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Comments and Casenotes

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In its efforts to identify a suspected criminal, it is common for the police department to line up a number of persons and to have a witness to the crime pick from the lot the one whom he alleges committed the act. Occasionally, photograph files are employed for this same purpose. Whatever the means used, the object is to obtain an indentification of the suspect as the one who committed the crime. Although the effectiveness and validity of the various methods of identification which are employed may vary significantly, these identifications are of at least some value if not conducted under manifestly unfair conditions. Even assuming the efficacy and value of such identifications, however, controversy has long existed as to whether or not a witness in a criminal case should be permitted to testify as to his extrajudicial identification of the defendant. Often, courts have rejected such evidence as hearsay.[1] Occasionally, however, the hearsay objections seem not to have prevented the use of such testimony. Many courts have admitted the evidence, either not having been apprised by counsel of the problems which might be incident to its admission or having resolved those difficulties to their satisfaction, but without discussing the problem in their opinions.[2] Where the courts have clearly considered the problems of admissibility of extrajudicial identification and held such evidence to be admissible, they have generally limited the use of such evidence to "corroboration" of the witness's testimony on the stand.[3] Rarely, has the extra-

[1] See cases cited in 70 A.L.R. 910, 915; *cf. infra* n. 24.

[2] See, e.g., following cases in which courts failed to indicate the reason for which evidence of an extrajudicial identification was admitted: People v. Hood, 140 Cal. App. 2d 585, 295 P. 2d 525 (1956); State v. Myer, 204 Iowa 118, 214 N.W. 710 (1927); State v. Jeffreys, 192 N.C. 318, 135 S.E. 32 (1926); People v. Hale, 64 Cal. App. 523, 222 P. 148 (1923); Smiley v. State, 156 Ga. 60, 118 S.E. 713 (1923); State v. Butler, 114 S.C. 433, 103 S.E. 762 (1920).

[3] Commonwealth v. Locke, 335 Mass. 106, 138 N.E. 2d 359 (1956); People v. Bennett, 119 Cal. App. 2d 224, 259 P. 2d 476 (1953); State v. McSloy, 127 Mont. 265, 261 P. 2d 663 (1953); People v. Slobodion, 31 Cal. 2d 555, 191 P. 2d 1 (1948); People v. Richardson, 74 Cal. App. 2d 528, 169 P. 2d 44 (1946); State v. Rhodes, 181 N.C. 481, 106 S.E. 456 (1921).

judicial identification been admitted as substantive evidence.[4]

Several times the Maryland Court of Appeals has considered the problem of admissibility of extrajudicial identifications. Apparently, the first case in which this issue was specifically presented to the Maryland Court was *Blake v. State*.[5] Against a strong dissent, the majority of the court adhered to the view then prevalent in most jurisdictions that such testimony is hearsay and inadmissible.[6] It was not until twenty-seven years later, when the Court decided *Basoff v. State*,[7] that it indicated a retreat from its former position in the *Blake* case and said that an extrajudicial identification of the accused, made under proper circumstances, may be admitted in evidence as an exception to the hearsay rule and, if admitted, would constitute "corroborative" evidence.[8] In that decision, the Court went

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[4] 70 A.L.R. 910, 911 comments:

> "In recent years, . . . the tendency has been towards the admission of such testimony both as substantive and corroborative evidence, so that now there exists a fairly balanced weight of authority on the question, with a slight preponderance of jurisdictions favoring admission."

Upon inspection of the cases cited therein, this writer was not able to find any in which evidence of an extrajudicial identification was admitted as substantive evidence. But see *infra*, *n.* 24.

[5] 157 Md. 75, 145 A. 185 (1929).

[6] *Ibid.*, 80-82.

[7] 208 Md. 643, 119 A. 2d 917 (1956).

[8] Although it is clearly intimated in the Basoff case, *supra*, n. 7, at no point in that case does the Court expressly state that testimony as to an extrajudicial identification is admissible for corroborative purposes only. This interpretation of the Basoff case has been made by the Court in Judy v. State, *infra*, *n.* 9.

Before proceeding further, it is necessary to clarify the meaning of the verb "to corroborate". The word is derived from the Latin, "corroborate", which means simply "to strengthen". OXFORD UNIVERSAL DICTIONARY OF HISTORICAL PRINCIPLES (3rd ed. 1955) 399. When used in the Law of Evidence either alone or in the phrase "corroborative evidence", this fundamental meaning is retained, but overtones peculiar to problems of evidence are acquired which give the word a certain ambiguity. A statement in dispute can be corroborated merely by the accumulation of other statements, none of which are necessarily true, but all of which, because of their consistency with the statement in question, point to the conclusion that the statement sought to be proved is true. As applied to the particular problem of this comment, extrajudicial identifications are corroborative in this sense when they are used to support the testimony of the identifying witness by suggesting that the testimony is more probably true because the witness has said the same thing on other occasions. By such a method of corroboration, one reasons that because statements B, C, D and E all agree with what is asserted in statement A, statement A is, therefore, probably true. One does not endeavor to prove that each of the statements B, C, D and E is, in fact, true, but rather relies on the sheer accumulation of statements to be persuasive. Indeed, whether those statements are true in fact is not the question. This type of corroboration, for reasons explained hereinafter, shall be referred to as "crediting evidence". As used in this sense, crediting evidence is intended to be the direct opposite in meaning of substantive evidence. It is like

as far as any court in the country seems to have gone in admitting such evidence, in the absence of statutory mandate.

The culmination of this series of cases was reached in 1958 when the Court decided *Judy v. State*.[9] The defendant had been indicted and tried in the Criminal Court of Baltimore on a charge of attempted robbery with a dangerous and deadly weapon. During the trial, an already con-

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"impeaching evidence", except that it supports, instead of attacks, the witness.

The term, "corroborative evidence" can be used in still another sense in which it is hardly distinguishable from "substantive evidence". In this sense, corroborative evidence is evidence which, because of its assumed or proved truth, is taken to establish the truth of a proposition in question. The jury is asked to believe that because statements B, C, D and E are true, statement A is also true. In the jargon of the law of Evidence, statements B, C, D and E are given substantive value, and their effect is to corroborate statement A, which is the proposition sought to be proved. In our case the extrajudicial identification is corroborative in this sense when it is taken directly for its truth to prove the identity of the defendant along with the testimony of the identifier, which it reiterates and reinforces.

