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Twenty-Years of Diminishing Protection: A Proposal to Return to the Wade Trilogy's Standards

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NOTES

TWENTY-YEARS OF DIMINISHING PROTECTION: A PROPOSAL TO RETURN TO THE WADE TRILOGY’S STANDARDS

I. INTRODUCTION

Twenty years have elapsed since the United States Supreme Court decided the landmark trilogy of pre-trial identification cases: United States v. Wade,1 Gilbert v. California,2 and Stovall v. Denno.3 These cases established that the denial of counsel to a defendant appearing in a pre-trial identification constituted a violation of the sixth amendment right to counsel,4 and that suggestive identification procedures could be violative of due process.5

Pre-trial identifications exist in three basic forms: the showup,6

4. Wade, 388 U.S. at 223-27. This Note does not address the right to counsel issue, and will mention it only in passing. See Massiah v. United States, 377 U.S. 201 (1964) (holding that the right to counsel begins once a person is formally charged by indictment or information); Miranda v. Arizona, 384 U.S. 436 (1966) (establishing that the sixth amendment right to counsel could be applied to protect other specific guarantees of the Bill of Rights). See generally Panel Discussion, The Role of the Defense Lawyer at a Lineup in Light of the Wade, Gilbert, and Stovall Decisions, 4 CRIM. L. BULL. 273 (1968); Read, Lawyers at Lineups: Constitutional Necessity or Avoidable Extravagance?, 17 UCLA L. REV. 339 (1969); Note, Protection of the Accused at Police Lineups, 6 COLUM. J.L. & SOC. PROBS. 345 (1970); Note, Lawyers and Lineups, 77 YALE L.J. 390 (1967) (all discussing the role of the defense lawyer at a lineup).
5. Stovall, 388 U.S. at 301-02.
the lineup, and the photographic identification. This Note concentrates primarily on the lineup, since it is the identification technique preferred by commentators, and the fairest form of identification for the defendant.

This Note first addresses the creation of the Supreme Court's due process standard for criminal identifications. The trend away from the Wade protections is then examined, as well as the effect that this trend has on lower federal courts. The development of the federal standard is then contrasted with the development of the New York State constitutional standard, which affords greater protection to defendants.

II. THE EARLY CASES: WADE, GILBERT, STOVALL, AND SIMMONS

In Wade the defendant was convicted of robbery after being identified in a lineup at which he was denied counsel. The defendant appealed, claiming that the lineup violated his fifth amendment privilege against self-incrimination, and his sixth amendment right to counsel. The Supreme Court, after dismissing the fifth amend-

7. In a lineup the suspect is placed with a number of other people, and the witness is then asked if he or she can identify which person, if any, is the suspect. The advantage of the lineup is that it provides the police with fairly strong evidence of identity, since the witness had a number of suspects from which to choose. See Williams & Hammelmann, Identification Parades-I, 1963 CRIM. L. REV. 479, 480.

8. Photographic identification exists in two forms. In the photo array, the witness is shown a number of photos simultaneously, one of which is of the suspect. This method is the photographic equivalent of a lineup, and is the preferable method. See Sobel, Assailing the Impermissible Suggestion: Evolving Limitations on the Abuse of Pre-Trial Criminal Identification Methods, 38 BROOKLYN L. REV. 261, 264 (1971). The second form is one in which the witness is shown only the defendant's photo, and is asked to make an identification. This method is analogous to a showup, and has been criticized by commentators. Id. See also N. Sobel, supra note 6, § 1.2, at 1-4 (Supp. 1985) (noting that this method indicates that the police believe that "that's the man").

9. See N. Sobel, supra note 6, § 1.2, at 5 (Supp. 1985); Sobel, supra note 8, at 264. The Lineup is nevertheless subject to manipulation. See Wade, 388 U.S. at 229 (stating "It is obvious that risks of suggestion attend either form of confrontation and increase the dangers inherent in eyewitness identification."). See also Williams & Hammelmann, supra note 7, at 481-90 (noting that reliability of lineups is not as great as it may seem); Note, Pretrial Identification Procedures—Wade to Gilbert to Stovall: Lower Courts Bobble the Ball, 55 MINN. L. REV. 779, 795 (1971) (noting that lineups can impart subtle suggestion).

10. See infra notes 15-58 and accompanying text.

11. See infra notes 59-108 and accompanying text.

12. See infra notes 109-126 and accompanying text.

13. See infra notes 127-202 and accompanying text.


15. Id. See U.S. CONST. amend. V: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

16. Wade, 388 U.S. at 220. See U.S. CONST. amend. VI: "In all criminal prosecutions,
ment claim,\textsuperscript{18} held that the denial of an attorney to the defendant during the lineup violated his constitutional right to counsel.\textsuperscript{19} Recognizing the seriousness of the lineup in the pre-trial proceedings, the Court noted that a lineup is a critical stage of a criminal proceeding,\textsuperscript{20} and that "the potential for substantial prejudice to the accused"\textsuperscript{21} exists because of "the dangers inherent in eyewitness identification."\textsuperscript{22} A critical issue which arose, after the finding of a constitutional violation, was whether to permit an in-court identification of the defendant.\textsuperscript{23} The defendant moved to strike the in-court identification, a sanction which would have greatly hindered the state's case.\textsuperscript{24} The Court, however, felt that such a sanction would be "unjustified,"\textsuperscript{25} and opted instead to follow the independent source rule\textsuperscript{26} which provides that the in-court identification would only be

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  \item the accused shall enjoy the right \ldots to have the Assistance of Counsel for his defense."
  \item Wade, 388 U.S. at 236-39. The sixth amendment issue is not relevant to this Note. For a thorough discussion of the effect of Wade on police lineups, see Note, Right to Counsel at Police Identification Proceedings: A Problem in Effective Implementation of an Expanding Constitution, 29 U. PITT. L. REV. 65 (1967). See generally supra note 4 and accompanying authority (discussing role of lawyers at lineups).
  \item Wade, 388 U.S. at 228.
  \item Id. at 232.
  \item Id. at 235.
  \item Id. at 220. During the course of a trial, it is an asset to the prosecution to have a victim or witness of a crime identify the suspect in front of the jury. This is known as the "in-court identification." See Sobel, supra note 8, at 267-68; Pulaski, Neil v. Biggers: The Supreme Court Dismantles the Wade Trilogy's Due Process Protection, 26 STAN. L. REV. 1097, 1097 (1974). This identification can be bolstered by testimony of a positive identification at a "pre-trial identification," such as a lineup. Bolstering strengthens the accuracy of the in-court identification in the minds of the jury. By testifying as to a previous identification, the witness appears doubly certain that "this is the man." See N. SOBEL, supra note 6, § 4.3, at 13-23. Since the prior lineup identification in Wade was elicited by the defense, testimony concerning it was not subject to suppression. Had the prosecution brought out testimony of the pre-trial identification on direct examination, then the conviction would have had to been reversed. See N. SOBEL, supra note 6, § 4.1(b), at 3 (Supp. 1986).
  \item Absent an in-court identification, the only way to connect the defendant to the crime is through documentary evidence, such as fingerprints, which can be harder to obtain and are less dramatic. Thus, in-court identifications play an important role in the prosecution's case. See Sobel, supra note 8, at 268; Note, Manson v. Brathwaite: Looking for the Silver Lining in the Area of Eyewitness Identifications, 35 WASH. & LEE L. REV. 1079, 1079 (1978).
  \item Wade, 388 U.S. at 240.
  \item An independent source gives the prosecution the opportunity to prove that the identification would have occurred even without the proper lineup. The independent source rule had previously been applied in other areas of criminal law. See Goldstein v. United States, 316 U.S. 114, 124 n.1 (Murphy, J., dissenting) (discussing application of independent source to
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permitted if the government could establish by "clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification." The Court considered a number of factors in determining whether an independent source existed:

