“Of all investigative procedures employed by police in criminal cases, probably none is less reliable than the eyewitness identification. Erroneous identifications create more injustice and cause more suffering to innocent persons than perhaps any other aspect of police work.”


“[N]umerous analyses over several decades have consistently shown that mistaken eyewitness identification is the single largest source of wrongful convictions.”


“Since DNA testing became available in the late 1980s, more than 250 innocent people have been exonerated by postconviction DNA testing. [Did] the first 250 DNA exonerations result from unfortunate but nevertheless unusual circumstances? Or were these errors the result of entrenched practices that criminal courts rely upon every day?

[The] role of mistaken eyewitness identifications in these wrongful convictions is now well known. Eyewitnesses misidentified 76% of the exonerees (190 of 250 cases). [Two] related problems recurred: suggestive identification procedures and unreliable identifications.”


“We can’t come close to estimating the number of false convictions that occur in the United States, but the accumulating mass of exonerations gives us a glimpse of what we’re missing. We have located 328 exonerations since 1989, not counting at least 135 defendants in the Tulia and Rampart mass exonerations, or more than 70 convicted childcare sex abuse defendants. Almost all the individual exonerations that we know about are clustered in two crimes, rape and murder. They are surrounded by widening circles of categories of cases with false convictions that have not been detected: rape convictions that have not been reexamined with DNA evidence; robberies, for which DNA identification is useless; murder cases that are ignored because the defendants were not sentenced to death; assault and drug convictions that are forgotten entirely. Any plausible guess at the total number of miscarriages of justice in America in the last fifteen years must be in the thousands, perhaps tens of thousands.

“We can see some clear patterns in those false convictions that have come to light: who was convicted, and why. For rape the dominant problem is eyewitness misidentification—and cross-
racial misidentification in particular, which accounts for the extraordinary number of the false rape convictions with black defendants and white victims. ***”


§ 1. WADe AND GILBERT: CONSTITUTIONAL CONCERN ABOUT THE DANGERS INVOLVED IN EYEWITNESS IDENTIFICATIONS

The Supreme Court recognized the potential reliability problems with eyewitness identification procedures over forty years ago in UNITED STATES v. WADE, 388 U.S. 218 (1967). As Justice Brennan, writing for a majority of the Court, explained:

“[T]he confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. [A] major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. A commentator has observed that ‘[t]he 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.’ Wall, Eye-Witness Identification in Criminal Cases 26 [1965]. Suggestion can be created intentionally or unintentionally in many subtle ways. And the dangers for the suspect are particularly grave when the witness’s opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest.

“Moreover, ‘[i]t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial.’

“The pretrial confrontation for purpose of identification may take the form of a lineup, also known as an ‘identification parade’ or ‘showup,’ as in the present case, or presentation of the suspect alone to the witness, as in Stovall v. Denno. It is obvious that risks of suggestion attend either form of confrontation and increase the dangers inhering in eyewitness identification. But as is the case with secret interrogations, there is serious difficulty in depicting what transpires at lineups and other forms of identification confrontations. [The] defense can seldom reconstruct the manner and mode of lineup identification for judge or jury at trial. [The] impediments to an objective observation are increased when the victim is the witness. Lineups are prevalent in rape and robbery prosecutions and present a particular hazard that a victim’s understandable outrage may excite vengeful or spiteful motives. In any event, neither witnesses nor lineup participants are apt to be alert for conditions prejudicial to the suspect. And if they were, it would likely be of scant benefit to the suspect since neither witnesses nor lineup participants are likely to be schooled in the detection of suggestive influences. Improper influences may go

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13 An additional impediment to the detection of such influences by participants, including the suspect, is the physical conditions often surrounding the conduct of the lineup. In many, lights shine on the stage in such a way

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a The Court decided two other pretrial identification cases the same day: Gilbert v. California, 388 U.S. 263 (1967), and Stovall v. Denno, 388 U.S. 293 (1967), both discussed infra.
undetected by a suspect, guilty or not, who experiences the emotional tension which we might expect in one being confronted with potential accusers. Even when he does observe abuse, if he has a criminal record he may be reluctant to take the stand and open up the admission of prior convictions. Moreover any protestations by the suspect of the fairness of the lineup made at trial are likely to be in vain; the jury’s choice is between the accused’s unsupported version and that of the police officers present. In short, the accused’s inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness’ courtroom identification.

“[The] potential for improper influence is illustrated by the circumstances, insofar as they appear, surrounding the prior identifications in the three cases we decide today. In the present case, the testimony of the identifying witnesses elicited on cross-examination revealed that those witnesses were taken to the courthouse and seated in the courtroom to await assembly of the lineup. The courtroom faced on a hallway observable to the witnesses through an open door. [One witness] testified that she saw Wade ‘standing in the hall’ within sight of an FBI agent. Five or six other prisoners later appeared in the hall. [Another witness] testified that he saw a person in the hall in the custody of the agent who ‘resembled the person that we identified as the one that had entered the bank.’

“The lineup in Gilbert was conducted in an auditorium in which some 100 witnesses to several alleged state and federal robberies charged to Gilbert made wholesale identifications of Gilbert as the robber in each other’s presence, a procedure said to be fraught with dangers of suggestion. And the vice of suggestion created by the identification in Stovall was the presentation to the witness of the suspect alone handcuffed to police officers. It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police. * * *

“Insofar as the accused’s conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him. And even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability. Thus in the present context, where so many variables and pitfalls exist, the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself. The trial which might determine the accused’s fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness—‘that’s the man.’”

Because of the “grave potential for prejudice, intentional or not, in the pretrial lineup,” the Wade-Gilbert Court held that a post-indictment lineup is a critical stage of the prosecution giving the accused person a right to have counsel present. See supra Ch. 4, Sec. 1.B. Absent notification and an “intelligent waiver” of that right, the Court adopted a per se rule excluding any reference to the out-of-court identification at trial:

“No substantial countervailing policy considerations have been advanced against the requirement of the presence of counsel. Concern is expressed that the requirement will forestall prompt identifications and result in obstruction of the confrontations. As for the first, we note that in the two cases in which the right to counsel is today held to apply, counsel had already been appointed and no argument is made in either case that notice to counsel would have that the suspect cannot see the witness. [In] some a one-way mirror is used and what is said on the witness’ side cannot be heard. * * *
prejudicially delayed the confrontations. Moreover, we leave open the question whether the presence of substitute counsel might not suffice where notification and presence of the suspect’s own counsel would result in prejudicial delay. And to refuse to recognize the right to counsel for fear that counsel will obstruct the course of justice is contrary to the basic assumptions upon which this Court has operated in Sixth Amendment cases. We rejected similar logic in *Miranda*, concerning presence of counsel during custodial interrogation.

“[I]n our view counsel can hardly impede legitimate law enforcement; on the contrary, for the reasons expressed, law enforcement may be assisted by preventing the infiltration of taint in the prosecution’s identification evidence. That result cannot help the guilty avoid conviction but can only help assure that the right man has been brought to justice.

“Legislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as ‘critical.’ But neither Congress nor the federal authorities have seen fit to provide a solution. What we hold today ‘in no way creates a constitutional strait-jacket which will handicap sound efforts at reform, nor is it intended to have this effect.’ *Miranda.*

In *Wade* itself, the prosecution had not attempted to introduce evidence of the out-of-court identification at trial. Rather, the trial court had permitted the eyewitnesses to identify the defendant in the courtroom over a defense objection that the in-court identification should be excluded because Wade had been denied counsel at the out-of-court-pre-trial line up. The Supreme Court refused to adopt a *per se* rule regarding the admission of later courtroom identifications:

“We come now to the question whether the denial of Wade’s motion to strike the courtroom identification by the bank witnesses at trial because of the absence of his counsel at the lineup required, as the Court of Appeals held, the grant of a new trial at which such evidence is to be excluded. We do not think this disposition can be justified without first giving the Government the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification. *** Where, as here, the admissibility of evidence of the lineup identification itself is not involved, a *per se* rule of exclusion of courtroom identification would be unjustified. [A] rule limited solely to the exclusion of testimony concerning identification at the lineup itself, without regard to admissibility of the courtroom identification, would render the right to counsel an empty one. The lineup is most often used, as in the present case, to crystallize the witnesses’ identification of the defendant for future reference. We have already noted that the lineup identification will have that effect. The State may then rest upon the witnesses’ unequivocal courtroom identification, and not mention the pretrial identification as part of the State’s case at trial. Counsel is then in the predicament in which Wade’s counsel found himself—realizing that possible unfairness at the lineup may be the sole means of attack upon the unequivocal courtroom identification, and having to probe in the dark in an attempt to discover and reveal unfairness, while bolstering the government witness’ courtroom identification by bringing out and dwelling upon his prior identification. Since counsel’s presence at the lineup would equip him to attack not only the lineup identification but the courtroom identification as well, limiting the impact of violation of the right to counsel to exclusion of evidence only of identification at the lineup itself disregards a critical element of that right.

“We think it follows that the proper test to be applied in these situations is that quoted in *Wong Sun v. United States* [p. 843], ‘[W]hether, granting establishment of the primary

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\(^b\) In *Gilbert*, however, the Court applied its *per se* exclusionary rule to the testimony of various prosecution witnesses that they had also identified petitioner at a pretrial lineup. See fn. c infra.
illegality the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.” Maguire, Evidence of Guilt 221 (1959).’ Application of this test in the present context requires consideration of various factors; for example, 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. It is also relevant to consider those facts which, despite the absence of counsel, are disclosed concerning the conduct of the lineup.33

The Wade majority then vacated the conviction pending a hearing to determine whether the in-court identifications had an independent source, or whether, in any event, the introduction of the evidence was harmless error under Chapman v. California [Ch. 27, § 5].

Notes on the Meaning of the Wade-Gilbert Rule

1. **How far does the Wade-Gilbert rule extend?** Justice White, joined by Justices Harlan and Stewart, dissented from the majority’s decision in Wade and described the Court’s opinion as “far-reaching.”

   “It proceeds first by creating a new per se rule of constitutional law: a criminal suspect cannot be subjected to a pretrial identification process in the absence of his counsel without violating the Sixth Amendment. If he is, the State may not buttress a later courtroom identification of the witness by any reference to the previous identification. Furthermore, the courtroom identification is not admissible at all unless the State can establish by clear and convincing proof that the testimony is not the fruit of the earlier identification made in the absence of defendant’s counsel—admittedly a heavy burden for the State and probably an impossible one. To all intents and purposes, courtroom identifications are barred if pretrial identifications have occurred without counsel being present.

   “The rule applies to any lineup, to any other techniques employed to produce an identification and *a fortiori* to a face-to-face encounter between the witness and the suspect alone, regardless of when the identification occurs, in time or place, and whether before or after indictment or information. It matters not how well the witness knows the suspect, whether the witness is the suspect’s mother, brother, or long-time associate, and no matter how long or well the witness observed the perpetrator at the scene of the crime. The kidnap victim who has lived for days with his abductor is in the same category as the witness who has had only a fleeting glimpse of the criminal. Neither may identify the suspect without defendant’s counsel being present.”

