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# Comments

## The Pre-Arraignment Lineup: Necessity of a Magistrate

At a time when the Constitutionally guaranteed rights of the criminally accused now cover almost every aspect of criminal procedure[1] from the time of the arrest, through and including the appellate levels,[2] there is one procedure during one brief time span when the accused is not afforded any remedial safeguards. The procedure is the lineup; the time is that interval from the arrest to the arraignment.[3]

It is the purpose of this article to discuss pre-arraignment lineups and showups,[4] as distinguished from post-arraignment pretrial

1. *See:* R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE (1957); D. NEDURD, THE CRIMINAL LAW (1967, 1968, 1969); M. TOBIAS & R. PETERSON, PRE TRIAL CRIMINAL PROCEDURE (1972).

2. For example: Miranda v. Arizona, 384 U.S. 436 (1966) (right to attorney at custodial interrogations); Gideon v. Wainwright, 372 U.S. 335 (1963) (basic right to attorney).

3. Arraignment, as the term is used in this article, is the time when the defendant is formally appraised of the charges against him.

4. [A] "showup" [is] the presentation of the suspect alone to the victim or other identifying eyewitness. A showup is always somewhat suggestive, for the victim is given no other choice. . . .

A "lineup" is the presentation to the victim of several alternative choices. If properly conducted, it certainly presents a lesser danger of mistaken identification although even the most correct procedures cannot remove all danger. N. SOBEL, EYE-WITNESS IDENTIFICATION: LEGAL AND PRACTICAL PROBLEMS, 6 (1972).

lineups.[5] Lineups and showups are of such an untrustworthy nature that to permit their use prior to arraignment is realistically to impose, in a great number of instances, an irreparable "taint" on the accused[6] even before "the beginning of the adversary proceedings."[7] The rationale given by the judiciary for not bringing safeguards into play at this stage of the process is faulty; it is the intention of this article to suggest measures to correct this judicial myopia.

There are to be three phases to this article: first, the documentation of the "untrustworthiness" of the lineup as an investigatory or prosecutorial tool; second, an exposition of the present state of the law regarding pre-arraignment lineups and an analysis of the rationale behind that law; and, finally, a suggested remedial procedure that in the opinion of these authors will protect the rights of an accused during the pre-arraignment lineup.

The lineup is, of course, nothing more than eyewitness identification, and the criticism leveled at eyewitness identification is both monumental and documented.[8] Justice Frankfurter, addressing himself to eyewitness identification, said of such procedure:

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5. This is the interval between the defendant's arraignment and trial, which was covered by United States v. Wade, 388 U.S. 218 (1967) and Gilbert v. California, 388 U.S. 263 (1967).

6. The influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined. United States v. Wade, 388 U.S. 218, at 229 quoting P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES, 26 (1965).

7. In Kirby v. Illinois, 406 U.S. 682, 689-90 (1972) the court defines when the adversary proceeding begins:

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

8. Murray, *The Criminal Lineup At Home and Abroad*, 1966 UTAH L. REV. 610. This article states at 610: "Almost all knowledgeable authorities agree that eyewitness identification is the most unreliable form of proof." Also, cited in this article are the following sources: E. BLOCK, THE VINDICAORS (1963); J. FRANK & B. FRANK, NOT GUILTY (1957); E. GARDNER, THE COURT OF LAST RESORT (1952); Q. REYNOLDS, COURTROOM

> . . . What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient criminal procedure.[9]

The barrage of criticism directed toward eyewitness identification has not been confined solely to the legal field[10] but appears to

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(1950); E. BORCHARD, CONVICTING THE INNOCENT (1932). Another source of material, articles and books was given by the Court in United States v. Wade, 388 U.S. 218, 228 n.6, 7:

> . . . Wall, Eye-Witness Identification in Criminal Cases; 3 Wigmore, Evidence § 786a (3d ed 1940); Rolph, Personal Identity; Gross, Criminal Investigation 47-54 (Jackson ed 1962); Williams, Proof of Guilt 83-89 (1955); Wills, Circumstantial Evidence 192-205 (7th ed. 1937); Wigmore, The Science of Judicial Proof §§ 250-253 (3d ed 1937). . . . Napley, Problems of Effecting the Presentation of the Case for a Defendant, 66 Col L Rev 94, 98-99 (1966); Williams, Identification Parades, (1955) Crim L. Rev. (Eng) 525; Paul, Identification of Accused Persons, 12 Austl LJ 42 (1938); Williams & Hammelmann, Identification Parades, Part I & II, 1963 Crim L Rev 479-490, 545-555; Gorphe, Showing Prisoners to Witnesses for Identification, 1 Am J Police Sci 79 (1930); . . . Devlin, The Criminal Prosecution in England 70; . . .

