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Manson V. Brathwaite: Looking For The Silver Lining In The Area Of Eyewitness Identifications

MANSON v. BRATHWAITE: LOOKING FOR THE SILVER LINING IN THE AREA OF EYEWITNESS IDENTIFICATIONS

Eyewitness identifications are important in criminal prosecutions because they can lend certainty in cases which might otherwise depend upon weak circumstantial evidence.[1] The reliability of identification testimony, however, is inherently suspect since it is based upon the perception of witnesses who may have been frightened or confused by the criminal act they observed.[2] Although courts traditionally ruled that all eyewitness identifications would be admissible and allowed the defense to attack only the weight of the evidence,[3] in 1967 the Supreme Court established guidelines for the admissibility of identification testimony at trial.[4] Under these guidelines the prosecution would have to prove that the witness had a sufficient opportunity to view the criminal act at the time of the crime[5] and that nothing that occurred between the crime and the witness' testimony would have rendered the identification unreliable.[6]

One event occurring between the crime and the trial, and over which the government has exclusive control, is the identification procedure, which may include a lineup,[7] showup,[8] or photographic display.[9] During the past decade, the Supreme Court has regulated these procedures by requiring exclusion of any testimony that might have been based upon such violations of the defendant's due process rights as unnecessary suggestiveness of the procedures[10] and lack of counsel at post-indictment

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[1] P. WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES 19 (1965) [hereinafter cited as WALL].

[2] Manson v. Brathwaite, 432 U.S. 98, 112 (1977). *See generally* N. SOBEL, EYEWITNESS IDENTIFICATION § 3 (1972) [hereinafter cited as SOBEL,]; Buckout, *Eyewitness Testimony*, 231 *Scientific American* 23-31 (Dec. 1974); Williams & Hammelmann, *Identification Parades-I*, 1963 CRIM. L. REV. 479, 482.

[3] Stovall v. Denno, 388 U.S. 293, 299-300 (1967); *see, e.g.*, United States v. Denno, 355 F.2d 731, 735-36 (1966) and cases cited therein.

[4] The Supreme Court's first comprehensive approach to the admissibility of eyewitness identification was in United States v. Wade, 388 U.S. 218 (1967). *See also* Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967). *See* text accompanying notes 26-41 *infra*.

[5] United States v. Wade, 388 U.S. 218, 241 (1967); *see* text accompanying notes 26-29 *infra*.

[6] *See* Stovall v. Denno, 388 U.S. 293, 301-02 (1967). An eyewitness identification which may have been reliable shortly after the crime may become questionable after the passage of time simply because the witness' memory may fade. *See* United States v. Wade, 388 U.S. 218, 241 (1967). In addition, an intervening suggestive identification procedure may render an identification unreliable. *See id.* at 235. *See also* SOBEL, *supra* note 2, at §§ 3, 3.01.

[7] *See* SOBEL, *supra* note 2, at § 40; WALL, *supra* note 1, at 40-64.

[8] In a showup, a single suspect is shown to the eyewitness. *See* SOBEL, *supra* note 2, at § 39; WALL, *supra* note 1, at 27-40. *See generally* note 32 *infra*.

[9] A photographic display may be conducted like a showup, showing single pictures, or like a lineup, with multiple pictures. *See generally* SOBEL, *supra* note 2, at §§ 45-51; WALL, *supra* note 1, at 66-89.

[10] Stovall v. Denno, 388 U.S. 293 (1967).

identifications.[11] Recently, however, in *Manson v. Brathwaite,*[12] the Supreme Court perfected a due process rule which emphasizes the reliability of the identification over the suggestiveness of the procedures, holding that exclusion of identification testimony should occur only when the unnecessary suggestiveness of the procedure might have rendered the witness' identifications unreliable.[13]

The identifications challenged in *Brathwaite* were offered by an undercover narcotics agent who had described his drug supplier to a uniformed policeman.[14] The policeman, thinking he recognized the description, procured a photograph of the defendant and left it in the agent's office.[15] Subsequently, the agent looked at the picture and concluded that the man pictured was the one who had previously sold him the narcotics.[16] At trial, the picture was received as evidence of the agent's out-of-court identification of the defendant.[17] In addition, the agent made an in-court identification of the defendant.[18] All identification testimony was admitted and the defendant was convicted of possession and sale of narcotics.[19]