A striking example of this usage of corroborating evidence is found in the requirement that the evidence of an accomplice be corroborated. 7 WIGMORE, EVIDENCE (3rd ed. 1940 § 2056-2060. It is probably in this sense that the Maryland Court of Appeals was using the expression "corroborative evidence" in Judy v. State, *infra*, n. 9. There, the Court stated that its earlier opinion in the Basoff case, *supra*, n. 7, held that an extrajudicial identification of the accused may be admitted in evidence "as an exception to the hearsay rule, and, if admitted, would constitute corroborative evidence". Manifestly, only if the corroborative evidence were given some substantive value would there be any hearsay problem which would necessitate admission of this evidence as an *exception* to the hearsay rule. See also Wright v. State, ... Md. ...., 150 A. 2d 733, 737 (1959), where the Court of Appeals, holding that there was sufficient corroboration of the testimony of two accomplices that the defendant had participated in the offense charged, quotes this statement from 1 UNDERHILL, CRIMINAL EVIDENCE (5th ed. 1956) § 185:

> "'. . . it seems that the corroboration which with some degree of cogency *tends to establish facts* material and relevant which would authorize the jury to credit accomplice's testimony should be sufficient.'"

Implicit in the requirement that corroborative evidence tend "to establish facts" seems to be the attributing of substantive value to such evidence. Only substantive evidence "tends to establish facts."

Hereinafter, therefore, we shall distinguish these two different usages of the term "corroborative evidence" in the following manner. Evidence which is offered only to strengthen the testimony of a witness and which is not offered as an assertion of its truth, i.e. as substantive evidence, but merely to show that on a prior occasion the witness made another statement which is the same as, or consistent with, his present testimony shall be referred to as "crediting evidence". On the other hand, evidence offered to support the testimony of the witness, but which must be given some substantive value by the trier of fact in order that it accomplish that purpose, shall be referred to as "corroborative evidence". That the distinction between this type of evidence and "substantive evidence" is difficult, if not impossible to make, seems quite apparent. The distinction is made primarily because the courts have persisted in making it.

[9] 218 Md. 168, 146 A. 2d 29 (1958).

victed accomplice in the crime was permitted to testify, over objection, that three days after his arrest, he had identified a photograph of the defendant for the police from among other photographs. At the trial, both the victim and the accomplice identified the defendant as the person who was the other participant in the attempted robbery. Appealing from his conviction and sentence, the defendant contended that the trial court erred in admitting testimony by the witness as to his extrajudicial identification of the defendant. Judge Horney, speaking for the unanimous Court of Appeals, affirmed the judgment, holding that where the identity of the accused is an issue, it is proper to permit a witness, even though he may have been an accomplice, to testify as to a previous identification of a photograph of the defendant. In regard to such testimony as to an extrajudicial identification, the Court stated:

> ". . . should be admitted for the purpose of corroborating the witness and bolstering his credibility, if for no other purpose. Indeed, we are of the opinion that the mere relation by a witness of a previous act of identifying a photograph of a person he knew or recognized is not hearsay, that it is admissible as substantive evidence, and that it is not subject to the preliminary inquiry as to unreliability or unfairness."[10]

With its decision in the *Judy* case, the Court of Appeals sets itself clearly among those states, such as New York, where testimony as to an extrajudicial identification of a defendant is admissible not only for crediting purposes, but also as substantive evidence. What distinguishes this holding from similar ones in New York, however, is that the Maryland Court of Appeals was acting without the sanction of statute.[11] Inspection of the decided cases and the legal principles involved will readily attest to the wisdom of the court's decision. As if the decision in the *Judy* case were not in itself remarkable enough, the Court fol-

[10] *Ibid.*, 174.

[11] Examples of statutory provisions which either provide expressly that testimony as to an extrajudicial identification shall be admitted as substantive evidence, or which have been so construed, are: N.Y. CODE CRIM. PROC. (1953), § 393-b; and 29 PAGE'S OHIO REV. CODE (1954) § 2945.55 (G.C. 13444-16). In New York, prior to passage of this statute, the Court of Appeals had followed strictly People v. Jung Hing, 212 N.Y. 393, 106 N.E. 105 (1914), which had held that evidence of an extrajudicial identification was not admissible unless the witness had been impeached, and then, it would be admitted only to corroborate him. The leading case construing the New York statute is People v. Spinello, 277 App. Div. 712, 102 N.Y.S. 2d 803, aff'd. 303 N.Y. 193, 101 N.E. 2d 457 (1951), noted 27 N.Y.U.L. Rev. 367 (1952) and 36 Minn. L. Rev. 530 (1952).

lowed it, early this year, with an equally extraordinary decision in *Bulluck v. State*,[12] holding "clearly admissible" the testimony of a detective that he saw and heard the victim identify the accused in a police line-up, citing the *Judy* case as authority.

In determining a proper result in this general area, four distinct problems should be considered: (1) whether the testimony of a witness as to his prior extrajudicial identification of a defendant, or other person, when offered as substantive evidence, is hearsay; (2) whether, assuming that such testimony is hearsay, it is, or should be admitted as an exception to the hearsay rule; (3) projecting the problem onto a more general plane, whether the hearsay rule should apply to the general case where the declarant is the witness available for cross-examination; and (4) whether the testimony of a third person as to the extrajudicial identification made by another should be admissible. Before considering specifically these problems, however, it is important to examine the broad area from which they have evolved so that the isolated area of extrajudicial identification can be seen in its proper perspective.

I.

Non-Hearsay Uses Of Prior Consistent And Prior Inconsistent Statements Generally

The rule excluding hearsay forbids the use of extrajudicial statements, i.e., those made by one who is not subject to the sanction of oath and the testing of cross-examination, as proof of the truth of the assertions contained in those statements, i.e., as substantive evidence.[13] The extrajudicial statements of a witness may, however, in appropriate situations, be admitted in evidence for non-substantive purposes. For example, courts have generally permitted the use of prior inconsistent statements of a witness for the purpose of impeachment.[14] Use of the

[12] 219 Md. 67, 148 A. 2d 433 (1959).

