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Eyewitness Identifications

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EYEWITNESS IDENTIFICATIONS

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Eyewitness identifications, perhaps more than any other type of evidence, have contributed to miscarriages of justice. Case histories of convictions based upon misidentifications have been documented by a number of authors. *See* E. Block, The Vindicators (1963); E. Borchard, Convicting the Innocent (1932); J. Frank & B. Frank, Not Guilty (1957); F. Frankfurter, The Case of Sacco and Vanzetti (1927); E. Gardner, The Court of Last Resort (1952); Q. Reynolds, Courtroom (1950); G. Williams, The Proof of Guilt (3d ed. 1963); O'Connor, *"That's the Man": A Sobering Study of Eyewitness Identification and the Polygraph,* 49 St. John's L. Rev. 1 (1974). Furthermore, psychological research has identified numerous deficiencies in identification testimony. One of the most thorough treatments of the psychological aspects of identifications appears in an American Bar Foundation study. Levine & Tapp, *The Psychology of Criminal Identification: The Gap from Wade to Kirby,* 121 U. Pa. L. Rev. 1079 (1973). That study concluded with the following comment: "This review of the psychological dimensions of eyewitness identification has shown that the dangers from fallible sense perception and memory and from suggestive influence are overwhelming." *Id.* at 1130. This article examines the constitutional and evidentiary problems associated with eyewitness identifications.

Right to Counsel

Prior to 1967 the reliability of eyewitness identifications was primarily a jury issue. In that year, however, the Supreme Court decided three cases that "constitutionalized" this area of criminal law. Two of the cases — *United States v. Wade,* 388 U.S. 218 (1967); *Gilbert v. California,* 388 U.S. 263 (1967) — involved the sixth amendment right to counsel. Because of the innumerable ways in which identification procedures can erroneously affect eyewitness identifications, the Court in *Wade* held that a lineup is a "critical stage" of the criminal process, thereby entitling the defendant to the assistance of counsel. The presence of counsel, according to the Court, would assure that a defendant could effectively challenge a subsequent in-court identification based upon a suggestive pretrial identification.

> 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 . . . [a post-indictment lineup is] a critical stage of the prosecution . . . .

388 U.S. at 236-37.

Subsequently, in *Kirby v. Illinois,* 406 U.S. 682 (1972), the Court restricted the right to counsel. Under *Kirby,* the right to counsel attaches only *after* the "initiation of adversary judicial criminal proceedings . . . ." *Id.* at 689. Thus, *Kirby* ignores the underlying rationale of *Wade,* which is the need to protect the accused's ability to confront effectively the eyewitnesses' identification at trial. The "grave potential for prejudice" associated with identification procedures is not diminished simply because judicial criminal proceedings have not yet commenced. In addition, the Court in *Kirby* failed to specify exactly when the right to counsel attached. *Wade* involved a lineup conducted after indictment while *Kirby* involved a lineup immediately following arrest. Some courts used this factual difference in the two cases as a basis for holding that the right to counsel applies only to post-indictment identifications. The Supreme Court recently rejected this view. In *Moore v. Illinois,* 98 S. Ct. 458 (1977), the Court reversed a defendant's conviction because he had not been afforded counsel at an identification made at the preliminary hearing: "The Court of Appeals therefore erred in holding that petitioner's rights under *Wade* and *Gilbert* had not yet attached at the time of the preliminary hearing." *Id.* at 465.

While the Court has yet to decide a case involving a lineup held prior to the preliminary hearing, language in several of its opinions strongly suggests the right to counsel may attach as early as the issuance of an

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arrest warrant, the filing of a complaint, or the initial appearance. The Court's explication of the phrase "adversary judicial criminal proceedings" in *Kirby* included the "formal charge, preliminary hearing, indictment, information, or arraignment." 406 U.S. at 689. Since the Court explicitly mentions indictment and information, the term "formal charge" must refer to some other charging instrument. The only instrument besides an indictment or information that would qualify as a charging document is a complaint. *See* 2 O. Schroeder & L. Katz, Ohio Criminal Law 126 (1974) ("Rule 3 spells out the requirements for the complaint, the basic charging document under the rules.") This view is also supported by the Court's language in *Moore:* "The prosecution in this case was commenced under Illinois law when the victim's complaint was filed in court." 98 S. Ct. at 464.

