Annual Survey of Massachusetts Law

Volume 1972 Article 15

1-1-1972

Chapter 12: Evidence

Paul J. Liacos

CHAPTER 12

Evidence

PAUL J. LIACOS

§12.1. Criminal identification evidence. The United States Supreme Court announced four major decisions in the years 1967 and 1968 defining the rights of defendants in regard to so-called identification evidence.[1] The application of the principles enunciated in these cases has given the courts of the Commonwealth some degree of difficulty and has resulted in a flood of cases[2] in the Supreme Judicial Court.

United States v. Wade[3] and *Gilbert v. California*[4] established a Constitutional right to counsel at pretrial identification proceedings. In both cases, individuals who had been indicted for crimes were observed and identified by witnesses at lineups where they were not represented by counsel. The United States Supreme Court held in *Wade* that a pretrial identification procedure, such as a lineup, was a "critical stage" of criminal proceedings and that the Sixth Amendment entitled the accused to the assistance of counsel in order to counter the many dangers that such a procedure could present. Both cases ruled that it was constitutional error to admit an in-court identification in evidence where the witness had participated in a pretrial lineup or showup at which accused was unrepresented by counsel *unless* the prosecution could establish "by clear and convincing evidence" that the identification was based on knowledge which was independent of the lineup and "untainted" by that viewing. *Gilbert* further held that testimony by any witness that he identified the accused at a pretrial lineup is *excludible per se* if the accused was not represented by counsel. Because such testimony is the "direct result of the illegal lineup," the fact that there may have been an independent source of recognition is immaterial.

PAUL J. LIACOS is a Professor of Law at Boston University and a partner in the firm of Liacos & Liacos.

§12.1. [1] United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967); Simmons v. United States, 390 U.S. 377 (1968). These cases are discussed in Liacos, Right to Counsel: Line Ups and Confessions, 32 A.T.L.L.J. 561 (1968); see also 1969 Ann. Surv. Mass. Law §§12.1-12.8.

[2] See 1969 Ann. Surv. Mass. Law §12.8; 1970 Ann. Surv. Mass. Law §§15.1-15.3.

[3] 388 U.S. 218 (1967).

[4] 388 U.S. 263 (1967).

[5] 388 U.S. 293 (1967).

Stovall v. Denno[5] and *Simmons v. United States*[6] applied the Constitutional due process guarantees to pretrial identification procedures. These cases involved pretrial identification procedures which were not within the collective scope of *Wade* and *Gilbert* and the Sixth Amendment protections articulated therein. In *Stovall,* the confrontation between the witness and the accused occurred prior to a date which the Supreme Court had fixed to avoid retroactive application of *Wade* and *Gilbert.* In *Simmons,* the witnesses had identified the accused by photograph prior to his apprehension. Neither case presented circumstances requiring the Sixth Amendment protection of assistance of counsel, the Court decided. Instead, it held that due process precludes conduct by law enforcement authorities which is unnecessarily suggestive or conducive to irreparable mistaken identification. Any determination for purposes of this test must be made with regard to the "totality of circumstances" surrounding the situation.

A number of cases decided by the Supreme Judicial Court in the 1972 SURVEY year dealt with problems of criminal identification evidence raised by the cases described above.

In *Commonwealth v. Mendes,*[7] the Court held once again that *Miranda* warnings[8] alone are not sufficient to advise a criminal defendant of his right to have counsel at a pretrial identification.[9] The admission of evidence of a pretrial identification obtained without advice of the right to have counsel present at the lineup is reversible error under the per se exclusionary rule of *Gilbert.* However, the per se exclusion relates only to evidence of the illegal identification itself. A subsequent in-court identification may be admitted provided that the trial court finds the in-court identification to be untainted by the prior illegal lineup. In *Mendes* the Court discussed whether the taint had been dissipated under the test set forth in *Wade,* and found that the original record in the case was insufficient to permit a decision on that issue. It therefore reversed with directions that evidence of the pretrial illegal lineup identification be excluded in the event of a new trial. It further directed the judge to find specifically whether the in-court identification at the second trial (if any) was influenced or tainted by the witness's prior exposure to the defendant at the illegal pretrial lineup.

The *Mendes* opinion referred to *Commonwealth v. Tempesta,*[10] a case which illustrates the difficulty that courts have experienced in coming to grips with the issues presented by *Wade* and *Gilbert. Tempesta,* which also involved an illegal pretrial lineup identification procedure, had to be remanded twice. The first remand directed the trial judge to determine whether the pretrial identification was illegal, and if so whether the

6 390 U.S. 377 (1968).
7 1972 Mass. Adv. Sh. 681, 281 N.E.2d 243.
8 Miranda v. Arizona, 384 U.S. 436 (1966).
9 See also Commonwealth v. Cooper, 356 Mass. 74, 248 N.E.2d 253 (1969).
10 1972 Mass. Adv. Sh. 335, 279 N.E.2d 663.

court room identification was tainted thereby. The trial judge was not convinced that the defendant understood his right to have counsel present at the lineup, but he found that the in-court identification was untainted thereby. However, the Supreme Judicial Court remained uncertain whether the additional findings dealt with all of the factors enumerated in *Wade* and amplified by the First Circuit in *Cooper v. Picard,*[11] the case was therefore remanded for yet another round of fact finding. This time the trial judge placed the matter in a different posture, finding in exhaustive detail that the witness's in-court identification was based on a recollection which was independent of the illegal lineup and that the lineup was not sufficiently suggestive to create a substantial likelihood of irreparable misidentification. The Supreme Judicial Court accepted the trial judge's findings.

