Law Reform Commission of Canada
Commission de réforme du droit du Canada

POLICE GUIDELINES

pretrial eyewitness identification procedures

CRIMINAL LAW SERIES

STUDY PAPER

Canada

POLICE GUIDELINES

PRETRIAL EYEWITNESS IDENTIFICATION PROCEDURES

Criminal Law Series

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A Study Paper prepared for the

Law Reform Commission of Canada

by

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Table of Contents

Preface

The identification of a suspect by an eyewitness is, in many cases, the only or the most important evidence of the suspect's guilt. However, the courts have often noted the potential dangers inherent in the pretrial procedures relating to eyewitness identification. Common to many of these cases is an expressed concern about: the lack of well-known, uniform identification procedures; the dangers inherent in suggestive procedures; and the inability to reconstruct and thus evaluate the trustworthiness of such procedures at trial.

The guidelines proposed in this Study Paper establish uniform rules for obtaining verbal descriptions of the suspect from an eyewitness; for preparing sketches and composites of the suspect; and for conducting lineups, photographic displays, informal viewings and confrontations. These guidelines are based primarily upon judicial authority and present police practices. However, as well as dealing with the subject comprehensively, the guidelines depart from present law and practice where necessary, in order to achieve the purposes enunciated in Rule 101 (p.17).

Form of the Guidelines

The guidelines are drafted as a comprehensive code. They are drafted in a style intended to make them understandable to police officers who have no legal training. They are structured to facilitate their use in police training manuals and day-to-day police work. They are not drafted in the form of legislation.

When the Law Reform Commission of Canada nears the completion of its work on criminal procedure, a decision will have to be made about the form any recommendations relating to pretrial identification procedures should take. Many of these guidelines are not suitable for legislative enactment: for example, those that deal with the detail of organizing and conducting pretrial identification tests.

One possible form they might take would be to enact as part of a comprehensive code of criminal procedure those rules that apply to

identification procedures generally, those that state the general goals of the regulation of identification procedures and those rules that embody important substantive policy judgments. The more detailed guidelines could then either be passed as regulations or as schedules to the statute, or simply left to be adopted by particular police forces. This approach would permit the flexibility necessary in drafting detailed guidelines that must apply to a wide variety of circumstances.[1]

It is more likely that the guidelines would be followed if they acquired statutory authority, either by being enacted as a schedule to a code of criminal procedure, or as regulations. The danger of implementing them in this form is that they might be construed strictly, as criminal legislation commonly is, and time and resources wasted arguing about their application in trial and appellate courts. There is also a danger that any slight deviation from them might result in the exclusion at trial of otherwise reliable evidence or in some other inappropriate sanction. However, both of these concerns could be dealt with in the legislation.[2]

Problems in Drafting Comprehensive Guidelines

At least two problems make the drafting of comprehensive and uniform guidelines difficult. First, identifications have to be obtained under a wide variety of circumstances over which the police have no control. The procedures to be followed are likewise varied. A second problem with uniform rules is that they must take account of the wide variety of communities and police forces across the country. For example, unlike small communities, large communities can afford sophisticated facilities and specialized officers. On the other hand, witness and public co-operation might be more difficult to obtain in urban areas.

However, the proposed legislation would not lead to iron-cast rules to be followed to the same extent by all police forces. The rules recognize the need for flexibility on the part of law enforcement authorities conducting identification procedures in very different communities across Canada. The intent of the rules is to provide clear administrable guidelines to ensure that the best possible procedure is followed in the circumstances. Thus the proposed guidelines attempt to provide, on the one hand, detailed standardized techniques for conducting identification procedures, and on the other hand, flexible guidelines so that exceptional cases and circumstances can be considered. Uniformity in a diverse federal state like Canada does not mean identical practice; rather, it signifies adherence to general federal standards.

Furthermore, with respect to the potential difficulty of uniform rules, too much should not be made of the differences between communities.

For example, in a survey of nineteen Canadian cities which included those cities where the vast majority of identifications would take place, it was found that all the police departments had specialized facilities for conducting lineups and other pretrial eyewitness identification procedures.

Legal Jurisdiction of the Federal Government

There might be some question as to whether the federal government in Canada has the constitutional competence to legislate on matters relating to pretrial eyewitness identification procedures. The federal government has the power to legislate for the criminal law (including procedure in criminal matters),[3] while the provinces have power over the administration of justice in the province.[4] Which of these heads of power the regulation of pretrial identification procedures falls within, is a difficult question. In its general provisions as to arrest and release from custody, the *Criminal Code* seems to assume that pretrial identification procedures come under its aegis;[5] federal competence is also suggested by the existence of the *Identification of Criminals Act*;[6] and observations made in at least two Supreme Court of Canada cases suggest that Parliament has legislative competence in this area. In *Di Iorio and Fontaine* v. *Warden of the Common Jail of Montreal and Brunet*,[7] Mr. Justice Dickson assumed that "police investigation of an individual must comply with federal standards of criminal procedure". In a subsequent decision, *Attorney General of Quebec and Keable* v. *Attorney General of Canada*,[8] Mr. Justice Estey noted that "a Province may investigate an identified crime in the manner and through the procedures prescribed by Parliament".[9] Finally, if provision for the conduct of pretrial identification procedures were not under Parliament's legislative competence as a matter pertaining to "criminal procedure", it would be difficult if not impossible to draw a line between such procedures and other procedures that are characterized as "criminal procedure".[10]

Background Survey

To assist in preparing these guidelines, a survey of present police practices in Canada relating to pretrial identification procedures was undertaken. The purposes of this survey were to establish the need and possibilities for reform as well as to provide ideas for improvements. Initially, police officers were interviewed personally in six Ontario cities: Ottawa, Toronto, London, Kingston, Hamilton and Guelph. Because it became apparent that practices varied so greatly, a country-wide survey was undertaken. A formal written questionnaire consisting of over one hundred questions was sent to thirteen police departments across Canada: Victoria, Vancouver, Edmonton, Calgary, Regina, Winnipeg, Montréal,

Trois-Rivières, Sherbrooke, Fredericton, Saint John, Halifax and St. John's. In some cities more than one police division completed the questionnaire. The questionnaires were completed by detectives in the relevant police divisions, and it was understood that the answers were to simply reflect their view of the local practice. Thus, the answers in no way reflect the official policy of police departments, or the point of view of any officer other than the one completing the questionnaire. Since the survey was not intended to be a comprehensive survey of police practices, the references to the surveys throughout this paper are selective. No attempt is made to state precise practice in particular police departments. Because of the nature and the purpose of the survey, the references to them are intended to provide only an impressionistic sense of present practices. A tabulation of the answers to the survey is on file at the Law Reform Commission of Canada.

The guidelines are set out in Chapter Two. Then in Chapter Three, each rule is individually commented upon. The commentary explains the reasons for the rule, reviews Commonwealth cases on related issues, and briefly describes present Canadian practice.

CHAPTER ONE

Introduction

I. The Need for Guidelines

The idea of drafting guidelines to govern eyewitness identification procedures is not novel. Most large police forces in Canada use some form of written guidelines, which are usually prepared by the local police force, to instruct and guide their officers in conducting pretrial identification procedures, particularly lineups.[11] In England, a Home Office Circular provides a fairly detailed procedure for police to follow when conducting identification parades and using photographs in identifying criminals.[12] In the United States, many American police departments have adopted written guidelines to follow in conducting identification procedures,[13] and commentators have urged that all police departments should have a detailed set of such guidelines.[14] The American Law Institute proposed legislation in its *Model Code of Pre-Arraignment Procedures* which, while providing general rules governing identification procedures, would mandate the issuance of detailed regulations by local law enforcement agencies.[15] In order to assist local police forces in drafting guidelines, the Project on Law Enforcement Policy and Rulemaking at the College of Law, Arizona State University, prepared a set of model rules for eyewitness identification.[16] Also, law reform bodies in many common law countries have recently studied the problem of eyewitness identification and have made recommendations relating to pretrial procedures.[17] As a result of these recommendations, it would appear that future legislation relating to criminal procedure will invariably contain rules regulating identification procedures.[18]

The need for comprehensive police guidelines for the conduct of pretrial identification procedures arises from two concerns. First, there is a general concern relating to the necessity for detailed rules to guide the exercise of police discretion in common law enforcement situations. Second, there is a specific concern for the dangers inherent in eyewitness testimony, requiring that this type of evidence, in particular, be treated with great caution and in

accordance with well-informed practices. Although guidelines cannot eliminate these concerns, they can enhance the reliability and fairness of pretrial identification procedures to the advantage of law enforcement officers, the accused, judges, juries and, indeed, the overall administration of criminal justice.

A. The Need to Structure the Exercise of Police Discretion

Much has been written about the need to structure the discretion exercised by the police in the discharge of their law enforcement duties.[19] The general policy of providing explicit and detailed guidance to the police has a number of advantages, which these guidelines attempt to achieve. First, the policies and practices of police forces are made unambiguous and visible so that they can be discussed and debated and the best procedures developed. Second, the police are given clear directions on how to proceed to ensure that the accused's rights are protected and that the evidence collected by them is admissible at trial and is as probative as possible. Finally, uniformity of police practices is promoted to the fullest extent possible.[20] Particularly in the area of pretrial eyewitness identification, where the problems are so many and so varied, and the consequences so significant to the fair conduct of a criminal proceeding, structuring the exercise of police discretion would appear to be not only justifiable but essential.

The courts have not been able to provide the police with the direction required in this area. Because Canadian courts do not exclude evidence of an improperly conducted pretrial identification procedure, an issue relating to such procedures is seldom raised in a case on appeal. When it is raised, other issues invariably overshadow it. Thus, only rarely will a court even remark on the conduct of pretrial identification procedures.[21]

Even if a court does have an opportunity to address an issue relating to the conduct of a pretrial identification procedure, because of its institutional characteristics, it is an inappropriate forum for providing the necessary degree of direction for police conduct of pretrial identification procedures. Since it is restricted to the facts and issues raised in a particular case, a court cannot prescribe a procedure that must be integrated into an overall scheme of pretrial procedure. Furthermore, since it must base its decisions on broad principles, and apply them to specific factual situations, a court cannot provide the arbitrary but clear-cut rules sometimes required in this area.[22] Finally, since it must rely for the most part upon the evidence presented to it by the parties, a court cannot always conveniently review,

and certainly it cannot conduct, the empirical research that might be essential in reaching an informed judgment on some of the issues related to eyewitness identification procedures.

B. Dangers Inherent in Eyewitness Testimony

The need for comprehensive police guidelines is particularly acute in the area of pretrial eyewitness identification procedures, because eyewitness testimony is inherently unreliable. This section's discussion of the dangers inherent in eyewitness testimony will serve to make the case for comprehensive guidelines, and to establish some of the problems that such guidelines must deal with, as well as their limitations. The first subsection reviews actual cases in which wrongful convictions have resulted from mistaken eyewitness identifications. The second subsection examines psychological studies that have documented the frailties of human perception and memory, revealing the inherent unreliability of this kind of evidence. A third subsection reviews the reasons why eyewitness testimony is difficult to assess: cross-examination is often ineffective in exposing its unreliability and jurors are often overimpressed with its probative value.

Properly conducted pretrial identification procedures cannot remove all the dangers inherent in eyewitness testimony. They can, however, ensure that judges and juries are presented with the most reliable identification evidence possible, and that the potential influence of the pretrial procedures on a witness's testimony is apparent and capable of assessment.

1. Cases of Wrongful Conviction

In many criminal cases, the evidence against the accused rests upon the assertion of one or more witnesses that they can identify the accused as the perpetrator of the crime. However, of all types of evidence, eyewitness identification is most likely to result in a wrongful conviction. This has long been recognized by commentators. In Great Britain, the Criminal Law Revision Committee stated in its *Eleventh Report* that "[w]e regard mistaken identification as by far the greatest cause of actual or possible wrong convictions."[23] This view is borne out by the hundreds of known cases in which innocent people have been convicted, imprisoned and sometimes executed after trials in which the prosecution's case depended largely upon eyewitness accounts. The more notorious cases have been well documented

by American and British authors.[24] Indeed, in the studies of wrongful conviction it is invariably concluded that misidentification is the greatest source of injustice.[25]

Professor Borchard, who studied sixty-five cases of wrongful conviction, found that in twenty-nine of them, mistaken eyewitness identification was largely responsible. In eight of these cases the wrongfully convicted person and the criminal bore no resemblance at all to each other, in twelve cases the resemblance was only slight, and in only two cases was the resemblance striking.[26] Brandon and Davis, who in 1973 completed an exhaustive study of English cases of wrongful conviction, also concluded that mistaken identification was the most common cause of wrongful conviction.[27] Indeed, recently in England, because of a number of well-publicized cases of wrongful conviction based on eyewitness testimony, a special departmental committee chaired by the Right Honourable Lord Devlin was established to inquire generally into the problems of eyewitness identification.[28]

In many cases of wrongful conviction, there is more than one mistaken eyewitness. A recent notorious case occurred in the United States in 1979; it involved a Roman Catholic priest who was accused of robbing several convenience stores. Seven witnesses under oath at trial identified the priest. Fortunately, before the defence opened its case-in-chief, the real criminal confessed to the crime.[29] However, wrongful conviction cases involving as many as thirteen,[30] fourteen (a Canadian case)[31] and even seventeen[32] eyewitnesses have been reported. In the most notorious instance of mistaken identification, an accused was mistakenly identified by twenty-three witnesses.[33]

Surveys of the known cases of wrongful conviction fail to reveal the full scope of the problem. Cases of wrongful conviction are drawn to public attention only in exceptional cases, such as those in which a person confesses to a crime for which another has been convicted. One can only speculate about the total number of cases in which innocent people have been convicted due to erroneous identification. Although there have been relatively few such reported cases of wrongful conviction in Canada, the fact that the safeguards required by our courts and adopted by our law enforcement authorities are no more, and in some respects even less, stringent than those in England and the United States suggests that Canada is not immune to the problem.

2. Unreliability of Eyewitness Testimony

Jurists frequently and somewhat misleadingly refer to testimonial proof as "direct evidence". It is contrasted with circumstantial proof, which is

referred to as "indirect evidence". Upon analysis, there is nothing very direct about testimonial proof. It requires the trier of fact to draw the inference that because a witness says "that is the person I saw", it is in fact the person the witness saw. In determining how probable this inference is, the trier must determine the likelihood that the witness: (i) correctly perceived the suspect, (ii) correctly remembered the details of the suspect's identity, (iii) correctly narrated the identification, and (iv) was sincere when he or she identified the accused.

Many jurists have appreciated the logical processes involved in testimonial proof and the fact that it is misleading to refer to it as direct evidence. For example, in 1933 the High Court of Australia pointed out that a witness who says "the prisoner is the man who drove the car", while appearing to affirm a simple proposition, is really saying: "that he observed the driver; that the observation became impressed upon his mind; that he still retains the original impression; that such impression has not been affected, altered or replaced, by published portraits of the prisoner; and that the resemblance between the original impression and the prisoner is sufficient to base a judgment, not of resemblance, but of identity."[34] In a sentence frequently quoted by other courts, a Canadian judge noted, "[a] positive statement 'that is the man' when rationalized, is found to be an opinion and not a statement of single fact."[35]

Although the logical processes of testimonial proof are frequently appreciated by jurists, the psychological processes are less well understood, in spite of the urgings of psychologists.[36] Yet, in evaluating testimonial proof, the full range of physiological and psychological factors that might cause people to misperceive or forget details of faces, to narrate their mental impressions of faces misleadingly, or to be insincere, must be considered. It is clear that a person's original perception of a face or an event can be influenced, not only by physiological factors, the stimulus conditions at the time of the perception, and the normal factors that affect the fallibility of all perceptual judgments, but also by such subjective factors as stress, personal prejudices, expectations (cultural or learned from past experience), biases, group pressure, ego involvement, psychological needs, emotional states, social attitudes and stereotypes. Both visual memory and the verbal description of images retained in memory are similarly affected by an equally wide range of factors.

Recently, a number of psychologists have directed their attention to the problem of eyewitness testimony. They have made a systematic effort to inform the legal system of their knowledge of perception and memory, so that it might be of assistance in evaluating testimonial proof.[37] This research should prove useful in the evaluation of eyewitness testimony, and, if properly used, should prevent some miscarriages of justice. Even if it is not relied upon directly in the evaluation of testimony, this research makes

apparent the frailties of eyewitness testimony and explains why it can so easily lead to wrongful convictions.

Simply by way of illustration, psychologists have shown that much of what one thinks one saw is really perceptual filling-in. Contrary to the belief of most laymen, and indeed some judges, the signals received by the sense organs and transmitted to the brain do not constitute photographic representations of reality. The work of psychologists has shown that the process whereby sensory stimuli are converted into conscious experience is prone to error, because it is impossible for the brain to receive a total picture of any event. Since perception and memory are selective processes, viewers are inclined to fill in perceived events with other details, a process which enables them to create a logical sequence. The details people add to their actual perception of an event are largely governed by past experience and personal expectations. Thus the final recreation of the event in the observer's mind may be quite different from reality.

Witnesses are often completely unaware of the interpretive process whereby they fill in the necessary but missing data. They will relate their testimony in good faith, and as honestly as possible, without realizing the extent to which it has been distorted by their cognitive interpretive processes. Thus, although most eyewitnesses are not dishonest, they may nevertheless be grossly mistaken in their identification.[38]

As well as studying factors that might affect a witness's original perception of an event, psychologists have examined a wide range of factors that might influence a witness's subsequent identification of a person as the person seen. For example, a number of studies have documented the dramatic effect that the manner and form in which questions are asked of a witness have on the witness's retrieval of information from memory.[39] Others have examined the subtle biases that might be present in other aspects of the identification procedure, for example, the lineup.[40]

Many of the factors leading to mistaken identification, such as those surrounding the original identification, cannot be eliminated or controlled. However, a proper understanding of them should assist in the evaluation of testimony. Some factors that might affect a witness's memory and retrieval from memory can be controlled in the pretrial identification procedure — such as the manner in which the witness is questioned and the conduct of the recognition test (which in most cases is a lineup).[41] It is the latter factors these guidelines attempt to eliminate. It is likely that these factors pose the most serious threat to the precept that no innocent person should be convicted.[42]

Psychologists have also undertaken studies that have directly demonstrated the inherent frailties of eyewitness testimony. These studies normally involve a "staged" assault, in which witnesses later attempt to identify the

assailant. The number of witnesses able to make an error-free positive identification is always low — in some cases, no greater than chance.[43]

3. Difficulty of Evaluating Eyewitness Testimony

Even though a type of evidence may be unreliable, that alone does not justify a concern about the danger of wrongful conviction. Many forms of evidence adduced at trial are unreliable. Indeed, it can be said that in every trial, all of the evidence led by one party will ultimately be found to have been unreliable. The efficacy of the trial depends upon the ability of the trier of fact to evaluate the evidence and determine which is reliable and which is not. Eyewitness testimony, then, is a dangerous form of evidence not only because it is unreliable, but because it is extremely difficult to evaluate. This is so because cross-examination, which is often effective in exposing the unreliability of other evidence, is frequently ineffective in exposing the unreliability of eyewitness testimony. Also, the jury tends to place undue reliance on eyewitness testimony, even when its dangers have been revealed.

