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NOTES

UNITED STATES v. *WADE:* A CASE OF MISTAKEN IDENTITY

The United States Supreme Court, in the recent case of *United States* v. *Wade,*[1] attempted to cure the evils inherent in the use of eyewitness identification evidence in criminal matters — a problem that has long been perplexing to the criminal bar.

Billy Joe Wade was arrested as a bank robbery suspect, and after an indictment was returned and counsel appointed to represent him, the Federal Bureau of Investigation conducted a lineup of the defendant "with five or six" other prisoners before two witnesses to the bank robbery. The defendant was required to wear strips of tape such as allegedly used by the robbers and was required to utter words that the felons used during the perpetration of the crime.

At the trial, the two witnesses made an identification of the defendant, and the prior lineup identification was then elicited from both witnesses upon cross examination. Defense counsel then moved to strike the witnesses' courtroom identification on the ground that conduct of the lineup without notice to and in absence of appointed counsel violated the defendant's sixth amendment right to the assistance of counsel and his fifth amendment privilege against self-incrimination. The motion was denied and Wade was convicted.

The Court of Appeals for the Fifth Circuit reversed the conviction and ordered a new trial at which the in-court identification evidence was to be excluded, holding that, though the lineup did not violate the defendant's fifth amendment right against self-incrimination, "the lineup, held as it was, in the absence of counsel, already chosen to represent appellant, was a violation of his Sixth Amendment rights."[2]

The Supreme Court, on certiorari,[3] described the pre-trial identification stage as critical in a criminal prosecution, and held that the accused, absent an intelligent waiver, is entitled to representation by counsel at pre-trial confrontations with his accusers for purposes of identification.[4]

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[1] 388 U.S. 218 (1967) [hereinafter cited as *Wade*].

[2] 358 F.2d 557, 560 (5th Cir. 1966).

[3] 385 U.S. 811 (1966).

[4] The Supreme Court also agreed with the conclusion of the court of appeals that the lineup itself, with the requirement of the defendant to repeat words used by the robber, did not violate the privilege against self-incrimination. The Court stated:

> We have no doubt that compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves

The Court concluded, however, that absence of counsel does not *per se* require exclusion of the eyewitness identification evidence since the threatened deprivation of the defendant's rights can be rectified by requiring the state to prove by "clear and convincing" evidence that the in-court identification had an origin independent of the objectionable lineup.

> 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.[5]

A full understanding of the impact of this decision requires an understanding of the nature and essential weakness of eyewitness identification evidence.

The gravity of the problem is recognized by numerous authoritative writers and case decisions dealing with the subject of

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no compulsion of the accused to give evidence having testimonial significance. It is compulsion of the accused to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have. It is no different from compelling Schmerber to provide a blood sample or Holt to wear the blouse, and, as in those instances, is not within the cover of the privilege. Similarly, compelling Wade to speak within hearing distance of the witnesses, even to utter words purportedly uttered by the robber, was not compulsion to utter statements of a 'testimonial' nature; he was required to use his voice as an identifying physical characteristic, not to speak his guilt. *Wade* at 222.

With this refusal to further extend the self-incrimination logic, *Wade* interrupts the continuing expansion of the fifth amendment privilege developed in the *Escobedo-Miranda* line of decisions. Escobedo v. Illinois, 378 U.S. 478 (1964); Miranda v. Arizona, 384 U.S. 436 (1966). *Wade*, however, adopts and carries forward the Supreme Court's recognition in these cases of an individual's right to counsel when faced with a critical head-on contest against the state. *Miranda* held that the right to counsel at the custodial interrogation stage in a criminal prosecution was such a critical circumstance. *Wade* further advances this protection by requiring right to counsel at *all* critical stages of the prosecution, which, the court concludes in *Wade*, includes all pre-trial confrontations with witnesses. The majority stated:

> [T]oday's law enforcement machinery involves critical confrontations of the accused by the prosecution at pre-trial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guaranty to apply to 'critical' stages of the proceedings. *Wade* at 224.

