The California Constitution and Counsel at Pretrial Lineups: Disneyland Claims or Deadly Serious Business?

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In 1967 the Supreme Court of the United States declared that it was a fundamental principal of American justice that a party accused of a crime be afforded counsel at a pretrial lineup. Less than six years later, in 1972, the court effectively withdrew that right once called fundamental. This turnabout is but a milestone on a course that the Nixon court has taken to weaken established procedural safeguards in the administration of criminal justice.

The time has passed when citizen/defendants could look to Washington and the Bill of Rights for vigorous enforcement of individual rights against government abuse. It is paradoxical, in an age in which the government continues to grow pervasively, that the court should abdicate its position as a leader in insuring procedural fairness and be content with setting constitutional minimums. Withdrawal is hardly the proper posture at this point in our civilization. Rather, bold steps need to be taken to confront and re-evaluate concepts of "individual liberty," "privacy," and "due process" in an age which stands in the wings of an Orwellian stage dominated by an electronic media and controlled by a super-sophisticated police force.

The activist years of the Warren court have left the impression that if one is to "forge" new law that it must be done, if at all, from the fabric of the Bill of Rights. The fact that the Supreme Court has been "followed" for the past 20 years has given the federal Constitution an apparent position of supremacy as the "wellspring" of jurisprudence. When attorneys talk of the constitution, it is usually with the Bill of Rights in mind; however this was not always so. The Fourteenth Amendment was not adopted until 1868 and was not applied until 1897. Most of the incorporation via the Fourteenth Amendment has occurred during the last 20 years—the Warren years. Prior to this time, the states relied on their own state constitutions to regulate the balance between government power and individual rights. The retrenching of the Nixon court, and some of the justices' avowed purpose of merely setting minimums, may signal a return to reliance on the state constitution for insuring procedural rights to defendants in criminal prosecutions. It is hardly enough to say that the Warren years have furnished the

criminal defendant with all he deserves. As the computerized
agents of the police power become increasingly "efficient", there is
all the more need to find a source of law which will give the citizen
power to counteract these forces, lest the individual be lost in the
flush.

Looking to the state constitution as a source of law would not be a
new phenomenon in California in that the state has a long history of
using that document for setting standards which are higher than
that required by the federal Constitution. The most striking exam-
ple of the California Supreme Court's use of the state constitution
came in People v. Anderson, where the court struck down the
death penalty as both cruel and unusual punishment. Associate
Justice Stanley Mosk, in commenting on the Anderson decision,
said:

Contrary to the implication of the Attorney General that Anderson
was an aberration and that the state Supreme Court has not ren-
dered opinions based upon state constitutional grounds, there are
innumerable examples over the years of cases in which we have
done so. The use of the state constitution, as our court did in An-
derson and other cases, was no sport designed to thwart federal re-
view. We have long regarded the declaration of rights of the Cali-
ifornia Constitution as a charter of independent significance. I do
not find . . . the slightest impropriety when the highest court of
a state invalidates state legislation, state administrative action, or
the conviction of a defendant in a state prosecution as being viola-
tive of the state constitution. Nor is the problem exacerbated
merely because the state constitutional provision is similar to, or
even identical with, the federal constitution.

The California Constitution is an independent document which
gives the state Supreme Court an adequate non-federal ground for
decision. The California Supreme Court need not ignore the Su-
preme Court, indeed it must adhere to the constitutional mini-
mums set by that court, but should follow the Supreme Court only
when its argument is intellectually persuasive. It is from this out-
look that this paper will deal with the narrow issue of a right to
counsel at pre-indictment lineups—an outlook which looks to

10. 6 Cal. 3d 628, 100 Cal. Rptr. 152, 493 P.2d 880 (1972), cert. denied,
11. Address by Associate Justice Stanley Mosk, Southern California As-
association of Law Libraries' Second Annual Institute on California Law,
March, 1974.
the California Constitution to maintain existing rights and to reinstate those lost through erosion by recent Supreme Court decisions.