*See*, Levine & Tapp, *The Psychology of Criminal Identification: The Gap From Wade to Kirby*, 121 U. PA. L. REV. 1079 (1973) wherein Judge Carl McGowan (U.S. Court of Appeals) is quoted from his lecture on *Constitutional Interpretation and Criminal Identification*, during the 4th Annual G.B. Sherwell Lecture at Marshall-Wythe School of Law in October, 1970. Also printed in 12 WM. & MARY L. REV. 235 (1970). Judge McGowan states:

> [T]he vagaries of visual identification have been thought by many experts to present what is conceivably the greatest threat to the achievement of our ideal that no innocent man shall be punished. [Later in the lecture Judge McGowan discusses United States v. Wade, *supra.*] . . . [T]he court in Wade viewed the lineup as a critical stage because the confrontantion compelled by the state between the accused and the victim or witness 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. . . . Among these factors were the well-known vagaries of eye-witness identification, the potential for improper intentional and unintentional suggestion, and the emotional state of the witness. Levine & Tapp, *supra* at 1081-82.

Even the California Supreme Court has recognized what a danger unfair lineups posed:

> [W]e do no more than recognize, as did the United States Supreme Court [in Wade], that unfairly constituted lineups have in the past too often brought about the conviction of the innocent. People v. Caruso, 68 Cal. 2d 183, 188; 436 P.2d 336, 340 (1968).

9. United States v. Wade, 388 U.S. 218, 228 (1967).

10. The United States Supreme Court in United States v. Wade, 388 U.S. 218 (1967) cites Williams & Hammelmann, Identification Parades, *supra* note 8, as one of the most comprehensive works in this area and the court quotes from the book on page 235 of the opinion:

> [T]he fact that the police themselves have, in a given case, little or no doubt that the man put up for identification has committed the offense, and that their chief pre-occupation is with the problem

be a rather pervasive feeling among researchers. Commenting on the limits of the human memory and perception systems, one such legal scholar has stated:[11]

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of getting sufficient proof, because he has not 'come clean' involves a danger that this persuasion may communicate itself to the witness in some way.

Murray, *supra* note 8, at page 610 n.2 makes the following observations about the reliability of eyewitness perception:

> An analysis of the testimony of 20,000 persons who were asked to describe the physical characteristics of the man they saw commit a crime . . . "revealed that, on average, they overestimated the height by 5 inches, the age by 8 years, and gave the wrong hair color in 87% of the case. . . ." It is well known that, because of disturbed emotions at the time of the crime, the victim of a rape or robbery is most likely to be an inaccurate observer of what then went on. . . .
>
> A person who eyewitnessed the crime, when he first talks to the police, may have no clear recollection of the man he saw. The police and prosecutor may work on the eyewitness by subtle and repeated questions until he loses his initial uncertainty about a suspect and finally, without hesitation declares him the man who did the deed.

Another source of information of eyewitness identification is P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES (2d ed. 1971). Wall writes the following concerning the basis of incorrect identifications:

> What are the causes of the erroneous identifications which, either in their actuality or their possibility, so vex the administration of criminal justice? Basically, there are two causes: 1) the normal and universal fallibilities of human sense perception and human memory, and 2) the susceptibility of the human mind to suggestive influences. Wall, *supra* at 8-9.

Other authors have commented on this problem: Gardner, The Perception and Memory of Witnesses, 18 Cornell L. Rev. 391, 401 (1933), "Imagination and suggestion are twin artists ever ready to retouch the fading daguerrotype of memory." Brown, Legal Psychology, 90 (1926), "Suggestion not only creates artifical memory out of nothing, but it changes existing memories to suit its own ends." Wall, *supra* at 10 clearly indicates the reasons for individuals making mistakes:

> The cause of this apparent anomaly is the fact that the normal persons sees but a few of someone else's distinguishing characteristics, retains even fewer in his mind, and is able to revive fewer still when asked to describe the person observed or to identify one thought to be the same.

