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Eyewitness Identification

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EYEWITNESS IDENTIFICATION

Manson v. Braithwaite, 97 S. Ct. 2243 (1977).

In *Manson v. Braithwaite*,¹ the United States Supreme Court set down further guidelines concerning the admissibility of suggestive pre-trial identification testimony. The Court, in an opinion by Justice Blackmun, held that reliability governs the admission of such testimony and rejected a per se exclusionary rule.

Manson was the latest in a line of cases concerning pre-trial identification guidelines. This line of cases began with the *Wade* trilogy² decided by the Court a decade ago. In *United States v. Wade*,³ the Court held that the sixth amendment guaranteed the right to counsel at a pre-trial lineup. The Court reasoned that the great possibility of unfairness arising from lineup procedures and the inability of the accused to reconstruct the events and obtain a full hearing on the identification issue made such confrontations a "critical" prosecutive stage. Consequently, the absence of counsel might deprive the accused of a fair trial. The Court said that any in-court identification by a witness who had taken part in such a lineup would be admitted only if the government could establish by clear and convincing evidence that the testimony was based on observations independent of the lineup.⁴ The Court

said that where the admissibility of evidence of the lineup identification itself was not involved, a per se exclusionary rule was unjustified.⁵

The issue of admissibility of testimony concerning the identification itself was determined in *Gilbert v. California*.⁶ The Court there held, laying down a per se exclusionary rule, that such testimony could not be admitted even if the government could show an independent source.⁷ The Court felt that the admission of such testimony would be an exploitation of the primary illegality—the denial of counsel at the lineup.⁸

In the third case of the *Wade* trilogy, *Stovall v. Denno*,⁹ the Court ruled that *Wade* and *Gilbert* applied prospectively only, and they established a basis to attack an identification procedure independent of the sixth amendment right to counsel. The Court said that an identification procedure may be so unnecessarily suggestive and conducive to irreparable mistaken identification that the accused is denied due process of law.¹⁰ Such claims must be evaluated by the "totality of the circumstances."¹¹ In *Stovall*, the

⁵ *Id.* at 240.

⁶ 388 U.S. 263 (1967). This companion case to *Wade* was quite similar. Prior to advice of counsel, the suspect in an armed robbery and murder case was placed in a lineup and identified by various witnesses. The witnesses later made in-court identifications, and some also testified as to the prior lineup.

⁷ "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." *Id.* at 273.

⁸ *Id.* at 272-73.

⁹ 388 U.S. 293 (1967). In *Stovall* the suspect in a murder case was brought to the hospital room of the victim's widow, who was also assaulted by the murderer. The suspect was the only black in the room and was handcuffed to two white detectives. The widow was in critical condition, and the police were afraid she might die before a more conventional procedure could be arranged. The witness testified to this showup at the trial.

¹⁰ *Id.* at 302. The Court cited no precedent for this due process claim except one court of appeals case, *Palmer v. Peyton*, 359 F.2d 199 (4th Cir. 1966).

¹¹ 388 U.S. at 302.

¹ 97 S. Ct. 2243 (1977).

² *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *Stovall v. Denno*, 388 U.S. 293 (1967).

³ 388 U.S. 218 (1967). This case involved a suspect who was forced to participate in a lineup and repeat words allegedly spoken by the criminal, without the advice or assistance of counsel. The witness made an in-court identification of the accused and on cross-examination mentioned the lineup.

⁴ 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.

Id. at 241.

Court found that the circumstances justified the procedure used.¹²

The next identification procedure case decided by the Supreme Court based on a due process claim was *Simmons v. United States*.¹³ In that case, the Court dealt with the admissibility of an in-court identification after an allegedly suggestive photographic identification. The Court held that such identifications were to be excluded only if the photographic identification procedure was so "impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."¹⁴ In determining whether to allow the in-court identification, the Court looked at factors similar to the *Wade* independent source test.¹⁵ The Court concluded that although the procedure used may have fallen short of the ideal, there was no reason to doubt the reliability of the in-court identifications.¹⁶

Subsequent decisions by the Supreme Court which questioned identification procedures on due process grounds relied on either *Stovall*, which considered the justification and necessity for the procedures used, or *Simmons*, which considered the reliability of the identifications. In *Foster v. California*,¹⁷ the Court apparently followed *Stovall* and focused on the identification procedures used rather than the witness' reliability.¹⁸ It denied the admission of testi-

mony concerning a pre-trial lineup. In *Coleman v. Alabama*,¹⁹ the Court allowed an in-court identification by the victim of an assault because it felt the identification was reliable, looking at the factors enumerated in *Simmons*.²⁰