THE HISTORY OF THE WADE DECISION

In United States v. Wade, the Supreme Court held that a pretrial lineup held in the absence of defendant's counsel was a violation of the Sixth Amendment. For a pretrial lineup held without benefit of counsel, Wade afforded the remedy of per se exclusion of all identification testimony at trial unless the prosecution could establish by clear and convincing evidence that the witness's identification of the defendant had a source independent of the unconstitutional lineup. Wade, unlike Miranda, had no real roots in prior decisions of the court, but stemmed rather from a somewhat belated recognition of dangers inherent in the police lineup. Wade recognized

[a] major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification.

Eyewitness identification is perhaps the most unreliable form of evidence in a criminal prosecution and causes more convictions of the innocent than any other method of proof. The news media continually carries stories of men mistakenly identified as the perpetrators of crime. No one will ever know how many innocent defendants have been convicted by mistaken identification. When we do find out, it is usually then only by accident. Realizing both the necessity for police lineups and the risks involved in the procedure, the Wade court saw counsel as the factor which would balance out the interests by allowing the police to conduct the lineup, but only if the suspect had counsel to represent him. The presence of an attorney at the lineup makes possible a later showing that the identification made was impermissibly suggestive and of no evidentiary value or will serve to reinforce the witness's statement, "That's the man." The presence of counsel preserves the right to fair trial by allowing the defense to demonstrate to the

12. Supra note 1.
13. Prior to Wade, the manner in which the lineup was conducted affected only the weight of the witnesses' testimony, not its admissibility. See, e.g., People v. Parham, 60 Cal. 2d 378, 384 P.2d 1001, 33 Cal. Rptr. 497 (1963).
15. 388 U.S. at 228.
court or jury that the identification procedures used by the police were the basis of the identification and not the witness's memory.

**PRE-INDICTMENT VS. POST-INDICTMENT—THE CALIFORNIA VIEW**

In *Wade* the defendant had been indicted for bank robbery and had appointed counsel. Forty-nine days after indictment, two witnesses identified Wade as the robber at a police lineup without presence of Wade's counsel. The *post-indictment* language in *Wade* became the focus of some controversy among the state courts and what was later to be its almost total emasculation. A few courts interpreted *Wade* as limiting the right to counsel to lineups conducted only after indictment,17 whereas, the majority of courts that considered the question held the *post-indictment* language to be merely descriptive and not a limitation on the right to counsel's presence.18

The question was first presented to the California Supreme Court in *People v. Fowler*19 some two years after the *Wade* decision. In *Fowler* the defendant surrendered himself to the police after a warrant had been issued for his arrest. Prior to arraignment, Fowler, without counsel's presence, was exhibited in a lineup at which he was identified by a witness. This out-of-court identification was later used in obtaining Fowler's conviction. The *Fowler* court, in rejecting the contention that the *Wade post-indictment* language

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set the legal limits to the right to counsel at lineups, outlined five reasons why counsel should be present pre-indictment. First, the dangers that inure in a police lineup are not reduced by the formal filing of an indictment or information. Second, counsel is required at any stage of the proceedings where there is a potential for substantial prejudice to the defendant's rights such as in Escobedo and Miranda. Third, the dissent in Wade felt

The rule applies to any lineup, to any other techniques employed to produce an identification and a fortiori to a face-to-face encounter between the witness and suspect alone, regardless of when the identification occurs, in time or place, and whether before or after indictment or information.20

Fourth, Stovall v. Denno,21 decided the same day as Wade, held that the per se exclusionary rule would not be retroactively applied, but intimated that if it were, it would be applicable to Stovall's pre-indictment lineup. Fifth,

...we think it clear that the establishment of the date of formal accusation as the time wherein the right to counsel at lineup attaches could only lead to a situation wherein substantially all lineups would be conducted prior to indictment or information. We cannot reasonably suppose that the high court, recognizing that the same dangers of abuse and misidentification exist in all lineups, would announce a rule so susceptible of emasculation by avoidance.22

One year later in People v. Martin,23 the California Supreme Court took this reasoning still further into a pure Escobedo-Miranda analogy in holding that the per se exclusionary rule extended to show-ups prior to arrest. That even though the

...defendant 'voluntarily' accompanied the officers to the police station, the circumstances of his apprehension lead us to conclude that he was in custody in a constitutional sense because he could reasonably have believed that he was deprived of his freedom of action.24

The fact that Martin was under detention, but not yet arrested, led the court to the conclusion that the witness viewing Martin at the police station was indeed a critical stage of the proceedings, within the meaning of Wade, to which the right to assistance of counsel attached.

