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Dennis Glass

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The United States Supreme Court has held that the due process clause of the fourteenth amendment does not compel a state criminal trial court to conduct a hearing outside the jury's presence to determine the admissibility of identification evidence whenever a defendant contends that a witness's identification of him was arrived at improperly.


On January 11, 1975, four men attempted to rob a Louisville, Kentucky liquor store where Walter Smith and Donald Goeing were working. During the course of the attempted robbery, one of the men shot Goeing twice. The four men then fled.¹

Later that night, both Smith and Goeing gave the police descriptions of the man who had fired the shots.² Two days after the attempted robbery, the police conducted a lineup consisting of John Gregory Watkins and two other black men. Smith identified Watkins as the man who had shot Goeing.³ Later that day, the police took Watkins to Goeing's hospital room where Goeing also identified him as the assailant.⁴ Watkins was then charged with robbery in the first degree and first degree assault.⁵

Prior to Watkins' trial, the defense counsel filed a written mo-

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¹ Watkins v. Sowders, 449 U.S. 341, 342 (1981). Upon entering the store, one of the men approached the counter where Smith was working and asked for a pack of cigarettes. As Smith turned to get the cigarettes, the man announced that it was a holdup. At this point Goeing, a part owner of the store who was filling a soda machine, turned toward the man at the counter, whereupon the man shot Goeing twice, once in the arm and once in the chest. *Id.* at 342.


³ 449 U.S. at 342-43. Smith testified at trial that at the time of the lineup he had not been "completely sure" that Watkins was the robber. 608 F.2d at 249.

⁴ 449 U.S. at 343. Goeing states, however, that "it could have been close enough that it could have been his twin brother, it could have been somebody else." 608 F.2d at 249.

tion for a suppression hearing on the identification testimony. At trial, before any evidence was presented and out of the jury's presence, counsel reasserted this motion, which was denied. Both Smith and Goeing then made in-court identifications of Watkins as the gunman. The prosecutor did not introduce any evidence of the previous identifications at the lineup or the showup, but the defense counsel cross-examined both Smith and Goeing concerning the details of the identification procedures used. Two witnesses for the defense testified that Watkins was in a pool hall at the time of the incident, and another witness stated that he had been present in the liquor store during the robbery and had not seen Watkins there. Watkins also took the stand and professed innocence. The jury returned a verdict of guilty on both charges, and the trial court sentenced Watkins to twenty years' imprisonment on each charge.

On appeal, the defense counsel reasserted his argument that the trial court was constitutionally required to conduct a suppression hearing outside the presence of the jury to determine the admissibility of the identification evidence and that the refusal to do so and the failure to suppress the identification evidence deprived Watkins of a fair trial. The Supreme Court of Kentucky ruled that while holding such a hearing would have been the preferred course, the trial court's refusal to do so did not require the reversal of Watkins' conviction.

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6. Watkins v. Commonwealth, 565 S.W.2d 630 (1978). Prior to the introduction of the identification testimony of Smith and Goeing, defense counsel objected to the denial of an in camera, (i.e., out of the jury's presence) hearing because it forced him to explore the circumstances of the identification procedures in the presence of the jury. The objection was overruled. Repeated motions for a mistrial on this basis were also denied. Id. at 630.

7. 449 U.S. at 343. A showup is a pretrial identification procedure in which the suspect is exhibited to a witness or to a victim of a crime, usually in a one-on-one confrontation. Black's Law Dictionary 1237 (5th ed. 1981). A police officer testified for the prosecution that he had used the showup procedure because at the time he was uncertain Goeing would survive the shooting. The defense counsel also cross-examined the officer on the details of the lineup and the showup and introduced pictures of the lineup into evidence.

8. 449 U.S. at 343.
9. 608 F.2d at 249.
10. 565 S.W.2d at 630.
11. Id. at 631. U. S. Const. amend. XIV, § 1 provides in pertinent part that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."
12. 565 S.W.2d at 631. The court quoted from its previous decision in Ray v. Commonwealth, 550 S.W.2d 482, 483 (Ky. 1977), and noted that the evidence
Watkins then petitioned the United States District Court for the Western District of Kentucky for a writ of habeas corpus. The court denied the petition, holding that although a pretrial suppression hearing on an identification question is preferable to the presentation of the entire identification case in the presence of the jury, the failure to hold such a hearing did not violate Watkins' due process rights.\textsuperscript{13}

Watkins appealed the denial of the writ to the Court of Appeals for the Sixth Circuit which affirmed the district court's judgment and held that an \textit{in camera} hearing on the admissibility of the identification evidence was not constitutionally mandated.\textsuperscript{14} The court further found that because of the seriousness of Goeing's wounds, a showup was necessary and constitutionally permissible.\textsuperscript{15} Noting that the admissibility of the lineup identification presented a very close question, the court nevertheless found the evidence admissible based on the totality of the circumstances of the case.\textsuperscript{16}

A companion case presented the same issue in a somewhat different factual setting. On the night of July 20, 1974, two men forced a young woman into their car and drove to an isolated area where one of the men raped her. The next day she described the rapist\textsuperscript{17} to the police and viewed approximately 1200 mug shots, failed to raise any question of impermissible suggestiveness and that Watkins was not prejudiced by its admission. \textit{Id.}

\textsuperscript{13} 449 U.S. at 344. The Memorandum Opinion of the District Court is unreported. \textit{See} Brief for Petitioners, Appendix at 38-45, Watkins v. Sowders, 449 U.S. 341 (1981). The district court explained that because Watkins was afforded and exercised the opportunity to cross-examine both Smith and Goeing on their identification testimony, he had not been denied due process. The court further observed that neither the lineup nor the showup procedures violated Watkins' due process rights inasmuch as the showup was necessary due to the seriousness of Goeing's injuries and the lineup was not unduly suggestive. \textit{Id.}

\textsuperscript{14} 608 F.2d at 251.