The requirements to establish on appeal that an in-court identification was shown by "clear and convincing evidence" to be of independent origin from any pretrial confrontation with a defendant were discussed at some length in *Commonwealth v. Ross.*[12] The court had the benefit not only of *Cooper v. Picard,*[13] *but also of Allen v. Moore,*[14] a subsequent First Circuit decision which elaborated the standards set forth in *Wade* for evaluating the independence of the in-court identification. The six factors mentioned in *Wade* are "(1) the extent of the witness's opportunity to observe the defendant at the time of the crime; prior errors, if any, (2) in description, (3) in identifying any other person or (4) in failing to identify the defendant; (5) the receipt of other suggestions; and (6) the lapse of time between the crime and the identification."[15] *Ross* and *Allen* indicate the primary importance of the opportunity to observe the defendant at the time of the crime: "Clearly the firmer the contemporaneous impression, the less is the witness subject to be influenced by subsequent events." The *Ross* Court also emphasized that the trial judge had made detailed factual determinations establishing a lack of taint for the in-court identification and it sustained his conclusion that "the Commonwealth had satisfied its burden of proving the independence of the in-court identifications by 'clear and convincing evidence' as *United States v. Wade* . . . requires."[16] (Citations omitted).

On another point the opinion in *Ross* specifically addressed the question of whether there is any illegality in the use of photographs from police files or elsewhere before a defendant is apprehended in an effort to identify the defendant for the purpose of making the appropriate arrest. The Court here relied upon the *Simmons* principle that such pretrial photographic identifications are not invalid per se; rather they must be

11 428 F.2d 1351 (1st Cir. 1970).
12 1972 Mass. Adv. Sh. 873, 282 N.E.2d 70.
13 428 F.2d 1351 (1st Cir. 1970).
14 453 F.2d 970 (1st Cir. 1971).
15 Id. at 975.
16 1972 Mass. Adv. Sh. at 877, 282 N.E.2d at 73.

tested against standards of due process and fairness because the right to counsel cannot apply prior to apprehension. The test of due process and fairness is whether the identification procedure was impermissibly suggestive. Finding no such impermissible suggestiveness in this case, and also being satisfied that in any event the in-court identification was proven to be sufficiently free of taint from the earlier photographic viewing, the Court affirmed the conviction.

The Supreme Judicial Court reached similar conclusions in *Commonwealth v. Finn*,[17] *Commonwealth v. Roberts*[18] and *Commonwealth v. Garvin*.[19] In each case, the defendant argued that a pretrial photographic identification had influenced or tainted a subsequent in-court identification. In each case, the trial court had applied the *Simmons* standard and found that the pretrial procedures were not unnecessarily suggestive, nor otherwise defective in a way which gave rise to substantial likelihood of irreparable misidentification. In each case, the Supreme Judicial Court upheld the findings.

These cases suggest a remarkably uniform tendency of the Supreme Judicial Court to uphold the findings made by lower courts regarding the constitutional requirements set down by *Wade, Simmons,* and related decisions. This apparent reluctance to overturn the decisions of trial judges is further manifested by two additional cases decided in July of 1972.

In *Commonwealth v. Thompson*,[20] the Court predictably affirmed a trial judge's ruling that a pretrial identification procedure (this time through a two-way mirror at a police station) was not unnecessarily suggestive nor a violation of the Fifth Amendment due process principles discussed in *Stovall v. Denno*.[21] The Court acknowledged at the outset that the weight and credibility due to oral testimony should be decided by the trial judge who hears the witnesses, and not by the Supreme Judicial Court on appellate review. It then decided that the in-court identification of the defendant by one of the witnesses was clearly and convincingly shown to be independent of the improper police station confrontation. This much of the decision is consistent with the cases described above. However, two other witnesses for the Commonwealth were also allowed to testify that they had identified the defendant at the police station before trial *despite the fact that they could not identify him at trial.* At the time of the pretrial identification, the defendant was the only black person in the room. Surprisingly, the Supreme Judicial Court allowed the conviction to stand. The purported justification for this

17 1972 Mass. Adv. Sh. 1285, 285 N.E.2d 105.
18 1972 Mass. Adv. Sh. 1477, 285 N.E.2d 919.
19 1971 Mass. Adv. Sh. 1326, 273 N.E.2d 882.
20 1972 Mass. Adv. Sh. 1503, 286 N.E.2d 333.
21 Thompson was not governed by Wade or Gilbert because the confrontations had taken place prior to the date prescribed by the Supreme Court after which the principles of those cases would govern confrontations between witness and accused.

position was Chapter 233, Section 23 of the General Laws which permits a party to contradict the testimony of his own witness by introducing in evidence proof of prior inconsistent statements made by the witness. The testimony of pretrial identification was thus treated as a prior inconsistent statement offered not for probative purposes but simply to impeach or contradict the witness. The fact that the testimony as to the pretrial identification preceded the testimony in which the witnesses were unable to identify the defendant at the trial was dismissed by the court as a matter within the sound discretion of the trial judge. Except for the fact that the improper identification took place before the date that the *Gilbert* principles became effective, this evidence would have been excluded per se—a consideration which renders the *Thompson* interpretation of the impeachment statute particularly unfortunate. The Court further suggested that any error in the admission of the prior identifications at trial was harmless beyond a reasonable doubt within the meaning of *Chapman v. California.*[22] Even if one accedes to this conclusion and assumes a correct result in *Thompson,* the case establishes a precedent of doubtful validity with regard to the use of the pretrial identification evidence and the interpretation of Section 23 of Chapter 233.

Commonwealth v. Marcotte[23] is a second questionable decision which further illustrates the danger of complete deference to a trial court's rulings. In this case, a witness testified that her in-court identification was probably aided by her viewing the defendant at a police lineup. The in-court identification was allowed anyway on the ground that the defendant had previously confessed to his participation in the crimes charged and had stated that he did not want a lawyer present at the lineup: the Court reasoned that this conduct waived the defendant's objection to the identification testimony. The decision offers nothing on the issue of whether the defendant was adequately advised of his right to counsel at the lineup, as distinguished from advice on his rights in regard to a confession. As previously indicated in discussion of the *Mendes* case, *Miranda* warnings alone are not sufficient to advise the accused of his right to counsel at a lineup. The Court in *Marcotte,* however, made no point of this at all and simply found a lack of error based on waiver of the right to counsel.