The California Supreme Court took the reasoning of Wade to its logical conclusion in requiring counsel at custodial lineups. The
court saw no reason to distinguish one lineup from another, on the basis of arrest or indictment, as long as fruits of that lineup could be used to convict the subject of the lineup. In California the dangers of the lineup were the focus of attention rather than abstract considerations of a point in time at which counsel was required.

**Pre-indictment vs. Post-indictment—The Federal Approach**

The Supreme Court was unimpressed with the reasoning of the California Supreme Court in *Fowler* and *Martin*, and the majority of other jurisdictions that had answered the question. In *Kirby v. Illinois*, the court reasoned that the right to counsel established in *Wade* stemmed from the Sixth Amendment and that a long line of cases had established that the Sixth Amendment right to counsel attached only upon initiation of adversary judicial proceedings against the defendant. Using *Powell v. Alabama* and *Johnson v. Zerbst* as stepping stones, the plurality opinion waded across the deeper issues underlying the need for counsel at lineups. The fact that counsel was required at custodial interrogations in *Escobedo* and *Miranda*, prior to the initiation of adversary judicial proceedings, was seen as an unrelated Fifth Amendment issue not relevant to the right to counsel at lineups. Because *Wade* was grounded in the Sixth Amendment and historically the right to counsel attached only upon the filing of a formal charge against the defendant, no counsel would be required at a pre-indictment lineup. The plurality opinion is perhaps best summed up in the following:

In this case we are asked to import into a routine police investigation an absolute constitutional guarantee historically and rationally applicable only after the onset of formal prosecutorial proceedings. We decline to do so.

In *Wade* a pretrial lineup had been characterized as a confrontation which is “peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial.” Six years later in *Kirby* that same pretrial

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25. Supra note 2.
27. 304 U.S. 458 (1938).
28. 406 U.S. at 690.
29. 388 U.S. at 228.
lineup has become a mere "routine police investigation."

There are two factors which distinguish Kirby from Wade and serve to explain the limitation on the per se exclusionary rule. First, in the six years that separate the opinions, the make-up of the court has changed dramatically. Justice Stewart, who dis- sented in Wade, wrote the plurality opinion in Kirby. He was joined by Justices Powell, Blackmun, Rehnquist and Burger. In 1965, two years before Wade was written, then Circuit Judge Bur- ger expressed his views concerning the right to counsel at pretrial lineups:

Such 'Disneyland' contentions as that absence of counsel at the po- lice lineup voids a conviction are becoming commonplace. Some arise from the hard experience of court-appointed lawyers who, having served diligently without compensation, later find them- selves subjected to vicious and unwarranted attacks by their ex- clients for failing to raise some bizarre point conceived by the 'le- gal experts' in prison. Having found that the indigent client's sense of gratitude is readily dulled by incarceration, some court ap- pointed counsel find it expedient to protect themselves by raising every point, however absurd, which indigent appellants suggest. Kirby represents the insensitivity of the new members of the court to the problems inherent in any pretrial lineup more than a serious Sixth Amendment analysis. Even if the Sixth Amendment historically is not applied pre-indictment, it will be shown that the right to counsel at lineups is not grounded solely on the Sixth Amendment, but rather on an interplay of the Sixth and Four- teenth Amendments.

The second factor which distinguishes Kirby from Wade is the timing of the filing of a formal charge. In Kirby no complaint or indictment had been filed, whereas in Wade, a grand jury had found probable cause to hold Wade over for trial. The Kirby court saw the arraignment or indictment as the point at which the right to counsel historically attached and found a place to hang their hat. In short, Kirby holds that only when probable cause has been found, does a defendant really need counsel at a lineup. If the prosecution does not have enough evidence to file a formal charge, they may, by virtue of Kirby, use a lineup conducted without counsel to obtain evidence sufficient to file against the defend- ant.