[5] *Wade* at 239. This case was the first of a triad handed down in the October 1966 term dealing with the problem of eyewitness identification as evidence. Stovall v. Denno, 388 U.S. 293 (1967), set the bounds of the *Wade* ruling — the retroactivity of the lineup decisions. The Court stated: "We hold that *Wade* and *Gilbert* affect only those cases and all future cases which involve confrontations for identification purposes conducted in the absence of counsel after this date, [June 12, 1966]." *Id.* at 296.

Gilbert v. California, 388 U.S. 263 (1967), held that the admission of the in-court identifications without first determining that they were not tainted by an illegal lineup but had an independent source was reversible error. Like the remand in the *Wade* decision, further proceedings were necessary to determine if the in-court identification had an independent source or that its introduction into evidence was harmless error.

identification evidence. The Supreme Court in the present case noted that: "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."[6]

The late Judge Jerome Frank stated that "[p]erhaps erroneous identification of the accused constitutes the major cause of the known wrongful convictions."[7] Professor Edmund Cahn has pointed out that "an honest mistake of identification . . . can hang an innocent man despite the most meticulous and fair minded trial of his case."[8]

The frequent occurrence of such honest mistakes, causing innocent men to be sent to jail, led Justice Frankfurter to state: "What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy."[9]

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[6] *Wade* at 228. In Miranda v. Arizona, 384 U.S. 436 (1966), Justice Harlan, in his dissenting opinion, in explaining the value of confessions, noted that without confessions it would be difficult for the state to obtain a conviction in most cases because the other evidence available, "the victim's identification, is evidence which is frequently unreliable." *Id* at 519.

[7] J. FRANK AND B. FRANK, NOT GUILTY 61 (1957).

[8] E. CAHN, THE MORAL DECISION 259 (1955).

[9] F. FRANKFURTER, THE CASE OF SACCO AND VENZETTI 30 (1927). Even prosecutors have recognized the inherent weakness of eyewitness identification. *See, e.g.*, Kuh, *Careers in Prosecution Officers*, 14 JUR. LEG. ED. 175, 187 n. 21 (1961). ("Proof that relies wholly on the identification made by eyewitnesses is inherently weak: persons who merely saw a thief or attacker briefly or under conditions of stress, may, despite the best intentions, too readily be mistaken.")

Mistakes in the eyewitness identification process have led a Commission of the English Government to state:

> [E]vidence as to identity based on personal impressions, however *bona fide*, is perhaps of all classes of evidence, the least to be relied upon, and therefore, unless supported by other facts, an unsafe basis for the verdict of a jury.

E. WATSON, THE TRIAL OF ADOLPH BECK 250 (1924).

The contention that eyewitness identification should be supported by other facts has one of its strongest advocates in Patrick M. Wall. In his work dealing with the eyewitness identification problem he states:

> To sum up, then, the proposed qualitative rule of corroboration, whether enacted by the legislatures or adopted by the courts, would constitute a compromise between the present situation in America, where it is often too easy to convict an innocent man, and some even more strict rule, which might unnecessarily hamper the conviction of the guilty.

WALL, EYE WITNESS IDENTIFICATION IN CRIMINAL CASES 192 (1965) [hereinafter cited as *Wall.*]

The Pennsylvania Supreme Court has also recognized the vagaries of eyewitness identification. *In re* Bryant, 176 Pa. 309, 35 A. 571 (1896), the court stated:

> There are few more difficult subjects with which the administration of justice has to deal. The carelessness or superficiality of observers, the rarity of powers of graphic description, and the different force with which peculiarities of form or color or expression strike different persons, make recognition or identification one of the least reliable of facts testified to even by actual witnesses who have seen the parties in question. . . .

Id. at 318, 35A. at 577.

