EYEWITNESS IDENTIFICATIONS:

THE LEGAL FRAMEWORK

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I. Introduction

> The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: "What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent -- not due to the brutalities of ancient criminal procedure."

United States v. Wade, 388 U.S. 218, 228 (1967) (quoting HON. FELIX FRANKFURTER, THE CASE OF SACCO AND VANZETTI 30 (1927)).

Despite these "well-known vagaries" and the fact that such testimony is "proverbially untrustworthy", eyewitnesses get on the stand in courtrooms all across this country and, with all the attendant drama, point at the defendant in open court and say "that's the man." Such testimony is particularly damning because, "there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says, 'That's the one!'" *See Arizona v. Youngblood*, 488 U.S. 51, 72 n.8 (1988) (Brennan, J., dissenting) (quoting ELIZABETH LOFTUS, EYEWITNESS TESTIMONY 29 (1979)).

This paper will set out the legal frame work for analysis of three issues arising with eyewitness identification testimony: (1) the right to counsel during identification procedures, (2) the due process requirement that identification procedures not be suggestive, and (3) the evidentiary rules and statutes applicable to testimony concerning out-of-court identifications.

II. Right to Counsel at Identification Procedure

A. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence." U.S. CONST. amend. VI. Further, "today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality." *See Wade*, 388 U.S. at 224. Consequently, the Sixth Amendment guarantees the right to counsel at all "critical stages" of the criminal proceedings. *See id.* An out-of-court identification line-up is a "critical stage" of the proceedings. *See Wade*, 388 U.S. at 236-37; *Gilbert v. California*, 388 U.S. 263, 272 (1967). Therefore, under the

Sixth Amendment, both the suspect and his or her attorney should be notified of an impending line-up procedure, and presence of the attorney at the line-up is mandatory. *See Wade*, 388 U.S. at 237.

! The policy behind the *Wade* and *Gilbert* decisions is that having an attorney present will often "avert prejudice and assure a meaningful confrontation at trial." *See Wade*, 388 U.S. at 237. In other word, the attorney will be there to witness the procedures utilized by the police and to provide helpful advice to the police to insure that those procedures are not unduly suggestive. As the Court noted, "[i]n our view counsel can hardly impede *legitimate* law enforcement . . . ." *Wade*, 388 U.S. at 238 (emphasis added).

B. The Fifth Amendment privilege against self-incrimination is NOT implicated by identification procedures because forcing the accused to stand in a line-up "is compulsion of the accused to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have." *See Wade*, 388 U.S. at 222-23.

C. The Sixth Amendment right to counsel attaches "only at or after the time that adversary judicial proceedings have been initiated." *See Kirby v. Illinois*, 406 U.S. 682, 688 (1972). Thus, there is no right to have counsel present at an identification procedure conducted before the "start of adversarial proceedings." *See id*. at 689-90.

! Initiation of "adversary judicial proceedings" can occur several ways: by formal charges being filed, a preliminary hearing being conducted, indictment, information, or arraignment of the accused. *See Texas v. Cobb*, 121 S. Ct. 1335, 1340 (2001) (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991)).

! There has been no "start of adversarial proceedings" simply because a person has been detained by the police who intend to file charges against him. *See Griffith v. State*, No. 1957-98, slip op. at ____, 2001 WL 1090773 at *3 (Tex. Crim. App. September 19, 2001) (citing *United States v. Gouveia*, 467 U.S. 180, 187-90 (1984)).

D. Despite the policy concerns justifying the presence of counsel at

a lineup articulated in *Wade*, there is no right to have counsel present for identification procedures that do not require the presence of the accused, i.e. photo spreads. *See United States v. Ash*, 413 U.S. 300, 321 (1975).

E. If there was a Sixth Amendment violation under *Wade/Gilbert* and their progeny, evidence of the tainted out-of-court identification is *per se* inadmissible. *See Moore v. Illinois*, 434 U.S. 220, 231 (1977); *Gilbert*, 388 U.S. at 272-73. However, even in light of a *Wade/Gilbert* violation, a witness' in-court identification is admissible if the prosecution can show that the in-court identification was derived from sources independent of the illegal identification procedure, i.e., that the in-court identification is not "fruit of the poisonous tree". *See Wade*, 388 U.S. at 241 (quoting *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963)).

! Several factors are considered in determining if the in-court identification is derived from an independent source: (1) the witness' prior opportunity to observe the alleged criminal act, (2) the existence of any discrepancy between any pre-lineup description, (3) any identification prior to lineup of another person, (4) the identification by picture of the defendant prior to the lineup, (5) failure to identify the defendant on a prior occasion, (6) the lapse of time between the alleged act and the lineup identification, and (7) "those facts which, despite the absence of counsel, are disclosed concerning the conduct of the lineup". *See Wade*, 388 U.S. at 241.