- the witness' prior opportunity to observe the alleged crime;
- the existence of any discrepancy between any pre-lineup description and the defendant's actual appearance;
- identification by picture of the defendant by the witness prior to the lineup;
- any identification prior to the lineup of another person;
- failure by the witness to identify the defendant on a prior occasion;
- the time lapse between the alleged crime and the lineup.

The Court also noted that other facts which are disclosed concerning the lineup's conduct are relevant.

_Gilbert v. California_ presented the Court with a different issue than _Wade_. The defendant in _Gilbert_ was identified in a lineup which was viewed simultaneously by approximately one hundred persons, all victims of his robberies. This unconventional identification procedure was compounded by the fact that the defendant was not provided with a lawyer. Unlike _Wade_, where testimony concerning the pre-trial identification came out under cross-examination, the testimony in _Gilbert_ was elicited by the prosecution as part of its direct case. As a result, the admissibility of both the pre-trial and the in-court identifications was in question.

wiretapping).

27. _Wade_, 388 U.S. at 240.
28. _Id._ at 241.
29. _Id._
30. _Id._
31. _Id._
32. _Id._
33. _Id._
34. _Id_. The logic behind the independent source rule is compelling. Consider the case of a robbery victim who viewed his attacker for ten minutes in good light. Is his in-court identification more likely to be based on his memory of the robbery, or of a suggestive lineup? To prohibit his in-court identification because of a poorly conducted lineup would be carrying the sanction to an illogical extreme. See _Wade_, 388 U.S. at 251 (White, J., dissenting).
36. _Id._ at 269-71.
37. _Id._ at 269.
38. See supra note 23.
The Court, following the *Wade* analysis, held that admitting the in-court identifications without first determining whether they arose from an independent source was constitutional error.\(^{40}\) The question of the pre-trial identification was then addressed, and it was held that a per se exclusionary rule should be adopted;\(^{41}\) the prosecution would not be permitted to show an independent source for the pre-trial identification. As the Court reasoned, "Only a *per se* exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right . . . ."\(^{42}\)

There is a strong argument in favor of excluding an in-court identification. This type of exclusionary rule would force law enforcement officials to respect the accused's constitutional rights, or face the possibility of a not guilty verdict. Fearing that an exclusionary rule applied by itself would be too severe, however, the Court in *Wade* and *Gilbert* chose instead to establish a dual standard.\(^{43}\)

First, in-court identifications following an improper pre-trial lineup or showup\(^{44}\) will be permitted only if the prosecution can show that such in-court identification arises from an independent source;\(^{46}\) and second, testimony concerning an improper pre-trial identification is subject to a per se exclusionary rule, and will not be permitted.\(^{48}\) While both *Wade* and *Gilbert* were concerned primarily with the right to counsel, the third case in the trilogy, *Stovall v. Denno*\(^{47}\) focused on an entirely different matter and established the standard upon which this Note is based.

In *Stovall* the defendant was convicted of murder.\(^{48}\) After being arrested, he was taken to the hospital where the witness was recovering.\(^{49}\) While handcuffed to a police officer, he was identified by the witness.\(^{50}\) The use of this identification aided in the conviction. Thereafter, the defendant appealed, claiming violations of his sixth
amendment right to counsel and fifth and fourteenth amendment due process rights.\textsuperscript{51}

The Supreme Court was faced with the issue of whether the defendant's due process rights were violated because the state had allegedly failed to apply his fifth amendment rights adequately. In deciding this issue, the Court noted that a defendant is entitled to relief if the identification was "so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law."\textsuperscript{52}

A majority of the Court held that this showup, despite the defendant's having been viewed alone and in handcuffs, was not unnecessarily suggestive.\textsuperscript{53} The Court reasoned that the "totality of the circumstances"\textsuperscript{54} must be examined in determining suggestiveness.

While this standard gives some direction to the Court's position, room still exists for judicial interpretation.\textsuperscript{55} The Court stated a "totality of the circumstances" test without enumerating the requisite factors that should be used. The Court, in examining totality, looked only to the factors surrounding the identification.\textsuperscript{56} Factors bearing on the crime were not discussed, thus indicating that the \textit{Wade} standards for independent source, which include factors based on observation of the crime,\textsuperscript{57} were not to be applied to the totality test.

The reasoning behind this standard seems logical. If the lineup was not suggestive, then the pre-trial lineup testimony is permissible; if it was suggestive, then the testimony about it should not be allowed. In contrast, the in-court identification is likely to be a product of both the crime itself and the pre-trial identification. If, by meeting the independent source criteria set out in \textit{Wade}, it can be shown that the in-court identification rests primarily on remembrance of the

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\item \textsuperscript{51} \textit{Id.} at 296.
\item \textsuperscript{52} \textit{Id.} at 302 (citing Palmer v. Peyton, 359 F.2d 199 (4th Cir. 1966)). See Recent Cases, Criminal Procedure: Admissibility of In-court Identifications-Unnecessarily Suggestive Out-of-Court Identifications-Due Process, 11 AKRON L. REV. 763, 766-67 (1978).
\item \textsuperscript{53} \textit{Stovall}, 388 U.S. at 302.
\item \textsuperscript{54} \textit{Id.}
\item \textsuperscript{55} See United States ex rel. Phipps v. Follette, 428 F.2d 912, 914-915 (2d Cir.) (Friendly, J.) (stating that "Although at first sight (the \textit{Stovall} test) seems fairly simple and straight forward, it has given rise to difficult problems . . . "), cert. denied, 400 U.S. 908 (1970). See also Grossman, Suggestive Identifications: The Supreme Court's Due Process Test Fails to Meet Its Own Criteria, 11 U. BALTIMORE L. REV. 53, 55 (1981) (noting the Court's failure to define totality); Note, supra note 10, at 781 (finding "no precise guidelines").
\item \textsuperscript{56} The Court noted that the hospital was not far from the jail, that no one knew how long the witness would live, and that the witness could not visit the jail. \textit{Stovall}, 388 U.S. at 302.
\item \textsuperscript{57} See supra notes 28-33 and accompanying text.
\end{itemize}
crime, then the in-court identification is permissible. If the prosecution cannot meet the *Wade* criteria, then any in-court identification would be based on the improper lineup, and thus would not be permitted.

