineup where practicable was a per se violation of due process. Rather, the court remanded to the district court for further findings of fact. The court intimated that in passing on these additional findings it would consider relevant, but not conclusive, the question of whether or not a lineup was feasible.[46] In addition, the court was willing to review factors, such as those found controlling in *Rutherford*, which went to the accuracy of the witness' pretrial identification.[47]

Chief Judge Bazelon, dissenting, also urged remand for additional fact-finding. However, he disagreed with the majority as to the relevant factors which should be considered on remand. Reasoning that the only question which had any bearing on the issue of due process was whether or not a lineup was feasible, Judge Bazelon set forth a brief but convincing criticism of the approach to totality later employed in *Rutherford*:

> [D]ue process is violated whenever police unjustifiably fail to hold a lineup . . . . "[I]n the present context, where so many variables and pitfalls exist, the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself. . . ." In other words, we must insist on the fairest feasible identification procedures and not rely on the courts' ability to gauge the psychological effects of more suggestive procedures.[48]

Subsequent to *Wright* the Supreme Court in *Simmons v. United States*[49] again passed on the validity of the one-to-one confrontation. Although the Court considered whether the witness' showup identification was accurate,[50] it did not do so until it had found that the reasons militating against the use of a lineup in that case were as strong as those present in *Stovall*.[51] Consequently, *Simmons* too can be read as a case of "compelling" circumstances. Moreover, since the affirmation in *Biggers* was the product of a four-to-four vote it has no precedential value.[52] Interestingly, while Mr. Justice Douglas' dissent noted that a showup does not always violate due process and considered the unfavorable conditions for observation at the scene of the crime, he directed his attack primarily at the lack of circumstances compelling the use of such a questionable procedure.[53] Thus, it seems safe to conclude that the Supreme Court has never upheld a showup under the fact pattern presented in *Rutherford*—the presentation of a suspect in a one-to-one situation and the state's failure to offer any justification for not employing a fairer identification procedure.

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46 Id.

47 Id.

48 Id. at 1262 (Bazelon, C.J., dissenting).

49 390 U.S. 377 (1968).

50 Id. at 385.

51 Id.

52 Biggers v. Tennessee, 390 U.S. 404 (1968).

53 Id. at 407.

B. *Compelling Circumstances*

Since showup identifications are extremely untrustworthy, the purpose of the exclusionary rule urged above is to encourage the police, at the risk of losing a pretrial identification as evidence of a suspect's guilt, to employ fairer identification procedures. However, where it is important to make an identification quickly, and where it would be impossible to provide counsel and employ a lineup without sacrificing an expeditious identification, the police should be permitted to use showup techniques in spite of the risk of prejudice.[54] Indeed, such exigent circumstances insulated the showup in *Stovall* from a due process attack.[55] Moreover, the *Simmons* Court described the facts before it as "compelling" in holding that the police there had justification to use a showup.[56] Furthermore, while in *Peyton v. Palmer*, the lone case cited by the Court in *Stovall* for the proposition that a confrontation could be conducted in violation of due process, the court found the use of a voice showup to be unconstitutional, it implied that under certain conditions such a procedure could be justified.[57] Two recent cases, *Commonwealth v. Bumpus*[58] and *United States v. Davis*,[59] are excellent vehicles for examining just what circumstances are sufficiently compelling to warrant the use of makeshift identification procedures.

In *Bumpus*, defendant was convicted of breaking and entering a building at night with intent to steal.[60] The victim of the crime had pretended to be asleep while observing a man making a search of his room. When the intruder left the apartment, the victim called the police, who came immediately to investigate. The police then left to search for the suspect. Shortly thereafter, they arrested defendant for breaking and entering, and brought him to the victim's apartment for identification. The victim positively identified defendant at that time as well as at the subsequent trial. The Supreme Judicial Court of Massachusetts found that the one-to-one identification of Bumpus did

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[54] Of course the showup techniques used when lineups are impossible should themselves be as fair as circumstances permit. If, for example, the police are unnecessarily abusive to the suspect when presented, the court should feel free to hold that while the showup technique was warranted by the circumstances, it was conducted in an unnecessarily suggestive way and hence was violative of due process.

[55] See note 42 supra and accompanying text. But were the circumstances in *Stovall* such that alternative procedures could not have been used without great inconvenience and pain to the victim-witness who was a patient in a hospital at the time of the identification? Could several persons resembling Stovall have been brought in with him? See Crume v. Beto, 383 F.2d 36, 41 (5th Cir. 1967).

[56] 390 U.S. 377, 385 (1968).