! The prosecution carries the burden of proving by clear and convincing evidence that an in-court identification is derived from an independent source. *See Wade*, 388 U.S. at 240; *Lucas v. Texas*, 451 F.2d 390, 391 (5th Cir. 1971), *cert. denied*, 406 U.S. 949 (1972); *Martinez v. State*, 437 S.W.2d 842, 849 (Tex. Crim. App. 1969).

F. A suspect may waive his right to have counsel present for a lineup under the *Wade/Gilbert* rule. *See Wade*, 388 U.S. at 237. However, that waiver is only valid if it constitutes an "intentional relinquishment or abandonment of a known right or privilege." *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

G. *PROCEDURAL WARNING!!!* — In federal court, a *pretrial* Motion to Suppress *must* be filed to preserve the right to complain about identification testimony. *See* FED. R. CRIM. P. 12(b)(3). Failure to file a *pretrial* Motion to Suppress constitutes waiver of the right to raise the issue at trial. *See, e.g.*, FED. R. CRIM. P. 12(f); *United States v. Chavez-Valencia*, 116 F.3d 127, 129-31 (5th Cir.), *cert. denied*, 522 U.S. 926 (1997). In state court, on the other hand, a timely objection at trial is sufficient to preserve the right to complain about identification testimony. *See, e.g.*, *Roberts v. State*, 545 S.W.2d 157, 158 (Tex. Crim. App. 1977) ("The defendant's counsel may either file a pretrial motion to suppress evidence *or* he may wait until the trial on the merits and object when the alleged unlawfully obtained evidence is offered.").

III. Suggestiveness of Identification Procedures

> [T]he confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. . . . . A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification.

Wade, 388 U.S. at 228.

A. A criminal defendant may claim that a identification procedure conducted was "so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law." *See Stovall v. Denno*, 388 U.S. 293, 301-02 (1967). However, "[c]onvictions based on eyewitness identification at trial following a pretrial identification [procedure] will be set aside on that ground only if the . . . procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *See Simmons v. United States*, 390 U.S. 377, 384 (1968). In other words, there is no *per se* rule of exclusion for identifications stemming from suggestive identification procedures. *See Manson v. Brathwaite*, 432 U.S. 98, 109-14 (1977)

B. "[R]eliability is the linchpin in determining the admissibility of

identification testimony." *Manson*, 432 U.S. at 114. A totality of the circumstances test is utilized to determine if an identification is "reliable" even though it was based upon a suggestive identification procedure. *See Manson*, 432 U.S. at 114; *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). Under this test, several factors are weighed against the corrupting effect of the suggestive identification procedure: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at the identification procedure, and (5) the length of time between the crime and the confrontation. *See Manson*, 432 U.S. at 114; *Neil*, 409 U.S. at 199-200; *Garza v. State*, 633 S.W.2d 508, 512-13 (Tex. Crim. App. 1982) (panel op.).

! The length of time can be overcome if the witness has a track record of reliability, i.e., if the witness has been shown several other line-ups or photospreads and did not misidentify anyone. *See Neil*, 409 U.S. at 201.

! The danger of misidentification is increased if the identification procedure is such that the witness is only shown one suspect or if one subject sticks out among the others in the identification procedure. *See Simmons*, 390 U.S. at 383 (danger of misidentification increased where "police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized"); *Stovall*, 388 U.S. at 302 ("The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned.").

! Think about this in terms of a situation where there was no pretrial identification — wouldn't the in-court identification be essentially a one-man "show-up"? *See Johnson v. McCaughtry*, 92

F.3d 585, 597 (7th Cir.), *cert. denied*, 519 U.S. 1034 (1996) (where witness was unable to identify suspect's photograph, but picked him out in court, where he was sitting next to his attorney at the defense table -- "Obviously such identifications appear much less reliable than fair line-ups and photo arrays."); *United States v. Archibald*, 734 F.2d 938, 941-43 (2nd Cir.), *clarified on reh'g*, 756 F.2d 223 (2nd Cir. 1984) (in situation where identity is in issue, a timely motion was filed addressing the issue, and the witness has not had the opportunity to view a fair out-of-court lineup or photospread prior to testifying, court should allow some type of special identification procedure to insure accurate in-court identification).

! The danger of misidentification is likewise increased if the police indicate to the witness that they have other evidence linking a given suspect to the crime. *See Simmons*, 390 U.S. at 383.

! Some courts have adopted the strength of the other evidence against the defendant as another "factor" not enumerated in *Neil* that can be considered in determining if an identification is reliable. *Compare Gilday v. Callahan*, 59 F.3d 257, 270 (1st Cir. 1995), *cert. denied*, 516 U.S. 1175 (1996) (identification reliable despite suggestiveness where defendant made admissions), *with United States v. Emanuele*, 51 F.3d 1123, 1128 (3d Cir. 1995) (other evidence of guilt not weighed in reliability calculus).