\textsuperscript{15} \textit{Id.} at 252 (citing Stovall v. Denno, 388 U.S. 293 (1967)).

\textsuperscript{16} 608 F.2d at 252-53. The court observed that the lineup had employed the key element of the witnesses' description, lightness of complexion, to call attention to Watkins rather than to the other two men in the lineup, who were of somewhat darker complexion. The court noted that this feature of the lineup probably could have been avoided, but found that despite the unnecessary element of suggestiveness, the identification by Smith was sufficiently reliable that there was no substantial likelihood of misidentification. \textit{Id.} at 252.

\textsuperscript{17} Summitt v. Commonwealth, 550 S.W.2d 548 (Ky. 1977). A police officer testified at Summitt's trial that the victim had described the rapist as a white male in his thirties, approximately five feet, nine inches tall, 180 to 190 pounds, with a rough complexion and tattoos on both arms. The description was given prior to the victim's perusal of any of the mug shots. \textit{Id.} at 549.
but she was unable to identify any of these photographs as that of her assailant. Two days later she viewed more photographs at a different police station and identified a picture of James Willard Summitt as that of the rapist. Summitt was subsequently arrested and charged with rape.

Summitt’s counsel filed a motion to suppress or exclude any in-court identification of Summitt by the victim. Prior to the introduction of the prosecution’s first witness at trial, the defense counsel sought an evidentiary hearing on his suppression motion; the hearing request was denied. A police detective then testified to the certainty with which the prosecutrix had identified Summitt’s photograph, and the prosecutrix testified that Summitt was the man who had raped her. The defense counsel cross-examined both witnesses extensively. The jury returned a verdict of guilty and Summitt was sentenced to life imprisonment.

On appeal to the Supreme Court of Kentucky, Summitt’s counsel reiterated his argument that the trial court erred by refusing to conduct a pretrial hearing outside the jury’s presence on his motion to suppress the in-court identification of his client by the prosecutrix. The court found that there was no error in the refusal to hold the hearing and that there was no semblance of impermissible suggestiveness in the photographic identification procedure. Summitt then petitioned the United States District Court for the Western District of Kentucky for a writ of habeas corpus. The court denied the writ, holding that it was unable to find any

18. 449 U.S. at 344.
20. 550 S.W.2d at 550.
21. 449 U.S. at 344-45. The prosecutrix testified that she got a good look at her assailant in the light immediately after she was abducted, and that upon viewing the photographs, she “knew his face right away . . .” and “picked him right out of there.” 550 S.W.2d at 550.
22. 449 U.S. at 345. Under cross-examination the prosecutrix virgorously resisted the implication of defense counsel that her in-court identification of Summitt had been strengthened by having seen the accused several times at pretrial court appearances. 550 S.W.2d at 550.
23. 550 S.W.2d at 549.
24. Id. at 550. The court found that the identification procedure was constitutionally acceptable within the standard announced in Simmons v. United States, 390 U.S. 377 (1978). Id. See infra notes 75-79 and accompanying text.
violation of constitutionally guaranteed rights in the identification procedure and that there was no error in the trial court's refusal to conduct the requested evidentiary hearing. On appeal to the Court of Appeals for the Sixth Circuit, the court consolidated Summitt's case with Watkins' and likewise found the challenged identification procedure to be neither suggestive, unreliable, nor constitutionally improper, and therefore affirmed the judgment of the district court.

The Supreme Court granted certiorari to decide whether due process requires a state trial court to conduct a hearing outside the presence of the jury on the admissibility of identification evidence. The Court held that the due process clause of the fourteenth amendment does not require such a hearing.

Justice Stewart, writing for the majority, noted that the issue presented was not whether it is prudent for the trial court to hold a hearing on the admissibility of identification evidence outside the jury's presence, but whether such a hearing is required by the due process clause of the fourteenth amendment.

Justice Stewart observed that the petitioners had cited the Court's previous holdings that a defendant is entitled to the presence of counsel at a post-indictment lineup, and that an identification procedure, in the absence of a lineup, may be so

25. 449 U.S. at 345. The Memorandum Opinion of the District Court is unreported. See Brief for Petitioners, Appendix at 117-20.
26. 449 U.S. at 345. The court also held that because Summitt had received an independent determination of the reliability of the identification evidence by the trial court and an adequate hearing on the issue, the procedure used for determining the admissibility of the identification evidence was not a denial of due process. 608 F.2d at 250-51.
28. 449 U.S. at 349.
30. 449 U.S. at 345. Justice Stewart noted that many decisions of the courts of appeals had endorsed the holding of such a hearing, and most had admonished trial courts to adopt the procedure. Id. at 345 & n.2.
31. Id. at 346.
32. Id. See United States v. Wade, 388 U.S. 218 (1967). The Wade Court extended the sixth amendment guarantee of the assistance of counsel to "critical stages" of criminal prosecutions, specifically to the post-indictment lineup. 388 U.S. at 236-37. U. S. CONST. amend. VI provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."
unreliable as to amount to a denial of due process of law.\textsuperscript{33} Moreover, he noted that the petitioners asserted that the Court, in \textit{Jackson v. Denno},\textsuperscript{34} had established a \textit{per se} rule requiring a hearing outside of the jury's presence whenever the voluntariness of a confession is at issue, and that if the due process standard of fairness requires such a hearing in the case of a challenged confession, it requires such a hearing as well in the case of a challenged identification.\textsuperscript{35} The \textit{Watkins} majority, however, found this reasoning unpersuasive. Noting that while the \textit{Jackson} Court had decided that a jury could not be relied upon to follow the trial judge's instruction to disregard a confession if they found it to be involuntary, Justice Stewart explained that the basis for this decision was grounded not only upon the concern for the potential unreliability of such a confession, but also upon the fundamental societal revulsion to coerced confessions.\textsuperscript{36}

