Memorandum of Pennsylvania Law on Identification

A Defense View

JUNE, 1977

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PUBLIC DEFENDER ASSOCIATION OF PENNSYLVANIA
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Financial assistance for the preparation of this memorandum was received from the Governor's Justice Commission under DS-75-C-7A-9-628.

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INTRODUCTION

This memorandum is intended to survey the current law relating to eye-witness identification evidence, as presented in Pennsylvania cases. The coverage is reasonably comprehensive, with emphasis placed not only on the constitutional questions addressed in the Wade-Gilbert-Stovall trilogy. but also on such other areas as sufficiency of evidence, jury instructions, non-constitutional evidentiary problems and nuts and bolts procedure. While the bulk of the material is presented in black letter law style, with citations to specific cases for further reference by the practitioner, unsettled areas have been given more analytic treatment. It is hoped that this approach will provide defense counsel with ammunition for innovative representation as well as ready access to helpful caselaw for dealing with the common identification issues.

I. THE RIGHT TO DEMAND OR REFUSE A LINEUP

A. Requesting A Lineup Or Other Pre-Trial Confrontation

One of the most crucial concerns of a lawyer is not to have his client suggestively displayed to a witness at the first court procedure, especially where there has been no previous identification procedure. Until recently, a criminal defendant was not thought to have a right to demand a lineup before this initial courtroom confrontation (e.g. the preliminary hearing).

Earlier cases did discuss this issue. The United States Circuit Court of Appeals for the District of Columbia voiced its concern over the possibility that if a defendant were to appear at a preliminary hearing without counsel having first been appointed for him, then the possibility of his being singled out at the preliminary hearing would be great. The Court felt that this was unfair in an identification case. So, while the issue before the court had to do with the right to counsel, the court thought that if counsel were appointed before the preliminary hearing, counsel could help protect his client from being suggestively presented to the witness. The court thought that a request for an impromptu or formal lineup would be an appropriate request in identification cases. Mason v. United States, 414 F.2d 1176 (D.C. Cir. 1969).

In other situations, defendants have asked motion-to-suppress courts and trial courts to allow them to sit among the spectators during the testimony of the identification witnesses. The Third Circuit has said that such a request is within the sound discretion of the trial court. United States v. Edwards, 439 F.2d 150 (3rd Cir. 1971). In Commonwealth v. McGonigle, 228 Pa. Super. 345, 323 A.2d 733 (1974) the Superior Court could find no authority requiring that the defendant's request be granted. It did not foreclose the issue completely; but rather, found that since the complainant had previously made a tentative photo identification of the defendant, his request to sit among the spectators was not improperly denied.

In Commonwealth v. Evans, 460 Pa. 313, 333 A.2d 743 (1975), the defendant argued to the Supreme Court that he had a constitutional right to a lineup. Apparently, this argument was based on the Fourteenth Amendment's guarantee to due process of law. The court simply said that it could "find no support in law for this proposition."[1]

Shortly after Evans, the Pennsylvania Appellate Courts handed down two decisions with probably the strongest language up to that date concerning a defendant's

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[1] The Evans opinion does not disclose whether there ever was a timely request for a pre-trial lineup.

right to demand a fair confrontation procedure. Both cases were also bottomed on due process claims, but this time, the nature of the claims were more specifically stated.

Relief was granted by the Supreme Court in Commonwealth v. Wilder, 461 Pa. 597, 337 A.2d 564 (1975), a rather unusual case, where the court found a violation of - essentially - a Brady due process right.[2] In Wilder, the complainant was shot. He said that he had been shot by "two black kids." Shortly after the shooting Wilder was found as a passenger in a car similar to the described getaway car. The weapon used was found in the car. Wilder claimed that he had just gotten into the car before he was arrested and that therefore he could not have been one of the two black males seen driving away from the scene. He demanded a confrontation with the complainant. The complainant was in the hospital, but apparently well enough to talk to people. The police refused, and the complainant died twenty-four days after the shooting, without participating in a confrontation.

In analyzing this situation, the court first recognized the Brady principle that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt." Second, the court held that the police action in denying the requested confrontation was, for all intents and purposes, action by the "prosecution" Next, the court cited Commonwealth v. Smith, 417 Pa. 321, 208 A.2d 219 (1965) for the proposition that "state refusal to obtain disclosure of vital information may amount to a trial lacking due process." Finally, the court cited Lewis v. Lebanon Court of Common Pleas, 436 Pa. 296, 260 A.2d 184 (1969) for the proposition that the prosecution could not interfere in the right of the defendant to have access to an otherwise willing witness. Putting these principles together (and in noting that Wilder was almost forty years old in a case where the twenty-three year old victim had said that two "kids" had shot him) the court noted that the evidence (the confrontation) sought by Wilder had "at least the potential for exculpation", and that the police refusal to allow the confrontation "effectively precluded" the confrontation.

After stating that the police could only refuse to allow the confrontation where the victim is unable to cooperate in the confrontation, the case was remanded for findings of fact concerning this issue. Justices Roberts and Manderino, concurring, pointed out that if the confrontation had been improperly denied, the appropriate remedy would be a discharge, because, since the complainant had died, Wilder now would never be able to receive a fair trial.

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2 Wilder was convicted of murder. He filed a PCHA petition alleging the unconstitutional suppression of evidence by the Commonwealth.

Finally, while the facts of this case indicated a good chance that the confrontation would result in evidence favorable to the defendant, the Smith and Lewis cases relied upon by the court do not require any kind of "apparent" or "prima facie" finding that the evidence would be favorable to the defendant. The Smith court, in holding that the defendant was entitled to eyewitnesses' statements to the Federal Bureau of Investigation, did not require the defendant to show that the statements actually contradicted the eyewitnesses' trial testimony. Similarly, the Lewis court stated that "if it is possible that [the witness] might have evidence which is favorable to the defendant, then the suppression of that evidence may well constitute a denial of due process" 436 Pa. 296, 302.

While the Wilder case does not actually address itself to the issue of whether a defendant has the right to demand a lineup (the Wilder court did not intimate whether the confrontation should be one-on-one or in the form of a lineup), we believe that the language is broad enough that in certain fact situations, a lineup might be granted on its rationale.

Although Evans and Wilder leave open the Supreme Court's view on lineup requests, in Commonwealth v. Garland, 234 Pa. Super. 241, 339 A.2d 109 (1975), the Superior Court did strongly intimate that in certain circumstances a denial of a lineup request may be an abuse of discretion.

> 'A serious problem arises if the suspect's right to a preliminary hearing on the validity of pre-trial detention cannot be exercised without exposure to a potentially suggestive, one-to-one confrontation with the witness. If the government's case turns upon the testimony of an identification witness, and defense counsel forecasts irreparable suggestivity if the witness appears at the preliminary hearing, his remedy lies in a motion for a lineup order to assure that the identification witness will first view the suspect at a lineup, rather than in the magistrate's hearing room. The magistrate or judge should grant the motion, unless cause to the contrary is shown, since a lineup conducted by the police, with the attendance of defense counsel, assures or promotes the reliability of the identifications and is therefore in the interest of justice.' United States v. Smith, 473 F.2d 1148, 1150 (D.C. Cir. 1972).

234 Pa. Super. 241, 244-245, 339 A.2d 109, 111 (footnote).

The Garland court, however, did not find an abuse of discretion in refusing the defendant's motion for a lineup, because the victim had given a full, accurate description, had previously identified the defendant's photo, and had a good opportunity to observe his assailant.

It is interesting to note that the Smith standard, which the Garland court approvingly cited, states that a motion for a lineup should be granted unless cause to the contrary is shown. This, we suggest, significantly changes the burden when defense counsel moves for a lineup.

Thereafter, in Commonwealth v. Sexton, ___ Pa. Super. ___, 369 A.2d 794 (1977), five judges of the Superior Court did hold, in a case where there had been no pre-court-room identification confrontation, that the Common Pleas judge incorrectly denied defense counsel's pre-certification hearing motion for a lineup. Judges Hoffman and Cercone not only concluded that there was an abuse of discretion in denying the lineup, but also said that the one-on-one confrontation was unnecessarily suggestive. These judges ordered a remand for a hearing to determine whether this unnecessarily suggestive confrontation tainted the trial identification. Judges Van der Voort and Spaeth agreed with this result, but did not think it was error to refuse the request for the lineup. Although Judges Price, Watkins, and Jacobs dissented, and would have affirmed the conviction, they stated:

> A pre-trial lineup, where the witness has not seen the accused since the time of the alleged crime, is undoubtedly an excellant method of testing a witness's ability to identify the perpetrator. It is certainly injudicious of a court to deny a request for a lineup without a very good reason for doing so. [Citation omitted]. It is irresponsible of the Commonwealth to oppose such a request.

369 A.2d 794, 799.

They argued, however, that there was no remedy for this abuse of discretion! They stated that there is no "right" to a lineup and that the granting or refusal of such is "totally within the discretion of the court"! While advocating this unique proposition, the three judges correctly did point out that Judges Hoffman and Cercone were. in effect, not giving any remedy to the defendant for the abuse of discretion in denying the lineup. The remand was simply for determining whether the unnecessarily suggestive confrontation tainted the trial identification. The dissent would have affirmed the judgment, since the record - in their opinion - adequately showed an untainted, independent basis.

We suggest that besides the remedy of remand for a taint hearing, there is the additional remedy of discharge. As Justices Roberts and Manderino noted in Wilder, if the defendant can not get a fair trial on remand, the appropriate remedy would be a discharge.

This drastic remedy was ordered by the court in United States v. Caldwell, 481 F.2d 487 (C.A.D.C. Cir. 1973):

> We have no quarrel with the District Court's finding... that the situation is beyond repair in that tribunal, either on the present record or on one to be made in a new trial. Thus, we think that the interests of justice require that the conviction be set aside and the case remanded to the District Court with directions to dismiss the indictment.

Quite simply, the Caldwell court meant by "the situation is beyond repair" that once the pre-trial lineup was improperly denied, and the witness was allowed to sit through the entire proceedings - viewing the defendant - it would be impossible to ever put the state of the witness's ability to identify the defendant back to where it should have been before the one-on-one courtroom confrontations.

While dismissal is a drastic remedy, the Caldwell reasoning is not unsound. As a result of a trial judge's abuse of discretion in denying a fair and proper confrontation procedure, the defendant is subjected to an unnecessarily suggestive confrontation, the effects of which can never be undone. In essence, the defendant cannot receive what could have been an unquestionably fair trial.

Besides the due process rationales of Brady and unnecessary suggestivity, a third rationale for justifying the granting of pre-preliminary hearing lineups could be best described as a due process pre-trial discovery rationale. Such was the theory in Evans v. Superior Court of Contra Costa County, 522 P.2d 681 (Calif. 1974).[3]

In this Evans, the court noted that the prosecutor has the ability "to compel a lineup and utilize what favorable evidence is derived" from the lineup in its prosecution. ("Favorable", in this context, means an identification of the suspect.) Holding that this was, in effect, pre-trial discovery for the prosecutor, the court held that fairness required "that the accused be given a reciprocal right to discover and utilize contrary evidence." ("Contrary", in this context, means an inability to make an identification.)