Although not involving identification procedures, another recent Supreme Court case sheds some light on this issue. In *Brewer v. Williams,* 430 U.S. 387 (1977), the Court considered the right to counsel in the context of police interrogation procedures. After referring to the *Kirby* standard, the Court stated: "There can be no doubt in the present case that judicial proceedings have been initiated against Williams .... A warrant had been issued for his arrest, he had been arraigned on that warrant before a judge in a Davenport courtroom, and he had been committed by the court to confinement in jail." *Id.* at 399. This passage demonstrates that the Court in *Kirby* was not using the term "arraignment" in its technical sense (Crim. R. 10), but was referring to the initial appearance (Crim. R. 5(A)). It is common practice in many jurisdictions to refer to the initial appearance as an arraignment. *See* Y. Kamisar, W. LaFave, & J. Israel, Modern Criminal Procedure 8 (4th Ed. 1974). This same usage of arraignment appears in *Holland v. Perini,* 512 F.2d 99 (6th Cir. 1975). Holland was arrested on May 9, 1970 for the robbery of a Cleveland restaurant, which had occurred the same day. The Sixth Circuit held that a station-house identification conducted on May 24 violated the right to counsel under *Wade* because the defendant had "been arraigned, and adversary criminal proceedings had begun." *Id.* at 103. It is clear that the court was referring to the initial appearance under Rule 5 when it employed the term "arraignment" because in another part of the opinion the court states: "Arraignment occurred on May 11, and indictment followed on May 25." *Id.* at 102. The court left open the question of whether the right to counsel "attach[ed] automatically upon the filing of an affidavit .... " *Id.* n. 1. One court, however, has held that the issuance of an arrest warrant upon information triggers the right to counsel. *United States ex rel. Robinson v. Zelker,* 468 F.2d 159 (2d Cir. 1972). For citations to other cases, see ALI Model Code of Pre-Arraignment Procedure 448 (1975).

Presence of Counsel

The courts are divided on whether the right to counsel encompasses the actual identification of a suspect by an eyewitness (sometimes called the "witness-response stage") as well as the viewing of the suspect by that witness. The leading case on this issue is *People v. Williams,* 3 Cal.3d 853, 478 P.2d 942 (1971), in which the California Supreme Court held that the right to counsel extends to the actual identification: "It is not the moment of viewing alone, but rather the whole 'procedure by which (a suspect) is identified' that counsel must be able to effectively reconstruct at trial. If defense counsel is to be able to intelligently cross-examine the witness, he cannot be excluded from the moment of identification any more than he can be excluded from the lineup itself." *Id.* at 856, 478 P.2d at 944. The Louisiana Supreme Court recently adopted the same position in *State v. McGhee,* 350 So.2d 370 (La. Sup. Ct. 1977). These cases are particularly persuasive because there is no legitimate reason for the police to exclude counsel from the witness-response stage. *See* Sobel, Eye-Witness Identification: Legal and Practical Problems 119 (1972).

Waiver of Right to Counsel

Although the Supreme Court in *Wade* recognized the possibility that a suspect entitled to counsel could waive that right, the prosecution carries a heavy burden in establishing a waiver. It is incumbent upon the prosecution to prove "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zebst,* 304 U.S. 458, 464 (1938). The Supreme Court reiterated this standard in a recent sixth amendment case: "We have said that the right to counsel does not depend upon a request by the defendant, and that courts indulge in every reasonable presumption against waiver. This strict standard applies equally to an alleged waiver of the right to counsel whether at trial or at a critical stage of pretrial proceedings." *Brewer v. Williams,* 430 U.S. 387, 404 (1977). The Ohio Supreme Court has also carefully scrutinized alleged waivers. *See State v. Hurt,* 30 Ohio St.2d 86, 282 N.E.2d 578 (1972.)

Exclusionary Rule

The principal remedy for violations of the right to counsel is the exclusionary rule. Thus, testimony concerning a lineup identification at which the defendant was denied the right to counsel is inadmissible. According to the Supreme Court, "[o]nly 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." *Gilbert v. California,* 388 U.S. 263, 273 (1967).

Even if the lineup is constitutionally defective because of the absence of counsel, a subsequent in-court identification may be admissible under certain circumstances. The in-court identification is treated as a "fruit of the poisonous tree" issue; it is only admissible if the prosecution can "establish by clear and convincing evidence that the in-court identifications [were] based upon observations of the suspect other than the lineup identification." *United States v. Wade,* 388 U.S. 218, 240 (1967). The factors relevant to determining whether the in-court identification is derived from an independent source include: "the [witness'] prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-

lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification." 388 U.S. at 241.