The importance of *Stovall* is that it helps to define the *Wade* and *Gilbert* rules by giving some meaning to the phrase “improper identification.” The *Stovall* rule would, therefore, be applied before the *Wade* and/or *Gilbert* rules: If a lineup is improper under *Stovall*, then *Wade* and/or *Gilbert* are applied; if the lineup is proper, however, *Wade* and *Gilbert* do not become an issue.

Despite the gains made by the *Wade* trilogy, further refinement was necessary to give lower courts guidance in applying the rules. The Supreme Court considered the identification issue again in *Simmons v. United States*, where it further defined the standards.

The defendant in *Simmons* was convicted of bank robbery after being identified through use of a photographic identification. The defendant challenged the use of the photographs as being so unduly prejudicial as to fatally taint his conviction. No challenge was made regarding the right to counsel, and the case did not involve testimony of the pre-trial identification. The challenge was solely to the in-court identification.

The Court began its analysis by allegedly following the *Stovall* “totality test.” The Court, however, delineated a more expansive definition of totality than the one established in *Stovall*. The identification would be set aside only if it “was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” While it was noted that this standard accords with the *Stovall* standard, it is, in reality, the beginning of the dismantling of the *Wade* trilogy’s protections. Substitution of the word “permissible” for “unnecessarily” creates the impression that what may be

58. If the witness would have been able to identify the suspect regardless of the improper lineup, the independent source rule would permit the in-court identification. See Sobel, *supra* note 8, at 268.


60. 390 U.S. 377 (1968).

61. *Id.* at 382.

62. *Id.* at 382-83.

63. See N. Sobel, *supra* note 6, § 3.1, at 2; Pulaski, *supra* note 23, at 1108 (noting that the reworded language of *Simmons* suggests a very different inquiry).

64. *Simmons*, 390 U.S. at 384.
“unnecessary” could still be “permissible.” Moreover, replacing “conducive to irreparable mistaken identification” with “a very substantial likelihood of irreparable misidentification” requires a much higher level of proof on the part of the defendant. Therefore, it appears that the two standards are not in accord, but rather in disharmony. Furthermore, if the Court was seeking a standard in accord with Stovall, it could have employed the Stovall standard verbatim.

As a second step in dismantling the trilogy, the Court looked to the circumstances of the crime itself in applying its reworded totality test. The Court is thus stating that the totality test looks not merely at the totality of the identification procedure, but also to the totality of the crime. When the test was first articulated in Stovall, the Court did not look to the crime. The Court’s inclusion of factors surrounding the crime in Simmons, however, makes it easier to justify an in-court identification; the witness’ identification can be based on his or her observations of the crime, which are easier to prove than the existence of an unbiased lineup.

The dismantling of the Wade-Gilbert-Stovall trilogy had thus begun. Two more cases were decided which continued the dismantling trend set in the Simmons decision: Neil v. Biggers and Manson v. Brathwaite.

III. THE LATER CASES: BIGGERS AND BRATHWAITE

Four years elapsed before the Court further defined the totality standard. Neil v. Biggers marked a shift away from the original intent of Wade and continued the dismantling process begun in Simmons.
In *Biggers*, the defendant was convicted after a suggestive station house identification procedure which consisted of two detectives walking the defendant past the victim.\(^{75}\) The defendant objected to the victim’s in-court identification and her testimony concerning the pre-trial identification.\(^{76}\)

The Court, perhaps in reaction to criticism being voiced by the lower federal courts,\(^ {77}\) gave its fullest enunciation of the totality test to date. Three major points were made, all of which inured to the benefit of the prosecution.

First, the Court held that any suggestiveness in the identification alone does not require the exclusion of pre-trial evidence, and that the deciding issue is that of the identification’s reliability, determined under the totality of the circumstances.\(^ {78}\) While suggestive confrontations are “disapproved” and unnecessarily suggestive ones are “condemned,” the Court held that they nevertheless may be admissible if the identification was reliable.\(^ {79}\) In other words, police misconduct will be tolerated as long as it does not affect reliability.\(^ {80}\) The focus thus moves away from what the police did wrong (suggestiveness) to what is left after discounting police errors (reliability). As a result, the defendant’s rights are further diminished, and the *Gilbert* sanctions, which were designed to protect the defendant’s interests, have been effectively reduced.

Second, five factors were given for evaluating the totality test: (1) the opportunity of the witness to view the criminal at the time of the crime;\(^ {81}\) (2) the witness’ degree of attention during the crime;\(^ {82}\) (3) the accuracy of the witness’ prior description of the accused compared to his actual appearance;\(^ {83}\) (4) the level of certainty demonstrated by the witness at the confrontation;\(^ {84}\) and (5) the length of

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\(^{75}\) *Biggers*, 409 U.S. at 195.

\(^{76}\) Id. at 193.

\(^{77}\) See supra note 55; see also Clemons v. United States, 408 F.2d 1230 (D.C. Cir. 1968) (en banc) (opinions of McGowan, Leventhal, and Wright, JJ.), cert. denied, 394 U.S. 964 (1969) (discussing problems arising in the application of the *Stovall* due process test).

\(^{78}\) *Biggers*, 409 U.S. at 198-99.

\(^{79}\) Id. at 198.

\(^{80}\) The Court in *Biggers* was more concerned with unreliable evidence being used than with unreliable procedures. See Note, supra note 59, at 466-67; Note, supra note 24, at 1083 n.44 (noting a shift from suggestiveness of the procedure to the reliability of the identification).

\(^{81}\) *Biggers*, 409 U.S. at 199 (numbers added).

\(^{82}\) Id.

\(^{83}\) Id.

\(^{84}\) Id.
time between the crime and the confrontation. 85

Three of the factors were taken from the Wade independent source test. 86 By expanding the totality test to include two additional factors, it is easier to dilute the wrongdoings which occurred in the identification procedure. Thus, police misconduct during the lineup can be explained within the context of the crime itself. 87

Finally, the Court in Biggers held that the test to be used is one which weighs the totality of the circumstances surrounding the lineup against the level of suggestiveness present in the lineup. 88 As a result, the Court moved from the relatively objective tests of Gilbert and Stovall to a subjective test. 89 The Biggers test first requires the determination of suggestiveness under an expansive reading of the totality test, and then, even if the lineup is found to be suggestive, it may still be used, if, after weighing all the factors surrounding the lineup, it is found to be reliable. Biggers, therefore, makes it difficult for the defendant to prove suggestiveness, while at the same time making it easier for the prosecution to use a suggestive identification. 90 The courts are thus able to dismiss flagrant violations on a finding of reliability, 91 and the police have little to fear concerning the suppression of suggestive identifications. 92

The Court completed the demise of the Wade trilogy in its latest identification case, Manson v. Brathwaite. 93 In Brathwaite, the defendant was identified from a single photograph left by a police