[13] McCormick, *The Borderland of Hearsay*, 39 Yale L. J. 489, 490 (1930). This rule is followed in at least 41 jurisdictions and the Federal courts. See, State v. Balto. Contracting Co., 177 Md. 1, 15, 6 A. 2d 625 (1939); Acker v. Acker, 172 Md. 477, 493-4, 192 A. 327 (1937); U. S. F. & G. Co. v. Cont'l. Baking Co., 172 Md. 24, 190 A. 768 (1927); Clay v. State, 211 Md. 577, 583, 128 A. 2d 634 (1957). Cases from other jurisdictions collected: 133 A.L.R. 1454, 1455-1457.

[14] "It is clear that prior statements by a witness which contradict his testimony are admissible for the purpose of impeaching or discrediting him." 133 A.L.R. 1454, 1455. Sun Cab Company, Inc. v. Cusick, 209 Md. 354, 121 A. 2d 188 (1956); West v. Belle Isle Cab Co., 203 Md. 244, 100 A. 2d 17 (1953).

extrajudicial statement for this limited purpose involves no violation of the hearsay rule, since the statement is not introduced as substantive evidence, but only to show that at some prior time, the witness made a statement which is inconsistent with what he now professes to be the truth and, for that reason, the witness's credibility is not free from question.[15]

This distinction between the use of evidence for impeachment and for substantive purposes persists to this day, despite the plausible arguments of scholars that the legal distinction between the two is usually meaningless to the jury, or, if not meaningless, is impossible to apply in evaluating the huge mass of evidence which the jury is called upon to assess in arriving at its verdict.[16] However valid the legal distinction between substantive and impeaching evidence may be in theory, it is argued that it must ultimately break down in practical application, since a statement admitted only for impeachment purposes is likely to be given substantive value by the jury in order that the witness's credibility be impugned.[17]

Possibly by analogy to the reasoning which made possible the admission of prior inconsistent statements of a witness for the purpose of impeachment, some courts have admitted the prior consistent statements of a witness as crediting testimony.[18] These courts compose a distinct minority, however, for most courts adhere staunchly to the view that prior consistent statements of a witness are inadmissible for this purpose.[19] And, even in those states, such as Maryland, which admit prior consistent statements as crediting evidence, such statements have been admitted

[15] 20 AM. JUR. 405, Evidence, §458.

[16] "The distinction is not one that most jurors would understand. If they could understand it, it seems doubtful that they would attempt to follow it." MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE (1954) 77; 133 A.L.R. 1454, 1466; Medlin v. County Board of Education, 167 N.C. 239, 83 S.E. 483, 484 (1914). 3 WIGMORE, EVIDENCE (3rd ed. 1940) §1018(b).

[17] MCCORMICK, *op. cit. ibid.* 78.

[18] See, e.g., American Stores Co. v. Herman, 166 Md. 312, 171 A. 54 (1934); Cross v. State, 118 Md. 660, 670, 86 A. 223 (1912); Piehler v. Kansas City Public Service Co., 360 Mo. 12, 226 S.W. 2d 681 (1950); State v. Bethea, 186 N.C. 22, 118 S.E. 800 (1923). See also, decisions collected in 140 A.L.R. 21, 49-77, 4 WIGMORE, *op. cit. supra*, n. 16, §1126.

[19] 4 WIGMORE, *op. cit. supra*, n. 16, 194, makes this unqualified statement: "When the witness has merely testified on direct examination, without any impeachment, proof of consistent statements is unnecessary and valueless. * * * Such evidence would ordinarily be both irrelevant and cumbersome to the trial; and is rejected *in all Courts.*" [Emphasis supplied.]

See Goldberg v. United States, 213 F. 2d 734 (4th Cir. 1954) (obiter dictum); Brown v. State, 309 S.W. 2d 452 (Tex., 1958); Mellon v. U. S., 170 F. 2d 583 (5th Cir. 1948); Coates v. People, 106 Colo. 483, 106 P. 2d 354 (1940); State v. Teitle, 117 Vt. 190, 90 A. 2d 562 (1952).

only for the very limited purpose of rehabilitating a witness whose testimony has been impeached by prior inconsistent statements or by evidence showing that the witness had fabricated his testimony to meet the exigencies of the case.[20] Although irrelevancy may well be a legitimate basis for the fairly general exclusion of testimony of prior consistent statements offered as crediting evidence, it does not seem that any hearsay objection can be sustained if the rationale of the hearsay rule is strictly adhered to. Evidence of an extrajudicial consistent statement not introduced to prove the assertion which that statement contains, but only to show that on a prior occasion, the witness made the same statement that he is now making, is technically not hearsay.[21] On the other hand, however, a valid hearsay objection conceivably could be raised when a prior consistent statement is to be given any substantive value.

II.

Is The Substantive Use Of Extrajudicial Identification Hearsay In Theory?

Inasmuch as testimony as to an extrajudicial identification is one type of evidence of a prior consistent statement, it would not unreasonably be supposed that the evidentiary problems are basically the same for both. And, by specific application of the rules which are usually applied to evidence of prior consistent statements, the following propositions would seem justified: (1) use of an extrajudicial identification for the purpose of giving credit to identification made by the witness, in court, would involve no violation of the hearsay rule, since the prior identification is being offered not to prove the assertion which it contains, but only to show that on a prior occasion the witness made the same statement that he is now making; (2)

[20] In addition to the cases already cited, *supra*, n. 18, see also: City Pass. Ry. Co. v. Knee, 83 Md. 77, 34 A. 252 (1896); Mallonee v. Duff, 72 Md. 283, 19 A. 708 (1890); Glover v. Callahan, 299 Mass. 55, 12 N.E. 2d 194 (1937); Commonwealth v. Calderbank, 161 Pa. Super. 492, 55 A. 2d 422 (1947); State v. D'Ippolito, 22 N.J. 318, 126 A. 2d 1 (1956); People v. Walsh, 47 Cal. 2d 36, 301 P. 2d 247 (1956); Farmer v. State, 201 Tenn. 107, 296 S.W. 2d 879 (1956). Only one case can be found in which corroborative (crediting) evidence was held to be admissible not only to support the testimony of a witness who has been impeached, but also to corroborate an unimpeached witness as to any fact in issue in the case: Chaachou v. Chaachou, 73 So. 2d 830 (Fla., 1954).