The stringency of the standard the prosecution must meet in order to establish an independent source is highlighted by the dissenting opinions in *Wade*. Justice Black thought the clear and convincing evidence standard "is practically impossible" to meet, while Justice White characterized the test as "admittedly a heavy burden for the State and probably an impossible one." *Id.* at 248 and 251. The principal Ohio cases are *State v. Lathan,* 30 Ohio St.2d 92, 282 N.E.2d 574 (1972) (independent source not established); *State v. Hurt,* 30 Ohio St.2d 86, 282 N.E.2d 578 (1972) (independent source established); *State v. Jackson,* 26 Ohio St.2d 74, 269 N.E.2d 118 (1971) (independent source established).

Procedurally, the constitutionality of eyewitness identifications should be raised prior to trial. "Motions to suppress evidence, including but not limited to statements and identification testimony, on the ground that it was illegally obtained" are governed by Criminal Rule 12(B)(3).

Due Process

At the same time it decided *Wade* and *Gilbert,* the Court also held that identification procedures implicate the due process clause. *Stovall v. Denno,* 388 U.S. 293 (1967). This development is important because a criminal defendant's right to due process is more extensive than his right to counsel; all identifications are subject to scrutiny under a due process analysis. Thus, identifications made prior to the attachment of the right to counsel, *Kirby v. Illinois,* 406 U.S. 682, 691 (1972), identifications involving photographic displays, *Simmons v. United States,* 390 U.S. 377 (1968), identifications conducted prior to the effective date of *Wade, Stovall v. Denno,* 388 U.S. 293 (1967), and presumably, even identifications at which counsel is present, may be suppressed as violative of due process.

The standard used by the Court in determining whether an identification comports with due process has undergone a substantial evolution since *Stovall* was decided. In *Stovall,* the due process test was whether the identification was "unnecessarily suggestive and conducive to irreparable mistaken identification." 388 U.S. at 302. The focus of this test is the reliability of the identification *procedure* used by the police; if the procedure is both suggestive and unnecessary, it offends due process. Although the Court considered the issue in a number of cases after *Stovall, Simmons v. United States,* 390 U.S. 377 (1968); *Foster v. California,* 394 U.S. 440 (1969); *Coleman v. Alabama,* 399 U.S. 1 (1970), it was not until *Neil v. Biggers,* 409 U.S. 188 (1972), that it became apparent that the *Stovall* standard had been altered. The new standard — whether a substantial likelihood of misidentification has occurred — focuses on the reliability of the actual identification rather than on the reliability of the identification procedure. In determining whether there has been a substantial likelihood of misidentification the trial court must evaluate the "totality of the circumstances," including "the 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 199-200.

The Court's most recent treatment of the subject, *Manson v. Brathwaite,* 97 S. Ct. 2243 (1977), may have altered again the due process test. After reaffirming *Biggers* and referring to the factors cited in *Biggers* as relevant to the totality of the circumstances test, the Court stated: "Against these factors is to be weighed the corrupting effect of the suggestive identification itself." *Id.* at 2253. Justice Marshall, in a dissenting opinion, read this statement as a recognition of the continued validity of *Stovall:*

> In assessing the reliability of the identification, the Court mandates weighing 'the corrupting effect of the suggestive identification itself' against the 'indicators of [a witness'] ability to make an accurate identification. The Court holds, as *Neil v. Biggers, supra,* failed to, that a due process identification inquiry must take account of the suggestiveness of a confrontation and the likelihood that it led to misidentification, as recognized in *Stovall* and *Wade.* Thus, even if a witness did have an otherwise adequate opportunity to view a criminal, the later use of a highly suggestive identification procedure can render his testimony inadmissible.

Id. at 2260.

For a recent Sixth Circuit case reversing an Ohio conviction because of an improper eyewitness identification, *see Webb v. Havener,* 549 F.2d 1081 (6th Cir. 1977). *See also, State v. Sheardon,* 31 Ohio St.2d 20, 285 N.E.2d 335 (1972).

Photographic Displays — Mug Shots

While a defendant does not have a right to counsel at a photographic display, *United States v. Ash,* 413 U.S. 300 (1973), an identification based on such a display may be subject to suppression on due process grounds. *Simmons v. United States,* 390 U.S. 377 (1968); *State v. Perryman,* 49 Ohio St.2d 14, 358 N.E.2d 1040 (1976); *State v. Hancock,* 48 Ohio St.2d 147 (1976).

The use of photographs to bolster an in-court identification is impermissible if the photographs reveal the defendant's prior criminal record. In *State v. Breedlove,* 26 Ohio St.2d 178, 271 N.E.2d 238 (1971), the Ohio Supreme Court commented on this issue:

> Under the circumstances in the case at bar, we believe it unjustifiable for the state, on direct examination, to present police mug shots, bearing police identification numbers, from which a reasonable inference can be drawn that the defendant, at some indefinite time in the past had trouble with the law.