In affirming the defendant's conviction, the Supreme Court held that any reliable identification is admissible, even if the witness was involved in an unnecessarily, impermissibly suggestive identification procedure.[20] Reliability must be determined, the *Brathwaite* Court said, by weighing the witness' opportunity to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of any description of the criminal given by the witness before the identification proceeding, the witness' certainty in identifying the criminal, and the time elapsed between the crime and confrontation, against the corrupting influence of the suggestive procedure.[21] If a court concludes that the corrupting effects of the suggestive procedure outweigh the indications of reliability, then the identification testimony should be excluded.[22] The test of admissibility as stated by the

[11] United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967).

[12] 432 U.S. 98 (1977).

[13] *Id.* at 114.

[14] *Id.* at 101.

[15] *Id.*

[16] *Id.*

[17] *Id.* at 102.

[18] *Id.*

[19] After Brathwaite's conviction was affirmed by the Connecticut Supreme Court, State v. Brathwaite, 164 Conn. 617, 325 A.2d 284 (1973), the federal district court denied the defendant's petition for habeas corpus. 432 U.S. at 103. The appeals court reversed, holding that all of the identification testimony should be excluded because it was the product of an unnecessarily suggestive identification procedure. 527 F.2d 363, 366-71 (2d Cir. 1975).

[20] 432 U.S. at 116-17. The *Brathwaite* Court did not find the identification procedures to be suggestive. *See* text accompanying notes 14-19 *supra.*

[21] 432 U.S. at 114. The Supreme Court's wording of the due process right protected by the *Brathwaite* test appears in Moore v. Illinois, 434 U.S. 220 (1977). "[D]ue process protects the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures." *Id.* at 227; *see* note 8 *supra.*

[22] *See* 432 U.S. at 116-17. Although the *Brathwaite* Court did not mention due process issues in its holding, *id.* at 114-17, it did say that due process was not violated unless, under

Brathwaite Court arose primarily from the earlier Supreme Court cases of *United States v. Wade*,[23] *Stovall v. Denno*,[24] and *Neil v. Biggers*.[25]

The reliability element of the *Brathwaite* test came almost verbatim from *Wade*,[26] in which a lineup identification was held in the absence of defense counsel.[27] The *Wade* Court held that a witness could identify the

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the "totality of the circumstances," the suggestive procedures led to a "substantial likelihood of misidentification." *Id.* at 106, *quoting* Neil v. Biggers, 409 U.S. 188, 199, 201 (1972); *see* Stovall v. Denno, 388 U.S. 293, 301-02 (1967). A defendant would be denied due process of law when, "under the totality of circumstances" the "confrontation . . . was . . . unnecessarily suggestive and conducive to irreparable misidentification." 388 U.S. at 301-02; *accord* Allen v. Estelle, 568 F.2d 1108, 1111 (5th Cir. 1978.)

[23] 388 U.S. 218 (1967).

[24] 388 U.S. 293 (1967).

[25] 409 U.S. 188 (1972).

[26] 388 U.S. at 240-41.

[27] *Id.* at 219-20. The sixth amendment right to counsel was applied to states via the fourteenth amendment by Gideon v. Wainwright, 372 U.S. 335 (1963). The *Wade* Court concluded that identification proceedings present a myriad of opportunities for abuse and mistake, necessitating the presence of defense counsel. 388 U.S. at 235-36. The Court ruled that the post-indictment lineup was a critical stage at which Wade was entitled to the presence of counsel. *Id.* at 237. At the time *Wade* was decided, the right to counsel was thought to be the best protection against suggestive identification procedures. *See* Recent Developments, *Identification: Unnecessary Suggestiveness May Not Violate Due Process*, 73 COLUM. L. REV. 1168, 1169-70 (1973) [hereinafter cited as *Identification*].