[21] It is interesting to note that at no point in his work does Wigmore, state that use of prior consistent statements to support the credit of a witness violates the hearsay rule. Rather, he indicates that the reason for the general exclusion of such evidence is that it is "irrelevant and cumbersome to the trial". 4 Wigmore, *op. cit.*, *supra*, n. 16, *circa* §§1122 et seq.

any attempted use of evidence of an extrajudicial identification for substantive purposes would violate the hearsay rule. But, as we shall see, the latter proposition, at least, is not necessarily true, either in the limited area of extrajudicial identification or in the general area of prior consistent statements.

Except in those states where statutes exist authorizing the admission of extrajudicial identifications — and those statutes have been construed to mean that such evidence, when introduced, should be given substantive force — the courts of this country with few exceptions, have rejected, as hearsay, testimony as to an extrajudicial identification offered as an assertion of its truth.[22] Similarly, use of the prior identification even for the limited purpose of corroborating (giving credit to) the witness has been condemned, unless there had been an impeachment of the witness or his testimony.[23] In recent years, however, there has been a tendency toward the admission of such testimony, usually as crediting, and occasionally as substantive, evidence.[24]

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[22] *Infra*, n. 24.

[23] The leading case for this proposition, followed by courts of many jurisdictions, is People v. Jung Hing, 212 N.Y. 393, 106 N.E. 105 (1914), now changed by statute in New York, *supra*, n. 11. See also: Thompson v. State, 223 Ind. 39, 58 N.E. 2d 112 (1944); Trimble v. State, 227 Ark. 867, 302 S.W. 2d 83 (1957).

[24] 70 A.L.R. 910, as of 1930, lists 22 jurisdictions and England as having decided the question of whether such evidence is admissible and of those, 13 admitted evidence of an extrajudicial identification; 8 excluded the evidence. Note that Maryland was not included in this compilation. Of the jurisdictions listed, all either admitted the evidence to "corroborate" (this term being used in different senses in the various cases) the witness's testimony or were unclear as to the purpose of the admission. As of this date, at least 28 jurisdictions have considered the question of admissibility of extrajudicial identifications; 25 have admitted the evidence for one purpose or another; only 3 now exclude it (some having changed position). With the exception of the Maryland Court of Appeals in the Judy case, the Pennsylvania Court in Commonwealth v. Saunders, 386 Pa. 149, 125 A. 2d 442 (1956), possibly the California court in People v. Hood, 140 Cal. App. 2d 585, 295 P. 2d 525 (1956), and New York and Ohio, where statutes, cited *supra*, n. 11, provide for the admission of evidence of an extrajudicial identification, no state which has considered the question seems clearly to hold that such evidence is admissible as substantive evidence.

Following is a list of states in which the question has been considered and decision made as to its admissibility: EVIDENCE ADMITTED — State v. Frost, 105 Conn. 326, 135 A. 446 (1926); People v. Filas, 369 Ill. 51, 15 N.E. 2d 496 (1938); Commonwealth v. Locke, 335 Mass. 106, 138 N.E. 2d 359 (1956); Commonwealth v. Saunders, 386 Pa. 149, 125 A. 2d 442 (1956); Casa v. State, 127 Tex. Cr. 607, 78 S.W. 2d 962 (1935); Colbert v. Commonwealth, 306 S.W. 2d 825 (Ky., 1957), noted 36 Tex. L. Rev. 666 (1958); State v. DePoortere, 303 S.W. 2d 920 (Mo., 1957); People v. Aguirre, 158 Cal. App. 2d 304, 322 P. 2d 478 (1958); People v. Hood, 140 Cal. App. 2d 585, 295 P. 2d 525 (1956); People v. Slobodion, 31 Cal. App. 2d 555, 191 P. 2d 1 (1948); State v. Rafferty, 145 Kan. 795, 67 P. 2d 1111 (1937); State v. Connelly, 5 N.J. Misc. 375, 136 A. 603 (1927) (New Jersey's position is not very clear in this case, which seems to be the only one in which

None of the cases in which this testimony has been admitted seem to have dealt adequately with the hearsay objection which is said to arise when evidence of the extrajudicial identification is given substantive value.

Scholars in the law of Evidence, although generally agreeing that such evidence should be admitted, seem to have reached this conclusion by different means. Professor McCormick seems to proceed on the basis that an extrajudicial identification, when offered as substantive evidence, is hearsay, and that it should be admitted as an exception to the hearsay rule.[25] Professor Morgan, on the other hand, apparently believes that such testimony is not hearsay.[26] The basis for these varying points of view seems to lie in a substantial difference in the definitions of hearsay which these authors adopt.

McCormick defines hearsay evidence as:

> ". . . testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of the matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter."[27]

Morgan adopts the definition of Greenleaf that hearsay is:

> " '. . . that kind of evidence which does not derive its value solely from the credit to be given to the witness

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the question has been considered); State v. Carlson, 50 Wash. 2d 220, 310 P. 2d 867 (1957); State v. Wilson, 38 Wash. 2d 593, 231 P. 2d 288 (1951); State v. Lanegan, 192 Or. 691, 236 P. 2d 438 (1951); Judy v. State, 218 Md. 168, 146 A. 2d 29 (1958); McCann v. Commonwealth, 174 Va. 429, 4 S.E. 2d 768 (1939) (Testimony by mother as to her daughter's extrajudicial identification of defendant admitted as part of the res gestae); People v. Kiely, 230 Mich. 403, 203 N.W. 112 (1925) (admitted, but no discussion as to problems of admissibility); State v. Klashtorni, 177 Minn. 363, 225 N.W. 278 (1929); State v. Ayles, 205 Ia. 1024, 219 N.W. 41 (1928); Peterson v. State, 227 Ala. 361, 150 So. 156 (1933); Smiley v. State, 156 Ga. 60, 118 S.E. 713 (1923); State v. McSloy, 127 Mont. 265, 261 P. 2d 663 (1953); Martin v. State, 100 Fla. 16, 129 So. 112 (1930); State v. Jeffreys, 192 N.C. 318, 135 S.E. 32 (1926); State v. Mansell, 192 N.C. 20, 133 S.E. 190 (1926); State v. Howie, 213 N.C. 782, 197 S.E. 611 (1938) (testimony of a policeman as to extrajudicial identification made by another, admitted); State v. Butler, 114 S.C. 433, 103 S.E. 762 (1920); New York and Ohio both have statutes providing for admission of such evidence, *supra*, n. 11.