Id. at 184, 271 N.E.2d 241; *accord, State v. Wilkin-*

son, 26 Ohio St.2d 185, 271 N.E.2d 242 (1971). Defense counsel must, however, make a timely objection at trial or the error is waived. *State v. Evans,* 32 Ohio St.2d 185, 291 N.E.2d 466 (1972).

Fourth and Fifth Amendment Issues

While it is clear that the fifth amendment privilege against compelled self-incrimination is not implicated in identification procedures, the fourth amendment proscription against unreasonable searches and seizures is a different matter. The fifth amendment issue was addressed by the Court in *Wade.* Relying on its decision in *Schmerber v. California,* 384 U.S. 757 (1966), the Court held that the fifth amendment applied only to "testimonial or communicative" evidence and that "compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance." 388 U.S. at 222.

The fourth amendment issue arises when a defendant is illegally detained and then compelled to submit to an identification procedure. In such a case the identification may be suppressed as "fruit of the poisonous tree." Thus, in *United States v. Edmonds,* 432 F.2d 577 (2d Cir. 1970), the court held that "where flagrantly illegal arrests were made for the precise purpose of securing identifications that would not otherwise have been obtained, nothing less than barring any use of them can adequately serve the deterrent purpose of the exclusionary rule." *Id.* at 584; *accord, Commonwealth v. Jones,* 362 Mass. 497, 287 N.E.2d 599 (1972); *State v. Accor,* 277 N.C. 65, 175 S.E.2d 583 (1970); *People v. Bean,* 121 Ill. App. 2d 332, 257 N.E.2d 562 (1970). A violation of the fourth amendment is independent of right to counsel or due process considerations; therefore, an identification tainted by an illegal detention would be suppressed irrespective of the presence of counsel or the lack of unnecessarily suggestive procedures.

Defendant's Right to a Lineup

In *Evans v. Superior Court,* 11 Cal.3d 617, 522 P.2d 681 (1974), the California Supreme Court held that a defendant had a constitutional right to a State-conducted lineup. The Court rested its decision on *Brady v. Maryland,* 373 U.S. 83 (1963), in which the Supreme Court found that under certain circumstances the state's failure to disclose exculpatory evidence violated due process. In *Evans,* the Court stated:

> Here petitioner seeks to compel the People to exercise a duty to discover material evidence which does not now, in effect, exist. Should petitioner be denied his right of discovery the net effect would be the same as if existing evidence were intentionally suppressed. It is settled that the intentional suppression of material evidence denies a defendant a fair trial. *Brady v. Maryland.* We conclude in view of the foregoing that due process requires in an appropriate case that an accused, upon timely request therefor, be afforded a pretrial lineup in which witnesses to the alleged criminal conduct can participate.
>
> We do note parenthetically that the accused himself has neither the facilities nor the experience to conduct an impartial lineup. The burden on the police is a nominal one, as the facilities, resources and other individuals who may be used in conducting a lineup are generally available.

11 Cal.3d at 625-6, 522 P.2d at 686.

In *United States v. Caldwell,* 481 F.2d 487 (D.C. Cir. 1973), the defendant's conviction was reversed because his motion for a pretrial lineup was denied. The court found the prosecutor's opposition to the motion inexplicable: "the [trial] court clearly had power to order such a lineup, and we have considerable difficulty in understanding why the prosecution chose to resist appellant's motion." *Id.* at 489. *See also Berryman v. United States,* 378 A.2d 1317 (D.C. Ct. App. 1977).

Hearsay

In-court testimony concerning a pretrial identification, either by the eyewitness or a witness to the identification, could constitute hearsay evidence. Nevertheless, such testimony is admissible in most jurisdictions as either an exception to the hearsay rule or for a nonhearsay purpose — corroboration of the in-court identification. R.C. 2945.55 controls the admissibility of such evidence; that provision reads: "When identification of the defendant is an issue, a witness who has on previous occasion identified such person may testify to such previous identification. Such identification may be proved by other witnesses." In *State v. Lancaster,* 25 Ohio St.2d 83, 267 N.E.2d 291 (1971), the Ohio Supreme Court interpreted that provision as admitting prior identifications "solely for the purpose of indicating the process by which the accused was identified, where said process is under attack, and to corroborate that identification." *Id.* at 92, 267 N.E.2d at 297. Thus, such evidence is admissible for corroboration only, which means the eyewitness must first identify the defendant in court. The proposed Ohio Rules of Evidence accord such identifications a somewhat different treatment. Rule 801(D)(1)(c) follows the Federal Rules of Evidence and treats prior identifications as nonhearsay evidence. Thus, prior identifications would be admissible even if the eyewitness does not testify at trial. *See generally,* 4 J. Weinstein & M. Berger, Weinstein's Evidence 801-102 (1975).