33. 449 U.S. at 346. \textit{See Stovall v. Denno}, 388 U.S. 293 (1967). In \textit{Stovall}, the Court found that a confrontation between an accused and an identifying witness was a "critical stage", requiring the presence of counsel at all such confrontations, 388 U.S. at 298, and that an identification procedure might be "so unnecessarily suggestive and conducive to irreparable mistaken identification..." as to constitute a denial of due process. \textit{Id.} at 302. The determination of whether an alleged denial of due process had occurred was to be made on the basis of "the totality of the circumstances..." of the confrontation. \textit{Id.}

34. Compare \textit{Jackson v. Denno}, 378 U.S. 368 (1964). The \textit{Jackson} Court asserted that a defendant who objected to the admission of a confession was "entitled to have a fair hearing and a reliable determination on the issue of voluntariness..." \textit{Id.} at 377. The voluntariness of the confession in \textit{Jackson} was questioned because the defendant had been interrogated by police officers while he was hospitalized for serious gunshot wounds and after he had been given doses of demerol and scopolamine. \textit{Id.} at 371-72. \textit{See infra} note 36.

35. 449 U.S. at 346. The Court noted that it had never held that \textit{all} voluntariness hearings must be held outside the jury's presence, regardless of the circumstances, although it would seem prudent to hold them in that manner. \textit{Id.} at 346 n.3. \textit{See Pinto v. Pierce}, 389 U.S. 31, 32 (1967).

36. 449 U.S. at 347. \textit{See Jackson}, 378 U.S. at 374 n.5, 376-86. \textit{Jackson} struck down the New York procedure whereby the trial judge made a preliminary determination of the voluntariness of a confession offered in evidence by the prosecution, but excluded it only if in no circumstances could it be found to have been given voluntarily. If there was a question of the voluntariness of the confession such that reasonable men could differ about the inferences to be drawn from the facts, the trial judge was compelled to leave both the issues of voluntariness and truthfulness to the resolution of the jury. Of course, the trial judge would instruct the jury that if they found the confession to be involuntary, they were to exclude it completely from consideration in determining the accused's guilt or innocence. \textit{Id.} at 377-78. Compare \textit{Stein v. New York}, 346 U.S. 156 (1953) (holding New York procedures for determining voluntariness of confessions constitutionally permissible).
Justice Stewart observed that the Jackson Court had concluded that because a jury might have difficulty excluding from consideration a confession which was involuntary but which they believed to be true, their findings on the voluntariness issue were likely to be unreliable.  

By comparison, however, the Watkins majority emphasized that where identification evidence is in question no special considerations exist to justify the assertion that the jury will be unable to follow the trial judge’s instructions. The Court noted that the admissibility of identification evidence is primarily a question of its reliability and that our legal system assumes that juries can properly evaluate evidence with adequate instructions. The Court recognized that identification evidence is important, but stressed that unlike the assistance of counsel it is not a factor which goes to the fundamental fairness of the adversary process. The Court concluded that cross-examination and summation provide adequate opportunities for defense counsel to expose any inaccuracy or suggestiveness. Thus, while conceding

37. 449 U.S. at 347. The concern of the Jackson Court was that the jury would unconsciously respond to the pressure to find a confession voluntary because they believed it to be true; if the other evidence bearing on the accused’s guilt were insufficient to convict, the jury would be faced with the prospect of seeing a “guilty” defendant go free. Jackson v. Denno, 378 U.S. at 382.

38. 449 U.S. at 347.

39. Id. In Neil v. Biggers, 409 U.S. 188 (1972), the Court had emphasized that the reliability of identification evidence was of paramount importance, and that the likelihood of misidentification, not the suggestiveness of the identification procedure, deprived an accused of due process. Id. at 198. See also Manson v. Brathwaite, 432 U.S. 98, 113-14 (1977) (reliability is the linchpin in determining the admissibility of identification testimony); Simmons v. United States, 390 U.S. 377, 384 (1968); United States ex rel. Kirby v. Sturges, 510 F.2d 397, 402-04 (7th Cir. 1975) (opinion of Stevens, J.).

40. 449 U.S. at 347. The Court noted that assessing the reliability of identification evidence is frequently the only function the jury performs in cases such as Watkins. Id.

41. Id. at 348. The Court cited its opinion in Manson, 432 U.S. at 114 n.14 (quoting Clemons v. United States, 408 F.2d 1230, 1251 (D.C. Cir. 1968) (Leventhal, J., concurring), cert. denied, 394 U.S. 964 (1969)). See also United States ex rel. Kirby v. Sturges, 510 F.2d at 406 (showup does not violate any constitutional right of the suspect).