The Supreme Judicial Court's reluctance to reverse a conviction where there has been a claim of improper in-court identification, or even of improper use of pretrial identification of an accused, may be attributable in part to the great volume of cases coming before it involving the same issues. The Court remarked in *Commonwealth v. Finn,* "We have considered issues similar to those raised here in a number of cases. . . . There is no need . . . for extensive and repetitious discussion of the applicable

22 386 U.S. 18 (1967).
23 1972 Mass. Adv. Sh. 1511, 286 N.E.2d 337.

principles."[24] A harsher statement appears in *Commonwealth v. Murphy,*[25] another claim of error in identification procedure. A footnote to the decision points out that the Court had involved itself with that problem forty-seven times since the Supreme Court decisions in 1967 and 1968. The footnote was appended to the part of the decision which affirmed the conviction and denied the claim of improper use of identification evidence. Citing *Wade, Gilbert, Stovall,* and *Simmons,* the Court ruled:

> There was no error. If this disposition of the defendant's contentions seems curt, peremptory or summary, such treatment of them should come as no surprise to anyone who has read the following language from our opinion of April 10, 1970, in *Commonwealth v. Frank,* . . .: "Once again, therefore, we are referred to *United States v. Wade.* . . . This leads us to comment on the current and understandable number of matters which have reached us in recent months arising under the *Wade* case or under *Gilbert v. California* . . . or under *Stovall v. Denno,* . . . . It does not appear to us that any good purpose would be served by further distillation of the *Wade* essense. . . ."
>
> We repeat, reaffirm and emphasize the position which we stated in the *Frank* case because of the continuing stream of cases in which this court is asked to review findings of fact by trial judges of the admissibility of identification evidence in criminal cases.[26] (Citations omitted).

The "position" of *Frank* and *Murphy* is that the Court will not disturb properly stated findings of the trial judge on the question of the propriety of the pretrial identification, or the question of whether in-court identification evidence was tainted as a result.

One can understand some slight impatience in the Supreme Judicial Court regarding the proper application of the law as set out in *Wade* and other cases. However, the question of whether the safeguards defined in those cases have been preserved in a particular criminal proceeding should not be automatic or perfunctory. It is particularly important that pretrial procedures and in-court identifications, and the findings of trial courts regarding them, be scrutinized to insure that protections guaranteed by the Constitution are available to defendants in criminal proceedings. Justice Hennessey, concurring in *Murphy,* was disturbed enough about the Court's position to emphasize that the Supreme Judicial Court should do more than simply rubber stamp the findings of trial judges below:

> This court must, where justice requires, substitute its judgment for that of a trial judge at the final stage. Not every combination of subsidiary findings may be said to meet constitutional standards.

[24] 1972 Mass. Adv. Sh. 1285, 1287, 285 N.E.2d 105, 106.
[25] 1972 Mass. Adv. Sh. 1679, 289 N.E.2d 571.
[26] Id. at 1683-84, 289 N.E.2d at 574.

> The mere recital of appropriate phrases denoting constitutional acceptability may serve only to obscure error in admitting the evidence.
>
> Many pre-trial identification procedures involve some measure of suggestiveness. Frequently this is unavoidable. Probably some invalid identification methods, even more than illegal interrogation or illegal search and seizure, tend to create evidence of guilt where none existed before. It is vital that a judge's findings and rulings generated by consideration of the principles of the *Wade, Stovall* and *Simmons* cases should not become pro forma exercises.[27]

Mr. Justice Hennessey's position should emphasize the grave responsibility of our Supreme Judicial Court, whether it is dealing with the *Wade-Gilbert* exclusionary rule or with the *Stovall-Simmons* due process rule, to thoroughly and independently evaluate whether a defendant's constitutional rights have been protected by the court below.

A factor which must weigh against the interests of defendants-appellant in pretrial identification cases, however, is the shift of position of the United States Supreme Court exemplified in *Kirby v. Illinois*.[28] The facts in *Kirby* were similar to those of *Wade* and *Gilbert* in relevant aspect except that the identification proceeding took place *prior to the indictment* of the accused. The question presented was whether the per se exclusionary rule of *Gilbert* should apply to testimony of an identification proceeding conducted before an indictment when the accused is unrepresented by counsel. The plurality[29] decided that it should not. Though the *Wade* and *Gilbert* opinions had not attached any great importance to the fact that the lineups in those cases took place at the post indictment stage, Justice Stewart fixed upon that distinction in *Kirby* to establish a point prior to which the Sixth Amendment guarantee of right to counsel will not attach.[30] In a vigorous dissent,[31] Justice Brennan stated, "[I]t should go without saying . . . that *Wade* did not require the presence of counsel at pretrial confrontations for identification purposes simply on the basis of an abstract consideration of the words 'criminal prosecution' in the Sixth Amendment."[32] He argued that the *Kirby* facts were fully within the intent and purview of *Wade* and *Gilbert*.[33]

A number of courts had proceeded under the same misapprehension,[34]

27 Id. at 1686-87, 289 N.E.2d at 578.

28 406 U.S. 682 (1972).

29 The Chief Justice and Justices Blackmun and Rehnquist concurred in Justice Stewart's opinion. Justice Powell concurred in the result.

30 The fact that the accused was under arrest at the time the identification was made was apparently of no importance on this issue.

31 Justices Douglas and Marshall joined. Justice White felt that the Wade and Gilbert decisions governed the Kirby case, and dissented separately.

32 406 U.S. 682, 697.

33 For a critical view of what the Supreme Court has done in Kirby, see Note, The Supreme Court, 1971 Term, 86 Harv. L. Rev. 50, 156-164 (1972).