[57] 359 F.2d 199 (4th Cir. 1966). The court assailed the fact that the sheriff "offered no explanation for the failure to afford . . . [the person making the identification] at least a choice among several voices, rather than concentrating solely on Palmer's." Id. at 202.

[58] — Mass —, 238 N.E.2d 343 (1968).

[59] 399 F.2d 948 (2d Cir. 1968).

[60] Mass. Gen. Laws Ann. ch. 266, § 16 (1959).

not violate due process and, hence, permitted both the pretrial and in-court identifications to be admitted into evidence.[61] In so holding, the court found that because the presentation was made so soon after the attempted burglary, the witness' memory was still fresh and therefore the procedure increased rather than decreased the chance of an accurate identification.[62]

In *Davis*, a state trooper saw defendant walking on a New York State Thruway near an abandoned automobile. After arresting Davis for walking on the Thruway in violation of a traffic ordinance,[63] the trooper checked to see if the abandoned car had been reported stolen. The check proved negative and Davis denied having any connection with the car. Driving through a toll booth on his way off the Thruway, the trooper, pointing to Davis who was sitting in the back seat, asked the toll collector if he had seen him recently. The booth operator identified Davis as the person who had, a short while before, driven through his stall an automobile fitting the description of the one abandoned. Later when the abandoned car turned out to have been stolen, Davis was convicted of auto theft at a trial in which the toll collector identified him as the person who drove the stollen car up to the booth. Davis' claim that his right to counsel was abridged was rejected by the Court of Appeals for the Second Circuit. Although the court was not formally presented with the allegation that the individual confrontation violated due process under *Stovall*, there are indications that the *Davis* court actually considered the presentation to be a showup, and upheld its validity on a consideration of the totality of circumstances.[64] The court answered the contention that counsel was required at the toll booth confrontation by holding that such confrontation had not yet become accusatory and hence did not take place at a critical stage of the criminal proceedings.[65] The court agreed, pointing to the

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[61] Commonwealth v. Bumpus, — Mass. —, —, 238 N.E.2d 343, 347 (1968).

[62] Id. at —, 238 N.E.2d at 346-47.

[63] 21 N.Y.C.R.R. § 102.2 (1966).

[64] The only claim pressed by appellant in *Davis* was that he had been deprived of his right to counsel at the presentation. The question of primary interest to this Note is whether or not that confrontation could have been invalidated on due process grounds. The Court's reasoning seems equally applicable to a claim of deprivation of right to counsel under *Wade*.

[65] 399 F.2d at 952. Many of the considerations which are relevant to the due process validity of a confrontation under *Stovall* are relevant to the determination of when counsel is required at such presentations.

Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964), in effect, holds that, in interrogation cases, the right to counsel accrues no later than the shift of the proceedings from the investigatory to the accusatory stage. *Bumpus* and *Davis* held that the accusatory test applies to identification cases. The confrontations in *Bumpus* and *Davis* were validated on the ground that the accusatory stage had not been reached.

Is this a good test in the normal confrontation case? Are not all such one-to-one confrontations accusatory in the sense that they ask one who witnessed the crime whether the person presented is the criminal being sought? See Rivers v. United States, 400 F.2d 935 (5th Cir. 1968). Is not the unusual situation

fact that at the time the identification was made, neither the trooper nor, more importantly, the toll-booth operator knew that a crime had been committed, and further, the operator had no reason to know why the presentation was being made.[66]

The two prime reasons running through both *Bumpus* and *Davis* for validating the showups are: (1) the belief that since the police should not be hampered in their attempt to prevent and investigate crime, the procedural rights created by *Wade, Gilbert* and *Stovall* attach only at the accusatory stage of the proceeding and not until the police have completed the investigatory stage;[67] and (2) the importance of making an identification as soon as possible after the crime, while memories are still fresh.[68]

If properly applied, the accusatory-investigatory approach[69] seems sound. It is essential to note at the outset that this dichotomy is far from clear cut. The showup conducted in *Bumpus* was certainly accusatory in the sense that it communicated to the witness that the police had reason to suspect Bumpus as the criminal. The question posed to the victim-witness was, "Is this the man who you just saw break into your house?" It is in fact this accusatory suggestion, whether express or implied, which makes showups so prejudicial.[70] On the other hand, the one-man confrontation in *Bumpus* was essential to good police investigation. When the police arrest a suspect near the scene of a crime soon after its commission, it is imperative that they ascertain whether their choice is correct so that, if wrong, they can resume their search while the criminal is still within easy reach. To require the police to take a suspect back to the stationhouse for a lineup would interrupt the investigation while additional police were sent to the vicinity of the crime. In each case a court must weigh the danger which inheres in all showups against the practical need involved in an on-the-scene investigation.[71]

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in *Davis* the exception to the generally accusatory nature of showups and defective lineups?