11. These medical articles and books discuss the development and functioning of the sensory and memory systems and the frailities that exist therein: D. KIMBLE, READINESS TO REMEMBER (1969); P. HERRIOT, ORGANISATION AND MEMORY (1973); W. KINTSCH, LEARNING, MEMORY, AND CONCEPTUAL PROCESSES (1970); J. PENNYCUICK, IN CONTACT WITH THE PHYSICAL WORLD (1971); J. KENNEDY, A PSYCHOLOGY OF PICTURE PERCEPTION (1974); W. DEMBER, THE PSYCHOLOGY OF PERCEPTION (1963); R. ROMMETVEIT, SELECTIVITY, INTUITION AND HALO EFFECTS IN SOCIAL PERCEPTION (1960); J. COHEN, SENSATION AND PERCEPTION (1969); D. RAVAPORT, EMOTIONS AND MEMORY, 183-237, (5th ed. 1971); G. KLEIN, PERCEPTION, MOTIVES, AND PERSONALITY (1970).

> We all know from our experience—and psychologists from their professional training and practice—that people quite often do not see or hear things which are presented clearly to their senses, see or hear things which are not there, do not remember things which have happened to them, and remember things which did not happen.[12]

These same frailities have also been subject to medical comment:

> People fabricate events that have not occurred in order to please, do not report events that have occurred to escape censure, change their thinking to suit a variety of motives, use terms that do not have shared meanings, forget, contradict themselves, distort experiences, and vary experiences with changes in the interpersonal and nonhuman environment.[13]

A distinguished jurist, Carl McGowan,[14] in discussing[15] Congressional passage of the Omnibus Crime Control and Safe Streets Act of 1963,[16] stated:

> A striking example of the popular attitude towards eyewitness identification appeared in the Senate Committee hearing on the Omnibus Crime Control and Safe Streets Act of 1968. . . . [T]he Committee labelled eyewitness testimony 'an essential prosecutional tool' and accused the Supreme Court of having struck 'a harmful blow at the nationwide effort to control crime. . . .' Yet inaccurate identification has been and continues to be a major source of faulty convictions.[17]

Untrustworthiness of eyewitness identification cannot be realistically questioned in light of the overwhelming damnation of its veracity.

Concern over the nature of eyewitness identification is very real because the initial identification which frequently takes place at a pre-arraignment lineup all too often may prove devastating to the defense of the suspect. As pointed out by numerous authorities, the uncertainty initially surrounding the identification very

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12. Levine & Tapp, *supra* note 8, at 1087-88. Also cited in Kubie, *Implications for Legal Procedure of the Fallibility of Human Memory*, 108 U. PA. L. REV. 59 (1959).

13. M. HOROWITZ, IMAGE FORMATION AND COGNITION, 4 (1970). Doctor Mardi Jon Horwitz is a research psychiatrist at Mount Zion Hospital and Medical Center besides being Assistant Clinical Professor of Psychiatry at the University of California School of Medicine, San Francisco, California.

14. Member of the United States Court of Appeals for the District of Columbia Circuit.

15. Three cases must be considered within this context: 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).

16. 18 U.S.C. § 3502 (1970). It is interesting to note that the constitutionality of 18 U.S.C. § 3502 (1970) has been questioned: *Recent Statute, Title II of the Omnibus Crime Control and Safe Streets Act of 1968*, 82 HARV. L. REV. 1392 (1969).

17. Levine & Tapp, *supra* note 8, at 1082.

often becomes a "certainty" by the time of the trial.[18] Murray discusses precisely that problem:

> Then, at the trial, this eyewitness testifies so positively that cross-examination does not create any doubt in the jury's mind, and they believe the witness's testimony that the defendant was the culprit . . ."[19]

Because of the frailties of human perception and retention, the use of eyewitness identification should be employed only within certain parameters which afford the suspect some degree of protection. The French moralist, Jean de La Bruyère, provides in one passage all the rationale necessary for remedial action:

> [T]he condemnation of an innocent person is the affair of all honest men. I might almost say in regard to myself, 'I will not be a thief or a murderer; but to say, 'I shall not some day be punished as such,' would be to speak very boldly.[20]

This reason is in itself sufficient to justify taking a hard look at any procedure dependent upon eyewitness identification.

