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Due Process in Extra-Judicial Identifications

Another basis for affording a presumption of prejudice can be found in the fact that the defense counsel's presence in the courtroom without the presence of the individual defendant[25] is an obvious admission to the jury that the real defendant is an insurance company. Such a situation can never be beneficial to the company.[26]

The result is that courts making decisions under the proof of prejudice rule are in fact breaking down whatever materialty an insurance contract has and in a sense are condoning the breach of a contract to serve an end—compensation. The courts following the prejudice per se view are following an outmoded approach and are construing the contract so strictly that often an innocent person is left to bear a great loss. While the presumption of prejudice rule gives the most equitable chance to both parties, it still does not afford the best solution. Proof of prejudice or the lack of it is a difficult, if not an impossible task, and the courts never venture to say by what means you can establish or disestablish this prejudice. The problem of proof is extremely burdensome for one of the parties, depending on which rule is applied.

Farley points out a problem that can offer no real equitable solution to all the parties involved. The dilemma of the cooperation clause and trial attendance is certain to grow along with the increase in cars, policyholders, and constant and often delayed litigation.

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DUE PROCESS IN EXTRA-JUDICIAL IDENTIFICATIONS

Criminal convictions of innocent people can result from an erroneous identification by a victim or eyewitness of the crime.[1] Normal human failings of perception and memory undoubtedly cause errors

[25] 21 APPLEMAN, INSURANCE LAW AND PRACTICE § 12831 at 794, says:
It is more commonly thought that in a personal injury suit, *there are ordinarily but two persons before the court,* and the trial of the action should be conducted, in so far as possible, without reference to the question of whether the defendant is insured. . . . The courts believe *that juries are prone to return larger verdicts* where there is insurance coverage, thus *subjecting a defendant to a burden which the law does not impose upon him.* (Emphasis added.)

[26] 2 WIGMORE, EVIDENCE § 282a at 133-34 (3d ed. 1940), says:
[A] knowledge of the fact of insurance against liability will motivate the jury to be reckless in awarding damages to be paid, but by a supposedly well-pursed and heartless insurance company that has already been paid for taking the risk.

[1] FRANK & FRANK, NOT GUILTY 61 (1957); WILLIAMS, THE PROOF OF GUILT 105 (3d ed. 1963); BORCHARD, CONVICTING THE INNOCENT *xiii* (1932). Professor Borchard analyzed the convictions of 65 innocent men, of whom 29 were found guilty because of such identification.

in identification,[2] but the influence of improper suggestion upon the identifying witness also plays a part in the naming of an innocent person as the perpetrator of a crime.[3] Although a witness is protected from improper suggestion while he is on the stand,[4] the original identification of the accused usually occurs under conditions largely controlled by the police.[5] Judicial scrutiny of extra-judicial identifications has been lacking, for courts have treated irregularities in the identification procedure as affecting only the weight of such evidence and not its admissibility.[6] This means that juries, who are often unduly receptive to evidence of identification,[7] will decide the validity of the identification. The danger of a jury unduly relying on a suggestive identification is increased by the reluctance of courts to give cautionary instructions on the dangers of identification testimony.[8] Nor is there much hope for relief from appellate courts since they generally will not reverse a conviction unless as a matter of law the evidence of identity was so weak as to constitute practically no evidence at all.[9]

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[2]Gardner, *The Perception and Memory of Witnesses*, 18 CORNELL L.Q. 391 (1933); Chenoworth, *Police Training Investigates the Fallibility of the Eye-Witness*, 51 J. CRIM. L., C. & P.S. 378 (1961); Williams, *supra* note 1, at 104-24; WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES, 8-11 (1965).

[3]WALL, *supra* note 2, at 26.

[4]The general rule is that in interrogating a witness on direct examination, questions which suggest the specific answer desired are improper. See 3 WIGMORE, EVIDENCE 769 (3d ed. 1940). "The witness is protected against suggestion only while on the stand, seemingly on the assumption either that intervening influences are unimportant or that he comes untouched from event to court." Cleary, *Evidence as a Problem in Communicating*, 5 VAND. L. REV. 277, 287 (1952).