In *Wade*, the Supreme Court called for legislation that would clearly establish the accused's right to counsel, 388 U.S. at 239, and denied that its decision was meant to limit the legislature. *Id.* Congress' response to *Wade* was § 701(a) of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 3502 (1976). Section 3502 made the identification testimony of eyewitnesses unconditionally admissible. It was an attempt to nullify the rights granted in *Wade* by statutorily removing any requirement for counsel or for reliability, thus allowing the prosecution to present all identification testimony. S. REP. No. 1097, 90th Cong., 2d Sess., *reprinted in* [1968] U.S. CODE. CONG. & AD. NEWS 2112, 2139; *see* Levine & Tapp, *The Psychology of Criminal Identification: The Gap From* Wade *to* Kirby, 121 U. PA. L. REV. 1079, 1084 n.29 (1973) (suggesting that § 3502 is unconstitutional). Nevertheless, most courts have ignored the statute and followed *Wade*'s interpretation of due process. *See, e.g.*, United States v. Sutherland, 428 F. 2d 1152 (5th Cir. 1970); United States v. King, 321 F. Supp. 614 (W.D. Tex. 1970). *See also* McGowan, *Constitutional Interpretation and Criminal Identification*, 12 WM. & MARY L. REV. 235, 249-50 (1970); Recent Statute, 82 HARV. L. REV. 1392 (1969).

In Kirby v. Illinois, 406 U.S. 682 (1972), the Supreme Court held that the right to counsel during identification proceedings arises only after the defendant has been formally charged. *Id.* at 691; *see* Grano; Kirby, Biggers, *and* Ash: *Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?* 72 MICH. L. REV. 719 (1974) [hereinafter cited as *Constitutional Safeguards*]. *Kirby* was clarified recently in Moore v. Illinois, 434 U.S. 220 (1977), where a witness testified as to an out-of-court identification that had taken place at a preliminary hearing. Defense counsel was present at the hearing. *Id.* at 223-24. The *Moore* Court held that it is not the indictment that triggers a right to counsel in identification cases, but "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* at 226, *quoting* Kirby v. Illinois, 406 U.S. 682, 689 (1972). There is a suggestion in *Moore* that the rule requiring exclusion where defense counsel is not present will give way to a rule which will ignore the right to counsel and concentrate upon the reliability of the identification. 434 U.S. at 229-30, (Rehnquist, J., concurring).

defendant in court despite the existence of this tainted pretrial identification.[28] Such an in-court identification, in order to be admissible, however, must have some reliable basis independent of the tainted proceedings. Specifically, the Court required adequate observation at the time of the crime.[29]

The suggestiveness element of the *Brathwaite* test[30] came from *Stovall,*[31] in which the defendant had been taken to a stabbing victim's hospital room for a showup identification[32] because the police feared the victim would die before she had an opportunity to view the suspect.[33] The Supreme Court held that the "totality of circumstances"[34] indicated that the suggestiveness was the product of necessity,[35] and not of police indifference to constitutional rights of the defendant. Testimony as to the out-of-court identification[36] was therefore held admissible, because the procedure

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[28] 388 U.S. at 240-41.

[29] *Id.* The policy of allowing the prosecution to prove that evidence improperly acquired ultimately would have been acquired legally arose in Wong Sun v. United States, 371 U.S. 471, 488 (1963). In *Wong Sun,* the Court affirmed the prosecutor's introduction of a confession which was obtained after the suspect, who had been arrested, returned several days later to confess. *Id.* at 491. In accord with *Wong Sun,* the *Wade* Court held that the identification testimony, though acquired under improper circumstances, would have been acquired in any case because the witness' identification was reliable. 388 U.S. at 240. Thus, the evidence was admissible because improperly obtained evidence can be "purged of the primary taint." 388 U.S. at 241, *citing* MAGUIRE, EVIDENCE OF GUILT 221 (1959).

[30] 432 U.S. at 114; *see* text accompanying note 13 *supra.*

[31] 388 U.S. at 301-02.