85. Id. at 199-200.
86. The second, third, and fifth factors were taken from the Wade independent source test. See supra notes 28-33 and accompanying text.
87. By expanding the number of factors in evaluating reliability, the weight of each factor, including police misconduct, is reduced. See Grossman, supra note 55, at 108 (noting that factors outside police control are often determinative under the expanded test); Sobel, supra note 8, at 289 (suggesting that external factors which focus on an identification's accuracy should not be considered).
88. A substantial likelihood of misidentification must exist for a due process violation to be found. Biggers, 409 U.S. at 201.
89. By allowing witnesses to evaluate their own biases and by permitting judges to determine the impact of subtle suggestion, the Biggers Court's test for reliability is a highly subjective and impractical standard. See Note, supra note 59, at 472.
90. The Biggers Court's major concern was not the use of suggestive procedures, but unreliable identifications. See Recent Cases, supra note 52, at 769; Note, supra note 24, at 1084 n.48 (suggesting that the burden shifts from the prosecution having to prove a fair identification procedure to the defense having to prove an unreliable identification).
91. See Grossman, supra note 55, at 60-61.
92. Id. at 68-69.
Brathwaite marks the official end of the Gilbert per se rule. A majority of the Court held that the rule went too far in its application because it kept reliable and relevant evidence from the jury. The Court reconsidered the Gilbert rule's automatic application, and desired the inclusion of alleviating factors.

Brathwaite additionally held that "[t]he standard, after all, is that of fairness as required by the Due Process Clause of the Fourteenth Amendment." Whether fairness is different than reliability is not mentioned, and no criteria for determining fairness are provided.

The Court further held that "reliability is the linchpin in determining the admissibility of identification testimony . . . ." Reliability is to be determined by weighing the Biggers factors against the corrupting influence of the suggestive identification. Like the Biggers balancing test, the Brathwaite test continued the trend away from Wade. In Biggers, totality is weighed against the level of suggestiveness. In Brathwaite, totality is weighed against the influence of suggestiveness. The prosecution is now free to argue that even if suggestiveness was present, it did not influence the witnesses when they viewed the lineup. Admissibility is not based on police wrongdoings, but on the reliability of the identification.

94. Id. at 101.
95. See supra note 8.
96. Brathwaite, 432 U.S. at 102.
97. Id. at 112.
98. The Court did not enunciate what these factors might be. Id. at 112. Additionally, the Court failed to note the desirability of such an automatic rule; its simplicity of use by the lower courts and its fairness to the defendant in that it leaves little room for subjective manipulation. The Court did note that the per se rule has the more significant deterrent effect, but held that the expanded totality approach also has an "influence" on police behavior. The Court ignored the difference between a deterrent and a mere "influence." Id.
99. Id. at 113.
100. See Grossman, supra note 55, at 58 (noting the Court's failure to articulate what constitutes suggestion).
102. See supra notes 81-85 and accompanying text.
103. Brathwaite, 432 U.S. at 114. See Recent Cases, supra note 52, at 775 (analyzing whether the corrupting effect is outweighed by the Biggers reliability factors).
104. Biggers, 409 U.S. at 201.
105. One commentator has suggested that the permissive due process test provides the prosecution with the means by which it may introduce at trial identification evidence obtained during tainted pretrial proceedings. See Pulaski, supra note 23, at 1114.
106. See N. Sobel, supra note 6, § 3.3(b), at 9 (Supp. 1984) (stating that admissibility...
The dismantling of the *Wade* trilogy was completed with the *Brathwaite* decision. As Justice Marshall, dissenting in *Brathwaite* lamented, “Today's decision can come as no surprise to those who have been watching the Court dismantle the protections against mistaken eyewitness testimony erected a decade ago in [*Wade, Gilbert, and Stovall*].”

IV. LOWER FEDERAL COURT DECISIONS POST-*BRATHWAITE*

The effect of *Brathwaite* can plainly be seen in a number of recent federal cases, two of which are discussed below.

*Carter v. Scully* combines the fact patterns of both *Stovall* and *Brathwaite*. The victim, while hospitalized, was shown a single photograph of the defendant, and made a positive identification. The defendant contested the resulting in-court identification, contending that it was irreparably tainted by the photographic showup.

Had this case been decided at the time of *Gilbert*, the court most likely would have found the identification to have been suggestive. Consequently, the case would have been remanded to determine if there was an independent source under the *Wade* criteria. Since the case was decided after *Brathwaite*, the court held that the *Simmons* standard was to be applied. Noting the recent federal developments, the majority held that “[t]his analysis has been further refined by [*Biggers* and *Brathwaite*] requiring courts to consider whether, despite a suggestive confrontation, an identification is reliable under the ‘totality of the circumstances.’”

The court then proceeded to apply the rules from *Biggers* and *Brathwaite*. After weighing all the *Biggers* factors, the court concluded that “there was no substantial likelihood of irreparable mis-

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107. Commentators have been highly critical of *Brathwaite*, noting that it has eliminated the protections provided by the *Wade* trilogy. See N. SOBEL, supra note 6, § 1.5, at 10, § 3.3(b), at 9; Decker, Moriarty, & Albert, The Demise of Procedural Protection in Laywitness Identifications in Federal Court: Who Is the Culprit?, 9 Loy. U. Chi. L.J. 335 (1978).


109. See cases cited in N. SOBEL, supra note 6, § 4.2(d), at 8-13. Compare *Allen v. Estelle*, 568 F.2d 1108 (5th Cir. 1978) (permitting reliable testimony despite suggestive procedure) with United States v. Mann, 557 F.2d 1211 (5th Cir. 1977) (excluding identification testimony because it was unreliable).


111. *Id.* at 628.

112. See supra notes 28-33 and accompanying text.

113. See supra note 64 and accompanying text.


115. See supra notes 81-85 and accompanying text.
identification,"\textsuperscript{116} and that the identification procedure was reliable. There was no need to proceed to the second step outlined in \textit{Brathwaite}, determining the weight of the suggestive influence, since no suggestive influence was found to exist. Later in the same opinion, however, the court agreed with the trial court’s finding that there was an independent source for the identification,\textsuperscript{117} a criterion not required until after the second \textit{Brathwaite} step, which itself was not required. The Court seems to have confused the totality test\textsuperscript{118} with the independent source test of \textit{Wade}\.\textsuperscript{119} Totality applies to pre-trial identifications, while independent source applies to in-court identifications. If the identification is reliable under the totality test, then independent source becomes irrelevant and need not be determined.

Another recent case involving the application of \textit{Brathwaite} is \textit{United States v. Shakur}\.\textsuperscript{120} The defendants moved to dismiss all pre-trial and in-court identification testimony based on a number of alleged improprieties,\textsuperscript{121} the most important of which was the use of allegedly obvious phony beards on the stand-ins in the lineup.\textsuperscript{122}

The court noted that “reliability is the linchpin” in determining the admissibility of identification testimony, and that reliability is to be determined by the “totality of the circumstances.”\textsuperscript{123} The \textit{Biggers} factors were then enumerated,\textsuperscript{124} which would seem to constitute the totality test. The balancing tests used in \textit{Biggers} and \textit{Brathwaite}, however, were not mentioned, and thus it appears that this court is moving away from the subjective Supreme Court view. A simple application of the \textit{Biggers} factors, without considering the effect of any suggestiveness or without balancing the facts with any influence, is a more objective way of determining reliability.