42. 449 U.S. at 348. The Court cited Manson, 432 U.S. at 114 n.14. The majority noted the petitioners’ contention that cross-examination is an inadequate method for testing the reliability of pretrial identification procedures because, while attempting to elicit information about possible procedural improprieties, defense counsel will be simultaneously emphasizing to the jury the fact that the witness has previously identified the accused as the perpetrator of the crime,
that a hearing by the trial court outside the jury's presence to determine the admissibility of identification evidence might often be advisable, and in some cases might even be constitutionally required, the Watkins majority found no constitutional requirement for such a hearing in every case.\textsuperscript{43}

Justice Brennan, writing in dissent, asserted that the due process clause mandates a hearing outside the jury's presence on the admissibility of eyewitness identification evidence whenever the accused offers some evidence that pretrial identification procedures were impermissibly suggestive.\textsuperscript{44} He found in identification evidence characteristics sufficiently similar to those which had led the Jackson Court to conclude that a jury could not be relied upon to follow a trial judge's instructions. According to Justice Brennan, a separate judicial determination of admissibility was required in both situations because jury instructions could not cure the erroneous admission of identification evidence any more than they could cure the erroneous admission of a confession.\textsuperscript{45}

Justice Brennan noted that several of the Court's previous decisions involving eyewitness identification testimony had stressed its unreliability,\textsuperscript{46} a characteristic which had caused the Court to thereby bolstering the in-court identification. \textit{Id.} The petitioners also argued that because of counsel's reluctance to explore fully the circumstances of the pretrial identification confrontation in the presence of the jury, questions which counsel might otherwise have asked the witness had been foregone. The result might be that serious flaws in the procedure would remain unexposed, and the accused would be denied effective assistance of counsel. Brief for Petitioners at 26-27. \textit{See also} United States v. Wade, 388 U.S. at 240-41. The Court observed, however, that the petitioners did not cite any specific instances during trial where their counsel were deterred from cross-examining the identifying witnesses, and that the record revealed that there had been extensive cross-examination on the identification procedures. 449 U.S. at 348. Moreover, the Court declared that this is precisely the problem that every trial lawyer must face when he decides to ask a question on cross-examination which may evoke an answer unfavorable to his client. \textit{Id.} at 349.

\textsuperscript{43} 449 U.S. at 349.
\textsuperscript{44} \textit{Id.} at 350 (Brennan, J., dissenting).
\textsuperscript{45} \textit{Id.}
\textsuperscript{46} \textit{Id.} at 350-52 (Brennan, J., dissenting). \textit{See, e.g.,} Mason v. Brathwaite, 432 U.S. at 111-12; United States v. Wade, 388 U.S. at 228 & n.6. \textit{See generally} E. Loftus, EYE-WITNESS TESTIMONY 8-19 (1979) (impact on jury of eyewitness identification testimony); N. Sobel, EYEWITNESS IDENTIFICATION, LEGAL AND PRACTICAL PROBLEMS §§ 1.1, 1.3 (2d ed. 1981) (identification evidence, without more to connect defendant with the crime, generally understood to be the least reliable of all classes of evidence); Levine & Tapp, \textit{The Psychology of Criminal
require the presence of counsel at a post-indictment lineup\textsuperscript{47} and to exclude identification evidence which was the product of a suggestive confrontation and which lacked sufficient indicia of reliability.\textsuperscript{48} He asserted that these holdings indicated that the Court's intent was to prevent the jury from being exposed to unreliable identification evidence.\textsuperscript{49}

The dissenter then observed that despite the inherent unreliability of identification evidence, its impact on a jury is powerful and convincing, especially when the testimony is presented with a high degree of confidence.\textsuperscript{50} Justice Brennan contended that these two attributes of identification evidence virtually compel the conclusion that when such evidence is inadmissible, the jury should not be exposed to it at all, because instructions by the trial judge to disregard it will prove inadequate to counter its prejudicial effect on the accused.\textsuperscript{51} Reviewing the essential elements of the Jackson decision and comparing them to the situation in Watkins, the dissenter concluded that the similarity of these considerations required a similar result in Watkins.\textsuperscript{52}
Justice Brennan also found the majority’s reliance on cross-examination to protect the accused misplaced, for defense counsel could cross-examine on the voluntariness issue in the Jackson situations as well. Noting that cross-examination does affect the weight and credibility which the jury affords to testimony, he observed nevertheless that it is an ineffective method for ensuring that a jury will ignore inadmissible identification evidence. He explained that the jury instruction, not cross-examination, is the tool designed to cure the effects of the erroneous admission of evidence. In the dissenter’s view, the only practical solution to this problem is to preclude the jury’s exposure to such inadmissible evidence in the first place, a result which a Jackson hearing would accomplish. Justice Brennan observed that most of the lower federal courts have encouraged the use of the type of hearing sought by the petitioners, and suggested that a rule requiring the defendant to make a minimal showing of impermissibly suggestive police procedures in order to be entitled to such a hearing would eliminate frivolous requests.

that a jury will be influenced by an involuntary confession despite its inadmissibility, jury instructions have been found inadequate to protect a defendant’s due process rights. Id. at 354-55 (Brennan, J., dissenting). The dissenter found it equally improbable that a jury will be immune to the impact of powerful eyewitness identification testimony even under proper instructions from the trial judge. Id. at 356 (Brennan, J., dissenting). See E. Loftus, supra note 46, at 189-90.