(a) Ineffectiveness of Cross-Examination

Occasionally the defence may disclose perceptual errors at trial through effective cross-examination. It may be possible to reveal that due to the circumstances surrounding the witness's observation of the event (for example, the distance between the witness and the offender, or the short observation period), it would have been impossible for him or her actually to observe all the details of the event that he or she purported to remember. Furthermore, because witnesses will usually be aware of defects in their senses (such as near-sightedness), and assuming that they do not seek to mislead the court, information bearing upon such things as the witness's ability to perceive will also ordinarily be disclosed at trial. For those witnesses who are mistaken about the conditions surrounding their observation of the event, or who are unaware of weaknesses in their sense organs or simply refuse to admit to them, it might be possible for the defence to uncover such facts through independent testimony or by means of in-court testing.

However, many variables that affect the reliability of eyewitness testimony, such as perceptual filling-in, are virtually impossible to expose through cross-examination. In most cases identification evidence will be given by an honest witness with normal powers of observation, who claims to have seen the accused under circumstances that would have

afforded adequate opportunity for observation. In such a case it is exceptionally difficult to assess the value of identification evidence. Since there is nothing more than the bare assertion of a witness that the accused is the person whom he or she observed in the criminal circumstances, cross-examination is largely ineffective. As was noted by the Devlin Committee in relation to this difficulty:

> The weapon of cross-examination is blunted. A witness can say that he recognizes the man and that is that or almost that. There is no story to be dissected, just a simple assertion to be accepted or rejected. If a witness thinks that he has a good memory for faces when in fact he has a poor one, there is no way of detecting the failing.[44]

Similarly, if the witness was induced through suggestion or some other form of bias to identify the suspect in a lineup or other identification procedure, this will be almost impossible to establish on cross-examination. It is a common experience that even identifications that were initially very tentative become more positive as the trial progresses. At trial, witnesses will often be absolutely certain of their identifications, not being aware that they might have been influenced by biased procedures.

It was this concern about the inability effectively to cross-examine an eyewitness that led the Supreme Court of the United States to adopt a rule excluding evidence of impermissibly suggestive pretrial identification procedures. In *United States* v. *Wade*[45] the court approved an observation made by two English scholars:

> It is a matter of common experience that, once a witness has picked out the accused at a line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may ... for all practical purposes be determined there and then, before the trial.[46]

Psychologists have also noted that eyewitness testimony is dangerous because often it cannot be assessed by the usual tests of coherence and demeanour.[47]

(b) Jurors' Undue Reliance on Eyewitness Testimony

Another problem lies in the fact that people generally, and jurors specifically, are not aware of the dangers inherent in the identification of others. They are consequently inclined to accept identification evidence uncritically and attach undue weight to it. This fact has been a common observation among legal commentators.[48] It is certainly a notion generally entertained by prosecutors who, in deciding whether to proceed to trial, attach great significance to whether the Crown's case is supported by eyewitness testimony.[49] The notion is undoubtedly founded on the knowledge that in a good number of cases, jurors are prepared to convict the accused on the testimony of only one eyewitness. Although this

knowledge is usually based only upon anecdotal evidence, it has been confirmed in a recent survey in England. In a study of lineups undertaken for the Devlin Committee, it was found that out of 850 people prosecuted in cases in which a lineup had been held, 347 were prosecuted even though the only substantial evidence against them was the testimony of eyewitnesses (in 169 of these cases the only evidence was that of a single witness); 74 per cent of these people were convicted.[50]

That jurors place undue reliance on eyewitness testimony is also illustrated by cases in which jurors choose to rely upon discredited eyewitness testimony instead of apparently reliable contrary evidence. For example, in a recent English case, a person was convicted of shoplifting on the basis of eyewitness testimony in spite of the fact that thirty alibi witnesses supported his own testimony that he was on a bus over one hundred miles from the scene of the crime.[51]

Psychological studies also confirm the fact that jurors place undue reliance on eyewitness testimony. A recent study by Professor Loftus involved a simulated criminal trial using 150 students as jurors. Each experimental juror received a description of a grocery robbery and murder, a summary of the circumstantial evidence pointing to the accused's guilt, and the arguments presented at trial. One-third of the jurors were told that there had been no eyewitnesses. Only 18 per cent of these jurors found the defendant guilty. Another third of the jurors were given the same set of facts, but in addition were told that the clerk testified he had seen the defendant shoot the two victims; that is to say, the jurors were told that there had been an eyewitness. The defence counsel claimed the clerk was mistaken. Of these jurors, 72 per cent judged the defendant to be guilty. A final third of the jurors were told of the clerk's eyewitness testimony but were informed that the defence had discredited him by showing that he had not been wearing his glasses at the time and had uncorrected vision poorer than 20/400. Still, 68 per cent of the jurors who had heard this evidence discrediting the eyewitness voted for conviction. If the eyewitness testimony had been completely ignored by them, as it should have been in light of the discrediting testimony, only 18 per cent should have voted for conviction, the same number that voted for conviction in the first third which heard only the circumstantial evidence.[52] This study tends to reveal the enormous credibility that jurors (lay persons) attach to eyewitness testimony. Other psychological studies have also tended to show that jurors are over-believing of eyewitnesses,[53] or at least that they cannot detect differences between reliable and unreliable identification witnesses.[54]

These studies really only confirm our intuitive judgments: one assumes that jurors rely on eyewitness testimony.[55] They evaluate testimony largely on the basis of their everyday experiences, and ordinarily have no occasion to test the limits of their capacity to recognize

faces. Indeed, since most jurors trust their ability to identify faces in conducting their day-to-day affairs, they are likely to trust eyewitnesses.[56] Moreover, most people assume that police procedures operate adequately in the vast majority of cases; therefore, they tend not to scrutinize individual cases carefully.

II. The Rationale of Guidelines

As the reports of cases of wrongful conviction reveal, mistaken eyewitness identification poses a serious threat to the administration of justice. There are no simple solutions to the problems posed:

(a) Eyewitnesses' original observations of the person they saw were often made under stressful and sub-optimal conditions, thus rendering their memory of the person very fragile and unreliable.

(b) It is difficult to expose the errors that eyewitnesses might have made in their identification because they are likely to be totally honest in expressing their opinion that the accused is the person they saw and be totally unaware of the factors that caused them to misperceive or mistakenly identify the accused.

(c) Jurors tend to place undue reliance on evidence of identification, even when it depends upon the evidence of a single witness.

It is not possible to improve a witness's original perception of events. However, it may be possible to establish procedures which will tend to minimize the dangers of eyewitness identification evidence. Commentators have recommended a number of rules of evidence and procedure to be implemented at the trial, in order to reduce the danger of wrongful conviction.[57] It has been recommended: that eyewitness testimony be required to be corroborated in order to support a conviction; that the judge in all eyewitness testimony cases instruct the jury to critically evaluate the witness's evidence, bearing in mind that innocent people have, in the past, been convicted on the basis of honest but mistaken identification by one or more witnesses and; that expert psychological evidence be admissible in order to assist the jury in rationally evaluating the testimony.

However, in this paper the principal concern is with procedures prior to trial that will minimize the risk of wrongful conviction on the basis of eyewitness testimony. This is the area where there is the greatest potential for reducing the risk of wrongful conviction.[58] Properly conducted pretrial procedures should partially screen out inaccurate

eyewitness testimony through unsuggestive testing procedures. At the very least, it is essential that a witness's already imperfect perception or recall of an event not be made to appear more credible and certain by virtue of suggestive police practices. Steps can be taken to ensure, as much as possible, that identification evidence given by eyewitnesses at trial is derived exclusively from their original viewing of the event, and is independent of any outside assistance.

The guidelines build on the premise that the police should always employ the most reliable identification procedure available. If the most reliable procedure is impractical, a less reliable procedure is permissible since it then represents the "best evidence". Thus, in-court dock identifications are generally prohibited unless the witness has attempted to identify the accused prior to trial. Lineups must be employed whenever possible; if a lineup cannot be used, a photographic display should be used; if a photographic display is impractical, an informal viewing may be used; finally, and only in very limited circumstances, a confrontation or show-up may be held. In addition to the value of reliability, the rules also consider the need to protect the rights of the accused and the need for effective law enforcement. The general principles upon which these guidelines are premised are discussed in detail in the commentary to Rule 101 (p. 35), which sets out the basic purposes of the guidelines.

As mentioned above, the conclusion of this Study is that a lineup is a better identification test than a photographic display. However, this is an issue upon which there are strong differences of opinion among informed commentators. The arguments, which are reviewed in detail in the commentary to Rule 501 (p. 98), do not point conclusively to one test or the other. Obviously, this is an important issue that needs further thought and research.

CHAPTER TWO

The Guidelines

Part I. The Scope of Guidelines

Rule 101. Purposes

The purposes of these guidelines are:

(a) *To Establish Uniform Procedures.* To establish uniform procedures for conducting pretrial eyewitness identifications of suspects.

(b) *To Increase the Reliability of Identifications.* To ensure that eyewitness identification procedures are reliable. To this end, the guidelines permit the expeditious holding of identification procedures and assist in preserving the accurate recollection of witnesses.

(c) *To Reduce the Risk of Mistaken Identification.* To minimize the possibility of mistaken identification. To this end, the guidelines require that eyewitnesses attempt to identify suspected offenders in unsuggestive circumstances, and discourage them from identifying a person in an identification procedure simply because he or she is the person who most closely resembles the person they saw.

(d) *To Protect the Rights of Suspects.* To ensure that the rights of any person identified are not prejudiced. To this end, the guidelines establish rules that will require suspects to be fully informed of the nature of the procedures and of their rights, and will permit pretrial identification procedures to be reconstructed at trial.

Rule 102. Definition of "Eyewitness Identification Procedures"

As used in these guidelines, "pretrial eyewitness identification procedures" refer to the following procedures:

(a) *Taking Descriptions.* Taking a verbal description of a suspect from an eyewitness.

(b) *Preparing Artist's Drawings and Composites.* Preparing a non-photographic pictorial representation (e.g., a free-hand sketch or identi-kit composite) of a suspect from an eyewitness.

(c) *Conducting Photographic Displays, Lineups, Informal Viewings, and Confrontations.* Conducting a photographic display, lineup, informal viewing or confrontation in order to obtain an eyewitness identification.

Rule 103. Definition and Role of "Supervising Officer"

The officer who is responsible and has the authority for ensuring that a pretrial eyewitness identification procedure is conducted pursuant to these guidelines shall be known as the "supervising officer". If at all possible, the supervising officer should not be otherwise involved in the investigation or prosecution of the case.

Rule 104. Definition and Role of "Accompanying Officer"

An "accompanying officer" is any officer who accompanies witnesses when they view a lineup or a photographic display or take part in an informal viewing. If at all possible, the accompanying officer shall not be otherwise involved in the investigation or prosecution of the case and shall not know of the identity of the suspect, if there is one.

Rule 105. Restrictions on Eyewitness Identifications

No police officer shall attempt to secure the identification by an eyewitness of any person as a person involved in a crime unless the pretrial eyewitness identification procedures established by these guidelines are followed or unless for one of the reasons provided in Rule 107, such a procedure is unnecessary.

Rule 106. Prerequisite to Trial Identification

No eyewitness shall identify the accused at trial unless he or she has identified the accused at a pretrial eyewitness procedure or unless for one of the reasons provided in Rule 107, such a procedure is unnecessary.

Rule 107. When Procedures Established by Guidelines are Unnecessary

A pretrial eyewitness identification procedure as required by these guidelines may be unnecessary in the following circumstances:

(a) *Inadequate Recollection.* The witness would be unable to recognize the perpetrator of the offence being investigated. However, if the person is a potential eyewitness, this shall be recorded, along with any relevant information as provided in Rule 206.

(b) *Prior Knowledge.* The witness knew the identity of the suspect before the offence occurred (e.g., the suspect was a personal acquaintance, relative, neighbour, or co-worker).

(c) *Independent Identification.* The witness, without police assistance, learned of the identity of the suspect after the offence occurred (e.g., the eyewitness recognized the suspect's picture in a newspaper or spotted the suspect at his or her place of employment).

(d) *Continued Observation.* The witness maintained surveillance of the suspect from the time of the commission of the offence to the time of the suspect's apprehension.

(e) *Identity Not Disputed.* The accused does not dispute the issue of identity.

Rule 108. Modification of Guidelines in Special Circumstances

If it is necessary in special circumstances to obtain an identification that might otherwise not be obtained, these guidelines may be modified, provided there has been as full a compliance as is practicable.

Part II. General Rules

Rule 201. Separating Witnesses

When there is more than one witness, they shall not take part in a pretrial eyewitness identification procedure in one another's presence.

Rule 202. Avoiding Witness's Suggestions

A witness who has taken part or who might take part in a pretrial eyewitness identification procedure shall be instructed not to discuss the suspect's appearance with other witnesses. If possible, witnesses shall be escorted in such a way that they do not encounter one another before or after engaging in a pretrial identification procedure. If witnesses are together, a police officer shall be present, to ensure that they do not discuss the suspect's appearance.

Rule 203. Avoiding Police Officer's Suggestions

Police officers shall not by word or gesture suggest to any witness who they think the suspect is. If they must confront the witness with a suspect, they shall do so in a way that minimizes the appearance of their degree of belief in the suspect's guilt. A police officer shall not say anything to the witness during or after the proceedings that suggests that the witness correctly described or identified the suspect.

Rule 204. Inviting Witnesses to Attend

When inviting witnesses to attend a pretrial identification procedure, the police shall only suggest that they have a possible suspect.

Rule 205. Instructing Witnesses

When conducting a procedure that requires witnesses to attempt to identify the person they saw from a group of people (or photographs), the accompanying officer shall instruct the witnesses:

(a) *To Study.* To take their time and to cast their minds back to the witnessed event, and to examine carefully all participants (or photographs) in the lineup (or photographic display) before identifying anyone as the person they saw.

(b) *To Exercise Caution.* That it is very easy to make mistakes in identifying people and therefore to exercise caution in identifying someone.

(c) *That the Person May Not Be Present.* That the police do not strongly suspect anyone of the crime and that the person they saw (or his or her photograph) may not be present.

(d) *To Identify the Person They Saw.* To indicate whether they can positively identify anyone as the person they saw.

(e) *To Indicate the Degree of Confidence in the Identification.* To indicate how certain they are that the person they identified is the person they saw.

(f) *To Indicate the Basis of Identification.* To indicate the features or describe the overall impression of the person upon which their identification is based.

Rule 206. Maintaining a Record

(1) *Procedures Applicable to All Eyewitness Identification Procedures.* A complete record of each identification procedure, written on a prescribed form, shall be maintained. The record shall contain the following information:

(a) *The Offence.* The alleged offence to which the pretrial eyewitness identification procedure relates.

(b) *Witnesses.* The names and addresses of all witnesses who took part in a pretrial identificaton procedure, whether or not they made an identification.

(c) *Persons Present.* The names of the supervising and accompanying officers, and other police officers and persons present.

(d) *Procedure.* The type, date, time and location of the procedure.

(e) *Statements Made.* Any statements made by, or to, the witness in the course of the procedure.

(f) *Confidence.* If the procedure involves obtaining a description from the witness, a statement as to how confident the witness is that he or she can identify the suspect. If the procedure involves identifying a person, and if the witness identifies a person, a statement as to how confident the witness is that he or she has correctly identified the person he or she saw.

(g) *Basis.* If the witness identifies a person, the features of the person's appearance upon which the identification was made.

(h) *Objections.* Any objections, suggestions or observations made by the suspect or his or her counsel, as well as any action taken in response to such objection or suggestion.

(i) *Other Relevant Factors*:

(i) whether the witness identified any person other than the suspect;

(ii) whether the witness previously discussed the suspect's appearance with any other witnesses;

(iii) whether the witness had previously seen the suspect or a photograph of him or her; and

(iv) any other factor relating to the procedure that might be relevant in assessing the reliability of the witness's identification.

(2) *Procedures Applicable Only to Specific Eyewitness Identification Procedures.*

(a) *Description.* If the procedure involved obtaining a verbal description, all questions asked of the witness and all responses to them.

(b) *Lineup.* If the procedure is a lineup:

(i) the names and addresses of all lineup participants;

(ii) a colour photograph of the lineup;

(iii) a description of any special lineup procedures followed.

(c) *Photographic Display.* If the procedure is a photographic display:

(i) if, when the photographs were shown, there was no suspect, a record that will permit the photographs shown to the witness to be retrieved and placed in the sequence in which they were shown; and

(ii) if, when the photographs were shown, there was a suspect, the photographs shown to the witness as they were affixed to a display board, or the photographs that were handed to the witness for his or her inspection.

(d) *Informal Viewing.* If the procedure involves an informal viewing:

(i) a general desciption of how the informal viewing was conducted;

(ii) the approximate number of people viewed who were similar in description to the suspect;

(iii) the suspect's reaction if he became aware that he was being observed;

(iv) the witness's reaction upon seeing the suspect; and

(v) the reason for holding an informal viewing in lieu of a lineup or a photographic display.

(e) *Confrontation.* If the procedure involves a confrontation:

(i) the exact circumstances surrounding the confrontation;

(ii) the witness's reaction upon seeing the suspect;

(iii) the suspect's reaction if he or she is identified; and

(iv) the reasons for holding a confrontation in lieu of a lineup, photographic display, or informal viewing.