This court also showed great concern to "protect" or "preserve" the witness's "memory" or "ability to observe" before it is affected, tainted, or destroyed by an unfair or suggestive confrontation. In essence, the court recognized that the witness's memory of his assailant's features is, essentially, "evidence"; and that if the defendant is not first allowed to test or "discover" that evidence at a fair confrontation, that "evidence" will forever be destroyed (or, at least, incapable of being reconstructed).

Again, it did not concern the court that the prosecutor did not actually "possess" this "evidence". It was sufficient that the prosecutor or police could easily

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[3] Closely related to the "discovery" rationale was also the court's concern with Brady - disclosure of favorable evidence.

conduct a procedure - a lineup - so that this "evidence" could come to light.[4] Thus, the court stated, and concluded:

> Here petitioner seeks to compel the People to exercise a duty to discover material evidence which does not now, in effect, exist. Should petitioner be denied his right of discovery the net effect would be the same as if existing evidence were intentionally suppressed. It is well settled that the intentional suppression of material evidence denies a defendant a fair trial. Brady v. Maryland.
>
> We conclude . . . that due process requires in an appropriate case that an accused, upon timely request therefore, be afforded a pre-trial lineup in which witnesses to the alleged criminal conduct can participate. The right to a lineup arises, however, only when eyewitness identification is shown to be a material issue and there exists a reasonable liklihood of a mistaken identification which a lineup would tend to resolve. 522 P.2d 681, 685.[5]

In summary, while there may be no "pure" due process right to demand a lineup before the initial courtroom confrontation between victim and defendant, there are specific due process theories which do establish the right. These theories, as discussed above, are: a Brady theory which prohibits the Commonwealth from suppressing, upon request, evidence favorable to the accused (i.e., an inability to identify the accused); an unnecessarily suggestive theory which prohibits the Commonwealth from unfairly exhibiting an accused to the victim; and a reciprocal discovery theory which gives the accused the same rights as the Commonwealth in requiring the accused to participate in a lineup.

What all these theories recognize is that the victim of a crime has a certain mental (and verbal) impression of the criminal which will be destroyed or inadequately reconstructed if and when the accused is unfairly presented to the victim for purposes of identification. Given this gross evidentiary problem, the only way to guarantee a fair trial is to fairly test the witness's "impression" before the eventual and unavoidable one-on-one courtroom confrontation.

Given the right, the problem of the remedy persists when a judge refuses to allow a fair, pre-courtroom confrontation or lineup. While a taint hearing might be sufficient in some cases, defense counsel can propose the remedy of discharge, relying on United States v. Caldwell, supra, and its theory that once it becomes apparent that it is

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[4] The court, in an example, opined that if a defendant were arrested for drunk driving, it would be a denial of due process to deny him the right to submit to a blood test.

[5] See, also, State v. Boettcher, 338 So.2d (La. 1976) approving Evans. And, see A.L.I., Model Penal Code of Pre-Arraignment Procedure, §§160.2(4)(d) and 170.2(2)(b), and (8), which recommends affording a pre-trial lineup to a defendant if he requests it for good cause.

impossible for the defendant to receive a fair determination of his guilt or innocence, he must be discharged from all criminal responsiblity.[6]

B. Refusing A Lineup

The four Constitutional rights cited for the proposition that a person has the right not to participate in a lineup are: (1) the Fifth Amendment's right against self-incrimination, (2) the Fourth Amendment's protection against unreasonable seizures of the person, (3) the Fifth and Fourteenths' right to equal protection of law, and (4) the Fifth and Fourteenth Amendments' right to due process of law.

In United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926 (1967), the court held that having a man appear in a lineup does not violate his Fifth Amendment right not to be a witness against himself. Four justices, in dissent, did say that requiring the man to speak, as part of the lineup, was violative of the Fifth Amendment.

In Schmerber v. California, 384 U.S. 757, 764; 86 S. Ct. 1826, 1832, the Supreme Court stated:

> ...both federal and state courts have usually held that [the Fifth Amendment privilege] offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. [Footnote omitted].

Relying on this language, the Supreme Court of Pennsylvania has unanimously rejected a claim that requiring lineup participants "to smile, speak certain phrases and show their hands" violated Fifth Amendment rights. Commonwealth v. Kahley, ___ Pa. ___, 356 A.2d 745, 753 (1976). (U.S. cert. denied). Also, in a handwriting exemplars case, the Superior Court held that Pennsylvania's constitutional provisions (Article 1, §9 provides, in part, that no person can "be compelled to give evidence against himself") gives no more protection to a criminal defendant than the Federal constitutional provisions ("no person ...shall be compelled in any criminal case to be a witness against himself"). Commonwealth v. Moss, 233 Pa. Super. 541, 334 A.2d 777 (1975).

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6 Whether an interlocutory appeal could be taken from a denial of a motion to dismiss under this rationale is beyond the scope of this paper. See, generally, Commonwealth v. Bolden, ___ Pa. ___, 373 A.2d 90 (1977). If the district justice refuses to order a lineup, perhaps an appeal could be taken to the Common Pleas Court.

Apparently, then, the law of Pennsylvania seems settled that neither an appearance in a lineup, nor words spoken in a lineup, is a violation of the privilege against self-incrimination.

The Fourth Amendment provides that persons have the right "to be secure in their persons ... against unreasonable ... seizures, ... and [that] no warrants shall issue, but upon probable cause ..." Article 1, §9 of the Pennsylvania Constitution similarly provides that "the people shall be secure in their persons ... from unreasonable ... seizures, and no warrant to ... seize any person ... shall issue without ... probable cause ..."

These protections lead to the proposition that in order for a person to be ordered into a lineup, there must be probable cause for so doing. Language from Schmerber clearly shows this intent:

> The overriding function of the Fourth Amendment is to protect personal privacy... 86 S. Ct. 1834.
>
> ...we recognized 'the security of one's privacy against arbitrary intrusion by the police' as being 'at the core of the Fourth Amendment' and basic to a free society'... id.

As a modification of the theory that a seizure of the person requires probable cause, the theory of "temporary seizure" has developed. In Adams v. Williams, 407 U.S. 143, 145-146; 92 S. Ct. 1921, 1923 (1972), the Supreme Court stated:

> ...The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary ... it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of facts known to the officer at the time.

The law thus requires "probable cause" to justify a substantial restraint or removal from a location, but only "reasonable suspicion" to justify a temporary restraint on movement. However, since requiring a free man to appear at a police station to participate in a lineup entails a substantial restraint on freedom and a removal from his desired location, it would seem that this action would require probable cause.[7]

A rather full discussion of whether a person can be forced into a lineup absent facts warranting a formal arrest is contained in Wise v. Murphy, 275 A.2d 205 (D.C. Ct.

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[7] The only cases (other than Wise v. Murphy, infra) which hold that a person must appear at a certain location, with a justification of less than probable cause, deal with grand jury subpoenaes. See, e.g., United States v. Dionisio, 410 U.S. 1, 93 S. Ct. 764 (1973). But these cases simply hold that a grand jury subpoena is not protected by the full rights of the Fourth Amendment.

App. 1971). This court was divided on whether probable cause had to be present to order a lineup, but the disagreement may be a matter of semantics rather than substantive law.

The majority questioned whether making someone appear at a location for a lineup was the same thing as formally arresting someone, for which probable cause would be necessary. First, they reasoned that the Constitution allows a detention on less than probable cause, as evidenced by Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968) and Adams v. Williams, supra. Next, they thought that a lineup order was a greater intrusion than a Terry stop, but less of an intrusion than a "formal arrest." They also thought that there was a great need to allow confrontations on less than probable cause so that the police could carry out their investigative functions. They did state that in their opinion a confrontation following a "formal arrest" based on less than probable cause would have to be suppressed as the fruits of police illegality.

Factually, Wise involved a complainant who, after looking at photographs, said of the defendant's picture that the "facial features ... [were] similar to those of the man who assaulted her... [and that] to be positive, she would have to see him in person." Given these facts, the majority did not believe that enough had been shown to justify ordering the defendant to appear in a lineup. The case was remanded to ascertain more facts concerning the ability of the complainant to make an identification.

The dissent also agreed that the Constitution allowed detentions on less than probable cause. However, they interpreted Terry as being a situation where, because there was swift, on-the-spot action, a warrant was not needed. They interpreted the situation at hand to require a warrant, and therefore require probable cause. They distinguished a temporary detention (allowed on less than probable cause) from an arrest as being an extremely short period with a "stop" rather than an affirmative command to move or appear elsewhere.[8] The dissent also questioned the standard by which the majority remanded the case for the trial court's consideration. Was the standard, in fact, less than probable cause, and how would a standard less than probable cause, but greater than reasonable suspicion, be articulable?

Looking at the law of seizure of the person in Pennsylvania, it appears inconceivable that the Pennsylvania Appellate Courts could find an order for a suspect to appear at a police station to participate in a confrontation in which he might be iden-

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[8] They also distinguished fingerprints from eyewitness identification, holding that the former was far more scientific and that it required less of an inconvenience. See, Davis v. Mississippi, 394 U.S. 721, 89 S. Ct. 1394 (1969), which still suppresses fingerprints if after a "dragnet arrest".

tified for a crime, anything other than a full seizure of the person, requiring probable cause.

The problem then arises as to whether these same Fourth Amendment rights inure to a person already legally in custody. We can find no persuasive authority stating that a person in prison custody still has a Fourth Amendment right not to be put in a lineup.[9] But there is interesting language in Adams v. United States, 339 F.2d 574 (D.C. Cir. 1968) relating to police station lineups of newly arrested suspects.

While this Adams case was concerned with unnecessary delay in presentment to a magistrate,[10] the following language is of interest here:

> Here, the lawful basis for appellants' arrest and detention rested solely on the probable cause for the belief that they had committed an attempted robbery on November 5 at the North Carolina Avenue store. There was no probable cause to detain them under arrest for other matters. Rule 5(a) [prompt arraignment] provides that presentment without unnecessary delay shall be made on the charge for which they are arrested. To continue their custody without presentment for the purpose of trying to connect them with other crimes is to hold in custody for investigation only, and that is illegal; its operative effect is essentially the same as a new arrest and, if not supported by probable cause, it is an illegal detention...
>
> It is not, thus, the precise scope of the Mallory exclusionary rule which is determinative here but, rather, the sweep of the general policy of excluding evidence gathered during a period of detention following upon an unlawful arrest [Footnote omitted.] 399 F.2d 577.