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33 Thus it is not the case that “[i]t matters not how well the witness knows the suspect, whether the witness is the suspect’s mother, brother, or long-time associate, and no matter how long or well the witness observed the perpetrator at the scene of the crime” [quoting from Justice White’s dissenting opinion in Wade]. Such factors will have an important bearing upon the true basis of the witness’ in-court identification. * * *

c Compare Gilbert, where various witnesses who identified petitioner in the courtroom also testified, on direct examination by the prosecution, that they had identified petitioner at a prior lineup. “That [pretrial lineup] testimony,” ruled the Court, “is the direct result of the illegal lineup ‘come at by exploitation of [the primary] illegality.’ Wong Sun. The State is therefore not entitled to an opportunity to show that that testimony had an independent source. Only a per se exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused’s constitutional right to the presence of his counsel at the critical lineup. [That] conclusion is buttressed by the consideration that the witness’ testimony of his lineup identification will enhance the impact of his in-court identification on the jury and seriously aggravate whatever derogation exists of the accused’s right to a fair trial. Therefore, unless the [state supreme court] is ‘able to declare a belief that it was harmless beyond a reasonable doubt,’ Chapman, Gilbert will be entitled on remand to a new trial * * *.”
Is that an accurate description of the majority opinion?

2. **Will counsel’s presence at a pre-trial line up enhance the reliability of identification procedures?** Justice White, in his Wade dissent did not think so: “I would not extend [the adversary] system, at least as it presently operates, to police investigations and would not require counsel’s presence at pretrial identification procedures. Counsel’s interest is in not having his client placed at the scene of the crime, regardless of his whereabouts. Some counsel may advise their clients to refuse to make any movements or to speak any words in a lineup or even to appear in one. [Others] will hover over witnesses and begin their cross-examination then, menacing truthful factfinding as thoroughly as the Court fears the police now do. Certainly there is an implicit invitation to counsel to suggest rules for the lineup and to manage and produce it as best he can. I therefore doubt that the Court’s new rule, at least absent some clearly defined limits on counsel’s role, will measurably contribute to more reliable pretrial identifications. My fears are that it will have precisely the opposite result. * * *”

Notice that the Wade majority disagreed with him about what role counsel would play at a pre-trial identification procedure. Who is correct? What should the role of defense counsel be at a pre-trial lineup? Consider the Commentary to the Model Pre-Arraignment Code at 429–33:

“The two extreme positions might be stated thus:

“(1) Counsel is to be present merely as an observer to assure against abuse and bad faith by law enforcement officers, and to provide the basis for any attack he might wish to make on the identification at trial.

“(2) The lineup procedure is to be a fully adversary proceeding in which the counsel for the suspect may make objections and proposals, which if they are proper or even reasonable must be respected.

“The cases and commentaries, as well as the practice since Wade would indicate that the first interpretation of the counsel’s role comes closer to describing the general interpretation of the constitutional requirement and to describing the practice under it. The major difficulty with this interpretation is that by forcing counsel into the role of a merely passive observer it gives him a job which at best can be accomplished in a large variety of ways including video recording and at worst is uncomfortable or demeaning.

“[On] the other hand, any attempt to give counsel at identification a more active role is fraught with difficulties not only for the police but for counsel himself. For the police the difficulty is that a procedure which is often under the supervision not of lawyers but of police officers will be subject to manipulation and objection by a trained legal counsel for one side only.

“[The] assigning of a more active role to counsel has perils for counsel as well. If he is entitled to make objections at the lineup procedure, will he be held to have waived these objections if he does not make them at the procedure and he wishes later to question the fairness or accuracy of the identification at trial? If such a possibility of waiver exists will he not almost be under an obligation to raise every conceivable objection? Moreover, this hard choice would be imposed on a lawyer at a very early stage of his contact with the case. Indeed the lawyer who did this work is often likely to be a junior member of the public defender’s staff assigned on rotation to do ‘lineup work,’ and thus would not likely be the lawyer to handle the case at trial.”

3. **Waiver.** If Wade seeks to protect the reliability of the identification process and to make available testimony about the conditions under which such process is carried out, why should the right to counsel at the lineup be subject to waiver? Permitting waiver of Miranda rights may be defended on the ground that an important, legitimate object is served by permitting suspects to bear witness to the truth under conditions which safeguard the exercise
of responsible choice, but what comparable value is served by allowing suspects to waive counsel at the identification process?

4. **When will an in-court identification be considered a fruit of an illegal out-of-court identification?** Justice Black concurred in the *Wade* Court’s establishment of a *per se* exclusionary rule for out-of-court identifications obtained in the absence of counsel, but dissented from its application of the fruits doctrine to later courtroom identifications: “The ‘tainted fruit’ determination required by the Court involves more than considerable difficulty. I think it is practically impossible. How is a witness capable of probing the recesses of his mind to draw a sharp line between a courtroom identification due exclusively to an earlier lineup and a courtroom identification due to memory not based on the lineup? [In] my view, the Fifth and Sixth Amendments are satisfied if the prosecution is precluded from using lineup identification as either an alternative to or corroboration of courtroom identification. If the prosecution does neither and its witnesses under oath identify the defendant in the courtroom, then I can find no justification for stopping the trial in midstream to hold a lengthy ‘tainted fruit’ hearing. * * * *

Does it follow, as Justice Black maintained, that therefore *every* courtroom identification made subsequent to an illegal police lineup (so long as not supplemented or corroborated by the earlier lineup) should be admitted? Or do the very reasons advanced by Justice Black—the great difficulties, if not impossibility of ascertaining the “taint” or lack of it—suggest that *no* courtroom identification preceded by an illegal police lineup should be allowed?

Is the requirement that the prosecution establish by clear and convincing proof that the courtroom testimony is untainted by the earlier illegal identification a “heavy” and “probably an impossible” burden, as Justice White maintained in his *Wade* dissent? If pre-trial identifications are held in violation of the suspect’s right to counsel, does the *Wade-Gilbert* rule, as Justice White claimed, bar all courtroom identifications “to all intents and purposes”? Consider the remarks of A.J. Davis, *The Role of the Defense Lawyer at a Lineup in Light of the Wade, Gilbert and Stovall Decisions*, 4 Crim.L.Bull. 273, 294–95 (1968) (panel discussion), a year after the lineup cases were decided:

“How [is the defense lawyer] going to prove that the in-court identification that the victim is about to make is the fruit of [the invalid police lineup]? The Supreme Court may say the burden of proof is on the prosecution, but you know and I know that the attitude of the trial judge is going to be that the burden of proof is on [the defense lawyer] as a practical matter to convince that judge. He is not going to be terribly sympathetic to these cases.

“*What is the prosecution going to do? The prosecution is going to put the victim on the stand and the victim is going to say, ’This robber came to me and put that gun in my face, I looked at him and I formed a mental picture. [Then,] I had this lineup and I compared this portrait in my mind with the people in the lineup and I picked out that defendant. Now I am in court and what am I doing? I am not paying any attention to the lineup. I am again conjuring up that [mental picture] which I evolved in my mind at the time of the robbery, and I am taking that [picture] and putting it next to this defendant at the counsel table and I am saying that they are precisely the same,’ and the judge is going to say, ’Whoopie, there’s an independent origin,’ and you can attempt to prove from today to tomorrow that the pre-trial identification was unfair, but the trial court has a finding of fact to make here, and nine times out of ten, unless you have a very exceptional trial court, he is going to find against you on this issue.”

Mr. Davis has turned out to be a better prognosticator than Justice White. The cases support the conclusions of commentators that, when confronted with invalid pre-trial identifications, the lower courts will bend over backwards to find an independent source to admit a later, in-court identification. See, e.g., Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 Vand. L. Rev. 451, 476–77 (2012) (collecting cases).
5. **A partial-exclusion approach.** Although courtroom identifications are highly suggestive (the defendant is sitting at counsel’s table waiting to be identified), they are not highly regulated by the courts. Consider Garrett, supra note 4, at 461: “Courts generally reject arguments that in-court identifications are inherently suggestive. . . . Judges may view the courtroom identification as pure theater or a witness demonstration, but . . . they also seem to think that the presence of counsel and the solemnity of testimony under oath in a courtroom makes the courtroom identification more, not less, reliable.” Professor Garrett takes issue with that approach, noting that “[t]oday courts almost always allow courtroom identifications, but they sometimes bar prior identifications. Instead, courts should per se exclude courtroom identifications if there was a prior identification, but they should sometimes admit out-of-court identifications. The result will encourage greater attention to procedures used out-of-court, when the eyewitness’s memory was most fresh, reliable, and accurate.” Id. at 457. Do you agree?

6. **Lineups and the self-incrimination clause.** In Wade and Gilbert, a 5–4 majority of the Court relied on Schmerber v. California (discussed supra p. 30 and infra p. 802) to hold that requiring a person to appear in a lineup and speak for identification (Wade) or provide a handwriting exemplar (Gilbert) did not violate the privilege against self-incrimination. The privilege, observed the Court, “protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature.” Because the lineup is not protected, the prosecution may comment on a suspect’s refusal to cooperate. The refusal is considered circumstantial evidence of consciousness of guilt. On occasion, courts have utilized civil or criminal contempt to coerce or punish the suspect who refuses to comply with a court order to participate in some identification proceeding. Still another possibility is for the police to proceed to conduct the identification proceeding over the suspect’s objection. See CRIMPROC § 7.2(c).

7. **Identification procedures and the Fourth Amendment.** The Supreme Court has suggested in dicta that it might be permissible to detain individuals for fingerprinting on less than probable cause. See Hayes v. Florida, 470 U.S. 811, 816–17 (1985); Davis v. Mississippi, 394 U.S. 721, 727–28 (1969). Does this mean that police can seize individuals for the purpose of an identification procedure on the basis of reasonable suspicion? See Charles H. Whitebread & Christopher Slobogin, Criminal Procedure 524 (5th ed. 2008) (suggesting yes). Courts have generally found no Fourth Amendment violation when a person lawfully in custody for one crime is ordered into a lineup for other crimes for which there is no probable cause to arrest him. But some courts have indicated that even under these circumstances there must be some individualized suspicion that the person committed the crimes. See generally Sobel et al., Suspect in Custody, Eyewitness Identification: Legal & Practical Problems 2d § 8:2 (West, Westlaw through June 2014). However, why should the viewing of suspects by witnesses—as opposed to the basis for detaining them in order to permit the viewing—raise any Fourth Amendment problems? Cf. United States v. Dionisio, 410 U.S. 1 (1973), infra Ch.11, p. 770.

8. **The Wade Court’s legislative invitation.** Notice that the Wade majority suggested that legislatures or regulatory bodies could implement procedures that would “remove the basis for regarding the [pretrial identification] stage as ‘critical.’” What alternative procedures would be sufficient? If a jurisdiction adopted pre-trial identification procedures to promote reliable identifications and later gave juries cautionary instructions about the dangers of misidentification, would that be sufficient? Consider cases discussed infra Section 4, Notes 3–7.