At this stage, the pattern that seemed to be emerging was two-pronged—if an unnecessarily suggestive procedure was employed, testimony concerning the confrontation itself must be excluded as in *Stovall*, but an in-court identification following an unnecessarily suggestive procedure would be admissible if it was determined to be reliable as in *Simmons*. This pattern is quite similar to the *Wade-Gilbert* rules concerning a lineup conducted in the absence of counsel. Most lower courts followed this pattern.²¹

The Supreme Court undermined this pattern, though, in *Neil v. Biggers*.²² The Court used the *Simmons* test to consider the admissibility of testimony concerning a pre-trial showup, apparently shattering the distinction between *Simmons* and *Stovall*.²³ The Court said that the primary evil to be avoided was substantial likelihood of misidentification, and that the standard established in *Simmons* for determining admissibility of in-court identifications would serve equally well in determining the admissibility of testimony concerning the out-of-court identification itself.²⁴

¹² *Id.* The Court said that the witness was the only person who could exonerate the suspect, and that the suspect had to be viewed by her as soon as possible due to her serious condition.

¹³ 390 U.S. 377 (1968). *Simmons* involved the armed robbery of a federally insured savings and loan association. In the search for the criminals, FBI agents showed pictures of the petitioners to witnesses of the crime. These witnesses later made in-court identifications of the petitioners.

¹⁴ *Id.* at 384.

¹⁵ See note 4 *supra*. The robbery took place during the day under good lighting conditions, and the witnesses clearly viewed the criminals. The photographic identification was held the next day, and the witnesses were certain in their identifications.

¹⁶ 390 U.S. at 385-86.

¹⁷ 394 U.S. 440 (1969).

¹⁸ There also existed serious doubts as to the witness' reliability. After a lineup where the defendant was six inches taller than the other two participants, the witness could only say that he "thought" the defendant might be the criminal. The police then arranged a one-on-one confrontation, after which the witness' identification was still tentative. Only after a second lineup, in which the defendant was the only repeat from the first, did the witness positively identify the defendant as the robber. *Id.* at 441-42.

¹⁹ 399 U.S. 1 (1970).

²⁰ The Court looked at the opportunity to view the criminals at the time of the assault, the witness' prior description and the witness' certainty at the time of the identification. *Id.* at 4-6.

²¹ See *Rudd v. Florida*, 477 F.2d 805 (5th Cir. 1973); *Workman v. Cardwell*, 471 F.2d 909 (6th Cir. 1972); *United States v. Fernandez*, 456 F.2d 638 (2d Cir. 1972); *United States v. Fowler*, 439 F.2d 133 (9th Cir. 1971); and *Mason v. United States*, 414 F.2d 1176 (D.C. Cir. 1969). Some cases though, did not draw such a sharp distinction between the *Stovall* and *Simmons* tests. See *United States ex rel. Gonzales v. Zelker*, 477 F.2d 797 (2d Cir. 1973); *United States ex rel. Phipps v. Follette*, 428 F.2d 912 (2d Cir. 1970); and *United States ex rel. Rutherford v. Deegan*, 406 F.2d 217 (2d Cir. 1969).

²² 409 U.S. 188 (1972). *Biggers* involved a defendant who was convicted of rape. The only testimony linking him to the crime was the victim's identification. The victim made an in-court identification and also testified as to a one-man showup conducted prior to trial at the police station.

²³ The Court looked at the lighting at the scene of the crime, the length of time the victim was in the rapist's presence, and the fact that she had not previously identified anyone in various other lineups. *Id.* at 200-01.

²⁴ *Id.* at 198.

However, *Biggers* dealt with a pre-*Stovall* confrontation, and the Court used language which intimated that it might apply a different rule to post-*Stovall* situations.²⁵ The Court said that the purpose of a strict exclusionary rule would be to deter police from using a less reliable procedure when a more reliable one was available. Such a rule was deemed inappropriate in *Biggers* since the confrontation took place prior to *Stovall* where the Court first denounced such procedures.²⁶ This language left open the standard applicable to confrontations which took place after the *Stovall* decision. The Court could apply a strict exclusionary rule similar to *Wade-Gilbert*, disallowing all testimony concerning an unnecessarily suggestive pre-trial identification procedure or could treat such testimony the same as an in-court identification, with reliability governing admissibility.