34 406 U.S. 682, 687 n.5.

the Supreme Judicial Court among them. In *Commonwealth v. Guillory,*[35] the *Wade* and *Gilbert* standard was applied to an identification which preceded indictment. The situation in *Guillory* is distinguishable from that in *Commonweath v. Bumpus*[36] where the confrontation without counsel had occurred almost immediately after the commission of the crime. In the latter instance, the Court applied the *Stovall* test to judge the situation on the "totality of the circumstances" and determine whether there was an impermissible suggestion in this confrontation which would violate due process of law. The position taken by the Supreme Judicial Court in the *Bumpus* and *Guillory* decisions was based on a commonsense approach to the entire problem, and not on a technical question of indictment or complaint.

Unfortunately, the Massachusetts Supreme Judicial Court reconsidered its position in regard to preindictment identification situations in *Commonwealth v. Lopes,*[37] decided in September 1972.[38] Lopes was charged with assault with a dangerous weapon and rape of female child under the age of 16 on October 24, 1970. He was viewed by the victim through a two-way mirror in the New Bedford Police Station on January 17, 1971. The victim also viewed the defendant at a district court hearing on January 20, 1971 and at a subsequent trial on March 4, 1971. The victim's identification testimony was obviously crucial to the outcome. The case was tried and the appeal argued after the decisions in *Wade,* and *Gilbert* and *Stovall,* but before the decision in *Kirby.* The defendant moved to suppress the pretrial identification testimony of the victim on the ground that he had not been informed of his right to have an attorney present during any confrontation. The trial judge denied the motion on the ground that defendant had waived his right to have counsel present at these pretrial identification procedures. When the case reached the Supreme Judicial Court, the defendant pressed his argument that the identification testimony should not have been allowed at trial. The Supreme Judicial Court noted that the lineup in question took place after arrest but before the defendant had been indicted or otherwise formally charged with any criminal offense. Relying on *Kirby,* the Court ruled that the per se exclusionary rule did not apply before indictment, and that its prior decisions in *Commonwealth v. Guillory,*[39] *Common-*

[35] 356 Mass. 591, 254 N.E.2d 427 (1970). See also Commonwealth v. Mendes, 1972 Mass. Adv. Sh. 681, 281 N.E.2d 243. Commonwealth v. Cooper, 356 Mass. 74, 248 N.E.2d 253 (1969).

[36] 354 Mass. 494, 238 N.E.2d 343 (1968).

[37] 1972 Mass. Adv. Sh. 1571, 287 N.E.2d 118.

[38] Other identification cases came before the Supreme Judicial Court between the Kirby and Lopes decisions, but arguably, none were squarely within the ambit of Kirby. See, e.g., Commonwealth v. Kirker, 1972 Mass. Adv. Sh. 1281, 285 N.E.2d 108, where the constitutional issue of the legality of the identification procedure was avoided because evidence on the point had been elicited by defense counsel on cross examination.

[39] 356 Mass. 591, 254 N.E.2d 427 (1970).

wealth v. Cooper[40] and *Commonwealth v. Mendes*[41] would no longer be followed to the extent that they assume a right to counsel for identification procedures at an earlier stage of prosecution. It was therefore unnecessary to consider the validity of the effect of the waiver found by the trial judge. Applying the *Kirby* standard of due process, the Court found that the defendant was entitled to relief if the confrontation in the totality of the circumstances was "so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law."[42] This was, of course, the familiar rule, already applied in cases where *Wade* and *Gilbert* did not apply.[43] In *Lopes,* the identification took place two and a half months after the crime, and the police had used a lineup rather than a one-to-one confrontation, sometimes called a showup. Moreover, the trial judge found that the defendant, although viewed through a two-way mirror, had been advised that he was in a lineup for the purpose of identification, and also that the victim's identification at the police station was positive, consistent and unshaken. Relying on these findings, the Court found no basis for concluding that the lineup was impermissibly suggestive. The First Circuit's prior condemnation of two-way mirrors in *Allen v. Moore*[44] did not bother the Court unduly. So long as the defendant knew that he was being so viewed, the Supreme Judicial Court saw no "flagrant constitutional violation" even though the accused was without counsel. Indeed the *Lopes* opinion seemed to find some great value on the use of two-way mirrors to protect witnesses from fear of harassment and retaliation.

It is unfortunate that our Supreme Judicial Court is taking the position that it need only follow the minimal standards set forth in *Kirby* for administration of criminal justice. *Kirby* is a poorly reasoned decision which obviously marks the shift of political tides in the composition of the Supreme Court. It has effectively removed from defendants some measure of protection in a most crucial aspect of a criminal prosecution. To say that the right to counsel does not attach because there is no formal charge or indictment flies in the face of reality, not to mention the prior decisions of both the United States Supreme Court and the Supreme Judicial Court of this Commonwealth. An accused who is under arrest is being held on a probable cause, and as far as he and the State are concerned the criminal process against him has commenced. Otherwise he would not be so held. While the per se exclusionary rule of *Wade* and *Gilbert* presents some difficulties of administration, the shifting of a large number of cases into a more ambiguous due process standard creates at least as many problems as it resolves. The "totality of the cir-

[40] 356 Mass. 74, 248 N.E.2d 253 (1969).
[41] 1972 Mass. Adv. Sh. 681, 281 N.E.2d 243.
[42] 1972 Mass. Adv. Sh. 1571, 287 N.E.2d 118.
[43] See, e.g., Commonwealth v. Bumpus, note 36, *supra;* Commonwealth v. Thompson, note 20, *supra.*
[44] 453 F.2d 970 (1st Cir. 1972).