Jury Instructions

Several courts, in an attempt to minimize the dangers of eyewitness identifications, have required cautionary instructions. In *United States v. Telfaire,* 469 F.2d 552 (D.C. Cir. 1972), the court proposed the following model instruction:

> One of the most important issues in this case is the identification of the defendant as the perpetrator of the crime. The Government has the burden of proving identity, beyond a reasonable doubt. It is not essential that the witness himself be free from doubt as to the correctness of his statement. However, you, the jury, must be satisfied beyond a reasona-

ble doubt of the accuracy of the identification of the defendant before you may convict him. If you are not convinced beyond a reasonable doubt that the defendant was the person who committed the crime, you must find the defendant not guilty.

Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification later.

In appraising the identification testimony of a witness, you should consider the following:

(1) Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?

Whether the witness had an adequate opportunity to observe the offender at the time of the offense will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness had had occasion to see or know the person in the past.

[In general, a witness bases any identification he makes on his perception through the use of his senses. Usually the witness identifes an offender by the sense of sight — but this is not necessarily so, and he may use other senses.]

(2) Are you satisfied that the identification made by the witness subsequent to the offense was the product of his own recollection? You may take into account both the strength of the identification, and the circumstances under which the identification was made.

If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care. You may also consider the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see defendant, as a factor bearing on the reliability of the identification.

[You may also take into account that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness.]

[(3) You may take into account any occasions in which the witness failed to make an identification of defendant, or made an identification that was inconsistent with his identification at trial.]

(4) Finally, you must consider the credibility of each identification witness in the same way as any other witness, consider whether he is truthful, and consider whether he had the capacity and opportunity to make a reliable observation on the matter covered in his testimony.

I again emphasize that the burden of proof on the prosecutor extends to every element of the crime charged, and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime with which he stands charged. If after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty. (Paragraphs in brackets are to be used only if appropriate.)

Id. at 558-59. The *Telfaire* court emphasized that a failure to use the model instruction with appropriate adaptations "would constitute a risk [of reversal] in future cases." *Id.* at 557. Several courts have explicitly mandated the use of this instruction or a substantial equivalent. *United States v. Hodges,* 515 F.2d 650, 653 (7th Cir. 1975); *United States v. Holley,* 502 F.2d 273, 275 (4th Cir. 1974). Other courts have expressed their approval of the instruction. *United States v. Roundtree,* 527 F.2d 16, 19 (8th Cir. 1975), *cert. denied,* 424 U.S. 923 (1976); *United States v. Wilford,* 493 F.2d 730, 734 n.9 (3d Cir.), *cert. denied,* 419 U.S. 851 (1974). In most eyewitness identification cases, the defense should request such an instruction.

Expert Psychological Testimony

Although there are few reported cases on the subject, the use of expert testimony on the problems of eyewitness identifications would be helpful to a jury's evaluation of identifications. Several trial courts have admitted this type of testimony. Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification,* 29 Stan. L. Rev. 969, 1006 n.173 (1977). Assuming the expert is qualified, the principal objection to this type of evidence is that the subject matter of eyewitness identifications is not outside the common knowledge of jurors. The modern trend, however, is against adopting a narrow view of the scope of expert testimony. Thus, proposed Ohio Rule of Evidence 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify thereto in the form of an opinion or otherwise." The purpose of expert testimony, as manifested in the proposed Rule, is to *assist* the trier of fact. The Advisory Committee Note to Federal Rule of Evidence 702, which is identical to proposed Ohio Rule 702, observes that the Rule "recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts." In view of studies which indicate that jurors are overly impressed by eyewitness identifications, an exposition on the psychology of identifications would be extremely valuable. *See* Note, 29 Stan. L. Rev., *supra,* at 970 n.8. For a discussion of Federal Rule 702, see 3 J. Weinstein & M. Berger, Weinstein's Evidence 702-4 (1975).

