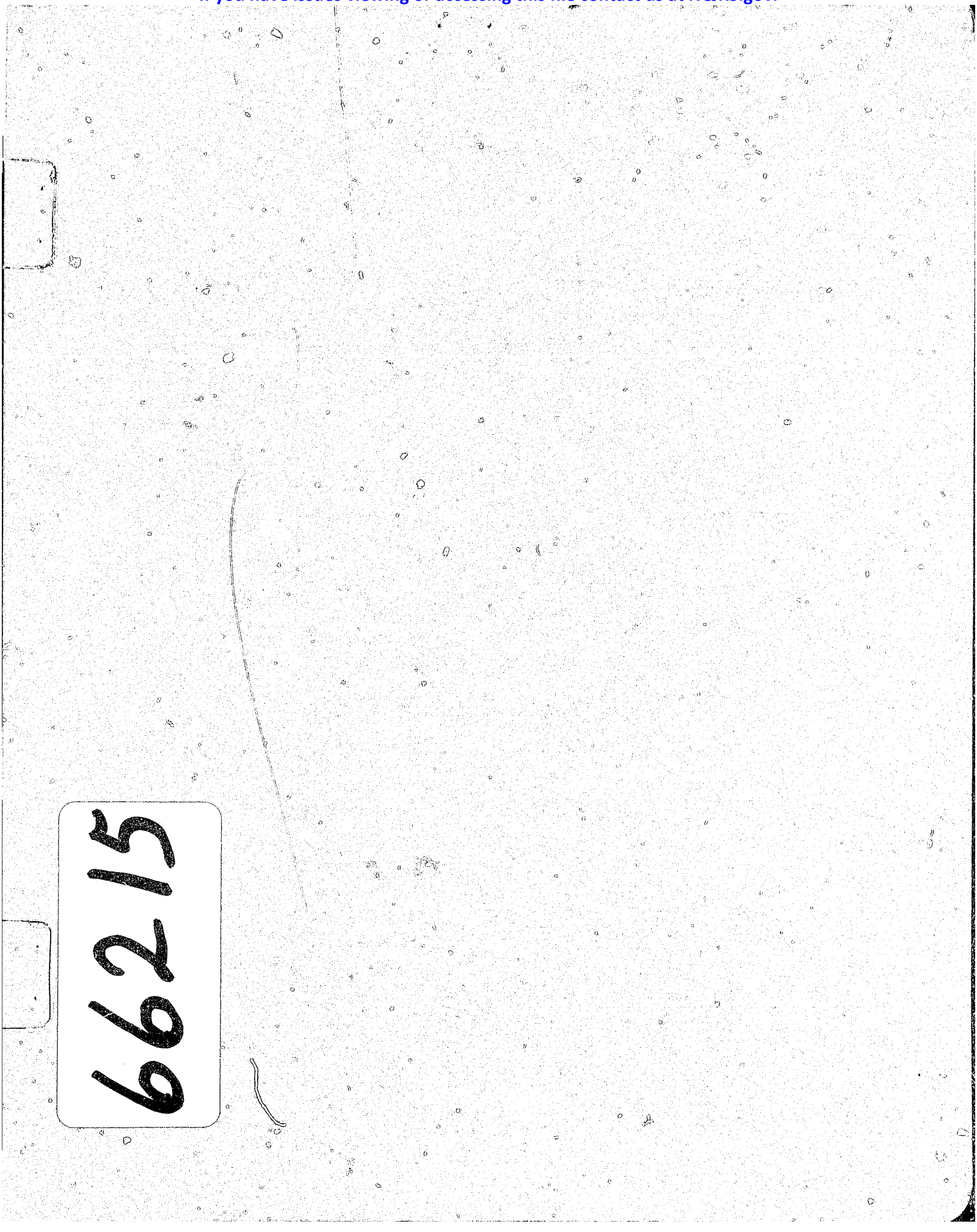

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The Role of Defense Counsel at Lineups

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Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

In 1967, the U.S. Supreme Court decided three cases dealing with police lineups.[1] In one of these, *United States* v. *Wade,* the Court discussed at length the dangers inherent in eyewitness identification and concluded:

> "The influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined."[2]