[32] *See* note 8 *supra.* Showup identifications like those in *Stovall* and Neil v. Biggers, 409 U.S. 188 (1972) are recognized as being inferior to proper lineups and are presumed to be suggestive. Stovall v. Denno, 388 U.S. 293, 302 (1967), *citing* WALL, *supra* note 1, at 24-60; Paul, *Identification of Accused Persons,* 12 AUSTRALIAN L.J. 42, 44 (1938); Williams & Hammelmann, *Identification Parades-I,* 1963 CRIM. L. REV. 479, 480-81; F. FRANKFURTER, THE CASE OF SACCO AND VANZETTI 31-32. Under *Stovall,* testimony as to unnecessarily suggestive out-of-court identifications is inadmissible. 388 U.S. at 301-02. *See* text accompanying notes 31-37 *supra.*

[33] 388 U.S. at 295.

[34] *Id.* at 302. The *Stovall* Court used "totality of circumstances" in reference to the necessity and suggestiveness of the confrontation "[A] claimed violation of due process of law in the conduct of a confrontation, depends on the totality of the circumstances surrounding it. . . ." *Id.* The only facts discussed in the Court's due process analysis related to the showup procedure itself. *Id.* Reliability had no part in the *Stovall* Court's totality of the circumstances test. *See id.* In later cases, however, the totality test was expanded to comprehend reliability. *See* note 46 *infra.*

[35] 388 U.S. at 302.

[36] In-court testimony as to an out-of-court identification technically is hearsay. It is an out-of-court statement offered to prove that the man identified earlier was the criminal. *See* Gilbert v. California, 388 U.S. 263, 272 n.3 (1967); WALL, *supra* note 1, at 134-40. State courts have been divided concerning the admissibility of this testimony. WALL, *supra* note 1, at 134; *see* cases collected in 71 A.L.R. 2d 449. Congress, noting the split, amended FEDERAL RULE OF EVIDENCE 801(d)(1) to include 801(d)(1)(C), which provides that a prior statement by a witness is not hearsay if "The declarant testifies at a trial or a hearing and is subject to cross-examination . . . and the statement is . . . one of identification made after perceiving him. . . ." FED. R. EVID. 801(d)(1)(C).

was neither improper nor violative of the defendant's due process rights.[37]

Together, *Wade* and *Stovall* established rules to be applied by courts faced with identification testimony based upon suggestive police procedures.[38] An in-court identification would be admissible if it had a reliable basis independent of the tainted proceeding.[39] An out-of-court identification would be admissible if the identification procedure had not, by its unnecessary suggestiveness, violated the defendant's due process rights.[40] If the procedures had been unnecessarily suggestive, or if they were conducted without defense counsel present, the testimony would be excluded and the prosecution would have no opportunity to prove reliability.[41]

Although *Wade* and *Stovall* drew a clear distinction between in-court and out-of-court identification,[42] *Neil v. Biggers*[43] subsequently erased that distinction by holding that all identification testimony should be judged according to a *Wade*-type reliability standard.[44] The *Biggers* Court concluded that in- and out-of-court identification should be admitted into evidence if there are sufficient indicia of reliability.[45] If, under the totality of the circumstances,[46] an identification seems reliable, admission of that

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[37] 388 U.S. at 302.

[38] *Wade* and *Stovall* belong to a trio of cases, the *Wade* Trilogy, which embodied the Warren Court's attitude toward identification testimony. The third case, Gilbert v. California, 388 U.S. 263 (1967), involved a doubly tainted lineup procedure. First, the lineup was suggestive because approximately one hundred witnessses were in the audience and no effort was made to keep them from influencing each other. *Id.* at 270-71 n.2. The Court, however, required the exclusion of the identification testimony because the post-indictment proceeding was conducted without defense counsel present. *Id.* at 272. *Gilbert* established the exclusionary rule as the proper handling of testimony as to identification obtained at tainted pretrial proceedings. *Id.* at 273.

[39] United States v. Wade, 388 U.S. 218, 241-42 (1967); Gilbert v. California, 388 U.S. 263, 272 (1967).