The fact that the eyewitness, in stating his opinion, uses positive or absolute terms, does not make his identification reliable. Borchard, in discussing this subject stated that "[t]he positiveness of witnesses is sometimes . . . in inverse ratio to their reliability."[10] Wall explains this conclusion when he states:

> Behind this view lie two explanations, one psychological and the other practical. Psychologically, the individual who is careless in his observations and weak in memory may often be the type of person who makes snap judgments and in whom such qualities as 'pride and stubborness, make for confirmation of the original identification rather than for open-minded reconsideration.' And as a practical matter, even if a witness is uncertain or hesitant, he may be subjected to so many suggestive influences by the police that at the trial he will make 'a positive identification which no amount of subsequent cross-examination will be able to shake.[11]

Thus, even a finding that an eyewitness is both credible and positive is not an alleviation of the shortcomings of such evidence. The eyewitness may be both honest, as Frankfurter has pointed out, and positive, as Borchard has pointed out, and yet still be mistaken.[12]

The principal causes for the inherent weakness of eyewitness identification evidence are: (a) The normal fallabilities of human sense perception and memory, and (b) the susceptibility of the human mind to suggestive influences.[13] Wigmore, in discussing the first of these causes, observed that it should be considered

> that most persons . . . have features not sharply distinctive of a few individuals (*e.g.* simply, a large nose, blue eyes), and that most observers receive only the simplest impressions of features, expressible in only the loosest language (*e.g.* large nose, dark hair), it is easy to appreciate how often the items . . . , as recorded, may be items common to many individuals, and yet may cause recognition of sameness.[14]

Cases of mistaken identity are surprisingly frequent. As noted above, one reason for this apparent anomaly is the fact that the normal person sees but a few of someone else's distinguishing characteristics, retains even fewer in his mind, and is

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[10] E. BORCHARD, CONVICTING THE INNOCENT 50 (1932).

[11] *Wall* at 15.

[12] For examples of many cases where credible and positive eyewitnesses have been mistaken, see C. A. MITCHELL, SCIENCE AND THE CRIMINAL 37-47 (1911).

[13] The *Wade* Court also enunciated this bipartite causation of the problem:

> We do not assume that these risks are the result of police procedures intentionally designed to prejudice an accused. Rather we assume they derive from [a] the dangers inherent in eye witness identification and [b] the suggestibility inherent in the context of the pretrial identification.

Wade at 235.

[14] J. WIGMORE, THE SCIENCE OF JUDICIAL PROOF §251, at 537 (3d ed. 1937).

able to revive fewer still when asked to describe the person observed or to identify one thought to be the same.[15]

The second major cause of the eyewitness identification problem is the "one factor which, more than anything else, devastates memory and plays havoc with our best intended recollections: that is, the power of suggestion."[16]

The *Wade* Court has taken judicial cognizance of the police practices of suggesting, indirectly for the most part, although at times blatantly, to the identifier, the person considered to be the accused.

> But the 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. . . . 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.[17]

The Supreme Court, in the *Wade* case, has not only recognized that suggestive identification practices exist, but has delineated the means employed:

> Similarly state reports, in the course of describing prior identifications admitted as evidence of guilt, reveal numerous instances of suggestive procedures, for example, that all in the lineup but the suspect were known to the identifying witness, that the other participants in a lineup were grossly dissimilar in appearance from the suspect, that only the suspect was required to wear distinctive clothing which the culprit allegedly wore, that the witness is told by the police that they have caught the culprit after which the defendant is brought before the witness alone or is viewed in jail, that the suspect is pointed out before or during a lineup, and that the participants in the lineup are asked to try on an article of clothing which fits only the suspect.[18]

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[15] *Id.* at 536. This conclusion is supported by many psychologists as well as legal scholars, one of whom has stated that "there is such likeness, as well as such difference, between many individuals, that persons who have not a clear and quick perception of form and expression may very easily mistake one man or woman for another. . . ." HARRIS, BEFORE AND AT TRIAL 373 (Kerr ed. 1890), as reported in *Wall* at 9, n. 15.

[16] H. MUNSTERBERG, ON THE WITNESS STAND 69 (1908).

[17] *Wade* at 228.

[18] *Id.* at 232. In a prosecution for armed robbery and rape, a husband and wife identified the subsequently convicted defendant. The conviction was upheld by the state's highest court notwithstanding that the lineup consisted of the defendant and four members of the states attorney's force known to the complainant husband in his capacity as an investigator for the states attorney's office. Thus, the evil of knowing all the members of a lineup except the suspect not only existed, but has been permitted. People v. Boney, 28 Ill.2d 505, 192 N.E.2d 920 (1963). In affirming the conviction, the court stated:

> 'There is no requirement in the law that an accused person must be placed among a group of persons for the purpose of testing the ability of a witness to identify him as the guilty person, . . . and the manner' does not render the identification testimony incompetent, but only goes to the weight of the evidence.