EVIDENCE EXCLUDED — Jacoby v. State, 203 Ind. 321, 180 N.E. 179 (1932); Thompson v. State, 223 Ind. 39, 58 N.E. 2d 112 (1944); Trimble v. State, 227 Ark. 867, 302 S.W. 2d 83 (1957); McCandless v. State, 44 Okl. Cr. 113, 279 P. 933 (1929); Alberty v. State, 68 Okl. Cr. 246, 97 P. 2d 904 (1939).

[25] *Infra*, *n.* 29.

[26] *Infra*, *n.* 30.

[27] MCCORMICK, *op. cit. supra*, n. 16, 460.

himself, but rests also, in part, on the veracity and competency of some other person.' "[28]

The scope of McCormick's definition seems significantly broader than that of Morgan. It does not appear to limit hearsay to those statements of a declarant who is not a witness, but includes also those out-of-court assertions made by the witness himself, if they are offered in court as assertions of their truth.[29] The implication of the Morgan definition would seem to be that where the evidence derives its value solely from the credit to be given to the witness himself and does not rest upon the veracity or competency of some other person, it is not hearsay.[30] The determinative test under this definition would probably be this: Is it only this witness whose statements we are asked to believe, whether those statements were originally made in court or out of court, or is it that we are asked also to believe the statement of some person other than this witness? If the former, the statement is not hearsay; if the latter, it is hearsay and subject to exclusion. Under this definition, it would seem that generally, where the declarant and witness are identical, an extrajudicial assertion would not be hearsay and would be admissible, unless there were some other basis for its exclusion.

It is apparently on the basis of the Morgan definition that the Maryland Court of Appeals, in the *Judy* case, was able to reach its decision that evidence of an extrajudicial

[28] MORGAN, SOME PROBLEMS OF PROOF (1956) 131, and *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177 (1948).

[29] That this is a correct interpretation of McCormick's definition is clearly indicated by this statement from his text:

"The reason for the orthodox view that a previous statement of the witness, though admissible to impeach, is not evidence of the facts stated, is clear and obvious. When used for that purpose, the statement is hearsay. Its value rests on the credit of the declarant who was not under oath nor subject to cross-examination, *when the statement was made.*" [Emphasis supplied]. MCCORMICK, *op. cit., supra*, n. 16, 74.

Although McCormick is here referring to the substantive use of prior inconsistent statements, it is manifest that the same reasoning would be applied also to prior consistent statements.

Essentially, the same definition of hearsay as that used by McCormick was adopted by Professor Strahorn in *Extra-Legal Materials and the Law of Evidence*, reprinted 15 Md. L. Rev. 330, 340, 343 (1955). For a judicial argument that the fact that witness and declarant are one and the same does not prevent the declaration from being hearsay, see State v. Saporen, 205 Minn. 358, 285 N.W. 898 (1939).

[30] MORGAN, SOME PROBLEMS OF PROOF (1956) 133:

"The evidence derives its value solely from the credit to be given to the witness or witnesses. Its value is not measured by the credit to be given to any person not sworn as a witness and subject to cross-examination. *It falls beyond the boundaries of hearsay* as described by Greenleaf and Underhill." [Emphasis supplied].

identification, when used substantively, is not hearsay. In fact, the Court almost quotes that definition in its opinion.[31] Had the Court of Appeals followed the McCormick definition, as it seems to have done in the *Basoff* case,[32] then the conclusion would have been inescapable that testimony as to an extrajudicial identification offered by a witness as evidence of the truth of the facts which it asserts, whether that identification was made by the witness or by some third person, would be hearsay and subject to exclusion (unless treated as an exception).

A categorical statement as to whether or not evidence of an extrajudicial identification, or of any other extrajudicial statement, is hearsay does not seem possible, for how one labels a particular statement seems to depend largely upon the definition of hearsay which he chooses to adopt. In the final analysis, the question of which definition is more desirable probably turns primarily on whether the subjection to cross-examination required to make a declaration non-hearsay, should be subjection to immediate cross-examination, *as soon as the declarant has spoken,* or whether the right to cross-examination *at some future time* should be sufficient protection. If one adopts the argument of Morgan, the extrajudicial consistent statement of a witness-declarant could not be excluded as hearsay as his presence in court and availability for cross-examination would be sufficient. Adhering to the McCormick test, however, the court would be obliged to exclude such statements of a declarant-witness, for the fact that the declarant-witness is present in court and available for cross-examination would not alter the original hearsay character of his utterance. As persuasive as the Morgan argument seems to be, there is only scant authority to support it. The courts seem still to adhere to the view that any extrajudicial statement offered as substantive evidence, but not subjected to immediate cross-examination, is hearsay.[33] Assuming, as we must, therefore, that substantive use of an extrajudicial identification is hearsay, we proceed to consider the question whether such evidence should be admitted as an exception to the hearsay rule.

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[31] Judy v. State, 218 Md. 168, 174-5, 146 A. 2d 29 (1958). The Court cites 20 AM. JUR., Evidence, §451, as authority for this definition. It will be noted that this definition and that adopted by Professor Morgan are almost identical.

[32] Basoff v. State, 208 Md. 643, 119 A. 2d 917 (1956).

[33] As to the inadmissibility of extrajudicial statements in general, as substantive evidence, see 2 JONES, EVIDENCE (5th ed. 1958) §271. As to the inadmissibility of extrajudicial identifications as substantive evidence, *supra*, n. 24.

III.

SHOULD THERE BE A HEARSAY EXCEPTION FOR SUBSTANTIVE USE OF EXTRAJUDICIAL IDENTIFICATION WHERE WITNESS AND DECLARANT ARE IDENTICAL?

Generally, exceptions to the hearsay rule have been established where otherwise hearsay evidence meets two qualifications: (1) some characteristic of the hearsay assertion is present which makes it inherently trustworthy; and (2) there is some necessity for the admission of the hearsay testimony,[34] such as the unlikeliness or impossibility of obtaining other evidence by alternative routes.[35] Every characteristic of an extrajudicial identification seems to justify its admission in evidence as an exception to the hearsay rule where the witness is also the declarant.