The court in *Davis* probably considered and rejected, sub silentio, the due process claim, since it concluded that the "trilogy do not cover this case." 399 F.2d at 952.

[66] Id.

[67] Commonwealth v. Bumpus, — Mass. —, —, 238 N.E.2d 343, 347 (1968); United States v. Davis, 399 F.2d 948 (2d Cir. 1968).

[68] Id.

[69] See Escobedo v. Illinois, 378 U.S. 478, 490-92 (1964).

[70] Hans Gross, in attacking the showup procedure as suggestive of guilt and hence conducive to misidentification, gives the blatant example of a witness who was asked to view a suspect in such a confrontation. The witness made a positive identification of a person not fitting the description he had previously given the police. When asked by the authorities about the apparent discrepancy, the witness answered, "You certainly would not have brought him here if he were not the right man." H. Gross, Criminal Psychology 36-37 (1911).

[71] If the judge determines that the showup was essential but that the circumstances of the witness' original observation point to the likelihood of mistake, the evidence should be admitted with the expectation that it will be impeached on cross-examination.

At the time he presented Davis to the toll booth operator, the trooper in the *Davis* case was not certain that an auto theft had been committed. To force a police officer to stage a lineup while pursuing this sort of hunch would place a tremendous burden on mere preliminary investigations. Moreover, the confrontation in *Davis* may be saved for another reason. At the traditional showup, a witness has a specific crime in mind and, as has been mentioned, may be influenced by his belief that the police must have some independent evidence that the person presented to him is the one who has committed the crime. Generally, the witness has observed the commission of the crime and knows the police are asking whether the person presented is the perpetrator. However, where the person making a one-to-one identification does not know why the presentation is being made, as was the case with the toll booth operator in *Davis*, the possibility of misidentification is not as great as in the typical showup. In *Davis*, the witness, having no particular criminal transaction in mind, was called upon to match the suspect against a wide range of people with whom he had recently had contact during his employment in order to determine whether he had ever seen the suspect.[72] While this Note takes the position that courts should be precluded from making an independent judgment of the accuracy of a suggestive confrontation without first determining the necessity, the confrontation in *Davis* did not suggest to the witness that a specific crime had been committed and that the suspect was thought to be the guilty party. It seems reasonable to exclude from the definition of a showup one-to-one presentations where the witness has no idea why the presentation is being made and the investigating police officer asks only, as he did in *Davis*, "Have you ever seen this man before?"

The argument that police investigations would be hampered by excluding all nonessential showup identifications from being introduced into evidence is not persuasive. Such an evidentiary rule would not require that police interrupt investigations to hold lineups in every case. Rather, such a requirement would apply only if the state chose to use a witness' identification as evidence of the defendant's guilt. If they chose to use the identification only as an investigatory device, the police could still immediately conduct a showup. Subsequently, if the identification was negative, they could promptly continue their investigation. On the other hand, if the identification proved positive, the police

[72] A one-to-one confrontation under these circumstances is much like a lineup. In the latter the witness knows what the police are driving at, i.e., he knows that they want him to point out which if any of those presented is the criminal being sought. But in such a confrontation the witness does not know which of those presented is the suspect. On the other hand, in a *Davis*-type situation the witness knows the person in whom the police are interested, but has no idea why. He has seen nothing out of the ordinary which would suggest the response the police are eliciting. In a showup the responses can be "yes," "no," or some shade of "I'm not sure." In a lineup they can be "yes" for any one of those presented, "no" for all, or "I'm not sure" for any number of those presented. In *Davis*, the toll booth operator was able to make a very specific response without prior suggestion.

would halt their investigation and gather evidence independent of the identification in order to establish the suspect's guilt at trial.[73] Waiving the evidentiary use of a particular witness' identification to gain its aid in an investigation would, of course, not be helpful where there was merely one witness to the crime or where the state's case is otherwise dependent on the identification. On the other hand, if there is no compelling need for the showup as an investigatory tool, its use unnecessarily deprives the defendant of the possibility that he will not be identified at a lineup. Such non-identification would be valuable exculpatory evidence.