Id. at 509, 192 N.E.2d at 922.

See also People v. James, 218 Cal. App. 2d 166, 32 Cal. Rptr. 283 (1963).

The dissimilarity might be in the clothing, in other words dissimilar to

This original identification, the reliability of which determines the worth of the courtroom identification, usually takes place in a police station, far removed from the courtroom, and from those rules of evidence and procedure which seek to insulate the witness from suggestive influences. It is this pre-trial corporeal identification of the defendant which is in issue for "[n]o part of the field of proof has been so defective in its use of the common sense of psychology. And at no point is the danger greater of condemning an innocent person."[19]

Prior to the *Wade* decision, it was generally the practice of the courts, when made aware of suggestive police practices or probable human error in the pre-trial identification of an accused, to permit such evidence to be considered by the jury rather than to exclude the subsequent in-court identification. This approach was based upon the supposition that any pre-trial impropriety was not a matter of admission or exclusion, but a mat-

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the clothing worn by the accused. *See, e.g.*, State v. Hill, 193 Kan. 512, 394 P.2d 106 (1964). In a number of cases, witnesses have admitted that they were unable to identify the defendant until after they had seen him dressed. "It is not unreasonable to conclude that these witnesses identified the clothing the defendant wore rather than the defendant himself, and this may be so even in the absence of an original reluctance to identify." *Wall* at 55.

The dissimilarity, causing the suggestion, can be that of characteristic nationality. In a Canadian case, *e.g.*, the defendant had been picked out of a lineup of six men, of whom he was the only Oriental. Regina v. Armstrong, 29 W.W.R. (n.s.) 141 (B.C. 1959). *See also* People v. Seppi, 221 N.Y. 62, 116 N.E. 793 (1917), where the defendant was the only Italian in the lineup.

Variance of the physical features of the lineup participants have been proven to cause the suggestion, both intentionally and subliminally; *e. g.*, height variance, State v. Duggan, 215 Or. 151, 333 P.2d 907 (1958), wherein the witness testified in open court that he identified the subsequently convicted defendant only because he was the only tall man in the lineup. The Court in affirming this assault and battery conviction, stated: "In view of the foregoing testimony, we fail to see how the jury could have been misled as to the basis on which the defendant was picked out of the lineup. The . . . assignment of error is without merit." *Id.* at 162, 333 P.2d at 912.

For other cases on physical dissimilarities, *see* Fredrickson v. United States, 105 U.S. App. D.C. 262, 266 F.2d 463 (D.C. Cir. 1959); People v. Adell, 75 Ill. App. 2d 385, 221 N.E.2d 72 (1966). Many cases affirm the police practice of informing the witness that they have apprehended the culprit after which the witness identifies such person, viewed alone. *See* Aaron v. State, 273 Ala. 337, 139 So.2d 309 (1961); Bishop v. State, 236 Ark. 12, 364 S.W.2d 676 (1963); People v. Thompson, 406 Ill. 555, 94 N.E.2d 349 (1950); People v. Berne, 384 Ill. 334, 51 N.E.2d 578 (1943); People v. Martin, 304 Ill. 494, 136 N.E. 711 (1922); Barrett v. State, 190 Tenn. 366, 229 S.W.2d 516 (1950). Authorities label this impropriety the "show-up," as distinguished from a "lineup" where at least two and as many as seven or more people are brought before the witness for purposes of identification. This practice has led *Wall* to comment: "Together with its aggravated forms, it constitutes the most grossly suggestive identification procedure now or ever used by the police. The nature and cause of the suggestion are readily discernible." *Wall* at 31. Wigmore's criticism of the "show-up" is equally as harsh when he states that "there is no excuse for jeopardizing the fate of innocent men by such clumsy, antiquated methods; a recognition under such circumstances is next to worthless." WIGMORE, EVIDENCE 1130, n. 2 (3d ed. 1940).