The dangers usually incident to hearsay are almost nonexistent in the case of an extrajudicial identification.[36] Because such identification is always made closer in time to the commission of the offense involved, when the recollection of the witness is fresher and less likely to have been influenced by confusing external factors, McCormick feels that the prior identification is not merely of equal reliability with the witness's identification in court, but is superior in trustworthiness.[37] There is an abundance of legal and psychological authority to support the proposition that a statement nearer to the event is usually more

[34] 2 JONES, *ibid.*, §§269, 272 et seq.; 5 WIGMORE, *op. cit. supra*, n. 16, 205, where that author states that the existence of any one of the following factors indicates the trustworthiness of an otherwise hearsay statement:

"a. Where the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed;

"b. Where, even though a desire to falsify might present itself, other considerations, such as the danger of easy detection or the fear of punishment, would probably counteract its force;

"c. Where the statement was made under such conditions of publicity that an error, if it had occurred, would probably have been detected and corrected."

Wigmore implies that exception may be founded merely on one of these considerations, but that more often, it rests on the operation, in different degrees, of two of them. See also Morgan's statement of the factors on which exceptions to the hearsay rule are based: 2 MORGAN, BASIC PROBLEMS OF EVIDENCE (1954) 222 *et seq.* And see Strahorn, *Extra-Legal Materials and the Law of Evidence*, reprinted, 15 Md. L. Rev. 330, 343 (1955).

[35] In discussing the necessity principle, Wigmore states that necessity may exist because the declarant is "otherwise unavailable", as in the case of a dying declaration, or it may exist because the assertion is such "that we cannot expect, again or at this time, to get *evidence of the same value* from the same or other sources", as in the case of spontaneous declarations. 5 WIGMORE, *op. cit. supra*, n. 16, 204.

[36] Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Ed. 177 (1948).

[37] MCCORMICK, *op. cit., supra*, n. 16, 75.

reliable than any subsequent statement.[38] Perhaps, however, the strongest and most persuasive language as to the value and trustworthiness of an extrajudicial identification is contained in the opinion of the Missouri Court of Appeals in *State v. Buschmann*:[39]

> "We know that impressions not firmly fixed in the mind are more likely to fade with lapse of time than those which have been more firmly and clearly impressed. Seeing a person repeatedly tends to fix in the mind the impression of that person's form and features, so that memory of his appearance will likely be clearer and recognition of him more certain after the lapse of a considerable time than if he had been seen but once. If one sees another person but once, perhaps fleetingly or under stress of excitement without opportunity for careful observance, it is easily conceivable that he may know that person again if seen the next day, but not be able so confidently to identify him if not seen again until six months or a year later."[40]

Again, in *State v. Frost*,[41] we find the highest court of Connecticut commenting on the relative values of a prior iden-

[38] McCARTY, PSYCHOLOGY FOR THE LAWYER (1929) 226; WHITMER, PSYCHOLOGY IN LAW, (2nd ed. 1951) 242; Gardner, *The Perception and Memory of Witnesses*, 18 Corn. L.Q. 391, 392-394 (1933); Hutchins and Slesinger, *Some Observations on the Law of Evidence — Memory*, 41 Harv. L. Rev. 860, 864, 867 (1928); Brown, *An Experience in Identification Testimony*, 25 Crim. L., C. & P. S. 621 (1934).

BROWN, LEGAL PSYCHOLOGY (1926) 88, contains these very pertinent observations:

> "Time is the essence of memory. * * * The greater the elapsed time between the observing of an event and the reporting upon it in a court of law the greater will be the unreliability of the testimony. The memory of everyone is subject to deterioration. A person who today was a witness to a railroad accident might remember the important details for some time, especially if there were vivid and startling consequences . . . but time, the fortunate healer of memory wounds, gradually smothers the details until finally all that would be remembered would be that an accident occurred in which some people were injured."

Again at 90:

> "Suggestion not only creates artificial memory out of nothing, but it changes existing memories to suit its own ends. It is one of the principal causes of inaccurate testimony. Newspapers are very suggestive. * * * Lawyers themselves may exert a suggestive influence on prospective witnesses.
>
> "Memory may be disturbed by constant talking about the facts which are remembered."

See also comments in State v. McSloy, 127 Mont. 265, 261 P. 2d 663, 667 (1953); People v. Slobodion, 31 Cal. 2d 555, 191 P. 2d 1, 4 (1948); Commonwealth v. Saunders, 386 Pa. 149, 125 A. 2d 442, 445 (1956). For general discussion and further references, see 4 WIGMORE, *op. cit., supra*, n. 16 §1130.

[39] 325 Mo. 553, 29 S.W. 2d 688 (1930).

[40] *Ibid.*, 692.

[41] 105 Conn. 326, 135 A. 446 (1926).

tification and an identification made for the first time in the court room:

> "The trustworthiness of the indentification is of first importance. An identification of an accused, made publicly for the first time by a witness in court, when there presumably have been many opportunities for the witness to have seen the accused and to have heard him spoken of by a given name, may be open to question, but, if it be shown that the witness identified the accused previously and the first time after his arrest . . . under circumstances which removed the suspicion of unfairness or unrealiability, the prior identification, . . . will be of utmost aid in determining the trustworthiness of the identification made in the court room."[42]

Undoubtedly, the extrajudicial identification itself may be unreliable. Far too often, people are mistaken about the identity of others. Even when the contact with a person is made under the most favorable circumstances, one is often unable to describe or accurately identify a stranger. When the contact is made under strained circumstances in which the identifier is emotionally overwrought and the contact itself is only brief, as is the usual situation in the relation of criminal to his victim, there is even greater possibility for error in identification. Assuming, however, the real possibility of inaccuracies in all identifications and acknowledging the need for the existence of maximum precautions to assure fairness and correctness in the identification process, one must agree that as between a prior identification and that made in court for the first time, the former is likely to be the more reliable of the two, if for no reason other than its greater proximity to the event. Its remoteness to the event robs an identification at the trial of most of its value, and it is from the fact that an uncorroborated or unsubstantiated identification made in the court room has little testimonial force that the necessity for the admission of the extrajudicial identification arises. This view has been expressed both by Wigmore and the Maryland Court of Appeals.[43]

There is an additional factor which greatly enhances the reliability and trustworthiness of an extrajudicial iden-

[42] *Ibid.*, 452.

[43] 4 WIGMORE, *op. cit., supra*, n. 16, §1130, Basoff v. State, 208 Md. 643, 651, 119 A. 2d 917 (1956); Judy v. State, 218 Md. 168, 174, 146 A. 2d 29 (1958).

tification: the fact that the person who made the identification is usually a witness in the case and, as such, is available for cross-examination. Any weakness which may have been inherent in the extrajudicial statement can thereby be subjected to as close scrutiny as any statement of the witness made on the stand for the first time. If, indeed, the prior identification was incorrect, cross-examining counsel has opportunity to show the inaccuracy; if it was made under suspicious circumstances, this also can be shown through cross-examination. If, however, the prior identification was an accurate one, its admission in evidence would serve only to remove any weakness which may otherwise have been inherent in the court room identification.