cumstances" test or the due process test of *Stovall v. Denno* leaves a fluid and ambiguous situation in which neither trial judges nor defendants, nor even the prosecution, have a clear idea of where they stand. It should be obvious in the wake of *Kirby* that most pretrial identifications will now be scheduled prior to indictment.[45] By its retreat in the face of *Kirby,* the Supreme Judicial Court has elected not to join those courts of other states that have been willing in this or in other areas to take the lead in setting a standard of fairness for the administration of criminal justice.[46]

§12.2. Privilege against self-incrimination. In the summer of 1971 an investigation was begun by the Chief Justice of the Massachusetts Superior Court into allegations of professional misconduct on the part of two justices of that court. During the course of the investigation, the Chief Justice interrogated one I. Charles Baker on August 25, 1971. Baker had also been interrogated by the State Police on August 5, 1971. When the matter came before the Supreme Judicial Court for a hearing, Baker invoked his Fifth Amendment privilege against self-incrimination. His refusal to answer questions at the Supreme Judicial Court hearing, in light of his willingness to answer questions at the two earlier interrogations, and the extent to which his previous answers constituted a waiver of his Fifth Amendment privilege were the principal issues in the case of *In the Matter of Edward J. DeSaulnier, Jr.*[1]

Although the opinion does not state exactly what matters Baker was trying to shield in the Supreme Judicial Court hearing, it can be inferred that he sought to be excused from testifying about a number of possible criminal activities, some committed by him prior to January 1, 1965, and others allegedly committed after January 1, 1968 (for which he was then under indictment in the superior court). The Court disposed of the post-1968 crimes by saying that Baker's liability for testifying about them was regulated by a binding stipulation between him and the District Attorney, assented to by the Attorney General. This stipulation precluded the use of Baker's testimony or any evidence discovered as a consequence thereof in any indictment charging larceny or conspiracy subsequent to January 1, 1965.[2] As for the pre-1965 crimes, the time had elapsed within which a criminal prosecution could have been brought against him for those activities and the court held that he was precluded from asserting the privilege against self-incrimination when asked to testify about them.

[45] "As the California Supreme Court pointed out, with an eye toward the real world, 'the establishment of the date of formal accusation as the time wherein the right to counsel at lineup attaches could only lead to a situation wherein substantially all lineups would be conducted prior to indictment or information.' People v. Fowler, 1 Cal.3d 335, 344, 82 Cal. Rptr. 363, 370, 461 P. 2d 643, 650 (1969)." Kirby v. Illinois, 406 U.S. 682, 699 n.8 (Brennan, J., dissenting).

[46] See, e.g., State v. Collins, 297 A.2d 620 (Maine 1972).

§12.2. [1] 1971 Mass. Adv. Sh. 1689, 276 N.E.2d 278.

[2] Id. at 1695, 276 N.E.2d at 282.

The denial of Baker's general claim of privilege was consistent with established practice in this Commonwealth. In 1964 the Supreme Court, in *Malloy v. Hogan*,[3] extended the Fifth Amendment to the states via the Fourteenth Amendment. In *Commonwealth v. Baker*,[4] the Supreme Judicial Court held that the federal standards announced in *Malloy* must be used to determine whether a claim of privilege is justified. The essence of *Malloy* and *Baker* is that the privilege against self-incrimination will be sustained where it is evident from the implications of the question, in the setting in which it is asked, that a responsive answer to it or an explanation of why it cannot be answered might constitute an incriminating disclosure.[5] To deny the privilege, the judge must be certain that the answers cannot possibly tend to incriminate the claimant. Since the statute of limitations had run on all of Baker's pre-1965 crimes, he could not be prosecuted for them and hence he would incur no risk by testifying directly about them. If testimony of former crimes linked him in some way to more recent crimes for which he could still be prosecuted, the stipulation of immunity would release him from liability.

If the Court had limited its decision to a denial of Baker's claim of privilege, it could have avoided the question of the extent to which Baker's answers to questions at the two earlier interrogations prevented him from raising the Fifth Amendment at the subsequent hearing. However, in an unusual move, the Court went out of its way to say what it would have decided if it had chosen to deal with the issue of waiver.

The Court began by saying that Baker's answers to the Chief Justice and to the State Police did not constitute a general waiver for all purposes of his privilege against self-incrimination. In attempting to formulate a guiding principle, it rejected as too mechanical the rule laid down in other jurisdictions that waiver of the privilege against self-incrimination must occur in precisely the same proceeding in which the privilege is claimed. Instead, it proposed that:

> Where a witness assisted and advised by counsel has testified in proceedings or investigations obviously directed to the subject matter of an inquiry or an issue later before a court, and where the prior testimony has been recorded by a competent stenographer or has been written out in the presence of the witness, the witness's privilege is to be deemed waived (a) at least to the extent of the subject matter of the questions which he has answered, (b) where the proceeding in which the privilege is invoked is a probable, logical, or natural continuation or outgrowth of the proceeding or inquiry in which prior testimony has been given by the witness.[6]

The Court's suggestion is an adaptation of the rule announced in

[3] 378 U.S. 1 (1964).
[4] 348 Mass. 60, 201 N.E.2d 829 (1964).
[5] See Hoffman v. United States, 341 U.S. 479 (1951).
[6] 1971 Mass. Adv. Sh. at 1693, 276 N.E.2d at 281.

Ellis v. U. S.,[7] where the court declined to let a witness invoke the Fifth Amendment at a trial on an indictment returned by a grand jury when the witness had testified before that grand jury without then invoking the Fifth Amendment. The suggestion here amplifies the *Ellis* rule by adding that the waiver occurs only when the witness is assisted by counsel in his testimony and his answers are recorded. The version adopted by our Court seems much superior to that of the *Ellis* court. While its view is dictum, it seems clear that the Court was seeking to establish a reasonable guideline to govern any such similar matters as may occur in the future. To this extent, it has helpfully clarified local law in a difficult area.