! In *Foster v. California*, 394 U.S. 440, 443-44 (1969), the Court found a due process violation on suggestiveness grounds where there were three different identification procedures. During the first procedure, a suggestive

lineup, the witness failed to identify the suspect. During the second, a one man "show-up," the witness could only make a tentative identification of suspect. Undeterred, the police arranged a lineup at which the witness finally was able to identify the suspect.

! According to the Court of Criminal Appeals, the standard that the defendant must meet to exclude an in-court identification on due process grounds is high: "unless it is shown by clear and convincing evidence that a complaining witness' in court identification of a defendant as the assailant was tainted by improper pre-trial identification procedures and confrontations, the in court identification is always admissible." *See Jackson v. State*, 628 S.W.2d 446, 448 (Tex. Crim. App. 1982) (panel op.). The federal courts handle the "burden of proof" issue slightly differently: "First, a defendant bears the burden of proving the identification procedure was impermissibly suggestive. Second, if the defendant proves that the identification procedures were impermissibly suggestive, the trial court must determine whether, under the totality of the circumstances, the testimony was nevertheless reliable." *See United States v. Hill*, 967 F.2d 226, 230 (6th Cir.), *cert. denied*, 506 U.S. 964 (1992); *see generally*, Scott D. Joiner, *Identifications* in *Thirtieth Annual Review of Criminal Procedure*, 89 GEO. L.J. 1051, 1189 (2001).

D. *PROCEDURAL WARNING!!!* — In federal court, a *pretrial* Motion to Suppress *must* be filed to preserve the right to complain about identification testimony. *See* FED. R. CRIM. P. 12(b)(3). Failure to file a *pretrial* Motion to Suppress constitutes waiver of the right to raise the issue at trial. *See, e.g.*, FED. R. CRIM. P. 12(f); *United States v. Chavez-Valencia*, 116 F.3d 127, 129-31 (5th Cir.), *cert. denied*, 522 U.S. 926 (1997). In state court, on the other hand, a timely objection at trial is sufficient to preserve the right to complain about identification testimony. *See, e.g., Roberts v. State*, 545 S.W.2d 157, 158 (Tex. Crim. App. 1977)

("The defendant's counsel may either file a pretrial motion to suppress evidence or he may wait until the trial on the merits and object when the alleged unlawfully obtained evidence is offered.").

IV. Evidentiary Rules and Statutes

A. "A statement is not hearsay if . . . the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving the person . . . ." FED. R. EVID. 801(d)(1)(C); TEX. R. EVID. 801(e)(1)(C).

- The declarant need not make an in-court identification for evidence of the out-of-court identification to be admissible under this rule. *See Rodriguez v. State*, 975 S.W.2d 667, 682 (Tex. App.—Texarkana 1998, pet. ref'd).

- A defendant's confrontation rights are not violated by admission of a prior out-of-court identification under this rule even if the declarant cannot remember the incident or making the prior identification. *See United States v. Owens*, 484 U.S. 554, 561-64 (1988).

- The rule applies to identifications made after viewing a photo spread as well as after seeing the suspect in person. *See United States v. Anglin*, 169 F.3d 154, 159 (1999); *Poullard v. State*, 833 S.W.2d 273, 277-78 (Tex. App.—Houston[1st Dist.], pet. ref'd).

- So long as the declarant testifies and is subject to cross-examination, a third party may testify about the declarant's statement of identification under this rule. *See Greene v. State*, 928 S.W.2d 119, 124-25 (Tex. App.—San Antonio 1996, no pet.) (wife's testimony about husband's previous out-of-court identification admissible under Rule 801(e)(1)(C))

B. Article 38.23 provides:

> No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of

> America, shall be admitted in evidence against the accused on the trial of any criminal case.
>
> In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

TEX. CODE CRIM. PROC. ANN. art. 38.23 (Vernon Pamph. 2001).

- Article 38.23 does NOT apply to in-court identifications. *See Allen v. State*, 511 S.W.2d 53, 54 (Tex. Crim. App. 1974).

- Article 38.23 does NOT apply to allow submission of a special jury instruction allowing the jury to disregard an in-court identification if it resulted from an unfair or suggestive identification procedure or to disregard evidence of the out-of-court identification as impermissibly suggestive. *See Andujo v. State*, 755 S.W.2d 138, 143 (Tex. Crim. App. 1988); *McAllister v. State*, 28 S.W.3d 72, 78-79 (Tex. App.—Texarkana 2000, no pet.).

V. Resources

Scott D. Joiner, *Identifications* in *Thirtieth Annual Review of Criminal Procedure*, 89 GEO. L.J. 1051, 1185-93 (2001).

ELIZABETH LOFTUS AND JAMES DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL (3rd ed. Lexis Law Publishing 1997)

http://www.eyewitness.utep.edu (Eyewitness Identification Research Laboratory at UTEP)

http://psych-server.iastate.edu/faculty/gwells/homepage.htm (website of Dr. Gary L. Wells, Ph.D. — contains lots of good information about eyewitness identification)