

Louisiana Law Review

Volume 28 | Number 2
February 1968

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Repository Citation

Cheney C. Joseph Jr., *Due Process at the Lineup*, 28 La. L. Rev. (1968)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol28/iss2/6>

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NOTES

DUE PROCESS AT THE LINEUP

Following most crimes of violence law enforcement authorities must rely heavily on what the victim says about the offender's physical features, clothing, and general demeanor. Often the only tangible link between the perpetrator and his crime is the memory of this victim or witness. Despite an officer's awareness of foibles of human memory, law enforcement officers often must rely on an immediate "lineup." This is the only practical manner by which investigators can test the strength of their case through the ability of the witness to identify the suspect in question. The victim might be swayed by suggestions that one or another is the right man in his eagerness to see the guilty party brought to justice. This factor, in addition to the "zeal" of the police officers to solve the case, bring into focus the dangers inherent in the lineup process.

In a series of companion cases the United States Supreme Court treated this problem.¹ In *United States v. Wade*,² the defendant was arrested for bank robbery. FBI agents conducted a lineup, requiring all the men to wear strips of tape similar to those worn by the robber and to speak words used by the robber. Two bank employees picked Wade out of the lineup. His appointed attorney was not informed of the lineup, however, and Wade was not given an opportunity to contact him. Defense counsel moved to strike the courtroom identification on the ground that the lineup violated Wade's fifth³ and sixth⁴ amendment rights. The Court of Appeals for the Fifth Circuit ordered a new trial excluding the in-court identifications.⁵ The Supreme Court then remanded the case to the district court for a hearing on the issue of whether the in-court identification could be based on independent recollections of the witnesses, untainted by the illegal line-up.

In *Gilbert v. California*,⁶ the defendant was placed in a

1. *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *Stovall v. Denno*, 388 U.S. 293 (1967).

2. 388 U.S. 218 (1967).

3. U. S. CONST. Amend. V: "No person . . . shall be compelled in any criminal case to be a witness against himself. . ."

4. *Id.* Amend. VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

5. 358 F.2d 557 (5th Cir. 1966), *cert. granted*, 385 U.S. 811 (1966).

6. 388 U.S. 263 (1967).

lineup and viewed by approximately 100 people without his attorney being notified or the defendant being advised of his right to have an attorney present. At trial two witnesses testified to their lineup identification and the courtroom identification. On appeal, the Court reversed the conviction and remanded as it did in the *Wade* decision. However, it further held that the lineup identification evidence could not be purged of taint as could be the in-court identification.

In *Stovall v. Denno*,⁷ a habeas corpus proceeding, the defendant alleged that his rights were violated when he was brought handcuffed to the hospital bedside of the victim, who was in critical condition and in danger of dying. He was not advised of the right to have counsel present at this confrontation. At the hospital he was forced to repeat certain words for voice identification, and the victim subsequently made a courtroom identification of the accused. The Court held that the procedures neither violated his privilege against self-incrimination nor deprived him of due process. *Stovall's* conviction was affirmed.

The Court's concern is to see that an accused person is viewed fairly by his victim without the presence of any suggestive influences.⁸ This problem was based upon three basic constitutional arguments: first, the defendant's privilege against self-incrimination is violated if he is required to stand in a lineup or to speak for identification; second, a lineup, in the absence of counsel, violates defendant's sixth amendment right to counsel; and third, the lineup, in the absence of counsel for the accused, violates "due process."

The Court summarily dispensed with the allegation that to place an accused in a lineup,⁹ make him speak,¹⁰ put on an article of clothing,¹¹ or assume a gesture¹² violates his privilege

7. 388 U.S. 293 (1967).

8. "The few cases that have surfaced . . . reveal the existence of a process attended with hazards of serious unfairness to the criminal accused and strongly suggest the plight of the more numerous defendants who are unable to ferret out suggestive influences in the secrecy of the confrontation." *United States v. Wade*, 388 U.S. 218, 234-35 (1967).

9. *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *Schmerber v. California*, 384 U.S. 757 (1966) (dictum); *Murray*, *The Criminal Lineup at Home and Abroad*, 1966 UTAH L. REV. 610.

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

11. *Holt v. United States*, 218 U.S. 245 (1910).

