

Chapter 14— Lineups and Other Pretrial Identification Procedures

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Introduction

The police generally use three methods in witness identification of suspects: lineups, showups, and photographic identifications. In a lineup, a victim or a witness to a crime is shown several possible suspects at the police station for identification. In a showup, only one suspect is shown to the witness or victim. This usually takes place at the scene of the crime and immediately following the arrest of the suspect. In photographic identification, the police show photographs of possible suspects to the victim or witnesses.

These three methods raise questions concerning the constitutional rights of suspects involved in identification proceedings. Do they have any rights at all? The answer is yes, but they are limited. The four constitutional rights usually invoked by suspects in identification proceedings are: the privilege against self-incrimination, the right to a lawyer, the right to due process, and the protection against unreasonable searches and seizures. Of these constitutional rights, only two have been held by the Supreme Court to apply in pretrial identification procedures. These are the right to counsel and the right to due process.

In the cases briefed in this chapter, the Court defines the rights of suspects in these proceedings. In sum, the Court holds that an accused who has been formally charged with a crime has the right to have a lawyer present during a lineup. In contrast, there is no right to counsel if the suspect has not been formally charged with a crime. As for due process rights, the Court has held that lineups are so suggestive that the resulting identification inevitably violates a suspect's constitutional rights. In a subsequent case, the Court concluded that the admission of testimony concerning a suggestive and unnecessary identification procedure does not violate due process as long as the identification is reliable.

Lineups, showups, and photographic identification procedures are helpful police practices for suspect identification. The police must be careful, however, not to violate the suspect's rights to counsel and due process. The cases in this chapter help determine (in addition to department rules and regulations) what the police can and cannot do.

The leading cases briefed in this chapter on lineups and other pretrial identification procedures are *United States v. Wade* and *Kirby v. Illinois*.

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

CAPSULE: An accused who has been formally charged with a crime has the right to have a lawyer present during a police lineup.

FACTS: A man with a small piece of tape on each side of his face entered a bank, pointed a pistol at a cashier and the vice president of the bank, and

forced them to fill a pillow case with the bank's money. The man then drove away with an accomplice. An indictment was returned against Wade and others involved in the robbery. Wade was arrested and counsel was appointed. Fifteen days later, without notice to his counsel, Wade was placed in a lineup to be viewed by the bank personnel. Both employees identified Wade as the robber, but in court they admitted seeing Wade in the custody of officials prior to the lineup. At trial, the bank personnel re-identified Wade as the robber and the prior lineup identifications were admitted as evidence. Wade was convicted of bank robbery.

ISSUE: Should the courtroom identification of an accused be excluded as evidence because the accused was exhibited to the witness before trial at a post-indictment lineup conducted for identification purposes and without notice to and in the absence of the accused's appointed lawyer? YES.

SUPREME COURT DECISION: A police lineup or other "face-to-face" confrontation after the accused has been formally charged with a crime is considered a "critical stage of the proceedings"; therefore, the accused has the right to have counsel present. The absence of counsel during such proceedings renders the evidence obtained inadmissible.

REASON: "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.' Thus both Wade and his counsel should have been notified of the impending lineup, and counsel's presence should have been requisite to conduct of the lineup, absent an 'intelligent waiver.'"

CASE SIGNIFICANCE: The *Wade* case settled the issue of whether an accused has a right to counsel after the filing of a formal charge. The standard used by the Court was whether identification was part of the "critical stage of the proceedings." The Court, however, did not say exactly what this phrase meant; hence, lower courts did not know where to draw the line. In a subsequent case, *Kirby v. Illinois* (see brief on page 201), the Court said that any pretrial identification prior to the filing of a formal charge was not part of a "critical stage of the proceedings," and therefore no counsel was required. The *Wade* case did not authoritatively state what is meant by "formal charge" either, so that phrase has also been subject to varying interpretations, depending on state law or practice.

Foster v. California 394 U.S. 440 (1969)

CAPSULE: Lineups that are so suggestive as to make the resulting identification virtually inevitable violate a suspect's constitutional right to due process.