Rule 207. Access to Records

Copies of the records of all pretrial eyewitness identification procedures relating to the case and involving the accused shall be

available to the accused or to his or her counsel prior to trial, whether or not the prosecution intends to offer evidence of any eyewitness identification procedure. Copies of the description of the suspect given by each witness shall be given to the accused or to his or her counsel before a lineup, photographic display or informal viewing is held. All other records shall be given to the accused or to his or her counsel as soon as is reasonably possible but not less than five days after the procedure has been held.

Rule 208. Right to Counsel

(1) *In General.* If a person is suspected of a crime and the police have reasonable cause to arrest him or her, and his or her whereabouts are known, he or she has a right to have a lawyer present at any pretrial eyewitness identification procedure except the procedure of obtaining descriptions from witnesses, unless:

(a) *Counsel Fails to Appear.* Having received a certain minimum notice (for example, twenty-four hours) prior to the time such procedure is to take place, the suspect does not notify a lawyer, or his or her lawyer fails to be present.

(b) *Counsel Is Excluded.* The lawyer is excluded from the identification procedure by the identification officer because he or she was obstructing the identification.

(c) *Exceptional Circumstances Arise.* Awaiting the presence of counsel would likely prevent the making of an identification.

(2) *Advising Suspect of Right to a Lawyer.* The suspect shall be told: that he or she has a right to have a lawyer present to observe the pretrial eyewitness identification procedure; that if he or she cannot afford a lawyer, one will be provided for him or her free of charge; and that the procedure will be delayed for a reasonable time after the suspect is notified (not exceeding twenty-four hours) in order to allow the lawyer to appear.

(3) *Waiver of Right to a Lawyer.* A suspect may waive the right to have a lawyer present, provided the suspect reads (or has read to him or her), and signs the "Waiver of Lawyer at a Pretrial Eyewitness Identification Procedure" form, or makes an oral waiver heard by at least two other persons. The oral statement must show that the suspect had full knowledge of the effect of waiving the right, and the precise words of the suspect's statement must be made part of the record. The suspect shall be informed that any waiver given may be revoked by him or her at any time.

Rule 209. Role of Suspect's Lawyer

(1) *In General.* The suspect's lawyer shall be allowed to consult with the suspect prior to the pretrial eyewitness identification procedure, and to observe the procedure. He or she may make suggestions but may not control or obstruct the procedure.

(2) *Lawyer's Suggestions.* Any suggestions the lawyer makes about the procedure shall be considered and recorded. Those suggestions that would render the procedure more consistent with these guidelines should be followed. The failure of a lawyer to object to certain aspects of the procedure shall not preclude the accused from objecting to those aspects at trial.

(3) *Lawyer's Participation.* A lawyer should be permitted to be present when a witness states his or her conclusion about the identity of the suspect. However, the lawyer should be instructed not to address the witness before the procedure and to remain silent while the witness attempts to identify the suspect. The lawyer may speak with any witness after the procedure, if the witness agrees to speak with the lawyer.

(4) *Communicating with the Witness.* A witness taking part in a pretrial eyewitness identification procedure may be told that he or she is under no obligation to speak with the lawyer, but that he or she is free to speak with the lawyer if he or she so wishes.

Part III. Obtaining Descriptions

Rule 301. From Whom

The police shall attempt to obtain a description of the suspect from all potential eyewitnesses. If a potential eyewitness cannot provide a description of the suspect, this shall be recorded.

Rule 302. When Taken

The police shall at the first reasonable opportunity obtain complete descriptions of the offender from all witnesses. In all cases, such descriptions shall be obtained before the witness attempts to identify a suspect.

Rule 303. Manner of Taking

Descriptions from a witness shall be elicited by questions that evoke the witness's independent and unaided recollection of the offender.

(a) *The Opportunity to Observe.* First, ask the witness questions about his or her opportunity to observe the offender, including such matters as what directed his or her attention to the person observed, the duration of observation, the distance from the person observed, and the lighting conditions.

(b) *A Narrative Description.* Second, ask the witness to describe the offender in a free narrative form.

(c) *Specific Questions.* Third, if the free narrative description is incomplete, ask the witness specific non-leading questions about particular features or characteristics of the offender. However, the witness should be told not to guess about specific details.

(d) *Confidence in the Ability to Identify.* Fourth, ask the witness how certain he or she is that he or she will be able to identify the offender.

Rule 304. Officer to Take Description

If practical, when there is more than one eyewitness, a description of the suspect shall be taken from each witness by a different officer, each of whom is unfamiliar with the description given by other witnesses and the general description of the suspect.

Part IV. Use of Sketches and Composites

Rule 401. Use of Non-Photographic Pictorial Representations

When there is no suspect, and the use of photographs has been or is likely to be unsuccessful, a non-photographic pictorial representation (e.g., free-hand sketch, identi-kit or photo-fit) may be used to assist in identifying a suspect. If such a representation leads to the identification of a suspect, no other sketch, composite or photograph should be

displayed to any other witness; instead, witnesses should be required to attend a lineup. In addition, the witnesses who took part in constructing the non-photographic pictorial representation should be required to attend a lineup for the purpose of testing the identification of the suspect.

Part V. Lineups

Rule 501. Lineups Shall Be Held Except in Special Circumstances

In all cases in which an identification of a suspect by a witness may be obtained, a lineup shall be held, unless one of the following circumstances makes a lineup unnecessary, unwise or impractical:

(a) *No Particular Suspect.* The police have no particular suspect.

(b) *Lack of Distractors.* It is impractical to obtain suitable distractors to participate in a lineup because of the unusual appearance of the suspect, or for any other reason.

(c) *Inconvenience.* The suspect is in custody at a place far from the witness; or, for reasons such as sickness or disability, it would be extremely inconvenient to require the witness or the suspect to attend a lineup.

(d) *Emergency.* Awaiting the preparation of a lineup might prevent the making of an identification; for example, when the witness or suspect is dying.

(e) *Lack of Viewers.* The witness is unwilling to view a lineup.

(f) *Uncooperative Suspect.* The suspect refuses to participate in a lineup or threatens to disrupt the lineup.

(g) *Suspect's Whereabouts Unknown.* The suspect's whereabouts are unknown and there is no prospect of locating him or her within a reasonable period of time.

(h) *Altered Appearance.* The suspect's appearance has been materially altered from what it was alleged to be at the time the offence occurred.

Rule 502. Avoiding Exposure Prior to Lineup

Prior to a lineup, a witness shall not be allowed to view the suspect, or a photograph or other representation of the suspect, except as expressly permitted by these guidelines.

Rule 503. Time of the Lineup

A lineup shall normally take place as soon as practicable after the arrest of a suspect; or before the actual arrest, if the suspect consents. Lineup arrangements (e.g., contacting viewers, obtaining distractors, arranging for a lawyer) shall be completed prior to the arrest whenever possible.

Rule 504. Refusal to Participate

A suspect is under no obligation to participate in a lineup. However, if a suspect under arrest refuses to participate in a lineup, evidence of the refusal may be introduced at trial. A suspect who refuses to participate in a lineup shall be told of this consequence and of the fact that a less safe method of identification such as a photographic display, informal viewing or confrontation may be substituted for the lineup.

Rule 505. Lineup Procedure

(1) *Number of Distractors.* All lineups, except blank lineups, shall normally consist of at least six persons (referred to in these guidelines as "distractors"), in addition to the suspect.

(2) *Persons Disqualified as Distractors.* Normally, no more than two persons from a group of persons whose appearance and mannerisms are unduly homogeneous shall act as distractors in a lineup, unless the suspect is a member of this group of persons. Normally, police officers shall not act as distractors.

(3) *No More than One Suspect.* No more than one suspect shall normally appear in a single lineup.

(4) *Physical Similarity.* The significant physical characteristics of all persons placed in a lineup shall be approximately the same. In determining the significant physical characteristics of the suspect, regard shall be had to the description of the offender given to the police by the witness.

(5) *Distinctive Features.* If the suspect has any distinguishing marks or features they shall be obscured in some way. For example, they may be covered and the corresponding locations on the distractors' bodies similarly covered. Or, all lineup participants may be made up so that they reveal features or marks similar to those revealed by the suspect.

(6) *Clothing.* Lineup participants shall be similarly dressed. Thus, ordinarily, either all or none of the lineup participants shall wear eyeglasses or items of clothing such as hats, scarves, ties, or jackets. Subject to Rule 505(12), the suspect shall not wear the clothes he or she is alleged to have worn at the time of the crime, unless they are not distinctive.

(7) *Identity of Suspect.* If possible, the distractors shall not be aware of the identity of the suspect.

(8) *Positioning of Suspect.* Suspects shall be permitted to choose their initial position in the lineup and change their position after each viewing. They shall be informed of these rights.

(9) *Uniform Conduct of Participants.* The distractors shall be instructed to conduct themselves so as not to single out the actual suspect. In particular, they shall be told to look straight ahead, to maintain a demeanour befitting the seriousness of the proceedings, and not to speak or move except at the request of the supervising officer.

(10) *Suspect's Objections.* Before the entry of the witness, the suspect or his or her counsel shall be asked whether he or she has any objections to the lineup. If objections are voiced, they shall be considered by the supervising officer and recorded.

(11) *Photograph of Lineup.* A colour photograph or videotape shall be taken of all lineups before or while they are being observed by the witnesses. If the accused changes position in the lineup after it has been viewed by one witness, or if the composition of the lineup is in some way changed, another photograph shall be taken before a subsequent witness views the lineup.

(12) *Donning Distinctive Clothing.* If a witness describes the suspect as wearing a distinctive item of clothing or a mask, and it would assist the witness to see the lineup participants wearing such clothing, and if the item (or something similar) can be conveniently obtained, each participant shall don the clothing in the order of his or her appearance in the lineup. If there is a sufficient number of masks or items of clothing, all participants shall don the clothing or masks simultaneously.

(13) *One-Way Mirror.* Witnesses may view the lineup from a viewing room equipped with a one-way mirror.

(14) *Simulating Conditions.* The conditions prevailing at the scene of the offence may be simulated by, for example, altering the lighting in the lineup room, varying the distance from which the witness views the lineup, or concealing aspects of the suspect's appearance that the witness did not observe.

(15) *Compelled Actions.* Lineup participants may be invited to utter specific words or to perform reasonable actions such as gestures or

poses, but only if the witness requests it, and only after the witness has indicated whether or not he or she can identify someone in the lineup on the basis of physical appearance. If possible, the identity of the lineup participant who is asked to engage in a particular action shall be unknown to the witness.

(16) *Method of Identification.* A large number shall be held by all lineup participants or marked on the wall above them. Witnesses shall identify the person they saw by writing down the number held by, or appearing above, that person. To confirm the witness's identification, that person shall be asked to step forward and the witness shall be asked if that is the person.

(17) *Final Objection.* After the departure of the witnesses, suspects or their counsel shall be asked whether or not they have any objections to the manner in which the lineup was conducted.

(18) *Location of Witnesses.* Before viewing the lineup, witnesses shall be placed in a location from which it is impossible to view the suspect or the distractors.

(19) *If More than One Witness.* When there is more than one witness, the witnesses may view lineups composed of different distractors.

(20) *Paying Distractors.* Distractors may be paid a nominal fee.

Rule 506. Lineups Held at Location

If, because of the significance of the context, a more accurate identification may be obtained, the lineup may be held, at the discretion of the supervising officer, at the location where the witness observed the offender committing the offence. In these circumstances, the rules of procedure for conducting a lineup as set out in these guidelines shall be followed to the extent possible.

Rule 507. Blank Lineups

(1) *When Held.* To determine whether a witness is prepared simply to select the most likely looking participant out of the lineup as the suspect, the witness may be asked, at the discretion of the supervising officer, to view more than one lineup. One or more of these lineups may be blank lineups. A blank lineup is one that does not include a suspect.

(2) *Rules of Conduct.* The rules for the conduct of lineups set out above shall apply to blank lineups, except that the blank lineup and the subsequent lineup in which a suspect appears shall be composed of not less than five participants who are of the same general appearance as the suspect. The witness shall not be informed of the number of lineups that he or she will be asked to view.

(3) *Distractors.* No person who appears in a blank lineup may subsequently appear in a lineup in which the accused appears, except as provided in Rule 507(4).

(4) *Misidentification.* If a witness identifies a participant in the blank lineup, he or she shall not be told that the participant is not the suspect. However, the witness may be invited to view a subsequent lineup in which both the suspect and the person originally identified by the witness appear.

Rule 508. Sequential Presentations

(1) *When Held.* To determine whether a witness is prepared simply to select the most likely-looking participant out of a lineup as the suspect, participants may, at the discretion of the supervising officer, be presented to the witness sequentially instead of in a lineup.

(2) *Rules of Conduct.* The rules for the conducting of lineups set out above shall apply to sequential presentations to the extent possible. The witness shall not be told how many potential participants there are, and shall be instructed to indicate the person he or she saw, if and when that person appears.

(3) *Misidentification or Failure to Identify.* If a witness identifies a participant who is not the suspect, he or she shall not be told that the participant is not the suspect; however, the witness may be invited to view the remaining participants. If a witness fails to identify anyone, he or she may be invited to view all the participants in a lineup.

Rule 509. Subsequent Lineups

If a witness does not identify anyone in a lineup (other than a blank lineup) or identifies someone other than the suspect, and a subsequent lineup is held, no suspect or distractor viewed by the witness in the first lineup shall appear in a subsequent lineup viewed by that witness.

Part VI. Showing Photographs

Rule 601. When Photographs May Be Used

The use of photographs to identify criminal suspects is permissible only when a lineup is impractical for one of the reasons specified in Rule 501.

Rule 602. Saving Witnesses to View Lineup

Whenever a witness makes an identification from a photograph and grounds for arresting the suspect are thereby established, or whenever the conditions that, under Rule 501, render the conducting of the lineup impossible, impractical or unfair cease to exist, photographs shall not be displayed to any other witnesses. Such other witnesses shall view the suspect in a lineup. Normally, any witness who selects the suspect from a photographic display shall also view the lineup.

Rule 603. Photographic Display Procedure

(1) *Use of Mug Shots.* Photographs used in a display may consist exclusively of previously arrested or convicted persons. However:

(i) the witness shall not be informed of this fact;

(ii) the photographs shall not be of a kind or quality that indicates that they are of arrested or convicted persons; and

(iii) if possible, some of the photographs shall be of people who have not been previously arrested or convicted, and the witness shall be so informed.

(2) *Alterations of Photographs.* At the request of the witness, alterations such as the addition of eyeglasses, hats or facial hair may be made to copies of any of the photographs. However, if the witness requests the alteration of a particular photograph, the supervising officer shall ensure that similar alterations are made to copies of at least four other photographs of similar-appearing persons if the police do not have a suspect, and to copies of all photographs in the display if the police do have a suspect.

(3) *Each Person's Photograph Shown Once.* Normally, photographs of any particular person shall be shown to the witness only once.

Rule 604. Additional Rules of Procedure for Conducting a Photographic Display When There Is No Suspect

(1) *Number of Photographs.* The witness may be shown the photographs of any number of potential suspects; however, normally not more than fifty photographs shall be shown at any one time. To ensure as accurate an identification as possible, a reasonable number of photographs shall be shown to a witness even if a suspect is selected almost immediately.

(2) *Presentation of Photographs.* The photographs and the manner of their presentation shall not be such as to attract the witness's attention to particular ones.

Rule 605. Additional Rules of Procedure for Conducting the Photographic Display When There Is a Suspect

(1) *Type of Photographs.* The photographs used in the display shall be of people whose significant physical characteristics are approximately the same. In determining the significant physical characteristics of the suspect, regard shall be had to the description of the offender given to the police by the eyewitness. None of the photographs shall be of a kind, quality or in a state that makes it conspicuous. If possible, the photographs shall be in colour.

(2) *Number of Photographs.* The witness shall be shown an array of photographs composed of the suspect's photograph and those of at least eleven distractors.

(3) *Presentation.* The photographs shall be fixed upon a display board in a manner that does not attract the witness's attention to particular ones; or, the photographs shall simply be handed to the witness for his or her examination.

(4) *Blank Photographic Displays.* The witness may be shown a photographic display or handed a group of photographs that does not contain a photograph of the suspect, prior to a display that does contain a photograph of the suspect. In such circumstances, the guidelines for conducting a blank lineup shall be followed to the extent possible.

(5) *Multiple Poses.* If more than one photograph of the suspect appears in a photographic display, an equal number of photographs of each subject shall appear.

(6) *More than One Witness.* When there is more than one witness, the witnesses may view different photographic arrays.

Part VII. Informal Identification Procedures

Rule 701. When Informal Identification Procedures May Be Used

Informal identification procedures (viewing the suspect in a natural setting such as a hospital, shopping centre, bus depot, or the scene of a crime) may be used only in the following circumstances:

(a) *Suspect at a Particular Locale.* When the suspect is unknown, but is known or suspected to be in a particular locale (this includes the procedure of transporting witnesses in police cars to cruise the general area in which a crime has occurred, in the hope of spotting the perpetrator; or taking the witness to restaurants or other places where the suspect might be).

(b) *Suspect Unable to Attend Lineup.* When the suspect has been hospitalized or cannot otherwise attend a lineup, but can be viewed along with similar-appearing and similarly-situated people by the witness.

Part VIII. Confrontations

Rule 801. When Permissible

A police officer may arrange a confrontation between a suspect and a witness for the purpose of identification only in the following circumstances:

(a) *Urgent Necessity.* In cases of urgent necessity, as where a witness is dying at the scene of the crime; or, for one of the reasons provided in Rule 501, a lineup, a photographic display, or informal viewing cannot be held.

(b) *Lineup or Photographic Display Attempted.* The witness was unable to identify the suspect in a lineup, photographic display, or informal viewing.

Rule 802. Impartiality During Confrontation Procedure

Whenever possible, in presenting a suspect to a witness for identification, an officer shall not say or do anything to lead the witness to believe that the suspect has been formally arrested or detained, that he or she has confessed, possessed incriminating items on his or her person when searched, or is believed to be the perpetrator. In all cases, the suspect shall be presented to the witness in circumstances that minimize the suggestion that the police believe the suspect to be the offender.

CHAPTER THREE

The Rules and Commentary

Part I. Scope of Guidelines

Rule 101. Purposes

The purposes of these guidelines are:

(a) ***To Establish Uniform Procedures.*** **To establish uniform procedures for conducting pretrial eyewitness identifications of suspects.**

COMMENT

Present practices with respect to pretrial eyewitness identification procedures vary enormously from city to city in Canada. In some cities lineups are held in virtually every case in which identification is an issue. In other cities they are almost never held; photographic displays are used instead. (Compare Ottawa, for example, where between 150 to 200 lineups are held per year, with Hamilton where two or three are held annually.) In most cities lineups will normally be held if the offence is serious, but in others whether a lineup is held is within the discretion of the investigating officer.