Kirby therefore requires counsel mainly in the 'other evidence' cases where apart from identification testimony, there exists other evidence which establishes probable cause to arrest and charge . . . . By virtue of Kirby, no right to counsel exists for lineups in 'pure' identification cases. These are the cases where there exists

no evidence to justify a formal arrest or charge—in short, those cases where apart from the identification (to be made in absence of counsel), there is no other evidence connecting the defendant with the crime or to establish guilt. These are the cases where counsel is most needed—where there exists the only real danger of convicting the innocent. The accused's fate will be decided not in a courtroom, but in a show-up staged in a police station before formal arrest and without counsel.\(^{31}\)

The major flaw in the *Kirby* opinion is the failure to adequately distinguish between the risks involved in a *pre-indictment* lineup as opposed to a *post-indictment* lineup. Indeed, as Judge Sobel points out, the dangers of a *pre-indictment* lineup are perhaps greater than in a *post-indictment* lineup.

**FOLLOWING KIRBY—CHOJNACKY’S BLUES**

After the California Supreme Court decision in *Fowler*, but before the Supreme Court decision in *Kirby*, Kenneth Chojnacky was arrested for robbery. Prior to the filing of a complaint, the police decided to put Chojnacky in a lineup. Chojnacky did not waive counsel, so a member of the public defender's office was called to represent him. When the public defender arrived at the lineup, the police would not allow him to talk to Chojnacky nor would the police tell the public defender which member of the lineup was his client. Subsequently, the witness's identification testimony was admitted at trial and Chojnacky was convicted of robbery.

The Court of Appeal reversed, holding the refusal of the police to tell the public defender who his client was denied Chojnacky effective assistance of counsel at the lineup and therefore violated the *Wade-Fowler* rule.

At this point, *Kirby v. Illinois* was handed down by the United States Supreme Court and *People v. Chojnacky*\(^ {32}\) reached the California Supreme Court. The opinion that resulted has left California law regarding counsel at lineups in limbo.

Justice Burke wrote an opinion joined by Chief Justice Wright and Justice McComb holding that *Kirby* retroactively controlled

\(^{31}\) N. SOBEL, EYE-WITNESS IDENTIFICATION, pp. 32–33 (1972). Nathan R. Sobel draws his conclusions from experience in that as a New York State County Judge and Supreme Court Justice, he has presided over 2,000 criminal jury trials.

\(^{32}\) 8 Cal. 3d 759, 505 P.2d 530, 106 Cal. Rptr. 106 (1973).
and therefore, Chojnacky had no right to counsel at a lineup that preceded the initiation of judicial criminal proceedings. This approach made consideration of the question of effective assistance of counsel at the lineup irrelevant.

Justice Mosk concurred in the decision, but reached his conclusion by very different reasoning. By virtue of Stovall v. Denno, Justice Mosk reasoned that Kirby was not retroactive and Fowler controlled. In Justice Mosk's view, Chojnacky's inability to consult with counsel did not affect the basic fairness of the lineup and therefore there was no violation of the rule of Fowler.

Justice Sullivan and Justice Tobriner dissented. The dissenting judges agreed with Justice Mosk that Kirby was not retroactive and that Fowler controlled, but disagreed as to the effect of the public defender not knowing who he was representing at the lineup. The dissent agreed with the Court of Appeal

... that for an attorney intelligently to be a 'silent observer' he should know what he is observing. At the very least, he should know who his 'client' is so that he may examine the other members of the lineup for indications of similarity and dissimilarity.

Viewing Chojnacky as a whole, three justices held Kirby controlled and three justices expressly declined to reach the question of whether Kirby compelled re-examination of Fowler. At this point in time, the Fowler-Martin line of cases has been shaken, but remains as law as a result of this 3-3 split. The Courts of Appeal in California now follow Kirby and will continue to do so until the California Supreme Court makes a definitive statement. It is true that the Fowler-Martin line of cases was based on the federal constitution, and in light of Kirby, the federal constitution no longer requires what the Fowler-Martin line compels. Even though based on the federal constitution, the reasoning of the Fowler-Martin line is a unique product of the California Supreme Court which finds a counterpart only among the dissenters on the United States Supreme Court.