References

P. Wall, Eye-Witness Identification in Criminal Cases (1965); N. Sobel, Eye-Witness Identification: Legal and Practical Problems (1972); R. Markus, Trial Handbook for Ohio Lawyers § 325 (1973); 1 Criminal Defense Techniques Ch. 2 (Cipes ed. 1969); ALI, Model Code of Pre-Arraignment Procedure Arts. 160 & 170 (1975); Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification,* 29 Stan. L. Rev. 969 (1977); Levine & Tapp, *The Psychology of Criminal Identification: The Gap from Wade to Kirby,* 121 U. Pa. L. Rev. 1079 (1973).

RECENT DEVELOPMENTS

Right To Be Present At Trial

The journal entry of the sentencing court recited that the defendant was before the court when in fact the official transcript showed the defendant was not present at the time she was found guilty and sentenced. Since Crim. R. 43(A) provides that a defendant shall be present at every stage of the trial, including the imposition of the sentence, the judgment and sentence were reversed. *State v. Welch,* 53 Ohio St.2d 47 (Athens Cty. 1978).

Probable Cause and Improper Closing Arguments

Defendant was arrested after a search of his person produced a glassine packet of heroin inside the rolled-up portion of his jeans. The arresting officer had entered a bar in which drugs were sold and where four drug-related arrests had recently been made. Despite the fact that the room was full, the officer focused his attention entirely on the defendant whose name and record were unknown to him. The officer had earlier seen the defendant with persons arrested for narcotics and observed the defendant lean forward and place his hands and arms under the table in the vicinity of his legs. The defendant was stopped and searched when he attempted to leave the premises. Under the circumstances, the Court found that the officer had reason to be suspicious of the defendant, but there was no probable cause to arrest him. Also, the prosecutor in his closing argument in effect told the jury that they could disbelieve an officer testifying for the prosecution only at their monetary peril; if they found against the officer, the city would have to pay. Such direct appeals to the pecuniary interest of the jury as taxpayers constitute reversible error. *State v. Hill,* 52 Ohio App.2d 393 (Hamilton Cty, 1977).

Physical Restraints on Defendant at Trial

At trial, the judge overruled a motion by defense counsel to remove the shackles from the legs of the defendant because the judge considered the use of shackles to be the responsibility of the Sheriff. This conclusion was found to be clearly erroneous. Because of the responsibility of the trial court to afford an accused a fair and impartial trial, as part of due process, the trial court must exercise its discretion in such matters. A defendant has the right to appear at trial without shackles except when the court, in the exercise of sound discretion, determines that restraint is necessary for the safe and orderly progress of the trial. Also, for effective appellate review, the record should reflect the factors which the court considered in exercising its discretion. *State v. Carter,* 53 Ohio App.2d 125 (Scioto Cty. 1977).

Uncorroborated Testimony of Accomplice

R.C. 2923.03(D), which states that "[n]o person shall be convicted of complicity under this section solely upon the testimony of an accomplice, unsupported by other evidence," changes the general rule formerly recognized in *State v. Flonnory,* 31 Ohio St.2d 124 (1972), that a conviction may be based on uncorroborated testimony of an accomplice, except where otherwise specifically provided by statute. The testimony must be corroborated by some other fact, circumstance, or testimony which also points to the identity of the accused as the guilty actor. Evidence merely showing that the crime was committed is insufficient. *State v. Myers,* 53 Ohio St.2d 74 (Tuscarawas Cty. 1978).

Death Penalty Procedure — Burden of Establishing Mitigating Factors

Under Ohio's death penalty procedure, R.C. 2929.04(B) provides a list of mitigating factors which may serve to allow the defendant to avoid the death penalty. It is, however, reversible error for a trial court to place the burden of proving these factors upon the defendant. The mitigation hearing is not adversarial in nature, and neither the defendant nor the prosecution has the burden of producing any evidence of mitigating circumstances. The defendant only bears the risk of non-persuasion. *State v. Toth,* 52 Ohio St.2d 206 (Licking Cty. 1977).

Grand Jury Witnesses — Miranda Warning

The Justice Department has decided to give grand jury witnesses a Miranda-type warning before their testimony and to notify grand jury "targets" of their target status where appropriate. The Department also issued a general directive that prosecutors should not present a grand jury with evidence which they know was obtained as a "direct result of a clear constitutional violation." For details see, 22 Crim. L. Rep. 2423.

Right to Analyze Drugs

A defendant in a drug prosecution is denied due process and the right of confrontation when the state destroys all of the controlled substance during an unnecessary quantitative test; the state has a duty to preserve some parts of the substance so that an independent chemical analysis may be made by the putative law violator in the event criminal prosecution is later instituted. *People v. Taylor,* 369 N.E.2d 573, (Ill. App. Ct. 1977).