IV.

Should There Be A General Hearsay Exception For All Cases In Which Witness And Declarant Are Identical?

In the *Judy* case,[44] the Court of Appeals quotes Professor Morgan for the proposition that "[w]hen the Declarant is also a witness, it is difficult to justify classifying as hearsay evidence of his own prior statements."[45] Although the Court comments that this statement of Professor Morgan was "peculiarly pertinent" to the question then before it, it is also to be noted that the quotation of this statement was really not in response to any issue then before the Court for decision. In view of the consistency with Morgan's views which the Court maintained in reaching its decision that substantive use of an extrajudicial identification is not hearsay, the fact that the Court went farther to indorse, maybe as dictum, the ideas which Morgan has long espoused with respect to the general area of extrajudicial statements of a witness may be of significance in indicating what answer the court might give in other cases involving the admissibility of the prior statements of witnesses.

The problem is to determine whether the Court was simply making a philosophical comment as to the unjustifiability of classifying as hearsay the prior statements of a witness-declarant, or was indorsing the bread proposition which Morgan has plainly stated: that the extra-

[44] Judy v. State, *ibid.*

[45] Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177, 192 (1948).

judicial statements of a declarant-witness are not hearsay.[46] Analysis of the court's opinion indicates that the Court may well be advancing and indorsing the broad view of Professor Morgan. It was not at all necessary that the Court hold that substantive use of an extrajudicial identification is not hearsay. The same result could have been reached by holding that admission of the extrajudicial identification as substantive evidence was an exception to the hearsay rule; this would have involved merely an extension of the position taken in the *Basoff* case.[47] Presumably, confronted with the alternative definitions and views in this area, the Court deliberately chose to adopt the Morgan definition of hearsay, and, applying that definition, concluded that substantive use of the evidence objected to was not hearsay. Almost as if to indicate that it did not intend this decision to be a mere aberration in the general area of extrajudicial statements, the Court seems, with equal deliberation, to indicate its intention that the doctrine which it has announced with respect to extrajudicial identifications will be applied also with respect to all extrajudicial statements of a witness.[48]

The effect of this is not so astounding as it might seem, at first impression. First, the rule would apply only to the extrajudicial statements of the witness himself, as to which, the witness would be present and subject to any testing required by law for determination of his competency and veracity. Secondly, even though there would be no hearsay basis for the general exclusion of such evidence, all of the other exclusionary rules would nevertheless be operative to exclude testimony which is objectionable for other reasons; irrelevancy will be the basis upon which much of this evidence can be excluded.[49] In

[46] MORGAN, SOME PROBLEMS OF PROOF (1956) 133. Quotation, *supra*, n. 30.

[47] *Supra*, n. 43.

[48] Precisely the same result would be reached under the UNIFORM RULES OF EVIDENCE (1953) which discard the traditional view excluding prior statements of a witness where the witness is available for cross-examination. The UNIFORM RULES [Rule 63 (1)], however, provide for admission of such evidence as an exception to the hearsay rule. Rather than multiplying exceptions to the hearsay rule, the approach of the Maryland Court in Judy v. State, 218 Md. 168, 146 A. 2d 29 (1958) seems much to be preferred, especially where there is equally reasonable basis for not classifying such evidence as hearsay.

[49] In Maryland, there is an additional factor imposed upon the use of prior consistent statements by 4 MD. CODE (1957) Art. 35, §3, which provides:

> ". . . nor shall it be competent, in any case, for *any party to the cause who has been examined therein as a witness*, to corroborate his testimony when impeached by proof of his own declarations or statements made to third persons out of the presence and hearing of the adverse party; . . . ." (Emphasis supplied.)

the limited area of extrajudicial identification, to which the Court's decision is necessarily limited by the facts of the *Judy* case, there is no doubt that the Court's decision is emminently sound. The indications, by way of dicta, of things which might be forthcoming, certainly vindicate Professor Morgan's early faith in the Maryland Court of Appeals.[50] One cannot avoid wondering, however, whether in a case other than one involving extrajudicial identification, the Court will hold in accord with the broad view of Morgan as to extrajudicial statements of a witness-declarant. The theoretical soundness of the Morgan view is difficult to deny, but the practical problems which might arise from its application to extrajudicial statements in general are undeniably great. On an elementary level, these difficulties are clearly dramatized in the case of a prior inconsistent statement. Under the Morgan view, the prior inconsistent statements of a witness-declarant should be admissible as substantive evidence. The present limitation of use of such statements for impeachment purposes (and the myriad limitations imposed even upon that usage) would be eradicated, and opposing counsel would be free to introduce them almost without qualification. Presumably, there would be no requirement that such prior inconsistent statements be vouched for as to accuracy by any witness at the trial. In view of the fact that the Maryland Court of Appeals has often repeated its opinion that the prior inconsistent statements of a witness are admissible only as impeaching, and not as substantive, evidence, problems of *stare decisis* also make extension of the Morgan view beyond the particular case of extrajudicial identifications (and possibly extrajudicial consistent statements, in general) improbable in Maryland.[51] Still another example of the kind of extrajudicial declaration which might conceivably be admissible under the Morgan view is the self-serving extrajudicial statement of a witness. This poses considerably less difficulty, however, for such a statement, having no special force, could easily be rejected by the court as cumulative. Perhaps all such difficulties are more illusory than real, but they arise from the law as it now exists, and any attempt to change that law will require consideration of them.

[50] *Op. cit., supra, n.* 45, 195.

[51] Recent cases so holding are: West v. Belle Isle Cab Co., 203 Md. 244, 251, 100 A. 2d 7 (1953) and Sun Cab Company, Inc. v. Cusick, 109 Md. 354, 361-2, 121 A. 2d 188 (1956).

V.

SHOULD THERE BE A HEARSAY EXCEPTION FOR EXTRAJUDICIAL IDENTIFICATION WHERE WITNESS AND DECLARANT ARE DIFFERENT?