53. 449 U.S. at 356 (Brennan, J., dissenting).
54. Id. at 356-57 (Brennan, J., dissenting). Justice Brennan states that cross examination, no matter how skillful, would be unlikely to offset the effect of erroneously admitted identification evidence because of its peculiarly convincing impact on the jury. Id. See E. Loftus, supra note 46, at 9, 19.
55. 449 U.S. at 357 (Brennan, J., dissenting).
57. 449 U.S. at 354 n.13 (Brennan, J., dissenting). Justice Brennan asserted that the petitioners had raised a colorable claim that the confrontation procedure were impermissible suggestive, and cited with approval the approach
Justice Brennan would remand the case for further proceedings to determine whether the identification evidence was erroneously admitted, because in his view the record was inadequate to decide that the petitioners would have been unsuccessful in having the evidence excluded had they been afforded a hearing out of the jury's presence.\textsuperscript{58}

The Supreme Court has held for the first time that the due process clause of the fourteenth amendment does not require a judicial determination out of the presence of the jury of the admissibility of pretrial identification evidence whenever an accused contends that the identification procedure was improperly suggestive. In reaching this decision, the Court has further refined the limitations which the Constitution imposes upon criminal prosecutions for the protection of defendants when identification issues are raised, an inquiry which the Court began in earnest in 1967 in \textit{United States v. Wade}.\textsuperscript{59}

In \textit{Wade}, the Court expressed concerns that because of the well-known unreliability of eyewitness identification testimony and the consequent likelihood of misidentification,\textsuperscript{60} coupled with the grave risk of suggestiveness inherent in lineup procedures,\textsuperscript{61} an accused who was forced to undergo a pretrial lineup without the assistance of counsel might be deprived of any meaningful opportunity thereafter to demonstrate what actually occurred and to attack the basis for the witness's in-court identification.\textsuperscript{62} The Court concluded that this would violate the accused's sixth amendment right to confront the witnesses against him through cross-examination.\textsuperscript{63} The Court, therefore, extended the sixth amendment right to counsel to the pretrial, post-indictment proceedings of the Third Circuit requiring a defendant to make such a showing and thereby eliminating frivolous requests for pretrial suppression hearings. See \textit{United States ex rel. Fisher v. Driber}, 546 F.2d 18, 22 (3d Cir. 1976).

\textsuperscript{58} 449 U.S. at 359-60 (Brennan, J., dissenting).
\textsuperscript{60} 388 U.S. at 228-29.
\textsuperscript{61} \textit{Id.} at 229-30.
\textsuperscript{62} \textit{Id.} at 230-32.
\textsuperscript{63} \textit{Id.} at 235. The Court noted that "even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability." \textit{Id.} The Court also observed that without counsel present at a lineup, the crucial identification issue might be determined before trial, \textit{id.} at 229, and any assistance provided by counsel at trial might hence be ineffective. \textit{Id.} at 235.
lineup. The Court was also reluctant, however, to exclude valid and reliable identification testimony. Consequently, the Court further held that an in-court identification would not be held inadmissible per se even when the accused had been previously identified at a lineup held in the absence of counsel if the prosecution could show by clear and convincing evidence that the in-court identification was based upon observations other than those made at the lineup. Thus the Wade Court sought to accommodate the often conflicting goals of protection of the rights of the accused and the enhancement of effective law enforcement.

In Gilbert v. California, a companion case to Wade, the Court applied the Wade holdings to the states and also announced a per se exclusionary rule to be applied to testimony that a witness had previously identified the accused at a lineup in the absence of counsel. Because the prosecution in Gilbert had elicited the testimony of the previous lineup identification on direct examination, the Court would not allow the prosecution to show

64. Id. at 237. Although the Wade Court noted that whether the presence of counsel was necessary to ensure the defendant a fair trial, in the context of the right to cross-examine meaningfully the witnesses against him and to have effective assistance of counsel at trial, required the scrutiny of any pretrial confrontation, id. at 227, the Court subsequently limited the application of the Wade decision to its factual setting, i.e., a post-indictment lineup. See Kirby v. Illinois, 406 U.S. 682 (1972) (right to assistance of counsel attaches only at or after initiation of adversary judicial proceedings).

65. 388 U.S. at 239-40. The Wade Court stated that the proper test was that set out in Wong Sun v. United States, 371 U.S. 471, 488 (1963): "[W]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint. Magurie, Evidence of Guilt 221 (1959)." 388 U.S. at 241.

66. 388 U.S. 263 (1967). Gilbert was exhibited to over 100 witnesses to the various robberies charged to him in a lineup conducted after indictment and appointment of counsel but without notice to defense counsel. Id. at 269-70 & n.2. Three witnesses to the crime for which Gilbert was subsequently convicted made in-court identification during the guilt stage of the trial. Id. at 269. Eight other witnesses to other robberies allegedly committed by Gilbert made in-court identifications during the penalty stage and also testified that they had previously identified Gilbert at the lineup. Id. at 269-70.

67. Id. at 272. Wade was a federal trial.

68. Id. at 272-73. The Gilbert Court noted that such testimony was the "direct result of the illegal lineup 'come at by exploitation of [the primary] illegality.'" Id. (quoting Wong Sun v. United States, 371 U.S. at 488).

69. 388 U.S. at 269-70.
that the testimony had an independent basis. The Gilbert Court determined that only such a sanction would ensure that the state's law enforcement officials would henceforth respect the accused's right to the presence of counsel at the lineup.70

The third decision in the Wade trilogy was Stovall v. Denno,71 in which the Court considered whether a confrontation procedure in and of itself could be so unnecessarily suggestive and conducive to irreparable mistaken identification as to deprive an accused of due process of law.72 The Court held that an alleged violation of due process in the conduct of an identification confrontation was to be determined on the totality of the circumstances surrounding it.73 Nevertheless, because the Court found no violation of due process due to the exigent circumstances of the case, it did not specify what sanctions might be appropriate for violation of this "due process" standard for pretrial confrontation procedures.74 In light of the holdings in Wade and Gilbert, however, it would seem to be implicit that such a violation would require exclusion of direct testimony concerning the suggestive pretrial identification unless exigent circumstances existed to justify the use of such a procedure. Similarly, any in-court identification of a defendant who had undergone an unnecessarily suggestive pretrial confrontation procedure should be inadmissible.