9. **Another “prophylactic” rule?** The Wade majority cited Miranda when it suggested that it was not intending to create “a constitutional strait-jacket which will handicap sound [legislative or regulatory] efforts at reform.” This prompted Justice White, in his dissent, to characterize the Wade holding as “prophylactic”:
“[The] Court apparently believes that improper police procedures are so widespread that a broad prophylactic rule must be laid down, requiring the presence of counsel at all pretrial identifications, in order to detect recurring instances of police misconduct. I do not share this pervasive distrust of all official investigations. None of the materials the Court relies upon supports it.

“[There] are several striking aspects to the Court’s holding. First, the rule does not bar courtroom identifications where there have been no previous identifications in the presence of the police, although when identified in the courtroom, the defendant is known to be in custody and charged with the commission of a crime. Second, the Court seems to say that if suitable legislative standards were adopted for the conduct of pretrial identifications, thereby lessening the hazards in such confrontations, it would not insist on the presence of counsel. But if this is true, why does not the Court simply fashion what it deems to be constitutionally acceptable procedures for the authorities to follow? Certainly the Court is correct in suggesting that the new rule will be wholly inapplicable where police departments themselves have established suitable safeguards. * * *”

Is Justice White correct that the Wade-Gilbert rule is prophylactic? If so, could Congress replace the rule? Consider the constitutionality of Title II of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 3502, designed to “repeal” the Wade-Gilbert rule in federal prosecutions: “The testimony of a witness that he saw the accused commit or participate in the commission of the crime for which the accused is being tried shall be admissible in evidence in a criminal prosecution in any trial court ordained and established under article III of the Constitution of the United States.” As one commentator has emphasized, as a practical matter, § 3502 “has proved to be meaningless,” because the lower courts have considered themselves bound by the Wade-Gilbert rule. See Judge Carl McGowan, Constitutional Interpretation and Criminal Identification, 12 Wm. & Mary L. Rev. 235, 249–50 (1970). What if that changed and lower courts began to rely on § 3502? Would the Wade-Gilbert rule be upheld as Miranda was in Dickerson (discussed supra p. 640) or should it be treated differently?

10. Application of fruits doctrine to other Sixth Amendment violations. In both Wade and Nix v. Williams, 467 U.S. 431 (1984) (discussed at p. 718 and p. 854), the Supreme Court applied the “fruit of the poisonous tree” doctrine when considering the admissibility of evidence obtained as a result of a Sixth Amendment violation. The Eighth Circuit, however, has declined to apply fruits doctrine to the admissibility of second statements obtained in violation of Massiah. See United States v. Fellers, 397 F.3d 1090 (8th Cir. 2005) (discussed at p. 861) (applying the Elstad-Seibert rule). Is that holding in tension with Wade and Nix or not?

§ 2. THE COURT RETREATS: KIRBY AND ASH

1. Pre-indictment identification procedures. Although Wade and Gilbert both involved post-indictment lineups, the language in Wade seemed broadly applicable to all pretrial identification procedures. Five years after it announced the Wade-Gilbert rule, however, the Supreme Court decided Kirby v. Illinois, 406 U.S. 682 (1972), in which it refused to apply the rule to a pre-indictment show-up:

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\[d\] Consider Grano at 785: “[A]n identification more unreliable than the witness’s familiar selection of the conspicuous defendant, frequently after scanning the courtroom for dramatic effect, is difficult to imagine. In effect, [these identifications are] one-man showups, albeit in the courtroom.” How can defense counsel avoid or minimize the impact of a suggestive confrontation between a witness and defendant in the courtroom? See also Garrett, supra note 5.

\[a\] Although Justice Stewart wrote for a plurality of the Court in Kirby (Justice Powell concurred only in the result), a majority of the Court has subsequently relied on and cited the ruling in Kirby. See, e.g., Brewer v. Williams, 430 U.S. 387, 398 (1977) (discussed at p. 698).
“[In] a line of constitutional cases in this Court stemming back to the Court’s landmark opinion in *Powell v. Alabama*, it has been firmly established that a person’s Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him.

“This is not to say that a defendant in a criminal case has a constitutional right to counsel only at the trial itself. [But] the point is [that] all of [the right to counsel cases] have involved points of time at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.

“The only seeming deviation from this long line of constitutional decisions was *Escobedo* [which] is not apposite here for two distinct reasons. First, the Court in retrospect perceived that the ‘prime purpose’ of *Escobedo* was not to vindicate the constitutional right to counsel as such, but, like *Miranda*, ‘to guarantee full effectuation of the privilege against self-incrimination.’ * * *

‘ Secondly, and perhaps even more important for purely practical purposes, the Court has limited the holding of *Escobedo* to its own facts, and those facts are not remotely akin to the facts of the case before us.

“The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the Government has committed itself to prosecute, and only then that the adverse positions of Government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the ‘criminal prosecutions’ to which alone the explicit guarantees of the Sixth Amendment are applicable.

“[Abuses of other pretrial identification procedures] are not beyond the reach of the Constitution. [When] a person has not been formally charged with a criminal offense, [the Due Process Clause] strikes the appropriate constitutional balance between the right of a suspect to be protected from prejudicial procedures and the interest of society in the prompt and purposeful investigation of an unsolved crime.”

Is the Court’s reasoning in *Kirby* consistent with *Wade*?

2. **Wade and Powell.** Did the early right to counsel precedents, as Justice Stewart indicates, mandate the result in *Kirby*? Consider Joseph D. Grano, Kirby, Biggers, and Ash: *Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?*, 72 Mich.L.Rev. 717, 727 (1974): “*Powell v. Alabama* [and its pre-*Gideon* progeny] relied on the fourteenth amendment due process clause rather than on the sixth amendment. Since the protections under the fourteenth amendment are not limited to any particular stage of a criminal proceeding, the fact that the defendants in these cases had already been charged is irrelevant.”

3. **“Custody” vs. “the initiation of adversary judicial criminal proceedings.”** Is it sound to view (as does Justice Stewart for the plurality in *Kirby*) the “initiation of judicial criminal proceedings [as] the starting point of our whole system of adversary criminal justice”? Is it realistic to say (as Justice Stewart does for the *Kirby* plurality) that “it is only then [that] the adverse positions of Government and defendant have solidified”? Is the postcustody police attitude supposed to be “neutral” or merely “investigative” rather than “accusatory”? Didn’t the Court explicitly recognize in *Miranda* that the accusatory function begins very soon after the defendant is taken into custody? Again, see Grano, supra at 726–27. Recall the statement in

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b After *Rothgery v. Gillespie County*, 554 U.S. 191 (2008) (discussed at p. 76), readers should add “first formal hearing” to this list.
Escobedo—over Justice Stewart’s strong dissent—that “it would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged * * *.”

4. **Alley confrontations.** To what extent did Kirby reject the “custody” approach because such an approach would pose a serious threat to the common police practice of conducting “alley confrontations,” i.e., prompt confrontations with the victim or an eyewitness at the scene of the crime? See Grano, supra at 731. Prior to Kirby, most courts exempted these identifications from the right to counsel requirement. See, e.g., *Russell v. United States*, 408 F.2d 1280 (D.C.Cir.1969) (Bazelon, C.J.). For the view that all the psychological assumptions on which *Russell* and similar cases are premised—(a) the victim or witness to a crime can be counted on to form an accurate mental image of the offender; (b) this image will be more accurate on the scene immediately after the crime than at the police station some hours later; and (c) the suggestion inherent in one-man confrontations is insignificant in light of the other factors—are speculative and questionable, see Grano at 734–38.

5. **Photographic versus corporeal identifications.** One year after the Court decided *Kirby*, it again limited the scope of the Wade-Gilbert rule when it declined to apply the rule to a post-indictment, photographic identification procedure in *United States v. Ash*, 413 U.S. 300 (1973). Justice Blackmun wrote the majority decision:

“[Although the right to counsel guarantee has been expanded beyond the formal trial itself], the function of the lawyer has remained essentially the same as his function at trial. In all cases considered by the Court, counsel has continued to act as a spokesman for, or advisor to, the accused. The accused’s right to the ‘Assistance of Counsel’ has meant just that, namely, the right of the accused to have counsel acting as his assistant.

“[The] function of counsel in rendering ‘Assistance’ continued at the lineup under consideration in *Wade* and its companion cases. Although the accused was not confronted there with legal questions, the lineup offered opportunities for prosecuting authorities to take advantage of the accused.

“A substantial departure from the historical test would be necessary if the Sixth Amendment were interpreted to give Ash a right to counsel at the photographic identification in this case. Since the accused himself is not present at the time of the photographic display, and asserts no right to be present, no possibility arises that the accused might be misled by his lack of familiarity with the law or overpowered by his professional adversary.

“[Even] if we were willing to view the counsel guarantee in broad terms as a generalized protection of the adversary process, we would be unwilling to go so far as to extend the right to a portion of the prosecutor’s trial-preparation interviews with witnesses. Although photography is relatively new, the interviewing of witnesses before trial is a procedure that predates the Sixth Amendment. [The] traditional counterbalance in the American adversary system for these interviews arises from the equal ability of defense counsel to seek and interview witnesses himself.

“That adversary mechanism remains as effective for a photographic display as for other parts of pretrial interviews. No greater limitations are placed on defense counsel in constructing displays, seeking witnesses, and conducting photographic identifications than those applicable to the prosecution. Selection of the picture of a person other than the accused, or the inability of a witness to make any selection, will be useful to the defense in precisely the same manner that the selection of a picture of the defendant would be useful to the prosecution.
“[Pretrial] photographic identifications [are] hardly unique in offering possibilities for the actions of the prosecutor unfairly to prejudice the accused. Evidence favorable to the accused may be withheld; testimony of witnesses may be manipulated; the results of laboratory tests may be contrived. In many ways the prosecutor, by accident or by design, may improperly subvert the trial. The primary safeguard against abuses of this kind is the ethical responsibility of the prosecutor ***. If that safeguard fails, review remains available under due process standards. These same safeguards apply to misuse of photographs. ***”

Justice Stewart concurred in the judgment:

“[The Wade Court held] 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.”

“A photographic identification is quite different from a lineup, for there are substantially fewer possibilities of impermissible suggestion when photographs are used, and those unfair influences can be readily reconstructed at trial. It is true that the defendant’s photograph may be markedly different from the others displayed, but this unfairness can be demonstrated at trial from an actual comparison of the photographs used or from the witness’ description of the display. Similarly, it is possible that the photographs could be arranged in a suggestive manner, or that by comment or gesture the prosecuting authorities might single out the defendant’s picture. But these are the kinds of overt influence that a witness can easily recount and that would serve to impeach the identification testimony. In short, there are few possibilities for unfair suggestiveness—and those rather blatant and easily reconstructed. Accordingly, an accused would not be foreclosed from an effective cross-examination of an identification witness simply because his counsel was not present at the photographic display. For this reason, a photographic display cannot fairly be considered a ‘critical stage’ of the prosecution. ***”

Justice Brennan, joined by Justices Douglas and Marshall, dissented:

“[To] the extent that misidentification may be attributable to a witness’ faulty memory or perception, or inadequate opportunity for detailed observation during the crime, the risks are obviously as great at a photographic display as at a lineup. But ‘[b]ecause of the inherent limitations of photography, which presents its subject in two dimensions rather than the three dimensions of reality, [a] photographic identification, even when properly obtained, is clearly inferior to a properly obtained corporeal identification.’ P. Wall, Eye-Witness Identification in Criminal Cases 70 (1965). ***

“Moreover, as in the lineup situation, the possibilities for impermissible suggestion in the context of a photographic display are manifold.