[5]BORCHARD, *supra* note 1, at *xv* says: "Expect in the few cases where evidence is consciously suppressed or manufactured, bad faith is not necessarily attributable to the police or prosecution; it is the environment in which they live, with an undiscriminating public clamor for them to stamp out crime and make short shrift of suspects, which often seems to induce them to pin a crime upon a person accused."

[6]*E.g.*, People v. Parham, 60 Cal. 2d 378, 33 Cal. Rptr. 497, 384 P.2d 1001 (1963), *cert. denied*, 377 U.S. 945 (1963); People v. Boney, 28 Ill. 2d 505, 192 N.E.2d 920 (1963); State v. Hill, 193 Kan. 512, 394 P.2d 106 (1964); Presley v. State, 224 Md. 550, 168 A.2d 510 (1961). For more cases see Annot., 71 A.L.R.2d 439, 457 (1960). But see People v. Evans, 39 Cal. 2d 242, 246 P.2d 636 (1952); People v. Conley, 275 App. Div. 743, 87 N.Y.S.2d 745 (1949), wherein convictions were overturned because improper identification procedures made the identification evidence insufficient to support the verdicts.

[7]"The only type of evidence more damning than personal identification is a confession." 2 U.C.L.A.L. REV. 552, 556 (1955); WALL, *supra* note 2, at 19-23. See also the discussion of the case of Adolph Beck in WILLIAMS, *supra* note 1, at 110-12.

[8]United States v. Moia, 251 F.2d 255 (2d Cir. 1958).

[9]"We have repeatedly held that all inferences must be construed in the light most favorable to sustaining the verdict, and that where there is evidence to support a verdict we will not disturb a finding of a jury." State v. Miranda, 98

Recent cases recognize that extra-judicial identifications may violate due process. The United States Court of Appeals for the Fourth Circuit decided in *Palmer v. Peyton*,[10] a federal habeas corpus proceeding brought by a state prisoner,[11] that the identification procedure used by the police violated the defendant's constitutional rights as guaranteed by the Fourteenth Amendment. *Palmer* involved voice identification of an accused rapist. On March 27, 1957, Mrs. Britt, a white woman, was raped and robbed. She stated that her attacker was a Negro about the same height as she, that he was wearing a feed bag over his head and an orange colored shirt, that he had been drinking, and that he spoke with a high, childlike voice. The following day a Negro youth informed the police that Palmer claimed to have raped a white woman the day before. Palmer was arrested, and Mrs. Britt was informed by the police that they had a Negro suspect they wanted her to hear. She was brought to the station house and shown the orange shirt that Palmer had been wearing at the time of his arrest.[12] She then sat in a room adjacent to the one in which Palmer was questioned, and, after listening to Palmer's voice for a few minutes through

Ariz. 18, 401 P.2d 721, 725 (1965), reversed on constitutional grounds in Miranda v. Arizona, 384 U.S. 436 (1966); People v. Hood, 140 Cal. App. 2d 585, 295 P.2d 525 (Dist. Ct. App. 1956).

[10]359 F.2d 199 (4th Cir. 1966). The United States Supreme Court recently granted certiorari in another identification case, United States *ex rel.* Stovall v. Denno, 355 F.2d 731 (2d Cir. 1966), *cert. granted*, 384 U.S. 1000 (1966). Stovall was identified when he was brought into the victim's hospital room handcuffed, and surrounded by several policemen. The prisoner's attorney argued that since extra-judicial identifications are a legitimate tool of police investigation and the results are admitted at trial as evidence of guilt, any identification procedure must, as with confessions, comply with some minimal standard of fairness. *In Brief*, 1 CRIM. L. BULL. 3, 5, 8 (March 1965). In this case the Second Circuit stated that an "identification procedure could be so unfair as to amount to a violation of the Fourteenth Amendment's due process guarantee." 355 F.2d at 738. However, the court in *Stovall* went on to say that this identification was not "so unfair" and therefore the weight to be given the identification was for the jury.