[19] Wigmore, *Corroboration by Witness' Identification of an Accused on Arrest*, 25 ILL. L. REV. 550, 551 (1931).

ter of weight to be accorded to such evidence of identification.[20] It was generally concluded that "[t]he jury is more likely to make an intelligent and correct decision on the accuracy of the trial identification if all the circumstances surrounding the original identification are brought out into the light."[21]

This approach has proved troublesome, however, in that a person being identified, prior to *Wade's* requirement of the presence of counsel, would ordinarily be unable to determine if improprieties existed. Justice Brennan, writing for the majority in *Wade,* supports this conclusion when he states:

> [N]either 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.[22]

The Supreme Court, after recognizing and discussing at great length the gravity of this problem, held that the accused, in light of the extension of constitutional protections to all "critical" stages in a criminal prosecution, is entitled to counsel at all pretrial confrontations with a witness. The Court further held that deprivation of that right, absent an intelligent waiver, would prohibit a subsequent courtroom identification by the witness unless the prosecution could establish by clear and convincing evidence that such in-court identification had an origin independent of the unattended pre-trial proceeding.[23]

The mere presence of counsel, the Court clearly implies, leads to the desired end, that the innocent be found innocent and the guilty be found guilty. "The presence of counsel at such critical confrontations, as at the trial itself, operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution."[24] The opinion asserts that with counsel present at the lineup, the prejudice attached to any impropriety can be overcome in the minds of the jury by effective cross examination. "[C]ounsel's presence at the lineup would equip him to attack not only the lineup identification, but the courtroom identification as well. . . ."[25]

The Court's first safeguard, presence of counsel, raises questions both as to its rationale and as to practical application of

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[20] *See, e.g.,* People v. Thompson, 406 Ill. 555, 94 N.E.2d 349 (1950); People v. Branch, 127 Cal. App. 2d 438, 274 P.2d 31 (1954); Commonwealth v. Downer, 159 Pa. Super. 626, 49 A.2d 516 (1946). *See generally* G. ABRAMS, ACCORDING TO THE EVIDENCE 26 (1958). For a complete and detailed survey of this pre-*Wade* problem see Annot. 71 A.L.R.2d 449 (1960).

[21] *Wall* at 136.

[22] *Wade* at 230.

[23] Such is not a new concept. It has been known by many names, for example, the "fruit of the poisonous tree doctrine" as labeled in Wong Sun v. United States, 371 U.S. 471, 488 (1962). The *Wade* Court extended the *Wong Sun* case in adopting the independent origin rule.

[24] *Wade* at 227.

[25] *Id.* at 241.

the protection. The Court does not take into consideration the possibility that suggestion may occur prior to the lineup. For example, policemen have occasionally used surreptitious methods to implant the suggestion. One such technique is to point out the accused to the witness before the lineup takes place, informing such witness of the individual's status as a suspect.[26] In fact, police practices have on occasion involved the use of peep-holes and two-way mirrors.[27]

Further, the *Wade* Court does not dictate a rule of police practice requiring the identification parade to desist if an attorney makes timely protestations of improprieties. And since the Court held that a defendant must, at the request of the police, wear particular clothing and utter the words used by the actual perpetrator of the crime while not violating any fifth amendment self-incrimination right, the lawyer seems to be relegated to the position of a mere passive observer. Justice Black, in his partly dissenting, partly concurring opinion, seems to be raising this issue when he states:

> Besides counsel's presence at the lineup being necessary to protect the defendant's specific constitutional rights to confrontation and the assistance of counsel at the trial itself, the assistance of counsel at the lineup is also necessary to protect the defendant's in-custody assertion of his privilege against self-incrimination, *Miranda* v. *Arizona,* 384 U.S. 436, for contrary to the Court, I believe that counsel may advise the defendant not to participate in the lineup or to participate only under certain conditions.[28]

A serious question arises as to how an attorney will effectively inform the jury of suggestive improprieties that were employed by the police at the lineup. Frequently, the best witness on this issue will be the defense counsel himself. Thus, attorneys may now be required to become key defense witnesses. And it is not mere academic speculation to question the propriety of the dual role of attorney and witness which *Wade* thus implicitly thrusts upon the defense counsel. Moreover, how much weight will an attorney's testimony be given by the jury in light of his vulnerability to impeachment for bias.