“[A]s with lineups, the defense can ‘seldom reconstruct’ at trial the mode and manner of photographic identification. It is true, of course, that the photographs used at the pretrial display might be preserved for examination at trial. But ‘it may also be said that a photograph can preserve the record of a lineup; yet this does not justify a lineup without counsel.’ Indeed, in reality, preservation of the photographs affords little protection to the unrepresented accused. [For] retention of the photographs [cannot] in any sense reveal to defense counsel the more

* I do not read Wade as requiring counsel because a lineup is a “trial-type” situation, nor do I understand that the Court required the presence of an attorney because of the advice or assistance he could give to his client at the lineup itself. Rather, I had thought the reasoning of Wade was that the right to counsel is essentially a protection for the defendant at trial, and that counsel is necessary at a lineup in order to ensure a meaningful confrontation and the effective assistance of counsel at trial.
subtle, and therefore more dangerous, suggestiveness that might derive from the manner in which the photographs were displayed or any accompanying comments or gestures. ** **

“(C)ontrary to the suggestion of the Court, the conclusion in Wade that a pretrial lineup is a ‘critical stage’ of the prosecution did not in any sense turn on the fact that a lineup involves the physical ‘presence of the accused’ at a ‘trial-like confrontation’ with the Government. And that conclusion most certainly did not turn on the notion that presence of counsel was necessary so that counsel could offer legal advice or ‘guidance’ to the accused at the lineup. On the contrary, Wade envisioned counsel’s function at the lineup to be primarily that of a trained observer, able to detect the existence of any suggestive influences and capable of understanding the legal implications of the events that transpire. Having witnessed the proceedings, counsel would then be in a position effectively to reconstruct at trial any unfairness that occurred at the lineup, thereby preserving the accused’s fundamental right to a fair trial on the issue of identification.

“There is something ironic about the Court’s conclusion today that a pretrial lineup identification is a ‘critical stage’ of the prosecution because counsel’s presence can help to compensate for the accused’s deficiencies as an observer, but that a pretrial photographic identification is not a ‘critical stage’ of the prosecution because the accused is not able to observe at all. ** **”

6. The different readings of Wade. The Ash majority looks back on Wade as concluding that “the lineup constituted a trial-like confrontation” requiring counsel in order “to render ‘Assistance’ [to a suspect] in counterbalancing any ‘overreaching’ by the prosecution,” implying that counsel is to be an active adversary at this stage. Was the Ash majority compelled to so interpret Wade because its historical analysis led it to the conclusion that the lawyer’s assistance is limited to the immediate aid he can give his client? See Note, 64 J. Crim. L. C. & P.S. 428 (1973). Notice that both Justice Stewart and Justice Brennan disclaim this reading and suggest that counsel is necessary at pretrial identification procedures in order to ensure a meaningful confrontation and the effective assistance of counsel at trial. Which interpretation is more consistent with the cases, commentaries, and practice since Wade?

7. The significance of defendant’s right to be personally present. As noted by the Court, the defendant in Ash did not claim the right to be personally present at the photographic display. But does the right to counsel only exist when the defendant is entitled to be personally present? Voluntary absence or contumacious conduct (see Illinois v. Allen, Ch. 25, § 3) may cause a defendant to lose his right to be present at trial, but does it follow that he also loses his right to counsel? Defendants on appeal have the right to counsel, but do they have the right to be personally present? See generally Grano, supra at 764–67.

8. Justice Stewart’s concurring opinion. Is Justice Stewart correct that photographic displays are less vulnerable to improper suggestion, are easier to reconstruct at trial, and are less indelible in their effect upon a witness? Consider Grano, supra at 767–70 (sharply challenging these conclusions); see also Section 4 infra.

9. Photographic displays and other pretrial interviews of prospective witnesses. Both the majority and concurring opinions in Ash expressed concern that granting a right to counsel at photographic displays might lead to the extension of the right to counsel to all pretrial interviews of prospective witnesses. But consider Note, 26 Stan. L. Rev. 399, 416–17 (1974): “[The] basis for extending the right to counsel to the identification context was that identifications by eyewitnesses—like confessions—are such damning evidence that they may completely decide the guilt or innocence of the accused. Photographic identifications can be just as critical to the future outcome of a trial as can corporeal identifications. Routine interviews between the prosecutor and his witnesses, on the other hand, do not have the potential for such damaging results, at least assuming good faith on the part of the prosecutor.”
10. The limits of Ash. Is a post-indictment corporeal lineup recorded on video tape and played for the trial court at the suppression hearing a “critical stage” within the meaning of Wade? What if a witness identifies the defendant in a photograph of a lineup—does Wade or Ash govern? Compare Justice Brennan dissenting in Ash (“[A] photograph can preserve the record of a lineup; yet this does not justify a lineup without counsel.”) with United States v. Barker, 988 F.2d 77 (9th Cir.1993) (Ash applies because the defendant’s absence at the time the photo of the lineup is shown means that he cannot be “misled” or “overpowered”).

§ 3. DUE PROCESS LIMITATIONS

The Supreme Court first discussed when an identification procedure would be “so unnecessarily suggestive and conducive to irreparable mistaken identification” as to violate a suspect’s due process rights in STOVALL v. DENNO, 388 U.S. 293 (1967)—decided the same day as Wade and Gilbert. In that case, the stabbing victim (Mrs. Behrendt), was hospitalized for major surgery. Without affording petitioner time to retain counsel (an arraignment had been promptly held but then postponed until petitioner could retain counsel), the police, with the cooperation of the victim’s surgeon, arranged a confrontation between petitioner and the victim in her hospital room. Petitioner was handcuffed to one of the seven law enforcement officials who brought him to the hospital room. He was the only black person in the room. After being asked by an officer whether petitioner “was the man” who had stabbed her, the victim identified him from her hospital bed. Both Mrs. Behrendt and the police then testified at the trial to her identification in the hospital. Despite the suggestiveness of the confrontation, the Court denied Stovall’s due process claim. Justice Brennan, writing for the majority, observed:

“The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup has been widely condemned. However, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it, and the record in the present case reveals that the showing of Stovall to Mrs. Behrendt in an immediate hospital confrontation was imperative. [As the Court of Appeals stated]:

“‘Here was the only person in the world who could possibly exonerate Stovall. Her words, and only her words, “He is not the man” could have resulted in freedom for Stovall. The hospital was not far distant from the courthouse and jail. No one knew how long Mrs. Behrendt might live. Faced with the responsibility of identifying the attacker, with the need for immediate action and with the knowledge that Mrs. Behrendt could not visit the jail, the police followed the only feasible procedure and took Stovall to the hospital room. Under these circumstances, the usual police station line-up, which Stovall now argues he should have had, was out of the question.’ ”

As Stovall illustrates, and as the Court reiterated the following year in a case involving a pretrial photographic identification, the question under the Due Process Clause is whether the identification procedure “was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” Simmons v. United States, 390 U.S. 377 (1968). It remained unclear after Stovall and Simmons, however, whether pretrial identifications that were impermissibly suggestive would be per se excluded at trial as unreliable or whether, despite their suggestiveness, out-of-court identifications that possessed certain features of reliability could be admitted into evidence at trial. The Supreme Court addressed that question in Manson v. Brathwaite, discussed below.

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*In Stovall, the Court held that the Wade-Gilbert principles would not be applied retroactively, but would affect only those identification procedures conducted in the absence of counsel after the date the Wade and Gilbert decisions were handed down. See Ch. 29 for a discussion of retroactivity principles.*
MANSON v. BRATHWAITE

JUSTICE BLACKMUN delivered the opinion of the Court. ** *

[Several minutes before sunset, Glover, a black undercover police officer, purchased heroin from a seller through the open doorway of an apartment while standing for two or three minutes within two feet of the seller in a hallway illuminated by natural light. A few minutes later, Glover described the seller to a back-up officer, D’Onofrio, as being “a colored man, approximately five feet eleven inches tall, dark complexion, black hair, short Afro style, and having high cheekbones, and of heavy build. He was wearing at the time blue pants and a plaid shirt.”]

[On the basis of the description, D’Onofrio thought that respondent might be the heroin seller. He obtained a single photograph of respondent from police files and left it at Glover’s office. Two days later, while alone, Glover viewed the photograph and identified it as that of the seller. At respondent’s trial, Glover testified that there was “no doubt whatsoever” that the person shown in the photograph was respondent. Glover also made a positive in-court identification. No explanation was offered by the prosecution for the failure to utilize a photographic array or to conduct a lineup.

[After the Connecticut Supreme Court affirmed respondent’s conviction, he sought federal habeas corpus relief. The Second Circuit, per Friendly, J., held that because the showing of the single photograph was “suggestive” and concededly “unnecessarily so,” evidence pertaining to it was subject to a per se rule of exclusion.]

Neil v. Biggers, 409 U.S. 188 (1972) concerned a respondent who had been convicted [of] rape, on evidence consisting in part of the victim’s visual and voice identification of Biggers at a [one-person] station-house showup seven months after the crime. [The] Court expressed concern about the lapse of seven months between the crime and the confrontation, [but pointed out that the] “central question” [was] “whether under the ‘totality of the circumstances’ the identification was reliable even though the confrontation procedure was suggestive.” Applying that test, the Court found “no substantial likelihood of misidentification. The evidence was properly allowed to go to the jury.”

Biggers well might be seen to provide an unambiguous answer to the question before us: The admission of testimony concerning a suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability. In one passage, however, the Court observed that the challenged procedure occurred pre-Stovall and that a strict rule would make little sense with regard to a confrontation that preceded the Court’s first indication that a suggestive procedure might lead to the exclusion of evidence. One perhaps might argue that, by implication, the Court suggested that a different

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b The Biggers Court, per Powell, J., observed:

“The victim spent a considerable period of time with her assailant, up to half an hour. She was with him under adequate artificial light in her house and under a full moon outdoors, and at least twice, once in the house and later in the woods, faced him directly and intimately. [Her] description to the police, which included the assailant’s approximate age, height, weight, complexion, skin texture, build, and voice [was] more than ordinarily thorough. She had ‘no doubt’ that respondent was the person who raped her. [The] victim here, a practical nurse by profession, had an unusual opportunity to observe and identify her assailant. She testified at the habeas corpus hearing that there was something about his face ‘I don’t think I could ever forget.’