The number of distractors used in lineups varies from city to city. In some cities, five distractors are normally used; in others, as many as twelve would constitute a typical lineup. Distractors are chosen off the street in most cities, but people in custody and police officers may also be used. If there is more than one suspect, they may be placed in one lineup or in several separate lineups. Sometimes photographs of lineups are not taken, because members of the public would not participate if they were. In most cities, however, colour or black-and-white photographs are taken

in every case. The police in some cities always require the suspect to don clothes different than those allegedly worn by the offender at the time of the offence, and attempt to disguise all distinguishing characteristics of the suspect; in other cities these things are never done. The above represent only a few of the ways in which pretrial eyewitness identification procedures vary from city to city. The tabulation of the answers to the survey of police practices in Canada, which is on file at the Law Reform Commission of Canada, reveals that the present police practice varies from city to city with respect to almost all aspects of the pretrial eyewitness identification procedure.

The need for uniformity in procedures springs, in large part, from the fact that these procedures are crucial to effective law enforcement and to the conduct of a fair trial. There would appear to be no reason why the procedural protections afforded the accused, and his or her ability to challenge such procedures, should vary from city to city. All accused persons in Canada are subject to one *Criminal Code*, which provides for police identification of arrested persons. It is incongruous for them to be subject to widely diverse identification procedures, all taking place under the general authority of the same *Code*.

(b) ***To Increase the Reliability of Identifications.*** **To ensure that eyewitness identification procedures are reliable. To this end, the guidelines permit the expeditious holding of identification procedures and assist in preserving the accurate recollection of witnesses.**

COMMENT

A primary purpose of eyewitness identification procedures must be to ensure that eyewitnesses will be able to identify the person they saw. Thus, for example, the guidelines that deal with how a description should be taken from an eyewitness attempt to ensure that this process does not impair the witness's ability to recognize the suspect subsequently. In cases of urgent necessity, such as where a witness is dying at the scene, a confrontation may be held even though this procedure is obviously suggestive.

These guidelines also attempt to ensure that if an identification is made it is as probative as possible — that a witness's identification is based only on his or her recollection of the offender's appearance. This is to ensure that no question can be raised at trial about the reliability of the identification procedure.

(c) *To Reduce the Risk of Mistaken Identification.* **To minimize the possibility of mistaken identification. To this end, the guidelines require that eyewitnesses attempt to identify suspected offenders in unsuggestive circumstances, and discourage them from identifying a person in an identification procedure simply because he or she is the person who most closely resembles the person they saw.**

COMMENT

One of the most important purposes underlying virtually all rules of criminal evidence and procedure is the protection of innocent persons from wrongful conviction. The State's interest, it is commonly said, is not in obtaining a conviction as such, but in obtaining the conviction of the guilty person. Coincidentally, the case in which the English Court of Appeal endorsed this idea was one dealing with the propriety of certain identification procedures employed by the police.[59]

It might be noted that in the area of eyewitness testimony, the risk of wrongful conviction is particularly insidious. The person likely to be mistakenly identified is one the police suspect of having committed the crime, and in many cases is likely to be known to the police by reason of previous charges or convictions. The people who suffer the greatest possibility of unjust conviction are those who have had previous contact with the criminal justice system.

The danger of mistaken identification is present in pretrial identification procedures because: (1) witnesses taking part in such a procedure are likely to expect that the police have a suspect; (2) if the witnesses are not completely confident about their ability to identify the person they saw, they will be anxious to identify the police suspect; and (3) there are numerous, often subtle ways that the identification procedure might be conducted or biased so that the witness is able to discern who the police suspect is.

The first danger giving rise to the possibility of mistaken identification is self-evident. If the police go to the trouble of staging an identification procedure (for example, a lineup), all witnesses are likely to correctly assume that the police have arrested or at least taken into custody a person that they strongly suspect is the offender.

Witnesses, unless they are absolutely confident about their ability to identify the offender, will feel some pressure to identify the police suspect. Most witnesses taking part in an identification procedure will be anxious to identify the suspect in order to discharge a public duty in solving a crime, vindicate the victim, appear cooperative to the police, or look intelligent.[60] In short, a whole range of factors contribute to the

witnesses' sense that they will have "failed the test" if they do not pick someone, preferably the police suspect, out of a lineup or other pretrial procedure.[61]

These two factors give rise to the dangers that the witness will be looking for manifest suggestions or latent cues from the police as to who the suspect is, or that in their zeal to "pass the test" they will simply pick out the most likely-looking person. The danger of suggestion is particularly serious in identification procedures, since the mind does not carry photographic reproductions of reality, but rather only fragmented and faded chunks of larger pictures, which are to some extent supplemented by interpretations of incomplete information. The influence of suggestion can cause people to superimpose the features of a currently-suspected person onto the faded memory images of faces they have seen in the past. This is particularly difficult to discern because witnesses are not ordinarily aware that their identification of a person may relate more closely to the effects of suggestion than to their original perceptions of the offender. Moreover, once their memory has been distorted by suggestion, witnesses will be unable to recall their original perception.

The guidelines, thus, attempt to minimize the risk of mistaken identification in an identification test by (1) reducing the witnesses' expectancy that the police have a suspect; (2) reducing the pressure on witnesses to identify someone; (3) ensuring that the identification takes place in circumstances as free as possible of any suggestion that might bias the witness towards the selection of a particular person. The rules are stricter in this respect than present police practices. It must be noted, however, that this should serve not only to protect persons from being wrongfully identified, but should also serve to ensure that identifications made are as reliable as possible — the second general purpose of these guidelines.

(d) ***To Protect the Rights of Suspects.*** **To ensure that the rights of any person identified are not prejudiced. To this end, the guidelines establish rules that will require suspects to be fully informed of the nature of the procedures and of their rights, and will permit pretrial identification procedures to be reconstructed at trial.**

COMMENT

Perhaps the two most serious defects in present police practices are the failures to ensure that (1) suspects are informed of their rights, and (2) the pretrial identification procedure is conducted in such a way that it can be reconstructed at trial so that the trier of fact can assess its influence on the witness's identification.

With respect to informing suspects of their rights, only Fredericton, Halifax and Sherbrooke routinely inform suspects of their right to counsel at the lineup. In the majority of cities the police report that although they cannot prevent counsel from attending the lineup, they do nothing to encourage it. In some cities they positively discourage it by threatening to subpoena lawyers as witnesses if they attend the lineup. Often, lawyers present at a lineup are not allowed to appear behind the one-way mirror in order to observe the procedure (in spite of the fact that the suspect is also unable to observe what is happening behind the one-way mirror). Any records made of the pretrial procedure are seldom given to the defence. Those that are made are given at the discretion of the Crown counsel. Confrontations and informal viewings are often held without the suspect's consent or knowledge.

Just as important as being informed of their rights is the suspects' ability to reconstruct the identification procedure at trial in order to expose any biases, if they are to have the in-court identification meaningfully evaluated. The concern about the difficulty at trial of reconstructing pretrial identification procedures was in large part responsible for the extension in the United States of constitutional safeguards to this stage of the proceedings.[62]

Although some records are kept of pretrial identification procedures in Canada, our survey of police practices revealed that police departments are not particularly sensitive to the need to conduct procedures in a fashion that can be reconstructed at trial. For example, informal procedures are often used in place of a more controllable procedure.

Under the proposed guidelines the accused's rights are protected, and the pretrial procedures will be capable of reproduction at trial. The judge or jury will be able to assess accurately any possible influences on the witness's identification. At the very least, a complete record of pretrial identification procedures will be available to the defence.

Rule 102. Definition of "Eyewitness Identification Procedures"

As used in these guidelines, "pretrial eyewitness identification procedures" refer to the following procedures:

(a) ***Taking Descriptions.*** **Taking a verbal description of a suspect from an eyewitness.**

(b) ***Preparing Artist's Drawings and Composites.*** **Preparing a non-photographic pictorial representation (e.g., a free-hand sketch or identi-kit composite) of a suspect from an eyewitness.**

(c) ***Conducting Photographic Displays, Lineups, Informal Viewings, and Confrontations.*** **Conducting a photographic display, lineup, informal viewing or confrontation in order to obtain an eyewitness identification.**

COMMENT

"Pretrial eyewitness identification procedures" refers to all pretrial procedures that relate to eyewitness identification.

Rule 103. Definition and Role of "Supervising Officer"

The officer who is responsible and has the authority for ensuring that a pretrial eyewitness identification procedure is conducted pursuant to these guidelines shall be known as the "supervising officer". If at all possible, the supervising officer should not be otherwise involved in the investigation or prosecution of the case.

COMMENT

Throughout these guidelines it is necessary to refer compendiously to the police officer in charge of conducting an identification procedure. A "supervising officer" need not be an officer of any particular rank, but simply the officer in charge of conducting the procedure. Police departments should establish a practice relating to how supervising officers will be designated in particular circumstances.

The responsibilities of the supervising officer include notifying the witnesses and the suspect of the procedure, selecting a location for the procedure and distractors for a lineup or photographic display, appointing assistants, and ensuring that all the necessary records are kept. In ensuring that the guidelines are followed, the officer will have the authority to maintain order at the identification procedure, and may, for example, exclude any person, including counsel for the person to be identified, if he or she disrupts the identification.

Obviously, the supervising officer should be familiar with the law and practice of pretrial identification procedures. He or she should also be familiar with psychological research evidence and theory relevant to the practice of pretrial identification procedures.

The guideline provides that normally the supervising officer should not be involved in the case. This practice will remove suspicions of unfairness and perhaps any temptation on the part of the officer,

consciously or unconsciously, to assist the witness in identifying the police suspect. This is a common prohibition in guidelines regulating lineups both in Canada and abroad.[63] Indeed, to avoid all suspicion that the investigating officer influenced the lineup, he or she should not be present at the identification proceeding, unless the suspect's lawyer is present.[64]

It has been suggested that in order to avoid biased lineup proceedings, they should be supervised by a magistrate or other judicial officer. This is the practice followed in India, where magistrates supervise the conducting of lineups.[65] Not only do police not conduct lineups in India; their presence is discouraged.[66] The rationale for this is based not only upon a concern about assistance the police might consciously or unconsciously provide to witnesses,[67] but also upon a concern for the need to maintain the appearance of justice.[68] Italy is another country in which the police do not conduct lineups or confrontations. They may be held only by a magistrate, before whom the police must bring the arrested person within forty-eight hours of making an arrest.[69] In France, members of the *police judiciaire* direct lineups, with the possibility of judicial supervision by the *juge d'instruction* (investigating magistrate). Although the conducting of the lineup precedes the beginning of the *juge d'instruction's* duties, there is no objection to his or her supervision of the lineup since he or she must eventually compile the dossier of the case and assess the evidence obtained, and in fact he or she is often present.[70]

In the United States a number of courts have undertaken to supervise identification procedures. Normally this is done by having the eyewitness attend the accused's first appearance at court or arraignment, and by asking him or her, under the judge's supervision, to identify the offender from persons in the courtroom, including an array of persons similar in appearance. In its recently-published *Code of Pre-Arraignment Procedure*, the American Law Institute did not provide for this practice in all cases, but the provisions were made compatible with such a practice in the event that a jurisdiction wished to experiment with it.[71]

There are obvious advantages to having pretrial identification procedures supervised by a magistrate or independent judicial officer.[72] Prohibiting the presence of police officers at lineups is likely to result in less pressure on witnesses to make an identification of someone about whom they are unsure. Having a judicial officer present might also remove the need for the presence of defence counsel. However, aside from the problem of obtaining suitable judicial officers, taking away from the police the responsibility for pretrial identification procedures would appear to be too drastic a response. The police guidelines established here, subject to judicial scrutiny, should amply provide for the fair conduct of procedures.

Present Practice

See the discussion of present practice under the next guideline, the definition of "Accompanying Officer".

Rule 104. Definition and Role of "Accompanying Officer"

An "accompanying officer" is any officer who accompanies witnesses when they view a lineup or a photographic display or take part in an informal viewing. If at all possible, the accompanying officer shall not be otherwise involved in the investigation or prosecution of the case and shall not know of the identity of the suspect, if there is one.

COMMENT

For the same reasons that the supervising officer should not be someone who is otherwise involved in the investigation or prosecution of the case, neither should the officer who actually presides over the making of an identification. However, it is also important that when identification tests are conducted, the officer who actually shows the witness the lineup, photographic display or informal viewing does not know who the suspect is.

If the person conducting the identification test knows who the police suspect is, he or she might communicate this knowledge to a witness.[73] Of course, only a dishonest police officer would reveal the suspect's identity by an explicit act. However, recent psychological studies have shown the dramatic effect of "experimenter bias", the "self-fulfilling prophecy" or the "Rosenthal effect", as it is variously called. The essence of this concept is that a person's expectations, predictions or hopes of another's behaviour are often realized. In the context of psychology experiments, the experimenter's expectations are unintentionally communicated to the subjects in subtle ways, so that there is a danger that the experimenter will obtain the expected results.[74]

It is very easy to see how this phenomenon might apply in the lineup situation. If the officer conducting the lineup knows who the suspect is, there is a danger that he or she may, albeit unknowingly, transmit this knowledge to the witness. The witness may act on this information and thus choose the "expected suspect". Indeed the danger of "experimental bias" is particularly likely to be present at a lineup because a witness will be anxious to choose the police suspect since police officers command respect and are authority figures for most persons.[75]

Thus this rule for conducting pretrial identification procedures, that the accompanying officer should not know who the suspect is, has its

counterpart in scientific research. In well carried out psychological experimentation, the experimenter is kept "blind" to the experimental manipulation when there is a possibility of bias — the experimenter is not made aware of the hypothesis being tested.[76]

Although the manner in which the experimenter's bias or expectation is communicated to the subject is still somewhat obscure, it is easy to imagine ways in which a police officer might unintentionally "tell" a witness who the suspect is. For example, a suggestion might be conveyed by the manner in which the photographs are handed to the witness for inspection. The officer conducting the proceeding might become tense when the witness examines the photograph of the suspect, or the officer might allow the witness more time to examine one photograph than another. In a lineup, the officer might inadvertently rest his or her eyes on the suspect during the proceeding, or unconsciously ask the witness questions or give them directions that might reveal who the suspect is.

Notwithstanding the theoretical preference for keeping the accompanying officer ignorant of the identity of the suspect, such a rule might be impossible to follow in some cases because a sufficient number of officers may not be available. In most cases it will necessitate the participation of at least one additional officer in the arrangement and conducting of an identification procedure, since not only will the accompanying officers have to be uninvolved in the investigation of the case, but they will not be able to take part in the preparation of the procedure.

Moreover, other guidelines require that suspects be given the choice of taking any position in the lineup they wish, and that they be asked, before the witness enters the viewing room, whether they have any objections to any of the other participants or any other aspect of the proceeding. Obviously, if an accompanying officer is to remain blind to the suspect he or she would not be able to perform this task.

More seriously, where there is more than one eyewitness, a strict application of the rule would require the accompanying officer to be replaced after each viewing at which a witness made an identification. It might be possible to arrange for the witness to write a number on a piece of paper signifying the position of the person identified, so that the accompanying officer would be kept ignorant of the person identified. However, such a practice would not only be subject to undetectable error, but would also conflict with the requirements of other guidelines that require witnesses who identify a person to be asked some simple questions relating to both the certainty and basis of their identifications. This would not be possible in multiple-witness cases if the accompanying officer had to be kept ignorant of the identity of the suspect unless, of course, different accompanying officers were substituted after each witness.

Despite such practical difficulties, in most cases there should be few difficulties in arranging the identification procedure in such a way that the accompanying officer is unaware of the suspect's identity. For example, the accompanying officer can simply be called in to accompany the witnesses once the process of forming the lineup has been completed.

Present Practice

In most cities the police attempt to ensure that the investigating officer does not take part in the conducting of the lineup. Indeed, in London, they make a point of not having the investigating officer in the building. In Montréal, Calgary, Fredericton and Regina, the lineup is almost always conducted by the investigating officer. Only in Vancouver did the police report that normally the officer who actually conducts the lineup would be unaware of the suspect's identity.

Although in most cities the investigating officer is not present at the lineup, in virtually all cities the investigating officer conducts photographic displays.

Rule 105. Restrictions on Eyewitness Identifications

No police officer shall attempt to secure the identification by an eyewitness of any person as a person involved in a crime unless the pretrial eyewitness identification procedures established by these guidelines are followed or unless for one of the reasons provided in Rule 107, such a procedure is unnecessary.

COMMENT

This rule establishes the primacy of these proposed guidelines. No sanction is provided in the rule for police officers who violate the guidelines. The sanction, which will eventually have to be inserted in the rule, will depend upon the form that the guidelines take. For example, if the guidelines take the form of police rules of practice, police departments will provide for their normal disciplinary actions when the rules are breached. For those guidelines that take the form of a statutory enactment, if a general exclusionary rule is adopted it might provide that evidence of a pretrial identification may be excluded at trial unless the guidelines have been at least substantially followed. The next rule, Rule 106, provides a sanction if a pretrial identification procedure is not held at all.

Rule 106. Prerequisite to Trial Identification

No eyewitness shall identify the accused at trial unless he or she has identified the accused at a pretrial eyewitness procedure or unless for one of the reasons provided in Rule 107, such a procedure is unnecessary.

COMMENT

This rule prevents the police from not holding a pretrial identification procedure, simply waiting until trial and having the witness identify the suspect in the courtroom.

Nothing is more unfair to an accused who claims that he or she is not the person who committed the crime than for the prosecution to wait until trial to ask the eyewitnesses to look about the courtroom and point to the offender. (This procedure is commonly referred to as a "dock identification".) The accused at this point is usually seated alone in the prisoner's dock or at the defence counsel's table, and is by far the most noticeable person in the courtroom. Even when the accused is permitted to sit in a less conspicuous place such as the public gallery, the identification procedure is unsatisfactory.