\textit{Shakur} posed an interesting objection to the lineup; the fake beards placed on some of the lineup participants were alleged to be suggestive as they were obviously phony.\textsuperscript{125} Rather than examine the totality of the lineup, the totality of the crime, or the influence ef-

\begin{thebibliography}{9}
\bibitem{116} \textit{Carter}, 557 F. Supp. at 630.
\bibitem{117} \textit{Id}.
\bibitem{118} \textit{Biggers}, 409 U.S. at 199-200. Suggestiveness is determined by the totality of the circumstances.
\bibitem{119} Even if the pre-trial identification was suggestive, the in-court identification will be allowed if an independent source is established. \textit{Wade}, 388 U.S. at 240-41.
\bibitem{120} 560 F. Supp. 353 (S.D.N.Y. 1983).
\bibitem{121} \textit{Id} at 354.
\bibitem{122} See \textit{infra} notes 125-26 and accompanying text.
\bibitem{123} \textit{Shakur}, 560 F. Supp. at 356 n.5.
\bibitem{124} \textit{Id}.
\bibitem{125} \textit{Id} at 357.
\end{thebibliography}
fected, the court proposed a more simple, objective test: fake beards worn by stand-ins in a lineup do not render the lineup unduly suggestive when a determination of which stand-ins were wearing the false beards could not be made from an examination of a photograph of the lineup. Such a standard is admirable for its simplicity and objectivity, as it does not involve the weighing of factors or a balancing test. This standard does not require a reading of the witness’ minds, or an evaluation of the crime, but simply a neutral third party’s judgment.

While Biggers and Brathwaite have given some shape to the identification standards to be applied by the courts, these decisions have made it more difficult for defendants because, as a result, the case law in the past twenty years has taken on a position favorable to the prosecution. The importance of the Wade trilogy has been minimized.

V. EVOLUTION OF THE NEW YORK IDENTIFICATION STANDARD

States cannot provide individuals with fewer due process rights than those provided under the Constitution; individual states, however, are permitted to provide greater protection. Thus, as a result of the Wade decision, New York was forced to determine how much protection it should provide to defendants in criminal identification cases.

One of the first post-Wade identification cases to be decided in New York was People v. Ballot. In Ballot, the defendant was exhibited alone before the robbery victim, and instructed to wear clothing similar to that worn by the criminal. While the Court of Appeals noted that Wade was not to be applied retroactively, and thus not applicable to the instant case, it held that “a pretrial identifi-

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126. Id.
127. See Brathwaite, 432 U.S. at 128-29 (Marshall, J., dissenting) (noting that the state courts remained free to interpret their own state constitutions to provide greater protection); Recent Cases, supra note 52, at 775 (inviting states to depart from Brathwaite and establish, under their state constitutions, a rule calling for the most reliable methods to be used). See generally Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977) (discussing greater protections available under state constitutions).
129. Id. at 603, 233 N.E.2d at 104, 286 N.Y.S.2d at 3.
130. Id. at 605, 233 N.E.2d at 106, 286 N.Y.S.2d at 5. The court followed the decision in Stovall, to not apply Wade and Gilbert retroactively. In Stovall, the defendant’s habeas corpus proceeding collaterally attacked his state conviction for the same errors alleged in Wade and Gilbert, both of which reached the Court on direct review. Stovall thus gave the Court the option to apply Wade and Gilbert retroactively, which it declined to do.
cation procedure, even though not violative of the defendant's right to counsel . . . may be so unfair as to amount to a denial of due process of law. Since it was faced with the question of excluding an in-court identification, the court properly directed the trial court to apply the independent source test, and remanded the case.

The Court of Appeals was again faced with the issue of a tainted identification in People v. Logan. The defendant urged that the pre-trial identification was unnecessarily suggestive and conducive to erroneous identification and, therefore, it violated his Stovall due process rights. The Logan court noted that the test to be used is one of "fairness," a standard adopted by the Supreme Court eight years later in Brathwaite. The totality of circumstances were considered, including the defendant's arrest and the identification of his car, and the court held that the pre-trial identification was not so "unfair" as to violate due process.

This case seems to be in accord with Simmons' view of totality which includes events extraneous to the identification, but the court's rationale is unclear. The defendant urged the court to use the Stovall standard, but after looking to the totality test, the court merely announced that the identification was not unfair. Whether the court's decision means not suggestive, suggestive but permissibly so, or something else, is left to individual interpretation.

People v. Lebron, decided five years after Logan, is a rare case because all identifications, both pre-trial and in-court, were supp-

The Court felt that the Wade and Gilbert holdings were not foreshadowed; that law enforcement officials had acted on the premise that the Constitution did not require the presence of counsel at pre-trial identifications; and that law enforcement authorities fairly relied on the weight of authority.

131. ballot, 20 N.Y.2d 605-06, 233 N.E.2d 106, 286 N.Y.S.2d at 5. Both New York as well as federal cases (including Stovall) were cited in support of this contention.

132. id. at 607, 233 N.E.2d at 107, 286 N.Y.S.2d at 7.


134. id. at 186, 250 N.E.2d at 455, 303 N.Y.S.2d at 355.

135. id. at 191, 250 N.E.2d at 457, 303 N.Y.S.2d at 358.

136. See supra note 99 and accompanying text.

137. Logan, 25 N.Y.2d at 192, 250 N.E.2d at 458, 303 N.Y.S.2d at 359.

138. id. at 193, 250 N.E.2d at 458, 303 N.Y.S.2d at 359.

139. See supra notes 69-70 and accompanying text.

140. Logan, 25 N.Y.2d at 193, 250 N.E.2d at 458, 303 N.Y.S.2d at 359.

141. The court properly noted, however, that once the identification was found to be fair, no further inquiry, namely the Wade independent source test, was necessary. id.

pressed. The defendant, a Hispanic, was convicted of murder and attempted robbery after being placed in a lineup with four other men, all of whom were Caucasian and only one of whom possibly resembled him. The court, perhaps because of the clearly apparent nature of the suggestive conduct, did not spell out the test it used to determine suggestiveness, but merely stated the facts and arrived at the conclusion that the lineup was "unduly suggestive." The opinion later notes, however, that the lineup was "unnecessarily suggestive," possibly indicating a reliance on the Stovall standard.

Interestingly, in determining fairness, no reference was made to totality, the test used earlier in Logan, or to the Biggers reliability standard and balancing test. The fact that the court looked only to the lineup itself and not to the mitigating factors examined in Logan and Biggers may indicate a preference for a simpler, more objective test, which is contrary to the practice that developed in the federal courts.