Search and Seizure

Defendant was arrested, handcuffed, and escorted by police back into the room from which he came. The Court held that a search of the room and seizure of marijuana plants growing by the windows was invalid because it involved areas beyond the confined reach of the defendant. Police observation of such plants

from the street would also not furnish sufficient basis for such a warrantless seizure. *People v. Robbins,* 369 N.E.2d 577 (Ill. App. 1977).

Search and Seizure

Both due process and fourth amendment rights were violated when police seized a packet of heroin from the defendant's throat by choking and holding his nose to prevent him from swallowing. Such behavior is reminiscent of, if not more excessive than, that condemned in *Rochin v. California*. The Court also held a search warrant for a residence invalid since it was based upon (1) information supplied by the defendant's children merely that he maintained another residence (no information on criminal activities), (2) the heroin illegally seized from the defendant, and (3) an informant's statement that he believed the heroin was stashed nearby. The illegally seized heroin tainted the warrant under *Wong Sun v. U.S.* and the independent information was insufficient to provide probable cause. *State v. Tapp,* 22 Crim. L. Rep. 2344 (La. Sup. Ct. 1977).

Plain View

To justify a warrantless entry to seize suspected narcotics paraphernalia under a plain view theory, it must be immediately apparent to the police that they have evidence before them. Where the opening of the door of a house by the wife of a man arrested for a narcotics violation allowed a detective to view spoons and strainers on top of a kitchen refrigerator, there was no probable cause to believe that these items were employed in narcotics activities, and thus their seizure did not fall within the rule. *U.S. v. Benn,* 22 Crim. L. Rep. 2300 (E.D. N.Y. 1977).

Plain View

An officer, who had recently sold his mobile home, returned to it to inquire about possessions which he had left there. While speaking to the defendant through an open window, the officer noticed marijuana plants growing inside the trailer. The officer then arrested the defendant and seized the plants. The Court found that as a foundational prerequisite for the application of the "plain view" doctrine, there must be a showing by the state of exigent circumstances. Plain view of evidence, standing alone, is an insufficient justification for warrantless seizures. There were found to be no exigent circumstances here because there was no suggestion of potential flight or destruction of the evidence. Thus, the search and seizure were unreasonable. The Court also held that the plain view doctrine does not extend to pre-intrusion observation of evidence within a "constitutionally protected area", but only to cases where there is a justifiable prior intrusion. *State v. Lane,* 22 Crim. L. Rep. 2397 (Mont. Sup. Ct. 1977).

Phone Call Interception — Consent Search

The Court rejected the government's contention that the right to conduct a premises search, whether based upon probable cause or consent, includes the right to intercept incoming phone calls. Where consent is involved, the government must prove that it was freely, voluntarily and knowledgeably given and that the interception of phone calls was within the scope of consent. Since the consent obtained was to allow the search of premises for money or cocaine, it did not include the right to intercept incoming phone calls. *People v. Harwood,* 22 Crim. L. Rep. 2298 (Calif. Ct. App. 1977).

Unreasonable Automobile Search

Defendant was arrested for driving with an invalid permit. Prior to arrest, the officer saw the defendant make "furtive movements" and place a brown paper bag under the car seat. The car was then driven to the police station where the bag was examined and contraband discovered. The Court held the search unreasonable on several grounds. First, the search could not be sustained as a warrantless automobile search because the officer did not have probable cause to search at the scene of the stop; the defendant's movements and the partially hidden bag were insufficient to establish probable cause. Second, it could not be upheld as an inventory search because the authorities must lawfully possess the car. Here the police had no authority to impound the car without first obtaining the defendant's consent or providing him an opportunity to make other arrangements for its disposition. Third, the search was not incident to arrest because it did not occur at the time or place of the arrest. Finally, the Court rejected the contention that the search was a "minimal" intrusion and thus reasonable despite the absence of probable cause. *Arrington v. U.S.,* 22 Crim. L. Rep. 2411 (D.C. Ct. App. 1978).

Involuntary Confessions

Despite the initiation of a second interview with the police by a teenaged defendant, the Court found the confession made during that interview was inadmissible because of the police's repeated refusal to supply a requested attorney and because of improper police threats and inducements made during the course of the first interview. *People v. McClary,* 22 Crim. L. Rep. 2304 (Calif. Sup. Ct. 1977).

