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Fourteenth Amendment--The Last Gasp of Due Process Requirements on Eyewitness Identifications: The Admissibility of Identification Evidence May be Determined in the Jury's Presence

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FOURTEENTH AMENDMENT—THE LAST GASP OF DUE PROCESS REQUIREMENTS ON EYEWITNESS IDENTIFICATIONS: THE ADMISSION OF IDENTIFICATION EVIDENCE MAY BE DETERMINED IN THE JURY’S PRESENCE


I. INTRODUCTION

The Supreme Court, in Watkins v. Sowders, refused to establish a per se rule that the admissibility of eyewitness identification evidence must be determined outside the jury’s presence. Instead, the Court held that in most cases, this determination may be made before the jury. Watkins is the latest in a series of decisions which have considerably weakened the due process requirement that police use non-suggestive pretrial eyewitness identification procedures. After Watkins, the jury may hear identification evidence which is totally unreliable, and hence

2. Id. at 659. The Court did not discuss what, if any, circumstances would require such a hearing out of the jury’s presence. Apparently, the only circumstances which might require such a hearing would be if the defendant claimed that the identification procedure violated his sixth amendment right to counsel at lineup identification procedures. This right was first established in United States v. Wade, 388 U.S. 218 (1967). See discussion at note 62 infra.
3. The Court did recognize that holding such a hearing out of the jury’s presence is the preferable procedure for determining the admissibility of eyewitness identification evidence. Watkins v. Sowders, 101 S. Ct. at 657. Before Watkins, at least some authorities believed that such a hearing was required. See C. Whitebread, Criminal Procedure 361 (1980).
5. This requirement was first established in Stovall v. Denno, 388 U.S. 293 (1967).

Pretrial eyewitness identification procedures include lineups (where the suspect and several non-suspects are displayed to the witness); showups (a one-to-one confrontation between suspect and witness); and photographic identifications (where a photograph of the suspect, usually along with several photos of non-suspects, are shown to the witness). For a general discussion of these procedures and their legal implications see C. Whitebread, supra note 3, at 363-74.
inadmissible. An instruction to disregard may not erase the impression such testimony can make upon the minds of the jury. This indelible impression could lead to the conviction of many innocent defendants. Moreover, Watkins will not decrease the number of guilty defendants who are set free, because it does not allow the jury to consider any additional probative evidence which it could not have considered before this decision.

This Note will analyze the Court's decision in Watkins, the prior decisions upon which Watkins was based, and the legal and practical implications of this decision. It will show that the only new evidence which Watkins will allow the trier of fact to hear is unreliable eyewitness identification evidence. Although Watkins will result in some marginal time savings for the courts, this efficiency is completely outweighed by the prejudicial effect of allowing the jury to hear totally unreliable, and hence irrelevant, evidence.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Watkins v. Sowders was based on two distinct factual situations which ultimately involved controversy over eyewitness identification evidence.

One situation arose from a January 11, 1975, robbery of a Louisville, Kentucky liquor store. At about 11:30 p.m., three or four men entered the store. One of the men announced the hold-up to the clerk, Walter Smith. Upon hearing this, Donald Goeing, another employee of the store, turned to face the men. This attracted the attention of the man who had announced the robbery. He fired two shots at Goeing, hitting him in the arm and in the heart. The gunman immediately ran out the door.

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6 See Neil v. Biggers, 409 U.S. 188; Manson v. Brathwaite, 432 U.S. at 114 ("reliability is the linchpin in determining the admissibility of identification testimony . . .").
7 See United States v. Wade, 388 U.S. at 228-29 n.6 (1967), and studies cited therein, for instances of convictions based upon mistaken eyewitness identifications.
8 Two cases, Watkins v. Sowders (No. 79-5949), and Summitt v. Sowders (No. 79-5951), were consolidated for argument and decision in the United States Supreme Court, as well as in the Sixth Circuit Court of Appeals.
10 The number of robbers who entered the store is unclear. The United States Supreme Court reported that four did so, 101 S. Ct. at 656, while the Supreme Court of Kentucky estimated that "three or four" did. Watkins v. Commonwealth, 555 S.W.2d 630, 630 (Ky. 1978).
That night, Smith and Goeing both gave the police verbal descriptions of the gunman.\textsuperscript{12} Two days later the police arrested Watkins.\textsuperscript{13} That day they showed Smith a three man lineup which included Watkins\textsuperscript{14} and two other black men.\textsuperscript{15} Although not completely sure at first,\textsuperscript{16} Smith eventually identified Watkins as the gunman. Watkins was then taken to Goeing's hospital room for a showup, because at that time it was uncertain whether Goeing would recover from his wounds.\textsuperscript{17} From his bed, Goeing identified Watkins as his assailant.\textsuperscript{18}

Both before and during the trial, Watkins' attorney requested that a hearing be held out of the presence of the jury to determine whether the identification evidence was admissible. These requests were denied.\textsuperscript{19}