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18. *See:* Sobel, *Assailing the Impermissible Suggestion: Evolving Limitations on the Abuse of Pretrial Criminal Identification Methods*, BROOKLYN L. REV. 261 (1971). Sobel states at 265-66 of the article:

> Before a trial can be obtained, the uncertain identification must necessarily become a positive identification in order to survive the preliminary examination and the grand jury. *Indeed, experience establishes then an initial uncertain identification becomes more and more positive at every successive stage of the proceeding and through the trial itself.* . . .
> If the *initial* identification was, however, mistaken or uncertain then an innocent man is on trial. *The initial "mistake" will inevitably be carried through all future identifications.* Rarely if ever will the witness who was positive at the initial identification or who has become positive by virture of suggestion, express any doubt in the several later judicial proceedings, including the trial. (emphasis added)

Also: Comment, *No Panacea: Constitutional Supervision of Eyewitness Identification*, 62 J. CRIM. L. C. & P. S. 363 (1971); P. Mueller, *Right to Counsel at Police Identification Proceedings: A Problem in Effective Implementation of an Expanding Constitution*, 29 U. PITT. L. REV. 65 (1968); F. Read, *Lawyers at Lineups: Constitutional Necessity or Avoidable Extravagance*, 17 UCLA L. REV. 339 (1970); A Biemiller, *Lawyers and Lineups* 77 YALE L. J. 390 (1967); N. SOBEL, EYE-WITNESS IDENTIFICATION: LEGAL AND PRACTICAL PROBLEMS (1972); GEORGE, CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES, 209-30 (1969 ed.); Case Note, *Criminal Law —The Lineup's Lament*, 22 DE PAUL L. REV. 660 (1973); *Protection of the Accused at Police Lineups*, 6 COLUM. J. LAW & SOC. PROB. 345 (1970); RINGEL, IDENTIFICATION AND POLICE LINE-UPS (1968); Comment, *The California Constitution and Counsel at Pretrial Lineups: Disneyland Claims or Deadly Serious Business?*, 2 PEPPERDINE L. REV. 83 (1974).

19. Murray, *supra* note 8, at 610.

20. LA BRUYÉRE, LES CARACTERS (1668), quoted in Wall, *supra* note 10,

The lineup, dependent as it is on eyewitness identification, is at best suspect and at its worst is completely prejudicial. In response to the harshness engendered by the lineup and because of the complete lack of safeguards afforded the accused at a pre-arraignment lineup, the last five years have seen various proposals for remedial action spring forth from the literature.[21] A review of the literature and an analysis of the state of the law indicate two avenues of assault by which this gap in protecting the rights of the accused can be filled.

This first avenue of assault is constructed upon the Sixth Amendment's[22] right to counsel. The foundation cases in this area are the companion cases of *United States v. Wade*[23] and *Gilbert v. California.*[24] In *Wade*, the post-arraignment pretrial lineup is characterized as a "critical stage" of the proceedings and, as such, entitles the defendant to the presence of counsel at the identification procedures:[25]

> Since it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that for Wade the post-indictment lineup was a critical stage of the prosecution at which he was 'as much entitled to such aid [of counsel] . . . as at the trial itself.'[26]

The court went a step further in *Gilbert* as it developed the "per se" exclusionary rule[27]—if testimony of a tainted pretrial identification (e.g., no attorney present for the lineup) is forwarded as part of the state's direct case, the conviction must be reversed.[28] Upon rehearing, the state may overcome the exclusion of the in-

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at 24. Also cited in ESMEIN, A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE 352 (1913).

21. *See supra* note 18.

22. U.S. CONST. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence [sic].

23. 388 U.S. 218 (1967).

24. 388 U.S. 263 (1967).

25. 388 U.S. at 236-37.

26. *Id.*

27. 388 U.S. at 273, the court states: "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." (emphasis added.)

28. *Id.* at 272.

court identification by establishing a separate basis for this identification.[29] The main thrust of the opinion establishes that in-court identifications, further re-enforced by prosecutorial evidence of pretrial confrontations, are subject to automatic reversal if the pretrial confrontation is found to be in violation of the defendant's constitutional rights.[30] But both *Wade*[31] and *Gilbert*[32] were limited expressly to post-arraingment lineups.[33]

Accordingly, the state of the law as to pre-arraignment lineups was left in utter confusion.[34] The confusion ended five years later with *Kirby v. Illinois*.[35] In *Kirby* the court held that constitutional right to counsel did not attach until the defendant was formally arrainged.[36] Thus, it would appear that the law as currently construed draws a clear distinction between post-arraignment and pre-arraignment lineups,[37] for the purposes of providing counsel.