The courts of appeals pursued divergent paths. The Seventh Circuit adopted reliability as the determining factor.²⁷ In *United States ex rel. Kirby v. Sturges*,²⁸ the court specifically faced the question whether *Biggers* was applicable to post- as well as pre-*Stovall* confrontations. The court, speaking through Judge (now Justice) Stevens, rejected the per se exclusionary rule. The court said that a suggestive lineup was not inherently unconstitutional and that the defendant was denied due process only by the admission of unreliable testimony.²⁹ Thus, if the identification is reliable, no matter how suggestive the procedure employed, there is no constitutional infirmity in its admission.

The Second Circuit was the only other court

²⁵ Such a [strict exclusionary] rule would have no place in the present case, since both the confrontation and the trial preceded *Stovall v. Denno, supra*, when we first gave notice that the suggestiveness of confrontation procedures was anything other than a matter to be argued to the jury.

Id. at 199.

²⁶ *Id.*

²⁷ *United States v. Kimbrough*, 528 F.2d 1242 (7th Cir. 1976); *Israel v. Odom*, 521 F.2d 1370 (7th Cir. 1975); *United States ex rel. Kirby v. Sturges*, 510 F.2d 397 (7th Cir. 1975); and *United States ex rel. Pierce v. Cannon*, 508 F.2d 197 (7th Cir. 1974).

²⁸ 510 F.2d 397 (7th Cir. 1975). The *Kirby* case involved the same defendant who had previously appealed to the Supreme Court in *Kirby v. Illinois*, 406 U.S. 682 (1972), in which the Court refused to extend the *Wade-Gilbert* right to counsel to a pre-indictment lineup. The defendant then sought habeas corpus on *Stovall*—due process grounds.

²⁹ 510 F.2d at 406.

of appeals to specifically address the question.³⁰ In *Braithwaite v. Manson*,³¹ the court settled on the per se exclusionary rule.³² It considered the deterrence of questionable police tactics of primary importance. The court followed the earlier dichotomy between in-court identifications and testimony concerning out-of-court identifications and held that *Biggers* changed the rule only with respect to pre-*Stovall* confrontations.

The Supreme Court granted certiorari in *Manson* to mend this growing rift among the circuits.³³ Braithwaite was convicted of the possession and sale of heroin. Glover, an undercover narcotics agent to whom Braithwaite allegedly sold the heroin, provided key evidence at the trial. He identified Braithwaite in court and also testified to a photographic identification of the accused two days after the sale.

The purchase took place just prior to sunset in a third floor hallway illuminated by natural light.³⁴ The transaction took approximately two minutes, during which time Glover clearly viewed the seller. Immediately after the sale, Glover described the seller to D'Onofrio, a police officer, who suspected the identity of the seller. D'Onofrio obtained a photograph of Braithwaite from police files and left it in Glover's office. Two days later, Glover saw the picture and immediately recognized the man in the picture as the seller.

The defense did not object to Glover's testi-

³⁰ Other circuits seem to have leaned one way or the other, though not specifically answering the question. The First and Eighth Circuits seem to favor the reliability test. *United States v. Lewis*, 547 F.2d 1030 (8th Cir. 1976); *Nassar v. Vinzant*, 519 F.2d 798 (1st Cir. 1975); *Souza v. Howard*, 488 F.2d 462 (1st Cir. 1973). The Fourth and Sixth Circuits, though, seem to favor a per se exclusionary rule. *Webb v. Havener*, 549 F.2d 1081 (6th Cir. 1977); *Smith v. Coiner*, 473 F.2d 877 (4th Cir. 1973). *But see United States v. Scott*, 518 F.2d 261 (6th Cir. 1975); *Stanley v. Cox*, 486 F.2d 48 (4th Cir. 1973).

³¹ 527 F.2d 363 (2d Cir. 1975).

³² Evidence of an identification unnecessarily obtained by impermissibly suggestive means must be excluded under *Stovall*. . . . No rules less stringent than these can force police administrators and prosecutors to adopt procedures that will give fair assurance against the awful risks of misidentification.

Id. at 371.

³³ 425 U.S. 957 (1976).