(Judge Burger, concurring, did not approve of this "divisible arrest" concept. He thought all that was necessary to decide the specific issue of whether unnecessary delay existed was to find that an investigation had begun for a different crime.)

This language, with the principles developed in the Equal Protection cases (see, infra), lead to the argument that while a person is in legal custody for a certain matter, he does not give up any rights that are not necessarily given up by his arrest for that crime. Therefore, subjecting a person legally arrested for crime "A" to a lineup for crime "B", for which probable cause does not exist, is illegal, in that just because a person comes into custody legally, does not mean that the state can then do whatever it wants with him.

Two courts have held that it is a denial of Equal Protection to put a man in a lineup simply because he is already in prison. Initially, it should be noted that the

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9 Since the suspect is already confined to the prison, it is no great inconvenience to make him go to the lineup room. There are, however, Equal Protection and Due Process arguments which are combined with Fourth Amendment principles, and are discussed shortly.

10 See Section II.A.2., infra.

Third Circuit has expressly addressed itself to this issue, and has rejected the Equal Protection claim.

In Butler v. Crumlish, 229 F. Supp. 565 (E.D. Pa. 1964), the district court granted a preliminary injunction against putting a prisoner in a lineup based on the "possibility" that he would be identified for unrelated crimes. The court reasoned that since the only reason the prisoner was in jail was for the purpose of insuring his presence at trial (i.e., bail had not been entered), the prison had the right to restrain or order about the prisoner only in furtherance of that objective. Obviously, requiring him to appear in a lineup has nothing to do with assuring the man's appearance at trial:

> The constitutional authority for the State to distinguish between criminal defendants by freeing those who supply bail pending trial and confining those who do not, furnishes no justification for any additional inequality of treatment beyond that which is inherent in the confinement itself.
>
> The compulsory "lineup" of the unbailed defendant thus amounts to a material distinction between those who enter bail and those - equally presumed to be innocent - who do not... 229 F. Supp. 567.

The Butler case never reached the Third Circuit because the petitioner made bail. The reasoning in Butler was, however, specifically rejected in Rigney v. Hendrick, 355 F.2d 710 (3rd Cir. 1965). We submit, however, that the Rigney court did not adequately answer that petitioner's equal protection argument. This claim was rejected in these two sentences:

> Admittedly, there is a classification between those who can and those who cannot make bail. The Constitution, however, permits such a classification, and any differences here, arise solely because of the inherent characteristics of confinement and cannot constitute invidious discrimination.

Apparently, the "inherent characteristics" had something to do with the fact that prison security would not allow a victim to wander through the prison looking for his suspect, whereas a complainant could wander through the city and possibly see his suspect on the street. The court stated that there was no "right" for a man, free or incarcerated, not to be observed; therefore, arranging a prison lineup was simply a security matter inherent in prison confinement. We suggest that a person out on bail does have a right not to be observed; which he can exercise merely by confining himself in a manner so that he cannot be observed.

In Matter of Mackell v. Palermo, 300 N.Y.S.2d 459 (Sup. Ct. 1969), the prosecutor petitioned the court to have a prisoner shave his beard and appear in a lineup for a crime for which there was no probable cause to believe that the prisoner had committed. The court held that since there was no legal justification for taking a man off

the street, having him shave, and putting him in a lineup because of the prosecutor's suspicions, there was no authority to do the same kind of things to him just because he was already a prisoner on an unrelated crime. The court reasoned that while custody deprives a prisoner of the freedom of movement, it does not require him to give up all of his other [Fourth Amendment] rights.

Finally, in the recent case of State v. Foy, 369 A.2d 995 (N.J. Sup. Ct. 1976), two brothers were arrested and charged with a robbery. The prosecutor wanted to put them in lineups for five other robberies. For some of these robberies there was no greater link than a very generalized method of operation and description; and to these robberies, the defendant's objected. The prosecutor argued that since they were already in custody they could not object. One of the brothers then made bail. The prosecutor withdrew his request to put the bailed brother in the disputed lineups.

The court held that none of the incarcerated brother's Fourth or Fifth Amendment rights (relating to seizure and self-incrimination) would be violated by forcing him to appear in a lineup. However, the court went on to specifically reject Rigney and hold, first, that due process required "some connecting evidence" linking the suspect to the crime, and second, that equal protection mandates that simply because a man is already a prisoner, he does not lose this due process right. The Foy case is extremely well-considered and should be consulted.

The Foy case thus also points out another constitutional issue concerning the due process right to refuse a lineup. The Foy court basically stated that even though the Fourth and Fifteenth Amendments do not prohibit putting an incarcerated man in a lineup, due process required that "excessive means" could not be used to obtain the identification evidence. There are "excesive means" (using a prisoner's detention to force him into a lineup on an unrelated crime) unless there is "some connecting evidence" that establishes a "well-grounded suspicion"[11] that the detainee committed the crime for which he is going to be viewed. Perhaps Rigney should be tested again.

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11 Again, whether there can be a standard between probable cause and reasonable suspicion, or whether "well-grounded suspicion" is in fact reasonable suspicion, is a difficult question.

II. CONSTITUTIONAL AND PROCEDURAL BASES FOR ATTACKING IDENTIFICATION PROCEDURES

A. General Rights That May Affect Subsequent Identification Procedures

1. Legality Of Arrest

As developed above, the law of arrest, i.e. a seizure of the person, is controlled by Fourth Amendment standards. An "arrest" requires probable cause, a "temporary seizure" requires reasonable suspicion. The legality of an arrest or seizure may affect the admissibility of evidence seized pursuant to the arrest or seizure.

Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963) refines the Mapp exclusionary rule. Evidence will be suppressed if "granting establishment of the primary illegality the evidence...has been come at by exploitation of that illegality...instead [of] by means sufficiciently distinguishable [so as] to be purged of the primary taint." Certainly, if there is a confrontation conducted pursuant to an illegal arrest, evidence of that confrontation can be suppressed. Commonwealth v. Youngblood, Pa. Super., 359 A.2d 456 (1976). This issue has been somewhat clouded in Pennsylvania because of the case of Commonwealth v. Garvin, 448 Pa. 258, 293 A.2d 33 (1972).[12]

In Garvin, the appellant argued that he was arrested illegally, and that the "identification evidence" should therefore be suppressed. The problem is that no distinction was made between the out-of-court identification evidence and the in-court identification evidence. The court therefore framed the issue as "whether the subsequent identification was tainted by" the illegal arrest. A fair reading of the case leads to the conclusion that the court simply held that where the opportunity to observe the perpetrators is good, the fact that the perpetrators are illegally arrested will not forever thereafter make them immune from prosecution. The court's failure to specifically mention the out-of-court identification can be explained by this failure to accurately frame the issue, and not because the court did not think an out-of-court identification should be

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12 Some of the Superior Court cases which seem to indicate that an out-of-court identification will not be suppressed if it is the result of an illegal arrest are: Stoutzenberger Appeal, 235 Pa. Super. 500, 344 A.2d 668 (1975); Commonwealth v. Davy, 227 Pa. Super. 455, 323 A.2d 148 (1974); and Commonwealth v. Allen, 239 Pa. Super. 83, 361 A.2d 393 (1976). These cases did find, nevertheless, either an independent basis for the in-court identifications, or suppressed the confrontation for a different reason. The Supreme Court has never said in any case, other than Garvin, that an out-of-court identification might not be suppressed because it resulted from an illegal arrest. More often, the Supreme Court uses language such as "even if [the out-of-court] identification was tainted by the illegality of the arrest the in-court identification of the appellant by the victim was free of that taint." Commonwealth v. Richards, 458 Pa. 455, 327 A.2d 63 (1974).

suppressed if it is the result of an illegal arrest. In addition, subsequent cases which discuss suppression of the fruits of illegality clearly show that it is not the court's intention not to suppress out-of-court identifications resulting from illegal arrests.

In any event, while it appears that in Pennsylvania an in-court identification will not be suppressed where there is an independent basis simply because it eventually results from an illegal arrest, the legal basis expressed in Garvin for so holding is dubious. The court stated that it could not "assume that but for the illegal arrest the appellant would have remained at large indefinitely." It cited as authority for this proposition United States v. Hoffman, 385 F.2d 501 (7th Cir. 1967). In Hoffman the facts were such that there was enough evidence and enough co-defendants that there was a real chance that the identities of the perpetrators could have been obtained other than by the illegal arrests that did take place. We can envision some fact situations where it appears plausible that but for an illegal arrest, the perpetrators would remain at large indefinitely. In any event, it was clear in the Garvin case that there was an independent basis for the in-court identification and that the out-of-court confrontation did not contribute to a bad identification.[13]

One further issue which deserves discussion here is whether a suspect can be subjected to a confrontation where there is only "reasonable suspicion" for a "temporary seizure." Terry and Adams at most seem only to allow an officer to briefly stop a suspicious individual in order to maintain the status quo, determine the suspect's identity, or to frisk for a weapon.

Some guidance is given by Commonwealth v. Brown, ___ Pa. Super. ___, 365 A.2d 853 (1976) and Commonwealth v. Ray, 455 Pa. 43, 315 A.2d 634 (1974). In Brown the arresting officers had "reasonable suspicion" to stop the defendants and conduct a Terry frisk. The officers then put the defendants in a police wagon and transported them to the police station. The Superior Court held that this was not an "intermediate response" as approved of in Adams, but a full-blown arrest requiring probable cause. Evidence abandoned by the defendants inside the police wagon was suppressed. In Ray a car was stopped for

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13 It is also clear that in Garvin the informer had singled out Garvin. This is distinguishable from confrontations that result from "dragnet" arrests - arrests based on a very generalized description. See, Commonwealth v. Favors, 227 Pa. Super. 120, 323 A.2d 85 (1974) (dissenting opinion by J. Spaeth).

speeding in the early morning hours. The description of the car and the passenger matched the description of the getaway car and the robber of a motel shortly before in the vicinity. The complainant was brought to the scene and identified the passenger as the robber. The Supreme Court held, for the purpose of determining whether the right to counsel attached, that this situation was not an arrest but a detention for immediate investigation. It should be noted, however, that the only issue before the Ray court was whether the right to counsel had attached, and not whether the confrontation was permissible.

Of course, what the police will be able to do with a temporarily seized suspicious individual will depend on the circumstances of each case. In Ray the confrontation occurred only after it had already been determined that the suspect fit the description previously given by the complainant. Certainly it should be argued that the police have a duty to first obtain as full a description as possible from the complainant, and then only conduct a confrontation if that description and all the circumstances warrant it. Of course, one factor that is in conflict when discussing on-the-scene confrontations is that of the location of the confrontation. An on-the-scene confrontation should be on-the-scene, but a suspicious individual, under Brown, can only be detained and supposedly not transported to the scene.