70. Id. at 272-73.
71. 388 U.S. 293 (1967). Wade, Gilbert, and Stovall were argued together and announced on the same day. Id. at 296.
72. 388 U.S. at 301-02. Stovall was arrested on a murder charge and exhibited to the wife of the victim while she was hospitalized for treatment of stab wounds inflicted during the assault on her husband. Stovall, the only black man in the room, was handcuffed to one of the police officers during the confrontation. The victim identified him as the assailant. At trial, she testified concerning the hospital identification and made an in-court identification of Stovall. Id. at 295. The Stovall Court noted that while showups had been widely condemned by commentators, the circumstances of the case made the procedure imperative and a conventional lineup was out of the question. Id. at 302 & n.6.
73. Id. at 302. Despite the suggestive nature of the confrontation and the absence of counsel, the Wade and Gilbert holdings were of no benefit to Stovall because the Court declined to apply them retroactively. Id. at 296.
74. See N. Sobel, supra note 46, § 4.2(a). Judge Sobel noted that while the Court found such a violation in Foster v. California, it remained the case without specifying the exclusionary sanctions deemed applicable. Judge Sobel pointed out that despite the lack of direction from the Supreme Court, lower courts unanimously applied the same sanctions for a due process violations as they applied to right to counsel violations prior to the Court's subsequent decision in Biggers. Id. See also infra notes 81-86 and accompanying text.
unless the prosecution could show that the identification was the product of an independent source. 5

One year later, the Court again had occasion to consider the issue of due process in pretrial identification procedures. In Simmons v. United States, 6 a case dealing with a pre-indictment identification by examination of photographs, the Court recognized that such a procedure was likely to result in some erroneous identifications, but was unwilling to prohibit its use, noting that it was widely and effectively used by the police and that it spared innocent suspects the humiliation of arrest by allowing them to be cleared by the witness by process of elimination. 7

The Court held that each case of allegedly improper identification must be considered on its own facts, and convictions based on pretrial photographic identification would be overturned only if they were so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. 7

Thus, in Simmons, the Court further defined the limits of due process protection and again expressed an awareness of the tension between the rights of the accused and the effectiveness of law enforcement. While articulating what might appear to be a more stringent burden of proof as to the degree of suggestiveness necessary to constitute a denial of due process, 7 the Simmons

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5. See Did Your Eyes Deceive You?, supra note 46, at 993.
6. 390 U.S. 377 (1968). Simmons was convicted of robbery after several bank employees identified him upon being shown several photographs by FBI agents while Simmons was still at large. Id. at 380-81. Defense counsel did not argue that Simmons was entitled to have counsel present while the photographs were being shown to the witnesses, but relied solely on the Stovall due process test. Id. at 383.
7. Id. at 383-84.
8. Id. at 384. In applying this standard to the facts of the case, the Simmons Court noted first that the use of photographic identification was necessary because the robbers were still at large and it was essential that the police determined whether they were investigating the correct suspects, a justification "hardly less compelling than that which we found to justify the 'one-man lineup' in Stovall v. Denno ...." Id. at 384-85. The Court also discussed various external factors which let it to conclude that there was little likelihood of misidentification in this case: the witnesses had observed the robbers for up to five minutes in good light; the robbers wore no masks; the witnesses viewed the photographs one day after the robbery while their memories were still fresh; the witnesses were certain of their identifications of Simmons. Id. at 385. The Court also noted that while the mechanics of the identification procedure were less than ideal, id. at 385-86 & n.6, there was no evidence of improper suggestion on the part of the police. Id. at 385.
79. See Brief for Petitioners at 20.
Court pronounced its holding to be in accord with the *Stovall* standard.

In 1972, in *Neil v. Biggers*, the Court reviewed its recent decisions on the identification issue and sought to synthesize their holdings. It concluded that the primary evil to be avoided is the likelihood of misidentification, not the suggestiveness of the confrontation. The Court stated that the central question is whether the identification is reliable despite the suggestiveness of the confrontation and enunciated five factors to be considered in evaluating the probability of misidentification. Thus the *Stovall-Simmons* standard of a very substantial likelihood of misidentification would determine the admissibility of both in-court identifications and testimony concerning pretrial identifications.

Finally, in *Manson v. Brathwaite*, the Court applied the *Biggers* analysis to post-*Stovall* confrontations, holding that the admission of testimony obtained by means of an unnecessarily suggestive identification procedure does not violate due process so long as the identification itself possesses sufficient aspects of re-

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80. 390 U.S. at 384. Compare *Foster v. California*, 394 U.S. at 442, where the Court quoted the *Stovall* standard that "identification procedures may be 'so unnecessarily suggestive and conducive to irreparable mistaken identification' as to be a denial of due process of law." *Id.* The *Foster* Court cited *Simmons* as a basic source that supports the quoted standard. *Id.*

81. 409 U.S. 188 (1972). *Biggers* was convicted of rape after being identified by the victim in a police station showup held seven months after the incident. At the trial the victim testified concerning her pretrial identification of the defendant. *Id.* at 195.