[40] Stovall v. Denno, 388 U.S. 293, 301-02 (1967).

[41] Gilbert v. California, 388 U.S. 263, 273 (1967).

[42] *See* text accompanying notes 39-40 *supra.*

[43] 409 U.S. 188 (1972). In *Biggers,* a rape victim who had viewed many suspects over the course of seven months finally identified the defendant at a showup. She testified in court as to the previous identification, *id.* at 194-95, but did not identify the defendant there. It appears that she was not asked to make an in-court identification.

[44] 409 U.S. at 199-200. The *Biggers* test of reliability of the identification is similar to the *Wade* independent basis criteria. 388 U.S. at 241. While the *Wade* criteria are elements of an admissibility test and the *Biggers* criteria are elements of a due process test, the distinction may be blurred, and "independent basis" and "reliability" are probably interchangeable. *See* SOBEL, *supra* note 2, at § 70 (1978 Supp.)

A subtle difference between the *Wade* and the *Biggers* tests illustrates the shift of the Supreme Court's emphasis from the suggestiveness of the procedure to the reliability of the identification. *Wade* gives no credence to an identification simply because the witness claims to be certain, but instead discredits his testimony if there are any misidentifications. 388 U.S. at 240. *Biggers,* on the other hand, might overlook some suggestiveness if the witness claims to be certain, 409 U.S. at 199, and therefore, might ignore misidentifications. *See id.* at 199-200.

[45] *Id.*

[46] *Id.* at 199. Although the *Biggers* Court appears to have applied the totality of circumstances test from *Stovall,* 409 U.S. at 196, 199, in fact, the *Biggers* test is different, since

testimony will not violate due process despite the unnecessary suggestiveness of the procedure.[47]

Biggers was criticized by some commentators who felt that the Supreme Court had tampered with the concept of due process by focussing on the reliability of the identification while ignoring the unnecessary suggestiveness of the procedure by which the identification was obtained.[48] More important to lower courts, though, the decision was ambiguous as to the proper application of the new reliability test. The crime, identification, and conviction in *Biggers* all took place before *Stovall* was decided,[49] and the *Biggers* Court did not state clearly whether its test was to be applied in all cases or only in those situations similar to *Biggers* where the procedure in question occurred prior to the announcement of *Stovall's* per se exclusionary rule.[50] *Biggers* held that a pre-*Stovall* case should not be subject to the strict exclusionary rule based upon suggestiveness.[51] However, courts applying *Biggers* were unsure whether to use the *Biggers* reliability test only in pre-*Stovall*[52] cases or in all cases.[53] This ambiguity was

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Stovall looked only to the suggestiveness of the procedure. 388 U.S. at 302; *see* note 34 *supra*. *See also* Manson v. Brathwaite, 432 U.S. 98, 123-24 (1977) (Marshall, J., dissenting).

[47] 409 U.S. at 199. The American Law Institute reasoned that *Biggers* applied *Wade's* admissibility test rather than *Stovall's* due process test because the *Biggers* Court did not want to analyze the due process issue closely. A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 160, General Comment at 421 (1975). Feeling that the Court's action in *Biggers* was an invitation to generate a code of procedures that would reduce the necessity of having a lawyer present at identification proceedings, the Institute accepted § 160 of the MODEL CODE.

[48] *See Constitutional Safeguards*, *supra* note 27, at 720-21; Pulaski, Neil v. Biggers: *The Supreme Court Dismantles The* Wade *Trilogy's Due Process Protection*, 26 STAN. L. REV. 1097, 1098-99 (1974) [hereinafter cited as Pulaski]; *Identification*, *supra* note 27, at 1181. *Biggers* was criticized because of its shift away from suggestiveness which took the burden off the prosecution to conduct a scrupulously fair identification procedure, and imposed upon the defense the burden of proving that an identification was not reliable. *See* Pulaski, *supra* this note, at 112. Another danger of using an independent basis test as a test of due process is that courts must look to factors external to the procedure itself to decide if due process has been violated. United States *ex rel.* Gonzalez v. Zelker, 477 F.2d 797, 804 (2d Cir. 1973), *cert. denied sub nom* Gonzalez v. Vincent, 414 U.S. 924 (1974) (circumstantial evidence of guilt used to corroborate identification and establish no due process violation); State v. James, 217 Kan. 96, 535 P.2d 991 (1975) (previous uncharged acts of bizarre sexual nature admitted to corroborate identification). *See generally* SOBEL, *supra* note 2, 1978 Supp. at 73-74.