2. Unnecessary Pre-Arraignment Delay

Provisions in the criminal rules require that after arrest a suspect be taken before an issuing authority for preliminary arraignment without unnecessary delay (Rule 122 for arrests with warrants and Rule 130 for arrests without warrants). Commonwealth v. Futch, 447 Pa. 389, 290 A.2d 417 (1972) held that evidence obtained during, and because of, a period of unnecessary delay will be suppressed. In Futch, the evidence suppressed was Futch's identification in a lineup that occurred 13 hours after his arrest.[14]

While the basic violation in Futch was the length of the delay, the violation in Commonwealth v. Hancock, 455 Pa. 583, 317 A.2d 588 (1974) was the nature of the delay. In Hancock, the suspect was held in police custody while a lineup was arranged for a crime other than the one for which he was arrested. (Recall that the lead opinion in Adams

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[14] Of course, the in-court identification was allowed as having an independent basis - "origins sufficiently distinguishable" from the suppressed lineup. See Section III, infra.

v. United States, supra, called this a "secondary illegal detention," while Justice Burger simply labeled this as unnecessary delay).

In both Hancock and Futch, the defendants had waived their right to have counsel present at the lineups. It was this waiver, secured during unnecessary delay, that bothered the court. Logically, a lineup during unnecessary delay, if conducted with an attorney present, would not be suppressed.[15]

The above analysis is now probably pointless in view of Commonwealth v. Davenport, Pa., 370 A.2d 301 (1977). Pursuant to its rule-making authority, a suspect must now have his preliminary arraignment within six hours of his arrest, or else any statement obtained after arrest will be suppressed. There is every reason to believe, looking at the language of Davenport, that identification evidence will also be suppressed if the suspect is not given his preliminary arraignment within six hours. Of course, whether this would include a prompt, on-the-scene identification, or only a police station lineup where required counsel is waived, is an open question.

Prosecutors might argue that with Davenport, the only consideration is one of time, and that the Hancock consideration of the nature of the delay is now unavailable. This argument, if accepted, might allow confrontations in which counsel has been waived within six hours of arrest for unrelated crimes for which probable cause to arrest does not exist. The due process, equal protection, and Adams v. United States, supra, Fourth Amendment rationales developed above should be used to prohibit any attempts to allow any such - in our view - illegal confrontations.

B. Specific Rights At The Identification Confrontation

1. Right To Counsel

In United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926 (1967) the Supreme Court ruled that a defendant has the right to counsel at a formal, post-indictment lineup. In Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877 (1972) a plurality of the court ruled that this right to counsel did not attach at a post-arrest pre-indictment lineup, or, in its

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15 In Commonwealth v. Bey, No. 42, Oct. 1976, Superior Court (6/29/77), the Superior Court had a chance to so hold. However, the court instead of saying that the counselled out-of-court identification did not have to be suppressed, said that even if it was illegal, there was an independent basis for the in-court identification and the introduction of the out-of-court identification was harmless beyond a reasonable doubt.

words, "before the commencement of any prosecution whatsoever." The Pennsylvania Supreme Court declined to follow Kirby in Commonwealth v. Richman, 458 Pa. 167, 320 A.2d 351 (1974), and held that the right to counsel attached after arrest, with the exclusion of prompt, on-the-scene confrontations (see discussion, infra).

As to what is "prompt" and "on-the-scene," the most extreme case is probably Commonwealth v. Ray, 455 Pa. 43, 315 A.2d 634 (1974). In Ray, the complainant was transported to a parking lot some undetermined distance away from the scene of the crime and made an identification some 50 minutes after the crime. The court said that Whiting, infra, did not really apply so as to require the presence of counsel since Ray was not arrested "but merely detained for immediate investigation." Because of the footnote in Richman, excluding prompt, on-the-scene confrontations from the right to counsel requirement, Ray is probably still good law. See also, Commonwealth v. Dickerson, 226 Pa. Super. 425, 313 A.2d 337 (1974) and Commonwealth v. Mackey, 447 Pa. 32, 288 A.2d 788 (1972).

Prompt, on-the-scene confrontations might also include a trip to the hospital, if the victim is in "extremis." Commonwealth v. Hall, 217 Pa. Super. 218, 269 A.2d 352 (1970).

Since Richman, there are two areas concerning the right to counsel which are not fully settled. The first area is the right to counsel at photographic displays. Relying on the language of Wade, and on United States v. Zeiler, 427 F.2d 1305 (3rd Cir. 1970), the Pennsylvania Supreme Court held in Commonwealth v. Whiting, 439 Pa. 205, 266 A.2d 738 (1970) that a custodial suspect had the right to counsel at a post-arrest photographic confrontation. Of course, Whiting was decided pre-Kirby and pre-United States v. Ash, 413 U.S. 300, 93 S.Ct. 2568 (1973). Ash overruled Zeiler and held that there was no right to counsel at a post-indictment photo display. Again, the Richman rationale would reject the Ash result. In fact, Richman, while holding that the right to counsel attaches after the initiation of judicial proceedings, actually said that Whiting "appropriately draws the line for [this determination]...at the arrest." Therefore, it seems safe to say that the right to counsel attaches after arrest, even for photo confrontations.

The other area that still can present problems is where a defendant has been arrested and charged with one crime, and then either his photo is shown to other complainants while he is in custody, or his presence at a court proceeding - such as the preliminary hearing - is used for a confrontation on another, as yet uncharged, crime.

While there appears to be no authority requiring the presence of counsel in this photo situation, there is language in Richman that would lead to the result that counsel is required to be notified as to what is occuring where the defendant's forced appearance is used for a confrontation as in the second situation.

First, such a situation would certainly be a critical stage in the determination of the defendant's fate - whether he is going to be prosecuted. Second, there does not appear to be that great of a need for a "prompt and purposeful investigation" that allows dispensing with counsel at an on-the-scene confrontation. Finally, there is no delay to contact counsel, as counsel is already present.

One final case should be mentioned in this connection - Commonwealth v. Taylor, ___ Pa. ___, 370 A.2d 1197 (1977). In Taylor, a confrontation procedure was carried out at the defendant's preliminary hearing, without his counsel being made aware of it. A detective had two eyewitnesses sit together at the preliminary hearing and asked them to tell him if they saw the robber in the room. As defendants were brought into the room, the two witnesses would indicate if any one of them was the robber. When Taylor was brought in, they indicated that he was the robber. The Court had no problems in finding that this procedure was, in fact, that type of "lineup" which required counsel, and that although counsel was present to represent Taylor, since counsel was not informed that the lineup was being conducted, Taylor was denied effective assistance of counsel. (The eyewitnesses were there for the crime charged, but this case clearly shows that the type of procedure involved here is protected by constitutional considerations of right to effective assistance of counsel).

2. Due Process

Since the Supreme Court's landmark trio of opinions, United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926 (1967); Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951 (1967); and Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967 (1967) Pennsylvania's appellate courts have had almost countless occasions to apply the concept of fundamental fairness to police identification procedures.[16] Adopting the Wade-Stovall formulation, they have reviewed the circumstances of pre-trial confrontations between suspects (or their photos) and the wit-

16 Prior to Wade the rule apparently was that while suggestive confrontations might detract from the weight of identification testimony they could not render such evidence inadmissible. Commonwealth v. Downer, 159 Pa. Super. 626, 49 A.2d 516 (1946).

nesses against them to determine whether the confrontations were "so unnecessarily suggestive and conducive to mistaken identification" as to constitute a violation of due process. The result has been the emergence of a general rule, consistent with the suggestions in Wade itself,[17] that where a suspect is shown to a witness in a context which indicates police belief that he or she is the guilty party, and there is no legitimate reason for utilizing the suggestive procedure, the resultant identification testimony is inadmissible. This section will attempt to present the rule's application to the various types of identification procedures employed by the police, beginning, for the sake of chronology, with the immediately post-arrest, on-the-scene confrontation.

a. "On-The-Scene" Confrontations

The rule is uniform that where the police arrest a suspect near the scene of a crime and thereafter immediately present him for possible identification by the victim or witness there is no violation of due process.[18] The courts find that the suggestion inherent in such situations is not unnecessary in light of their assumption that minimizing the time elapsed between the crime and presentation of the suspect reduces the likelihood of misidentification while promoting speedy release of those erroneously apprehended. The cases also speak, however, of such identifications being admissible "absent some special element of unfairness." This clearly indicates that where the police attempt to convey to the witness their belief that the suspect brought back is the actual culprit, the prompt

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17 In Wade the Supreme Court compiled this partial list of suggestive procedures which it gleaned from reported state cases:

> [T]hat all in the lineup but the suspect were known to the identifying witness, that the other participants in a lineup were grossly dissimilar in appearance to the suspect, that only the suspect was required to wear distinctive clothing which the culprit allegedly wore, that the witness is told by the police that they have caught the culprit after which the defendant is brought before the witness alone or is viewed in jail, that the suspect is pointed out before or during a lineup, and that the participants in the lineup are asked to try on an article of clothing which fits only the suspect. 388 U.S. at 233, 87 S. Ct. at 1935.

18 Commonwealth v. Turner, 454 Pa. 520, 314 A.2d 496 (1974). Commonwealth v. Manns, 229 Pa. Super. 21, 323 A.2d 262 (1974); Commonwealth v. Jones, 231 Pa. Super. 323, 331 A.2d 788 (1974).

on-the-scene confrontation violates due process. Slight changes in circumstances between the crime and the show-up, such as movement of the complainant to where the defendant was arrested, do not constitute such special elements of unfairness.[19] However, a substantial lapse of time will render such a delayed "on-the-scene" confrontation inadmissible.[20]

b. Hospital Identifications

The problem of the hospital confrontation, where the victim is in the hospital and the police bring the suspect in singly to see if they can get an identification, has been considered both in Stovall v. Denno, supra, and in two Pennsylvania cases, Commonwealth v. Hall, supra and Commonwealth v. Dessus, 214 Pa. Super. 347, 257 A.2d 867 (1969). The resultant rule is that where the victim is demonstrably in extremis a one-on-one confrontation is not unnecessarily suggestive, since the suggestiveness does not outweigh the alternative possibility that there might be no confrontation at all. Thus in Dessus the identification was admitted because the victim, who had been severly beaten, died from her injuries within three weeks of the crime. Likewise in Stovall, the witness had just undergone surgery necessary to save her life when the show-up took place and no one knew how long she would live. In Hall, however, the witness, though at the hospital, did not then require further hospitalization and thus the confrontation, within minutes of the robbery, was held to be improper. The court there reasoned that the change in scene from the crime to the hospital enhanced the likelihood of suggestion and unreliability and noted that the victim could have easily been transported to the police station for a lineup.

c. Station House One-On-One Confrontations

The rule is that where the police bring a witness to a police station to view a recently apprehended suspect under non-lineup, suggestive circumstances, any resultant identification is inadmissible.[21] The same result has followed from station house show-ups involving only two co-defendants.[22]

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19 Commonwealth v. Ray, 455 Pa. 43, 315 A.2d 364 (1974). See also, Commonwealth v. Jones, 231 Pa. Super. 323, 331 A.2d 788 (1974).