Having concluded that the lineup was suggestive, the court then followed the precedent set in Ballot and applied the Wade independent source test. The court, in a rare decision, found that no source for an independent identification had been proven to exist, and, as a result, a total suppression of identification testimony was ordered.

Any divergence from the federal standard which may have existed in Lebron disappeared in People v. Smith, which marked a return to the more lenient federal standard. After being apprehended as a suspect in a bank robbery, the defendant was driven to the bank and identified by the witness while he was sitting in the back of the police car next to another man. In response to the defendant's contention that the showup was improperly suggestive, the court re-
turned to the fairness standard of *Logan.* The *Smith* court measured fairness by the “reasonableness of the police actions in light of the surrounding circumstances.” This test was an entirely new formula. It did not weigh the suggestive effect of the lineup vis-à-vis totality, but whether the police action was reasonable within the total circumstances of the case. This was the first and last appearance to date of this test.

The trend toward the federal standard continued in *People v. Walker.* In *Walker,* the defendant was captured by a rape victim’s friends, who then turned him over to the police and identified him. This constituted the sole in-person, pre-trial identification. Citing post-Simmons state and federal decisions, including *Brathwaite* and *Smith,* the court concluded that the due process protection is one against unreliable evidence rather than the use of unreliable procedures. If the evidence of an identification is reliable, it does not matter that the procedures used to obtain it were unreliable. This indicates a complete departure from the concepts of the *Wade* trilogy, which provided sanctions aimed directly at unreliable police

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153. The court held that a denial of due process results from an unfair identification procedure and that fairness is measured “in light of the surrounding circumstances.” *Id.* at 755, 404 N.Y.S.2d at 747. This is an entirely different test than that applied in *Lebron.* *Id.* While not citing to *Brathwaite,* *Smith* post-dates *Brathwaite* and could reflect the *Brathwaite* court’s approval of the fairness standard. As further evidence of this possibility, the *Smith* opinion notes that “instantaneous show-up identifications . . . are productive of reliable identifications,” *Id.* at 755, 404 N.Y.S.2d at 747 in much the same way that *Brathwaite* held that “reliability is the linchpin.” 432 U.S. at 114. The focus in *Smith* shifts from the reliability of the procedures to the reliability of the identification.


156. *Id.* at 172, 411 N.Y.S.2d at 157.

157. In a curious twist, the court noted that a common justification for showups which are conducted at the scene is that such on-scene showups are apt to be productive of reliable identifications, since there is such a short delay factor between the crime and identification. *Id.* at 173, 411 N.Y.S.2d at 158. *Contra* Pulaski, *supra* note 23, at 1104 (stating that one person showups are particularly conducive to misidentification); Note, *supra* note 10, at 782 (severely criticizing showup practices); Note, *Due Process Considerations in Police Showup Practices,* 44 N.Y.U. L. Rev. 377, 392 (1969) (discussing dangers in showups); Note, *supra* note 24, at 1082 n.32 (noting that showups are often presumed suggestive). While it may be true that the short delay between the crime and the identification may be helpful, it is also true that the mental state of the victim shortly after the crime is not one productive to fair and unprejudiced reasoning, especially in the context of a showup.

In a recent development, Manhattan State Supreme Court Justice Atlas held that model Marla Hanson’s on-the-scene identification of the two men who allegedly slashed her face was the product of an unduly suggestive showup, and thus had to be suppressed. In contrast to the *Walker* holding, Justice Atlas said, “It is clear that on-the-scene show-ups are suggestive. They imply that the police suspect the person presented.” *Model’s ID of 2 Rejected,* New York Newsday, Feb. 27, 1987, at 9, col.4.
procedures. The *Walker* court further held that the concept of per se suggestiveness, as applied to an in-court identification, "is not, and has never been the law" in New York. New York applies the independent source rule which allows an in-court identification despite a suggestive lineup, something a strict per se rule would not allow. The court went on to discuss reliability (*Biggers*) and fairness (*Brathwaite*) and stated that the *Wade* hearing should perhaps now more aptly be called a *Biggers/Brathwaite* hearing. This is strong judicial testimony concerning the change in judicial thinking from the *Wade* protections to the *Brathwaite* leniency.

The trend towards New York's adoption of *Brathwaite* reached its apex in *In re Mark J.*, where the victim was robbed by three black youths, one of whom was the defendant. A lineup was later conducted at the scene, with the three black youths and two white youths. The victim identified the three black youths as the ones who had robbed her. In a well-reasoned opinion, Judge Aileen Schwartz identified the threshold issue as being whether *Brathwaite* represents the New York standard governing pre-trial and in-court identifications, or whether a more protective due process test, namely the one established in the *Wade* trilogy, is mandated by New York law. In order to determine this, Judge Schwartz conducted a thorough survey of both the federal and New York case law, and reached a number of conclusions.

First, the court noted the indecisiveness of the Court of Appeals, stating, "[T]here has been no definitive statement by the [New York

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158. *See* *Gilbert*, 388 U.S. at 273.
160. *A Wade* hearing occurs when a question arises concerning an identification procedure that has possibly violated a constitutional right. The hearing is made outside the presence of a jury, and concerns not the in-court identification, but only the pre-trial identification. It is provided for by statute in New York, N.Y. CRIM. PROC. LAW § 710 (McKinney 1984), and in many other jurisdictions. *See, e.g.*, IND. CODE ANN. § 35-36-8-3 (West 1986); LA. CODE CRIM. PROC. ANN. art. 703 (West 1981); TEX. CODE CRIM. PROC. ANN. art. 28.01 (Vernon 1987); WIS. STAT. ANN. § 971.31 (West 1985). *See also* Sobel, *supra* note 8, at 318-21 (discussing the procedures involved in a suppression hearing).
162. 96 Misc. 2d 733, 412 N.Y.S.2d 549 (Fam. Ct. 1979).
163. *Id.* at 734, 412 N.Y.S.2d at 549-50.
164. The lineup took place approximately one half hour after the robbery. While the victim originally described the three youths as boys from nine to twelve years old and from four foot six to five feet three inches tall, the youths she identified were from fourteen to over sixteen years old, and were estimated by a police witness to be from five feet to five feet four inches tall. *Id.* at 735-36, 412 N.Y.S.2d at 550.
165. *Id.* at 736, 412 N.Y.S.2d at 550.
Court of Appeals] addressing the *per se* exclusionary rule vs. [sic] the 'reliability under the totality of the circumstances' rule debate subsequent to *Manson v. Brathwaite...* 166 While there seems to be no such definite statement, the development of the New York case law on the subject paralleled federal case law, as seen through the cases discussed above.