At trial, the prosecution relied upon in-court identifications of Watkins made by Smith and Goeing, but did not introduce evidence of the pretrial identifications.\textsuperscript{20} Watkins' attorney, however, cross-examined both witnesses about the circumstances of the pretrial identifications.\textsuperscript{21} The trial judge found that all of the identification evidence was admissible.\textsuperscript{22} Watkins was found guilty of both robbery and assault, and sentenced to twenty years on each charge.\textsuperscript{23} The Supreme Court of

\begin{footnotesize}
\begin{enumerate}
\item Goeing described the gunman as a young black male with a light complexion. Smith described him as a light skinned black man about thirty to thirty-five years old, and approximately five feet, nine inches tall. See Summitt v. Bordenkircher, 608 F.2d 247, 249 (6th Cir. 1979).
\item Since this lineup occurred before Watkins had been arraigned, id., Watkins did not have the right to the presence of an attorney at his lineup. See Kirby v. Illinois, 406 U.S. 682 (1972).
\item Both non-suspects in the lineup had darker complexions than Watkins, although neither had a particularly dark complexion. Summitt v. Bordenkircher, 608 F.2d at 249.
\item See id. Smith testified that he was not completely sure of his identification of Watkins during the lineup, but when he "got himself together" he was sure that Watkins was the gunman. Watkins v. Bordenkircher, No. C78-0241 L(A) (W.D. Ky., Sept. 28, 1978), at 2.
\item Watkins v. Sowders, 101 S. Ct. at 656.
\item Although at the same time Goeing stated that "it could have been close enough that it could have been his twin brother, it could have been somebody else." Summitt v. Bordenkircher, 608 F.2d at 249.
\item A written motion for a suppression hearing on the identification testimony was initially submitted before trial. That motion was denied. Watkins v. Commonwealth, 565 S.W.2d at 630. Before any evidence was heard, Watkins' attorney again moved for a hearing out of the presence of the jury; this motion was also denied. Id. Before Smith or Goeing testified, defense counsel objected to the denial of an in camera hearing on the admissibility of the identification evidence, but was overruled. Id.
\item 101 S. Ct. at 656.
\item Watkins' attorney also cross-examined one of the officers present at the hospital room showup about the circumstances of that identification. Id.
\item The trial judge denied Watkins' motion for a mistrial based upon the introduction of the identification evidence. Summitt v. Bordenkircher, 608 F.2d at 249.
\item Kentucky v. Watkins, No. 153965 (Jefferson County, Ky., Circuit Court, July 15, 1977).
\end{enumerate}
\end{footnotesize}
Kentucky affirmed both convictions. Watkins then filed a petition for a writ of habeas corpus with the United States District Court for the Western District of Kentucky. The district court dismissed the petition after the State moved for summary judgment.

The other situation involved a rape in Jefferson County, Kentucky. Shortly after midnight on July 21, 1974, the victim was forced into a car by two men, driven to an isolated area, and raped by one of the men. The next day, the victim reported the incident to the police, and gave a verbal description of her assailant. She looked through volumes of mug shots in an attempt to identify her assailant, and after viewing over 1200 photographs, she positively identified a photograph of Summitt as her assailant. Prior to trial, Summitt's attorney moved to suppress any in-court identification by the victim, and requested a hearing out of the jury's presence to determine the admissibility of the identification evidence. The motion and request were denied. At trial, both the pretrial and in-court identifications were admitted into evidence. The jury returned a verdict of guilty, and Summitt was sentenced to life.

24 Watkins v. Commonwealth, 565 S.W.2d 630 (Ky. 1978).
25 Watkins v. Bordenkircher, No. C78-0241 L(A). Watkins claimed that the failure of the trial court to grant him an in camera hearing on the admissibility of the identification evidence denied him a fair trial in accordance with due process. He also claimed that the identification procedures used were impermissibly suggestive, and that the prosecutor had made prejudicial remarks in his closing statement to the jury, which denied him a fair trial.
26 On the suppression hearing issue, the federal district court relied upon rulings of the Kentucky Supreme Court which had held that such a hearing was not constitutionally required. Ray v. Commonwealth, 550 S.W.2d 482, 483 (Ky. 1977); Watkins v. Commonwealth, 565 S.W.2d 630 (Ky. 1978).
28 Summitt v. Commonwealth, 550 S.W.2d at 549.
29 The entire incident lasted about 45 minutes. Summitt v. Bordenkircher, No. C78-0165 L(B).
30 She described the rapist as a white male in his thirties, about five feet, nine inches tall, 180 pounds, with a rough complexion and tattoos on both arms. 608 F.2d at 249, 550 S.W.2d at 549.
31 The Supreme Court of Kentucky reported that this identification was made within twenty hours, 550 S.W.2d at 549, while the federal courts reported that it was made two days after the victim started reviewing the photographs. 101 S. Ct. at 657; 608 F.2d at 249.
32 608 F.2d at 249.
33 Id.
imprisonment.  