82. *Id.* at 196-98. The *Biggers* Court reviewed *Stovall, Simmons, Foster,* and *Coleman v. Alabama*, 399 U.S. 1 (1970) (evidence could support a finding that in-court identification was based upon independent source).

83. 409 U.S. at 198. The *Biggers* Court observed that suggestive pretrial identification procedures are disapproved because they increase the likelihood of misidentification, and unnecessarily increase the probability that any resulting misidentification will be gratuitous. *Id.*

84. *Id.* at 198-99. Judge Sobel has stated that the holding in *Biggers* "is very close to a holding that if a confession is 'reliable' or 'truthful' it does not matter that it was 'involuntary' or 'coerced'". N. SOBEL, supra note 46, § 3.3(a). He also noted that the *Biggers* analysis implies that the "denial of fundamental fairness..." inherent in a showup does not violate due process. *Id.*

85. These factors are: the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. 409 U.S. at 198-99.

86. 409 U.S. at 198.

liability. The reliability of the identification is to be determined by consideration of the factors set out in Biggers, weighed against the corrupting influence of the suggestive identification procedure.

While the foregoing cases deal primarily with the issue of whether eyewitness identification testimony is admissible, they are of importance in analyzing the Watkins holding because Watkins, in essence, raises the issue of how, or more precisely where, such a determination is to be made, and by whom.

Because both petitioners' identification proceedings preceded their indictment, neither was entitled to the assistance of counsel during the identification procedure. Thus each petitioner's identification procedure is to be judged by the Stovall-Simmons due process test, as construed in Brathwaite.

By analogy to the Court's holding in Jackson, the petitioners assert that an in camera hearing is required to determine the admissibility of identification evidence by applying the Brathwaite

88. Id. at 106. The Brathwaite Court rejected the per se approach applied by the Court of Appeals for the Second Circuit which required exclusion of testimony concerning an out-of-court identification without regard to the reliability of the identification whenever it was the product of an unnecessarily suggestive procedure. Id. at 110-13.

89. Id. at 114. See supra note 85.

90. 409 U.S. at 114. The Brathwaite Court observed that in the instant case there was little pressure on the witness to make an identification, and that the witness had made the identification while alone "in circumstances allowing care and reflection." Id. at 116.

91. See Brief for Petitioners at 9.

92. Brief for Respondent at 14 n.5.

93. See Kirby v. Illinois, 406 U.S. at 688. See also United States v. Ash, 413 U.S. 300 (1973) (Wade right to counsel does not apply to photographic identifications).

94. See supra notes 71-80 and accompanying text.

95. See supra notes 87-90 and accompanying text. Stovall at least impliedly suggested that an accused had a fourteenth amendment right to a lineup which was conducted in a fundamental fair manner. See Manson v. Barthwaite, 432 U.S. at 121 (Marshall, J., dissenting). However, this construction is untenable after Brathwaite, for despite the suggestiveness of the procedure, the identification is admissible if it possesses sufficient indicia of reliability based upon a consideration of factors which are irrelevant to the fairness of the procedures. See supra notes 83-90 and accompanying text. The reliability of the identification based upon these factors is then weighed against the corrupting effect of the procedure. See supra notes 89-90 and accompanying text. The result is therefore much akin to the use of the Wade independent source test. See Manson v. Brathwaite, 432 U.S. at 127 (Marshall, J., dissenting); Did Your Eyes Deceive You?, supra note 46 at 998.
balancing test and that failure to hold such a hearing is tantamount to allowing the jury to decide a question of law. However, the logic of *Jackson* does not support such an assertion. The New York procedure struck down in *Jackson* permitted the jury to decide a question of law, i.e., the voluntariness of a confession and hence its admissibility, prior to its determination of the credibility of the confession, a question of fact. No such determination by the jury was made in *Watkins*; the trial court found the eyewitness identification admissible, and the jury apparently found it to be credible. It appears that the real question the petitioners were asking the Court to decide was whether the jury can be relied upon to disregard eyewitness identification testimony under proper instructions from the trial judge when such testimony is determined to be *inadmissible* after the jury has heard it. On the record in *Watkins*, however, no such question is presented, and thus the issue is not properly before the Court. Moreover, in the factual context of a "pure" identification case such as this, it is unlikely that such an issue would arise because exclusion of the prosecution's identification evidence would virtually compel dismissal of the case.

The petitioners' second argument is essentially that they were denied their sixth amendment right to the assistance of counsel because defense counsel were forced to explore the details of the pretrial confrontation procedures in the presence of the jury and were thereby prevented from demonstrating the unfairness of the pretrial confrontations. In order to allow the trial court to make an informed decision on the admissibility of the identification testimony, defense counsel must be able to demonstrate the existence and extent of any impermissible suggestiveness in the identification procedure, i.e., the corrupting influence articulated in *Brathwaite*. In a pure identification case, however, the identification procedure will almost invariably precede the information

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96. Brief for Petitioners at 22-23.
99. See Brief for Petitioners at 30-33. See also *Watkins v. Sowders*, 449 U.S. at 350, 352-53 & n.6 (Brennan, J., dissenting).
100. Brief for Petitioners at 4 & 7. Judge Sobel defines a “pure” identification case as one in which there is no other evidence but the eyewitness identification that tends to establish the guilt of the accused. N. SOBEL, supra note 46, § 1.3.
101. Brief for Petitioners at 24-30
or indictment, because without the identification there will be insufficient evidence to justify an arrest or indictment. Thus, in accordance with the Court's ruling in *Kirby v. Illinois*, defense counsel will not be present. This leaves the accused in precisely the same tenuous position which led the Court to fashion the *Wade* protections. However, as the respondent pointed out, there was extensive discovery of the details of both petitioners' identification procedures by defense counsel prior to trial, and defense counsel had equal access to witnesses for pretrial interviews. The Court observed that cross-examination on the identification issue was active and extended and noted that the petitioners were unable to show any specific instances during the trial where their counsel were hampered by the presence of the jury.