In effect, an in-court identification is similiar to a pretrial confrontation if the accused is conspicuous in the courtroom. It is similar to a pretrial informal viewing if the accused is seated inconspicuously in the courtroom along with the members of the public. The comment following Rule 505, the rule that deals with holding a lineup, explains why a lineup is always preferred to either of these procedures. The same reasoning would imply that a pretrial lineup is always to be preferred to an in-court identification. Indeed, if a lineup cannot be held for one of the reasons enumerated in Rule 501, a pretrial confrontation or informal viewing is likely to be better than an in-court identification. Once the accused has been brought to trial, the pressures on eyewitnesses to identify the accused as the person they saw are almost overwhelming. Obviously the police and prosecution strongly suspect the accused; they have gone to a great deal of trouble in bringing him or her to trial; and, if the witness cannot identify the accused, he or she will have to state so publicly. Furthermore, a witness in court is probably suffering from more anxiety than a witness at a pretrial procedure, and is therefore less likely to make an accurate identification. In addition, if an identification is not made until trial, there is a danger that the identifying witness might see the accused in the custody of a police officer at the time of arraignment, or consulting with a lawyer prior to trial.

Case Law

Under the present law, there is no legal requirement that an eyewitness must identify the accused at a pretrial identification procedure. An in-court identification is admissible evidence of identification. However, the courts have recognized the danger inherent in an in-court identification,[77] and have consistently stated that, as a rule of prudence, the police ought not to rely upon an in-court identification as the sole means of linking the accused to the crime.[78] Indeed, some courts have held that it is a reversible error if there is no pretrial identification procedure and the trial judge does not warn the jury specifically about the dangers surrounding a dock identification.[79] Moreover, in a number of cases even though a warning is given, appeal courts have held that because of the general weakness of the prosecution's case, an in-court identification was insufficient evidence to sustain a conviction.[80]

To some extent the dangers of a dock identification can be lessened by having the accused sit in the public gallery in the courtroom. However, the cases have held that whether the accused should be able to sit in the public gallery until identified by an eyeitness is within the discretion of the trial judge.[81]

Rule 107. When Procedures Established by Guidelines are Unnecessary

A pretrial eyewitness identification procedure as required by these guidelines may be unnecessary in the following circumstances:

(a) ***Inadequate Recollection.*** **The witness would be unable to recognize the perpetrator of the offence being investigated. However, if the person is a potential eyewitness, this shall be recorded, along with any relevant information as provided in Rule 206.**

COMMENT

There would obviously be little point in requiring persons who assert that they could not identify a suspect to attend an identification test. However, evidence that an eyewitness to an alleged crime asserts that he or she could not identify the perpetrator is often relevant. For example, such evidence might be relevant in assessing the weight to be given to the testimony of another eyewitness who purports to be able to identify the suspect, but who was in a situation similar to that of the eyewitness who cannot make an identification. Therefore, a record containing information

relating to the potential eyewitness should be prepared, as required in Rule 206.

(b) ***Prior Knowledge.*** **The witness knew the identity of the suspect before the offence occurred (e.g., the suspect was a personal acquaintance, relative, neighbour, or co-worker).**

COMMENT

Another clear exception to the general rule that a witness should be asked to attempt a pretrial identification of the accused arises when the witness is acquainted with the accused. A lineup or other pretrial identification proceeding would in these circumstances serve no useful purpose. It would only test the witness's ability to identify an already-familiar face. For example, if a woman accused her estranged husband of assaulting her on a dark street corner, there is a possibility that the victim was mistaken in her recognition of the assailant. However, this error will not be detected in a lineup, since the wife will be able to pick out her husband with no difficulty. Similarly, the witness's identification will not be biased by the police's bringing her husband before her and asking whether he is the man who assaulted her. All pretrial identification would prove in these circumstances is that the wife could identify her husband. This is hardly probative of any of the matters likely to be in dispute at the trial.

Naturally, there will be cases where there will be some doubt as to whether the witness was sufficiently acquainted with the suspect to dispense with the need for a pretrial identification procedure.[82] Basically, the test should be whether the witness was sufficiently familiar with the suspect that he or she could not be mistaken about the suspect's identity.

Case Law

Since the courts do not insist on a pretrial identification, there is no clearly-defined exception under the present law for cases where the eyewitness has had some prior association with the accused. However, from reported cases, it is clear that under the present practice, usually no pretrial identification procedure is followed in such instances, and the courts have not commented adversly on this practice.[83] Also, if a pretrial identification procedure has been improperly conducted, such as where the witness is shown a single photograph of the suspect, the courts have indicated that this is not a serious error when the witness had prior knowledge of the suspect.[84] Furthermore, in noting the importance of an unsuggestive pretrial identification procedure, the courts often expressly exclude the case where the suspect was previously known to the

witness.[85] Finally, in cases where appeal courts have quashed convictions because of the frailty of eyewitness evidence, the courts often note the fact that the witness had never seen the offender before the commission of the offence.[86] The courts clearly draw a line between the considerations appropriate for cases where the witness was previously acquainted with the suspect and those where this was not so.

The courts have, however, quite properly distinguished between the frailties in the initial identification, and dispensing with the need to conduct a pretrial identification procedure if the witness asserts that an acquaintance is the offender. Owing to the frailties of perception, eyewitnesses might well be mistaken in asserting that it was a prior acquaintance they saw. Thus, even though the witness and accused were well known to each other, the trial judge may caution the jury that the initial recognition may have been erroneous.[87] Further, in England the mandatory common-law rule that the trial judge must give a warning to the jury, pointing out the dangers of mistaken identification, has been held to apply even to cases where the witness was acquainted with the suspect.[88]

Present Practices

All police forces, except in Ottawa, report that they would not hold a lineup if the witness had prior knowledge of the suspect.

(c) ***Independent Identification.*** **The witness, without police assistance, learned of the identity of the suspect after the offence occurred (e.g., the eyewitness recognized the suspect's picture in a newspaper or spotted the suspect at his or her place of employment).**

COMMENT

Witnesses will sometimes by chance see a person whom they identify as the offender; for example, they may see the person on the street or a picture of him or her in a newspaper. One of the important purposes of these rules is to ensure that, when the police conduct a pretrial identification procedure, it is conducted in the most reliable and fairest manner possible. Obviously, if a witness identifies, or learns of the identity of, the person he or she saw prior to an identification procedure, the police cannot exercise any control over that identification (to ensure that it is not suggestive) and the guidelines cannot be applied.

The mere fact, however, that an eyewitness sees, without police assistance, a person he or she thinks is the offender, is not enough to

make an identification procedure unnecessary. The witness must be able to identify that person. For example, if a witness identifies a person sitting in a bar as the person who committed an assault one week earlier, and the police arrive at the scene before the person leaves, there will be no need for any further pretrial identification test by that witness. Indeed, an identification procedure would be meaningless since the witness would presumably simply pick out the person seen in the bar.[89] However, if the witness merely catches a glimpse of the alleged offender getting into a car, and copies down the car's licence number, should the witness later be asked to attempt an identification of the offender at a lineup? On the one hand, the danger of conducting a lineup would be that the witness might identify the suspect not necessarily because he fits the appearance of the offender, but because he fits the appearance of the man the witness saw getting into the car. If this is the true basis of the witness identification, the lineup is valueless. Worse yet, if the jury does not understand the actual source of the identification (when the suspect was seen getting into the car), the results of the lineup may acquire an undeserved legitimacy. On the other hand, if the witness did not get a good look at the person getting into the car, and is not positive it was the offender, it would be dangerous not to subject the witness to some form of pretrial identification testing. Therefore, this might be a case where a lineup should be held; although the witness was able to direct the police to a suspect, he or she had not "learned the identity of the suspect" without police assistance as required by the guidelines.

Where a witness selects a suspect independent of police assistance but, for example, might not have gained a clear view at that time of the suspect and, therefore, a lineup is held, a few additional precautions might be called for. For example, the conduct of any pretrial identification proceeding might be delayed at least one week from the time the witness claims to have seen the offender. This delay should lessen the extent to which the witness concentrates upon his or her image of the suspect rather than the actual offender. It should have little effect on the witness's recall of the original event, since studies show that the memory of faces tends to deteriorate slowly.[90] Also, the witness should be specifically told, before viewing the lineup, to look for the person whom he or she saw committing the offence, and not the person seen subsequently. Finally, the trial judge should instruct the jury about the special danger of misidentification in such circumstances.

Case Law

Again there is no clearly-developed jurisprudence on the issues raised by this provision, since there is no firm rule under the present law that a pretrial identification procedure is essential; however, the concerns expressed by judges support this exception. For example, in *R.* v.

Racine,[91] an independent identification was made when the witness recognized a photograph of the accused in a newspaper, *Photo-Police*. Even though viewing a photograph of a "wanted" person is clearly suggestive, and no subsequent lineup was held in the case, the court dismissed the accused's appeal because, among other things, it was "not a case of the police showing the victim a package of photographs and saying 'pick one'."[92]

In an Australian case[93] both the police and the court recognized the dangers mentioned above. The victim in the case thought she recognized her attacker three weeks after the event and gave the police the licence plate number of the motorcycle she saw him on. A lineup was subsequently held, although the facts do not indicate the time lapse. The court dismissed the accused's appeal but nonetheless revealed an appreciation of the problem presented when a witness sees the accused between the time of the offence and the lineup: "It is obvious, however, that her identification of the man must have been based upon her inspection of him at the railway gates, as much as, if not more than, upon her opportunities of seeing her assailant."[94]

(d) ***Continued Observation.*** **The witness maintained surveillance of the suspect from the time of the commission of the offence to the time of the suspect's apprehension.**

COMMENT

If an eyewitness observes a person committing a crime and the person is apprehended in the presence of the witness, an identification procedure is obviously unnecessary.

(e) ***Identity Not Disputed.*** **The accused does not dispute the issue of identity.**

COMMENT

In many cases identification will be admitted by the accused, and some other element of the offence will be in issue. In these cases, a pretrial identification procedure is a needless formality. The difficulty lies in determining the cases in which the procedure should be dispensed with. Even if the accused were to make an admission relating to

identification before trial, there is nothing preventing him or her from subsequently disputing the issue at trial. Unless some formal procedure for taking such an admission is established, perhaps the police should be required to conduct a pretrial identification procedure in all serious cases. This is currently the practice of some police departments. In this case a rule would presumably be required, making identification procedures unnecessary for less serious offences.

Rule 108. Modification of Guidelines in Special Circumstances

If it is necessary in special circumstances to obtain an identification that might otherwise not be obtained, these guidelines may be modified, provided there has been as full a compliance as is practicable.

COMMENT

An eyewitness identification is often the most important, and in some cases, the only evidence tending to prove the accused's guilt. Therefore, if these cases are to be resolved justly, the evidence must be admitted. However, in some cases it may not be possible to obtain an identification according to the strict application of these guidelines. In such cases this rule permits these guidelines to be modified on an *ad hoc* basis. The importance of an identification can, in some cases, justify an identification procedure that is suggestive and which cannot be controlled if no reasonable alternative exists. This guideline is an acknowledgement of the fundamental interest in law enforcement, and the fact that the most that the court can ask of law enforcement officials is the production of the best evidence.

Even in these cases, the rules should be followed to the extent possible to maximize the integrity of the law enforcement process. The advice of a legally-trained and disinterested person — the police department's legal adviser — should be obtained, if possible.

There is a danger that the courts might use a rule such as this simply to superimpose their own standards of a properly-conducted pretrial identification procedure on the police. However, these guidelines are sufficiently detailed that the probability of their being essentially overridden by the courts seems remote.

Part II. General Rules

Rule 201. Separating Witnesses

When there is more than one witness, they shall not take part in a pretrial eyewitness identification procedure in one another's presence.

COMMENT

Each witness's identification evidence should be the result of independent judgment. If witnesses view a lineup together, there is a risk that those who are in some doubt about whether a particular lineup member is the offender may simply agree with another witness who identifies a suspect. There is also a risk that a group of witnesses, all of whom might be in some doubt about the identity of the suspect, will aggregate their suspicion against a particular person, and come to a collective judgment about who the suspect might be. Thus, through a process of mutual reinforcement, a number of uncertain individuals could convince themselves beyond any doubt that a particular member of the lineup is the criminal.

The practice of having witnesses view the suspect in one another's presence is particularly dangerous since jurors are more inclined to convict an accused who has been identified by more than one witness. Their view might be that while one witness may be honestly mistaken, it is unlikely that several people would make the same mistake (although one is reminded of the cases in which ten or more witnesses identified a person who after conviction was found to be innocent).[95] However, it is clear that where one witness positively identifies the accused and several other witnesses resolve their doubts by concurring in that judgment, whatever safety may be found in numbers is eliminated. All but one of the identifications would be tainted by suggestion, and the trier of fact would only be able to speculate as to whether the other witnesses would have also identified the accused, if left to make their choices independently.

A number of psychological experiments dealing with group pressure and conformity support the view that people will frequently abandon their individual judgment in order to conform to group judgments. One of the most notable experiments in the area was conducted by Solomon Asch.[96] Briefly, in this experiment subjects were asked to differentiate lines of obviously different lengths. Unknown to the true subject, people giving "wrong" answers to the question were confederates of the experimenter.

Asch found that a large number of the true subjects modified their views to conform to the opinion of the confederates, and thus gave the wrong answer.

Although the above argument was cast in terms of the dangers arising at a lineup, the pressure to conform to group judgments, and people's basic instincts to create a harmonious atmosphere would obviously be present in any pretrial identification procedure. Thus, witnesses should not give descriptions, take part in reconstructing pictorial representations, view photographic displays, nor take part in confrontations or informal viewings in one another's presence.

It has been suggested that more than one witness should be entitled to view the same lineup at the same time, provided that they do not in any way communicate. The witnesses could, for example, be instructed to write down the number worn by the person whom they identify.[97] Several practical concerns, however, mitigate against allowing witnesses to view lineups together, even under these conditions. First, although witnesses may be instructed not to speak, it will be difficult to control spontaneous outbursts. Second, some witnesses may wish to examine a particular lineup participant more closely. Third, witnesses who, for example, pay inordinate attention to a particular person, may thereby communicate their selection to the other witnesses. Finally, it would not be appropriate to ask witnesses questions as to the certainty or basis of their identification, as required by Rule 205, in the presence of other witnesses, for again, the pressure to conform would be present. Some police stations have individual cubicles from which a number of eyewitnesses can view a lineup at the same time. Since the witnesses are out of one another's presence in such circumstances, this practice would not be prohibited by the guideline. Of course, care would have to be taken to ensure that questions asked of individual witnesses relating to such matters as the basis and confidence of their identification not be overheard by other witnesses.

Case Law

The courts have not consistently condemned the practice of allowing witnesses to undertake pretrial identification procedures in each other's presence.[98] But in at least one case, *R.* v. *Armstrong*,[99] the court clearly revealed an awareness of the dangers of not separating witnesses at identification procedures. In this case, the three witnesses were left together at the police station to look through a book of photographs. This practice was strongly criticized by DesBrisay C.J.B.C.:

> I would add that it is most objectionable to provide books of photographs for inspection by more than one person at a time. This gives opportunity for discussion between the persons examining photographs, and it may well happen that the one who is uncertain in his identification, or who is unable to

identify, may be influenced or persuaded by what appears to be the confidence or certainty of another person. Each witness should be required to make his own inspection and selection, if any, and to reach his own conclusion, without the opportunity for consultation or discussion with any other person....[100]

Present Practice

In all the cities surveyed, except three, the police reported that witnesses view lineups separately. In two of these cities it would appear that witnesses frequently view lineups together. In Vancouver, although witnesses view the lineup at the same time, that city has facilities enabling eight witnesses to view a lineup from separate cubicles, so that they are unable to observe one another.

Rule 202. Avoiding Witness's Suggestions

A witness who has taken part or who might take part in a pretrial eyewitness identification procedure shall be instructed not to discuss the suspect's appearance with other witnesses. If possible, witnesses shall be escorted in such a way that they do not encounter one another before or after engaging in a pretrial identification procedure. If witnesses are together, a police officer shall be present, to ensure that they do not discuss the suspect's appearance.

COMMENT

This rule is necessary to protect the integrity of Rule 201. There would be little point in ensuring that witnesses take part separately in identification procedures if, before or after the procedure, they could confer with one another. Although the dangers posed by collaboration are greatest after a witness has taken part in an identification procedure and has identified a suspect, they are also present if collaboration takes place prior to an identification. Witnesses who confer with one another prior to an identification might attempt to tailor their reports to reflect a consistent story, or some witnesses might simply yield to the descriptions of the suspect given by others.

Psychological experiments confirm that if witnesses are allowed to consult with one another prior to an identification, their reports will be more homogeneous. Although their reports will also be more detailed, their composite report (in effect) will be more unreliable than their individual descriptions.[101] For example, in one study,[102] the authors presented a staged purse-snatching incident to unsuspecting subject-witnesses, then asked them to complete questionnaires regarding the details of the incident. Subsequently, the individual witnesses were put

into groups and asked to complete the questionnaire together. The authors found that although the questionnaires completed by individuals tended to be less complete, with respect to the answers completed, the groups tended to make 40 per cent more errors than the individuals. The influence of others in this regard is likely to be especially strong in novel and ambiguous situations, such as that experienced by an eyewitness to a crime.

Ideally, witnesses should be physically separated from one another. Where it is impossible to keep the witnesses separated prior to viewing a lineup, the guidelines suggest that a police officer be stationed in the waiting room to ensure that the witnesses do not discuss the matter of identification.

The guidelines provide that witnesses should be cautioned against discussing the suspect's appearance with one another. However, when witnesses are associated by such things as marriage or place of employment, this caution may be of little effect. In these cases, it is particularly important that identification procedures take place as soon as possible, and that witnesses take part in the identification test at approximately the same time. This will prevent one witness from describing to another the appearance of a person whom he or she had previously identified.

This rule attempts to prevent witnesses from conferring with one another about their identification evidence. However, in the event that they do, a number of subsequent rules attempt to remove all possible dangers that might result; see for example, Rule 505(8).