On appeal, the Supreme Court of Kentucky affirmed Summitt’s conviction. The court found that the victim’s identification of Summitt had not been obtained through an improperly suggestive identification technique, that it was reliable, and that the trial judge had not erred in refusing to conduct a pretrial suppression hearing.

The United States Supreme Court granted certiorari to consider whether the refusals of the respective trial courts to conduct a hearing on the admissibility of the eyewitness identification evidence outside the presence of the jury had violated the defendants’ right to due process. The court found that the victim’s identification of Summitt was reliable, and that the refusal of the trial court to grant the requested hearing was not erroneous. The court applied Jackson v. Denno, 378 U.S. 368 (1964), and Pinto v. Pierce, 389 U.S. 31 (1967), to identification evidence to reach this conclusion. The court found that since the trial courts had before them all the facts concerning the reliability of the identification evidence, and had made independent determinations that the identification evidence was admissible, the defendants had had adequate hearings.

The United States Supreme Court, in a 7 to 2 decision, affirmed the lower courts’ rulings and held that an out-of-court hearing on the admissibility of the eyewitness identification evidence was not constitutionally mandated. Justice Stewart delivered the majority opinion and Justice

III. THE SUPREME COURT’S ANALYSIS

The United States Supreme Court, in a 7 to 2 decision, affirmed the lower courts’ rulings and held that an out-of-court hearing on the admissibility of the eyewitness identification evidence was not constitutionally mandated. Justice Stewart delivered the majority opinion and Justice

34 Summitt v. Bordenkircher, No. C78-0165 L(B).
35 Summitt v. Commonwealth, 550 S.W.2d 548. The court found that the victim’s identification of Summitt had not been obtained through an improperly suggestive identification technique, that it was reliable, and that the trial judge had not erred in refusing to conduct a pretrial suppression hearing.
36 Summitt v. Bordenkircher, No. C78-0165 L(B).
37 Id. The court found that the victim’s identification of Summitt was reliable, and that the refusal of the trial court to grant the requested hearing was not erroneous.
38 Summitt v. Bordenkircher, 608 F.2d 247 (6th Cir. 1979).
39 Id. at 250.
40 Id. at 251.
41 Id. The court applied Jackson v. Denno, 378 U.S. 368 (1964), and Pinto v. Pierce, 389 U.S. 31 (1967), to identification evidence to reach this conclusion. The court found that since the trial courts had before them all the facts concerning the reliability of the identification evidence, and had made independent determinations that the identification evidence was admissible, the defendants had had adequate hearings. 608 F.2d at 251.
42 Id.
43 445 U.S. 962 (1980). The grant of certiorari was limited to the pretrial admissibility hearing issue. Certiorari was denied on Watkins' claim that he did not receive a fair trial because of prejudicial statements in the prosecutor's closing statement.
Brennan wrote the dissenting opinion, joined by Justice Marshall.

Justice Stewart initially acknowledged that a hearing out of the presence of the jury is the most prudent method of determining whether identification evidence is admissible. However, he correctly identified the issue in this case as whether such a hearing is constitutionally required under the Due Process Clause of the fourteenth amendment.

The defendants had argued that the hearing on the admissibility of eyewitness identification evidence must occur outside the presence of the jury. They attempted to analogize their situation to Jackson v. Denno, in which the Court struck down as unconstitutional a New York procedure in which the voluntariness of a confession was determined by the trial jury. The defendants in Watkins argued that Jackson had established a per se due process right to a preliminary determination of voluntariness outside the presence of the trial jury. They then attempted to show that the considerations which led to the per se rule in Jackson applied equally to the determination of the admissibility of eyewitness identification evidence.

The Watkins majority found that the special considerations which led to the Jackson rule for confession evidence did not apply to eyewitness identification evidence. Jackson created an exception to the usual presumption that juries will follow the trial judge's instructions. The Watkins Court feared that juries would not be able to disregard reliable yet inadmissible confessions. The Watkins majority distinguished