§12.3. Juvenile delinquency proceedings. In *Commonwealth v. A Juvenile*,[1] the court interpreted some aspects of the special evidentiary laws which govern juvenile delinquency proceedings. After a heading in the juvenile session of the district court, the defendant juvenile was adjudicated a delinquent in that he did commit murder. The defendant appealed to superior court and was adjudicated a delinquent on the same basis by a jury verdict. He appealed to the Supreme Judicial Court and assigned as error, among other things, a ruling that he was not allowed to use the transcript of evidence from the district court hearing in the cross-examination of witnesses in superior court. A further assignment of error related to allowance of testimony on behalf of the Commonwealth by the same witnesses who had previously testified against him in the district court.

In considering the defendant's assignments of error, the Court dealt with G.L., c. 119, §60, which says that any adjudication of a child as a delinquent, or disposition thereunder of any child so adjudicated, or any evidence given in a delinquency hearing shall not be lawful or proper evidence against such child for any purpose in any proceeding in any court. The statute further provides that records in delinquency cases cannot be received in evidence or used in any way in further court proceedings against the child except in subsequent delinquency proceedings or in imposing sentence in a criminal proceeding.

The Court first said there was no merit in the juvenile's contention that witnesses who testified in district court were disqualified from testifying in superior court on the basis of the above statute. The seeming premise behind this contention was that if a witness testified in a delinquency hearing in district court and then testified again on the same case in superior court, his superior court testimony became "evidence" against the child drawn from the first stage of the delinquency proceeding and used against him in a further court proceeding. If this position were to prevail it would mean that only a fresh group of witnesses would be allowed to testify in the superior court, and the prosecu-

[7] 416 F.2d 791 (D.C. Cir. 1969).

§12.3. [1] 1972 Mass. Adv. Sh. 361, 280 N.E.2d 144.

tion would be required to hold back some of its witnesses from the district court proceeding on the assumption that the case might eventually reach the superior court. Such a construction would render the statute ludicrous.

In dealing with the defendant's other assignment of error, the Court said that it was error to prevent him from using the transcript of the delinquency hearing in the district court to impeach the credibility of witnesses for the Commonwealth in the superior court. Although it is not clear from the opinion, it appears that the judge in the superior court proceeding deemed the hearing in his Court a "proceeding in any court" so that the "evidence given in [the] delinquency hearing" against the defendant could not be used. The Supreme Judicial Court said this was an erroneous construction of the statute, because the section's proscription against use of evidence does not apply to further stages of the original delinquency complaint, including its trial on appeal in superior court and any appeal that might be taken to the Supreme Judicial Court. Failure to let the defendant use the transcript required reversal of the judgment and a new trial.

The Court's decision draws a circle around the entire proceeding on the delinquency complaint and makes it one judicial unit so that evidence obtained on the first level can be used on succeeding levels. This holding follows logically from the court's finding that witnesses who testify on one level can testify throughout. This situation differs, of course, from the one where the original delinquency complaint has been dismissed, and the defendant juvenile is held on an independent criminal complaint.[2] Evidence obtained at the hearing on the criminal complaint, if otherwise competent, is admissible; but evidence from the dismissed delinquency hearing is not.[3]

It is interesting to note that Section 60 only prohibits the use of evidence obtained in a delinquency hearing *against* the child. Here the defendant argued that he should be allowed to use the evidence *for his own purposes*. Although the Court held the lower court's construction of Section 60 inapplicable on broader grounds, the decision reaffirms the defendant's right to use prior inconsistent statements to impeach opposition witnesses, in accordance with the established practice. The Court indicates that this would be permitted even apart from the broad construction of Section 60. The Court's position in this regard is also obviously the only logical one.

§12.4. Criminal discovery. Several noteworthy decisions in the area of criminal discovery were announced by the Court in the current survey year.

Grand jury minutes. The necessity of showing "particularized need"[1]

[2] See G.L., c. 119, §75.

[3] Commonwealth v. Wallace, 346 Mass. 9, 16, 190 N.E.2d 224, 228 (1963).

§12.4. [1] For a detailed examination of the "particularized need" doctrine in both the federal area and in Massachusetts, see §7.7, *supra*.

in order to inspect grand jury minutes was the issue before the court in *Commonwealth v. DeChristoforo*.[2] The defendant and two others, Oreto and Gagliardi, were discovered by police to be riding in a car with the body of a man who had been shot to death. All three were indicted for first degree murder and illegal possession of firearms. Oreto was tried separately and pleaded guilty to second degree murder and the gun charges. Gagliardi and the defendant were tried together. At trial the Commonwealth conceded that Oreto and Gagliardi had fired the fatal shots, but it used evidence given by the arresting officer to connect the defendant with the plan to kill the deceased. Defendant claimed that he had nothing to do with the killing, but was only in the car for a ride home. In an attempt to impeach the officer's testimony, he argued that there were inconsistencies between the officer's testimony at trial and his testimony at an earlier probable cause hearing, and further that the officer's police report of the incident was also inconsistent with his trial testimony.

The defendant filed two pretrial motions to inspect the minutes of the officer's testimony before the grand jury; both were denied. He renewed his motions during cross-examination of the officer at the trial, and moved in the alternative that the judge make an *in camera* inspection of the minutes. These motions too were denied. The court held that the defendant had shown no "particularized need" to see the grand jury minutes, ostensibly because neither of the prior inconsistent statements was made as part of his testimony before the grand jury. Other factors diminishing the claim of "particularized need" were the defendant's ability to use the inconsistencies between the officer's probable cause testimony and trial testimony, and the fact that the inconsistencies in the police report were clarified at the trial. The fact that the police officer had earlier attributed an inculpatory statement to Oreto (at the probable cause hearing) rather than to the defendant, as he did at the trial, seemed neither to impress the trial judge nor, ultimately, the majority of the Court. Neither was it significant to the trial judge or the majority that Gagliardi pleaded guilty to second degree murder and the firearms charges at the close of all the evidence, and that the jury had knowledge of that fact.