[49] Archie Biggers was charged with a rape that occurred on August 17, 1965. The Supreme Court of Tennessee affirmed the conviction on Jan. 12, 1967, Biggers v. State, 219 Tenn. 553, 411 S.W.2d 696 (1967), seven months before *Stovall* was decided. The United States Supreme Court affirmed the state court decision by an equally divided court. Biggers v. Tennessee, 390 U.S. 404 (1968). A decision by an equally divided Court is not considered a final adjudication within the meaning of 28 U.S.C. § 2244(c) (1970), which prohibits habeas hearings on cases already adjudicated by the Supreme Court of the United States. Therefore, Biggers was allowed to attack the state decision collaterally by means of a habeas petition that was granted by the federal district and circuit courts. Biggers v. Neil, 448 F.2d 91 (6th Cir. 1971). The Supreme Court did not finally rule on the case until seven years after the crime was committed. 409 U.S. at 201.

[50] 409 U.S. at 199.

[51] *Id.*

[52] *See* Bloodworth v. Hopper, 539 F.2d 1382 (5th Cir. 1976); Brathwaite v. Manson, 527

the primary issue to be decided by the *Brathwaite* Court.[54]

Although the *Brathwaite* Court specifically stated the *Biggers* "totality of the circumstances" analysis[55] would be applied to both pre- and post-*Stovall* cases,[56] the Court nevertheless modified that analysis, requiring courts to consider the suggestiveness of the identification procedure.[57] In reaching this conclusion, the court recognized the existence of two rules: a per se exclusionary rule based upon *Stovall*[58] and a due process exclusionary rule arising from *Wade* and *Biggers*.[59] The *Brathwaite* Court compared the efficacy of the two rules. First, the Court noted that although both rules promote reliability of identification, the per se exclusionary rule could prevent reliable testimony from reaching the trier of fact.[60] Second, the Court considered deterrence of improper police procedure and concluded that while the per se exclusionary rule was a more effective deterrent, the due process exclusionary rule was not powerless to deter police from subjecting suspects to unnecessarily suggestive identification procedures.[61] Finally, the effect on judicial administration was seen by the Court as one of the best reasons for adopting a due process rule.[62] Not only would the per se rule deprive the trier of fact of valuable,[63] reliable evidence, it would, because of its rigidity, make judicial error more likely than a due process approach, which allows the trial judge to examine the totality of the circumstances.[64]

F.2d 363 (2d Cir. 1975); United States v. Jones, 517 F.2d 176 (D.C. Cir. 1975); Smith v. Coiner, 473 F.2d 877, 882 (4th Cir.), *cert. denied sub nom.* Wallace v. Smith, 414 U.S. 1115 (1973).

[53] United States *ex rel.* Kirby v. Sturges, 510 F.2d 397, 407-08 (7th Cir.), *cert. denied*, 421 U.S. 1016 (1975); Stanley v. Cox, 486 F.2d 48 (4th Cir.), *cert. denied sub nom.* Stanley v. Slayton, 416 U.S. 958 (1973).

[54] 432 U.S. at 107.

[55] 409 U.S. at 199-200; *see* text accompanying notes 44-46 *supra*.

[56] 432 U.S. at 114.

[57] *Id.*

[58] *See* note 52 *supra*.

[59] *See* note 53 *supra*. The *Biggers* Court was sensitive to the difference between a per se exclusionary rule like *Stovall's*, which would automatically exclude evidence if the identification process were proved unnecessarily suggestive, and a due process exclusionary rule which was also stated in *Stovall:* "[T]he pretrial confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process of law." 388 U.S. at 301-02. *See generally* SOBEL, *supra* note 2, at §§ 8-9.