20 Commonwealth v. Mackey, 447 Pa. 32, 288 A.2d 788 (1972). See generally, Stanley v. Cox, 486 F.2d 48, 52 (4th Cir. 1973), which contains extensive discussion and authority dealing with the problem of show-up confrontations.

21 Commonwealth v. Rodriguez, 234 Pa. Super. 294, 338 A.2d 633 (1975); Commonwealth v. Hall, supra.

22 Commonwealth v. Wilson, 450 Pa. 296, 301 A.2d 823 (1973). The confrontation in this case was made particularly egregious by police statements to the victim beforehand that the same men had committed similar acts on other women.

Nonetheless, such confrontations have been upheld in some circumstances. In Commonwealth v. White, 447 Pa. 331, 290 A.2d 246 (1972), our Supreme Court held that there had been no due process violation where the police brought a witness to the police station and he spontaneously identified two suspects sitting handcuffed to a bench in the waiting room. It reasoned that there had been no impropriety since the confrontation was "uncontrived." Since White remains part of the law in this area, it is incumbent on defense counsel to establish to the suppression court's satisfaction that a police station confrontation is not "uncontrived," but instead a wilfully arranged procedure designed to secure a positive identification.[23]

d. Photograph Displays

In Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967 (1968), the Supreme Court, in holding that there is nothing wrong in principle with identification of suspects by photograph (although corporeal lineups are preferred) acknowledged that such use of photographs is subject to abuse. The showing of a single photograph, repeating a suspect's photograph in multiple photospreads, or including a photograph of the suspect of a different kind then the others are all examples of unnecessarily suggestive procedures. Commonwealth v. Fowler, 466 Pa. 198, 352 A.2d 17 (1976).

More subtle suggestive techniques, such as using a group of photographs where the prime suspect is the only one of his particular coloring, facial shape and hair style, have also been found to offend due process.[24]

Likewise, where one witness has the opportunity to reinforce and encourage the photographic identification by another, due process may be offended.[25] Of course, the police may also render unfair an otherwise fair photo spread by their own suggestive conduct,

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23 See Judge Hoffman's concurring opinion in Commonwealth v. Lord, 220 Pa. Super. 240, 281 A.2d 757 (1971) for a more skeptical view of these stationhouse accidents, and also Pearson v. United States, 389 F.2d 684, 688 (5th Cir. 1968). Perhaps not only should stationhouse confrontations not be contrived, but should not the police have some duty to detain prisoners in such a manner so as to prevent "uncontrived" confrontations? Also, a staged one-on-one confrontation outside a courtroom is improper. Commonwealth v. Goins, 227 Pa. Super. 470, 323 A.2d 198 (1974).

24 Commonwealth v. Weber, 232 Pa. Super. 6, 331 A.2d 752 (1974) (here the police showed the victim photographs of the getaway car, before they showed him the defendant's photo); United States v. Sanders, 479 F.2d 1193 (D.C. Cir. 1973) and United States v. Fernandez, 456 F.2d 638 (2nd Cir. 1972).

25 United States ex rel. Thomas v. State, 472 F.2d 735 (3rd Cir. 1973); Monteiro v. Picard, 443 F.2d 311 (1st Cir. 1971); Rudd v. State, 477 F.2d 805 (5th Cir. 1973).

as where the witness had reduced a group to two possibilities, selected one, and then was told by police that her choice was wrong.[26] However, it has been held that showing a witness a single surveillance photograph of the defendant committing the crime is not unnecessarily suggestive. The argument supporting this result is that the photographs of the crime only refreshed the witness's actual recollections and did not give rise to possible misidentification.[27]

e. In-Court Confrontations

Not surprisingly the courts have found no undue suggestion inherent in unavoidable though obviously suggestive confrontations between witness and defendant in the courtroom. The rule is not absolute, however. In Commonwealth v. Sexton, supra, a majority of the Superior Court held that where a lineup request is refused before a hearing, and the witness or witnesses have made no prior identification of the defendant, the trial court must determine whether there is a basis for any at-trial identification independent of the pre-trial hearing confrontation. The fair import of this result is that under those limited circumstances the initial in-court confrontation is unnecessarily suggestive!

f. Lineups

The principles defining the "proper" and "improper" for corporeal lineups are identical and interchangeable with the principles defining "proper" and "improper" photographic displays. Thus, one-on-one "lineups," or "lineups" involving only two suspects are unnecessarily suggestive. Likewise requiring any conduct which singles out a lineup participant, such as having him give his name, which the witness knows from prior photographic identifications, is improper.[28] Allowing witnesses to discuss their identification or overhear the identifications by other witnesses is also improper lineup procedure.[29] Repeated presentations of a suspect after the witness has initially been unable

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26 United States v. Russell, 532 F.2d 1063 (6th Cir. 1976).

27 United States v. Grose, 525 F.2d 1115 (7th Cir. 1975).

28 Commonwealth v. Ehly, 457 Pa. 225, 319 A.2d 167 (1974).

29 Commonwealth v. Garland, 234 Pa. Super. 241, 339 A.2d 109 (1975); Commonwealth v. Taylor, Pa., 370 A.2d 1197 (1977).

to make an identification and lineups which single a suspect out by size, color, or clothing offend due process as well.[30] However, a lineup consisting of all women except the suspect, a female impersonator, was permissible because of difficulties encountered by the police in obtaining female impersonator "fillers."[31]

g. Pre-Arrest Delay And Identification Testimony

Due process fundamental fairness considerations have also been applied to restrict suspect identification testimony in circumstances where there has been substantial delay between the alleged crime and the first confrontation between accuser and accused. In Ross v. United States, 349 F.2d 210 (D.C. Cir. 1965), the Circuit Court of Appeals for the District of Columbia reversed a drug sale conviction and dismissed the indictment after finding that a substantial pre-arrest delay (seven months) had prejudiced the accused's defense and that the sole evidence against him was an uncorroborated identification by an undercover officer who had to rely heavily on contemporaneous notes in testifying. The Ross decision produced a considerable number of later applications in that Circuit and in others,[32] as well as some dissenting authority, before receiving approval from the Supreme Court in United States v. Marion, 404 U.S. 307, 92 S.Ct. 455 (1971).

Our Superior Court has adopted the Ross principle and applied it thus far in four instances. Three of those were drug sales like Ross which called upon the Court to balance the police justification for the pre-arrest delay (need to preserve undercover agents usefullness, to protect informant, etc.), against any prejudice to the defense caused by the delay, while weighing also the strength of the Commonwealth's case. In all three, Commonwealth v. McCloud, 218 Pa. Super. 230, 275 A.2d 841 (1971); Commonwealth v. King, 234 Pa. Super. 249, 338 A.2d 662 (1975); and Commonwealth v. Baines, 237 Pa. Super.

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30 Foster v. California, 394 U.S. 440, 89 S.Ct. 1127 (1969); Commonwealth v. Taylor, supra; Commonwealth v. Lee, 215 Pa. Super. 240, 257 A.2d 326 (1969). See also Young v. United States, 435 F.2d 405 (D.C. Cir. 1970); United States v. Williams, 469 F.2d 540 (D.C. Cir. 1972). However, the Superior Court has refused to suppress lineup identifications where the defendant stood out by height alone. Commonwealth v. Kitchens, 224 Pa. Super. 191, 303 A.2d 30 (1973); Commonwealth v. Carter, 223 Pa. Super. 148, 297 A.2d 505 (1972).

31 Commonwealth v. Spann, 235 Pa. Super. 327, 340 A.2d 456 (1975).

32 See e.g., United States v. Childs, 415 F.2d 535 (3rd Cir. 1969) [no violation]; United States v. Feldman, 425 F.2d 688 (3rd Cir. 1970) [no violation].

407, 352 A.2d 107 (1975), the Court found dismissal of the charges unwarranted, despite delays of eight, five and six months, in light of the positive identifications by the agents, the justifications for the delay, and the absence of prejudice.

The opposite result flowed from the facts in Commonwealth v. DeRose, 225 Pa. Super. 8, 307 A.2d 425 (1973), which is instructive although not a case involving great potential for misidentification. There the defendant had been arrested for attempted bribery of a police officer twenty-two months after the alleged crime and the Commonwealth presented no justification for the delay. The complaining witness was unable to remember exactly what was said or when, within a one month period, the incident took place. The defendant could not recall his activities during the relevant time period and, although there were at least three other people present during the crime, none could be identified at the time of trial. Finally, before dismissing the charges, the Superior Court observed that the police officer's testimony was uncorroborated.[33]

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33 See also Commonwealth v. Crawford, Pa., 364 A.2d 660 (1976).

III. EFFECT OF FINDING ILLEGALITIES

A. Finding Illegality Before The Identification Procedure

As previously pointed out, confrontations or other identification evidence might be suppressed as being the fruits of some primary illegality. Again, the test as laid down in Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407 (1963) is:

> ... not ... all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such cases is 'whether granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of the illegality or instead by means sufficently distinguishable to be purged of the primary taint.' 371 U.S. 487-488, 83 S. Ct. 417.

Some of the important cases on fruits analysis in Pennsylvania are: Commonwealth v. Cephas, 447 Pa. 500, 291 A.2d 106 (1972); Commonwealth v. Whitaker, 461 Pa. 407, 336 A.2d 603 (1975); Commonwealth v. Nicholson, 239 Pa. Super. 175, 361 A.2d 724 (1976) (allocatur denied); and Commonwealth v. Crutchley, ___ Pa. Super. ___, 364 A.2d 381 (1976).

In Cephas, the testimony of a co-defendant (who would have identified Cephas as being the perpetrator of a crime) was excluded because the existence of this co-defendant was come upon solely as the result of an illegal search. In Nicholson, the testimony of a co-defendant (who also would have identified the defendant as the perpetrator of a crime) was also excluded because the defendant's illegal arrest directly led to the co-defendant. In Crutchley, the complainant's identification of the defendant was not suppressed even though evidence which linked the defendant to the crime was found pursuant to an illegal search. The court found in Crutchley that the complainant's observations of the perpetrators was sufficiently distinguishable from any police illegality.

Whether these cases establish a "but for" test or not (the dissent in Whitaker argued that that case did), obviously defense counsel does have an argument if there is a real and direct causal connection between some illegality and some contested evidence. The Garvin influence is certainly still significant, however, as demonstrated in Crutchley, when it comes to trying to suppress a complainant's in-court (or even out-of-court) identification, where there is a good independent basis for the in-court identification.

B. Finding Illegality In The Confrontation Procedure Itself

If the confrontation procedure itself is illegal (as described in the above section on Specific Rights At The Confrontation Procedure), then that out-of-court con-

frontation must be suppressed. An in-court identification will then be allowed only if the Commonwealth proves by clear and convincing evidence that there is an independent basis for the in-court identification.