[11]Palmer had two previous trials. On June 22, 1957, a jury found him guilty and fixed his punishment at death. The judge declared a mistrial and set aside the conviction. On January 11, 1958, his second trial ended with a hung jury. At his third trial, Palmer waived his right to a jury and was tried and sentenced by the judge who had presided at the two previous trials. Although no appeal was taken from his conviction, in 1962 Palmer petitioned the Supreme Court of Virginia for a writ of habeas corpus. This petition was denied, and the United States Supreme Court denied certiorari in February, 1963. Palmer v. Cunningham, 372 U.S. 921 (1963). Palmer's petition for federal habeas corpus was dismissed after a hearing by the U.S. District Court for the Eastern District of Virginia on July 10, 1964. This is the decision appealed to the Court of Appeals.

[12]It is unclear as to whether the shirt was shown to the witness before listening to the voice, or immediately thereafter.

a partially opened door, she identified his voice as that of her assailant. Palmer was convicted and sentenced to consecutive terms of life imprisonment for rape and forty years for robbery. Eight years later the Fourth Circuit held that the identification procedure violated due process and Palmer was granted a writ of habeas corpus setting aside his conviction and directing his release, unless the state afforded him a new trial "uninfected by the voice identification testimony." [13]

The fact that the witness was informed that a Negro suspect had been arrested, that she was shown the orange shirt, that the prisoner was not identified in a line-up but instead his voice was the only one presented for identification, combined to convince the court that the state had generated a "highly suggestive atmosphere that . . . could not have failed to affect her judgment." [14] The court also noted that the danger of suggestion is increased when the identification is based on only one facet of the suspect's total personality. "This is especially so when the identifier is presented with no alternative choices; there is then a strong predisposition to overcome doubts and fasten guilt upon the lone suspect." [15]

Courts have been reluctant to exclude evidence of extra-judicial identifications because such identifications are considered more reliable than identifications made at trial.[16] Extra-judicial identifications are usually made shortly after the crime when the witness' memory is fresh, whereas identification at the trial have little probative value because "the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witness's mind." [17] However, the probative value of an extra-judicial identification will be weakened if it is made under circumstances which suggest the guilty identity of the suspect. Professor Wigmore warned that although the original identification is generally more reliable, "no part of the field of proof has been so defective in the use of the common

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[13]359 F.2d at 203.

[14]*Id.* at 201.

[15]*Ibid.*

[16]United States v. Forzano, 190 F.2d 687 (2d Cir. 1951); People v. Gould, 54 Cal. 2d 621, 7 Cal. Rptr. 273, 354 P.2d 865 (1960); State v. Frost, 105 Conn. 326, 135 Atl. 446 (1926). These cases deal primarily with the hearsay objection to the introduction into evidence of an extra-judicial identification. For a discussion of the *Gould* case in particular, see 8 U.C.L.A.L. Rev. 467 (1961); 109 U. Pa. L. Rev. 1182 (1961). For a comprehensive discussion of the hearsay problem with regard to extra-judicial identifications, see Annot., 71 A.L.R.2d 449 (1960); 4 Wigmore, Evidence § 1130 (3d ed. 1940); 30 Rocky Mt. L. Rev. 332 (1958).

[17]People v. Gould, 54 Cal. 2d 621, 7 Cal. Rptr. 273, 354 P.2d 865, 867 (1960).

sense of psychology. And at no point is the danger greater of condemning an innocent person." [18]

Extra-judicial identifications may be made in several ways. The two principal procedures used by police to identify a suspect are the "show-up" and the "line-up." The show-up, a practice frequently[19] used by American police,[20] consists of bringing a single suspect before a witness for identification purposes, whereas in a line-up the accused is placed in a line with three or four other persons.

A show-up is strongly suggestive of guilt because "the emotions of the victim . . . create a predisposition to believe the worst of a person brought before him as the probable offender, especially when there is no alternative suspect." [21] In regard to show-ups, Professor Wigmore states that "there is no excuse for jeopardizing the fate of innocent men by such clumsy antiquated methods; a recognition under such circumstances is next to worthless." [22] Suggestion may be substantially increased by seeing the suspect handcuffed and guarded by policemen,[23] telling the witness that the person to be shown was the actual perpetrator of the crime,[24] making a suspect dress in clothing similar to the eye-witness's description,[25] or showing a picture of the accused to the witness before the identification.[26] However, "no

[18]Wigmore, *Corroboration by Witness' Identification of an Accused on Arrest*, 25 ILL. L. REV. 550, 551 (1931).