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33. Supra note 21.
34. 8 Cal. 3d at 770, 505 P.2d at 537, 106 Cal. Rptr. at 113.
35. Justice Peters died January 2, 1973. At the time of the decision in People v. Chojnacky, his seat had not been filled—thus, the 3-3 split of the court.
cases, and the state's history of not following dot for dot all federal nuances in criminal procedure, it is time for the court to re-examine the issue of counsel at lineups from a fresh approach based on California law and precedent.

**APPROACHING THE PROBLEM**

There is a body of law in California which demonstrates that there are two possible avenues open for the California Supreme Court to require counsel in situations where the federal courts do not. First, Article I section 13 of the California Constitution has a long history of setting standards higher than those required by the federal constitution, and second, the Supreme Court of California is free to declare a rule of criminal procedure that requires counsel in situations not covered by the federal courts. However,

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38. Perhaps the best example is the refusal of the California courts to follow the federal standing requirements for challenging Fourth Amendment violations. See, e.g., People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955).

39. CAL. CONST. art. I, sec. 13 (West 1954), provides inter alia:

   In criminal prosecutions, in any court whatever, the party accused shall have the right to . . . be personally present with counsel . . . No person shall be . . . deprived of life, liberty, or property without due process of law . . . .

40. In re Rider, 50 Cal. App. 797, 195 P. 965 (1920) interpreted Art. I, sec. 13 to require that a juvenile detained on a felony charge had the right to assistance of counsel, whereas the Supreme Court did not require the same right until 47 years later in In re Gault, 387 U.S. 1 (1967). In re Jingles, 27 Cal. 2d 466, 165 P.2d 12 (1946) held that Art. I, sec. 13 required that a defendant charged with a misdemeanor had a right to appointed counsel—the same right was not extended by the Supreme Court until 26 years later in In re Gault.

41. This method was first used in People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955), where the California Supreme Court adopted the exclusionary rule prior to Mapp v. Ohio, 367 U.S. 643 (1969). The Cahan approach was recently used in People v. Vickers, 8 Cal. 3d 451, 503 P.2d 1313, 105 Cal. Rptr. 305 (1972) in fashioning a judicially declared rule of criminal procedure requiring that a probationer is entitled to representation by retained or appointed counsel at formal proceedings for the revocation of probation. In holding a probationer has a right to counsel at probation hearings, the court went beyond the Supreme Court decision in Morrissey v. Brewer, 408 U.S. 471 (1972), which set up minimum due process requirements, but did not require counsel. Chief Justice Burger at 408 U.S. at pp. 488-489 said:
the mere fact that the California Supreme Court is free to require
counsel at lineups where the federal courts do not is clearly not a
sufficiently compelling reason for the court to act. What is re-
quired is a re-examination of the problems that underlie eye-wit-
ness identification at lineups and the relationship of counsel to
those problems.

THE SUBSTANCE OF THE PROBLEM

In the area of eye-witness identification, three primary problems
present themselves to those involved in the criminal process. First,
the nature of the human organism and its inherent fallibilities in
both perception and memory. Second, suggestive identification
procedures utilized by the police or prosecuting agencies. And
third, the inherent difficulties in determining whether the lineup
identification is reliable.

Fundamental fairness demands that any criminal system deal
with these problems in a manner which is favorable to the ac-
cused. Delays and additional expenses in prosecution that result
from implementing safeguards are far outweighed by the potential
for wrongfully convicting an innocent person on the basis of unre-
liable eye-witness identification. The task thus imposed on the
judiciary is to require that the defendant is afforded a “fair” lineup,
regardless of where or when it takes place, in order to insure the
reliability of the evidence offered to link the defendant with crim-
inal activity.