Second, the court noted that while the cases do not articulate a fixed doctrine defining the New York standard, they do indicate a preference for the reliability under the totality of the circumstances test, citing *Logan* and *Ballot* as supporting this theory. 167 In reaching this conclusion, *Logan* was of major importance because it was viewed as a precursor to *Brathwaite*. 168 Apparently of the opinion that the federal law was paralleling the New York law, instead of the other way around, the court concluded that *Brathwaite* was the governing law in New York. 169 Choosing to ignore *Lebron*, 170 the court held that *Logan* was the landmark case in New York on the subject, noting that it was often cited. 171 The emphasis in *Logan* was on fairness, which was the same standard used in *Brathwaite*. Therefore, the *Brathwaite* fairness holding was said to be controlling.

Third, the *Mark J.* opinion applied the *Brathwaite* criteria in a step-by-step analysis and then weighed the affect of those criteria vis-a-vis the suggestive lineup. The evidence did not permit a finding of a very substantial likelihood of irreparable misidentification, and the pre-trial identification was held to be reliable. 172 Considering the facts of the lineup (three black suspects with two white stand-ins), a contrary result would likely have been reached if a *per se* standard had been applied.

*People v. Johnson* 173 marked the beginning of a trend away from the permissiveness of the *Brathwaite* standard. The defendant in the case was the only suspect in a lineup wearing a plaid jacket, which had figured prominently in the witness' description of the sus-

166. *Id.* at 742, 412 N.Y.S.2d at 554.
167. *Id.* at 743, 412 N.Y.S.2d at 555.
168. The court held, "*People v. Logan...* in language and substance represents the 'reliability under the totality of the circumstances' approach as later enunciated in *Manson v. Brathwaite...*" *Id.*
169. *Id.*
170. The court noted that "notwithstanding other New York decisions seeming to apply a *per se* exclusionary standard" *Logan* was the controlling New York case. *Id.*
171. *Id.*
172. *Id.* at 744-45, 412 N.Y.S.2d at 556.
While the trial court found this was not impermissibly suggestive, the appellate court held that it was unnecessarily suggestive, indicating that the court did not consider the two standards to be equivalent, and indicating a shift back toward the Wade standard. In addition, neither Logan nor Brathwaite, supposedly the two controlling cases in New York, were used as authority, but Lebron, a case which did not look to totality or reliability, was cited. Moreover, the Johnson court looked only to the lineup itself. The focus on the lineup would seem to point toward a disapproval of Brathwaite as controlling authority in New York. Though the suggestiveness prohibited testimony concerning the pre-trial identification, independent source was found, so that an in-court identification was not suppressed. This decision is in accord with the Walker holding that a strict per se rule, as applied to an in-court identification, is not the New York law.

People v. Adams is perhaps the most important New York case on the subject of pre-trial identifications. The defendant and two co-defendants were identified in a showup in which they were the only participants, with a police officer holding them from behind. The New York Court of Appeals first held that the trial court’s determination of independent source was supported by sufficient evidence and thus beyond review. The opinion went on to state, however, that “under no view of the evidence could it be said that the station house identification was not suggestive.” The court reviewed the circumstances of the showup in some detail, but did not consider it necessary to include factors outside of the showup. No reliability tests were made, no balancing test, and no standards were

174. *Id.* at 618, 433 N.Y.S.2d at 479.
175. *Id.*. The trial court was apparently using the Simmons standard. See supra notes 60-70 and accompanying text.
177. See supra note 63 and accompanying text.
179. *Id.*
180. *Id.*
181. See supra note 159 and accompanying text.
183. In addition to the defendants being the only showup participants, the witnesses were informed by a police officer that he thought they had the robbers. *Id.* at 246, 423 N.E.2d at 381, 440 N.Y.S.2d at 903.
184. *Id.* at 248, 423 N.E.2d at 382-83, 440 N.Y.S.2d at 905.
185. *Id.*
Having concluded that an independent source existed (thus permitting an in-court identification), and that the pre-trial identification was suggestive, the court was left to decide whether testimony of the pre-trial identification should be allowed.

If the Court of Appeals had followed Brathwaite, as the family court had done in Mark J., there is a chance that the identification would have been allowed. Contrary to Mark J., however, the court in Adams stated, "We have never held that it is proper to admit evidence of a suggestive pretrial identification. Indeed it seems to have been understood . . . that a pretrial identification would not be admissible if the procedures were unnecessarily suggestive." The use of the phrase "unnecessarily suggestive" implies that the Stovall standard is to be used, and the entire statement appears to indicate a return to the Gilbert per se exclusionary rule for pre-trial identifications.

Judge Wachtler justified this position by noting that the New York Court of Appeals was concerned with the risk of misidentification "[l]ong before the Supreme Court entered the field," and that "the State Constitution affords additional protections above the bare minimum mandated by Federal law." The Court of Appeals held that the per se rule was necessary to reduce the risk that an innocent person would be convicted as a result of suggestive identification procedures.

People v. Sapp followed the Adams standard and applied it to a case in which the defendant was the only member of a lineup wearing a "lamb jacket," which had figured "prominently" in the witness' description. The lineup was found to be unnecessarily suggestiveness.

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186. Id.
187. Id. at 251-52, 423 N.E.2d at 384, 440 N.Y.S.2d at 907.
188. Id. See N. SOBEL, supra note 6, § 4.2(d), at 11 (Supp. 1986) (noting that New York, under its state constitution, holds to its pre-Brathwaite analysis).
190. Id.
191. Cooke, C.J., concurring in a separate opinion, in which Gabrielli, J., joined, noted that the Adams decision created a separate state constitutional rule, based on a per se exclusionary standard. They found the Brathwaite rule to be "far preferable" in that it would admit "reliable out-of-court identifications." Id. at 252, 423 N.E.2d at 384, 440 N.Y.S.2d at 907.
193. Id. at 784, 469 N.Y.S.2d at 804. The use of the word "prominently" would indicate that a lineup involving clothing which was just one part of a lengthy description would not lead to suggestiveness should the suspect be wearing it at the time of the identification. See Plummer v. State, 270 Ark. 11, 603 S.W.2d 402 (1980) (holding lineup proper, despite defendant's wearing clothes almost identical to those reported in witness' description, because the clothes were of little significance in witness' identification); Griffin v. State, 356 So. 2d 723...
suggestive, and thus, following Adams, testimony concerning the pre-trial identification was suppressed. The Sapp court did not look to the totality test, to factors outside the identification, or to its reliability. It examined the lineup solely. The court then applied the Wade independent source test and allowed an in-court identification to be made.

People v. Tatum is final evidence of the difference between the federal and New York standards. The defendant was a black man with a glass eye and was identified from a lineup in which he was the only member with that distinguishing feature. The court acknowledged that Brathwaite held that “reliability is the linchpin,” but then stated that the New York Court of Appeals has noted that New York provides additional constitutional protections above those provided by the federal government. The court further stated that “if the identification procedure used was ‘unduly suggestive’ or ‘unnecessarily suggestive’ then testimony concerning any out-of-court identification made would be inadmissible, regardless of the reliability of the identification.” The court noted that by suppressing any testimony arising from suggestive lineups, “a burden [would be placed] on the police to exercise care when conducting lineups.” This reasoning differs from the federal rationale that a subjective view of the evidence is what counts, rather than improper procedures.