³⁴ The purchase was intended to be made from another drug dealer, but Glover apparently went to the wrong apartment where he met Braithwaite instead. 97 S. Ct. at 2245.

mony at trial and a jury found Briathwaite guilty on two counts. The Connecticut Supreme Court denied appeal³⁵ and Braithwaite petitioned for habeas corpus in the United States District Court for the District of Connecticut. The district court, in an unpublished opinion, dismissed the petition, but the Second Circuit Court of Appeals reversed with instructions for the writ to issue unless the state gave notice of a desire to retry the respondent.³⁶ The court of appeals felt that evidence of the photographic identification should have been excluded, regardless of reliability, because examination of a single photograph was unnecessary and suggestive.³⁷ Additionally, the court felt that Glover's testimony was unreliable.³⁸

The United States Supreme Court reviewed its decisions up to *Biggers* and recognized the unresolved issue. It said, "[t]he question before us, then, is simply whether the *Biggers* analysis applies to post-*Stovall* confrontations as well as those pre-*Stovall*."³⁹ The Court said that the identification procedure used by the police was suggestive because Glover saw only one photograph, and it was unnecessary because no emergency or exigent circumstances existed.⁴⁰ The Court recognized the two possible ap-

proaches employed by the courts of appeals, and it weighed the benefits of each in light of what it deemed to be three relevant considerations.

First, the Court reiterated *Wade's* concern with the fallibility of eyewitness testimony.⁴¹ The Court noted that a witness often must testify about a brief encounter with a total stranger under conditions of emergency or emotional stress. This already somewhat unreliable testimony may be further weakened by suggestive police procedures. The Court characterized *Wade* and its companion cases as reflecting the concern that the jury not hear eyewitness testimony unless it has certain aspects of reliability.⁴² It said that both the totality of circumstances and per se approaches would be responsive to that concern.⁴³ But the Court concluded that the per se approach went too far, since it automatically and preemptorily excluded evidence from the jury which may be reliable and relevant.⁴⁴

Second, the Court cited the deterrence of questionable police practices. The Court admitted that the per se approach would have a more significant deterrent effect, but said the totality approach would also influence police behavior.⁴⁵ It felt that the totality approach would have an effect because the police would guard against unnecessarily suggestive procedures for fear that the identifications may be excluded as unreliable.⁴⁶ Also, the police would not use unnecessarily suggestive procedures for fear that the jury would discount the weight to be given the testimony and thereby decrease the chances for a conviction.⁴⁷

Third, the Court viewed the effect of the alternative approaches on the administration of justice. Here, the Court felt that the per se approach suffered serious drawbacks.⁴⁸ By denying the trier of fact reliable evidence, the

³⁵ *State v. Braithwaite*, 164 Conn. 617, 325 A.2d 284 (1973).

The defendant claims that the court erred in permitting officer Glover to make an in-court identification of the defendant. The defendant asserts that the court should have determined whether evidence of Glover's observance of the defendant's photograph shortly after the sale was prejudicial before it allowed the in-court identification of the defendant. There was no objection or exception to the evidence when offered and this claim first appears in the defendant's brief. The defendant has not shown that substantial injustice resulted from the admission of this evidence. Unless substantial injustice is shown, a claim of error not made or passed on by the trial court will not be considered on appeal. *State v. Bausman*, 162 Conn. 308, 315, 294 A.2d 312; *State v. Fredericks*, 154 Conn. 68, 72, 221 A.2d 585.

325 A.2d at 285.

³⁶ 527 F.2d 363 (2d Cir. 1975).

³⁷ *Id.* at 366-67.

³⁸ *Id.*

³⁹ 97 S. Ct. at 2249.

⁴⁰ The per se approach demands the exclusion of testimony concerning unnecessarily suggestive identifications. If a subsequent identification is determined to be reliable, testimony concerning it and any in-court identification will be admitted. The totality approach looks to see if the challenged iden-

tification is reliable and, if so, allows testimony concerning it and any subsequent identifications. *Id.* at 2251 n.10.

⁴¹ 388 U.S. at 228-29.

⁴² This analysis of *Wade* is not entirely correct in that the *Wade-Gilbert* line of cases exclude testimony concerning a lineup without regard to reliability if the accused had been denied his right to counsel.

⁴³ 97 S. Ct. at 2252.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 2252 n.12.