Furthermore, the petitioners' second argument is dependent on the alleged impermissible suggestiveness of the pretrial confrontations. However, *Brathwaite* holds that the admission of testimony concerning an unnecessarily suggestive identification procedure does not violate due process so long as the identification possesses sufficient indicia of reliability. Here, both the Supreme Court of Kentucky and the Court of Appeals for the Sixth Circuit found that Summitt's identification procedure was neither suggestive nor unreliable, and that while the identification procedures to which Watkins was subjected were to some degree suggestive, they were not impermissibly so, but were sufficiently reliable that there was no substantial likelihood of misidentifica-

102. See N. Sobel, supra note 46, § 1.3.
105. Brief for Respondent at 14-15. The brief notes that Summitt's counsel moved for and was granted discovery of all photographs viewed by the prosecution, and that Watkins's counsel discovered a photograph of the lineup and information about the hospital showup and introduced this evidence at the trial. *Id.* However, petitioners contend in their Brief that none of the photographs in Summitt's case were produced at or before trial. Brief for Petitioners at 13.
106. Brief for Respondent at 15.
107. 449 U.S. at 348. *But see supra* note 63.
108. 449 U.S. at 348.
109. 432 U.S. at 106.
tion under the totality of the circumstances.\textsuperscript{111} Thus it is difficult to see how the petitioners were prejudiced by the defense counsel's inability to show that suggestive procedures were used, because even assuming that suggestive procedures were used, the identifications were found to be sufficiently reliable to be presented for the jury's determination about credibility.

Justice Brennan noted in dissent that the petitioners here had made a colorable claim of impermissibly suggestive procedures and that such a claim should mandate holding a hearing outside the jury's presence.\textsuperscript{112} As the court of appeals noted, however, the trial court would be required to make a threshold decision on what constitutes a colorable claim, a decision which would be difficult to make without holding the hearing.\textsuperscript{113} This would seem to impose a \textit{per se} requirement for the hearing, which would in at least some cases be a waste of time. The present approach allows the trial court to use its discretion to discriminate between frivolous and serious claims of unfairness and to act as justice requires based on the facts of each case.\textsuperscript{114}

It is worth noting that the Court did not decide that a hearing outside the jury's presence may not ever be required. The cryptic statement that in some circumstances such a hearing may be constitutionally necessary\textsuperscript{115} seems to suggest that given a factual setting where the hypothetical issues raised in \textit{Watkins} are actually present,\textsuperscript{116} a different result may be required. Moreover,

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  \item \textsuperscript{111} \textit{Watkins v. Commonwealth}, 565 S.W.2d at 631; \textit{Summitt v. Bordenkircher}, 608 F.2d at 252-53. Watkins' exhibition to Goeing was necessary since it was unclear whether Goeing would survive the shooting. Compare \textit{Stovall v. Denno}, 388 U.S. at 302. Watkins' lighter skin made him stand out in the lineup, but "there is no requirement that a defendant in a lineup must be surrounded by people nearly identical in appearance." N. SOBEL, supra note 46, § 10.2(b) (quoting People v. Blair, 25 Cal.3d 640, 661, 602 P.2d 738, 751, 159 Cal. Rptr. 818, 831 (1979)). This facet of suggestiveness was also made known to the trial court and jury by Watkins' defense counsel. See supra note 105.
  \item \textsuperscript{112} 449 U.S. 359 (Brennan, J., dissenting). See also \textit{United States ex rel. Fisher v. Driber}, 546 F.2d at 22.
  \item \textsuperscript{113} \textit{Summitt v. Bordenkircher}, 608 F.2d at 251.
  \item \textsuperscript{114} See \textit{United States ex rel. Kirby v. Sturges}, 510 F.2d 397, 407 (7th Cir. 1975) (Stevens, J.); \textit{Clemens v. United States}, 408 F.2d at 1237.
  \item \textsuperscript{115} 449 U.S. at 349.
  \item \textsuperscript{116} Compare \textit{Foster v. California}, 394 U.S. at 443: "In effect, the police repeatedly aid to the witness, 'This is the man.'" Id. It is also possible that the issue of a jury's ability to disregard instructions might arise in an "other evidence" case. See N. SOBEL, supra note 46, § 1.3.
\end{itemize}
given the virtual unanimity of opinion in the lower federal courts that an *in camera* hearing is preferable,\footnote{See Cooper v. California, 386 U.S. 58, 62 (1967); Commonwealth v. Richman, 458 Pa. 167, 181 n.7, 320 A.2d 351, 361 n.7 (1974) (concurring opinion); N. Sobel, *supra* note 46, § 2.3(b).} it is likely that the *Watkins* decision will have little practical impact on federal trial courts. In any case, many state constitutions may mandate more stringent procedural requirements.\footnote{See Cooper v. California, 386 U.S. 58, 62 (1967); Commonwealth v. Richman, 458 Pa. 167, 181 n.7, 320 A.2d 351, 361 n.7 (1974) (concurring opinion); N. Sobel, *supra* note 46, § 2.3(b).}