12. *People v. Lopez*, 60 Cal. 2d 223, 32 Cal. Rptr. 424, 384 P.2d 16 (1963), *cert. denied*, 325 U.S. 994 (1964).

against self-incrimination.¹³ This privilege only extends to evidence of a "testimonial or communicative nature" and not to physical or demonstrative evidence.¹⁴

Prior cases have avoided the issue of an accused's right to counsel at lineup.¹⁵ The *Massiah v. United States*¹⁶ and *Miranda v. Arizona*¹⁷ decisions held that the accused had a right to counsel at the "critical" interrogation stage of the proceedings.¹⁸ By "critical" the Court means that there is a risk that the absence of counsel might impair the defendant's ability to get a fair trial.¹⁹

In *Gilbert* the court rejected the defense's allegation that his sixth amendment right was violated by absence of counsel at the taking of handwriting exemplars on the grounds that there was only "minimal risk."²⁰ Since the lineup is a critical stage, however, the defendant there has a right to counsel.²¹

The right to counsel at a lineup will allow defense counsel to conduct a meaningful cross examination of the identifying witness at the trial.²² The attorney is in a far better position to reveal any possible unfairness or suggestion than is the accused.²³

13. In this respect the court relies heavily on its reasonings in *Schmerber v. California*, 384 U.S. 757 (1967), decided June 20, 1966, about one year prior to *United States v. Wade*, 388 U.S. 218 (1967). *Schmerber* was forced to give a sample of his blood which was, over objection of his attorney, introduced into evidence to prove his intoxication. See Note on *Schmerber* decision, 27 LA. L. REV. 329 (1967).

14. *Schmerber v. California*, 384 U.S. 757 (1966).

15. "[N]o court announced such a requirement until *Wade* was decided by the Court of Appeals for the Fifth Circuit." *Stovall v. Denno*, 388 U.S. 293, 299 (1967).

16. 377 U.S. 201 (1964).

17. 384 U.S. 436 (1966).

18. *Id.*

19. *United States v. Wade*, 388 U.S. 218 (1967); *Schmerber v. California*, 384 U.S. 757 (1966); *Miranda v. Arizona*, 384 U.S. 436 (1966).

20. "The taking of the exemplars was not a 'critical' stage of the criminal proceedings entitling petitioner to the assistance of counsel. Putting aside the fact that the exemplars were taken before the indictment and appointment, there is minimal risk that the absence of counsel might derogate from his right to a fair trial." 388 U.S. 263, 267 (1967).

21. In so holding the Court distinguished the *Schmerber* case as follows: "In contrast [to *Schmerber*] in this case (*Wade*) it is urged that the assistance of counsel at the lineup was indispensable to protect *Wade's* most basic right as a criminal defendant—his right to a fair trial at which the witnesses against him might be meaningfully cross-examined." *United States v. Wade*, 388 U.S. 218, 223-24 (1967).

22. "The presence of counsel at such critical confrontations, as at the trial itself, operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution. *Id.* at 227.

23. In *Wade* the court refers to the "plight of the more numerous defendants who are unable to ferret out suggestive influences." *Id.* at 234. "[A]s is the case with secret interrogations, there is serious difficulty in

He can be more objective about the proceedings than the often confused and frightened accused, especially in the case of the youthful suspect.

The presence of counsel may also protect the accused from being forced to take the stand in order to rebut police allegations based on evidence adduced from an unfair lineup.²⁴ Even if he does take the stand, the jury, absent an observing attorney, has only the defendant's unsupported version against the officer's version.²⁵

An earlier case held that an unfair lineup could make the identification of the defendant inadmissible.²⁶ In *Palmer v. Peyton*,²⁷ while the sheriff questioned the defendant in another room, the victim was allowed to listen after having been notified that a suspect was in custody.²⁸ The victim had told officers the assailant had a high childlike voice, but there were no other voices with which to compare the defendant's. The Fourth Circuit Court of Appeals felt this was so grossly unfair as to deny the defendant the due process of law.

However, in *Stovall v. Denno*²⁹ the identification was upheld by the Supreme Court despite the fact that the accused, handcuffed to one of five policemen, was the sole person observed. The confrontation necessarily took place at the critically wounded victim's hospital bedside.

Fairness in the lineup is the key point in the due process claim. The Court is afraid that the defendant, unassisted by an observing attorney, risks conviction by faulty identification. Thus right to counsel and due process claims are closely related to the lineup situation. It appears the right to counsel is extended to lineups to guard against unfair treatment which the un-

depicting what transpires at lineups and other forms of identification." *Id.* at 230.