“There was, to be sure, a lapse of seven months between the rape and the confrontation. This would be a seriously negative factor in most cases. Here, however, the testimony is undisputed that the victim made no previous identification at any of the showups, lineups, or photographic showings. Her record for reliability was thus a good one, as she had previously resisted whatever suggestiveness inheres in a showup. Weighing all the factors, we find no substantial likelihood of misidentification.”
rule could apply post-Stovall. The question before us, then, is simply whether the Biggers analysis applies to post-Stovall confrontations as well to those pre-Stovall. ***

Petitioner at the outset acknowledges that “the procedure in the instant case was suggestive [because only one photograph was used] and unnecessary” [because there was no emergency or exigent circumstance]. The respondent, in agreement with the Court of Appeals, proposes a per se rule of exclusion that he claims is dictated by the demands of the Fourteenth Amendment’s guarantee of due process. He rightly observes that this is the first case in which this Court has had occasion to rule upon strictly post-Stovall out-of-court identification evidence of the challenged kind.

Since the decision in Biggers, the Courts of Appeals appear to have developed at least two approaches to such evidence. See Pulaski, Neil v. Biggers: The Supreme Court Dismantles the Wade Trilogy’s Due Process Protection, 26 Stan.L.Rev. 1097, 1111–1114 (1974). The first, or per se approach, employed by the Second Circuit in the present case, focuses on the procedures employed and requires exclusion of the out-of-court identification evidence, without regard to reliability, whenever it has been obtained through unnecessarily suggested confrontation procedures.10 The justifications advanced are the elimination of evidence of uncertain reliability, deterrence of the police and prosecutors, and the stated “fair assurance against the awful risks of misidentification.”

The second, or more lenient, approach is one that continues to rely on the totality of the circumstances. It permits the admission of the confrontation evidence if, despite the suggestive aspect, the out-of-court identification possesses certain features of reliability. This second approach, in contrast to the other, is ad hoc and serves to limit the societal costs imposed by a sanction that excludes relevant evidence from consideration and evaluation by the trier of fact. ***

Wade and its companion cases reflect the concern that the jury not hear eyewitness testimony unless that evidence has aspects of reliability. It must be observed that both approaches before us are responsive to this concern. The per se rule, however, goes too far since its application automatically and peremptorily, and without consideration of alleviating factors, keeps evidence from the jury that is reliable and relevant.

The second factor is deterrence. Although the per se approach has the more significant deterrent effect, the totality approach also has an influence on police behavior. The police will guard against unnecessarily suggestive procedures under the totality rule, as well as the per se one, for fear that their actions will lead to the exclusion of identifications as unreliable.

The third factor is the effect on the administration of justice. Here the per se approach suffers serious drawbacks. Since it denies the trier reliable evidence, it may result, on occasion, in the guilty going free. Also, because of its rigidity, the per se approach may make error by the trial judge more likely than the totality approach. *** Certainly, inflexible rules of exclusion that may frustrate rather than promote justice have not been viewed recently by this Court with unlimited enthusiasm. ***

We therefore conclude that reliability is the linchpin in determining the admissibility of identification testimony for both pre-and post-Stovall confrontations. The factors to be considered are set out in Biggers. These include the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of his prior

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10 Although the per se approach demands the exclusion of testimony concerning unnecessarily suggestive identifications, it does permit the admission of testimony concerning a subsequent identification, including an in-court identification, if the subsequent identification is determined to be reliable. The totality approach, in contrast, is simpler: if the challenged identification is reliable, then testimony as to it and any identification in its wake is admissible.
description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

We turn, then, to the facts of this case and apply the analysis:

1. **The opportunity to view.** Glover testified that for two to three minutes he stood at the apartment door, within two feet of the respondent. The door opened twice, and each time the man stood at the door. *** Natural light from outside entered the hallway through a window. There was natural light, as well, from inside the apartment.

2. **The degree of attention.** Glover was not a casual or passing observer, [but] a trained police officer on duty—and specialized and dangerous duty—when he [made the heroin purchase]. Glover himself was a Negro and unlikely to perceive only general features of [black males].

3. **The accuracy of the description.** Glover’s description was given to D’Onofrio within minutes after the transaction. It included the vendor’s race, his height, his build, the color and style of his hair, and the high cheekbone facial feature. It also included clothing the vendor wore. No claim has been made that respondent did not possess the physical characteristics so described. ***

4. **The witness’ level of certainty.** There is no dispute that the photograph in question was that of respondent. Glover, in response to a question whether the photograph was that of the person from whom he made the purchase, testified: “There is no question whatsoever.” This positive assurance was repeated.

5. **The time between the crime and the confrontation.** Glover’s description of his vendor was given to D’Onofrio within minutes of the crime. The photographic identification took place only two days later. We do not have here the passage of weeks or months between the crime and the viewing of the photograph.

These indicators of Glover’s ability to make an accurate identification are hardly outweighed by the corrupting effect of the challenged identification itself. Although identifications arising from single-photograph displays may be viewed in general with suspicion, we find in the instant case little pressure on the witness to acquiesce in the suggestion that such a display entails. D’Onofrio had left the photograph at Glover’s office and was not present when Glover first viewed it two days after the event. There thus was little urgency and Glover could view the photograph at his leisure. And since Glover examined the photograph alone, there was no coercive pressure to make an identification arising from the presence of another. The identification was made in circumstances allowing care and reflection. ***

Surely, we cannot say that under all the circumstances of this case there is “a very substantial likelihood of irreparable misidentification.” Short of that point, such evidence is for the jury to weigh. [Juries] are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature. ***c

**JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.**

Today’s decision can come as no surprise to those who have been watching the Court dismantle the protections against mistaken eyewitness testimony erected a decade ago in [Wade, Gilbert and Stovall]. But it is still distressing to see the Court virtually ignore the teaching of

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"c Stevens, J., concurring, joined the Court’s opinion, but emphasized that although “the arguments in favor of fashioning new rules to minimize the danger of convicting the innocent on the basis of unreliable eyewitness testimony carry substantial force, [this] rulemaking function can be performed 'more effectively by the legislative process than by somewhat clumsy judicial fiat,’ and that the Federal Constitution does not foreclose experimentation by the States in the development of such rules.”
experience embodied in those decisions and blindly uphold the conviction of a defendant who may well be innocent.

[In] determining the admissibility of the post-Stovall identification in this case, the Court considers two alternatives, a per se exclusionary rule and a totality-of-the-circumstances approach. The Court weighs three factors in deciding that the totality approach, which is essentially the test used in Biggers, should be applied. In my view, the Court wrongly evaluates the impact of these factors.

First, the Court acknowledges that one of the factors, deterrence of police use of unnecessarily suggestive identification procedures, favors the per se rule. Indeed, it does so heavily, for such a rule would make it unquestionably clear to the police they must never use a suggestive procedure when a fairer alternative is available. I have no doubt that conduct would quickly conform to the rule.

Second, the Court gives passing consideration to the dangers of eyewitness identification recognized in the Wade trilogy. It concludes, however, that the grave risk of error does not justify adoption of the per se approach because that would too often result in exclusion of relevant evidence. In my view, this conclusion totally ignores the lessons of Wade. The dangers of mistaken identification are, as Stovall held, simply too great to permit unnecessarily suggestive identifications. * * *

Finally, the Court errs in its assessment of the relative impact of the two approaches on the administration of justice. The Court relies most heavily on this factor * * *.

First, the per se rule here is not “inflexible.” Where evidence is suppressed, for example, as the fruit of an unlawful search, it may well be forever lost to the prosecution. Identification evidence, however, can by its very nature be readily and effectively reproduced. The in-court identification, permitted under Wade if it has a source independent of an uncounseled or suggestive procedure, is one example. Similarly, when a prosecuting attorney learns that there has been a suggestive confrontation, he can easily arrange another lineup conducted under scrupulously fair conditions. * * *

Second, other exclusionary rules have been criticized for preventing jury consideration of relevant and usually reliable evidence in order to serve interests unrelated to guilt or innocence, such as discouraging illegal searches or denial of counsel. Suggestively obtained eyewitness testimony is excluded, in contrast, precisely because of its unreliability and concomitant irrelevance.

[For] these reasons, I conclude that adoption of the per se rule would enhance, rather than detract from, the effective administration of justice. In my view, the Court’s totality test will allow seriously unreliable and misleading evidence to be put before juries. * * *

Even more disturbing than the Court’s reliance on the totality test, however, is the analysis it uses. [The] decision suggests that due process violations in identification procedures may not be measured by whether the government employed procedures violating standards of fundamental fairness. By relying on the probable accuracy of a challenged identification, instead of the necessity for its use, the Court seems to be ascertaining whether the defendant was probably guilty. * * *

[It] is my view that, assuming applicability of the totality test enunciated by the Court, the facts of the present case require [exclusion of the identification testimony].

I consider first the opportunity that Officer Glover had to view the suspect. Careful review of the record shows that he could see the heroin seller only for the time it took to speak three sentences of four or five short words, to hand over some money, and later after the door reopened, to receive the drugs in return. The entire face-to-face transaction could have taken as
little as 15 or 20 seconds. But during this time, Glover’s attention was not focused exclusively on the seller’s face. He observed that the door was opened 12 to 18 inches, that there was a window in the room behind the door, and, most importantly, that there was a woman standing behind the man. Glover was, of course, also concentrating on the details of the transaction—he must have looked away from the seller’s face to hand him the money and receive the drugs. The observation during the conversation thus may have been as brief as 5 or 10 seconds.

As the Court notes, Glover was a police officer trained in and attentive to the need for making accurate identifications. [But] the mere fact that he has been so trained is no guarantee that he is correct in a specific case. *** Moreover, “identifications made by policemen in highly competitive activities, such as undercover narcotic [work], should be scrutinized with special care.” P. Wall, *Eye-Witness Identification in Criminal Cases* 14 (1965). Yet it is just such a searching inquiry that the Court fails to make here.

Another factor on which the Court relies—the witness’ degree of certainty in making the identification—is worthless as an indicator that he is correct. Even if Glover had been unsure initially about his identification of respondent’s picture, by the time he was called at trial to present a key piece of evidence for the State that paid his salary, it is impossible to imagine his responding negatively to such questions as “is there any doubt in your mind whatsoever” that the identification was correct. ***

Next, the Court finds that because the identification procedure took place two days after the crime, its reliability is enhanced. While such temporal proximity makes the identification more reliable than one occurring months later, the fact is that the greatest memory loss occurs within hours after an event. After that, the dropoff continues much more slowly. ***

Finally, the Court makes much of the fact that Glover gave a description of the seller to D’Onofrio shortly after the incident. [But the description was only] a general summary of the seller’s appearance. We may discount entirely the seller’s clothing, for that was of no significance later in the proceeding. Indeed, to the extent that Glover noticed clothes, his attention was diverted from the seller’s face. *** Conspicuously absent is any indication that the seller was a native of the West Indies, certainly something which a member of the black community could immediately recognize from both appearance and accent.