Given the fact that an identification is made soon after the commission of a crime, it is at least arguable that since the identifying witness' memory is still fresh, the probative value of such an identification far outweighs any prejudicial suggestion which might inhere in the presentation. Indeed, in *Wright* Judge Bazelon recognized that preservation of fresh memories is a compelling consideration sufficient to justify a pretrial showup.[74] If, as it might be assumed, freshness is important, courts could, after a certain amount of case-by-case experience, develop definite guidelines for determining up to what point in time after the witness' original contact with the perpetrator, the delay occasioned by staging a lineup would be material to freshness of memory. For example, if it normally takes a day to arrange a lineup, the value of presenting the suspect to a witness five minutes after the commission of the crime at least arguably outweighs the benefits of a lineup procedure. If a suspect is apprehended a month after the crime, the twenty-four hour delay in arranging a lineup would not seem to have a substantial effect on freshness of memory; the countervailing danger of misidentification occasioned by the showup procedure would be even greater at this time than it would have been five minutes after the witness saw the criminal transaction. While prior to a certain point in time the police could present a suspect singly to a witness and still be permitted to introduce the resulting identification into evidence at trial, after such time the police would be required to place the suspect in a lineup in order to preserve the evidentiary value of the identification.

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[73] It might be argued that independent evidence thus secured is inadmissible as fruit of the poisonous tree, i.e., the prior showup. The argument seems specious because any causal link between the showup identification and subsequent non-identification evidence is tenuous.

[74] Wright v. United States, 404 F.2d 1256 (D.C. Cir. 1968). "The clear thrust of *Stovall* is that without justifying circumstances, a one-man showup is too unnecessarily suggestive to satisfy due process. A lineup must be conducted unless it will necessitate a delay which is likely to make identification impossible or less reliable." Id. at 1262 (Bazelon, C. J., dissenting).

From the above it seems clear that the necessity to make an identification quickly while memories are fresh would be recognized by Judge Bazelon as a compelling circumstance sometimes justifying the use of the showup procedure.

III

ESTABLISHING THE INDEPENDENT BASIS OF AN IN-COURT IDENTIFICATION

Although in *Wright* Chief Judge Bazelon disagreed with the majority as to what factors should be weighed in determining whether a pretrial confrontation violates due process, there was agreement that the evidentiary rules promulgated in *Wade* and *Gilbert* should be applied analogously once a violation is found.[75] While an identification made at a violative confrontation should be absolutely inadmissible, the in-court identification of the defendant made by the witness who had previously identified him at an unconstitutional presentation should also be inadmissible, unless the state can demonstrate by clear and convincing evidence that the in-court identification had a source other than the improper confrontation.[76] The evidence and procedures which should be required to rebut the presumption that an in-court identification is tainted by an invalid pretrial confrontation remains an open question. The reasoning and conclusions developed herein are equally applicable to the question of establishing an independent basis for an in-court identification following a pretrial confrontation conducted without counsel in violation of *Wade*.

It would appear from a close reading of *Wade* that the test for determining the independence of an in-court identification is whether it can be said with any degree of certainty that *at the time of the trial* the witness would have recognized the defendant in a fairly conducted lineup had the violative confrontation not intervened.[77] Since in any case where independence is at issue a violative confrontation must have intervened, how are courts to determine what would have happened if an intervening violative confrontation had not occurred?

It has been suggested in Part II of this Note that a court's consideration of the accuracy of an identification made at a showup does not control its validity or determine its admissibility at trial. However, once a due process violation is found, the factors considered by the court in *Rutherford* are very relevant to the question of whether an in-court identification has a source independent of the tainted showup.[78] Among the factors which *Wade* listed as establishing the independence of the in-court identification are two which the court employed in *Rutherford*: (1) "the prior opportunity to observe the alleged criminal act"; and

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[75] Id. See also Clemons v. United States, No. 21,001 (D.C. Cir., Dec. 6, 1968); United States v. Washington, 292 F. Supp. 284 (D.D.C. 1968).

[76] Cf. the dispositional principles in *Wade* and *Gilbert* discussed in notes 10 & 11 supra and accompanying text.

[77] United States v. Wade, 388 U.S. 218, 242 (1967). See also United States v. Trivette, 284 F. Supp. 720 (D.D.C. 1968), where the court in deciding independence asked itself whether or not the witness could have made an in-court identification free of the effects of the violative pretrial identification.

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

(2) "the existence of any discrepancy [or lack of discrepancy] between any pre-lineup description and the defendant's actual description."[79]

However, conceding that the above considerations are relevant to the determination of an independent basis, it should not be assumed that they are the last word on the subject. While it is impossible for a court to know with any degree of certainty whether an in-court identification is accurate once a prior, improper confrontation has been conducted, a procedure can be followed that will act as a preliminary check on the accuracy of the identification made at trial: conducting a lineup immediately prior to trial whenever the prosecution intends to make use of an in-court identification. In short, if a witness cannot pick the defendant out of a properly conducted lineup before trial, there is little sense in speaking of his ability to make an independent identification at trial. After all, an in-court identification is a showup made more suggestive than most, since the state's belief in defendant's guilt is thus emphatically communicated to the witness.[80]