[60] 432 U.S. at 112.

[61] *Id.* Because the per se rule requires the automatic exclusion of any testimony as to an improper identification procedure, it seems police departments would recognize that such procedures would be a wasted effort and would avoid them. On the other hand, while the due process rule may allow the use of identifications obtained at improper proceedings, the worst abuses would still be excluded and police departments would have to be alert to the danger of excessive suggestiveness. Thus, both rules can potentially prevent police misconduct.

[62] *Id.* at 112-13.

[63] *Id.*

[64] Presumably, the *Brathwaite* Court meant that a totality of circumstances test will result in fewer judicial errors than a per se test because the totality test allows more pertinent evidence to be admitted. On the other hand, the Court might have meant that the more

The *Brathwaite* Court concluded that the reliability of an identification must be the "linchpin" in analyzing the admissibility of identification testimony in all cases, pre- and post-*Stovall.*[65] In setting forth the totality of circumstances test, however, the *Brathwaite* Court did not abandon the *Stovall* suggestiveness test[66] as the *Biggers* Court had done.[67] Where *Biggers* had ruled simply that the reliable identification would be admissible, *Brathwaite* ruled that reliability must be weighed against the "corrupting effect of the suggestive identification."[68]

The *Brathwaite* Court's totality of circumstances test of due process appears to be more comprehensive than the due process tests of *Stovall* and *Biggers.*[69] Prudently applied, the test should protect the defendant from an identification procedure that is "unnecessarily suggestive and conducive to irreparable misidentification,"[70] and at the same time allow reliable testimony to be presented. The *Brathwaite* Court's application of the test is exemplary. There must be an examination of each reliability criterion, seriatim, accompanied by an analysis of the suggestiveness of the procedure.[71]

Although the Supreme Court thoroughly analyzed the totality of the circumstances in *Brathwaite,* it did not explicitly mandate such a full treatment for future cases. Thus, situations may arise in which a court would accept a characterization of the facts that supports a finding of

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flexible totality of circumstances rule could help prevent procedural errors in the admission and exclusion of evidence. The latter interpretation is illogical, however, in that a strict rule, because of its rigidity, does not leave much room for error, while a flexible rule is open to many erroneous interpretations.

[65] 432 U.S. at 117.

[66] *Id.* at 114. The *Stovall* suggestiveness test is discussed in the text accompanying notes 35-38 *supra.*

[67] The totality of circumstances test set forth in *Biggers* does not take the suggestiveness of the identification into account. 409 U.S. at 199-200. *See* Manson v. Brathwaite, 432 U.S. 98, 129 (Marshall, J., dissenting); *see* notes 34, 46 *supra.*

[68] 432 U.S. at 114.

[69] *Id.* at 129 (Marshall, J., dissenting). Justice Marshall, while criticizing the majority's retreat from the per se exclusionary rule, *id.* at 118-29, praises the majority's revival of the *Stovall* test of suggestiveness, Stovall v. Denno, 388 U.S. 293 (1967); *see* text accompanying notes 31-41 *supra,* that had been ignored in *Biggers. See* note 67 *supra.*

[70] Stovall v. Denno, 388 U.S. 293, 302 (1967). The language quoted in the accompanying text has become the due process standard by which out-of-court identification procedures are measured. Neil v. Biggers, 409 U.S. 188, 198 (1972). Equivalent language is sometimes substituted. *See* Simmons v. United States, 390 U.S. 377, 384 (1968) ("very substantial likelihood of irreparable misidentification"). With the word "irreparable" deleted, the *Stovall* language becomes the standard for admissibility of testimony as to tainted out-of-court identifications. Neil v. Biggers, 409 U.S. 188, 198 (1972).