FACTS: The day after a robbery, one of the robbers, Foster, surrendered to the police and implicated the other two people involved. Foster was placed in a lineup with two other men and was viewed by the only witness to the robbery. Foster was wearing a jacket similar to the one worn by the robber and was several inches taller than either of the two men. The witness could not positively identify Foster as the robber and asked to speak with him. Foster was brought into an office alone and was seated at a table with the witness; still the witness could not positively identify Foster as the robber. A week to ten days later, the witness viewed a second lineup of Foster and four completely different men. This time the witness positively identified Foster as the robber. The witness testified to the identification of Foster in the lineups and repeated the identification in court. Foster was convicted of robbery.

ISSUE: Do lineups conducted by the police that may bias a witness' identification of a suspect violate his or her constitutional rights? YES.

SUPREME COURT DECISION: Lineups that are so suggestive as to make the resulting identifications virtually inevitable violate a suspect's constitutional right to due process.

REASON: "This case presents a compelling example of unfair lineup procedures. In the first lineup arranged by the police, petitioner stood out from the other two men by the contrast of his height and by the fact that he was wearing a leather jacket similar to that worn by the robber. When this did not lead to positive identification, the police permitted a one-to-one confrontation between petitioner and the witness.... Even after this the witness' identification of petitioner was tentative. So some days later another lineup was arranged. Petitioner was the only person in this lineup who had also participated in the first lineup.... This finally produced a definitive identification.... The suggestive elements in this identification procedure made it all but inevitable that [the witness] would identify petitioner whether or not he was in fact 'the man.' In effect, the police repeatedly said to the witness, 'This is the man.' This procedure so undermined the reliability of the eyewitness identification as to violate due process."

CASE SIGNIFICANCE: This case tells the police how not to conduct a lineup. Lineups are important to the accused as well as to the police and, therefore, must be conducted properly. Any lineup that practically identifies

the suspect for the witness is unfair to the suspect and violates due process. The procedure followed by the police in this case practically ensured the suspect's identification by the witness. Lineups must be fair to the suspect; otherwise, the due process rights of the suspect are violated. A fair lineup is one that guarantees no bias against the suspect.

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

CAPSULE: There is no right to counsel at police lineups or identification procedures if the suspect has not been formally charged with a crime.

FACTS: A man reported that two men robbed him of a wallet containing traveler's checks and a social security card. The following day, police officers stopped Kirby and a companion. When asked for identification, Kirby produced a wallet that contained three traveler's checks and the social security card bearing the name of the robbery victim. The officers took Kirby and his companion to the police station. Only after arriving at the police station and checking police records did the arresting officers learn of the robbery. The victim was then brought to the police station. Immediately upon entering the room in the police station where Kirby and his companion were seated, the man positively identified them as the men who had robbed him. No lawyer was present in the room and neither Kirby nor his companion asked for legal assistance, nor were they advised by the police of any right to the presence of counsel. Kirby was convicted of robbery.

ISSUE: Is a suspect entitled to the presence and advice of a lawyer during pretrial identification? NO.

SUPREME COURT DECISION: There is no right to counsel at police lineups or identification procedures prior to the time the suspect is formally charged with the crime.

REASON: "The initiation of judicial criminal proceedings is far from mere formalism. It is the starting point of our whole adversarial system of 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."

CASE SIGNIFICANCE: *Kirby* was decided five years after *United States v. Wade*. It clarified an issue that was not directly resolved in *Wade*: whether the

ruling in *Wade* applied to cases in which the lineup or pretrial identification takes place prior to the filing of a formal charge. The court answered this question in the negative, saying that what happened in *Kirby* was a matter of routine police investigation, hence not considered a “critical stage of the proceedings.” The Court reasoned that a post-indictment lineup is a “critical stage” whereas a pre-indictment lineup is not.

United States v. Dionisio 410 U.S. 1 (1973)

CAPSULE: Any person may be required against his or her will to appear before a grand jury or to give a voice exemplar without violating the Fourth or Fifth Amendments.

FACTS: In the course of its investigation into illegal gambling, a grand jury received voice recordings obtained pursuant to court orders. The grand jury subpoenaed 20 people, including Dionisio, and compelled them to provide voice exemplars for comparison with the intercepted messages. Each witness was advised that he was a potential defendant in the investigation and was given the right to have an attorney present during the taping. Each witness was provided a copy of the transcript of the messages and was compelled to read the transcript into a recording device. Dionisio and others refused to provide the voice exemplars. The government filed petitions in the District Court to compel the witnesses to make the voice recordings, which the court did. Dionisio maintained his refusal to provide the voice exemplars and was found in civil contempt and was incarcerated until he complied with the order or for 18 months.