Case Law

From the reported Canadian cases it is clear that under the present practice, witnesses often communicate with one another. The courts have not been critical of this practice; even in particularly blatant situations, the courts have not only failed to emphasize that the police should caution witnesses not to discuss the appearance of the suspect among themselves, but they have also failed to criticize the police for not separating witnesses at a pretrial identification procedure.[103]

One country where the courts have been particularly vigilant in commenting on the police practice of permitting, or even giving the opportunity for, witnesses to confer with one another is South Africa. In *R.* v. *W.*[104] for example, where witnesses were assembled together in one room prior to the lineup and admitted to having described the assailant to each other, the court commented:

> One appreciates that the police personnel and accommodation available will not always permit of the isolation of each witness; but they should, if they are

assembled together, at least be instructed by the police not to discuss the matter of the identity of the person sought for, and a member of the force, if available, should be present to see that such instruction is not infringed.[105]

In another case[106] a number of irregularities were committed at the lineup, but the court noted that the most important of them was the practice "of herding the witnesses together in a room without supervision or control, without warning not to discuss, and in circumstances where they had every opportunity of exchanging notes as to the appearance of the accused."[107]

Interestingly, in Italy the practice of separating eyewitnesses is considered so important that it is codified in the *Code of Criminal Procedure*. The Code provides that each witness must make a separate private identification and that the judge must ensure that those witnesses who have viewed a suspect do not communicate with those who have not yet made an identification.[108]

Present Practice

Virtually all our police respondents reported that steps are taken to ensure that, after viewing a lineup, witnesses are kept separate and apart, and that there is no chance for witnesses to converse with one another after the lineup is complete. Most police departments provide for witnesses to leave the viewing room by way of a special exit. This prevents those witnesses who have viewed the lineup from communicating with those who have not.

In most cities it would appear that witnesses assemble in the same room prior to viewing the lineup, but an officer is often present to ensure that the witnesses do not confer with one another.

Rule 203. Avoiding Police Officer's Suggestions

Police officers shall not by word or gesture suggest to any witness who they think the suspect is. If they must confront the witness with a suspect, they shall do so in a way that minimizes the appearance of their degree of belief in the suspect's guilt. A police officer shall not say anything to the witness during or after the proceedings that suggests that the witness correctly described or identified the suspect.

COMMENT

For the reasons discussed above, witnesses will invariably be looking to the police officers for cues as to whom the officers suspect. This gives

rise to two dangers. First, witnesses unable to identify the offender based upon their own independent recollection, might do so in order to be helpful to the police, believing that the police would only suspect someone if they had other evidence indicating his or her guilt. Second, witnesses whose original perception or present recollection of the offender's appearance is incomplete will tend to fill in the missing details unconsciously and, when their attention is directed to a particular person there will be a strong inclination for the witness to draw from that person the missing details. The effect may be to make the witness's image of the offender's appearance conform to that of the suspect.

The first sentence of this proposed guideline simply provides, as a general rule, that the police shall not in any way suggest to the witness the identity of the suspect. Subsequent guidelines attempt to prevent the danger that the police will unintentionally suggest to the witness who the suspect is. They provide, for example, that the presiding officer should not be aware of the identity of the suspect.

The second sentence of the guideline provides that in those cases where the police have to inform the witness of whom they suspect, namely, in those instances where a confrontation is permissible under these rules, they should minimize the appearance of their degree of belief in the suspect's guilt. The dangers of suggestion are great in a confrontation; however, if the police were also to inform the witness that they caught the suspect in possession of incriminating evidence, or that strong circumstantial evidence pointed to the suspect's guilt, or even that the suspect had been charged with the offence (although in some cases this will be obvious), the pressures on the witness to identify the suspect as the person they saw would be even more overwhelming.

The guideline also provides that police officers shall not say anything to the witness during or after the proceedings which suggests that the witness correctly described or identified the suspect. If witnesses are uncertain about their identification of the person they saw, anything that the police might say to them to indicate that they picked the "right" person might improperly increase their confidence that they accurately picked the person they saw. This might lessen the likelihood that they will subsequently go through a process of self-examination in trying to decide whether they correctly identified the offender, and might affect their demeanor and testimony at trial. It is important, therefore, that after the witness has made a selection at an identification test nothing be said or done by the police to indicate whether the witness's selection confirmed their suspicions. Indeed nothing should be said to the witness to indicate that there was a "right" or "wrong" answer. This problem should not, of course, present itself if the accompanying officer is not aware of the identity of the suspect, as suggested in Rule 104.

Case Law

The courts are particularly vigilant in recognizing situations in which the police have suggested the identity of the suspect to the witness, and they invariably condemn the practice in the strongest terms. For example, in *R.* v. *Opalchuk*[109] the police officer conducting the identification procedure told one witness that the group of photographs he was given to examine included a photograph of a person they were suspicious of. The same police officer said to another witness: "Take a look at this one here; that's the one the other people picked out."[110] The trial judge, in acquitting the accused, was vehement in his criticism of the prosecution's identification evidence: "What weight, what value, what sufficiency can I attribute to this type of evidence in view of the manner in which the photographs were used?... Can it be said for a moment that the identification was absolutely independent?"[111]

In *R.* v. *Bundy*[112] the court called the police's action of telling a witness that a particular person in the lineup resembled the man the police suspected, "extremely improper".[113]

There are no reported Commonwealth cases in which the court has criticized the police for thanking a witness for being helpful after an identification procedure. However an American court mildly criticized an officer for telling a witness that she had "done well" following her identification of the accused.[114] The court said: "There is no reason to suppose that the detective's remark was more than a comforting gesture to a witness, who was, quite naturally, on edge. It was better left unsaid, but does not seem to us to be the kind of action that materially affected her certainty as to the identification."[115]

Rule 204. Inviting Witnesses to Attend

When inviting witnesses to attend a pretrial identification procedure, the police shall only suggest that they have a possible suspect.

COMMENT

The purpose of this rule is to try to reduce the witnesses' expectation that the police have a suspect they would like them to identify. Witnesses should be instructed in such a way as to reduce whatever pressure there is on them to pick out the "right" person; namely, the person the police suspect. In particular, the police can make it clear that they are not certain their suspect is the offender.[116]

Present Practice

The police forces in some of the cities surveyed used the following wording in inviting witnesses to attend lineups: Victoria — "We request you attend at police headquarters to view a line-up of possible suspects concerning the crime in which you were the victim." Calgary — "You are requested to view a line-up to determine if you can make an identification regarding the matter at hand (we never say we have a suspect or an accused)". Edmonton — "We advise them that we have a possible suspect in the crime and the purpose and procedure of the line-up is described to them." Saint John — "A witness is asked if they would view a police line-up in an effort to identify a possible suspect in a criminal investigation we are conducting." Halifax — "We are arranging a line-up. Would you look at it to determine if you can identify the person responsible for the crime." Montréal — "We tell the witness we have a suspect and we need him to see if the suspect really is the person involved in the event he witnessed." Sherbrooke — "A suspect has been arrested and he is asked to come to the station to identify him."

Rule 205. Instructing Witnesses

When conducting a procedure that requires witnesses to attempt to identify the person they saw from a group of people (or photographs), the accompanying officer shall instruct the witnesses:

(a) ***To Study.*** **To take their time and to cast their minds back to the witnessed event, and to examine carefully all participants (or photographs) in the lineup (or photographic display) before identifying anyone as the person they saw.**

COMMENT

This instruction will prevent careless and overly anxious witnesses from choosing the first person who bears even a vague resemblance to the offender. If a lineup is assembled carefully, the participants will bear a close resemblance to one another; a fact witnesses may grow to appreciate only after studying each participant.

However, the instruction has a more subtle purpose. Even though the police may inform witnesses that they can take as long as necessary, the reality of the situation is such that witnesses will likely feel that they have to make a quick identification, in order to appear to be "good" witnesses.

Psychological studies have shown that if subjects attempt to make hasty identifications, their decisions are more likely to be incorrect than if

they take their time.[117] The results of these studies are consistent with the common experience of struggling to recall or recognize items from long-term memory, and often only after several minutes of effort suddenly being able to make the correct choice.

Thus, it is crucial that witnesses be made to feel that they have ample time to make an identification. In view of their likely perception of the situation, a simple instruction to them to "take your time" is unlikely to convince them that the accompanying officer is sincere in this respect. Asking them to perform a specific task, "to cast their minds back to the witnessed event" and to carefully examine each participant, is a more effective way of ensuring that they do not make hasty decisions.

The instruction "to cast their minds back to the witnessed event" is designed to serve another purpose. There is some evidence that if witnesses are invited to recall and reinstate the context of the witnessed event, accuracy will be enhanced.[118]

(b) ***To Exercise Caution.*** **That it is very easy to make mistakes in identifying people and therefore to exercise caution in identifying someone.**

COMMENT

Considerable attention has been focussed on what warnings judges ought to give juries about the inherent frailties of eyewitness identification.[119] No study has been devoted to the question of whether mistaken identifications can be avoided by warning witnesses about the general weaknesses of human perception and memory.[120] But if one of the causes of witness error is the over-confidence people have in their ability to identify faces, such an instruction may cause witnesses to make a more careful and accurate identification. Moreover, if they are cautioned, they will be less likely to view a failure to identify a suspect as a personal failing.

The exact wording of the caution is problematic. The accompanying officer might caution witnesses that there are a number of known cases in which innocent people have been convicted and imprisoned upon the strength of honest but mistaken identification by eyewitnesses, or that psychologists have repeatedly demonstrated in scientific studies that even the most attentive and perceptive people are prone to error. The major objection to cautions of this nature would be that, if too strongly worded, they might unduly inhibit witnesses from making an identification. Therefore, the suggested caution is a simple and straightforward warning about the dangers of eyewitness testimony.

Present Practice

Most police forces report that they do not give witnesses any special caution about the dangers of false identification; they cannot see any point to it, and it might alarm witnesses, causing them not to make an identification at all.

(c) ***That the Person May Not Be Present.*** **That the police do not strongly suspect anyone of the crime and that the person they saw (or his or her photograph) may not be present.**

COMMENT

A desire to discharge a public duty, revenge a crime, or appear to the authorities to be an intelligent and co-operative witness all undoubtedly contribute to the witnesses' sense that they will have failed the test if someone is not picked out of the lineup. The response of many people who are faced with such a challenge to their abilities will be to point out the person or the photograph of the person who most closely conforms to their imperfect mental image of the offender.[121] This tendency of witnesses is likely to be particularly strong because they will assume that the police have a suspect, and that the police are merely seeking confirmation of their suspicions.

There is considerable experimental evidence that subjects with a high expectation that the person they saw is in a lineup are more likely to make errors (pick a wrong person) than those who have a low expectation. In one study[122] witnesses to a staged assault were given either a high expectancy instruction: "Find the assailant among these six photographs"; or a low expectancy instruction: "Do you recognize anyone among these six photographs?" Although witnesses given the high expectancy instruction were significantly more likely to select the assailant's photograph when it appeared, they were more inclined to identify an innocent person when it did not appear.

A research paper undertaken for the Law Reform Commission[123] also tested the effect of high as opposed to low expectancy instructions. One group of subjects was told: "In the lineup you are about to see, the criminal may or may not be present; he is not necessarily there. If he is there, he may or may not be wearing the same clothing." Another group of subjects was told: "You have been the eyewitness to a crime. I'd like you to imagine that the police have asked you to come to the police station to view a lineup to see whether or not you can identify the criminal." Consistent with previous findings, the subjects who were given the low expectancy instruction made significantly fewer identification errors.[124]

It is probably inevitable that witnesses who are asked by the police to view a lineup will believe that the police have a suspect.[125] However, it is quite another thing for the police to say anything to make the witness believe that they are convinced of the guilt of a particular person. Witnesses who view a lineup thinking that the police have made a positive identification may feel little reluctance in guessing at the identity of the suspect. Their attitude will be that if they guess correctly, the prosecution's case against a guilty person will be strengthened; if they guess incorrectly, no harm will be done, since the police will realize they have identified the wrong person.

The police should not, therefore, express any opinion to the witness as to whether they think they have apprehended the offender. Nor should witnesses be told to pick the "right person" from the lineup or be given similar instructions, since such an instruction implies that the police believe the criminal to be among the lineup participants.

While the recommended instructions will obviously not remove all suspicion from the witness's mind that the police know who the offender is, they should go some distance in removing the pressure on the witness simply to select the most likely-looking person. The instructions should assure witnesses that they will not have "failed" if they do not choose someone.

Case Law

The Supreme Court of New South Wales[126] has stated that there is nothing wrong with the police indicating to a witness that they have a suspect. In that case a witness testified that before viewing the lineup he was told "to examine them carefully and when I got the right man to put my right hand on his shoulder". The witness also said that the police "told me there were some men lined up and I had to pick out the one I thought was the right one". The court reasoned:

> [A]ny sensible person who attends an identification parade at a police station does so with the reasonable foresight that he is being asked to identify there a man suspected of the crime, and it is unreal to suggest that the evidence is unreliable merely because he believes in advance that one of the men in the line might be his assailant.[127]

The British Columbia Court of Appeal, on the other hand, was critical of the policy of telling witnesses before they viewed the lineup that "they [the police] had picked up one of the men, the man who had the gun, and that he was to appear in a line-up".[128]

In a South African case[129] the court suggested that the police give an instruction similar to the one recommended in the guidelines: "[I]t is

important that officers holding identification parades should add the important words 'if such person is present on the parade', otherwise a witness ... might think it is his duty to point out somebody....''[130]

Present Practice

No police force routinely instructs witnesses that the person they saw might not be present. On the other hand, most report they do not expressly tell the witness that they have a suspect; they simply ask the witness if the assailant, for example, is in the group.

(d) *To Identify the Person They Saw.* To indicate whether they can positively identify anyone as the person they saw.

COMMENT

This guideline attempts to ensure a positive identification. An empirical study found that subjects given a lax instruction (''Don't worry too much about making mistakes'') made twice as many errors as those given a strict instruction (''The faces that you saw may not be here. You should pick out someone only if you are quite sure he is the person that you saw'').[131]

The Devlin Committee considered a proposal to pose three questions to the witness: ''(1) Can you positively identify anyone in the parade as the person you saw? (2) If not, does anyone on the parade closely resemble the person you saw? (3) If not, can you say that the person you saw is not on the parade?''[132]

It was suggested that by asking separate questions about identity and resemblance, the witnesses would convey the degree of their certainty. It was also thought that a series of questions would serve to alleviate the pressure on the witness to make a positive identification. The second question would give the witness an opportunity to escape the pressure to identify without feeling totally unhelpful.

The Devlin Committee eventually decided not to make such a recommendation because it feared there might be some danger in asking the witness a question about resemblance. The Committee reasoned that the suspect will usually bear some resemblance to the witness's description of the offender; otherwise, he or she would probably not be asked to appear in the lineup. Moreover, since all of the participants should resemble the suspect in a general way, it would be incongruous for the witness to assert that the suspect resembles the offender but that the others do not. Further, since the witness has described the offender's

appearance to the police, a statement that none of the lineup participants resemble the accused carries with it either an admission that the witness did not adequately describe the offender, or a suggestion that the police were not doing a good job in locating suspects who fit the description. Finally, the chief reason that the Devlin Committee did not make this recommendation was the perceived danger that witnesses would become confused by the multiple questions.[133]

For the reasons given by Devlin, the best approach would appear to be simply to ask witnesses whether they can positively identify the offender. Witnesses will often identify on the basis of resemblance without being told to do so. Supplementary questions relating to the certainty and basis of an identification can be asked after the witness has indicated a selection. The supplementary questions should disclose witnesses who have identified on the basis of resemblance. To instruct witnesses to point to a person who closely resembles the offender would likely only encourage this tendency.

Rules 205 (a) to (d) might be implemented by an instruction such as the following:

> We do not strongly suspect any of the persons standing here before you (among these photographs). If you think that you can identify a person as the person you saw, before you do so, be sure that you carefully study each of the lineup members (photographs). Each will in some way resemble the description we have of the offender. Can you positively say that one of these persons is the one you saw? It is not necessary to choose anyone; remember that the offender may not be present and that it is easy to mistake one person for another.

Present Practice

Most police forces do not appear to indicate to the witnesses how certain they must be before they select someone as the person they saw. However, in some cities the police do ask the witnesses to identify someone only if they are positive. For example, in Calgary, witnesses are told that if they are not positive they should not make an identification. In Regina, witnesses are advised that if they are not sure or are unable to make any identification, they are to say so. In Edmonton, witnesses are advised not to identify someone unless they are positive. In Vancouver, they are advised that if they do not recognize the suspect or are not sure, they should not identify anyone.

(e) ***To Indicate the Degree of Confidence in the Identification.*** **To indicate how certain they are that the person they identified is the person they saw.**

COMMENT

It is important that, at the time of the initial identification, witnesses be asked how confident they are about the accuracy of their identification. As mentioned above, there is a tendency for witnesses to identify someone merely because that person bears the closest resemblance of all of the lineup participants to the witnesses' mental picture of the offender. This problem is exacerbated by the tendency of witnesses to become progressively more certain of their identifications with the passage of time.[134] Thus witnesses may point to a suspect at the lineup because the suspect "looks like" the offender. There may be substantial doubt in the witnesses' mind about whether the resemblance is close enough to be safely referred to as identity. Yet having committed themselves to a position at the lineup, witnesses will be reluctant to admit later that they may have been mistaken. Furthermore, over time the witness's image of the offender may undergo subtle changes, so that it more closely corresponds to the accused's appearance. By this process, witnesses unconsciously reinforce their choice. The result often is that a witness whose initial identification of the accused was far from certain, will testify at trial in the most sincere and positive manner that the accused is the criminal.

This guideline assumes that it may be possible to counteract this tendency towards progressive assurance by requiring witnesses to acknowledge at the time of their lineup identification, whether they are at all uncertain and whether their identification is based upon mere resemblance. Witnesses who have admitted to some doubt at the lineup identification, will not be subject to such strong pressure to reinforce and defend their previous decision. Also the testimony of a witness who has made a qualified identification at the lineup but who then testifies with complete assurance at trial, will be subject to evaluation in view of this apparent inconsistency.

There has been a substantial amount of psychological research on the question of whether the confidence with which people make an identification is related to the accuracy of their choice.[135] A number of studies have found no correlation. This suggests that perhaps a high degree of confidence on the witness's part might simply indicate the witness's desire to appear to be a good witness, that the witness is a person who is quick to stereotype, or simply the witness's general temperament. Other studies have found a negative correlation — the more certain a witness is, the less likely it is that he or she is accurate.[136]

Intuitively, it seems clear that in some cases, a witness who makes an identification only after long and careful study of the entire lineup, and who frankly acknowledges the possibility of mistake, might be more trustworthy than the witness who confidently identifies the accused

without a moment's hesitation. A review and rationalization of the studies concluded that there is likely to be a correlation between a witness's confidence in his or her identification and its accuracy, if the original perception was made under optimal conditions.[137] Therefore, since at least in some cases such a correlation probably exists, evidence of the witness's confidence should be before the court.