The defendant was convicted of first degree murder and illegal possession of firearms. He pressed several matters on appeal, including a claim of error in the denial of his motions for access to the grand jury minutes. The Court found no error, deciding that the defendant had shown no "particularized need" to inspect grand jury minutes. While the Court purported to follow the reasoning of previous Massachusetts decisions requiring "particularized need," the test itself is uncertain at best. It has evolved in Massachusetts to apply in an especially narrow and mechanical fashion. The only recent case which acknowledged a

[2] 1971 Mass. Adv. Sh. 1707, 277 N.E.2d 100.

"particularized need" was *Commonwealth v. Carita,*[3] where a witness who had testified before the grand jury gave testimony at trial and then admitted that she had not given that same information to the grand jury. Since a defendant cannot inspect the grand jury testimony as a matter of right, it thus appears that he can only demonstrate "particularized need" if a witness admits his inconsistencies on the stand.

The inadequacy of this standard was emphasized in Justice Spiegel's strongly worded dissent in which the Chief Justice joined.[4] The majority had said that the defendant was not entitled to disclosure because he did not show that the grand jury minutes would cast further light on any of the alleged inconsistencies of the witness, or that the grand jury testimony given by the witness was inconsistent with his trial testimony. How, asked Justice Spiegel, could any defendant possibly know these things unless he first inspected the grand jury minutes, unless he were equipped with supernatural powers, or unless the witness admitted his inconsistencies on the stand? He also cited a number of federal cases holding that the defendant does have the right to examine a government witness's grand jury testimony once the witness has testified at trial.[5] The modern and realistic view of the matter is recognized by Justice Spiegel in citing the American Bar Association Standards Relating to Discovery and Procedure Before Trial §2.1(2)(iii), at 13 (Approved Draft 1970). Under this view, already adopted by several states, defendants may inspect before trial any portions of the grand jury minutes pertaining to witnesses whom the prosecution intends to call at trial. But one need not go this far, as Justice Spiegel recognized. In *DeChristoforo,* the witness had already testified and the reasons for preserving grand jury secrecy as to the testimony of that witness had clearly ceased to exist.[6] The majority's holding amounts to a flat prohibition against disclosure. It overlooks a number of Massachusetts cases holding that the trial judge should at least read the grand jury minutes upon request to determine if there is an inconsistency between a witness's testimony before the grand jury and his testimony at trial.[7] If the Court will not make the minutes available to the defense where the witness has testified, it should at least require the trial judge to examine them *in camera* to determine if a "particularized need" exists.

Evidence favorable to the defense. In *Commonwealth v. Roberts,*[8] a defendant under 17 years of age appealed his conviction in superior

[3] 356 Mass. 132, 249 N.E.2d 5 (1969).

[4] 1971 Mass. Adv. Sh. 1707, 1724, 277 N.E.2d 100, 112.

[5] See, e.g., Harris v. United States, 433 F.2d 1127, 1128-29 (D.C. Cir. 1970); United States v. Amabile, 395 F.2d 47, 53 (7th Cir., 1968); United States v. Youngblood, 379 F.2d 365, 370 (2d Cir. 1967). See also FED. R. CRIM. p. 6(e).

[6] See 1971 Mass. Adv. Sh. 1707, 1727, 277 N.E.2d 100, 114.

[7] See Commonwealth v. Doherty, 353 Mass. 197, 229 N.E.2d 267 (1967); Commonwealth v. Abbot Engineering Inc., 351 Mass. 568. 222 N.E.2d 862 (1967); Commonwealth v. Kiernan, 348 Mass. 29, 201 N.E.2d 504 (1964).

[8] 1972 Mass. Adv. Sh. 1477, 285 N.E.2d 919.

court for armed robbery, assigning as error the failure to quash his indictment on the ground that the police prosecutor at his juvenile court hearing did not disclose to defense counsel that two eyewitnesses had failed to select the defendant's photograph from a group of three or four photographs shown to them by police on the evening of the robbery, and had later selected two from a group of two hundred pictures at police headquarters which "looked like . . . the two boys."[9] Neither picture selected was that of the defendant. The defendant claimed that the failure to disclose this information to his counsel constituted suppression of evidence "material to the decision of the juvenile court judge to dismiss the delinquency proceedings and order the issuance of a criminal complaint." Relying on *Brady v. Maryland*,[10] and subsequent federal cases, he argued that this suppression was a denial of due process under the Fourteenth Amendment to the United States Constitution. The Commonwealth countered this contention by arguing that the due process requirements of *Brady* and later decisions do not apply because the question of guilt or innocence is immaterial to a juvenile court hearing such as that in question; the purpose of such proceedings is "merely to decide whether [to try] the defendant . . . as a delinquent child or a criminal offender."[11] The Court did not deal with the Commonwealth's contention. Rather it based its decision on a finding that, even if juvenile hearings were within the ambit of the due process requirements of *Brady*, the nondisclosure of evidence in the instant case did not warrant reversal. Citing *U.S. v. Keogh*[12] and *Commonwealth v. Earl*,[13] the Court said there was no evidence that this was a deliberate refusal to disclose evidence after a request or a deliberate attempt by the prosecution to withhold knowledge of its existence. The prosecutor at the hearing was a police officer rather than an attorney. The Court pointed out that he may have failed to appreciate the use to which the defense counsel might have put the evidence and assumed it was of no consequence since the two witnesses who had previously failed to select the defendant's photo, as well as three other witnesses, had identified the defendant in person. The Court thus applied the *Keogh* standard: where the suppression was not deliberate and no request was made for the material, a substantially higher probability that disclosure of the evidence would have altered the result is required. Since three other eyewitnesses identified the defendant, the Court was convinced "beyond a reasonable doubt" that there was no such probability that disclosure would have altered the result.