ISSUE: May a person be required to appear before a grand jury? Is the providing of voice exemplars compelled by a grand jury for the purpose of comparison with intercepted messages a violation of the Fourth Amendment protection from unreasonable searches and seizures and the Fifth Amendment privilege against self-incrimination? NO.

SUPREME COURT DECISIONS:

1. Any person may be required against his or her will to appear before a grand jury. This is not a form of seizure protected by the Fourth Amendment.
2. Suspects may be required by the police to give voice exemplars. This requirement does not violate the Fifth Amendment privilege against self-incrimination.

REASONS:

1. “It is clear that a subpoena to appear before a grand jury is not a ‘seizure’ in the Fourth Amendment sense, even though that summons may be

- inconvenient or burdensome. . . . [W]e again acknowledge what has long been recognized, that ‘citizens generally are not constitutionally immune from grand jury subpoenas. . . . These are recent reaffirmations of the historically grounded obligation of every person to appear and give his evidence before the grand jury. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public.’”
2. “The physical characteristics of a person’s voice, its tone and manner, as opposed to the context of a specific conversation, are constantly exposed to the public. Like a man’s facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world.”

CASE SIGNIFICANCE: A suspect may be required to appear before a grand jury and can be forced to give a voice exemplar for the purposes of comparison with an actual voice recording. Neither the appearance before the grand jury nor the giving of a voice exemplar is a form of seizure that is protected by the Fourth Amendment. Appearance before a grand jury is a duty; therefore, non-appearance cannot be a constitutional right. In the case of a person’s voice, there is no reasonable expectation of privacy to it because a voice is constantly exposed and available to the public. Although not discussed directly in this case, the Court considers voice exemplars to be a form of physical (as opposed to testimonial) evidence and, therefore, not protected by the Fifth Amendment prohibition against self-incrimination. It is important for police officers to know that the prohibition against self-incrimination applies only to testimonial and not to physical evidence. Physical self-incrimination would, therefore, compel a person to appear in a police lineup against his or her will.

Manson v. Brathwaite 432 U.S. 98 (1977)

CAPSULE: The admission of testimony concerning a suggestive and unnecessary identification procedure does not violate due process as long as the identification possesses sufficient aspects of reliability.

FACTS: Glover (an undercover police officer) and an informant (Brown) went to an apartment building to buy narcotics from a known drug dealer (it was later determined that the officers did not make the drug purchase from the intended person). As they stood at the door, the area was illuminated by natural light from a window in the hallway. Glover knocked on the door, and a man opened the door 12 to 18 inches. Brown identified himself, and Glover asked for “two things” of narcotics and then gave the man \$20. The man closed the door and later returned and gave Glover two glassine bags. While

the door was open, Glover stood within two feet of the man and observed his face. At headquarters, immediately after the sale, Glover described the seller to two other officers; however, at that time, Glover did not know the identity of the seller. He described the seller as “a colored man, approximately five feet eleven inches tall, dark complexion, black hair, short Afro style, and having high cheekbones, and of heavy build. He was wearing at the time blue pants and a plaid shirt.” One of the officers suspected who the seller was, obtained a picture of Brathwaite from the Records Division, and left it in Glover’s office. Glover identified the person as the man who sold him narcotics two days before. Brathwaite was arrested in the same apartment building where the narcotics sale had occurred. Brathwaite was charged with possession and sale of heroin. At his trial, the photograph from which Glover had identified Brathwaite was admitted into evidence. Although Glover had not seen Brathwaite in eight months, “there [was] no doubt whatsoever” in his mind that the person shown in the picture was Brathwaite. Glover also made a positive in-court identification of Brathwaite. Brathwaite testified that, on the day of the alleged sale, he had been ill at his apartment, and at no time on that particular day had he been at the place of the drug deal. His wife, after Brathwaite had refreshed her memory, also testified that he was home all day. Brathwaite was found guilty of possession and sale of heroin.

ISSUE: Should pretrial identification evidence obtained by a police examination of a single photograph be excluded as evidence under the due process clause if it was thought to be suggestive and unnecessary, regardless of whether it was reliable? NO.

SUPREME COURT DECISION: “The admission of testimony concerning a suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability.”