The makers of both the state and federal constitutions provided
for no specific right to deal with the problems peculiar to eye-wit-
ness identification. The Wade opinion approached the problem by
emphasizing a lineup as a critical stage of the prosecution to which
the Sixth Amendment right to counsel attached. But what if
counsel is present at the lineup and the conduct of the lineup is un-
fair? The Wade per se exclusionary rule does not pretend to deal
with these situations, rather, only with lineups at which counsel
was not present. The remedy for an unfair lineup at which coun-
sel is present was established in Stovall v. Denno.48

42. In England the accused is informed of his right to have counsel or
a friend present at a lineup, both orally and in writing. In France there
is often a magistrate present at the lineup to insure its fairness. See gen-
erally, WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES, p. 42.
43. 388 U.S. 293 (1967).
The required inquiry is two-pronged. The first question is whether the initial identification procedure was 'unnecessarily' or 'impermissibly' suggestive. If it is found to have been so, the court must then proceed to the question whether the procedure found to have been 'unnecessarily' or 'impermissibly' suggestive was so 'conducive to irreparable mistaken identification' or had such a tendency 'to give rise to a very substantial likelihood of irreparable mis-identification' that allowing the witness to make an in-court identification would be a denial of due process.\textsuperscript{44}

The Fourteenth Amendment due process protection afforded by \textit{Stovall} is the primary right of the accused—the right to a fairly conducted lineup. The \textit{Stovall} due process protection attempts to deal with the first and second problems outlined above: human fallibilities in perception and suggestive procedures used in conducting the lineup.

The \textit{Kirby} decision, by denying the right to counsel at pre-indictment lineups, has left the accused with only the due process protection provided by \textit{Stovall}. Due process does require the exclusion of eye-witness identification based on an unfairly conducted lineup, but the difficulty remains for the accused to establish that his rights were violated—the third problem outlined above.

The proof problems the accused faces in challenging the fairness of the lineup are unlike those he meets in attempting to rebut scientific proof offered by the prosecution. For example, blood\textsuperscript{45} drawn from a suspect accused of drunk driving is subjected to an experimental set-up in a laboratory and put through identical steps each time to arrive at the alcohol content. The scientific method allows for elimination of variables and for test results which are constant under normal experimental condition. Counsel is not required at the blood test because the same sample tested by any two lab technicians will theoretically produce the same results.\textsuperscript{46} Because counsel or his experts are aware of the correct laboratory procedure, the lab technician testifying at trial may be subjected to effective cross-examination to determine if the procedure used was


\textsuperscript{45} Other examples which are subject to the same procedure would include such techniques as fingerprint analysis, ballistics, voice graphs, handwriting analysis, "breathalyzer" test, chemical analysis, spectroscopy, microscopy and forensic pathology.

within the allowable limits for accurate results. In other words, the blood test may be scrutinized in court to determine that it was fair.

The lineup, on the other hand, is inherently variable and incapable of reproduction in court.

In People v. Fowler (citation omitted), it was contended that it would be possible to reconstruct the lineup [at trial] from, among other things, photographs taken of the show-up line after the lineup was completed. This procedure is clearly inadequate because there is no assurance that the post-lineup photographs duplicate what the witness actually observed.47

Not only is the lineup method of identification itself fraught with uncertainty and chance for error, the ability of the accused to ferret out unfairness in the lineup is tremendously difficult because he doesn't know what went on at the lineup.48

It is possible that a lineup could be fair without the presence of counsel, but ultimately the reliability of any evidence is dependent on its testability. Testability implies a procedure that allows for a determination of the trustworthiness of the evidence offered—such as the scientific method allows for in a blood test. Evidence presented which is not subject to testing by the defendant is inherently a denial of due process.49

47. People v. Lawrence, 4 Cal. 3d 273, 481 P.2d 212, 93 Cal. Rptr. 204, (1971) at note 2.
48. The accused is normally of little help to defense counsel in attempting to reconstruct what took place at the lineup in that:

1) The accused may not be able to see the witness and the police because of the design of the “stage” on which the lineup is conducted (one-way mirrors, lights, etc.).
2) The accused is normally separated from the witness and cannot hear conversations between the witness and the police.
3) Unless the accused is a “veteran” of lineups, he will not be sensitive to potential prejudicial aspects of the procedure.
4) The accused, in order to challenge the lineup, may have to waive his Fifth Amendment privilege in order to enforce his Fourteenth Amendment rights, creating the constitutionally questionable situation of waiving one right to secure another. [Cf. Jones v. United States, 362 U.S. 257 (1960). But see Williams v. Florida, 399 U.S. 78 (1970).]
49. At the lowest level, due process will demand that a defendant be afforded an opportunity to “test” the evidence against him by cross-examination. Evidence which is produced as a result of the scientific method allows the defendant greater “clarity” of cross-examination by affording the opportunity to probe into the known limits within which accurate results may be obtained. Prior to trial, through a discovery process, the defendant’s own experts may be able to test the evidence sought to be introduced against him. The California Supreme Court in People v. Hitch, 11 Cal. 3d 159, — P.2d —, — Cal. Rptr. — (1974) has held that destruction of breathalyzer equipment prior to trial, without affording the defendant an opportunity to test the equipment, denies him due process. Contrast this with
The procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data. 'Procedure is to law what 'scientific method' is to science.'

To deny the accused the presence of counsel at a lineup is to deprive him of the procedural "tools" necessary to test the reliability of the identification evidence. Without being able to record hesitancy, mistake, subtle suggestion, dissimilarity of lineup participants or other irregularities in the lineup, the defendant must cross-examine witnesses without knowledge of the variables in the method used to arrive at the witness's conclusion "that's the man."

The Kirby historical analysis of Sixth Amendment rights attaching only on formal charge was misplaced in failing to perceive that it was not the right to counsel that was at issue, but rather the right of the accused to secure his Fourteenth Amendment right to a fair lineup. It is clear that due process protects the accused from an unfair lineup, but that right is indeed a hollow one if there are no means available to enforce it. At the present state of the art, the presence of counsel at any lineup is the only way to guarantee the accused's Fourteenth Amendment right to a fair lineup. Counsel functions at the lineup not as a director or a choreographer, but as a silent observer recording the event for later reconstruction at trial. The denial of counsel at a pretrial lineup effectively precludes the accused from reconstructing the event and asserting the situation in which one or more witnesses identify the defendant at a lineup where the defendant is not represented by counsel. This evidence is then introduced at trial against the defendant (see Cal. Evidence Code, section 1238) and is not subject to anything but defense counsel's speculative attack on cross-examination. The primary value expressed by the concept of due process is that seeking to minimize the possibility that an innocent man will be punished. Surely, if due process requires the defendant be afforded the opportunity to test highly reliable physical evidence such as a breathalyzer ampule or blood prior to trial, it also requires that the defendant be afforded an opportunity to test highly unreliable eye-witness identification evidence produced at a lineup. At the very least, the presence of counsel at the lineup would remove the cloud of ignorance through which the lineup witness must now be cross-examined. At most, the presence of counsel at the lineup would serve to enhance the integrity of the fact-finding processes in court and prevent the conviction of innocent men.

his due process right to a fair lineup. Just as *Miranda* saw the presence of counsel as necessary to insure the Fifth Amendment privilege against self-incrimination, counsel is required at a lineup to insure the accused's due process right to a fair lineup. The presence of counsel at the lineup would insure that the police procedure in conducting the lineup conforms to the dictates of due process.

**APPROACHING A CALIFORNIA SOLUTION**

In *People v. Graves* the defendant, relying on *Escobedo*, sought to exclude handwriting exemplars taken from him after arrest on the theory that he had a right to counsel when the exemplars were taken. The court concluded

> We find no support in *Escobedo* for invoking the right to counsel to block scientific crime investigation. Reliance on handwriting exemplars for expert analysis is not a substitute for thorough scientific investigation of crime but an excellent example of such investigation.

The court was obviously impressed with the scientific nature of handwriting analysis in denying the defendant a right to counsel when the exemplars were taken. It is the scientific nature of the process and the defendant's ability to produce his own expert witnesses which obviates the need for counsel at such encounters—factors which are not present in the lineup procedure.