VI. CONCLUSION

The standard used in the federal system is found in

(Ala. Crim. App.) (noting that witnesses testified that suspect’s distinctive clothing was not the pivotal identifying factor), cert. denied, Ex parte Griffin, 356 So. 2d 728 (1978). Cf. United States v. Barron, 575 F.2d 752 (9th Cir. 1978) (holding lineup fair even though defendant was only one in lineup with a big nose, because some of the witnesses also emphasized his beady eyes and oddly shaped lips in their descriptions).

194. 98 A.D.2d at 784, 469 N.Y.S.2d at 804.
195. Id.
197. Id. at 203, 492 N.Y.S.2d at 1005. The court referred to the defendant’s “uniquely distinguishing facial appearance,” his “facial deformity,” and his “remarkable” facial characteristics, before mentioning that the defendant had a glass eye. Id. at 200-01, 492 N.Y.S.2d at 1003.

198. Brathwaite, 432 U.S. at 114.
199. Tatum, 129 Misc. 2d at 202-03, 492 N.Y.S.2d at 1004-05.
200. Id. at 203, 492 N.Y.S.2d at 1005 (emphasis added).
201. Id. at 204, 492 N.Y.S.2d at 1006.
202. See Brathwaite, 432 U.S. at 114.
Brathwaite. This standard permits in-court testimony of a suggestive lineup if it is found to be reliable. The federal standard, however, is diametrically opposed to the current New York standard found in Adams, which does not permit any testimony concerning a suggestive lineup.

In order to determine which rule better serves society's interests, there must be an analysis of the reasons behind the establishment of these rules. First, these rules were adopted, in part, to curtail improper police behavior while conducting identifications. In order to secure convictions, the police have gone so far as to place one woman in a lineup composed otherwise entirely of men, one Asian in a lineup with five Caucasians, one black in a lineup with two whites and one Mexican, and in New York, one Puerto Rican with five whites. These excesses all occurred in the context of a lineup, considered by courts and commentators to be the fairest of the identification procedures.

Of equal concern to the courts was reducing the use of showups, a practice widely condemned by the courts and commentators.

Second, it is of paramount importance in our criminal justice system that a person receive a fair trial, and that innocent men are not found guilty. Since the primary reason for improper convictions

205. See Brathwaite, 432 U.S. at 111-12.
206. State v. Batchelor, 418 S.W.2d 929 (Mo. 1967).
207. Regina v. Armstrong, 125 C. C. C. 56 (1959), noted in Murray, supra note 18, at 623.
209. People v. Lebron, 46 A.D.2d 776, 360 N.Y.S.2d 468 (1974). See also People v. Mendoza, 72 A.D.2d 608, 421 N.Y.S.2d 116 (1979) (finding that defendant and co-defendant were the only Puerto Ricans in the lineup, as well as the shortest, the heaviest, and the only ones with beards).
210. See, e.g., Wright v. United States, 404 F.2d 1256 (D.C. Cir. 1968)(Bazelon, C.J., dissenting). Chief Judge Bazelon wrote, "I believe that due process is violated whenever the police unjustifiably fail to hold a lineup. Since mistaken identifications are probably the greatest cause of erroneous convictions, we must require the fairest identification procedures available under the circumstances." Id. at 1262 (footnote omitted).
211. See, e.g., Stovall, 388 U.S. at 302. The Court stated, "The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." Id. (footnote omitted). See also Pulaski, supra note 23, at 1104 (noting that one person showups are particularly conducive to misidentification); Note, supra note 10, at 782 (severely criticizing showup practices); Note, Due Process Considerations in Police Showup Practices, 44 N.Y.U. L. Rev. 377, 392 (1969) (noting the dangers in showups); Note, supra note 24, at 1082 n.32 (stating showups are often presumed suggestive).
is mistaken identification, standards governing the conduct of pre-trial identifications are essential. Steps had to be taken to insure that these pre-trial identifications are conducted both fairly and free of bias.

How do the standards enunciated in Brathwaite and Adams meet these two concerns? Under Brathwaite, the showup has flourished, because the totality approach has failed to discourage this practice. As a deterrent to suggestive police practices, the federal standard is quite weak. Almost any suggestive lineup will still meet reliability standards. The Brathwaite standard has failed to meet the concerns of Wade, which stressed the need to control police misbehavior.

In New York, however, a state which has expressly declined to follow Brathwaite, court decisions have put greater pressure on the police to conduct fair lineups. In cases such as Sapp and Tatum, testimony of pre-trial identifications was suppressed as a result of police misconduct. If the state should desire to have such evidence available to it, care must be taken to insure a suggestion-free lineup.

The federal standard permits juries to be influenced by police misconduct by allowing in-court identifications to be bolstered by testimony of suggestive pre-trial identifications. The fact that a judge makes a determination of reliability is of little comfort, considering the subjectivity involved in the test. In New York, however,

212. See Wade, 388 U.S. at 228 & n.6. See also E. BORCHARD, Convicting the Innocent at xiii (1932), cited in Grossman, supra note 55, at 65 (discussing the dangers of wrongful convictions because of misidentification); Murray, supra note 18, at 610 (noting that eyewitness identification is the most unreliable form of proof); Note, supra note 59, at 462 (concluding that eyewitness identification is peculiarly susceptible to inaccuracy and injustice).


214. Professor Grossman has noted that "even intentional or flagrant suggestive conduct might produce no negative consequences for the police under the totality of circumstances approach." Grossman, supra note 55, at 59. See also Grossman, supra note 55, at 58-63 (discussing deterrence effect); Note, supra note 59, at 472, 473 (doubting that police will be at all deterred by the reliability rule); Note, supra note 10, at 819 (finding that police have not been motivated to provide unnecessarily suggestive pre-trial identification procedures).

215. See, e.g., Summitt v. Bordenkircher, 608 F.2d 247 (6th Cir. 1979), aff'd sub nom., Watkins v. Sowders, 449 U.S. 341 (1981) (holding lineup suggestive because defendant was of lighter complexion than other lineup members, but finding it to be reliable based on the totality of the circumstances).

216. See supra notes 107-08 and accompanying text.

217. See Pulaski, supra note 23, at 1120 (Biggers will even permit the use of bolstering evidence obtained from a suggestive lineup).

218. See Grossman, supra note 55, at 69 (noting that reliability standard leaves much open to judicial interpretation); Pulaski, supra note 23, at 1113 (noting ease in which lower courts find an independent source).
only evidence concerning a properly conducted lineup can be used against a defendant, and this guarantees him the fairest possible trial. As a result, mistaken eyewitness testimony is much less likely to become part of the prosecution’s case.

In summary, the conclusion which must be reached is that the federal courts no longer evince the advances made in criminal law by *Wade*, *Gilbert*, and *Stovall*. It is only by returning to a standard similar to the one used in New York that the goals of the *Wade* trilogy, namely sanctions on police misconduct and a fair trial for defendants, will be met.

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