⁴⁸ *Id.* at 2252.

per se approach might result in the guilty going free.⁴⁹ In those cases where the admission of identification evidence is error under the per se approach but not under the totality approach—cases in which the identification is reliable despite the unnecessarily suggestive procedure used—reversal is a harsh measure.⁵⁰ The Court noted, as did the Seventh Circuit in *Kirby*, that the suggestive identification itself does not intrude upon any constitutionally protected right.⁵¹ It is the admission of unreliable testimony which deprives the defendant of due process.

The Court therefore concluded that the totality approach was the preferable standard:

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 act at the time of the crime, the witness' degree of attention, the accuracy of his prior 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.⁵²

The Court applied these standards to *Manson* and determined that Glover's identification of Braithwaite was reliable, despite the suggestive procedure employed.⁵³

Justice Stevens, concurring, reaffirmed his position in *Kirby*.⁵⁴ He also noted that when determining the reliability of a questioned identification, other evidence of guilt should not be considered.⁵⁵ Such evidence may be properly considered only when determining whether the admission of unreliable testimony was harmless error.⁵⁶

Justice Marshall filed a strong dissenting

⁴⁹ This contrasts with Marshall's view that the totality approach might result in the conviction of the innocent, with the guilty remaining free. 97 S. Ct. at 2259 (Marshall, J., dissenting).

⁵⁰ 97 S. Ct. at 2252.

⁵¹ *Id.* at 2252 n.13.

⁵² *Id.* at 2253.

⁵³ *Id.* at 2253-54.

⁵⁴ 97 S. Ct. at 2254 (Stevens, J., concurring).

⁵⁵ *But see* *United States v. Reid*, 517 F.2d 953 (2d Cir. 1975); *United States ex rel. Gonzales v. Zelker*, 477 F.2d 797 (2d Cir. 1973).

⁵⁶ 97 S. Ct. at 2255 n.*.

opinion in which Justice Brennan concurred.⁵⁷ They believed the Court was dismantling the protections against mistaken eyewitness identifications erected a decade ago in the *Wade* trilogy.⁵⁸ Justice Marshall reviewed the series of identification procedure cases dealing with due process claims in terms of the dichotomy between in-court and out-of-court identifications. Analogizing to *Wade*, Justice Marshall said that *Stovall* required the exclusion of any evidence concerning an unnecessarily suggestive identification.⁵⁹ He felt that the *Stovall* and *Simmons* tests applied to two totally different situations and that merging the two tests was error.⁶⁰

Adopting the same analytic approach used by the majority, Justice Marshall favored the per se standard.⁶¹ Considering the deterrence of questionable police conduct, he said that there was "no doubt that the conduct would quickly conform to the rule,"⁶² if the per se approach were adopted. Justice Marshall also said that nothing since *Wade* had changed his assessment of the miscarriages of justice caused by mistaken eyewitness identifications.⁶³

And as to the effect on the administration of justice, Justice Marshall again found the balance favored the per se rule. He said that such testimony should be excluded precisely because it is inherently unreliable and has no place in the judicial process. This contrasts to other exclusionary rules which prevent the jury from hearing relevant and reliable evidence to discourage unconstitutional practices, such as illegal searches or the denial of counsel.⁶⁴ A per se exclusionary rule would protect the integrity of the truth-seeking function of the trial and discourage the use of needlessly inaccurate and ineffective investigatory procedures.⁶⁵

Justice Marshall concluded that the totality approach would allow seriously unreliable and misleading evidence to be put before the jury, as he felt was done in *Manson*. Even using the totality approach, Justice Marshall would have

⁵⁷ 97 S. Ct. at 2255 (Marshall and Brennan, J.J., dissenting).

⁵⁸ *Id.*

⁵⁹ *Id.* at 2256.

⁶⁰ *Id.* at 2257.

⁶¹ *Id.* at 2258-60.

⁶² *Id.* at 2258.

⁶³ *Id.* at 2258-59.

⁶⁴ *Id.* at 2259.