However, even if there were little correlation in some circumstances between a witness's confidence and accuracy, there would still appear to be value in obtaining a statement of the witness's confidence at the time of the identification. As mentioned above, this practice would permit the court to weigh such statements along with any statements the witness may make at trial. Any discrepancy in confidence would call for some explanation.

Some consideration was given to the possibility of posing a series of questions to witnesses, asking them which question best describes their judgment. The following questions, for instance, might be asked at the time the identification is made: (a) Are you certain that the person you have chosen is the person you saw? (b) If not, would you say your choice is the one who most closely resembles the one you saw?

However, the degree of a witness's confidence is most likely to be discernible if stated in his or her own words. Moreover, this will lessen any confusion as to the degree of the witness's confidence over time.

Case Law

The possible danger that witnesses' degree of confidence in their identification is likely to increase over time has been recognized by the courts. Thus Laskin J.A. (as he then was) in a judgment of the Ontario Court of Appeal, stated: "[S]tudies have shown the progressive assurance that builds upon an original identification that may be erroneous."[138] Other courts have acknowledged that a witness's certainty may be misleading if she or he initially makes a tentative identification, but later expresses a firm conviction in his or her selection.[139]

In evaluating testimony, the courts frequently note witnesses' confidence in their identification at trial. However, they have not formulated a strict guideline as to what weight should be given to a witness's degree of confidence. In some cases, if a witness at trial clearly lacks confidence in the identification of the accused and expresses uncertainty, Courts of Appeal have quashed convictions if this is the only identification evidence available.[140] However, other courts have recognized that there is no necessary relationship between a witness's certainty

of identification and the reliability of his or her identification.[141] Moreover, in some cases, Courts of Appeal have been willing to sustain a conviction based upon a weak expression of identification.[142]

Present Practice

Most police departments in Ontario cities report that they do not ask witnesses how certain they are when they make an identification; they simply record everything that is said. Most police departments in other cities, however, report that they do question witnesses about how certain they are after they have identified a suspect. Some police departments do not do it routinely. For example, Vancouver and Calgary suggest that it may be discussed and that the investigating officer may ask the question, but the question is not asked in every case as a matter of course.

(f) ***To Indicate the Basis of Identification.*** **To indicate the features or describe the overall impression of the person upon which their identification is based.**

COMMENT

Many people have difficulty articulating the basis for their recognition of a person, and there may be no correlation between a person's ability to describe why they identified a particular person and the accuracy of that identification.[143] However, it is still useful to have witnesses articulate, in as much detail as possible, the basis of their identification. First, it may expose untrustworthy witnesses. For example, given the distance at which, or the lighting conditions under which their original observation took place, it might have been impossible for them to discern the particular features upon which they purport to base their identification. Second, if the basis of the witness's identification is a feature possessed by the suspect but not the other lineup members, the fairness of the lineup might be impeached. For example, if a witness asserts that he or she identified the suspect because she was pigeon-toed, and she was the only person in the lineup with this characteristic, then the lineup could be discredited. (Presumably this would only occur in a situation in which the eyewitness had not mentioned this characteristic to the police before the lineup, since otherwise the police would have ensured that all lineup participants have this characteristic.)

One danger in asking witnesses questions about the basis of their identification is that those who have difficulty expressing themselves, or who did not perceive the appearance of the person identified in terms of specific features, may lose confidence in their ability to identify. In some cases this may be desirable; but in others, a perfectly reliable witness

may be made to appear confused and indecisive. Therefore, the instruction to the witnesses should not compel them to describe identifying features of the suspect, but should invite them simply to give their overall impression of the person upon which their identification is based.

Case Law

It would appear that some courts place considerable weight on witnesses' ability to articulate the basis of their identification. Indeed, many cases require that evidence of identification be definite if it is to be of any value. For example in *R.* v. *Smith*,[144] the judge noted:

> If the identification of an accused depends upon unreliable and shadowy mental operations, without reference to any characteristic which can be described by the witness, and he is totally unable to testify what impression moved his senses or stirred and clarified his memory, such identification, unsupported and alone, amounts to little more than speculative opinion or unsubstantial conjecture, and at its strongest is a most insecure basis upon which to found that abiding and moral assurance of guilt necessary to eliminate reasonable doubt.[145]

Present Practice

Most cities report that after an identification is made, the witness will be asked for the basis of that identification. Victoria and Edmonton, however, report that this question is not asked. Vancouver notes that the investigating officer may ask this question; however, it is not asked by the identification squad.

Rule 206. Maintaining a Record

(1) *Procedures Applicable to All Eyewitness Identification Procedures.* A complete record of each identification procedure, written on a prescribed form, shall be maintained. The record shall contain the following information:

COMMENT

This rule simply restates a basic tenet of sound police practice: A thorough record should be kept of every important phase of criminal investigations. The safeguards provided for in these guidelines will not be effective unless a complete and accurate record is kept of every aspect of every pretrial identification procedure. This record is necesary to enable counsel and the court to review the fairness of the proceedings, and to assess its influence upon the witnesses' identification testimony.

An incidental advantage of requiring supervising officers to maintain detailed records is that it will encourage them to become familiar with the provisions of these guidelines. It will also help to impress upon them the importance of pretrial identifications to the determination of a suspect's guilt or innocence. Finally, it will make clear to supervising officers that the ultimate responsibility for the fairness of the proceeding rests upon them. Keeping a complete record of the proceedings should not impose an administrative burden on supervising officers, since the proper conducting of the procedure will require them to make inquiries as to the various matters that must be recorded in any event. It should not involve much additional effort to record the responses; in some cases the officers would be assisted by a stenographer.

The form upon which the information is recorded should be prescribed. This will ensure that there is uniformity in practice and that all the relevant information is recorded. Prescribed forms will also facilitate the recording of the information, and will make it easier for users to determine the relevant information. No sample forms are suggested in this paper. However, an idea of how such forms might be laid out can be obtained by reviewing the forms prescribed for the police in England.[146] Many police forces now use standardized identification forms; however, they do not require as complete a record as would be required by these guidelines.

In commenting upon the various matters that this Rule requires to be included in the record, the author will refer to relevant rules in these guidelines. The significance of the matter will be discussed in the commentary following that rule.

Present Practice With Respect to Records Generally

Virtually all cities report that a record is kept of the lineup proceedings. Most cities have a standard lineup form that is filled out by the officer in charge. In Toronto, a stenographer is usually present at the lineup and records everything said. This is not the case in other cities.

(a) ***The Offence.*** **The alleged offence to which the pretrial eyewitness identification procedure relates.**

(b) ***Witnesses.*** **The names and addresses of all witnesses who took part in a pretrial identification procedure, whether or not they made an identification.**

COMMENT

At trial the prosecution is likely to call as witnesses only those persons who identified the accused at a pretrial identification procedure. However, it might be particularly important for the court, in assessing the reliability of an identification made by a witness, to know whether any other witnesses were unable to identify the accused.[147] Therefore, a record should be kept of all witnesses who attempted an identification.

Case Law

In *R.* v. *Churchman and Durham*[148] it was held that at the preliminary hearing the defence was entitled to cross-examine in order to secure the names of everyone viewing a lineup, including those who did not identify anyone or who identified the wrong person.

(c) ***Persons Present.*** **The names of the supervising and accompanying officers, and other police officers and persons present.**

(d) ***Procedure.*** **The type, date, time and location of the procedure.**

(e) ***Statements Made.*** **Any statements made by, or to, the witness in the course of the procedure.**

(f) ***Confidence.*** **If the procedure involves obtaining a description from the witness, a statement as to how confident the witness is that he or she can identify the suspect. If the procedure involves identifying a person, and if the witness identifies a person, a statement as to how confident the witness is that he or she has correctly identified the person he or she saw.**

COMMENT

See Rules 205(f) and 303(d).

(g) ***Basis.*** **If the witness identifies a person, the features of the person's appearance upon which the identification was made.**

COMMENT

See Rule 205 (f).

(h) ***Objections.*** **Any objections, suggestions or observations made by the suspect or his or her counsel, as well as any action taken in response to such objection or suggestion.**

COMMENT

See Rule 505(10).

(i) ***Other Relevant Factors*:**

(i) whether the witness identified any person other than the suspect;

(ii) whether the witness previously discussed the suspect's appearance with any other witnesses;

(iii) whether the witness had previously seen the suspect or a photograph of him or her; and

(iv) any other factor relating to the procedure that might be relevant in assessing the reliability of the witness's identification.

COMMENT

Obviously the court should have before it all evidence necessary to assess the witness's reliability. Therefore, a record should be kept of all such facts.

Case Law

An identifying witness's reliability may sometimes be attacked by proving that, on previous occasions, he or she made observational errors. The most common example of these types of mistakes occurs where the witness fails to identify the accused at an identification test, or mistakenly identifies an innocent participant. Courts invariably comment on this type of error in assessing the trustworthiness of a witness's testimony.[149]

(2) *Procedures Applicable Only to Specific Eyewitness Identification Procedures.*

(a) *Description.* If the procedure involved obtaining a verbal description, all questions asked of the witness and all responses to them.

COMMENT

See Part III of these Rules.

Present Practice

Police in all cities report that a written record is kept of the description given by all witnesses. If a potential witness cannot describe

or identify the suspect, this is mentioned in the initial report by the investigator. In some cities a standard form is used for taking statements and descriptions of the suspect by the witness, and police in a few cities report that this statement is signed by the witness.

(b) *Lineup.* If the procedure is a lineup:

(i) the names and addresses of all lineup participants;

COMMENT

Particularly where the accused was not represented at the lineup, his or her lawyer may wish to question the lineup participants about what transpired at the proceeding. In the event that no photograph was taken of the lineup, it might also be important that these people be contacted so that a comparison can be made between their appearances and the accused's. Even where a photograph is available, the defence counsel may believe that the differences in appearance between the accused and the others will be more effectively brought to the jury's attention if the lineup participants attend the trial in person. The accused's lawyer might also wish to know the names of the lineup participants in order to determine such matters as whether any lineup participant was acquainted with the witness, or if they had stood in any other lineups viewed by the same witness.

Present Practice

In virtually all cities a report is kept of the name, address, description, and position in the lineup of each person in the lineup. This is frequently recorded on a special form.

(ii) a colour photograph of the lineup;

COMMENT

See Rule 505(11).

(iii) a description of any special lineup procedures followed.

COMMENT

This description should include any particular actions that were taken, in accordance with the Rules in 505, relating to the conducting of

the lineup, such as any words spoken, clothing donned, bodily movement or gestures performed by any or all of the lineup members, any steps taken to conceal any distinguishing marks or features possessed by the suspect, and any attempts made to simulate conditions which existed during the witness's observation at the scene of the crime.

(c) ***Photographic Display.*** **If the procedure is a photographic display:**

(i) if, when the photographs were shown, there was no suspect, a record that will permit the photographs shown to the witness to be retrieved and placed in the sequence in which they were shown; and

COMMENT

Frequently, if the police have no suspect, they will show a witness a series of "mugshots" of persons fitting the general description of the person the witness saw, who might possibly be that person. Guidelines relating to this procedure are provided for in Part VI.

Although as many as fifty or even hundreds of such photographs might be shown to a witness, it is important that a record be kept of all photographs shown. The reason for this relates to a psychological phenomenon often referred to as unconscious transference.[150] In the context of a lineup, this means that an eyewitness might pick a person because his or her face is similar to one that the eyewitness saw in a "mugshot" display, instead of at the scene of the crime. Although the eyewitness will recognize the familar face, he or she will unconsciously transfer the place at which it was seen.

Studies conducted by Brown and colleagues[151] confirm the dangers that arise when a witness who is to view a lineup sees a photograph of a person who subsequently appears in the lineup. In one of their studies, for example, subjects were shown a group of criminals. An hour and a half later, they were shown a number of "mugshots". One week later, they were asked to pick the "criminals" out of a lineup. The witnesses mistakenly identified as criminals 8 per cent of the participants in the lineup whom they had never seen before. However, if an innocent participant's photograph had appeared in the earlier mugshot display, his chances of being falsely identified rose to 20 per cent. Thus, the study shows rather dramatically the dangers of a photo-biased lineup.

Of course, another reason for keeping a record of the photographs is that, if a person's mugshot appeared in the display and he or she was not identified, but was later picked out of a lineup by a witness, that fact alone would be relevant in assessing the reliability of the identification: A

question would arise as to why the witness was unable to pick the person out of the mugshot display.

(ii) if, when the photographs were shown, there was a suspect, the photographs shown to the witness as they were affixed to a display board, or the photographs that were handed to the witness for his or her inspection.

COMMENT

If the pretrial identification procedure is composed of a photograph display, the part of the record that will be most valuable to the court is the photographs actually shown to the witness. This will permit the court to decide whether the accused's photograph stood out in any material respect from the others.

Case Law

At present, the photographic array shown to an identifying witness is not always available for the court's inspection. In some cases the courts have expressed concern about the absence of this record,[152] but in other cases they appear not to have appreciated its significance.[153] The importance of introducing the photographic display at trial was illustrated in *R.* v. *Pace*.[154] Although the conviction was upheld in that case on the basis of one other witness's identification evidence, the photographic display introduced into evidence served to discount completely the evidence of a number of witnesses. "The various witnesses were shown a group of sixteen loose photographs of which six were of the appellant taken at different times.... [O]f the ten photographs of men other than the appellant, only one or two resemble the accused and then only remotely.... In addition, and more importantly, it was the coloured photograph C-2A that several witnesses picked out as resembling the robber. None of the other fifteen pictures were in colour...".[155]

Present Practice

Police in virtually all cities report that if photographs are used, a record is kept of these photographs and they are subsequently available for production in court if called for.

(d) *Informal Viewing*. If the procedure involves an informal viewing:

(i) a general description of how the informal viewing was conducted;

(ii) the approximate number of people viewed who were similar in description to the suspect;

(iii) the suspect's reaction if he became aware that he was being observed;

(iv) the witness's reaction upon seeing the suspect; and

(v) the reason for holding an informal viewing in lieu of a lineup or a photographic display.

COMMENT

See Part VII of these Rules.

(e) *Confrontation.* **If the procedure involves a confrontation:**

(i) the exact circumstances surrounding the confrontation;

(ii) the witness's reaction upon seeing the suspect;

(iii) the suspect's reaction if he or she is identified; and

(iv) the reasons for holding a confrontation in lieu of a lineup, photographic display, or informal viewing.

COMMENT

See Part VIII of these Rules.

Case Law

The suspect's reaction upon being identified by a witness will often be relevant as an indication that he or she is or is not the criminal. There is some disagreement in the cases as to when the accused's conduct in the face of an accusation might amount to an implied admission.[156] However, in some circumstances even the accused's silence has been found to be relevant evidence of guilt, if in the circumstances surrounding the statement it would have been normal for the accused to deny the validity of the identification.[157] Also, of course, the accused's denial of an accusation is relevant evidence and thus should be recorded.[158]

Rule 207. Access to Records

Copies of the records of all pretrial eyewitness identification procedures relating to the case and involving the accused shall be available to the accused or to his or her counsel prior to trial, whether or not the prosecution intends to offer evidence of any eyewitness identification procedure. Copies of the description of the suspect given by each witness

shall be given to the accused or to his or her counsel before a lineup, photographic display or informal viewing is held. All other records shall be given to the accused or to his or her counsel as soon as is reasonably possible but not less than five days after the procedure has been held.

COMMENT

One important purpose of keeping a detailed record of all pretrial identification procedures will not be fulfilled if the accused is not given access to the record.

In order to cross-examine effectively identifying witnesses called by the prosecutor, the defence counsel should be given the same description of the suspect as was initially given by a witness to the police. As will be discussed under the rules dealing with descriptions, some people are notoriously bad at describing others, but better at recognizing them. However, this is a matter to be taken into account by the trier of fact. Even if the initial description given by a witness is not detailed, it is still, in many cases, essential in assessing the witness's credibility. Furthermore, defence counsel should not have to wait until cross-examination to obtain the description given by the witness. This information should be available to counsel prior to trial, so that he or she can effectively prepare for it.

Indeed, the guideline recommends that descriptions be given to defence counsel prior to an identification test. A subsequent rule in these guidelines recommends that the accused be entitled to have counsel present at a lineup so that he or she can make suggestions as to its fairness and can observe its conduct. Only if counsel has the descriptions of the suspect given by the eyewitnesses will he or she be able to evaluate the fairness of the lineup and thus make suggestions or objections to the identification officer.

The guidelines require that records be kept not only of the descriptions given by witnesses who identified the suspect at a lineup, but of all eyewitnesses to a crime. Some of these witnesses may attend an identification test and identify a person other than the suspect; some may fail to make an identification; some may attend identification tests not containing the accused; and others, for whatever reason, may not be required by the police to attend an identification test. However, the defence should have access to all of these records. In determining the credibility of those witnesses who identified the suspect, the descriptions given by those who did not or were not asked to do so might be relevant.

The defence should also obtain the records of all identification tests relating to the offence for which the accused is charged, and not only the

record of the test in which the accused was identified. The records of all tests relating to the offence for which the accused is charged are essential in assessing the reliability of the identification evidence.

This rule raises several issues relating to discovery in criminal cases. As with many forms of criminal discovery, there will be a concern that if the defence is given access to these records prior to trial, it might use them to intimidate and confuse Crown witnesses. This problem will have to be resolved by the Law Reform Commission in a manner consistent with its other recommendations in the area of discovery in criminal cases.

Present Practice

Police forces in most cities report that the records are not given directly to the defence counsel; they are provided to the prosecutor, who may or may not give them to defense counsel. However, the police in Calgary and Vancouver report that the record of the lineup is routinely given to the defence counsel before trial. The Vancouver and Regina police report that descriptions are routinely given to the defence counsel.

Case Law

There are no cases requiring the defence to be given access to all the records of pretrial identification procedures. However, in *R.* v. *Churchman and Durham*[159] it was held that the defence was entitled to cross-examine at the preliminary hearing in order to secure the names of everyone viewing a lineup, including those who did not identify anyone or who identified the wrong person.