The precise implications of the *Roberts* decision remain unclear. If the failure to disclose the evidence was held harmless error because it was not sufficiently probable that disclosure would have altered the re-

9 Id. at 1479, 285 N.E.2d at 922.
10 373 U.S. 83 (1963).
11 1972 Mass. Adv. Sh. 1477, 1480, 285 N.E.2d 919, 922.
12 391 F.2d 138 (2d Cir. 1968).
13 1972 Mass. Adv. Sh. 1081, 283 N.E.2d 677.

sult, the decision is probably correct. However, the opinion suggests that there was no violation of due process because the prosecutor had *no duty* to disclose the evidence. If this is what the opinion means, it overlooks the distinction between the type of evidence suppressed in *Keogh* and that in the present case. The evidence in *Keogh* was an FBI report on the financial status of one of the government witnesses and it was not on its face favorable to the defendant. It later turned out that Keogh could have used the information to his advantage, but the prosecutor might reasonably have overlooked the value of the information. Here, however, the prosecutor could not fail to know that a misidentification would help the defense. In *United States v. Deleo,*[14] also cited in *Roberts,* the court of appeals decided upon similar facts, not that there was no duty to disclose this material, but that the failure to do so was harmless error.

Although the result in *Roberts* is probably correct, the Court should have clarified the prosecutor's duty to disclose evidence that might be helpful to the defense. The objectives of *Keogh* are laudable: to balance the rights of the defendant against the burden on the prosecution and preserve the finality of judgments. Nevertheless, the usefulness of a prior misidentification by a witness is obvious and the defendant should not be made to suffer because the prosecutor lacks legal competence.

In *Commonwealth v. Thompson,*[15] the Court also considered a due process claim predicated upon *Brady v. Maryland.*[16] Like *Roberts* the evidence related to identification. Unlike *Roberts, Thompson* involved a superior court trial of an adult on charges of assault and battery and assault and battery by means of a dangerous weapon. Presumptively, the prosecutor in this case was neither inexperienced nor unaware of the full extent of his prosecutorial responsibility for a fair trial.

After Thompson had been convicted he filed two motions for a new trial alleging newly discovered evidence. Each motion was accompanied by an affidavit of one Bolis. In substance, the affidavits stated that the affiant had been present at the scene of the alleged assault, and that after viewing the defendant through a two way mirror at police headquarters, he stated to police that defendant had not been present at the scene. Both motions were denied. While the Court on appeal discounted the significance of the first affidavit, it admitted that the second affidavit contained on its face evidence "very favorable" to the defendant which "might indeed be material to the issue of guilt." However, it denied the appeal on the ground that the trial judge could and did disbelieve the second affidavit. His finding could be upheld in light of the principles that the validity of such affidavits are matters to be determined in the trial judge's discretion.[16] By taking this stance, the Court was able to avoid the main thrust of defendant's argument, namely, that this was

14 422 F.2d 487, 498-99 (1st Cir. 1970).
15 1972 Mass. Adv. Sh. 1503, 286 N.E.2d 333.
16 373 U.S. 83 (1963).

not merely a case where a new trial was warranted because of newly discovered evidence, but one of prosecutorial misconduct in failing to disclose evidence favorable to the defense prior to or during the trial. Thus, the impact of the constitutional rule of *Brady v. Maryland* was avoided, and the real issue apparently unresolved.

§12.5. Statutory Changes. During the 1972 SURVEY year, the legislature made a number of changes in G.L., c. 90, §24, which deals with drunk driving. One addition to the statute makes a certificate by a chemist of the Department of Public Safety, containing the results of his analysis of the percentage by weight of alcohol in the blood of a defendant, prima facie evidence of such percentage.[1] Another change in the statute lowers the prima facie level of presumption of operating under the influence of intoxicating liquor from a percentage of 15 one-hundredths to 10 one-hundredths by weight of alcohol in a defendant's blood.[2] The third change deals with a person's refusal to submit to a blood alcohol test or breath analysis. Before the latest change, a person who drove upon a public way in the Commonwealth was deemed to have consented to submit to such test if he was arrested for driving a car while under the influence of liquor. A person who refused to submit to a test could not be compelled to do so, but his refusal was duly noted in a written report made by the police officer before whom such refusal was made. The person was then subject to suspension of his license for ninety days. Under the amended provision, the arresting officer must inform the person of the ninety day suspension which follows a refusal to undergo the test. Furthermore the report of the arresting officer must be endorsed by a third person who witnessed the refusal.[3] The amendment adds the kind of due process safeguards that are necessary in a statute that prescribes summary and discretionary sanctions.

Two other statutes utilizing the approach of "prima facie evidence" were enacted. Chapter 252 of the Acts of 1972 amends G.L. c. 147 by inserting Section 4F providing that a certificate by a chemist of the Department of Public Safety showing the presence of sperm cells or seminal fluid in any material or substance furnished by a police officer of any department shall be prima facie evidence of the same if the certificate is signed and sworn to by such chemist. Chapter 268 of the Acts of 1972 adding Section 121A to G.L. c. 140, has a similar effect with regard to ballistics results certified by ballistics experts of the Department of Public Safety provided such expert had previously qualified as such in a court proceeding.

Finally, we note that one of the Commonwealth's most peculiar ways of impeaching the credibility of a witness may soon be no more than a

[17] Commonwealth v. Heffernan, 350 Mass. 48, 53, 213 N.E.2d 399, 403 (1966).

§12.5. [1] Acts of 1972, c. 376.
[2] Acts of 1972, c. 488, §1.
[3] Acts of 1972, c. 488, §2.

historical relic: the legislature has passed a resolve providing for an investigation into the feasibility of prohibiting admission of evidence of a witness' disbelief in the existence of God as a means of affecting his credibility.[4]

[4] Resolves of 1972, c. 39, Cf. G.L., c. 233, §19. See also, LEACH AND LIACOS, HANDBOOK OF MASSACHUSETTS EVIDENCE 126-127.