⁶⁵ *Id.*

granted the writ because he felt that Glover's testimony was unreliable. Thus, he reached the opposite conclusion on the same evidence considered by the majority.⁶⁶

The Supreme Court has taken the wiser path in *Manson*. The basic difference between the admissibility of testimony concerning an unnecessarily suggestive identification procedure and evidence obtained in an illegal search or illegally obtained confession is that the suggestive procedure itself does not invade a constitutionally protected right. Only when unreliable testimony is admitted is the accused denied due process of law.⁶⁷ Thus, testimony concerning a pre-trial lineup conducted in the absence of counsel is automatically excluded without regard to reliability or the procedure used.⁶⁸ Testimony concerning a suggestive confrontation conducted when there is no sixth amendment right to counsel is excluded only if it is unreliable.⁶⁹

Thus, the *Wade-Gilbert* rules protect the accused's right to counsel and the *Stovall* rules protect the right to due process. If testimony is reliable despite suggestive procedures, the accused's right to due process is not violated. The dissent's solution, to conduct a subsequent confrontation using fair procedures to promote reliability⁷⁰ seems cosmetic only. Once a witness has chosen a suspect, he is not likely to change his mind at a subsequent lineup.⁷¹ So the admissibility will still turn on those factors of reliability enumerated by the majority.⁷²

⁶⁶ *Id.* at 2260-64.

⁶⁷ 97 S. Ct. at 2252 n.13; 510 F.2d at 406.

⁶⁸ *Gilbert v. California*, 388 U.S. 263, 272 (1967).

⁶⁹ *Kirby v. Illinois*, 406 U.S. 682, 690 (1972).

⁷⁰ 97 S. Ct. at 2259.

⁷¹ Moreover, "[i]t is a matter of common experience that, once a witness has picked out the accused at a 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."

United States v. Wade, 388 U.S. at 229 (quoting *Williams & Hammelman, Identification Parades, Part I.*, 1963 CRIM. L. REV. 479, 482.

Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification.

Simmons v. United States, 390 U.S. at 383-84.

⁷² 97 S. Ct. at 2259.

Manson v. Braithwaite is the culmination of the *Stovall* line of cases. It completed the evolution of what was once a question of fact for the jury into a mixed question of law and fact. Prior to *Stovall*, the issue of suggestive identification procedure was a matter raised on cross-examination and put before the jury as a question of credibility. *Stovall* said that the issue may be so clear-cut as to make the identification unreliable as a matter of law.⁷³ Now *Manson* has made the principle uniform throughout the courts and eliminates testimony only when it is clearly unreliable, otherwise leaving it to the jury to weigh and credit the evidence.

However, problems still remain. The weight of evidence necessary to remove the issue from the jury is of primary importance. This problem is illustrated by *Manson*, where the majority and the dissent evaluated the same evidence by the same standard and reached opposite conclusions. Another problem is the isolation of evidence relevant to reliability from other evidence of guilt. The dissent expressed this concern, saying that a violation of due process would now be judged by the probability of guilt.⁷⁴ Though evidence of guilt will not enter the decision process as overtly as envisioned by the dissent, it will be difficult to block it totally from consideration. To view evidence of guilt in a vacuum will be difficult.

These problems can be solved by the development of identification procedures and guidelines by the local legislatures and police departments. Such legislation was envisioned by the Court in the *Wade* and *Gilbert* decisions.⁷⁵ The writing and enforcement of guidelines will help

⁷³ The reliability of properly admitted eyewitness identification, like the credibility of other parts of the prosecution's case, is a matter for the jury. But it is the teaching of *Wade*, *Gilbert* and *Stovall*, *supra*, that in some cases the procedures leading up to an eyewitness identification may be so defective as to make the identification constitutionally inadmissible as a matter of law. *Foster v. California*, 394 U.S. 440, 442-43 n.2.

⁷⁴ 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. . . . By importing the question of guilt into the initial determination of whether there was a constitutional violation, the apparent effect of the Court's decision is to undermine the protection afforded by the Due Process Clause. 97 S. Ct. at 2260.

⁷⁵ Legislative or other regulations, such as those

eliminate unnecessarily suggestive identification procedures and protect the rights of the accused. Admittedly, the impetus for the adoption of such guidelines has slackened somewhat by the adoption of the totality, rather than the

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 straightjacket which will handicap sound efforts at reform, nor is it intended to have this effect."

per se, approach. The totality approach, as the majority noted, should have some effect and should spur the local law enforcement agencies to control their identification procedures. Until that time, the burden will fall on the courts to ensure that unreliable identification testimony does not reach the jury.

United States v. Wade, 388 U.S. at 239.

In the absence of legislative regulations adequate to avoid the hazards to a fair trial which inhere in lineups as presently conducted, the desirability of deterring the constitutionally objectionable practice must prevail over the undesirability of excluding relevant evidence.

Gilbert v. California, 388 U.S. at 273.