The "miscarriage of justice" referred to by the Court is the mistaken identification that can result if a pretrial identification procedure is conducted in a suggestive manner. Because the subsequent conviction may rest on an in-court identification, which is the product of the suggestive pretrial identification, a suspect appearing in the lineup is exposed to a "grave potential for prejudice."[3] The Court noted that the presence of counsel could help avoid the prejudice of a mistaken identification by preventing unfairness at the lineup itself and allowing the defendant to reconstruct the lineup at trial through cross-examination of the lineup witnesses. It then went on to hold that a postindictment lineup is a critical stage of the prosecution at which the suspect is entitled to the assistance of counsel.[4]

The Court's "constitutionalization" of pretrial lineups carried with it an exclusionary sanction. A lineup held in violation of a defendant's sixth amendment right to counsel will result in suppression of any testimony about the lineup identification. It will also result in suppression of any in-court identification by the lineup witness, unless the government can establish by clear and convincing evidence that the in-court identification is based on the witness' recollection of seeing the defendant's features at the crime scene

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"Once the lineup actually begins, the lawyer should function merely as an observer. . . ."

and not from his recollection of the defendant at the tainted lineup. Because of the seriousness of this sanction, officers conducting lineups should be aware of those situations that frequently result in claims of a sixth amendment violation.

It is clear from the *Wade* decision, and from cases decided subsequent to that opinion, that the right to counsel at a pretrial lineup can be violated in one of two ways. First, and most obvious, is the situation in which an attorney is not present at the lineup and the defendant has not executed a voluntary waiver of his right to counsel. Less obvious, but possibly of more potential concern to officers conducting pretrial lineups, is the situation in which it is contended that "the attorney's role during the lineup was so severely restricted by the government that the attorney could not effectively carry out the purpose for which . . . [the *Wade* decision] . . . require[s] an attorney's presence." [5]

The purpose of this article is twofold: (1) To identify the proper role of a defense attorney attending a pretrial lineup, and (2) to discuss steps lineup officers can take to accommodate that role and thus avoid subsequent claims that the defendant was denied the effective assistance of counsel at his lineup.

Reasons for Presence

The role of the lineup lawyer probably can best be ascertained by examining the very reasons for his presence. As stated earlier, the purposes of having defense counsel at lineups are to minimize the likelihood of misidentifications by eliminating or reducing suggestiveness and enable counsel to make informed challenges to subsequent identification testimony through motions to suppress and cross-examination of lineup witnesses.

With these purposes in mind, the limits of the lawyer's activities can be established by answering the following questions, one or more of which are common to most police lineups:

1) In the event the suspect's lawyer does not appear, under what circumstances may the lineup proceed without him?

2) Should the lineup officer solicit or accept suggestions offered by the defense attorney regarding the composition or conduct of the lineup?

3) What participation should the defense attorney be allowed once the lineup has begun?

4) Should the defense counsel be present at the moment of the identification attempt or be allowed to attend the postlineup interview of the witnesses?

Failure To Attend Lineup

One problem that can develop even before the lineup begins is the failure of the defense counsel to appear. It may be that the lawyer was not notified of the lineup, or if notified, prevented from attending by other commitments or unforeseen circumstances. To the officer running the lineup, this is a major cause for concern. Delaying or rescheduling the lineup may be costly, time-consuming, or inconvenient and may result in a less-reliable identification. But may the lineup be conducted in the absence of the defense attorney? Several possibilities exist.

First, the defendant may be willing to waive his right to counsel. This appears to be a common solution to the problem and was contemplated by the *Wade* decision itself. " . . . counsel's presence should have been a requisite to conduct the lineup, absent an 'intelligent waiver'." [6]

If the suspect is unwilling to execute a waiver of counsel, consideration should be given to obtaining a substitute attorney. Although the question of whether substitute counsel would suffice was left open in *Wade*, the lower courts generally have approved the practice.[7] Logical sources of substitute counsel would appear to be the public defender's office, a legal aid bureau, or possibly a court-appointed lawyer.

In the event the suspect refuses to waive counsel, substitute counsel is impossible or impracticable, and it is absolutely imperative to conduct the lineup immediately, consideration might be given to conducting a "photo lineup." A "dry" lineup (a lineup which is not attended or viewed by the witnesses) is conducted. The suspect and the elimination participants are assembled in the lineup room, while the witnesses are sequestered in a remote location. The lineup array is then video taped or photographed and the pictures shown to the sequestered witnesses. Because there is no constitutional right to have counsel present when a suspect's photograph is shown to witnesses for identification,[8] the sixth amendment is not implicated. It should be observed, however, that this procedure is somewhat extraordinary and has, at this time, received limited judicial approval.[9] It is recommended that officers consult with their prosecutor or legal adviser before resorting to its use.