45 Id. at 657.
46 "... nor shall any State deprive any person of life, liberty, or property, without due process of law ..." U.S. CONST. amend. XIV, § 1.
47 Id. at 658; see also Petitioner's Brief at 15, Watkins v. Sowders, 101 S. Ct. 654 (1981).
49 Id. at 391. Actually, under the New York procedure the judge made the initial determination of voluntariness. If he found the confession to be unquestionably involuntary, he was not to admit it into evidence. However, if he found the voluntariness to be a "fair question," he was to leave the final determination of voluntariness to the jury. 378 U.S. at 377-78. The judge was not required to exclude the jury from the presentation of evidence for this preliminary determination. Id. at n.7.
50 The Jackson Court never explicitly held that the jury must be excluded from the presentation of evidence on the voluntariness of the confession before the judge's initial determination of admissibility. See Pinto v. Pierce, 389 U.S. 31, 32 (1967). However, one of the major considerations which led to the Jackson decision was the Court's fear that the jury would be unable to completely disregard confession evidence if it was found to be involuntary and thus inadmissible. 378 U.S. at 388-89. See also Smith v. United States, 348 U.S. 147, 151 (1954); United States v. Carignan, 342 U.S. 36, 38 (1951). The Watkins Court assumed arguendo that Jackson had established a per se right to a voluntariness hearing outside of the presence of the jury. 101 S. Ct. at 658.
53 Jackson v. Denno, 378 U.S. at 381-82. Regardless of their truth, involuntary confessions are not admitted into evidence in a criminal prosecution both because they tend to be
Jackson by noting that identification evidence is always admissible if reliable.\(^5^4\) (This presumes that the defendant's sixth amendment right to counsel has not been violated by the identification procedure.\(^5^5\)) Since the jury is not required to ignore reliable identification evidence, Justice Stewart concluded that the special considerations of Jackson are inapplicable to identification evidence.\(^5^6\)

The petitioners next argued that cross-examination would be an ineffective means of exposing unreliability in eyewitness identification evidence.\(^5^7\) The petitioners relied upon a passage from United States v. Wade\(^5^8\) maintaining that, by dwelling upon the subject, cross-examination might actually make a questionable identification more reliable in the minds of the jury.\(^5^9\) As a result, defense attorneys might be reluctant to use intensive cross-examination to discredit the reliability of an eyewitness identification.\(^6^0\) Therefore, many questionable identifications would go to the jury without sufficient demonstration of their unreliability. If, however, the evidence of the unreliability of the identification could be presented at a hearing away from the jury, defense counsel would not need to be overcautious in exploring the circumstances of the identification.

The Court noted that cross-examination always creates risk for a defendant.\(^6^1\) It dismissed the quoted passage from Wade as concerning only the defendant's right to the suppression of an in-court identification evidence unreliable, and because the integrity of the courts would be tarnished if such confessions were admitted. \(\text{Id. at 385-86.}\) The Jackson Court feared that juries would not grasp the significance of these policies, and would use evidence of any reliable confession in assessing the guilt of the accused, regardless of how the confession was obtained. \(\text{Id. at 381-82.}\) For example, it is doubtful that a jury would ignore a statement, obtained by police coercion, which contained incriminating details only the true culprit would know. See \(\text{Id. at 388.}\)

\(^{54}\) 101 S. Ct. at 658. See also Manson v. Braithwaite, 432 U.S. at 113-14, Neil v. Biggers, 409 U.S. at 198.

\(^{55}\) See note 62 infra.

\(^{56}\) The Court found that often the jury's sole duty in cases involving eyewitness identification evidence is to judge the reliability of that evidence. 101 S. Ct. at 658. Obviously, the jury would not be required to ignore reliable identification evidence. Therefore, Jackson's questioning of the ability of the jury to ignore reliable confession evidence is inapplicable to identification evidence.

\(^{57}\) \text{Id. at 659.}\)

\(^{58}\) 388 U.S. 218 (1967). Wade established the right to counsel at post-indictment lineups.

\(^{59}\) The quoted passage from Wade is:

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.

\(^{60}\) 101 U.S. at 658; See also Petitioner's Brief at 24-27.

\(^{61}\) 101 U.S. at 659.
resulting from a lineup held in the absence of the defendant's attorney.\textsuperscript{62} The majority added that a cross-examining attorney is always in a "predicament" when he asks a witness a question which may yield a response unfavorable to his client.\textsuperscript{63} Since cross-examination has historically been considered one of the most effective means of ascertaining the truth,\textsuperscript{64} the Court found it to be the device best suited to testing the reliability of identification testimony.\textsuperscript{65}

In his dissent, Justice Brennan first emphasized the unreliability of identification evidence. He quoted a passage from \textit{Manson v. Braithwaite}\textsuperscript{66} which observed that "[u]sually the witness must testify about an encounter with a total stranger under circumstances of emergency or emotional stress. The witness' recollection of the stranger can be distorted easily by the circumstances or by later actions of the police."\textsuperscript{67} Justice Brennan found that these characteristics made all identification evidence suspect, and had caused the Court to mandate safeguards to ensure that the jury's decision-making process was not impaired by the introduction of unreliable identification evidence.\textsuperscript{68}

Justice Brennan then attacked the effectiveness of an instruction to

\textsuperscript{62} \textit{Id.} See also \textit{Wade v. United States}, 388 U.S. at 239-42. Holding a post-indictment lineup in the absence of the defendant's attorney is the identification procedure which \textit{Wade} prohibited. What the \textit{Wade} court was discussing in the quoted passage (see note 59 supra) was the ineffectiveness of cross-examination in exposing the unreliability of an in-court identification due to a prior suggestive lineup. The \textit{Watkins} majority implied that its decision would not apply to such evidence. 101 S. Ct. at 659.