[71] 432 U.S. at 114-17. Several cases decided subsequent to *Brathwaite* have been in close accord with the Supreme Court's thorough analysis. Some have concluded that the identification testimony is admissible. Allen v. Estelle, 568 F.2d 1108 (5th Cir. 1978); United States v. Marchand, 564 F.2d 983 (2d Cir. 1977), *cert. denied,* 98 S. Ct. 732 (1978); United States v. Collins, 559 F.2d 561 (9th Cir. 1977); United States v. McNair, 439 F. Supp. 103 (E.D. Pa. 1977). Other cases, after full analysis, have decided that the identification testimony must be excluded. United States v. Mann, 557 F.2d 1211 (5th Cir. 1977); Thacker v. South Carolina, 438 F. Supp. 447 (D.S.C. 1977).

reliability[72] and then either decide that no amount of suggestiveness can outweigh reliability,[73] or ignore the suggestiveness.[74] In addition, a court, convinced that it need not test reliability unless suggestiveness is proven, might accept a weak demonstration of the propriety of the procedure and never examine reliability at all.[75] Both of these approaches seem incorrect in light of the care taken by the *Brathwaite* Court to apply each element of the test.[76]

Although the *Brathwaite* Court stated that the only question under consideration was whether *Biggers* should apply only to pre-*Stovall* cases or to all cases,[77] it may ultimately be more important that *Brathwaite* abandoned the per se exclusionary rule propounded in *Stovall*[78] and modified the *Biggers* formulation of the due process exclusionary test.[79] Because it requires a consideration of the suggestiveness of the identification procedure in addition to an evaluation of the reliability of the identification, *Brathwaite* recognizes that a due process test must consider procedure.

Brathwaite will be judged harshly by advocates of per se exclusionary rules. Nevertheless, the majority's decision explicitly weighed the dangers of misidentification against the evil of excluding valid evidence.[80] The augmented test of reliability[81] was the Court's response to the fear that misidentification arising from suggestive procedure can put the wrong man on trial.[82] While *Brathwaite* does not require that identifications based upon unnecessarily suggestive procedures be automatically excluded, it does give a criminal defendant an opportunity to have the suggestiveness of the procedure scrutinized, and a chance to get the identification excluded on the basis of its suggestiveness.[83]

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[72] *Compare* Neil v. Biggers, 409 U.S. 188, 200-01 (1972) *with* Biggers v. Neil, 448 F.2d 91, 93 (6th Cir. 1971). *Compare* Manson v. Brathwaite, 432 U.S. 98, 114-16 (1977) *with* Manson v. Brathwaite, 432 U.S. 98, 129-36 (1977)(Marshall, J., dissenting) *and* Brathwaite v. Manson, 527 F.2d 363, 371-72 (2d Cir. 1975).

[73] *See, e.g.*, McGuff v. Alabama, 566 F.2d 939 (5th Cir. 1978). In *McGuff* witnesses to a murder based their identifications upon their view of the murderer as he drove by, shouted an obscenity, stuck a gun out the window and fired. *Id.* at 940. The next morning, the police picked up the defendant and drove him to each witness' house. During this identification procedure, the defendant never got out of the police car. *Id.* All identifications were admitted and the defendant was convicted. *Id.* at 940-41.

[74] *Cf.* United States v. Bubar, 567 F.2d 192 (2d Cir.), *cert. denied*, 434 U.S. 872 (1977)(good factual basis existed for finding of reliability, but court did not balance reliability against suggestiveness); United States v. Ivory, 563 F.2d 887 (8th Cir. 1977)(facts strongly supported finding of reliability, but court did not balance reliability against suggestiveness).

[75] *See, e.g.*, United States v. Lewis, 565 F.2d 1248 (2d Cir. 1977). Although *Lewis* was decided after *Brathwaite*, the court did not refer to *Brathwaite*, possibly explaining the court's failure to examine reliability where the identification procedure was challenged.

[76] 432 U.S. at 114-17.

[77] *Id.* at 107; *see* note 54 *supra*.

[78] 432 U.S. at 118-29 (Marshall, J., dissenting).

[79] *See id.* at 129 (Marshall, J., dissenting).

[80] *Id.* at 111-14.

[81] *Id.* at 114.

[82] *See generally Constitutional Safeguards*, *supra* note 27, at 719-25.

[83] 432 U.S. at 129 (Marshall, J., dissenting).