C. Independent Basis For In-Court Identification

Success in suppressing an out-of-court identification as a result of some legal defect in the procedure utilized (e.g. no counsel, unduly suggestive)[34] is really only the first step in attacking a witness's identification of the defendant. The next step is the so-called "taint" hearing at which, according to United States v. Wade, the Commonwealth must be given the opportunity to establish that the in-court identification is the result, not of the illegal confrontation, but of the witness's recollection of the assailant from the crime itself.[35] Under Pennsylvania law the Commonwealth has the burden of showing such an independent basis by clear and convincing evidence. The Wade court pointed to a number of factors as being relevant to this determination and our courts have since frequently considered these and others in making their own judgments. These Wade criteria are:

> The prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification.

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34 It should be noted that absent some illegality the failure of a witness to make an early lineup or in-court identification does not give rise to a due process attack on his or her later trial identification. Commonwealth v. Davis, Pa., 102, 351 A.2d 642 (1976); Commonwealth v. Tate, 229 Pa. Super. 202, 323 A.2d 88 (1974).

35 Commonwealth v. Fowler, supra. The Supreme Court's other important taint decisions are Foster v. California, 394 U.S. 440, 89 S.Ct. 1127 (1969); Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999 (1970); Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375 (1972); and Manson v. Brathwaite, 21 Cr.L.R. 3120 (June 16, 1977). Foster excluded in-court testimony of a witness who was not positive in his identification until after a series of suggestive confrontations. In Coleman, an independent basis was found as a result of the witness's testimony that he saw the defendant "face to face" in automobile lights and got a "real good look at him." In Biggers the Court admitted the challenged identification despite a suggestive stationhouse confrontation and a delay of seven months between the crime and the show-up, because the witness had viewed her assailant for half an hour under adequate lighting. In Manson, the eyewitness was a narcotics agent certain of his identification. The court found no taint from a single photo viewing two days after the crime.

The Supreme Court also found it relevant "to consider those facts which, despite the absence of counsel, are disclosed concerning the conduct of the lineup."[36]

In applying these criteria Pennsylvania appellate courts have had no difficulty finding an independent basis in such obvious situations as where the witness knew the defendant or was familiar with his appearance, from prior contacts, when the offense occurred.[37] Similarly, the absence of taint is routinely found where the witness or witnesses had an opportunity to observe the culprit of one minute or more, under reasonably bright lighting, and where there is no evidence suggesting that the identification is unreliable.[38]

On the other hand, where the opportunity to observe was limited or where the witness had difficulty making an identification at some stage, the courts have been more willing to find taint. This is especially true where the improper confrontation was a suggestive one. As examples, our Supreme Court has suppressed in-court identification testimony in two rape prosecutions (after observing, rightly or wrongly, as the Wade court, that there is a particular danger of misidentification in such cases because the prosecutrix's judgment may be clouded by her sense of outrage). In the first, Commonwealth v. Mackey, 447 Pa. 32, 301 A.2d 778 (1972), the victim had just awakened from sleep when the attack occurred, mis-identified her assailant within hours, and made an equivocal in-court identification. In Commonwealth v. Wilson, 450 Pa. 296, 301 A.2d 823 (1973), the Court found that a suggestive station house confrontation tainted the

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36 388 U.S. at 241, 87 S.Ct. at 1940; Commonwealth v. Futch, 447 Pa. 389, 392, 290 A.2d 417 (1972). The Wade case, of course, was a Sixth Amendment assistance of counsel situation. Where a due process suggestivity violation has been found, we believe that the degree of suggestivity in the conduct of the confrontations should be an extremely important factor. The witness's statement that he is certain of his identification or that he has an independent basis is not conclusive on the issue. United States v. Gambrill, 449 F.2d 1148, 1154 (D.C. Cir. 1971).

37 Commonwealth v. Allen, 239 Pa. Super. 83, 361 A.2d 393 (1976); Commonwealth v. Sansbury, 229 Pa. Super. 60. 323 A.2d 820 (1974); Commonwealth v. Ray, 227 Pa. Super. 462, 322 A.2d 724 (1974); Commonwealth v. Pugh, 226 Pa. Super. 50, 311 A.2d 709 (1973); Commonwealth v. Johnson, 226 Pa. Super. I, 311 A.2d 694 (1973); Commonwealth v. Rankin, 441 Pa. 401, 272 A.2d 886 (1971). Finding no taint in such situations was specifically sanctioned in Wade. 388 U.S. at 241 (fn. 33) 87 S.Ct. at 1940 (fn 33).

38 Commonwealth v. Thomas, 444 Pa. 436, 282 A.2d 693 (1971); Commonwealth v. Pennebaker, 224 Pa. Super. 512, 306 A.2d 921 (1973); Commonwealth v. Minifield, 225 Pa. Super. 149, 310 A.2d 366 (1973) [errors in height and age of accused not dispositive] 342 A.2d 84; Commonwealth v. Cos, Pa., 353 A.2d 844 (1976); Commonwealth v. Brown, 462 Pa. 578, 342 A.2d 84 (1975); Commonwealth v. Thomas, 460 Pa. 442, 333 A.2d 856 (1975); Commonwealth v. Sawyer, 238 Pa. Super. 213, 357 A.2d 587 (1976).

in-court, despite the positive nature of the latter because the criminal episode lasted only a few moments on a dark street, there was a delay of four weeks between the attack and the illegal confrontation, the complainant described her assailant as only a "tall man" and she testified that she was not sure of her ability to pick him out either on the street or from a group of other men.

Our Supreme Court also found taint in Commonwealth v. Fowler, supra. There the homicide victim's adult daughter was repeatedly shown photographs of the defendant, in the course of photospreads in which his was a different kind and view than most of the others. She was unable to make a positive identification, however, until three and a half months after the crime, at a lineup where shehad to ask the defendant to speak before she could be "sure." The Court was unpersuaded that she had an independant basis because she had had only momentary glimpses of the assailant during the crime and her description of him (including a mistake in age of ten years) could have applied to any tall, slender, male of the same race. Moreover, her inability to make the photographic identification pointed clearly toward taint.

Similarly, an effectively counselless "lineup," conducted during the course of a preliminary hearing, has been held to taint in-court testimony where the witness observed the culprit for "only a few minutes and was only 90% sure of the identification," the robber's features were obscured by a hat and glasses, and other witnesses, with similar opportunities to observe, were unable to identify the defendant. The Supreme Court there also noted that while the witness's description of the perpetrator remained consistent throughout, it was "very limited": "hat, sunglasses, a mustache and five feet something in height."[39]

However, where the witness is able to provide a credible explanation for an apparent weakness in his or her identification, the in-court may be saved despite pre-trial improprieties. Thus in Commonwealth v. Wortham, 235 Pa. Super. 25, 342 A.2d 759 (1975)

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39 Commonwealth v. Darrell Taylor, supra; see also United States v. Russell, 532 F.2d 1063 (6th Cir. 1976) (in-court barred when witness picked out defendant's photograph after police critized her selection of another picture and she had had limited opportunity to observe - a few seconds from a distance of thirty feet). In Commonwealth v. Jackson, 227 Pa. Super. 1 (1974), at least three judges of the Superior Court were skeptical that a brief confrontation after the burglar broke into the victim's home would support a finding of independent basis. See also, Coleman v. State, 258 A.2d 42 (Maryland) where the court suppressed an eyewitness's in-court identification because the witness failed to select the defendant's photo, failed to pick him out of a lineup, and only identified him at an unnecessarily suggestive one-on-one confrontation at the preliminary hearing after his name and the charges were read in open court.

an eyewitness failed to identify the defendant at a suggestive stationhouse show-up but later satisfied the court that only the wig worn by the suspect and the fact that she looked away during the confrontation prevented a positive identification at that time. Likewise, otherwise untainted in-court testimony was permitted in Commonwealth v. Baker, 220 Pa. Super. 86, 283 A.2d 716 (1971), despite uncertainty at a preliminary hearing, where the witness testified that her positive identification was based on the defendant's profile and that she had been confused by the full-face viewing at the prior proceeding. See also, Commonwealth v. Rodgers, ___ Pa. ___, 372 A.2d 771 (1977) where the Court accepted the eyewitnesses explanation that she was not wearing her glasses for her failure to identify the defendant at the preliminary hearing.

IV. MOTION TO SUPPRESS IDENTIFICATION TESTIMONY

The content and filing requirements for motions to suppress identification testimony are presented in Rule 323 of the Pennsylvania Rules of Criminal Procedure. Rule 323(d) states that such applications must state specifically the evidence sought to be suppressed, the constitutional grounds rendering the evidence inadmissible, and the facts and events in support thereof. Rule 323(h) provides that the Commonwealth has the burden of establishing the admissibility of any challenged evidence. Once an out-of-court identification has been suppressed the Commonwealth must establish an independent basis of any in-court identification by clear and convincing evidence. Rule 323(b) requires that all motions must be filed not later than ten days before trial in districts with continuous trial sessions and, in other districts, not later than ten days before the beginning of the trial session in which the cases is listed. The only exceptions to this timeliness requirement are where the opportunity did not previously exist or the interests of justice mandate leave to file out of time.[40] Moreover, it should be noted that our appellate courts have thus far shown great reluctance to overrule a trial judge's finding that the exceptions do not apply.[41] Once filed, the motion may be heard either before or at trial in the discretion of the court. Rule 323(3).

Obviously thorough preparation is essential to success in suppressing identification evidence, but failing that, a well presented motion can be a valuable source of discovery and inconsistent testimony for use at trial. Since the credibility and reliability of witnesses will be at issue on the questions of both primary illegality and independent basis (which the Commonwealth will sometimes attempt to establish at the same time it presents evidence to show the legality of the challenged confrontations),[42] counsel should be entitled to prior statements of witnesses in the possession of the police or

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40 Thus, if counsel first becomes aware of an identification witness or a pre-trial confrontation at trial which, with due diligence, he would not have discovered previously, a motion to suppress the identification could then be made orally. Commonwealth v. Taylor, supra.

41 See e.g. Commonwealth v. Kim Lee Hubbard, Pa., 372 A.2d 687 (1977); Commonwealth v. Kenneth Page, Pa., Super. 371 A.2d 890 (1977); and compare Commonwealth v. Taylor, supra. In Commonwealth v. Ronald Grace, Pa., A.2d (July 8, 1977), the Supreme Court held that a prosecutor's representation that he was not aware of any pre-trial identifications did not excuse failure to file a motion to suppress pre-trial!