24. "Even when he does observe abuse, if he has a criminal record he may be reluctant to take the stand and open up the admission of prior convictions." *Id.* at 231.

25. "Moreover, any protestations by the suspect of the fairness of the lineup made at the trial are likely to be in vain; the jury's choice is between the accused's unsupported version and that of the police officers present." *Ibid.*

26. *Palmer v. Peyton*, 359 F.2d 199 (4th Cir. 1966).

27. *Ibid.*

28. The defendant also had a high voice.

29. Because Mrs. Behrendt was hospitalized in critical condition and in danger of dying, the court felt "on the facts of this case petitioner was not deprived of due process of law in violation of the Fourteenth Amendment." 388 U.S. 293, 296 (1967).

assisted defendant might find difficult to recognize—and later, to prove.

The Court will require defendants to submit to scrutiny regarding their physical characteristics, i.e., voice, handwriting, size, fingerprints, and the like, as long as there is no danger that unfairness to the accused may result from the procedure employed. The lawyer is necessary to act as a "third pair of eyes" which will unveil the secrecy and bring out any unfairness practiced in the lineup process.

The Court has implied that procedures which insure uniform and fair treatment in a "meaningful confrontation"³⁰ may be sufficient to fulfill all constitutional requirements.³¹

Formulation of lineup procedures which might satisfy constitutional requirements without the presence of counsel deserves consideration. Convenience and efficiency in investigative work and availability of counsel, especially in indigent situations are not the only reasons for developing such procedures. Speedy release of suspects cleared by lineup is important.

Lineup procedures in accordance with the following suggestions should provide an obvious guarantee of fairness. The lineup must be so conducted that the identification can be made without unwarranted influence. To that end, all lineups should be photographed and each person should be photographed individually.³² All police departments should be required to maintain a room where lineups are to be held. They should be built to certain designated specifications and so constructed that the accused and victims cannot observe one another prior to the lineups. All subjects should be required to dress in identical fashion. Whenever possible, the defendant himself should be required to pick out the subjects who are to stand with him in the lineup.³³ This should help assure a physical resemblance between those in the lineup. The accused should be allowed to choose his position in the lineup. No less than three other subjects unknown to the viewer and the accused

30. *United States v. Wade*, 388 U.S. 218, 239 (1967).

31. "Legislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as 'critical.'" *Id.* at 239.

32. These photographs are to be full-length and of the faces.

33. Murray, *The Criminal Line-up at Home and Abroad*, 1966 UTAH L. REV. 610.

should constitute a valid lineup. The names, addresses, photographs, height, age, weight, and signature of participants should be made available to the defendant or his attorney.³⁴

The viewer should be required to write the number of the person identified on a plain slip of paper. He should also specify, whenever possible, what physical features or characteristics prompted his identification of the subject. This slip should be signed and dated by the witness and initialed by the officers and the accused.

In the event that circumstances are such that the procedures outlined are impossible to follow, a warrant should be obtained from a judge setting forth the specific circumstances surrounding the confrontation and the reasons why normal procedures could not be followed.

With these safeguards, the absence of counsel at a lineup will not impair the meaningful and effective cross-examination of eye witnesses concerning their recognition of the defendant. The uniform procedures and records of the lineup will reveal any irregularities. They will also insure the accused of a fair lineup which affords a reasonable choice to the witness attempting the identification. It will also avoid suggestion and influence, whether intentional or unintentional, which might affect the choice made by the witness. Such obviously fair procedures will eliminate any substantial risk of prejudice to the accused—thus possibly negating the contention that this is a "critical" stage of the proceedings where counsel must be afforded the defendant since the need for counsel will have been supplanted by proper legislative safeguards. This will provide law enforcement with a more expedient and efficient method of identifying and convicting the guilty while protecting the innocent.

Even if the Court should not accept such regulations as a full substitute for the right to counsel, the procedure would still serve a very significant function. Should waiver of counsel be given by the accused, the courts would be far more likely to find it was intelligent waiver where the procedure submitted to was obviously fair.

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34. This would insure the defense attorney that he could duplicate the lineup at trial if necessary in order to impeach the pretrial identification.

* Editor's Note—Mr. Joseph is an Administrative Assistant to the District Attorney for East Baton Rouge Parish. His investigative duties involve the use of lineups.