[19]*E.g.*, People v. Branch, 127 Cal. App. 438, 274 P.2d 31 (Dist. Ct. App. 1954). Taylor v. State, 75 Ga. App. 205, 42 S.E.2d 926 (1947); People v. Cobb, 52 Ill. App. 2d 332, 202 N.E.2d 56 (1964), *cert. denied*, 379 U.S. 1004 (1964); Brown v. Maxwell, 174 Ohio St. 29, 186 N.E.2d 612 (1962).

[20]English Courts and policemen apparently are more concerned with the identification procedure. Thus, if the identification is secured improperly, an appellate court can quash any resulting conviction if the trial judge fails to sufficiently point out to the jury the dangers of such an identification. See: Paul, *Identification of Accused Persons*, 12 AUSTR. L.J. 42 (1938); Paiken, *Identification as a Facet of Criminal Law*, 29 CAN. B. REV. 372 (1951); Annot., 12 CRIMINAL REPORTS 328 (Can.) (1951); 10 HALSBURY'S LAWS OF ENGLAND 440 (3d ed. 1955); 3 WIGMORE, EVIDENCE § 786a (3d ed. 1940).

[21]BORCHARD, *supra* note 1, at 84. See also, WILLIAMS, *supra* note 2, at 121; WALL, *supra* note 2, at 28-29; Gorphe, *Showing Prisoners to Witnesses for Identification*, 1 AM. J. POLICE SCI. 79, 82 (1930).

[22]4 WIGMORE, EVIDENCE § 1130 n.2 (3d ed. 1940).

[23]See, United States *ex rel.* Stovall v. Denno, *supra* note 10; Gorphe, *supra* note 21, at 82; Wigmore, *supra* note 18, at 551.

[24]See, Hilson v. State, 101 Tex. Crim. 449, 276 S.W. 272 (1925).

[25]People v. Conley, *supra* note 6. (Beside having to dress-up in certain clothing, the suspect was forced to remove the glasses which he habitually wore. The court held that the identification procedure was improper and conviction was against the weight of the evidence.)

[26]People v. Evans, *supra* note 6, at 642. The court decided it could hardly be considered fair "to show a complaining witness the picture of one man and then take her into a room where that man is the only occupant."

matter how artificial or rigged the show-up is, the courts are disposed to treat it in terms of weight rather than admissibility." [27]

Placing the suspect in a line-up will naturally reduce the chances of an erroneous identification provided that the line-up is conducted fairly.[28] Yet the value of the line-up and the reliability of any identification will be as weak as one from a show-up if special attention is called to the suspect by telling the witness the suspect's name and then requiring the members of the line-up to state their names,[29] dressing the suspect differently from the others,[30] requiring members of the line-up to try on clothes that obviously fit only the suspect,[31] showing a witness a picture of the suspect prior to the line-up,[32] or using people in the line-up who are known to the identifying witness.[33] The need to discourage these suggestive methods of identification is obvious. However, courts have repeatedly held that there is no requirement that a suspect should be placed in a line-up since line-ups are merely designed to assist the jury in weighing the evidence relating to identification.[34] Thus, even if the identification was secured by police suggestion, this fact would not render the identification evidence incompetent but only affect its weight.[35]

Palmer is significant because it is the first case to hold that the element of suggestion was so strong as to make the extra-judicial identification a denial of due process, thus making the identification evidence inadmissible.[36] It may be argued that *Palmer* is limited to its fact situation, a voice identification under suggestive conditions. However, courts have generally regarded "the sense of hearing as reliable as that of any other of the five senses" [37] and there is no apparent reason why

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[27]Cleary, *supra* note 4, at 284 n.40.