The second avenue of assault is founded on basic due process[38] principles. The claim in this area is *not* that the defendant was denied counsel during the lineup, but that the procedures of the lineup itself were so "unfair" that the defendant was deprived of due process of law.[39] The due process line of reasoning as applicable here was sounded in *Stovall v. Denno*.[40] The *Stovall* court sets

29. *Id.*
30. Gilbert v. California, 388 U.S. 272-74 (1967).
31. United States v. Wade, 388 U.S. 218 (1967).
32. Gilbert v. California, 388 U.S. 263 (1967).
33. *See* United States v. Wade, 388 U.S. 218, 220 (1967); Gilbert v. California, 388 U.S. 263, 269 (1967).
34. People v. Fowler, 1 Cal.3d 335, 461 P.2d 643 (1969).
35. 406 U.S. 682 (1972).
36. *Id.* at 689-91.
37. *See* Kirby v. Illinois, 406 U.S. 682, 684-85 (1972); Gilbert v. California, 388 U.S. 263, 269-73 (1967); United States v. Wade, 388 U.S. 218, 220 (1967).
38. Neil v. Biggers, 409 U.S. 188 (1972), discusses the factors to be considered in determining whether there has been a denial of due process. The court stresses the "totality of the circumstances" and evaluates this in terms of the following elements in identification/due process issues:

> [T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *Id.* at 199.

39. Cases that have dealt with denial of due process: Coleman v. Alabama, 399 U.S. 1 (1970); Foster v. California, 394 U.S. 440, 442 (1969); Simmons v. United States, 390 U.S. 377 (1968).
40. Stovall v. Denno, 388 U.S. 293 (1967).

forth a general standard to be followed in determining whether certain identification procedures violate a person's right to due process. The test to be employed is whether "[t]he confrontation conducted . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification . . . [as to deny due process to the accused]."[41] The Court perfected the dictates of *Stovall* in *Neil v. Biggers*[42] by defining the nature of an unfair identification procedure:

> It is the likelihood of misidentification which violates a defendant's right to due process. . . . Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.[43]

Even with this attempt to define due process more clearly, it remains an elusive concept.

Both approaches are lacking in that they fail to remedy the procedure of the pre-arraignment lineup. An extension of the *Wade-Gilbert* reasoning offers exclusion of the lineup in certain instances, but even at that the remedial action is merely a stopgap procedure and entirely inadequate.[44] Equally inadequate is the *Stovall-Biggers* assault on the due process gaps within criminal proceedings. The use of such imprecise terms and phrases as "unfairness"[45], "unnecessarily suggestive"[46] and "substantial likelihood of irreparable misidentification"[47] is testimony to the degree of judicial uncertainty in attempting to conform the lineup to the

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41. *Id.* at 301-02.
42. 409 U.S. 188 (1972).
43. *Id.* at 198.
44. The exclusion in Wade-Gilbert is entirely unrealistic. If counsel is not present at the lineup, the lineup is thrown out and the witness must then at trial identify the accused disregarding the lineup and relying upon the actual alleged criminal event. For the court to instruct the witness to exclude from his mind the lineup so as to dissipate any "taint" that may have occurred is such an unrealistic approach as to border on fantastic. Clearly such an instruction is worthless as documented by a Supreme Court statement in Wade:

> Moreover, '[i]t is a matter of common experience that, once a witness has picked out the accused at the lineup, 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. 218, at 229 quoting WILLIAMS AND HAMMELMANN, IDENTIFICATION PARADES, Part I, Crim. L. Rev. 479, 482 (1963).

45. Stovall v. Denno, 388 U.S. 293, 299 (1967).
46. *Id.* at 302.
47. Neil v. Biggers, 409 U.S. 188, 198 (1972); Simmons v. United States, 390 U.S. 377, 384 (1968).

requirements of "due process". Such non-standards place an undue degree of discretion in the court and, consequently, inequities not only may arise, but in all likelihood have already arisen and certainly will continue to arise.

For these reasons, a radical, perhaps even "Disneylike",[48] approach must be taken. This radical departure involves the interjection of a magistrate into the pre-arraignment lineup process.[49] The same rationale used to require a magistrate to review an affidavit to determine if such contains facts sufficient to issue a warrant should be made applicable to the pre-arraignment lineup. Underlining the dictates of the Fourth Amendment[50] which make a warrant mandatory is the rationale that there should be brought into play a neutral and detached intermediary to determine if this is such an occasion that would constitutionally justify a violation of the sanctity of a person's home.[51]

Notwithstanding that the warrant procedure is a specific dictate of the United States Constitution,[52] it is the position of these authors that it is not unreasonable to draw an analogy between the warrant procedure mandated by the Fourth Amendment and the remedial proposals set forth hereinafter. The analogy is proper because, in both instances, the desired end is to protect against unreasonableness, i.e. the warrant procedure is designed to protect against unreasonable searches and seizures and the proposed lineup

48. It is interesting to note that before the United States v. Wade, 388 U.S. 218 (1967), decision, arguments for counsel being present at POST arraignment identification were considered a "Disneyland" contention. Williams v. United States, 345 F.2d 733 (D.C. Cir. 1965); F. Read, *supra* note 18, at 357; Comment, *The California Constitution and Counsel at Pretrial Lineups: Disneyland Claims or Deadly Serious Business?*, *supra* note 18, at 83, 93.