Impeachment by Silence

A federal prison inmate, working as a janitor, found an envelope containing marijuana. Guards later searched him and discovered the envelope. The inmate was not asked any questions and remained silent until he was subsequently interviewed by the FBI. Upon trial for possession of marijuana, the prosecutor commented in closing argument on the defendant's silence at the time of the search. In reviewing whether these comments constituted reversible error, the Court held that when an accused has not been given a *Miranda* warning, his silence cannot be used to impeach his credibility, unless the silence is inconsistent with innocence as well as with his exculpatory trial testimony. The Court concluded that the defendant's silence was consistent with his innocence and with his statement to the FBI agent that he remained silent because the guards did not ask him any questions and because he feared reprisals from other inmates who might consider him a "snitch." Thus, the com-

ments were "highly prejudicial" and constituted plain error. *U.S. v. Henderson,* 22 Crim. L. Rep. 2388, (5th Cir. 1978).

Collateral Estoppel

Where the defendant's imprisonment in another state made it impossible for him to join in his co-indictee's successful suppression motion, it was held that the absent defendant may not later be prosecuted with the suppressed evidence. The Court stated that the principles of fairness underlying the collateral estoppel doctrine require the defendant be afforded the benefits of the earlier ruling that the search was unlawful. In so holding, the Court adopted a flexible approach to collateral estoppel which focuses on the type of litigation and the details of the prior adjudication. *State v. Gonzales,* 22 Crim. L. Rep. 2346 (N.J. Sup. Ct. 1977).

Withdrawal of Involuntary Guilty Plea

Defendant and his co-defendant pled guilty to an indictment pursuant to a plea bargaining agreement signed by the prosecutor and the public defender. Defendant later moved to withdraw his plea. In holding that the district court abused its discretion in not allowing withdrawal, the Court pointed out that the defendant had always maintained his innocence and had only pled guilty after being induced to do so by his attorney of record. The attorney had told the defendant that he did not have a very good chance at trial and that his co-defendant planned to plead guilty. As a result, the defendant felt he could not prove his innocence. This raised serious doubts about the voluntariness of the plea — doubts which should be resolved in the defendant's favor. *Gladu v. Eight Judicial District,* 22 Crim. L. Rep. 2483 (Mont. Sup. Ct. 1978).

Right To Be Present At Trial

At a bench conference following the presentation of evidence in a criminal trial, the trial court considered the possible bias of a juror. On appeal, the Court held that such a conference was a stage of trial at which the accused had a right to be present. Because the bench conference involved a determination as to the make-up of the jury, it was just as much a stage of the trial as the initial impaneling of the jury. Therefore the defendant had the right to be present, a right that could not be waived by counsel. *Bunch v. State,* 22 Crim. L. Rep. 2415 (Md. Ct. App. 1978).

Hearsay Evidence — Guilty by Insinuation

Where the prosecution repeatedly referred to the defendant by an alias and there was no admissible proof that the defendant was in fact known by that alias, the defense was fatally prejudiced. The result of this tactic of insinuation was to "splash" the defendant with damaging matter that was not in evidence. *U.S. v. Hilliard,* 22 Crim. L. Rep. 2350 (D.C. Ct. App. 1977).

Dismissal of Charge Added After Defendants Assert Bail Rights

The Court dismissed a conspiracy count which was added to the charges against the defendants, after their successful assertion of a right to bail. The Court was concerned that the additional charges would give the appearance of prosecutorial vindictiveness. The suggested justifications of the inexperience of the prosecutor and the unavailability of the grand jury were rejected. It is the appearance of vindictiveness, and not the actuality of such, which is crucial. *U.S. v. Andrews,* 22 Crim. L. Rep. 2481 (U.S.D.C., E.D. Mich. 1978).

Dual Representation

The Eight Circuit has extended its rule that trial judges have an affirmative duty to advise defendants of the potential danger of joint representation and of their rights to conflict-free counsel to cases involving retained counsel. Heretofore the rule was applied to appointed counsel cases. Absent such notification, a finding of knowing and intelligent waiver will seldom be sustained by the court. *U.S. v. Lawriw,* 22 Crim. L. Rep. 2369 (8th Cir. 1977.)

Unconstitutionality of Marijuana Law

The Court declared Florida's marijuana law unconstitutional as applied to private possession because the legislature lacked a rationale basis for the decision to ban the private possession of marijuana. The Court found that the state failed to show that public health, safety or welfare justified such legislation. The Court also found the statute violative of the eighth amendment ban against cruel and unusual punishment because the punishment provided in the statute (up to 5 years imprisonment for private possession): (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; and (2) is grossly out of proportion to the severity of the crime. *State v. Leigh,* 22 Crim. L. Rep. 2407 (Fla. Cir. Ct., 1978).