42 Technically, the motion should first go only to establishing the legality of the procedures employed. If the legality is not established, then there would be a determination of whether an independent basis exists. However, holding the Commonwealth to this two step procedure may only result in depriving counsel of an opportunity to cross-examine the identification witness where the Commonwealth can prima facie show the absence of illegality through police testimony.

prosecutor. The photographs used in a photo spread must be provided by the Commonwealth upon defense request where an identification occurred and its suggestiveness is at issue.[43] Where the Commonwealth concedes or presents no evidence in response to a well pleaded claim of illegality and taint the challenged evidence must of course be excluded from trial, Commonwealth v. Tull, 224 Pa. Super. 494, 307 A.2d 318 (1973); Commonwealth v. Heacock, 467 Pa. 453, 355 A.2d 828 (1976).

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43 Commonwealth v. Jackson, supra. See also Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967 (1968).

V. REMEDIES ON APPEAL

There are several different situations and remedies which can arise on appeal:

1. Out-Of-Court Identification Should Have Been Suppressed, But Not Used At Trial.

In this instance, the appellate court will examine the record to see if the lower court adressed itself to, or had facts sufficient to rule upon, the existence of an independent basis for the in-court identification. If it is convinced that an independent basis existed, the conviction will be affirmed. If it does not have facts sufficient for this determination, it will remand for a taint hearing. If it is convinced that there is no independent basis, it should suppress all identification evidence and grant a new trial.

2. Out-Of-Court Identification Should Have Been Suppressed, And Used At Trial.

Here, again, the appellate court will look to see if the record is sufficient to determine whether there is an independant basis for the in-court identification. Again, there may be a remand, or a suppression with the granting of a new trial. If an independent basis is clear from the record, then a new trial might be granted, with instructions not to use the suppressed identification. If, however, the court finds an independent basis, and finds that the introduction of the out-of-court identification was "harmless beyond a reasonable doubt," the conviction may be affirmed.

3. In-Court Identification (And Possibly Out-Of-Court Identification) Should Have Been Suppressed.

If the record is sufficient to show that an in-court identification should have been suppressed, a new trial will be granted with instructions not to use the suppressed identification. Again, of course, if somehow the error was "harmless beyond a reasonable doubt," the conviction could be affirmed. It is difficult to imagine how an in-court identification could be harmless beyond a reasonable doubt. See: Stoutzenberger Appeal, 235 Pa. Super. 500, ___ A.2d ___ (1975); Commonwealth v. Hodges, 218 Pa. Super. ___, ___ A.2d ___ (1971); Commonwealth v. Padgett, 428 Pa. 229, ___ A.2d ___ (1968); United States v. Wade, supra; Gilbert v. California, supra: and Stovall v. Denno, supra.

4. Use Of Suppressed Evidence At Trial

If certain identification evidence has been suppressed, and the Commonwealth introduces it at trial, defense counsel's motion for mistrial should be granted. Of course, it would probably not be an abuse of discretion to hold under advisement the motion for mistrial (with any appropriate jury instructions to ignore the evidence), and grant the mistrial later unless the use of the suppressed evidence proved to be harmless beyond a reasonable doubt. See, Commonwealth v. Tull, 224 Pa. Super. 494, 307 A.2d 318 (1973) (allocatur denied), for a case involving a statement. Likewise, on appeal, the harmless beyond a reasonable doubt standard is used. If, however, there is evidence that the prosecution deliberately introduced the suppressed evidence, prosecutorial misconduct may be an additional grounds for relief; and possibly even a bar to a retrial.

5. Defendant's Admission Of Identity

If a motion to suppress identification is improperly denied, and identification evidence is introduced as part of the Commonwealth's case, the defendant may get himself into a precarious situation, if he takes the stand and, by offering an exculpatory version, admits that he is the person in question. For a discussion of this issue, see, Commonwealth v. Guyton, 230 Pa. Super. 168, 326 A.2d 913 (1974), where a divided Superior Court held that the defendant's trial testimony rendered harmless any error in denying the motion to suppress.

One final note regarding appellate relief. If a motion to suppress is not litigated, the case goes to trial, there is a conviction, and an appellate court grants a new trial, a defendant is able to file and litigate a motion to suppress. Commonwealth v. DeCampli, ___ Pa. Super. ___, 364 A.2d 454 (1976).

VI. SUFFICIENCY OF THE EVIDENCE IN IDENTIFICATION CASES

The identity of the defendant as the person who committed the crime must be proven beyond a reasonable doubt. Listed below are a few cases on sufficiency of the identification evidence, together with what they hold.

In Commonwealth v. Crews, 436 Pa. 346, 260 A.2d 711 (1970) appellant's first-degree felony-murder conviction was reversed because the identification testimony was insufficient. Crews and his co-defendant were seen together before and after the murder - Crews wearing a gold or orange sweater, the co-defendant wearing a black leather coat. An eyewitness saw two black males - one taller, lighter-complected and wearing a gold sweater, the other wearing a black leather coat - fleeing from the murder scene. The co-defendant was arrested, and the black coat he was wearing was identified by the eyewitness. A gold sweater was found in Crews' home, but the eyewitness could not positively say that it was the same sweater she saw the taller felon wearing. The court held that this evidence - similar height and coloration, plus the clothing, and the defendant's association - "failed to point with sufficient certitude to Crews as the perpetrator of the crime."

In Commonwealth v. Paschall, 214 Pa. Super. 474, 257 A.2d 687 (1969) appellant's robbery conviction was also vacated because of insufficient identification testimony. The complainant, who had been drinking, testified that he recognized the robber's build (the robber was masked) as the same as Paschall's build, but that there was another person whom he knew that had the same build. The court noted that there was nothing in the record to show that Paschall's build was unique, and that the complainant merely assumed that the robber was someone from the neighborhood, thereby leaving open "the possibility that another person with a build similar to that of appellant [outside his circle of acquaintances] may have been the robber."

In Commonwealth v. Pereria, 219 Pa. Super. 104, 280 A.2d 623 (1971) (allocatur refused), the court found that the victim's "in-court identification of appellants were [so] vague, tenuous, and uncertain" that their convictions had to be reversed. The victim has seen two men breaking into his car at night. The victim identified the two defendants' photos the next day. At trial, two years later, the witness said of co-defendant Farrington, "This is the face but not the body." As to Pereria he said, "He looks like the man, looks like the photograph, but I am not 100% sure." He further

testified that he was sure of his photo identifications, but that in court he could only say that the defendants were "different than the two men who were hacking at my car. The resemblance is there, yes." See also, Commonwealth v. Sharpe, 138 Pa. Super. 156 (1939), cited with approval in Pereria, which states that if the case rests on identification alone, the identification must be "a well founded belief...to a moral certainty."

See also, Commonwealth v. Donald, 227 Pa. Super. 407, 323 A.2d 67 (1974) and Commonwealth v. Atkins, 232 Pa. Super. 206, 335 A.2d 375 (1975) where the evidence was sufficient for convictions. For a case involving the sufficiency of the evidence regarding proving identity through fingerprints in an extradition case, see, Commonwealth ex rel. Walker v. Hendrick, 434 Pa. 175, 253 A.2d 95 (1969).

VII. JURY INSTRUCTIONS

Commonwealth v. Kloiber, 378 Pa. 412, 106 A.2d 820 (1954) contains language which is overwhelmingly used for identification jury charges. The language is divided into two parts, commonly called the first half of the Kloiber charge and the second half. The first half is:

> Where the opportunity for positive identification is good and the witness is positive in his identification and his identification is not weakened by prior failure to identify, but remains, even after cross-examination, positive and unqualified, the testimony as to identification need not be received with caution - indeed the cases say that 'his [positive] testimony as to identity may be treated as the statement of a fact.' 378 Pa. 424.

The second half is:

> On the other hand, where the witness is not in a position to clearly observe the assailant, or he is not positive as to identity, or his positive statements as to identity are weakened by qualification or by failure to identify defendant on one or more prior occasions, the accuracy of the identification is so doubtful that... the testimony as to identity must be received with caution. Id.

In Commonwealth v. Mouzon, 456 Pa. 230, 318 A.2d 703 (1974), the court said it was error for the court not to give the "cautionary instruction" in Kloiber where "there was evidence upon which the jury could find that the lighting was poor." Apparently, then a defendant is entitled to the second half of the Kloiber charge only if there is some evidence in the case warranting it. And if there is such evidence, and the judge refuses to give the second half, it is reversible error. Whether he is entitled to only the cautionary portion is not clear.

The first half of the Kloiber charge has been criticized as being confusing in that it tells the jury that identification testimony, if positive and unwaivering, can be "treated as the statement of a fact." This treatment of identification testimony as "fact" might have had its genesis from language such as contained in Commonwealth v. Sharpe, 138 Pa. Super. 156, 159 (1939):

> Where the witness has been acquainted with the subject of identification or has had the opportunity of observing him on prior occasions, his testimony as to identity may be treated as the statement of a fact. But where, one is observed for the first time and only while committing the crime, testimony of identification may be ... merely the expression of an opinion ...

We believe that this type of distinction is unnecessary, illogical, and confusing.

The Criminal Instructions Subcommittee of the Pennsylvania Supreme Court Committee for Proposed Standard Jury Instructions also believes that the first half of Kloiber is confusing. Attached hereto as Appendix "A" are its proposed instructions concerning identification testimony, including the comments. These instructions, we believe, more realistically put the issue before the jury.

For another model instruction on identification, see United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972). Note that Telfaire and the above proposed instructions do draw a jury's attention to how the identification is arrived at. The jury will therefore, hopefully, give extra scrutiny to in-court identifications which have been influenced by an initial, suggestive confrontation.[44]

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[44] See Telfaire also for the concept of jury instructions concerning a witness's ability to recognize his assailant based upon the race of both the victim and the accused.

VIII. GUILTY PLEAS MOTIVATED BY A MOTION TO SUPPRESS BEING DENIED

The situation often arises where a motion to suppress identification has been denied, and the evidence is such that counsel believes a guilty plea would be in the best interests of his client. By pleading guilty, the defendant gives up the right to challenge on appeal the legality of any evidence in the possession of the police, or an adverse ruling on his motion to suppress. A defendant who does plead guilty, however, is not completely remediless concerning an improperly denied motion to suppress, or to challenge evidence in the possession of the police.

In Commonwealth v. Marsh, 440 Pa. 590, 271 A.2d 481 (1970) the Pennsylvania Supreme Court approved of the United States Court's rule that to successfully attack a guilty plea under such circumstances, the defendant must show: (1) the existence of constitutionally infirm incriminating evidence; (2) "that the guilty plea was primarily motivated by such evidence; and (3) that the defendant was incompetently advised by counsel to plead guilty, in the circumstances, rather than stand trial." With respect to what constituted incompetent advice, the court ruled that "mere miscalculation" of the evidence's admissibility was not sufficient - there had to be "a showing of gross error on the part of counsel."

Marsh has been recently followed in Commonwealth v. Kittreles, 465 Pa. 431, 350 A.2d 842 (1976). See also, Commonwealth v. Halloway, 215 Pa. Super. 136, 257 A.2d 308 (1969) for a guilty plea that was challenged on the basis that a motion to suppress an illegal identification was not litigated before the defendant pled guilty.