49. United States v. Pollard, 335 F. Supp. 868 (D.D.C. 1971), offers an indicia tending towards the standarization of characteristics used during the lineup.

50. U.S. CONST. amend. IV:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

51. Johnson v. United States, 333 U.S. 10, 13-14 (1948), more recently cited in Coolidge v. New Hampshire, 403 U.S. 443, 449 (1971).

52. U.S. CONST. amend. IV.

procedure is designed to protect against prejudicial misidentification. In the latter, there is such an inherent possibility for error and, consequently, such a serious invasion of a person's right to have a fair trial on the merits, that a proposal of the nature presented here is not without merit. Clearly a plausible argument can be raised for interjecting a neutral participant into the arena at this prearraignment stage to oversee the proceedings and provide some safeguards against police and prosecutorial conduct in general.

The actual operation of this proposal shall be as follows: if after the arrest of the suspect the police feel a lineup is warranted for any number of reasons, they should require the witness, prior to viewing the suspect, to give a written description of the suspect. This description shall be given on a prepared form requesting the witness to fill out an appropriate answer for each of the following characteristics: height, weight, hair and skin color, characterization of body build, and special information (e.g., scars or physical defects). This completed description, the analogous document to the affidavit required in the warrant procedure, shall then be presented to a magistrate, who will review it as to those salient characteristics specified in the description. On the basis of this description the magistrate shall issue an order[53] detailing characterestics that all persons comprising the lineup must have in common.[54] The police, upon obtaining the order, must conduct the lineup in accordance with the order.

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53. The order should be comprised of acceptable height and weight ranges, build, color of hair and eyes, complexion, and any special characteristics for persons taking part in the lineup.

54. Criticism may be directed to a situation in which a witness is unable to verbalize or articulate specific characteristics of a suspect and yet that witness is assertive in his belief, that given a face-to-face encounter he would be able to identify the suspect. ("I'll know him if I see him.") However, valid this criticism may or may not be is not relevant to the remedial action as proposed herein. All that is demanded in the proposed remedial action is a recitation of very general characteristics (i.e., general height in relation to witness, general coloring, etc.). If a person is unable to give even such general characteristics the identification is of such a nature that no lineup should be issued. To allow such a "gut-reaction" identification, based on nothing more than a person's inarticulable feeling, may well result in an unfounded prejudicial identification. As noted by Wall, *supra* note 6, at 98 in which he quotes from Regina v. Smith, [1952] Ont. 432, 436. That Canadian court maintained:

> If the identification of an accused depends upon unreliable and shadowy mental operations, without reference to any characteristic which can be described by the witness, and he is totally unable to testify what impressions moved his senses or stirred and clarified his memory, such identification, if unsupported and alone, amounts to little more than speculative opinion or unsubstantial conjecture, and at its strongest is a most insecure basis upon which to found that abiding and moral assurance of guilt necessary to eliminate reasonable doubt.

Further, at the lineup itself at least six persons must be present, in addition to the accused, and a mandatory and thorough documentation of names, addresses, and descriptions of each person comprising the lineup must be prepared.[55] Copies of the order issued by the magistrate, as well as the documentation of the lineup itself, shall be made available to defense counsel upon request in order that defense counsel may review the entire procedure.

This proposal has several distinct advantages over those approaches favored in the literature.[56] First of all, it is not subject to the frailties of the *Stovall-Biggers* line of thinking in that judicial discretion is severely restricted. It also embodies the due process mandates so loftily spoken of in *Stovall-Biggers* without the nebulousness of that standard.

Secondly, the proposed procedure provides an exact formula for exclusion of the noncomplying lineup and would present a complete bar to any identification by any witness present at an improperly conducted lineup. If the suspect can establish that the lineup was not in strict compliance with the proposal as presented above, that lineup would be excluded.

The apparent lack of any safeguards for an accused from arrest to arraignment and the inherent untrustworthiness of lineups in general have motivated the authors to create a pre-arraignment procedure, which in their opinion provides a concrete and viable solution to these problems. The present alternatives forwarded by case law and literature in this area are not wholly successful in filling the gap and thus the authors have ventured their own alternative. The essential element of that alternative is the guiding presence of the neutral magistrate to oversee the pre-arraignment lineup.