The rule in \textit{Watkins} will probably not apply to the admissibility of evidence of out of court post-indictment lineups held in the absence of the defendant's attorney. This is because such identification evidence is inadmissible regardless of its reliability. \textit{Gilbert v. California}, 388 U.S. at 272; see also \textit{Stovall v. Denno}, 388 U.S. at 299-99. \textit{Watkins} probably will apply, however, to the admissibility of in-court identifications which may have been tainted by prior \textit{Wade}- violative lineups. Although technically the test for the admissibility of such an in-court identification is a "taint" test, 388 U.S. at 241 (applying \textit{Wong Sun v. United States}, 371 U.S. 471 (1963)), and not a reliability test, in practice the two tests are identical. \textit{Compare} \textit{Wade v. United States}, 388 U.S. at 241, \textit{with} \textit{Manson v. Braithwaite}, 432 U.S. at 114. Therefore, \textit{Watkins} will probably apply to the situation considered in the quoted passage from \textit{Wade}. The \textit{Watkins} Court's out-of-hand dismissal of this passage seems unjustified.

The \textit{Watkins} Court could have distinguished the quoted passage by explaining that it concerned a taint test, and not a reliability test. In order to do so, however, it would have to hold that the two tests are different, and that some in-court identifications subsequent to a \textit{Wade}- violative lineup would be inadmissible, despite being reliable. Not only would this argument seem to contradict the substance of the two tests, it seems quite unlikely that the present Supreme Court would expand the circumstances under which reliable identification evidence must be kept from the jury. \textit{See} \textit{Manson v. Braithwaite}, 432 U.S. at 112.

\textsuperscript{63} 101 S. Ct. at 659.


\textsuperscript{65} 101 S. Ct. at 659.

\textsuperscript{66} 432 U.S. 98 (1972).

\textsuperscript{67} 101 S. Ct. at 660 (Brennan, J., dissenting) (quoting \textit{Manson}, 432 U.S. at 112).

\textsuperscript{68} 101 S. Ct. at 660-61 (Brennan, J., dissenting).
disregard, since such an instruction was all that would now stand between unreliable identification evidence and the jury. He concluded that an instruction was insufficient to ensure that the jury would disregard unreliable identification testimony.69 He recognized that the powerful impact identification evidence has upon jurors may not always be related to its reliability. He cited several studies which found that "there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'"70 Due to the power of such testimony, an admonition from the judge to ignore it may not have much effect upon the jury.

Justice Brennan found that the impact of eyewitness identification evidence is not always related to its reliability. He pointed out that one of the major factors in the credibility of identification testimony is the witness' level of confidence, which is not necessarily related to the reliability of his testimony.71 He also noted that when the witness is also the victim of the crime, as in both Watkins and Summitt, his understandable feelings of outrage at what was done to him may lead him to make sure that someone is punished.72 This emotional reaction can lead to hasty identifications that the victim is unlikely to retract.73 Justice Brennan concluded that identifications by victims are likely to be both more convincing and less reliable than other identification evidence.74

The dissent found Jackson directly applicable to the admission of identification evidence. Justice Brennan said that identification evidence can be just as unreliable as coerced confession evidence.75 He observed that allowing the police to conduct identification confrontations in a suggestive manner was just as repugnant to the ideals of a democratic society as allowing them to coerce confessions.76 Finally, he found that an instruction to disregard was just as ineffective in ensuring that the jury did not consider unreliable identification evidence as it was to ensure that the jury did not consider coerced confession evidence.77

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69 Id. at 663.
70 Id. at 661 (quoting from E. LOFTUS, EYEWITNESS TESTIMONY 19 (1979)) (Justice Brennan's italics). See also the other studies cited by Justice Brennan in 101 S. Ct. at 661 n.3.
71 Id. at 661. The Court has previously used the level of confidence of the witness in assessing the reliability of an identification. See Neil v. Biggers, 409 U.S. at 199. This would, however, seem to be as much a function of the personality of the witness as an indication of the reliability of his identification.
72 The Wade Court said that "[l]ineups are prevalent in rape and robbery prosecutions and present a particular hazard that the victim's understandable outrage may excite vengeful or spiteful motives." 388 U.S. at 230.
73 Id. at 229.
74 Watkins v. Sowders, 101 S. Ct. at 663 n.10 (Brennan, J., dissenting).
75 Id. at 662.
76 Id. at 662-63.
77 Id.
He therefore concluded that a hearing out of the jury’s presence should be required to determine the admissibility of all identification evidence, before it is heard by the jury.