In the landmark decision of *People v. Dorado* the California Supreme Court recognized the need for counsel at any stage of the proceedings where rights may be irretrievably lost if not then and there asserted or protected. Quoting Justice Schauer, the court held

> Neither Article I, section 13, nor the statutes implementing the right granted therein, should be construed in a manner that would hamper legitimate police investigation when no substantial right of the accused is involved. We do not believe that the accused has a right to have counsel present during purely investigatory activities which are not designed to elicit information from the accused or otherwise.

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51. "The denial of the defendant's request for his attorney thus undermined his ability to exercise the privilege [Fifth Amendment]—to remain silent if he chose or to speak without any intimidation, blatant or subtle. The presence of counsel . . . would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion." *Miranda v. Arizona*, 384 U.S. 436, 466 (1966).

52. 64 Cal. 2d 208, 411 P.2d 114, 49 Cal. Rptr. 386 (1966).

53. Id. at 211, 411 P.2d at 116, 49 Cal. Rptr. at 388.

impinge upon his constitutional rights. [emphasis added] 55

Article I, section 13 of the California Constitution does indeed require counsel in situations where the defendant's rights may be forever lost. In Dorado counsel was required at a custodial interrogation to insure against the potential loss of the privilege against self-incrimination. Does not the same reasoning apply with equal force in a situation where the defendant stands to lose his right to effectively assert his due process right to a fair lineup?

In challenging a lineup on due process grounds, the defendant must bear the burden of proof. 56 Cross-examination of witnesses will afford the defendant his only means of meeting this burden. The question becomes whether counsel probing in the dark as to what happened at the lineup is a satisfactory method of preserving a fundamental right of fairness. In case after case where a lineup is challenged on due process grounds, the challenge is overruled for failure to make an adequate record. 57 It is only in the most blatant cases of unfairness where the defendant is effectively able to assert a due process argument. 58 One can only wonder at the number of unfair lineups that go undetected under the present method of assuring due process to a criminal defendant. Surely a lineup, conducted in the absence of counsel, amounts to an event that carries a substantial probability of prejudice to the accused. It is precisely the kind of event that the California Supreme Court in Dorado held Article I, section 13 of the California Constitution sought to protect. Article I, section 13 incorporates not only the due process protection of a right to a fair lineup, but also the means to insure that a citizen receives due process through presence of counsel at any pretrial lineup. 59

CONCLUSION

A man is placed in a lineup who stands accused of rape. He at-

55. Id. at 348, 398 P.2d at 368, 42 Cal. Rptr. at 176.
58. In People v. Hogan, 264 Cal. App. 2d 254, 70 Cal. Rptr. 448 (1968) a witness to a burglary described the thief as a black man to the police. The defendant, a black, was identified by the witness in a lineup which consisted of the defendant, a Mexican man and two other white men.
59. Supra at note 39.
tempts to look at the men standing next to him, but is told, “Face the front.” He sees figure-like shadows below him with an arm pointed in his direction. Lights glare in his face. He hears tones of unintelligible conversation and the sound of movement about the room. Then, sudden silence and the snap of “number three step forward” commands his movement. “Keep quiet, honey, or I’ll kill you” is forced from his lips. The staccato of “Yes, yes that’s him” is replaced by the sound of soft sobbing. Our man has been identified, we have the rapist.

“But wait!” he implores . . .

Too late . . . we have all we need.

At this most critical point of a lifetime, the law today would have this man stand alone . . .

But wait you say! The most noble principle of law forbids unfairness. Surely he must be the man; why else would she pick him?

“Why else would she pick him?” Is not this the precise question on which the fate of this man depends? The ability to answer this question is the very heart of the matter. The question may indeed be metaphysical and beyond the reach of human understanding, but our man does not ask for tentacles to probe into the mind of the witness. Rather, in the name of fairness, he asks for a friend, a counselor, another set of eyes and ears that will deliver him from his ignorance in the face of the most devastating charge, “That’s the man.”

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