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55. See Appendix A.
56. *Id.*

# Appendix A

1. Model standard set forth by Murray, *The Criminal Lineup at Home and Abroad*, 1966 Utah L. Rev. 610, 627-28:

> Most, if not all, of the attacks on the lineup process could be averted by a uniform statute modeled upon the best features of the civilian codes. Any proposed statute should provide for the right to counsel during any lineup or during any confrontation. Provision should be made that any person, whether a victim or a witness, must give a description of the suspect before he views any arrested person. A written record of this description should be required, and the witness should be made to sign it. This written record would be available for inspection by defense counsel for copying before the trial and for use at the trial in testing the accuracy of the identification made during the lineup and during the trial.
>
> This ideal statute would require at least six persons in addition to the accused in a lineup, and these persons would have to be of approximately the same height, weight, coloration of hair and skin, and bodily types as the suspect. In addition, all of these men should, as nearly as possible, be dressed alike. If distinctive garb, was used during the crime, the suspect should not be forced to wear similar clothing in the lineup unless all of the other persons are similarly garbed. A complete written report of the names, addresses, descriptive details of the other persons in the lineup, and of everything which transpired during the identification would be mandatory. This report would include everything stated by the identifying witness during this step, including any reasons given by him as to what features, etc., have sparked his recognition.
>
> This statute should permit voice identification tests by having each person in the lineup repeat identical innocuous phrases, and it would be impermissible to force the use of words allegedly used during a criminal act.
>
> The statute would enjoin the police from suggesting to any viewer that one or more persons in the lineup had been arrested as a suspect. If more than one witness is to make an identification, each witness should be required to do so separately and should be forbidden to speak to another witness until all of them have completed the process.
>
> The statute could require the use of movie cameras and tape recorders to record the lineup process in those states which are financially able to afford these devices. Finally, the statute should provide that any evidence obtained as the result of a violation of this statute would be inadmissible.

2. Model standard set forth by the 1972 Project on Law Enforcement Policy and Rulemaking as established by College of Law, Arizona State University:

Rule 401 Holding a Lineup: Exceptions.

> When identification by a witness may be obtained, a lineup should be held following the arrest of a suspect, unless one of the following circumstances makes a lineup unwise or impractical:
>
> A. Unusual Appearance of Suspect. Lack of suitable persons to include in the lineup group (e.g., the suspect is very tall or very

short; very young or very old; the suspect's hair length or facial hair is unusual).

B. Prior Knowledge. The witness knew the identity of the suspect before the offense occurred (e.g., personal acquaintance, relative, neighbor, co-worker); or learns his identity after the offense without police assistance (e.g., a victim spots the suspect at his place of employment, or an eyewitness recognizes the suspect's picture in the newspaper); or the prospective viewer has had an opportunity to identify the suspect in an earlier confrontation procedure.

C. Inconvenience. The suspect is in custody at a place too far from the witness.

D. Lack of Viewers. There is no witness willing or able to view the lineup.

E. Uncooperative Suspect. The suspect threatens to disrupt the lineup. (See Rules 408-09.)

F. Suspect Released from Custody. The suspect has been released on bond or recognizance before he can be viewed.

## Rule 402 Time of the Lineup.

A lineup, when conducted, should take place as soon as practicable after the arrest of a suspect. Lineup arrangements (contacting viewers, obtaining innocent participants, arranging for a lawyer when appropriate under Rule 405) should be completed prior to the arrest whenever possible.

## Rule 403 Right to a Lawyer.

A. General Rule. A suspect has the right to a lawyer for any lineup connected with an offense for which he has been arrested or charged—and to have a lawyer appointed for this purpose if he cannot afford one—if the lineup is held following the start of criminal proceeding against him.

B. Limitation of Right to a Lawyer: Uncharged Offenses. Even after criminal proceedings have been commenced against a suspect, he does *not* have the right to a lawyer at a lineup relating to other offenses which have not been formally charged against the suspect.

## Rule 404 Advising the Suspect of His Right to a Lawyer.

A. Before Suspect Has Right to a Lawyer. If the lineup will take place before the suspect has the right to a lawyer (see Rule 403), there is no obligation to advise the suspect about having a lawyer at the lineup.