From all of this, I must conclude that the evidence of Glover’s ability to make an accurate identification is far weaker than the Court finds it. In contrast, the procedure used to identify respondent was both extraordinarily suggestive and strongly conducive to error. [By] displaying a single photograph of respondent to the witness Glover under the circumstances in this record almost everything that could have been done wrong was done wrong.

In this case, [the] pressure [to identify respondent] was not limited to that inherent in the display of a single photograph. Glover, the identifying witness, was a state police officer on special assignment. He knew that D’Onofrio, an [experienced] narcotics detective, presumably familiar with local drug operations, believed respondent to be the seller. There was at work, then, both loyalty to another police officer and deference to a better-informed colleague. ***

Notes on the Stovall-Brathwaite Due Process Test

1. *The threshold inquiry.* Before considering whether there is “a very substantial likelihood of irreparable misidentification,” the Court asks whether the procedure used to obtain the out-of-court identification was unnecessarily or impermissibly suggestive. Why impose that threshold requirement? If, as the *Brathwaite* Court says, “reliability is the linchpin in determining the admissibility of identification testimony,” shouldn’t all identifications that involve a very substantial likelihood of irreparable misidentification be excluded regardless of
how they were obtained? Would such a test overwhelm the criminal justice system? Cf. *State v. Henderson*, 27 A.3d 872, 923 (N.J. 2011) (allowing reliability hearings in all eyewitness cases would overwhelm the system).d At the very least, if suggestive procedures increase the likelihood of a mistaken identification, shouldn't courts consider the reliability of any identification obtained by virtue of a suggestive procedure, whether it was necessary or not? Consider Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 Law & Hum. Behav. 19 (2009) ("[F]rom a scientific perspective, whether the suggestive procedure was necessary or not necessary has no bearing at all on the power of the suggestive procedure to induce mistaken identifications.") (hereinafter "Wells & Quinlivan").

2. **When is an identification procedure unnecessarily suggestive?** Stovall, Biggers, and *Bratwaite* make it clear that a one-person show up or single photographic identification procedure is suggestive, but when are such procedures necessary? The Supreme Court thought that Mrs. Behrendt's identification of Stovall was necessary. Do you agree? Consider Judge Friendly’s opinion, dissenting from the lower court judgment in *Stovall*, 355 F.2d 731, 744–45 (2d Cir. 1966):

"[The argument that law enforcement officials were confronted with an emergency] ignores the huge amount of circumstantial identification the excellent police investigation had produced; moreover, if the state officials were motivated [by] solicitude [for Stovall], the natural course would have been to ask Stovall whether he wanted to go. The emergency argument fails both on the facts and on the law. [If] Mrs. Behrendt’s condition had been as serious as my brothers suppose, nothing prevented the prosecutor from informing the state district judge at the preliminary hearing that Stovall had to be taken immediately before her, and suggesting that counsel be assigned forthwith for the limited purpose of advising him in that regard—rather than standing silent when Stovall told the judge of his desire to have counsel and then carting him off to a confrontation by the victim which counsel might have done something to mitigate."

Lower courts have not only followed *Stovall* in similar cases of serious injury to the victim or a witness but have applied it to situations where the suspect is seriously injured. See Commentary to § 160.5 of the *Model Pre-Arraignment Code* at 451–52. Is a "showup" in such cases necessary? Could a photographic array be utilized? If the suspect is hospitalized for an extended period, could the witness be taken to several hospital rooms? See *Model Code* at 452.

3. **Does the unnecessarily suggestive identification procedure have to be arranged by the police or does any identification obtained under suggestive circumstances satisfy the threshold requirement?** The Supreme Court answered this question in *Perry v. New Hampshire*, 132 S.Ct. 716 (2012), which involved the following facts: Around 3:00 a.m., police responded to a call that an African-American male was trying to break into cars in an apartment parking lot. They found Perry in the parking lot holding two car-stereo amplifiers in his hands. The owner of the amplifiers then appeared in the parking lot indicating that his neighbor had just told him that she saw someone break into his car. One police officer stayed in the parking lot with Perry while another went to speak to the neighbor. When the officer asked the neighbor to describe the man she saw break into her neighbor’s car, she pointed to her kitchen window and said that the person she saw was standing in the parking lot next to the police officer. Perry later moved to suppress this out-of-court identification on due process grounds, but the New Hampshire courts denied his motion, holding that the Due Process

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d The New Jersey Supreme Court held that reliability hearings should be conducted only after the defendant presents some evidence of suggestiveness. In explaining its holding, the court noted that, “[i]n 2009, trial courts in New Jersey conducted roughly 200 Wade hearings . . . . [If any claim of possible unreliability] could trigger a hearing, that number might increase to nearly all cases in which eyewitness identification evidence plays a part.” 27 A.3d at 923.
Clause only required a trial court to assess the reliability of an out-of-court identification when the police employed suggestive identification techniques. Here, the courts held, the identification was not police-orchestrated. The Supreme Court, per Justice Ginsburg, agreed:

“[Perry] contends [that] it was mere happenstance that each of the Stovall cases involved improper police action. The rationale underlying our decisions, Perry asserts, supports a rule requiring trial judges to prescreen eyewitness evidence for reliability any time an identification is made under suggestive circumstances. We disagree.

‘Perry’s argument depends, in large part, on the Court’s statement in Brathwaite that ‘reliability is the linchpin in determining the admissibility of identification testimony.’

“[Perry] has removed our statement in Brathwaite from its mooring, and thereby attributes to the statement a meaning a fair reading of our opinion does not bear. [The] Brathwaite Court’s reference to reliability appears in a portion of the opinion concerning the appropriate remedy when the police use an unnecessarily suggestive identification procedure. The Court adopted a judicial screen for reliability as a course preferable to a per se rule requiring exclusion of identification evidence whenever law enforcement officers employ an improper procedure. The due process check for reliability, Brathwaite made plain, comes into play only after the defendant establishes improper police conduct. The very purpose of the check, the Court noted, was to avoid depriving the jury of identification evidence that is reliable, notwithstanding improper police conduct.

“[Perry] ignore[s] a key premise of the Brathwaite decision: A primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances, the Court said, is to deter law enforcement use of improper lineups, showups, and photo arrays in the first place. Alerted to the prospect that identification evidence improperly obtained may be excluded, the Court reasoned, police officers will ‘guard against unnecessarily suggestive procedures.’ This deterrence rationale is inapposite in cases, like Perry’s, in which the police engaged in no improper conduct.

“[Perry] place[s] significant weight on United States v. Wade, describing it as a decision not anchored to improper police conduct. In fact, the risk of police rigging was the very danger to which the Court responded in Wade when it recognized a defendant’s right to counsel at postindictment, police-organized identification procedures. ‘[T]he confrontation compelled by the State between the accused and the victim or witnesses,’ the Court began, ‘is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial.’ ‘A major factor contributing to the high incidence of miscarriage of justice from mistaken identification,’ the Court continued, ‘has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification.’ To illustrate the improper suggestion it was concerned about, the Court pointed to police-designed lineups where ‘all in the lineup but the suspect were known to the identifying witness, . . . the other participants in [the] lineup were grossly dissimilar in appearance to the suspect, . . . only the suspect was required to wear distinctive clothing which the culprit allegedly wore, . . . 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, . . . the suspect is pointed out before or during a lineup, . . . the participants in the lineup are asked to try on an article of clothing which fits only the suspect.’ Beyond genuine debate, then, prevention of unfair police practices prompted the Court to extend a defendant’s right to counsel to cover postindictment lineups and showups.

“Perry’s [argument] thus lacks support in the case law he cites. Moreover, his position would open the door to judicial preview, under the banner of due process, of most, if not all, eyewitness identifications. External suggestion is hardly the only factor that casts doubt on the
trustworthiness of an eyewitness’ testimony. [Many] other factors bear on ‘the likelihood of misidentification’—for example, the passage of time between exposure to and identification of the defendant, whether the witness was under stress when he first encountered the suspect, how much time the witness had to observe the suspect, how far the witness was from the suspect, whether the suspect carried a weapon, and the race of the suspect and witness. There is no reason why an identification made by an eyewitness with poor vision, for example, or one who harbors a grudge against the defendant, should be regarded as inherently more reliable, less a ‘threat to the fairness of trial,’ than the identification [in] this case. To embrace Perry’s view would thus entail a vast enlargement of the reach of due process as a constraint on the admission of evidence.

‘Perry maintains that the Court can limit the due process check he proposes to identifications made under ‘suggestive circumstances.’ Even if we could rationally distinguish suggestiveness from other factors bearing on the reliability of eyewitness evidence, Perry’s limitation would still involve trial courts, routinely, in preliminary examinations. Most eyewitness identifications involve some element of suggestion. Indeed, all in-court identifications do. Out-of-court identifications volunteered by witnesses are also likely to involve suggestive circumstances. For example, suppose a witness identifies the defendant to police officers after seeing a photograph of the defendant in the press captioned ‘theft suspect,’ or hearing a radio report implicating the defendant in the crime. Or suppose the witness knew that the defendant ran with the wrong crowd and saw him on the day and in the vicinity of the crime. Any of these circumstances might have ‘suggested’ to the witness that the defendant was the person the witness observed committing the crime.

‘[In] urging a broadly applicable due process check on eyewitness identifications, Perry maintains that eyewitness identifications are a uniquely unreliable form of evidence. We do not doubt either the importance or the fallibility of eyewitness identifications. Indeed, in [Wade,] we observed that ‘the annals of criminal law are rife with instances of mistaken identification.’

‘[T]he potential unreliability of a type of evidence does not alone render its introduction at the defendant’s trial fundamentally unfair. [The] fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness.

“Our unwillingness to enlarge the domain of due process [rests,] in large part, on our recognition that the jury, not the judge traditionally determines the reliability of evidence. We also take account of other safeguards built into our adversary system that caution juries against placing undue weight on eyewitness testimony of questionable reliability. These protections include the defendant’s Sixth Amendment right to confront the eyewitness. Another is the defendant’s right to the effective assistance of an attorney, who can expose the flaws in the eyewitness’ testimony during cross-examination and focus the jury’s attention on the fallibility of such testimony during opening and closing arguments. Eyewitness-specific jury instructions, which many federal and state courts have adopted, likewise warn the jury to take care in appraising identification evidence. The constitutional requirement that the government prove the defendant’s guilt beyond a reasonable doubt also impedes convictions based on dubious identification evidence.

“State and federal rules of evidence, moreover, permit trial judges to exclude relevant evidence if its probative value is substantially outweighed by its prejudicial impact or potential for misleading the jury. In appropriate cases, some States also permit defendants to present expert testimony on the hazards of eyewitness identification evidence.

“[For] the foregoing reasons, [we] hold that the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the
identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement."