IV. THE SIGNIFICANCE AND IMPACT OF WATKINS

The main effect of the Watkins decision will be the increased exposure of the jury to totally unreliable identification evidence. Before Watkins, a hearing would be held away from the jury to determine whether the identification evidence was admissible; only identification evidence which was arguably reliable could be presented to the jury. Watkins has dispensed with the need for such a hearing. The jury can now hear all identification evidence, no matter how unreliable, unless that evidence is per se inadmissible under Gilbert v. California. This deprives the prior Supreme Court protections in this area of having any meaningful effect. Although dispensing with the preliminary hearing will save some time, this advantage is greatly overshadowed by the prejudicial effect of allowing the jury to hear such unreliable evidence.

Before Watkins, the jury would not hear identification evidence which lacked “aspects of reliability.” Stovall v. Denno was the first Supreme Court case to declare that a defendant would be denied due process if convicted on pretrial identification evidence which resulted from unnecessarily suggestive identification procedures. A year later, in Simmons v. United States the Court found that an in-court identification could violate due process if it was the direct product of unnecessarily suggestive identification procedures.

See C. Whitebread, supra note 3, at 361.

See Foster v. California, 394 U.S. 440 (1969). In Foster, identification evidence was found inadmissible because the procedures used “made it all but inevitable that [the witness] . . . would identify petitioner whether or not he was in fact ‘the man’.” Id. at 443. Foster is the only case where the Supreme Court has found identification evidence to be inadmissible because it was unreliable. See notes 102-06 & accompanying text infra.

101 S. Ct. at 659.


See Manson v. Braithwaite, 432 U.S. at 112: “Wade and its companion cases reflect the concern that the jury not hear eyewitness identification testimony unless that evidence has aspects of reliability” (emphasis added).

Id.

388 U.S. 293 (1967).

The Fourth Circuit had reached the same conclusion as Stovall a year earlier, in Palmer v. Peyton, 359 F.2d 199 (4th Cir. 1966).

388 U.S. at 301-02. The Court established a “totality of the circumstances” test to determine whether such evidence should be admitted. Id. at 302.

Stovall’s due process claim was eventually rejected by the Court. He had been identified at a hospital room show-up where he was the only black person present. The Court found this procedure suggestive, but found that it was the best procedure available under the circumstances. There had been some doubt whether the sole witness would survive long enough to make an identification under less suggestive circumstances.

rily suggestive identification procedures. In these cases, the Court emphasized the suggestiveness of the procedure used and the necessity of using that procedure in determining whether identification evidence was admissible. If the identification was the result of unnecessarily suggestive procedures, the use of that evidence at trial would violate the defendant's due process rights.

It was not until Neil v. Biggers and Manson v. Braithwaite, however, that the Court established clear guidelines as to what eyewitness identification evidence violates due process. Biggers held that reliability was the standard for the admissibility of both pretrial and in-court identification evidence. Biggers applied the test originally formulated in Simmons for in-court identification evidence to pretrial identification evidence. Thus, an inadmissible pretrial identification had to be conducted under such circumstances as to create "a very substantial likelihood of misidentification" while a subsequent in-court identification had to be tainted by a pretrial identification creating "a very substantial likelihood of irreparable misidentification" while a subsequent in-court identification had to be tainted by a pretrial identification creating "a very substantial likelihood of irreparable misidentification" to be inadmissible.

88 Id. at 384. The Simmons Court stated the rule that "convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Id. See also Neil v. Biggers, 409 U.S. at 198; Coleman v. Alabama, 399 U.S. 1, 5 (1970).


90 Two later cases which applied these rules were Foster v. California, 394 U.S. 440 (1969), and Coleman v. Alabama, 399 U.S. 1 (1970).

In Foster the Court reversed and remanded a conviction for robbery. The prosecution had introduced evidence of a witness' pretrial identification, and used the same witness to identify the defendant in court. The Supreme Court found the pretrial identification evidence inadmissible, because the witness had failed to identify the defendant at an earlier lineup and showup. It was not until a second lineup, where the defendant was the only participant who had also been in the first lineup, that the witness identified the defendant. The Court found this procedure so suggestive that it was "all but inevitable" that the witness would identify this suspect. Id. at 443. It is worth noting that Foster is the only case where the Supreme Court has reversed a conviction because of a suggestive identification procedure. See also Moore v. Illinois, 434 U.S. 220 (1977), where a suggestive identification procedure was an alternate ground for the Court's reversal.

In Coleman, the Court found that a lineup identification did not fatally taint the reliability of an in-court identification. The witness had spontaneously identified the suspects before the lineup procedure had formally begun. There was some question as to whether the defendants were singled out to speak the words uttered by the criminals at the scene of the crime, but the Court found that the trial court could have reasonably found that the witness had identified the defendants before they spoke. 399 U.S. at 6.