"Presence of counsel is required to minimize the likelihood of misidentifications and enable counsel to intelligently challenge subsequent identification testimony."

One other solution appears available in those infrequent situations when the suspect is not indigent and has the means to hire his own lawyer, but has failed to do so.

In *United States* v. *Clark*,[10] the defendant was arrested on bank robbery charges and appeared before a U.S. magistrate who determined he was not indigent and thus not entitled to court-appointed counsel. A lineup was arranged for the purpose of exhibiting Clark to the robbery witnesses, but it was postponed as Clark had not retained the services of an attorney. The lineup was rescheduled and subsequently held, although the defendant still had not hired a lawyer and did not execute a waiver. He was identified and later convicted. On appeal he contended that he was denied his right to counsel at the pretrial lineup.

The court of appeals rejected his contention, pointing out that Clark was financially able to retain counsel and was given a reasonable time to secure one. "In these circumstances, his failure to retain counsel was properly treated by the court as a waiver of his right to counsel." [11]

It is emphasized that the steps taken by the officers in the *Clark* case appear to have application only to those situations in which the lineup suspect is not indigent and has been instructed to make arrangements for hiring his own attorney, but has failed to do so even though he has been given ample opportunity and has been placed on notice regarding the impending lineup. If a retained or appointed lawyer does not appear, through no fault of the accused, a lineup would most likely be ruled in violation of the suspect's right to counsel (absent a waiver or substitute attorney).

Lawyer's Suggestions

Once the lineup is about to begin, should the defense counsel be permitted to make suggestions regarding the composition or conduct of the lineup? Or should his role be limited to that of a passive observer?

Language in the *Wade* opinion states that ". . . the presence of counsel itself can often avert prejudice. . . ."[12] It was not immediately clear whether this passage meant that the mere presence of the defendant's lawyer at the lineup would deter the police from employing suggestive tactics, or whether the counsel was to be given an active role in setting up and running the lineup. In 1973, the Court itself appeared to state a preference for the former when it summarized the *Wade* holding as follows:

> "The Court held, therefore, that counsel was required at a lineup, primarily as an observer, to ensure that defense counsel could effectively confront the prosecution's evidence at trial. Attuned to the possibilities of suggestive influences, a lawyer could see any unfairness at a lineup, question the witnesses about it at trial, and effectively reconstruct what had gone on for the benefit of the jury or trial judge."[13]

Four years later, however, in *Moore* v. *Illinois*,[14] the Court strongly suggested that the attorney's role was not limited to that of a mere observer.

> "If an accused's counsel is present at the pretrial identification, he can serve both his client's and the prosecution's interests by objecting to suggestive features of a procedure before they influence a witness' identification." [15]

One can easily see how the "*client's* interests" can be served by allowing the defense attorney to participate in the arrangements for the lineup—misidentifications resulting from suggestive confrontations could be avoided. But to what "*prosecution* interest" was the Court referring? An obvious one, "preventing the infiltration of taint in the prosecution's identification evidence" was mentioned in the *Wade* opinion.[16] Two others have been suggested by the lower courts.

First, it is likely the government will be required to respond to fewer motions to suppress identification testimony if the defendant's attorney has been allowed a role in staging the lineup. Having been afforded the chance to suggest lineup procedures, he may be less likely to object later to identifications made at the lineup. This seems especially true if his recommendations were adopted. As stated in *United States* v. *Eley*,[17] ". . . suggestions of defense counsel may be followed and lineup contests averted."[18]

Second, even if a motion to suppress is made, judges may be reluctant to suppress eyewitness identification testimony because of an allegedly suggestive lineup, if the defense attorney had been given the opportunity to take part in the actual preparation of the lineup. As noted by the Court of Appeals for the District of Columbia Circuit:

"... the prosecution is not constitutionally required to furnish the defense names and addresses of witnesses attending the lineup."