B. After Suspect Has Right to a Lawyer. If the lineup will take place after the suspect has the right to a lawyer (see Rule 403), the suspect must be told that he has the right to have a lawyer present to observe the lineup procedure; that if he cannot afford a lawyer, one will be provided for him free of charge; and that the lineup will be delayed for a reasonable time after the lawyer is notified, in order to allow the lawyer to appear.

## Rule 405 Procedures Where Suspect Has Right to a Lawyer.

A. Counsel Already Retained. If the suspect already has a lawyer—whether retained or appointed—and indicates that he wants the lawyer to attend the lineup, he must be allowed to notify the lawyer about the planned lineup and the offense involved.

B. Non-Indigent Suspect Without Lawyer. If the suspect has no lawyer but wants one to attend the lineup, and the suspect states that he can afford his own lawyer, he must be allowed a reasonable time to retain a lawyer.

C. Indigent Suspect Without Lawyer. If the suspect has no lawyer and wants one to attend the lineup, but states that he cannot afford a lawyer, the officer conducting the lineup should contact (insert name of appropriate agency) to provide a lawyer for him free of charge.

D. Reasonable Delay. A lineup should be delayed for a reasonable time while waiting for the lawyer to appear following notification.

## Rule 406 Waiver of Right to a Lawyer.

A suspect who is entitled to a lawyer at a lineup may waive this right, provided he reads (or has read to him) and signs the *Waiver of Lawyer at a Lineup* form, or makes an oral waiver heard by at least two other persons. The oral statement must show that the suspect has full knowledge of the effect of waiving the right, and the precise words of the suspect's statement must be made part of the investigation file.

## Rule 407 Lineup Procedure.

A. Number of Participants. All lineups should consist of at least four persons in addition to the suspect.

B. Physical similarity. Persons placed in the lineup should have approximately similar physical characteristics. Factors such as age, height, weight, hair length and color, and physical build should be considered. Sex and race should be the same for all participants, except in unusual cases where the characteristic is difficult to determine (e.g., female impersonator).

C. Positioning Suspect. The suspect should be informed that he can choose his initial position in the lineup, and that he may change his position after each viewing.

D. Eliminating Suggestion. Officers should not say or do anything to distinguish the suspect from the other lineup participants.

E. Uniform Conduct of Participants. The non-suspects in the lineup should be instructed to conduct themselves so as not to single out the actual suspect.

F. Compelled Actions. The suspect can be instructed to utter specified words, make gestures, or assume a particular pose, if the viewer so desires. All participants should do whatever reasonable act is required of the suspect.

G. Donning Distinctive Clothing. If a witness describes the suspect as wearing a distinctive item of clothing, and the item (or something similar) is in police custody, the suspect can be compelled to wear the item. Each participant must don the clothing in the order of his appearance in the lineup.

H. Photographs. Photographs or video recordings shall be taken of all lineups.

## Rule 408 Refusal to Participate.

A. General Rule. A suspect who either refuses to participate in a lineup or refuses to perform as required by Rule 407 shall be informed that he has no right to refuse, and that evidence of his refusal may be used against him at trial. A record of the precise words of the suspect's refusal should be made for subsequent use.

B. Continuing Refusal. If the suspect continues his refusal, [in most cases] he should not be forced to participate in the lineup or to perform a certain act. [However, in some cases, subject to approval from (insert name of appropriate official), compliance may be forced. When this occurs, the other lineup participants must fake resistance similar to that used by the suspect. This faking serves to eliminate suggestiveness but is only feasible where police officers are the innocent participants.]

## Rule 409 Role of the Suspect's Lawyer.

A. In General. The suspect's lawyer shall be allowed to consult with him prior to the lineup, and to observe the lineup procedure. He may make suggestions, but may not control or obstruct the procedure.

B. Lawyer's Suggestions. Any suggestions the lawyer makes about the procedure should be considered and recorded. Those suggestions which would render the procedure more consistent with these Rules should be implemented.

C. Lawyer's Participation. A lawyer should be permitted to be present when a witness states his conclusion about the lineup. However, the lawyer should be instructed (and required) to remain silent during both the lineup and the giving of the witness' conclusion. The lawyer may speak with any witness after the procedure, if the witness agrees to speak with the lawyer.

D. Communication With the Witness. A witness taking part in a lineup procedure may be told that he is under no obligation to speak with the lawyer, but that he is free to speak with the lawyer if he wishes. The witness' name and address should not be revealed to the lawyer without the witness' consent.

## Rule 410 Court-Ordered Detention for Appearance in a Lineup.

Where probable cause does not exist, or where otherwise desirable, a ct. order may be sought to compel cooperation of the suspect in appearing in a lineup.