[28]For a list of "line-up" rules proposed by one writer, see 2 U.C.L.A.L. REV. 552, 557 (1955).

[29]People v. Hicks, 22 Ill. 2d 364, 176 N.E.2d 810, 811 (1961).

[30]Presley v. State, *supra* note 6.

[31]People v. Parham, *supra* note 6.

[32]People v. Krazik, 397 Ill. 202, 73 N.E.2d 297 (1947).

[33]People v. Boney, *supra* note 6; People v. James, 218 Cal. App. 2d 166, 32 Cal. Rptr. 283 (1963).

[34]People v. Branch, *supra* note 19.

[35]People v. Crenshaw, 15 Ill. 2d 458, 155 N.E.2d 599 (1959), *cert. denied*, 359 U.S. 997 (1959).

[36]Some cases have held that the improper identification procedure made the identification evidence too weak to support a guilty verdict. See, People v. Evans, *supra* note 6; People v. Conley, *supra* note 6.

[37]Bowlin v. Commonwealth, 195 Ky. 600, 242 S.W. 604, 607 (1922); *accord*, State v. Bell, 300 S.W. 504 (Mo. 1927). In Bland v. State, 129 Tex. Crim. 563, 89 S.W.2d 996, 997 (1935), the court stated: "There seems to be no more similarity in the voice of different people than there is in their physical appearance." See also,

Palmer should be limited to voice identification cases. Rather than being a limited decision, *Palmer* appears to set broad guide lines for future extra-judicial identifications. *Palmer* suggests that trial judges scrutinize all identification procedures and require such procedures to meet " 'those canons of decency and fairness' established as part of the fundamental laws of the land." [38] Translating this principle into specifics, *Palmer* warns against exposing a witness to an atmosphere of suggestiveness and an absence of choices. *Palmer* thus casts doubt on the show-up as a proper police procedure since a show-up inherently involves suggestion and a lack of alternatives. Whether a show-up will ever be ruled improper in itself remains to be seen, but it seems clear that *Palmer* has taken a proper step in encouraging trial courts to scrutinize more closely extra-judicial identifications. Law enforcement authorities substantially control the environment under which most extra-judicial identifications are made, and it seems wise to require them to furnish the witness with alternatives and an atmosphere relatively free of suggestive influences. If they fail to do so, the trial judge may in his discretion refuse to allow evidence of this extra-judicial identification to be placed before the jury, and the prosecution will have to rely on a courtroom identification.[39]

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Mack v. State, 54 Fla. 55, 44 So. 706 (1907); Small v. State, 165 Neb. 381, 85 N.W.2d 712 (1957); Commonwealth v. Johnson, 201 Pa. Super. 448, 193 A.2d 833 (1963). *But see,* Reamer v. United States, 229 F.2d 884 (6th Cir. 1956); People v. Sher, 8 Misc. 2d 359, 167 N.Y.S.2d 748 (Ct. Spec. Sess. 1957) (Weight to be given to voice identification was for trial judge to determine). Evidence of voice identification has been admitted even when obtained under suggestive conditions. State v. Simmons, 22 Conn. Supp. 360, 173 A.2d 134 (Cir. Ct. App. 1961); Commonwealth v. Guerro, 207 N.E.2d 887 (Mass. 1965); Dyson v. State, 238 Md. 398, 209 A.2d 609 (1965), (show-up conditions); State v. Hill, 193 Kan. 512, 394 P.2d 106 (1964); People v. Jones, *supra* note 32 (improperly conducted line-up); Taylor v. State, *supra* note 20 (identifying witness instructed to call the jail and ask to speak to the suspect).

[38] 359 F.2d at 202.

[39] Naturally there is danger that a court-room identification will be greatly influenced by an improper extra-judicial identification. The comment in 30 ROCKY MT. L. REV., *supra* note 10, at 340-41 states that this identification should also be excluded. *Cf.*, United States *ex rel.* Stovall v. Denno, 355 F.2d 731, 742 (1966) (Concurring opinion). Cautionary instructions to the jury on the possible dangers of an extra-judicial identification affecting a courtroom identification might be the best solution to this problem.