REASON: Using a previous case, *Stovall v. Denno*, the Supreme Court concluded that reliability is the “. . . linchpin in determining the admissibility of identification testimony . . .” The factors for the court to consider for reliability were stated in *Neil v. Biggers*. The factors are: (1) the opportunity for the witness to view the criminal at the time of the crime, (2) the witness’ degree of attention, (3) the accuracy of his prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation. The Court then took the facts of the case and applied the five-factor analysis. Glover had a substantial opportunity to view Brathwaite as he stood within two feet of Brathwaite for two to three minutes while the man twice stood with the door open. Also, there was natural light entering a window in the hallway aiding the view. Furthermore, Glover was not a casual observer; and, being of the same race as respondent, it was unlikely he would perceive only general features. Glover then provided a very detailed description of respondent to the other officer immediately after the

sale and identified him from a picture two days later. Glover was also very positive in his identification of Brathwaite as he testified: “there is no question whatsoever.” The time between the crime and the confrontation was very short, as Glover gave his description to the officer immediately after the crime and positively identified Brathwaite only two days later by the photograph. The Court concluded: “[t]hese indicators of Glover’s ability to make an accurate identification are hardly outweighed by the corrupting effect of the challenged identification itself.”

CASE SIGNIFICANCE: The Supreme Court concluded that the five factors set forth in *Biggers* should be used to test the reliability of the identification. The opportunity to view asks whether the officer was at a distance adequate enough to examine the suspect and whether the officer had a sufficient amount of time to examine him or her, while also considering the environmental factors, such as daylight. The degree of attention refers to the amount of attention the officer placed on examining the suspect. This could be revealed in the accuracy of the description: did the officer provide a very detailed description of the suspect, such as Glover’s, or an undetailed description? The witness’ level of certainty describes how certain the officer was of his identification of the suspect after the alleged incident or crime occurred. Finally, the time between the crime and the confrontation or identification of the suspect is important because long periods of time between the crime and identification produce a greater likelihood of the officer forgetting the exact details that he first saw in the suspect, thus making the officer’s identification less reliable.

United States v. Crews 445 U.S. 463 (1980)

CAPSULE: A pretrial identification is illegal if the arrest is illegal; however, an in-court identification is admissible if the victim’s recollections are independent of the police misconduct.

FACTS: Immediately after being assaulted and robbed at gunpoint, the victim notified the police and gave them a full description of her assailant. Several days later, a man matching the description was seen by police near the scene of the crime. After an attempt to photograph him failed, he was taken to the police station, questioned briefly, photographed, and released. The victim identified the photograph as that of her assailant. Crews was then taken into custody and identified by the victim in a lineup. On a pretrial motion to suppress, the court ruled that the initial detention constituted an arrest without probable cause and that the photographs and lineup identifications were not admissible. The court, however, ruled that the courtroom identification by the victim was admissible. Crews was convicted of armed robbery.

ISSUE: Is the in-court identification of a suspect by a witness, when the identification is the result of a prior illegal arrest, admissible as evidence? YES.

SUPREME COURT DECISION: The pretrial identification of the suspect in a photograph and lineup are not admissible as evidence due to the illegal arrest. The in-court identification, however, is admissible because the victim's recollections were independent of the police misconduct.

REASON: The courtroom identification by the victim was wholly independent of any police misconduct. Aside from the fact that Crews was present in the courtroom, partially as the result of the illegal arrest, the prosecutor's case was established from the courtroom identification by the victim, which had nothing to do with the arrest. The conviction, independently established, was legal.

CASE SIGNIFICANCE: This case introduced the doctrine of "independent untainted source," an exception to the exclusionary rule. Under this exception, the police may use evidence related to an illegal search as long as it is not connected to the illegality. The Court said that the initial illegality (in this case the illegal detention of the suspect) could not deprive prosecutors of the opportunity to prove the defendant's guilt through the introduction of evidence wholly untainted by police misconduct. For example, a 14-year-old girl was found in the defendant's apartment during an illegal search. The girl's testimony that the defendant had sex with her was admissible because she was an independent source that predated the search of the apartment. Prior to the search, the girl's parents had reported her missing, and a police informant had already located her in the defendant's apartment (*State v. O'Brenski*, 70 Wash. 2d 425 [1967]). Note, however, that if the evidence has been tainted by police misconduct, such evidence cannot be admitted in court (*Wong Sun v. United States*, 371 U.S. 471 [1963]).