Rule 208. Right to Counsel

(1) ***In General.*** **If a person is suspected of a crime and the police have reasonable cause to arrest him or her, and his or her whereabouts are known, he or she has a right to have a lawyer present at any pretrial eyewitness identification procedure except the procedure of obtaining descriptions from witnesses, unless:**

(a) ***Counsel Fails to Appear.*** **Having received a certain minimum notice (for example, twenty-four hours) prior to the time such procedure is to take place, the suspect does not notify a lawyer, or his or her lawyer fails to be present.**

(b) ***Counsel Is Excluded.*** **The lawyer is excluded from the identification procedure by the identification officer because he or she was obstructing the identification.**

(c) ***Exceptional Circumstances Arise.*** **Awaiting the presence of counsel would likely prevent the making of an identification.**

COMMENT

The presence of counsel at identification procedures is critical for at least two reasons. First, counsel might be able to remove any possible danger of suggestion, intentional or otherwise, in the conducting of the identification procedure. As explained above, this is important since any harm caused by suggestion could be irreparable: Once a witness has picked a suspect out of a lineup, a change of mind is unlikely.

Second, the presence of counsel is important so that the pretrial identification procedure can be reconstructed at trial. The accused's lack of training and emotional tension at the pretrial identification would usually preclude him or her from critically observing the whole procedure so as to be capable of later attacking in court the manner in which the procedure was conducted. Furthermore, the accused would have no way of knowing exactly how the procedure was conducted since witnesses usually observe lineups from behind one-way mirrors. Even if an accused did attempt to reconstruct the identification procedure in court, the allegation would probably not be accorded much weight against any contradicting police testimony. In the absence of counsel, even a written record of the entire procedure might be of little assistance to the defence in determining whether the procedure was fairly conducted. A lawyer who had been present at the identification procedure would be well prepared to set out any unfair circumstances surrounding the identification.

The presence of counsel at lineups will also provide the police with some protection from subsequent allegations that the lineup was unfairly conducted. Furthermore, in situations where the guidelines do not provide explicit instructions, the police may appreciate the suggestions of the suspect's counsel. In these ways, effective law enforcement can only be enhanced.

Finally, since the suspect is unlikely to be familiar with the pretrial identification procedure, a lawyer can be a source of assurance.[60]

Lawyers may not often wish to appear at the lineup. They may be concerned that they will then be called as witnesses at trial. In other circumstances, lawyers may be confident that they can advise their clients of their rights without being present and can assume that the police will conduct a fair lineup. However, the question of whether the suspect will exercise the right to have a lawyer present is quite irrelevant to the question of whether the right should be available.

A survey of the parameters of the right to counsel in European countries offers evidence of the almost universal respect for it at pretrial eyewitness identification procedures. The new identification-parade rules

released by the Home Office in England explicitly provide that a suspect has the right to have a solicitor or friend present at the parade.[161] The French *Code of Criminal Procedure* provides that an accused may be confronted by witnesses only in the presence of his counsel, unless the accused waives this right.[162] Supplemental legislation has since given an accused the right to counsel "en tout état de cause".[163] The German *Code of Criminal Procedure* is not explicit as to the extent of an accused's right to counsel at a confrontation with witnesses. However, in article 137.I, it is stated that an accused "may avail himself of the assistance of defense counsel at any stage of the proceeding".[164] In Italy, the *Constitution* itself guarantees the right to defence at all stages of the procedure. The absolute nature of this right ensures that it does not depend on judicial authorization. In addition, the *Code of Penal Procedure* declares the right of defence counsel to be present during any judicial experiment, expert examination, search of domicile, or formal identification of the accused by witnesses.[165]

The United States jurisprudence on the right to counsel at lineups is discussed under *Case Law*, below.

Although extending the right to counsel to lineups might not be contentious, this would probably not hold true with respect to photographic displays. But the need for counsel at a photographic display is certainly as great as the need for counsel at a lineup: the potential for harmful suggestion is greater at a photographic display than at a lineup (and the possibilities for suggestion more subtle); there are fewer neutral observers at the photographic display (for example, there are no distractors); the suspect will not be present at the identification procedure; a photographic identification is as difficult to reconstruct at trial as a lineup; and witnesses are as unlikely to retract photographic identifications as they are lineup identifications. Thus, since there is no countervailing law enforcement interest in proceeding with a photographic display in the absence of a suspect's lawyer (invariably witnesses will have to be contacted and times set, thus providing time to notify counsel), the suspect should have the right to counsel extended to photographic displays.

The right to counsel at photographic displays could, in some cases, cause considerable inconvenience and expense. For example, when the accused's place of custody is far removed from potential witnesses, it might be burdensome to bring the witnesses to the accused or to require defence counsel to travel with the police from one location to another. However, these cases can be minimized, and a substitute counsel might be used in some cases. Finally, it may be possible in some cases for the police to prove the necessity of conducting the photographic display in counsel's absence because of exceptional circumstances, and thus bring

the proceeding within the exception provided in Rule 208(1)(c) or within the general exception to the application of these rules, Rule 108.

Under the guideline, the point at which a suspect's right to counsel is "triggered" is when (i) a person is suspected of a crime, (ii) the police have reasonable cause to arrest the suspect, and (iii) the suspect's whereabouts are known. Each of these elements will be examined separately.

(i) *A person is suspected of a crime.* Obviously, when the police have no suspect and are using photographs to provide investigative leads, a "counsel requirement" would be practically impossible, since counsel would have to be afforded for each person whose picture is displayed. Thus, the rule provides a right to counsel only to a person suspected of a crime.

(ii) *The police have reasonable cause to arrest the suspect.* Before a right to counsel is "triggered", the police must have reasonable cause to arrest the suspect. Thus, for example, if the police have some circumstantial evidence which points to a particular suspect, but they need a photographic identification in order to establish reasonable cause to arrest, the suspect will not have a right to counsel. Although the danger of suggestion is present at such a photographic display, the law enforcement interests in withholding the right to counsel are compelling. First, notifying counsel might cause some delay in a situation in which a speedy arrest is necessary. Second, if the police have more than one suspect, several lawyers might be necessary, occasioning considerable inconvenience. Third, there would be enormous practical problems in attempting to provide counsel for suspects not yet arrested.

It might be argued that requiring a person to have a right to counsel at all pretrial identification procedures, as soon as the police have reasonable cause to arrest the suspect, is granting the right at too early a stage in the proceedings. The right to counsel should only be "triggered" when a person is taken into custody or is arrested, or only after the formal decision to charge is made — that is, after a complaint, indictment or information is filed. This standard would be much easier to apply than the one proposed. In addition, in some cases the police may rush to identify a suspect but not arrest him — for example, in a conspiracy charge involving many suspects. However, the difficulty with using arrest as the trigger for the right to counsel is that the reasons for providing a person with a right to counsel at a pretrial identification procedure (for example, to ensure that the procedure is unsuggestive and can be reconstructed at trial) apply with equal force whether the person is only a suspect or is charged. Furthermore, if the right to counsel were not provided until a charge was laid, an incentive would be provided to law

enforcement officials to delay the issuing of a complaint, information or indictment.

(iii) *The suspect's whereabouts are known.* The police might have a suspect but might be unable to locate him or her. In some such situations it might be advisable to hold a photographic display while the memory of the suspect's appearance is fresh in the minds of the eyewitnesses. Obviously, in such a case, it will be impossible to provide the suspect with a lawyer (unless one is appointed by the court).

The right to counsel is not provided by the guideline for the pretrial interview of prospective witnesses. Requiring a lawyer's presence at these procedures would impair effective law enforcement. Furthermore, whereas testimony regarding a pretrial identification is admissible as an exception to the hearsay rule, testimony concerning interviews relating to an identification is excluded as hearsay. Thus, the witness must take the stand, give testimony, and be cross-examined if such testimony is to be admitted. Finally, mistakes in a description of the offender are much less serious, and the evidence itself less probative and decisive, than mistakes in direct identification testimony.

There are three exceptional circumstances in which the suspect will not have a right to counsel. The first exception is where the accused refuses to notify a lawyer or the lawyer does not appear within a reasonable time. Obviously there are strong law enforcement interests in holding a lineup as soon as possible after the police have a suspect: the police may want to determine whether they have the right person before they lay a formal charge, in order to complete their investigation; witnesses may be anxious to make an identification as soon as possible; and finally, if the suspect is not identified, the police will want to begin investigating alternative leads. This need to hold lineups or other identification procedures expeditiously must, of course, be balanced against the suspect's interests in having his or her rights protected by the presence of counsel at the procedure. But, particularly if the suspect is not in custody, he or she may be in no special haste to have the lineup held. Although the police should provide a reasonable time to allow the suspect to obtain a lawyer, they should not hold up the procedure indefinitely. Therefore, the rule provides that the suspect has twenty-four hours to obtain a lawyer. This is an arbitrary time limit, but a clear line is necessary here so that the police may know exactly when they may proceed with an identification procedure in the absence of counsel. Of course, if the suspect's lawyer is not present within twenty-four hours, the suspect could continue to delay a lineup by simply refusing to participate. However, evidence of a refusal to participate in a lineup may be considered relevant and therefore admissible at trial.[166] Moreover, it has been held that an accused does not have the right to delay the police

in the discharge of their duties, which include requests that the accused participate in identification procedures.

The second exception provides that the right to counsel may be suspended if the lawyer is obstructing the identification procedure. The reasons for this exception are obvious. Since the supervising officer has control over the identification procedure by virtue of Rule 103, it is he or she who has the right to exclude the accused's lawyer if the lawyer is obstructing the proceedings.

The final situation in which there will not be a right to counsel is where the circumstances are exceptional — for example, where a witness is in danger of dying at the scene of the crime. Awaiting the presence of a lawyer in such a circumstance would likely preclude the making of any identification.

Case Law

There does not appear to be a single Commonwealth case in which the right of a suspect to be represented by counsel at a lineup or other pretrial identification procedure has even been raised.[167] However, the subject has frequently been argued in American courts, and is the subject of innumerable law journal articles.[168] Since evidence obtained pursuant to a denial of a right to counsel is excluded in the United States, the jurisprudence generally arises in the context of the exclusion of illegally obtained evidence.

The American position is based on the trilogy of cases decided by the United States Supreme Court (the Warren Court) on June 12, 1967 and three cases decided in 1972-73 (by the Burger Court). A review of these cases and the reasoning adopted in them will illustrate the possible scope of a right-to-counsel provision such as provided in Canada's new Charter of Rights.

In the leading case, *U.S.* v. *Wade*,[169] it was held that there was a right to counsel at a post-indictment lineup, predicated on the American Sixth Amendment right to counsel. It was held that this constitutional right pertained not only to trial, but also to any critical stage of the prosecution "where counsel's absence might derogate from the accused's right to a fair trial ... as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself."[170]

In holding that the right to counsel at a lineup might derogate from the accused's right to a fair trial, the court reasoned:

> Insofar as the accused's conviction may rest on a courtroom identification, in fact, the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him....
>
> Since it appears that there is grave potential for prejudice, intentional or not, in the pretial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that, for Wade, the post-indictment lineup was a crictical stage of the prosecution at which he was "as much entitled to such aid [of counsel] ... as at the trial itself."[171]

In *Wade*, the prosecution had an eyewitness make an in-court identification. But the eyewitness had previously identified the accused at a lineup at which the accused was not allowed to be represented by counsel. As a sanction for the failure to afford Wade the right to counsel at the lineup, the court held that the in-court identification must be excluded, unless the prosecution could establish by clear and convincing evidence that the in-court identification was not tainted by the illegal lineup, but was of independent origin. This independent source test included consideration of

> the prior opportunity [of the witness] to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occassion, and the lapse of time between the alleged act and the lineup identification.[172]

In *Gilbert* v. *California*,[173] the second case in the Warren Court trilogy, *Wade* was followed and extended by the further holding that out-of-court identifications made at a lineup where defence counsel was neither present nor notified are *per se* inadmissible. That is to say, if the prosecution introduces, as part of its direct case, evidence of a tainted pretrial confrontation, the conviction must be reversed. It will not suffice to establish an independent source. There must be a new trial. The reason for this broader rule was stated to be as follows:

> Only a *per se* exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup. In the absence of legislative regulations adequate to avoid the hazards to a fair trial which inhere in lineups as presently conducted, the desirability of deterring the constitutionally objectionable practice must prevail over the undesirability of excluding relevant evidence.[174]

Taken together then, the combined effect of *Wade* and *Gilbert* was that testimony about any pretrial confrontation without counsel was to be completely excluded.

In the final case of the Warren Court trilogy, *Stovall* v. *Denno*,[175] it was held that the newly-enunciated principles of *Wade* and *Gilbert* would

not be applied retroactively. *Stovall* also decided that, aside from the accused's right to counsel, if a pretrial identification was unnecessarily suggestive, it would violate the accused's right to due process of law and would therefore be excluded from evidence at trial.

The *Wade-Gilbert-Stovall* decisions provided broad constitutional safeguards for suspects subjected to pretrial identification procedures. However, beginning with three decisions of the United States Supreme Court in 1972-73 under Chief Justice Burger, the American courts have substantially retreated from this position.

In *Kirby* v. *Illinois*,[176] the *Wade-Gilbert* ruling as to the right to counsel was limited to those in-person confrontations occurring *after* indictment. This finding permits law enforcement authorities to conduct identification procedures prior to the initiation of formal criminal proceedings, without granting the suspect a right to counsel. As one commentator has remarked: "It seems unlikely that police departments and prosecutors will decline the Court's invitation in *Kirby* to dispense with the *Wade-Gilbert* requirements legitimately."[177]

The decision in *U.S.* v. *Ash*[178] is another reflection of the Burger court's retreat from *Wade*. It was held that the Sixth Amendment right to counsel did not require that the accused have counsel present at a post-indictment photographic display identification. The court reasoned that the Sixth Amendment right to counsel did not extend to procedures conducted in the accused's absence. Justice Stewart, in a concurring judgement, applied the *Wade* rationale but considered that photographic displays were generally less suggestive than lineups and easier to reconstruct at trial and therefore counsel was not necessary at these procedures.

This limiting approach was seen again in *Neil* v. *Biggers*.[179] Although the Supreme Court found that the showup procedure used in the case was suggestive and unnecessary (and thus applying the test in *Stovall* v. *Denno* inadmissible), it enunciated the true test to be whether under the "totality of circumstances" the identification was reliable. That is to say, instead of applying a *per se* exclusionary rule, if the confrontation procedure was suggestive, the court applied a test that depended upon an *ad hoc* evaluation of the testimony.

The decision in *Neil* v. *Biggers* seriously undermines the due-process guarantees established in *Stovall* v. *Denno*. Certainly the conclusion reached turns the emphasis away from the reliability of the identification procedure used to the reliability of the particular eyewitness evidence. Thus, such an approach would appear to be detrimental to the task of standardizing pretrial identification methods, and to ensuring their fairness.

Present Practice

Although in most cities the accused may have counsel present at the lineups, police in four cities report that the accused is not so entitled: Halifax, Edmonton, Vancouver and Regina. The lawyer is not allowed behind the one-way mirror in Victoria and Kingston. The police in all cities report that counsel is very seldom present; indeed, in a number of cities, counsel is never present. Some police report that if a lawyer did appear, they would subpoena him or her as a witness.

(2) *Advising Suspect of Right to a Lawyer.* The suspect shall be told: that he or she has a right to have a lawyer present to observe the pretrial eyewitness identification procedure; that if he or she cannot afford a lawyer, one will be provided for him or her free of charge; and that the procedure will be delayed for a reasonable time after the suspect is notified (not exceeding twenty-four hours) in order to allow the lawyer to appear.

(3) *Waiver of Right to a Lawyer.* A suspect may waive the right to have a lawyer present, provided the suspect reads (or has read to him or her), and signs the "Waiver of Lawyer at a Pretrial Eyewitness Identification Procedure" form, or makes an oral waiver heard by at least two other persons. The oral statement must show that the suspect had full knowledge of the effect of waiving the right, and the precise words of the suspect's statement must be made part of the record. The suspect shall be informed that any waiver given may be revoked by him or her at any time.

COMMENT

This guideline requires that suspects be advised in the fullest possible terms of their right to a lawyer. Suspects should be told that a lawyer will be appointed if they cannot afford the fee, in order to prevent indigent suspects from waiving their right because of the possible cost of a lawyer.[180] They should also be told that the proceedings will be delayed while awaiting the presence of a lawyer, so as to make it clear to them that they are occasioning no inconvenience by requesting a lawyer.

Even though suspects are advised of the right to a lawyer, many will undoubtedly waive this right. However, Rule 208(3) attempts to ensure that the waiver is made knowingly and intelligently. Stringent requirements are imposed upon the identification officer to ensure that any waiver be so made.

It could be argued that a lawyer's presence at a pretrial eyewitness identification procedure should be mandatory. Counsel's presence is essential at all procedures for the reasons given in the commentary following Rule 208, and it might be doubted that a suspect in police

custody can intelligently waive this right. Since counsel's function at a lineup is limited to observing the proceedings and ensuring that no suggestive conduct takes place (see Rule 209), there might be no reason why, even if the suspect does not want a lawyer, one cannot be appointed from a list of designated duty counsels.

However, unless funds for duty counsel become more generally available, it would be difficult to justify the expenditure of scarce resources for this purpose. Particularly if these guidelines are implemented, although counsel's presence might be important, it cannot be said to be crucial. A complete and detailed record of the proceedings will be available to defence counsel, and the proceedings will be open to challenge at trial.[181]

Present Practice

At present, no police force advises the suspect of his or her right to have a lawyer at the lineup. Fredericton, Sherbrooke and Halifax, however, suggest that they do so in some cases.

Rule 209. Role of Suspect's Lawyer

(1) *In General.* The suspect's lawyer shall be allowed to consult with the suspect prior to the pretrial eyewitness identification procedure, and to observe the procedure. He or she may make suggestions but may not control or obstruct the procedure.

(2) *Lawyer's Suggestions.* Any suggestions the lawyer makes about the procedure shall be considered and recorded. Those suggestions that would render the procedure more consistent with these guidelines should be followed. The failure of a lawyer to object to certain aspects of the procedure shall not preclude the accused from objecting to those aspects at trial.

(3) *Lawyer's Participation.* A lawyer should be permitted to be present when a witness states his or her conclusion about the identity of the suspect. However, the lawyer should be instructed not to address the witness before the procedure and to remain silent while the witness attempts to identify the suspect. The lawyer may speak with any witness after the procedure, if the witness agrees to speak with the lawyer.

(4) *Communicating with the Witness.* A witness taking part in a pretrial eyewitness identification procedure may be told that he or she is under no obligation to speak with the lawyer, but that he or she is free to speak with the lawyer if he or she so wishes.