Whether or not a witness should be permitted to testify as to an extrajudicial identification made by another person poses considerably greater problems than where declarant and witness are identical. In the *Basoff* case,[52] a policewoman was permitted to testify that the prosecuting witness had recognized the defendant's photograph among photographs of twelve other men. On appeal, the Court did not consider what difference, if any, results from the fact that it was not the declarant who was testifying as to the extrajudicial identification, but a third person who had witnessed that identification. Implicit, however, in the Court's decision is its acceptance of the idea that evidence of an extrajudicial identification may be presented either by the declarant himself or by some third person who witnessed the identification. To remove any doubt that may have existed regarding this, the Court, in *Bulluck v. State*,[53] rejected the defendant's contention that the testimony of a detective that he saw and heard the victim identify the accused in a line-up was hearsay and inadmissible. Without any discussion, the Court stated that such evidence was "clearly admissible".[54]

On its face, it would seem that testimony of this sort would involve the most flagrant violation of the hearsay rule, regardless of which definition of hearsay one chose to follow.[55] A person, not the witness, has made an out-

[52] 208 Md. 643, 119 A. 2d 917 (1956).
[53] 219 Md. 67, 148 A. 2d 433 (1959).
[54] *Ibid.*, 74.
[55] Williams v. State, 152 Ga. 498, 110 S.E. 286 (1922) (admitted evidence of an extrajudicial identification made by the witness, but indicated that it would be hearsay to attempt to establish such identification by testimony of a third person); People v. Infantino, 224 App. Div. 193, 230 N.Y.S. 66, (1928) (construing N.Y. CODE CRIM. PROC. (1953) §393-b, which had earlier been construed in People v. Spinello, 227 App. Div. 712, 102 N.Y.S. 2d 803 (1951), to authorize substantive use of extrajudicial identification the Court held that the statute permits the use of the extrajudicial statement of a *witness only*, and does not authorize testimony by a third person as to such extrajudicial identification); State v. Lanegan, 192 Or. 691, 236 P. 2d 438, 440 (1951) ("Evidence of extrajudicial identification of a defendant by a person other than the witness who testifies to such identification is hearsay, and the objection to such evidence in this case should have been sustained"); State v. Willie, 199 La. 181, 198 So. 897, 899 (1940) (quoting an earlier case, with approval — "'The contents of a letter written by a third person concerning accused cannot be read to the jury, being hearsay, unless the person who wrote the letter is produced to testify and to be cross-examined.'"); Commonwealth v. Saunders, 386 Pa. 149,

of-court statement, which was offered in evidence by the witness for the truth of the assertion which it contained. In the *Basoff* case, the Court clearly recognized that the declarant and witness were different persons, but it seemed to regard that fact as making no difference as to admissibility of the evidence. As to that case, it may be argued that no hearsay problem arises since the extrajudicial identification was accepted only as corroborative (crediting) evidence. But, the problem is clearly posed by the *Bulluck* case, where on the authority of the *Judy* case,[56] the identification was apparently accepted as substantive evidence.

For the same reasons for which it has been contended that an exception to the hearsay rule should exist to admit testimony of an extrajudicial identification, where declarant and witness are identical, one might conceivably argue also that an exception should exist to admit such testimony where the witness and declarant are different persons. It would seem that the result to be achieved in either case, supporting an identification made in court which has little testimonial force, is the same. The element of necessity, however, upon which exceptions to the hearsay rule are usually predicated, seems to be lacking. Where the declarant is available as a witness, there is no necessity for having the evidence introduced by some other person, since the same testimony can be elicited from the declarant-witness. Where the declarant is unavailable by reason of incapacitation, death or other acceptable reason, then, within the existing framework of the law of Evidence, adequate necessity might be said to exist for admitting the evidence of the extrajudicial identification through the testimony of a third-person-witness, as an exception to the hearsay rule.[57] In both of these situations, however, there looms a tremendous question as to the reliability of a third-person-witness, the possible inaccuracies of whose testimony cannot be demonstrated by cross-examination. The cross-examiner cannot show that the declarant did not observe accurately, that his powers of perception were inadequate, that his recollection is imperfect, or indeed that he was

125 A. 2d 442 (1956) (indicates clearly that testimony of a witness who merely heard or saw an extrajudicial identification made by another would be hearsay); State v. Evans, 98 Or. 214, 192 P. 1062 (1920); People v. Lukoszus, 242 Ill. 101, 89 N.E. 749 (1909).

[56] 218 Md. 168, 146 A. 2d 29 (1958).

[57] MODEL CODE OF EVIDENCE (1942) Rule 503, Admissibility of Evidence of Hearsay Declaration:

"Evidence of a hearsay declaration is admissible if the judge finds that the declarant

"(a) is unavailable as a witnesss, or

"(b) is present and subject to cross-examination."

not telling the truth. Testimony from the relation of a third person to the event, even where the declarant is known, cannot be subjected to such tests. Obviously, such testimony is subject to every conceivable hearsay objection.

The view which the Maryland court seems to adopt in the *Bulluck* case,[58] whereby a witness may testify without restriction as to an extrajudicial identification made by himself or another is not without support. The Court of Appeals for the Second Circuit and other state courts seem to have adopted a similar rule.[59] In view of the real dangers against which the hearsay rule affords protection, and in view of the fact that the hearsay statements of a declarant, offered in evidence by a witness other than the declarant, may involve such dangers, one may seriously question the advisibility of admitting such evidence except, perhaps, where the declarant is unavailable as a witness and the trial court, in its discretion, determines that the situation creates such necessity as justifies the use of such evidence.

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[58] *Supra*, n. 53.

[59] Di Carlo v. United States, 6 F. 2d 364 (2d Cir. 1925), cert. den., 268 U.S. 706 (1925); United States v. Forzano, 190 F. 2d 687 (2nd Cir. 1951); United States v. Fox, 97 F. 2d 913 (2nd Cir. 1938). At least two state courts have admitted, without comment, testimony as to an extrajudicial identification made by another: State v. Findling, 123 Minn. 413, 144 N.W. 142 (1913) (county attorney permitted to testify as to an identification made by a boy of eight); State v. Wilson, 38 Wash. 2d 593, 231 P. 2d 288 (1951) (Chief of Police permitted to testify as to an identification made by the prosecuting witness). In Johnson v. State, 254 Wis. 320, 36 N.W. 2d 86 (1949), testimony of police officers as extrajudicial identification of defendant, *held* not hearsay.