If the attorney does not himself take the stand, will it be advisable to permit the accused to testify as to any pre-trial impropriety? The jury's response to the defendant's own testimony that the police, either intentionally or unintentionally, were

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[26] This pre-lineup identification practice was used extensively in the case of one Bertram Campbell, an excellent example of mistaken identity, where the defendant spent three years in a New York prison for a crime of which he was subsequently proven not to be guilty. Campbell v. State, 186 Misc. 586, 62 N.Y.S.2d 638 (1946).

[27] For a complete discussion of the police technique of not permitting the accused to know when he is being identified *viz.* two-way mirrors, peep-holes, etc., see G. Williams & H. Hammelman, *Identification Parades — II,* (Aug. 1963) CRIM. L. REV. (Eng.) 533.

[28] *Wade* at 246.

guilty of unfair transgressions will be skeptical at best. The *Wade* Court recognized the limited value of a defendant's protestations as a witness, and noted the dangers inherent in his very appearance as a witness:

> 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. . . .[29]

The preceding discussion suggests strongly the inadequacy of the Court's position. Further, it is submitted that even if counsel's awareness of the pre-trial improprieties would "equip him to attack" the evidence of identification by crossexamination of the witness, it is questionable how successful his attack would be in light of the great influence identification evidence has on a jury. Numerous authorities and cases point out the fact that juries are unduly receptive to such evidence. Wilder and Wentworth have stated that evidence of identification, however untrustworthy, for whatever reasons, is "taken by the average juryman as absolute proof."[30] Thus, the problem created by the inherent weaknesses in eyewitness identification is compounded by the fact that juries are unduly receptive to such evidence.

In view of the foregoing, it is submitted that if counsel for defendant is able to prove by clear and convincing evidence that the pre-trial confrontation was suggestive, the subsequent courtroom identification should be prohibited. At the very least such a showing of the suggestive nature of the pre-trial confrontation should shift the burden to the prosecution to prove by clear and convincing evidence that the courtroom identification had an origin independent of the improper lineup.

The Court, in attempting to protect the rights of the accused in the event the right to counsel is denied at the pre-trial confrontation, held that under such circumstances the prosecution must establish, by clear and convincing proof, that the in-court identification had an independent origin — a source other than the improper lineup. Absent such a showing, the courtroom identification will be prohibited. Justices White, Harlan and Stewart, in their partly concurring, and partly dissenting opinion, noted:

> The Court's opinion is far reaching. It proceeds first by creating

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[29] *Id.* at 231.

[30] H. WILDER & B. WENTWORTH, PERSONAL IDENTIFICATION 29 (1918). *E.g.*, in a Florida prosecution for rape, Spries v. State, 50 Fla. 121, 39 So. 181 (1905), the defendant was convicted and sentenced to death almost exclusively upon the victim's identification testimony. The crime had occurred in an unlit bedroom on a dark night. The victim testified that the rapist had fired a gun, thus creating enough light to enable her to see his features well enough to make an accurate identification. The conviction was affirmed.

> 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.[31]

The independent origin test laid down by the Court also raises serious problems of application at the trial court level. The Court, though it offers variables that can be applied in the identification area, never defines precisely what will qualify as an independent recollection. It is doubtful that witnesses can ever really know, to any degree of certainty, whether the lineup affected their present in-court identification. It is not clear whether trial courts are to apply to their full extent the pre-existing rules of the "taint-fruit" doctrine. Justice Black raises these same questions and others:

> 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? *What kind of 'clear and convincing evidence' can the prosecution offer to prove upon what particular events memories resulting in an in-court identification rest?* How long will trials be delayed while judges turn psychologists to probe the subconscious minds of witnesses?[32]

As to the problem of what will satisfy the independent origin test, the majority opinion suggests these guidelines:

> 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]

Despite the Court's broad outline of the relevant considerations, the actual method of applying the independent origin test remains unclear. This confusion is exemplified by lower court decisions prior to *Wade* applying the pre-*Wade* "taint-fruit"

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[31] *Wade* at 250. Justice Fortas, in a note to his dissenting opinion, also relates that mere presence of counsel at pre-trial confrontations will not alleviate the inherent weaknesses of eyewitness identifications:

> While it is conceivable that legislation might provide a meticulous lineup procedure which would satisfy constitutional requirements, I do not agree with the Court that this would 'remove the basis for regarding the [lineup] stage as critical.' *Wade* at 262.