> "... it might well be that, absent plain error or circumstances unknown to counsel at the time of the lineup, no challenges to the physical staging of the lineup could successfully be raised beyond objections raised at the time of the lineup." [19]

Because both the defense and prosecution can benefit if the accused's lawyer is allowed to offer suggestions about lineup composition and procedure, it appears reasonable to provide for it in departmental lineup policy. Further, it is advisable from a prosecutive standpoint to accept those recommendations that are reasonable. (Clearly, unreasonable recommendations should be rejected.) All suggestions offered by the defense attorney, whether or not adopted, should be noted by the lineup officer and made a part of the written record describing the lineup.

Participation During Lineup

Once the lineup actually begins, the lawyer should function merely as an observer and should not be permitted to converse with any of the lineup participants or witnesses. Any attempts by the attorney to disrupt the lineup should be noted by the lineup officer on his written report of the proceedings.

Presence at Moment of Identification

Another situation frequently resulting in litigation is the question of whether the defense attorney should be allowed to be present at the moment the lineup witness is asked to make an identification. The answer depends, in part, on whether the identification attempt takes place during the physical confrontation between the witnesses and the suspect or later in a postlineup interview. Although "it may be good procedure to identify the accused at the lineup" [20] itself, the common practice is for the identification attempt to take place after the lineup has ended and the witnesses have been removed to an interview room.

Clearly, the defense attorney should be present if the identification attempt takes place in the lineup room, while the suspect is still within view of the witness. But what if the identification occurs later, after the confrontation is terminated? This issue has not been addressed squarely by the Supreme Court. But with few exceptions, "[v]irtually all the [lower] courts which have had occasion to consider this problem have refused to extend . . . [the right to counsel] . . . beyond the actual confrontation between the accused and the witnesses to a crime." [21]

The rationale for allowing the attorney at the lineup confrontation, but denying him access to the postlineup interview, rests on the view that a substantial potential for misidentification exists during the actual time "the accused is exhibited to identifying witnesses." [22] This is because of the suggestive manner in which the lineup might be conducted. Due to nervous tension or inexperience, the accused is unlikely to be able to correct the suggestiveness at the time or reconstruct it later at trial without the assistance of counsel.

Conversely, even though the prosecution may improperly assist the eyewitness in the postlineup interview, the potential for prejudice is not as great as at the lineup itself. The defense attorney can easily reconstruct the circumstances of the interview by skillful cross-examination of those present. "To hold otherwise is to require the presence of counsel whenever a witness who will testify about the identity of the accused is interrogated by the police." [23]

It should be noted, however, that some courts which have held that defense counsel need not be present at the postlineup identification have based their decisions, in part, on the fact that the witness was made available to defense counsel for interview immediately after the lineup, or later, before trial began.[24] And one court has held that if defense counsel is denied access to an identification witness, a verbatim recording (video tape or tape recording) of the postlineup interview should be made and furnished to the defense attorney in time for a pretrial suppression hearing.[25] Although this practice may be commendable, the majority view appears to be that the prosecution is not constitutionally required to furnish the defense names and addresses of witnesses attending the lineup.[26]

Conclusion

A lineup held after the initiation of adversary judicial proceedings is a critical stage of the prosecution entitling the defendant to the assistance of counsel. Presence of counsel is required to minimize the likelihood of misidentifications and enable counsel to intelligently challenge subsequent identification testimony. If defense counsel is denied his proper role at the lineup, a violation of the suspect's right to counsel ensues, which can result in suppression of eyewitness testimony.

In the event the defendant's counsel fails to appear for the lineup, officers should attempt to secure a waiver of counsel from the accused or locate a substitute lawyer. If the suspect refuses to waive and substitute counsel is unavailable, a "photo lineup" is a possibility.

The lineup attorney should be allowed to make suggestions regarding the composition and conduct of the lineup, prior to its commencement. After the lineup has begun, however, he should function only as an observer and should not be allowed to converse with lineup participants or witnesses or disrupt the lineup.

It is advisable for the witnesses to make the identification attempt during the actual confrontation, when the defense counsel is present. However, if the attempt at identification takes place later in a postlineup interview, the defense attorney may be excluded. The prosecution is under no constitutional duty to furnish to the defense the names and addresses of lineup witnesses.

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Footnotes

[1] *Stovall* v. *Denno*, 388 U.S. 293 (1967); *Gilbert* v. *California*, 388 U.S. 263 (1967); *United States* v. *Wade*, 388 U.S. 218 (1967).

[2] 388 U.S. at 229 quoting Wall, *Eye-Witness Identification in Criminal Cases* (1965), p. 26.