IX. MISCELLANEOUS EVIDENTIARY PROBLEMS RELATING TO IDENTIFICATION

A. Identification Exception To The Hearsay Rule

In Commonwealth v. Hill, 237 Pa. Super. 543, 353 A.2d 870 (1975)(allocatur refused), Judge Spaeth argued for the acceptance in Pennsylvania of McCormick's "statements of identification" exception to the hearsay rule. It was noted that this was apparently not the current law in Pennsylvania. Emphasizing that traditional hearsay rules protect the defendant's right to confrontation, the identification exception would allow either testimony from a second person as to a first person identifying a suspect - as long as the first person is available for examination, or testimony from that first person himself that he previously made an out-of-court identification.

While Pennsylvania now only allows such testimony to be used to impeach, or rehabilitating, and not for the truth of the matter asserted, Hill will surely be exploited by prosecutors. Note that the language in Hill is only dicta, and no authority for the proposition is cited other than McCormick.

B. Using Previous Testimony At Trial When The Witness Is No Longer Available

If a witness dies before the motion to suppress or before trial, the Commonwealth might try to introduce previous sworn testimony of the witness. In Commonwealth v. Rodriguez, 234 Pa. Super. 294, 338 A.2d 633 (1975) the court prohibited use of the deceased witness's preliminary hearing testimony at trial because there was evidence of a suggestive confrontation and the preliminary hearing testimony was inadequate to establish an independent basis. If this problem arises, besides Rodriguez and the cases cited there, the applicable statute governing use of previous testimony should be consulted. 19 P.S. §582.

C. Waiver Of Illegality

The right to counsel at an identification procedure can be waived by the suspect (except, of course, to the extent that an unnecessary delay can still coerce a suspect into unintelligently waiving the right). Commonwealth v. Richman, supra, states that in order for a suspect to intelligently waive his right to counsel he "should at least know the general nature of the transaction giving rise to the charges." Exactly

what this means will have to be decided on a case by case basis. The standard applicable to a Miranda waiver is applicable here. See Commonwealth v. Jones, 460 Pa. 223, ___ A.2d ___ (1975) - defendant told he was being questioned about "the Stancko stabbing.

Of course, not only must the suspect know the nature of the charges, but he also must be told that he has the right to have a lawyer present, and if he cannot afford to hire a lawyer, one will be appointed for him free of charge.

Whether a suspect can validly consent to an unnecessarily suggestive confrontation has not yet been discussed by the appellate courts. It is not inconceivable, for instance, that a suspect could "demand" a one-on-one confrontation at a police station, after the necessity for a prompt, on-the-scene one-on-one confrontation has passed. While the right to counsel and the right to due process at a confrontation procedure may be waived, the concept of waiving some initial illegality, such as an illegal arrest, has not been recognized. See, e.g., Betrand Appeal, 451 Pa. 381, 303 A.2d 486 (1973) which holds that standard Miranda warnings does not cure the taint of an illegal arrest.

One last particular situation should be mentioned in regard to the right to counsel and non-suggestive confrontations and any possible waiver. It would not be impossible for the situation to arise where a defendant is told at his preliminary arraignment to hire a private lawyer, and then bail is set so high that he remains incarcerated and cannot hire a lawyer. A real problem would arise if the prisoner appears at the preliminary hearing without a lawyer, in a case where a pre-preliminary hearing lineup would have been appropriate. Having the defendant stand in front of the magistrate, in the presence of the identification witness, and having him explain why he could not get a lawyer could hardly be called a waiver of counsel or a waiver of an unnecessarily suggestive confrontation. Mason v. United States, 414 F.2d 1176 (D.C. Cir. 1969) recognized this danger and noted in a footnote:

> ...efforts should be made to obtain counsel for defendants prior to the hearing. That failing, the prosecutor should explain his dilemma to the magistrate, who may see fit to arrange an impromptu lineup under his own supervision or to take other remedial measures. 414 F.2d 1179.

Commonwealth v. Sawyer, 238 Pa. Super. 213, 357 A.2d 587 (1976) also apparently holds that Sawyer did not effectively waive counsel at his preliminary hearing where the magistrate merely asked if [he] would proceed without counsel and he "acquiesced."

X. EXPERT TESTIMONY

Since identification testimony of a witness is the product of his human perceptions and thus subject to human frailty, it is wide open to scientific inquiry. While this memorandum cannot purport to review the pertinent literature, it can represent that there has been considerable investigation in this area. In addition, if the conclusions presented in a recent article in Scientific American[45] be correct, then the incidence of misidentification and the dangers of suggestion are very frightening indeed.

Briefly stated, psychological studies conform all of the concerns repeatedly voiced by skeptics of eyewitness identification testimony. Experiments have shown that witnesses perceiving under stress, such as presumably victims in assaultive crimes, are less than normally reliable witnesses. Evidence shows also that a witness's recollections are colored by what he initially expects or wants to see, and that time rapidly dims the accuracy of observations. Finally, there is impressive proof that people do respond in conformity with suggestive inferences, both subtle and unsubtle.

In light of this research it would of course be helpful to present such expert testimony, where available, on issues of admissibility and guilt. Those appellate courts reviewing refusals to admit such evidence have taken the position that the question is one within the discretion of a trial judge, after weighing probative significance against potential prejudice (to the prosecution). That such evidence has been held admissible is demonstrated by the opinion of the Supreme Court in Neil v. Biggers, 409 U.S. at 200, 93 S.Ct. at 382. Its admissibility in Pennsylvania, though apparently not yet considered, would be presumably governed by the rule for expert evidence:

> Expert testimony is permitted only as an aid to the jury when the subject matter is distinctly related to a science, skill, or occupation beyond the knowledge or experience of the average layman. Commonwealth v. O'Scaro, Pa., 352 A.2d 30, 32 (1976).

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45 R. Buckhout, Eyewitness Testimony, December 1974, Vol. 231, No. 6.

APPENDIX "A"

CRIMINAL INSTRUCTIONS SUBCOMITTEE OF
THE PENNSYLVANIA SUPREME COURT COMMITTEE
FOR PROPOSED STANDARD JURY INSTRUCTIONS

SUBCOMMITTEE DRAFT - MAY 15, 1972

§4.07 IDENTIFICATION TESTIMONY

(1) Even though a crime has been committed, the defendant may not be found guilty unless the Commonwealth has proven beyond a reasonable doubt that this defendant is in fact the one (one of the persons) who committed the crime.

(2) The Commonwealth's witness(es), ( ), (has) (have) identified the defendant as the one (one of the persons) who committed the crime. However, a mistake can be made in identifying a person, even by a witness attempting to be truthful.

(3) In this case:

(( ) has testified that he was not in a position clearly to observe the person committing the crime).

(( )'s positive identification of the defendant was weakened by his testimony that (elaborate)).

(There is evidence indicating that on (insert when) ( ) made an inconsistent identification by (elaborate)).

Because of this, the accuracy of the identification by ( ) is so doubtful that you should consider his testimony with caution in deciding whether the defendant was the one (one of the persons) who committed the crime.

(4) In determining whether or not to accept as accurate the identification testimony of ( ), using caution for the reason I just mentioned, you must also take into consideration the following matters:

(a) whether the testimony of the identification witness is generally believable;

(b) Whether his opportunity to observe was sufficient to allow him to make an accurate identification;

(c) How the identification was arrived at;

(d) all the circumstances indicating whether or not the identification was accurate;

(e) whether the identification testimony is supported by other evidence, and you must conclude that it is so supported before you can accept it as being accurate.

SUBCOMMITTEE NOTE

The above instruction on identification should be given only when identifying witness was not in a position which would permit him to observe clearly the person committing the crime, when the witness is not positive as to identity, when his positive statements as to identity are weakened by qualification, by failure to identify the defendant on one or more other occassions, or by a prior inconsistent identification or when his identification testimony otherwise appears to be doubtful. No instruction on identification testimony should be given when the identification witness had a good opportunity for positive identification, he is positive in his identification, and his identification is not weakened by prior inconsistent identification or prior failure to identify but remains, even after cross-examination, positive and unqualified. To give an instruction on identification under these circumstances would serve only to confuse the jury. See Commonwealth v. Kloiber, 378 Pa. 412, 106 A.2d 820 (1954), cert. denied 348 U.S. 875, 75 S. Ct. 112, 99 L.Ed. 688, which still appears to be controlling in Pennsylvania; Commonwealth v. Holden, 390 Pa. 221, 134 A.2d 868 (1957); Commonwealth v. Wilkerson, 204 Pa. Super. 213, 203 A.2d 235 (1964).

The section in parentheses that applies to the particular situation should be read; the court may wish to discuss the facts which give rise to the necessity for giving the cautionary portion of the charge under Kloiber. Any uncertainty in an identification goes to its weight. Commonwealth v. Nason, 211 Pa. Super. 328, 236 A.2d 548 (1967). But see below.

For subdivision (1), see Commonwealth v. Shelbert, 195 Pa. Super. 209, 171 A.2d 574 (1961). A weak identification, together with other evidence, may be sufficient to convict. Commonwealth v. Kloiber, supra.

Subdivision (2) is taken from Commonwealth v. Kloiber, supra.

In subdivision (4) various factors by which the identification is arrived at are to be considered by the jury. The method of placing suspect in a lineup may be important. See Commonwealth v. Downer, 159 Pa. Super. 626, 49 A.2d 516 (1946). See

also Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed 2d 1199 (1967), which deals with the question of the admissibility of identification testimony under the 14th Amendment. Stovall and its companion cases, United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149 (1967), and Gilbert v. California, 388 U.S. 273, 87 S.Ct. 1951, 18 L.Ed. 2d 1178 (1967) deal with lineup questions and problems in making eyewitness identifications and indicate the United States Supreme Court's concern with questions of identification. "A conviction which rests on a mistaken identification is a gross miscarriage of justice." Id. at 297. See especially United States v. Wade, supra, at 228 et seq. And see Commonwealth v. Lee, 219 Pa. Super. 240, 257 A.2d 366 (1969), criticizing and unduly suggestive identification procedure. If the identification method is unduly suggestive or if counsel was not present, then the principles of Stovall or Wade may have been violated and the witnesses' identification testimony may be inadmissible. See, for example, Commonwealth v. Mackey, 447 Pa. 32, ___ A.2d ___ (1972) and Commonwealth v. Whiting, 439 Pa. 205, A.2d 738 (1970).

For subparagraph (3) of subdivision (4), see Commonwealth v. Kloiber, and Commonwealth v. Shelbert, both supra. It seems that when the identification testimony is "weak" or "doubtful" that it must be supported by other evidence in the case. Since this instruction is given only when the identification testimony is doubtful, this requirement is included in the instruction.

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