[32] *Wade* at 248 (emphasis added).

[33] *Id.* at 241.

doctrine to related identification areas. On the whole, courts have been quite liberal in finding that an in-court identification had an independent source.

Many courts have found an independent origin, upon a simple statement under oath by the identifying witness that his conclusion was not based upon the pre-trial opportunity to view the accused. For example, in *Jacobson* v. *United States*,[34] during an illegal arrest and detention of the defendant, a police officer was permitted to view the accused and subsequently identified the defendant at the trial. The defendant was convicted solely as a result of this officer's identification. On appeal it was held that:

> Appellant's contention that Peterson would not have been able to make a positive identification of appellant but for the fact that he viewed appellant on November 10, 1964 [the time of the illegal detention] is purely speculative. . . . Appellant's argument is contrary to the sworn testimony of the witness when interrogated in the absence of the jury prior to his appearance on the stand.[35]

In *People* v. *Stoner*,[36] defense counsel moved to strike the witness' in-court identification on the ground that it was based on a prior identification of the accused at a suggestive lineup in which the defendant was required to wear clothing worn by the perpetrator of the crime. The court held:

> The rights of the accused in a case like the present are adequately protected when the complaining witness takes the stand in open court, for examination and cross-examination. . . . Although it may be impossible for a person to forget a significant perception and to prevent stored remembrances from subconsciously affecting his later perceptions and decisions . . . , it does not follow that . . . a person in [witness] Greeley's position should be excluded. Even if Greeley's courtroom identification was dependent in part on his viewing defendant in illegally obtained clothing at the showup, it was 'sufficiently distinguishable to be purged of the primary taint.'[37]

In *Warren* v. *Territory of Hawaii*,[38] counsel for the defendant moved to strike the in-court identification of an illegally seized electrocuting device which caused the death of a police officer because such was previously identified by the citizens called by the state. The court stated: "[E]ach citizen testified at the trial concerning the electrocuting device that her testimony was based on her independent recollection of its installation and was not based on what she saw at the police station."[39]

Therefore, the possibility that courts will hold that the independent origin test will be satisfied by the witness merely stat-

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[34] 356 F.2d 685 (8th Cir. 1966).

[35] *Id.* at 688.

[36] 55 Cal. Rptr. 897, 422 P.2d 585 (1967).

[37] *Id.* at 901, 422 P.2d at 589.

[38] 119 F.2d 936 (9th Cir. 1941).

[39] *Id.* at 938. *See also* Hoffa v. United States, 385 U.S. 293 (1966); Edwards v. United States, 330 F.2d 849 (D.C. Cir. 1964); Payne v. United States, 294 F.2d 723 (D.C. Cir. 1961); Monroe v. United States, 234 F.2d 49 (D.C. Cir. 1956).

ing under oath that his recollection is based on a source other than the lineup not attended by counsel, may destroy the value of the *Wade* Court's constitutional dictate that counsel is required at such critical stage in the prosecution, or in the absence of such, that it is incumbent upon the state to prove by "clear and convincing" proof that the in-court identification had an origin independent of the improper lineup.

In light of the fact that eyewitness identification is inherently weak, that pre-trial confrontations are often riddled with intentional and unintentional suggestion, and that the *Wade* solution raises more problems than it solves, it is submitted that a more reasonable and workable solution to the problem is this bipartite conclusion: (a) if no counsel is present at the pre-trial confrontation the eyewitness identification should be excluded absolutely, prohibiting any in-court identifications by the witness who attended the lineup; and (b) even with counsel present, if it is established by clear and convincing proof that the confrontation was suggestive, the courtroom identification should be excluded without regard to any independent origin consideration.

Application of the foregoing standard will lead to only one end — a fair and impartial pre-trial confrontation.

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