[3] *Wade*, *supra* at 236.

[4] Five years later, in *Kirby* v. *Illinois*, 406 U.S. 682 (1972), the Court indicated that the right to counsel for lineup purposes does not attach until the formal commencement of adversary judicial proceedings. Clearly, adversary judicial proceedings may begin prior to indictment. See *Moore* v. *Illinois*, 434 U.S. 220 (1977) (preliminary hearing); *United States ex rel. Robinson* v. *Zelker*, 468 F. 2d 159 (2d Cir. 1972), *cert. denied*, 411 U.S. 939 (1973) (issuance of arrest warrant). Additionally, the right to counsel applies only to lineups dealing with the crime for which the defendant is charged. See *Boyd* v. *Henderson*, 555 F. 2d 56 (2d Cir. 1977), *cert. denied*, 434 U.S. 927 (1977) (defendant who was charged with car theft had no right to counsel for viewing by robbery victim inasmuch as robbery charges not yet filed); *Bruce* v. *State*, 375 N.E. 2d 1042 (Ind. 1978), *cert. denied*, 439 U.S. 988 (1978) (in-custody murder suspect had no right to counsel at lineup for witnesses to rape for which charges not yet filed).

[5] *United States* v. *Bierey*, 588 F. 2d 620, 623 (8th Cir. 1978), *cert. denied*, 99 S. Ct. 1260 (1979).

[6] 388 U.S. at 237.

[7] See *United States* v. *Smallwood*, 473 F. 2d 98 (D.C. Cir. 1972); *United States* v. *Kirby*, 427 F. 2d 610 (D.C. Cir. 1970).

[8] *See United States* v. *Ash*, 413 U.S. 300 (1973).

[9] See *People* v. *Lawrence*, 4 Cal. 3d 273, 481 P. 2d 212 (1971), *cert. denied*, 407 U.S. 909 (1971) (photo of simulated lineup shown to kidnap victim); *People* v. *Lewis*, 74 Cal. App. 3d 633 (1977) (video tape of lineup displayed to hospitalized witness.)

[10] 499 F. 2d 802 (4th Cir. 1974).

[11] *Id.* at 808 quoting *United States* v. *Terry*, 449 F. 2d 727, 728 (5th Cir. 1971).

[12] 388 U.S. at 236.

[13] *United States* v. *Ash*, 413 U.S. 300, 324.

[14] 434 U.S. 220 (1977).

[15] *Id.* at 225.

[16] 388 U.S. at 238.

[17] 286 A. 2d 239 (D.C. Ct. App. 1972).

[18] *Id.* at 240.

[19] *United States* v. *Allen*, 408 F. 2d 1287, 1289 (D.C. Cir. 1969).

[20] *State* v. *Favro*, 487 P. 2d 261, 263 (Wash. 1971), *cert. denied*, 405 U.S. 1040 (1972).

[21] *United States* v. *Bierey*, 588 F. 2d 620, 624 (8th Cir. 1978) *cert. denied*, 99 S.Ct. 1260 (1979). See also *United States* v. *Tolliver*, 569 F. 2d 724, (2d Cir. 1978). *Contra*, *State* v. *McGhee*, 350 So. 2d 370 (La. 1977) (right to counsel extends to postlineup interview; ruling based on interpretation of sixth amendment and State constitution); *People* v. *Williams*, 3 Cal. 3d 853, 478 P. 2d 942 (1971).

[22] *Wade*, *supra* at 272.

[23] *Favro*, *supra* note 20, at 263.

[24] See *United States* v. *Wilcox*, 507 F. 2d 364, 367 (4th Cir. 1974), *cert. denied*, 420 U.S. 979 (1975); *United States* v. *Banks*, 485 F. 2d 545, 548 (5th Cir. 1973), *cert. denied*, 416 U.S. 987 (1973).

[25] See *Tolliver*, *supra* note 21, at 728.

[26] See *United States* v. *Eley*, 286 A. 2d 239 (D.C. Ct. App. 1972) Nor is production required under the exercise of a court's supervisory authority. See *United States* v. *Yates*, 279 A. 2d 516, 518 (D.C. Ct. App. 1971). This is compatible with language in *Wade* which suggests that officers might mask lineup witnesses to conceal their identities from defense counsel. 388 U.S. at 239, n. 28.

END