Justice Sotomayor was the lone dissenter:

“This Court has long recognized that eyewitness identifications’ unique confluence of features—their unreliability, susceptibility to suggestion, powerful impact on the jury, and resistance to the ordinary tests of the adversarial process—can undermine the fairness of a trial. Our cases thus establish a clear rule: The admission at trial of out-of-court eyewitness identifications derived from impermissibly suggestive circumstances that pose a very substantial likelihood of misidentification violates due process. The Court today announces that that rule does not even ‘come into play’ unless the suggestive circumstances are improperly ‘police-arranged.’

“Our due process concern, however, arises not from the act of suggestion, but rather from the corrosive effects of suggestion on the reliability of the resulting identification. By rendering protection contingent on improper police arrangement of the suggestive circumstances, the Court effectively grafts a mens rea inquiry onto our rule. The Court’s holding enshrines a murky distinction—between suggestive confrontations intentionally orchestrated by the police and, as here, those inadvertently caused by police actions—that will sow confusion. It ignores our precedents’ acute sensitivity to the hazards of intentional and unintentional suggestion alike and unmoors our rule from the very interest it protects, inviting arbitrary results. And it recasts the driving force of our decisions as an interest in police deterrence, rather than reliability. Because I see no warrant for declining to assess the circumstances of this case under our ordinary approach, I respectfully dissent.

“As this case illustrates, police intent is now paramount. [Perry] was the only African-American at the scene of the crime standing next to a police officer. For the majority, the fact that the police did not intend that showup, even if they inadvertently caused it in the course of a police procedure, ends the inquiry. The police were questioning the eyewitness [about] the perpetrator’s identity, and were intentionally detaining Perry in the parking lot—but had not intended for [the eyewitness] to identify the perpetrator from her window. Presumably, in the majority’s view, had the police asked [the eyewitness] to move to the window to identify the perpetrator, that could have made all the difference.

“I note, however, that the majority leaves what is required by its arrangement-focused inquiry less than clear. In parts, the opinion suggests that the police must arrange an identification ‘procedure,’ regardless of whether they ‘inten[d] the arranged procedure to be suggestive.’ Elsewhere, it indicates that the police must arrange the ‘suggestive circumstances’ that lead the witness to identify the accused. Still elsewhere it refers to ‘improper’ police conduct, connoting bad faith. Does police ‘arrangement’ relate to the procedure, the suggestiveness, or both? If it relates to the procedure, do suggestive preprocedure encounters no longer raise the same concerns? If the police need not ‘inten[d] the arranged procedure to be suggestive,’ what makes the police action ‘improper’? And does that mean that good-faith, unintentional police suggestiveness in a police-arranged lineup can be ‘impermissibly suggestive’? If no, the majority runs headlong into Wade. If yes, on what basis—if not

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6 Justice Thomas filed a concurring opinion in which he criticized the entire Stovall line of cases noting that the cases are all “premised on a ‘substantive due process’ right to ‘fundamental fairness’” and arguing that “those cases are wrongly decided because the Fourteenth Amendment’s Due Process Clause is not a ‘secret repository of substantive guarantees against “unfairness.”’" As a result, he indicated that he would “limit the Court’s suggestive eyewitness identification cases to the precise circumstances that they involved.”

4 The majority denies that it has imposed a mens rea requirement, but by confining our due process concerns to police-arranged identification procedures, that is just what it has done. The majority acknowledges that ‘whether or not [the police] intended the arranged procedure to be suggestive’ is irrelevant under our precedents, but still places dispositive weight on whether or not the police intended the procedure itself.
deterrence—does it distinguish unintentional police suggestiveness in an accidental confrontation?

“The arrangement-focused inquiry will sow needless confusion. If the police had called Perry and [the eyewitness] to the police station for interviews, and [the eyewitness] saw Perry being questioned, would that be sufficiently ‘improper police arrangement’? If Perry had voluntarily come to the police station, would that change the result?

“[We] once described the ‘primary evil to be avoided’ as the likelihood of misidentification. Biggers. Today’s decision, however, means that even if that primary evil is at its apex, we need not avoid it at all so long as the suggestive circumstances do not stem from improper police arrangement.

“The majority gives several additional reasons for why applying our due process rule beyond improperly police-arranged circumstances is unwarranted. In my view, none withstands close scrutiny.

“[The majority’s reading of our precedent as focusing on deterrence] mischaracterizes our cases. We discussed deterrence in Brathwaite because Brathwaite challenged our two-step inquiry as lacking deterrence value. [Our discussion of deterrence in that case was not a] list of ‘primary aim[s].’ Nor was it a ringing endorsement of the primacy of deterrence. [To] the contrary, we clarified that deterrence was a subsidiary concern to reliability, the ‘driving force’ of our doctrine.

“[The] majority emphasizes that we should rely on the jury to determine the reliability of evidence. But our cases are rooted in the assumption that eyewitness identifications upend the ordinary expectation that it is ‘the province of the jury to weigh the credibility of competing witnesses.’ [Jurors] find eyewitness evidence unusually powerful and their ability to assess credibility is hindered by a witness’ false confidence in the accuracy of his or her identification.

“[The majority also] suggests that applying our rule beyond police-arranged suggestive circumstances would entail a heavy practical burden, requiring courts to engage in ‘preliminary judicial inquiry’ into ‘most, if not all, eyewitness identifications.’ But that is inaccurate. [As] is implicit in the majority’s reassurance that Perry may resort to the rules of evidence in lieu of our due process precedents, trial courts will be entertaining defendants’ objections, pretrial or at trial, to unreliable eyewitness evidence in any event. The relevant question, then, is what the standard of admissibility governing such objections should be.

“[Finally,] the majority questions how to ‘rationally distinguish suggestiveness from other factors bearing on the reliability of eyewitness evidence,’ [and] more broadly, how to distinguish eyewitness evidence from other kinds of arguably unreliable evidence. Our precedents, however, did just that. We emphasized the ‘formidable number of instances in the records of English and American trials’ of ‘miscarriage[s] of justice from mistaken identification.’ Wade. We then observed that ‘the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor.’ Id. [The] majority points to no other type of evidence that shares the rare confluence of characteristics that makes eyewitness evidence a unique threat to the fairness of trial.

“[It] would be one thing if the passage of time had cast doubt on the empirical premises of our precedents. But just the opposite has happened. A vast body of scientific literature has reinforced every concern our precedents articulated nearly a half-century ago. [Over] the past three decades, more than two thousand studies related to eyewitness identification have been published.

“[The] empirical evidence demonstrates that eyewitness misidentification is ‘the single greatest cause of wrongful convictions in this country.’ Researchers have found that a staggering
76% of the first 250 convictions overturned due to DNA evidence since 1989 involved eyewitness misidentification. Study after study demonstrates that eyewitness recollections are highly susceptible to distortion by postevent information or social cues; that jurors routinely overestimate the accuracy of eyewitness identifications; that jurors place the greatest weight on eyewitness confidence in assessing identifications even though confidence is a poor gauge of accuracy; and that suggestiveness can stem from sources beyond police-orchestrated procedures. The majority today nevertheless adopts an artificially narrow conception of the dangers of suggestive identifications at a time when our concerns should have deepened.

4. The relationship between the two prongs. According to Brathwaite, if a court finds that the police used impermissibly suggestive identification procedures, then the trial judge should weigh the corrupting effect of the process against its five reliability factors. But, as one state supreme court has observed, “three of those factors—the opportunity to view the crime, the witness’ degree of attention, and the level of certainty at the time of the identification—rely on self-reporting by the eyewitnesses; and research has shown that those reports can be skewed by the suggestive procedures themselves. [Thus, the test] may unintentionally reward suggestive police practice [rather than deterring it].” State v. Henderson, 27 A.3d 872, 918 (N.J. 2011); see also Wells & Quinlivan at 9 (“[T]he use of suggestive procedures can lead the eyewitness to enhance (distort) his or her retrospective self-reports in ways that help ensure the witness’ high standing on the Manson [v. Brathwaite] criteria.”).

5. The practical result of the Brathwaite approach. The practical result of the broad discretion conferred on the trial court by Brathwaite, observes Robert P. Mosteller, The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to “Do Justice”, 76 Fordham L.Rev. 1337, 1386 (2007), “is a paucity of decisions finding a due process suggestivity violation and excluding the identification evidence. If a violation is found under Brathwaite, the witness or, most poignantly, the victim is not allowed to identify the defendant in the courtroom.” As Richard Rosen has written, Reflections on Innocence, 2006 Wis.L.Rev. 237, 251: “This places an almost intolerable burden on an (often elected) trial judge who must not only find that the identification was so flawed that the witness cannot be believed, but then has to tell the witness, often the victim of the crime, that she will not even be allowed to tell the jury what she honestly believed she saw. This would be a different thing to tell any witness, but imagine looking a rape victim in the eye, one who swears that she can identify the man who violated her, and telling that woman she will not even be allowed to tell her story to a jury. It is no wonder that few identifications have been suppressed for due process violations.”

6. Conflating the due process and Sixth Amendment inquiries. The vast majority of state courts has borrowed the “independent source” doctrine from the Wade-Gilbert line of Sixth Amendment right-to-counsel cases and held that an in-court identification is permissible despite an inadmissible out-of-court identification by the same eyewitness provided that the court finds that there is an “independent source”—i.e., a source other than the prior, inadmissible out-of-court identification—for the in-court identification. See Brandon L. Garrett, Eyewitnesses and Exclusion, 65 Vand. L. Rev. 451 (2012) (collecting cases). Professor Garrett has argued that this approach “has it backwards:”

“[T]he Pennsylvania Supreme Court asked ‘whether there exists a basis for identification which is independent of the allegedly suggestive showup.’ How could there be such a basis? The same eyewitness is testifying at trial with a memory affected by the showup. Similarly, a South Carolina appellate court noted that ‘[t]he in-court identification is admissible if based on information independent of the out-of-court procedure.’ What ‘information’ does that eyewitness have that is ‘independent’ where nothing has transpired except that the eyewitness is now confronted with the same person in a courtroom setting?”
Garrett, supra at 456, 478. As Professor Garrett explains, “[i]n the eyewitness context, neither time nor unrelated events can ‘dissipate the taint.’ . . . The very idea that a courtroom identification could be seen as ‘independent’ is anomalous [because, in] the courtroom, the eyewitness cannot access a memory of what happened that is ‘independent’ of the suggestive lineups that came before.” Garrett, supra at 484–85; see also id. at 487 (noting that several state and federal courts “cite to other evidence in the case as another ‘independent’ basis for allowing the in-court identification;” if there is sufficient other evidence of guilt, that will “help to show that [the in-court identification] was reliable or ‘independent’ of any suggestive police conduct”).

§ 4. SOCIAL SCIENCE RESEARCH ON IDENTIFICATION PROCEDURES AND THE NEED FOR REFORM

Recent developments in the social science literature, coupled with revelations from DNA exoneration cases regarding the prevalence of misidentifications, demonstrate that the problem of mistaken eyewitness identifications may be worse than the Wade Court originally thought. Human memory is far from perfect. Even when people are paying close attention, they have limited abilities to process multiple stimuli in their environment. Witnesses cannot simultaneously observe the height, weight, age, clothing, and physical features of a criminal suspect. As a result, witnesses often have memory gaps that they later unconsciously fill in based on stereotypes or expectations. People often see what they expect to see. This tendency to fill in memory gaps with inaccurate details is exacerbated by the fact that memory fades over time, and that new information that a person learns will affect and shape her memory of an event.