It is urged that in determining the independence of a proposed in-court identification, the courts should order a pretrial lineup to be conducted to resolve the primary question of whether an identification can be made at all. Such a procedure seems a small price to pay for a check on the independence of in-court identifications, a check which can conclusively demonstrate the witness' inability to identify the defendant. "With the stakes so high, due process does not permit second best. . . . [W]e must insist on the fairest feasible identification procedures . . . ."[81]

The seeds of such a procedure may be found in *Wade*. Besides the considerations mentioned above, *Wade* looked to the prior unsuccessful identification by the witness.[82] Requiring a pretrial lineup merely institutionalizes this factor. An efficient method for implementing this procedure would be for courts to initially consider factors such as the conditions under which the witness observed the criminal at the time of the crime. If after weighing such criteria the judge is convinced that the in-court identification would be tainted by the prior improper con-

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[79] Id.

[80] If the danger in showup cases is that the police may communicate to the witness their belief in the defendant's guilt, as it seems to be (see note 19 supra), then an in-court showup is most suggestive of all. Traditionally, such procedure has been allowed without question. See, e.g., State v. Roberts, — Ore. —, 437 P.2d 731 (1968); Green v. State, 223 Ind. 614, 63 N.E.2d 292 (1945); Boyd v. State, 50 Tex. Crim. 138, 94 S.W. 1053 (1906). If a lineup is required to determine the independence of an in-court identification following a violative predecessor as is urged above, one should be required where the in-court identification follows no other confrontation. Under such circumstances the court would have the opportunity to determine positively whether or not the witness can identify the accused at the time of trial under fair conditions.

[81] Wright v. United States, 404 F.2d 1256, 1262 (D.C. Cir. 1968) (Bazelon, C. J., dissenting).

[82] United States v. Wade, 388 U.S. 218, 241 (1967). See note 76 supra and accompanying text.

frontation, the identification at trial should not be permitted, and a lineup would prove unnecessary. On the other hand, if the judge finds that an in-court identification might have an independent basis, as the court found in *Rutherford*, a lineup should be conducted, since it might detect error in his initial determination.

If the witness identifies defendant at a pretrial lineup, conducted as a test of the witness' ability to make an in-court identification, the lineup identification should not itself be admissible. Since this lineup is merely designed as a partial check for independence, it should not be used to arm the prosecution with impressive evidence.

The determination of the issue of independence, as well as the question of the due process validity of the pretrial confrontation, should be made before trial on a motion to suppress.[83] When such objection is raised in this manner and either or both identifications are suppressed, the jury has heard nothing which might unfairly influence its decision.

IV

Conclusion

Ideally an identification is a matching of past and present sense impressions. When a witness is presented with a group of persons, roughly similar in appearance, he is forced to rely on the strength of his past impression. As the witness realizes that a particular person is suspected by the police, the danger increases that the identification will be a mere ratification of the arrest. Hence, practices which spotlight the accused are those particularly to be avoided. The showup is by its very nature the epitome of such suggestive practices. An identification which is the product of a nonessential showup, even if conducted in counsel's presence, should not be admissible in evidence.

It is clear from *Stovall* that where the showup is the only practicable method of identification, necessity justifies its use. While the Supreme Court has never invalidated an identification on due process grounds,[84] it has never validated a nonessential showup and it is submitted that finding such procedures violative of due process is the necessary end-product of *Wade*, *Gilbert* and *Stovall*.

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[83] See, e.g., United States v. Washington, 292 F. Supp. 284 (D.D.C. 1968); United States v. Wilson, 283 F. Supp. 914 (D.D.C. 1968); State v. Bratten, — Del. —, 245 A.2d 556 (1968).

[84] At the time this note was originally sent to the printer, the Supreme Court had itself never invalidated a confrontation on the ground that it was so unnecessarily suggestive as to violate due process of law. Subsequently, in Foster v. California, 37 U.S.L.W. 4281 (U.S. April 1, 1969), the Court has so ruled. In *Foster*, the defendant was originally presented to the witness in a lineup in which defendant was the only tall man. When that confrontation failed to produce an identification, the police presented the defendant in a showup, but still no identification was forthcoming. A positive identification was finally procured when the police again presented the defendant to the witness, this time in a lineup otherwise comprised of new members.

Since an identification at trial is likely to be influenced by a prior confrontation, the state should bear a heavy burden in showing that it is independent of its violative predecessor. A conclusive determination of independence is of course impossible, but such an identification should be precluded if the witness is unable to identify the defendant at a pretrial lineup.