91 409 U.S. 188 (1972).
93 409 U.S. at 198-99.
94 Id. at 198.
95 Id.
96 Id. (quoting Simmons v. United States, 390 U.S. at 384) (emphasis added). Both tests are based on the theory that the only due process interest to be protected is the defendant's...
Biggers, however, raised doubts as to whether evidence of suggestive pretrial identifications which took place after the Stovall decision would need only to pass a reliability test, or if any evidence from an unnecessarily suggestive pretrial identification would be per se inadmissible.\textsuperscript{97} Manson v. Braithwaite eliminated these doubts by applying the Biggers reliability test to evidence from an unnecessarily suggestive pretrial identification which was held after the Stovall decision.\textsuperscript{98} The Manson Court held that "reliability is the linchpin in determining the admissibility of identification for both pre- and post-Stovall confrontations."\textsuperscript{99} The Court maintained that some identification evidence would be excluded under its reliability test.\textsuperscript{100} It found, however, that its rejection of a per se exclusionary rule for suggestive identifications would lead to increased preservation of probative evidence.\textsuperscript{101}

The Court has always been quite lenient in admitting identification evidence. The only case where identification evidence was held to be inadmissible because of its unreliability is Foster v. California,\textsuperscript{102} where right not to be convicted on the basis of a mistaken identification obtained through impermissibly suggestive procedures. See Neil v. Biggers, 409 U.S. at 198-99.

Justice Marshall did not participate in the Biggers decision. However, he strongly criticized its holding in his dissent in Manson. 432 U.S. 118-36 (Marshall, J., dissenting). He believed that Stovall had created a per se exclusionary rule for pretrial identifications conducted under unnecessarily suggestive circumstances. Id. at 120. In his view, the reliability of a pretrial identification was irrelevant—the only question was whether the procedure used was the least suggestive available under the circumstances. Id. However, he agreed that Simmons had created a reliability test for subsequent in-court identifications. Id. at 121-22. Regarding this point, it is worth noting that neither Stovall nor Foster discussed the reliability of the identification evidence in deciding whether the pretrial identification evidence was admissible.

Of course, if the majority in Manson had followed Justice Marshall's reasoning concerning the irrelevance of reliability, Watkins would have had an opposite holding. Since some identification evidence would be inadmissible although reliable, Jackson would have been directly applicable.


\textsuperscript{97} "Such a [per se] 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." Neil v. Biggers, 409 U.S. at 199.

\textsuperscript{98} The Manson Court found that an identification procedure, although unnecessarily suggestive, still could provide reliable evidence. 432 U.S. at 116. The identification was made from a single photograph shown to the witness. Id. at 101. The state offered no explanation for its failure to use a less suggestive technique. Id. at 102. The Court held that this identification evidence was admissible. Id. at 117.

\textsuperscript{99} Id. at 114.

\textsuperscript{100} For the Court's discussion of the relative advantages of the reliability and per se exclusionary rules, see 432 U.S. at 111-13.

\textsuperscript{101} Id. at 112-13.

\textsuperscript{102} 394 U.S. 440 (1969). See also note 90 supra.
the Court found the identification inadmissible because the identification was "all but inevitable under the circumstances." On the other hand, identification evidence has been found to be admissible despite uncontroverted suggestiveness in the procedures used. In Manson, a single photograph of the defendant was shown to the witness, who had had only a few minutes to view the criminal at the scene of the crime. Both Biggers and Stovall involved showups, where the police simply brought the suspect to the witness and asked the witness if he was the man. All these identifications were found to be admissible despite their questionable accuracy. From the facts in these cases it is apparent that the Court has only found identification evidence inadmissible if it was completely unreliable.

Through Watkins, the Court has allowed almost any identification to reach the jury, regardless of its reliability. Watkins will apply to all identification evidence except lineup identifications held in the absence of the defendant’s attorney, which are per se inadmissible under Gilbert v. California. Except for these rare cases, a hearing away from the jury is not required to determine the admissibility of identification evidence. Therefore, almost all identification evidence will be allowed to make an impression upon the jury, regardless of its reliability.

The Watkins Court has practically destroyed the effectiveness of the protections established by Stovall v. Denno and the cases following it. The Stovall line of cases held that unreliable identification evidence is inadmissible to ensure that “the jury not hear eyewitness testimony unless that evidence has aspects of reliability.” Principles of due process prevent totally unreliable identification evidence from being used to convict. Under Watkins, however, the jury will still hear this evidence, since there is no way to exclude it before it is introduced. Henceforth, any identification evidence, no matter how unreliable, will be brought