In addition to these general problems with memory, there are a host of situational circumstances that can affect a witness’s ability to perceive events. Social science research has identified two categories of variables that contribute to the well-recognized problem of mistaken identifications—estimator variables and system variables.

1. Estimator variables. Estimator variables are factors over which the legal system has no control and include the characteristics of the witness, the characteristics of the perpetrator, and the circumstances of the witnessed event. Some people are better at being witnesses than others. Young children and the elderly are less able to make accurate identifications than young adults, and sober individuals are better at making accurate identifications than those who are intoxicated. The characteristics of the suspect can also affect the reliability of an identification. Research reveals that the use of disguises—including hats, sunglasses, masks, wigs—severely inhibits witnesses’ abilities to later identify someone. Moreover, there is robust research documenting problems with cross-racial identifications. People have a much harder time identifying the facial features and distinguishing among people of a different race. The circumstances of the event can also affect reliability. A brief or fleeting exposure to a suspect is less likely to produce an accurate identification than a prolonged one. An identification made at a great distance or in bad lighting conditions is more likely to be inaccurate than one made up close with good lighting. Research has shown that witnesses are particularly bad at identifying suspects who have used weapons to commit their crimes due to a phenomenon known as “weapon focus.” Witnesses focus on the weapon itself rather than focusing on the person holding

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The social science research analyzing the reliability of eyewitness identification testimony is vast. For an excellent summary of the research discussed in this section, see Nat’l Acad. of Sciences, Identifying the Culprit: Assessing Eyewitness Identification (Oct. 2, 2014), available at http://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification; State v. Henderson, 27 A.3d 872 (N.J. 2011) (discussing the current state of the research after a hearing that “probed testimony by seven experts and produced more than 2,000 pages of transcripts along with hundreds of scientific studies”); State v. Lawson, 291 P.3d 673 (Or. 2012) (similarly cataloguing the scientific research).
it. Moreover, studies reveal that high levels of stress can diminish an eyewitness’s ability to recall details and make an accurate identification later.

Notice that, under the current due process test, these estimator variables are only relevant if there was an unnecessarily suggestive identification procedure. In light of this research, should the Court revisit that requirement?

2. **System variables.** System variables are factors—like identification procedures—that are within the legal system’s control. Witnesses are very susceptible to suggestion. Even the most subtle comment or action by a police officer can affect a witness’s selections, and police comments made after an identification praising or congratulating the witness can improperly reinforce a shaky identification and engender a false sense of confidence. The composition of the lineup or photo array can also be suggestive. Sometimes, if a witness does not select the suspect out of a photo array, the police will then conduct a live lineup in order to get the witness to make an identification. Research on the “mugshot exposure effect” reveals that presenting a suspect to the witness multiple times increases the likelihood that the witness’s later identification of the suspect is based on her memory of having seen the earlier photograph rather than her memory of the crime itself. Witnesses are often anxious to make an identification and naturally believe that the culprit is in the lineup or photospread. As a result, they will frequently identify the person who most resembles the witnesses’ memory relative to other people in the lineup or photospread. If the suspect is the only person in the lineup or photospread that fits the general description of the perpetrator, witnesses will pick the suspect because they want to be helpful and he looks most like their memory of the perpetrator. Moreover, once the witness makes a selection, she becomes committed to the identification and will psychologically reinforce her choice.

Young children and the elderly are more susceptible to having their memories of an event distorted by misinformation after the fact, as are “people who have lower cognitive abilities” and “persons with certain personality characteristics, such as being high in cooperativeness.” Gary L. Wells & Elizabeth Loftus, *Eyewitness Memory for People and Events,* Handbook of Psychology, Forensic Psychology, vol. 11, ch. 25, p. 621 (2013). Should a different legal standard apply when determining how reliable these individuals’ identifications are after a suggestive procedure?

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Given research demonstrating that jurors often overestimate the reliability of eyewitness identification testimony and place a high value on such testimony, police departments, courts, and legislatures around the country have begun to consider ways to enhance the reliability of identifications and protect against misidentifications.

3. **Changes in identification procedures.** Social scientists have long advocated the following requirements for lineups and photospreads:

- The person conducting the lineup or photospread should not be aware of which member of the lineup or photospread is the suspect. (Research shows that lineup administrators familiar with the suspect will consciously or unconsciously leak that information to the witness and affect the witness’s behavior.)

- Eyewitnesses should be told explicitly that the suspected offender might not be in the lineup or photospread, and therefore that they should not feel they have to make an identification. (The danger of false identification arises from a tendency for

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eyewitnesses to identify the person who most closely resembles the offender relative to the others in the lineup.)

- The suspect should not stand out in the lineup or photospread as being different from the fillers on the basis of the witness’s previous description of the offender or other factors that would draw special attention to the suspect. (E.g., the suspect should not be the only one dressed in the type of clothes the victim said was worn by the offender or the suspect’s photo should not be taken from a different angle than the other photos.)

- Lineups or photospreads should include a minimum of five people other than the suspect and should not feature more than one suspect. (Having at least five fillers and only one suspect decreases the possibility of “lucky guesses” and increases the reliability of the process.)

- Pre- and post-identification feedback of any kind should be avoided. (Information received by witnesses both before and after an identification can affect their memory.)

- At the time the identification is made, a clear statement should be taken from the eyewitness regarding his degree of confidence that the person identified is the actual offender. (Research shows that witnesses who were highly confident in the accuracy of their identifications at the time the identifications were made were more likely to have made accurate identifications. Confidence statements from eyewitnesses can be greatly affected by postidentification events that have nothing to do with the witness’s memory. E.g., an eyewitness might learn, after his identification, that another witness has identified the same person or that the person he has identified has a prior record for offenses of the same type.)

- Police should not permit witnesses to view a suspect (or a filler) more than once.

- The lineup or photospread should be presented to one witness at a time.

- Videotape and audiotape the identification procedure whenever possible.

A number of police departments and state attorneys general have recommended adopting some or all of these requirements. See, e.g., Office of the Attorney Gen., Wis. Dep’t of Justice, Model Policy and Procedure for Eyewitness Identification 1 (2005) (recommending double-blind sequential photo arrays and lineups with non-suspect fillers chosen to minimize suggestiveness, non-biased instructions to eyewitnesses, and immediate confidence assessments); see also Dallas Police Dep’t, Dallas Police Department General Order § 304.01 (2009); Denver Police Dep’t, Operations Manual § 104.44 (2006); Police Chiefs’ Ass’n of Santa Clara County, Line-up Protocol for Law Enforcement (2002); International Association of Chiefs of Police, Training Key #600: Eyewitness Identifications (2006); U.S. Dep’t of Justice, Eyewitness Evidence: A Guide For Law Enforcement (1999). Some state legislatures have written many of these requirements into state law. See N.C. Gen. Stat. § 15A–284.50 to –.53 (mandating pre-lineup instructions and blind, sequential lineup administration); 725 Ill. Comp. Stat. 5/107A–5 (mandating that lineups be photographed or recorded and requiring pre-identification instructions); Md. Code. Ann. Pub. Safety § 3–506 (requiring police to revise identification procedures in light of social science); Ohio Rev. Code Ann. § 2933.83 (requiring blind identification procedures when possible and imposing a recording requirement); W. Va. Code Ann. § 62–1E–1 to –3 (requiring pre-

c  Cf. Randolph N. Jonakait, Reliable Identification; Could the Supreme Court Tell in Manson v. Brathwaite?, 52 U. Colo. L. Rev. 511, 525 (1981); Gerald Lefcourt, The Blank Lineup: An Aid to the Defense, 14 Crim. L. Bull. 428 (1978), advocating the use of “blank” lineups. This entails the viewing of two separate lineups. The witness should be told the suspect may or may not be in the first lineup. Thereafter, the suspect is presented in the second lineup.

identification instructions and recording of procedures and creating a task force to develop further procedures); Wis. Stat. § 175.50 (recommending double blind identification procedures).

If a police officer violates these requirements, however, there is typically not a per se exclusionary remedy. It might, however, be a sufficient indicator of suggestiveness as to merit a hearing on the reliability of the identification.

4. More and better training of law enforcement officers. According to a recent report issued by the National Academy of Sciences, many law enforcement agencies do not have any standard written policies or formalized training for the administration of identification procedures or for ongoing interactions with witnesses. See Identifying the Culprit: Assessing Eyewitness Identification (Oct. 2, 2014). The report recommends that all law enforcement agencies provide their agents with training on vision and memory and the variables that affect them, on practices for minimizing contamination, and on effective eyewitness identification protocols.


7. Providing for more protection against unreliable identifications under state law. Some states provide more protection against misidentification by expanding on the Biggers/Brathwaite factors that are used to assess the reliability of an identification. See, e.g., State v. Henderson, 27 A.3d 872, 919–20 (N.J. 2011) (allowing all relevant system and estimator variables to be explored and weighed at pretrial hearings once suggestiveness is shown); State v. Hunt, 69 P.3d 571, 576 (Kan. 2003) (expanding on the due process analysis’s reliability factors and requiring cautionary instructions); State v. Ramirez, 817 P.2d 774, 780–81 (Utah 1991) (same). Other states have relied on their evidence rules to circumscribe the admissibility of unreliable identifications. See, e.g., State v. Lawson, 291 P.3d 673 (Or. 2012) (using rules about personal knowledge, lay opinion testimony, and relevance to address eyewitness identification problems). Still others have adopted requirements that more severely restrict the admissibility

Would you support a rule of *per se* exclusion whenever the police used a suggestive identification procedure? Consider Wells & Quinlivan at 9: “Imagine, for instance, that a victim-witness had been abducted and held for 3 months during which the culprit’s face was never covered and there was full light (repeated opportunity to view), the victim studied the face repeatedly (repeated attention), the victim described the face in great detail, including unique features (excellent description), and the witness identified the suspect with total certainty within minutes after escaping. Surely, in this case we would not care if the identification procedure had multiple characteristics of a highly suggestive procedure.”

8. Preventing resort to the ultimate punishment. Consider Margery Malkin Koosed, *The Proposed Innocence Protection Act Won’t—Unless It Also Curbs Mistaken Eyewitness Identifications*, 63 Ohio St.L.J. 263, 265 (2002): “While cautionary instructions and expert testimony may be helpful, these have not proved strong enough in our battle to assure against mistaken identification. Altering the *Manson* standard for admission of the in-court identification and returning to the *Stovall* inquiry of whether the pretrial procedure was ‘conducive to irreparable mistaken identification’ (or an analogous ‘any likelihood of misidentification will exclude the in-court testimony’ standard) may further improve our arsenal. But the better approach would be for legislatures to simply bar the State from seeking death when suggestive procedures have been used.”