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103 394 U.S. at 443.
104 432 U.S. at 114.
106 The Court has also found identification evidence inadmissible because the defendant's right to counsel has been violated. Gilbert v. California, 388 U.S. 251 (1967). However, this does not alter the fact that the Court has never found identification evidence inadmissible if it was at least arguably reliable, despite suggestiveness in the procedures used.
107 Id.
108 After Kirby, the police can easily avoid Wade's requirement that defense counsel be present at a lineup by holding the lineup before the suspect has been arraigned. This is what happened in Watkins.
111 Manson v. Braithwaite, 432 U.S. at 112 (emphasis added).
112 Id.
before the jury, except that which is per se inadmissible under Gilbert. The defendant's only protection against unreliable identification evidence will be a demonstration of its unreliability, and in extreme cases, an instruction to disregard. These are the same protections that defendants had before Stovall.\footnote{See Neil v. Biggers, 409 U.S. at 199 ("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").} The Watkins majority placed a great deal of confidence in the accurate assessment of evidence by the jury. In most contexts and with most types of evidence, a jury can accurately assess evidence and give it its proper weight. Yet, as the Stovall and Jackson decisions recognized, the jury's accuracy comes into question when it is asked to deal with evidence which is highly persuasive yet contains hidden sources of unreliability.\footnote{See the discussion of Jackson at notes 48-56 & accompanying text supra, and the discussion of Stovall at notes 83-86 & accompanying text supra.} Nevertheless, the Watkins majority maintained that its decision will not make any difference in the evidence the jury actually uses to convict, because the jury is predisposed to ignore unreliable identification testimony anyway.\footnote{See 101 S. Ct. at 659.} Moreover, cross-examination will place before the jury all the evidence of the identification's unreliability.\footnote{Id. at 659.}

Cross-examination can backfire on the defense, however. By dwelling upon the identification, cross-examination can make the jury more convinced of its importance.\footnote{Wade v. United States, 388 U.S. at 241. See also the discussion at notes 59-62 & accompanying text supra.} Also, there is always the risk that cross-examining a hostile witness will yield an unexpected answer which will damage the defendant's case.\footnote{101 S. Ct. at 659.} In order to avoid these risks, many defense attorneys will limit the length and scope of their cross-examination. A great deal of evidence on the unreliability of an identification will not come out at trial. Therefore, many questionable identifications will go to the jury without sufficient evidence of their unreliability. Moreover, this deficiency will usually be indetectable on appeal.\footnote{See, e.g., 101 S. Ct. at 659 ("The petitioners point to no specific instances in the trial where their counsel were thus deterred [from cross-examining] . . . ").}

A separate hearing, away from the jury, on the admissibility of identification evidence would avoid these risks. Since the jury would not be present, defense counsel could probe the circumstances of the identification as long as necessary, without worrying that he is reinforcing the identification in the minds of the jury. Defense counsel could ask questions which may yield an unfavorable response, without rein-
forcing the prosecution's case before the trier of fact. This hearing need not be time consuming. As soon as the judge was satisfied that the identification had some "aspects of reliability," he could rule it admissible. The extensive proof required at trial to determine the reliability of the evidence would not be necessary at this preliminary hearing.

The Watkins majority also relied upon instructions to disregard to ensure that juries would not use unreliable evidence to convict. An instruction to disregard may be ineffective for several reasons. First, because of the previously discussed limitations in cross-examination before the jury, the judge may not hear all the evidence of the identification's unreliability. Thus, instructions to disregard may not be given because the judge has not been fully informed about the circumstances of the identification. Moreover, instructions to disregard may not be effective even if given. Identification evidence may appear more reliable than it actually is, especially to the lay juror. Even if the jury is told to disregard the identification evidence, it may still make an impression on the jurors' minds. Thus, the inadmissible evidence may influence the jury's verdict despite an instruction to disregard. Again, preventing the jury from hearing identification evidence until it was determined to be admissible would prevent this problem.

V. Conclusion

The Supreme Court, in Watkins v. Sowders, has allowed almost any identification evidence to come before the jury, regardless of its reliability. This will result in many innocent defendants being convicted upon totally unreliable evidence. The safeguards the Court proposes to prevent this occurrence—cross-examination and instructions to disregard—are not equal to the task placed upon them. The Court seemed more impressed with the reliability of the identifications in this case than with the future situations where identification evidence brought before the jury is totally unreliable.

Watkins is an example of the Court's recent efforts to greatly reduce the scope and applicability of exclusionary rules in criminal prosecutions. Whatever the merits of this effort in general, the Court does not seem to be weighing the costs and benefits of an exclusionary rule in each situation. Identification evidence differs from, for example, the fruits of an illegal search. Even under Justice Marshall's formulation of the Stovall rule, pretrial identification evidence found to be per se inad-
missible could be recreated under scrupulously fair circumstances. Unless the first, illegal, identification procedure had so tainted the witness' memory as to make any subsequent identification totally unreliable, this second identification would be admissible. However, the present Court seems just as anxious to eliminate the exclusionary rule in this situation as it is to eliminate it where it results in probative evidence being irretrievably lost. *Watkins* is another step in this process. It seems that only a change in the composition of the Court will reverse this disturbing trend.

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